

**Industrial Electric Reels, Inc. and Lodge 31, International Association of Machinists and Aerospace Workers, AFL-CIO.** Case 17-CA-15705

April 12, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On July 7, 1992, Administrative Law Judge Wallace H. Nations issued the attached decision. The Charging Party filed exceptions and a supporting brief; and the Respondent filed exceptions, a supporting brief, and a brief in answer to the Charging Party's 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, findings, and conclusions only to the extent consistent with this Decision and Order.

This case concerns the Respondent's conduct during its negotiations with the Union (the Charging Party) over a successor collective-bargaining agreement in 1991.<sup>1</sup> The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by bargaining in bad faith in several respects, and by implementing its last offer with respect to returning strikers without having first bargained to a lawful impasse. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate unfair labor practice strikers after the Union had made an unconditional offer on their behalf to return to work.

The judge found that the Respondent had bargained in bad faith in only one respect, namely, by making a "take it or leave it" offer to the Union on July 1. Having found this violation, however, the judge found that the Respondent subsequently offered to, and did, engage in further bargaining and at all times thereafter bargained in good faith, ultimately to a lawful impasse, and lawfully implemented its final offer. The judge further found that the Respondent's unlawful conduct on July 1 was not a contributing cause of the strike, and that the strike was, from the beginning and afterwards, an economic strike. Because the strikers were economic strikers who had been permanently replaced, the judge found that the Respondent was not obliged to reinstate them on request; he also found that the Respondent did make a valid offer of reinstatement to all strikers except for those accused of strike misconduct. In sum, the judge found that the Respondent did not violate Section 8(a)(3) and violated Section 8(a)(5)

only by the manner in which it presented its offer on July 1.

In exceptions, the Respondent contends that the judge erred only in finding that its conduct on July 1 was unlawful, and that the complaint should be dismissed altogether. The Union argues that the judge incorrectly found that the Respondent effectively repudiated its July 1 conduct, and hence that he also erred in finding that the strike was an economic strike, that the Respondent lawfully implemented its final offer after bargaining to a good-faith impasse, and that it lawfully permanently replaced the strikers.<sup>2</sup> For the reasons that follow, we agree with the Respondent, and we shall dismiss the complaint in its entirety.

As the judge found, the Respondent and the Union have been parties to a series of collective-bargaining agreements, the most recent of which was effective from July 5, 1988, through July 4, 1991. The parties commenced bargaining over a successor agreement in May. At the first bargaining session, on May 29, the parties agreed to follow the same procedure they had used in the 1988 negotiations, that is, to discuss non-

<sup>2</sup>The Union explains that, although it filed numerous exceptions, "they all boil down to one basic exception from which all of the others flow," that is, that the judge erroneously found that the Respondent "'repudiated' its unlawful bargaining conduct up to and including July 1, 1991, thereby converting the unfair labor practice strike into an economic strike. Further, that the poststrike conduct of the employer created an impasse which permitted the employer to permanently replace the employees then on strike." The Union asserts that the "Questions to be argued" are "Whether or not the employer's remedial conduct subsequent to July 1, 1991 effectively repudiated its past conduct . . . thus turning the unfair labor practice strike into an economic strike, setting the ground work for bargaining to impasse and the ultimate replacement of striking employees with permanent replacements." We understand from the foregoing that the Union's arguments are based entirely on its assertion that the Respondent did not effectively remedy its July 1 conduct. The Union has not formally excepted to the judge's recommended dismissal of the complaint allegations that the Respondent unlawfully refused at times to discuss economic issues and that the Respondent refused after July 1 to meet with the Union until after July 4. The Union's brief does contain several suggestions that the Respondent demonstrated bad faith in other ways, but does not identify the conduct referred to or explain why it should affect our decision. In the absence of such identification or explanation, we decline to find such bad-faith bargaining.

The Respondent has moved to strike the Union's exceptions and brief on the ground that they are based on theories—surface bargaining and ineffective repudiation of unlawful conduct—not argued to the judge. We deny the motion. Although we would not have characterized this as a "surface bargaining" case, "take-it-or-leave-it" bargaining, of the sort alleged to be unlawful here, has the same kind of "going through the motions" quality as surface bargaining. Similarly, although the Union inaccurately states that the judge found that the Respondent *repudiated* its July 1 conduct, rather than that it *remedied* that conduct (as the judge actually found), the two concepts are not unrelated. See *Mohawk Liqueur Co.*, 300 NLRB 1075, 1086 (1990). In any event, the parties' contentions on this point are moot; as we find that the Respondent did not violate the Act on July 1, it is immaterial whether its conduct on that day was either remedied *or* repudiated.

<sup>1</sup>Unless otherwise noted, all dates are in 1991.

economic issues before taking up economic proposals.<sup>3</sup> They also agreed that, as in 1988, the Respondent's president, Don Brockley, would not take part in negotiations until the parties were ready to discuss economic issues.<sup>4</sup>

The parties' negotiators met again on May 30 and on eight more occasions in June. Numerous proposals were exchanged; some were agreed to, and others were dropped. At the end of the June 27 session, however, several important issues—the Respondent's ability to make technological changes, subcontracting, certain job classifications, and severance pay—remained unresolved.<sup>5</sup>

At the June 25 meeting, the Union's chief negotiator, Gary Miller, proposed that the existing contract be extended, but the Respondent's negotiators did not agree. At the June 27 session, one of the Respondent's negotiators, Ken Hamlin, responded that the morale at the plant was bad, and that the Respondent wanted to conclude the negotiations and have a new contract before the July 4 expiration date of the existing agreement. The parties agreed to hold the next bargaining session on Monday, July 1, and that Brockley would be present to discuss economic proposals. (Brockley was in Europe on June 27, but returned to Omaha on Friday, June 28; he told his bargaining team to be prepared to meet over the weekend.)

According to the apparently credited testimony of Tony Bailey, a member of the Respondent's negotiating team, when the July 1 bargaining date had been set, Gary Miller told Bailey and Hamlin, "Fine, you guys are going to have to give us your best offer on Monday so we can take a vote then."<sup>6</sup> The judge then found that:

Although the Union representatives may not have intended it, I believe that both Hamlin and Bailey honestly believed that the Union had asked for the Company's best offer to be presented on July 1. No other meetings were set and evidently a ratification vote meeting was scheduled for July 2. This position was communicated to Brockley in Europe. Everything the Company did next points

to the fact that it held the belief that their July 1 proposal would be voted upon on July 2.<sup>7</sup>

We note that the Respondent's good-faith belief, as found by the judge, that it was expected to make its best offer to the Union on July 1 was consistent with the course negotiations took in 1988. Thus, in 1988, after several bargaining sessions, Brockley returned to the negotiations and the Respondent made its first economic offer on July 1. The Union voted the proposal down. The Union then sought, and obtained, the Respondent's agreement to extend the contract. The parties met again on July 6 and reached a tentative agreement, which was ratified the next day.<sup>8</sup>

In any event, Brockley and his 1991 negotiating team set about drafting the Respondent's initial economic proposal. Brockley was worried about a strike, because he was afraid the Respondent could not withstand one. Complicating matters was the fact that the Respondent, with the Union's acquiescence, had implemented a "two-tier" wage system in 1986. In Brockley's view, the higher paid Tier I employees were still being overpaid, and he wanted to hold the line on wages for that group. That being the case, Brockley doubted that the Tier I employees would approve any proposal the Respondent might make. The Respondent therefore structured its proposal with the goal of making it attractive to the Tier II employees, who constituted about 60 percent of the unit, in the hope that enough of them would vote for the proposal and that it would be ratified. The proposal thus provided for no wage increase in the first year for Tier I employees, followed by 1-percent increases in each of the next 2 years. For Tier II employees, the Respondent offered a 10-percent first-year wage increase and 3-percent increases in each of the next 2 years. The Respondent also proposed increasing the deductible on the employees' health insurance, increasing the premiums paid by the employees, and requiring employees to pay 20 percent of the first \$2500 of covered expenses annually.

At the July 1 meeting, the Respondent presented and explained its economic proposal. After a discussion, the Union caucused and returned with a counter-

<sup>3</sup>The complaint alleges that the Respondent unlawfully refused to discuss economic issues before July 1. As the parties had agreed to discuss only noneconomic issues first, the judge dismissed that allegation, and no exceptions were filed to the dismissal.

<sup>4</sup>Brockley was present at the May 29 session, as he had been at the first session in 1988.

<sup>5</sup>The importance of those issues, and the parties' positions concerning them, are explained in the judge's decision.

<sup>6</sup>Both Gary Miller and James Mueller, who also represented the Union at the June 27 meeting, testified that Miller made no such statement. However, the judge seems to have discredited their denial. Indeed, the judge found Gary Miller to be a generally unreliable witness.

<sup>7</sup>In fact, the Respondent's July 1 proposal was put to a ratification vote by the Union on July 2, and was rejected.

<sup>8</sup>We therefore do not find significance in the Respondent's rejection of the Union's June 25 request to extend the 1988 contract. The Union asked for a contract extension in 1988 after the membership had voted to reject the Respondent's initial economic proposal. In 1991, by contrast, the Union requested a contract extension before the Respondent had made its economic offer, but did not renew its request after the employees had rejected the Respondent's proposal. In addition, the July 4 expiration date of the contract fell on a Thursday in 1991; the next workday was Monday, July 8. Thus, in 1991, even without a contract extension, there was a full week between the July 1 negotiating session and the first day that a failure to reach agreement would have effectively forced a decision over whether to strike or to work without a contract.

proposal. The Union proposed annual wage increases of 5, 4, and 4 percent for Tier I employees, and larger increases for employees in Tier II; at the end of 5 years, Tier II would have been merged into Tier I. The Union also proposed phasing the Respondent's insurance proposals in over a 3-year period.

When it became clear that the Union was calling not only for a merger of Tier II into Tier I, but at considerably higher wage rates than the Respondent had proposed, Brockley said he was not interested in the Union's proposal. Exactly what was said thereafter is unclear, because the judge did not attempt to resolve the discrepancies in the testimony concerning the rest of the bargaining session.<sup>9</sup> According to the union witnesses, Brockley told the union negotiators that they had his offer "and that's it," or "take it or leave it." Gary Miller testified that Brockley said there was nothing more to talk about; Miller then asked Brockley to put a total written proposal together—the Respondent's best offer—so that the Union could vote on it the next day, and Brockley agreed to do so. Gary Miller also testified that he asked Brockley if they could let the employees have the proposal during the holidays and vote on it afterward, but that Brockley refused and also refused to extend the contract. Still according to Gary Miller, the Respondent's negotiators left while the Union's bargaining team was caucusing. The Respondent's witnesses testified that Gary Miller asked Brockley for his best offer, and that Brockley replied that Miller already had it, although the figures for the Tier II employees could be reduced and those for the Tier I employees increased if that would help to get the proposal accepted. The Respondent's witnesses testified that Gary Miller said that the Respondent's offer "sucked," and that he was going to recommend a strike; Miller testified that he may have made such a comment.

