

**Frank Ivaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf Club and Recreation Co. and Hotel Employees and Restaurant Employees and Bartenders Union, Local 50, Hotel and Restaurant Employees International Union, AFL-CIO.** Cases 32-CA-11599 and 32-CA-11734

February 8, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On March 10, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified below and to adopt the recommended Order.

The judge found, inter alia, and we agree, that the Respondent's contract offer of October 16, 1990, and the Union's acceptance of it on March 1, 1991, resulted in a complete contractual agreement between the parties, and that the Respondent violated Section 8(a)(5) and (1) by refusing to execute that agreement. In so holding, the judge found that the Respondent's contract offer was extinguished neither by the Union's own contract counterproposal of January 4, 1991 (*Pepsi-Cola Bottling Co.*, 251 NLRB 187 at 189 (1980), enfd. 659 F.2d 87, 89 (3d Cir. 1981)), nor by the 4 months which elapsed between the offer and acceptance (*Worrell Newspapers*, 232 NLRB 402, 405-407 (1977)), particularly because the passage of 2 of the 4 months was caused by the Respondent's unlawful withdrawal of recognition from the Union.

The judge, in finding that the parties had reached agreement, relied specifically on the Respondent's repeated proffer of its October 16 contract offer on October 30, 1990, and the fact that the Respondent did not expressly withdraw that contract offer from the bargaining table at any time prior to the Union's accept-

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There is no exception to the judge's dismissal of the complaint allegation relating to the Respondent's unilateral change in its method of scheduling banquet waitresses.

ance of it.<sup>2</sup> He thus rejected the Respondent's contention that its unlawful withdrawal of recognition of the Union on January 4, 1991, had the effect of withdrawing the contract offer.<sup>3</sup> We accordingly agree with the judge's Order requiring the Respondent to execute the agreement with the Union. We note, moreover, that this is consistent with our normal remedy for unlawful withdrawals of recognition during bargaining. In such cases we require the offending party to restore the status quo ante by continuing to offer, for a reasonable period of time, proposals that were outstanding at the time of the unlawful withdrawal of recognition. See *Star Dental Products*, 303 NLRB 968 fn. 2 (1991); *Northwest Pipe & Casing Co.*, 300 NLRB 726 (1990) (Member Oviatt concurring in part). The fact that the Union has already accepted the Respondent's final contract offer makes that particular affirmative relief superfluous in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Frank Ivaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf Club and Recreation Co., Sunol, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>2</sup> *Hydrologics, Inc.*, 293 NLRB 1060, 1063 (1989) (a contract offer remains on the bargaining table unless explicitly withdrawn by the offeror or unless circumstances arise that would lead the parties to believe that this offer had been withdrawn).

<sup>3</sup> The judge further rejected the Respondent's contention that its entering into a settlement agreement concerning its withdrawal of recognition required it only to resume bargaining. Rather, the judge found that compliance with the settlement agreement would have, in effect, reinstated the former bargaining negotiations, including the Respondent's final contract offer which the Union accepted. In any event, we note that the settlement agreement was properly set aside by the Regional Director due to the Respondent's unfair labor practices committed subsequently to the agreement.

*Jeffrey L. Henze*, for the General Counsel.

*Robert M. Cassel (Sullivan, Roche & Johnson)*, for the Respondent.

*Joe D. Regacho*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held on August 26, 27, and 29, 1991, is based on unfair labor practice charges filed by Hotel Employees and Restaurant Employees and Bartenders Union, Local 50 (the Union), against Frank Ivaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf Club and Recreation Co. (Respondent), in Case 32-CA-11599 on January 9, 1991, and in Case 32-CA-11734 on March 25, 1991, and on an order consolidating cases and a consolidated complaint issued May 22, 1991, by the Regional Director for Region 32 of the National Labor Rela-

tions Board (the Board), on behalf of the Board's General Counsel, alleging that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.<sup>1</sup>

The consolidated complaint, based on the charge filed in Case 32-CA-11599, alleges that Respondent on January 4, 1991, withdrew its recognition of the Union as the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees and that by engaging in this conduct violated Section 8(a)(5) and (1) of the Act. Prior to the issuance of the consolidated complaint the Board's Regional Director for Region 32 on February 21, 1991, approved a unilateral settlement agreement in Case 32-CA-11599. However, on May 22, 1991, contemporaneously with the issuance of his order consolidating cases and the consolidated complaint, the Regional Director issued an order withdrawing his approval of the settlement agreement, because of the Respondent's alleged failure to comply with its obligation under the settlement agreement.

In its answer to the consolidated complaint, Respondent admitted having withdrawn recognition from the Union as alleged in the complaint, but as an affirmative defense alleged it would be improper to find that its withdrawal of recognition violated the Act because the matter had been settled by means of the settlement agreement, which it alleged it had fully complied with.

The consolidated complaint, based on the charge filed in Case 32-CA-11734, alleges Respondent violated the Act, as follows: Section 8(a)(5) and (1), by failing and refusing since March 11, 1991, to execute a collective-bargaining agreement embodying the terms of an agreement reached by the Union with Respondent; Section 8(a)(5) and (1), by unilaterally altering the method of assigning work to its banquet servers on or about March 18, 1991;<sup>2</sup> Section 8(a)(3) and (1), by failing and refusing on various dates in March and April 1991 to reinstate six named striking employees who had made unconditional offers to return to work; Section 8(a)(1), by sending a letter on March 13, 1991, to a striker, who had already submitted an unconditional offer to return to work, stating she would have to complete an employment application as a condition of reinstatement; Section 8(a)(1), by informing a striker on or about March 16, 1991, that Respondent would never again employ employees who picketed Respondent; Section 8(a)(1), on or about March 18, 1991, by requiring a striker who had submitted an unconditional offer to return to work to submit an employment application and submit to an employment interview as a condition of reinstatement; and Section 8(a)(1), by its letter of April 17, 1991, requiring a striker to confirm her availability for employment, even though she had already unconditionally offered to return to work.

Last, the consolidated complaint alleges that some of the Respondent's employees concertedly ceased work and en-

gaged in a strike commencing on or about October 17, 1990, and that this strike was prolonged by Respondent's withdrawal of recognition from the Union on January 4, 1991, thereby converting it into an unfair labor strike as of that date.

On the entire record, and from my observation of the demeanor of the witnesses, and having considered the posthearing briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Respondent's Alleged Refusal to Execute an Agreed-Upon Contract

###### 1. The evidence

Respondent operates a 36-hole golf course with a 40,000-square-foot clubhouse in Sunol, California. It employs approximately 170 full-time and part-time employees. In addition to its recreational activities, Respondent serves food and beverages 7 days a week in its Golf Cafe. It also does a substantial banquet business, having several rooms which it uses to cater banquets.

Since it opened for business in 1968, Respondent has recognized the Union as the exclusive collective-bargaining representative of its food and beverage employees, except for the period in 1991, *infra*, when it withdrew recognition from the Union. Respondent and the Union have been parties to successive collective-bargaining agreements covering these employees. The last such agreement was effective by its terms from December 4, 1987, through June 30, 1990, and covered the approximately 15 food and beverage employees in Respondent's employ.

The negotiations for a successor agreement to replace the one scheduled to expire on June 30, 1990, began in May 1990 and from that month until the end of September 1990 approximately 12 negotiation sessions were held. Thereafter, the final five negotiation sessions were held on October 9, 12, 16, and 30 and on January 4, 1991.

Prior to the October 16 bargaining session the Union was represented at the negotiations by its Business Representative Ted Ahl. Respondent was represented by its principle negotiator, Labor Relations Consultant Michael Lynn, who was assisted by Respondent's general manager Daniel Russell. Lynn and Russell represented Respondent for the remainder of the negotiations. However, starting with the October 16 bargaining session, the composition of the Union's representation changed. Ahl, at this time, was joined at the bargaining table by the Union's principal official, Secretary-Treasurer Joe Regacho. Also present during those negotiation sessions were Respondent's employee Gloria Richards, who was a union committeeperson. A Federal mediator was present at the negotiations of October 12, 16, and 30 and January 4, 1991.

###### The October 9, 1990 Bargaining Session

Ahl's testimony about the October 9 bargaining session, is as follows. Lynn, at approximately 12 noon, gave Ahl General Counsel's Exhibit 5, a one-page handwritten document of 12 paragraphs numbered 1 through 12, entitled "Offer to

<sup>1</sup> Respondent admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. Respondent also admits that it meets the Board's applicable discretionary jurisdictional standard and is an employer engaging in commerce within the meaning of Sec. 2(6) and (7) of the Act.

<sup>2</sup> The consolidated complaint was amended during the hearing to include this allegation.

HERE Union Local 50." Paragraphs 1 through 4 of the offer proposed the following: an agreement which would expire July 1, 1991; health and welfare payments by Respondent of \$275 per month per employee; an increase of Respondent's monthly pension payments of \$2.50 per eligible employee; and, a 5-percent wage increase for nontipped and a 2-percent wage increase for tipped employees. Paragraphs 5 through 12 contained the remaining substantive terms of the offer. Lynn told Ahl that the terms of the offer would go into effect on ratification by the Union. The offer, as it was written, did not expressly, or by implication, state it would expire on rejection, nor did Lynn say anything to that effect. Ahl rejected the offer. He told Lynn that the Union had to have retroactivity.

Lynn and Russell testified that, as Ahl testified, Lynn presented Ahl with General Counsel's Exhibit 5 at approximately noontime, but that later during the afternoon gave to Ahl Respondent Exhibit 1, a typed document of four pages, titled "SUNOL VALLEY GOLF COURSE FINAL OFFER TO H.E.R.E. LOCAL 50." The substance of this offer was the same as the handwritten offer made earlier that day. However, it contained the following additional language not included in the earlier handwritten offer.

The *final offer* is based on the unions [sic] *acceptance of a one year* labor contract proposal, which was *agreed to* on Friday, September 28, 1990 at the offices of the Federal Mediation and Conciliation Service.

All terms of this final offer shall become effective on contract ratification. In the alternative all terms of this final offer shall expire on rejection.

[At this point the substantive terms of the proposal are set forth in 12 indented paragraphs numbered "1" through "12"]

The employer, Sunol Valley Golf Course will continue to serve the public and provide jobs for our employees, who desire to work. The strike action threatened by the Union is both unwarranted and unwise and may only result in destruction of our relationship.

Management has complied with most Union demands. As can be seen by reading the numbered proposals there has been *agreement reached* on most *every point*. This offer provides the greatest stability between Sunol Valley Golf Course and our Employees as can be attained. It is the result of exhaustive bargaining between the Union and the Employer and represents the best efforts of all parties.

We see no need for rejection of this final offer and urge all our employees *to accept* this final offer. Thank you all.

Respectfully,  
Dan Russell, P.G.A.  
General Manager

Richards unequivocally denied that Respondent's Exhibit 1 was presented to the Union during the October 9 bargaining session. Ahl testified he did not believe Respondent's Exhibit 1 was presented to the Union during this bargaining session, but believed it came into his possession subsequent to that meeting when it was handed to him by one of Respondent's employees. However, Ahl testified he was not able to unequivocally deny it had been presented to him at the October

9 negotiation session. Regacho, who was not present at this meeting, testified he was given Respondent's Exhibit 1 approximately 5 to 7 days after the October 9 bargaining session, when, he testified, Ahl brought him the document and told him it had supposedly been handed out by Respondent to Respondent's employees. Regacho further testified that on October 9, following the October 9 bargaining session, Ahl, in reviewing with Regacho what had occurred at that session, showed him General Counsel's Exhibit 5, not Respondent's Exhibit 1, as having been presented to him by Respondent.

The testimonial demeanor of Richards, Ahl, and Regacho was good. They impressed me as being sincere and conscientious witnesses, attempting to truthfully recall what occurred during the contract negotiations involved in this case. The testimonial demeanor of Lynn and Russell was poor when they testified about the contract negotiations. They impressed me as being insincere witnesses, whose sole interest was in supporting the Respondent's theory of the case. This is why I reject their testimony that Lynn gave Respondent's Exhibit 1 to Ahl during the October 9 bargaining session.

The conclusion that Respondent's Exhibit 1 was not presented to the Union during the October 9 bargaining session is bolstered by the way the document is worded. Unlike the usual contract offer submitted to a union by an employer across the bargaining table, Respondent's Exhibit 1, as described supra, is worded in terms of an offer that Respondent intended to communicate directly to its employees, rather than to the Union across the bargaining table. Respondent's Exhibit 1, as worded, constituted an effort by Respondent to persuade the employees, not the Union, to accept Respondent's contract offer. It explained to the employees why Respondent felt the employees should accept the Respondent's final offer and concluded with General Manager Russell thanking the employees.

Also, the conflict between Lynn's and Russell's testimony, described hereinafter, and the internal inconsistency in Russell's testimony, described hereinafter, make suspect their testimony that at the October 9 bargaining session Respondent's Exhibit 1 was given to the Union. Thus, Lynn admitted it was Respondent's intention to distribute Respondent's Exhibit 1 to its employees; when asked at the hearing why that exhibit was worded in terms of an announcement to the employees, he testified, "We were of the impression that the union was not communicating back to the rank and file and *so we wrote this in order to give it to the rank and file, our own employees*, as well as the union." Nonetheless, despite Lynn's aforesaid testimony, Russell testified Respondent's Exhibit 1 was never communicated by Respondent to its employees. Immediately after he gave this testimony it was pointed out to Russell that the way in which Respondent's Exhibit 1 was worded indicated it had been prepared by Respondent for the purpose of being publicized by Respondent to its employees, whereupon, for the first time, Russell testified, "We asked them [referring to the Union's representatives] to give it [R. Exh. 1] to the employees." Previously, Russell had not mentioned that this had been stated, when he testified about what was said to Ahl when Respondent, on October 9, supposedly submitted Respondent's Exhibit 1 to him. Lynn, who also testified about what was stated to Ahl on October 9 concerning Respondent's Exhibit 1, failed to corroborate Russell's testimony that Respondent asked the Union to give Respondent's Exhibit 1 to the employees.

Lynn's failure to corroborate Russell is not surprising inasmuch as Russell ultimately repudiated that testimony. For, when he was asked, when, during the October 9 bargaining session, Respondent asked the Union to give Respondent's Exhibit 1 to the Union, and asked who for the Respondent made that statement and what was said, Russell's answers were vague and evasive and eventually Russell reluctantly admitted that neither he nor Lynn asked the Union to take Respondent's Exhibit 1 and distribute it to the employees, as Russell had previously testified.

#### The October 12, 1990 Bargaining Session

It is undisputed that during the October 12 bargaining session the Union submitted its first written contract offer to Respondent. This offer, among other things, proposed: a contract of 3-years duration from July 1, 1990, to June 30, 1993; health and welfare monthly payments of \$275 per employee during the first year and a 15-percent maintenance of benefit payment effective July 1, 1991, and July 1, 1992; an increase in Respondent's monthly pension payments of \$2.50 per employee during the first year and further monthly increases of \$1.50 and \$1 effective respectively July 1, 1991, and July 1, 1992; a general wage increase of 5 percent for nontipped employees and 2 percent for tipped employees effective July 1, 1990; a 3-percent wage increase for nontipped employees and 2 percent for tipped employees effective July 1, 1991; and a 2-percent wage increase for nontipped employees and 1 percent for tipped employees effective July 1, 1992.

Later during this bargaining session, at approximately 5:30 p.m., Lynn gave Ahl General Counsel's Exhibit 17, a one-page handwritten document of several paragraphs numbered 1 through 13, titled "Final Offer," with the handwritten date of "October 12, 1990—5:30pm" in the upper right-hand corner. Admittedly, all the handwriting is Lynn's and it is admittedly signed by Lynn, "Respectfully, Michael Lynn Labor Relations."

The first four paragraphs of this offer (G.C. Exh. 17) proposed the following terms: a contract of 3 years' duration; health and welfare monthly payments of \$275 with a 15-percent maintenance of benefits effective on July 1, 1991, and July 1, 1992; pension payments of \$2.50 a month; and a 3-1/2-percent wage increase for nontipped employees, with the statement that Respondent may increase this amount, but that future wages were to be based on merit and ability. The remainder of this "Final Offer," the numbered paragraphs 5 through 13 read as follows:

5-11 As previously agreed.

12. Oper.Engers. H&W language as agreed, with necessary clean up of terms, etc.

13. 1 exemption for Exec. Chef as agreed.

1 exemption for Chef Relief Manager.

Union cooperation with Management in all areas of dispute.

