THE ZISKIN LAW FIRM
A LIMITED LIABILITY PARTNERSHIP
6268 JERICHO TURNPIKE, SUITE 12A
COMMACK, NEW YORK 11725
www.ziskinlawfirm.com

ROBERT M. ZISKIN
STACEY E. ZISKIN*
RICHARD B. ZISKIN**
SUZANNE HARMON ZISKIN**

TELEPHONE: 631-462-1417
FACSIMILE: 631-462-1486

*ALSO ADMITTED IN NJ & DC
**ALSO ADMITTED IN NJ & FL

January 10, 2007

Sent Electronically
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street N.W.
Washington, D.C. 20570

Att: Lester A. Heltzer, Executive Secretary

Re: Cofire Paving Corp. & Local 175 United Plant and Production Workers
29-CA-27556

Dear Mr. Heltzer:

Our firm is counsel to Cofire Paving Corp. Enclosed please find the following:

1. Cofire Paving Corp.'s Exceptions to the Decision of the Administrative Law Judge; and
2. Cofire Paving Corp.'s Brief in Support of its Exceptions to the Decision of the Administrative Law Judge (Affidavit of Service attached).

Thank you for your consideration in this matter.

Very truly yours,

RICHARD B. ZISKIN

cc: NLRB Region 29
Att: Alvin Blyer, Regional Director
Eric B. Chaikin, Esq.
Local 175 United Plant & Production Workers
Cofire Paving Corp.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
----------X
COFIRE PAVING CORP.

and

CASE NO.:
29-CA-27556

LOCAL 175 UNITED PLANT &
PRODUCTION WORKERS.
----------X

COFIRE PAVING CORP.'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE RAYMOND P. GREEN

EXCEPTIONS

I. The following exceptions are related to the Administrative Law Judge's finding that Respondent Cofire Paving Corp. ("Cofire") has violated Section 8(a)(1) & (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay them, as part of their existing wages, the amounts of money that it had previously paid to a pension and an annuity plan and for failing to pay two weeks of vacation pay.

1. The Administrative Law Judge ("ALJ") erred in finding and concluding that Cofire has violated Section 8(a)(1) & (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay them, as part of their existing wages, the amounts of money that it had previously paid to a pension and an annuity plan. (ALJ Decision, p. 17, l. 10-14)
2. The ALJ erred in finding and concluding that there is no doubt that Cofire was obligated under the NLRA, to continue making those payments that it would have otherwise made to the Pension and Annuity funds as those amounts of money constituted a portion of the wage scale that the employees enjoyed as of the date that Local 175 was certified. (ALJ Decision, p. 14, l. 41-45)
3. The ALJ erred in finding and concluding that Cofire could not unilaterally reduce the employees' wages upon the replacement of the old union with the newly certified union,

unless and until an impasse was reached in bargaining or until the new union was decertified. (ALJ Decision, p. 14, l. 45-49)

4. The ALJ erred in finding and concluding that the pension and annuity monies could and should have gone directly to the employees. (ALJ Decision, p. 15, l. 1-2)
5. The ALJ erred in finding and concluding that Cofire was obligated to maintain the existing terms and conditions of employment after Local 175 was certified by the Board. (ALJ Decision, p. 17, l. 28-30)
6. The ALJ erred in finding and concluding that Cofire was required to continue to make payments to the employees that were the equivalent of the amounts that it had previously paid on their behalf to the Pension and Annuity plans that had existed prior to the certification date. (ALJ Decision, p. 17, l. 30-32)
7. The ALJ erred in failing to rely on his previous decisions in Lihli Fashions Corp., 317 NLRB 163 (1995) and Bayshore Electrical Supply Co. and Amalgamated Union, Local 355, 1992 WL 1465459. (ALJ Decision, p. 12, l. 29-41)
8. The ALJ erred in finding and concluding that Bayshore Electrical Supply Co. and Amalgamated Union, Local 355 is not applicable to the facts of this case. (ALJ Decision, p. 13, l. 1-2)
9. The ALJ erred in finding and concluding that Bayshore Electrical Supply Co. and Amalgamated Union, Local 355 extends only to the predecessor union and cannot extend to Local 175, which won the election and which became the substituted union, holding a newly created right to bargain. (ALJ Decision, p. 13, l. 5-9)
10. The ALJ erred in finding and concluding that Cofire could not, without violating Section 8(a)(1) of the Act, change, modify or alter the existing terms and conditions of employment before there was a certification. (ALJ Decision, p. 13, l. 10-12)

11. The ALJ erred in finding and concluding that Cofire could not, during the election campaign, withhold or withdraw existing benefits even though the incumbent union's contract had expired on June 30, 2005. (ALJ Decision, p. 13, l. 12-15)

12. The ALJ erred in finding and concluding that once Local 175 became certified on August 8, 2005, Cofire could not, without violating Section 8(a)(5) of the Act, change, alter or modify the existing mandatory terms and conditions of employment during the course of collective bargaining, until and unless the parties bargained in good faith to an impasse or until Local 175 became decertified as the bargaining representative. (ALJ Decision, p. 13, l. 15-20)

13. The ALJ erred in finding and concluding that Cofire was obligated to maintain the status quo as it existed as of the Certification date, (August 8, 2005); including the wage rates and other terms and conditions of employment as represented in the contract that expired on June 30, 2005, to the extent that Cofire was legally bound to comply with those terms. (ALJ Decision, p. 13, l. 20-25)

14. The ALJ erred in finding and concluding that if there is a collective bargaining agreement between an employer and a union, the terms of employment have been established through bargaining and neither side, absent consent by the other, can alter the agreed upon terms of their contract during the life of the contract. See Section 8(d) of the NLRA. (ALJ Decision, p. 11, l. 17-21)

15. The ALJ erred in finding and concluding that in situations where a union has won a Board conducted election, an employer will be barred from unilaterally changing the status quo in terms of wages and terms and conditions of employment during negotiations until and unless a legitimate impasse is reached. NLRB v. Katz, 369 U.S. 736 (1962). (ALJ Decision, p. 11, l. 35-38)

16. The ALJ erred in finding and concluding that Cofire commencing on July 1, 2005, (and prior to either the election or the start of bargaining), ceased making payments to the Welfare, Pension and Annuity Funds that were required in the expired contract with Local 1175/731, the losing union. (ALJ Decision, p. 5, l. 19-21)
17. The ALJ erred in finding and concluding that Cofire did not notify either union of what it was doing before it ceased making these payments. (ALJ Decision, p. 5, l. 21-23)
18. The ALJ erred in failing to find and conclude that after Cofire ceased making the payments, the monies that it had been paying into the three funds were not distributed to the employees or otherwise used to provide any equivalent annuity or pension benefits as the cost of the private health benefits were greater than the previous cost of health benefits with the losing union. (ALJ Decision, p. 5, l. 29-31)
19. The ALJ erred in finding and concluding that Cofire failed to bargain in good faith with Local 175, United Plant & Production Workers, by failing to give notice to and offering to bargain with it before unilaterally failing to pay its employees, as part of their existing wages, the amounts of money that it had previously paid to a Pension and an Annuity plan on their behalf. (ALJ Decision, p. 18, l. 1-5)
20. The ALJ erred in failing to find and conclude that Cofire's "obligation to maintain existing conditions after contract expiration also ceases whenever the union has lost majority status" which was what occurred in this matter. (T. p. 31, l. 22-25, p. 32, l. 1-2)
21. The ALJ erred in finding and concluding that Cofire that the backpay period should commence on August 8, 2005. (ALJ Decision, p. 17, l. 32-34)
22. The ALJ erred in finding and concluding that any amount owed, should be paid with interest in accordance with New Horizons for the Retarded, 283 NLRB 1173 (1987). (ALJ Decision, p. 17, l. 34-37)

23. The ALJ erred in finding and concluding that Cofire make whole, with interest, the employees for the loss of earnings they suffered as a result of the unilateral changes to the vacation, pension and annuity policies, in the manner set forth in the remedy section of the decision. (ALJ Decision, p. 18, l. 25-28)
24. The ALJ erred in finding and concluding that Cofire has violated Section 8(a)(1) & (5) of the Act by unilaterally failing to pay its employees two weeks of vacation pay that they had accrued under their pre-existing conditions of employment. (ALJ Decision, p. 17, l. 15-17)
25. The ALJ erred in finding and concluding that Cofire failed to bargain in good faith with Local 175, United Plant & Production Workers, by failing to give notice to and offering to bargain with it before unilaterally failing to pay its employees the amount of money that they had accrued as paid vacation leave. (ALJ Decision, p. 18, l. 5-9)
26. The ALJ erred in finding and concluding that when the employees were no longer employed as of March 24, 2006, they had, under the pre-existing terms and conditions of employment, accrued three weeks of vacation pay. (ALJ Decision, p. 15, l. 3-6)
27. The ALJ erred in finding and concluding that the vacation issue was not even discussed during negotiations and that the Respondent owes two weeks of vacation pay to the bargaining unit employees. (ALJ Decision, p. 15, l. 6-9)
28. The ALJ erred in finding and concluding that the vacation benefits continued in the expired contract and that the employees accumulated their full entitlement to vacation pay. (ALJ Decision, p. 10, l. 29-31)
29. The ALJ erred in finding and concluding that the topic of vacation pay was not really discussed at the negotiations and there is no dispute that the Company did not notify the

Union about its decision to reduce the amount of vacation pay. (ALJ Decision, p. 10, l. 31-34)

30. The ALJ erred in finding and concluding that Cofire on request, bargain with Local 175 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. (ALJ Decision, p. 18, l. 15-24)

II. The following exceptions are related to the Administrative Law Judge's finding that Cofire did not agree to provide a Pension, Annuity or Welfare Plan in its prior agreement with Local 1175.

31. The ALJ erred in finding and concluding that the point is that Cofire did not agree to provide a Pension Plan or a Welfare Plan or an Annuity Plan. (ALJ Decision, p. 14, l. 35-37)

32. The ALJ erred in finding and concluding that there were no employer-union negotiations over the Pension Plan, the Welfare Plan or the Annuity Plan. (ALJ Decision, p. 14, l. 3-4)

33. The ALJ erred in finding and concluding that with respect to the three benefit funds, the testimony was that during negotiations the discussion centered on how much of a total increase should be given by Cofire to the workers instead of focusing on wages and each fund contribution as a separate item. (ALJ Decision, p. 3, l. 39-41)

34. The ALJ erred in finding and concluding that the testimony was that when a contract was made, there was, as indicated by Article V, Section 1, an agreement that Cofire would increase the total compensation package by x percent per year. (ALJ Decision, p. 3, l. 41-44)

35. The ALJ erred in finding and concluding that the Union discussed internally with its members and with the insurance providers and actuarial consultants, how that total package should be allocated. (ALJ Decision, p. 3, l. 44-45)

36. The ALJ erred in finding and concluding the Union determined how much of the total package should be allocated to pay for Health Insurance, how much should go into the Pension fund and how much should be allocated to the Annuity fund. (ALJ Decision, p. 3, l. 45-47)
37. The ALJ erred in finding and concluding that from Cofire' perspective, the allocation of monies was of no concern, since their obligation was simply to pay a total amount of money per employee per hour. (ALJ Decision, p. 3, l. 47, p. 4, l. 1-2)
38. The ALJ erred in finding and concluding that in relation to wage rates and benefit funds, the history within the New York asphalt Industry has been that the predecessor union negotiated only for wage increases. (ALJ Decision, p. 13, l. 50-52)
39. The ALJ erred in finding and concluding that history of the expired contract, (and previous contracts as well), the respective negotiators dealt only with the amount of a wage increase that would be given to each classification of employee over the lifetime of the contract. (ALJ Decision, p. 14, l. 1-3)
40. The ALJ erred in finding and concluding that Cofire that after the parties agreed on new wage rates, the Union went back to its membership and after consulting with them, with actuaries and with health insurance providers, decided how to split up the total wage pie so as to allocate amounts to go to each fund. (ALJ Decision, p. 14, l. 4-7)
41. The ALJ erred in finding and concluding that if the actuary reported that it would take x amount to guarantee the defined benefit promised by the Pension Fund, then the Union, after discussion with the employees, would allocate x dollars per employee per hour to the Pension Fund. (ALJ Decision, p. 14, l. 7-10)
42. The ALJ erred in finding and concluding that the if the health insurance provider offered to provide medical benefits at a certain level, the Union, with the employees' assent,

would allocate a certain portion of the new contract wage rates for the Heath Plan and that the same would be true for the Annuity Fund. (ALJ Decision, p. 14, l. 10-14)

43. The ALJ erred in finding and concluding that the evidence shows that as far as the companies were concerned, they simply negotiated for a new wage rate scale and did not negotiate at all on the subjects of Pension, Welfare or Annuity contributions. (ALJ Decision, p. 14, l. 16-17)

44. The ALJ erred in finding and concluding that whatever negotiations that took place on these latter subjects were internal within the Union and between the Union and potential health insurance companies. (ALJ Decision, p. 14, l. 15-19)

45. The ALJ erred in finding and concluding that upon agreement within the Union, the Union simply forwarded to Cofire a description of how the pie was to be sliced and the final printed collective bargaining agreement was drawn up to conform to that result. (ALJ Decision, p. 14, l. 19-22)

46. The ALJ erred in finding and concluding that insofar as wage rates and benefit funds, what Cofire agreed to was simply a new wage scale which would be divided up, at the Union's discretion. (ALJ Decision, p. 14, l. 22-24)

47. The ALJ erred in finding and concluding that the bargain was that Cofire would pay a total amount of money per employee per hour and the Union would do the rest. (ALJ Decision, p. 14, l. 37-38)

48. The ALJ erred in finding and concluding that it was to be the Union that would decide, with the employees, how to allocate the total amount of money and allocate it for different purposes. (ALJ Decision, p. 14, l. 38-41)