On July 2, the Respondent gave the Union its full written proposal. The employees voted to reject the offer and to strike. On July 3, the Respondent gave the Union a letter from Brockley stating that the Respondent was ready to meet with the Union at the Union's convenience to continue good-faith negotiations. Gary Miller called Ken Bailey that same day and asked when the parties could meet again. According to Bailey's credited testimony, Bailey told Miller that the Respondent was prepared to negotiate through the weekend to avoid a strike, but Miller refused. The strike commenced on July 8. The parties resumed negotiations on July 11. At this and subsequent meetings, the parties engaged in further bargaining over economic issues; however, although both the Respondent

<sup>9</sup>The pertinent testimony is recounted in sec. III,B,2 of the judge's decision.

and the Union modified their initial positions,<sup>10</sup> no agreement was ever reached.

As we have noted, the judge did not decide which version of the events of July 1 should be credited. He found it unnecessary to do so because, in his view, under any version, Brockley's actions on July 1 clearly conveyed a "take it or leave it" message. Consequently, the judge found that the Respondent demonstrated an unwillingness to negotiate over its economic proposal on that date, or to make any significant change in that proposal, thus forcing the Union to call for a vote over the Respondent's economic package without significant negotiation. The judge found that the manner in which the Respondent presented its "first, best and final" offer and its refusal to negotiate seriously over it violated Section 8(a)(5).<sup>11</sup> Even though he found that the Respondent made its economic offer in an attempt to reach a contract (a posture the judge recognized is normally not the mark of bad-faith bargaining), he concluded that the Respondent was unlawfully attempting to circumvent the bargaining process.<sup>12</sup>

Whether an employer has fulfilled its statutory duty to bargain in good faith depends on whether its conduct at the bargaining table (and elsewhere) demonstrates a real desire to reach agreement and enter into a collective-bargaining contract.<sup>13</sup> "The essential thing is . . . the serious intent to adjust differences and to reach an acceptable common ground."<sup>14</sup> Because the existence or nonexistence of good faith depends on the employer's desire or intent, the Board must consider the employer's overall conduct.<sup>15</sup> In this regard, Section 8(d) specifically provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Thus, the Board has held that "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient

<sup>10</sup>The judge inadvertently misstated certain details of the offers made at the July 22 bargaining session. The Respondent's initial offer that day for Tier I employees was for wage increases of 4, 3, and 2 percent for the 3 years of the contract, and for 6, 3, and 3 percent for Tier II employees. The Union's counterproposal for Tier I employees was for 3, 3, and 2 percent. These inconsequential errors do not affect our decision.

<sup>11</sup>The judge found nothing unlawful in Brockley's unwillingness to discuss the Union's counterproposal at length, because he found that proposal to be incompatible with the Respondent's economic goals. Rather, he found unlawful the Respondent's refusal to consider any substantive change in its own offer.

<sup>12</sup>The judge cited *General Electric Co.*, 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970), and *American Meat Packing Corp.*, 301 NLRB 835 (1991).

<sup>13</sup>*NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485, 498 (1960).

<sup>14</sup>*Id.* at 485, citing 1 NLRB Annual Report 85–86 (1936); *General Electric Co.*, *supra*, 150 NLRB at 194.

<sup>15</sup>*Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *General Electric Co.*, *supra*, 150 NLRB at 197.

bargaining strength to force the other party to agree.”<sup>16</sup> However, entering negotiations “with a predetermined resolve not to budge from an initial position” betrays an attitude inconsistent with good-faith bargaining.<sup>17</sup> Statements made at the bargaining table may, of course, be evidence of an intention not to bargain in good faith. However, the Board is careful not to “throw back in a party’s face remarks made in the give-and-take atmosphere of collective bargaining,” because to do so would frustrate the Act’s policy of encouraging free and open communications between the parties.<sup>18</sup>

A party may be found to have violated its duty to bargain in good faith by maintaining a “take-it-or-leave-it” attitude while going through the motions of bargaining.<sup>19</sup> Thus, “if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its ‘take-it-or-leave-it’ approach to bargaining.”<sup>20</sup>

Applying the foregoing principles to the events in this case, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) at the July 1 meeting. We find, instead, that the Respondent’s conduct and statements at that session, when viewed in the context of the parties’ prior and subsequent actions, were fully consistent with good-faith bargaining.

To begin with, we note that, even if the Respondent couched its initial economic proposal on July 1 in language indicating that it was presenting its best or final offer, that fact alone does not compel a finding of bad faith. The duty to bargain does not preclude a party from making its best offer first, or require “auction” bargaining.<sup>21</sup> And although presenting an offer on a “take-it-or-leave-it” basis may be evidence of bad faith, it is not per se unlawful. The determination of whether a party making such an offer has bargained in bad faith must be based on the totality of that party’s conduct.<sup>22</sup>

Here, the Respondent has not been found to have acted unlawfully in any respect other than by its be-

havior at the July 1 bargaining session. The judge recommended dismissal of all the other complaint allegations, and the Union does not argue that any of the Respondent’s other conduct in negotiations was unlawful.<sup>23</sup> Nor is there any contention that the Respondent engaged in other conduct which, though lawful, nonetheless might be indicative of bad faith. Therefore, any finding that the Respondent failed to bargain in good faith would have to stand on the Respondent’s July 1 actions.

The Respondent’s conduct and statements on July 1 cannot be evaluated, however, without considering both what preceded and what followed them. The parties had agreed, as they had in 1988, to take up non-economic matters first and to reach economic issues only later, when Brockley would be present. On July 1, the parties met to discuss economic issues for the first time. The judge found that the Respondent’s negotiators came to that session honestly believing that the Union wanted them to present their best offer, and that the Union would put the offer to a ratification vote on July 2.<sup>24</sup> In effect, the Respondent’s negotiators did as they believed they had been asked. They brought to the table an economic proposal that met the Respondent’s business needs and that they also believed had a reasonable chance of being accepted. The latter point was important, because Brockley feared the Respondent could not withstand a strike, and therefore structured the offer to make it attractive to the Tier II employees who constituted the majority of the unit. Having presented its offer, with the expectation that it would be voted on the next day, the Respondent reasonably declined to make any further offers for the time being.<sup>25</sup> During the July 1 session, the Union’s Gary Miller asked Brockley to give his best offer so that it could be voted on the next day. Thus, even if the Union’s negotiators had not asked for the Respondent’s best offer *before* July 1, Miller admittedly did so *on* that date.

On July 2, the Respondent tendered a written copy of its July 1 offer to the Union, at Gary Miller’s request. When the employees rejected the proposal, the Respondent offered on July 3 to meet at the Union’s convenience for further bargaining. Although bargaining did not resume until July 11, the judge found that the delay was caused by the Union’s refusal to accept the Respondent’s suggestion to bargain through the weekend, if necessary, to avoid a strike. During the subsequent bargaining, as noted, the Respondent modified its economic proposals, although never to the Union’s satisfaction.

<sup>23</sup> See fn. 2, *supra*.

<sup>24</sup> In 1988, the Respondent also presented its initial economic offer on July 1, and it was voted on (and rejected) on July 2.

<sup>25</sup> See *Long Island Jeep*, *supra* at 1367.

<sup>16</sup> *Atlanta Hilton & Tower*, *supra*, 271 NLRB at 1603 (citation omitted).

<sup>17</sup> *General Electric Co.*, *supra*, 150 NLRB at 196, citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154 (1956) (Frankfurter, J., concurring).

It is not always easy in practice to draw the fine distinctions between lawful and unlawful bargaining conduct in this area. As the court of appeals put it in *General Electric*, “The difficulty here . . . arises out of the herculean task of legislating a state of mind.” 418 F.2d at 762.

<sup>18</sup> *Sage Development Co.*, 301 NLRB 1173, 1176 (1991), citing *Allbritton Communications*, 271 NLRB 201, 206 (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985), *cert. denied* 474 U.S. 1081 (1986).

<sup>19</sup> *NLRB v. Insurance Agents’ Union*, *supra* at 485; *General Electric Co.*, *supra*, 150 NLRB at 194.

<sup>20</sup> *88 Transit Lines*, 300 NLRB 177, 178 (1990).

<sup>21</sup> *Long Island Jeep*, 231 NLRB 1361, 1367 (1977).

<sup>22</sup> *Ibid.*

The foregoing, we find, is not the account of a course of bad-faith bargaining. We find no suggestion in this record that the Respondent entered into negotiations “with a predetermined resolve not to budge from an initial position.” The credited evidence establishes that the Respondent, honestly believing that the Union wanted its best offer on July 1, presented the most attractive proposal it was prepared to offer at that time, in the hope of reaching a contract and avoiding a strike. We have already observed that it is not per se unlawful for a party to make its best offer first, and it is hardly inconsistent with good-faith bargaining for a party to make its best offer at the request of the other party. Having been asked for, and having made, its best offer, the Respondent cannot be seriously faulted for its temporary unwillingness to modify its proposal, at least until the employees had voted on it.

Even if Brockley did tell the union negotiators to “take it or leave it,” that statement, in the context of the Union’s request for the Respondent’s best offer which was to be voted on the next day, does not suggest an attitude on the part of the Respondent of the sort condemned in *General Electric* and other cases. In this context, such a statement differs little, if at all, from an announcement that the offer on the table is the Respondent’s best, as the Union had requested. There is no evidence that the Respondent was simply “going through the motions” of bargaining or lacked a “serious intent to adjust differences and reach an acceptable common ground.” There was no obdurate refusal here to consider any alternatives to the Respondent’s initial proposal.<sup>26</sup> Indeed, after that offer was rejected, the Respondent moved promptly to resume bargaining, and thereafter modified its proposals in a further attempt to reach agreement.

In sum, we find that the Respondent’s actions and statements on July 1, viewed in the context of the rest of the negotiations and in light of the fact that the remainder of its conduct was neither unlawful nor otherwise indicative of bad faith, were in accord with the Respondent’s duty to bargain in good faith.<sup>27</sup>

Because we have found that the Respondent’s conduct on July 1 was not unlawful, and because we agree with the judge that the Respondent’s bargaining conduct was otherwise lawful, we adopt his finding that the strike was an economic strike and not an unfair

<sup>26</sup> We do not rely on the judge’s discussion of the relative reasonableness of the parties’ July 1 offers.

<sup>27</sup> See *Long Island Jeep*, supra.

*General Electric* and *American Meat Packing*, relied on by the judge, are clearly distinguishable from this case. In both cases, the employers not only displayed a “take-it-or-leave-it” attitude, which we find absent here, but also engaged in numerous other actions, including other violations of Sec. 8(a)(5), which further indicated bad faith.

Because we find that the Respondent acted lawfully on July 1, we need not decide whether the judge correctly found that the Respondent effectively remedied its conduct on that occasion.

labor practice strike from its inception. We also adopt the judge’s finding that the Respondent lawfully implemented its July 22 offer after bargaining in good faith to impasse; thus, the strike was not converted to an unfair labor practice strike because of the implementation of that offer. Finally, we adopt his finding that the Respondent did not violate Section 8(a)(3) by failing to reinstate the strikers on request, because they were economic strikers who had been permanently replaced.<sup>28</sup> We therefore shall dismiss the complaint.

## ORDER

The complaint is dismissed.