This offer, as it was written, did not expressly or by implication state it would expire on rejection, nor is there evidence that Lynn said anything to the Union's negotiators to that effect, in connection with this offer.

The above-findings concerning General Counsel's Exhibit 17 are based on the testimony of Ahl and Richards. Lynn and Russell testified, as did Ahl and Richards, that Respond-

ent made a written final contract offer to the Union during this negotiation meeting. However, Lynn and Russell testified the final offer was not made in the form of General Counsel's Exhibit 17, but was made in the form of Respondent's Exhibit 4.

Respondent's Exhibit 4 is identical to Respondent's Exhibit 1, *except* for the inked in deletions and additions to the paragraphs numbered 1 through 4, and paragraph 12, and the inked in addition of two new numbered paragraphs, 13 and 14. Also the date on the top right-hand corner of Respondent's Exhibit 1 has been changed on Respondent's Exhibit 4 from "October 9, 1990" to "October 12, 1990—5:00pm"; the 9 having been X'd out and a 12 substituted and the time "5:00pm" written in.

A comparison between General Counsel's Exhibit 17 and Respondent's Exhibit 4 reveals that the substantive contract terms proposed therein differ in certain significant respects substantially. Also, as noted previously when describing Respondent's Exhibit 1 in detail, that part of Respondent's Exhibit 1 which stated, "All terms of this final offer shall expire on rejection," was left unchanged in Respondent's Exhibit 4.

Ahl and Richards testified unequivocally that the "final offer" submitted to the Union on October 12 was General Counsel's Exhibit 17, not Respondent's Exhibit 4, and that Respondent's Exhibit 4 was not presented to the Union. I credit their testimony because their testimonial demeanor was good, whereas as the testimonial demeanor of Lynn and Russell, as noted previously, was poor when they testified about the contract negotiations.

The conclusion that it was General Counsel's Exhibit 17 rather than Respondent's Exhibit 4 that was presented by Respondent to the Union is supported by the following additional considerations: the failure of Lynn's contemporaneous notes of the October 12 bargaining session to indicate that Lynn submitted the proposals embodied in Respondent's Exhibit 4 to the Union; and, Lynn's incredible testimony that he had no recollection of the circumstances of his drafting General Counsel's Exhibit 17 nor what he did with it after drafting it.

It is undisputed that Lynn made contemporaneous notes of important matters which occurred during the contract negotiations involved in this case, yet his notes of the October 12 bargaining session do not mention Respondent's Exhibit 4 as having been presented to the Union. Lynn did not offer an explanation for this omission.

Even more significant in evaluating Lynn's testimony concerning the October 12 bargaining session is Lynn's testimony: "I don't have a copy of that [referring to G.C. Exh. 17]; the first time I've seen it was when I just walked in five minutes ago." This, despite the fact, that General Counsel's Exhibit 17 was admittedly in Lynn's handwriting, admittedly was signed by him, admittedly was dated by him "October 12, 1990—5:30pm," and, on its face is obviously a contract proposal prepared by Lynn for presentation to the Union. Lynn testified in effect that while General Counsel's Exhibit 17 must have been prepared by him because it was in his handwriting and was signed by him, he had no recollection of the circumstances under which he prepared and signed it nor could he recall what he did with it after having prepared and signed it. This lack of recall, however, did not prevent Lynn from testifying unequivocally that he did not present

this final offer to the Union. Plainly, Lynn's professed inability to remember the circumstances under which he prepared General Counsel's Exhibit 17 and what he did with it after he signed it is inherently incredible and, when coupled with his poor testimonial demeanor, warrants the inference that General Counsel's Exhibit 17 is what on its face it purports to be, namely, a "final offer" prepared by Lynn which was submitted by him to the Union on October 12, 1990, at approximately 5:30 p.m., as Ahl and Richards credibly testified.

#### The October 16, 1990 Bargaining Session

During the October 16 bargaining session Respondent presented to the Union (G.C. Exh. 3) its "last, best, and final offer." This offer, a one-page handwritten document, was in Lynn's handwriting and was signed by Russell. It contained no language which, expressly or by implication, indicated the offer would expire upon rejection; it was silent on the subject of its expiration. The offer contained a preamble, which stated:

This is the last, best and *final offer* of [Respondent] to be made to [the Union]. All terms shall become effective on contract ratification. We strongly recommend that union present this final offer to our employees and that the employees carefully consider their response. We urge you to accept this offer.

The rest of the offer consisted of proposed terms and conditions of employment, set forth in 14 numbered paragraphs. In comparison with Respondent's October 12 final offer, Respondent's October 16 last, best and final offer provided better terms and conditions of employment for the employees, insofar as wages and monthly pension contributions were concerned, but, in all other respects, the October 16 offer was virtually essentially the same as the October 12 offer.

Respondent's October 16 last, best and final offer was a complete offer for a collective-bargaining agreement. The terms of that proposed agreement were embodied in three different documents: (G.C. Exh. 3) the October 16 offer itself; (G.C. Exh. 4) which sets out paragraphs 5 through 12 referred to in the October 16 offer; and (G.C. Exh. 2) the parties' recently expired collective-bargaining agreement which, in certain respects, was incorporated into the provisions set forth in General Counsel's Exhibit 4.

The October 16 last, best and final offer contained a 5-percent wage increase for nontipped employees and a 2-percent wage increase for tipped employees, and an increase in Respondent's monthly pension contributions by \$1.50 and \$1 effective July 1, 1991, and July 1, 1992, whereas its October 12 final offer provided for no such additional pension contribution increases and only provided for a 3-1/2-percent wage increase which was to be paid only to nontipped employees. I note that the wage provision of the October 16 offer was worded in terms of "increase wages 5 percent for all tipped employees and 2 percent for all non-tipped." This was a clerical error and all the parties to the negotiations understood it was an error and should have read 5 percent to nontipped and 2 percent for tipped employees.

It is undisputed that Regacho, Ahl, and Richards, who represented the Union at the October 16 negotiation meeting, were given copies of the Respondent's October 16 last, best

and final offer at that meeting, and after reviewing the terms of the offer, that Regacho informed Respondent's representatives the offer was unsatisfactory and indicated he would recommend that the employees reject it. It is also undisputed that it was the Union's dissatisfaction with the Respondent's wage proposal and the failure of the Respondent's offer to provide for retroactivity which made the October 16 offer unsatisfactory to the Union.

The aforesaid description of the October 16 bargaining session is undisputed. There is a serious dispute, however, about other events which occurred on October 16 during and immediately after the conclusion of the October 16 bargaining session.

Lynn testified that when he gave the Company's October 16 last, best and final offer to the Union's negotiators that he told them, among other things: "if this [offer] is not accepted, the deal is dead." Russell testified that when Lynn gave Respondent's October 16 offer to the Union's negotiators that Lynn urged them to accept the offer and warned them that, "If not, it's over, it's dead." The Union's negotiators, Regacho, Ahl, and Richards, on the other hand, testified in effect that Lynn did not make any of the above-described remarks attributed to him.

Lynn and Russell also testified that on October 16, shortly after Regacho rejected Respondent's last, best and final offer, Ahl, by himself, visited Russell's office,<sup>3</sup> where Lynn and Russell had gone, and asked to speak to Lynn. Lynn testified that Ahl, at that time, asked Lynn if Respondent would meet with the Union on October 30, 1990, for another negotiation meeting, and that Lynn answered by agreeing to an October 30 negotiation meeting, and that Lynn then informed the Federal Mediator, who was also present, that another negotiation meeting had been scheduled for October 30. Lynn further testified he then spoke to Ahl about Respondent's October 16 last, best and final offer and, among other things, told Ahl if the Union did not accept that offer "it's a dead deal" and testified that later during this conversation he also told Ahl that he wanted Ahl to "understand the consequences; we're not going to prolong this offer, not going to inflate this offer, not going to come back with something else."

Ahl disputes Lynn's and Russell's aforesaid testimony. Ahl testified that on October 16, after Regacho rejected Respondent's last, best, and final contract offer, Ahl did not speak to Lynn, but stayed with Regacho and Richards. His testimony is corroborated by Regacho's testimony that Ahl, after Regacho rejected Respondent's offer, did not leave Regacho's side and they left the building together.

As I have stated previously, the testimonial demeanor of Ahl and Regacho was good; they impressed me as being sincere and conscientious witnesses attempting to truthfully recall what occurred during the contract negotiations. The testimonial demeanor of Lynn and Russell, as I have stated previously, was poor when they testified about the contract negotiations; they impressed me as being insincere witnesses whose only interest was to support Respondent's theory of the case, regardless of what actually occurred. It is for this reason that I reject their above-described testimony and credit the testimony of Regacho and Ahl.

<sup>3</sup>The October 16 negotiation session took place at Respondent's place of business.

The conclusion that Lynn and Russell falsely testified that Ahl on October 16, after Regacho rejected Respondent's contract offer, went to Russell's office and spoke to Lynn is bolstered by the following circumstances. According to Lynn's testimony, Ahl's purpose in going to Russell's office to speak to Lynn was to schedule another negotiation meeting with Respondent for October 30. In this regard, Lynn testified Ahl knocked on the office door and when Lynn answered, Ahl told him he wanted to schedule another negotiation meeting for October 30. Lynn further testified that he responded by agreeing to meet with the Union on that date and then told Federal Mediator Capella, who was present, that Ahl had proposed that the parties meet again on October 30 and asked if Capella was available to meet on that date and Capella answered in the affirmative. It was only at this point that Lynn supposedly took both Capella and Ahl away from Russell's office, leaving Russell behind, in order to initiate a conversation with Ahl about the state of the contract negotiations, during which Lynn supposedly told Ahl that if the Union did not accept Respondent's October 16 offer that it would become "a dead deal" and would not be "prolonged."

In other words, the plausibility of Lynn's testimony concerning his private conversation with Ahl depends in large part on the credibility of his testimony that Ahl's purpose in coming to Russell's office to speak to Lynn was to schedule another negotiation meeting for October 30. The record as a whole reveals that this part of Lynn's testimony was demonstrably false.

It is undisputed that on October 19, 1990, Respondent received the following telegram from Ahl:

EMPLOYER'S LAST AND FINAL OFFER WAS REJECTED BY A MORE THAN TWO TO ONE VOTE. THE UNION IS NOW ON STRIKE. WE STAND READY TO RESUME NEGOTIATIONS AT ANY TIME. YOU MAY CONTACT JOE REGACHO OR MYSELF DIRECTLY OR THROUGH FEDERAL MEDIATOR TONY CAPELLO.

It is also undisputed that during the evening of October 18, 1990, immediately after the employees had voted to strike, that Ahl telephoned Lynn and left a message for him on his answering machine which stated, in substance, that the employees had voted to reject Respondent's last, best, and final contract offer, that the Union was on strike, and if Respondent wanted to meet again with the Union for contract negotiations that Lynn should contact either Ahl or Regacho.

If Ahl, previously on October 16, had already arranged with Lynn to meet again for negotiations on October 30, he obviously would not have bothered in his October 19 telegram or in his October 18 telephone message to Lynn, to ask that Respondent contract either Ahl or Regacho if it desired to schedule another negotiation meeting. The logical sequence of events, under the circumstances, would have been for Lynn, on behalf of Respondent, to contact Ahl and the Federal mediator, if Respondent desired to accept Ahl's October 18 and October 19 invitations to schedule another negotiation meeting. This is exactly what happened. For, on October 24, Lynn wrote Ahl this letter:

This letter will serve to confirm our response to your message of October 19, 1990 and will confirm a phone call to your office today.

We have attempted to contact Mr. Tony Capella of the F.M.C.S. and yourself and left the following message:

We invite you to meet with the management of Sunol Valley Golf Course for collective bargaining purposes on Tuesday, October 30, 1990 at a place mutually agreeable to all parties.

Please reply to either myself at (415) 484-1813 or to Mr. Capella.

Lynn initially testified he did not communicate by letter to the Union concerning the October 30 negotiation meeting. However, when confronted with his above-described letter of October 24, 1990, his memory was refreshed and he admitted having authored and sending the letter. Lynn testified he had forgotten about sending this letter and testified he did not even have a copy of it in his files. This probably explains why Lynn fabricated his above-described testimony about Ahl coming to him on October 16 for the purpose of scheduling the October 30 negotiation meeting, even though such a story was obviously incredible when viewed in the light of Lynn's October 24 letter to Ahl. Lynn's explanation for having sent this letter was that several days after October 16 he received a telephone call from Ahl stating Ahl was in trouble with Regacho for having scheduled the October 30 negotiation meeting without Regacho's permission. Lynn further testified that Ahl then asked, "If I would send [Ahl] a letter in effect, doctoring up confirmation of the meeting of the 30th." Lynn testified this was the reason why he sent the letter. Ahl, who I credit, testified he made no such phone call nor made such a request of Lynn. Moreover, when Lynn's explanation for sending the letter is viewed in the context of the contents of the letter, the explanation is implausible because the letter, as written, would do nothing to help Ahl remedy Regacho's alleged dissatisfaction with Ahl for having scheduled the October 30 meeting without Regacho's permission.

#### The Events Which Occurred Between the October 16, 1990, and the October 30, 1990 Bargaining Sessions

On October 18 or 19, 8 of the approximately 15 employees represented by the Union employed by the Respondent ceased work and went out on strike against Respondent in support of the Union's bargaining position. The sole contact between the Union and Respondent concerning the contract negotiations from the October 16 negotiating meeting to the October 30 negotiating meeting was Ahl's telegram, supra, received by Respondent on October 19, notifying it of the strike and inviting it to communicate to the Union for another bargaining session, and Lynn's October 24 letter to Ahl, supra, asking to meet with the Union on October 30 for the purpose of contract negotiations.

#### The October 30, 1990 Bargaining Session

The October 30 bargaining session took place in the offices of the Federal Mediation and Conciliation Service. Present for the Union were Regacho, Ahl, and Richards and for the Respondent, Lynn and Russell.

The parties met together, in the presence of the Federal mediator, at which time Regacho proposed that the parties agree there would be no retribution against employees for

supporting or not supporting the Union's strike; he stated he felt such an amnesty agreement should be a part of any collective-bargaining agreement reached by the parties. Also discussed was Respondent's contention that some of the strikers had engaged in misconduct while on the picket line. Also discussed at some point during this meeting was the subject of how banquet personnel were being hired by Respondent when the Union was unable to provide it with the necessary applicants. Regacho suggested that if the parties reached agreement on the terms of a collective-bargaining agreement that they could resolve the issue of the hiring of the extra banquet personnel by means of a side letter to the agreement.

On the subject of contract negotiations Respondent's representatives stated they were there to negotiate a contract, rather than to simply accept the Union's proposal and sign a contract. The parties' principal negotiators, Lynn and Regacho, reviewed the terms of Respondent's October 16 last, best, and final offer. Regacho, as was the case during the October 16 bargaining session, stated Respondent's wage offer was unacceptable, explained why this was so, and also stated that for Respondent's contract offer to be acceptable to the Union it would have to provide for retroactivity especially in the area of the proposed wage increases. Also, on the subject of wages, Lynn, in response to Regacho's inquiry, stated that the wage provision of the Respondent's October 16 offer contained a clerical error and that the percentages were actually the reverse from the way they had been written in the offer and that everyone knew that Respondent meant to propose that nontipped employees receive a 5-percent wage increase and tipped employees receive a 2-percent wage increase, rather than the reverse as written in the offer.

The parties' negotiators during this face-to-face meeting on October 30 were unable to resolve their differences, and Lynn at one point remarked he wished the Union had accepted Respondent's contract offer or words to that effect. It is undisputed that during this part of the October 30 meeting, when all of the negotiators were face-to-face with one another, that nothing was stated by either Lynn or Russell to the effect that Respondent's October 16 offer was no longer on the bargaining table or had been withdrawn.<sup>4</sup>

It is undisputed that the October 30 bargaining session ended with the parties caucusing in separate rooms and with the Federal mediator then having Lynn and Regacho join him for a private meeting. Lynn's and Regacho's testimony about this private meeting, as described infra, differs significantly.

Lynn's testimony given during cross-examination may be summarized as follows. Regacho asked if Respondent had "sweetened" its October 16 offer, whether Respondent had

better terms to offer. Lynn answered, "No." Regacho then asked why Respondent had asked the Union to meet with it. Lynn stated Regacho would have to "come off his position" and "eat a little crow" in order to get Respondent back to the negotiating table, and stated he could not understand why the Union had struck Respondent as Respondent's wage proposal was a good one. Regacho stated he would not change his bargaining position and repeatedly asked why Lynn had dragged him down there for a negotiating meeting if Respondent was not prepared to change its position. Lynn stated, "Joe you're gonna stay out on strike until you come off your position or until you voluntarily withdraw from the strike." Regacho replied by asking, "Is your offer still out there?" Lynn answered, "No, the offer is dead; there is no offer out there."

