Dynatron/Bondo Corporation *and* Union of Needletrades, Industrial and Textile Employees, AFL–CIO. Case 10–CA–29735

April 3, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On February 25, 1998, Administrative Law Judge Keltner W. Locke delivered a bench decision and certification in this proceeding. The General Counsel, the Charging Party, and the Respondent each filed exceptions and a supporting brief, and the Respondent filed an answering brief.

On September 30, 1998, the National Labor Relations Board, by a three-member panel, issued an Order remanding proceeding to administrative law judge.[1] The Board, finding that the bench decision lacked sufficient rationale, ordered the judge to prepare a supplemental decision with a "written analysis of the facts and legal precedent relevant to all the issues presented in this case."

On April 15, 1999, the judge issued the attached supplemental decision in this proceeding. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the bench decision, the supplemental decision, and the record in light of the exceptions to the bench and supplemental decisions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as explained below and to adopt the recommended Order as modified below.[3]

At issue, inter alia, is whether the Respondent lawfully declared that the parties were at a bargaining impasse in October 1996. The judge found that the Respondent's unremedied unfair labor practices "had a direct, serious and pervasive adverse effect" on the bargaining process and that there was a "causal connection between these unremedied unfair labor practices and the parties' failure to reach agreement." The judge concluded that the Respondent could not lawfully declare impasse and implement its final contract proposals. For the reasons set forth below, we agree with the judge.

1. Background

The Union began its organizing activities at the Respondent's facility in 1989. On June 5, 1991, the Board certified the Union as the collective-bargaining representative of the Respondent's production and maintenance employees. Thereafter, the Respondent refused to bargain with the Union and refused to furnish requested information.

On November 8, 1991, the Board found that the Respondent had violated Section 8(a)(5) and ordered it to bargain with the Union.[4] The Respondent did not meet with the Union for the first time until July 27, 1993, after the United States Court of Appeals for the Eleventh Circuit enforced the Board's Order. Between July 27, 1993, and October 10, 1996, the parties held 35 bargaining sessions. During the last session, the Respondent declared that the parties had reached impasse. The bargaining sessions will be discussed in more detail below.

During the 3 years of bargaining, the Respondent repeatedly acted in disregard of its employees' rights under our Act. In 1997 the Board found that the Respondent had violated Section 8(a)(5) by making the following unilateral changes to employees' terms and conditions of employment:[5]

- In October 1991, after the Union was certified, the Respondent increased employee contributions to the cost of health insurance premiums.
- In October 1992 the Respondent increased employee contributions to the cost of health insurance premiums.
- In May 1993 the Respondent discontinued giving merit increases to employees.
- In July 1993 the Respondent changed its smoking policy.

[1] 326 NLRB 1170.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces 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.

The Charging Party's request for additional remedies is denied.

[3] The judge inadvertently neglected to order the Respondent to bargain with the Union. We shall modify his recommended Order accordingly.

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

Finally, we clarify the judge's make-whole remedy in par. 2(b) of his recommended Order to provide that the Respondent shall reimburse employees for any expenses ensuing from the Respondent's unlawful conduct, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] 305 NLRB 574, enfd. 992 F.2d 313 (11th Cir. 1993).

[5] 323 NLRB 1263.

- In October 1993 the Respondent increased employee contributions to the cost of health insurance premiums.
- In October 1994 the Respondent increased employee contributions to the cost of health insurance premiums.

In the same case, the Board found that the Respondent committed the following violations of Section 8(a)(3):

- In June 1994 the Respondent discharged Union negotiating committee member Floyd Robin Davis.
- In August 1994 the Respondent converted the resignation of Union negotiating committee member Mark Pepper to a termination.
- In November 1994 the Respondent converted the resignation of Union negotiating committee member Gene Bennett to a termination.
- In February 1995 the Respondent converted the resignation of Union negotiating committee member Bob Moss to a termination.

Finally, in the same case, the Board found that the Respondent violated Section 8(a)(1) in February 1992 by engaging in surveillance of its employees' union activities.

Further, in a separate proceeding in 1997,[6] the Board found that the Respondent continued to discriminate against employees who supported the Union. Specifically, the Board found that the Respondent committed the following violations of Section 8(a)(3):

- On September 14, 1995, the Respondent suspended Union negotiating committee member Lee Carter.
- On September 19, 1995, the Respondent discharged Carter.
- In January 1996 the Respondent discharged outspoken union adherent Brenda Rogers.

In 1999, all of the above-listed unfair labor practice findings were upheld by the Eleventh Circuit. *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310.[7]

[6] 324 NLRB 572 (1997).