<sup>28</sup> The Union does not dispute the judge’s finding that the strikers were permanently replaced.

*Lyn R. Buckley, Esq.*, for the General Counsel.  
*Richard Thesing, Esq.* and *David F. Byrnes, Esq.*, of San Francisco, California, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges and amended charges filed by Lodge 31, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) on July 12 and 29 and August 12 and 15, 1991,<sup>1</sup> the Regional Director for Region 17 issued a complaint and notice of hearing on November 15, alleging inter alia, that Industrial Electric Reels, Inc. (Respondent or Company) engaged in certain activity in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Another amended charge was filed by the Union on December 18. Respondent filed timely answer to the complaint, wherein it admits, inter alia, the jurisdictional allegations of the complaint and denies it committed any unfair labor practice.

Hearing was held in this matter in Omaha, Nebraska, on March 25–27 and 30–31 and April 1, 1992. Briefs were received from the parties on or about May 29, 1992. Based on the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation, with an office and place of business in Omaha, Nebraska, is engaged in the manufacture and sale of electrical reels and related products. It admits the jurisdictional allegations of the complaint and I find that it is now and has been at all times material to this proceeding an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> All dates are in 1991 unless otherwise noted.

## II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *An Overview of the Conflict and Involved Issues*

Respondent is a manufacturing company which produces electrical reels and is owned by a French company, Delechaux. Since about 1970, the Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in the following unit:

All employees in the classifications of tool, die, jig, and fixture maker; journeyman machinist; apprentice machinist; journeyman welder; material control; drill press operators including drill press set-up operator; drill press operator, drill press production operator; utility assembler; material handler; production worker; painter; utility painter and shipping and receiving clerk employed by Respondent at its facility located in Omaha, Nebraska, but excluding office clerical employees, guards and supervisors as defined in the Act.

The parties have entered into a series of collective-bargaining agreements, the last of which was effective by its terms for the period from July 5, 1988, through July 4, 1991. The parties began negotiations for a successor agreement in May.

Prior to negotiations for a successor agreement to the one expiring July 4, the Company and the Union had developed goals which they were intent on achieving at the bargaining table. Respondent had brought in Don Brockley as president in 1986. He initiated a study of the Company, seeking to expand its sales. According to Brockley the study revealed that this could be accomplished by expanding the Company's distribution network, expanding its product line to include lower end products, and cutting the cost and price of the products it presently made. To achieve this goal, Respondent dramatically expanded its number of distributors, created a low-end product line made in Taiwan,<sup>2</sup> and achieved cost reductions through establishing a two-tier wage system at its Omaha facility. A wage study made in 1985-1986 indicated to Brockley that his unit employees were making about 40 percent more than employees of area competitors and that the Company's prices were about 10 to 15 percent above those of its competitors.

Therefore, in 1986, during the middle of a collective-bargaining agreement, the Company and Union negotiated a second, lower tier of wages for new hires (Tier II). For several years prior to this, the Company had ceased hiring new employees or replacing employees who left the Company. It had instead increasingly utilized subcontractors to control labor costs. Brockley testified that this process could not continue indefinitely and the lower tier of wages would allow the Company to hire new employees and at the same time make its products more competitive from a cost standpoint. At no time has Respondent asked that existing Tier I employees take a wage cut.

<sup>2</sup> According to Brockley, the Company is considering bringing this production to Omaha if costs can be contained.

The lower wage for new hires did in fact result in increased sales and substantial hiring of new employees. When the lower tier of wages went into effect the Company had 29 employees in the unit. At the time of the strike involved herein, there were 46 unit employees, 29 of which were Tier II employees, and only 17 were Tier I employees.

Brockley testified that though the changes he instituted beginning in 1986 significantly increased sales for the Company, sales growth flattened toward the end of 1989 and the beginning of 1990. Therefore, he again sought ways to make the Company's product more competitive from a pricing standpoint. He determined to achieve this more competitive position by holding down wage and health insurance costs, modernizing the plant's equipment and realizing additional flexibility in the use of employees in the manufacturing process.

With respect to wages, Respondent proposed to offer little or no increases in the wages of Tier I employees, who it believed were still substantially overpaid based on area salaries and its ability to hire new employees at the Tier II wages, and to make more significant increases in the Tier II salaries. To differing degrees, both the Union and the Company wanted to ultimately merge the two tiers of employees though their methods to accomplish this end differed dramatically. The Company acknowledged that having two tiers caused morale problems with the lower paid employees. The Union understandably wanted all the employees to make the higher Tier I wages. The Company's method for merging the Tiers was to sharply limit growth in the Tier I wages while giving significant raises to the Tier II employees over a period of time until the two tiers were merged. The Union proposed giving significant raises to the Tier I employees, and even more significant raises to the Tier II employees, so that when the two tiers were merged the employees would be at a much higher wage level than that envisioned by the Company. The Union's wage proposal would have cost the Company about \$450,000 whereas the Company's proposal cost about \$250,000 in additional labor costs over the life of the contract.

With respect to the other major component of labor costs, health insurance, Respondent had experienced significant increases in the cost of this benefit in the 3 years since the last contract was negotiated. To gain control over the growth of this cost, Respondent proposed substantially increasing the employees' contribution toward insurance premiums and increasing the level of deductibles. The Union wanted certain additional benefits added to the existing health insurance plan at no additional cost to the employees.

The Respondent frequently had the need to have its employees work overtime to meet fluctuating customer demand. It had experienced strong resistance to overtime work from its employees, even though it had instituted a bonus system to encourage willingness to work overtime. To solve this problem, Respondent wanted a mandatory overtime provision, a provision which the Union opposed. The Company initially proposed 10 hours of mandatory overtime, a position which softened to 5 hours during negotiations. The Union initially offered no mandatory overtime, but softened that position to offer 4 hours of mandatory overtime during negotiations. However the Union wanted the employees to have the right to pick which day the overtime was worked, and the right to work 1 hour of overtime before a shift and 1 hour

after a shift. This latter requirement did not suit the Company because it created problems in scheduling and supervising the overtime.

The Company wanted more flexibility in subcontracting, especially on some smaller jobs which could not be produced efficiently in the plant. Under the expiring contract, and the parties interpretation of that contract, this could only be done at a substantial penalty in the event that some employees were on layoff status or not working in their skill trade, a condition which existed at the plant. The Union opposed any change in subcontracting provisions. With respect to this issue, and others which could affect job security, the Union feared that Respondent was seeking ways to eliminate jobs and/or transfer work to another, nonunion, plant owned by Respondent's French corporate parent. It therefore opposed these changes vigorously, and as a further preventative measure, proposed that a severance pay provision be instituted, initially proposing that a permanently laid-off employee be given a week's pay for each year of employment.

On the issue of so-called technological change, the parties also took divergent stances. The Company had not introduced any new equipment into the plant for years, at least in part because of contract provisions which would not thereafter allow Respondent to lay off employees if the layoff was caused by the introduction of the new equipment. Although the contract provisions in this regard are ambiguous, the parties had evidently interpreted them in a very restrictive manner. Respondent gave an example of the problems this caused citing an incident where it terminated some probationary employees on the last day of their probation because it was considering bringing in a new CNC lathe. At the time the Company was in a peak production mode and these employees were needed. When demand slackened however, they would likely be candidates for layoff. However, because of the parties interpretation of their contract, if these employees were allowed to complete their probation and the lathe were brought in, the Respondent would not thereafter be allowed to lay them off as they could contend that they were laid off because of the new machinery. The Company decided it wanted the new equipment so it terminated the employment of the involved employees so that it would not thereafter have to permanently retain them. This situation did not sit well with the Union.

The Company wanted to bring in more new equipment as the equipment in the plant was evidently very outdated and more modern equipment was necessary if the Company wanted to remain competitive. The Union opposed this proposed change as it feared that new equipment might result in layoffs of employees. The Company's position was that the new equipment would create, not cut, jobs in the plant.

The Company and the Union also differed on changes in the existing contract which would allow certain items previously purchased from outside suppliers to be made in house. This matter was referred to as the so-called fab shop issue. The Company wanted to use higher skilled employees to set up the work, and utilize its lowest paid unit employees to perform this work. The Union wanted the higher paid, more skilled classifications to be used for both setup and production. In its contract proposal on this issue, Respondent proposed the work be set up by drill press operator and thereafter the production run accomplished by a production

worker. The Union wanted the work done by welders, the highest paid employees.

In the negotiations in June, the Company told the Union that the equipment it wanted to bring in with respect to the fab shop consisted of punch presses, brake presses, and shears. With respect to equipment affected by the technological change issue, the Company wanted to bring in a CNC lathe, punch presses, brake presses, shears, lathes, and mills. The Company also wanted to bring in a NCNY which would be affected by the production processes language of the contract.

Given these agendas, and a fair amount of mutual distrust, the parties began negotiations in late May 1991 for a successor agreement to the one expiring July 4. According to the complaint, the Respondent refused to discuss economic proposals until the negotiation session of July 1, when it presented the Union with its first and final offer with respect to economic issues. The next day the Union rejected the Employer's offer, and again, according to the complaint, the Employer refused to meet again before the July 4 expiration date of the existing contract. On July 8, the first working day after the contract's expiration, the Union began a strike against Respondent, which the complaint alleges was an unfair labor practice strike caused by Respondent's actions on July 1 and its refusal thereafter to meet and bargain in good faith prior to the expiration of the existing contract.

The Respondent contends that the manner in which negotiations were conducted up to and including the meeting on July 1, including the manner in which the economic offer was made, was a matter of mutual agreement between it and the Union. It further contends that its economic offer was negotiable on July 1, but the Union choose not to negotiate over it. After the Union voted on July 2 not to accept the contract offered by Respondent, Respondent offered on July 3 to meet and negotiate further, an offer which the Union did not accept until after the strike began on July 8.

After July 8, the parties met in several bargaining sessions. It is alleged that in a bargaining session held July 16, the Respondent refused to discuss economic issues until agreement was first reached on all outstanding noneconomic issues, thereby prolonging the strike. The complaint also alleges that on July 24, Respondent declared impasse and thereafter, on July 29, implemented its final offer. The complaint alleges that the declaration of impasse was premature and the unilateral implementation was unlawful and prolonged the unfair labor practice strike. Respondent contends that it was willing to discuss economics, and in fact made a concessionary economic offer in the meeting of July 16. It further contends that the parties were at impasse on July 24 and that it communicated that position to the Union both orally and in writing. It took the Union's expressed lack of room for further movement and agreement to cancel the only remaining scheduled meeting to be agreement that the parties were at impasse. Beginning on or about July 29, the Respondent permanently replaced the striking employees and implemented its last offer to the Union. On or about August 7, the Union made what the complaint characterizes as an unconditional offer to return to work. Thereafter Respondent offered reinstatement to all but five of the striking employees, maintaining that it had no duty to make such an offer to these five because they engaged in strike misconduct. The strikers did

not return to work pursuant to Respondent's offer and remain on strike to this day.

