WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY AND INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS (AFL-CIO), UP-2496 (2/3/88). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

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Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

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

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

The issue in this case is whether the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority ("Authority") violated Sections 4(1), (4) and (5) of Chapter 150A of the General Laws ("Law") by failing to bargain in good faith with the International Organization of Masters, Mates and Pilots, AFL-CIO ("Union" or

"MMP") and whether the Authority unlawfully coerced or intimidated the Union during negotiations in violation of Section 4(1) of the Law.

On January 12, 1984, following an investigation of unfair labor practice charges filed by the Union on October 30, 1983, the Commission issued a Complaint alleging that the Authority had violated Sections 4(1), (4) and (5) of the Law by: (1) introducing new proposals some eighteen months after commencing bargaining with the International Organization of Masters, Mates and Pilots, AFL-CIO for a collective bargaining agreement to succeed the most recent agreement which expired April 15, 1982;

(2) unilaterally withdrawing from participation in the Atlantic and Gulf Region Pension Plan (Pension Plan or Plan); (3) introducing new proposals into the bargaining and withdrawing from the Pension Plan in retaliation for certain protected activity by employees represented by the Union; and (4) making threatening or coercive statements to the Union during bargaining in violation of Section 4(1) of the Law.

Pursuant to notice, six days of hearing were held before Hearing Officer Timothy Buckalew. All parties were present and represented by counsel. On April 14, 1986, the Hearing Officer issued his Decision finding that the Authority had violated Sections 4(1) and 4(5) of the Law by withdrawing from the Atlantic and Gulf Region Pension Plan, and by making other unilateral changes in working conditions prior to reaching a good faith impasse in negotiations. The Hearing Officer found that the Authority did not violate Section 4(5) of the Law by introducing new proposals late in the bargaining process because there were legitimate business reasons for the new proposals, and their introduction was not inconsistent with the ground rules established by the parties. The Hearing Officer found that neither the withdrawal from the Pension Plan, nor the introduction of new proposals at the table constituted unlawful retaliation for protected activity by the Union. The Hearing Officer also concluded that representatives of the Authority did not make threatening or coercive statements during the bargaining. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 12 MLC 1704 (H.O. 1986) (hereinafter Woods Hole II (H.O. Decision)).

The Authority has filed a Supplementary Statement[1] challenging both certain

[1]The Authority has also renewed a Motion to Supplement the Record, originally filed with the Hearing Officer. By its Motion the Authority requests us to incorporate the Commission's original Decision and Order in Cases UPL-100 and UP-2485 published at 12 MLC 1531 (1986) (herein Woods Hole I (Original Decision)) together with portions of the record in that case. The Decision and Order in Woods Hole I (Original Decision) need not be incorporated in the record of this case. We take administrative notice of each Commission decision. The same parties, with the able assistance of the same counsel, litigated both Woods Hole I and Woods Hole II, and the allegations of the two cases are related. The Union has had the opportunity to examine and cross examine the winesses and to protect its interests in Woods Hole I. For the purpose of our decision in Woods Hole II, we have taken full notice (continued)

factual findings made by the Hearing Officer, and the conclusion that the withdrawal from the Pension Plan and other unilateral changes violated the Law. The Union filed a Supplementary Statement challenging not only the Hearing Officer's conclusions that the Authority did not engage in "regressive bargaining" by its late introduction of new proposals, but also the conclusion that the Authority did not unlawfully retaliate against the Union because of certain protected activities.

FINDINGS OF FACT

The instant case, hereinafter referred to as Woods Hole II (Commission Decision), involves the same parties and, to a large extent, arises out of a common fact pattern as another case which we issue today: Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, Case Nos. UP-2485, UPL-100 (hereinafter referred to as Woods Hole I (Reconsideration)).[2] The Hearing Officer in Woods Hole II based

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1 (continued)
of the findings made in our decision in Woods Hole I. It does not abuse our procedures to receive the underlying record supporting that decision into evidence in Woods Hole II. We decline to receive only portions of the Woods Hole I transcript, however, since excision of the portions of any transcript risks distortion of the record evidence. Accordingly, we will incorporate the full transcript and exhibits in Woods Hole I, including the stipulation of the parties designated "Exhibit B" in the Employer's Motion and already received in evidence in Woods Hole I. Appended to the Employer's Motion is a slip opinion in the matter of Ronald Alman, Trustee of ILGWU National Retirement Fund v. Donna-Lee Sportswear Company d/b/a Classic of Boston, et al., Civ. Action 84-3348-MA (D.C. MA. 1986). It is not clear whether the Employer is moving the Commission to supplement the record with the decision. The decision was not part of the record in Woods Hole I, and the Authority has not explained whether or why it should be made part of the record in Woods Hole II. Accordingly, we deny the Authority's Motion to incorporate the U.S. District Court decision into the record. The Commission, of course, has taken notice of the U.S. District Court decision. Also appended to the Motion was a December 6, 1984, letter from Richard Benka to the Commission stating a position of the Authority. Although technically not a brief, the letter purports to state the Authority's position. The Union has had ample opportunity to respond to the Authority's statement and we shall consider the Authority's letter as though filed as a memorandum of position.

[2]The original Commission Decision in Woods Hole I (Original Decision) was issued prior to the Decision of the Hearing Officer in Woods Hole II (H.O. Decision). The Hearing Officer incorporated certain relevant factual findings from the Commission decision in Woods Hole I (Original Decision) but indicated that "the legal consequences of those findings of fact contained in the Motion to Supplement the Record (see n.1, supra.) are not properly before the Hearing Officer and played no role in the conclusions of law reached in this decision." Woods Hole II (H.O. Decision), 12 MLC at 1706 n.3.

In its Supplementary Statement, the Authority asserts that the Hearing Officer erred by failing to consider in the context of his Decision the legal effect of the findings by the Commission in Woods Hole I (Original Decision). We find no
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his decision both on facts found by him in Woods Hole II and on certain findings of fact from the Commission Decision in Woods Hole I (Original Decision), 12 MLC 1531 (1986). We have reviewed the findings made by the Hearing Officer and find them supported by the record, with some modification described below. We summarize the material facts as follows.

The MMP is the exclusive bargaining representative of certain of the Authority's employees including Captains (or Masters), Pilots and Mates (including Inland Mates). The Authority and the MMP were parties to an extension of the prior collective bargaining agreement, which was effective beginning April 15, 1982. During the term of that agreement several events occurred which affected bargaining for a successor agreement.

Prior to 1981, the Authority and the MMP had acquiesced in a staffing practice known as "double crewing." Under the practice, two employees were assigned to each crew position on a vessel. The two employees were permitted to divide their assignments in a manner convenient to them. Where this "double crewing" practice was in use, certain overtime provisions of the contract were waived. During the term of the prior collective bargaining agreement effective from 1979 to 1982, the Coast Guard had ruled that crew members could not work more than one twelve-hour tour in any twenty-four hour period. This ruling effectively prevented the use of the double crewing system.