Previously, on direct examination, Lynn testified to a slightly different version of what occurred, as follows. Regacho asked him if Respondent was ready to give him what he wanted. Lynn answered, "No," and stated that this was not the purpose of the meeting and informed Regacho that Regacho would have to come off of his set of demands in order to get Respondent back to the bargaining table, "because our final offer was no longer effective" and testified that at this time he also told Regacho, "We didn't have an offer on the table." Regacho replied he would not come off of his demands, that he felt there was very little holding the parties apart, and Respondent should make the concessions. Lynn told him that Respondent was very disappointed with the conduct of the strike and with the manner in which Respondent's final offer had been rejected.

Regacho's testimony may be summarized, as follows. Lynn stated that the parties past bargaining relationship had been good, that he felt Respondent's offer was a fair offer, and did not see what the problem was with the wage provisions of the offer and stated Respondent was not willing to give the Union retroactivity. Regacho replied by stating he agreed the parties' bargaining relationship had been a good one, but that the Union's members wanted a wage increase divided up over a period of 3 years, as proposed by the Union, rather than Respondent's wage proposal. Lynn indicated he could offer the Union a lesser wage proposal than the one Respondent was currently proposing. Regacho stated he would consider that to be bad-faith bargaining and file an unfair labor practice charge with the Board. Lynn answered by stating he did not care if Regacho filed a charge with the Board. Lynn at this point told Regacho that neither he nor Russell were authorized to "settle this dispute." Regacho asked for the name of the person who had that authority. Lynn stated Respondent's owner, Frank Ivaldi, had the authority. Regacho replied if Lynn did not have the authority to settle their dispute that there was no sense in continuing with the meeting, and the meeting ended. However, immediately prior to Lynn leaving the office where this private meeting with the Federal mediator had taken place, Lynn remarked, "You've got my offer, it's there," and the Federal mediator stated that "the Union has the employer's offer" and that it was the Union's "call." Regacho also testified that during this private meeting Lynn did not state that the Respondent's October 16 last, best and final offer was "dead" nor say anything about the offer having been withdrawn or words to that effect.

<sup>4</sup>Regacho, Ahl, and Russell were the only witnesses questioned about what was stated during the October 30 meeting, when all the parties' representatives were face-to-face across the bargaining table. Their individual testimony does not conflict, thus the above-description of what was stated is based on a composite of their testimony. However, if Russell's testimony can be interpreted as standing for the proposition that the only thing that occurred during this part of the October 30 bargaining session concerned Regacho's amnesty proposal, Respondent's contention that strikers were engaged in misconduct, and Lynn's declaration, in response to Regacho's inquiry, that Respondent was there to negotiate, I reject Russell's version of what occurred, because his testimonial demeanor was poor whereas Regacho's and Ahl's was good.

I reject Lynn's testimony that during his private meeting with Regacho and the Federal mediator on October 30 that Lynn stated Respondent's last, best, and final offer of October 16 had been withdrawn from the bargaining table or used words to that effect, rather I credit Regacho's denial and his testimony about what occurred during this meeting. I do so primarily because, as I have indicated on several occasions previously, when Lynn testified about the parties' contract negotiations I received the impression from his poor testimonial demeanor—his tone of voice, his manner of speaking and the way he appeared while testifying—that he was not a sincere witness, but was tailoring his testimony to fit Respondent's theory of the case, in disregard of the truth. Moreover, the implausibility of his testimony that during his private meeting on October 30 with Regacho and the Mediator that he stated Respondent's last, best, and final offer had been withdrawn, is demonstrated by the following factors: Lynn's failure to include such language in the offer itself and the failure of Lynn's notes of the October 30 meeting to mention that he made such a statement;<sup>5</sup> and, Lynn's failure to deny, as I have found supra, that during the face-to-face meeting of all of the parties' negotiators on October 30, prior to his private meeting with Regacho and the Federal mediator, that Lynn did not indicate to the Union's negotiators that the October 16 offer had been withdrawn, or say words to that effect,<sup>6</sup> but, to the contrary, Lynn reviewed the terms of the offer with Regacho, defended the fairness of the offer, and clarified a clerical error in the wage provisions of the offer.

In rejecting Lynn's testimony that, as described supra, during the negotiating session of October 16 he expressly stated that Respondent's last, best, and final offer was withdrawn on rejection and his testimony that during his private meeting with Regacho and the Federal mediator on October 30 he stated that the offer had been withdrawn, I considered Lynn's testimony that his conduct was consistent with his past practice. In this regard, he testified that since he began representing Respondent in 1982 he has negotiated three collective-bargaining agreements for Respondent with the Union and that prior to the 1990 negotiations had submitted "final" contract offers to the Union and that those offers were "normally conditioned to expire if they are rejected," because that was his practice. However, contrary to his alleged practice, not one of the three final offers presented to the Union during the 1990 negotiations contained such language. If it was Lynn's practice to normally include such language in all final offers, I find it difficult to believe that, as he testified, he "simply overlooked it" in wording three different offers. Moreover, Regacho, whose testimony I credit, testified that prior to the current negotiations he represented the Union in contract negotiations with Respondent during the negotiations

<sup>5</sup>When asked during the hearing why he did not include language in Respondent's October 16 final offer stating it would terminate on rejection, or words to that effect, Lynn unconvincingly testified that he "simply overlooked it." He also failed to explain why his notes of the October 30 meeting between himself, Regacho and the Federal mediator, contain no mention of his stating that Respondent's contract offer had been withdrawn or words to that effect.

<sup>6</sup>Lynn admitted that on October 30, prior to his private meeting with Regacho and the Federal mediator, he did not inform the Union's negotiators that the offer had been withdrawn or say words to that effect.

involving the most recently expired contract and testified that during those negotiations the Union was never informed that any of the Respondent's contract proposals terminated on rejection.

In evaluating Lynn's credibility I have also considered that in an effort to persuade Respondent's employees to accept its final offer of October 9, in the face of the Union's recommendation that they reject it, that Lynn prepared a document for issuance to the employees which, besides including the terms of the Respondent's contract offer, explained to the employees why they should accept it and warned them that the terms of the offer "shall expire on rejection." However, the fact that Respondent explained to the employees why they should accept its offer, despite the Union's recommendation that it be rejected, and as a part of the message, as a tactic to persuade them to accept the offer, warned the employees that the terms in the offer "shall expire on rejection," does not mean that this was the Respondent's bargaining position. It does not follow that a tactic used by an employer to persuade its employees to accept a contract proposal, which the employees' union disapproves of, coincides with the employer's bargaining position, as expressed to the union.

#### Respondent's January 4, 1991 Unlawful Withdrawal of Recognition

Subsequent to the above-described October 30, 1990 meeting there was no communication between the Union and Respondent until their representatives "met" on January 4, 1991, at the offices of the Federal Mediation and Conciliation Services. There is no showing as to who requested this meeting. Present for the Respondent were Lynn and Russell and for the Union Regacho, Ahl, and Richards.

The parties' representatives did not meet face-to-face, but caucused in separate rooms. Regacho, on the Union's behalf, submitted to the Federal mediator a new union contract offer, which the mediator transmitted to Lynn and Russell, who informed him that it was rejected. Russell and Lynn, on behalf of Respondent, then gave a handwritten one-page document to the Federal mediator to give to the Union's representatives. The document, dated January 4, 1991, and signed by Russell and Lynn, was given to the Union's representatives. It read as follows:

The NLRB has informed the management of [Respondent] that [the Union] is not the *certified* exclusive employee representative.

Therefore, unless and until you have attained such status you are hereby informed that under the National Labor Relations Act as amended we are prohibited from dealing with your union as the exclusive representative for our employees.

In its answer to the complaint, Respondent admits that on January 4, 1991, it withdrew recognition from the Union as the exclusive representative of its employees in an appropriate unit. It also admits that on that date and continuing thereafter during all times material to this case that the Union has been the exclusive bargaining representative of an appropriate unit of the Respondent's employees. In view of these circumstances, Respondent conceded (Tr. 36-37) and I find, that Respondent's January 14, 1991 withdrawal of recogni-

tion from the Union as the exclusive bargaining representative of an appropriate unit of the Respondent's employees constituted a violation of Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

It is undisputed that there was no communication between the Respondent and the Union from Respondent's unlawful January 4, 1991 withdrawal of recognition until Regacho's March 1, 1991 letter to Lynn, discussed *infra*.

Respondent Enters into a Settlement Agreement  
Remediating Its Unlawful Withdrawal of Recognition  
Which is Approved by the Board's Regional Director  
on February 21, 1991

On February 21, 1991, the Board's Regional Director for Region 32 approved a unilateral informal settlement agreement in Case 32-CA-11599 concerning Respondent's unlawful withdrawal of recognition. The Union, which filed the charge in that case, had previously been invited by the Regional Director to become a party to the settlement agreement, but declined the invitation. The Union was notified by the Regional Director, by letter of February 21, 1991, of his unilateral approval of the settlement agreement and of the contents of the agreement. The Union in that letter was also informed it had the right to appeal the Regional Director's decision until the close of business March 7, 1991. The Union did not file an appeal.

The settlement agreement required Respondent, among other things, to cease and desist from withdrawing recognition from or refusing to bargain with the Union, and affirmatively required Respondent, among other things, to bargain collectively with the Union as the exclusive representative of Respondent's employees in the appropriate unit.

Initially, in proposing a settlement agreement to the Respondent, Field Examiner Nicholas Tsiliacos, the Board agent who investigated the Union's charge, proposed that as part of the settlement agreement Respondent agree to "inform the Union that our final offer dated October 16, 1990 remains our current proposal." Respondent's representative, Lynn, objected to this language and it was not included in the agreement eventually signed by Respondent and approved by the Regional Director. The circumstances surrounding the deletion of that language, according to Lynn's testimony, are as follows.

On February 4, 1991, Tsiliacos faxed a proposed settlement agreement to Lynn which required Respondent, among other things, to agree to "inform the Union that our Final offer dated October 16, 1990 remains our current proposal." On receiving it that morning, Lynn testified he telephoned Tsiliacos and objected to the quoted language because, according to Lynn, he explained to Tsiliacos that "the offer was rejected on the 30th of October—or actually died on rejection the 18th, and . . . does not represent our final offer." When Lynn was asked during the hearing if he specifically told Tsiliacos that Lynn had informed the Union that if the Union rejected the October 16 offer it would be dead, or used words to that effect, Lynn testified in the affirmative. He also testified that previously, during Tsiliacos' investigation of the charge, he had shown Tsiliacos Respondent's Exhibits 1 and 4, the typed contract offers of October 9 and 12, discussed *supra*, which stated in the preamble that the terms of those offers "shall expired on rejection." In response to Lynn's objection, Tsiliacos, according to Lynn, replied that

since Tsiliacos did not have any evidence that there was a final offer still on the bargaining table, he would delete the objectionable paragraph.

Union Representatives Regacho and Ahl, and William Sokol, the Union's attorney who filed the charge on behalf of the Union in Case 32-CA-11599, testified they were not informed by Tsiliacos that Respondent had stated that its October 16, 1990 offer was no longer its current proposal. They also testified that Tsiliacos did not discuss with them the terms of the settlement agreement that he was proposing to Respondent and, more specifically, testified they were never informed that one of the provisions of the proposed settlement would have required Respondent to inform the Union that Respondent's final offer dated October 16, 1990, remained its current proposal. They testified, in effect, that the only terms which Respondent was asked to accept, which were ever brought to their attention, were the terms contained in the settlement agreement which the Regional Director approved on February 21, 1991.

Respondent served a subpoena ad testificandum on Board Agent Tsiliacos seeking to have him testify about his alleged conversation with Lynn, described *supra*, and to also question him about whether he informed the Union that Respondent had stated that its October 16, 1990 final contract offer no longer remained on the bargaining table. I denied the General Counsel's petition to revoke that subpoena. The General Counsel appealed to the Board. On October 23, 1991, the Board issued a published order in this case granting the General Counsel's appeal and quashing the subpoena (305 NLRB 493).

On March 1, 1991, the Union Accepts Respondent's  
October 16, 1990 Last, Best, and Final Offer

As described *supra*, the Union was informed by the Board's Regional Director, by letter dated February 21, 1991, that Respondent had entered into a settlement agreement in Case 32-CA-11599, approved by the Regional Director on that date, which required Respondent to cease and desist from its withdrawal of recognition from the Union and required it to enter into collective-bargaining negotiations with the Union. Shortly after receiving this letter, the Union's Secretary-Treasurer Regacho, on March 1, 1991, wrote Respondent's labor relations consultant Lynn that in view of the terms of the settlement agreement entered into by Respondent in Case 32-CA-11599, "we are once again in a bargaining mode," and further stated:

When bargaining left off as a result of your unfair labor practice, you had a last, best and final offer on the table. The Union accepts it, has executed it, and there is a copy of the executed last, best and final offer enclosed herein. This means that the employer and the Union are now bound to all the terms of this three year agreement.

On March 11, 1991, by letter of that date, Lynn answered Regacho, as follows:

Please be informed that there was no "offer on the table." Therefore, we have no contract. See the attached settlement agreement to guide your future conduct.

From January 4, 1991, when Respondent notified the Union it had withdrawn recognition from the Union, until March 1, 1991, when the Union wrote Respondent stating it was accepting its last, best, and final offer, there had been no communication between the Respondent and the Union.

Regacho testified that the Union's reason for notifying Respondent on March 1, 1991, that it was accepting the Respondent's last, best, and final offer was due to the fact that "my people on strike were getting hungry."

## 2. Discussion and conclusions

The complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act by refusing since March 11, 1991, to sign a written collective-bargaining agreement embodying the terms of a collective-bargaining agreement reached with the Union on March 1, 1991. The question presented by this allegation is whether an agreement on a collective-bargaining agreement was reached on March 1, 1991, when the Union notified Respondent of its acceptance of the Respondent's October 16, 1990 "last, best and final" contract offer. If so, then, as alleged in the complaint, Respondent violated Section 8(a)(5) and (1) of the Act by refusing since March 11, 1991, to sign the agreement. The evidence pertinent to this issue, which has been set forth in detail *supra*, is hereinafter summarized and evaluated against the applicable legal principles.

### The Pertinent Facts Summarized

On October 16, 1990, during a negotiating session, Respondent submitted to the Union its "last, best and final" contract offer which was a complete offer for all the terms of a collective-bargaining agreement. The Union's principle representative, Regacho, indicated to Lynn, the Respondent's labor relations consultant, that the offer was unsatisfactory and the Union intended to recommend that the employees reject it. The offer contained no express time condition for acceptance, nor was the Union verbally informed it would lapse on rejection.

On October 19, by telegram, Respondent was informed by the Union that the employees had voted to reject the Respondent's "last, best and final offer" and to engage in a strike against Respondent. Some of Respondent's employees who were represented by the Union did in fact at that time commence a strike which continued during the time material.

On October 30, at the parties' next negotiating session, Respondent did not indicate that its "last, best and final" offer was no longer on the bargaining table or withdrawn. Rather, by its conduct Respondent indicated to the Union that its "last, best and final" offer was still Respondent's current offer, despite having been rejected by the Union. Thus, Respondent's negotiator Lynn reviewed all of the terms of that offer with the Union's principal official, Regacho, and clarified a clerical error contained in the wage provision of the offer. Also, during a private meeting with Regacho and the Federal mediator, which occurred on October 30, Lynn defended the fairness of the Respondent's "last, best and final" offer and ended the meeting by declaring, "You've got my offer, it's there."

Between October 30, 1990, and January 4, 1991, the next scheduled negotiating session, there was no communication between the parties.

On January 4, 1991, at the parties' next scheduled negotiation meeting, but prior to the start of any negotiations, Respondent abruptly withdrew recognition from the Union, in violation of Section 8(a)(5) and (1) of the Act; it informed the Union's negotiators it was prohibited from dealing with the Union until the Union attained the status of a certified bargaining representative. As a result of Respondent's unlawful refusal to recognize and bargain with the Union, the scheduled January 4, 1991 negotiating session abruptly ended before it ever commenced and no further communication took place between the parties until the Union's March 1, 1991 letter, discussed *infra*.

