WOOD'S HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY AND INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS (AFL-CIO), UP-2485 AND INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS (AFL-CIO) AND WOOD'S HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY, UPL-100 (1/21/86).

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Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner

Appearances:

James Grady, Esq.	-	Representing International Organization of Masters, Mates and Pilots (AFL-CIO)
Richard Benka, Esq.	-	Representing Woods Hole, Martha's Vineyard and Nantucket Steamship Authority

DECISION AND ORDER

Statement of the Case

On April 19, 1983, the International Organization of Masters, Mates and Pilots, AFL-CIO (Union or MMP) filed a charge with the Labor Relations Commission (Commission) alleging that the Authority had engaged in unfair labor practices within the meaning of Sections 4(1) and (5) of G.L. c.150A (the Act). On April 21, 1983, the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (Authority) filed a charge alleging that the Union had engaged in unfair labor practices within the meaning of Sections 4A(2) and 4B. The Commission investigated the charges and on June 29, 1983 issued complaints on both charges.

The Authority and MMP filed timely answers to the Complaints. On September 20, and October 25, 1983, a consolidated hearing was conducted before a hearing officer of the Commission at which time the parties were afforded full opportunity to be

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heard, to examine and cross-examine witnesses and to otherwise support or defend against the charges in the complaints. The Authority and the Union filed briefs which have been carefully considered along with the record as a whole in making the following findings of fact and conclusions of law.

These consolidated cases raise questions concerning the parties' respective collective bargaining obligations under the Act. In Case No. UP-2485, we address the question of whether the Authority has refused to bargain collectively in good faith in violation of Sections 4(5) and 4(1) of the Act by: 1) refusing to participate in the binding arbitration of unresolved collective bargaining issues by the Board of Conciliation and Arbitration pursuant to c.760 of the Acts of 1962 as sought by the Union and, 2) unilaterally ceasing dues check-off for members employed by the Authority after the labor contract requiring the check-off had expired.

In Case No. UPL-100, it is alleged that the Union has failed to bargain in good faith by: 1) refusing to supply information to the Authority about the operation of the Atlantic and Gulf Maritime Region Pension Plan (Pension Plan); 2) misrepresenting material facts concerning the vesting requirements of the Pension Plan and the nature or status of the Authority's participation in the Pension Plan; 3) unilaterally changing the method employed by the Pension Plan to determine an employer's withdrawal liability; and 4) refusing to negotiate with the Authority while litigating before the Board of Conciliation and Arbitration and the Courts of the Commonwealth the issue of whether the Authority should be required to engage in interest arbitration on all unresolved collective bargaining proposals.

Facts

The Authority and the Union have had a collective bargaining relationship since 1968. The parties' most recent collective bargaining agreement, which was executed December 12, 1979, was effective from April 16, 1979 through April 15, 1982.[1] The agreement was a comprehensive document covering the entire range of working conditions, wages, benefits and related subject matters. Of particular relevance to our consideration were the articles relating to the check-off of union dues for members of the bargaining unit (Article 31) and the Authority's obligation to make contributions to the fund supporting the Atlantic and Gulf Region Pension Plan (hereinafter "the Pension Plan") (Article 30).

Article 31, Check-off of Union Dues, stated:

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[1] On or about April 15, 1982, the Union and Authority entered into an "Agreement to Extend Collective Bargaining" extending the contract "on a day to day basis" and terminable upon execution of a successor agreement or upon forty-eight (48) hours written notice of termination. The extension agreement also contained language concerning the retroactive application of the successor agreement.

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ARTICLE 31. -- CHECK-OFF FOR UNION DUES

31.1(a) The Employer agrees to deduct from the earnings of the Licensed Deck Officer who has so authorized in writing the regular membership dues of the Organization uniformly required and consisting of membership dues, service fees and initiation fees and remit same to the Organization. Such authorization to be valid, shall conform to applicable State and Federal Laws.

(b) Dues or service fees deducted shall be an amount equal to 2% of the gross earnings of each such Licensed Deck Officer. Monies deducted shall be transmitted to the Organization by the fifteenth of the month for the preceeding [sic] month's deductions and shall be accompanied by a report showing, for each Licensed Deck Officer, (including those not on check-off) the gross earnings, dues deducted, Social Security number and capabity in which served during the period involved.

31.2 CHECK-OFF AUTHORIZATION

TO: WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY	INTL ORGANIZATION OF MASTERS, MATES & PILOTS ATLANTIC & GULF MARITIME REGION, AFL-CIO
LOCATION: WOODS HOLE, MA	DATE: ____________________

I, hereby authorize my Employer to deduct from my wages: two (2) percent of my Gross Wages as earned, as authorized by the Organization in accordance with its By-Laws and to remit same to the Regional Director of the Organization either monthly, quarterly, bi-annually, or annually, whatever may be prescribed by the Organization.

This Authorization shall remain in effect, unless and until revoked by me, as hereinafter provided, and shall be irrevocable for a period of one (1) year from the date hereof, or until the termination of this collective bargaining agreement between the Employer and the Organization, whichever occurs sooner.

I further agree and direct, the authorization shall be automatically renewed for successive periods of one (1) year, and shall be irrevocable during each such renewal period, unless written notice of revocation is given by me to the Employer and to the Regional Director of the Organization by certified mail, return receipt requested, not more than twenty (20) days, and not less than ten (10) days, prior to the expiration of each term of one (1) year prior to the termination of the applicable collective bargaining agreement between the Employer and Organization, whichever occurs sooner.

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(Signature)

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Article 30 provided:

> <u>ARTICLE 30</u>. -- <u>PENSION PLAN</u>
>
> <u>30.1</u> Commencing with the sixteenth day of April 1979, and for the duration of this Agreement, subject to (30.4), the Employer shall make contributions to the Atlantic and Gulf Region Pension Plan for all Licensed Deck Officers for all days on the payroll at the following:
>
> (a) Effective April 16, 1979 thru April 15, 1980 $7.00 per day;
>
> (b) Effective April 16, 1980 thru April 15, 1981 $7.75 per day;
>
> (c) Effective April 16, 1981 thru April 15, 1982 $8.00 per day.
>
> <u>30.2</u> Should a Regular Licensed Deck Officer fail to earn sufficient credits in two (2) years, due to being sick or injured, and is in danger of having all pension credits cancelled, the Employer agrees to pay the necessary credits, up to two hundred eighty (280) days, in the third year to insure the Licensed Deck Officer's continuity of service.
>
> <u>30.3</u> Further, it is agreed, if a Licensed Deck Officer, who has already earned thirteen and one-half (13-1/2) years of pension credit (prior to April 16, 1976), twelve (12) years of which is past service credit, and two hundred and ten (210) days (three quarters) is future service credit becomes permanently disabled and cannot work, the Employer will pay whatever credits are necessary, up to two hundred and ten (210) days (three quarters), in order to insure the Licensed Deck Officer sufficient credit for fifteen (15) years of pension credit necessary to qualify for a disability pension.
>
> <u>30.4</u> The Employer and the Organization agree to maintain the present pension plan, as is, with no change in rate of contribution, except as noted in (30.1).

In late 1981 or early 1982, the Union and the Authority commenced negotiations for a successor collective bargaining agreement. The Authority was represented in negotiations by its Executive Director, Joseph McCormack (McCormack), John J. McCue (McCue), the retired general manager of the Authority employed as a collective bargaining consultant, James Halloran, Jr. (Halloran) and Peter Duart (Duart), managerial employees of the Authority. McCue was the spokesman for the management team.

The Union's negotiating team consisted of Charles J. Landry (Landry), New England field representative of the Union, John Bierne (Bierne), vice-president of the Union, Allen Scott (Scott), executive vice-president of the Union and three members of the local bargaining unit. Landry was the spokesperson for the Union.