[7] The court disagreed with the Board in certain other respects. Specifically, the court reversed the Board's finding that the Respondent unlawfully implemented a "late arrival to work station" rule and discharged employee Lamar Shelton for violating the rule. The court also reversed the Board's findings that the Respondent unlawfully instituted new work policies relating to material handlers, parking, compensation for work during power outages, and the use of identification cards. The Board recognizes that the court's opinion is controlling for purposes of resolving the issues presented by this case. See *Dynatron/Bondo Corp.*, 330 NLRB 16 (1999) (accepting Eleventh Circuit's decision as the law of related case involving the same parties).

The Respondent's unfair labor practices, starting shortly after the Union was certified and continuing during negotiations, were a source of controversy from the beginning of bargaining.

As stated above, a few days before the first bargaining session, the Respondent announced the change in the smoking policy, to be effective the day after bargaining began. The smoking policy change consumed much of the first bargaining session on July 23, 1993. Union negotiator Harris Raynor expressed the Union's suspicions about the timing of the policy change: "You don't come to the table on July 27th and say you are going to implement a policy on July 28th; it's now irrelevant because you have already announced it. That's typical of the [Respondent's] tactics of bargaining." The Respondent's negotiator, Walt Lambeth, disingenuously responded, "That's why we didn't make it effective until tomorrow—so we could negotiate with you."

Again, as stated above, by the time negotiations began, the Respondent had twice increased employee contributions to the cost of health insurance premiums. During the first bargaining session, the Union attempted to discuss the Respondent's unilateral increases in employee contributions. The Respondent refused the Union's request to rescind the increases and refused to discuss the matter because it was pending before the Board.

The Union also complained at the first bargaining session about the Respondent's surveillance of union activities. The Respondent announced that it intended to continue its video surveillance of company property.

At the September 27, 1993 session, the Respondent, as though to emphasize its disregard for its obligation to bargain with the Union, announced an additional increase in employee contributions to the cost of health insurance premiums "in accordance with our past practice." The Respondent spurned the Union's attempt to discuss the increase at the next bargaining session on October 21, 1993. Then, on August 29, 1994, the Respondent *again* unilaterally announced *further* increases in employee contributions to the cost of health insurance premiums, despite the Union's reminder that such changes were the subject of unfair labor practice litigation. The subject came up again on September 19, 1994. Union negotiator Raynor complained that the change "is a violation. You are not authorized to change the rates unless you negotiate." Lambeth replied, "We'll negotiate about insurance and be happy to talk with you about what we do in the future. Until we reach an agreement, we'll continue doing the same as we have in the past." Then, on September 9, 1996, the Respondent *again* unilaterally announced *further* increases in employee contributions to the cost of health insurance premiums.

The Respondent's unilateral discontinuation of annual merit increases was another contentious issue during bargaining. In the September 9, 1993 session, the Union sought to determine whether the Respondent had discontinued its merit increase policy. The Respondent refused to answer any questions, accusing the Union of seeking to "continue [its] pattern of harassment of this company . . . . If [the Union] were honestly seeking information for the purpose of bargaining, it might be a little easier to communicate." Then, on September 27, 1993, the Respondent insisted that merit raises were not being given, but stated that it was not allowed to grant them unless the *Union* agreed. On July 22, August 29, September 19, October 6, 1994, and January 9, 1995, the Respondent refused to be forthcoming about various aspects of the merit increase policy because of pending litigation or other reasons.

Finally, one at a time at regular intervals during the course of bargaining, the Respondent unlawfully discharged six employees, five bargaining committee members, and a vocal union supporter. Dealing with the discharges consumed considerable time at the bargaining table. Equally significant, the discharges made it difficult for the Union to replace bargaining committee members because unit members feared retribution for serving on the committee.

The Respondent declared that the parties were at a bargaining impasse at the October 10, 1996 bargaining session. Shortly thereafter, the Respondent sent a draft of its final proposal to the Union. The Union insisted that impasse had not been reached and that bargaining should continue. The Respondent countered that, because the Union would not agree to its final proposal, "it is clear that further meetings are futile and we are at an impasse." On October 31, 1996, the Respondent notified the Union of its announcement to employees that the parties were at impasse and that, effective November 4, 1996, the Respondent would implement an increase in employee contributions to the cost of health insurance premiums and a wage increase.