As a result, the Authority initiated interim bargaining with the MMP to seek a new agreement on staffing; but no agreement could be reached. In 1981, the Authority ordered a halt to the double crewing practice in response to the Coast Guard directive and the Union then insisted on strict application of the overtime and work week provisions of the contract. The parties disagreed about their contractual rights and obligations and a number of grievances seeking overtime compensation resulted. These "overtime/manning" grievances were of great concern to the parties

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2 (continued)
error in the ruling by the Hearing Officer. As requested by the Authority, the Hearing Officer did incorporate relevant findings of fact from the Commission Decision in Woods Hole I (Original Decision). This was appropriate since the parties to the cases are the same, and the cases to some extent are related. In reviewing the Decision of the Hearing Officer we find that he properly considered all the facts before him, including those incorporated from Woods Hole I (Original Decision). Specifically, we find that in determining whether there was a good faith impasse when the Authority unilaterally withdrew from the Pension Plan and made other changes in working conditions, the Hearing Officer had before him and considered the finding by the Commission in Woods Hole I (Original Decision) that the MMP had made misrepresentations to the Authority concerning the nature of the Pension Plan. Woods Hole II (H.O. Decision), 12 MLC at 1727-1729.

as they potentially involved large sums of money.[3] These grievances were pending during a part of the time when the parties began to negotiate a new agreement.

Another ruling by the Coast Guard provided a backdrop to negotiations for a new contract. The Coast Guard determines the minimum number and type of crew required to operate the Authority's vessels. In 1981, the Boston office of the Coast Guard determined that the position of "Inland Mate" was superfluous and should not be required on any of the Aithority's vessels. The MMP appealed this decision to the Coast Guard in Washington, which modified the decision by requiring assignment of an Inland Mate to two vessels, the Inlander and the Naushon, during the peak season from May 30 to September 1.

Bargaining for a successor contract began in January 1982. Initially, the parties focused their attention on the "major issues," including Authority proposals to change the hours of work (to deal with the "overtime/manning" issue) and staffing (to eliminate the Inland Mate from all vessels). By April 15, 1982, when the old contract was to expire, the parties had not reached agreement. They executed an "Agreement to Extend Collective Bargaining Agreement" (Extension Agreement). The Extension Agreement extended the contract on a day-to-day basis, terminable by either party upon forty-eight hours notice. The Extension Agreement also provided that "if and when a new agreement is entered into between the parties that the terms of such new agreement shall be retroactive to and including April 16, 1982."

In June 1982, the Authority and the MMP reached an "interim agreement" on the major economic issues, including wages; a new work week conforming to Coast Guard regulations; an agreement to drop pending "overtime/manning" grievances; and the elimination of the Inland Mate from all vessels other than as required for Coast Guard certification. On June 12, 1982, the Union membership rejected the "interim agreement." By this time, the Authority had reached agreements with other unions with which it was negotiating.

When the negotiations with MMP resumed, the Authority proposed changes in the existing pension benefits. Under the terms of the extended contract, the Authority made contributions on behalf of its employees to the Atlantic and Gulf Region Pension Plan ("Plan" or "Pension Plan"). When bargaining resumed, the Authority proposed a change in the method of calculating its contributions to the Plan. Under its proposal, the Authority would make contributions based on the number of days an employee actually worked, rather than the number of days that an employee was on the payroll. The Union resisted any changes in calculating the employer contribution

[3]The Authority contends that the Hearing Officer misstated certain facts when describing the crew and overtime practices of the parties. The Authority concedes and we agree that the Hearing Officer's misstatements are not material to the decision in the case. Moreover, our review of the alleged misstatements and of the evidence cited by the Authority leads us to many of the same factual conclusions as the Hearing Officer reached.

to the Plan. In response, the Authority amended its proposal to add a guarantee that it would make sufficient contributions to ensure that all full-time employees would receive credit for a full year of work regardless of the number of days they actually worked.

It was during these summer negotiations that Authority negotiators asked Union bargaining representatives several questions concerning the operation of the Pension Plan. Authority negotiator John H. McCue asked Union chief negotiator Charles Landry[4] whether contributions made by the Authority were segregated from the contributions of other employers. McCue explained that the Authority wanted to be sure that its contributions were only for the benefit of Authority employees. Landry told McCue that under the Plan, the Authority was treated as a "separate entity" and that its contributions were segregated. In fact, this was not the case. The Plan was a "multi-employer plan" within the meaning of Section 3(37) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq. (hereinafter ERISA) with pooled contributions. The Commission's original decision in Case No. UPL-100, Woods Hole I, found that Union negotiators did not deny that they knew from the inception of negotiations in 1982 that the Plan was a conventional "multi-employer" plan with pooled assets.[5]

During discussions of the Pension Plan issue, Landry also told Authority negotiators that a minimum of 280 days of employer contributions were required to credit an employee with a full year's benefits under the Plan. In fact, the Plan had been amended in April 1981 to reduce the minimum employer contribution from 280 days to 240 days. Union negotiators had learned of this change by late 1981 or early 1982, but did not communicate the correct information to the Authority's negotiators.

Negotiations over the Pension Plan and other issues continued through autumn of 1982. Authority negotiators expressed concerns over the financial soundness of the Plan, and continued to press Landry for details of its operation. Eventually, Landry responded that the questions were too detailed and that he could not answer them. The Authority requested a copy of the Plan, a statement of the Authority's contributions, and copies of the most recent ERISA filings. In December 1982, the Union responded that it did not have the requested information, and that the Authority should request the information directly from the administrators of the Plan in Jacksonville, Florida.

By December 1982, a state-appointed mediator was assiting the bargaining. By this point, the Authority had proposed a comprehensive "interim agreement." The Authority proposed a wage offer which it contended would give the licensed deck officers parity with other unionized employees. The Authority proposed that the wage offer would be effective upon execution of the "interim agreement." The Authority proposed a new work schedule of "triple crewing" vessels, with changes in

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[4] Prior to the time of the hearing in this case, Mr. Landry was not and had never been a trustee of the Pension Plan.

5 See Woods Hole I (Original Decision), 12 MLC 1531, 1449 (1986).

computing overtime entitlement and each employee guaranteed forty-two hours of work per week. The Inland Mate was to be employed only when required by the Coast Guard. The Authority continued to propose pension contributions based on days worked rather than days on the payroll, with a guaranteed "minimum" of 280 days for full-time employees, the number of days it believed was the minimum required for full benefits. The parties agreed to meet on March 17 and 18, 1983, with both the mediator and representatives of the Pension Plan.

In January 1983, the administrators of the Plan sent the Authority some of the information it had requested, including a copy of the Plan. At this time the Authority learned that the Plan was a multi-employer plan, with commingled contributions. The Authority also learned that the employer contribution for full employee benefit credit was 240 days per year, not 280 days, as the Union had represented. The Authority also had requested "information necessary" for the Authority to compute its potential withdrawal liability, if any, under the provisions of ERISA.[6] The administrators of the Plan responded that for a fee, they would calculate the Authority's withdrawal liability.

When bargaining resumed on March 17, 1983, the Authority confronted the Union with the information it had obtained about the Pension Plan. The Authority also announced that it was considering withdrawing from the Plan.