In order to get Respondent back to the bargaining table, the Union filed its refusal to bargain charge in Case 32-CA-11599. On or about February 21, 1991, the Union learned that on February 21 the Board's Regional Director had approved a settlement agreement entered into in that case by and between Respondent and the General Counsel. Under the terms of that settlement agreement, Respondent agreed to, among other things, recognize and bargain with the Union. Promptly on receipt of this agreement, Regacho, on behalf of the Union, on March 1, 1991, wrote Respondent's representative Lynn and stated that since the parties were "once again in a bargaining mode" as a result of the settlement agreement, that the Union was now accepting Respondent's October 16, 1990 "last, best and final offer" which had been on the table when Respondent broke off the negotiations and further informed Lynn that as a result of the Union's acceptance of the offer the parties were now bound by a collective-bargaining agreement. By letter of March 11, 1991, 10 days later, Lynn wrote Regacho that there was "no offer on the table," thus the Union's acceptance had not resulted in a collective-bargaining agreement.

Between Respondent's unlawful withdrawal of recognition and refusal to bargain on January 14, 1991, and Lynn's letter to Regacho of March 11, 1991, stating that Respondent's October 16, 1990 offer had not been on the table, Respondent had not informed the Union that the offer was no longer on the bargaining table or otherwise indicated to the Union that the offer had lapsed.

However, on February 4, 1991, Field Examiner Nicholas Tsiliacos, an agent employed by the Board's Regional Office, was allegedly informed by Lynn that Lynn had specifically told the Union that Respondent's October 16, 1990 contract offer had lapsed. In this regard, the record reveals that on February 4, 1991, Board Agent Tsiliacos, in connection with the settlement negotiations in Case 32-CA-11599, faxed a proposed settlement agreement to Lynn which by its terms required Respondent, among other things, to agree to "inform the Union that our Final offer dated October 16, 1990 remains our current proposal." Lynn's undenied testimony is that in objecting to this provision he told Tsiliacos that the October 16 offer had been rejected by the Union and that Lynn had told the Union that if the offer was rejected that it would be "dead" or had said words to that effect to the Union. According to Lynn's undenied testimony, Tsiliacos answered that since Tsiliacos did not have in his possession any evidence that there was a final offer still on the bargaining table, that he would delete the objectionable paragraph. In fact the settlement agreement entered into by and between Respondent and the General Counsel, which was signed by Lynn, did not contain the objectionable lan-

guage, but, in pertinent part, simply obligated Respondent to cease and desist from withdrawing recognition from or refusing to bargain with the Union, and required Respondent to bargain collectively with the Union.

#### The Applicable Law

The governing principles of law are well established. Technical rules of contract law do not necessarily control the making of collective-bargaining agreements. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 242 (7th Cir. 1982). In this regard, the Board and courts have held that the “common law rule that a rejection or counterproposal necessarily terminates the offer has little relevance in a collective-bargaining setting.” *Pepsi-Cola Bottling Co. of Mason City, Iowa v. NLRB*, 659 F.2d 87, 89 (3d Cir. 1981), enfg. 251 NLRB 187 (1980). Accord: *Presto Casting Co. v. NLRB*, 708 F.2d 495, 497 (9th Cir. 1983).

In *Pepsi-Cola*, the Board adopted a judge’s finding that a company July 12 offer, rejected by the union on July 16, was still viable on July 30 when the union accepted the offer. The Board held it was not bound by the technical rules of contract law and that:

a complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn, prior to such acceptance . . . . [*Pepsi-Cola Bottling Co.*, 251 NLRB at 189.]

In enforcing the Board’s decision, the Eighth Circuit stated:

[A] contract offer is not automatically terminated by the other party’s rejection or counterproposal, but may be accepted within a reasonable time unless it was expressly withdrawn prior to acceptance, was expressly made contingent upon some condition subsequent, or was subject to intervening circumstances which made it unfair to hold the offeror to his bargain. Under this policy, an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn.

*Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d at 89–90. Accord: *Presto Casting Co. v. NLRB*, supra.

In determining the reasonableness of the period of time between an outstanding offer and an acceptance, it is not the length of time per se which governs, rather it is the “surrounding circumstances” which determines whether the time period is reasonable. See *Worrell Newspaper*, 232 NLRB 402, 406–407 (1977) (6 months between offer and acceptance held reasonable). Likewise, the “[l]ength of time between offer and acceptance is only one of the circumstances to be considered” in determining “whether circumstances would lead a party to reasonably believe that the offer has expired” *Teamsters Local 688 (Crown Cork & Seal) v. NLRB*, 756 F.2d 659 (8th Cir. 1985).

#### Conclusions

The relevant facts, when measured in the light of the appropriate legal principles, reveal that Respondent violated Section 8(a)(5) and (1) of the Act by refusing on March 11, 1991, to sign a written agreement embodying the terms of a complete collective-bargaining agreement reached with the Union on March 1, 1991. This conclusion is based upon the following considerations.

Respondent’s October 16, 1990 “last, best and final” contract offer was an offer of a complete collective-bargaining agreement and contained no express time limitation or condition for its acceptance. Although the Union on October 16 and on October 19 notified Respondent of the offer’s rejection, the Respondent, at the end of the next negotiating session held on October 30, 1990, notified the Union that the October 16 offer was Respondent’s current offer. Thereafter, the October 16 offer was never expressly withdrawn and remained open for acceptance on March 1, 1991. On that date the Union accepted the October 16 offer, and the parties thereby reached agreement on a complete collective-bargaining agreement. The apparent failure of the Union’s strike did not amount to a change in negotiating circumstances sufficient for the parties reasonably to view the proposal as effectively withdrawn. See, e.g., *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d at 90.

Although the Union’s acceptance of Respondent’s October 16, 1990 offer came approximately 4 months after the offer on October 30, 1990, was specifically reaffirmed by Respondent as being its current contract offer, I do not, under the circumstances of this case, find that to be an unreasonable period of time for the offer to be considered open and available for acceptance. Despite the Union’s rejection on October 16 and 19, 1990, of Respondent’s October 16, 1990 offer, the Respondent on October 30, 1990, rather than withdraw that offer, ended the October 30 bargaining session by stating to the Union that the October 16 offer was still Respondent’s current contract offer. Between October 30 and the next scheduled negotiation meeting of January 4, 1991, Respondent did not inform the Union it had withdrawn the October 16 offer. Nor did Respondent communicate such a message to the Union at the January 4, 1991 negotiating session. Instead, at the start of that meeting Respondent broke off negotiations by withdrawing recognition from the Union, in violation of Section 8(a)(5) and (1) of the Act.

As a result of Respondent’s unlawful withdrawal of recognition there was no communication between the parties concerning the collective-bargaining negotiations from January 4, 1991, until the Union’s March 1, 1991 acceptance of Respondent’s October 16 offer. Shortly before March 1, 1991, the Union was notified by the Board’s Regional Director that Respondent had agreed to resume collective-bargaining negotiations with the Union by virtue of a settlement agreement in Case 32–CA–11599, which had been approved on February 21, 1991, by the Regional Director. On receipt of this information, on March 1, 1991, the Union wrote Respondent it desired to resume collective-bargaining negotiations with Respondent and stated that in connection with those negotiations was accepting Respondent’s October 16 “last, best and final” contract offer.

In other words, 2 of the 4 months between Respondent’s outstanding “last, best and final” contract offer and the Union’s acceptance of that offer, were the result of Respond-

ent's unlawful withdrawal of recognition. I recognize it is not certain what would have happened at the bargaining table if Respondent had complied with its obligation under the Act and continued to recognize and bargain with the Union on January 4, 1991, and continuing thereafter; there is no certainty that the Union on January 4, 1991, or shortly thereafter would have accepted the October 16, 1990 "last, best and final" contract offer or that Respondent would not have specifically withdrawn that offer before the Union accepted it. Nonetheless, I am of the opinion that since Respondent by virtue of its unlawful conduct is responsible for this uncertainty that the doubts must be resolved against it. See *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 880 (3d Cir. 1968) (where there was uncertainty whether a union would have been able to resist the employer's demand to decrease employees' share of profits, had the employer not unlawfully refused to bargain, "the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act"); see also *Bigelow v. RKO Pictures*, 327 U.S. 251, 256 (1946) ("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created").

Respondent's contention that its January 4, 1991 unlawful withdrawal of recognition from and refusal to bargain with the Union was the type of conduct reasonably calculated to lead the Union to believe Respondent's October 16, 1990 "last, best and final" contract offer had been withdrawn, is beside the point; namely, what would have occurred if Respondent had complied with its lawful obligation under the Act by continuing to recognize and bargain with the Union. Respondent's view of the matter would have me reward it for violating the Act by unlawfully refusing to continue to recognize and bargain with the Union.

Likewise without merit is Respondent's contention that Board Agent Tsiliacos must have informed the Union in February 1991 that Respondent's negotiator Lynn had told Tsiliacos that Respondent's October 16, 1990 final offer was no longer on the bargaining table. There is no evidence that Tsiliacos communicated this message to the Union. Quite the opposite, Union Representatives Ahl and Regacho, and the Union's attorney, Sokol, testified no such message was communicated by Tsiliacos to them.<sup>7</sup> Moreover, even if Tsiliacos communicated Lynn's representation to the Union concerning the Company's October 16 offer, it would not have led the Union to believe the offer had been withdrawn, because the Union would have realized that Lynn's representation to Tsiliacos was false. In this regard, Lynn's representation to Tsiliacos that Lynn had told the Union that if the Company's October 16 offer was rejected it would be considered "dead," or stated words to the effect, was false because, as I have found supra, Lynn made no such statement (verbal or written) to the Union during the collective-bargaining negotiations. To the contrary, on October 30, despite the Union's previous rejection of the October 16 offer, Lynn informed the Union that the offer was still on the bargaining table. It

<sup>7</sup>As indicated supra, Respondent subpoenaed Tsiliacos to testify. I denied the General Counsel's petition to revoke the subpoena. The General Counsel appealed and the Board, in a published Order of October 23, 1991, granted the General Counsel's appeal and quashed the subpoena (305 NLRB 493).

is undisputed that at no time subsequent to October 30, prior to March 11, 1991, did Lynn indicate to the Union that the October 16 offer had been withdrawn on rejection. Therefore, if, during February 1991, Tsiliacos did relay Lynn's misrepresentation to the Union, the Union would have had good reason to ignore it.

In any event, if Tsiliacos, without any explanation to the Union, simply informed the Union in February 1991 that it was Lynn's position that Respondent's October 16 offer had lapsed, the Union would have had no reason to believe that Board Agent Tsiliacos was acting for Respondent as its agent for purposes of the Respondent's collective-bargaining negotiations with the Union. Admittedly, Lynn did not designate Tsiliacos as Respondent's agent for that purpose nor did he even indicate to Tsiliacos that he wanted Tsiliacos to communicate what Lynn was saying to the Union. Lynn's failure to do so is not surprising, inasmuch as Respondent was obligated under the Act to recognize and bargain with the Union and it was obligated to do this directly, not through an agent of the National Labor Relations Board. If Respondent desired to inform the Union that Respondent's October 16 "last, best and final" offer was no longer on the bargaining table it would have been a simple matter for Lynn to have done this by communicating directly to the Union. Lynn failed to do this. The Union during February 1991 in assessing the Respondent's current bargaining position was entitled to rely on statements made by Respondent and its agents, and was not required to conduct its bargaining based on remarks expressed by persons who were not agents of the Respondent, such as an agent of the National Labor Relations Board. Accordingly, any remarks which might have been made to the Union by Board Agent Tsiliacos during February 1991 which concerned the current status of the Respondent's October 16 final contract offer are irrelevant in deciding whether the Union had reason to believe that the offer had been withdrawn.

Also without merit is Respondent's contention that the Union was (or should have been aware) of the withdrawal of the October 16 offer as a result of the deletion from the settlement agreement of a provision which required Respondent to inform the Union that its October 16 offer remained its current offer. There is no evidence the Union was ever shown a copy of the proposed settlement agreement which contained the deleted provision; Union Representatives Ahl and Regacho, and Union Attorney Sokol, testified no such document was ever shown to the Union.<sup>8</sup> In any event, even if the Union in February 1991 learned that the Board's initial settlement proposal included a provision which required Respondent to notify the Union that its October 16 final offer remained its current proposal, its deletion from the settlement agreement ultimately approved by the Board's Regional Director would not have been reasonably calculated to lead the Union to believe that Respondent had in fact withdrawn its October 16 offer, for, during the parties' contract negotiations up until Respondent's January 4, 1991 unlawful refusal to continue to bargain, the Respondent had not withdrawn the October 16 offer, and, despite the Union's rejection of

<sup>8</sup>As described supra, the Respondent's effort to establish through Board Agent Tsiliacos' testimony that the contents of the proposed settlement were communicated to the Union was denied by the Board's Order of October 23, 1991.

that offer, had reaffirmed the offer's existence, and it was not until March 11, 1991, that for the first time Respondent advised the Union that the offer was not on the bargaining table. In other words, despite the deletion of the above provision from the approved settlement agreement, both the Union and the Respondent knew that the Respondent had not informed the Union that Respondent's October 16 final offer had been withdrawn. Moreover, in assessing the Respondent's current bargaining position, the Union was entitled to rely on what was communicated to the Union by Respondent's representatives, and was not obligated to guess what inference might or might not be drawn from the fact that certain language had been included or omitted from a settlement agreement.

I also considered Respondent's further argument that when it informed the Union that its October 16, 1990 final contract offer was not "on the table," it was relying on the terms of the settlement agreement in Case 32-CA-11599. This argument is premised on the following evidence: the initial settlement proposal made to Respondent by Board Agent Tsiliacos provided for Respondent to inform the Union that Respondent's final offer of October 16, 1990, remained its current proposal; and, this provision was deleted by Tsiliacos from the settlement agreement ultimately agreed to by the parties and approved by the Regional Director, when, the Respondent's representative, Lynn, objected to its inclusion because, as he explained to Tsiliacos, the October 16, 1990 final contract offer had been rejected by the Union and that Lynn had specifically told the Union that if the offer was rejected Respondent would consider it as ("dead") being withdrawn.

Assuming for the sake of argument that as a part of the settlement agreement the parties to the agreement agreed Respondent's October 16 final contract offer was no longer on the bargaining table, the circumstances leading up to the formation of that agreement would preclude Respondent from relying on that part of the agreement as a justification for its conduct at issue herein. Respondent is precluded because, as Lynn testified, Board Agent Tsiliacos agreed to modify the proposed settlement agreement by deleting the provision requiring Respondent to inform the Union that Respondent's October 16, 1990 final contract offer remained its current proposal, only after Lynn falsely represented to Tsiliacos that the Union had been expressly informed by Lynn that the October 16 contract offer was no longer on the bargaining table. In view of Lynn's false representation, relied upon by Tsiliacos in agreeing to delete the objectionable provision, Respondent is estopped from relying upon the settlement agreement as a justification for having treated the October 16 final offer as having lapsed.

In any event, the evidence relied on by Respondent does not establish that in entering into the settlement agreement in Case 32-CA-11599 that the parties to the agreement meant to incorporate, as a part of the settlement, a further agreement that Respondent's October 16 final contract offer had been withdrawn from the bargaining table. The agreement by the General Counsel to delete the provision requiring Respondent to inform the Union that the October 16 offer remained on the bargaining table does not warrant the inference that the General Counsel also agreed, as a part of the settlement, that the October 16 offer was withdrawn, in view of its rejection by the Union. In this regard, I note that since the charge filed by the Union in Case 32-CA-11599 did not

encompass the question of an alleged unlawful withdrawal by Respondent of its October 16 final contract offer, there was no need for the General Counsel or the Respondent to address that issue in either the investigation of the charge or in fashioning the terms of an acceptable settlement. Thus, it is not surprising that in view of Lynn's representation to Board Agent Tsiliacos that the October 16 offer had terminated because it had been rejected by the Union, that Board Agent Tsiliacos, rather than block a settlement of the case because of a nonrelevant matter, took the position that because there was no evidence to controvert Lynn's representation, he would agree to the deletion of the objectionable provision.

### *B. Respondent's Alleged Unilateral Change in its Method of Assigning Work to its Banquet Servers*

#### 1. The evidence

As found supra, in mid-October 1990 the Respondent and the Union were negotiating a successor collective-bargaining agreement to replace the one which had expired on June 30, 1990. On October 18, 1990, a majority of Respondent's employees represented by the Union ceased work and went out on strike in support of the Union's bargaining position. The strike at its inception was an economic strike but, as found infra, in view of the Respondent's unlawful withdrawal of recognition on January 4, 1991, the strike on that date was converted into an unfair labor practice strike and thereafter remained an unfair labor practice strike.

