Capitol Steel and Iron Company *and* Shopmen's Local Union No. 620, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Cases 17–CA–17584 and 17–CA–17721

May 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On March 20, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Capitol Steel and Iron Company, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Frank A. Molenda, Esq., for the General Counsel.
W. Davidson Pardue Jr., Esq. and *Charles Ellis, Esq.*, for the Respondent.
David Turnbull, District Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Oklahoma City, Oklahoma, on January 24, 1995, based upon charges filed on September 2 and November 23, 1994 (as amended), by Shopmen's Local Union No. 620, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Union or Local 620), and a complaint issued by the Regional Director for Region 17 of the National Labor Relations Board (the Board), on December 30, 1994. The complaint alleges that Capitol Steel and Iron Company (Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), by failing and refusing to bargain in good faith, by soliciting strikers to return to work and threatening them with replacement if they failed to do so, and by failing and refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

The Respondent, a corporation, with an office and a place of business in Oklahoma City, Oklahoma, is engaged in the manufacture and nonretail sale of steel products. Jurisdiction and labor organization status are not in issue. The complaint alleges, Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union[1] had represented the employees of Respondent's predecessor for many years. In about 1986, Respondent acquired certain assets of that predecessor and commenced operations. Following a refusal to recognize it as bargaining representative, the Union filed a charge on November 16, 1987. That charge ultimately resulted in a Board Order[2] holding Respondent to be a successor, obligated to recognize and bargain with the Union. The unit deemed appropriate for collective bargaining within the meaning of Section 9(b) of the Act was and is:

> All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance in or about the Oklahoma City, Oklahoma facility, excluding all office, clerical, drafting, engineering employees, inspectors, watchmen, janitors, guards, supervisors and nonproduction yardmen.

A second charge, alleging surface bargaining,[3] grew out of the negotiations that followed the Board's Order. A hearing was held in November 1992 and, on April 29, 1993, Administrative Law Judge David L. Evans issued his decision. In that decision, Judge Evans concluded that Respondent had violated Section 8(a)(5) and (1) by bargaining in bad faith with no intention of entering into a final or binding collective-bargaining agreement. No exceptions were taken to the judge's decision and Order.

Subsequently, Respondent and the Union entered into a 1-year agreement, effective from September 1, 1993, to August 31, 1994. Included in that agreement was the following language applicable to wages:

> 3.3 The wages and other ''fringe benefits'' (i.e.: benefits which have a direct monetary cost to the Company) which are provided for in this Agreement are

[1] Prior to a July 1, 1994 merger, the union representing Respondent's employees was known as Local 546 of the International Association of Bridge, Structural and Ornamental Iron Workers.

[2] *Capitol Steel & Iron Co.*, 299 NLRB 485 (1990), enfd. mem. 135 LRRM 103 (10th Cir., Feb. 6, 1991).

[3] Case 17–CA–15707.

> minimum requirements. The Company may pay wages in excess of the minimum requirements of this Agreement to one or more employees in different amounts to different employees and may reduce such wages at any time so long as they are not reduced below the minimum requirements of this Agreement.

Article 9.1 set the minimum hourly wage at $5.50 per hour and article 9.3 reiterated the wage language of the management prerogatives clause, quoted above.

With respect to seniority, that agreement provided:

> 16.1 Subject to the reasonable production requirements of the Company, seniority shall be considered for the purpose of scheduling vacation leave and recall from layoff. . . . Seniority shall not be considered for any other purpose.

A decertification election was held on August 15, 1994.[4] The Union prevailed and was certified as the exclusive collective-bargaining representative of the unit employees.

B. *1994 Bargaining and the Wage Increase*

Negotiations for a successor agreement began on August 1. David Turnbull, the International Union's district representative, presented an initial proposal to Richard Fenner, Respondent's executive vice president, and Charles Ellis, its counsel. Also present were two employee members of the negotiating committee, Cecil Prock and Ollie Clay. The Union proposed a system of wage categories, an across-the-board wage increase of $1 per hour, and participation in the International's pension plan. Ellis requested that the Union furnish him with a copy of the form 5500, showing the financial condition of the pension fund, the numbers of participants and retirees, and other details. Turnbull agreed to furnish it at the next meeting.