At the same meeting, the Union responded to the Authority's comprehensive December 1982 proposal. The Union rejected the Authority's wage offer, arguing that it did not give the deck officers a raise equal to that given the engineers and did not maintain the historical wage advantage enjoyed by the Master over the Chief Engineer. The Union rejected the Authority's staffing proposals and suggested instead that the provisions of the current contract be extended. The Union's position would have precluded the "triple crewing" proposal and would have required an Inland Mate on all vessels. The Union also continued to insist on a continuation of the existing method and amount of contributions to the Pension Plan. Finally, the Union insisted that any wage settlement be fully retroactive to April 16, 1982, as provided in the "Extension Agreement." At some point on March 17, the Union made a written counterproposal on the pension issue, the substance of which is not revealed in the record. The Authority apparently rejected the proposal.

On March 18, representatives of the Pension Plan attended a negotiation session and addressed the issue of the Authority's potential withdrawal liability. They explained that the Plan currently used the "presumptive method" to calculate withdrawal liability. Under that computation method, the Authority's withdrawal liability would be negligible because the Plan had no unfunded liability. The Plan

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[6] Under the terms of ERISA, an employer withdrawing from a multi-employer plan must make a contribution sufficient to fund employee benefits already vested. Computation of such withdrawal liability may be done by several methods, including the "presumptive" method and the "attribution" method, discussed infra.

representatives invited the Authority to send a representative to the next meeting of the Plan's Board of Trustees scheduled for March 21, 1983, in Jacksonville, Florida.

Negotiations on March 18 broke off abruptly when Authority negotiators discovered a tape recorder in the briefcase of a Union negotiator. The mediator, upon being informed, apparently advised the Authority negotiators to leave. When the mediator confronted the Union negotiators they denied any wrongdoing. The incident adversely affected the climate for negotiations and each side accused the other of bad faith. Following the March 18, 1983 bargaining session, the parties did not meet again face-to-face for six months.

On March 21, 1983, the Board of Trustees of the Pension Plan met. No representative of the Authority was present. At the meeting, the Board was informed of the breakdown of negotiations with the Authority and the Authority's suggestion that it might withdraw from the Plan. There was also some discussion of the Plan's current method of computing withdrawal liability. The Board was informed that because it used the "presumptive method," the Plan had lost the opportunity to collect some $300,000 from withdrawing employers. After some discussion, the Board voted to adopt the "attribution method" for computing withdrawal liability. Under this method, the liability of the Authority upon withdrawal might be as high as $1,100,000. By letter of March 23, 1983, the Plan informed the Authority of the change in the method of computing withdrawal liability. By letter of the same date, the Authority renewed its request for certain information about the operation of the Plan, including a summary of the Authority's contributions, a projection of employee benefits, a statement describing allocations of investment income among contributing employers, and copies of ERISA filings. The Authority agreed to pay for a computation of its withdrawal liability. On April 29, 1983, the Pension Plan provided the Authority with some, but not all, of the information requested on March 23. The Plan supplied information related to the Authority's contribution to the Plan, benefits paid, and projected benefits to covered employees. In addition, certain tax and actuarial information was provided.

Also on March 23, 1983, the Authority, after giving the required notice to the Union, terminated the April 15, 1982, "Extension Agreement."

On March 29, 1983, the MMP filed a petition with the Board of Conciliation and Arbitration seeking to compel the Authority to engage in binding interest arbitration under the provisions of Chapter 790 of the Acts of 1962. The Authority denied that it was obligated to participate in binding interest arbitration under this statute, and declined to participate voluntarily. The Union filed suit in Superior Court attempting to compel the arbitration. The parties were informed of the Superior Court decision denying the Union's request in August of 1983. During the period of time when it was seeking to compel interest arbitration, the Union declined to meet with either the Authority or the mediator.

On April 2, 1983, the Authority ceased both deducting MMP dues from the paychecks of employees and transmitting them to the MMP, as had been required by the extended agreement.

On April 25, 1983, during this hiatus in the negotiations, Arbitrator Robert Rosemere issued his decision (Award) in the "overtime/manning" arbitration cases. Rosemere ruled that after the Authority had ordered a halt to the double crewing practice, it was obliged to follow the contractual provisions regulating work week and overtime. Because it had not done so, but instead had instituted a new system, the Authority had violated the contract. The Award, later confirmed by the Superior Court, did not make clear the extent to which the Authority was liable to individual employees for failure to pay overtime. A review of the Award suggests, however, that it could increase labor costs both retroactively and prospectively because of the overtime obligations it would impose.

There was an informal meeting between the parties in July 1983, at which representatives of the Union and the Authority met to discuss issues relative to the Pension Plan, among other things. The meeting did not produce any agreements.

After receipt of the Superior Court decision declining to order the Authority to participate in binding interest arbitration, the parties agreed to meet on September 13, 1983. When the bargaining resumed, both parties put new proposals on the table.

The Union proposed a three-year agreement retroactive to April 16, 1982. It made new proposals for an additional two percent wage increase, payment for Coast Guard-required courses, "license protection insurance," a "voluntary layoff" provision, and a change in the definition of full-time regular status.

The Authority made a number of new proposals, all seeking some concessions from the Union in existing contract language or working conditions. The Hearing Officer found that a number of the new proposals dealt with circumstances that had arisen during the hiatus in bargaining.

The expired agreement required notice to the MMP when any new vessel was deployed. The Authority proposed elimination of this requirement. The expired agreement had applied to any succsssor of "lessee." The Authority proposed the elimination of the term "lessee" from this provision. Both proposals were in response to a plan by an outside group[7] to arrange for the Authority's purchase of the steamboat "Nobska," and lease back to the organizing group. The Employer's proposal was intended to exclude the "Nobska" from application of the collective bargaining agreement.

Several proposals related to the continuing dispute over staffing generated by the Coast Guard's prohibition of the double crewing system, the unilateral implementation of a new crewing system by the Authority, and the Rosemere arbitration award. The Authority proposed a new staffing system, different from the old "double crewing" system in effect prior to December of 1981, and also different from the staffing practices unilaterally imposed by the Authority in December of 1981

[7]The group was called the "Friends of the Nobska."

which had led to the Rosemere arbitration award. Related to this proposal were new methods of calculating overtime hours and a new hourly rate for crews assigned to ships being repaired.

Two other Authority proposals were made in response to the Authority's dissatisfaction with the Union's hiring hall referral system. The Authority proposed language designed to eliminate the hiring hall system. In addition, for the first time, the Authority proposed deletion of the language of the expired contract which required that assignments and promotions be made on the basis of seniority. Both proposals resulted from problems that had occurred during the summer of 1983.

Other new proposals included language changes to permit reassignment of duties previously performed by Inland Mates to other classifications; to delete "abuse of discretion" from the definition of grievance; and to delete the "preservation of past practices" language from the contract. The Authority proposed the same wage rates as had been proposed in the March 1982 Interim Agreement.