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The Authority proposed making contributions to the Pension Plan on the basis of "days actually worked" rather than "days on the payroll" which was the established practice set out in Article 30.1 of the agreement. The Union rejected the proposal, maintaining that the basis for making contributions could affect employee eligibility under the Pension Plan.

During the parties' negotiations in the summer of 1982 over the pension contributions, McCue asked Landry whether the Authority's contributions for its employees were segregated and maintained as a "separate entity." In McCue's words, the concern of the Authority "...was to make certain that any contributions [made by the Authority] would only be used for the benefit of [Authority] employees and not be diverted to pay -- or pay benefits or costs that were accountable to the other employees in the plan." Landry replied that it was his understanding that the Authority's members were treated as a "separate entity."[2] At one negotiating session, Bierne was present when the Authority's negotiators asked questions about the Pension Plan. They asked whether the Authority participated as a separate entity. Lnadry replied that the Authority was treated as a separate entity. Bierne did not respond to the Authority's questions, or dispute Landry's characterization.[3]

The trust agreement that established the Pension Plan trust fund was still in effect in 1982 when Landry made his statements. The trust agreement defined the trust fund and Pension Plan as a "multi-employer plan" within the meaning of Section 3(37) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 <u>et seq</u> (hereinafter ERISA).[4] This meant that the Authority's contributions were lumped together with contributions from all other Employers contributing to the Plan. The Authority was somehow unaware that contributions for its employees were comingled with those of other pension plan participants until it received a copy of the Pension Plan and related documents on February 28, 1983.

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[2]When the parties negotiated their first contract in 1968, Bierne told the Authority that "their members" would be treated as a "separate entity actuarially and accounting-wise."

[3]Landry denied making this or other statements about the status of the Plan. McCue's testimony was credible and cooroborated by other members of the management negotiating team. We credit McCue's testimony.

[4]Article II, Section 2.1 of the Restated Agreement and Declaration of Trust, Atlantic and Gulf Region Pension Fund, as amended, provides, in part, that:

> "...[the] Trust Fund and Pension Plan be a 'multi-employer plan' as that term is defined in Section (3)37 of the Act."
>
> "The Act" is defined elsewhere in the trust document to be ERISA. Section (3)378 of ERISA defines "multi-employer plan" as a plan:
>
> i) to which more than one employer is required to contribute; ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

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In response to the Union's continued insistence on maintaining the established levels of contributions, the Authority made a counterproposal. The Authority countered by 1) offering its initial proposal of limiting contributions to the days an employee actually worked and 2) offering to make sufficient contributions per year to ensure that all full-time employees would receive a full year of credited service toward their retirement benefits, regardless of the number of days actually worked. During the discussion, McCue, the Authority's spokesperson, asked Landry how many days of contributions were required to receive a full year's credit to determine the employee's level of benefits. Landry replied that at least 280 days of contributions were required per year to receive a full year's credit for benefits. Thereafter, the Authority incorporated that figure into its written proposals on this subject.

In fact, to receive full benefit credit, fewer days were required. Specifically, prior to 1981, the Pension Plan required 280 days of contributions for an employee to be credited with a full year of benefits. The trustees of the Pension Plan, however had, in 1981, amended the Plan to require only 240 days of contributions. Landry did not attend the trustees' meeting amending the contribution requirements, and had not been informed of the change prior to telling the Authority that the Plan required 280 days of contributions. Landry testified that he learned of the Trustees' reduction in the required contribution vote from Scott and Bierne, both his supervisors and trustees of the Pension Plan, in late fall or December of 1981. Landry, however, never advised the Authority of the reduced requirements in subsequent bargaining.

Throughout the fall of 1982, the Authority's negotiators continued to question Landry about the operation of the Pension Plan. Eventually, Landry told McCue and others that their increasingly specific questions were either too technical or required knowledge he did not possess. McCue asked Landry to supply the Authority with a copy of the Pension Plan, an accounting of the Authority's contributions, including a breakdown of the projected benefits for each covered employee, and a copy of the most recent ERISA reports filed by the trustees. Landry did not have the requested information. Landry relayed the questions to Scott and Bierne, who in turn directed the Authority to contact the salaried administrators of the Pension Plan in Jacksonville, Florida.

On January 25, 1983, McCue sent the following letter to David Mast (Mast), vice-president of Administrative Services, Inc., the designated administrative manager of the Pension Plan.[5]

> Confirming our prior requests to Union Officials during contract negotiations, please forward the information requested below in the Pension Plan of the International Organization of the Masters,

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[5] Pursuant to Section 5.8 of the trust agreement establishing the Pension Plan, the "administrative manager" of the Pension Plan was responsible for coordinating and administering the accounting, bookkeeping, actuarial requirements, preparation and filing of ERISA and all other reports of the trust.

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Mates and Pilots Union which covers the Authority's Licensed Deck Officers under our Collective Bargaining Agreement.

We have been assured by Union Officials on many occasions that the Authority's Employees are accounted for and treated by the Trustees as a separate actuarial group under the plan and not commingled [sic] with other Multi-Employer groups for purposes of Funding, Benefits and Actuarial Evaluation. The information we request is based on this understanding. If this understanding is not correct, please advise and explain how the Authority group is accounted for under the Plan.

Please forward the following information:

(1) A copy of the Pension Plan detailing benefits and administrative provisions; and a copy of the Pension Trust Agreement.

(2) A complete Actuarial Report and Financial Statement, as of the end of the Plan's latest fiscal year, for the Authority's employee group.

(3) A list of Authority Employees covered by the Plan as of the end of the Plan's latest Fiscal Year, the years of service of each employee under the plan and the benefits to which each is entitled, broken down into vested and unvested.

(4) Currently projected monthly pension to each employee listed, assuming continued employment to Normal Full Credit Retirement Date.

(5) Total and yearly amount of the Authority's contributions to the plan including accrued interest over the years to pay for the benefits. Present value of the Liability of the separate fund to pay for these benefits, broken into Vested and Unvested Liability.

(6) All other information necessary for the Authority to compute its potential withdrawal liability, if any, under the provisions of the Multi-Employer Pension Plan Amendments Act of 1980. This does not mean the Authority is considering withdrawal. It is necessary for this Authority and its Certified Public Accountants to know of any contingent or potential liability that may exist.

On or about February 28, 1983, Mast sent the Authority: 1) a copy of the Pension Plan and amendments, with the trust agreement and amendments described previously; 2) the Pension Plan's 1978 ERISA form 5500; 3) an actuarial report for the same year; 4) a list of Authority employees then covered by the Pension Plan.

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Mast informed the Authority that the Pension Plan could not provide the Authority information concerning the "total and yearly amount of the Authority's contributions to the plan" or the "present value of the liability of the separate fund to pay for these benefits, broken into vested and unvested liability," because "the information requested is not available on an individual employer basis." Mast indicated that the Pension Plan's actuary would, for an unstated cost, calculate the Authority's withdrawal liability.

On March 17 and 18, the Authority's and the Union's negotiators, together with a mediator from the State Board of Conciliation and Arbitration, met in Massachusetts for a special bargaining session devoted to the Pension Plan issue, which by now had become a crucial concern of the parties. Reflecting the importance attached to that issue, the Union arranged for Mast to attend and provide information about the Pension Plan. The attorney for the Union, Mr. Frank Hamilton (Hamilton), was also present.