A substantial part of Respondent's food and beverage business involves catering for banquets held in Respondent's five banquet rooms. The banquet servers are represented by the Union. Since June 1989 Dorothy Grayson, the Respondent's banquet coordinator, has been their immediate supervisor and the person who assigns their work.

Immediately prior to the October 18, 1990 strike, Respondent employed a crew of seven banquet servers: Kathy Brown, Lorraine Yartz, Elsa Krueger, Jamie Hernandez, Joan Van Cleave, Anna Pacheco, and Gloria Leal. When, on a particular day, the services of those seven were not sufficient to satisfy Respondent's needs, Grayson used other persons she employed as banquet servers.

Of the seven banquet servers regularly employed by Respondent prior to the strike, five joined the strike at its inception: Krueger; Van Cleave; Brown, Yartz, and Hernandez. Krueger and Van Cleave crossed the picket line and returned to work in 1990 shortly after the strike started. Brown and Yartz remained on strike and, as described infra, wrote letters to Respondent in March 1991 offering to return to work and, as found infra, Respondent failed to reinstate them, in violation of Section 8(a)(3) and (1) of the Act. Hernandez, according to the General Counsel's posthearing brief, joined the strike at its inception and has never offered to return to work. He is not a part of this case. The remaining two members of the regular crew of banquet servers, Pacheco and Leal, continued to work for Respondent at all times material.

During the strike, from its inception, Respondent employed a substantial number of striker replacements as banquet servers.

Prior to the strike, Banquet Coordinator Grayson assigned work to the banquet servers in the following manner. Each week a schedule for the following week was posted. Across

the top of the schedule were the days of the week and down the right side of the schedule were the names of the banquet servers assigned to work the scheduled banquets. The names, which were typed, were always listed in the same order, as follows: Brown, Yartz, Krueger, Hernandez, Van Cleave, Pacheco, and Leal. As I have found *supra*, these seven servers comprised Grayson's regular banquet crew. If she ever needed more banquet servers, Grayson called in other employees and their names were handwritten on the list. The servers listed were assigned work in the order in which their names appeared on the list. For example, if two servers were needed on a Monday, the first two names (Brown and Yartz) would always be assigned and if on Tuesday four servers were needed, the first four names (Brown, Yartz, Krueger, and Hernandez) would be assigned.

The aforesaid description of the way in which Grayson assigned work to the banquet servers prior to the strike is based upon the testimony of Brown. Brown's testimony was undenied and uncontradicted and corroborated in all significant aspects by Grayson's testimony. Grayson also testified that prior to the strike Brown and Yartz, as numbers one and two on her assignment list, "were always called" for work, and if there was a need for additional banquet servers, she assigned the other servers whose names came after Brown's and Yartz' on the list, in the order that their names appeared. Grayson further testified that Brown, Yartz, and the other five banquet servers who were part of the regular crew, came to expect that their work assignments would be made in this fashion and that both the employees and Grayson considered that this method of assigning work was "a condition of their employment."

Brown did not, when she testified, explain why Respondent's regular crew of seven banquet servers were assigned to work in the above-described order, or if she was ever told the reason. She was not questioned about this subject. Grayson was the only witness questioned about this subject.

During direct examination, Grayson testified that before the strike she "normally" assigned work to the banquet servers "by seniority" provided that "availability [was] equal" (Tr. 672-673). Also during her direct examination she testified that currently she "normally" makes work assignments on the basis of seniority (Tr. 652-653).

During Grayson's cross-examination, she was shown a copy of the list of banquet servers currently being used by her to make work assignments, and testified it did not list the banquet servers in order of their seniority. She testified she was not currently assigning work to the banquet servers based solely on seniority, that banquet servers' seniority did not govern priority in work assignments, but in some instances availability and ability might take precedence. Grayson further testified that the method by which she assigns work to the banquet servers has remained "just the same" since she took over the position of banquet coordinator in June 1989. Grayson testified, "There has never been seniority in banquets."

Grayson was then asked why, prior to the strike, Brown and Yartz had been listed numbers one and two on the assignment list? Grayson replied by testifying this was the assignment list used by Grayson's predecessor and that when Grayson took over the position of banquet coordinator in June 1989, she continued to follow that list until the strike of October 1990, when it became impossible to use that list

anymore since a majority of the regular banquet servers had cease work in support of the strike.

Lastly, I find that whatever the reason for Brown's name being placed first on the prestrike work assignment list, it could not have been solely due to Brown's seniority, because it is undisputed that Yartz, number two on the assignment list, had more seniority than Brown.<sup>9</sup>

## 2. Discussion and conclusions

The complaint, as amended at the end of the hearing, alleges that "Respondent unilaterally altered its method of assigning work to its banquet servers" without notice to the Union, thereby violating Section 8(a)(5) and (1) of the Act. This allegation is without merit because the General Counsel has failed to establish by a preponderance of the evidence that Respondent changed its method of assigning work to its banquet servers.

The theory of the violation, as set forth in the General Counsel's posthearing brief, is that before the strike Respondent employed a crew of seven banquet servers who received preference in work assignments and were assigned work in the order of their seniority, whereas Respondent is currently assigning banquet work using a list of 16 banquet servers, whom it assigns work based on their availability and ability, as well as seniority, and did not notify the Union about this new method of work assignment. This theory lacks evidentiary support because there is insufficient evidence to impugn Grayson's testimony that she has never used seniority as the sole basis for assigning work or to impugn her further testimony that Respondent's method of assigning banquet work has not changed.

In reaching this conclusion, I considered that before the strike, during Grayson's approximately 16 months as banquet coordinator, when Respondent employed the same seven persons as its regular banquet servers, that Grayson gave preference to them in assigning work, and that she assigned them work in a specific order. There was insufficient evidence, however, to establish they were assigned work in that order based on their seniority, as contended by the General Counsel. Quite the opposite, as I have found *supra*, there is evidence which shows that the order in which the banquet servers were assigned work must have been based upon criteria other than just seniority, thus corroborating Grayson's testimony that Respondent has always used other factors, in addition to seniority, to make work assignments. The General Counsel has failed to present sufficient evidence to establish that the criteria currently being used by Respondent in deciding who gets preference for banquet serving work, differs from the criteria used by Respondent in formulating its prestrike work assignment list. I therefore find that the General Counsel has failed to establish that Respondent has changed its method of assigning work to its banquet servers, and for this reason I shall recommend the dismissal of the instant allegation.<sup>10</sup>

<sup>9</sup> Yartz had worked continuously as a banquet server for Respondent since November 1983, whereas Brown had worked in that capacity since only 1985 (Tr. 188-189, 314).

<sup>10</sup> As described *supra*, prior to the strike, if two banquet servers were needed on a Monday, the first two on the assignment list (Brown and Yartz) were assigned and if on Tuesday four servers were needed, the first four names on the list (Brown, Yartz, etc.) were assigned. In other words, even if Respondent added more

C. Respondent's Alleged Failure to Reinstate Six Strikers who Offered to Return to Work

1. The nature of the strike and the legal principles governing Respondent's obligation to reinstate the strikers

As described supra, in mid-October 1990 Respondent and the Union were negotiating a successor collective-bargaining agreement to replace one that had expired on June 30, 1990. On October 18, 1990, a majority of the Respondent's employees represented by the Union ceased work and went out on strike in support of the Union's collective-bargaining position. As described infra, six of the strikers, the alleged discriminatees herein, during March and April 1991 wrote letters to the Respondent offering to return to work, and Respondent failed to reinstate any one of them.

As I have found supra, Respondent violated Section 8(a)(5) and (1) of the Act, when, on January 4, 1991, it withdrew recognition from the Union.

It is agreed that the strike which began on October 18, 1991, at its inception, was an economic strike. It is settled, however, that if an employer's unfair labor practice prolongs an economic strike, it converts the strike into an unfair labor practice strike. *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1349 (9th Cir. 1978). Here, as contended by the General Counsel, the economic strike was converted into an unfair labor practice strike on January 4, 1991, when, as I have found supra, Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union. In this regard, "[i]t is well settled that the unlawful withdrawal of recognition from a union prolongs the strike because it deprives the employees of their bargaining representative and thereby precludes the possibility of reaching agreement on a contract and impedes the settlement of the strike." *Rose Printing Co.*, 289 NLRB 252 (1988); see also *NLRB v. Giustina Bros. Lumber Co.*, 253 F.2d 371, 372-373 (9th Cir. 1958); *NLRB v. Reliance Clay Products Co.*, 245 F.2d 599 (5th Cir. 1957); and *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 276 (8th Cir. 1983).

I also find that the strike, which became an unfair labor practice strike on January 4, 1991, remained an unfair labor practice strike at all times thereafter. Respondent's contention that the strike reconverted to an economic strike on or about February 21, 1991, when the Board's Regional Director approved the settlement agreement in Case 32-CA-11599, lacks merit.

As described supra, on February 21, 1991, the Regional Director approved a settlement agreement entered into by Respondent and the General Counsel which by its terms obligated Respondent to bargain collectively with the Union as required by the Act. However, as I have found supra, on resuming its collective-bargaining relationship with the Union, the very first thing the Respondent did was to refuse to bargain collectively within the meaning of Section 8(a)(5) of the

Act by refusing the Union's request that it execute an agreed-upon contract. In view of this unfair labor practice, Respondent failed to remedy its prior unlawful withdrawal of recognition. Moreover, Respondent's unlawful refusal to sign an agreed-upon contract was reasonably calculated, in the context of its prior unlawful withdrawal of recognition, to further prolong the strike. Thus, this is not a situation where the Respondent's unlawful refusal to bargain with the Union, which had prolonged the Union's strike, faded in significance and the employees continued the strike solely to enforce their economic demands. Compare, *Studio 44, Inc.*, 284 NLRB 597, 600-602 (1987), and *Trident Seafoods Corp.*, 244 NLRB 566, 569-570 (1979), *enfd.* 642 F.2d 1148 (9th Cir. 1981). It is for these reasons that I reject Respondent's contention that the Regional Director's February 21, 1991 approval of the settlement agreement reconverted the strike from an unfair labor practice to an economic strike.

I further find that Respondent is precluded from relying on its execution and the Regional Director's approval of the settlement agreement, in support of its contention that the strike was reconverted to an economic strike, inasmuch as, I have found infra, the Regional Director acted reasonably in setting aside the settlement agreement, thereby making the agreement void ab initio.

Respondent's obligation under the Act toward the strikers who offered to return to work may be briefly summarized as follows. Under the *Laidlaw* doctrine, permanently replaced economic strikers who unconditionally request reinstatement have rights only to preferential hiring as positions reopen or are newly created. *Laidlaw Corp.*, 171 NLRB 1366, 1367-1370 (1968), *enfd.* 414 F.2d 99, 103-105 (7th Cir. 1969). In contrast, unfair labor practice strikers have rights to their positions greater than any replacements hired during the unfair labor practice strike, and must be rehired on unconditional request for reinstatement. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

It is also settled law that where an economic strike is converted to an unfair labor practice strike the economic strikers become unfair labor practice strikers on the date of conversion. They are then entitled, on their unconditional offer to return to work, to immediate reinstatement unless they were permanently replaced prior to conversion. If they were permanently replaced prior to conversion, the employer is obligated to place them on a preferential hiring list and to reinstate them before any other persons are hired or on the departure of their preconversion replacements. See *Charles D. Bonanno Linen Service*, 268 NLRB 552, 553-554 (1984), *enfd.* 782 F.2d 7 (1st Cir. 1986).

The law is also settled that Respondent has the burden of proving that a striker was permanently replaced. *NLRB v. Murray Products*, 584 F.2d 934, 939 (9th Cir. 1978). In determining whether an employer has sustained its burden of showing that striker replacements were permanent, the Board and courts look to whether the replacements were hired in a manner that would "show that the [replacements] were regarded by themselves and the [employer] as having received their jobs on a permanent basis." *Georgia Highway Express*, 165 NLRB 514, 516 (1976), affirmed sub nom. *Teamsters Local 728 v. NLRB*, 403 F.2d 921 (D.C. Cir.), quoted in *Belknap v. Hale*, 463 U.S. 491, 501 (1983); *Hansen Bros. Enterprises*, 279 NLRB 741, 741 (1986), *enfd.* 812 F.2d 1443(T) (D.C. Cir. 1987) ("in order to show replacements

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names to its list of seven it would not have adversely affected the employment opportunity of those at the top of the list. There is no evidence that Respondent's current work assignment policy has changed in this respect. Thus, the fact that the current list used by Grayson to assign work contains 16 rather than seven names, fails to establish that employees have been adversely affected by the addition of more names to the list.

have been permanently employed, the employer must show a mutual understanding between itself and the replacements that they are permanent’). See also *NLRB v. Murray Products*, 584 F.2d 934, 938–939 (9th Cir. 1978).

2. Respondent conditions the reemployment of the strikers on their completing applications for reemployment and submitting to reemployment interviews

On January 9, 1991, the Union filed its charge in Case 32–CA–11599 protesting Respondent’s January 4, 1991 unlawful withdrawal of recognition, which had resulted in the Respondent’s refusing to continue bargaining with the Union and, as I have found supra, prolonged the Union’s October 18, 1990 strike, thereby converting it into an unfair labor practice strike. As I have found supra, on February 21, 1991, the Board’s Regional Director for Region 32 approved a unilateral settlement agreement entered into by and between the Respondent and the General Counsel. In addition to the provisions which obligated Respondent to recognize and bargain with the Union, the settlement agreement contained the following provision:

WE WILL, within 5 days after their unconditional application for reemployment, offer to all striking employees reinstatement to their former position, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements hired after January 4, 1991, and make whole employees who have made such a request for reinstatement, but who have not been offered reemployment, for any loss of pay from the day beginning 5 days after the date of their unconditional offer to return to work and terminating on the date of our offer of reinstatement.

Labor Relations Consultant Lynn, who signed and negotiated the settlement agreement on Respondent’s behalf, testified that prior to signing it he had the following discussion with Board Agent Tsiliacos about the meaning of the above-quoted striker reinstatement provision: Tsiliacos told Lynn the quoted provision was “boilerplate language”; Lynn stated since it was not language mutually negotiated by the parties, he needed to understand what it meant, and specifically asked if the words, “WE WILL, within 5 days after their unconditional application for reemployment,” meant that the strikers had to make “an application for reemployment”; Tsiliacos answered, “Yes, that’s exactly what they have to do”; Lynn responded by stating, “I’m going to give them a written application”; and, Tsiliacos answered, “That’s fine.”

Immediately after giving the above testimony, Lynn was asked if he discussed anything with Tsiliacos about interviewing returning strikers? Lynn testified, in response, he told Tsiliacos, “We intend to offer them applications for employment and to interview them,” and that Tsiliacos asked who was going to do the interviewing, and that Lynn stated either himself or General Manager Russell, and that Tsiliacos stated “that’s fine you may interview them and make them fill out an application.”

It is undisputed that, after the execution of the settlement agreement, in considering whether to reinstate the strikers

who had offered to return to work, Respondent required the strikers, as a condition of reinstatement, to complete an employment application and to submit to an employment interview.

Lynn’s undenied testimony is that in March 1991, after Respondent received letters from strikers offering to return to work, he telephoned Board Agent Tsiliacos and told him that strikers had made such offers and that Respondent had hired replacements prior to January 4, 1991, and that Respondent had responded to the strikers’ offers to return to work by informing them that “we will accept applications and an interview.” Tsiliacos, according to Lynn’s undenied testimony, replied, “That’s right, you’re well within your rights; that is the nature of what we agreed to in this settlement agreement.”

Lynn’s above-described testimony concerning his two conversations with Board Agent Tsiliacos about the meaning of the settlement agreement is undenied. The Union subpoenaed Tsiliacos for the purpose of having him testify about these conversations. Counsel for the General Counsel filed a petition to revoke the subpoena which I denied. The General Counsel appealed my ruling. On October 23, 1991, the Board in a published Order granted the General Counsel’s appeal and quashed the Union’s subpoena (305 NLRB 493). In so ruling, the Board held that what, if anything, Board Agent Tsiliacos told Lynn about the propriety of requesting an application form and interview of returning strikers under the terms of the unilateral settlement agreement was not relevant to the issues present in this case because, the Board stated,

[t]he Board is not estopped from proceeding against a respondent because of statements made by a board agent during the investigation of a charge [cases cited]. [305 NLRB at 495.]