III. <u>The following exceptions are related to the Administrative Law Judge's failure to find that economic exigencies compelled Cofire to take prompt action and make unilateral changes.</u>

49. The ALJ erred in failing to find and conclude that economic exigencies compelled Cofire to take prompt action and make unilateral changes. See RBE Electronics of S.D., Inc., 320 NLRB 80, 81 (1995) and Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enfd., 15 F.3d 1087 (9th Cir. 1994). (ALJ Decision, p. 11, l. 43-46)

50. The ALJ erred in failing to find and conclude that Cofire demonstrated the existence of an economic emergency of the kind that would have entirely excused its obligation to bargain. In this regard it was established that (1) the 1175 Pension Fund had withdrawal liability which occurred when Cofire withdrew from the Local 1175 Pension Fund. (T. p. 72, l. 6-13); (2) the 1175 Pension Fund assessed withdrawal liability to Cofire in amount of approximately $256,000.00 as a consequence of its withdrawal from the Fund which is to be paid in quarterly payments over a period of ten years.. (T. p. 72, l. 18-25, p. 360, l. 15-21); (3) Cofire's "Paid Invoice Register" indicates that the company's first quarterly payment of $6,684.34 was submitted to the Local 1175 Pension Fund in connection with the company's withdrawal liability obligation. (T. p. 360, l. 6-14, p. 361, l. 1-8; Respondent's Exhibit 11); and (4) Local 175 President Tomaszewski acknowledged that Cofire had withdrawal liability to the 1175 Pension Fund and that a "nice amount of money" was owed. (T. p. 196, l. 23-25, p. 197, l. 1-10) Moreover, the ALJ credited union representative Falzone's testimony that at every bargaining session, Holland said that it was not economically possible for the Company to continue the terms and conditions of the previous contract with Local 1175. (ALJ Decision, p. 7, l. 27-30)

51. The ALJ erred in failing to find and conclude economic exigencies existed inasmuch as the Judge concluded credited union representative Falzone's testimony that at every bargaining session, Holland said that it was not economically possible for the Company to continue the terms and conditions of the previous contract with Local 1175. In this

regard, the Judge credited Falzone's testimony that Cofire's tonnage and productivity capabilities placed it at an economic disadvantage to the other asphalt companies in the New York City area. (ALJ Decision, p. 7, l. 27-32)

52. The ALJ erred in failing to find and conclude that Holland informed the Union that he did not think it would be economically feasible for the company to continue operating under the terms of the expired 1175 agreement and that the Union delegates responded by asking Cofire to continue its asphalt manufacturing operation and negotiations. (T. p. 339, l. 11-25)

53. The ALJ erred in failing to find and conclude that Tomaszewski acknowledged that during negotiations Holland advised the Union that the company could not continue to operate this plant under the existing economic conditions and that Tomaszewski knew that there was truth in Holland's statement. (T. p. 192, l. 20-25, p. 193, l. 1-5)

54. The ALJ erred in failing to find and conclude that Falzone admitted that Holland advised the Union that it was not economically feasible for the company to continue the terms and conditions from the expired 1175 agreement. (T. p. 271, l. 24-25, p. 272, l. 1-2) Falzone testified that Holland made that statement at every meeting. (T. p. 272, l. 4-17)

IV. <u>The following exceptions are related to the Administrative Law Judge's failure to find that the parties reached an impasse in the Fall of 2005, in part caused by Local 175's Most Favored Nations with Cofire's competitors.</u>

55. The ALJ erred in failing to find and conclude that Cofire bargained to an impasse with the Union in the fall of 2005. (T. p. 29, l. 19-25)

56. The ALJ erred in failing to find and conclude that Cofire repeatedly advised the Union that it was incurring significant economic problems and that it could not continue to operate under the terms of the expired agreement. (T. p. 30, l. 1-13).

57. The ALJ erred in failing to find and conclude that during the course of negotiations Cofire was never provided with the summary plan descriptions for the Local 175 Benefit Funds.

> The testimony is as follows:
> Mr. Chaikin: "The Local 175 Pension, Annuity and Welfare Funds were created effective July 1, 2005; commenced receiving contributions from one or more firms, some of which were retroactive to July 1, 2005; that the trust agreements ... for the Pension, Annuity and Welfare plans were provided to Respondent, Cofire, however SPDs or summary plan descriptions were not available at the time of the request in that they're not required to be produced until after the Internal Revenue Service actually issues an approval of the plan, which they had not done at the time of the request." (T. p. 207, l. 24-25, p. 208, l. 1-9).
> Judge Green: "Okay. So the bottom line is what he wants, what Mr. Ziskin wants is an acknowledgement that such SPDs were not provided to Cofire during the negotiation period." (T. p. 208, l. 15-17)
> Mr. Chaikin: "That would be correct." (T. p. 208, l. 18)

58. The ALJ erred in failing to find and conclude Cofire's competitors, Willets Point, Grace and College Point Asphalt each agreed to the three year increases of 5 ¼%, 5 ½% and 5 ¾%. (T. p. 259, l. 20-25, p. 260, l. 1-14)

59. The ALJ erred in failing to find and conclude that Local 175 offered the same percentage increases to Cofire. (T. p.260, l. 15-17)

60. The ALJ erred in failing to find and conclude that Local 175 never offered Cofire a smaller percentage increase than what was agreed to by the other asphalt plants. (T. p. 261, l. 15-21)

61. The ALJ erred in failing to find and conclude that Local 175 entered into a written agreement with Willets Point Asphalt covering the company's asphalt plant workers. (T. p. 262; Respondent's Exhibit # 5)

62. The ALJ erred in failing to find and conclude that the Willets Point agreement was entered into on June 9, 2006 and was retroactive to December 1, 2005. (T. p. 262, l. 2-3; Respondent's Exhibit # 5, p. 18 and addendum)

63. The ALJ erred in failing to find and conclude that the Willets Point agreement contained a "Most Favored Nations" clause that he described as "... whatever we give to one company, we have to give to the others." (T. p. 264, l. 12-19; Respondent's Exhibit # 5, p. 18)

64. The ALJ erred in failing to find and conclude that the Willets Point collective bargaining agreement provides the following wages and benefits:

- Increase
7/1/05... $2.60 per hour; 7/1/06.... $2.86 per hour; and 7/1/07... $3.16 per hour
- Hourly Wage
July 1, 2005... $41.17 per hour; July 1, 2006... $44.03 per hour; and July 1, 2007... $47.19 per hour (Respondent's Exhibit # 5, p. 5)
- Welfare Fund Contribution
July 1, 2005... $3.77 per hour (Respondent's Exhibit # 5, p. 8)
- Pension Fund Contribution
July 1, 2005... $1.43 per hour (Respondent's Exhibit # 5, p. 9)
- Annuity Fund Contribution
July 1, 2005... Straight Time...$5.70 per hour (Respondent's Exhibit # 5, p. 9-10)
- Most Favored Nations- The Union agrees that it will not enter into an Agreement with any employer containing more favorable conditions or wages than those agreed to in the current Agreement. Should it be shown that more favorable conditions or wages prevail, then more favorable conditions or wages shall apply to all signatories to this Agreement. (Respondent's Exhibit # 5, p. 18)
- There will be no job classifications-plant worker only
- The contract will be five years with five percent total increases each of the last two years
- There will be six men for a minimum of 8 hours in each 24 hour period of a normal work week. (Respondent's Exhibit # 5, addendum following p. 18)

65. The ALJ erred in failing to find and conclude that Local 175 entered into a written agreement with College Point Asphalt covering the company's asphalt plant workers. (T. p. 267, l. 11-19, p. 270, l. 22-24; Respondent's Exhibits # 6-7)

66. The ALJ erred in failing to find and conclude that the College Point Asphalt collective bargaining agreement provides the following wages and benefits:

- Increase
7/1/05... $2.60 per hour; 7/1/06.... $2.86 per hour; and 7/1/07... $3.16 per hour
- Hourly Wage

July 1, 2005… $41.17 per hour; July 1, 2006… $44.03 per hour; and July 1, 2007… $47.19 per hour (Respondent's Exhibit # 6, p. 5)

- Welfare Fund Contribution

July 1, 2005… $3.77 per hour (Respondent's Exhibit # 6, p. 8)

- Pension Fund Contribution

July 1, 2005… $1.43 per hour (Respondent's Exhibit # 6, p. 9)

- Annuity Fund Contribution

July 1, 2005… Straight Time…$5.70 per hour (Respondent's Exhibit # 6, p. 9-10)

- Most Favored Nations- The Union agrees that it will not enter into an Agreement with any employer containing more favorable conditions or wages than those agreed to in the current Agreement. Should it be shown that more favorable conditions or wages prevail, then more favorable conditions or wages shall apply to all signatories to this Agreement. (Respondent's Exhibit # 6, p. 18)
- In part, the addendum provides the following terms:
- There will be no job classifications-plant worker only
- The contract will be five years with five percent total increases each of the last two years
- There will be six men for a minimum of 8 hours in each 24 hour period of a normal work week. (Respondent's Exhibit # 7, addendum p. 1)

V. The following exception is related to the Administrative Law Judge's finding that Cofire and Local 175 agreed to include the asphalt "shipper" into the bargaining unit and that there were five employees in the unit during the relevant time period.

67. The ALJ erred in finding and concluding that the parties agreed to include the "shipper" into the bargaining unit and that there were five employees in the unit during this time. (ALJ Decision, p. 5, l. 40-42)

68. The ALJ erred in failing to find and conclude that the NLRB election involving the asphalt plant workers was held on July 27, 2005 and Cofire was provided with a certified copy of the election results in August 2005. (T. p. 335, l. 13-24, p. 336, l. 1-11)

69. The ALJ erred in failing to find and conclude that Local 175 prevailed in the election at Cofire in August 2005. (T. p. 114, l. 18-24)

70. The ALJ erred in failing to find and conclude that, the Regional Director's Order dated July 15, 2005 granted Local 175's request to withdraw the shipper, because of the one man unit rule, from the overall unit. (Case No. 29-RC-10354, Order dated July 15, 2005)

71. The ALJ erred in failing to find and conclude that a Stipulated Election Agreement was not entered until May 24, 2006 which only then permitted the shipper the right to vote and decide whether he wished to join the overall unit. (29-RC-11340)

72. The ALJ erred in failing to find and conclude that the certification of the asphalt plant shipper occurred after two (2) months after the March 24, 2006 lockout.

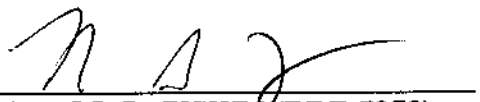
VI. Alternatively, the following exception is related to the Administrative Law Judge's failure to find and conclude Cofire was entitled to a credit as the cost to the Company of placing the employees into the Company's plan was greater than the amount of the contributions that the Company had been making on behalf of the employees to the Local 1175/731 plan.

73. In the alternative, the ALJ erred in failing to find and conclude that Cofire was entitled to a credit as the cost to the Company of placing the employees into the Company's health insurance plan was greater than the amount of the contributions that the Company had been making on behalf of the employees to the Local 1175/731 plan. (ALJ Decision, p. 7, l. 9-12)

Dated: Commack, New York
January 10, 2007

Respectfully submitted,

The Ziskin Law Firm, LLP

By: 

RICHARD B. ZISKIN (RBZ-7378)
Attorneys for Respondent
Cofire Paving Corp.
Office and P.O. Address:
6268 Jericho Turnpike
Suite 12A
Commack, New York 11725
(631) 462-1417

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29
----------X
COFIRE PAVING CORP.

and

CASE NO.:
29-CA-27556

LOCAL 175 UNITED PLANT &
PRODUCTION WORKERS.
----------X

COFIRE PAVING CORP. BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Ziskin Law Firm, LLP
Attorneys for Respondent
Cofire Paving Corp.
Office & P.O. Address:
6268 Jericho Turnpike
Suite 12A
Commack, New York 11725
Telephone: (631) 462-1417
Facsimile: (631) 462-1486
E-Mail: richard@ziskinlawfirm.com

Submitted By: Richard B. Ziskin, Esq.
Suzanne Harmon Ziskin, Esq.