At the September 13, 1983, meeting the Aurhotiry first proposed both withdrawal from the Pension Plan and substitution of an annuity benefit. The Authority's proposal did not specify the details of the proposed annuity.

The Union initially rejected all the new proposals. With respect to the major issues, the Union proposed in the alternative either the old double crewing method (already prohibited by the Coast Guard) or an eight-hour day, forty-hour week. The Union proposed full wage and benefit retroactivity to April 1982. The MMP altered its position with respect to contributions to the Pension Plan and accepted the principle of contributions based on days worked rather than days on the payroll.

The parties met again on September 14 and 28, 1983. By September 28, the MMP had modified its position on several issues. For example, the Union agreed to eliminate the Inland Mate position on certain vessels and to reassign the duties during non-peak periods. The Union proposed that employees who performed the new duties should receive additional compensation. The Union also altered its position on hours of work and overtime, and proposed a forty-hour work week, with overtime only after sixteen hours per vessel. The MMP also modified its interpretation of the effect of a new staffing system on retroactivity calculations.

By September 28 the Authority also had further modified its September 13 proposals. It agreed to accept seniority as a component of promotion and assignment decisions. It also agreed to "consider" referrals from the Union hiring hall. In addition, the Authority agreed to reduce from 150 to 100 the number of days an employee had to work to be considered "full time."

The parties met again on or about October 3, 1983, but there were no further changes in their positions. They discussed pensions, retroactivity and overtime, but did not exchange proposals. During this session, Authority negotiators asked the Union whether they believed that an impasse existed. The Union caucused, and then asked to meet directly with management of the Authority. Authority negotiators agreed to convey this request to their principals. Union representatives expected

some further contact, either directly with management of the Authority or additional sessions with the negotiators.

On October 6, 1983, the Authority notified the Directors of the Pension Plan that it was ceasing all contributions and withdrawing from the Plan effective immediately. On the same day, the Authority notified the Board of Conciliation and Arbitration that the bargaining had reached an impasse. By letter of October 11, 1983, the Union asserted that no impasse existed.

By letter of October 7, 1983, John McCormack, Executive Director of the Authority, wrote to the management of the Authority and conveyed the Union's request to meet with them directly. No meeting was held. Instead, on November 2, 1983, the Authority sent a letter to each member of the bargaining unit stating that the negotiations had reached an impasse and that the Authority would implement changes in working conditions "consistent with its pre-impasse position."[8]

DISCUSSION

A. The Authority's Contentions

1. Impasse

The Authority argues that the Hearing Officer erred in failing to find that the parties had reached a good faith impasse prior to the unilateral actions taken by the Authority. After having reviewed the Hearing Officer's Decision and the record and having considered the contentions of the parties, we affirm the Hearing Officer's conclusion that the parties had not reached a good faith impasse. Therefore, the Authority violated the Law by its unilateral withdrawal of certain employee beenfits.

After a long hiatus in the bargaining during the summer of 1983, the Authority changed its bargaining position in September 1983. The changes were of two kinds: altered proposals in areas previously under discussion; and new proposals in areas not previously discussed. The Hearing Officer concluded that the scope and significance of the new Authority proposals made a speedy agreement unlikely. The Authority made new proposals concerning elimination of the hiring hall, and changes in the contractual language governing past practice and work assignment provisions. In addition, the Authority altered its pension proposal from an earlier proposal to reduce pension contributions to a proposal to withdraw from the Plan and to substitute an unidentified annuity benefit. The Union also changed its proposals at the September 13, 1983, bargaining session as recited above.

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[8] The Hearing Officer found that the Authority's changes affected all major bargaining issues including hours of work and scheduling, overtime, manning, seniority, pension fund, et al. Woods Hole II, 12 MLC 1704, 1722 (H.O. 1986). In view of our discussion about the unilateral changes, see section A.4. infra., we need not elaborate on the facts found by the Hearing Officer.

Given the changes in both parties' bargaining positions, we agree with the Hearing Officer that there was no good faith impasse on October 4, 1983. We base this conclusion mainly on the same factors cited by the Hearing Officer. The bargaining sessions in September and October did not provide sufficient time to explore and discuss the parties' altered positions. Under such circumstances, a good faith impasse was not reached. City of Worcester, 9 MLC 1622, 1629 (1982). Although the negotiations were "protracted," there was relatively little time devoted to the changed bargaining positions presented in September 1983. Both the hiatus in bargaining and the proposed changes significantly altered the framework for the negotiations. The time spent bargaining after these major changes in position was rather abbreviated when compared with the time spent by the parties when negotiating prior proposals. The evidence is insufficient to establish that further negotiations would have been futile.

For example, there was movement on some issues during September 1983 and no evidence that the parties were entirely "deadlocked." The Authority had made some concessions in wage proposals to insure that the historical wage supremacy of Masters would be maintained. The MMP had altered its work week proposal to move closer to the Authority's position. The Authority had accepted the Union's proposal to reduce from 150 to 100 the number of work days required for full coverage in the Pension Plan. While these concessions do not guarantee eventual agreement, they belie the contention that the parties were deadlocked on October 3. There is evidence of continued willingness to bargain and continued willingness to modify positions. Under such circumstances, we cannot conclude that further negotiations would have been "fruitless." Commonwealth of Massachusetts (Unit 9), 8 MLC 1978, 1982 (1982).

The Authority argues that an "impasse" existed because the parties had failed to reach agreement on a number of major issues, any one of which was sufficient to preclude an agreement. Supplementary Statement of Authority at 17-18, citing Western Newspaper Publishing Co., Inc., 269 NLRB 355 (1984); The Woods School, 270 NLRB 1711, 178 (1984); E.I. DuPont de Nemours & Co., 268 NLRB 1075 (1984).

We have never adopted this view of good faith impasse. Where there is continued discussion of all issues, and movement in the bargaining, the continued insistence by either party on one or more significant issues will not alone create an impasse justifying unilateral action. Many factors influence the ability of two parties successfully to conclude collective bargaining negotiations. The passage of time is one important factor. Because collective bargaining is a dynamic process, undertaken in an environment that is constantly changing, an analysis of whether the parties are at impasse necessarily assesses the likelihood of further motion by either side. Frequently the passage of time tempers the demands of each party. Whether the demands become sufficiently tempered to appear attractive to the other party can only be tested through negotiations. In collective bargaining negotiations, as in other forums, many factors influence the negotiability of a demand. In circumstances where the positions of the parties have been explored thoroughly during negotiations, yet their proposals indicate no reasonable likelihood of compromise, we have found that the parties were at impasse. See City of Worcester, 9 MLC 1022 (1982). The bargaining posture in this case, however, was

not so intractable. Here, instead, the parties demonstrated a willingness to change position and to try alternative proposals and they achieved some compromise.