After going through the Union's proposals, which Ellis characterized as ''food for thought,'' the parties adjourned. No date was set for the next meeting in view of the then-pending decertification election. At the conclusion of the August 4 voting, Fenner promised to get back to Turnbull with dates for bargaining to continue. Turnbull called Fenner when he had not heard from him by August 24, reminded him of the August 31 contract expiration date, and they set a meeting for August 30.

The parties met at Ellis' office in the early afternoon of August 30. Additionally present were Bill Owen, Local 620 business representative, and John Nesom, Respondent's president. Respondent provided certain information that the Union had requested with respect to vacations and there was some discussion of the Employer's vacation proposal. The Union presented a revised proposal that continued to seek an across-the-board wage increase and job categories, with minimum wages for each category. It also proposed that the union representatives have a right to visit the plant.

Respondent had resisted negotiating wage increases since the parties' had first began to bargain. At this point in the second meeting, Nesom reiterated Respondent's objections to minimum wages and classifications. There was little discussion beyond Turnbull possibly pointing out that what the Union sought were job categories, not classifications. They then continued through the remainder of the Union's proposals and Respondent caucused.

Upon returning from the caucus, Nesom addressed the union committee. He related how poorly the Company was doing, how he and his wife had invested their personal assets in the Company, and how they had managed to stay out of bankruptcy. Pointing out that the prior year had been a bad one, he prophesied that they would ''get out of this hole somehow.'' He then promised to pass on the profits to the employees ''like we always have done'' if any profits were realized.

Upon concluding these discouraging remarks, Nesom announced, ''We have been evaluating things in the last five months'' and have decided to adjust some pay scales. Some employees, he said, have gotten a raise.

Turnbull interjected: ''You've been discussing this for the last five months and you're going to adjust some pay scales, and you're going to give some people raises. . . . When did you make this decision?'' Nesom turned to Fenner and asked, ''It was August 22nd, wasn't it, Dick?'' Fenner confirmed that the decision had been made on August 22.

Bargaining continued with Respondent presenting two written proposals, one on notice to the Union of new hires and the other in regard to recognition of the Union's committeemen in the complaint procedure. There was also verbal agreement to a union proposal that paid holidays be counted as time worked for overtime purposes and to a proposal that seniority be counted for the purposes of recall from layoffs, at least regarding long-term employees. There was movement with regard to paid holidays.

Under the contract, which was about to expire, the union representatives had no express right to visit the plant. In practice, those representatives had been excluded from the property throughout the parties' strained relationship. In these negotiations, Turnbull's proposal of August 30 included language to permit the union representatives to visit the Company's office or shop upon notice and with the approval of certain management representatives. Visits to the office or shop would be permitted when necessary in connection with the grievance procedures. Access to the parking lots would be allowed before work and during lunch periods. Management rejected this proposal, stating that the representatives could talk to the members during union meetings. Turnbull proposed some changes that would limit the Union's access to the shop to periods before work or during lunch. Nesom responded that Turnbull could visit his office at any time and just needed to call first. Turnbull expressed fear that, were he to come on the property, he would be arrested for trespassing. Nesom questioned whether Turnbull trusted him.

The parties met again in the morning of August 31. The meeting was earlier than usual because the Union had scheduled a 2:30 p.m. meeting with the unit employees to consider and vote upon the Company's proposals. The Union provided the form 5500 that Ellis had earlier requested. Some progress and changes were made from earlier sessions; the Company agreed to Labor Day as a paid holiday but retreated from its earlier agreement that paid holidays would be counted as time worked for overtime purposes. No progress was made on the Union's plant visitation language; as to that, Ellis said they were at an ''absolute impasse.'' The Union then took a caucus.

[4] All dates hereinafter are 1994 unless otherwise specified.

When the parties got back together, Owen Bill asked Nesom about the wage increases he had announced in the prior meeting. ''I want to know who got them. . . . I want to know how much they got. I want to know why each individual got them and I want to know when they got them.'' Nesom said that all he could tell Bill was that there were two men in the room who had gotten them. When asked, he acknowledged that the employees had not been told but would ''find out about the raise and how much they got when they get their next check.'' That would be on September 9, according to Bill's quick glance at a calendar. Bill then asked if Nesom had with him the information about who got the raises, in what amounts they received them and who did not get them. Nesom said that he did not have that information at hand and Bill again inquired as to how much each man got and how the Company decided on their raises. Nesom said that the Company gave them the raises on what it considered appropriate for each man, considering his attitude, attendance, and skill.

