

McAllister Bros., Inc. and Local 333, United Marine Division International Longshoremen's Association. Cases 2-CA-22970-1 and 2-CA-23248

October 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 23, 1992, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Charging Party filed exceptions with supporting briefs and reply briefs, and the General Counsel filed an answering brief to the Respondent's cross-exceptions. The Respondent filed cross-exceptions, a supporting brief, answering briefs, and a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified below, and to adopt the recommended Order.

This case presents numerous issues arising in the context of the parties' unsuccessful negotiations for a successor contract and an ensuing strike. The judge found that the Respondent did not engage in any unlawful conduct and recommended that the complaint be dismissed in its entirety. Although we agree with the result reached by the judge, our rationale differs from the judge's on certain issues, as more fully discussed below.

1. The Respondent's reopener proposal

For the reasons set forth by the judge, we agree with him that the Respondent's contract reopener proposal was a mandatory subject of bargaining, that the Respondent presented the Union with reasonable and legitimate economic justifications for the proposal, and that the complaint allegation that the Respondent violated Section 8(a)(5) by bargaining over the reopener proposal should be dismissed. Inasmuch as no other prestrike unfair labor practice is alleged, we also agree with the judge that the strike which began on February 15, 1988,² was an economic strike.

2. The April 5 impasse

The judge concluded, *inter alia*, that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally

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

²All dates are in 1988 unless otherwise indicated.

changing the terms and conditions of employment for economic strikers who returned to work on and after June 2, because he found that the parties had reached a lawful impasse in negotiations on February 15, and that the changes were consistent with terms of the Respondent's final offer of April 4. In so finding, the judge failed to address whether the parties also reached a lawful impasse on April 5.

The Respondent has cross-expected to the judge's failure to find that the parties reached lawful impasse on April 5. Upon a careful review of the judge's decision and the entire record, we find, for the reasons stated below, that the parties had exhausted the prospects of concluding an agreement and reached lawful impasse on April 5.³ Accordingly, we agree with the judge that the Respondent's implementation of the terms of the April 4 proposal for strikers returning to work on and after June 2 did not violate the Act. The relevant facts, which are more fully set forth in the judge's decision, may be summarized as follows.

The Respondent, a member of the Marine Towing and Transportation Employers' Association, was party to a collective-bargaining agreement with the Union effective February 16, 1985, through February 15, 1988. The Respondent timely withdrew from the Association and on January 20 began negotiations with the Union for a new contract.

On February 15, the date the contract expired, the Union voted to strike all the towing companies in the port of New York, including the Respondent. The strike was unsuccessful, and the Respondent and its competitors were able to continue operations by hiring replacement workers.

On March 16, 1 month after the strike began, the Respondent sent the Union a set of revised proposals. In light of the changed economic climate, these proposals were less favorable to the Union than the Respondent's prestrike proposals. At a bargaining session on March 18, the Union rejected the revised proposals as "regressive," and offered a counterproposal similar to the Union's last prestrike offer of a 10-percent wage reduction. The Respondent explained that it could no longer talk about a contract with a 10-percent reduction because the parties were now bargaining in a much different economic environment. The Respondent stated that it was competing against companies operating with low-wage replacement employees and stressed that it needed to reduce its labor costs to the neighborhood of its competitors', which it estimated at \$800 to \$1000 per day. The Respondent estimated daily labor costs under the Union's 10-percent reduction proposal at approximately \$1900.

³Because the Respondent did not make any unilateral changes prior to the April 5 impasse, we find it unnecessary to pass on the issue of whether the parties reached impasse on February 15.

The parties next met on March 30 with the assistance of a Federal mediator. The parties exchanged a series of proposals and then caucused to cost them out. The Respondent concluded that each proposal the Union made still left it with labor costs of approximately \$1700 a day, while its competitors were then paying only \$900 to \$1000 per day.

The Union argued that the Respondent would be protected by a most-favored-nations clause, but the Respondent pointed out that this clause would apply only if its competitors reached agreement with the Union. The Respondent offered to sign a contract for whatever wages its competitors were paying.

The Union offered to do away with the first hour of overtime, and stated that it would agree to wages equal to what Eklof, another struck employer, was paying its replacement workers. The Respondent refused to agree to Eklof wages because it did not consider Eklof, an oil barge towing company, to be a competitor. The Union closed the meeting by asking the Respondent to furnish a proposal that set forth what the Respondent was willing to offer to get the strikers back to work, and the parties agreed to meet in several days.

