

**PBA Incorporated and Teamsters Local No. 115  
a/w International Brotherhood of Teamsters,  
Chauffeurs, Warehousemen and Helpers of  
America. Cases 4-CA-11292 and 4-CA-11404**

31 May 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS**

On 30 September 1983 Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent 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,<sup>1</sup> and conclusions, as modified herein, and to adopt the recommended Order.

1. On 31 July 1980<sup>2</sup> the Respondent's employees struck for union recognition and to protest the Respondent's unfair labor practices committed during the previous week. The judge found the strike to be an unfair labor practice strike from its inception.<sup>3</sup> As shown by the record, approximately 20

out of a total of 24 or 25 employees participated in the strike, including Rolando Marquez, Pedro Garcia, Hipolito Perea, and Francisco Quinones. On various dates in December, these four strikers each applied for reinstatement at the Respondent's facility. None was reinstated by the Respondent. Along with two other strikers, they were refused reinstatement on the basis of alleged serious strike misconduct.<sup>4</sup>

The judge found that these four strikers actually engaged in the misbehavior attributed to each by the Respondent. Since culpability was established, it is necessary to assess the misbehavior to ascertain if it was serious enough to deprive the individual employee of reinstatement. Without citing any Board precedent, the judge found the misconduct serious enough to sustain the Respondent's action. The General Counsel has excepted to the judge's conclusion that the denial of reinstatement of these strikers was lawful. We agree with the judge's determination, but for the reasons stated in our recent decision in *Clear Pine Mouldings*.<sup>5</sup>

In *Clear Pine Mouldings* we adopted the objective test as to "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." We further stated that we would apply an analogous standard to the assessment of strikers' verbal and nonverbal conduct against persons who do not enjoy the protection of Section 7 of the Act.<sup>6</sup> Applying the above principles to the present case, we find that strikers Marquez, Pedro Garcia, Perea, and Quinones exceeded the bounds of protected strike activity. Marquez and Pedro Garcia engaged in rock throwing at vehicles of nonstriking employees and company officials. Marquez' rock throwing was at a stationary vehicle, smashing one of its rear lights. Pedro Garcia's rock throwing resulted in a state court conviction of harassment. He also was involved in a hazardous car-truck chase and, as either perpetrator or the accomplice, hit a customer's moving truck with a board. Perea and Quinones made various threats of assault while at the picket line. Perea's threats directed to the Miquon Paper truckdriver, customer Lynn Stanton, and the Reno Bar owner clearly had a reasonable tendency to coerce and intimidate them, regardless of whether they are employees or nonemployees, within the standards set forth in *Clear Pine Mouldings*. In addition, Perea's threats to the Reno Bar owner were

<sup>1</sup> The General Counsel has 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.

We note that it was acceptable for the judge to credit the General Counsel's witnesses only in part when they testified about the alleged 8(a)(1) conduct. The judge did not credit these same witnesses when their accounts of the strike misconduct incidents differed from the versions given by the Respondent's witnesses. The trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says. *Brinkman Southeast*, 261 NLRB 204 (1982); *Giovanni's*, 259 NLRB 233 (1981); *Maxwell's Plum*, 256 NLRB 211 (1981); *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

We correct the following inadvertent errors in the judge's decision, which are insufficient to affect our general agreement with the judge's decision. At sec. II,C,2(a), the record shows that the door was slammed in a fashion "almost hitting [the driver] in a forceful manner" or "narrowly missed hitting the driver" and not "coming close to crushing the driver's leg," as found by the judge. At sec. II,C,2(b) and (c), the judge indicated that Miguel Garcia was the driver and his brother Pedro the passenger in the vehicle following the Miquon Paper truck. From the record, it is unclear which of the Garcia brothers was the driver and which was the passenger, but we find that resolution of their roles is unnecessary since their very presence in the vehicle and complicity in the conduct is what is crucial to assessing their behavior as serious misconduct. At sec. II,E, the promises by the Respondent's official, Secretary-Treasurer Cohen, were made "after" recognition was demanded and "before" the strike ensued, not in the time frame found by the judge.

<sup>2</sup> All dates are in 1980 unless otherwise indicated.

<sup>3</sup> No exceptions were taken to this finding.

<sup>4</sup> No exceptions were taken to the judge's conclusion that the denial of reinstatement of the other two strikers was *not* an unfair labor practice. Thus, these matters are not on review before the Board.

