Pepsi-Cola Bottling Company of Fayetteville, Inc. ***and*** **United Food and Commercial Workers Union, Local 204 affiliated with United Food International Union, AFL–CIO, CLC.** Cases 11–CA–14889, 11–CA–15034, 11–CA–15181, 11–CA–15281, 11–CA–15289, 11–CA–15383, and 11–CA–15556

March 20, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On December 16, 1994, the National Labor Relations Board issued a Decision and Order[1] in this proceeding finding that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The Respondent's unfair labor practices, which occurred both before and after a Board-conducted representation election, included interfering with, restraining, and coercing employees in the exercise of their Section 7 rights in violation of Section 8(a)(1); unlawful discharges of employees in violation of Section 8(a)(3) and (1); withholding of a wage increase in violation of Section 8(a)(5), (3), and (1);[2] and unilateral amendments to wages, hours, working conditions, or other terms and conditions of employment relating to mandatory subjects of bargaining in violation of Section 8(a)(5) and (1).

The Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the Fourth Circuit. In an unpublished decision of September 10, 1996,[3] the court enforced in part, denied enforcement in part, and remanded in part the Board's Order. Specifically, as discussed more fully below, the court directed the Board to develop the record regarding the nature of the withheld wage increase and to identify the employees, if any, affected by the withholding of the wage increase. The court also directed the parties on remand to identify any other employees similarly situated to employee Felix Romero. Romero had voluntarily quit the Respondent's employ and returned, and was denied the wage increase after it was ultimately implemented. With respect to the unilateral changes, the court instructed the parties on remand to address the pertinent information concerning whether the Union had notice of the changes prior to implementation, and the materiality of the changes.

On August 12, 1997, the Board advised the parties that it had decided to accept the court's remand and invited them to submit statements of position with respect to the issues raised. Thereafter, the Respondent and the General Counsel filed statements of position. On November 7, 1997, the Board reopened the record and remanded the case for a hearing before an administrative law judge for the purpose of taking evidence in accordance with the remand of the United States Court of Appeals for the Fourth Circuit.

On September 9, 1998, Administrative Law Judge John H. West issued the attached supplemental decision.[4] The Respondent filed exceptions and a supporting brief.[5]

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

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[6] and conclusions[7] and to adopt the recommended Order.

[1] 315 NLRB 882 (1994).

[2] See discussion, infra.

[3] *Pepsi-Cola Bottling Co.,* enfd. mem. 96 F.3d 1439.

[4] On September 24, 1998, Judge West issued a correction to his supplemental decision. The correction involved three stylistic changes to the supplemental decision and did not otherwise affect the supplemental decision.

[5] We have, pursuant to the Respondent's request, taken official notice of the unfair labor practice charge filed in Case 11–CA–15281 on January 15, 1993, and the Regional Director's letter refusing to issue a complaint. We find that these documents do not affect the outcome of this proceeding.

[6] 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 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 Respondent further claimed that the proceedings here were tainted by bias. In this regard, the Respondent essentially requested that we take official notice of (or consider) two deeds of trust which the Respondent argues are evidence of a mortgage held jointly by a Board attorney in Region 11 and a union official. We do not take official notice of these documents because they are not part of the record and are wholly unrelated to the proceedings at issue. We emphasize that after a careful examination of the entire record, we are satisfied that the Respondent's allegation that the proceeding at issue was tainted by bias is without merit.

In adopting the supplemental decision, we disavow statements made by the judge in par. 13 of the analysis section of the supplemental decision criticizing the court's opinion.

[7] Although the court of appeals stated that withholding of a wage increase may constitute a violation of Sec. 8(a)(3) and (1) of the Act, the judge, in his supplemental decision, found that the withholding of the wage increase at issue constituted a violation of Sec. 8(a)(5), (3), and (1) (par. 16, analysis section of the supplemental decision). Specifically, the judge concluded that by withholding the January 1992 wage increase from bargaining unit employees because they selected a union as their bargaining representative while granting the wage increase to its unrepresented employees, the Respondent violated Sec. 8(a)(3) and (1) of the Act (par. 8, analysis section of the supplemental decision). The judge also concluded that Respondent's failure to grant the January 1992 wage increase retroactively to full-service employees, as it did with other employees in the bargaining unit, violated Sec. 8(a)(5) and (1) of the Act (par. 9, analysis section of the supplemental decision). And, the judge concluded that by refusing to grant the January 1992 wage increase retroactively to Romero, who had left the Respondent's employ and returned, and was denied the wage increase after it was retroactively implemented, the Respondent violated Sec. 8(a)(5) and (1) (par. 9, analysis section of the supplemental decision). These conclusions in the supplemental decision are consistent with those in Administrative Law Judge Lowell M. Goerlich's decision adopted by the Board. Further, the consolidated amended complaint, which was fur-

Background

On October 11, 1991, a representation election was held among the Respondent's employees. The employees voted in favor of unionization, but certification was delayed pending the Board's resolution of three challenged ballots. On August 17, 1992, the Board resolved the challenged ballots, and on September 4, 1992, the Union was certified.

After investigating a variety of charges relating to the Respondent's actions both before and after the unionization campaign, the Board issued an amended consolidated complaint.

On December 7, 8, 9, and 10, 1992, and February 1, 2, and 3, 1993, Judge Goerlich held a hearing on the amended consolidated complaint. Judge Goerlich subsequently issued a decision in which he found that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act. On review, the Board adopted the judge's Order with two modifications.[8]

As stated above, the Respondent filed with the United States Court of Appeals for the Fourth Circuit a petition for review of the Board's Order, and the Board filed a cross-application for enforcement. In an unpublished opinion, the court granted enforcement in part, denied enforcement in part,[9] and remanded in part. *NLRB v. Pepsi-Cola Bottling Co. of Fayetteville,* enfd. mem. 96 F.3d 1439 (4th Cir. 1996).

Response to the Court of Appeals Decision

The court's remand instructions, and the portions of the Board's decision to which they relate are as follows.

1. With respect to the Board's adoption of the judge's finding that the Respondent's initial withholding of the wage increase of January 1992 was a violation of Section 8(a)(3) and (1), the court noted that if the wage increase was discretionary and notice was given to the Union, the withholding would not be unlawful. The court instructed the Board on remand "to develop the record regarding the nature of the [January 1992] wage increase and to identify the employees, if any, affected by the wage increase." (Slip op. at 8.) Specifically, the court instructed that, on remand

> the parties should address the number of years the wage increase was implemented, whether any discretion was employed in determining to implement it, why the NLRB advanced inconsistent positions concerning the wage increase, the effect of any compliance proceedings regarding this issue, and any other pertinent information. [Slip op. at 9.]

We adopt the judge's findings on these matters without further comment.[10]

2. The Board, in its original decision, adopted the judge's finding that denying the wage increase to employee Romero, while retroactively implementing the wage increase with regard to the balance of employees in the bargaining unit in the summer of 1992, violated Section 8(a)(5) and (1). In its remand instructions to the Board, the court stated:

> In its brief, the NLRB states that "there may have been other employees like Romero who were rehired after the wage increase was implemented and who were denied the wage increase. The identity of these individuals will be determined in compliance proceedings." (Petitioner's Brief at 10 n. 2.) We have not been provided, however, with any similarly situated employees, nor have we been apprised of any compliance proceedings. . . . [O]n remand, the parties are ordered to address the effect of any compliance proceedings and to identify any other employees similarly situated to Romero. [Slip op. at 4 fn. 1.]

We note, as the judge did, that the Respondent did not respond to the General Counsel's subpoena requesting information about any employees in Romero's situation who were denied the January 1992 wage increase. We note, too, that during the hearing before Judge Goerlich, the complaint was amended to include an allegation relating to the denial of the wage increase to Romero and other similarly situated employees.

The Board previously found an 8(a)(5) and (1) violation relating to the denial of the retroactive wage increase to Romero and other similarly situated employees. If this finding is upheld by the court, the Board will utilize a compliance proceeding[11] to attempt to identify employees from whom the wage increase was withheld.[12] This will include identifying employees, if any, who are similarly situated to Romero.[13]

ther amended at hearing, included the above-mentioned allegations of unlawful conduct by the Respondent.

[8] The modifications involved the following: the Board concluded that the Respondent did not violate Sec. 8(a)(5) by failing to provide some of the information described in the Union's information request, and ordered the Respondent to furnish the Union only the balance of the information requested; the Board also ordered that a new notice be substituted for that of the judge.

[9] The court concluded that substantial evidence did not support the judge's findings, adopted by the Board, that the Respondent violated Sec. 8(a)(3) and (1) by requiring employees Roger Deskin and Jimmy Evers to clean the garage drains or by requiring Deskin to change tires.

