

**Industrial Waste Service, Inc. and Southern Conference of Teamsters.** Cases 12-CA-9573, 12-CA-9757, 12-CA-10145, and 12-CA-10236

27 February 1984

**DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 7 June 1983 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Charging Party filed exceptions, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in response to the exceptions.

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,<sup>1</sup> findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The General Counsel has excepted to the judge's refusal to allow into evidence the affidavit given to the Board's Regional Office by former employee Freddy Farmer, who died before the hearing. We would find this affidavit admissible. *Custom Coated Products*, 245 NLRB 33 (1979). Yet, noting that such an affidavit "must be evaluated with maximum caution, and only be relied upon if and when consistent with extraneous, objective, and unquestionable facts" (*United Sanitation Services*, 262 NLRB 1369, 1374 (1982)), we would find the General Counsel has not met this burden in this case and, accordingly, we would place no weight on Farmer's affidavit.

<sup>2</sup> The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 13 of the Decision, the judge states inadvertently that the Respondent filed a decertification petition on 16 November 1981. The petition filed by the Respondent on that date was an RM employer petition and not a decertification petition.

**DECISION**

**PRELIMINARY STATEMENT**

**BENJAMIN SCHLESINGER**, Administrative Law Judge: On October 28, 1980, Southern Conference of Teamsters (the Union) was certified as the exclusive collective-bargaining representative of the employees of Respondent Industrial Waste Service, Inc. in the following appropriate unit:

All drivers, drivers/helpers, welders, mechanics, tiremen, partsmen, labor/helpers, painters and leadmen; *excluding* all office clerical employees, dispatchers, salesmen, independent contractors, guards and supervisors as defined in the Act.

Negotiations for an agreement began in December 1980 and on February 26, 1981, the employees struck the Respondent and filed an unfair labor practice charge (Case 12-CA-9573) against the Respondent complaining, inter alia, that the Respondent had engaged in surface bargaining. That allegation was dismissed on April 20, 1981, the Regional Director for Region 12 finding that the Respondent had met with the Union at reasonable intervals, had made proposals and counterproposals, had agreed to some provisions, and was continuing to meet with the Union for the purpose of negotiating a complete agreement.

On June 18, 1981, the Union filed another charge (Case 12-CA-9757), this time alleging, inter alia, that its strike was caused by the Respondent's unfair labor practices and that the Respondent had refused to reinstate striking employees following the Union's offer to have them return to work. On July 31, 1981, the Regional Director dismissed that portion of the second charge, finding that the strike was economic from its inception and that it had not been converted to an unfair labor practice strike. Appeals were taken by the Union from both dismissals, and the Office of Appeals sustained the appeals on the limited grounds that the Respondent's "conduct away from the bargaining table during the negotiations raised Section 8(a)(1) and (5) issues and that [Respondent's] refusal to immediately reinstate the strikers raised Section 8(a)(1) and (3) issues."

As a result, a consolidated complaint issued on November 25, 1981, alleging that the Respondent violated the Act by interrogating employees, by stating that it would never sign an agreement with the Union, by offering employees benefits if they would not join the strike or if they would return to work from their strike, by granting wage increases and promising other benefits, and by refusing to reinstate striking employees to their former positions. The Respondent denies that it violated the Act in any way. Hearings were held in Miami, Florida, on May 3-7, 1982, during which time the consolidated complaint was amended to incorporate the allegations contained in the Union's unfair labor practice charge in Case 12-CA-10145, to wit, that the Respondent engaged in further refusals to bargain in violation of Section 8(a)(5) by directly dealing with its employees and unilaterally granting further wage increases or promising to institute new benefits.

Thereafter, on June 16, 1982, the Union filed a new charge in Case 12-CA-10236; and on November 19, 1982, another complaint issued alleging that the Respondent committed new violations of the Act. A motion to consolidate that complaint with the complaint then pending was made and, over Respondent's opposition, an order consolidating the complaints was granted on January 7, 1983, and a hearing was scheduled. However, all parties moved in February 1983 to sever all 8(a)(3) and (1) allegations contained in the new complaint; and the

parties stipulated to facts and waived a further hearing pertaining to one allegation of a unilateral change of terms and conditions of employment. The motion was granted on March 7, 1983.