On March 17, McCue, after reviewing the Pension Plan and related documents, confronted the Union over the reduction in the contribution eligibility requirement from 280 to 240 days. He accused Landry and the Union of bad faith. McCue informed the Union that based on his study of the documents, the Authority was considering complete withdrawal from the Pension Plan due to its concerns about the integrity of the fund. Specifically, the Authority was concerned over what it perceived to be a failure of the Pension Plan and its trustees and managers to meet their reporting requirements under ERISA and the fact that the Pension Plan was involved in litigation to recoup unpaid contributions from several employers. McCue told the Union that the Authority believed it could provide better pension benefits to its employees at less cost through a separate plan. The Authority also modified its pension offer plan by proposing to pay only 240 days of contributions per year for each full-time employee -- i.e., the minimum required for a year's credit by the Pension Plan. The Union offered a counter offer that same day which was rejected by the Authority.[6]

On March 18, Mast addressed the question of the Authority's outstanding request for information and explained to the Authority that the current plan evaluation, audits and ERISA reports requested in January were still not available but would be provided when available. Mast also represented to the Authority's negotiators that the Pension Plan had adopted the "presumptive" method for determining the withdrawal liability for participants, one of the methods for determining liability specifically approved by ERISA. Under the presumptive method, the cost to the Authority of leaving the Pension Plan would be negligible because the Plan then had no unfunded liability. Mast and Hamilton urged the Authority to send a representative to the next scheduled meeting of the trustees of the Pension Plan scheduled for March 21, 1983 in Jacksonville, Florida.

[6]The record does not disclose the details of the Union's counter offer.

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On March 18, the negotiations came to an abrupt conclusion when the Authority's negotiators left the meeting room after a tape recorder was discovered in Mast's briefcase. The Authority's representatives reported the existence of the tape recorder to the state mediator and he reportedly advised them to leave the negotiations. When confronted by the mediator, the Union's representatives denied any wrongdoing. The record does not disclose what other evidence, if any, may have supported the Authority's negotiator's conclusions that the Union was illicitly taping the Authority's caucuses. Nevertheless, this event created considerable enmity on both sides of the table with each protagonist claiming that the incident demonstrated their opponent's bad faith. After the walkout, for reasons explained below, the parties did not meet to bargain for six months.

On March 21, the Board of Trustees of the Pension Plan held the regularly scheduled meeting in Florida. The Authority did not send a representative. Scott, chairman of the Trustees, Bierne, and another Union representative also attended the meeting as trustees. At least one trustee representing the employer participants in the Pension Plan was present as required under the trust agreement to constitute a quorum for conducting business. James Methuen (Methuen), the Pension Plan's official actuary, Mast, plan administrator, H. Leon Holbrook, the Pension Plan's attorney, and Hamilton, the Union's attorney, were also present. At the meeting, Bierne reported on the progress of negotiations with the Authority over pension contributions and the breakdown and walkout on March 18. Mast informed the meeting of the Authority's proposal to reduce the number of days of contribution to the number of days actually worked, and expressed his opinion that the plan, if implemented, would likely reduce eligibility credits.

Hamilton and Mast then outlined the status of the negotiations over the Pension Plan with the Authority, including the March 18 workout. The meeting then turned to other matters. The Pension Plan's legal counsel, Holbrook, reported on the status of various suits the Pension Plan had initiated to collect unpaid contributions.

Holbrook explained that because the Pension Plan had adopted the presumptive method of determining withdrawal liability instead of the attribution method, the Plan had failed to realize approximately $300,000 it could have recovered from the withdrawing employers. He recommended that the Trustees consider adopting the attribution method. Methuen indicated that the attribution method for assessing liability would prevent future losses. After discussion and upon the recommendation of Holbrook, Hamilton and Methuen, the Trustees unanimously voted to adopt the resolution that "employers withdrawing from the Plan after January 1, 1983 shall have the withdrawal liability, if any, calculated and enforced to the fullest extent permitted by applicable law or regulation under the attribution method described in section 4211(c)(4)(E) of the Multi-employer Pension Plan Amendment Act of 1980." Under the attribution method, the Authority's liability upon withdrawal from the Plan could now be as much as $1,100,000.[7] The meeting then turned to other matters including voting on employee requests for pension benefits and thereafter adjourned.

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[7] The Authority would incur no withdrawal liability under the presumptive method.

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On March 23, 1983, Hamilton informed the Authority by letter of the trustees' vote concerning the change in method of determining withdrawal liability. That same day, the Authority renewed its written request to Mast for information about the operation of the Pension Plan. The Authority asked for the following specific information: 1) the total and yearly amount of the Authority's contributions to the Plan exclusive of allocated gains and losses; 2) the method used by the Plan to allocate investment and every other kind of gains and losses among contributing employers and the amount of all such gains and losses allocated to the Authority; 3) benefits paid by the Plan to all Authority employees who had retired; 4) projected monthly pension for current employees; 5) the Plan's ERISA form 5500 for 1980; and 6) the Plan's 1983 actuarial evaluation as of January 1, 1983. The Authority offered to pay for the calculation of its withdrawal liability.

On March 23, 1983, after giving the Union notice as rquired by the extension provisions of the collective bargaining agreement, the Authority terminated the April 1982 contract extension.

On March 29, 1983, the Union filed a written request with the Massachusetts Board of Conciliation and Arbitration (BCA) demanding interest arbitration pursuant to c.760 of the Acts of 1962.[8] The chairman of the Board of Conciliation and Arbitration contacted the Authority seeking its participation. The Authority declined to participate in interest arbitration. The Authority argued that the state board lacked jurisdiction to order interest arbitration and that the request was "premature." The Authority's executive director, however, indicated his willingness to continue bargaining about the Pension Plan. The Authority's legal counsel also represented in a letter to the chairman of the BCA that, "the principal, if not the sole unresolved issue" was the Pension Plan.

On April 2, the Authority ceased deducting and remitting dues from MMP members' paychecks without giving the Union prior notice and an opportunity to bargain. No employee gave notice to the Authority that they were revoking individual dues check-off authorizations as specified by the terms of Article 31.2 of the expired collective bargaining agreement prior to the Authority's action.

The Union continued to press its efforts to require the Authority to submit the parties' contract to interest arbitration. On April 13, 1983, the Union filed

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[8] c.760 of the Acts of 1962 provides in pertinent part:

> [The Steamship Authority] shall have the authority to bargain collectively with labor organizations representing [its] employees...and to enter into agreements with such organizations, relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees. The employees of [the Steamship Authority] shall submit all grievances and disputes to arbitration, pursuant to the arbitration provisions in agreements existing at the time of the passage of this act or subsequently entered into with [the Steamship Authority], or in the absence of such provisions with the state board of conciliation and arbitration, or other board or body having similar powers and duties, whose decisions shall be final and binding.

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suit under G.L. c.150E, Section 2 to compel the Authority to submit "all disputes now pending between the parties to final and binding arbitration under the jurisdiction of the State Board of Conciliation and Arbitration." In late April, the Massachusetts Superior Court, Morse, J., denied the Union's request, ruling that Chapter 760 did not require the Authority to submit to interest arbitration and the courts lacked jurisdiction to compel interest arbitration.

The parties, however, were not notified that judgment had entered on the case until on or about August 16, 1983. In the meantime, the Union refused to meet and negotiate with the Authority after March 29, 1983. During this period, the Authority made repeated offers to the state mediator to meet and negotiate with the Union. No sessions ever materialized.

On or about April 29, 1983, the Pension Plan administrator provided the Authority with additional information as requested in its March 23 letter. The information provided included a more detailed breakdown of the Authority's contributions (excluding gains and losses), current pension benefits being paid to former Authority employees, and an approximate allocation of assets for the Pension Plan based on a January 1, 1979 actuarial evaluation, and the last complete actuarial evaluation of the Plan then existing. The Administrator also provided projected monthly pension benefits for current Authority employees participating in the Plan and a copy of the Plan's 1980 tax form, including a detailed summary of its actuarial methods, assumptions and data used to complete the 1979 actuarial evaluation. The administrator explained that the estimate of projected benefits for current employees was based only on credited service in classifications covered by the parties' collective bargaining agreement, i.e. licensed deck officers -- masters, mates, pilots. He explained that a final projection could be different because some employees covered by the Union's contract worked for the Authority for certain periods of the year in job classifications not included in the bargaining unit which were nevertheless covered under the terms of the Pension Plan. These employees could have accured vesting credits which were not accounted for in the estimate then being provided by the administrator. The administrator promised to provide the Authority with a copy of the 1983 actuarial valuation as soon as it was completed. On August 29 the Pension Plan administrator received the actuarial valuation of the Authority's employee participants. The Authority received the valuation on or about August 31, 1985. The Authority then demanded that the Pension Plan provide the names of participants, comparative programs, vesting and service information upon which the final report was based. At the time of the hearing the information had not been provided.