TABLE OF CONTENTS

STATEMENT OF THE CASE		p. 1
THE ALJ DECISION		p. 4
ISSUES		p. 5
FACTS		p. 6
A.	The RC Election	p. 8
B.	The Bargaining Sessions between Cofire and Local 175	p. 8
1.	The September 14th Meeting	p. 8
2.	The September 22nd meeting	p. 9
3.	Cofire's alleged promise to escrow the trust Fund monies	p. 10
4.	The Local 175 Trust Fund Summary Plan Descriptions	p. 11
5.	The October 21, 2005 Meeting	p. 11
6.	The October 31, 2005 written offer of health insurance	p. 12
7.	The November 8th letter	p. 12
8.	Cofire's Health Insurance Plan	p.13
9.	Local 1175 Welfare Fund	p. 13
10.	The November 2, 2005 meeting	p. 13
11.	The November 10, 2005 meeting	p. 14
12.	The March 22, 2006 meeting	p. 15
13.	The March 24th Lockout	p. 17
14.	Local 175's request for information	p. 18
15.	The June 2006 meeting	p. 18
16.	The Current Status of Cofire's Asphalt Plant	p. 19
17.	Withdrawal Liability	p. 19

18. The Asphalt Plant Agreements p. 20

a. Willets Point Agreement p. 20

b. College Point Agreement p. 21

19. The Local 1175 Trust Funds p. 23

ARGUMENT p. 25

SUMMARY ARGUMENT p. 25

Issue 1: The evidence in the record and the applicable law does not support the Administrative Law Judge's finding that that Cofire violated Section 8(a)(1) & (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay them, as part of their existing wages, the amounts of money that it had previously paid to a pension and an annuity plan. (Exceptions one (1) through thirty (30))

p. 25

1. Pursuant to Section 8(d) of the Act, Cofire was not bound to the terms and conditions of employment as set forth in the expired contract, as it was lawfully discharged from such obligation when Local 1175 was decertified and replaced by Local 175 under the election procedures established by the Board.

p. 25

a. The Board cannot compel Cofire and Local 175 to reach a collective bargaining agreement that provides for welfare, pension, annuity and vacation benefits as the Board may only compel the parties to bargain over such terms and conditions of employment.

p. 25

b. Cofire is not bound by the terms and conditions of the expired collective bargaining agreement once Local 1175 was decertified and replaced by Local 175.

p. 27

c. Cofire was lawfully discharged from its obligation to maintain the status quo when Local 1175 was decertified and replaced by Local 175 and as such was permitted to unilaterally change the terms and conditions of the expired contract.

p. 29

d. Section 8(d) permits an employer to terminate and/or modify a collective bargaining agreement upon an intervening certification of the Board, under which the labor organization, which is a party to the contract, has been superseded as the representative of the employees subject to the provisions of section 9(a).

p. 30

e. This matter is analogous to the Trial Examiner's finding in American Seating

p. 32

f. It would be unlawful pursuant to Section 8(a)(1) and (5) of the Act for Cofire to bypass the Union and unilaterally secure pension and annuity benefits for the Unit.

p. 34

2. According to the terms of the expired collective bargaining agreement between Cofire and Local 1175, Article XIII sets forth that the agreement shall terminate on June 30, 2005.

p. 36

Issue 2: The evidence in the record and the applicable law does not support the Administrative Law Judge's finding that that Cofire did not agree to provide a Pension, Annuity or Welfare Plan in its prior agreement with Local 1175. (Exceptions thirty-one (31) through forty-eight (48))

p. 37

Issue 3: The evidence in the record and the applicable law supports a finding that economic exigencies permitted Cofire to take prompt action and make unilateral changes. (Exceptions forty-nine (49) through fifty-four (54))

p. 42

Issue 4: The evidence in the record and the applicable law supports a finding that the parties reached an impasse in the Fall of 2005, in part caused by Local 175's Most Favored Nations Clause contained in its collective bargaining agreements with Cofire's competitors. (Exceptions fifty-five (55) through sixty-six (66))

p. 44

Issue 5: The evidence in the record and the applicable law does not support the Administrative Law Judge's finding that Cofire and Local 175 agreed to include the

asphalt "shipper" into the bargaining unit. (Exception sixty-seven (67) through seventy-two (72))

p. 48

Issue 6: The evidence in the record and the applicable law supports a finding that Cofire is entitled to a credit where the cost to Cofire of placing the employees into the company's plan was greater than the amount of the contributions that the company had been making on behalf of the employees to the Local 1175/731 Welfare Fund. (Exception seventy-three (73))

p. 49

CONCLUSION

p. 50

TABLE OF CASES

1. American Seating Company, 106 NLRB No. 44, 106 NLRB 250, 262, 32 L.R.R.M. (BNA) 1439, 1953 WL 10942 (N.L.R.B.) P. 28, 32-34
2. American Sunroof Corporation-West Coast, Inc., 243 NLRB No. 172, 243 NLRB 1128, 1129-1130 102 L.R.R.M. (BNA) 1086, 1979-80 NLRB Dec. P 16093, 1979 WL 9389 (N.L.R.B.) P. 28-29
3. Angelica, 284 N.L.R.B. at 853. P. 42
4. Bayshore Electrical Supply Co. and Amalgamated Union Local 355, 1992 WL 1465459 (N.L.R.B. Div. of Judges) P. 29
5. Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enfd., 15 F.3d 1087 (9th Cir. 1994).P. 42
6. Burns International Security Services, Inc. v. NLRB, 406 U.S. 272, 281, 92 S.Ct. 1571, 1579, 32 L.Ed.2d 61, 80 L.R.R.M. (BNA) 2225 P. 27-28
7. Farmbest, Inc., 154 N.L.R.B. 1421, 1453--1454 (1965), enf. with mod. sub nom. Farmbest, Inc. v. NLRB, 370 F.2d 1015 (CA8 1967) P. 28

8. General Dynamics Corp., 184 N.L.R.B. No. 71 (1970). P. 28

9. H. K. Porter Co. v. NLRB, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970). P. 25, 26, 36

10. Harold W. Hinson, d/b/a Hen House Market No. 3, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). P. 41

11. Henry Cauthorne, an Individual, t/a Cauthorne Trucking and Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 256 NLRB 721, 256 NLRB No. 115, 1981 WL 20510 (N.L.R.B.), 107 L.R.R.M. (BNA) 1281. P. 41-42

12. In re America Piles, Inc., 333 NLRB 1118, 1119 (2001) P. 39

13. J.D. Lunsford Plumbing, 254 NLRB 1360, 1365, 1370-1371 (1981) P. 47-48

14. Kings Material Handling Corp., 2005 WL 3487613 (N.L.R.B. Div. of Judges) Case 29-CA-26991, JD(NY)-53-05 P. 30

15. Lihli Fashions, 317 NLRB 163 (1995) enfd. in part, 80 F.3d 743, 151 L.R.R.M. (BNA) 2941, (2nd Cir, 1996); P. 30

16. Modine Mfg. Co. v. Grand Lodge International Association on Machinists, 216 F.2d 326 (CA6 1954). P. 28

17. NDK Corporation and United Food And Commercial Workers Union, Local 1550, 278 NLRB 1035 (1986) P. 39

18. NLRB v. A. W. Thompson, Inc., 449 F.2d 1333, 1336 (5th Cir. 1971), Cert. denied, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972).P. 40

19. NLRB v. Electric Workers Local 11, 772 F.2d 571, 575 (9th Cir. 1985) P. 39

20. NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962) P. 34

21. NLRB v. Newspapers, Inc., 515 F.2d 334, 340-41 (5th Cir. 1975) P. 40

22. NLRB v. Sac Const. Co., Inc., 603 F.2d 1155, 1156 (5th Cir. 1979) P. 40

23. Our Lady of Lourdes Health Ctr., 306 N.L.R.B. 337, 340 n. 6 (1992). P. 42

24. RBE Electronics of S.D., Inc., 320 NLRB 80, 81 (1995) P. 42-43

25. Roman Iron Works, 292 NLRB 1292, 1293 (1989). P. 30

26. Sanders Bus Lines, Inc., 256 NLRB 316, 256 NLRB No. 56, 1981 WL 20452 (N.L.R.B.), 107 L.R.R.M. (BNA) 1260, 1980-81 NLRB Dec. P 18,114.P. 28-29

27. Sheet Metal Workers' Int'l Ass'n v. West Coast Sheet Metal Co., 954 F.2d 1506 (9th Cir.1992), P. 36

28. W. A. Krueger Co., 299 NLRB 914, 915 (1990) P. 30

29. West Lawrence Care Center Inc., 308 NLRB 1011 (1992); P. 30

30. Westinghouse Electric Corporation, 188 NLRB 885 (1971). P. 42

31. Winn-Dixie Stores, 243 N.L.R.B. at 976. P. 42

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29
----------X
COFIRE PAVING CORP.

and

CASE NO.:
29-CA-27556

LOCAL 175 UNITED PLANT &
PRODUCTION WORKERS.
----------X

BRIEF IN SUPPORT OF THE EXCEPTIONS FILED ON BEHALF OF COFIRE PAVING CORP.

STATEMENT OF THE CASE

Pursuant to an unfair labor practice charge filed by Local 175 United Plant & Production Workers (hereinafter the "Union" or "Local 175") (Board Exhibit No. 1-a), the Regional Director of Region 29 issued a Complaint and Notice of Hearing which alleged that Cofire Paving Corp. (hereinafter "Cofire" or "the company") violated Section 8(a)(1) and (5) of the National Labor Relations Act. (Board Exhibit No. 1-c) A trial was held before Administrative Law Judge Raymond Green with respect to the allegations set forth in the complaint on September 19th and September 20, 2006.

The Complaint, in effect, alleged that Cofire violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with Local 175 as the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and (5) of the Act. Specifically, it is alleged that Cofire has:

1. failed and refused to secure, or attempt to secure, medical benefits for the Unit that are substantially equivalent to the benefits it had previously enjoyed pursuant to the collective bargaining agreement between Cofire and Sand, Gravel, Crushed

Stone, Ashes and Material Yard Workers of New York City and Vicinity, Local 1175, LIUNA, AFL-CIO, which was merged into Local 731 and decertified by the unit employees on August 8, 2005 in an election conducted by Region 29 (herein "Local 1175" or "Local 731");

2. failed and refused to secure pension and annuity benefits for the Unit that are substantially equivalent to the benefits it had previously enjoyed pursuant to the collective bargaining agreement between Cofire and Local 1175;
3. failed and refused to pay vacation benefits for the Unit that are substantially equivalent to the vacation benefits it had previously enjoyed pursuant to the collective bargaining agreement between Cofire and Local 1175.

In its affirmative defenses, Cofire asserted that the complaint should be dismissed for the following reasons (Board Exhibit No. 1e):

1. As Cofire is not a party to a collective bargaining agreement with Local 175, United Plant and Production Workers (herein "Local 175"), Cofire may not submit health, pension and annuity contributions to the Local 175 Benefit Funds in accordance with the provisions of the Employee Retirement Security Act of 1974, as amended, 29 U.S.C. Sections 1102 and 1145 and the Labor Management Relations Act of 1947, Section 302, 29 U.S.C. Section 186.
2. As Cofire is not a party to a collective bargaining agreement with Local 1175, for at least the period August 8, 2005 to the present, Cofire may not submit health, pension and annuity contributions to the non-party Local 1175 Benefit Funds in accordance with the provisions of the Employee Retirement Security Act of 1974, as amended, 29 U.S.C. Sections 1102 and 1145 and the Labor Management

Relations Act of 1947, Section 302, 29 U.S.C. Section 186.

3. After the contract expired, Cofire was free to unilaterally change the existing terms and conditions of employment as embodied in the expired contract, as it was lawfully discharged from its obligation to bargain when Local 1175 was decertified and replaced by the Union under the election procedures established by the Board.

4. Although Cofire may enter into an agreement with the Union to retroactively remit contributions to the Union's pension and annuity funds from the effective date of the Union's August 8, 2005 certification, it would be unlawful pursuant to Section 8(a)(1) and (5) of the Act for Cofire to bypass the Union and unilaterally and independently secure pension and annuity benefits for the Unit.

5. It is well established that even after the expiration of a collective bargaining agreement, the extant wages and terms and conditions of employment continue in effect and cannot be unilaterally changed until such time as the parties reach an impasse in bargaining, reach a new agreement modifying those terms, or until the Employer is legally discharged from its obligation to bargain with the union. As Cofire was legally discharged from its duty to bargain with Local 1175, Cofire did not violate Section 8(a)(1) and (5) of the Act by not securing pension and annuity benefits for the Unit after the date of the decertification.

6. The pension, annuity and health benefits previously provided to the Unit employees via contributions to the non-party Local 1175 Benefit Funds are not available to Cofire as Local 1175 was decertified on August 8, 2005.

7. The pension, annuity and health benefits previously provided to the Unit

employees by the Local 1175 Benefit Funds are not available to the Unit employees since Local 1175 was decertified on August 8, 2005.

8. The pension, annuity and health benefits previously provided to the Unit employees by the Local 1175 Benefit Funds cannot be duplicated as such benefits were solely provided by the Local 1175 Benefit Funds for its participants.
9. Local 175 cannot enforce the terms and conditions set forth in the expired collective bargaining agreement between Cofire and Local 1175.
10. According to the terms of the expired collective bargaining agreement between Cofire and Local 1175, Article XIII sets forth that the agreement shall terminate on June 30, 2005.
11. Effective August 8, 2005, the certification date of Local 175 the terms and conditions set forth in the expired collective bargaining agreement between Cofire and Local 1175 became unenforceable.

THE ALJ DECISION

In sum, the Administrative Law Judge ("ALJ") concluded that Cofire was obligated under the NLRA, to continue making those payments that it would have otherwise made to the Pension and Annuity funds as those amounts of money constituted a portion of the wage scale that the employees enjoyed as of the date that Local 175 was certified. (ALJ Decision, p. 14, l. 41-45) In this regard, the ALJ decided that Cofire could not unilaterally reduce the employees' wages upon the replacement of the old union with the newly certified union, unless and until an impasse was reached in bargaining or until the new union was decertified. (ALJ Decision, p. 14, l. 45-49)

In reaching this conclusion, the ALJ determined that Cofire had not agreed to provide a Pension Plan or a Welfare Plan or an Annuity Plan when the former Local 1175 agreement was negotiated. (ALJ Decision, p. 14, l. 35-37) The ALJ further determined that the evidence revealed that as far as Cofire was concerned, it simply negotiated for a new wage rate scale and did not negotiate at all on the subjects of Pension, Welfare or Annuity contributions. (ALJ Decision, p. 14, l. 16-17)

ISSUES

1. Whether the evidence in the record and the applicable law supports the Administrative Law Judge's finding that that Cofire violated Section 8(a)(1) & (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay them, as part of their existing wages, the amounts of money that it had previously paid to a pension and an annuity plan. (Exceptions one (1) through thirty (30))
2. Whether the evidence in the record and the applicable law supports the Administrative Law Judge's finding that that Cofire did not agree to provide a Pension, Annuity or Welfare Plan in its prior agreement with Local 1175. (Exceptions thirty-one (31) through forty-eight (48))
3. Whether the evidence in the record and the applicable law supports the Administrative Law Judge's that economic exigencies did not permit Cofire to take prompt action and make unilateral changes. (Exceptions forty-nine (49) through fifty-three (53))
4. Whether the evidence in the record and the applicable law supports the Administrative Law Judge's finding that the parties did not reach an impasse in

the fall of 2005, in part caused by the Most Favored Nations clause contained in Local 175's contracts with Cofire's competitors. (Exceptions fifty-four (54) through sixty-five (65))

5. Whether the evidence in the record and the applicable law supports the Administrative Law Judge's finding that Cofire and Local 175 agreed to include the asphalt "shipper" into the bargaining unit and that there were five employees in the unit during the relevant time period. (Exception sixty-six (66) through seventy-one (71))

6. Whether the evidence in the record and the applicable law supports the Administrative Law Judge's finding that Cofire is not entitled to a credit where the cost to Cofire of placing the employees into the company's plan was greater than the amount of the contributions that the company had been making on behalf of the employees to the Local 1175/731 plan. (Exception seventy-two (72))

FACTS

Except as set forth below, the Board is respectfully referred to the Administrative Law Judge's Findings and Conclusions beginning on page two (2), line forty-five (45) and continuing through page eleven (11), line (2) of the decision dated December 5, 2006.