During September 1983, the negotiations were not static, even with respect to the major issues. Although progress towards settlement was slow and uncertain, we do not find that the negotiations were deadlocked. During the September bargaining sessions, negotiating proposals on important issues such as wages, work week, overtime, pension eligibility and retroactivity were modified. There were new tentative agreements on two issues: pension plan eligibility and preservation of the wage superiority of Masters. That progress was slow may reflect only the difficulty and importance of the issues involved and the existence of changed circumstances, rather than any inflexibility of the parties or the impossibility of concluding an agreement. Where there was a demonstrable willingness to discuss issues, and some movement in position, especially on major issues, we decline to find an impasse based solely on the fact that the parties had "well established positions" on major issues, and that they were still far from agreement. We decline to conclude that further bargaining would have been "futile." We distinguish our views in this regard from the position expressed by the National Labor Relations Board in E.I. DuPont de Nemours, supra at 1075 relied upon by the Authority. Where the parties are still negotiating and exchanging substantive proposals, an impasse is not necessarily created by the lack of agreement by one side to the other's position on one or more major issues, even in the face of public statements that a certain issue is critical to settlement. Our evaluation of whether an impasse exists considers not only whether the parties are on the verge of agreement but also whether, in the context of their bargaining history, the parties have presently exhausted all possibility of compromise. The evidence presented in this case does not establish that further bargaining between the parties would have been futile.

In view of the limited opportunity to bargain about the proposals which were made in September 1983, the evidence of movement on certain significant issues, and the continued willingness on the part of the MMP to meet and discuss all issues, we conclude that no impasse existed on October 6, 1983. In the absence of impasse, the Authority was not privileged unilaterally to change employees' wages, hours, or working conditions. We therefore affirm the finding of the Hearing Officer that no impasse existed at the time that the Authority unilaterally changed working conditions by terminating its participation in the Pension Plan.

2. Withdrawal from the Pension Plan

The Authority argues that without respect to whether the parties were or were not at impasse on October 6, 1983, the Authority should have been permitted to withdraw from the Pension Plan because of the prior misrepresentations made by the MMP concerning the Plan.

The same argument and authorities cited in support of this argument have been fully considered in the companion case Woods Hole I (Reconsideration), UP-2485 and UPL-100, also issued today. In that case we conclude that the misrepresentations made by the Union concerning the Plan do not justify a remedial order relieving the Authority of its obligation to continue in the Plan. For the same reason we

conclude in the instant matter that the Hearing Officer did not err when he found that the Authority had violated Section 4(5) of the Law by unilaterally withdrawing from the Plan prior to impasse.

In Woods Hole I (Original Decision), 12 MLC 1531 (1986), the Commission concluded that the Union had "encouraged the Authority to believe that it was participating in the Pension Plan as a 'separate entity.'" 12 MLC at 1549. Moreover, the Commission concluded that the Union "had an affirmative obligation to correct the false information disseminated during negotiations [concerning the "separate entity" status of the Authority...and the Union's] failure to do so was a failure to negotiate in good faith in violation of the Law." Id. The Complaint in that case did not allege, nor did the Commission find, that the Authority had been fraudulently induced to join the Plan initially by intentional misrepresentations by the Union. None of the litigation in these cases concerned the Authority's motive for originally agreeing, in or around 1968, to offer the Atlantic and Gulf Region Pension Plan to its employees. Nor does the evidence establish that the Authority continued to participate in the Plan only because of its misimpression that the Plan segregated the Authority's pension contributions in some "separate entity" from the rest of the participating employers' funds. In the absence of such evidence in Woods Hole I (Reconsideration), issued this same day, we have declined to order that the Union reimburse the Authority for the costs of the Authority's continued participation in the Plan. For the same reasons outlined in that decision, we decline to sanction the Authority's unilateral withdrawal from the Plan in this case. See Woods Hole I (Reconsideration), 14 MLC 1501, sl. op. at 1507 et. seq.

Under the circumstances we decline to conclude that the Authority's belief that this multi-employer Pension Plan consisted of segregated contributions should now excuse the Authority's unilateral termination of pension contributions to the Plan on behalf of employees. Instead, we conclude that the Authority is not justified in withdrawing from employees a significant benefit which comprises a term or condition of their employment by unilaterally terminating its contribution to the Plan.

3. ERISA Preemption.

We next consider the Authority's argument that the remedy ordered by the Hearing Officer is unlawful because its implementation would violate the preemption provisions contained in ERISA.

In Woods Hole I (Original Decision), the Commission concluded that the broad preemption language of ERISA did not preclude the Commission's exercise of jurisdiction pursuant to G.L. c.150A over issues concerning the conduct of collective bargaining. Woods Hole I (Original Decision), 12 MLC at 1545. The order in that case required the Union to cease and desist from making misrepresentations during the negotiations concerning the terms of the Pension Plan. In the instant case, the Hearing Officer concluded, in reliance upon the Woods Hole I (Original Decision) rationale, that ERISA did not preempt the Commission from rendering a finding that the Authority had bargained in bad faith by unilaterally terminating Pension Plan

participation. Consistent with that conclusion, the Hearing Officer ordered the Authority to restore the status quo by resuming participation in the Plan, and by making employees whole for any loss resulting from the Authority's unlawful action. Woods Hole II (H.O. Decision), supra at 1730. In its request for review, the Authority argues that the Hearing Officer's order is preempted by ERISA.

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq. is a federal statute which establishes a comprehensive scheme for regulating certain employee benefit plans. Congress intended ERISA to preempt any state or local regulation insofar as it "relate[s] to" a pension plan covered by ERISA 29 U.S.C. Section 1144. At issue in this case is whether the Hearing Officer's remedial order so "relate[s] to" a covered pension plan as to be preempted by ERISA. We find the question sufficiently close to deem it prudent to modify the Hearing Officer's remedial order slightly to clarify that it is designed to regulate not the Pension Plan but the collective bargaining relationship of the parties.

The duty of an employer to bargain with a union about terms and conditions of employment is separate from other legal duties which affect the terms of employee working conditions. See e.g., Occupational Health and Safety Act of 1970, 29 U.S.C. Sec. 651 et seq. [regulating hazardous working conditions and promoting job safety]; or Fair Labor Standards Act, 29 U.S.C. Sec. 201 et seq. [regulating minimum wages, hours and overtime pay]. Notwithstanding direct federal regulation of many working conditions, employers and unions have a duty to bargain about employee working conditions, wages and hours, G.L. c.150A Section 4(5) and 4B. Similarly, although ERISA regulates pension plans it does not excuse unfair labor practices simply because they concern, inter alia, employee pension benefits. In addition, the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq., which regulates the duty of private employers in interstate commerce to bargain collectively, is not preempted by ERISA.[9]

Our case poses an unusual situation. It is clear that were the Authority a private employer subject to the jurisdiction of the National Labor Relations Board (NLRB),[10] it would be obligated to bargain with the Union concerning the terms of

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[9]29 U.S.C. Section 1144(d). At least one commentator has emphasized that "[i]t is important to recognize that the applicability of ERISA in no way affects the duty to bargain imposed by the NLRB." Glanzer, The Impact of ERISA on Collective Bargaining, 52 St. John's L. Rev. 513, 548-49 (1978). See also Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497, 121 LRRM 2776 (9th Cir. 1985), [employer's failure to make pension contributions pursuant to an expired collective bargaining agreement raised a question of labor law, therefore primary jurisdiction of NLRB preempted the fund's ERISA suit to recover delinquent contributions.] cert. granted ___U.S.___ (Dkt. 85-2079) (Feb. 23, 1987).