Opinion

I. ALLEGED UNION UNFAIR LABOR PRACTICES

The Complaint in UPL-100 specifies four independent unfair labor practices against the Union, all arising out of the Union's obligation to bargain collectively in good faith with the Authority. For purposes of convenience, we address the charges in their order in the complaint.

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A. Failure to Provide Information Concerning the Authority's Potential Withdrawal Liability.

During the negotiations for a contract to succeed the agreement expiring April 15, 1982, the Authority proposed changes in the method of making its payments to the Pension Plan intending to reduce its pension costs. The Union's negotiator rejected the proposals on the ground that the reduction in funding could not be accepted by the Union. The Authority's negotiators then made oral requests that the Union provide information on the Pension Plan and its operation to justify the Union's refusal to accept any modification in the method of funding. The Authority asked for a copy of the document establishing the Pension Plan, the Plan's current ERISA report and other information about the Plan's financial and actuarial status to permit the Authority to determine its potential liability if it withdrew from the Pension Plan. Landry did not possess the requested information and relayed the request to Scott, a trustee of the Pension Plan, and Bierne. No information was provided as a result of the oral requests at the bargaining table. When the Authority again requested information, Landry directed them to the Pension Plan's designated administrator, Administrative Services, Inc. in Florida. On January 25, 1983, the Authority made a formal written request for information including a copy of the Pension Plan and Pension Trust Agreement, a complete actuarial report and financial statement for the most recent year, a list of Authority employees covered and their projected monthly pension, a breakdown of the Authority's contributions and all other information necessary for the Authority to compute the potential withdrawal liability. On or about February 28, 1983, the Pension Plan administrator provided the Authority with some of the information requested -- the Pension Plan trust agreement and amendments, a breakdown of the status of the Authority's employees' projected benefits, and copies of actuarial and financial statements filed pursuant to ERISA for 1978. The administrator also offered to provide the Authority with updated reports when prepared and to provide an estimate of its withdrawal liability for a fee. Further information was provided by the Administrator on April 29 and August 21.

In cases concerning an employer's duty to provide information arising under the public employee collective bargaining law, G.L. Chapter 150E, the Commission requires a public employer, upon request, to provide an employee organization with information it possesses which is relevant and reasonably necessary to allow the bargaining agent to fulfill its bargaining responsibilities. Board of Trustees, University of Massachusetts, 8 MLC 1139, 1141-1142 (1981). Decisions of the federal courts and the National Labor Relations Board (Board) under the National Labor Relations Act, 29 U.S.C. 141, et. seq., uniformly hold that private employers have an obligation to furnish relevant information to union representatives during contract negotiations. See, e.g., NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 153, 38 LRRM 2042 (1956). The duty continues during the life of the agreement so long as the sought-after information is necessary to enable the parties to administer the contract. See, e.g., Sunstrand Heat Transfer, Inc. v. NLRB, 538 F.2d 1257, 92 LRRM 3266 (7th Cir. 1976). The Board, with federal court approval, has determined that the same rationale applies to unions, concluding that unions have a reciprocal duty to provide relevant information to employers. Detroit Newspaper Printing and Graphics Communication Local 13 (Oakland Press Co.), 233 NLRB 994,

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97 LRRM 1047 (1977), aff'd 589 F.2d 267, 101 LRRM 2036 (DC Cir., 1979).[9]

We concur with the Board's reasoning and will follow our prior holdings in this area and parallel decisions under the NLRA.

Union Defenses

The Union raises several defenses t6 its alleged failure to provide information. First, the Union contends that the Commission lacks subject matter jurisdiction to decide this issue because "these charges are governed by provisions of ERISA" which preempt state regulation pursuant to G.L. c.150A (Union Brief, at 4). Additionally, the Union argues that it cannot be held liable for failing to provide the requested information because neither it nor its agents actually possessed or controlled such information.

We first address the issue of federal preemption. If the parties are correct in their contentions, the Commission lacks jurisdiction to proceed and these charges would have to be dismissed. See City of Boston, 7 MLC 2005 (1981).

ERISA and its amendments, principally the Multi-Employer Pension Amendment Act of 1980, is a comprehensive federal statute intended:

> to protect intrastate commerce and the interests of participants in employee benefit plans and their beneficiaries by requiring disclosure and reporting to participants of financial and other information...by establishing standards of conduct, responsibility and obligations for employee benefit plans and by providing appropriate remedies, sanctions and ready access to federal courts. 29 U.S.C. 1001(B).

There is no dispute that the Pension Plan at issue here is a plan established under and governed by ERISA.[10] The preemption provision of ERISA provides that ERISA "...shall supersede any and all State laws insofar as they may...relate to any employee benefit plan." 29 U.S.C. 1144(a). The statute defines "state" to include "any political subdivision thereof, or any agency or instrumentality of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by the title." 29 U.S.C. 1144(c)(2). (emphasis added). Both parties rely on U.S. Supreme Court precedent to argue that we may not decide whether their collective bargaining with respect to the Pension Plan comports with the requirements of c.150A.

In Shaw v. Delta Airlines (Shaw), 463 U.S. 85, (1983), the Supreme Court discussed at length the scope of ERISA preemption. At issue in Shaw was whether a

[9] The Commission noted the Oakland Press Co. case in Board of Trustees, infra.

[10] The exceptions contained in 29 U.S.C. Sections 1003 and 1144 are not relevant to the instant case.

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provision of the New York Human Rights Law, a comprehensive anti-discrimination statute, prohibiting employee benefit plans from treating pregnancies differently from other non-occupational disability, was preempted.[11] The Supreme Court held that the anti-discrimination provisions "related to" employee benefit plans within the meaning of ERISA, 29 U.S.C. Section 1144(a). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Id. at 96-97. The Court further held that the legislative history of the Act demonstrates that Congress intended to preempt the field for federal regulations, thus eliminating the threat of conflict with State and local regulations of employee benefit plans. "This principle is intended to apply in its broadest sense to all actions of State and local governments, or any instrumentality thereof, which have the force or effect of law." Id. at 99, quoting remarks of Rep. Williams, a sponsor of the bill. In light of the specific language of ERISA and the legislative history cited above, the Court concluded that the state statute requiring employers to offer pregnancy disability benefits "related to" an employee benefit plan and was thus preempted.

Although the Court declined to define the outer limits of the scope of ERISA preemption, it did note that "some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." As an example of such a tenuous connection, the Court cited with approval, American Telephone and Telegraph v. Mercy 592 F.2d 118, 121 (2nd Cir., 1979), where the lower court held that state garnishment of pension monies in order to enforce alimony and support orders was not state action preempted by federal law. Shaw, supra, 463 U.S. at 100, fn.21.

Notwithstanding the broad preemption language of ERISA, we conclude that the Commission retains jurisdiction to decide whether the parties before us have violated their obligation under G.L. c.150A to bargain in good faith. The purpose of c.150A is to protect the rights of employees to organize and bargain collectively, thereby minimizing strikes and other forms of disruptive labor disputes. G.L. c.150A, Section 1. To this end, the Commission is directed by law "to prevent any person from engaging in any unfair labor practice...affecting trade or health care." G.L. c.150A, Section 6(a). In enforcing the collective bargaining obligation, we are not regulating the parties' participation in an employee benefit plan in accordance with the provisions of ERISA, but rather we are concerned with the narrow question of their reciprocal responsibilities to bargain collectively as required by the state labor law. Enforcement of collective bargaining obligations does not impinge on the formation or operation of employee benefit plans; nor does the enforcement of the obligation to bargain in good faith require any action or forebearance by the trustees to the pension plan. Nor do we seek to regulate the "terms and conditions of employee benefit plans" under the regulation of ERISA but rather, the collective bargaining relationship in which such substantive terms may be negotiated.[12] Specifically, our decision and orders here with respect to the parties'

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[12] Indeed, the collective bargaining law does not mandate substantive terms and conditions of employment. See e.g. H.K. Porter v. NLRB, 397 U.S. 99 (1970).