On consideration of the entire record in this proceeding,<sup>1</sup> including my observation of the demeanor of the witnesses as they testified, and the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The principal thrust of the General Counsel's case is based on the Regional Director's finding, never reversed by the Office of Appeals, that the Respondent bargained in good faith in its negotiating sessions with the Union. The Respondent attempted to make proposals on the issues raised by the Union; it generally met with the Union at reasonable times and places; and it attempted to reach agreement. On the other hand, however facially appropriate the Respondent's conduct may have been at the bargaining table, the General Counsel contends that outside events, such as its threats never to sign a contract, its direct dealing with employees, and its promises of bonuses if employees would not strike transformed the Respondent's legal bargaining conduct into a violation of Section 8(a)(5) of the Act, relying on *Skrl Die Casting*, 245 NLRB 1041 (1979), enfd. in part 651 F.2d 1218 (6th Cir. 1981); *Clearwater Finishing Co.*, 254 NLRB 1168 (1981), enfd. in part 670 F.2d 464 (4th Cir. 1982); *Cagle's, Inc.*, 234 NLRB 1148, 1149, enfd. 588 F.2d 943 (5th Cir. 1979); *Safeway Trails*, 233 NLRB 1078, enfd. 641 F.2d 930 (D.C. Cir. 1979), cert. denied 444 U.S. 1072 (1980); *Berbiglia, Inc.*, 233 NLRB 1476 (1977).

Notwithstanding these comments and the Office of Appeals' reversal of the Regional Director's dismissal letters solely on the basis that it was the conduct away from the bargaining table that made the Respondent's bargaining illegal, vestiges of another theory still remain. Thus, the General Counsel's brief contends that certain events occurred at the bargaining table which implicitly support the theory that the Respondent never had any intention to bargain in good faith and reach an agreement, to wit, (1) when faced with the Union's threat to strike, the Respondent did nothing to avert a strike; (2) despite the Union's request that the Respondent submit a total contract proposal, the Respondent continued to submit one-page or one-paragraph proposals; and (3) the Respondent refused to modify its proposal that employees be paid for the work they performed rather than an hourly rate.

Board law makes clear that a respondent may insist to impose on any proposal it deems reasonable, providing that the proposal relates to a mandatory subject of bargaining. The Act does not require that a respondent modify proposals, even in the face of a threat to strike or a strike itself. As long as parties are bargaining in good faith, one-page or individual paragraph proposals are not only often appropriate but are also frequently traditional

and practical. Indeed, without reviewing the negotiations in detail, by the commencement of the strike, the Respondent had made counterproposals on many of the Union's suggestions, was expressing its opposition to other proposals, and was bargaining. The major issue throughout negotiations was whether employees would be paid pursuant to the Respondent's tasks system, whereby employees received a per diem amount for completing their routes for pickups of garbage, no matter how long they were required to service their routes, or whether the employees should be paid an hourly rate, as the Union proposed. These constituted two entirely different concepts of paying workers for their labor; and up to the time of the strike, and even at the time of the hearing, both Respondent and the Union maintained equally unyielding positions, which, until resolved, prevented the negotiators from making progress on many other proposals.

Accordingly, I conclude there is nothing inherent in the parties' bargaining which proves any violation of the Act and I proceed to one of the earlier incidents which allegedly affected the otherwise legal bargaining. Employee George Gabriel testified that John Lawson, the Respondent's secretary-treasurer, at a monthly drivers' safety meeting held on February 4, 1981, at the Joseph Caleb Community Center, offered employees a 13-percent wage increase and threatened that he would run the Respondent's business as it had been run for years and that he was not going to change anything. Employee Gerry Pollard testified, however, that Lawson stated that he had brought a proposal to the meeting, that the employees were supposed to be getting a 13-1/2 percent pay increase, and that he could not understand why the employees would want to continue their support of the Union when he was giving such an increase. Pollard insisted that the Union and terms and conditions of employment constituted the sole subjects of discussion, even to the extent of disavowing his earlier affidavit which indicated that safety conditions were discussed. Employee Ervin Ellison testified to a third scenario: that the meeting on February 4 was actually held at the Holiday Inn and that employees asked when they were going to get their wage increase, to which Lawson replied that they would get a 13-percent increase that they were "supposed to be getting."<sup>2</sup>

Lawson denied that he made any mention of an increase at the February 4 meeting, but conceded that he had first discussed with employees the subject of a wage increase in early February 1981, which might coincide with the date of the safety meeting, and acknowledged that a wage increase was a "likely topic of conversation" engaged in by employees at safety meetings. His first recollection of any such discussion at a meeting, however, was at a meeting on February 25 at the Miami Springs Villa, when an employee said that he had heard different rumors of what the Respondent's wage proposal was; and Lawson explained that the Respondent's offer was 10 percent, across-the-board, plus a merit in-

<sup>1</sup> The Union moved to correct the official transcript. There being no opposition, the motion is granted; and the transcript is amended accordingly.