The only portions of the Judge's factual findings that Respondent disagrees with and has filed exceptions to are as follows:

1. The finding that with respect to three Local 1175/731 benefit funds, the testimony was that during negotiations the discussion centered on how much of a total

increase should be given by Cofire to the workers instead of focusing on wages and each fund contribution as a separate item. (ALJ Decision, p. 3, l. 39-41);

2. The finding that the testimony was that when a contract was negotiated, there was, as indicated by Article V, Section 1, agreement that Cofire would each increase the total compensation package by x percent per year. (ALJ Decision, p. 3, l. 41-44);
3. The finding that the Union discussed internally with its members and with the insurance providers and actuarial consultants, how that total package should be allocated. (ALJ Decision, p. 3, l. 44-45);
4. The finding that the Union determined how much of the total package should be allocated to pay for Health Insurance, how much should go into the Pension fund and how much should be allocated to the Annuity fund. (ALJ Decision, p. 3, l. 45-47);
5. The finding that from Cofire' perspective, the allocation of monies was of no concern, since their obligation was simply to pay a total amount of money per employee per hour. (ALJ Decision, p. 3, l. 47, p. 4, l. 1-2)
6. The finding that the parties agreed to include the "shipper" into the bargaining unit and that there were five employees in the unit during this time. (ALJ Decision, p. 5, l. 40-42)
7. The finding that the topic of vacation pay was not really discussed at the negotiations and there is no dispute that the Company did not notify the Union about its decision to reduce the amount of vacation pay. (ALJ Decision, p. 10, l. 31-34)

A. The RC Election

The NLRB election involving the asphalt plant workers was held on July 27, 2005 and Cofire was provided with a certified copy of the election results in August 2005. (T. p. 335, l. 13-24, p. 336, l. 1-11) Local 175 prevailed in the election at Cofire in August 2005. (T. p. 114, l. 18-24) In fact, all of the Local 1175 represented asphalt companies that were parties to the GCA agreement were decertified in 2005 and such companies' employees are now represented by Local 175. (T. p.95, l. 19-25, p. 96, l. 1-3)

Further, the Regional Director's Order dated July 15, 2005 granted Local 175's request to withdraw the shipper from the overall unit due to the one man unit rule. (Case No. 29-RC-10354, Order dated July 15, 2005) Moreover, a Stipulated Election Agreement was not entered until May 24, 2006 which only then permitted the shipper the right to vote and decide whether he wished to join the overall unit. (29-RC-11340) Clearly, the certification of the asphalt plant shipper occurred over two (2) months after the March 24, 2006 lockout.

B. The Bargaining Sessions between Cofire and Local 175

1. The September 14th Meeting

Holland received a proposed memorandum of understanding ("MOU") from the Union dated August 30, 2005. (T. p. 338, l. 2-12, GC Exhibit # 6, p. 19-24) Holland advised Tomaszewski that he had received the MOU through counsel and that the issue of benefit Fund monies was not raised. (T. p. 338, l. 13-22) Holland testified that Tomaszewski asked him to sign the MOU at the first meeting. (T. p. 341, l. 22-25)

Tomaszewski verified that the Union's August 30th proposal sought a contract with Cofire retroactive to August 6, 2005 and that Tomaszewski advised Holland that

retroactivity was tied to the Union's certification date. (T. p. 162, l. 8-18) Tomaszewski further testified that paragraph 1 of the proposal would have required Cofire to submit fringe benefit Fund contributions to the Local 175 Funds retroactive to August 6, 2005. (T. p. 163, l. 4-15) Ultimately, Cofire did not sign the August 30th proposal. (T. p. 163, l. 16-18)

2. The September 22nd meeting

Holland informed the Union that he did not think it would be economically feasible for the company to continue operating under the terms of the expired 1175 agreement. (T. p. 339, l. 11-25) The Union delegates responded by asking Cofire to continue its asphalt manufacturing operation and negotiations. (T. p. 339, l. 11-25) Holland stated that the company was asked to pay into the 175 Welfare Fund and that he declined because he did not feel it was in the company's best interest to agree on one issue when so many other issues remained open. (T. p. 340, l. 5-8)

Tomaszewski confirmed that the Union's September 21st MOU proposal sought to have Cofire contribute Health, Pension and Annuity monies to the 175 Funds and retroactive to August 2005. (T. p. 165, l. 24-25, p. 166, l. 1-2, p. 166, l. 16-25)

Falzone testified that the meeting concerned the unit employees health insurance and that the Union requested a three year contract with annual percentage increases of 5 ¼ %, 5 ½ % and 5 ¾% based upon the unit employees prior wage and benefit package. (T. p. 235, l. 16-25, p. 236, l. 1-3) This percentage increase was contained in the collective bargaining agreement between Grace and Local 175. (T. p. 237, l. 8-15) Falzone also testified that there was an agreement with Willets Point and "It's the same contract everybody signs, just the same contract. There's no different contract for

different plant." (T. p. 242, l. 13, 15-21) Falzone testified that the percentage increases were verbally presented to Cofire. (T. 245, l. 6-17)

After the September 21, 2005 proposal, Tomaszewski could not point to another written proposal that was made by the Union. (T. p. 189, l. 1-6) Although Tomaszewski could not recall if Holland advised him at the November 2005 meeting that it was economically unfeasible for the company to continue the terms of the expired agreement, Tomaszewski acknowledged that Holland was "complaining that he had too many men to run his operation and that there needed to be some very big changes for him to continue to operate." (T. p. 189, l. 11-22) Tomaszewski also acknowledged that Holland said he was having a hard time, "we kind of knew that. The industry knows that, that Cofire is not, you know, a big powerful company, so we knew that he had a little, he was having some trouble..." (T. p. 191, l. 12-15) Tomaszewski acknowledged that during negotiations, Holland advised the Union that the company could not continue to operate this plant under the existing economic conditions and that Tomaszewski knew that there was truth in Holland's statement. (T. p. 192, l. 20-25, p. 193, l. 1-5)

On re-direct examination, Tomaszewski testified that previous economic accommodations had been made to Cofire by 1175. (T. p. 22, l. 17-24) Tomaszewski testified that for a period of more than one year, Cofire's employees rotated on a four-day schedule for four day's pay and worked through lunch to allow Cofire to remain open five days a week. (T. p. 223, l. 1-8)

3. <u>Cofire's alleged promise to escrow the trust Fund monies</u>

It is Holland's position that he did not make an oral promise to the Union to escrow the trust Fund monies and asserted that such an arrangement would have required

a written agreement that would have required the company to deposit the Funds into an account. (T. p. 342, l. 19-23) Holland maintains that he never promised that the company would escrow the Pension, Annuity and Welfare monies and did not recall the issue being raised by the Union. (T. p. 342, l. 7-18)

4. The Local 175 Trust Fund Summary Plan Descriptions

Throughout the course of negotiations Cofire never received the summary plan descriptions for the Local 175 Benefit Funds. (T. p. 345, l. 3-9) The following testimony occurred:

> Mr. Chaikin: "The Local 175 Pension, Annuity and Welfare Funds were created effective July 1, 2005; commenced receiving contributions from one or more firms, some of which were retroactive to July 1, 2005; that the trust agreements ... for the Pension, Annuity and Welfare plans were provided to Respondent, Cofire, however SPDs or summary plan descriptions were not available at the time of the request in that they're not required to be produced until after the Internal Revenue Service actually issues an approval of the plan, which they had not done at the time of the request." (T. p. 207, l. 24-25, p. 208, l. 1-9):
>
> Judge Green: "Okay. So the bottom line is what he wants, what Mr. Ziskin wants is an acknowledgement that such SPDs were not provided to Cofire during the negotiation period." (T. p. 208, l. 15-17)
>
> Mr. Chaikin: "That would be correct." (T. p. 208, l. 18)

5. The October 21, 2005 Meeting

Holland made a verbal offer at the meeting to put the employees into the company's health insurance plan and stated that any costs incurred by the company would be deducted from any future package. (T. p. 348, l. 2-9) The office health plan covers Holland and the company's administrative personnel. (T. p. 347, l. 1-9)

Tomaszewski agreed that the health care issue was discussed and that Holland proposed placing the unit employees on the company's private health insurance plan. (T.

p. 122, l. 14-21) Tomaszewski acknowledged that Cofire offered to place the unit employees on the company's healthcare plan with Blue Cross/Blue Shield. (T. p. 174, l. 15-18, p. 175, l. 1-4)

Falzone also admitted that by October 2005, Holland offered to place the unit employees on the company's private health insurance plan. (T. p. 281, l. 3-14)

Falzone testified that Holland advised the Union that it was not economically feasible for the company to continue the terms and conditions from the expired 1175 agreement. (T. p. 271, l. 24-25, p. 272, l. 1-2) Falzone testified that Holland made that statement at every meeting. (T. p. 272, l. 4-17) Falzone testified that Holland raised the company's tonnage capabilities as a reason for its inability to maintain the expired terms. (T. p. 273, l. 17-19) Falzone also acknowledged that Cofire's tonnage capabilities were substantially less than Grace, Willets Point and College Point. (T. p. 274, l. 6-17)

6. The October 31, 2005 written offer of health insurance

By letter dated October 31, 2005, Holland sent a written offer to the Union's attorney describing the company's offer of health insurance and attached a brief summary plan description that set forth the co-payments, deductibles and prescription coverage. (T. p. 349, l. 1-25, p. 350, l. 1-4; GC Exhibit # 6, p. 176, l. 17-25, p. 177, l. 1)

7. The November 8th letter

Holland was hand delivered a letter on Local 175 letterhead dated November 8, 2005. (T. p. 351, l. 1-14; GC Exhibit # 6-B) Tomaszewski acknowledged that unit employees accepted the company's offer of health insurance by letter dated November 8, 2005. (T. p. 177, l. 23-25, p. 178, l. 1-6) In his affidavit to the NLRB, Tomaszewski testified that he "told Holland that the men would have to accept the company's health

insurance plan…" (T. p. 178, l. 21-22) Tomaszewski confirmed that after receiving the November 8th letter, Cofire provided the health care coverage to the unit employees and made it retroactive. (T. p. 179, l. 11-16)

8. Cofire's Health Insurance Plan

The health insurance plan was implemented for the unit employees. (T. p. 352, l. 4-6) The billing statements from Empire Blue Cross reflect that the employees were covered under the company's policy for the period October 1, 2005 through March 2006. (T. p. 352, l. 11-25) The Empire billing statement reflects that the monthly cost was as $5,341.96. (Respondent's Ex. # 10, p. 2) Cofire paid the cost of the employees' health insurance. (T. p. 356, l. 11-15)

9. Local 1175 Welfare Fund

Prior to the period ending June 30, 2005, Cofire made contributions on behalf of its unit employees to the Local 1175 Funds. (T. p. 356, l. 17-20; Respondent's Exhibit # 11) Cofire's "Paid Invoice Register" reflects the various payments to the Local 1175 Benefit Funds for the period December 2004 through June 2005. (T. p. 357, l. 6-8, Respondent's Exhibit 11) Cofire's monthly contribution to the Local 1175 Welfare Fund varied depending upon hour worked by the unit employees and is set forth below: (T. p.358-359, p. 360, l. 1-4; Respondent's Exhibit 11)

Month Ending	Amount Paid
December 31, 2004	$5,302.51
January 31, 2005	$2,746.45
February 28, 2005	$3,404.31
March 31, 2005	$3,276.13
April 30, 2005	$2,416.57
May 31, 2005	$2,601.30
June 30, 2005	$4,688.00

10. The November 2, 2005 meeting

At this meeting, Holland reiterated his position to the Union that it was not economically feasible for the company to operate under the terms of the expired 1175 agreement and mentioned the withdrawal liability assessment from the 1175 Pension Fund. (T. p. 361, l. 21-25, p. 362, l. 1-6) In response, the Union delegates suggested a lower manning requirement through attrition which Holland believed had two problems: (1) the union would not put the offer in writing; and (2) Cofire was an older plant and could not reduce its staffing because it needed laborers to fill pails of liquid asphalt . (T. p. 362, l. 7-25, p. 363, l. 1-2) Holland suggested a tiered structure for the unit employees and Falzone suggested an incentive based plan based on annual asphalt production. (T. p. 363, l. 3-13)

11. <u>The November 10, 2005 meeting</u>

At this meeting Holland provided a proposal that included incentives based on annual asphalt tonnage. (T. p. 364, l. 1-3; GC Exhibit # 9) The document was entitled "Cofire Paving Corp. Asphalt Plant Workers Wage and Benefit Proposal." (T. p. 364, l. 5-8) The proposal was prepared by Holland between the first and second November meeting. (T. p. 364, l. 4-12) The proposal was provided by Holland to the Union at the second meeting. (T. p. 364, l. 22-25, p. 365, l. 1) According to Holland, the Union officials were confused by the proposal in its spreadsheet form and Holland explained that the spreadsheet detailed the theoretical costs of labor for a full year with no overtime under the expired contract in comparison to the company's proposal that included a company administered defined contribution plan. (T. p. 365, l. 6-20; GC Exhibit # 9)