(11, see page 1549)

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obligation to provide information during bargaining, their duty to avoid misrepresentations of material facts and practices related to bargaining, and our conclusions on other aspects of their conduct are not "related to" an employee benefit plan within the meaning of Section 514(a) or 514(c)(2) of ERISA but are directed only at the parties' labor management relations. Our enforcement of this collective bargaining law furthers important state interests in preventing disruption of commerce and protecting statutory rights. It is important to note here that the National Labor Relations Board lacks jurisdiction over all state and other public employees such as the respondent Authority here. 29 U.S.C. Section 152(2). A finding of federal preemption would thus mean that employees and employers subject exclusively to the jurisdiction of G.L. c.150A, would lack any forum in which to bring unfair labor practice complaints arising out of the parties' bargaining conduct when the subject matter under negotiation was an employee benefit plan. As the Supreme Court stated, "[P]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reason -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." Chicago & N.W.Tr.Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981), quoting Florida Lime and Avacado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

We are not persuaded that Congress intended to deprive a state labor relations agency of the authority to protect vital state interests where enforcement of the local laws does not impinge on the substantive terms and conditions of employee benefit plans. We therefore conclude that Commission adjudication of these unfair labor practice claims is not preempted by ERISA.

Lack of Control Over Requested Information

The Union's second defense to the alleged failure to provide the previous information is that the information sought was not in the possession or control of the Union, but was controlled by the trustees of the Pension Plan and their salaried administrator of the Pension Plan, whose reporting responsibilities are governed by various provisions of ERISA. We agree. There is no evidence that Landry, the Union's chief negotiator, and the agent to whom the Authority addressed their oral requests, possessed any of the information sought by the Authority. Landry ultimately referred specific questions about the Pension Plan to his superiors, Bierne and Scott who were trustees. The Authority did not make a written request for information to the Pension Plan administrators until January 25, 1983. Thereafter, the requested information, including financial and actuarial information, was provided although admittedly over a period of months. There is no evidence that Landry, Scott, Bierne or any other Union agent or officer delayed the transmission of such information as was available.

The Authority argues, however, that because Scott and Bierne were trustees of the Plan, the Union should be held liable for the failure of Mast to provide all of the information requested and should also be held accountable for any delay in providing that information. As support for this argument, the employer relies on General Teamsters Local 959, 244 NLRB 19, 102 LRRM 1117 (1979). In Local 959 the Board found that a union violated its duty to bargain in good faith by failing to

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provide requested pension fund information. In that case, the president and secretary-treasurer of the union charged with failure to provide information also served as union representatives on the board of trustees of a multi-employer, ERISA-regulated pension plan. The union there had bargained for an increase in pension contributions based on advice from its salaried administrator that such increases were required to meet the financial needs of the pension plan. The employer during negotiations asked for actuarial and financial information to justify the requested increase at the bargaining table. The Union's negotiators denied they had such information and referred the employer's negotiator to the pension plan's administrator. The administrator subsequently provided the most recent audited financial statements of the pension fund, but refused to provide current, unaudited information. The Board concluded that because the union's officers also served as trustees of the pension plan, the information sought was in the possession and control of the union officers as trustees who were responsible for providing any relevant requested information to which they had access whether or not approved by the remaining trustees of the Plan. Id. at 22-23.

In National Union of Hospital and Health Care Employees Division Of RWDSU, AFL-CIO, District 1199E (District 1199), 248 NLRB 631 (1980) enf'd 108 LRRM 3252 (4th Cir. 1981), the Board held that where a president and vice-president of a union had acted in their capacity as trustees and executive director of a health and welfare plan to block the release of requested information about the operation of the plan, the union breached its duty to bargain in good faith. The Board opined in District 1199 that the union officers violated the labor act because they lacked a legitimate business reason for denying the employers' request for information and had used their fiduciary capacity as pension plan trustees as a pretext to circumvent their bargaining obligation and "violated their affirmative obligation to make a reasonable effort to obtain the information, or to investigate reasonable alternative means for obtaining it, or to truthfully explain or document the reasons for its unavailability..." Id. at 633.

In, NLRB v. Amax Coal Co., 453 U.S. 322 (1981), the Supreme Court held that, "an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. Thus, the statute (ERISA) defining the duties of a management-appointed trustee made it virtually self evident that welfare fund trustees are "not representatives for the purposes of collective bargaining or adjustment of grievances" within the meaning of 8(b)(1)B [of the National Labor Relations Act] Id. at 334. (emphasis added). Moreover, "[t]he management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract...Rather the trustees operate under a detailed written agreement (citation omitted) which is itself the product of bargaining..." Id. at 336. In UFCW, Local 1439, 268 NLRB 780 (1983), the Board reconsidered its prior position in District 1199 and Teamsters, Local 959 which held that union officer who serve as trustee of pension plan may be responsible under collective bargaining law for the actions of a pension fund managers or trustees. The Board held that a union officer/trustee of a fund does not violate his obligation to bargain collectively in good faith unless "it is in de facto control of a nominally independent trust fund." Id. at 781. In UFCW, Local 1439, there was no violation where an employer was denied information requested by a vote of the trustees of a plan where the union trustee took no action

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to prevent the employer from getting the requested information and "while it is true that the trustee possessed information about the fund as a matter of course, he did not possess the specific information the Employer requested...[W]e find no reason for imposing additional burdens on the Union's collective bargaining representative since he would have had to secure it from the administrator, which the Employer could do equally well, and there is no evidence that the Union's collective bargaining representative had any more expeditious or effective access to the information than the Employer." Id.

The Board's modified position on the responsibilities of a union officer as trustee as stated in the UFCW, Local 1439 case is, in our opinion, prudent and reasonable, and we adopt it.

There is no evidence in the case at hand that any of the requested information was in the possession or control of Landry or other union officers or agents at any time during the negotiations over the Pension Plan. When requested, Landry and other Union officers thereupon directed the Authority to the Pension Plan's official administrators who thereafter provided such information as we have reason to believe was available. There is no evidence that Bierne or Scott as trustees thwarted or delayed the administrator's attempts to provide that information. The Pension Plan documents submitted as evidence in this proceeding show that the Pension Plan is governed by a board of trustees composed equally of management and union representatives. The fact that Scott is chairman of that body does not establish that the Union is in "de facto" control of the pension plan. Nor is there other evidence to warrant finding that the Pension Plan is under the control of the Union. Similar to UFCW, the Union's bargaining representative, who lacked the information requested by the Authority, whould have had to secure it from the Pension Plan's salaried administrator and instead directed the Authority to seek the information directly from the Administrator. Since the Union neither possessed the information formally requested by the Authority, nor dominated the Pension Plan, there is no basis for finding that the Union failed to provide information relevant to the parties' bargaining and that charge is dismissed.

B. Alleged Union Misrepresentation

A necessary corollary to the duty on the part of the union and management to supply relevant collective bargaining information is that deception and misrepresentation of material facts during negotiations is inimical to good faith collective bargaining. "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." NLRB v. Truitt Mfg., supra, 351 U.S. 149, 38 LRRM at 2043 (1956). The Board holds that intentional misrepresentation of facts which purports to exclude the possibility of negotiating over a mandatory subject of bargaining is evidence of a lack of good faith. Rangaire Corporation, 157 NLRB 682, 684 (1966); Architectural Fiberglass, 165 NLRB 238, 239 (1967).