As the meeting drew to a close, Nesom asked whether and where the Union was going to meet with the employees to discuss this proposal. He was told that the meeting would be at the Cattleman's Restaurant. Nesom requested that he be informed of the employees' decision as soon as the meeting was over. Bill questioned whether they had received the Employer's ''last best and final offer'' and Nesom confirmed that they had. They left with the understanding that Ellis would draft up language on seniority for layoffs and recalls of more senior employees. The union committee left to go to its meeting at 2 p.m.

The employees arrived at the meeting around 2:35 p.m. They reported that, as they had left the plant, Nesom and Larry Ozment had passed out notices informing some employees of their raises. The employees questioned whether the Union had negotiated those raises and expressed both anger and fear that, if they rejected the Employer's proposal, the raises would be taken from them. Turnbull told them that while the Union had been told, in general terms, about the increases, it had neither agreed to them nor withdrawn its wage proposal.

As the meeting progressed, Turnbull noticed an individual placing himself outside the meeting room so as to observe who was there. Employees identified that individual as Larry Ozment, the assistant plant superintendent. Ozment then entered the room, notwithstanding Turnbull's insistence that he leave because this was a union meeting. Ozment stated that he would leave in a minute and passed two pieces of paper down the table to Prock and Clay. Those papers, which the others could see as they were passed from hand to hand, revealed the raises given to these employee-committeemen. Ozment departed, telling the employees that he would see them in the morning.

Respondent gave the wage increases when it did, Nesom testified, as a result of employee requests, beginning in about June. It was at that time that the Company had started ''getting some work back . . . and bringing some people back to work.'' He claimed that he wanted to show the employees that they ''had intentions of giving them the increases when the cash flow caught up with the production we could get out the door.'' It was the Company's effort, he said, to demonstrate to the employees that they would do what they said they would do to reward employee performance. It was also given, he candidly acknowledged, to gain the good will of these employees ''to be on our side as they were going to a meeting that we'd been informed about by the Union to vote on whether to accept the current negotiations that were on the table about what we could offer.'' As noted, Respondent had made no wage proposal in these negotiations and had rejected all of the Union's proposals for wage increases.

C. *The Decision to Strike in Protest of Respondent's Unfair Labor Practices*

After Ozment left the employees' meeting, Turnbull was asked if he thought Nesom had sent him. Turnbull replied, ''Who knows?'' and said that, as far as he was concerned, the Company had committed an unfair labor practice by spying on them.[5] There was further discussion of the Employer's offer and of the possibility that their raises might be revoked. They then voted, by a substantial margin, to reject the Employer's final offer. Turnbull was instructed to call Ellis to inform him of the vote and to ask if there was any more room for further bargaining. Turnbull asked the employees what their major issues were and then called Ellis. Ellis said he would pass the information on to Nesom and asked that Turnbull call him back. Turnbull complied with Ellis' requests.

After talking with Ellis, Turnbull returned to the meeting. He discussed Ozment's actions with the employees and suggested that unfair labor practice charges be filed. At Prock's request, he explained the ramifications of an unfair labor practice strike, what steps they would have to take and what he thought were the unfair labor practices. He suggested that Ozment's presence at their meeting and the Company's attempts to influence their vote on ratification by passing out these raises at the timeclocks as they left to come to the meeting violated the Act. Similarly, he told them that the Union had requested information concerning those raises and that the Employer's refusal to talk about them appeared violative. He said, however, he wanted to do some further research before he committed them to ''the wrong kind of a strike.''

The employees then voted, by an even larger margin, to strike. Turnbull called Ellis, was told that Nesom had said that there was no more room to move, and told Ellis that the employees had voted to strike, effective in the morning. He also told Ellis that the Employer's announcement of the raises as they left to go to the union meeting had really aggravated the men and that he would be filing charges. Ellis stated that he thought the Union had wanted Nesom to do this.

D. *The Strike*

During the evening of August 31, each of the employees was called by Nesom or Fenner. Each was told:

> We have been advised by the Union that Union members have voted to strike instead of accepting the Company's contract offer.
>
> We anticipate that a picket line will be placed on the Agnew entrance to the plant tomorrow morning.

[5] Counsel for the General Counsel disclaimed any intention of alleging a surveillance violation.