Holland explained that the proposal would reduce the company's labor costs from approximately $585,000 per year to $429,000 pursuant to the proposed wage scale and benefit package in the proposal. (T. p. 267, l. 7-25, p. 377, l. 10-20; GC Exhibit # 9)

Holland also advised the Union that the other asphalt plant labor costs per ton of asphalt were approximately $2.50 per ton whereas Cofire's per ton labor costs were in the mid-teens per ton because of actual asphalt tonnage production. (T. p. 368, l. 7-18) The proposal's defined contribution plan was tied to annual asphalt tonnage production. (T. p. 375, l. 11-125, p. 376, l. 1-15) Additionally, the proposal included a vacation entitlement of two weeks upon working 1,040 hours. (T. p. 378, l. 3-6)

The proposal also continued the unit employees in the company's existing Empire Healthchoice plan. (T. p. 378, l. 8-14) Holland testified that the proposal was not rejected at the meeting and that the Union promised a response to the offer. (T. p. 378, l. 15-18)

Tomaszewski acknowledged that he saw a spreadsheet similar the document that was entitled "Cofire Paving Corp. Asphalt Plant Workers Wage and Benefit Proposal" and that the spreadsheet was received by the Union at a bargaining session. (T. p. 185, l. 18-25, p. 186, l. 1-21; GC Exhibit # 9) Falzone also admitted that Cofire provided the Union with a Wage and Benefit Proposal during the course of negotiations. (T. p. 285, l. 11-25, p. 286, l. 1-2; GC Exhibit # 9)

12. <u>The March 22, 2006 meeting</u>

Holland testified that no meetings were held between the second November meeting and the March 2006 meeting. (T. p. 378, l. 23-25) Between such meetings, the Union never responded to the company's wage and benefit proposal. (T. p. 379, l. 2-13)

Holland provided a full draft agreement to the Union at the March 22nd meeting. (T. p.381, l. 8-17) The March 22nd company proposal further reduced economic considerations after Holland completed an analysis of the asphalt plant operations. (T. p. 382, l. 1-9; GC Exhibit # 9) Tomaszewski testified that the Union received a written proposal from the company in March 2006 and a spreadsheet from Cofire that showed where the company needed to be in order to stay in business. (T. p. 184, l. 6-10; GC Exhibit # 9)

Holland discussed the proposal with the Union and the delegates stated that the Union wanted to work with Cofire and that they did not want Cofire to shut down, but did not present a counter-offer. (T. p. 382, l. 18-25, p. 383, l. 1-7) Tomaszewski acknowledged that a proposal was made by Cofire and that the terms and conditions in the proposal were what Cofire needed in order to continue running its operation. (T. p. 133, l. 18-25, p. 134, l. 1-5; GC Exhibit # 9) The Union presented the offer to the unit employees who rejected the proposal almost immediately and one unit employee did suggest that the company shut down. (T. p. 383, l. 15-25, p. 384, l. 1-4) Tomaszewski testified that the unit employees entered the meeting and voted on the company's proposal. (T. p. 135, l. 17-25, p. 136, l. 17) The unit employees rejected the proposal. (T. p. 137, l. 1-7) Tomaszewski acknowledged that during negotiations, the Union did not make any written accommodations to Cofire. (T. p. 225, l. 5-25)

Tomaszewski testified that Holland response was that this was the company's best and final proposal and that the company might close because it could not afford the old wage and benefit package. (T. p. 137, l. 9-12)

Falzone testified that Holland stated that "... since the asphalt plant doesn't make any money, I'm not going to be able to stay in business. So I might close the plant." (T. p. 249, l. 23-25)

13. The March 24th Lockout

Holland discussed the March meeting with his partners, which included a review of the Winter 2006 season that showed a gross loss for the season. (T. p. 384, l. 14-25) Holland determined that if the men could not accept the offer or provide a realistic counter offer, the decision was made to close the plant until some future agreement with the Union could be reached. (T. p. 385, l. 1-8) Thereafter, Cofire notified the Union of the plant closing by letter dated March 24, 2006. (T. p. 385, l. 9-25, P. 386; Respondent's Exhibit # 8)

On March 24, 2006, Tomaszewski was advised that the asphalt plant had been closed because it was not economically feasible and that the company would continue to negotiate. (T. p. 139, l. 13-17)

Falzone testified that the unit employees also received written notice that the asphalt plant was closing and that March 24th would be the last day until an agreement was reached with the Union. (T. p. 256, l. 1-13; GC Exhibit # 19)

The March 24, 2006 letter sets forth:

- Cofire engaged in negotiation sesssions with Local 175 on October 21, November 2nd, November 10th and March 22nd
- At the meeting on November 10th, Cofire presented a summary proposal of wages and benefits and never received a response or counter-offer to the proposal

- Cofire determined that it was not economically feasible to continue operating the asphalt plant; and that it would be closing the plant while the company continued negotiations. (Respondent's Exhibit # 8)

14. Local 175's request for information

By letter dated March 27, 2006, Local 175 requested documentation from Cofire to support its position that it was not economically feasible for the company to continue operating its asphalt plant. (T. p. 387, l. 13-24; Respondent's Exhibit # 12) In response, Cofire and Local 175 entered into a confidentiality agreement in which Cofire agreed to produce the requested documentation. (T. p. 388, l. 8-24; Respondent's Exhibit # 13) Thereafter, Cofire provided information regarding the employees earnings for the period April 2005 through March 2006; fringe benefit Fund contributions from April 2005 through March 2006; the asphalt plant's annual financial statements for the period 2001-2003. (T. p. 389-391; Respondent's Exhibit # 13) The annual financial statements for 2001-2003 reflect an operating loss for the asphalt plant. (T. p. 391, l. 5-14) The company's pro forma financial statement for 2004 reflected a gross loss of $257,244.02. (T. p. 391; Respondent's Exhibit # 13) The company's pro forma financial statement for 2005 reflected a gross loss of $572,269.95. (T. p. 391; Respondent's Exhibit # 13) The Company's pro forma financial statement for the first quarter of 2006 reflected a gross loss of $65,472.59 (T. p. 391-392; Respondent's Exhibit # 13)

15. The June 2006 meeting

The Union did not provide a counteroffer to the company's proposals and Local 175 merely offered to have the unit employees return to work under the terms of the expired agreement. (T. p. 394, l. 7-14) Holland rejected the Union's proposal at the

meeting. (T. p. 394, l. 18-20) At the time of the June 2006 meeting, Cofire had not yet received the Local 175 Fund summary plan descriptions. (T. p. 394, l. 20-24)

Falzone testified that Holland did not alter the company's March 2006 proposal at the June meeting. (T. p. 253, l. 5-8) Falzone testified that the Union offered concessions at the meeting such as "no classification" and not having to replace retirees. (T. p. 253, l. 13-19) Falzone testified that the "no classification" requirement would allow the company to use the same employees to handle different job functions as long as the unit employees did not lose their jobs. (T. p. 254, l. 18-25)

16. The Current Status of Cofire's Asphalt Plant

The asphalt plant remains closed, but has not been dismantled. (T. p. 394, l. 25, p. 395, l. 1-4) Although there are no imminent plans to reopen the plant, Holland testified that the plant would be re-opened if an agreement with the union is reached. (T. p. 395, l. 11-25, p. 396, l. 1-15) The Union has not requested a meeting with Cofire since June 2006. (T. p. 396, l. 18-22)

17. Withdrawal Liability

Cofire's "Paid Invoice Register" indicates that the company's first quarterly payment of $6,684.34 was submitted to the Local 1175 Pension Fund in connection with the company's withdrawal liability obligation. (T. p. 360, l. 6-14, p. 361, l. 1-8) The total assessment is approximately $250,000 and is to be paid in quarterly payments over a period of ten years. (T. p. 360, l. 15-21; Respondent's Exhibit 11) Tomaszewski acknowledged that Holland advised that Cofire had withdrawal liability to the 1175 Pension Fund and that a "nice amount of money" was owed. (T. p. 196, l. 23-25, p. 197, l. 1-10)

18. The Asphalt Plant Agreements

Falzone testified that Willets Point, Grace and College Point Asphalt each agreed to three year increases of 5 ¼%, 5 ½% and 5 ¾%. (T. p. 259, l. 20-25, p. 260, l. 1-14) Falzone confirmed that the same percentage increases were proposed to Cofire as well. (T. p.260, l. 15-17) Falzone could not recall if the Union ever offered Cofire a small percentage increase than what was agreed to by the other asphalt plants. (T. p. 261, l. 15-21)

a. Willets Point Agreement

The Union entered into a written agreement with Willets Point Asphalt covering the company's asphalt plant workers. (T. p. 262; Respondent's Exhibit # 5) Falzone signed the contract. (T. p. 262, l. 24-25, p. 263, l. 1) The agreement was entered into on June 9, 2006 and was retroactive to December 1, 2005. (T. p. 262, l. 2-3; Respondent's Exhibit # 5, p. 18 and addendum) Falzone acknowledged that there are specific wage rates in the Willets Point agreement. (T. p. 263, l. 4-18; Respondent's Exhibit # 5, p. 5) Falzone further acknowledged that there are specified fringe benefit rates in the agreement, including $3.77 per hour to the Local 175 Welfare Fund. (T. p. 264, l. 7-11; Respondent's Exhibit # 5, p. 8-10) Finally, Falzone testified that the agreement contained a "Most Favored Nations" clause that he described as "… whatever we give to one company, we have to give to the others." (T. p. 264, l. 12-19; Respondent's Exhibit # 5, p. 18)

In part, the Willets Point collective bargaining agreement provides the following wages and benefits:

- Increases

- 7/1/05… $2.60 per hour; 7/1/06…. $2.86 per hour; and 7/1/07… $3.16 per hour
- Hourly Wages
- July 1, 2005… $41.17 per hour; July 1, 2006… $44.03 per hour; and July 1, 2007… $47.19 per hour (Respondent's Exhibit # 5, p. 5)
- Welfare Fund Contributions
- July 1, 2005… $3.77 per hour (Respondent's Exhibit # 5, p. 8)
- Pension Fund Contributions
- July 1, 2005… $1.43 per hour (Respondent's Exhibit # 5, p. 9)
- Annuity Fund Contributions
- July 1, 2005… Straight Time…$5.70 per hour (Respondent's Exhibit # 5, p. 9-10)
- Most Favored Nations Clause- "The Union agrees that it will not enter into an Agreement with any employer containing more favorable conditions or wages than those agreed to in the current Agreement. Should it be shown that more favorable conditions or wages prevail, then more favorable conditions or wages shall apply to all signatories to this Agreement." (Respondent's Exhibit # 5, p. 18) In part, the addendum provides the following terms:
- "There will be no job classifications-plant worker only."
- "The contract will be five years with five percent total increases each of the last two years."
- "There will be six men for a minimum of 8 hours in each 24 hour period of a normal work week." (Respondent's Exhibit # 5, addendum following p. 18)

b. College Point Agreement

The Union entered into a written agreement with College Point Asphalt covering the company's asphalt plant workers. (T. p. 267, l. 11-19, p. 270, l. 22-24; Respondent's Exhibits # 6-7) Falzone signed the contract. (T. p. 268, l. 6-7,) The agreement was retroactive to December 1, 2005. (Respondent's Exhibit # 7, p. 1) Falzone acknowledged that there are specific wage rates in the College Point agreement. (T. p. 268, l. 8-18; Respondent's Exhibit # 6, p. 5) Falzone further acknowledged that there are specified fringe benefit rates in the agreement, including $3.77 per hour to the Local 175 Welfare Fund. (T. p. 268, l. 20-25, p. 269, l. 1-2; Respondent's Exhibit # 6, p. 8-10) Finally, Falzone testified that the agreement also contained a "Most Favored Nations." (T. p. 269, l. 14-18; Respondent's Exhibit # 6, p. 18)

In part, the College Point collective bargaining agreement provides the following wages and benefits:

- Increases
- 7/1/05… $2.60 per hour; 7/1/06…. $2.86 per hour; and 7/1/07… $3.16 per hour
- Hourly Wages
- July 1, 2005… $41.17 per hour; July 1, 2006… $44.03 per hour; and July 1, 2007… $47.19 per hour (Respondent's Exhibit # 6, p. 5)
- Welfare Fund Contributions
- July 1, 2005… $3.77 per hour (Respondent's Exhibit # 6, p. 8)
- Pension Fund Contributions
- July 1, 2005… $1.43 per hour (Respondent's Exhibit # 6, p. 9)
- Annuity Fund Contributions
- July 1, 2005… Straight Time…$5.70 per hour (Respondent's Exhibit # 6, p. 9-10)

- Most Favored Nations Clause- "The Union agrees that it will not enter into an Agreement with any employer containing more favorable conditions or wages than those agreed to in the current Agreement. Should it be shown that more favorable conditions or wages prevail, then more favorable conditions or wages shall apply to all signatories to this Agreement." (Respondent's Exhibit # 6, p. 18)

In part, the addendum provides the following terms:

- "There will be no job classifications-plant worker only."
- "The contract will be five years with five percent total increases each of the last two years."
- "There will be six men for a minimum of 8 hours in each 24 hour period of a normal work week." (Respondent's Exhibit # 7, addendum p. 1)

19. The Local 1175 Trust Funds

The Local 1175 Fund Administrator testified that Cofire withdrew as a contributing employer in August of 2005 and that the company ceased making fringe benefit contributions. (T. p. 64, l. 21-25, p. 65, l. 1-4) The 1175 Funds have not requested that Cofire continue contributions since August 2005 and Fund Administrator acknowledged that 1175 Funds' operating agreements specifically prohibit the 1175 Funds from accepting contributions to the Welfare, Pension and Annuity Funds. (T. p.65, l. 9-16)

The "Amended Agreement and Declaration of Trust for the Material Yard Workers Local # 1175 Welfare Fund" serves as the operating agreement for the Welfare Fund's Trustees and contains various rules of the Fund, including the Funding of the Funds and various definitions. (T. p. 67, l. 7-25, p. 68, l. 1-4, Respondent's Exhibit # 2)