<sup>5</sup> 268 NLRB 1046 (1984).

<sup>6</sup> Id. at 8 fn. 14.

accompanied by the throwing of tacks under the latter's vehicle. Quinones' carrying, waving, and swinging a baseball bat on different occasions at customers, management personnel, and nonstriking employees are sufficient to disqualify him from reinstatement under *Clear Pine Mouldings*. Additionally, Quinones' threat to "break [Secretary-Treasurer Cohen's] head with a baseball bat" runs afoul of the *Clear Pine Mouldings* strictures governing peaceful picketing.

In view of the foregoing, we find that the Respondent acted lawfully when it denied these strikers reinstatement, and we uphold the judge's dismissal of the portion of the complaint relating to them.<sup>7</sup>

2. The judge did find that the Respondent had committed various unfair labor practices in this proceeding, but rejected the General Counsel's contention that these warranted a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The unfair labor practices found were 8(a)(1) violations committed by the Respondent's foreman and two of its company officials.<sup>8</sup> These unfair labor practices were in the nature of threats and promises primarily communicated before the strike commenced. On 22 July, the first day of organizing at the Respondent's plant, Foreman Rentas told employee Rodriguez that if he filled out a union organization card, he would lose his job because the Company would not accept the Union. Despite Rentas' warning, Rodriguez signed a union card that very day at his lunch break, but was not discharged. By 23 July, 18 of 24 or 25 bargaining unit employees had signed union cards. On 24 July, in a group meeting of the night-shift employees, Foreman Rentas promised them a wage increase and other benefits if they rejected the Union; warned them that the Company would never sign a contract and that a strike was inevitable; and threatened to close the plant if they struck. Then, on 30 July, Secretary-Treasurer Cohen promised several employees a wage increase and other benefits to induce them not to have the Union in the plant. About a month into the strike, in late August, stockholder Brenner promised employees at the picket line higher wages if they abandoned the strike and returned to work. None of the pickets did so, and the strike continued. The

<sup>7</sup> In reaching this conclusion, we reaffirm our recent position that "[b]alancing the misconduct of strikers against the seriousness of the employer's unfair labor practice is inappropriate because it condones misconduct on the part of employees as a response to the employer's unfair labor practice and indeed makes it part of the remedy protected by the Act." *Clear Pine Mouldings*, supra at 11 fn. 25.

For the reasons stated in the *Clear Pine Mouldings* concurrence, Member Dennis joins her colleagues in adopting the judge's conclusion that the Respondent lawfully denied reinstatement to the four strikers.

<sup>8</sup> No exceptions were taken to these unfair labor practice findings.

judge found that when the Union demanded recognition, it had majority status in the stipulated bargaining unit, but that the Respondent refused to recognize the Union. The judge found, however, based on the 8(a)(1) violations alone, no bargaining order was warranted and any lingering effects from these violations could be erased by the Board's traditional remedies. We agree with the judge's conclusion that a bargaining order is not appropriate here. However, we wish to elucidate our reasons for not issuing a bargaining order.

Determination of the appropriateness of a bargaining order is not based on "automatic formulae"<sup>9</sup> involving any set combination or type of unfair labor practices. Rather, the impact on employees' choice and the election process is what is critical. Here we are not faced with a situation where the respondent's 8(a)(1) conduct is coupled with any unlawful disciplinary action against any employee. Moreover, six of the unit employees affected by the threats and promises, about one-fourth of the unit, have since lawfully been denied reinstatement because of their strike misconduct. We conclude that "[w]hile we do not consider the violations Respondent committed to be trivial, they are of neither a nature or number indicating 'the tendency to undermine majority strength and impede the election process.'"<sup>10</sup>

We recognize that threats of plant closure because of union activity are flagrant interferences with Section 7 rights and are likely to destroy election conditions for a considerable period of time. See *NLRB v. Gissel Packing Co.*, supra. But, in this case, significant are the circumstances underlying the particular threats uttered by Foreman Rentas. Foreman Rentas' threat of plant closing was conditioned upon the employees' actually striking. The strike occurred, but no plant closing ever happened. We think it unlikely that this particular threat of plant closure, made 3-1/2 years ago and contingent upon the act of striking, would sustain a fear that employees would lose employment if they persisted in union activity or would prevent the holding of a fair election. Equally important in this regard is the strike participation by over 80 percent of the Respondent's employees. Such a large employee turnout weakens any contention that the Respondent's unlawful conduct had a reasonable tendency to undermine the Union's strength.<sup>11</sup> In the same vein, two-thirds of the Respondent's employees signed union cards on the heels of Fore-

<sup>9</sup> *NLRB v. K & K Gourmet Meats*, 640 F.2d 460 (3d Cir. 1981).