> We want you to know you have a right to cross the picket line to come to work. No one can legally prevent you from doing this if you choose to.
>
> However, if you decide to not report for work, the Company does plan to replace any employee who does not clock-in and your job may be permanently filled by a replacement hired in your absence.
>
> We hope you will choose to come to work. The Company needs you and your support.

Turnbull and the employees met at a coffee shop near the plant at about 5:30 a.m. on September 1. They told him of the phone calls and he told them of his belief that they had ''pretty solid footing'' to engage in an unfair labor practice strike. They all proceeded to the plant gate. Nesom drove up and asked them what they were doing. They told him of their intentions to strike and he left. Nesom returned after a few moments and handed each of the strikers a paper stating what had been told them the prior evening, as quoted above.[6]

Picketing began on September 1 with signs protesting the Employer's unfair labor practices. Unfair labor charges were filed on September 2. They alleged Ozment's actions on August 31 as interference, particularly surveillance in violation of Section 8(a)(1), and Respondent's conduct as refusing to negotiate in good faith and attempting to undermine the Union's status as bargaining agent in violation of Section 8(a)(5).

On September 5, Turnbull sent Ellis a letter summarizing the state of the negotiations. In this letter, Turnbull stated that he deemed it unfortunate that the employees had struck for better benefits and against Respondent's unfair labor practices and expressed his hope that they could soon resolve the dispute. The Union, he said, was awaiting a suggestion from the Employer about a time and date to meet again.

Not having heard from Ellis by September 13, Turnbull called to remind him of his promise to draft up language on seniority. He asked when that language would be furnished. Turnbull told Ellis that, notwithstanding the strike, the men wanted a pension proposal and he offered to let the Employer subtract the raises it had given from the across-the-board raise the Union had sought. Ellis promised to relay this to his client. Turnbull then repeated the request for the information the Union wanted in regard to the wage increases, threatening to file charges if it was not furnished.

By letter dated September 15, received on September 16, Ellis responded. He related the Employer's position that it was unwilling to make a proposal on pensions or wages and, therefore, saw no reason to schedule another meeting. He enclosed a list of the wage increases announced on August 31. That list revealed that 17 employees (of approximately 25 in the unit) had received raises in amounts varying from 25 cents to $1 per hour.

E. *Offers to Return to Work*

About September 25, Felipe Olivas called Larry Ozment and asked whether he could return to work. Ozment told him that all of the positions had been filled but suggested that Olivas provide the Company with his current address and phone number.[7] Misunderstanding this to be a demand that he file a new application and return only as a new employee, Olivas did not comply and has not returned to work.

On September 27, Turnbull met with the employees. After learning that the NLRB was going to take some action on the unfair labor charges filed on September 2, they voted to end the strike, unconditionally. Turnbull drove to the plant gate and called Fenner on a car phone. He asked whether he could come on to the property to talk with Fenner. Fenner denied his request. He said he wanted to hand deliver a letter to Fenner. Fenner said that they did not want him on the property.

Turnbull then told Fenner what the letter was. ''Now the guys are ending their strike and offering to come back to work unconditionally,'' he said. Fenner commented, ''[T]hey haven't told me that.'' Turnbull replied, ''Well, I'm telling you that'' and Fenner noted that when another employee had returned earlier, he had not needed the Union to ask for him. Turnbull replied that that individual (Rudy Winter, who returned on September 15) had returned on his own.

Fenner told Turnbull to send the letter to the Company's attorney. Turnbull reiterated that they wanted to end the strike, that the offer was unconditional, and that the employees wished to return to work in the morning. Fenner stated that they had all been replaced and were no longer needed. After another reiteration of the foregoing, Fenner again denied Turnbull access to the plant, refused to receive the letter, and directed Turnbull to send it to Ellis.

Turnbull's letter of September 27, addressed to Mr. and Mrs. Nesom, was then sent to Ellis. In that letter, the Union stated that the employees who had been on strike were ''offering to return to work unconditionally.'' It asked that the Employer notify the Union regarding whether or not the employees would be allowed to return to work on September 28. In reply, Ellis denied that there had been any unfair labor practices committed, noted that no individual striker had made an offer to return to work, asserted that all of the strikers had been replaced and informed Turnbull that there was no work available for the strikers. They were asked to provide the Company with their current addresses and phone numbers so that they could be called when work again became available.