[10] As found by the judge, employees affected by the wage increase include employees in the involved bargaining unit. Regarding identifying these individuals and the backpay due them, this is a function of the Board's compliance proceedings, which follow issuance or enforcement of the Board's decisions. See Sec. 102.52, et seq., of the Board's Rules and Regulations.

[11] See Sec. 102.52, et seq., of the Board's Rules and Regulations, cited above.

[12] With respect to Romero, the class of employees includes employees, if any, who are found to be similarly situated to him.

[13] The compliance proceeding will be used, in part, to identify individuals in the class of employees similarly situated to Romero. "In a variety of contexts, where discrimination has been alleged and found against a defined and easily identifiable class, the Board, with court approval, has found it appropriate to extend remedial relief to all mem-

3. With respect to the unlawful unilateral changes, the court stated that, to resolve whether the unilateral changes violated Section 8(a)(5) and (1), as found by the administrative law judge and adopted by the Board, the Board must determine whether the Union had notice of the changes, and, if so, whether the Union waived the right to bargain about the changes. The court stated that it could not "review whether substantial evidence supports the finding that Pepsi violated [Section 8(a)(5)] in implementing unilateral amendments to conditions of employment. Accordingly, we remand this issue to the NLRB and order it to develop the record respecting this issue." The court continued:

> On remand, the parties are instructed to describe any notice given by Pepsi, the manner in which Pepsi conveyed the notice, the period of time the Union had to respond to this notice, the materiality of the unilateral amendments, and any other pertinent information respecting notice. [Slip op. at 12.]

The court described the unilateral changes at issue. According to the court,

> the NLRB argues that Pepsi violated [Section 8(a)(5) and (1)] by unilaterally amending the employees' conditions of employment. According to theNLRB, Pepsi improperly unilaterally amended: the work hours of route salesmen; compensation schemes for "tell sell" and vending machine salesmen; the policy regarding personal telephone calls, breaks, and lunch periods; calculation of receipt shortfalls by route salesmen, thereby resulting in Parker's discharge; and the vehicular moving violations policy, thereby resulting in Hyatt's, Lee's, Curtis's, and Faass's discharges.[14] [Slip op. at 10.]

With respect to the unlawful implementations, Section 8(d) of the Act defines collective bargaining, and Section 8(a)(5) establishes that an employer's refusal to bargain collectively may constitute an unfair labor practice. Section 8(d) states, in part, that

> to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours, and other terms and conditions of employment* . . . . [Emphasis added.]

Under Section 8(a)(5), an employer's refusal "to bargain collectively with the representatives of his employees" is an unfair labor practice.

Subjects falling under the language of Section 8(d) are mandatory subjects of bargaining.[15] "Section 8(a)(5) . . . read together with Section 8(d), requires an employer to bargain collectively with the representative of his employees 'with respect to wages, hours, and other terms and conditions of employment.'"[16] It is well settled that, absent certain circumstances,[17] "an employer acts in violation of Section 8(a)(1) and (5) of the Act by unilaterally, without affording its employees' exclusive collective-bargaining representative an opportunity to bargain on their behalf, materially and substantially changing the employees' terms and conditions of employment."[18]

We agree with Judge West that the Respondent did not give notice of the unilateral changes. In adopting Judge West's finding regarding materiality, we note the following, which provides further support for the judge's conclusion that the unilateral amendments at issue were material, substantial, and significant changes to wages, hours, and other terms and conditions of employment.

First, Judge Goerlich found that the Respondent, in June or July 1993, unilaterally changed the starting time for route salesmen from 6 to 5:45 a.m. Under Section 8(d), an employer is obligated to bargain with employees' collective-bargaining representative with respect to, inter alia, "hours." The unilateral change to the route salesmen's starting time necessarily involved a change in these employees' hours.[19] As such, the Respondent was obligated to bargain with the Union about these changes as a mandatory subject of bargaining under Section 8(d). The record reflects that no such bargaining occurred. The schedule change was a material, substantial, and significant change because it resulted in route salesmen commencing their workdays 15 minutes earlier than they had before.

Second, Judge Goerlich found that the Respondent made unilateral changes in the method of payment for the bulk truckdrivers and the tell sell and full-service route salesmen, and that these employees retroactively received the withheld wage increase of January 1992. Judge Goerlich found that, prior to July 1992, the bulk truckdrivers were paid under one scheme and that after

bers of the class." *Grand Rapids Press*, 325 NLRB 915 (1998) (citing cases), enfd. *NLRB v. Grand Rapids Press*, Nos. 98-6108, 98-6128 (6th cir. 2000) (unpublished).

[14] In addition to the unilateral amendments listed by the court in its decision, Judge Goerlich found that the Respondent unlawfully changed the sparemen's work schedule and the merchandisers' work schedule. We discuss, infra, why these changes, along with those enumerated by the court, were material, significant, and substantial changes to the wages, hours, and other terms and conditions of employment.

[15] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

[16] Id. See also *Overnite Transportation Co. v. NLRB*, 372 F.2d 765, 768–769 (4th Cir. 1967), cert. denied 389 U.S. 838 (1967).

[17] See *NLRB v. Katz*, 369 U.S. 736, 748 (1962).

[18] *Washington Beef, Inc*., 328 NLRB 612, 617 (1999), and cases cited therein; see also *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987).

[19] A work schedule is a mandatory subject of bargaining. See, e.g., *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992). See also *Hedison Mfg. Co*., 260 NLRB 590, 592–594 (1982), wherein the Board concluded, in part, that when an employer unilaterally changed employees' reporting time from 7:30 to 7:25 a.m. it violated Sec. 8(a)(5) and (1).

July 1992, the bulk truckdrivers were paid under a different scheme. Specifically, Judge Goerlich found that, prior to July 1992, the bulk truckdrivers were paid under an overtime scheme utilizing a method of calculating overtime pay that was different from the method of calculating overtime pay in the unilaterally implemented overtime scheme. Further, Judge Goerlich credited testimony that the drivers made less money under the new system than they made under the former system. Judge Goerlich also found that a new pay system was implemented for the tell sell and full-service route salesmen,[20] and that the Respondent did not grant the full-service salesmen wage increases retroactive to January 1, 1992. Under Section 8(d), an employer is obligated to bargain with a collective-bargaining representative with respect to, inter alia, "wages." Changes to a payment system involve changes to wages. The changes to these employees' method of pay constituted a material, significant, and substantial change, and the Respondent changed employees' method of payment without affording employees an opportunity to bargain over such changes.

Third, Judge Goerlich found that, on May 12, 1992, the Respondent implemented a list of rules for the shop employees. These rules changed the telephone use policy, the lunch and break periods, and placed new, restrictive conditions on conversations among employees. Judge Goerlich found that, prior to the implementation of the new rules, employees had unlimited access to the telephone, but that the new rule restricted the employees' use of the telephone to emergencies. This is a material, substantial, and significant change. The Board has recognized that employees' use of a telephone at work may constitute a term and condition of employment, and that an employer's unilateral amendment to a telephone use policy, without notice to or consultation with the employees' collective-bargaining representative may constitute a violation of Section 8(a)(5) and (1).[21]

Similarly, the Board has recognized that lunch and break periods may constitute terms and conditions of employment.[22] Judge Goerlich found that the Respondent unilaterally changed the break periods policy so that, after the change, employees were limited to two 15-minute break periods.[23] The judge also found that the Respondent unilaterally changed the lunchbreak policy and placed new restrictions on conversations among employees. The judge found that the Respondent sought to prohibit one particular employee from conversing with another employee. The record reflects that these changes were promulgated on May 12, 1992, after the election, and approximately four months before the Union was certified. These were material, significant, and substantial changes.

Fourth, Judge Goerlich found that, on December 9, 1991, the Respondent unilaterally implemented a zero settlement policy which required route salesmen to check up to zero[24] on a nightly (or daily) rather than a weekly basis with respect to their product supplies and moneys. The judge found that the zero settlement policy was a mandatory subject of bargaining. The zero settlement policy constituted a material, substantial, and significant change for the following reasons. First, it required route salesmen to account for their products and moneys on a nightly (or daily) rather than a weekly basis. Prior to the implementation of the zero settlement policy, route salesmen had until the end of the week to settle monetary discrepancies in their accounts. The judge implicitly credited testimony that, by having to account for their wages on a nightly (or daily) basis instead of on a weekly basis, route salesmen had less time to rectify their shortages and thus faced the prospect of having a greater number of accounting shortfalls.