The evidence shows that Landry, the Union's spokesperson, misrepresented material facts concerning the pension plan and failed to correct misrepresentations after he had learned of the falsity of his statements. On various occasions

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in early 1982, Landry informed the Authority's negotiators that a minimum of 280 days of employer contributions were necessary under the Pension Plan for an employer to receive a full year of benefit credit. Landry also stated several times that the Authority's contributions were maintained as a "separate entity." The latter statement was made on at least one occasion in the presence of Bierne, an officer in the Union.[13]

In fact, the Plan's requirements to receive a year of benefit had been changed from 280 to 240 days by amendment dated April 10, 1981. Regarding the Authority's participation in the Pension Plan, it is clear that the Pension Plan was established as a conventional multi-employer plan and operated as a multi-employer plan; its contributions were mingled with contributions of other employees, and the Authority's employees were not treated as participants in a separate entity, actuarially or otherwise. Losses and gains experienced by the Pension Plan would thus be distributed among all plan participants, and future pension benefits for its employees were dependent upon the actuarial status of the plan as a whole and not on the basis of the Authority's employee experience.

Landry learned of the reduction in the contribution/benefit credit requirements in late 1982. During previous negotiations Landry had insisted to the Authority that the contribution requirement was determined by the trustees of the Plan and that it was a non-negotiable aspect of the Authority's participation in the Pension Plan. Landry was aware that the contribution requirement was a critical component in the pension issue, which in turn was crucial to the negotiations for a new contract. Upon learning of the 1981 amendment in late 1982, neither Landry nor his superiors informed the Authority, and it was not until the Pension Plan and amendments in March 1983 that the Authority first learned of the factual misstatements made by Landry. The Union offered no explanation for its failure to correct the misinformation transmitted by Landry about the Plan's requirements. In light of the Union's awareness in late 1981 that the Authority had not yet received the information about the Pension Plan it had been actively seeking, combined with Landry's insistence that the Union could not accept a fewer number of days of contribution than that required by the trustees of the Pension Plan and his knowledge that the figures proffered by the Union had been incorporated into the Authority's proposals, we conclude the Union was under an affirmative duty to correct the misinformation previously conveyed by Landry. In this context, the Union's lack of candor in this matter must be considered a breach of the duty to bargain in good faith in violation of Section 4(b).

The Union's bargaining representatives also misrepresented the nature of the Authority's participation in the Pension Plan. Throughout the negotiations, Union

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[13] The Union admits that Landry told the Authority that 280 days of contributions were obligatory under the Plan, but denies he ever stated the Authority's contributions were maintained as a "separate entity." The Authority's negotiators credibly testified to the contrary. The Union did not call Bierne, who could have corroborated, in part, Landry's version of the facts.

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agents both directly, and indirectly by silence, led the Authority to believe that its employees were in a "separate entity" and were not participants in a multi-employer pension plan. As noted above, the Union was not in possession of significant portions of the information requested by the Authority and cannot be held accountable for its non-production. The Union, however, does not deny that its representatives knew from the inception of negotiations in 1982 that the Pension Plan was a conventional multi-employer plan with pooled assets. The weight of credible evidence suggests that the Union encouraged the Authority to believe that it was participating in the Pension Plan as a "separate entity," and the Union's agents took no steps to dissuade the Authority's representatives of that belief. Accordingly, as late as January 1983, the Authority was seeking information from the Plan administrators about the management of the funds segregated for its employees which, of course, did not exist. The Union's negotiators knew of the nature of the Pension Plan and could have readily corrected the Authority's misunderstandings. In light of 1) the Union's awareness of the importance of these issues to the success of the negotiations, 2) the Union's agents' knowledge that the Authority did not understand the Pension Plan and 3) the fact that the Authority was actually seeking to obtain information on the Pension Plan and its operations, the Union's agents had an affirmative obligation to correct the false information disseminated during negotiations that the Authority's employees were in a "separate entity." We conclude that failure to do so was a failure to negotiate in good faith in violation of the Law.

C. Unilateral Change in the Method Employed to Determine Withdrawal Liability.

On March 17 and 18, 1983, the Authority's negotiating team and representatives of the Union, including Union vice-president Bierne, met with the specific purpose of negotiating over the pension issue. To this end, the Union arranged to have a representative from the Pension Plan, Mast, and the Union International's attorney, Hamilton, present. The negotiations did not succeed in producing any agreement on the pension plan, however. Indeed, the Authority walked out of the talks on March 18, after claiming that the Union's representatives had been illegally eavesdropping on confidential management caucuses. Prior to the breakup of negotiations, the Authority indicated that, based on the information provided by Mast, the Authority was considering withdrawing from the Pension Plan. The Authority had originally asked the administrator for financial and actuarial information on its withdrawal liability in its written request on January 25, 1983. At the negotiations in March, 1983, the administrator told the Authority's representative that the Plan had not adopted a specific method of determining liability and that

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11 (from page 1544)
The New York Law was passed after the Supreme Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), which held that discrimination based on pregnancy (before federal law was amended by the Pregnancy Discrimination Act, 42 U.S.C. 2000(k)) was not discrimination under Title VII of the Civil Rights Act 42 U.S.C. 2000(e) et seq.

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under ERISA such liability would be determined by the so-called "presumptive method." Under the "presumptive method" the Authority's liability would have been zero. Before the incident leading to the walkout occurred, the administrator and Plan attorney invited the Authority's representatives to the next scheduled meeting of the Plan trustees March 21, 1983.

At the March 21 meeting, the trustees unanimously voted to adopt a resolution to amend the Pension Plan to require that, "[E]mployers withdrawing from the Plan after January 1, 1983, shall have their withdrawal liability, if any, calculated and enforced to the fullest extent permitted by applicable law under the attribution method described in...the Multi-Employer Plan Amendment Act of 1980." On March 23, 1983, the Union's counsel informed the Authority of the trustees' actions. The effect of the trustees' actions was to substantially increase the potential liability of the Authority if it withdrew from participation in the Plan.

The Authority argues that the resolution to change the method of calculating withdrawal liability voted by the trustees constitutes a unilateral change in a mandatory subject of bargaining in violation of the duty to bargain in good faith. The Authority contends that 1) because the proposal to amend the Plan was recommended by the Union's attorney after Mast informed the trustees of the Authority's suggestion that it might withdraw from the Plan, and 2) because Union officers were serving as trustees and voted for the change, the trustees were acting as agents for the Union, and the Union must be charged with responsibility for changing the terms of the Pension Plan.

We believe that our rationale expressed in the earlier section of the decision of the union's failure to provide information should apply to the Pension Plan's change in withdrawal liability. In other words, to establish a violation of the duty to bargain the Authority has to prove that the Union was in _de facto_ control of the trust fund and that the board of trustees was acting not _in_ its fiduciary capacity to protect the trust and its beneficiaries but rather as an agent of the union when the trustees voted to change the method of determining withdrawal liability. _UFCW, Local 1439_, _supra_, 268 NLRB 780; _NLRB v. United Brotherhood of Carpenters-Joiners_, 531 F.2d 424 (9th Cir. 1976); _NLRB v. Driver Salesmen_, 670 F.2d 855 (1982). The trustees of an employee benefit trust fund, whether selected by union or management, are charged by law to act solely in the interest of the participants and beneficiaries of the trust and are not representatives of the parties by whom they were appointed. _NLRB v. Amax Coal Co._, _supra_.