On October 7, Ozment called Ollie Clay, telling him, ''Ollie, I need a fitter.'' Clay asked about the other employees and was told that only one was needed. Clay told Ozment that he would have to talk to Turnbull. Clay then called Turnbull and reported Ozment's call. Turnbull asked Clay what he intended to do. Clay stated that he needed the work but that the others were senior to him and he didn't want to do this to them.

Turnbull then called Fenner and told him that the employees wanted to come back to work but that there were some with greater seniority than Clay. ''We'd like to sit down with you and bargain about the order of reinstatement,'' he said. Fenner stated that there was no seniority in the shop and

[6] As claimed by Nesom and Fenner, I find that the statement quoted above was read, essentially verbatim, to each of the employees who were called on August 31.

[7] Olivas communicated with Ozment either through an interpreter (as Ozment testified) or in a mixture of Spanish and English (as he claimed). In either event, it appears most likely that Olivas misunderstood what Ozment asked of him, interpreting it as a demand that he complete a new employment application. I note that, when another employee had earlier sought (and gained) reinstatement, no new application had been required.

Turnbull reiterated, ''Exactly. We'd like to talk to you about the order of reinstatement.'' He also made reference to the tentative agreement on seniority and recalls and suggested that this is one which the Employer should honor. Fenner told him, ''We don't have a contract with you and we need Ollie [Clay] to come to work. . . . Is Ollie refusing to come to work?'' Turnbull denied that Clay had refused and reiterated the request to sit down and bargain about the order of reinstatement. Fenner said something about talking with his attorney and the conversation ended. On October 7 and 8, Turnbull wrote to Fenner, suggesting dates on which to meet for such discussions.

Thereafter, Ellis and Turnbull corresponded with each other, disputing whether the Union had a right to negotiate the order of reinstatement and whether Turnbull's insistence that Respondent do so rendered its offer to return conditional. No strikers were reinstated.

F. *Issues*

1. Whether Respondent's unilateral grant of wage increases, in the circumstances present here, and whether Respondent's delay in furnishing requested information concerning those increases, violated Section 8(a)(5) and (1)? I conclude that they did.

2. Whether the strike that began on September 1 was caused or prolonged by Respondent's unfair labor practices? I conclude that it was.

3. Whether Respondent violated Section 8(a)(1) by soliciting unfair labor practice strikers to return to work and threatening them with permanent replacement? I conclude that it did.

4. Whether Respondent's refusal to reinstate Felipe Olivas,[8] individually, and the strikers, collectively, violated Section 8(a)(1) and (3)? I conclude that it did.

G. *Analysis*

1. The wage increases

The parties' 1993–1994 collective-bargaining agreement gave Respondent the right to grant individual wage increases. To the extent that Respondent simply granted such increases in accord with its terms, during the life of that agreement, it is not subject to legal challenge. *S-B Mfg. Co.*, 270 NLRB 485, 493 (1984).

Respondent did not simply grant these increases pursuant to that agreement's terms, however. It granted them, unilaterally, while engaged in collective bargaining with the Union. In that bargaining, Respondent had refused to make any proposal for a wage increase, had stated that it could not agree to having any minimum wages set by negotiation, and in virtually the same breath with its announcement of the unilateral increases, had stressed its perilous financial condition. Moreover, Nesom misstated how long the increases had been under consideration, telling the Union that they had been thinking of doing this for 5 months but testifying that they were the result of employee inquiries beginning in June, only 2 months earlier, when business began to pick up. He also mislead the Union about when the employees would learn of this increase, telling the committee that they would learn of it with their next paycheck, due September 9, and then rushing to personally inform them on August 31.

Most significantly, as Nesom admitted, the increases were announced in such a way and at such a time as to sway the employees who would immediately thereafter vote on Respondent's ''last and final offer.'' Indeed, the manner in which Ozment passed out the notices to Clay and Prock at the ratification meeting was calculated to sow dissension and demean the role of the Union.

Although Respondent's actions did not achieve Nesom's stated objective, and may actually have had the opposite effect, they did create the reasonably anticipatable anxiety. Employees expressed anger, confusion, and fear that if they did not accept the little that was offered them, they might lose what had just been unilaterally granted. Seldom has the ''danger inherent in well-timed increases . . . the suggestion of a fist inside a velvet glove,'' been so clearly demonstrated. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409–410 (1964). These increases, I find, were given at such a time, and in such a way, as to undermine the Union as the employees' collective-bargaining representative.