<sup>10</sup> *L. M. Berry & Co.*, 266 NLRB 47 (1983).

<sup>11</sup> See *NLRB v. K & K Gourmet Meats*, supra; *Red Oaks Nursing Home v. NLRB*, 633 F.2d 503 (7th Cir. 1980), denying enf. in relevant part 241 NLRB 444 (1979).

man Rentas' threat to discharge employee Rodriguez if he signed a union card. There is no evidence that Rodriguez communicated this threat to other employees. Even if Rodriguez had done so, the large number of card signers indicates, if anything, that the employees chose to exercise their Section 7 rights in disregard of Rentas' threat.<sup>12</sup>

In concluding that a bargaining order is inappropriate here, we have considered the extensiveness of the Respondent's unfair labor practices and the likelihood of their recurrence in the future. We find that the Respondent's unlawful conduct, i.e., illegal threats and promises, was confined to a short time span, had no lingering effect on the employees' exercise of their Section 7 rights or their continuing their support for the Union, and was in the circumstances unlikely to be repeated.

For all the above reasons, we find that a bargaining order is inappropriate. The 8(a)(1) violations can be adequately remedied by a cease-and-desist order and a posted Board notice.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, PBA Incorporated, Pennsauken, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>12</sup> *Red Oaks Nursing Home v. NLRB*, supra.

### DECISION

#### STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried at Philadelphia, Pennsylvania, September 13-15, 1982. The charges were filed by the Union August 1 and September 9, 1980<sup>1</sup> (amended April 8 and 10, 1981); a complaint was issued September 19; and a consolidated complaint was issued October 31 and amended July 7, 1982, and at the trial. Following an unsuccessful strike, during which an injunction was issued in state court against continuing violence, the Company refused to reinstate six former strikers who were charged with strike misconduct.

The primary issues are whether the Company, the Respondent, (a) made unlawful threats and promises of benefits to employees, causing an unfair labor practice strike, (b) refused to reinstate and drop criminal charges against the six former strikers, (c) conditioned reinstatement on the employees' abandoning their union support, and (d) unlawfully refused to bargain while preventing a fair election, necessitating a bargaining order, in violation of

Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Company, and the Union, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Company, a Pennsylvania corporation, recuts and wholesales paper tape at its facility in Pennsauken, New Jersey, where it annually receives materials valued over \$50,000 directly from outside the State. The Company admits and I find 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. Threats and Promises of Benefits

By the time of the night shift on July 22, the first day of the union organizing at the plant, Night Shift Foreman Miguel Rentas was already aware that union authorization cards were being signed. Machine operator Juan Rodriguez was warming up his machine at the beginning of the shift when, as Rodriguez credibly testified, Rentas "told me that if I filled out the card, I was going to lose my job . . . that the company was not going to agree with the union, it was not going to accept the union." (Tr. 282-283.) Despite this warning, Rodriguez later signed a card when machine operator Hipolito Perea gave him one in the cafeteria at the lunchbreak. (Tr. 282.) (Rentas was present in the cafeteria at the time. Perea did not ask him to sign a card (Tr. 293).)

About 4:15 at the beginning of the night shift 2 days later, July 24 (after the Union made its first request for recognition earlier that day), Foreman Rentas called a meeting of the night-shift employees. As employee Perea credibly testified, "Everybody went to the cafeteria, and then Mike Rentas went to the office, came back," and told the employees that Secretary-Treasurer Sol Cohen said if we turned down the union, he would give them a 30-cent wage increase, another week's vacation, and holiday pay for their birthday. (Tr. 98-99.) When Perea responded that they would not turn down the Union, Rentas "got mad . . . walked away, but he came back" and told the employees that Cohen said that he was never going to sign a contract, that that would cause a strike, and that if they struck, he would close down (Tr. 100, 110).