The Authority has not demonstrated that the Union controlled the Pension Plan when its trustees voted to adopt the attribution method. In order for the resolution to adopt the attribution method to become effective, the terms of the trust agreement require that a majority of union and management trustees approve the resolution. The trustees acted in accordance with provisions of that agreement. _Cf. NLRB v. United Brotherhood of Carpenters_, _supra_, 531 F.2d at 427. _Sinai Hospital v. Natl. Benefit Fund_, 697 F.2d 562, 112 LRRM 2001, 1005 (4th Cir. 1982). The record demonstrates that the adoption of the attribution method was done to protect the plan's assets. It is true that the vote to take such steps followed a discussion of the Authority's threat to withdraw from the Plan. Nonetheless the

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trustees and their administrators, attorneys and actuaries also discussed the recent withdrawal of other employers and the negative effect that such losses would have on the Plan. The value to the Plan of adopting such protective measures was urged by the Pension Plan's salaried actuarial consultant and its legal counsel. Where the adoption of such a provision is clearly related to the protection of the Pension Plan's assets, the fact that the new provision was also recommended by the Union's attorney and the union officers voted to support the resolution does not prove that the trustees were acting as agents of the Union. Absent additional evidence demonstrating domination of the Pension Plan and its Board of Trustees by the Union, we conclude that the Pension Plan trustees were not acting as agents of the Union when they adopted the resolution to change the Pension Plan's method of calculating withdrawal liability and thus the Union may not be held to have violated the Law. See generally, UFCW, supra. The change, therefore, may not be attributed to the Union and that aspect of the change is dismissed.

D. Union Refusal to Bargain During Pendency of Litigation

On April 6, 1983, the Union filed for interest arbitration with the Board of Conciliation and Arbitration under c.760 of the Acts of 1962 (Chapter 760). In its demand for arbitration, the Union alleged that the parties had reached a collective bargaining impasse. The Authority, on the other hand stated that its negotiators were willing to continue to bargain. The Authority refused to participate in arbitration proceedings because in its view Chapter 760 did not compel interest arbitration and that the parties had not reached impasse. Thereafter the Union cancelled a scheduled negotiating session and sued in Superior Court to compel arbitration. The Superior Court denied the Union's claim. Thereafter the Union refused requests by the mediator to return to the bargaining table until after the Superior Court's written memorandum and decision was issued, claiming that participation in negotiations could compromise its demand for interest arbitration.[14] The Authority represented on numerous occasions that it was willing to resume negotiations during the summer. The Union appealed the Superior Court's decision directly to the Supreme Judicial Court. In Int'l. Organization of Masters, etc. v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 392 Mass. 811 (1984). The Court, on the basis of the language of the act and its legislative history, ruled that c.760 did not require the Authority to submit to interest arbitration. Id. at 813.

The issue before us is whether the Union's refusal to meet and negotiate with the Authority during the pendency of the suit in Superior Court between April 13 and August 16 constitutes an unfair labor practice. In cases arising under G.L. c.150E, the Commission has long held that the duty to bargain is not suspended because of pending litigation either in the courts or before the Commission. Town of Ipswich, 4 MLC 1600, 1603 (1977); Southern Worcester Co. Regional Vocational School District, 2 MLC 1488, 1499 (1976), See also Tildee Products, Inc., 174 NLRB 705 (1969); aff'd sub nom. IUE v. NLRB, 426 F.2d. 1243, 73 LRRM 2870 (D.C. Cir.

[14] The Superior Court issued its decision on or about August 16, 1983.

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1970). Indeed the obligation to meet and negotiate continues where an employer is engaged in litigation challenging the legality of a statute requiring interest arbitration by public employers. Town of Ipswich, supra. We conclude that the Union committed an unfair labor practice by refusing to meet and negotiate with the Authority after the suit to compel arbitration was filed in the Superior Court.

In summary, the Union engaged in unfair labor practices within the meaning of Section 4(B) of the Law by failing during negotiations to correct misrepresentations of material facts made to the Authority after it learned such statements were false and by refusing to negotiate with the Authority while it was litigating its interest arbitration suit. As set forth in our Order, below, we order the Union and its agents to cease and desist from such practices and post at its offices, meeting halls and other places where its members usually congregate the attached Notice to Employees. For the reasons stated above, the remaining allegations in UPL-100 are hereby DISMISSED.

We now turn to the allegations against the Authority set out in Case No. UP-2485.

II. ALLEGED AUTHORITY'S UNFAIR LABOR PRACTICES

A. Unilateral Cessation of Union Dues Checkoff.

After the Authority terminated the 1982 agreement extending the terms of the parties' collective bargaining agreement, it stopped deducting and transmitting Union dues as provided for in Article 31 of the contract. The Authority did not bargain with the Union prior to ending the Union dues checkoff. It argues that its failure to bargain does not constitute a violation because the obligation to check off and transmit Union dues was purely contractual and expired when the Authority terminated the extension agreement.

The law obligates an employer to bargain with the exclusive representative of its employees over terms and conditions of employment. Newton School Committee, 5 MLC 1016 (1978), aff'd 388 Mass 557 (1983); NLRB v. Katz, 369 U.S. 736 (1962). The obligation to bargain requires that an employer refrain from altering terms and conditions of employment without first bargaining with the union to either resolution or impasse. Commonwealth of Mass. and MOSES, 8 MLC 1978 (1982). The bargaining duty continues both during the term of the existing agreement and after the agreement has expired. It is well established that union security and agency fee status as a condition of employment and an employer's responsibility to have monies deducted from an employee's pay to satisfy these employment conditions -- dues checkoff -- are mandatory subjects of bargaining. University of Massachusetts, 7 MLC 2090 (1981).

Theoretically, then, an employer should be required to maintain the existing practice of union security and dues checkoff until the parties have bargained to resolution or impasse. Because of statutory provisions in the private sector, however, the National Labor Relations Board and Federal courts have arrived at different

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conclusions with respect to continuing the practice of union security after a collective bargaining agreement has expired. Specifically, section 8(a)(3) of the National Labor Relations Act provides that an employer may contract with a union to require union membership as a condition of continued employment.[15] Consequently, the courts and the Board have held that only when an agreement is in force can the union and employer enforce an agreed upon union security provision. Bethlehem Steel Co., 136 NLRB 1500 (1962); aff'd in relevant part, 320 F.2d 615 (2nd Cor. 1963).[16] Consequently, when a collective bargaining agreement expires, the law prohibits the maintaining of the status quo of union security, and an employer may not discharge an employee for failing to maintain union membership.

The practice of dues check-off, however, is independent of a union security clause that may exist in a collective bargaining agreement. See Anheuser-Busch, Inc. v. Local 822, 584 F.2d 41, 99 LRRM 2539 (4th Cir. 1978). Checkoff is a practice which compels an employer to deduct union dues from an employee's earnings and to pay that amount to the union when authorized to do so by an individual employee. See generally, Morris, The Developing Labor Law, Ch. 29 Section VI. Checkoff relieves the union of the burden of collecting dues from each employee. Similar to union security provisions, dues checkoff is also a mandatory subject of bargaining and is regulated under specific provisions of the National Labor Relations Act. Section 302(c)(4) of the Taft-Hartley Act (29 U.S.C. Section 186(c)(4))).[17] See Atlanta Printing Specialties, 215 NLRB 237, 87 LRRM 1744 (1974), aff'd sub nom. NLRB v. Local 527, 523 F.2d. 783, 90 LRRM 3121 (5th Cir. 1975). Similar to union security, it has been held that the NLRA restricts the continuation of dues checkoff past the expiration of the collective bargaining agreement. Bethlehem Steel Co., supra.

Chapter 150A, however, contains no regulation or restrictions on the practice of dues checkoff.[18] Accordingly, we hold an employer's statutory obligation to

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[15] Section 8(a)(3) of the NLRA provides:

> It shall be an unfair labor practice for an employer...to discriminate... in regard to hire or tenure of employment to encourage or discourage membership in any labor organization. Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization...to require as a condition of membership therein...

[16] Section (4)(3) of Chapter 150A contains a similar provision on union security. Accordingly, for parties subject to the Commission's jurisdiction under Chapter 150A, it would appear that union security as a condition of employment could not continue after the expiration of a collective bargaining agreement.

[17] In general, Sec.302 restricts an employer from making payments to employee representatives. However, Sec.302(c)(4) permits an employer to deduct membership dues from employees' pay and remit them to the exclusive representative.