Though I believe the foregoing recitation fairly sets out the issues framed by the complaint, I will set out the specific complaint allegations as they are very specific and are very fact dependent. I will also set forth the substance of the charges on which the complaint is based as the manner in which charges were filed indicates problems with this case from the outset. The first charge, filed July 12, alleges that Respondent, by its president, Don Brockley, refused to bargain in good faith by since on or about July 1, by using tactics that could cause an immediate impasse with his "take it or leave it" first and final offer. This charge was amended on July 29, to additionally complain that Respondent since on or about July 18, violated the Act by arbitrarily increasing the cost to the employees of health insurance. The allegation does not appear in the complaint. A third amended charge was filed on August 15. This charge repeats the original allegation, drops the allegation about health insurance, and adds an allegation that the Respondent since August 7 has refused to reinstate unfair labor practice strikers after the Union made an unconditional offer to return to work. It also alleges that the Respondent has bargained in bad faith since on or about July 2.

The complaint, which issued on November 15, alleges:

(1) At various times material herein, in or about the months of May, June, July, and August 1991, Respondent met for the purpose of engaging in negotiations with respect to wages, hours, and other terms and conditions of employment of employees in the described unit.

(2) During the time period described above, the Respondent engaged in the following acts and conduct:

(a) In all of the negotiation meetings held before July 1, 1991, Respondent refused to discuss economic issues and insisted that only noneconomic issues be discussed by the parties.

(b) On or about July 1, 1991, Respondent first presented its economic proposal to the Union and took the position that this first proposal on economics was its last, best offer.

(c) On or about July 1, 1991, after presenting its last, best economic offer to the Union, Respondent insisted on the proposal and refused to bargain further on the Union's counterproposal on the economic issues.

(d) On or about July 1, 1991, Respondent refused to meet with the Union again before the existing contract expired on July 4, 1991.

(e) On or about July 16, 1991, Respondent took the position that all noneconomic items had to be agreed on before it would discuss economic issues further.

(f) On or about July 24, 1991, Respondent declared impasse in bargaining at a time when Respondent and the Union had not reached impasse.

(g) On or about July 29, 1991, Respondent unilaterally implemented its offer with regard to returning strikers at a time when Respondent and the Union had not reached impasse in bargaining.

(h) Since on or about July 8, 1991, certain employees of Respondent represented by the Union and employed at Respondent's facility, ceased work concertedly and engaged in a strike.

(i) On or about July 29, 1991, Respondent permanently replaced employees who engaged in the strike.

(j) On or about August 7, 1991, the Union made an unconditional offer to return to their former positions of employment on behalf of the employees who engaged in the strike.

(k) On or about August 7, Respondent failed and refused to reinstate the employees referred to above, and continues to fail and refuse to reinstate them.

The complaint concludes that Respondent's alleged conduct violates Section 8(a)(1), (3), and (5) of the Act, and that the strike was caused by Respondent's unfair labor practices described in paragraphs (2)(a) through (d) above and was prolonged by Respondent's unfair labor practices described in paragraphs (2)(e) through (g) above. On December 15, the Union filed another amended charge in this proceeding which repeats the original charge, and adds that Respondent has since on or about August 7 and continuing to date, refused to reinstate unfair labor practice strikers who made an unconditional offer to return to work, and further, since on or about July 29, unilaterally implemented their offer without first bargaining and reaching an impasse. This late amendment was obviously filed because no earlier charge supported the complaint allegations about unlawful implementation of the Respondent's final offer and the failure to reach impasse. The Union's allegations of bad-faith bargaining by Respondent since July 2, was withdrawn, and was not incorporated in the complaint.

I do not believe the facts or the law support any of the complaint allegations of unfair labor practices other than the allegation that Respondent violated the Act by the manner in which it presented its economic offer on July 1. As will be shown hereinafter, the Union relied on certain statements of fact given it by the Union to issue the complaint. At the hearing, it was demonstrated that many of these statements were not correct, thus leaving the complaint factually unsupported in significant areas.

All of the acts alleged by the complaint to have been violations of the Act fall in chronological order, and thus will be dealt with in that fashion.

#### *B. The Bargaining Process Leading to Respondent's Alleged "Take it or Leave it" Economic Offer of July 1*

1. Did Respondent violate the Act as alleged by refusing to discuss economic issues and insisting that only noneconomic issues be discussed prior to July 1?

In negotiations, the Union was represented by Business Agent Gary Miller. Miller has been responsible for representing the involved bargaining unit for at least 9 years and participated in the negotiations which led to the expiring contract. The other members of the Union's bargaining committee were employees James Mueller, Sebastian (Subby) D'Agosta, and Mike Campos. The Company was represented by its President Don Brockley and management members Ken Hamlin and Tony Bailey. The Company's financial officer Loni Miller<sup>3</sup> participated in some of the negotiations.

The involved negotiations were in many ways similar to the 1988 negotiations which resulted in the contract which expired on July 4, 1991. A description of these negotiations is given because I believe that what happened in them bears

<sup>3</sup> Hereinafter, Gary Miller will be referred to as Miller and Loni Miller will be referred to as Loni Miller.

on the parties motivation and actions in the 1991 negotiations. In 1988, the parties first met with everyone on both bargaining committees, including Brockley, present. They exchanged proposals and agreed that noneconomic items would be discussed before economic items. Brockley did not attend the sessions wherein noneconomic items were negotiated. After the first five or six sessions, held at the union hall, it was decided to use a mediator and move the sessions to a hotel. There were two sessions held with the mediator before Brockley came back to negotiations. On July 1, 1988, Respondent made its first economic offer. The Union took a vote on the proposal and turned it down. Miller then called Brockley and asked for a contract extension, which he granted. The parties then met on July 6 and reached a tentative agreement, which was ratified by a nearly tie vote the next day. During the week preceding July 6, 1988, Miller had several conversations with Brockley in which he said that he was trying to avoid a strike. The wage increases in the 1988–1991 contract called for percentage increases for Tier I of zero, 1, and 2 percent for the first, second, and third years of the contract. For Tier II employees, the increases were 8, 6, and 5 percent. The other major issues in the 1988 negotiations were insurance, wages, mandatory overtime, and subcontracting. As noted earlier, these issues, with the addition of technological change, were the main issues in the 1991 negotiations.

The first 1991 bargaining session was held at the union hall on May 29, with the Union represented by Miller, Campos, Mueller, and D'Agosta. The Company was represented by Brockley, Hamlin, and Bailey. At this meeting, the parties exchanged proposals and set the groundwork for future sessions. As in the 1988 negotiations, the parties agreed to first bargain over noneconomic items and defer economic proposals until later. It was agreed that Brockley would not participate again in negotiations until the parties were ready to discuss economics.

As the parties mutually agreed to discuss noneconomic items first and defer until later the discussion of economic items, I find that Respondent did not "refuse to discuss economic issues and insist that only non-economic issues be discussed by the parties," as alleged in the complaint, and that no violation of the Act was committed in this regard.

In the meeting on May 29, the parties agreed to meet every Tuesday and Thursday on a regular basis. It appears that the parties agreed to meet on June 4, 6, 11–13, 18, 20, 25–26, and 28, and July 1–3. Although the contract was to expire on July 4, July 4–7 were also potential meeting dates prior to a strike because July 8 was the first workday after July 4. The Union proposed a number of changes in the existing contract, the most significant of which included moving all Tier II employees to Tier I; an across-the-board 10-percent wage increase for each year of the contract and COLA; adding prescription drug plans, dental, and eyecare plans to the health insurance package; increasing the Employer's contribution to the pension fund; adding life insurance and severance pay of 1 week per year of service; and increasing pay for overtime with no provision for mandatory overtime. During the course of negotiations, the Company costed out this proposal and pointed out to the Union that it would cost \$447,000 in additional expense over the existing contract and would require a 6-percent price increase to pay for it.

At the first meeting, Brockley gave an overview of what the Respondent considered important issues from its viewpoint. He mentioned the Respondent's frustration with not being able to purchase new equipment because of contract restrictions, and that if the Company could add new equipment, it would increase the total number of employees at the plant. The Company proposed, as most pertinent, mandatory overtime, changes in employee classifications to allow fab shop work to be performed by lower classification workers, and changes to allow flexibility in bringing in new equipment. The Company made no initial economic proposal consistent with its agreement to discuss these matters at a later date.

The parties met again on May 30 and went through proposals in more detail. Some relatively minor matters were tentatively agreed to.

At the next meeting, on June 6, the company representatives took the position that each item proposed, beginning with the first, must be resolved before negotiations could begin on the next item. Miller objected to this procedure and Company acquiesced. The company representatives also identified a number of items considered economic and which would be deferred until Brockley returned to negotiations. These were deferred by mutual agreement. Union bargaining committee member Mueller testified that he asked the Company for its justification for proposed changes in subcontracting and technological changes provisions, and was not given an answer. He testified that Miller repeated the question and was told by Hamlin that the Company wanted the employees to have less job security. I have difficulty accepting this testimony, at least insofar as it implies that the Company was offering no justification for its positions on the involved issues. The issues of subcontracting and technological change had been discussed on a number of occasions prior to negotiations with the Union's shop committee, on which both Campos and Mueller served. On these occasions, the Company's problems had been advanced and its reasons for relief given. In addition, Brockley, at the outset of negotiations and at virtually every other meeting in which he participated gave a talk or speech wherein he expressed the Company's goals and why its proposals were necessary to achieve these goals. I am not at all sure that the Union believed what they were told and apparently feared that the Company harbored some unstated ulterior motive for the proposed changes. However, I cannot find from this testimony that the Company offered no explanation or justification for its proposals.

The parties met again on June 7, where agreement was reached on some proposals and some proposals were withdrawn. The Company presented a written status report on negotiations to date.

The parties met on June 10 and again agreed tentatively to some items and some further items were withdrawn. The Company presented another written status report.

Meetings set for June 11 and 12 were canceled by the Company because of suspected vandalism by employees. This matter was put to rest and the parties met on June 13 and discussed proposals. According to Mueller, the parties spent much of the time discussing the fab shop issue.

The next meeting was held on June 18 and the fab shop issue was again discussed. The Union was upset because it believed that the Company had proposed prior to negotiations that if the fab shop work were brought in, it would be

set up by welders and the work performed by drill press operators. In negotiations, the Company had changed its position to one where it wanted drill press operators to do the set up and less-skilled production workers to do production. This of course would cost the Company less money and conversely deprive the more skilled and highly paid employees some new work. Miller testified that the parties were a long way apart at this point.

The parties met again on June 20. There was some progress at this meeting and there were several tentative agreements and withdrawals made. At this point, economic issues aside, the toughest issues were classifications, wherein the Company wanted to lump a number of classifications into the production worker classification, the fab shop, mandatory overtime and job-security issues, including subcontracting and technological change.

The parties met again on June 25, with the Union suggesting that a federal mediator be called in to help. The company negotiators at first objected, but then agreed. They continued to negotiate. Miller indicated that he proposed a contract extension at this meeting and Hamlin did not agree. Mueller testified that he had prepared a package proposal dealing with several issues, including a proposal on certain economic issues. According to Mueller, when he tried to present it, Hamlin told him that economic issues had to wait for Brockley who was in Europe and would not be back until the following week.