At a meeting toward the end of the day shift on July 30 (the day before the strike), Sol Cohen himself made a similar offer to day-shift employees and to arriving night-shift employees (Tr. 139, 284). As credibly testified by employee Jose Jimenez, who acted as Cohen's interpreter to the Spanish-speaking employees, Cohen "started to talk by asking us why we didn't give him a chance to correct some of the complaints" and "asked what some of our problems were." "I told him the guys were com-

<sup>1</sup> All dates are in 1980 unless otherwise indicated.

plaining about the foremen pushing too much . . . poor pay . . . three weeks' vacation and some other things." (Tr. 154.) Cohen offered that, "To not get in the union," he would give the employees more money, 3 weeks' vacation, and holiday pay for their birthday (Tr. 141). Jimenez asked the employees what they wanted to do and they said they wanted to stay with the Union. (Tr. 155.)

On Friday in August, several weeks after the strike began, stockholder Peter Brenner went to the picket line and spoke in English to about five of the strikers. As employee Perea (who spoke English the best) credibly testified, Brenner first asked if they were getting ready to return to work. Perea responded that if Brenner wanted to sign a contract, they would go back, and Brenner asked why should he. Brenner then said that if they all went back to work that Saturday, he would pay them double for the day and "some extra money under the table." (Tr. 102, 132.)

The Company's defense was flat denials that these threats and promises of benefit ever occurred. When shown the allegations in the complaint referring to him, Foreman Rentas denied all of them (Tr. 353). Cohen admitted meeting with some of the employees the day before the strike, but claimed that he merely told them that he would take their requests under consideration (Tr. 728.) Brenner denied any meeting with the strikers and claimed the allegation in the complaint that he made them certain promises was "absolutely false" (Tr. 385). When so testifying, the three company witnesses impressed me as being less than candid, and I discredit the denials. Although I do not credit some of their testimony concerning the strike violence, employees Jimenez, Perea, and Rodriguez impressed me by their demeanor on the stand as being forthright witnesses when testifying about these and other matters.

The Company's other defense was that Rentas was not a foreman, but merely a leader with no supervisory authority. I find that this defense is fabricated.

Rentas worked under President William Carley on the 4:15-12:15 night shift until about 5:30 or 6 p.m. when Carley customarily went home (Tr. 686), and responsibly directed the 10 or 12 employees for the rest of the shift. Although claiming that Rentas was only a leader, Carley twice referred to him as "foreman" when testifying about conversations with him ("over the time that he was a foreman" and "Over the entire period that he was foreman") (Tr. 687.) Even though machine operator Perea was being paid \$6.35 an hour (20 cents more than Rentas (Tr. 61, 719)) when transferred to the night shift, Rentas told Perea he had to do everything Rentas told him because Rentas was the foreman (Tr. 65). Carley also told Perea that Rentas was the night foreman (Tr. 61). Although Carley (who impressed me as being less than candid when so testifying) claimed that Rentas merely carried out his orders and consulted him by telephone "Several times a week" (Tr. 685), Rentas recalled telephoning him "only a couple of times" in the 6-month period before the strike (Tr. 357-358). The evidence is clear that the employees considered Rentas to be their immediate supervisor (Tr. 277, 293). In fact, the belief that Night-Shift Foreman Rentas "was ordering us too much things to do" was a deciding factor in the employ-

ees' decision to seek union representation (Tr. 69). I find that Rentas possessed and exercised the authority to responsibly direct the night-shift employees and that he was a supervisor.

Having rejected the Company's defenses, I find that (a) about July 22, the Company acting through Foreman Rentas made at least an implied threat to close the facility, telling employee Juan Rodriguez that if he filled out a union organization card, he would lose his job because the Company would not accept the Union; (b) that on July 24, the Company acting through Foreman Rentas (1) promised the employees a wage increase and other benefits if they rejected the Union, (2) warned that the Company would never sign a contract and that a strike was inevitable, and (3) threatened to close the plant if the employees went on strike; (c) on July 30, the Company through Secretary-Treasurer Cohen promised the employees a wage increase and other benefits to induce them not to have the Union in the plant; and (d) in late August, the Company acting through stockholder Brenner promised employees at the picket line higher wages to induce them to abandon the strike and return to work. I find that each of these statements tended to coerce the employees in the exercise of their Section 7 rights and violated Section 8(a)(1) of the Act.

#### B. *Unfair Labor Practice Strike*

By July 23, 18 of the 24 or 25 bargaining unit employees had signed union authorization cards. The following day, union representatives appeared at the plant and requested union recognition. Secretary-Treasurer Cohen refused to sign a recognition agreement, stating he wanted time to talk to his lawyer. Union Representative Joseph Yeoman told him that was no problem, "we'll be back in a few days to give you a chance to get hold of your lawyer." (Tr. 27.)