The Respondent submitted a written proposal to the Union on April 4 outlining what the Respondent was willing to offer to end the strike. The proposal contained, inter alia, the following terms: captains involved in ship docking would receive \$42,525 per year, plus \$1215 in 401(k) contributions; engineers and deckmates \$37,665 per year plus \$1215 in 401(k) contributions, and deckhands from \$19,440 to \$24,300 per year plus \$1215 in 401(k) contributions if they worked 243 days of the year. The proposal also covered manning requirements, work schedules, overtime, vacations and holidays, sick leave, "grub money," and medical and pension benefits.

The April 4 proposal was discussed at a bargaining session conducted the following day in the presence of a Federal mediator. The Union opened the meeting by characterizing the proposal as "bullshit." The parties exchanged proposals but quickly recognized that they were far apart on labor costs. The Respondent consistently proposed labor costs of \$800 to \$1000 per day, while the Union proposed labor costs of over \$1500 per day. As the parties were unable to compromise on this issue, the Respondent suggested alternatively that the cook and second deckhand positions be eliminated. The Union rejected this alternative by stating, "[T]hat's out of the question, it's a deal breaker." The Respondent's attorney and chief negotiator, Ray McGuire, credibly testified that the parties "were just beating each other at that point. We were going nowhere. We made some nice talk, but ended the negotiations."

The parties did not meet again until August 23, some 4 months later, and thereafter on September 30

and December 12. Although the same issues were discussed in these meetings, neither party moved from its April 5 position.

On and after June 2, six employees abandoned the strike and returned to work. The parties stipulated that the terms and conditions of employment for the returning strikers were consistent with the Respondent's April 4 offer.

On September 2, the Union offered on behalf of the striking employees "to return to work under the terms and conditions that existed under the expired collective bargaining agreement." By letter of September 14, the Respondent advised the Union that its offer was not unconditional because "many months ago, McAllister and Local 333 reached a good faith impasse in bargaining over company proposals for wages, hours, staffing levels, and terms and conditions of employment substantially below those contained in the expired collective bargaining agreements."

The Board has long held that an impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *affd.* sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), *enf. denied* 500 F.2d 181 (5th Cir. 1974), the Board stated:

A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

Based on our review of the record, we conclude that the parties had indeed negotiated to a genuine impasse on April 5. There is no evidence that the Respondent engaged in bad-faith bargaining. Despite the parties' best efforts to reach an agreement, they were consistently far apart on the central issue of labor costs. By April 5, the Union had asked for and received the Respondent's offer to end the strike, and the Union characterized it as "bullshit." When the Respondent raised the alternative of eliminating the cook and second deckhand positions, the Union responded by totally rejecting the proposal and calling it a "deal breaker." The parties acknowledged that neither of them was willing to concede on these issues and determined that continuing negotiations at that point was useless. The April 5 session ended without any agreement to meet again and, as the record shows, the parties did not meet again for 4 months. Under these circumstances, we conclude that the parties had exhausted all prospects of achieving an agreement and reached impasse on April 5.

3. Unilateral changes in terms and conditions

It is well established that after an impasse has occurred, an employer does not violate the Act by making unilateral changes in terms and conditions of employment consistent with its pre-impasse proposals. *Taft Broadcasting*, supra. At the hearing, the parties entered into the following stipulation with respect to the strikers returning to work on and after June 2:

These individuals were employed under wages, hours and terms and conditions of employment which although not inconsistent with the wages, hours and terms and conditions of employment contained in McAllister's proposal to Local 333 dated April 4, 1988, were different from and less favorable to those individuals than the wages, hours and terms and conditions of employment which pertained under the expired Agreement.

Because the unilateral changes in working conditions implemented on June 2 were consistent with the terms of the Respondent's pre-impasse offer of April 4, we find that the Respondent did not violate Section 8(a)(5) and (1) by making such changes.

4. Failure to make fund payments

It is undisputed that the Respondent did not make payments to the New York Marine Towing and Transportation Industry Insurance and Pension Funds with respect to the employment of unit employees who abandoned the strike and returned to work on and after June 2. These employees were subject to the terms of the April 4 offer which proposed Blue Cross health insurance and contributions to a 401(k) plan in lieu of contributions to the Union's health and pension funds. Since the unilateral changes in benefit plans were consistent with the Respondent's April 4 pre-impasse offer, we find that the Respondent did not violate Section 8(a)(5) and (1) by making such changes.