At the meeting on June 27, the Company proposed to grandfather existing employees with respect to the technological change and subcontracting or farm-out issues. This did not satisfy the Union which still feared the Company planned to move work to another plant. The Company took the fab shop proposal out because of the union opposition. On mandatory overtime, the Company dropped its initial proposal of 10 hours of mandatory overtime to 5. The Union counterproposed 2-1/2 hours of mandatory overtime, with the right to have 1 hour before a shift and 1 hour after, as well as the right to pick the days overtime was worked. The Company objected to this as it would require the presence of a supervisor all week just to supervise overtime. There were also situations where the Company needed employees to work overtime together, something it could not require under the Union's proposal. Thus, by the end of the meeting of June 27, the parties had not reached agreement on technological changes, subcontracting, some job classifications, or severance pay.

At the meeting of June 25, the Union had asked if the contract could be extended as the parties were still far apart and economic issues had not been addressed. In response, at the meeting held on June 27, Hamlin responded that the morale at the plant was bad and the Company wanted to get negotiations over with and have a contract before the expiration date. Miller then asked when Brockley would return and was told he would return by Friday, June 28. To this point, there is little dispute in the testimony. However, the evidence offered by union witnesses and company witnesses on the events which next transpired is very different. Hamlin suggested meeting on June 29, but Miller indicated he would not be available, but could meet on July 1, 2, and 3. Miller testified that he asked when Brockley would be available and was told that he would meet on July 1, but could not be at meetings on July 2 and 3. Miller did not believe that

Brockley could attend a meeting before July 1 as he was in Europe. Brockley, however, did return on June 28 and had told his bargaining team to be prepared to meet over the weekend. According to Bailey, Miller then said, "Fine, you guys are going to have to give us your best offer on Monday so we can take a vote then." Mueller and Miller testified that this was not said.

Although the union representatives may not have intended it, I believe that both Hamlin and Bailey honestly believed that the Union had asked for the Company's best offer to be presented on July 1. No other meetings were set and evidently a ratification vote meeting was scheduled for July 2. This position was communicated to Brockley in Europe. Everything the Company did next points to the fact that it held the belief that their July 1 proposal would be voted on on July 2. However, whether Company correctly or incorrectly understood that the Union wanted its best offer on July 1, its actions on that date would still have violated the Act in my opinion.

2. Did the Respondent violate the Act by its actions at the July 1 negotiating meeting?

Prior to the July 1 meeting, the Company's negotiation team had met with Brockley and begun preparation of an economic proposal. On June 19, Brockley met with Bailey, Hamlin, and his chief financial officer, Loni Miller, prior to leaving for Europe to discuss the status of negotiations and to develop an economic offer. Brockley was worried about the possibility of a strike, fearing the Company could not sustain one. Because of the long experience of many of its employees, blueprints for the development of production items were not completely finished, and the employees were free to complete work from the incomplete prints. Without the experienced employees, Brockley did not believe work could be completed. With respect to his aims on economics, based on his experience in hiring Tier II workers, Brockley believed that Tier I employees were being overpaid by at least 30 percent. Loni Miller developed several wage and insurance proposals, costing each out. His goal was to produce a package that would have a chance of ratification, hold down or cut back Tier I wages, pass on some of the increased insurance costs to the employees, and meet the financial performance guidelines set for the Company by its French owners. At some point, he decided that the Company could pay about \$250,000 in additional wages over the life of the contract and meet these guidelines. Although his early proposals were discussed, none of them were selected by July 1.

In a morning meeting on July 1 to prepare the wage and insurance proposal, Loni Miller presented more proposals. Brockley felt that Tier I was not going to be happy with any company proposal, so in order to have a chance to have a contract ratified, he aimed the proposal at Tier II employees, who constituted the majority of employees. Although Miller proposed one scenario in which Tier II employees would get substantial raises, but Tier I would be dropped back to the Tier II level, Brockley dismissed it because it would have injured the Tier I employees who had allowed him to introduce Tier II and Brockley felt it might cause a strike. Using his other proposal as a starting point, the Company's bargaining team structured its proposal to appeal to the Tier II employees who constituted about 60 percent of the unit employees.

It felt it could sell the plan to them and get a contract. It felt that Tier I employees would vote against the plan under any wage proposal because of the increase health insurance costs it was imposing on the employees. Respondent believed that the proposal had a good chance of ratification because its wage offer to the Tier II employees was so appealing.

Loni Miller testified that the July 1 meeting began with Brockley giving a short talk on the condition of the Company and where it was trying to go. He stressed that the Company had to remain competitive and be able to make the changes that its competitors were making. When he finished, the Company presented its economic proposal. Loni Miller explained the proposal both with respect to the wage proposals and the health insurance. He also explained the importance of the health insurance proposals, citing the rapidly rising costs in this area.

The Company's economic proposal for Tier I employees provided for no increase in the first year, and a 1-percent increase in each of the next 2 years of the contract. For Tier II employees, it proposed a 10-percent increase in the first year, and 3-percent increases in each of the next 2 years. It included a proposal on increasing the pension contribution. The health insurance proposal called for doubling the deductible from \$100 per person or \$200 per family to \$200 per person or \$400 per family. It proposed that employees pay 20 percent of the first \$2500 of covered medical expense instead of the 100-percent coverage presently provided. It also called for an increase in monthly employee premium contributions from the current \$10 per person or \$20 per family to \$20 per person or \$40 per family. Its noneconomic proposal, which was a draft of the Company's last language proposal reflecting all tentative agreements and withdrawals was submitted separately in a packet entitled "final draft."

There was a discussion of the proposal, and according to company witnesses, other outstanding issues. The Union then took a caucus where it prepared a counterproposal. This counterproposal, *inter alia*, called for increases in the Tier I wages 5 percent, 4 percent and 4 percent over the 3-year life of the proposed contract. It also called for the phasing out of Tier II over a 5-year period, significantly raising the wage levels for both Tiers. The proposed increases amounted to several dollars an hour for both Tiers. It proposed reaching the Company's position on insurance in stages over the life of the contract.

The parties began discussing this proposal and it became clear that it would not only merge Tier II with Tier I over a 5-year period, but would also raise Tier I at the same time by about 5 percent per year. Brockley indicated that the Company was not interested in that proposal. At this point, the description of the meeting varies, depending on whether a company witness or a union witness was giving testimony.

Miller testified that he started explaining the counterproposal and Brockley asked to see it. Brockley looked at it, commented that it merged Tier I and Tier II, and said that he was not interested in the counterproposal, the Union had his proposal, take it or leave it. Miller's affidavit says "Brockley said this was his offer and indicated that we could take it or leave it. I do not remember exactly what he said." Mueller testified that Brockley said, "You have my proposal and that's it." The Union then caucused and Miller asked the mediator if the Union could prepare another counter-

proposal.<sup>4</sup> The mediator said he would check with the Company and reported back that the Company said the Union had its proposal, take it or leave it. Miller testified that he and the mediator met with Brockley and he asked if there was anything they could talk about, and Brockley said no. He asked Brockley to put together a total written proposal to present to the Union for a ratification vote the next day. Brockley said he would do it. According to Miller, the union committee then went to their caucus room where he asked the mediator if there was anything they could do to continue negotiating. The mediator came back and said the Company had left. Miller testified that at this meeting there was no discussion of mandatory overtime, the fab shop, apprentices, seniority, the Union's position on insurance or other issues. On cross, he remembered that Brockley gave a talk to the committee on bringing the Company out of the 1950s and into the 1990s. He remembers asking Brockley to give his best offer so it could be voted on the next day. He said he may have made the comment, "this [the proposal] sucks, we can do better than this, there's no way I'm going to tell the employees to vote for this, I'm going to tell the employees that if they strike, they will get a better deal." Miller believed that Respondent had committed an unfair labor practice by failing to negotiate over the economic proposal. This belief was the reason for his being upset and part of the reason he recommended the contract proposal be turned down and the employees strike. The other part was his dislike of some of the language in the contract proposal.

Miller testified that he had asked the Company if they could let the employees have the proposal over the holidays and take a vote after them. Brockley would not allow this nor would he extend the contract. Miller said he expected the contract to be extended because it was extended in the 1988 negotiations. It should be noted that in 1988, the contract was not extended until after the initial vote was taken and the proposed contract was rejected. On cross, Miller admitted that he did not make a request for contract extension after July 1.

Loni Miller testified that after Brockley rejected the Union's counterproposal, the parties then discussed some of the other outstanding issues including subcontracting, overtime, and technological changes. The meeting became heated and the mediator suggested the parties break into different rooms. While the Union caucused, Brockley suggested that Loni Miller determine what would happen to costs if the proposed percentage increases were changed around.

The Union returned after about a half hour to an hour, and Brockley gave a speech on the importance of the Company's proposals. Miller said for the Company to give him its best offer so the Union could vote on it. Brockley replied that the Company move the figures around a bit, taking money from Tier II, and putting it into Tier I if it would help the contract be ratified. However, if merging Tier II with Tier I is in-

<sup>4</sup> Witnesses from both sides of this dispute described a number of conversations they had with the mediator and responses he reported to them from the other side. I am not relying on any of these descriptions in any way. For the most part they are totally self-serving and totally incapable of being tested as the mediator did not testify. Furthermore, even if they were accurately described, one does not really know if the mediator accurately passed on to one of the parties what the other side asked, or accurately reported what he was told.

volved, then the parties were far apart. He indicated that other than some moving of the figures between Tiers, the Union had the Company's best offer. Miller told Brockley that he thought the proposal sucked and would not recommend it to the employees. According to Loni Miller, Gary Miller also said that he was going to tell the employees that if they went on strike, they could do better. At that point the Union left.

According to Brockley, in the July 1 meeting with the Union, after he had turned down the Union's counteroffer, the parties discussed overtime, a premium for training, health insurance, including the Union's proposal for a prescription card, and severance pay. The Union made a complete presentation of its proposal. At the end of this discussion, Gary Miller asked Brockley for his best offer and Brockley indicated that he had it, though he could move the percentages around if it would get a favorable vote. The Union then left the negotiations to caucus. They came back a little later and Brockley made a presentation about why all the proposals it made were necessary. Miller got frustrated and told Brockley that his offer sucked, and that he was going to recommend a strike.