Specifically, under the new system, a route salesman had to account for his product shortages at the completion of his daily route, while, under the former policy, if a route salesman was short product, he had more time to locate it and return it to inventory to avoid being penalized for the shortage by having money taken out of his paycheck. The same testimony demonstrates that, under the unilaterally implemented zero settlement policy, route salesmen are responsible for paying for any shortfalls in their account moneys on the same day that these shortfalls occur. The credited testimony established that, under the previous settlement policy, if a route salesman had not settled his account at the end of the week, the amount of money needed to settle the account was taken out of that salesman's paycheck. Under the zero settlement policy, route salesmen are required to make on-the-spot out-of-pocket payments to cover that day's shortage in moneys, cases, flats, or empties. Thus, the new policy may have a substantial monetary effect on route salesmen, who may see their wages (or commissions) reduced by the necessity of paying for more accounting mistakes and on a daily basis.

Further, this testimony demonstrates that, under the unilaterally implemented zero settlement policy, route salesmen could not work until they settled their accounts.[25] Previously, route salesmen had until the end of

[20] Judge Goerlich implicitly credited testimony establishing that the salesmen's payment system was modified to include both hourly pay and commissions.

[21] See, e.g., *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1190–1191 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987).

[22] See, e.g., *Garrison Valley Center, Inc.*, 246 NLRB 700, 709 (1979).

[23] In so finding, the judge implicitly credited testimony that, prior to May 12, 1992 breaks were unregulated.

[24] Zero settlement refers to the method by which route salesmen must account for all of their product supplies and moneys. A route salesman fails to settle to zero if he either exceeds or falls short of a complete accounting of his product supplies or moneys. If there is a shortfall in a route salesman's account, he must make up the difference.

[25] See *Watsonville Register-Pajaronian*, 327 NLRB 957 (1999) (unilateral schedule change unlawful where it affected how employees

the week to settle their accounts, and were not precluded from working during the week before they settled their accounts. And, as stated above, because the zero settlement policy requires route salesmen to settle on a nightly (or daily) basis, there is a greater chance that route salesmen will experience shortfalls in their accounts. By extension, then, there is also a greater likelihood that route salesmen will be unable to pay out-of-pocket for these shortfalls on a daily basis and may, therefore, have their hours of work reduced.[26] Finally, the fact that a route salesman was discharged pursuant to the unilaterally implemented zero settlement policy also demonstrates the materiality of this change.

The final unlawful unilateral change involves Judge Goerlich's finding that the Respondent unilaterally changed the employment guidelines relating to chargeable accidents and moving violations.[27] Specifically, Judge Goerlich found that the Respondent unlawfully unilaterally amended its rule relating to discharges as the result of accidents and moving violations. The judge found that, prior to the unilateral amendment of the rule, only chargeable accidents and moving violation convictions were counted for discharge. Subsequent to the unilateral amendment, moving violations without conviction and accidents without fault were counted for discharge.

Disciplinary rules are, as the judge found, mandatory subjects of bargaining.[28] The Respondent's unilateral changes to these rules were material, significant, and substantial insofar as the new rule permitted employee discharges as the result of circumstances not contemplated by the previous rules. Further, the judge found that three employees—Matthew Hyatt, Joseph Theodore Lee Jr., and Benjamin Frank Curtis—were discharged as a result of the unilaterally amended rule. This, standing alone, demonstrates that the unilateral change to the disciplinary rule, was material, substantial, and significant.

Although the court did not refer to the following unilateral amendments in its opinion, Judge Goerlich also found that the Respondent unlawfully unilaterally changed the sparemen's work schedule and the merchandisers' work schedule. Additionally, Judge West, in his supplemental decision concluded that, by withholding the January 1992 wage increase, the Respondent violated Section 8(a)(3) and (1), and violated Section 8(a)(5) and (1) by failing to grant retroactively the wage increase to full service employees and Romero. These unilateral amendments all concerned mandatory subjects of bargaining. As stated above, the withheld wage increase was a material change because it denied employees the raise they had customarily received. The schedule changes affecting the sparemen and the merchandisers were also material changes. Prior to the schedule change affecting the merchandisers, Judge Goerlich found that merchandisers did not have to work on Saturdays; after the change, merchandisers had to work on Saturdays and were given a day off during the workweek. Judge Goerlich found that prior to the change sparemen were responsible for filling in for drivers or assisting drivers, but that the Respondent unilaterally amended the sparemen's schedule. The unilateral change was material because, as Judge Goerlich found, after a spareman brought the schedule change to the Respondent's attention, the Respondent returned the sparemen to their previous schedule.

could arrange their workday and potentially affected the relationship between work assignments and the time needed to complete them).

[26] Hours are a mandatory subject of bargaining under Sec. 8(d). See, e.g., *Watsonville Register-Pajaronian*, supra.

[27] At one point in his decision, the judge stated that the Respondent announced the new chargeable accident and moving violations rules to employees on January 14, 1993. The judge also credited testimony referring to the Respondent's announcement of these rules on January 14, 1993. However, at another point in his decision, the judge stated that the new rules were announced on July 14, 1993. We note that this inconsistency does not affect our conclusion that the rules changes violated Sec. 8(a)(5) and (1).

[28] See, e.g., *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. 71 F.3d 1434 (9th Cir. 1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order dated September 9, 1998.

Jasper Brown, Esq., for the General Counsel.
Joel Keiler, Esq., of Reston, Virginia, for the Respondent.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. On December 16, 1994, the National Labor Relations Board (the Board) issued a Decision and Order in this proceeding adopting, as here pertinent, another administrative law judge's findings that Pepsi-Cola Bottling Company of Fayetteville, Inc. (Respondent) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1]

Thereafter, the Respondent filed with the United States Court of Appeals for the Fourth Circuit a petition for review of the National Labor Relations Board's (the Board) Order and the Board filed a cross-application for enforcement.

On September 10, 1996, the majority of the court in *NLRB v. Pepsi-Cola Bottling Co.,* [enfd. mem. 96 F.3d 1439 (4th Cir.)] No. 95-1924 (unpublished), issued its decision granting in part and denying in part enforcement of the Board's Order. Additionally, the majority of the court remanded for further development of the record indicating as follows:

> Pepsi does not dispute that the wage increase was budgeted and implemented at the other North Carolina Pepsi plants, but argues that the increase was discretionary, not compulsory. *Additionally, Pepsi posits that the NLRB initially found the wage increase compulsory, then subsequently found it discretionary. According to Pepsi, because the NLRB took inconsistent positions regarding*

[1] *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994).

the wage increase, Pepsi cannot be held to have violated . . . [Section 8(a)(1) and (3) of the Act].

. . . .

The parties have not submitted evidence that there was an established practice of awarding wage increases, and, if so, to whom they were awarded. On the record before us, we cannot determine how established any practice of paying wage increases was, nor can we determine whether any discretion entered the calculus for disbursing the wage increase. See *Phelps Dodge Mining Co.,* 22 F.3d at 1498–99 (explaining that an employer is free to bestow bonuses at its discretion, absent any unlawful motive); compare *Bonnell/Tredegar Indus.,* 46 F.3d at 343–44 (holding that if a practice of paying Christmas bonuses is so established, it can become an implied term of a collective bargaining agreement, thereby depriving an employer of discretion to withhold it). Thus, we are left with a record that does not enable us to assess whether substantial evidence supports the . . . [Administrative Law Judge's] holding on this issue. *In addition, the NLRB has not explained its inconsistent positions regarding the wage increase*. Accordingly, we remand this issue to the NLRB with instructions to develop the record regarding the nature of the wage increase and to identify the employees, if any, affected by the wage increase. See *Daily News of Los Angeles v. NLRB,* 979 F.2d 1571, 1575–78 (D.C. Cir. 1992) (remanding to the NLRB the issue of whether the discontinuance of periodic but discretionary merit raises constituted an unfair labor practice and noting that the NLRB had taken conflicting stances regarding this issue). *On remand the parties should address* the number of years the wage increase was implemented, whether any discretion was employed in determining to implement it, *why the NLRB advanced inconsistent positions concerning the wage increase,* the effect of any compliance proceedings regarding this issue, and any other pertinent information.

. . . .

In analyzing ... [Section 8(a)(5)] violations respecting unilateral amendments in conditions of employment, notice to the Union and opportunity to bargain over proposed amendments are essential to the collective bargaining process. *See NLRB v. Oklahoma Fixture Co.,* 79 F.3d 1030, 1036–37 (10th Cir. 1996*). An employer cannot successfully contend that a union waived the right to bargain if it failed to notify the union respecting the unilateral amendments*. See id. Of course, if the Union has notice of the employer's unilateral amendments, but does not act on them, then the Union waives the right to bargain, See *YHA, Inc. v. NLRB*, 2 F.3d 168, 173–74 (6th Cir. 1993); *NLRB v. Island Typographers, Inc.,* 705 F.2d 44. 51 (2d Cir. 1983). . . . To demonstrate that the Union waived the right to bargain over the unilateral amendments, Pepsi must show the right to bargain was clearly and unmistakably relinquished." *Bonnell/Tredegar Indus.,* 46 F.3d at 346 n.6. Thus, to resolve this issue, we must determine whether the Union had notice of the right to bargain, and if so, whether it waived the right to bargain.