Article I, Section 1 of the Welfare Fund trust agreement contains a definition for the term "contributing employer" which reads:

> "The term 'Contributing Employer' as used herein, shall mean an employer who has in force, or who hereinafter executes, a collective bargaining agreement with the Union providing for such Employer's participation in the Fund by making regular payment thereto or who agrees to make the payments required by such collective bargaining agreement or other written agreement." (Respondent's Exhibit # 2, p. 2)

The "Agreement and Declaration of Trust Establishing the Material Yard Workers Local # 1175 Pension Fund" serves as the operating agreement for the Pension Fund's Trustees and contains various rules and regulations of the Fund. (T. p. 71, 10-13, Respondent's Exhibit # 3) Article 12, Section 1 of the Pension Fund trust agreement contains a definition for the term "termination of individual employers" which reads:

> "An Employer shall cease to be an Employer within the meaning of this Agreement and Declaration of Trust when he is no longer obligated, pursuant to a Collective Bargaining Agreement with the Local Union to make contributions to this Pension Fund, or, as determined by the Trustees, when he is delinquent in his contributions or reports to the Pension Fund." (Respondent's Exhibit # 3, p. 10)

The "Agreement and Declaration of Trust Establishing the Material Yard Workers Local # 1175 Annuity Fund" serves as the operating agreement for the Annuity Fund's Trustees and contains various rules and regulations governing the Fund. (T. p. 73, l. 10-19, Respondent's Exhibit # 4) Article I, Section 1 of the Annuity Fund trust agreement contains a definition for the term "employer" which reads:

> "The term 'Employer' as used herein, shall mean an employer who has presently in force, or who hereinafter executes a collective bargaining agreement or other written agreement with the Union or the Fund either through the Association with whom the Union is in the collective bargaining agreement, or individually, and which provides for such employer contributions." (T, p. 73-74; Respondent's Exhibit # 4, p. 1)

ARGUMENT

SUMMARY ARGUMENT

For the following reasons, Cofire asserts that the complaint should be dismissed in its entirety as the Administrative Law Judge did not reconcile his holding with the record evidence and established Board case law:

Issue 1: The evidence in the record and the applicable law does not support the Administrative Law Judge's finding that that Cofire violated Section 8(a)(1) & (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay directly into its employees paychecks the amounts of money that the company had previously paid to a pension and an annuity plan. (Exceptions one (1) through thirty (30))

1. Pursuant to Section 8(d) of the Act, Cofire and Local 1175 were not bound to the terms and conditions of employment set forth in Cofire and Local 175's expired collective bargaining agreement. The company was lawfully discharged from obligations under such agreement when Local 1175 was decertified as the employees designated bargaining representative and replaced by Local 175 pursuant to a Board run election and certification.
    a. The Board cannot compel Cofire and Local 175 to reach a collective bargaining agreement that provides for welfare, pension, annuity and vacation benefits. The Board may only compel the parties to bargain over such terms and conditions of employment.

After Local 175 was certified under the Board's election procedures, the Act required that Cofire meet and bargain with the newly designated collective bargaining agent (the Union) for the purpose of negotiating a collective bargaining agreement. This obligation does not, however, compel the parties to come to any agreement arising from such negotiations. In fact, the Supreme Court specifically held in H. K. Porter Co. v. NLRB, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970) that the Board does not have the power to compel the parties to agree to any substantive terms and conditions of employment.

In H.K. Porter Co. the Supreme Court found that that the employer violated section 8(a)(5) by its refusal to consent to a proposed dues checkoff provision, due to its efforts to disrupt the bargaining process. However, the court held that the Board erred in ordering the employer to agree to the inclusion of a dues checkoff provision in the contract:

> "... while the Board does have power . . . to require employers and employees to negotiate, **it is without power to compel a company or a union to agree to any substantive contractual provision** of a collective-bargaining agreement. It would be anomalous indeed to hold that while s 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under s 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract." (Emphasis added) 397 U.S., at 102, 108, 90 S.Ct., at 823, 826 (citations omitted).

As such, the Board cannot compel Cofire to remit health, pension, annuity and vacation payments to Local 175 because to do so would essentially compel the employer to agree to terms of a contract which is still in the negotiation stage. In fact, multiple negotiation sessions between Cofire and Local 175 have failed to yield any agreement between the parties concerning pension, annuity and vacation entitlements.

Cofire's obligation under the Act is analogous to the Section 8(d) duties of a successor employer. A successor employer is required to bargain with its predecessor's union, but is not required to abide by the terms and conditions of the predecessor's agreement. While Cofire has a duty to bargain with Local 175, it is not required to observe the substantive terms of an expired collective-bargaining agreement that it had negotiated with an entirely different entity. To do so would bind the successor union to an agreement in which it had no part in negotiating.

When dealing with the issue of successor employers, the Supreme Court held that where the bargaining unit remains unchanged at the time of change in employers and when a majority of the employees hired by the new employer are represented by the recently certified bargaining agent, the National Labor Relations Board is entitled to order the new employer to bargain with the incumbent union. Burns International Security Services, Inc. v. NLRB, 406 U.S. 272, 281, 92 S.Ct. 1571, 1579, 32 L.Ed.2d 61, 80 L.R.R.M. (BNA) 2225, National Labor Relations Act, §§ 8(a) (5), (d), 9(a) as amended 29 U.S.C.A. §§ 158(a) (5), (d), 159(a). The Court in Burns noted that:

> **"It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed.** Section 8(d) of the Act expressly provides that the existence of such bargaining obligation 'does not compel either party to agree to a proposal or require the making of a concession.'" Id. at 281-282.

Pursuant to Section 8(d) of the Act, the Board cannot require Cofire and Local 175 to reach a collective bargaining agreement that provides for welfare, pension, annuity and vacation benefits, as the Board lacks the power to compel parties agreement to substantive contract terms. The Board has only the authority to compel the parties to bargain over such terms.

b. Cofire is not bound by the terms and conditions of the expired collective bargaining agreement with Local 1175 once such union was decertified and replaced by Local 175.

The Burns Court referred to the very circumstances at issue in the instant case as a part of its conclusion that a successor employer merely has the duty of bargaining with his predecessor's union and is not bound by the substantive provisions of a collective-

bargaining agreement negotiated by their predecessor. Id. at 284. Specifically, the Burns Court stated that:

> "FN8. **When the union that has signed a collective-bargaining contract is decertified, the succeeding union certified by the Board is not bound by the prior contract, need not administer it, and may demand negotiations for a new contract, even if the terms of the old contract have not yet expired.** (Emphasis added) American Seating Co., 106 N.L.R.B. 250 (1953); Farmbest, Inc., 154 N.L.R.B. 1421, 1453--1454 (1965), enf. with mod. sub nom. Farmbest, Inc. v. NLRB, 370 F.2d 1015 (CA8 1967); see also Modine Mfg. Co. v. Grand Lodge International Association on Machinists, 216 F.2d 326 (CA6 1954). The board has declined to overturn its 'long standing' American Seating rule after Burns. General Dynamics Corp., 184 N.L.R.B. No. 71 (1970)." Id. at 284.

As set forth in the footnote above, Cofire is not bound by the contract with Local 1175.

Since Burns, the Board, on two occasions has held that, **"It is well settled, that when a union is decertified, or when an employer transfers its business to a successor employer, the succeeding union or employer is not bound by a prior contract, even if the terms of the contract have not yet expired."** (Emphasis added) American Sunroof Corporation-West Coast, Inc., 243 NLRB No. 172, 243 NLRB 1128, 1129-1130 102 L.R.R.M. (BNA) 1086, 1979-80 NLRB Dec. P 16093, 1979 WL 9389 (N.L.R.B.); and Sanders Bus Lines, Inc., 256 NLRB 316, 256 NLRB No. 56, 1981 WL 20452 (N.L.R.B.), 107 L.R.R.M. (BNA) 1260, 1980-81 NLRB Dec. P 18,114.

The Board has made it clear that the Section 8(d) obligation to maintain the status quo ceases in two situations. One situation is where the union has been decertified and the second occurs when a successor employer has assumed the operations of an employer that had a collective bargaining agreement with the incumbent union. Therefore, Cofire cannot be bound by the terms of the expired contract with Local 1175.

In American Sunroof Corporation-West Coast, Inc., the Board went so far as to hold that a collective-bargaining agreement is terminable at will and that dissatisfied employees may escape the terms of their contract by filing a deauthorization petition in order to compel their employer to renegotiate employment conditions simply by persuading their current representative to disclaim interest in representing them. Id. at 1129-1330.

In Sanders Bus Lines, Inc., the NLRB held that the employer could not assert that its collective-bargaining agreement with a defunct Union remained in effect after the dissolution of such Union and the subsequent certification of a successor Union. Id. at 317.

c. Cofire was lawfully discharged from its obligation to maintain the status quo when Local 1175 was decertified as bargaining representative and replaced by Local 175 and, as such ,Cofire was permitted to unilaterally change the terms and conditions of the expired contract.

In Bayshore Electrical Supply Co. and Amalgamated Union Local 355, 1992 WL 1465459 (N.L.R.B. Div. of Judges) Administrative Law Judge Green specifically found:

> **"...after a contract expires, an employer may not unilaterally change the existing terms and conditions of employment as embodied in the expired contract, (insofar as they relate to mandatory subjects of bargaining), without first bargaining in good faith to a new agreement or impasse, unless it lawfully is discharged from its obligation to bargain; for example if the union were to be decertified or replaced by another union under the election procedures established by the Board."** (Emphasis added)

Judge Green's findings specifically referenced the very factual circumstances present in this case. He found that an employer is permitted to unilaterally change the terms and conditions of an expired contract upon a superseding union certification.

Similarly, in Kings Material Handling Corp., 2005 WL 3487613 (N.L.R.B. Div. of Judges) Case 29-CA-26991, JD(NY)-53-05, Judge Green held that:

> "It is well established that even after the expiration of a collective bargaining agreement, the extant wages and terms and conditions of employment, including contractually agreed upon visitation rights, continue in effect and cannot be unilaterally changed until such time as the parties reach an impasse in bargaining, reach a new agreement modifying those terms, or **until the Employer is legally discharged from its obligation to bargain with the Union.** (Emphasis added) Citing to Lihli Fashions, 317 NLRB 163 (1995) enfd. in part, 80 F.3d 743, 151 L.R.R.M. (BNA) 2941, (2nd Cir, 1996); West Lawrence Care Center Inc., 308 NLRB 1011 (1992); W.A. Krueger Co., 299 NLRB 914, 915 (1990); Roman Iron Works, 292 NLRB 1292, 1293 (1989)." Emphasis added

In Lihli Fashions Corp., 317 NLRB No. 24, Judge Green stated that:

> "Under the National Labor Relations Act, an employer **may not unilaterally change the terms of employment as set out by the terms of a collective-bargaining agreement, even after the contract expires.** The employer is required to maintain the contract's terms and conditions, including payments to benefit funds, (but not the checkoff of union dues), until a new agreement is reached which modifies or terminates such obligations; or until after an impasse is reached whereupon a company may unilaterally implement some or all of its last contract offer; or **until the employer is legally discharged from its obligation to recognize and bargain with the Union."** (Emphasis added) Citing to W. A. Krueger Co., 299 NLRB 914, 915 (1990); Roman Iron Works, 292 NLRB 1292, 1293 (1989).

d. Section 8(d) of the Act permits an employer to terminate and/or modify a collective bargaining agreement upon an intervening certification when the labor organization which is a party to the contract has been superseded as the representative of the employees subject to the provisions of section 9(a).

Section 8 (d) provides that no party to an existing collective bargaining agreement: … shall terminate or modify such contract, unless the party desiring such termination or modification:

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or

modification;
(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

Section 8 (d) then provides that:

> **"The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a)**, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." (Emphasis added)

It is clear that pursuant to Section 8(d) an employer may terminate or modify a collective bargaining agreement without meeting the requirements set forth in Section 8(d)(2)(3)and (4) of the Act so long as there has been "an intervening certification of the Board, under which the labor organization ..., which is a party to the contract, has been <u>superseded</u> as or ceased to be the representative of the employees subject to the provisions of section 9(a)." (Emphasis added) Such provision unequivocally applies in this matter.

Upon the intervening certification, the employer and/or union seeking to terminate or modify the collective bargaining agreement is <u>not</u> required to: (1) offer to

meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; (2) notify the Federal Mediation and Conciliation Service; and (3) continue in full force and effect all the terms and conditions of the existing contract.

This provision permitted Cofire to terminate and/or modify the terms and conditions of the expired collective bargaining agreement when Local 1175 was decertified and replaced by Local 175, the superseding union, pursuant to the Board's election procedures. Thus, Cofire was free to terminate and/or modify the welfare, pension, annuity and vacation provisions contained in the prior contract.

e. This matter is analogous to the Trial Examiner's finding in American Seating

In American Seating Company, 106 NLRB No. 44, 106 NLRB 250, 262, 32 L.R.R.M. (BNA) 1439, 1953 WL 10942 (N.L.R.B.), the Trial Examiner concluded that a collective bargaining agreement does not continue upon an intervening certification, because if an agreement did continue in such circumstances, there would be as much need for Section 8 (d) (2), (3), and (4) as in any other contract situation. (The Board did not pass judgment upon the Trial Examiner's interpretation of Section 8 (d). Id. at 256.) The question in American Seating was whether an expired collective bargaining agreement was binding on the company and the successor union after the union which negotiated the agreement was decertified. Id. at 263. In American Seating, the Judge concluded that:

> "The cause of industrial stability would not be served by holding a unit of employees and their new statutory representative to be bound by the terms of an agreement executed by a superseded rival union." Id. at 265.