[10]The NLRB has jurisdiction to regulate the collective bargaining conduct of private employers in interstate commerce but is prohibited from exercising jurisdiction over "State[s] or political subdivision[s] thereof." 29 U.S.C. Section 164(c).

pension benefit coverage for employees represented by the Union. See e.g., American Distributing Co. v. NLRB, 715 F.2d 446, 114 LRRM 2402 (9th Cir. 1983) cert. denied 466 U.S. 958 (1984); Finger Lakes Plumbing & Heating Co., Inc., 253 NLRB 406 (1980). Similarly, were the Authority within the jurisdiction of the NLRB, it could not unilaterally terminate employee benefits, such as the pension coverage, in violation of the duty to bargain collectively in good faith. See e.g., Imperial House Condominium, Inc., 279 NLRB No. 154, 122 LRRM 1289, 1291 (1986). Upon finding such a violation, the NLRB typically orders the same type of remedy as was ordered by the Hearing Officer in this case. E.g., Rapid Fur Dressing, Inc., 278 NLRB No. 126, 121 LRRM 1300 (1986); Finger Lakes Plumbing and Heating Co., Inc., supra. Alternatively, were the Authority a participant in a "governmental" pension plan, rather than a private pension plan, it would be exempt from most provisions of ERISA.[11]

Instead, however, the Authority is neither subject to the jurisdiction of the NLRB nor a participant in a "governmental plan" and therefore the Authority's participation in the Plan appears to be regulated by the provisions of ERISA. There is no indication either in ERISA or in its legislative history that Congress intended to exempt from the collective bargaining process non-governmental pension benefits received by the employees of employers exempt from NLRB jurisdiction. If Congress intended that ERISA not alter the collective bargaining obligations of employers whose employees enjoy employer-sponsored pension benefits, state agencies like the Commission must continue to regulate the bargaining conduct of parties subject to state jurisdiction to the same degree as does the NLRB regulate employers and unions subject to the NLRA. Application of this principle to this case would require affirmation of the Hearing Officer's remedial order in its entirety because not only is it consistent with Commission precedent requiring the restoration of the status quo ante, but also it is consistent with remedial orders of the NLRB.

We find no indication, however, that Congress ever considered the regulatory scheme which would apply to the relatively small number of employers, like the Authority, who neither are subject to the NLRB's jurisdiction nor are exempt from many provisions of ERISA because of their participation in a "governmental plan." While it seems clear to us that ERISA does not preempt the Commission's authority to determine the existence of an unfair labor practice, we recognize that the preemptive principles of ERISA may restrict our authority to fashion a remedy in this case.[12]

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[11] 29 U.S.C. Section 1003(b)(1). A "governmental plan" is defined as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. Section 1002(32). Neither party suggests that the Plan in this case is a "governmental plan," and our decision is premised on the assumption that it is not a "governmental plan."

[12] We note, however, that nothing in our Order is intended to interfere with the Authority's relationship with the Pension Plan. Our Order does not relate to the withdrawal liability, if any, of the Authority. Nor does our Order require

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The goal of a remedial order in a unilateral change case is to restore the status quo that existed prior to the change. The employer, union and employees should be placed in the same position that they would have been in "but for" the employer's unlawful action. Exact restoration of the status quo in this case could be most simply achieved by reinstatement of the Pension Plan, with full credit for employee service retroactive to the date of the Authority's withdrawal. Because such an order might appear to intrude impermissibly into the realm of ERISA's regulation by requiring the Authority to implement a particular pension plan, we have decided to fashion a slightly different remedy in this case.

The Authority's unilateral change unlawfully withdrew from employees a term of employment, pension coverage, which is a significant form of compensation. The Authority must make its employees whole for the loss of this compensation. Because the value of the lost pension coverage can be quantified, it is possible for the Authority to fully compensate employees for their lost pension benefits and to restore them to the same economic position they would have enjoyed but for the Authority's unlawful conduct. We recognize that there are many ways by which this restoration of the employees' status quo can be accomplished and we will leave to the parties' agreement, or failing that to a subsequent compliance proceeding, determination of the details of the compensation. We note that one option that may be available to the parties, should they agree, would be reinstatement of the Pension Plan as though it had never been terminated. Other options include the following: payment to employees of the full value of all pension benefits that would have been credited to them but for the Authority's action, plus payment to them of a sum equivalent to the value of future pension benefits which would have been earned by employees had the Authority not withdrawn from the Pension Plan; or institution of an equivalent pension or annuity benefit package that fully compensates employees for the value of all pension benefits that would have been credited to employees but for the Authority's action, and which continues to provide to employees a monetary benefit equivalent to the value of the withdrawn Pension Plan.[13]

Because our Order requires the Authority to make employees whole for benefits lost as a result of the Authority's unlawful unilateral change, it does not conflict with the provisions of ERISA.[14] Our order neither regulates a pension plan,[15] nor

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12 (continued)
the Plan to take or to refrain from taking any action. In sum, our Order does not affect the Plan itself.

[13]We recognize that any remedy other than reinstatement of the Pension Plan will fail to restore the Union to the exact status quo ante because the Union may no longer enjoy the same relationship with a substitute benefit administrator. Nonetheless, we conclude that the Union's loss of the exact status quo must be balanced against the language of ERISA. On balance the remedial order contained herein seems best to accommodate the separate statutes.

[14]Exercise of jurisdiction by the Commission in this case does not threaten the uniformity of the federal regulatory scheme, or otherwise require the application of the doctrine of preemption to protect the supremacy of the federal interest in

(continued; 15, see page 1535)

requires the Authority to take action which might interfere with the administration of the Plan.[16]

The principal issues in this case are issues of labor law, not pension law. Whether the Authority's unilateral withdrawal from the Pension Plan was lawful depends upon whether or not there was a good faith impasse prior to the unilateral action by the Authority in withdrawing from the Plan. The remedial order in this case neither establishes nor changes any provision of the Pension Plan. By ordering the Authority to honor its collective bargaining obligations, our remedial order only requires the Authority to fulfill the statutory requirement of collective bargaining before making changes in pension coverage. ERISA does not prohibit the Authority and the Union from negotiating the terms of a pension plan for employees. Once such a plan has been negotiated, ERISA regulates many of the details of the plan. Nothing in our remedial order, however, contravenes the regulatory provisions of ERISA.

4. The Remedial Order to Restore the Status Quo Concerning Overtime Opportunities.

The Hearing Officer concluded that the Authority had implemented changes in working conditions, in addition to the Authority's withdrawal from the Pension Plan,[17] which constituted unfair labor practices. The Hearing Officer ordered the Authority to cease and desist from unilaterally changing working conditions and ordered the Authority, inter alia, to "restore the status quo ante with respect to terms and conditions of employment in effect prior to the Authority's declaration of impasse..." While not mentioned explicitly by the Hearing Officer, it appears that the parties understand the Hearing Officer's reference to other unilaterally changed working conditions to mean certain "lost overtime resulting from the unilateral change in workweek." (Authority Supplementary Statement, UP-2496 dated June 16, 1986, citing Union brief, p.28 n.8). The Authority argues that the Hearing Officer erred by finding a violation and ordering a remedy for this alleged conduct because the Complaint in this case did not reference such a unilateral change.