Here, the Union alleges that it did not bargain with Pepsi respecting the challenged unilateral amendments because it had no notice of these amendments. *Rather than specifically responding to this allegation, Pepsi generally asserts that it gave the Union notice, without providing any particulars, such as the type of notice, how the notice was conveyed, or the length of time the Union had in which to respond to the proposal to implement unilateral amendments. Indeed, neither the . . . [Administrative Law Judge] nor the . . . [Board] addressed the issue of notice*. In short, the parties have not provided sufficient facts, with concomitant citations to the Joint Appendix, to support their respective positions. We cannot review whether substantial evidence supports the finding that Pepsi violated . . . [Section 8(a)(5) of the Act] in implementing unilateral amendments to conditions of employment. Accordingly, we remand this issue to the NLRB and order it to develop the record respecting this issue. On remand, the parties are instructed to describe any notice given by Pepsi, the manner in which Pepsi conveyed the notice, the period of time the Union had to respond to this notice, the materiality of the unilateral amendments, and any other pertinent information respecting notice. [Emphasis added.]

Circuit Judge Murnaghan, in his concurring and dissenting opinion in this case, pointed out as follows:

> The . . . [Administrative Law Judge's] determination that Pepsi violated . . . [Section 8(a)(1) and (5) of the Act] by unilaterally altering conditions of employment *without notice* to the union is similarly supported by substantial evidence. Under the Act, the union is entitled to notice and an opportunity to bargain over proposed material amendments to conditions of employment. See *NLRB v. Oklahoma Fixture Co.,* 79 F.3d 1030, 1035–37 (10th Cir. 1996); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 388–89 (4th Cir. 1967). While the union may waive its bargaining right, Pepsi failed to show that the union clearly and unmistakably did so with regard to the changes at issue here. See *Bonnell/Tredegar Indus. v. NLRB,* 46 F.3d 339, 346 n. 6 (4th Cir. 1995) *(noting that the burden is on the party claiming waiver)*. Instead, the record supports the . . . [Administrative Law Judge's] finding that each challenged amendment was material, yet implemented *without notice* or negotiation with the union.[3] Thus, the union had no obligation to request bargaining over those changes. See *Oklahoma Fixture Company,* 79 F.3d at 1036–37.

[3] While the parties may not have addressed the notice issue in their briefs, that omission alone fails to compel remand because substantial evidence exists in the record to support the . . . [Administrative Law Judge's] determination that Pepsi unilaterally altered several conditions of employment *without notice*, negotiation or waiver of the right to bargain. [Emphasis added.]

As indicated at page 901 of the Board's decision in *Pepsi-Cola Bottling Co.,* 315 NLRB 882 (1994), the case involved herein, Administrative Law Judge Lowell M. Goerlich found as follows:

> In the instant case, the credible evidence indicates that the Union was given *no notice* of the Respondent's intent to change the foregoing rules and regulations nor does the credible evidence indicate that the Union had waived its right to bargain about the changes. [Emphasis added.]

The remainder of Judge Murnaghan's opinion reads as follows:

I disagree with . . . [the majority's] determination that remand is necessary to resolve the remaining issues. Thus, I cannot join the opinion in full.[1] Mindful that our task is to review for substantial evidence and proper application of the law rather than to substitute our own judgement for that of the . . . [Administrative Law Judge] and the Board, see *Nance v. NLRB*, 71 F,3d 486, 489–90 (4th Cir. 1995), I would grant enforcement with regard to the withheld wage increases and the unilateral amendments to employment conditions at the Fayetteville plant. Unlike the majority, I believe that substantial evidence supports the conclusion that Pepsi engaged in unfair labor practices in both respects.

The . . . [Administrative Law Judge] reasonably concluded from the testimony of company officials that the annual pay raise Pepsi bestowed on all of its North Carolina plants was "customary" and anticipated by employees and supervisors alike. While managers exercised some discretion in dividing the allotted amount among employees each year, they treated the pay raise itself as a given.[2] Because Pepsi thus *established a practice* of granting the annual raise, its withholding during the organizational effort of the increases budgeted for the Fayetteville employees was improper unless done for a legitimate business purpose. See *Southern Md. Hosp. Ctr. v. NLRB,* 801 F,2d 666, 668–69 (4th Cir. 1986). The record shows that Pepsi never offered any explanation for withholding the planned wage increases other than the contested union election. *Moreover, even if the annual pay raise did not constitute an established practice, when considered along with the anti-union animus exhibited by Pepsi officials who threatened to freeze benefits if the Fayetteville employees unionized, the withholding of the wage increases from only the Fayetteville bargaining-unit employees clearly violated* . . . [Section 8(a)(1) and (3). See id. at 669 (explaining that even when there is no established practice of granting benefits, an employer's withholding of a benefit for anti-union reasons may violate the Act). [Emphasis added.]

[1] I concur in the majority's affirmance of the other violations found by the . . . [Administrative Law Judge] and the Board.

[2] For example, General Sales Manager Randall Kennedy testified that Pepsi had bestowed the raise each of the 6 years he had worked for the company and that if one plant got the increase, they all did.

By Order dated November 7, 1997, the Board reopened the record and remanded the proceeding for further hearing. More specifically, the Board ordered that the record in this proceeding be reopened and a further hearing be held before an judge for the purpose of taking evidence in accordance with the remand of the United States Court of Appeals for the Fourth Circuit.

The remand hearing was held in Fayetteville, North Carolina, on April 29 and May 12, 1998. Upon the entire record thus made, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law:

Facts

Counsel for the General Counsel called four witnesses at the remand hearing, namely, David Schriber and Thomas Leak, who are both former employees of Respondent, Shelda Upchurch, who was a union representative for the United Food and Commercial Workers (the Union), and Kennedy. Respondent called one witness, Kennedy.

Schriber testified that he worked for Respondent at Fayetteville from 1987 to 1993; that he was a route salesman;[2] that while working at Respondent he received regular annual wage increases; that he was normally notified about these wage increases at a Thursday sales meeting near the end of the year; that normally the sales manager conducted the sales meetings; that normally the employees present were told that they would be getting a cost of living raise and it would be 1-cent per case on what the employees present sold, and the "flats" and bottles would get an increase too of about a penny; that the wage increases became effective near the beginning of the following year; that he received these wage increases every year that he worked at Fayetteville except 1992; that before 1992 he received the wage increases every year at the same time and he was notified of the wage increases the same way every year; that in 1992 he did not receive a wage increase; that in February 1992 he attended a meeting where the subject of wage increases was brought up by Kennedy, who was sales manager and who told the 20 plus route salesmen present, when asked by an employee when they were going to get their raises, that Respondent was waiting on the Board to make a decision in the case and that was what the hold up was; and that 1992 was the only year that he did not get a wage increase from Respondent. On cross-examination Schriber testified that Respondent fired him after he cracked the glass in a door and had deductions taken out of his check on a weekly basis because Respondent said that there was a shortage on his route; that when he first began working for Respondent as a trainee his rate of pay, he thought, was $6.25; that after he was made a regular route salesman his rate of pay in 1987 was 32 cents per case that he sold plus 4 cents on returned wood flats and 6cents on cases of empty bottles; that in 1988 he thought that his rate of pay was 52 cents a case but he had changed from a cold bottle route where he worked grocery and convenience stores to a full-service route where he was filling drink machines with 12-ounce cans; that in 1989 his pay went to 53 cents; that his pay in 1990 was 54 cents; that his pay in 1991 was 55 cents; that his pay in 1992 stayed the same because the route salesmen did not get a raise but toward the middle of 1992 the pay was changed from 100-percent commission to, he thought, $4.25 an hour and 19 cents per case; that while Respondent said sometime in 1992 that it would give a retroactive raise, Respondent indicated that it was changing the way that the full-service segment was paid because, according to Respondent they were overpaid, and he did not receive any retroactive backpay and his pay changed from a 100-percent commission rate to the hourly and commission rate; that he was on the union negotiating team and he did not remember that he or anyone from the Union brought up the issue of the pay raise in the negotiation sessions; that the raises were one cent every year he received a raise except for 1 year; and that he did not know how the raises were calculated. On redirect he testified that he was not sure what year he did not receive the 1-cent raise; and that he was certain that he got pay raises during those years except for 1992.