That same evening, July 24, Foreman Rentas held the meeting of night-shift employees, informing them what Cohen said about a wage increase and benefits if they turned down the Union and about never signing a contract, causing a strike, and closing down if they struck. Then, toward the end of the day shift on July 30, Cohen himself held an employee meeting and offered employees a wage increase and other benefits not to have the Union in the plant.

The next day, July 31, union representatives returned to the plant. They refused to talk about bargaining demands until Cohen signed the recognition agreement, and Cohen stated, "I talked to my lawyer, and I can't sign the agreement." Union Representative Yeoman responded that "we'd have to go out and talk to the employees, and . . . some action may be taken" because "all we recognize you're doing now is just stalling for time so that you can reduce the majority to a minority . . . you have been out threatening employees and promising them benefits." (Tr. 29-30.)

In a meeting outside the plant, as Representative Yeoman credibly testified, he explained to the employees what had happened and asked them whether they wanted to give Cohen "a few more days to see if he would come around" or to set up a picket line immedi-

ately. "They said, no, we don't want to wait because . . . the company has [been] putting pressure on us, and have been trying to buy some guys off and promising us benefits . . . if we get rid of the union . . . we don't want to wait, we want to stay together." They went across the street, made signs reading, "Teamsters Local 115 on strike, PBA Company, unfair labor practice," and began picketing. (Tr. 31-33.)

Thus, between the first and second times the Union sought recognition, a foreman and a top official of the Company had attempted to undercut the Union's majority by making threats and promises. When the Company refused the second time to grant recognition, the Union accused the Company of "just stalling for time" while threatening employees and promising them benefits, necessitating some action. Then when the Union asked the employees if they wanted to give the Company "a few more days to see if [Secretary-Treasurer Cohen] would come around," they answered no because the Company was "trying to buy some guys off and promising us benefits" to "get rid of the union . . . we don't want to wait, we want to stay together." The employees went on strike and began picketing with signs protesting the unfair labor practices.

An unfair labor practice strike is one that is caused in whole or in part by an unfair labor practice. *Tufts Bros. Inc.*, 235 NLRB 808, 810 (1978). I find that the employees were striking not only for union recognition but also to stop the Company's unlawful attempts to undercut the Union's support. I therefore find that the Company's unlawful conduct constituted a contributing cause of the strike and that the strike was an unfair labor practice strike from its inception.

### C. Refusal to Reinstate and Drop Charges

#### 1. Conflicts in testimony

Despite the conflicts in the testimony, the evidence is clear that (a) the Union did not have a policy requiring its striking supporters to maintain a lawful, peaceful picket line (one or more union representatives sometimes being present when acts of violence were occurring), (b) arrests were made before and even after the strike violence was enjoined in state court, and (c) all six of the former strikers whom the Company refused to reinstate were convicted April 29, 1981, of criminal charges, given a suspended \$100 fine, and assessed \$25 in court costs on each charge.

The Company contends that there were repeated and continuing acts of misconduct and violence throughout the strike and that it refused to reinstate the six striking employees because of their violence and unlawful picket-line conduct against the Company and its management and against other employees, customers, and innocent parties.

The General Counsel contends that the company witnesses "gave very unreliable testimony," which was embellished concerning various alleged incidents and which at times "appeared to be contrived." He contends that "the six named discriminatees did not engage in these incidents." He argues that, even if they did, none of the incidents "rise to the level of serious misconduct" that

would preclude reinstatement—the alleged conduct being merely "impulsive," minor misbehavior "that can be expected on a picket line during the course of a lengthy and tense strike." *Southern Florida Hotel*, 245 NLRB 561, 564 (1979). The Union contends that the Company's evidence is incredible at best and that the rebuttal testimony should be credited.

Although I agree with the General Counsel that some of the Company's testimony appears to be embellished and contrived at times, I find that some of the inconsistencies resulted from faulty memory caused by the 2-year lapse of time before the trial. After weighing all the evidence (and disregarding the apparently untrustworthy testimony of administrative assistant Andrea Novin), I conclude despite the denials that credible evidence supports the following

#### 2. Findings of strike misconduct

##### a. Rolando Marquez

On August 1 Marquez was in a group of strikers who attempted to prevent a Miquon Paper driver from picking up an order. After the driver succeeded in opening the truck's trailer door to load the order, Marquez tried to slam the door closed, coming close to crushing the driver's leg (although the driver escaped injury). (Tr. 390, 756.)