[18] Instead, the only Massachusetts provisions dealing with the subject, permit dues checkoff without mention of the necessity to have a collective bargaining agreement in effect. Specifically, under Massachusetts law public employees have the right to have their dues deducted and paid to the union if they provide the

(continued)

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maintain terms and conditions of employment after an agreement has expired also applies to the practice of dues checkoff. "During the hiatus period between contracts, an employer's obligation is to continue the prevailing practice regarding wages, hours, and working conditions." Commonwealth of Massachusetts, 9 MLC 1355, 1359 (1982). The employer nevertheless contends that it was the intent of the parties, as revealed by the terms of the collective bargaining agreement, that the employer's obligation to continue dues checkoff was to end upon expiration of those agreements. In other words, the employer contends the union waived its right to bargain about the discontinuance of checkoff. It is therefore necessary to consider the terms of the collective bargaining agreement.

In the instant case, the contract is ambiguous concerning the parties' intent to continue the practice after the expiration of the contract. Article 31.1(9) states that "The Employer agrees to deduct from the earnings of the Licensed Deck Officer who has so authorized in writing the regular membership dues of the organization...and remit same [sic] to the Organization." Section 31.2 sets out a standard employee authorization form. That form states, in relevant part, that "This Authorization shall remain in effect, unless and until revoked by me, as hereinafter provided, and shall be irrevocable for a period of one (1) year from the date hereof, or until the termination of this collective bargaining agreement between the Employer and the Organization, whichever occurs sooner."

Neither Section 31.1 nor 31.2 compel the conclusion that the parties clearly and unmistakably intended the practice of dues deduction to cease when the contract (or its written voluntary extension) expired. The authorization form permitted employees to withdraw their otherwise irrevocable authorization upon expiration of the agreement (or one year after execution of the form). Such a provision is consistent with our interpretation of Section 4(3) of the Law that provides employees covered by the Law with a statutory right to continue to demand that the employer deduct dues from their paycheck and remit those dues to their chosen labor organization,[19] and that the right is not limited by the Authority and Union's agreement.[20]

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18 (continued)
appropriate authorization and are members of certified or recognized bargaining unit. See, e.g., Ch.180 Section 17A; Section 17C; Section 17E; Section 17G. In other words, dues checkoff exists regardless of whether a collective bargaining agreement is in effect.

[19]The language of the Section 31.1 and 31.2 of the agreement here is clearly distinguishable from the contractual terms at issue in Bethlehem Steel, supra at 1502, that "the company will, beginning the month which this Agreement is signed and so long as this agreement shall remain in effect...." deduct union dues or fees.

[20]Indeed, the language of the checkoff provision is nearly identical to the language of Section 302(c)(4) of the [Taft Hartley Act]. The National Labor Relations Board stated that Section 302(c)(4) "guarantees an employee two distinct rights when he executes a checkoff authorization under a collective bargaining agreement: 1) a chance at least once a year to revoke his authorization, and 2) a chance upon the termination of the collective bargaining agreement to revoke authorization." Atlanta Printing Specialties, supra, 157 NLRB 237 (1974). This provision (continued)

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There was no evidence that employees represented by the Union withdrew their checkoff authorization after the expiration of the contract. Instead, the Authority unilaterally informed employees while the parties remained in negotiations (and before the issue of check-off or union security having been raised during negotiations) that it would no longer honor the employees' dues checkoff authorizations. In so doing, the Authority unilaterally changed conditions of employment affecting a mandatory subject of bargaining in violation of Section 4(5) of c.150A and also thereby interfered with, restrained and coerced its employees' exercise of rights protected by Section 3 of the Law in violation of Section 4(1). To remedy this unilateral change, we order the Authority to restore the practice of deducting union dues and other fees for employees who have executed an appropriate authorization and have not since revoked such authorization and to remit such fees and dues to the Union. The Authority will make the Union whole for any dues it should have deducted and which the union can demonstrate they have not received after April 2, 1983 until the practice is restored.

B. Refusal to Participate in Interest Arbitration

In light of the Supreme Judicial Court's decision in Int'l. Organization of Masters, etc. v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, supra, that c.760 of 1962 did not require the Authority to participate in binding arbitration of the contractual issues outstanding when the Union filed to compel arbitration, we must dismiss the remaining allegations in UP-2485. During the period that the Authority refused to participate in interest arbitration, the Authority's representatives attempted to meet and negotiate with the Union and otherwise indicated a willingness to bargain collectively in good faith. Accordingly, the Authority's refusal to engage in interest arbitration as demanded by the Union did not constitute a refusal to bargain in good faith over a mandatory subject for bargaining and those allegations must be, and hereby are, dismissed.

ORDER - Case No. UPL-100

WHEREFORE, based upon the foregoing findings of fact and conclusions of Law, IT IS HEREBY ORDERED pursuant to Section 4B of the Law that the International Organization of Masters, Mates and Pilots, AFL-CIO shall:

1. Cease and desist from failing to correct false information provided to the Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority concerning the operation of Gulf and Atlantic Pension Plan and Fund;

2. Cease and desist from refusing to meet and negotiate with the Authority during the pendency of litigation seeking to compel interest arbitration or any like or similar litigation;

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20 (continued)
only deals with employees right under the law to revoke their dues authorization.

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3. Sign and post the attached Notice to Employees (See Attachment A) where notices to employees in the Union are usually posted for a period of thirty (30) days;

4. Notify the Commission in writing within thirty (30) days of the service of the decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
GARY D. ALTMAN, COMMISSIONER

ORDER - Case No. UP-2485

WHEREFORE, based upon the foregoing findings of fact and conclusions of Law, IT IS HEREBY ORDERED pursuant to Section 4(5) and 4(1) of the Law that the Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority shall:

1. Cease and desist from deducting dues and fees for members of the International Organization of Masters, Mates and Pilots, AFL-CIO (Union) who have executed appropriate authorizations and have not since revoked the same;

2. Restore the practice of remitting dues deducted from employees to the Union;

3. Make whole the Union for all dues lost due to the Authority's unilateral cessation of dues checkoff on or about April 2, 1983;

4. Sign and post the attached Notice to Employees (See Attachment B) where notices to employees in the Union are customarily posted for a period of thirty (30) days;

5. Notify the Commission in writing within thirty (30) days of the service of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
GARY D. ALTMAN, COMMISSIONER

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(ATTACHMENT A)
NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Labor Relations Commission has ruled that the International Organization of Masters, Mates and Pilots, AFL-CIO (Union) has violated Section 4(B) of G.L. Chapter 150A by refusing to bargain with the Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority (Authority) during the pendency of litigation to require the Authority to submit to interest arbitration, and by failing to correct false information the Union supplied to the Authority after the Union's negotiators learned that such information was false. Such practices constitute a failure to bargain under G.L. Chapter 150A.

WE WILL cease and desist henceforth from engaging in such practices.

WE WILL bargain in good faith with the Authority.

Charles J. Landry
New England Field Representative
International Organization of Masters,
Mates and Pilots, AFL-CIO

(ATTACHMENT B)
NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Labor Relations Commission has ruled that the Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority (Authority) has violated Sections 4(5) and 4(1) of G.L. Chapter 150A by refusing to deduct dues and fees from members of the International Organization of Masters, Mates and Pilots, AFL-CIO (Union) after April 2, 1983 who authorized th- check-off of dues and fees from their pay-checks. That action unilaterally changed conditions of employment and constituted a refusal to bargain in good faith.

WE WILL cease and desist from refusing to deduct union dues and fees from employees who have executed such authorization.

WE WILL re-commence to deduct dues and fees and remit the same to the Union.

WE WILL make whole the Union for the loss of dues and fees after April 2, 1983 until such time as the check-off practice is restored.

Executive Director, Wood's Hole, Martha's
Vineyard and Nantucket Steamship Authority

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