Upchurch testified that she worked on the campaign at Respondent's Fayetteville facility; that the union election was held

[2] The position involves driving a truck and making deliveries at the facilities of the accounts he services.

on October 17, 1991; that the Union was certified as the bargaining representative and she believed that this occurred in August 1992; that she became aware after the union election and before the Union was certified of a change in the working hours for route salesmen; that prior to this change Respondent did not in any way notify her[3] as the union representative that there was going to be a change and give her the opportunity to bargain over it, and she did not waive the Union's right to bargain over this change in any way; that she was aware that the method of compensation for Tel-Sel and vending machine salesmen was changed by Respondent, prior to this change Respondent did not notify her either in writing or verbally that it intended to make the change, and she did not notify Respondent or anyone else that she was waiving the Union's right to negotiate over these matters; that no official or supervisor of Respondent notified her in writing or verbally that changes in the policy regarding telephone calls, breaks, and lunch periods for shop employees would be made prior to the change, and she did not waive the Union's right to negotiate regarding these changes; that she was not made aware of any of the changes that Respondent made but rather she became aware of the changes after Respondent made the changes; that she was aware that Respondent made a change as to the zero settlement policy,[4] she did not get anything in writing or verbally from Respondent indicating prior to making this change that it intended to make this change, and she did not notify the Respondent that she was waiving the Union's right to bargain over this change; that when there were changes the route sales people brought it to her attention and charges would be filed; that as a result of the change in the settlement policy at least one employee was terminated and a charge was filed; that she became aware that Respondent changed its rule on moving violations from sales people, no official or supervisor of Respondent ever notified her in writing or verbally prior to making the change in the moving violation rule that Respondent intended to make that change, and she did not notify any official of Respondent that she was waiving the Union's right to bargain over this change; that with respect to the above-described rules changes, Respondent never sent her a letter indicating to the effect that Respondent would give her an opportunity to bargain over these matters; and that the Respondent never sent a letter and gave her a period of time in which to respond regarding any of these changes. On cross-examination Upchurch testified that she did not know what the employee handbook specified regarding telephone calls but she was told by the sales people that Respondent had changed its policy in that previously the sales people and the shop people had been able to use the telephone freely; that she did not bring up any of the changes in negotiations; and that the route sales people told her that the zero settlement policy got changed, she did not write a letter to the Respondent once she found out that the policy had been changed asking the Respondent to negotiate or warning the Respondent not to put the policy into effect because the policy was already in effect when she found out about it, and she did not write to Respondent asking it to stop the policy. On redirect Upchurch testified that the Respondent never notified her of any changes; and that her knowledge of the changes came from the employees themselves.

Leak testified that he worked for Respondent from 1986 to 1997, working as a route salesman for 6 years and then as a merchandiser for the last 5 years; that as a merchandiser he went to the facilities of his accounts and filled shelves, ordered, and maintained inventory in the storage area;[5] that while working at Respondent he received regular annual wage increases; that he was notified about these wage increases at a salesman meeting toward the end of each year; that the sales manager would conduct the meeting; that the 1990 sales meeting about the wage increase that year was held by the sales manager who should have been Kennedy at that time; that the employees present were told that the wage increase would go into effect probably the first of the year; that this was the customary procedure for being notified; that these wage increases were given every year that he worked for Respondent except for 1992; and that the wage increases usually became effective the first of the year. On cross-examination Leak testified that he did not recall his salary or rate of pay for each of the years he worked for Respondent; and that he was on the union negotiating committee but he did not recall how many negotiating meetings he attended and whether he or anyone from the Union brought up any issues about changes the Respondent was or was not making that the Union was unhappy about and wanted to negotiate about.

When called by counsel for the General Counsel at the remand hearing herein, Kennedy testified, with respect to the subpoena served by the General Counsel on Respondent, that Respondent had documents pertaining only to item 1 of the subpoena;[6] that he did not have in his possession and there were no documents in Respondent's records showing the decision to deny the wage increase of January 1, 1992; that no documents were sent to the Union to inform them that the January 1, 1992 wage increase would be withheld; that, with respect to the work rules pertaining to work hours for route salesmen, compensation schemes for tell sell and vending machines salesmen, policies regarding personal telephone calls, breaktimes and lunch periods, calculation of receipt shortfalls for route salesmen and policies regarding vehicular moving violations, he did not have any documents which were sent to the Union regarding these work rules; that he has been employed by Respondent since September 1, 1986; that from 1986 through 1991 wage increases were granted on a regular basis; that the employees were notified about those wage increases on or about the latter part of each of those years; that the wage increases became effective between the second and last week of January of the following year; that, if they completed probation, all drivers, salesmen, warehouse employees, mechanics, and service technicians were granted wage increases during the years 1986

[3] More specifically she testified that Respondent did not send her any document letting her know that it was going to make the change; and that no company supervisor ever communicated verbally to her about this change prior to making the change.

[4] Apparently the change required drivers to reconcile their accounts and pay any shortages on a daily basis instead of weekly.

[5] The only difference from being a route salesman is that he does not roll the product into the stores.

[6] G.C. Exh. 2. Item 1 reads as follows:

> True copies of all company documents and records, including but not limited to, letters, correspondence, internal memoranda and notes, reflecting or in any manner pertaining to the granting of wage increases to any and all employees employed at Respondent's Fayetteville, North Carolina plant effective during the period January 1, 1981, through January 1, 1992, including dates of notice to employees, effective dates of wage increase, positions or jobs of all employees granted such wage increases, the amounts of wage increases granted by position or jobs for all affected employees.

through 1991 and he was a 100 percent sure at the two facilities that he was a part of;[7] that during the years 1986 through 1991 a sales manager would hold a meeting to inform the employees of the wage increases; that he held such meetings as a sales manager and he told the employees that the Company had reviewed the estimated forecast for the following year, we would be able, at this point, to grant an increase of some type, and he would get back to them on an individual or a group basis as soon as he was given the approval to put the raises in place; that from 1986 to December 3, 1990, he was at the Lumberton, North Carolina facility and from December 3, 1990, he was at the Fayetteville, North Carolina facility; that he could not testify to whether the employees at the Fayetteville plant were granted wage increases during the years 1986 through 1991; that he could testify that the Fayetteville employees were granted a wage increase in 1991; *that, with respect whether the 1991 wage increase granted to the Fayetteville plant employees was a plantwide increase, except for probationary employees* (emphasis added):

> I didn't put that wage increase together, wasn't involved in that because I came in the latter part of the year. So, I would—I can only assume that it was [a plantwide increase in 1991 at the Fayetteville Plant]. I can't say yeah or nay because I didn't put that particular forecast together. It was there when I arrived and it had been approved. So, whatever they had approved prior to me coming was going in[;]

that he could not recall whether he notified the Fayetteville employees in 1990 of the 1991 wage increase; that he is aware that it is customary for the Company to give a companywide wage increase, to notify employees in the latter part of the year and to make the increase effective in the beginning of the following year; that in January 1992 there was not a wage increase given to the employees who were in the involved unit at Fayetteville but the supervisory employees did receive a wage increase; that, with respect to whether notice was given to the Union regarding the Respondent's decision not to grant a wage increase on or about January 1992 to the Fayetteville employees in the involved unit,

> we would have held a meeting with our people and explained to them that we would not be giving an increase. We had voted, I want to say October of 1991, the ballots, as I recall there were three ballots in question that had been contested, so the ballots had not been opened as of January, 1992, and we told our employees we're not going to—won't do anything with the pay at this point, we're waiting on the outcome of the ballots. And, in those meetings, the people that would be, or were involved in the—on the Union negotiating team were sitting there in those meetings, so they heard the information. There wasn't really any need to notify the Union because you're notifying the bargaining people that's involved with the Union[;]

that he did not send any union official any written correspondence notifying them that there would not be a wage increase; and that he did not notify Upchurch or her successor, Eileen Hanson, that there would not be an increase in January 1992.

[7] Kennedy claimed that he could not answer for the other Pepsi facilities, testifying, "I guess there would have been eleven more facilities."