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14 (continued)
regulating employee benefits plans. No other state or federal administrative agency has jurisdiction to answer the labor relations questions raised by this case. The statute enforced by the Commission is similar to, and consistent with, the federal labor relations law in all material respects. Indeed, only by exercise of Commission jurisdiction can this Employer's participation in a private pension plan be treated in a manner consistent with the federal statutory scheme. See generally, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 201-202, 83 LC para. 10,582 (1978) (state court not necessarily preempted if no other forum available).

15 (from page 1534)
See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

16 Cf. Commonwealth v. Federico, 383 Mass. 485 (1981) (where state law
(continued; 17, see page 1536)

The Union argues that the Authority received sufficient notice of the allegation at the hearing when Union Exhibit 13, the Authority's letter of November 2, 1983, announcing the implementation of new terms of employment, was introduced into evidence. The Union also argues that the Complaint adequately notified the Authority that its negotiating demands of September 1983 "were in issue." Since the September negotiating demands subsequently were implemented as alleged unilateral changes, apparently the Union reasons that the unilateral change allegation was implied.

Conduct which has not been specifically pleaded in a complaint may still form the basis for an unfair labor practice finding when the conduct relates to the general subject matter of the complaint and when the issue has been fully litigated. Local 285, SEIU (Irene L. Hueter), 3 MLC 1646 (1977). However, the Commission requires that the respondent receive sufficient notice of the fact that the conduct is an issue in the case to ensure that the respondent has the opportunity to fully litigate the allegation. City of Worcester, 5 MLC 1397 (1978). Where the facts which support the charging party's unpleaded allegation have been "touched upon" but not fully litigated, the Commission has declined to conclude that the respondent was on notice of the allegation. E.g., Boston School Committee, 10 MLC 1410 (1984); Whitman-Hanson Regional School Committee, 10 MLC 1606 (1984).

In the instant case, we conclude that the Authority was not given adequate notice that changes referenced in the November 2, 1983, letter, other than the Pension Plan, were at issue. When the letter of November 2, 1983, was admitted into evidence the Authority made no objection. During subsequent direct examination of the Union's witness through whom the document was introduced, the Hearing Officer limited the purpose of the letter to determine "if the proposals stated in this document were the proposals that were made after the 13th of September." The Authority's counsel requested and received the agreement of both the Union's counsel and the Hearing Officer that the parties were not "litigating a question of whether the changes in terms and conditions that were implemented varied from the offers that the Authority made between September 13th and October 6th." Later during the

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16 (continued)
provided criminal penalties for failing to make contributions to pension plans it was preempted by ERISA). Although we take no position on any claims that the Pension Plan may have against the Authority as a result of the Authority's withdrawal from the Plan, we note that federal courts have held that claims seeking pension fund contributions pursuant to collective bargaining agreements are matters of federal labor law, not pension law, and therefore should be brought initially to the National Labor Relations Board rather than to the federal courts. E.g., U.A. 198 Health and Welfare Education and Pension Fund v. Rester Refrigeration Service, 790 F.2d 423, 122 LRRM 2457 (5th Cir. 1986) pet. for cert. pending Dkt. 86-262, filed Aug. 20, 1986; Pension Fund v. Botsford Ready Mix Company, 605 F. Supp. 1441, 122 LRRM 2460 (W.D. Mo. 1985); also see Moldovan v. Great A & P Tea Co., 790 F.2d 894, 122 LRRM 2762 (3d Cir. 1986) pet. for cert. pending.

17 The Authority's unilateral withdrawal from the Pension Plan was alleged in the Complaint to have been an unlawful change.

hearing, the Authority's counsel voiced his objection to the use of the document for any purpose other than "related to Paragraph 11" of the Complaint.[18] The Hearing Officer noted the objection. At no point did the parties discuss whether the document could be used to establish that the Authority unilaterally had instituted new working conditions. In view of the fairly extensive discussions concerning the purpose for which the document was being offered, it is notable that no one mentioned the possibility that the document would be used to demonstrate other, unpleaded, unilateral changes. Moreover, when the Union first referred to other unilateral changes (beside the Pension Plan withdrawal) in its brief to the Hearing Officer, the Authority responded by letter dated December 6, 1984, objecting to the Union's assertion that the other unilateral changes had been "fully litigated" at the hearing.

On the basis of our review of the record, we agree with the Authority that the changes announced in the Authority's letter of November 2, 1983 (other than the withdrawal from the Pension Plan), were not the subject of the Complaint in this case and were not fully litigated at the hearing. The Authority's letter of November 2, 1983, announced changes in the following terms of employment: hours of work; wages; vacation days; the use of seniority in hiring, promoting and assigning work; and the Pension Plan. In addition, by a letter dated November 3, 1983, from Attorney Benka on behalf of the Authority to Attorney Grady, representing the Union, the Authority announced its unilateral termination of the dues checkoff provision of the expired contract.[19]

The announced changes in hours of work, wages, vacation days, and the use of seniority in hiring, promotion and assigning work were never alleged in the Complaint, nor was the Authority given notice that its implementation of the changes was alleged to be an unlawful change in working conditions. While the Authority's

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[18] Complaint paragraph 11 alleged the following: "[t]he Union and the [Authority] recommenced collective bargaining negotiations on or about September 13, 1983. On that date, and at approximately six subsequent negotiation sessions, the [Authority] introduced new collective bargaining proposals that had not been previously considered during these negotiations, some of which would change working conditions that had existed for several years. The new proposals concerned..." and the Complaint then listed eleven working conditions. Subsequent paragraphs of the Complaint alleged that by the conduct alleged in paragraph 11, the Authority had "refused to bargain," "discriminate[d] against employees because they have filed charges and have given testimony...," and "derivatively, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed under the Law..."

[19] As found in Woods Hole I, the Authority had unilaterally ceased deducting and remitting Union dues in April 1983. That unilateral change was the subject of litigation in Woods Hole I.

November 2, 1983, letter appears to demonstrate that a change was made in these working conditions, and while the parties extensively litigated the conduct of bargaining that preceded the announced change, the record does not permit us to conclude that the parties fully litigated the issue of whether the Employer's action with respect to these subjects was unlawful. We do not know, for example, whether the Authority would have introduced other evidence to defend its conduct had it been given adequate notice that these issues were alleged.[20] In the absence of a demonstration that the Authority had full notice and full opportunity to introduce evidence concerning this matter, we decline to conclude that the matter was fully litigated. Accordingly, we modify that portion of the Hearing Officer's findings, conclusions, and remedial order that refer to changes in terms and conditions of employment other than the Pension Plan.