<sup>2</sup> Ellison also testified that Lawson opened the meeting with: "You know why we are all here . . . [to] come to agreement."

crease, an offer that the Union had twice rejected. Two of the Respondent's current employees corroborated that no discussion of wage increases occurred on February 4. However, Supervisor Edward Brown, the Respondent's lead dispatcher, recalled Lawson's discussion of a 10-percent, plus merit, increase, but could not recollect whether it took place at the February 4 meeting, or earlier, or later. Further, he could recall no meeting at the Miami Springs Villa as late as February 1981. Finally, Brown recalled one employee asking Lawson whether an agreement would ever be reached, to which Lawson replied that he did not know.

For a variety of reasons, I am persuaded that Lawson made none of the statements on February 4 which were attributed to him. First, the varying recollections of the General Counsel's witnesses do not constitute the model of consistency; rather, Gabriel's and Pollard's narrations are equally improbable, in different ways, neither hinting at any reason which would motivate Lawson to engage in any of the comments attributed to him. Moreover, Ellison's testimony was that what he heard occurred at a different meeting; indeed, what he testified to does not amount to a violation of law and is closer to what Lawson testified to. Second, the alleged proposed across-the-board increase of 13 or 13-1/2 percent was not the same as the Respondent later proposed at the bargaining table. Although at one negotiating session, the Respondent explained that the package might amount to an average of a 13-percent increase, many employees receiving merit increases, no one on the union side, particularly Gabriel, who was the principal employee representative, mentioned the fact that Lawson had previously offered 13 percent to all employees, without qualification, and now the Respondent was reneging on its offer. The lack of response is surprising and leads me to find that Lawson did not, at least as early as February 4, make the offer attributed to him and, therefore, did not engage in individual bargaining. Rather, I credit the denials of the Respondent's witnesses, including two current employees, and find unpersuasive the differing recollections, filled with inconsistencies, of the General Counsel's witnesses.

Although the alleged 13-percent increase constitutes the only allegation of prestrike individual bargaining, Lawson's alleged statements that the Union was not going to get him to run the Respondent's business any differently from the manner it had been run for years and that the Respondent would not sign a contract with the Union constitute a recurrent theme throughout the testimony of many of the General Counsel's witnesses. The General Counsel and the Union argue that the effect of such statements was to make futile further negotiations because the Respondent's position was utterly firm and intransigent.

The Respondent's alleged statements arose in a variety of contexts and on numerous occasions and were all denied by the Respondent's witnesses. Whether it is probable that the statements were made rests, in part, on the progress of negotiations. The parties in their first three sessions, two in December 1980 and one on January 8, 1981, thoroughly reviewed the Union's initial contract proposal, a form contract (which contained spaces

for amounts to be paid for pension and health and welfare contributions and left open a minimum wage scale) taken from an agreement which the Union had with a different employer. Their fourth session on January 20 included a discussion of what would be the critical issue in the negotiations—the Union's demand that employees be paid an hourly rate contrasted with the Respondent's insistence that it maintain its current task system—a dispute which union organizer Tony Zivalich described as "our work week versus their work week."

It was at the next negotiating session on February 12 that Lawson stated that the employees were expecting their annual February raises<sup>3</sup> and James C. Crosland, the Respondent's attorney, made known the Respondent's desire to implement the raises, which would consist of a 10-percent across-the-board interim increase, plus a continuation of merit increases, averaging about 7 to 9 percent for employees who were eligible therefor. However, Crosland made clear that this proposal was only an interim one and its implementation would not preclude further bargaining on wages or other economic benefits.