When called by Respondent's attorney at the remand hearing, Kennedy testified that he attended all but one of the six union negotiating sessions; that the Union never raised the issue of unilateral changes at any of these negotiating sessions; that the percentage of the wage increases at the Lumberton plant for the several years of which he was aware was arrived at as follows:

> We were given a number somewhere in August or September, most of the time by August, we were given a number from the corporate office that said we are not sure, but if we were to give an increase to the employees the following year, that percent would be, and I'll just pick a number, four percent. So, you have four percent to deal with. And what that four percent is, go back—you can bring your plant in at no more than a four percent increase over the prior year's payroll. You can spread that four percent any way you want to, meaning one guy may get a ten percent and someone else may not get anything, but it's the—the total plant can come in at any more than four percent, if that's the number we're given[;]

that in a year that a wage increase was given in Lumberton all of the sales group received it; *that he was aware of a situation where there were employees who did not get a raise and "[t]hat was in Fayetteville in January in 1991"*; and that at Lumberton the percentages of the wage increases bounced between 3 and 4 percent. On cross-examination by counsel for the General Counsel Kennedy testified that the documents Respondent provided in response to the aforementioned subpoena do not show whether the employees involved here received an increase in a given year. Counsel for the General Counsel also elicited the following testimony:

> Q. *For the years 1991, effective 1991, is it correct to say that drivers, salesmen, warehouse employees, mechanics and service technicians [the involved unit] received wage increases for the year effective 1991?*
>
> A. *Again, that's coming off of me. I've only been in there since December [1990]. I really can't answer that because I'd only been there less than a month. I can only answer for myself during that time period.*
>
> Q. You don't have any reason to believe that they did not get a wage increase during that year, 1991?
>
> A. I don't have any facts to it, no, sir.
>
> Q. You wouldn't deny it?
>
> A. That they did? *That everybody in the facility got a raise?* Is that what you—
>
> Q. Yes.
>
> A. *Not everybody in the facility got a raise.*
>
> Q. No those classifications.
>
> A. Give me those classifications again, please.
>
> Q. Drivers, the route salesmen, the warehouse employees, mechanics and service technicians.
>
> A. I have nothing that tells me they didn't, no, sir.

Analysis

Before treating the merits, a procedural matter must be resolved. After Schriber concluded his direct on the first day of the remand hearing, counsel for Respondent requested that counsel for the General Counsel turn over to him any affidavits the witness gave the Board. One affidavit was turned over. The counsel for Respondent, who tried this matter before Judge Goerlich also, then indicated that his notes of that trial showed

that he was previously given three affidavits for this witness when he testified before Judge Goerlich. After a short recess, counsel for the General Counsel indicated that he did not have the other two affidavits and the Board's involved Regional Office was unable to locate the other two affidavits. As indicated above, the remand hearing was held on 2 days. This matter was brought up again on May 12, 1998, at the second session. Counsel for the General Counsel again indicated that the two other affidavits were not located. Pepsi's motion to strike all of Schriber's testimony was denied. On brief Pepsi cites what it describes as a lack of good faith. Counsel for the General Counsel, on brief, points out that the Board has long held that when a statement has been lost or destroyed in good faith, the testimony of the witness concerned need not be struck. *Wabash Transformer Corp.,* 215 NLRB 546 (1974), citing *NLRB v. Seine & Line Fishermen's Union of San Pedro,* 374 F.2d 974, 979 (9th Cir. 1967), cert. denied 389 U.S. 913 (1967). Notwithstanding Pepsi's assertions, it has not been demonstrated that the two affidavits have been mislaid or lost in other than good faith. Respondent had an opportunity to review the affidavits in question at the trial in this matter before Judge Goerlich approximately 5 years ago; Respondent was given access when they were available. Additionally, Schriber's testimony, with some minor mistakes, is in accord with the evidence of record regarding the wage increase. Accordingly, no reason has been shown to reverse my prior ruling.

On pages 3 and 4 of its unpublished decision in *NLRB v. Pepsi-Cola Bottling Co.,* supra, the majority of the court made the following factual findings:

> On October 8, 1991—two days prior to the election to determine unionization—Pepsi convened compulsory meetings of its employees to discuss the consequences of unionization. At these meetings, Pepsi General Manager Randall Kennedy informed the employees that there were thirty-four actions Pepsi could take in response to unionization . . . . Kennedy told the employees that wages would . . . freeze . . . .
>
> . . . .
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> . . . in January 1992 . . . Pepsi implemented a wage increase at all of its North Carolina plants except the Fayetteville plant. Although a wage increase was budgeted for the Fayetteville plant in January 1992, Pepsi increased only the supervisors' wages, not those of the bargaining unit employees.

The majority of the court then concluded as follows:

> Accordingly, we remand this issue to the NLRB with instructions to develop the record regarding the nature of the wage increase and to identify the employees, if any, affected by the wage increase. . . . *On remand the parties should address* the number of years the wage increase was implemented, whether any discretion was employed in determining to implement it, *why the NLRB advanced inconsistent positions concerning the wage increase,* the effect of any compliance proceedings regarding this issue, and any other pertinent information. [Emphasis added.]

Regarding the number of years the wage increase was implemented, the General Counsel, on brief, points out that Judge Goerlich at page 892 of *Pepsi-Cola Bottling Co.,* supra, found that "Kennedy testified that in the 6 years that he had been with the Respondent, it was an annual corporate decision to grant wage increases . . . ."; that Respondent's failure to grant a wage increase to bargaining unit employees in 1992 was a marked departure from its well-established practice of paying wage increases to all employees employed at the Fayetteville facility; that the testimony of Kennedy establishes that the wage increases had been granted for at least the 6 years before 1992; that Schriber testified at the remand hearing that he received regular annual wage increases each year during the period extending from 1987 to 1993, with the exception of 1992; that Leak testified at the remand hearing that he began working for Respondent at its Fayetteville facility in 1987 and he received wage increases every year except 1992; that both Schriber and Leak testified that they were notified of the wage increases in the latter part of the year and the wage increases would become effective the first part of the following year; and that the pattern and practice of granting wage increases was only interrupted in January 1992 because of the conduct of the union election. Respondent, on brief, argues that the testimony reveals that a wage increase has been granted, at most, for 4 years; and that in *Phelps Dodge Mining Co. v. NLRB,* 17 F.3d 1334 (10th Cir. 1994),[8] the court held that a bonus given for 5 years was not of a sufficient length of time or of such a fixed nature that it could not be discontinued. As here pertinent, the credible evidence of record received at the remand hearing indicates that Respondent had an annual wage increase in January at its Fayetteville plant for, at the least, each of the years from 1986 through 1991. While Schriber and Leak were not able to recall the exact amounts of all of the wage increases, they both impressed me as being credible witnesses.

With respect to the majority's question of whether any discretion was employed in determining whether to implement the wage increase, the General Counsel, on brief, contends that the record evidence reflects that all nonprobationary employees are eligible for this annual wage increase; that Kennedy testified that the only discretion exercised was with respect to the specific amount or percentage of increase granted each employee; and that the evidence clearly shows that the only discretion employed by Respondent was in the amount or percentage of increase granted each employee, rather than the decision to actually grant a wage increase. Respondent, on brief, argues that the granting of the wage increase was discretionary and the amount varied from year to year and from employee to employee with some employees receiving no increase; and that this is, at best for the Board, an increase which is consistent as to timing but discretionary as to amount. According to the testimony of Kennedy, at Lumberton the percentage of the annual wage increase varied between 3 and 4 percent. No evidence was produced showing that the situation at Fayetteville was different. Kennedy was unable to deny that the employees in the involved unit did receive a wage increase in 1991. It has not been shown that any discretion was employed in determining whether to implement wage increases between 1986 and 1991.

While the majority of the court apparently concludes that the Board advanced inconsistent positions concerning the wage increase, the majority does not indicate in its opinion where or when the Board advanced inconsistent positions. The majority does indicate that Pepsi "posits" that the "NLRB" initially

[8] The citation is in error for the case at 17 F.3d 1334 is not the named case and the cited case involves a criminal law matter. Perhaps the case Respondent is referring to can be found at 22 F.3d 1493 (10th Cir. 1994).