After announcing these wage increases, Respondent rejected the Union's request to bargain further on wages. It expressly stated that it was unwilling to make a proposal on wages and therefore saw no reason to schedule another meeting. Such conduct is inconsistent with Respondent's bargaining obligation. *Aaron Bros. Co.*, 245 NLRB 29 (1979), enfd. sub nom. *Chromalloy American Corp. v. NLRB*, 661 NLRB 750 (9th Cir. 1981). See also *S-B Mfg. Co.*, supra at 496.

Finally, in this regard, Respondent waited for 2 weeks before providing the Union with the presumptively relevant information that it had requested concerning these wage increases. Although 2 weeks may not, in some situations, be an unreasonable time within which to provide information, Respondent's conduct here cannot be deemed reasonable. The information was simple, the names of 17 employees who received wage increases and the amounts of those increases. It was also close at hand. Respondent was able to put together the notices that were passed out to the employees, apparently between the end of the third bargaining session about 2 p.m. and the end of the shift, about 2:30 p.m. Moreover, during those 2 weeks, the strike had begun, warranting a little extra effort toward achieving a negotiated resolution.[9]

By all of the foregoing conduct, I find, Respondent has failed and refused to bargain with the Union in good faith, in violation of Section 8(a)(5) and (1).

2. The strike

A strike which is motivated or prolonged, even in part, by an Employer's unfair labor practices is an unfair labor practice strike. *C-Line Express*, 292 NLRB 638 (1989); *Tall*

[8] The complaint alleges that Respondent's insistence that Olivas submit a new employment application violated Sec. 8(a)(1) and (3). I have found that no such requirement was imposed upon Olivas. The General Counsel's brief argues, but the complaint does not allege, Respondent's failure to reinstate Clay as an independent violation of Sec. 8(a)(3). I shall consider the facts relating to Clay together with those relating to the other strikers.

[9] That the Union may have been 1 day late in providing the form 5500, as requested by Ellis, in order to support its proposal for participation in the pension plan is irrelevant to the consideration of whether Respondent's delay in furnishing wage information necessary to defend its actions and positions was unlawful.

Pines Inn, 268 NLRB 1392, 1411 (1984); *Pace Oldsmobile*, 256 NLRB 1001, 1010 (1981). In the instant case, immediately prior to the start of the strike, Respondent violated Section 8(a)(5) and (1) by unilaterally granting wage increases in such a way as to undermine the Union's status as exclusive bargaining representative, while refusing to make any offer respecting wages in the negotiations. Those wage increases angered and frightened the employees and were the subject of considerable discussion in the debate leading up to the strike vote. That discussion focused on whether the Employer's conduct violated the Act. It is the fact that the employees were motivated by Respondent's unlawful conduct that is determinative. That they may have discussed that unlawful conduct in terms of surveillance, which the complaint did not allege, as well as bad-faith bargaining, as it was alleged, is irrelevant. It is not required that they correctly perceive the unlawful nature of the Employer's actions. *F. L. Thorpe*, 315 NLRB 147, 150 fn. 8 (1994).

The strike was no less an unfair labor practice strike because the employees discussed whether they would receive the added protection accorded unfair labor practice strikers rather than whether a strike would cure those unfair labor practices. Such discussions may in fact evidence that, but for such conduct, the strike would not have occurred. Similarly irrelevant is evidence that there were other motives for striking or that some employees may have indicated that the strike would cease if the employer agreed to one of its major proposals. A willingness to forgive or overlook the unlawful conduct in return for a significant gain in the negotiations does not establish that the unlawful conduct was not a motivating factor.

Accordingly, I find that, from its inception, the strike was an unfair labor practice strike. I also find that the unfair labor practices discussed below, and the failure to timely furnish information about the wage increases, supra, contributed to the prolongation of the strike.

3. Solicitations and threats

As they were preparing to strike, each of the employees was twice solicited to return to work under threat of permanent replacement. Because the law prohibits the permanent replacement of unfair labor practice strikers, such a threat violates Section 8(a)(1). *Storer Communications*, 294 NLRB 1056, 1093 (1989); *Consolidation Coal Co.*, 266 NLRB 670, 672 (1983). The solicitations that they return to work, expressed in the context of the unlawful threat, are similarly violative. *Polynesian Hospitality Tours*, 297 NLRB 228, 248 (1989).