2. Discussion

Generally, "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *White Oak Coal*, 295 NLRB 567, 568 (1989). And, in the absence of a lawful, good-faith impasse, an employer may not unilaterally implement its final contract offer. Id. Indeed, an employer that has committed unfair labor practices cannot "parlay an impasse resulting from its own misconduct into a license to make unilateral changes." *Wayne's Dairy*, 223 NLRB 260, 265 (1976).

Not all unremedied unfair labor practices committed before or during negotiations, however, will lead to the conclusion that impasse was declared improperly, thus precluding unilateral changes. *Alwin Mfg. Co*., 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999). Only "serious unremedied unfair labor practices that *affect the negotiations*" will taint the asserted impasse. Id. (Emphasis added.) Thus, the central question is whether the Respondent's unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock.

In *Alwin*, 192 F.3d at 139, the court identified

> at least two ways in which an unremedied ULP can contribute to the parties' inability to reach an agreement. First, a ULP can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement.

Applying the *Alwin* standard here, we find that there is ample evidence that the Respondent's conduct made it harder for the parties to come to an agreement.

The Respondent set the tone for negotiations on the first day of bargaining. By the end of the first session, the Respondent had refused to delay implementation of the change in the smoking policy, had refused to discuss its increase in employee contributions to the cost of health insurance premiums, and had stated its intention to continue to engage in surveillance of employees' union activities. As stated above, the Board found that the Respondent's changes and surveillance were unfair labor practices. All in all, the first bargaining session was an inauspicious start to what became increasingly fractious negotiations.

The Respondent remedied none of the unfair labor practices, despite the Union's repeated protests during bargaining. Instead, the Respondent continued violating the Act during bargaining by repeatedly announcing unilateral increases in employee contributions to the cost of health insurance premiums, refusing to discuss the annual merit increase policy,[8] and discharging union members.

It is evident that the Respondent used its intransigence regarding previous unilateral changes and repeated uni-

[8] In addition to our finding that the Respondent's actions moved the baseline for negotiations and created friction at the bargaining table, we note that the unilaterally-imposed increase in health insurance premiums and the discontinuance of merit increases had an immediate and direct impact on unit employees—the diminution of regular, take-home pay. "Clearly, these were not isolated or insignificant matters, but rather were areas in which the entire bargaining unit was adversely affected in the most fundamental way—in their paychecks." *Intermountain Rural Electric Assn.,* 305 NLRB 783, 789 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

lateral changes during bargaining to gain an advantage in the bargaining process. In essence, the Union could not formulate bargaining proposals based on a status quo because the Respondent, by repeatedly acting unilaterally and refusing to discuss its changes, kept terms and conditions of employment in a constant state of flux. Further, the Respondent's conduct forced the parties to focus on its changes, which it refused to rescind, rather than on legitimate bargaining proposals. We conclude that the Respondent's conduct "move[d] the baseline for negotiations . . ., making it harder for the parties to come to an agreement." *Alwin*, supra, 192 F.3d at 139.

Additionally, we find that there is ample evidence that the Respondent's unfair labor practices increased friction at the bargaining table. First, the Respondent's refusals to discuss unilateral changes in terms and conditions of employment and the Respondent's attack on the Union for filing unfair labor practice charges about these changes could be expected to create friction. Further, the discharging of union bargaining committee members would tend not only to hinder the committee's ability to negotiate, but also would reasonably lead it to believe that its very existence was under attack.[9] In fact, the exchanges quoted above, between Union negotiator Raynor and the Respondent's negotiator Lambeth, exemplify that friction did occur at the table.

We conclude that the parties were unable to reach an agreement due in part to the existence of the unremedied unfair labor practices committed by the Respondent. It follows that the parties could not, and did not, reach a good-faith impasse, and that the Respondent was not entitled to implement its final contract proposals by changing wages and group health insurance.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Dynatron/Bondo Corporation, Atlanta, Georgia, 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 accordingly.

"(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All production and maintenance employees employed by the Employer at its Atlanta, Georgia facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act."

2. Substitute the following for relettered paragraphs 2(d) and (e).

"(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1996."

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

[9] Oddly, the Respondent's exceptions illustrate its inclination to engage in action that would create friction. In the supplemental decision, the judge stated that the Respondent's "acts did not build trust in [its] good faith at the bargaining table, but signaled the opposite, a trust-destroying demand for surrender." The Respondent excepts to the judge's further statement that "experience demonstrates that progress at the bargaining table bears a direct relationship to the success of the parties in building some degree of trust." This exception exhibits a disdain for the bargaining process that mirrors the Respondent's attitude about its bargaining obligation, which it has repeatedly refused to accept despite Board and court orders.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT make changes in the wages or group health insurance of our employees in the bargaining unit represented by the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, without providing the Union adequate notice of the proposed changes and adequate opportunity to bargain about them.