At the next negotiating session of February 20, 1981, the interim wage increase was again raised, but Zivalich flatly rejected it. After discussion of some other proposals and counterproposals, another of the Union's negotiators, impatient with his perceived lack of progress, stated that the negotiations were wasting the Respondent's money and the Union's time and that the Union might as well prepare picket signs. He requested that the Respondent prepare its complete proposal and present its final position at the next meeting, which was set for and held on February 25. At that meeting, the Respondent presented a formal written explanation of the task system, to which Zivalich replied that the proposal was a "gut issue" and that it was "totally unacceptable." Although there was movement and some agreement on other proposals during the morning of that day, the task system was not further discussed. Before the parties recessed for lunch, union attorney G. William Baab demanded "meaningful" proposal by the Respondent by 2:30 p.m. That afternoon, the demand for a "final position" was renewed and Crosland explained that he found it difficult to do so because the Union had never presented any wage or fringe benefits proposal. Baab replied that "Teamsters' policy was to secure agreement on all substantive issues before discussing wages"; and Zivalich added that it was "not meaningful to discuss wages until we get this task system worked out. I could propose \$20 an hour but it wouldn't make any difference."

That night, the Union held a meeting at which the members voted to strike. What actually happened is subject to some debate, particularly because the reasons for the strike vote, as testified to by Gabriel and Zivalich, constituted the proof relied on by the General Counsel and the Union to demonstrate that what occurred on February 26 was an unfair labor practice strike and not an economic strike. Before reaching that ultimate issue, the testimony of Gabriel alone is helpful in resolving

<sup>3</sup> I find that Lawson had spoken earlier to employees about the possibility of raises, but I do not find that he did so in violation of the Act or as stated by Gabriel and Pollard.

what unfair labor practice activity actually occurred prior to February 25. He stated that four reasons gave impetus to the Union's action. The first was the discharge of an employee more than a half-year before. The second was the Respondent's surface bargaining, not in the sense complained of herein, but in terms of the inability of the parties to reach agreement at the table because of the Union's perception that the Respondent was not bargaining in good faith because it was not agreeing with the Union's position. The third was the Respondent's approach to various employees to pay bonuses to those who refused to support the strike and who were willing to work behind the Union's picket line.<sup>4</sup> The fourth and final reason was "hearsay and . . . rumors" that the Respondent would never sign an agreement (although Gabriel later recalled his own testimony that Casagrande had allegedly made such a statement directly to him).

Based on these reasons, the Union's membership, testified Gabriel, authorized him to instruct Baab, who attended the meeting, to file immediately unfair labor practice charges with the Board; and Baab did so on February 26. The charge that was filed, however, accused the Respondent solely of refusing to bargain in good faith and attempting to coerce employees, by bribes, from engaging in protected concerted activities. Conspicuously absent were the Respondent's alleged statements that bargaining was futile and alleged threats that the Respondent would never sign a contract. Although it may be said that such were subsumed into an 8(a)(5) charge, it appears more likely that the alleged statements and threats were not separately charged as violations because they were not mentioned by Gabriel on February 25 and because they did not occur.

Furthermore, Gabriel's testimony on direct examination was the product of many leading questions and attempts to refresh his recollection and, on cross-examination, he had forgotten some of the facts that he had testified to only on the day before—all of which leads me to find him unreliable. That conclusion is bolstered by the inconsistencies between his testimony and that of Pollard and Ellison<sup>5</sup> about the February 4 meeting and I credit the denials of Lawson and employees Commodore Stewart and Henry White<sup>6</sup> that the threats were made as al-

<sup>4</sup> Gabriel identified employee Alfred Kitchen as one who was asked by the Respondent to work behind the picket line. However, Kitchen testified that the first time he was asked to work was the morning after the meeting.

<sup>5</sup> At the February 4 meeting, Ellison testified, one of the first events that occurred was that an employee asked Lawson whether he was going to sign a contract with the Union, to which Lawson responded: "No." Upon further questioning, Ellison revised his narration by testifying that an employee asked whether a contract had been signed and Lawson repeated the question, "Have I signed the contract?" At this point, another employee asked whether the Respondent would sign a contract, and Lawson said: "No." No other witness corroborated Ellison on either of these exchanges; and, in light of the evident confusion of Ellison, even if I credited him, it may well be that Lawson misunderstood the inquiry and was merely answering that no contract had then been signed. In any event, I credit Lawson's denial. I would be remiss if I did not add that I find it improbable that any of the alleged questions were asked.