I do not believe it necessary to decide which version of this meeting is correct, or which portions of the testimony of each witness is the most credible on this point. Regardless of which version of this meeting one accepts, it is clear that Respondent was not willing to really negotiate over its economic proposal at this time.<sup>5</sup> It had purposely prepared a proposal which would appeal to Tier II employees, conceding that nothing it was willing to offer would likely appeal to Tier I employees. According to the company witnesses, it offered only to "fudge" the percentages between Tiers to achieve ratification. It seems clear to me and it must have been clear to the Union that the Company was unwilling to make any significant change in its economic proposal at the July 1 meeting. Whether Brockley used take it or leave it language or not, that was the clear import of his actions. I do believe that the meeting ended with Miller frustrated, telling the Company that their offer "sucked," and that he was going to recommend that it be rejected. Whether other, noneconomic issues were discussed briefly or not at all, as indicated by union witnesses, or more fully, as indicated by company witnesses is not really relevant. It was the Company's forcing of the economic package to a vote without significant negotiation that matters in the context of the complaint. I believe that the Company violated the Act by the manner in which it presented its economic offer and refused to seriously negotiate over it. I make this finding even though I believe that by making the offer in the manner it

<sup>5</sup>I do not find that Respondent cut off the Union's presentation of its counterproposal. The Company's witnesses notes of this meeting reflect that all economic portions of the counterproposal were at least mentioned, including a proposal for life insurance, prescription drug card, and health insurance including deductibles and contributions. Union committee member Mueller admitted on cross that he could not remember when the union presentation was "cut off," but that their insurance proposal may have been discussed. The meeting did become heated when the Company refused to consider the merging of Tier II with Tier I, and as this was the most important element of the Union's counterproposal the Union's witnesses memory of discussion of the other elements of the proposal may be understandably weak, given the absence of notes.

did Respondent was attempting to reach a contract, a position not normally consistent with a finding of failure to bargain in good faith. It is my belief that though Respondent did want a contract, it was attempting to circumvent the bargaining process to get one. That I believe violates the Act. *General Electric Co.*, 150 NLRB 192 (1964), *American Meat Packing Corp.*, 301 NLRB 773 (1991).

Respondent took a calculated risk in its presentation, based on its assessment of how a vote might go, taking into consideration what had happened at the previous negotiations in 1988. The previous contract had been ratified on a very close vote and so it had some reason to believe that it might achieve ratification of its July 1 proposal. If it did not, then even though it may have committed an unfair labor practice, it still had time to resume negotiations and try to get a contract by further bargaining. However, it cannot avoid at least the initial consequences of its actions. It did, in the context of the July 1 meeting, present its "first, best and final offer," and forced the Union to take it to a vote without affording any real bargaining over the offer.

Although I have found that Respondent's method of presenting its economic offer violates the Act, I feel compelled to discuss briefly the substance of the parties' economic proposals, as the General Counsel on brief takes an approach which seems to assume that there is something very wrong with the Respondent's economic proposal, and something inherently right about the Union's July 1 counterproposal. At least within the context in which the Board has looked at the substantive content of proposals to determine whether they are made in good faith or not, this assumption is not correct. If anything, the Union's insistence on the merger of the two tiers, at a much higher Tier I wage rate, given the Company's immediate past history, appears to be more unreasonable to the Company than the Company's July 1 offer to the employees. The Company had negotiated the Tier II wage level in 1986 and retained it with little increase in the Tier I wages in the 1988 negotiations. Brockley had made it clear that he considered the Tier II wages one of the keys to the Company's continued success. Therefore, it is certainly reasonable that he would not seriously entertain a proposal which would undo what he had gained in the earlier negotiations and set back his goals for the Company. If that was not clear to the Union before July 1, it should have been thereafter. Indeed, in subsequent negotiations, the notion of merging the tiers was dropped and the parties seriously discussed levels of percentage wage increases for both tiers which would not result in their merger. Thus, what I find to be unlawful about Respondent's behavior at the July meeting is not its refusal to engage in some protracted discussion of the Union's counterproposal, but an unwillingness to consider any substantive change in its own proposal.<sup>6</sup>

<sup>6</sup>Although this unwillingness to move may well have been caused by Respondent's mistaken belief that the Union wanted its best offer on July 1, a conversation between Mueller and Bailey the following day indicates that negotiation over the economic proposals did not take place. On July 2, Bailey approached Mueller at the plant and asked Mueller if he thought the employees were going to strike. Mueller replied that he did not know, but that a vote would be taken that afternoon. Mueller then asked Bailey why Brockley had handled negotiations in the manner he did on July 1. Bailey replied that he did not see much negotiation going on.

*C. Was the Strike Which Began on July 8, Caused by Respondent's Unfair Labor Practices?*

On July 2, Miller picked up the Respondent's full proposal from Loni Miller, who told him copies would be sent to the Union a little later. About 4 p.m., the employees came to the union hall for a ratification vote. There were 44 members present. Miller went through each article of the contract and took questions. He told the employees that there was no negotiation over the economic package, that it was given to the committee on a take it or leave it basis. Miller testified that he was asked what should be done, and he replied that he was filing unfair labor practice charges against the Company for what he believed was illegal action, and that his recommendation was to turn the contract down and go on strike.

Committee members Mueller and Campos also recommended that the contract not be ratified and that the employees go on strike. Mueller testified that he urged the members to strike because the Union wasn't given a fair shake at the negotiation table, especially with the events of the July 1 meeting, which he described to the membership. He thought the proposed contract was a bad agreement, but more important was the fact that Respondent would not negotiate with the bargaining committee. At the hearing he testified that some members asked why the contract could not be extended and negotiations continued. He informed them that management had refused to extend the contract. In an affidavit given to the Board, he stated that members had asked why they could not continue to work without a contract while negotiations continued. His affidavit indicates he replied that the Company would not make that option available to the Union. He disavowed his affidavit. I credit his affidavit as being given more closely in time to the event than his testimony. He agreed that it would have been possible to negotiate on July 3-7 without a contract extension being necessary. He told the members before the strike vote the Company would not meet to negotiate any other days that week. The membership voted to reject the contract and strike.

At this meeting, picket signs were already made and were sitting on the stage at the front of the room. Six of the signs said the Union was on strike against Respondent for unfair labor practices. These signs had been previously used for another strike. Three of the signs prepared specifically for the involved strike said the strike was for wages, hours, and working conditions.

Employees who attended this strike vote meeting testified that a major reason they voted to strike was Brockley's take it or leave it action as described to them by Mueller and Miller.

Miller testified that after the meeting, he called the mediator, told him the contract had been voted down and the Union wanted to have another meeting and was ready to meet. The mediator said he would inform the Company and get back with Miller. On July 3, Miller received a letter from the Respondent, hand delivered by Mueller. Mueller was

---

At a subsequent bargaining session held July 11, Mueller testified that Loni Miller said, "Gary [Miller], if this is the way the game is going to be played, we'll know better next time. We could have come in low and worked up high, but we sat down and offered you guys the best deal we could come up with. To continue negotiations any further would have been a waste of our time and your time."

aware of the contents of the letter. In the letter Brockley stated that Respondent was ready to meet with the Union at the Union's convenience to continue good-faith negotiations. According to Miller, he then called Bailey and asked if they could set up another meeting. Bailey testified that Miller called him on July 3 and asked when the parties would meet. Bailey told him the Company was prepared to negotiate through the weekend to avoid a strike. According to Bailey, Miller said no.

Miller testified on direct that the Union did not refuse to meet that week. Mueller testified that he overheard Miller's end of this conversation and that Miller told Bailey that the employees were on strike and for Bailey to let him know when the Company was available to meet. He testified that he did not hear Miller refuse to meet.<sup>7</sup> I credit Bailey's assertion that Respondent offered to meet and negotiate over the weekend and Miller said no. Loni Miller testified credibly that he canceled weekend plans on Brockley's direction to remain available for negotiations. However, it is the serious inconsistency in Miller's versions of the events between July 2 and 8 that weighs most heavily against believing him. There is no mention in Miller's affidavit given to the Board that he asked the mediator to set up a meeting in response to the Company's offer to meet. In fact, Miller's affidavit states that "Between July 3rd and July 11th, no one from the Company asked me when we were going to get back together. I had called Fraizer [the Federal mediator] and told him we rejected the Company's offer and Fraizer set up the meeting for July 11."<sup>8</sup> Rather incredibly, General Counsel finds no inconsistency in this statement in Miller's affidavit and the actual facts. I, however, find that Miller did not tell the Board the truth in the investigatory stage of this proceeding, and I do not believe his testimony that he did not refuse to meet before the strike began. On cross-examination, Miller admitted Bailey called and asked when they were going to get back together. He could not "recall" Bailey asking if he were available to meet on the weekend and saying no. (See Tr. 200-201.)

Neither Mueller nor Miller told any other members about either Respondent's letter offering to resume negotiations or the Bailey conversation prior to July 8. Mueller testified that he would have gone on strike even if the Company offered to negotiate on every day from July 3 to the date of the strike because of what happened on July 1. He later testified that the strike could possibly been avoided by fruitful negotiations prior to the strike.

Miller at least impliedly blames the mediator for not setting up a meeting before the strike began. He does admit that he took responsibility for setting up the meeting and I seriously question whether he did in fact ask the mediator to set

---

<sup>7</sup> Bailey also testified that Miller called him at the plant on July 5 and in this conversation, Bailey again asked to meet before the July 8 strike date. Miller denies speaking to Bailey on July 5. I believe that one or the other of the witnesses is incorrect about the date of the phone call, but all agree that such a call took place, though not on its contents.

<sup>8</sup> There is no mention in this affidavit that Miller asked the mediator to set up a meeting.

up a meeting until after the strike began.<sup>9</sup> I find no credible evidence that he made any effort whatsoever to respond to the Company's request to meet and certainly did not inform the bargaining unit members of the offer, though ostensibly the refusal to negotiate over economics was the prime reason for the strike. Moreover, he did not again ask for a contract extension even though the Company had offered to continue negotiations and in previous negotiations had extended the contract when an initial proposal had been rejected by a vote of the employees.

I do not find that under the circumstances presented that the strike can be characterized as an unfair labor practice strike from its inception. The Respondent took a risk when it forced its proposal to a vote, perhaps not realizing that its actions in this regard could anger the employees to such an extent that even the Tier II employees would reject its proposal. However, I do not believe that the Union has the luxury of ignoring what I find to be a good-faith offer to resume negotiations well before the strike began. This is especially true since there had been a significant change in circumstances between July 1 and 3. On July 1, Respondent may have hoped its proposal would be ratified by the employees. On July 3, it not only knew this was not the case, but it faced with the immediate prospect of a strike. One could assume that the strike vote itself had gotten the message across to Respondent that its employees could not be bullied and it had to negotiate. This seems to be the case in light of Respondent's immediate offer to resume negotiations. Actually going on strike would accomplish nothing more, at least with respect to the stated reason for calling the strike an unfair labor practice strike.

If any bad faith is evident at this stage of events, I believe it is on the part of the Union generally and Miller specifically. As noted above, Miller told the Board during the investigation stage of this controversy that "between July 3rd and July 11th, no one from the Company asked me when we were going to get back together." This is patently untrue. The complaint alleges that on or about July 1, the Company refused to meet with the Union again before the existing contract expired on July 4. This allegation, which is clearly based on Miller's evidence about the July 1 meeting and his failure to tell the Board about Respondent's subsequent offers to meet on July 3, is obviously important. If the unfair labor practice which triggered the strike vote was Respondent's unwillingness to bargain, then a good-faith change in that position must be tested to determine whether Respondent is in fact willing to negotiate in good faith.<sup>10</sup>

Miller, who was in control of the situation, chose not to test Respondent's offer. His refusal to do and his failure or refusal to notify the membership of the offer and seek their advice on how to proceed indicates to me that he wanted a strike for economic reasons, not to redress the refusal to ne-

gotiate over economics on July 1. Even if Miller doubted that Respondent would entertain serious bargaining over economic issues, I believe he had the obligation of testing Respondent's good faith before he could take the membership on a strike and accurately call it an unfair labor practice strike. I find that the Respondent's offer to meet and negotiate prior to the strike date, coupled with the Union's refusal to meet and test Respondent's good faith, effectively remedies Respondent's conduct on July 1. If Respondent had been found to have violated the Act on July 1, and if Respondent had not made the offer to immediately resume bargaining, the Board would have ordered Respondent to cease and desist from its unlawful actions and to begin bargaining in good faith. Respondent voluntarily took these same remedial steps. I find that the strike which began on July 8 was an economic strike from its inception. *K-B Resources*, 294 NLRB 908 (1989); *Whisper Soft Mills*, 267 NLRB 813 (1983).