Respondent’s general manager, Daniel Russell, testified he was the person who decided that the strikers who offered to return to work after the execution of the settlement agreement must submit applications and be interviewed as a condition of reemployment. He testified he reached this decision because Respondent’s labor relations consultant, Lynn, told him Lynn had asked Board Agent Tsiliacos about the meaning of that part of the settlement agreement stating, “Within 5 days after their unconditional application for reemployment,” and that Tsiliacos had told him it meant Respondent “had to accept applications and interviews of the strikers.” Russell testified it was based upon Tsiliacos’ above statement to Lynn that Russell decided to require strikers who offered to return to work to fill out applications and submit to interviews. But, when asked, if absent Tsiliacos’ interpretation of the settlement agreement as communicated to Russell by Lynn, Russell would have required the returning strikers to complete employment applications and submit to interviews, Russell testified, “In this particular instance, probably I would have.”<sup>11</sup> In this regard, Russell further testified that he believed the application and interview requirements would be of assistance to him in deciding whether or not to reinstate strikers, because: the fact that a striker took the trouble to visit Respondent’s place of business to fill out an employ-

<sup>11</sup> I note that Lynn testified that “the only place we got the idea for an application” was from Board Agent Tsiliacos’ interpretation of the settlement agreement (Tr. 275).

ment application would indicate to Russell that the striker was sincere in stating she wanted to return to work; the answer to the questions posed in the application and during the interview would help Russell decide whether a striker due to health or other problems was unable to perform the job the striker had held prior to the strike; and, the interview would enable Russell to determine if the striker was available to work the same work shift worked prior to the strike.<sup>12</sup>

Russell testified it would have been “feasible” for Respondent to have reinstated the strikers who offered to return to work, without requiring them to fill out employment applications or be interviewed, but instead chose to require the employment applications and interviews because, as he testified, “I chose to abide by the interpretation of the Board of that paragraph [referring to the settlement agreement’s striker replacement provision].”

It is well settled that strikers, economic as well as unfair labor practice strikers, retain their status as “employees” under Section 2(3) of the Act. *NLRB v. Mackay Radio & Telegraph Co.*, 303 U.S. 333, 345 (1938). As employees, strikers are entitled to reinstatement on their unconditional offer to return to work, unless the employer can show, as an affirmative defense, that the strikers have been permanently replaced or some other “legitimate and substantial business justification.” *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–379 (1967). Absent such a showing, a refusal to reinstate strikers constitutes an unfair labor practice, even in the absence of bad faith or antiunion motive. *NLRB v. Fleetwood Trailer Co.*, supra.

Consistent with the above legal principles, “[i]t is well settled that, absent legitimate and substantial business justification, an employer may not attach conditions to accepting an unconditional offer to work on behalf of economic strikers.” *Blue & White Cabs*, 291 NLRB 1047, 1050 (1988). More specifically, the Board has held that absent legitimate and substantial business justification, an employer’s requirement that striking employees submit new applications and/or submit to reemployment interviews violates the Act and that conditioning strikers’ reinstatement on these additional requirements does not constitute a valid offer of reinstatement. *Scalera Bus Service*, 210 NLRB 63, 63–64 (1974); *Pepsi-Cola Bottling Co. of Topeka*, 227 NLRB 1959, 1964 (1977), enf. denied 613 F.2d 87 (10th Cir. 1980). For, as explained in *Pepsi-Cola*, by an administrative law judge, whose findings and conclusions were adopted by the Board (227 NLRB at 1964):

strikers, although their jobs have been taken by permanent replacements during a strike, retain definitive rights under the statute. The retention of the rights certainly sets them apart from, and elevates them to, a status higher than that accorded one who has never worked for the Company before and thereafter makes an application for new employment. To denigrate and deny the replaced strikers their rights by placing them on a par with someone who applies for a job off the street, as it were, necessarily results in a loss of these

rights to the striker. In short, the requirement of making out new applications for employment addressed to the replaced strikers wipes the slate clean with respect to any rights and privileges they may have secured as employees. This deprivation constitutes, in my view, a retaliation or penalty for having engaged in protected, concerted activity and is therefore violative of Section 8(a)(1) of the Act.

See also *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978) (“Inasmuch as the right to strikers to reinstatement cannot be conditioned on the filing of applications for employment as new employees, Respondent’s insistence that striking employees file such applications as new employees further prolonged the strike and also violated Section 8(a)(3) and (1) of the Act.”); *Harowe Servo Controls*, 250 NLRB 958, 961 (1980) (“Respondent violated Section 8(a)(1) of the Act . . . by requiring as a precondition to reinstatement that [unfair labor practice strikers] fill out and return the ‘availability’ forms which the Respondent mailed them after receipt of the Union’s offer”).

In the instant case Respondent argues it acted lawfully in requiring new employment applications and job interviews from its strikers, as a condition of making reinstatement offers to them, because: (1) the striker reinstatement provision of the settlement agreement in Case 32–CA–11599, as interpreted by Board Agent Tsiliacos, whose interpretation Respondent relied on in entering into and applying the settlement agreement, sanctioned Respondent’s conduct; and/or (2) the Respondent had a legitimate and substantial business justification for its conduct. These defenses lack merit for the reasons below.

Respondent’s contention that its employment application and interview requirements were sanctioned by the settlement agreement because of Board Agent Tsiliacos’ conduct has already been considered and rejected by the Board in its published Order of October 23, 1991 (305 NLRB 493) issued in connection with the General Counsel’s appeal of my ruling concerning the Union’s subpoena issued to Tsiliacos. Accordingly, I am bound by the Board’s ruling, as it is the law of this case, which as an administrative law judge I am obliged to follow.

However, there is an additional reason why Respondent is precluded from relying on the settlement agreement to justify its requirement that the returning strikers file new employment applications and submit to reemployment interviews. The settlement was void ab initio inasmuch as the Regional Director has set it aside and in doing so acted reasonably inasmuch as by its postsettlement unlawful refusal to sign an agreed-upon contract, supra, and its unlawful failure to reinstate strikers Kathy Brown and Gloria Richards, infra, Respondent both breached the terms of the settlement agreement and engaged in subsequent unfair labor practices. I realized that, as I have found infra, Respondent also breached the express terms of the settlement agreement by its unlawful failure to reinstate several other strikers. However, in Brown’s and Richards’ cases it is undisputed that even under Respondent’s interpretation of the settlement agreement its failure to reinstate them violated the Act and constituted a breach of the terms of the settlement agreement.

Respondent’s contention that it had a legitimate and substantial business justification for requiring new employment

<sup>12</sup>I note Lynn testified in effect that the reasons Respondent required the returning strikers to complete employment applications and to submit to an interview was that they had been absent from work for an extended period of time and Respondent wanted to ascertain if they were unable to work due to some disability.

applications and job interviews from its strikers, as a condition of making reinstatement offers to them, lacks merit because Respondent's general manager Russell, the person who decided to institute those requirements, testified it would have been "feasible" for Respondent to have offered to re-employ the returning strikers without first requiring them to reapply for their jobs and submit to interviews. In addition, the fact that the strikers had been absent from work for approximately 5 months due to a strike,<sup>13</sup> by itself, was not such a lengthy period of time so as to have reasonably caused Respondent to believe that the strikers no longer desired to work for Respondent or that they would be unable to physically perform their prestrike work or work their prestrike work shifts—the business reasons advanced by Russell for imposing the application and interview requirements. Respondent presented no evidence that it had any reason whatsoever to believe that any one of the strikers did not want to return to work or to work their prestrike shift or were physically unable to perform their prestrike job. Quite the opposite, Respondent's receipt of letters from all six of the strikers involved herein, which unequivocally informed Respondent that they desired to return to work for Respondent, was reasonably calculated to demonstrate to Respondent that the strikers wanted to return to their former positions and work shifts and were physically able to perform the work. Respondent received these letters from two of the strikers (Brown and Jesus) even prior to notifying the strikers about the application and interview requirements, and received the unconditional offers to return to work from the other strikers shortly thereafter. Russell did not explain why those unconditional offers to return to work did not satisfy him that the strikers were prepared to return to work to their former positions and work shifts and were physically able to perform the work.

It is for all of the aforesaid reasons that I find Respondent failed to establish that it had a legitimate and substantial business justification for requiring new employment applications and job interviews from returning strikers, as a condition of making reinstatement offers to them.

### 3. Respondent fails to reinstate striker Kathy Brown

#### (a) *The evidence*

Brown at the time of the October 18, 1960 strike was employed by Respondent as a banquet server. She ceased work on October 18, 1990, with several other employees, in support of the Union's strike, and thereafter walked the Union's picket line.

Several of Respondent's banquet servers worked only part of their employment time for Respondent, as they were employed full time by other employers. Brown, however, was available at anytime to work for Respondent. She did work for another restaurant as a banquet server, but did so only on those days she had no work from Respondent.

On March 8, 1991, Brown wrote Respondent offering to unconditionally return to work as a banquet server. On or about March 13, 1991, Respondent's office manager, Mary Fidone, responded to that letter by telephoning Brown and

instructing her to come to the office of Respondent's general manager Russell on March 16, 1991, for the purpose of filling out an employment application and to be interviewed by Respondent's labor relations consultant Michael Lynn.

On March 16, 1991, as instructed, Brown went to Russell's office, where Lynn spoke to her alone. Lynn gave Brown an employment application and told her to go to the bar area to complete it. Brown did this and after filling out the application returned to the office and gave it to Lynn who placed it on the desk and then left Brown alone in the office for approximately 10 minutes. On his return, Brown asked, "If there was a seniority list," referring to the list of banquet servers used by Banquet Coordinator Grayson before the strike to assign the banquet servers work. Lynn answered by stating that there was no such list anymore and that "there is no seniority here." Lynn then told Brown that Respondent had "not settled with the Union," that Respondent could hire anyone it wanted, that it was not a union shop, and further stated that "whoever pulled picket duty would probably not be back on to work at [Respondent]." The meeting ended at this point with Lynn stating that Respondent had "a full crew" and did not need Brown "now" but that "maybe" in May 1991 Respondent "might" be able to "use" her.

The above description of Lynn's meeting with Brown is based on Brown's testimony. Lynn testified he informed Brown there was no present job openings for banquet servers and that he did not anticipate there would be any openings until May, and further testified that Brown replied by stating, "She was not interested in returning unless she went back to number one on the list with 5 days of employment," and that Lynn answered there was no seniority list and that the last time there had been such a list was in 1982, and ended the meeting by telling Brown she would be called as soon as a job opening occurred.

Brown specifically denied Lynn's above account of the meeting. Lynn was not asked specifically if, as Brown testified, he made certain remarks about the Union and told Brown that "whoever pulled picket duty would probably not be back on to work at [Respondent]." However, at one point in his testimony, not when he was testifying about his meeting with Brown, Lynn was asked, "Did you ever make any statements with respect to the eligibility or non-eligibility of any employee based upon his or her union activities?" Lynn answered, "No . . . I would have never done that."

I credit Brown's account of this meeting, because her testimonial demeanor was good, whereas Lynn's was poor. I considered Respondent's argument that Brown's testimony that Lynn said that whoever picketed would probably not be re-employed by Respondent was implausible because two of the strikers were reinstated by Respondent and that in mid-June 1991 Respondent's banquet coordinator asked Brown to work one banquet. The two strikers, referred to by Respondent, returned to work shortly after the October 18, 1990 strike had commenced and there is no evidence that either of them walked the union picket line, like Brown. Also, Respondent's belated offer of a day's employment, which was made to Brown long after the complaint issued in this case, is not the type of conduct which undermines Brown's testimony.

Following the March 16, 1991 meeting between Lynn and Brown, the next time Brown was contacted by Respondent

<sup>13</sup>I note that approximately 2-1/2 months of the 5 months was the result of the Respondent's unlawful conduct which prolonged the strike.

was shortly after April 17, 1991, when Brown received a letter dated April 17, signed by Lynn, which read as follows:

This will confirm that, as of this date, your name has been added on to the list of persons who are eligible to be called for work as banquet waitresses. Please call Ms. Dorothy Grayson, the Banquet Coordinator to confirm your availability.

Brown did not answer this letter because, as she testified, "I felt like I had responded already twice. And I felt that they should respond." Brown was referring to the fact that, as described supra, about 1 month earlier she had made it abundantly clear to the Respondent, by letter, that she was available to commence work immediately and, in response to Respondent's reply to that letter, had visited the office of Respondent's general manager and made it abundantly clear to Respondent's labor relations consultant that she was available for work immediately by filling out an employment application and submitting to an interview.

The next contact between Respondent and Brown was on June 17, 1991, when Banquet Coordinator Grayson telephoned Brown and asked if she could work a party scheduled for June 21, 1991. Brown replied by stating that she was already busy that night, but that Grayson should call her for the next party. As of the date of the hearing in this case, August 26, 1991, Respondent had not again asked Brown to work.

(b) *Discussion and conclusions*

Brown was legally entitled to reinstatement on receipt by Respondent of her March 8, 1991 unconditional offer to return to work, unless Respondent had permanently replaced her with a strike replacement.<sup>14</sup> As discussed supra, Respondent has the burden of establishing that Brown was permanently replaced, and as also discussed supra, because the strike was converted to an unfair labor practice strike on January 4, 1991, Respondent must also establish that Brown had been permanently replaced prior to January 4, 1991, and that the person who permanently replaced her was still employed during March 1991, on the date of Brown's unconditional offer to return to work.

I am of the opinion, for the reasons below, that Respondent failed to establish Brown had been permanently replaced. I therefore find that by failing and refusing to reinstate Brown immediately on her March 8, 1991 offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

Between the start of the strike on October 18, 1990, and January 4, 1991, when the strike was converted to an unfair labor practice strike, Respondent hired several banquet servers. It is undisputed, however, that by the time Brown made her March 8, 1991 unconditional offer to return to work, all but one of them, Corinne Cordiero, had left Respondent's employment. And, although the record also shows that Erin Richardson was employed as a banquet server on March 8, 1991, Respondent was unable to establish that Richardson,

who had been transferred to that position from another department, was transferred prior to January 4, 1991.

Cordiero, the only banquet server hired during the strike prior to January 4, 1991, that was still employed on March 8, 1991, could not have been a replacement for Brown because she was hired to work only 2 days a week, whereas Brown was a full-time employee who was available for work at anytime. Even more significant is Respondent's failure to establish that Cordiero was a permanent strike replacement. Respondent failed to present any evidence whatsoever that Cordiero understood she was hired as a permanent employee. Quite the opposite, Banquet Coordinator Grayson, who personally hired Cordiero, testified there was no discussion with Cordiero about what might happen to her employment status if the strikers returned to work and that nothing was said to Cordiero about whether she was a temporary or a permanent employee. I have considered that Respondent has a probationary period for new hires, but the record shows that the only thing said to Cordiero about the probationary period was that if she was hired Grayson would watch her work performance during the first 90 days to make sure that her work performance was satisfactory. Grayson did not indicate to her what would happen to her employment status after the 90-day probationary period. In view of the foregoing circumstances, Respondent did not establish that Brown had been permanently replaced by Cordiero.

I also find that even if the strike had remained an economic strike at all times material that Respondent's employment of Erin Richardson as a banquet server would not have privileged Respondent's March 1991 refusal to reinstate Brown because, as was the case with Cordiero, there is no evidence whatsoever that Richardson understood that he was being employed as a permanent banquet server when he was transferred into that department.

Having found Respondent had not permanently replaced Brown and that it had no other legitimate and substantial business justification for refusing to reinstate Brown, I further find that by failing and refusing to reinstate Brown immediately on her March 8, 1991 offer to return to work, that Respondent violated Section 8(a)(1) and (3) of the Act.

Respondent apparently contends it satisfied its obligation to reinstate Brown, when, on April 17, 1991, its Labor Relations Consultant Lynn wrote Brown that as of April 17 her name "has been added on to the list of persons who are eligible to be called for work as banquet waitresses" and instructed Brown to call Banquet Coordinator Grayson "to confirm your availability." This contention lacks merit for these reasons.

As I have found supra, Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate Brown immediately on her March 8, 1991 offer to return to work. An employer that, like Respondent, has unlawfully discharged an employee, may satisfy its legal obligation to reinstate the discriminatee and may toll its backpay liability by offering to reinstate the discriminatee, provided that it is a "firm, clear and unequivocal" offer of reinstatement. *Lipman Bros.*, 164 NLRB 850, 853 (1967). Accord: *Consolidated Freightways*, 290 NLRB 771 (1988), enf. 892 F.2d 1052 (D.C. Cir. 1989). Respondent's April 17, 1991 letter to Brown, inasmuch as it merely stated that she was "eligible" for employment, did not constitute a "firm, clear and unequivocal" offer of reinstatement. Since the offer was not

<sup>14</sup> Respondent does not contend and the record does not establish that Respondent had any other business justification for refusing to reinstate Brown following her March 8, 1991 unconditional offer of reinstatement.

valid on its face, Brown was not obligated to even consider or respond to it. *Consolidated Freightways*, supra.