<sup>6</sup> Had White's testimony not otherwise been corroborated, I would not have credited him because he demonstrated a general lack of recall about the events at issue.

leged on February 4 and that they were mentioned at the union meeting.

Accordingly, I dismiss the allegation of the complaint pertaining to direct dealing with employees on February 4. I also find no credible testimony supporting the allegations of the Respondent's threats that no contract would be signed with the Union or that the Respondent would never alter its methods of doing business. Much could be written with respect to each individual incident alleged in the complaint. Suffice it to say, first, that the Respondent's conduct at the bargaining table evidenced a good-faith attempt to accommodate numerous of the Union's demands.<sup>7</sup> The major dispute, however, involved the manner in which the Respondent was willing to compute its employees' wages and, because of the parties' fundamental difference in approach, even the Union had made no offer on wages and pension and welfare benefits. It should not be incumbent solely on an employer to offer a "complete contract," but that is one of the contentions made by the General Counsel. On the basis of the record herein, however, neither the Union nor the Respondent deserves criticism; they were simply unable to agree and the Act requires neither party to accede to the other's desires. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-404 (1952). They must only listen and honestly attempt to reach agreement, if that is possible. I find that both parties bargained in good faith.

By finding in particular that the Respondent was attempting to reach an agreement, I find, in the circumstances herein, that it was improbable that, while seeking an agreement at the bargaining table, its officers and representatives were spouting to one and all that they had no intention to reach any agreement, that they would never sign a contract, and that they would close the business before doing so. The proof is inadequate, in fact wholly lacking, to support such a notion, and I reject all testimony on that ground, as well as find a general lack of consistency, clarity, and candor on the part of the General Counsel's witnesses, as evidenced by the following incidents:

(a) Gabriel, in an attempt to corroborate the testimony of Pollard and Ellison regarding Lawson's unwillingness to change the Respondent's method of business, stated that an employee asked whether the Respondent would change its insurance benefits and its method of paying vacation benefits, to which Lawson allegedly replied that he was not going to change anything. Gabriel believed the question was asked by Kitchen, who had been previously called by the General Counsel as a witness and who was asked nothing about the February 4 meeting. I infer that his testimony would not have been favorable

<sup>7</sup> For example, the Respondent had made compromises on the use of seniority for layoff and recall and vacations, had made offers of an additional week of vacation to some employees and increased premiums for health and welfare benefits coverage, and had made commitments on dues checkoff and binding neutral arbitration. On other demands of the Union, the parties were far apart simply because the Respondent could not agree to the concept of the Union's proposals, to wit, the Union's demand that employees have the right to honor all picket lines and that no employee strike could be enjoined. On yet another demand, that for health and welfare benefits, the Union was still evaluating the Respondent's health and welfare benefits and had not decided what it wanted.

to the General Counsel's case. In addition, I note that Gabriel could not recall on cross-examination whether Lawson's purported statement about his continuing to run the Respondent as he had always run it occurred at the February 4 meeting.

(b) On January 23, 1981, driver Ervin Ellison was suspended for 3 days for negligently causing a truck to overheat, causing permanent damage to its engine. Employee George Gabriel, allegedly as the person designated to handle employee grievances,<sup>8</sup> met with the Respondent's general manager, Jack Casagrande, to discuss the suspension on or about that same day. During the course of the conversation, Gabriel testified, he asked Casagrande whether, if the employees got rid of the Union and its two organizers, the employees could have a contract with the Respondent and would the Respondent sign it. Casagrande's answer varied, depending on which, if any, of the three statements of Gabriel is believed: (1) that the Respondent was not going to sign any contract; (2) that Casagrande would not sign any contract with the employees or the Union; and (3) that Casagrande was not going to sign any contract with "us," pointedly omitting any reference to the Union.