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

WE WILL, on request, rescind the changes we made by implementing our wage and group health insurance proposals unilaterally, and restore the terms and conditions of employment pertaining to wages and group health insurance which were in effect before we unlawfully changed them.

WE WILL, to the extent that any employee was affected adversely because of the changes we made in wages and group health insurance, make each such employee whole, with interest, for all losses the employee suffered because of the unlawful changes.

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 following appropriate bargaining unit:

All production and maintenance employees employed by us at our Atlanta, Georgia facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act.

DYNATRON/BONDO CORPORATION

SUPPLEMENTAL DECISION

KELTNER W. LOCKE, Administrative Law Judge. On February 25, 1998, I issued a bench decision and certification in this case. On September 30, 1998, the Board issued an order remanding the case to me with instructions to issue a supplemental decision. *Dynatron/Bondo Corp.*, 326 NLRB 1170 (1998).

Thereafter, I issued an order affording the parties the opportunity to file briefs. Both the General Counsel and Respondent did file briefs, which I have carefully considered.

Findings Regarding Uncontested Issues

I adopt the following findings, set forth in the bench decision and certification, regarding uncontested issues. The charge in this proceeding was filed by the Union on November 8, 1996, and a copy was served by first-class mail on Respondent on November 8, 1996.

At all material times Respondent, a Georgia corporation, with an office and place of business in Atlanta, Georgia, called Respondent's facility, has been engaged in manufacturing automobile filler, and other automotive products.

During the relevant 12-month period, Respondent, in conducting its business operations, sold and shipped from its Atlanta, Georgia facility goods valued in excess of $50,000 directly to points outside the State of Georgia. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

All production and maintenance employees by the Respondent at its Atlanta, Georgia facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

On September 8, 1989, in an election by secret ballot, conducted under the supervision of the Regional Director for Region 10, a majority of the employees in this unit designated and selected the Union as their representative for the purpose of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. On June 5, 1991, the Board certified the Union as the exclusive collective-bargaining representative of all the employees in the unit described above.

The Issue of Impasse

Paragraph 10 of the complaint alleges that on or about October 25, 1996, Respondent implemented the wage and group health insurance proposals that had been contained in its final bargaining proposal to the Union regarding the terms and conditions of employment of the employees in the unit. Respondent's answer admitted that it had implemented the wage and group health insurance proposals contained within its final bargaining proposal, but further asserted that this implementation was "pursuant to lawful impasse to the Union regarding the terms and conditions of employment" of the employees in the unit.

In my February 25, 1998 bench decision, I found that no lawful impasse existed when Respondent implemented the wage and group health insurance proposals because at that time unfair labor practices existed which Respondent had not remedied. Specifically, I found that Respondent previously had made a number of unilateral changes in working conditions which the Board had found unlawful in *Dynatron/Bondo Corp.*, 323 NLRB No. 217 (1997),[1] and *Dynatron/Bondo Corp.*, 324 NLRB No. 98 (1997).[2] These unlawful changes included unilaterally instituting new disciplinary rules, changing its parking policy, and creating a new policy for employee compensation during power outages.

I found that these unremedied unfair labor practices precluded the existence of a lawful impasse.[3] My bench decision stated, in part, as follows:

> [I]f the evidence shows the bargaining process is felt to have been adversely affected by employer's unfair labor practices, the parties cannot reach a valid bargaining impasse; see *Intermountain Rural Electric Association*, 305 NLRB 783 at 789 [1991].
>
> In the case of *Columbian Chemicals Co.*, 307 NLRB 592, at footnote one [1992], the Board stated that an employer's application of the unilaterally implemented policy to employees would preclude a finding that the employer had bargained in good faith to impasse after implementing that policy.
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> In *Dynatron/Bondo Corporation*, 323 NLRB 1263, issued July 16, 1997, the Board found that the Respondent herein had made unlawful unilateral changes, including discontinuing its past practice of granting merit raises, increases its unit employees' contributions to their health insurance program, and imposing a total smoking ban.
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> In *Dynatron/Bondo Corporation*, 324 NLRB 572, issued September 30, 1997, the Board found, among other violations, that the Respondent herein had unlawfully made a number of unlawful changes in working conditions unilaterally, including unilaterally instituting new disciplinary rules, changing its parking policy and creating a new policy for employees' compensation during power outages.

In view of the unilateral changes found unlawful by the Board in the previous cases, and because the Respondent had not remedied these changes, I concluded that a lawful impasse did not exist.