We affirm the Hearing Officer's finding that the Authority unilaterally withdrew from the Pension Plan, and we affirm the Hearing Officer's conclusion that the Authority's unilateral withdrawal of pension benefits from employees was an unlawful unilateral change in the terms and conditions of employment of employees represented by the Union. We have previously discussed the remedy for this unilateral change. To the extent that the Hearing Officer's decision required the Authority to otherwise restore the status quo ante with respect to hours of work, wages, vacation days, or the use of seniority in hiring, promotion or assigning work, we vacate the Hearing Officer's order.

B. The Union's Contentions

1. Regressive Bargaining

The Union challenges the failure of the Hearing Officer to find that the Authority violated Section 4(1) and (5) of the Law when it demanded new concessions in September of 1983.

The record is clear that the Authority introduced a number of new proposals in September 1983, and modified its position with respect to certain items already on the table. The Hearing Officer found that the new items fell into either one of two categories: (1) items which had come up since the last negotiations, and which were prompted by legitimate business considerations; (2) issues not previously bargained because the parties had agreed to deal with "major issues" first.

The MMP concedes that there was no formal ground rule prohibiting either party from introducing new items. The MMP contends, however, that despite the

[20]We note that if the record demonstrated that no other evidence could have been offered to exonerate the Authority, we might conclude that the Authority had not been prejudiced by the failure of the Complaint to specifically plead this allegation. On the basis of this record, however, we cannot assume that the Authority had no other evidence which might have rebutted the suggestion of unlawfulness raised by the letter of November 2, 1983.

absence of such a ground rule, the introduction of so many substantial new proposals after bargaining so long must be a violation of the duty to bargain in good faith.

While such conduct might constitute or be evidence of unlawful regressive bargaining under certain circumstances, in this case, the Hearing Officer concluded that the Authority had an implicit right to introduce new matters after attempting to deal with "major issues." Further, the Hearing Officer also found that changed circumstances during the course of the bargaining had prompted the new demands. We agree with the Hearing Officer that a party does not necessarily engaged in regressive bargaining when it introduces proposals resulting from changed circumstances which have arisen during the course of negotiations.

The MMP argues that the Authority lacked "legitimate" justification for the new proposals. We find substantial evidence to support the Hearing Officer's finding that events which arose subsequent to the beginning of bargaining prompted the new proposals. The new circumstances cited by the Haring Officer included the judicial disposition of the Union's request for binding interest arbitration; the issuance of the Rosemere Arbitration award; the Friends of Nobska proposal; and hiring hall incidents during the summer of 1983.[21] We find no support in this record for the proposition that these were not matters of legitimate concern to the Authority. We agree with the Hearing Officer's assessment that it was appropriate for the Authority to bring those concerns to the bargaining table.

We find no contradiction between our conclusions on this issue and the decision of the Commission in Watertown School Committee, 9 MLC 1301, 1304 (1982), cited by the Union. In the Watertown case, the parties had apparently reached a complete agreement, which was ratified by the Union. The employer then refused to ratify the contract unless new demands were agreed to. In the instant case, the "new" demands were not added after agreement or ratification, but during the course of bargaining. Further, the Watertown case did not involve a finding of changed circumstances, or of a reserved right to introduce new items during bargaining.

2. Authority Coercion

The MMP also contends that the Hearing Officer erred in failing to find that the Authority unlawfully coerced employees in retaliation for their having filed certain grievances. The Hearing Officer found that the Authority altered its bargaining position in response to these grievances. The Union argues that such a change in bargaining position constitutes retaliation.

The Hearing Officer did not credit certain Union testimony regarding retaliatory animus on the part of the Authority, and we affirm his findings in this respect.[22] Thus, in effect, we must consider whether it is a per se violation of Section 4(1) and (4) of the Law for a party to alter its bargaining position in

[21] Neither party disputes the Haring Officer's findings that these events occurred after bargaining began.

(22, see page 1540)

response to arbitration decisions or to the filing of grievances. We are aware of no authority for such a proposition and the Union cites none. Indeed, the bargaining table seems the appropriate place to address problems which arise concerning the interpretation or application of the terms of the prior agreement. We therefore affirm the decision of the Hearing Officer to dismiss that portion of the Complaint which alleged unlawful coercion in retaliation for filing or processing of grievances.

Conclusion

Based upon the foregoing, the Decision and Order of the Hearing Officer is AFFIRMED AS MODIFIED.

ORDER

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

1. Cease and desist from:

   a) Failing and refusing to bargain collectively with the International Organization of Masters, Mates and Pilots, AFL-CIO (Union) by unilaterally changing terms and conditions of employment by withdrawing from the Atlantic and Gulf Region Pension Plan.

   b) Otherwise interfering with, restraining, or coercing employees represented by the Union in the exercise of their rights under the Law.

2. Take the following affirmative action which will effectuate the policies of the Law:

   a) Restore the status quo ante either by reinstating the Atlantic and Gulf Region Pension Plan or by instituting an equivalent method of compensating employees for the monetary value of the pension coverage which they formerly received through the Atlantic and Gulf Region Pension Plan in effect prior to the Authority's unilateral change;

   b) Make whole the employees represented by the Union, for any loss that they may have suffered as a result of the unlawful unilateral withdrawal from the Atlantic and Gulf Region Pension Plan;

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22 (from page 1539)
The credibility determinations of a hearing officer generally will not be overruled unless the clear preponderance of the evidence requires otherwise. Town of Clinton, 12 MLC 1361, 1365 (1985).

c) Upon request, bargain collectively with the Union over wages, hours or other working conditions;

d) Sign and post in conspicuous places where notices to employees are usually posted the attached Notice to Employees and leave posted for a period of thirty (30) days;

e) 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
MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

Woods Hole, Martha's Vineyard and Nantucket Steamship Authority and International Organization of Masters, Mates and Pilots (AFL-CIO), 14 MLC 1518

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 Woods Hole, Martha's Vineyard and Nantucket Steamship Authority has violated Sections 4(5) and 4(1) of G.L. Chapter 150A (the Law) by failing and refusing to bargain collectively with the International Organization of Masters, Mates and Pilots, AFL-CIO (Union) in unilaterally changing terms and conditions of employment by terminating participation in the Atlantic and Gulf Region Pension Plan.

WE WILL NOT refuse or fail to bargain collectively with the Union by unilaterally changing terms and conditions of employment by terminating participation in the Atlantic and Gulf Region Pension Plan.

WE WILL restore the status quo ante with respect to certain terms and conditions of employment in effect prior to the Authority's declaration of impasse either by reinstating the Atlantic and Gulf Region Pension Plan or by instituting an equivalent method of compensating employees for the monetary value of the pension coverage which they formerly enjoyed through the Atlantic and Gulf Region Pension Plan.

WE WILL make whole the employees in the bargaining unit for any loss that they have suffered as a result of the unlawful unilateral change in pension coverage.

WE WILL, upon request, bargain collectively with the Union over wages, hours or other working conditions.

WE WILL NOT otherwise interfere with, restrain, or coerce employees represented by the Union in the exercise of their rights under the Law.

EXECUTIVE DIRECTOR
Woods Hole, Martha's Vineyard and
Nantucket Steamship Authority