The latter statement would appear to undercut the complaint's allegation that the Act was violated because the Respondent stated that it would not sign a contract with the Union. Leaving that problem aside, I have grave difficulty believing any of Gabriel's three narrations. Implicit in the conversation is Gabriel's desire to bypass the Union and make a contract directly between the employees and the Respondent, but no rationale was presented why Gabriel felt that course of action necessary. Negotiations had begun only a month before, there had been four negotiating sessions, and there appears no reason for Gabriel's anxiety; nor could Gabriel recall how he and Casagrande ever became involved in the subject. I do not consider Casagrande a stupid man and cannot understand why he would tell the leader of his employees that he would not sign any contract with anyone, while at the same time he also attended numerous negotiating sessions which were purportedly aimed at reaching such a contract. Further, if Casagrande made the statement attributed to him, there seems little point in the Union's having continued to meet with the Respondent at the negotiating table. Instead, negotiations continued, and never once at the bargaining table did the Union mention this statement nor did Gabriel ask Casagrande about it. Under all the circumstances, I credit Casagrande's denial and dismiss this allegation.

(c) Two allegations are based on partially overheard conversations by Ellison and Pollard, wherein Lawson and Casagrande, respectively, stated that the Respondent would never enter into a contract with the Union. I find Ellison's powers of recall minimal and find that the noise of his operation of a gas pump, while his truck's motor was running, did not permit him to overhear any conversation. (This finding assumes that Lawson's car was not in its usual parking place, which was so far away from where Ellison stated he was standing as to make it im-

possible for Ellison to overhear the conversation.) I credit, in any event, Lawson's denial, including his comment that he would have had no reason to make such a statement. Furthermore, I do not credit Pollard, who testified that he overheard the comment while walking with another employee on February 10. The Respondent demonstrated that the other employee did not work on February 10. While it may have been that Pollard referred to an incorrect date, the General Counsel failed to introduce testimony or evidence showing that possibility. Without such a showing, I find that the incident was deliberately concocted to create allegations otherwise most difficult to counter.

(d) Finally, there were allegations of and testimony regarding attempted bribes or payments to persuade employees to work behind the picket line or not to strike. I found Kitchen to be the only fully candid employee witness called by the General Counsel. He testified (except for the Wittken incident, discussed *infra*) that he was not offered a bonus not to picket or to return to work and that he overheard Lawson tell an employee who was asking for a bonus that he could not give employees any extra money. Lawson denied that he offered bribes or extra money, consistent with what Kitchen heard; and I credit both. Pollard also testified to being offered by Casagrande a payment of 2 days' sick leave, which the Respondent had previously refused to give him. Casagrande testified that employees earned sick leave days by working and that he had no reason to pay Pollard twice for the same days he was out of work. I credit Casagrande's explanation and denial, noting that Pollard never made mention of this "bribe" when employees at the February 25 union meeting were discussing reasons for striking the Respondent.

I am cognizant of and have often relied on *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950): "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." Unfortunately, I was wholly unpersuaded by the demeanor of Ellison at the hearing, the confusion of Gabriel, Pollard, and Ellison, the often selective memory of Gabriel, and Pollard's lack of recollection on cross-examination about Lawson's condemnation of the Union. After thorough review of the record, I remain unconvinced of the truthfulness and candor of their testimony. Notwithstanding the arguments contained in the Union's brief, there are points when misstatements of material facts are so frequent that a factfinder must conclude that there is evidenced more than innocent and pardonable confusion. I credit the denials of all of the Respondent's witnesses and credit none of the alleged violations testified to as having occurred prior to the commencement of the strike. I will recommend that all such allegations be dismissed.

Therefore, I find and conclude that, prior to the strike, there were no unfair labor practices committed and that the strike could not have been an unfair labor practice strike. The strike lasted from February 26 until May 30, 1981. On May 28, the Union made an unconditional offer on behalf of the striking employees to return to work.

<sup>8</sup> Gabriel was also the chairman of the employees' negotiating committee.

The Respondent was willing to reinstate strikers according to seniority only as openings occurred, and numerous employees were not immediately rehired. If the strike had been converted into an unfair labor practice, the Respondent would have had to reinstate all of its striking employees immediately even if replacements for them had been made. *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 and fn. 8 (1956).

To demonstrate that the strike was converted into an unfair labor practice strike, the complaint relies on two acts of alleged illegal solicitation by the Respondent to induce employees to return to work. Kitchen testified that Supervisor Ralph Velocci telephoned him early on February 26, the day the strike began, and asked Kitchen whether he was going to come to work and would he come to work. Velocci told Kitchen to call his work partner and ask him to come to work. When Kitchen protested that he would not cross a picket line, Velocci said he would bring Kitchen's truck to him at any place.<sup>9</sup> Although Kitchen agreed to return to work, he did not, despite further requests by Velocci.