Reviewing my decision, however, the Board determined that I had not applied the correct legal standard, and remanded the case to me for that purpose, stating, "for the judge to conclude that the unremedied unfair labor practices prevented the parties from reaching lawful impasse, he must first find that there was a causal connection between the previous unfair labor practices and the failure to reach an agreement." The Board further stated:

> The record contains evidence of the parties' extensive bargaining, which the judge failed to discuss. Further, the judge's brief discussion contains no explanation for why he believed the bargaining was adversely affected by the Respondent's prior unfair labor practices.

Dynatron/Bondo Corp., 326 NLRB 1170 (1998).

I understand the Board's concern to be grounded in the important principle that the Board's authority is remedial, not punitive. Ordinarily, an employer which bargains in good faith may implement its final offer at impasse. Denying the Respondent this right would be punitive unless the evidence establishes that the unremedied unfair labor practices had an adverse impact on the negotiations.

If the previously found and still unremedied unfair labor practices did push the negotiators in the direction of impasse, then the claimed impasse resulted from the Respondent's own wrongdoing. Therefore, allowing Respondent to implement its final offer would violate the principle that a wrongdoer should not be permitted to benefit from its unlawful action.

There is no conflict between the principle that the Board's authority to order relief is remedial, not punitive, and the principle that a wrongdoer should not profit from its transgression. If the unremedied unfair labor practices pollute the negotiating atmosphere and make agreement less likely, this consequence must be addressed and rectified, not as punishment, but as part of restoring the status quo which existed before Respondent broke the law.

The inquiry must begin by identifying the unfair labor practices which the Board found in the two previous cases cited above. Then, I must determine what effect, if any, these unlawful acts had on the negotiations.

The Board has found, inter alia, that Respondent violated the Act by discharging, at various times, three members of the Union's negotiating committee, by discharging another employee who supported the Union, and by converting the resignations of three union negotiating committee members into discharges. These unlawful acts of discrimination against union negotiators all took place during the course of the bargaining which began in July 1993 and ended with the Respondent's unilateral implementation of its wage and group health proposals on October 25, 1996.

In the previous cases, the Board also found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing a number of terms and conditions of employment which were mandatory subjects of bargaining, without reaching either agreement with the Union or lawful impasse. These unlawful changes included discontinuing the practice of granting merit increases to employees after their 90-day probationary periods and after their anniversary dates, unilaterally increasing employee contributions to group health insurance premiums, changing its smoking policy from a partial to a complete ban, promulgating a new disciplinary policy for material handlers, and instituting new rules regarding parking, late arrival, failure to bring identification cards to work, and for payment in the event of a power outage.

The unlawful discharge of members of the Union's negotiating committee has an obvious effect on the bargaining process.

[1] Appearing in bound volume as 323 NLRB 1263.

[2] 324 NLRB 572.

[3] Other unremedied unfair labor practices include discrimination against employees serving on the Union's bargaining committee.

Moreover, these unfair labor practices entailed more than terminating the employment of the Union's negotiators. Significantly, Respondent's unlawful conduct also included a continuing refusal to reinstate these employees. These acts of discrimination produced a number of effects which have an adverse impact on the bargaining process.

Most obviously, the unlawful firing of employees on the Union's bargaining team reasonably and forseeably interfered with the continuity of that committee and, therefore, hindered the Union's ability to negotiate. The Union's chief negotiator, Harris Raynor, credibly testified that "as individual members of our committee left, whether voluntarily or not, it was very difficult to replace them. Getting people to volunteer to be on the committee was difficult because people felt that there might be retribution taken against them."

In its brief, Respondent urges that Raynor's testimony be rejected. It argues that the evidence "shows that none of the unremedied unfair labor practices had any effect on the progression of the parties' negotiations, much less precluded agreement from being reached." Respondent asserts that the unremedied unfair labor practices had no effect on the ability of the Union to get employees to serve on its bargaining committee. Respondent further stated:

> The Union's contention that employee support was undermined by fear of retaliation is further belied by the fact that *employee participation was greater in 1996 than in prior years*. Indeed, more employees participated in the final negotiating meetings than ever before. (R.Br. 17, emphasis in original.)

Based on Raynor's demeanor as a witness, however, I credit his testimony. I also reject Respondent's argument because there is no showing that the number of employees who showed up as union negotiators bore any reliable relationship to the level of fear created by Respondent's unlawful discharges. The record does not reflect how many employees declined the Union's request for volunteers.