4. The failure to reinstate unfair labor practice strikers

As unfair labor practice strikers, Respondent's striking employees were entitled to immediate reinstatement upon their unconditional application. *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970); *Pecheur Lozenge Co.*, 98 NLRB 496, 498 (1952). This is so even if so-called permanent replacements have been hired to fill their jobs and must be terminated to make room for them.

Olivas' individual offer of September 25, and the Union's repeated oral and written offers of September 27,[10] were clearly and unequivocally unconditional. Olivas, on September 25, and the remaining strikers, on September 27, were thus entitled to immediate reinstatement. Although Respondent may have been entitled to schedule their returns over the 5 days following those offers, its obligation arose immediately, as did its violation when it failed to honor the offers to return. *Pillowtex Corp.*, 241 NLRB 40, 48 fn. 18 (1979).

It is irrelevant that 2 weeks after the Employer's reinstatement obligation arose, a condition on the offer to return was allegedly imposed. Respondent may not rely on the Union's subsequent statements, made in response to the Employer's picking and choosing of whom to reinstate, to retroactively modify the previously stated unconditional offer. *J. M. Sahlein Music Co.*, 299 NLRB 842, 848 (1990).

Moreover, the Union's demand for bargaining on the order of reinstatement did not render its offer conditional. When the employees are unfair labor practice strikers entitled to immediate reinstatement, such a demand is permissible. It is more like the proffer of a concession, i.e., less than that to which the employees were entitled, than it is to an insistence on something more. It is akin to a union's demand for the termination of temporary replacements, i.e., something to which they were entitled, which does not render an offer to return conditional. *National Football League*, 309 NLRB 78, 80 fn. 11 (1992); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986).

Accordingly, I find that by failing to reinstate Olivas upon his September 25 unconditional offer to return to work, and the remaining strikers, including Clay, upon the Union's September 27 offer on their behalf, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. Alternative analysis—economic strike

Assuming arguendo, that the strike was not an unfair labor practice strike, the fact remains that the Union made an unconditional offer, on behalf of all striking employees, on September 27. Thereafter, on October 7, the Union expressly demanded that Respondent sit down and discuss the order of reinstatement *of the unfair labor practice strikers* (G.C. Exh. 18). Even if it erred in this judgment and they were economic strikers, the Union's demand did not render its offer conditional. The collective-bargaining representative has a statutory right (and the employer has a correlative duty) to bargain over the procedure for reinstating employees from an economic strike. Indeed, an employer's unilateral adoption of a reinstatement procedure, without affording the union timely notice and an opportunity to request bargaining, violates its bargaining obligation.[11]

It has been the Respondent's contention throughout that the employees were engaged in an economic strike. The Union made no demand to bargain the order of reinstatement of economic strikers. Even if a demand for bargaining over

[10] Contrary to Fenner's objection, a union may make a valid offer of reinstatement on behalf of its members. *Hotel Roanoke*, 293 NLRB 182, 200 (1989).

[11] *Emhart Industries*, 297 NLRB 215 (1989). No charge alleging such a violation was filed herein and the complaint does not allege Respondent's refusal to meet with the Union upon its timely request as violative.

the order of reinstatement would render an offer for economic strikers to return conditional, the Union's demand to bargain *over the return of ULP strikers* was not a retraction of its earlier unconditional offer, which was for the strikers, whatever their status, to return to work. See *Home Insulation Service*, 255 NLRB 311 (1981), in which a union representative's subsequent statement that all of the employees would show up for work, including two whom the employer had lawfully discharged, was held not to modify or retract the earlier unconditional offer. As in that case, Turnbull's statement, at most, made the offer ambiguous and placed upon Respondent the obligation to seek a clarification. Although they corresponded after the October 7 message, Ellis never asked Turnbull what his position vis-a-vis the order of reinstatement would be if the employees were deemed economic strikers. In *Home Insulation*, supra, the Board stated, ''Respondent may not be heard to complain if such uncertainty is resolved against its interest'' citing *Haddon House Food Products*, and *Flavor Delight*, 242 NLRB 1057 fn. 6 (1979). See also *Dold Foods*, 289 NLRB 1323, 1333 (1988). If Respondent truly believed that they were economic strikers, it should have continued to offer them reinstatement as the positions occupied by the replacements came open, to test whether their offers were conditional. At least, Ellis could have asked the Union what the employees would do if it refused to meet for such negotiations.