*D. Did Respondent Unlawfully Refuse to Discuss Economic Issues at a Bargaining Session held July 16, and Thereafter Unlawfully Declare Impasse and Unilaterally Implement Its Last Offer?*

1. The meetings of July 11, 16, and 22

Although it is not mentioned in the complaint, the parties resumed negotiations on July 11. If a refusal to discuss economics at a subsequent meeting held on July 16 can be said to have unlawfully prolonged the strike, then under any rational theory of the case what happened at the meeting of July 11 in this regard is also relevant and material. Union witnesses testified generally that Respondent was unwilling to discuss economics at this meeting.

According to Miller on direct examination by General Counsel, Hamlin called the employees a liability and a bunch of wimps. The parties argued and then caucused. Miller testified that the Union drafted a proposal, but was told that the Company wanted to settle noneconomic matters first and that ended the meeting. On cross-examination, Miller admitted this did not happen. Miller first could not remember that the Company in this meeting said it was okay to discuss economic items. However, his affidavit states that "They [Respondent] said they could talk about economics, but there was not much discussion about those items. They did not repeat that we had their final proposal on wages." On cross, Miller admitted there was discussion of the health insurance proposal.

The Union's economic proposal presented at this meeting called for percentage increases of four, three and three for Tier I, nine, eight and a half, and eight for Tier II, with an additional 10 cents a quarter until Tier II matched Tier I, and 5 cents an hour additional for pensions. The Union increased its proposed severance pay from prior proposals. The proposal continued the Union's position on mandatory overtime and seniority. The Union proposed that the fab shop be put back in the proposal with higher paid employees performing set up and production, that subcontracting be eliminated and for the Company to provide steel-toed shoes.

Bailey testified that at the July 11 meeting, he had costed out the Union's economic proposal and pointed out to the Union at this meeting that it would increase the Company's existing costs by \$447,000 and would require a 6-percent in-

<sup>9</sup>Bailey testified that he talked with Miller on the picket line on both July 8 and 9, asking him when negotiations were going to resume. Miller said he would set something up.

<sup>10</sup>It should be remembered that when voting to take a strike, the employees were told that Respondent refused to bargain further before the contract's expiration, would not extend the contract, and would not bargain in the absence of a contract. By July 3, the first of the statements was no longer true, and Miller did not ask Respondent if its position had changed on the other two, even though it had extended the contract in similar circumstances in 1988.

crease in prices. This was given in response to Mueller calling the Company's noneconomic proposals "ballbusters," and Bailey referring to the Union's economic proposal similarly. Union witnesses testified that Loni Miller in effect said that the Company had presented the best deal it could come up with and it would be a waste of time to discuss the Union's proposal (to merge Tier II with Tier I) any further. All witnesses agreed to one degree or another that a substantial amount of time was spent discussing the health insurance issue.

Union witnesses testified that at this meeting the Union began by asking that all previous tentative agreements be kept and the Company gave silent approval. They objected at the end of the meeting when the Company gave another of its draft proposals, this one containing some language which it had earlier agreed to withdraw. Of course, the Union itself had proposed a more regressive severance pay provision in this same meeting.

I believe the foregoing recitation of evidence makes it clear that the Company did not foreclose discussion of economic issues. In fact, it appears from the credible evidence that one of the prime economic issues, health insurance, was discussed at length. That the Company was not willing to entertain a proposal to merge the two tiers of employees is not a refusal to discuss economics. There is no showing that anyone from the Union suggested any change be made in Respondent's economic offer and Respondent did not reiterate that that offer was its final offer.

The parties next met on July 16. At this meeting Brockley offered to give the Union a lump sum dollar figure for wages and let the committee decide how to distribute it between Tiers and years, but wanted to discuss the remaining issues first and get them out of the way. The parties did discuss some of them. According to Loni Miller, the parties were close to an agreement on subcontracting as the Company had agreed to grandfather existing employees. The Union still expressed concern about two welders who were working in a lesser classification. It felt that if some welding work was farmed out, these two employees would never have a chance to get back to their welding classification. Brockley offered to enter into a side letter addressing this point. The Union seemed to agree and took a caucus. Loni Miller testified that he had prepared a costing of the Company's wage proposal which showed the Company was offering an additional \$268,000 in wages over the 3-year life of the proposed contract. It was never given to the Union because the meeting ended without the parties coming back together. Both company witnesses and union witnesses offered testimony about the reason the meeting ended, each citing conversations with the mediator which favored the side offering the testimony. As I stated earlier, I do not rely on these one-sided conversations with the mediator as there is no way to test their truthfulness. For all I know, the mediator may have told one side one thing and the other something else. In any event, the Union evidently did not take Brockley's offer seriously, or did not consider it good enough to seriously consider. The Union made no economic counteroffer to Brockley's proposal at this meeting.

I consider the offer to let the union committee decide or at least propose how the dollar amount of Respondent's proposal would be split between the tiers to be a valid concession, and the Union's witnesses at the hearing did also. How-

ever, at this meeting, the Union did not seek to explore this concession and did not ask for any particulars, including what dollar amount Brockley was offering. That Brockley also wanted to settle the remaining noneconomic issues is certainly not inconsistent with reaching an agreement. The Respondent at this meeting was willing to make concessions on noneconomic matters and did make an economic concession. I do not find that its actions in either the meeting of July 11 or 16 could be considered unfair labor practices or to have converted the strike to an unfair labor practice strike or unlawfully prolonged the strike.

The next meeting was held on July 22. In the interim, the Company had sent the employees a letter dated July 19 urging them to return to work and stating that if they did not, the Company would begin hiring permanent replacements. To this point, no real production had been accomplished since the strike began, though management with some part-time help had continued shipping product.

On July 22, the Company proposed changing its wage proposal to one offering Tier I employees increases of 1 percent, 4 percent, and 3 percent, and Tier II increases of 6 percent, 3 percent, and 2 percent. The Union then submitted a counterproposal. The Company accepted the Union's proposal that Tier I employees be given a 3-percent-per-year increase, and countered the Union's Tier II proposed 8-percent, 3-percent, and 3-percent increase with a 6-percent, 4-percent, and 4-percent proposed increase. The Union proposed some changes in the health insurance proposal, but no agreement was reached on any proposal on this date except for one with respect to holidays. At this point, Loni Miller estimated that the Company and Union were about \$100,000 apart. Since July 1, the Company had upped its wage offer by about \$25,000. Near the end of this meeting Gary Miller made a comment about shutting the Company down, which irritated Brockley. The mediator broke up the meeting at this point, with each side indicating that they had nothing more to give. At the end, the Company's latest economic proposal was under consideration by the Union, and a further meeting was scheduled for July 25.

Miller testified that he, in private, handed Brockley a letter which said that the Union wanted to return all employees to work under the expired contract and begin marathon negotiations to reach an agreement. He said Brockley handed the letter back to him and said he was not interested. Mueller and D'Agosta testified that Miller told them that he had shown the letter to Brockley on July 22 and Brockley had rejected it. Brockley denies ever seeing the letter. I credit Brockley's denial based on my findings with respect to Miller credibility and for the reasons set forth below. If the employees wished to return under the terms of the expired contract as July 22, they could simply return to work as no replacements had been hired and the Company had not implemented any of its proposals. Such a proposal would have made sense after replacements had been hired, but not before. Indeed, in his letter to employees on July 19, Brockley had expressly urged the employees to return to work. On cross-examination, Miller agreed that the letter might have been prepared on another later date. No mention of this letter appears in any of Miller's affidavits.

No contention is made that anything that happened in the meeting of July 22 violates the Act. Although I have found that Respondent's written and oral offers to resume negotia-

tions remedied its unlawful act on July 1 and thus the strike was an economic strike from its inception, I would further note that the bargaining which occurred on July 11, 16, and 22 would also constitute a remedy of that unfair labor practice. As noted immediately below, the employees held a meeting on July 23, wherein the status of negotiations was reported to them and they voted not to discuss the contract. If the report to them was accurate, they would have learned that the parties had seriously negotiated over economics and that the gap between the parties had narrowed significantly. Thus, as their stated reason for starting the strike no longer existed, they could have ended the strike, returned to work and continued the negotiations. By choosing not to do so, I would find that the strike reverted an economic one, assuming, which I do not, that it was an unfair labor practice strike at its inception.

2. Did the Company unlawfully declare impasse and implement its last offer?

The Union held a meeting on July 23. As noted, the employees had been sent a letter by the Company urging them to return to work and informing them that it may begin hiring replacements. At the meeting, Miller told the employees he had filed unfair labor practice charges and updated them on the status of negotiations. The employees voted not to discuss the contract anymore and the meeting ended. According to Mueller, Miller told the members that negotiations were slow, and he did not feel they were really in good faith and he had filed unfair labor practice charges. Mueller addressed the group. He remembered a member speaking from the floor saying that if the members gave into threats of replacement, that the next time there would be replacements from the first day. Mueller explained some of the problems with negotiations, that there were times the Company would not touch on issues, that the committee received a lot of insults, and that he was upset because the Company had accused the committee of misinforming the membership. He asked the members to refrain from talking with management. He said Miller told the members about the wage proposal received from the Company on the previous day, and that the members had to be more flexible to get things settled. He suggested that the Union might have to give in on one of the security proposals, but not both. This position was not communicated to the Company in any fashion until a meeting held either August 2 or 5.<sup>11</sup>

On August 23 or 24, Miller received a call from Brockley who asked if there was any reason to hold the next meeting on August 25. Miller asked him if he had any room for movement and Brockley said no. Miller then said that if he did not have room for movement, there was no point in meeting. Brockley testified that Miller said he had no room to move and no proposals to make. Miller denied that he said in this conversation that the Union had no room to move. I do not believe this denial. Miller then testified generally that the Union did have some room for movement. However, the Company had made the last proposal, and if the Union had reason to move, why cancel the meeting? On cross, Miller modified his version of the conversation to indicate that the

Union had room to move only if the Company made some movement first. He then indicated that he did not say this on the telephone. Because of Miller's demonstrated lack of candor in this record and because his actions do not logically make sense, I credit Brockley's version of this conversation.<sup>12</sup> If one believes his earlier testimony, just 2 days before he was suggesting marathon bargaining sessions. Significantly, Miller called the mediator and canceled the meeting. He next received a letter from Brockley verifying the cancellation of the meeting set for August 25. This letter, *inter alia*, states:

As I advised you, Industrial Electric Reels, Inc. does not have any further proposals to advance in the negotiations. I understood you to indicate that the Union likewise has no further proposals or modified proposals to make. This leaves our respective positions where they were when we ended our session on Monday, July 22. Unless you have further proposals, or modifications to proposals, that you wish to discuss and which might resolve our negotiations, I believe we are at impasse and that further negotiations would be futile. If you have any proposals, modifications or ideas which might bring us to agreement, please let me know right away, as the Company's position is that we are at impasse in our negotiations.