Additionally, I reject Respondent's related argument that the continued presence at the bargaining table of an employee after his unlawful discharge demonstrates that the firing of this employee did not affect negotiations. Specifically, Respondent's brief asserted that Lamar Shelton, who was discharged unlawfully, "continued to participate in the negotiations even after he was terminated in March 1996 . . . . In fact, his termination was discussed during the April 8, 1996, negotiation meeting. Nothing in the negotiating notes show, however, that Shelton's termination adversely affected the parties' ability to negotiate during that session or any of the subsequent sessions." (R.Br. 17–18.)

It certainly is true that the notes of the April 8, 1996 negotiating session do not indicate that a brawl ensued after Shelton showed up. The notes do not even suggest that the negotiators reacted to each other with greater-than-usual acrimony. The absence of overt hostility, however, does not signify that Respondent's unlawful discharge of Shelton had no effect on the negotiations simply because he continued to attended some bargaining sessions.

Under the logic of Respondent's argument, a chemical would not be considered toxic unless the body reacted immediately with coughing and gagging in protest. The most insidious contaminants only become manifest over time and through the silent damage they produce. It would be naive to conclude that Respondent's unlawful discharge of this negotiator caused no harm to the process of reaching agreement simply because it did not turn a bargaining session into the *Jerry Springer Show*.

Moreover, the fact that negotiators spent considerable time discussing a discharge which the Board has found discriminatory and unlawful plainly demonstrates that the unfair labor practices were having a detrimental effect on bargaining. Focus on Respondent's unlawful discrimination necessarily detracted from discussion of the parties' contract proposals.

The unlawful discharges of union committee members necessarily caused other types of harm to the bargaining process, as well. Regardless of whether the fear of retaliation reduced the number of employees on the Union's bargaining committee, it foreseeably would discourage them from speaking candidly about workplace problems. Such fear chills the open, robust discussion which facilitates effective negotiation.

The specter of discrimination evoked by the unlawful discharges also interfered with the development of the working relationships necessary to reach compromise on sensitive issues. These unremedied unfair labor practices destroyed the essential ingredient of trust.

In theory, perhaps, opposing sides might be able to reach an agreement without ever trusting each other at all. In labor negotiations, however, experience demonstrates that progress at the bargaining table bears a direct relationship to the success of the parties in building some degree of trust. Nothing can destroy trust more quickly than Respondent's unlawfully discharging members of the Union's negotiating team. Refusing to reinstate these employees, even after the Board ordered Respondent to do so, perpetuated a bargaining relationship barren of trust.

In assessing the adverse impact on trust, the unlawful discharges should be viewed together with Respondent's other unremedied unfair labor practices. When employees considered the Respondent's unlawful firings of union negotiators, they would also take into account the numerous changes in working conditions which Respondent unlawfully made over the course of negotiations.

All of the unlawful acts, considered together, conveyed a message of intimidation. These unfair labor practices, and the Respondent's refusal to remedy them when ordered to do so, constituted a demonstration of raw power seemingly unrestrained by law. The pervasive impact of the unlawful acts, and Respondent's continued willingness to disregard the labor law, could only broadcast to the employees a calculated message that "resistance is futile."

These acts did not build trust in Respondent's good faith at the bargaining table, but signalled the opposite, a trust–destroying demand for surrender. The Union did not surrender, and the bargaining process continued until Respondent declared impasse in October 1996. However, the fact that negotiations did not die instantly does not signify an absence of serious injury to the bargaining process.

Notes of the bargaining sessions reflect how the unremedied unfair labor practices injected a continuing tension which made a meeting of the minds more difficult. This tension is readily apparent, for example, in the following exchange between Respondent's attorney, Walter Lambeth (WL), and the Union's chief negotiator, Harris Raynor (HR), reported in the notes of the September 25, 1996 bargaining session:

> HR: What about Hours of Work and Overtime? You got a new proposal.
>
> WL: We have gone through and explained our position on that. We reject it completely. We have no further movement.
>
> HR: That doesn't mean we may not have movement on other proposals.
>
> WL: Do you have any?
>
> HR: It takes time.
>
> WL: I suggest you get on with it. These people have been sitting around without an increase for three years, while you're fooling around. We're ready right now for you to take this proposal to your people. We want to wrap this up.
>
> HR: We think consideration of the Labor Board will more than compensate these people. I don't think people need to worry that something is being held from them. I think when the Labor Board goes back and recalculates the back pay, there may be some substantial money—far more than what you are offering in your proposal.
>
> WL: We're not the first bit concerned with what the Labor Board is doing. We're concerned with these negotiations at this table. I suggest you forget about the Labor Board and get on with getting to an agreement.