found the wage increase compulsory, then found it discretionary. But the majority neither provides reasoning other than the assertions of Pepsi's nor does the majority make specific factual findings on this issue prior to asking the Board to explain why it advanced inconsistent positions concerning the wage increase. The General Counsel, on brief, contends that a review of the entire Board's Decision and Order fails to reflect any such inconsistency by the Board or Judge Goerlich regarding this matter; that while the Respondent may have asserted that the Board took inconsistent positions concerning wage increases in 1992 and 1993, there is no indication of an inconsistency in the Board's position as stated in its Decision and Order in this matter; that it is well settled that the General Counsel has unreviewable discretion in determining whether the facts presented in an investigation warrant the issuance of a complaint; that the fact that the Regional Director for Region 11 concluded that a complaint was not warranted on the facts presented in the 1993 wage increase allegation, does not establish that a determination was made that the wage increase was discretionary; that the record establishes that the factual situation in 1993 differed from that in 1992 in a number of respects, including the fact that the parties were engaged in contract negotiations; and that aside from Respondent's assertions, there is no factual basis to conclude that the Board has advanced inconsistent positions concerning the wage increase. Respondent, on brief, argues that the inconsistency can be found in the fact that Region 11 took the position that the January 1992 raise had to be given despite the fact that these were discretionary increases and some employees would receive nothing and then Region took the position that the January 1993 raise did not have to be given; and that this is precisely the inconsistency which led the U.S. Court of Appeals for the D.C. Circuit to refuse to enforce a Board Order in an almost identical case, *Daily News of Los Angeles v. NLRB,* 979 F.2d 1571 (D.C. Cir. 1992). *Daily News*, supra, involved a situation where, according to the court, the Board took a position in that case which conflicted with a prior Board decision, *Anaconda Ericsson, Inc.,* 261 NLRB 831 (1982), and the Board did not, according to the court, advance any reconciliation of the two cases. In the instant proceeding we are not dealing with inconsistent Board precedents. The only thing cited by Respondent in support of its argument is the action of the Regional Director with respect to the 1992 and 1993 wage increases. The resolution of the question regarding the 1993 wage increase was not accomplished in a published Board decision. The resolution of the 1993 wage increase question was not accomplished by the Board acting in its decisional capacity. The resolution of the 1993 wage increase question was accomplished at the Regional level. By law the authority of the Board is divided between the five member Board which acts as a quasi-judicial body in deciding cases on formal records and the General Counsel who, as here pertinent, is responsible for the investigation and prosecution of unfair labor practice cases. The General Counsel exercises general supervision over the Board's network of field offices. In unfair labor practice cases, the Region is, in effect, the prosecutor. And as indicated, the members of the Board sit in a quasi-judicial capacity, as here pertinent, issuing decisions in unfair labor practice cases. Equating the actions or the inaction of the prosecutor, namely the Regional Director, in an unfair labor practice case with that of the decision makers, the Board members, is, at best, an error. The Board, as that term was used in *Daily News*, supra, and as it was meant to be used when referring to precedent in unfair labor relation decisions, did not "advance . . . inconsistent positions regarding the wage increase." Obviously, therefore, the Board cannot be expected to explain that which it did not do.

With respect to the effect of any compliance proceedings regarding the wage increase issue, the General Counsel, on brief, correctly points out that the function of the compliance proceedings is to identify and provide specific remedies for individuals who have been determined to be aggrieved; that the compliance proceeding only comes into effect upon the determination by the Board that the Act has been violated; and that here the effect of the compliance proceeding would be to determine the specific amounts owed each individual in the bargaining unit, in order to make them whole for Respondent's failure to grant a wage increase in January 1992.

As to the "identity of the employees, if any, affected by the wage increase," this would include the employees in the involved bargaining unit. And with respect to the identity of any other employee similarly situated to Felix Romero who was denied the wage increase because he left Pepsi but returned after the wage increase was implemented, the aforementioned subpoena of the General Counsel (G.C. Exh. 2) contains the following paragraph:

> True copies of all records and documents which relate to or in any manner reflect Respondent's decision to withhold or deny a wage increase to any and all employees employed at the Fayetteville, North Carolina, plant as of January 1, 1992, who subsequently quit their employment, then returned to work at the Fayetteville, North Carolina plant during the year 1992, including names of all employees denied a wage increase, effective dates wage increase was withheld, and amount of wage increases withheld for all affected employees.

Kennedy testified that he did not have any documents pertaining to this item in the subpoena.

The withholding of the January 1992 wage increase involves Section 8(a)(1), (3), and (5) of the Act. *Under Wright Line,* 252 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management, Corp.,* 462 U.S. 393 (1983), in cases alleging violations turning on employer motivation, the General Counsel must first make a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's action. As found by the majority of the court herein:

> On October 8, 1991—two days prior to the election to determine unionization—Pepsi convened compulsory meetings of its employees to discuss the consequences of unionization. At these meetings, Pepsi General Manager Randall Kennedy informed the employees that there were thirty-four actions Pepsi could take in response to unionization . . . . Kennedy told the employees that wages would . . . freeze . . . .
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> . . . .
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> . . . in January 1992 . . . Pepsi implemented a wage increase at all of its North Carolina plants except the Fayetteville plant. Although a wage increase was budgeted for the Fayetteville plant in January 1992, Pepsi increased only the supervisors' wages, not those of the bargaining unit employees.

Pepsi had an unlawful motive and Pepsi did not hesitate to express it.[9] Certainly this is a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's action. Under *Wright Line,* supra, once this showing is made the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. In other words, the employer has to show a business justification and demonstrate that it would have taken this action absent the protected activity. It appears that the majority's above-described factual finding pretty much takes care of this aspect of *Wright Line*. Respondent did not demonstrate that it would have withheld the January 1992 wage increase absent the protected activity. By carrying out its very specific threat and withholding the January 1992 wage increase from bargaining unit employees because they selected a union as their bargaining representative, while granting the wage increase to its unrepresented employees, Respondent has discriminated against its represented employees in violation of Section 8(a)(3) and (1) of the Act.[10]

For the purposes of determining whether Section 8(a)(1) and (5) of the Act was violated with respect to the January 1992 wage increase, what occurred in August 1992 with the full-service salesman, including Schriber, and what occurred with Felix Romero in November 1992 at Respondent's Fayetteville facility must be reviewed. As Schriber testified without contradiction, sometime in 1992 Respondent indicated that it would give a retroactive raise but that full-service employees would not get the January 1992 raise retroactively because Respondent was changing the way the full-service segment was paid. In August 1992 full-service employees were told that they would no longer be paid strictly on a commission basis. Rather they were paid $4 an hour, 19 cents a case and overtime. The full-service employees made less under the new system than the old system. Respondent admitted that the wage changes had not been negotiated with the Union but were implemented unilaterally. As pointed out by the Board in *Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974):

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that . . . [challenges] to an election are pending and the final determination has not yet been made. And where the final determination on the . . . [challenges] results in the certification of a representative, the Board has held an employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employed in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when . . . determinative challenges to the election are pending. Accordingly, since we have already determined in this case that the Union should be certified, we find . . . that Respondent was not free to make changes in terms and conditions of employment during the pendency of postelection . . . challenges without first consulting with the Union. [Footnotes omitted.]

With its unlawful unilateral changes to the terms and conditions of employment of the full-service employees, Respondent did not grant full-service employees the wage increase retroactive to January 1992. Its failure to grant the January 1992 wage increase retroactively to full-service employees, as it did with other employees in the bargaining unit, violated Section 8(a)(5) and (1) of the Act. Again we are not dealing strictly with a past practice. Here, Pepsi was granting the January 1992 wage increase retroactively to some members of the bargaining unit and, by changing the pay rules with respect to the full-service employees, Pepsi was denying it to them. Also by refusing to grant the January 1992 wage increase retroactively to Romero, who is a bargaining unit employee, during his tenure Respondent violated Section 8(a)(5) and (1) of the Act.

As noted above, the majority of the court concluded at page 12 of its unpublished opinion as follows:

> Here, the Union alleges that it did not bargain with Pepsi respecting the challenged unilateral amendments because it had no notice of these amendments. *Rather than specifically responding to this allegation, Pepsi generally asserts that it gave the Union notice, without providing any particulars, such as the type of notice, how the notice was conveyed, or the length of time the Union had in which to respond to the proposal to implement unilateral amendments. Indeed, neither the . . . [Administrative Law Judge] nor the . . . [Board] addressed the issue of notice.* In short, the parties have not provided sufficient facts, with concomitant citations to the Joint Appendix, to support their respective positions. We cannot review whether substantial evidence supports the finding that Pepsi violated . . . [Section 8(a)(5) of the Act] in implementing unilateral amendments to conditions of employment. Accordingly, we remand this issue to the NLRB and order it to develop the record respecting this issue. On remand, the parties are instructed to describe any notice given by Pepsi, the manner in which Pepsi conveyed the notice, the period of time the Union had to respond to this notice, the materiality of the unilateral amendments, and any other pertinent information respecting notice. [Emphasis added.]

The General Counsel, on brief, points out that, contrary to the assessment of the majority of the court in its decision herein, Judge Goerlich's decision specifically addressed Respondent's failure to furnish the Union with notice prior to the implementation of the unilateral changes in question; that Judge Goerlich's decision made specific findings that the amendments

[9] This makes irrelevant any case cited which relies on the absence of an unlawful motive. Also, it should be noted that *Daily News*, supra, dealt strictly with Sec. 8(a)(1) and (5) and *not* Sec. 8(a)(1) and (3). For the reason noted above and for this reason, *Daily News*, supra, is not on point. Judge Goerlich correctly pointed out at 887 of *Pepsi-Cola Bottling Co.*, supra, that Pepsi "harbored a strong antiunion animus."