The April 17, 1991 offer was also invalid because it indicated to Brown that as a precondition to reemployment she was required to confirm to Respondent that she was available to work for Respondent, despite the fact that only a month earlier, as described supra, she had unequivocally informed Respondent she was available to return to work for Respondent. Respondent failed to establish that it had a legitimate and substantial business justification for this requirement, which was reasonably calculated to lead Brown to believe that if she failed to respond to Respondent's inquiry about her availability for reemployment, that she would be faced with the loss of her right to immediate reinstatement as an unfair labor practice striker and as a discriminatee. It is for this reason that the April 17, 1991 offer violated Section 8(a)(1) of the Act. See *Chesapeake Plywood*, 294 NLRB 201 (1989); *Harowe Servo Controls*, 250 NLRB 958, 961 (1980).

I also find that Respondent violated Section 8(a)(1) of the Act, when, on March 16, 1991, its Labor Relations Consultant Lynn told employee Brown that Respondent could hire anyone it wanted, that it was no longer a "union shop" and that "whoever pulled picket duty would probably not be back on to work at [Respondent]." This statement was calculated to restrain and coerce Brown from exercising her statutory right to strike because it was reasonably calculated to lead her to believe that she and the other strikers who had actively supported the Union strike would not be reinstated by the Respondent because of this protected union activity.

I also find Respondent violated Section 8(a)(1) of the Act by requiring Brown, as a precondition of reemployment, to complete a new employment application and to submit to an employment interview. As described supra, in response to Brown's unconditional offer to return to work, Respondent instructed her to fill out a new employment application and to submit to an employment interview. This conduct was reasonably calculated to give Brown the impression that she was being penalized because of her protected concerted activity; that because she had supported the union strike she was being treated as an applicant for employment, rather than as an employee returning from a strike who was entitled under the Act to preferential treatment. Moreover, during Brown's employment interview, Respondent's labor relations consultant Lynn said nothing to Brown to disabuse her of the obvious implications which flow from requiring her to fill out a new employment application and to submit to an employment interview as a condition of being offered her job. It is for these reasons and because, as I have found supra, Respondent had no legitimate and substantial business justification for requiring Brown to complete a new employment application and submit to an employment interview, as a condition of making a reinstatement offer to her, that I find Respondent violated Section 8(a)(1) of the Act by requiring Brown, as a condition of reemployment, to complete a new employment application and to submit to an employment interview.

#### 4. Respondent fails to reinstate striker Lorraine Yartz

##### (a) *The evidence*

On October 18, 1990, Yartz was employed by Respondent as a banquet server. She ceased work on October 18, with several other employees, in support of the union strike.

On March 13, 1991, Respondent's office manager Mary Fidone, telephoned Yartz at her home and told her to come to Respondent's place of business on Saturday, March 16, 1991, in the morning, for the purpose of filling out an application for employment, and told her to ask for Respondent's labor relations consultant Lynn. Yartz did not indicate whether or not she intended to do this. Fidone ended the conversation by informing Yartz that "she was to come in Saturday if she was interested."<sup>15</sup> Yartz did not, as requested by Fidone, go to Respondent's place of business to be interviewed by Lynn and to submit an application for employment. As of March 13, 1991, Yartz had not notified Respondent that she desired to return to work. She did not do this until March 19, 1991, when she sent a letter to Respondent's general manager Russell, stating, in pertinent part: "I am now ready, willing and able to resume work. With all past practices in force."

Respondent received but did not answer Yartz' March 19, 1991 letter and, as of the date of the hearing in this case, August 26, 1991, Respondent has not offered to reinstate Yartz.

Respondent's witnesses—Office Manager Fidone, General Manager Russell, and Labor Relations Consultant Lynn—did not explain why Respondent failed to answer Yartz' March 19, 1991 offer to return to work. Nor did they explain why Yartz has not been offered reinstatement.

##### (b) *Discussion and conclusions*

I find that by failing and refusing to reinstate Yartz immediately upon her March 19, 1991 offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act. My reasons follow.

For the reasons set forth previously in connection with Respondent's unlawful refusal to reinstate striker Brown, who, like Yartz, was employed as a banquet server, Respondent failed to establish that Yartz had been permanently replaced or that Respondent had some other business justification for not reinstating her in response to her March 19, 1991 offer to return to work. As a matter of fact, Respondent does not contend it was justified in not reinstating her because she had been permanently replaced or for some other business reason. Rather Respondent's sole defense for its failure to respond to Yartz' offer to return to work, as stated in its posthearing brief, is: "Respondent had no obligation contractually, statutorily, or otherwise to guarantee Ms. Yartz that 'all past practices' would be in force upon her return to work." In other words, Respondent contends that Yartz' offer was not an unconditional offer to return to work. This defense lacks merit for two different reasons.

<sup>15</sup>The description of Fidone's March 13, 1991 conversation with Yartz is based on Fidone's testimony which Yartz did not deny.

“The burden rests on [the Respondent] to prove that an offer to return to work is conditional.” *SKS Die Casting & Machine v. NLRB*, 941 F.2d 984 (9th Cir. 1991). Respondent did not meet its burden. What Yartz meant when she wrote Respondent that she was offering to return to work “with all past practices in force” is not readily apparent; it is ambiguous. But, rather than clarify what Yartz meant, by asking her for a clarification, Respondent chose to ignore the offer. The law is settled that in making that choice Respondent acted at its peril and may not be heard to complain, if, as I do here, resolve the ambiguity against its interests. See *SKS Die Casting & Machine*, 294 NLRB 372 (1989), and cases cited therein, *enfd.* 941 F.2d 948 (9th Cir.). It is for this reason that Respondent’s contention that Yartz’ offer to return to work was conditional lacks merit.

Alternatively, Respondent’s defense that it was not legally obligated to respond to Yartz’ offer to return to work because it was a conditional offer, lacks merit because the record establishes this was not the reason why Respondent ignored the offer and failed to reinstate her. This conclusion is based upon the following factors: In its answer to the complaint Respondent admitted the complaint allegation that Yartz’ offer to return to work was an unconditional offer;<sup>16</sup> Respondent’s counsel did not explain why Respondent admitted this allegation, if, as Respondent now contends it ignored Yartz’ offer and refused to reinstate her because it believed her offer was not an unconditional offer; Respondent’s witnesses did not testify that Respondent failed to answer Yartz’ offer or reinstate her because of the way in which the offer was worded or because Respondent thought the offer was not an unconditional offer; and, Yartz did not comply with the Respondent’s request that she submit to an employment interview and fill out a new employment application.

The foregoing circumstances, viewed in their totality, persuade me that Respondent’s failure to respond to Yartz’ offer to return to work had nothing whatsoever to do with the way in which the offer was worded, but was caused by Yartz’ failure to comply with the Respondent’s policy which required returning strikers to submit to an employment interview and complete a new employment application as a condition of being offered reemployment. As I have found *supra*, Respondent’s policy of requiring the returning strikers to submit to employment interviews and fill out new employment applications was not permissible under the Act. For the reasons, discussed *supra*, Respondent violated Section 8(a)(1) of the Act when, on March 13, 1991, its office manager instructed Yartz to come to Respondent’s office to fill out an employment application and speak to Respondent’s labor relations consultant Lynn if she was “interested” in returning to work.

#### 5. Respondent fails to reinstate strikers Fran Machado and Peggy Jesus

##### (a) *The evidence*

Machado and Jesus were employed by Respondent as cocktail waitresses. They ceased work on October 18, 1990,

<sup>16</sup>It was not until the second day of the hearing while cross-examining Yartz, that Respondent’s counsel amended the answer to deny this allegation.

with several other employees, in support of the Union’s strike.

Prior to the strike they were employed by Respondent in its Golf Bar. They were the only cocktail waitresses regularly employed in the Golf Bar. Machado worked there weekends and Jesus worked there 4 days during the week.

During March and April 1991, the time period relevant to Respondent’s failure to reinstate them, Respondent employed four cocktail waitresses: Doris Robinson, hired January 19, 1991; Pam Munoz, hired January 29, 1991; Sharon Connor, hired January 29, 1991; and Brenda Johnson, hired February 19, 1991.

Johnson worked Wednesday, Thursday, Friday, Saturday, and Sunday. She worked the “bulk” of her working time in the Golf Bar. The other three cocktail waitresses—Robinson, Munoz, and Connor—rarely worked in the Golf Bar. They normally served drinks at banquets held in the several banquet rooms. I therefore find, for this reason, that neither Robinson, Munoz, or Connor, could be considered as replacements for either Machado and Jesus.

I also find that the record does not establish that either Robinson, Munoz, Connor, or Johnson were permanent strike replacements. They were not informed by Respondent that they were being hired as permanent employees nor did Respondent ever discuss with them what their employment status would be if the strikers offered to return to work. I also note that during March and April 1991, the period material herein, that each of them were still within their 90-day probationary period. In short, Respondent failed to present any evidence whatsoever that either Robinson, Munoz, Connor, or Johnson understood that they were hired as permanent employees.

It is for all of the above reasons that I find Respondent failed to establish that either Robinson, Munoz, Connor, or Johnson were permanent strike replacements for either Machado or Jesus during the months of March and April 1991. In any event, since all four were hired subsequent to January 4, 1991, when the strike was converted to an unfair labor practice strike, Respondent was legally obligated to discharge them, if necessary, to make room for the returning strikers.

#### Machado Offers to Return to Work

On April 17, 1991, Machado sent a letter to the Respondent unconditionally offering to return to work.

On April 24, 1991, Machado received a letter, dated April 23, 1991, signed by Respondent’s labor relations consultant Lynn, on Respondent’s stationery, which read as follows:

This will acknowledge receipt of your letter stating availability to return to work. In accordance with the settlement agreement reached with the National Labor Relations Board, Case number 32–CA–11599, you are hereby offered reinstatement to your former position. This offer is subject to your unconditional application for reemployment.

We have set aside the time of *Monday, April 29, @ 1:00 PM* for you to submit your application and be interviewed. If this time is not convenient please contact me at the above address and phone number to reschedule. Failing to hear from you we will expect you at that time and date.

On April 25, 1991, Machado telephoned Respondent's place of business. She spoke to an office employee and asked to speak to Lynn. She was informed Lynn was not there. Machado told the clerical that the time set for her interview with Lynn, as set forth in the letter, was not convenient<sup>17</sup> and that she would let Lynn know when it would be convenient for her to come to Respondent's premises to be interviewed by him. She declined the office employee's offer to have Lynn return her call.

Machado did not thereafter communicate with Lynn or, as requested in Lynn's letter to her, submit an employment application or meet with him to be interviewed.

Machado, who had been employed by Respondent for 8 years prior to the strike, testified the reason she decided not to file an employment application or submit to an employment interview was "because I felt like after working there eight years I shouldn't have to go back and fill out an application and be interviewed. I hadn't been . . . fired—and I hadn't quit. I was still [an] employee of [Respondent]."

#### Jesus Offers to Return to Work

On March 8, 1991, Jesus sent a letter to the Respondent unconditionally offering to return to work.

On March 13, 1991, Respondent answered Jesus' March 8 offer to return to work by sending a letter to her, signed by Respondent's office manager Mary Fidone, which reads as follows:

I tried repeatedly to reach you by phone today to no avail.

According to the settlement agreement, if you wish to return to work you must come in and fill out an application.

We are accepting applications Saturday 3/16/91 from 10:00 AM to 12:00 Noon. Please ask for Mike Lynn.

This letter was sent by regular mail and was not delivered by the Postal Service to Jesus. It was returned to the Respondent by the Postal Service. The record fails to reveal why the Postal Service was unable to deliver the letter.

Subsequently, on or about April 12, 1991, Jesus received a certified letter dated April 11, 1991, signed by Respondent's labor relations consultant Lynn, on Respondent's stationery, which read as follows:

In accordance with the settlement agreement reached with the National Labor Relations Board, case number 32-CA-11599 you are hereby offered reinstatement to your former position. This offer is subject to your unconditional application for reemployment.

We have set aside the time of 10 A.M. on Wednesday April 17 for you to submit your application and be interviewed. If this time is not convenient please contact me at the above address and phone number to reschedule. Failing to hear from you we will expect you at that time and date.

Jesus did not respond to the letter.

<sup>17</sup>The date scheduled for the interview, Monday, April 29, was inconvenient for Machado because for the past 2-1/2 years, with Respondent's knowledge, she had been working for another employer on Mondays.

#### (b) Discussion and conclusions

I find, for the reasons below, by failing and refusing to reinstate Machado immediately on her April 17, 1991 offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

As I have found supra, Respondent failed to establish Machado had been permanently replaced. Nor did Respondent establish it had some other legitimate and substantial business justification for not reinstating her, in response to her April 17, 1991 unconditional offer to return to work. As a matter of fact, Respondent does not contend Machado was permanently replaced or that it had some other business reason for failing to reinstate her. Respondent's sole defense is its letter of April 23, 1991, constituted a valid offer of reinstatement and that by failing to comply with the terms of that offer, which required Machado to submit an employment application and be interviewed for reemployment, Machado forfeited her statutory right to reinstatement and backpay. I disagree.

Respondent's April 23 letter informed Machado that Respondent's offer of reinstatement was conditioned upon her submitting an employment application and being interviewed. As I have discussed supra, absent a showing of legitimate and substantial business justification, an employer's requirement that striking employees submit employment applications and be interviewed, as a precondition of reemployment, violates Section 8(a)(1) of the Act, and that conditioning strikers' reinstatement on these additional requirements does not constitute a valid offer of reinstatement. As I have found supra, Respondent did not establish a legitimate and substantial business justification for requiring new employment applications and job interviews from returning strikers, as a condition of making reinstatement offers to them.<sup>18</sup> I therefore find that by informing Machado in its April 23, 1991 letter that Respondent's offer to reinstate her was conditioned on her submitting a new employment application and being interviewed, Respondent violated Section 8(a)(1) of the Act.

Having found that Respondent's April 23, 1991 letter to Machado was a reinstatement offer which was invalid on its face, I further find that because of this Machado was not obligated to respond to it. For, the law is settled, Machado was not obligated to respond to a reinstatement offer that was invalid on its face. See *Consolidated Freightways*, 290 NLRB 771, enf. 892 F.2d 1052 (D.C. Cir.).

I find, for the reasons below, by failing and refusing to reinstate Peggy Jesus immediately upon her March 8, 1991, offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

As I have found supra, Respondent did not establish Jesus had been permanently replaced. Nor did Respondent establish it had some other legitimate and substantial business justification for not reinstating her, in response to her March 8, 1991 unconditional offer to return to work. As a matter of fact, Respondent does not contend Jesus was permanently replaced or that it had some other business reason for failing to reinstate her. Respondent's sole defense is that its letters

<sup>18</sup>Also without merit, for the reasons previously set forth in this decision, is Respondent's defense that it was privileged by virtue of the terms of the settlement agreement reached with the Board in Case 32-CA-11599 to require new employment applications and job interviews from its returning strikers.

of March 13, 1991, and April 11, 1991, constitute valid offers of reinstatement and that by failing to respond to those offers Jesus forfeited her statutory right to reinstatement and backpay. I disagree.

Jesus never received the March 13, 1991 letter and there is insufficient evidence to determine whether in sending the letter Respondent satisfied its obligation under the Act to make a good-faith effort to contact her for the purpose of offering her reinstatement, thereby tolling its backpay liability. In any event, as discussed hereinafter, the March 13 letter did not constitute a valid offer of reinstatement, so, even if Jesus had received it, she would not have been obliged to consider or respond to it. *Consolidated Freightways*, supra.

It is settled that an employer's offer to reinstate a striker who has made an unconditional offer to return to work must be specific, unequivocal and unconditional. *REA Trucking Co.*, 176 NLRB 520, 526 (1969), enfd. 439 F.2d 1065 (9th Cir. 1971). The letter of March 13, 1991, did not offer reinstatement, it was merely an invitation to apply for reinstatement, and therefore was inadequate. *Polynesian Cultural Center v. NLRB*, 582 F.2d 467 (9th Cir. 1978). It indicated no notice of an actual job opening nor suggested that a job existed. Further, the letter did not even suggest that a job was certain if Jesus took the initiative and followed the Respondent's requirements. Thus, even if Respondent was privileged to respond to Jesus' unconditional offer to return to work by offering to reinstate her on the condition that she submit a new employment application, Respondent failed to even do that in sending the March 13 letter, inasmuch as under no stretch of the imagination can that letter be construed as constituting an offer of reinstatement conditioned on Jesus filling out a new employment application. In any event, since as I have found supra, Respondent was not privileged to require the returning strikers to fill out new employment applications, as a condition of making them an offer of reinstatement, the March 13 letter was invalid for that additional reason.