Respondent's implication that the Union was allowing the charges it filed with the Board to distract it from the task of negotiating, has a particularly disingenuous ring, considering that the Respondent's unlawful actions had prompted filing of the charges. Indeed, Respondent's violations of the labor law have been established in two separate proceedings and are now beyond question.

Therefore, Respondent's criticizing the Union for filing charges with the Board seems about as appropriate as taking a hammer under the poker table, hitting the opponent's big toe, and then responding to his exclamations with a demand that he shut up and play cards. No one can doubt that it is the hammer blow, not the resulting howl of pain, which is responsible for the disruption. Likewise, any harm to the negotiating process originated in the Respondent's unlawful acts, not in the Union's lawful protest of them.

Still, the statements by Respondent's attorney to the union negotiator, that the Union should stop "fooling around" and should "forget about the Labor Board and get on with getting to an agreement," indicate the harm the unfair labor practices had caused to the bargaining process. Such statements are symptoms of a frustrating disorder in bargaining, even if incorrect as to its etiology.

Bargaining notes reflect that Respondent's unlawful unilateral changes particularly harmed the bargaining process from the very outset. This impact becomes clear by examining how individual unilateral changes affected negotiations.

Before bargaining began on July 27, 1993, Respondent announced it was changing its policy concerning employees smoking on the premises, resulting in a total ban. In *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), the Board found, inter alia, that respondent made this change without notice to or bargaining with the union, and that it violated Section 8(a)(5) and (1) of the Act. In the same decision, the Board also found that respondent had committed unfair labor practices when it increased employee contributions to their health insurance premiums after the union was certified as the employees' exclusive bargaining representative in 1991.

Bargaining notes establish that discussion of the unilateral change in smoking policy consumed a significant portion of the parties' time at the first negotiating session and continued to be a source of disagreement in bargaining. At the first bargaining session, negotiators also came into conflict over the Respondent's unlawful change in health insurance premiums. Bargaining notes reflect the following exchange between the Union's representative, Harris Raynor (HR), and the Respondent's attorney, Walter Lambeth (WL):

> HR: The union will continue to insist that the company return any increased amount of premium and any change made in November 1991, when you normally review insurance costs. We want to know what changes were made in 1991.
>
> WL: These are complaints that are there with the Board. It is up to the Labor Board to decide what they want to do. I am not at this point sure what our position is. That is the decision of the company. *I don't think it would be appropriate for us to respond. Not about matters that are pending in litigation.* [Emphasis added.]

Respondent's unwillingness even to discuss the substance of the change in health insurance premiums at this first bargaining session provides compelling evidence of the chilling effect this unfair labor practice had on negotiations. Although Respondent offered, as a reason for its refusal to discuss this issue, the fact that unfair labor practice litigation was pending, that reason is hardly persuasive. Respondent's unlawful conduct resulted in the unfair labor practice litigation, and it cannot rely upon the consequences of its own unlawful acts to excuse its lawful bargaining obligation.

Although Respondent's unilateral changes in smoking policy and health insurance premiums had an adverse impact on bargaining, another unlawful change caused even greater damage to negotiations. In *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), the Board also found that the respondent had an established pattern and practice of granting raises to employees on their probationary or annual anniversary dates and that the employees had come to view these increases as fixed terms and conditions of employment.

In May 1993, well after the Union became the certified bargaining representative but before the first negotiating session, Respondent discontinued its practice of granting such wage increases without notifying or bargaining with the Union. The Board found that this change violated Section 8(a)(5) and (1).

The bargaining notes reflect that this unilateral action had a significant and continuing effect on the negotiations. At the September 9, 1993 session, for example, Union Representative Harris Raynor and Respondent's attorney, Walter Lambeth, had the following exchange:

> HR: Do you have a policy for evaluating employees approximately on anniversary date and at other times before? It's a simple question. It's also part of a written request.
>
> WL: You'll get responses to your legitimate requests for information. Your real purpose in asking this is to file charges against this company so that you can continue your pattern of harassment of this company, and that is why I want to make certain that when you get an answer, it is accurate. If you were honestly seeking information for purposes of bargaining, it might be a little easier to communicate.

The unlawful discontinuation of the periodic raises continued to be a source of friction throughout negotiations. When this issue arose during the October 6, 1994 session, for example, Respondent's attorney told the Union that the Respondent could not "go back and correct these things" because the Union had "our hands tied. We are locked in."

At the June 17, 1996 session, the Union asked if employees received a bonus for perfect attendance. The Respondent's attorney responded, "They get $25.00. Are you going to file a charge about that?"