In the instant matter, Local 175 and General Counsel argue that "Substitution Theory" (the theory in which a successor union is substituted for the contracting union in a previously negotiated collective bargaining agreement) requires that Cofire maintain the expired terms and conditions of the Cofire/ Local 1175 agreement and that Local 175, as the successor union, should be substituted for Local 1175 to administer the expired agreement on behalf of the unit employees. Interestingly, General Counsel in American Seating argued against the imposition of "Substitution Theory."

The imposition of "Substitution Theory" was rejected by the Trial Examiner in American Seating who held that numerous legal issues would be raised with respect to not only determining which provisions of the expired agreement continued but also in determining which terms of the expired agreement are inherently inconsistent with the certification of the successor union. A legal determination would then have to be made with respect to the fate of those provisions which are inconsistent. Id. at 263. In American Seating, the Trial Examiner stated:

> It would appear that the substitution theory, with the numerous problems it would create in the variety of representation situations arising under the Act, is hardly conducive to the peaceful labor-management relations which the Act would promote. To adopt the theory in these cases would compound complexity in a field already overflowing with difficulties. On the other hand, the General Counsel's defeasance or inoperation theory, which would wipe the bargaining slate clean upon the certification of a new union, raises none of these problems. ...
>
> The adoption of the substitution theory would not necessarily redound to an employer's advantage in all situations, nor would it be, necessarily, to a newly certified union's disadvantage under all circumstances; this would depend entirely, it seems to me, on the economic picture at any given time as it bears on the employer's operations. I am of the opinion, however, that the cause of industrial stability would not be served by holding a unit of employees and their new statutory representative to be bound by the terms of an agreement executed by a superseded rival union. Confusion rather than stability would result. I agree with the General Counsel that the

> employees and the new union are not so bound so far as the Act is concerned, and I find no warrant in the Act, its legislative history, or in sound labor-management relations for holding the Pattern Makers to be a substituted agent for the UAW to administer the July 1950 agreements of the UAW...." Id. at 263-264.

In referring to the terms of the expired agreement, it is clear that the contract required Cofire to remit contributions directly to the Local 1175 Benefit Funds. For a newly certified union's benefit funds to be substituted in its place would be both contrary to Section 8(d) and legal precedent. (General Counsel's Exhibit # 3) As such, Cofire was not obligated to maintain the terms and conditions of the expired agreement when Local 1175 was decertified and replaced by Local 175.

f. It would be unlawful pursuant to Section 8(a)(1) and (5) of the Act for Cofire to bypass the Union and unilaterally secure pension and annuity benefits for the Unit.

Cofire asserts that after bargaining with Local 175 commenced, it could not unilaterally decide to reallocate the pension and annuity benefits previously provided to unit employees to either newly created funds or to the employees themselves as any such action would have constituted a violation of Section 8(a)(1) and (5) of the Act.

The existence or nonexistence of an impasse is normally at issue when, after negotiations have been carried on for a period of time, the position of the parties become fairly fixed and talks reach to the point of stalemate. When this occurs, the employer is free to make unilateral changes in working conditions consistent with its last offer that the union has rejected. NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962). However, before an employer may lawfully make unilateral changes, an impasse must exist.

Although Cofire President Ross Holland vehemently denied that he promised to escrow the pension and annuity monies, and no written verification of the alleged

promise exists, such a promise would have merely required Cofire to abide by whatever collective bargaining agreement was ultimately reached between Local 175 and the company. If an agreement was reached that required pension and annuity contributions retroactive to the certification date, then Cofire would become obligated to make such contributions. However, if an agreement was reached that did not require retroactive pension and annuity contributions the escrowed funds would not be utilized.

It remains possible that Cofire will at some later date enter into an agreement with Local 175 which requires the retroactive remittance of contributions to Local 175's pension and annuity funds from the effective date of the Union's August 8, 2005 certification. Absent an impasse in bargaining, it would be unlawful pursuant to Section 8(a)(1) and (5) of the Act for Cofire to bypass Local 175 and unilaterally secure pension and annuity benefits for the unit employees from another provider. Further, any such subsequently provided funds may not provide similar benefits to the unit employees. Any new fund would have substantially different eligibility requirements than the Local 1175 funds and such benefits would not merge with any preexisting benefits that were provided by Local 1175.

As it is undisputed that Local 175 has sought an agreement with Cofire that would require the company to retroactively submit pension and annuity contributions to the August 8th certification date, it would be contrary Section 8(a)(5) for Cofire to impose its own pension and/or annuity plan until an agreement or impasse is reached. Imposition of such a pension or annuity plan would then limit Cofire's ability to make retroactive contributions.

Thus, the record does not support a finding that Cofire was required to secure pension and /or annuity benefits for the Unit that are substantially equivalent to the benefits that the unit employees previously enjoyed pursuant to the collective bargaining agreement between Cofire and Local 1175. In fact any substitute pension or annuity plan may have in fact worked to the employees' detriment. It is urged that Cofire has not violated Sections 8(a)(1) and (5) of the Act and that it has properly bargained in good faith with the Union regarding pension and annuity benefits.

As is previously set forth more fully herein, the Supreme Court has held that the Board does not have the power to compel such parties to agree to any substantive terms. To hold otherwise would be inconsistent with the Supreme Court's decision in H. K. Porter Co. v. NLRB, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146 (1970).

g. Article XIII of the expired collective bargaining agreement between Cofire and Local 1175 sets forth that the agreement shall terminate on June 30, 2005.

Article XIII of the collective bargaining agreement between the General Contractors Association and Local 1175, of which Cofire was a party, provides that:

> "This Agreement shall continue in full force and effect up to and including June 30, 2005..." (General Counsel Exhibit # 3, p. 21)

The 9th Circuit in Sheet Metal Workers' Int'l Ass'n v. West Coast Sheet Metal Co., 954 F.2d 1506 (9th Cir.1992), examined the issue of when a binding collective bargaining agreement ceases to exist. The Court held that an employer's obligations to make contributions to ERISA employee benefit plans as provided for in a collective bargaining agreement ceased when the employees of the union voted to decertify the union.

Moreover, the provisions of the expired collective bargaining agreement

specifically provide that the operating agreements of the Local 1175 Trust Funds are accepted and adopted by the Employer and incorporated into the collective bargaining agreement. (General Counsel Exhibit # 3, p. 14)

As set forth above, the Local 1175 Trust Agreements define the term "Contributing Employer" and specifically excludes employers who are not parties to a collective bargaining agreement with Local 1175. (Respondent's Exhibit # 2, p. 2; Respondent's Exhibit # 3, p. 10; Respondent's Exhibit # 4, p. 1) The 1175 Trust Funds did not consider Cofire to be a contributing employer pursuant to the terms of the Funds' operating agreements effective on the date of the decertification. (T. p. 68, l. 19-25, p. 69, l. 1, p. 71, l. 1, p. 72, l. 3-5, p. 74, l. 4-7)

As such, upon the decertification of Local 1175, the expired collective bargaining agreement became inoperative and Cofire's obligation to maintain the terms and conditions of the expired agreement ceased.

Issue 2: <u>The evidence in the record and the applicable law does not support the Administrative Law Judge's finding that that Cofire did not agree to provide a Pension, Annuity or Welfare Plan in its prior agreement with Local 1175. (Exceptions thirty-one (31) through forty-eight (48))</u>

In his decision, the ALJ specifically concluded that Cofire "did not agree to provide a Pension Plan or a Welfare Plan or an Annuity Plan." (ALJ Decision, p. 14, l. 35-37) Solely based upon this reasoning, the ALJ concluded that Cofire was "obligated under the NLRA, to continue making those payments that it would have otherwise made to the Pension and Annuity funds as those amounts of money constituted a portion of the wage scale that the employees enjoyed as of the date that Local 175 was certified." (ALJ Decision, p. 14, l. 41-45) This finding is clearly without merit.

The ALJ's conclusion that Cofire did not agree to the establishment of such Trust Funds is contrary to the record evidence. The Local 1175 Pension, Welfare and Annuity Plans are specifically provided for in the expired collective bargaining agreement. Such agreement is the memorialization of the parties' negotiated agreement with respect to the terms and conditions governing the employment of Cofire's employees. It is unfathomable that Cofire was found to "not (have) agree(d)" to provide such employee benefits to specific employee benefit funds when the agreement between the parties contains an entire section with respect to the Funds existence and contributions thereto. The fact that allegations exist which state that that the parties negotiated increases to the contract as a whole, with distribution of monies to the funds being discussed by actuaries of the funds, does not in any way lead one to a conclusion that the employer did not agree to provide pension, welfare or annuity plans. Further, such a conclusion is patently ridiculous.

Cofire's collective bargaining proposals specifically referenced the pension, welfare and annuity funds. Moreover, Cofire proposed at one time to eliminate the annuity plan. Further, it proposed a change in the type of pension plan. Such proposals clearly show that not only did Cofire agree to the Funds, but that it wished to make substantial changes thereto in order to assure the company's survival.

The mere existence of the actuaries' involvement in allocation of funds to either the pension, welfare or annuity fund merely demonstrates the financial complexity of such funds administration. The financial reality of the administration of such types of ERISA benefit funds is that at times it is necessary for a fund to allocate monies at its discretion to maintain the financial integrity of the Funds. The actuaries presence with

respect to conversations regarding the allocation of funds does not negate the bargaining process. The actuaries presence does not negate the fact that not only did Cofire specifically bargain with respect to contributions made on behalf of its employees but also with respect to its employees underlying participation in such plans.

National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective-bargaining agreement valid on its face. NDK Corporation and United Food And Commercial Workers Union, Local 1550, 278 NLRB 1035 (1986) Board precedent prohibits the use of parol evidence to vary the unambiguous terms of collective bargaining agreements. In re America Piles, Inc., 333 NLRB 1118, 1119 (2001) As the Ninth Circuit has stated, "Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant." NLRB v. Electric Workers Local 11, 772 F.2d 571, 575 (9th Cir. 1985)

The record evidence clearly sets forth that Cofire was a party to a collective bargaining agreement with Local 1175. Such agreement provided for the establishment of the Local 1175 Welfare, Pension and Annuity Funds to be jointly administered by Trustees representing Local 1175 and the Employers. (General Counsel Exhibit # 3, p. 11-14) Moreover, the collective bargaining agreement sets forth that the signatory employer accepts and adopts the Agreement and Declaration of Trusts that create and govern the Local 1175 Trust Funds. (General Counsel Exhibit # 3, p. 11-14)

To highlight this point Article I, Section 1 of the Annuity Fund trust agreement contains a definition for the term "employer" which reads:

> "The term 'Employer' as used herein, shall mean an employer who has presently in force, or who hereinafter executes a collective bargaining

> agreement or other written agreement with the Union or the Fund either through the Association with whom the Union is in the collective bargaining agreement, or individually, and which provides for such employer contributions." (T, p. 73-74; Respondent's Exhibit # 4, p. 1)

Similar provisions are also contained in the Welfare Fund and Pension Fund trust agreements. (Respondent's Exhibit # 2 and 3)

Therefore, the terms of the collective bargaining agreement clearly establishes that Cofire agreed to establish a Welfare, Pension and Annuity Fund with the former union. It follows that it cannot be established by parole testimony that an oral understanding varied the terms of the written agreement. Thus, the ALJ's determination that the employees' pension and annuity monies constituted a portion of the wage scale because Cofire, in his opinion, did not agree to provide a Pension or Annuity plan is not supported by the record evidence or established Board law.

Thus, Cofire was legally discharged from its obligation to continue welfare, pension, annuity and vacation entitlements after Local 1175 was decertified and replaced by Local 175. In NLRB v. Sac Const. Co., Inc., 603 F.2d 1155, 1156 (5th Cir. 1979), the Court of Appeals concluded that an employer's duty to bargain with a union, whether it is a Board-certified union or simply an incumbent union, ceases when the employer can demonstrate a good faith belief that the union lacks majority status. See NLRB v. Newspapers, Inc., 515 F.2d 334, 340-41 (5th Cir. 1975); NLRB v. A. W. Thompson, Inc., 449 F.2d 1333, 1336 (5th Cir. 1971), Cert. denied, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972). In application, the Fifth Circuit held that "**the obligation to maintain existing conditions after contract expiration also ceases whenever the union has lost majority status.**" (Emphasis Added) N.L.R.B. v. Sac Const. Co., Inc., at 1155-1156.

The Board has held that health and pension fund plans which are part of an expired contract constitute an aspect of employee wages and a term and condition of employment which survives the expiration of the contract. Harold W. Hinson, d/b/a Hen House Market No. 3, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). However, an employer may unilaterally alter payments into such plans if: (1) the changes are made subsequent to the parties' reaching a bargaining impasse and the union has rejected the changes prior to the impasse, (2) **the employer demonstrates that, at the time the changes were made, the union did not represent a majority of the unit employees or that the employer had a good faith doubt, based on objective considerations, of the union's continuing majority status,** or (3) the union has waived its right to bargain regarding the changes. (Emphasis added) Henry Cauthorne, an Individual, t/a Cauthorne Trucking and Drivers, Chauffeurs and Helpers Local Union No. 639, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 256 NLRB 721, 256 NLRB No. 115, 1981 WL 20510 (N.L.R.B.), 107 L.R.R.M. (BNA) 1281.

In Henry Cauthorne the pension fund trust agreement contained the following language:

> "It is understood and agreed that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued."

In the Board's view, the trust agreement expressly waived both the employees' right to receive the benefits of pension fund contributions and the Union's right to bargain regarding an employer's cessation, at the expiration of a contract, of payments into the

pension trust fund absent a renewed agreement to continue such payments. Westinghouse Electric Corporation, 188 NLRB 885 (1971). As Cauthorne did not agree to make such payments beyond the end of the contract, the Board held that the employer was privileged, under the terms of the pension trust fund agreement, to cease payments into that fund. For this reason, the Board found that employer's refusal to continue payments into the Union's pension fund did not violate Section 8(a)(5). Id. at 722.