Based on the foregoing I find that by failing and refusing to reinstate Jesus immediately upon her March 8, 1991 unconditional offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

Respondent's subsequent letter of April 11, 1991, did not toll its backpay liability or satisfy its obligation to offer Jesus reinstatement, because the letter on its face conditioned Respondent's offer of reinstatement to Jesus upon her submitting a new employment application and being interviewed for employment. For the reasons discussed supra, those conditions made Respondent's April 11 offer invalid on its face and violated Section 8(a)(1) of the Act, and for those reasons Jesus was not obligated to respond to the offer.

#### 6. Respondent fails to reinstate strikers Wilma Uchiyama and Gloria Richards

##### (a) *The evidence*

Prior to the strike which began on October 18, 1990, Respondent employed four grill cooks: Mary Brockman, Gloria Richards, Wilma Uchiyama, and Tina Bariocchi. All but Brockman ceased work on October 18, 1990, and supported the union strike. Brockman continued to work as a grill cook and at the time of the hearing in this case was still employed by Respondent as a grill cook. Bariocchi has never returned

to work or offered to return to work for Respondent and is not a part of this case. As described below, Uchiyama and Richards each wrote Respondent in March 1991 and offered unconditionally to return to work.

In 1990, after the strike began, Respondent employed a complement of three grill cooks: Brockman; Mike Lynn, hired November 3, 1990; and, Tammy Allread, hired November 15, 1991. Respondent employed only these three as grill cooks until May 16, 1991, when Mike Lynn was transferred to another position and was replaced as grill cook by John Edwards, who was hired on May 16, 1991.

Brockman, Allread, and Edwards were Respondent's complement of grill cooks from May 16 to June 15, 1991, when Respondent hired Jagdeep Grewal as a grill cook. However, Edwards' employment terminated on June 18, 1991. Thereafter, on August 2, 1991, Respondent hired another grill cook, Matt Lekos, increasing its complement of grill cooks to four: Brockman, Allread, Grewal, and Lekos. As of the date of the hearing in this case (Aug. 26, 1991) these four remained as Respondent's grill cooks.

In mid-December 1990 grill cooks Lynn and Allread were informed by Respondent's general manager Russell that they could consider themselves as "permanent replacements" for the strikers. I find that grill cooks Lynn and Allread as of mid-December 1990 were permanent employees.

#### Uchiyama Offers to Return to Work

On March 14, 1991, Respondent received a letter from striker Uchiyama, dated March 13, 1991, informing Respondent she was "available and willing to return to work as quickly as possible" and asked when she could return to work. The letter gave Uchiyama's address as 41680 Sherwood Street, Fremont, California 94538.

Respondent replied to Uchiyama's March 13, 1991 unconditional offer to return to work by letter dated March 14, 1991, signed by Office Manager Mary Fidone. The letter read as follows:

Wilma Uchiyama  
41680 Sherwood St.  
Fremont, CA 94538  
Dear Wilma,

I tried repeatedly to reach you by phone today to no avail.

According to the settlement agreement, if you wish to return to work you must come in and fill out an application.

We are accepting applications Saturday 3/16/91 from 10:00 AM to 12:00 Noon. Please ask for Mike Lynn.

The parties stipulated that if Fidone had been called to testify she would have testified that she mailed this letter. The letter was sent by regular mail.

Uchiyama, whose testimonial demeanor was good, testified she did not receive this letter; she credibly testified she did not receive a response to her March 13, 1991 letter from Respondent, either verbal or written. I find that Respondent's letter of March 14, 1991, was not delivered by the Postal Service to Uchiyama.

### Richards Offers to Return to Work

On March 16, 1991, Richards, by letter to Respondent, unconditionally offered to return to work. Respondent did not answer this letter, so, on April 24, 1991, Richards sent Respondent another letter which, in pertinent part, reads:

Apparently you are not going to answer my letter dated March 16 1991, which was received by you on March 20, 1991 . . . regarding my return to work. Therefore, will you please advise me of the status of my employment with [Respondent].

Respondent did not answer Richards April 24, 1991 letter.

#### (b) Discussion and conclusions

On its receipt in March 1991 of the unconditional offers to return to work from strikers Uchiyama and Richards, Respondent was not legally obligated to offer to reinstate either of them at that time, because they had been permanently replaced by strike replacements Lynn and Allread in November 1990, prior to the strike's conversion to an unfair labor practice strike. Lynn and Allread were still employed by Respondent as grill cooks in March 1991,<sup>19</sup> therefore Respondent was not legally obligated to offer to reinstate either Uchiyama or Richards at that time.

However, as I have noted supra, when setting forth the applicable legal principles, in view of Uchiyama's and Richards' unconditional offers to return to work, Respondent was obligated to place their names on a preferential hiring list and to offer to reinstate them when the next grill cook job openings occurred. Thus, absent a legitimate and substantial business justification, Respondent was obligated to offer to reinstate either Uchiyama or Richards on May 16, 1991, when it hired Edwards as a grill cook, and it was obligated to offer reinstatement to either Uchiyama or Richards on June 15, 1991, when it hired Grewal as a grill cook. Respondent failed to establish any legitimate and substantial business justification for its failure to offer to reinstate them on either May 16 or June 15, 1991.

Based on the foregoing, I find that by failing to reinstate Uchiyama or Richards on May 16 and June 15, 1991, Respondent violated Section 8(a)(1) and (3) of the Act.<sup>20</sup>

Respondent's contention that Uchiyama forfeited her legal right to reinstatement and backpay because she failed to respond to Respondent's letter of March 14, 1991, informing her that if she wanted to return to work she was required to speak to Respondent's Labor Relations Consultant Lynn and fill out an employment application, is without merit.<sup>21</sup> Ini-

<sup>19</sup>As found supra, the third grill cook employed by Respondent in March 1991 had been employed prior to the strike.

<sup>20</sup>The question of which of the two dates Uchiyama and Richards were entitled to be reinstated is a matter best left for the compliance stage of this proceeding. Respondent was legally obligated to offer to reinstate one of the two on May 16, 1991, and the other one on June 15, 1991.

<sup>21</sup>I note Respondent never informed Richards that, as a condition of receiving an offer of reemployment, she was required to submit an employment application and be interviewed. Respondent ignored Richards unconditional offer to return to work. The only explanation in the record for Respondent's failure to reinstate Richards, is Labor Relations Consultant Lynn's testimony that, "we had hired replacement grill cooks and [Richards] was . . . the number 1 person to

tially, I note that as I have found supra, Uchiyama credibly denied receiving the March 14, 1991 letter. Cf. *Carruthers Ready Mix*, 262 NLRB 739, 740 (1982):

telephone calls to an employee's residence where there is either no answer or where a message is left with a third party, but not communicated to the striking employees, are insufficient [to meet the employer's obligation to communicate an offer of reinstatement to a striker], *as are offers transmitted by ordinary mail which the striking employee credibly denies receiving.*

In any event, for the reasons previously set forth in this decision, Respondent's requirement that if striker Uchiyama wanted to return to work for Respondent she was first obligated to fill out an employment application and be interviewed by Respondent's labor relations consultant Lynn, was an improper requirement that violated Section 8(a)(1) of the Act. Therefore, even if Uchiyama had received this letter she would not have been obligated to have responded to it.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees performing work in and covered by the job classifications set forth in "Section 2. Recognition" and in the "Wage Scales and Classifications" portion of the Appendix of the December 4, 1987, through June 30, 1990 collective-bargaining agreement between Respondent and the Union, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. The Union is now and at all times material has been the exclusive collective-bargaining representative of all the employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to execute a written collective-bargaining agreement embodying the collective-bargaining agreement reached by the Respondent and Union on March 1, 1991, the Respondent since March 11, 1991, has violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to reinstate striking employee Kathy Brown immediately upon her March 8, 1991, offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

7. By failing and refusing to reinstate striking employee Lorraine Yartz immediately upon her March 19, 1991 offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

8. By failing and refusing to reinstate striking employee Fran Machado immediately upon her April 17, 1991 offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

be recalled." Respondent offered no explanation for not recalling Richards when openings for grill cooks occurred on May 16 and June 15, 1991.

9. By failing and refusing to reinstate striking employee Peggy Jesus immediately upon her March 8, 1991 offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.

10. By failing and refusing to reinstate striking employees Wilma Uchiyama and Gloria Richards on May 16 and June 15, 1991, Respondent violated Section 8(a)(1) and (3) of the Act.<sup>22</sup>

11. By threatening striking employee Kathy Brown on April 17, 1991, with the loss of her reinstatement rights as an unfair labor practice striker if she failed to respond to Respondent's inquiry as to whether she was available for employment, Respondent violated Section 8(a)(1) of the Act.

12. By requiring striking employee Kathy Brown, who had unconditionally offered to return to work, to fill out an employment application and submit to an employment interview, as a condition of making a reinstatement offer to Brown, Respondent violated Section 8(a)(1) of the Act.

13. By telling striking employee Kathy Brown on March 16, 1991, that she and other employees who supported the Union's strike by picketing would probably not be reinstated, Respondent violated Section 8(a)(1) of the Act.

14. By informing striking employee Lorraine Yartz on March 13, 1991, that if she was interested in returning to work she would have to fill out a new employment application and speak with Respondent's labor relations consultant, Respondent violated Section 8(a)(1) of the Act.

15. By its letters of April 11 and 23, 1991, to striking employee Peggy Jesus and Fran Machado, who had unconditionally offered to return to work, Respondent violated Section 8(a)(1) of the Act by informing Jesus and Machado that they were required to fill out employment applications and submit to employment interviews, as a condition of reinstatement.

16. The Regional Director acted reasonably in setting aside the informal settlement agreement in Case 32-CA-11599, because by its above-described unfair labor practices the Respondent breached the terms of the settlement agreement and engaged in subsequent unfair labor practices.<sup>23</sup>

17. By withdrawing recognition from the Union on January 4, 1991, as the representative of the employees in the appropriate unit herein, the Respondent violated Section 8(a)(5) and (1) of the Act.

18. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend an order requiring it to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

<sup>22</sup> As noted supra, the question of which of the two was entitled to be reinstated on May 16 and June 15, 1991, is left for the compliance stage of this proceeding. Respondent was legally obligated to offer to reinstate one of the two on May 16, 1991, and the other on June 15, 1991.

<sup>23</sup> It is settled that a settlement agreement can be set aside, and violations found based on the presettlement conduct, where an employer fails to comply with the settlement agreement or commits subsequent unfair labor practices. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 254-255 (1944); *Kuna Meat Co.*, 304 NLRB 1005 fn. 2 (1991).

I have found that Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate strikers Kathy Brown on March 8, 1991; Fran Machado on April 17, 1991; Lorraine Yartz on March 19, 1991; Peggy Jesus on March 8, 1991; and Wilma Uchiyama and Gloria Richards on May 16, 1991, and June 15<sup>24</sup>. Accordingly, I shall recommend that Respondent cease and desist from engaging in such unlawful conduct and that the aforesaid strikers be reinstated to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. I shall also order the Respondent to make each of them whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to reinstate them on the stated dates. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing since March 11, 1991, to sign the collective-bargaining agreement embodying the terms of an agreement reached by the parties on March 1, 1991, I shall recommend that Respondent cease and desist from engaging in such unlawful activity and that, on request, it sign the collective-bargaining agreement forthwith. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). In addition, I shall order Respondent to give effect to the terms of the agreement retroactive to March 11, 1991, and that the unit employees be made whole for any losses they may have suffered by reason of the Respondent's failure to execute and sign the aforesaid agreement, with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>25</sup>

#### ORDER

The Respondent, Frank Ivaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf Club and Recreation Co., Sunol, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the Respondent's employees employed in the appropriate unit described below, by withdrawing recognition from the Union and by failing and refusing to execute a written collective-bargaining agreement embodying the terms of a collective-bargaining agreement reached by the Union with the Respondent. The appropriate bargaining unit is as follows:

All full-time and regular part-time employees performing work in and covered by the job classifications set forth in "Section 2. Recognition" and in the "Wage Scales and Classifications" portion of the Appendix of

<sup>24</sup> The question of which of the two (Uchiyama or Richards) was entitled to be reinstated on May 16 or June 15, 1991, is left for the compliance stage of the proceeding.

<sup>25</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the December 4, 1987 through June 30, 1990 collective-bargaining agreement between Respondent and the Union; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Discouraging membership in the Union, or any other labor organization, by unlawfully failing and refusing to reinstate or otherwise discriminating against its employees because they have engaged in a protected strike or other concerted activity for their mutual aid or protection.

(c) Threatening striking employees with the loss of their reinstatement rights as unfair labor practice strikers if they fail to respond to Respondent's inquiry as to their availability for reemployment.

(d) Requiring striking employees, who unconditionally offer to return to work, to fill out employment applications and submit to employment interviews, as a condition of making reinstatement offers to them.

(e) Telling striking employee, who unconditionally offer to return to work, that they are required to fill out employment applications and submit to employment interviews, as a condition of reinstatement.

(f) Telling striking employee that employees who support the Union's strike by picketing will probably not be reinstated.

(g) Telling striking employees that if they are interested in returning to work, they will have to fill out new employment applications and speak with Respondent's labor relations consultant.

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

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

(a) On written request, sign the collective-bargaining agreement reached with the Union on March 1, 1991, and give effect to all of the terms of that agreement, retroactive to March 11, 1991, and make whole the employees in the appropriate unit for any loss of earnings and other benefits they suffered as a result of Respondent's refusal to execute and sign the agreement on March 11, 1991, in the manner prescribed in the remedy section of this decision.

(b) Offer to striking employees Kathy Brown, Lorraine Yartz, Fran Machado, Peggy Jesus, Wilma Uchiyama, and Gloria Richards immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner prescribed in the remedy section of this decision.

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

(d) Post at its place of business in Sunol, California, copies of the attached notice marked "Appendix."<sup>26</sup> Copies of

<sup>26</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to bargain collectively with Hotel Employees and Restaurant Employees and Bartenders Union, Local 50, as the exclusive collective-bargaining representative of our employees employed in the appropriate unit described below, by withdrawing recognition from Local 50 and by refusing to sign an agreed-upon collective-bargaining agreement with Local 50. The appropriate bargaining unit is as follows:

All full-time and regular part-time employees performing work in and covered by the job classifications set forth in "Section 2. Recognition" and in the "Wage Scales and Classifications" portion of the Appendix of the December 4, 1987 through June 30, 1990 collective-bargaining agreement between our company and Local 50, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT discourage membership in the above-named labor organization, or in any other labor organization, by unlawfully failing and refusing to reinstate or otherwise discriminate against employees because they have engaged in a protected strike or other concerted activity for their mutual aid or protection.

WE WILL NOT threaten striking employees with the loss of their reinstatement rights as unfair labor practice strikers if

they fail to respond to our inquiry as to their availability for reemployment.

WE WILL NOT require striking employees, who unconditionally offer to return to work, to fill out employment applications and submit to employment interviews, as a condition of our making reinstatement offers to them, and WE WILL NOT tell them that we are engaging in this conduct.

WE WILL NOT tell striking employees that employees who have supported a strike by the above-named labor organization, or any other labor organization, will probably not be reinstated.

WE WILL NOT tell striking employees that if they are interested in returning to work, they will have to fill out new employment applications and speak with our labor relations consultant.

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

WE WILL, on written request, sign the collective-bargaining agreement we reached with the above-named labor organization on March 1, 1991, and give effect to all of the terms

of the agreement, retroactive to March 11, 1991, and WE WILL make whole the employees in the appropriate unit for any loss of earnings and other benefits they suffered as a result of our refusal to sign and execute the agreement on March 11, 1991, with interest.

WE WILL offer to the employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

Kathy Brown	Peggy Jesus
Lorraine Yartz	Wilma Uchiyama
Fran Machado	Gloria Richards

FRANK IVALDI, ET AL., A CALIFORNIA LIMITED PARTNERSHIP D/B/A SUNOL VALLEY GOLF CLUB AND RECREATION CO.