Throughout negotiations, Respondent made such statements, indicating that it blamed the Union for filing charges and that it considered the charges a source of delay and an impediment to bargaining. However, Respondent's logic does not go quite far enough. The undeniable strains which Respondent tried to attribute to the unfair labor practice charges actually arose because of the unlawful acts which precipitated them.

As the exclusive representative of the bargaining unit employees, the Union had every right to file charges with the Board and to seek a remedy for the Respondent's unfair labor practices. It cannot be blamed for trying to right the wrong done to the employees it represents.

Under the law, the Union's assertion of its legal rights does not constitute an impediment to bargaining. Rather, it is Respondent's unlawful unilateral actions, and its refusal to undo them, which burdened and obstructed the negotiating process. Such changes show Respondent's contempt for its bargaining duty more dramatically, and more painfully, than if Respondent's negotiators had greeted their union counterparts each time with a salute of thumb to nose.

As the administrative law judge stated in *Alwin Mfg. Co.*, 326 NLRB 646 (1998), "While no unfair labor practice is insignificant, in the context of determining whether an impasse is present, some have more significance than others in the negotiating process and its progress. For example, unilateral changes in employees' terms and conditions of employment may constitute significant violations of the Act in the context of which misconduct, no lawful impasse can be reached." Affirming, the Board stated:

> During the time period covered by the present proceeding, the Respondent still has not complied with the remedial obligations imposed by [the Board's previous order]. Rather, as the judge correctly observed, "the Respondent, without hiatus, has continued to enforce its unlawfully implemented vacation policy and minimum production standards, has continued to discipline employees for not meeting those standards and has inflexibly insisted on including these terms in the next collective-bargaining agreement."
>
> Indeed, the judge specifically found that the Respondent's insistence on maintaining the unlawfully implemented employment terms resulted in friction and disagreement at the bargaining table and ultimately was responsible, in material part, for the breakdown in negotiations.

Alwin Mfg. Co., Inc., above. I find that the Respondent's conduct in the present case is remarkably close to the actions which the Board found violative in *Alwin*.[4] See also *Great Southern Fire Protection*, 325 NLRB 9 (1997); *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991).

In sum, I find that Respondent's unremedied unfair labor practices had a direct, serious, and pervasive adverse effect on the collective-bargaining process. Further, I find that there is a causal connection between these unremedied unfair labor practices and the parties' failure to reach agreement. Therefore, I conclude that Respondent could not lawfully declare impasse and implement its wage and group health insurance proposals.

CONCLUSIONS OF LAW

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

2. Union of Needletrades, Industrial and Textile Employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

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

All production and maintenance employees by the Respondent at its Atlanta, Georgia facility, including all quality control technicians, but excluding all office clerical employees, technical employees, laboratory and professional employees, guards, and supervisors as defined in the Act.

4. At all times since June 5, 1991, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

5. Respondent violated Section 8(a)(5) and (1) of the Act, by on/or about October 25, 1996, unilaterally implementing its

[4] In *Alwin*, the administrative law judge ordered the respondent to reimburse the union for expenses related to negotiations, and also ordered the respondent to reimburse the union and the General Counsel for litigation costs. The respondent did not file exceptions to these requirements and the Board adopted them.

In the present case, the General Counsel has not sought reimbursement of either negotiation or litigation expenses. In the absence of such a request, I will not reach the issue of whether such remedies would be appropriate here.

contract proposals regarding wages and group health insurance when it was in negotiations with the Union for a collective-bargaining agreement, and at a time when Respondent's prior unremedied unfair labor practices, affecting negotiations, precluded a lawful impasse.

6. This unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, described below in the recommended Order, including posting the notice to employees attached as an appendix.

I hereby issue the following recommended[5]

ORDER

The Respondent, Dynatron/Bondo Corporation, of Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in its employees' wages and group health insurance without providing the Charging Party adequate notice of the proposed changes and adequate opportunity to bargain about them.

(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) At the Charging Party's request, rescind the changes it made on or about October 25, 1996, by implementing its wage and group health insurance proposals unilaterally, and restore the terms and conditions of employment pertaining to wages and group health insurance which were in effect before it unlawfully changed them.

(b) To the extent that any employee was affected adversely because of the changes in wages and group health insurance which the Respondent made unilaterally on about October 25, 1996, the Respondent shall make each such employee whole, with interest, for all losses the employee suffered because of the unlawful changes.

(c) Preserve and, on request, make available to the Board or its agents for examination a copy of all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay which may be due under this order.

(d) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1996.

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

[5] 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.