Later the same day, Marquez and other strikers frightened customer Jerry Udell away, preventing him from picking up an order. An 8-year-old girl was with Udell. As striker Hipolito Perea (another alleged discriminatee) was shouting, "You ain't getting no fucking paper. Get that fucking car out of here," Marquez was pounding his fist on the fender, near the girl. (Tr. 761-764.)

On August 13, Craig Brenner and Peter Carley (sons of stockholders) were leaving the plant in stockholder Peter Brenner's car. Marquez threw rocks at the car, smashing one of the rear lights. (Tr. 400-402.)

On August 21, Marquez and Miguel Garcia (another alleged discriminatee) were arrested and charged with harassment when they pressed against the front doors of the plant and refused President Carley's repeated demands that they leave so he could go home. Both were convicted of the charge.

##### b. Miguel Garcia

On August 1, Miguel Garcia was present when Marquez attempted to slam the door closed on the Miquon Paper truck. After the truck was loaded and as the driver began driving away, Miguel Garcia followed in his car. He drove alongside the truck while Pedro Garcia (another alleged discriminatee) was leaning out the right window of the car and striking the truck with a board. (Tr. 392-393.)

Miguel Garcia was with strikers Perea and Marquez when they accosted customer Jerry Udell later the same day and prevented him from picking up an order. (Tr. 761-764.)

On August 6, Miguel Garcia and striker Perea threw rocks at a rental truck that stockholder Brenner and a security guard were using to make a delivery. (Tr. 399.)

On August 21, Miguel Garcia was arrested along with striker Marquez when they pressed against the front doors of the plant and refused President Carley's repeated demands that they leave. Both of them were convicted of harassing Carley.

On September 5, as two customers were picking up an order, Miguel Garcia threw a rock at their parked car and shattered the windshield. (Tr. 787-793.)

Also on September 5, Miguel Garcia was charged with criminal trespass and later convicted. (R. Exh. 16.)

#### c. Pedro Garcia

On August 1, after being present with Marquez and Miguel Garcia when Marquez attempted to slam the door closed on the Miquon Paper truck, Pedro Garcia followed the truck in Miguel Garcia's car, leaned out the car window, and repeatedly struck the truck with a board. (Tr. 393-394.)

Sometime in early August, Pedro Garcia threw a rock that hit the back of the van truck being driven by stockholder Brenner to make a delivery. (Tr. 641, 646.)

On September 5, after the Company began hiring strike replacements, the wife of one of the new employees drove up with children in the car. A guard escorted three or four of the new employees to the car. As they were driving away, Pedro Garcia heaved a large rock at the car. (Tr. 402-403.) He was convicted of harassment, for "throwing stones at the cars of employees." (R. Exh. 7.)

#### d. Hipolito Perea

On August 1, when striker Marquez was attempting to slam the door closed on the Miquon Paper truck, Hipolito Perea was shouting at the driver, "This will be the most expensive pickup you ever made in your life; we're going to get you." (Tr. 390.)

Later that day, when striker Marquez was pounding his fist on the fender of customer Jerry Udell's car, near the girl riding in the car with Udell, Perea was shouting, "Get this mother fucking car out of here, pal. You ain't getting no fucking paper. Get that fucking car out of here." Udell left without picking up his Order. (Tr. 763-764.)

On August 4, when bookkeeper Christine Salvatore escorted customer Lynn Stanton back through the picket line to Stanton's car with an order of paper, Perea shouted, "We are on strike. Do not come back to get any more paper or we will bang up the car the next time we see it." He told Salvatore, "Chris, do not help any more customers," and warned, "you will get hurt, you will be in trouble if you help any more customers." As she was walking back into the building, Perea repeatedly shouted to her, "If you help any more customers, we are going to bang up your car." (Tr. 626-630.)

On August 6, Perea and Miguel Garcia threw rocks at the truck that stockholder Brenner and a guard used to make a delivery. (Tr. 399.) Perea then got into a car driven by a union representative and followed the truck several miles. They sometimes cut in front of the truck and also drove alongside the truck, with Perea shouting, "What's the idea of driving and breaking the strike?" (Tr. 400.)