[10] Compare, *Martin Industries*, 290 NLRB 857 (1988). This case was also cited by Judge Goerlich in his decision. Respondent, in effect, told bargaining unit employees that in January 1992 you are not going to receive the January wage increase you have been receiving since at least 1986 if you vote the union in. Respondent then made good on its threat, granting the wage increase to its unrepresented employees while withholding it from its bargaining unit employees. Obviously this is discrimination, pure and simple. This is about as clear cut a violation of Sec. 8(a)(1) and (3) of the Act as you can have. Respondent did not engage in this unlawful activity without giving an explanation. As indicated by the majority's factual findings set forth above, Respondent, in effect, told the employees in advance of the election that they would be punished if they voted the Union in. Then Pepsi proceeded to unlawfully punish the employees.

were genuine departures from Respondent's past practices; that Judge Goerlich's findings that employees were discharged and adversely affected by these unilateral changes demonstrates that the amendments were material; and that Judge Goerlich made specific findings that Respondent failed to furnish notice or bargain with the Union regarding any of the unlawful unilateral changes. The General Counsel contends that Judge Goerlich's decision specifically found that the unilateral changes were mandatory subjects of bargaining and by definition constitute a material change affecting terms and conditions of employment; that specified employees testified, collectively, that, with the changes, they experienced a reduction in pay, were terminated, or had their work schedule changed so that they either had to work on weekends for the first time or the number of weekends that they had to work increased; and that the findings of fact and conclusions of law set forth in the Board's Decision and Order dated December 16, 1994, in this matter should be affirmed.

Respondent, on brief, argues that "Pepsi Did Not Make Unilateral Changes in Violation Of Section 8(a)(1) Of The Act."[11] Respondent also argues that Kennedy testified that he informed the bargaining committee of the changes; that some of the alleged changes were not changes at all; that some changes were too minor to be of any import; that the Union never sought to negotiate about unilateral changes; and that the Union waived its bargaining rights and the unilateral changes were lawful.

The following language of Judge Goerlich appears in *Pepsi-Cola Bottling Co.,* 315 NLRB 882 at 901 (1994):

> In the instant case, the credible evidence indicates that the Union was given *no notice* of the Respondent's intent to change the foregoing rules and regulations nor does the credible evidence indicate that the Union had waived its right to bargain about the changes. [Emphasis added.]

One must wonder, therefore, whether the majority of the court, in concluding in its opinion herein that Judge Goerlich did not "address . . . the issue of notice," read Judge Goerlich's decision herein. This is even more perplexing when one considers the fact that Circuit Judge Murnaghan, in his concurring and dissenting opinion in this case, pointed out as follows:

> Instead, the record supports the . . . [Administrative Law Judge's] finding that each challenged amendment was material, yet implemented *without notice* . . . .[3] [Emphasis added.]

[3] While the parties may not have addressed the notice issue in their briefs, that omission alone fails to compel remand because substantial evidence exists in the record to support the . . . [Administrative Law Judge's] determination that Pepsi unilaterally altered several conditions of employment *without notice*, negotiation or waiver of the right to bargain. [Emphasis added.]

Judge Goerlich spoke to notice and Circuit Judge Murnaghan spoke to the fact the Judge Goerlich spoke to notice. The majority of the court does not attempt to resolve this apparent conflict between (1) the record and Circuit Judge Murnaghan's findings regarding the record, and (2) the majority's conclusion which is not in agreement with either the record or Circuit Judge Murnaghan's finding regarding the record.[12]

[11] The involved Sec. of the Act is Sec. 8(a)(5) and (1).

[12] At p. 882 of the Board's Decision in *Pepsi-Cola Bottling Co.*, supra, the following appears:

> The board has considered the decision [of Judge Goerlich herein] and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified. [Footnotes omitted.]

This means exactly what it says, namely that the Board takes as its own the findings of Judge Goerlich. Those findings include Judge Goerlich's findings with respect to the lack of notice to the Union. It is difficult to understand how the majority of the court in its decision herein could, therefore, conclude that the "NLRB [did not] address . . . the issue of notice." Certainly the majority of the court does not expect the Board to reiterate each and every finding of Judge Goerlich.

The majority of the court does conclude as follows:

> To demonstrate that the Union waived the right to bargain over the unilateral amendments, Pepsi "must show the right to bargain was clearly and unmistakably relinquished." *Bonnell/Tredegar Indus.,* 46 F.3d at 346 n. 6. Thus, to resolve this issue, we must determine whether the Union had notice of the right to bargain, and if so, whether it waived the right to bargain.
>
> Here, the Union alleges that it did not bargain with Pepsi respecting the challenged unilateral amendments because it had no notice of these amendments. Rather than specifically responding to this allegation, Pepsi generally asserts that it gave the Union notice, without providing any particulars, such as the type of notice, how the notice was conveyed, or the length of time the Union had in which to respond to the proposal to implement unilateral amendments. [Emphasis added.]

With respect to these two quoted paragraphs of the majority's opinion, in the first the majority, citing one of its own decisions (which one member of the majority herein participated in) concludes that "Pepsi must show the right to bargain was clearly and unmistakably relinquished." In other words, Pepsi has the burden of proof. This fact was fully appreciated by Circuit Judge Murnaghan who also cites *Bonnell/Tredegar Industries, Inc.,* supra (a decision in which he also participated), for the proposition that the burden is on the party claiming waiver. But then the majority of the court in its opinion herein concludes as follows:

> Here, the Union alleges that it did not bargain with Pepsi respecting the challenged unilateral amendments because it had no notice of these amendments. *Rather than specifically responding to this allegation, Pepsi generally asserts that it gave the Union notice, without providing any particulars, such as the type of notice, how the notice was conveyed, or the length of time the Union had in which to respond to the proposal to implement unilateral amendments.* [Emphasis added.]

It appears that while the majority indicates that Pepsi has the burden of proof with respect to waiver and Pepsi did not satisfactorily explain to the majority how Pepsi met that burden of proof, pepsi was given another chance to make such a showing.[13]

What did Pepsi do with its additional chance? In addition to cross-examining the General Counsel's witnesses, as set forth above, Pepsi, as indicated above, called one witness who, as here pertinent, testified as follows:

[13] Obviously if the proof existed Pepsi would have put it on the record long ago and Pepsi would not have hesitated to cite it by chapter and verse.

> we would have held a meeting with our people [employees] and explained to them that we would not be giving an increase. . . . And in those meetings, the people that would be, or were involved in the—on the Union negotiating team were sitting there in those meetings, so they heard the information. There wasn't really any need to notify the Union because you're notifying the bargaining people that's involved with the Union.

Kennedy did not impress me as being a credible witness. Judge Goerlich did not credit Kennedy. Kennedy was a key player in Pepsi's unlawful effort to avoid unionization. And Kennedy demonstrated that he placed Pepsi above the truth. Kennedy changed his testimony depending on who was asking the question and he conceded the obvious only when cornered.[14]

No verbal or written notice was given directly to the Union with respect to the involved unlawful unilateral changes. It appears that employees found out about the unlawful unilateral changes at some point in time. Some of Pepsi's involved employees were on the negotiating committee. But no one refuted Upchurch's testimony given at the remand hearing herein that she only found out about the unlawful unilateral changes from employees after Respondent made the changes. Upchurch impressed me as being a credible witness. Her testimony is credited. No notice was given to the Union regarding the involved unilateral changes before they were implemented. The Union was not given an opportunity to bargain regarding the involved unilateral changes before they were implemented. The Union did not clearly and unmistakably relinquish the right to bargain. And as pointed out by counsel for the General Counsel in his postremand hearing brief herein, Judge Goerlich found that the unilateral changes were mandatory subjects of bargaining and by definition constitute a material change affecting terms and conditions of employment. No purpose would be served by my reiterating in this decision each and every finding of Judge Goerlich on these matters. His decision is already a part of the record herein. For the reasons set forth above and for the reasons given by counsel for the General Counsel in his postremand hearing brief, which are summarized above, the findings of fact, conclusions of law, and Order set forth in the Board's Decision and Order herein dated December 16, 1994, regarding the unlawful unilateral changes in question here should be affirmed.

Additionally, for the reasons specified above in this decision, the findings of fact, conclusions of law, and Order set orth in the Board's Decision and Order herein dated December 16, 1994, regarding the withholding of the January 1992 wage increase in violation of Section 8(a)(1), (3), and (5) of the Act should be affirmed.

ORDER

It is ordered that the findings of fact, conclusions of law, and Order set forth in the National Labor Relations Board's Decision and Order dated December 16, 1994, be, and they are affirmed with respect to (A) the withholding of the January 1992 wage increase in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act and (B) the involved unlawful unilateral changes in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

[14] As pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749 at 754 (2d Cir. 1950):

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

Those portions of Kennedy's testimony corroborated by other reliable evidence of record will be credited.