The General Counsel contends that Velocci's solicitation violated Section 8(a)(1) of the Act. I disagree. In *Texas Co.*, 93 NLRB 1358, 1360-61 (1951), enf. denied on other grounds 198 F.2d 540 (9th Cir. 1952), the Board held:

Absent a threat or a promise of benefit designed to coerce the strikers into returning . . . the legality of the Respondent's individual solicitation of the strikers must be determined against the background in which such solicitation was done. For, although the Board has, in the past, found individual solicitation of strikers violative of the Act, in all such cases one or both of the following two factors has been present: (1) The solicitation has constituted an integral part of a pattern of illegal opposition to the purposes of the Act as evidenced by the Respondent's entire course of conduct, or (2) the solicitation has been conducted under circumstances, and in a manner, reasonably calculated to undermine the strikers' collective bargaining representative and to demonstrate that the Respondent sought individual rather than collective bargaining. [Footnotes omitted.]

Thus, the noncoercive solicitation of individual strikers to return to work is not per se violative of the Act. *American Mfg. Co. of Texas*, 98 NLRB 226, 260 (1952); *Webb Wheel Division*, 121 NLRB 1410, 1411 fn. 3 (1958); *American Steel Building Co.*, 208 NLRB 900, 912-913 (1974).

Although the General Counsel's position has some appeal, if only because the Board has not seen fit to overrule any of the authority the General Counsel relies

<sup>9</sup> Kitchen's investigatory affidavit also recites Velocci's promise to Kitchen that, when the strike was over, Velocci would show his appreciation. Kitchen could not recall this at the hearing. Rather, he said that Velocci offered extra work, which was available to employees both before and during the strike, and that when Kitchen said that he had heard that employees were getting extra money, Velocci denied that that was so. In the circumstances, I find that Velocci offered no bonus, extra money, bribe, or any other inducement to Kitchen to return to work.

on,<sup>10</sup> the Board's position is not as clear as one might assume at first blush. In *Camay Drilling Co.*, 254 NLRB 239 (1981), the Board noted that "in certain instances the solicitation of employees to cross a picket line and work during a strike is not violative of the Act . . . [but that conclusion is warranted only in] the absence of a promise of special benefit or a threat of detriment in the request. [Citing *Mosher Steel Co.*, 220 NLRB 336 (1975); *Coca-Cola Bottling Co. of Louisville*, 166 NLRB 134, 135 (1967).]"<sup>11</sup> Because the employer's letter in *Camay* was soon followed by a similar request with a threat of detriment to an employee and occurred during the midst of an unfair labor practice strike and within a context of other violations of the Act, the Board found that the letter violated Section 8(a)(1) of the Act. See also *Cantor Bros., Inc.*, 203 NLRB 774, 777-778 (1973).

Here, Velocci's telephone calls made no reference to the Union, disparaging or otherwise. There is no pattern of illegal opposition to the purposes of the Act; rather, the Respondent's entire course of conduct was not illegal. The solicitation was not conducted to undermine the strikers' collective-bargaining representative; and the Respondent was interested only in securing employees to do its work, rather than "to demonstrate" that it sought to bargain only individually with the employees and not collectively with the Union. *Bromine Division*, 233 NLRB 253, 263 (1977). Accordingly, I conclude that this allegation of the complaint should be dismissed.

The other solicitation, contrary to the Velocci incident, involved a direct bribe. Chester Wittken conceded that in early March, shortly after the strike began, he offered \$300 to Kitchen and to other employees whom Kitchen was asked to solicit, if they would return to work. Kitchen agreed to talk with the other employees. These facts are not in dispute, but the Respondent denies that Wittken was its supervisor or agent.

Wittken was the general manager and one of the major stockholders of a waste disposal company whose assets, including routes, were purchased by the Respondent in 1979. Subsequently, he and another stockholder bought back one of the routes and commenced serving that route under a different company. When Casagrande became concerned in mid-February 1981 that a strike was a possibility, he called Wittken, among others, to ask him to work one of the routes formerly run by his former company. Wittken agreed to do so to ensure that the Respondent did not lose its routes to its competitors and that the Respondent would receive sufficient moneys to continue to make its monthly payments to Wittken and his partners.