Around the middle of August, stockholder Brenner drove a truck from the plant to make a delivery. Perea threw a stone and hit the truck. He then went over and picked up the stone from the street, juggling it in his hand and laughing with other strikers as he walked back and sat down with them. (Tr. 656-661.)

On August 19, Perea threw tacks under a car driven by the owner of Reno's Bar and told the driver, "Don't you ever dare come the fuck back into this place again." (Tr. 797.)

On September 5, after Perea arrived in a car driven by a union representative, a police officer found a folding knife in the seat of the car where Perea had been sitting and filed a charge that Perea had possession of the knife "with a purpose to use it unlawfully." (R. Exh. 13.) He was convicted of the downgraded charge of disorderly conduct. (Tr. 302.)

#### e. Juan Rodriguez

On August 12, customer Ed Stucker was escorted in and out of the plant, where he picked up an order. As he was driving away, Juan Rodriguez ran after his car and threw two large rocks toward it. The first rock struck the car in the bumper area, and "a large cheer went up" from the other strikers. (Tr. 775, 777, 782-783.)

On August 13, Rodriguez hurled a large rock at Secretary-Treasurer Cohen as Cohen was approaching an Eisenberg Paper truck with an order of paper. The rock barely missed Cohen's head and went through the windshield. The police arrested Rodriguez and filed a criminal charge against him for smashing the windshield. He was convicted. (Tr. 670, 784-787, R. Exh. 9.)

On September 5, Rodriguez was arrested, and later convicted, for criminal trespass. (R. Exh. 11.)

#### f. Francisco Quinones

Quinones, who did not testify, participated in several incidents, waving a baseball bat (or what appeared to be a baseball bat).

On August 1, he was carrying the bat in the group of strikers who attempted to prevent the Miquon Paper driver from picking up an order (when striker Marquez tried to slam the trailer door closed) (Tr. 388, 625). On the same day he was present, waving the bat, when the group of strikers frightened customer Jerry Udell away (Tr. 766).

On August 4, Quinones was swinging the bat at bookkeeper Salvatore and customer Lynn Stanton when striker Perea was making threatening remarks to the two women. (Tr. 629.) Later that day, after Salvatore went outside the building again and caught Quinones removing the valve cap from a tire on her car, he began shouting something in Spanish and swinging the bat first at her and then at her car (although not touching either her or her car). After another striker told Quinones to leave her alone, she went back inside, telling Quinones, "Please, just leave my car alone." He had replaced the valve cap, but when she went outside again on the way home, the tire was flat. (Tr. 633-636.)

On August 21 Quinones was arrested with striker Marquez and Miguel Garcia and also charged with harassing

President Carley. He was convicted of the offense (R. Exh. 17).

On September 4, 2 days after the state court injunction was issued against continuing violence, Secretary-Treasurer Cohen insisted that Quinones leave the front lawn, telling him, "Do you mind? The injunction said you people . . . must be outside, on the curb line, walking. You cannot stand in front of our tree pointing your baseball bat." Quinones responded, "Fuck off. I'll break your head with this baseball bat." (Tr. 799.)

Having found that the many instances of continuing strike violence and other misconduct did occur, contrary to the denials, I reject the General Counsel's contention that they were merely "impulsive," minor misbehavior. *Southern Florida Hotel*, 245 NLRB at 564. I find instead that, although the six strikers were engaged in an unfair labor practice strike, each of them engaged in such serious misconduct that the Company was warranted in refusing to reinstate them. I therefore find that the 8(a)(1) and (3) refusal-to-reinstate allegations must be dismissed.

### 3. Refusal to drop criminal charges

The complaint alleges that about November 14, the Company refused to request dismissal of the criminal charges against the six alleged discriminatees "because they had continued to support the strike." The General Counsel presented no evidence to support this allegation. Moreover, even if there had been evidence that the Company refused a request during the continued strike in the fall of 1980 to drop the charges against the strikers, the refusal would not be unlawful merely because the Company did drop the trespass charge against another striker, Luis Murria, who was charged by mistake. (Tr. 936.) I therefore find that these 8(a)(1) and (3) allegations must also be dismissed.

### D. Unlawful Condition for Reinstatement

The complaint was amended at the trial to allege that the Company, acting through Secretary-Treasurer Cohen, conditioned reinstatement of striking employees on their abandonment of their union support.