Miller testified that he received the letter on the 25th or 26th, and that at some point, he took the letter to the Union's attorney who looked at it.<sup>13</sup> By letter dated July 31, he responded in a letter to Brockley. This letter states that the Union does not feel the parties are at impasse and feels it has some room for movement. It asks that Brockley contact him to set up a meeting.

Between the date of the Union's receipt of Brockley's letter declaring impasse and its response some 6 days later, some real changes took place in the parties' relationship. Beginning July 26, the Company placed newspaper ads for replacement workers. The wage rates mentioned in the ads were the rates contained in its July 22 proposal. On July 29, the Company had a large number of persons come into the plant to apply for jobs as replacements, an event obvious to those strikers on the picket line. The Company offered evidence that it had 19 applicants on July 26, 33 on July 27, 148 on July 29, and 91 on July 30. Miller testified that he first learned of the applicants on Friday, July 26, and first learned that replacements had been hired and were working on Monday, July 29. The Company also implemented its offer of July 22 with respect to replacements it hired and the few strikers who crossed the picket line and returned to work.

Miller at some point called the mediator to set up a meeting, and the mediator contacted the Company on July 31. As a result, a negotiation meeting was held on August 2. At this meeting the Company made no concessions. The Union made some proposals which included some concessions in return for concessions from the Company. They were all rejected.

<sup>11</sup>It is difficult to discern accurately what was offered by the Union in a bargaining session held August 2. The testimony with respect to this meeting is fragmented and generalized.

<sup>12</sup>Loni Miller overheard this telephone conversation and heard Brockley indicate that the parties were at impasse.

<sup>13</sup>The letter was sent certified mail and the receipt indicates that the Union received it on July 25.

Another meeting was held on August 5. Miller testified that the Union offered to accept the Company's proposals and go back to work. This offer was rejected. The Company presented a proposal which added some items which it had previously dropped or withdrawn. The Union would have to agree to these to get a new contract. At some point in this meeting, Miller agreed to accept the Company's proposal as of August 5, a proposal more favorable to the Company than its proposal of July 22, if the Company would recall the strikers rather than put them on a preferential hiring list. The Company was unwilling to do this.

I believe the parties were at impasse as of July 22 or 24, when Respondent declared impasse. "Impasse is a way of describing that point in collective bargaining at which, at least until further developments occur," the parties have bargained in good faith in an effort to agree to a set of terms and conditions of employment, but have been unable to strike an accord. When that point is reached, two practical consequences ensue: (1) an employer may put into effect, without further discussion with the union, terms earlier offered by it during the bargaining; and (2) either party may, for the present, refuse to schedule bargaining sessions.

The authoritative definition of impasse is that given by the Board in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), an impasse exists when "good-faith negotiations have exhausted the prospects of concluding an agreement." The *Taft* case has also been quoted, probably in every impasse case issued by the Board since 1967, for the summary of some of the factors relevant to the determination of the existence of an impasse (at 478):

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." [*Storer Communications*, 294 NLRB 1056 (1989).]

Each of the above-cited factors in determining whether impasse existed on July 24 will be briefly discussed.

(a) *Bargaining history*: The parties have enjoyed a collective-bargaining relationship since 1970 and have entered into a number of collective-bargaining agreements. They have necessarily engaged in a number of negotiations to reach those agreements. Both of the principals involved in the instant negotiations, Miller and Brockley, had engaged in bargaining with each other in the past. For them to reach a point where each states that there is no further room for movement, given the past history of bargaining and their knowledge of each other, indicates to me that the parties have actually reached impasse and are not simply engaging in some ploy to force movement from the other side.

(b) *Good faith of the parties*: Although I have found that Respondent engaged in an unlawful bargaining tactic in the meeting of July 1, I have also found that it remedied that action. Overall, I find that Respondent engaged in good faith, though at times, hard bargaining with an honest aim of reaching an agreement. The same can be said for the Union. The parties had reached a number of tentative agreements, and both had made significant concessions on a number of

serious issues. For example, Respondent had during the course of negotiations proposed grandfathering current employees on subcontracting and technological change issues, reducing by half the number of hours it sought on mandatory overtime, and raising the amount of money involved in its economic package by about \$25,000 from July 1.

(c) *Length of negotiations*: By July 22, the parties had met 14 times, and had identified almost from the outset of negotiations the issues on which they most seriously disagreed. These issues had been discussed over and over, and though concessions had been made with respect to many of them, no agreement had been reached on any of them. These issues included subcontracting, technological change, mandatory overtime, and economics. The length of negotiations also seems parallel with the 1988 negotiations wherein in about the same number of sessions, agreement had been reached. I agree with Respondent that both sides appeared to be waiting for some intervening event to occur before either was willing to give further.

(d) *Seriousness of the issues about which there is disagreement*: As noted in detail at the beginning of this decision, the issues of subcontracting, technological change, mandatory overtime, and economics were important to both sides. Both had goals with respect to these issues which lead to immediate confrontation. The Company sought to control costs and make its plant more competitive by achieving more flexibility in the use of its employees, by modernizing its equipment, and by less restrictive use of subcontracting. The Union genuinely disliked the two-tier wage structure, wanted substantial raises for Tier I employees, and feared the "job security" changes proposed by Respondent were a means to reduce the workforce. Each side had in their own minds legitimate reasons for taking the stances they did on these issues and by insisting on their positions, neither side in my opinion was trying to frustrate the bargaining process.

(e) *Contemporaneous understanding of the parties*: Based on the telephone conversation of Miller and Brockley, and Brockley's letter confirming that conversation, I find that both parties agreed that they were at impasse on July 24. Both parties indicated that they had no more room for movement, and Miller canceled the next and only scheduled meeting. If the Union had room for movement, it could have resisted canceling the meeting and made a counterproposal to the Respondent's outstanding proposals. If the Union disagreed with Respondent's letter, Miller could have responded immediately by letter rather than waiting a week, or could have simply called. The Union could have filed an unfair labor practice charge alleging unilateral declaration of impasse. It did none of these things.<sup>14</sup>

As I noted at the outset of this discussion, impasse does not mean forever. I believe that impasse did exist on July 24, and developments occurred over the next several days which prompted the resumption of negotiations. These events were the hiring of replacement workers and the implementation of the Company's last offer with respect to those workers. The response of Miller to Brockley's written declaration of impasse appears to me to be a direct response to the hiring of

<sup>14</sup>As noted at the outset of this decision, the Union did file an unfair labor practice charge over the declaration of impasse in December, a month after the complaint issued. The charge was filed at the direction of the Region.

replacements and not to a busy schedule as contended by General Counsel. The Union's agreeing with the Respondent's demands within the next week also indicate to me that the Union was not at all certain that it was engaged in an unfair labor practice strike. I believe that the Union, like Brockley, initially believed that Respondent's employees could not be replaced because of their long experience. I further believe that the hiring of these replacements broke the impasse.

As I have found that Respondent lawfully declared impasse, I also find that its implementation of the July 22 offer with respect to the replacements was lawful.

*E. Did Respondent unlawfully fail and refuse to reinstate strikers on and after August 7?*

I have heretofore found that the strike was an economic strike and thus, the striking employees were only entitled to the reinstatement rights of economic strikers, not unfair labor practice strikers. A fair amount of evidence was adduced at the hearing on whether the Union ever made an unconditional offer to return to work because it insisted that all strikers, including some who were accused of serious strike misconduct, be returned as a group. This evidence will not be discussed as it is unnecessary to the disposition of this case.

On August 6, the Union learned that the Region was issuing a complaint in this matter, and in a letter dated August 7, Miller wrote Brockley:

On behalf of all of the employees, bargaining unit members, I hereby make an unconditional offer to return to work at the prior terms and conditions which existed before the strike. I would be most happy to meet with you at your earliest convenience to determine scheduling of the return of the unit to the plant. Obviously, with this unconditional offer to return to work, we hope to get everyone back to work as soon as possible.

I find that this offer is not unconditional as it predicates the return of the strikers on the Respondent reinstating them under the terms and conditions which existed prior to the strike. Respondent had lawfully implemented different terms and conditions and was not obligated to reinstate the strikers under the older conditions.

Brockley responded on August 8 with a letter to Miller, in which he states that he was willing to meet to discuss the return of the strikers, though he commented that he did not believe he was legally bound to recall them because of the hiring of replacements. He also stated the Respondent's position that strikers would return under the conditions set out in the Respondent's offer of August 5, and not the expired contract. He advised that if the Union did not accept that offer, the parties were again at impasse.

Miller sent Brockley another letter on August 12, which states:

In my August 7, 1991 letter I made an unconditional offer to return all striking employees to work. I am making the same unconditional offer in this letter. We are offering to return to work at your current terms and conditions of employment. We are not conceding that your current terms and conditions have been lawfully

implemented. The union wants all striking employees returned to work immediately. I am available to meet with you on Tuesday, August 13, 1991, to work out the return of all of the striking employees.

By August 12, four employees had been offered reinstatement by Respondent. Thereafter, several meetings were held between the parties attorneys to discuss the matter of reinstatement. Following these meetings, during August, valid reinstatement offers were sent to all striking employees except five accused of strike misconduct.<sup>15</sup> Two striking employees returned pursuant to the offer of reinstatement. None of the other striking employees responded. All of these striking employees were permanently replaced.

Contrary to the complaint allegations, I find that following the Union's offer to return to work, the Respondent did make a valid offer of reinstatement to all of its striking employees to whom it had an obligation to offer reinstatement and did not violate the Act as alleged. If the striking employees now wish to return to work, they may have a right to be placed on a preferential hiring list as the strike has evidently never formally ended.

#### CONCLUSIONS OF LAW

1. Respondent Industrial Electric Reels, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(2) of the Act.

3. The Respondent, on July 1, 1991, by presenting its initial economic proposal during negotiations in a take it or leave it manner and refusing to seriously negotiate over economics until a vote was taken by the Union on its proposal violated Section 8(a)(1) and (5) of the Act.

4. The strike which commenced on July 8, 1991, was an economic strike from its inception as Respondent remedied its unfair labor practice of July 1, before the commencement of the strike.

5. The Respondent lawfully declared an impasse in negotiations on July 24 and thereafter, lawfully implemented the terms and conditions of its last offer.

6. The strike was neither prolonged by nor converted to an unfair labor practice strike by any action of Respondent alleged in the complaint.

7. The unfair labor practice found to have been committed by Respondent is one which affects commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not commit any other unfair labor practice alleged in the complaint.

#### REMEDY

Having found that Respondent engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, it is hereby ordered to cease and desist therefrom. As Respondent thereafter remedied its unfair labor practice, I recommend that it be ordered only to post appropriate notice.

[Recommended Order omitted from publication.]

<sup>15</sup>The parties stipulated that the Company had evidence which would support the belief that those employees had engaged in picket line misconduct, and that the Union had such knowledge when it relayed its "all or none" offers.