It was while he was an unpaid route driver that Wittken made his offer to Kitchen. There is no evidence that Wittken performed any supervisory functions for the Respondent, and I conclude that he is not a supervisor within the meaning of Section 2(11) of the Act. Nor is there any evidence that he was directly or indirectly authorized by the Respondent to make the offer to Kitchen.

<sup>10</sup> See, e.g., *General Electric Co. v. NLRB*, 400 F.2d 713, 720-721 (5th Cir. 1968).

<sup>11</sup> See also *NLRB v. Robin American Corp.*, 654 F.2d 1022, 1026 (5th Cir. 1981).

en, a fact that both Wittken and Casagrande denied. Indeed, Kitchen testified that Wittken made clear that he was making the offer solely because it would help him get his loan repaid and was not attempting to entice Kitchen for the Respondent's benefit. I conclude that the Respondent is not legally responsible for Wittken's offers and has not violated the Act. *Westward Ho Hotel*, 251 NLRB 1199, 1206-08 (1980); *Longshoremen (Sunset Line)*, 79 NLRB 1487, 1509 (1948); *Jacobo Marti & Sons, Inc.*, 264 NLRB 30 fn. 1 (1982).

There is an additional allegation which requires only brief mention. The complaint alleges that a March 6 letter from Casagrande threatened strikers with discharge, to wit, "The Company also has the right to hire new employees to do your jobs and when the strike is over we are not required to discharge the new employees in order to take striking employees back." The theory is that the strikers were unfair labor practice strikers and that an employer may not threaten to discharge them. Because I have found that the employees were economic strikers, the letter accurately states the Respondent's rights. To the extent that the General Counsel's brief alleges that the letter also constituted an illegal direct appeal to employees to return to work, that contention is rejected for the reasons previously stated.

Accordingly, there is nothing that occurred during the strike which converted the economic strike into an unfair labor practice strike. I turn then to the remaining allegations, which concern the announcement of and the later granting of two unilateral increases of wages, in late November 1981 or early December and the other in early March 1982, each of 10 percent across-the-board and a merit increase of from 7 to 9 percent to certain employees, the announcement in February 1982 that the Respondent was contemplating the institution of a bonus and pension plan, and the unilateral institution of a bonus plan in April 1982. For a variety of reasons, the Respondent's conduct does not violate the Act in any respect.

The November 1981 increase of wages was the same as the Respondent had proposed in February 1981, and the Union had rejected. The last negotiations between the Union and the Respondent occurred on April 23, 1981. By then, if not before, the parties were clearly at an impasse. The Respondent, therefore, was entitled to

grant the same increase which was its last offer and which the Union had previously rejected. *NLRB v. Katz*, 369 U.S. 736 (1962); *Midwest Casting Corp.*, 194 NLRB 523 (1971).

The February 1982 wage increase, the effectuation of the bonus plan, and the November 1981 promises are valid for different reasons. The Union's certification year ended on October 28, 1981. By then, Respondent had a good-faith doubt that the Union continued to represent a majority of its employees. The latter is grounded on the Respondent's receipt on September 11, 1981, of a petition with 111 employees' signatures,<sup>12</sup> stating: "We don't want the Union. What we want is what belongs to us. Our raises long waited."

The first sentence suffices to give Respondent a good-faith doubt that the Union no longer represented a majority of its employees.<sup>13</sup> Because the Respondent's assertion of doubt was raised in a context free of unfair labor practices, it follows that, at the end of the certification year, the Respondent was no longer obliged to bargain with the Union and could lawfully unilaterally change terms and conditions of employment. *KSD-AM Radio*, 262 NLRB 687 (1982).

Accordingly, I find that the Respondent has not violated the Act in any respect. Upon the above findings of fact and conclusions of law, and the entire record in this proceeding, including my observation of the demeanor of the witnesses as they testified, and my consideration of the briefs filed by all parties, and pursuant to Section 10(c) of the Act, I issue the following recommended

#### ORDER<sup>14</sup>

The complaints herein are hereby dismissed in their entireties.

<sup>12</sup> The Respondent then had approximately 140 employees.

<sup>13</sup> Respondent filed a decertification petition on November 16, 1981.

<sup>14</sup> If no exceptions are filed as provided in 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.