Under this alternative scenario, each of the striking employees was entitled to, but never received,[12] an offer of reinstatement. At least 23 unit employees were hired after September 27, 7 of whom terminated their employment by December 10 and were themselves replaced.[13] Respondent also advertised for unit employees after September 27.[14] No offers of reinstatement were made after the October 7 offer to Clay. That Clay, in effect, rejected the offer made to him, out of an admirable loyalty toward more senior colleagues, may affect his right to reinstatement. He was not speaking for any other striking employee, however, and his failure to return when the offer was made, cannot be deemed to establish that the other strikers would have behaved similarly. Neither had Turnbull stated that, if the demand for bargaining on the order of reinstatement was rejected, the other employees would not return.

Accordingly, even under an alternative holding that the strike was economic only, Respondent has violated Section 8(a)(3) and (1) by failing to offer reinstatement to the striking employees (other than Clay) as positions became available.[15]

Conclusions of Law

1. By unilaterally granting wage increases so as to undermine the status of the Union as exclusive collective-bargaining representative, while failing and refusing to make a proposal or meet and negotiate with the Union with respect to wage increases, and by its failure to timely furnish the Union with information the Union had requested with respect to those wage increases, which information was necessary to the performance of the Union's statutory duties as exclusive collective-bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The strike that began on September 1, 1994, was caused and prolonged by Respondent's unfair labor practices and was an unfair labor practice strike from its inception.

3. By soliciting unfair labor practice strikers to return to work and threatening them with permanent replacement if they failed to comply, the Respondent violated Section 8(a)(1).

4. By failing and refusing to immediately reinstate unfair labor practice strikers to their former positions upon their unconditional applications to return to work, Respondent has violated Section 8(a)(3) and (1).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully failed and refused to reinstate the unfair labor practice strikers upon their unconditional offers to return to work (Olivas on September 25 and the remaining strikers on September 27, 1994), I shall recommend that that Respondent be required to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after the September 1, 1994 commencement of the strike. Respondent shall also be required to make those employees whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's refusal to reinstate them, from the dates of their offers to return.[16] Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Capitol Steel and Iron Company, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally granting wage increases so as to undermine the status of the Union as exclusive collective-bargaining representative, while failing and refusing to make a proposal or meet and negotiate with the Union with respect to wage increases.

(b) Failing to timely furnish the Union with information it had requested which information is necessary to the perform-

[12] Striking employees other than Ollie Clay.

[13] R. Exh. 5.

[14] G.C. Exh. 22.

[15] Under this alternative analysis, I would not find that Respondent's threat to permanently replace economic strikers, or its solicitation that they cross the picket line, to be violative of the Act.

[16] *Pillowtex Corp.*, supra.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ance of the Union's statutory duties as exclusive collective-bargaining representative.

(c) Soliciting unfair labor practice strikers to return to work and threatening them with permanent replacement if they failed to comply.

(d) Failing and refusing to immediately reinstate unfair labor practice strikers to their former positions upon their unconditional applications to return to work.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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

> All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance in or about the Oklahoma City, Oklahoma facility, excluding all office, clerical, drafting, engineering employees, inspectors, watchmen, janitors, guards, supervisors and nonproduction yardmen.

(b) Offer all of the unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to immediately reinstate them upon their unconditional applications to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Oklahoma City, Oklahoma, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

WE WILL NOT unilaterally grant wage increases so as to undermine the status of the Shopmen's Local Union No. 620, International Association of Bridge, structural and Ornamental Iron Workers, AFL–CIO as your exclusive collective-bargaining representative, while failing and refusing to make a proposal or meet and negotiate with the Union with respect to wage increases.

WE WILL NOT fail or refuse to timely furnish the Union with information it had requested that is necessary to the performance of its statutory duties as exclusive collective-bargaining representative.

WE WILL NOT solicit unfair labor practice strikers to return to work or threaten them with permanent replacement if they fail to comply.

WE WILL NOT discriminate against unfair labor practices by failing and refusing to immediately reinstate them to their former positions upon their unconditional applications to return to work.

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

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees engaged in the fabrication of iron, steel, metal and other products or in maintenance in or about the Oklahoma City, Oklahoma facility, excluding all office, clerical, drafting, engineering employees, inspectors, watchmen, janitors, guards, supervisors and nonproduction yardmen.

WE WILL offer all of the unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the our failure to immediately reinstate them upon their unconditional applications to return to work, with interest.

CAPITOL STEEL AND IRON COMPANY