All six of the alleged discriminatees applied to Cohen for reinstatement. Rodriguez made an oral request September 15. (Tr. 285-286.) Marquez made an undated written request. (G.C. Exh. 8.) Quinones made a written request December 24. (G.C. Exh. 13.) (It is clear that his handwritten note, promising "that if I return to work . . . I will not participate in any strike, "was an application for reinstatement.) About the same time, Perea also made a written application. (G.C. Exhs. 6 and 7.) A short time later, Miguel Garcia submitted his written application to Cohen. (Tr. 233, G.C. Exh. 10.) Pedro Garcia submitted his on December 19. (G.C. Exh. 11.)

The only direct evidence that Cohen conditioned reinstatement on the employees' abandonment of their union support was the testimony of Miguel Garcia, who testified that he "understood" that Cohen (speaking in English) said he would have to give up the Union. (Tr. 238.) Miguel testified through an interpreter and understands only "a little bit" of English. (Tr. 232.) I credit Cohen's denial (Tr. 824) and discredit the testimony that Cohen

told him "to try to leave the union behind" (Tr. 232) or to "forget about the union." (Tr. 240.)

I find that the General Counsel has failed to prove the belated allegation and that it must be dismissed.

### E. Alleged Unlawful Refusal to Bargain

On July 24, when the Union made a valid demand for recognition, a majority of the bargaining unit employees had signed valid union authorization cards. By July 23, 18 of the 24 or 25 employees in the stipulated appropriate bargaining unit ("All full-time and regular part-time production and maintenance employees, warehousemen and truckdrivers employed by the Employer at its Pennsauken, New Jersey facility; excluding office clericals, guards and supervisors as defined in the Act") had signed the union cards. I find it unnecessary to rule whether Marcellino Colin, the day-shift foreman, was a supervisor who should be excluded from the unit.

The General Counsel and the Union contend that the Company's unfair labor practices are sufficiently serious to warrant the imposition of a bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Company argues to the contrary, even if the alleged violations are proved.

As found above, the only unfair labor practices that the General Counsel has proved are 8(a)(1) violations by a minor supervisor (threats and promises) and an official (promises made at a meeting) before the demand for recognition and strike, and by an official (promise of higher wages) during the strike. Although these were serious violations of the employees' Section 7 rights, I find that the General Counsel has failed to show that the lingering effects could not be sufficiently erased by the use of traditional remedies to ensure a fair election.

I therefore find that the General Counsel has failed to prove that a bargaining order is necessary and that the Company unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSIONS OF LAW

1. By threatening to close the plant if the employees joined the Union or went on strike, by warning that the Company would never sign a contract and that a strike was inevitable, and by promising a wage increase and other benefits to induce employees not to support the Union, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By promising striking employees higher wages to induce them to abandon the strike and return to work, the Company violated Section 8(a)(1).

3. The strike that began July 31, 1980, was an unfair labor practice strike from its inception.

4. The Company did not violate Section 8(a)(3) and (1) by refusing to reinstate Miguel Garcia, Pedro Garcia, Rolando Marquez, Hipolito Perea, Francisco Quinones, and Juan Rodriguez, or by refusing to request dismissal of the criminal charges against them.

5. The Company did not condition reinstatement of striking employees on their abandonment of their union support.

6. The General Counsel has failed to prove by a preponderance of the evidence that the Company unlawfully refused to bargain in violation of Section 8(a)(5) and (1) and that a bargaining order is necessary to erase the lingering effects of the Company's unfair labor practices.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, PBA Incorporated, Pennsauken, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to close the plant if the employees join a union or go on a strike caused by its refusal to sign a union contract.

(b) Warning employees that it would never sign a union contract and that a strike is inevitable.

(c) Promising to increase wages and grant employees other benefits to induce them not to support a union.

(d) Promising to increase wages to induce employees to abandon a strike and return to work.

(e) In any like or related manner interfering with, restraining, or coercing 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) Post at its facility in Pennsauken, New Jersey, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained

<sup>2</sup> 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.

<sup>3</sup> 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."

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.

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

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to close the plant if you join a union.

WE WILL NOT threaten to close the plant if you go on a strike caused by our refusal to sign a union contract.

WE WILL NOT warn you that we will never sign a union contract, causing you to go on strike.

WE WILL NOT promise an increase in wages and other benefits to induce you not to support a union.

WE WILL NOT promise to increase wages to induce you to abandon a strike and return to work.

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

PBA INCORPORATED