As in Henry Cauthorne, an Individual, t/a Cauthorne Trucking, Cofire was not obligated to continue the welfare, pension, annuity and vacation entitlements because there was no continuing bargaining relationship or agreement after the decertification of Local 1175. Id. at 722.

Issue 3: The evidence in the record and the applicable law supports a finding that economic exigencies permitted Cofire to take prompt action and make unilateral changes. (Exceptions forty-nine (49) through fifty-four (54))

The ALJ erred in failing to find and conclude that economic exigencies compelled Cofire to take prompt action and make unilateral changes. See RBE Electronics of S.D., Inc., 320 NLRB 80, 81 (1995) and Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enfd., 15 F.3d 1087 (9th Cir. 1994). (ALJ Decision, p. 11, l. 43-46)

An employer attempting to prove economic exigency must carry a "heavy burden." Our Lady of Lourdes Health Ctr., 306 N.L.R.B. 337, 340 n. 6 (1992). Economic exigency requires a "compelling business justification." Winn-Dixie Stores, 243 N.L.R.B. at 976, n. 9. An underlying reason for not requiring bargaining when there are 'compelling economic considerations' is that an unforeseen occurrence, having a major economic effect, is about to take place that requires the company to take immediate action." Angelica, 284 N.L.R.B. at 853. "Consistent with the requirement that an

employer prove that its proposed changes were 'compelled,' the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." RBE Elecs. of S.D., Inc., 320 N.L.R.B. 80, 82 (1995) The exception is limited only to those exigencies in which time is of the essence and which demand prompt action, and requires an employer to show a need that the particular action proposed be implemented promptly.

Cofire has demonstrated the existence of an economic emergency of the kind that would have entirely excused its obligation to bargain. In this regard it was established that (1) the 1175 Pension Fund had assessed withdrawal liability after Cofire was forced to withdraw from the Local 1175 Pension Fund (T. p. 72, l. 6-13); (2) the 1175 Pension Fund assessed withdrawal liability to Cofire in amount of approximately $256,000.00 as a consequence of its withdrawal from the Fund, which is to be paid in quarterly payments over a period of ten years.. (T. p. 72, l. 18-25, p. 360, l. 15-21); (3) Cofire's "Paid Invoice Register" indicates that the company's first quarterly payment of $6,684.34 was submitted to the Local 1175 Pension Fund in connection with the company's withdrawal liability obligation. (T. p. 360, l. 6-14, p. 361, l. 1-8; Respondent's Exhibit 11); and (4) Local 175 President Tomaszewski acknowledged that Cofire was assessed withdrawal liability from the 1175 Pension Fund and that a "nice amount of money" was owed. (T. p. 196, l. 23-25, p. 197, l. 1-10) Moreover, the ALJ credited union representative Falzone's testimony that at every bargaining session, Holland said that it was not economically possible for the Company to continue the terms and conditions of the previous contract with Local 1175. (ALJ Decision, p. 7, l. 27-30)

Certainly, Cofire's withdrawal liability was caused by external events beyond the company's control and such liability was not reasonably foreseeable. Specifically, the withdrawal from the funds which triggered the withdrawal liability assessment was the employees' decision to replace Local 1175 with Local 175. Further, it is significant to note that a precipitating event to this election was the formation of Local 175 by former union officials employed by Local 1175. While the company acknowledges the employees' section 7 rights to choose their representation, Local 1175 cannot be held harmless for their role in this scenario.

Moreover, after Local 1175 was decertified, Cofire, by virtue of Section 302 of the LMRA, was no longer permitted to make payments of any moneys to any funds jointly administered by Local 1175/731 because the Union, as of August 8, 2005, no longer was the legal bargaining agent of Cofire's employees. (ALJ Decision, p. 13, l. 30-33) Further, Cofire had no legal obligation to come to an agreement with Local 175 that would require contributions to a newly created plan established by Local 175 (ALJ Decision, p. 15, l. 16-21)

Finally, it is undisputed that Local 175 has sought an agreement with Cofire that would require the company to retroactively submit pension and annuity contributions to the August 8th certification date. (GC Exhibit # 6) Therefore, it would be contrary Section 8(a)(5) for Cofire to impose its own pension and/or annuity plan until an agreement or impasse is reached.

Under this standard, the ALJ's finding that Cofire did not face an economic exigency is not supported by the evidence and must not be upheld.

Issue 4: <u>The evidence in the record and the applicable law supports a finding that the parties reached an impasse in the Fall of 2005, in part caused by the Most Favored</u>

Nations Clause contained in Local 175's collective bargaining agreements with Cofire's competitors. (Exceptions fifty-five (55) through sixty-six (66))

Alternatively, Cofire maintains that it bargained to an impasse with the Union in the fall of 2005. As such, the company was lawfully permitted to discontinue its pension and annuity payments and was further permitted to reduce vacation entitlements on behalf of unit employees. In this regard, Cofire repeatedly advised the Union that the company was incurring significant economic problems and that it could not continue to operate the asphalt plant under the terms of the expired agreement.

The Union entered into three collective bargaining agreements with Cofire's competitors. Each agreement contained a "Most Favored Nations" clause which set forth:

> "The Union agrees that it will not enter into an Agreement with any employer containing more favorable conditions or wages than those agreed to in the current Agreement. Should it be shown that more favorable conditions or wages prevail, then more favorable conditions or wages shall apply to all signatories to this Agreement. (Respondent's Exhibit # 5, p. 18)

Such clause tied the union's own hands in that Local 175 would be required to offer any economic concessions which it gave to Cofire, to the other companies. Cofire was not a party to such agreements and, as such, is not responsible for the ramifications that such clauses had on its own negotiations. As set forth above Tomaszewski and/or Falzone confirmed the following:

1. Cofire is the smallest asphalt manufacturing plant in the surrounding geographic area. (T. p. 154, l. 12-18)
2. Cofire was "probably the smallest guys on the block, if you will. They were doing the least amount of asphalt per year, per season." (T. p.154, l.19-25, p. 155, l. 1-3)

3. Cofire's ability to manufacture asphalt in comparison to the other plants was demonstrably different. (T. p. 155, l. 9-13)
4. In comparing the asphalt plants, Cofire is "… the smallest. Maybe he can produce eighty tons an hour and the guy down the block could produce three hundred tons an hour." (T. p. 155, l. 9-13, p. 170, l. 11-13)
5. Cofire is not as productive per man hour use as the other plants and that it had been that way for twenty years. (T. p. 171, l. 12-17)
6. Tomaszewski acknowledged that Holland said he was having a hard time, "we kind of knew that. The industry knows that, that Cofire is not, you know, a big powerful company, so we knew that he had a little, he was having some trouble…" (T. p. 191, l. 12-15)
7. Holland advised the Union that the company could not continue to operate this plant under the existing economic conditions and that Tomaszewski knew that there was truth in Holland's statement. (T. p. 192, l. 20-25, p. 193, l. 1-5)
8. Falzone acknowledged that Holland advised the Union that it was not economically feasible for the company to continue the terms and conditions from the expired 1175 agreement and that Holland made that statement at every meeting. (T. p. 271, l. 24-25, p. 272, l. 1-2, p. 272, l. 4-17)
9. Falzone testified that Willets Point, Grace and College Point Asphalt each agreed to the three year increases of 5 ¼%, 5 ½% and 5 ¾%. (T. p. 259, l. 20-25, p. 260, l. 1-14) Falzone confirmed that the same percentage increases were offered to Cofire. (T. p.260, l. 15-17)

10. The Union never offered Cofire a smaller percentage increase than what was agreed to by the other asphalt plants. (T. p. 261, l. 15-21)

11. Falzone testified that the agreement contained a "Most Favored Nations" clause that he described as "... whatever we give to one company, we have to give to the others." (T. p. 264, l. 12-19; Respondent's Exhibit # 5, p. 18)

By the October bargaining session, Holland had clearly explained that Cofire could not continue its asphalt plant operations without reducing the unit employees' compensation package. In response to such statements, the Union did not strike and the unit employees continued to work without benefit fund contributions made on their behalf until the plant closed in March 2006. Moreover, it is undisputed that Local 175 never responded to the wage and benefit proposal that was made by Cofire in November 2005. As discussed above, the union could not reduce its own wage proposals due to its negotiation of a "Most Favored Nations" clause with Cofire's competitors. Thus, in its alternate argument, Cofire asserts that a lawful impasse was reached and that it was lawfully permitted to discontinue the pension and annuity benefits and reduce the vacation benefits that had been contained in the expired agreement.

In J.D. Lunsford Plumbing, 254 NLRB 1360, 1365, 1370-1371 (1981), the Board held that an impasse existed because the union (1) had agreed to a most-favored-nation clause in its association contract and could not offer lower terms than set forth in that contract and (2) the employer was financially unable to accept the terms of the association agreement. The judge, affirmed by the Board stated: "I believe that those constraints rather than any bad faith by the employer prevented the parties from reaching agreement." Id. at 1370. This case is analogous to the circumstances at issue in this case.

Local 175 provided Cofire with only one choice, which was the standard agreement that it had with the other asphalt plants. The Union never presented Cofire with any proposals that differed from the industry agreement. The Union was only willing to agree to a contract containing the exact same terms of the standard contract. Thus, Local 175 is the root cause of the impasse by its negotiations of a most-favored-nations clause with the Grace, College Point and Willets Point. As a practical matter, due to its own negotiations with other asphalt plants the union could not offer different terms and conditions to Cofire. If it negotiated more favorable terms to Cofire, who employed only four employees, it would have had to give the same terms to the other plants who employed far more employees. As in J.D. Lunsford Plumbing, the evidence establishes that Cofire was bargaining in good faith in an attempt to reach an agreement that it believed it could abide by within its economic circumstances. Cofire could not agree to the terms of the industry contract due to the company's belief that such contract would lead to the company's closing. Id. at 1371.

Thus, it is Cofire's alternative argument that the parties had negotiated to an impasse in the fall of 2005 and that the company was permitted to discontinue pension and annuity payments and as well as reduce the vacation entitlements of the unit employees.

Issue 5: The evidence in the record and the applicable law does not support the Administrative Law Judge's finding that Cofire and Local 175 agreed to include the asphalt "shipper" into the bargaining unit. (Exception sixty-seven (67) through seventy-two (72))

The Regional Director's Order dated July 15, 2005 granted Local 175's request to withdraw the shipper, because of the one man unit rule, from the overall unit. (Case No. 29-RC-10354, Order dated July 15, 2005) Moreover, a Stipulated Election Agreement

was not entered until May 24, 2006 which only then permitted the shipper the right to vote and decide whether he wished to join the overall unit. (29-RC-11340) Clearly, the certification of the asphalt plant shipper occurred more than two (2) months after the March 24, 2006 lockout.

As such, should the Board find that Cofire has a backpay obligation for the period August 2005 through March 2006, the asphalt plant "shipper" should not be included in any such obligation as the shipper was not part of the certified unit during the relevant time period.

Issue 6: The evidence in the record and the applicable law supports a finding that Cofire is entitled to a credit where the cost to Cofire of placing the employees into the company's plan was greater than the amount of the contributions that the company had been making on behalf of the employees to the Local 1175/731 Welfare Fund. (Exception seventy-three (73))

It is undisputed that the cost of Cofire's office health insurance plan for the five unit employees was $5,341.96 per month (Respondent's Ex. # 10, p. 2) In comparison, Cofire's monthly contribution to the Local 1175 Welfare Fund varied between $2,416.57 and $5,302.51 per month depending upon the hours worked by the unit employees. (T. p.358-359, p. 360, l. 1-4; Respondent's Exhibit 11) Between January 2005 and May 2005, Cofire's five consecutive monthly welfare contributions did not exceed $3,404.31 in any month and three months were below $2,746.45. (Respondent's Exhibit 11)

Although Cofire maintains that the expired collective bargaining agreement became inoperative on the decertification date, it should be noted that the cost of health insurance for unit employees substantially exceeded Cofire's previous health insurance costs for unit employees who had been enrolled in the Local 1175 Welfare Fund.

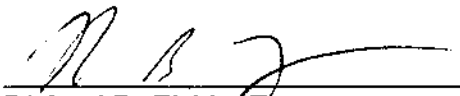
Thus, should it be determined that Cofire was required to pay the pension and annuity monies directly to the unit employees, Cofire should be entitled to a credit or an offset due to its increased health care costs.

CONCLUSION

For the reasons set forth above, it is respectfully asserted that the Complaint should be dismissed in its entirety and that the portion of the decision of the Administrative Law Judge that requires Cofire to pay the pension, annuity and vacation monies directly to the unit employees should be reversed.

Dated: Commack, New York
January 10, 2007

THE ZISKIN LAW FIRM, LLP

By: 

Richard B. Ziskin, Esq.
Suzanne Harmon Ziskin, Esq.
Attorneys for Respondent
Cofire Paving Corp.
Office & P.O. Address:
6268 Jericho Turnpike, Suite 12A
Commack, New York 11725
(631) 462-1417

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
COUNTY OF SUFFOLK)

I, Richard B. Ziskin, an attorney admitted to practice in the courts of the State of New York and in the federal district courts of the Southern and Eastern Districts of the State of New York, do hereby certify, under the penalties of perjury, that a true and correct copies of Cofire Paving Corp.'s Exceptions to the Decision of the Administrative Law Judge and the Brief in Support of the Exceptions are served by mailing same in a sealed envelope, with postage pre-paid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addresses as indicated below:

Eric B. Chaikin, Esq.
444 Madison Avenue, 17th Floor
New York, NY 10022

Local 175 United Plant & Production Workers
505 Northern Boulevard
Great Neck, NY 11023

National Labor Relations Board
Region 29
Two Metrotech Center North- 5th Floor
Jay Street & Myrtle Avenue
Brooklyn, NY 11201-4201
Att: Alvin Blyer, Regional Director

Dated: Commack, New York
January 10, 2007

RICHARD B. ZISKIN (RBZ-7378)