5. Failure to reinstate the strikers

In agreement with the judge, we find that the Union's September 2 offer to return to work was conditioned on implementation of the terms that existed under the expired agreement. Accordingly, because an unconditional offer to return to work was not made, we conclude that the Respondent did not violate Section 8(a)(3) and (1) when it refused to reinstate the striking employees.⁴

6. Failure to use the hiring hall

The complaint alleges that after September 2 the Respondent violated Section 8(a)(5) and (1) by failing to use the Union's hiring hall as required by the terms of

the expired contract. This issue was litigated on the theory that the Union's September 2 offer to return to work was unconditional, that it ended the strike, and that it triggered the Respondent's obligation to resume using the hiring hall. However, we have found, as stated above, that on September 2 the Union did not make an unconditional offer to return to work. Accordingly, as we have rejected the premise on which this complaint allegation rests, we find that the Respondent's failure to use the hiring hall did not violate the Act.

ORDER

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

Burt Pearlstone, Esq., for the General Counsel.
Raymond McQuire, Esq. (Kauff, McLain & McQuire), for the Respondent.
Daniel Engelstein Esq. (Vladeck, Waldman, Elias & Englehard), for the Union.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me at New York, New York, on September 30 and October 1-4, 1991.

On August 3, 1988, Local 333 United Marine Division, International Longshoremen's Association, AFL-CIO (the Union) filed a charge in Case 2-CA-22970-1 against McAllister Brothers Inc. (Respondent). On January 6, 1989, the Union filed an additional charge against Respondent in Case 2-CA-23248. On October 30, 1990, a consolidated complaint issued alleging in substance, that Respondent insisted, as a condition to consummating any successor collective-bargaining agreement, that the Union agree to a company proposal entitled "Company Proposals on Protective Clauses," and that Respondent bargained to impasse in furtherance of its insistence on this proposal. The complaint alleges further that this proposal: (1) is not a mandatory subject of bargaining, and (2) constitutes a demand for a contract without any fixed duration, in circumstances where there is no reasonable or legitimate justification for such a demand. Additionally, the complaint alleges that Respondent: (1) since on or about February 16, 1988, failed to make payments to the New York Marine Towing and Transportation Industry Insurance Fund as required by the parties' collective-bargaining agreement; (2) since on or about September 2, 1988, failed to use the contractual hiring hall provisions on the occurrence of employment vacancies; (3) made other unilateral changes, since on or before February 16, 1988, in terms and conditions of employment of unit employees; and (4) refused, since on or about September 2, 1988, a valid unconditional offer to return to work made by the Union on behalf of employees who had commenced a strike on February 16, 1988, which strike was caused and prolonged by the aforementioned unfair labor practices of Respondent.

Briefs were filed by counsel for the General Counsel and by counsel for Respondent. On consideration of the entire

⁴ *Purolator Products*, 270 NLRB 694, 700 (1984), enfd. mem. 121 LRRM 2120 (4th Cir. 1985).

record, the briefs, and the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent is a domestic corporation, engaged in the marine towing and transportation in New York harbor, including the docking and undocking of ships. It has an office and place of business at Battery Place, New York, New York. Respondent annually derives, in the course and conduct of its business operations gross revenues in excess of \$50,000 for the transportation of freight in interstate commerce pursuant to arrangements with, and as agent for various common carriers, each of which operates between and among various States of the United States. Respondent functions as an essential link in the transportation of freight and other commodities in interstate commerce. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

In order to properly evaluate the collective-bargaining negotiations that took place in this case beginning in January 1988, it is necessary to review the collective-bargaining history between the Union and Respondent and between the Union and Respondent's competitors in the New York harbor area, and to review Respondent's economic condition and its share of the work performed as against similar work performed by its competitors.

There was no significant issue of credibility in this case as to the facts, except as to what was stated by union officials to assembled members of the Union on February 15, 1989, concerning the reason for voting to strike Respondent. This credibility resolution is dealt with in detail.¹

For many years Respondent has been engaged in marine towing and transportation in New York harbor, including the docking and undocking of ships. Prior to 1988, Respondent was a member of the New York Marine Towing and Transportation Employers Association (the Association) a multi-employer association with an aggregate of some 2000 employees. Respondent was bound by a series of collective-bargaining agreements between the Association and the Union. The most recent agreement was a 3-year agreement which expired February 15, 1988. In 1987, Respondent timely withdrew from the Association and notified the Union of its intent to negotiate independently.

According to the credible and uncontradicted testimony of William Kallop, Respondent's chairman of the board, Respondent's decision to bargain independently, as well as its subsequent bargaining strategy, were driven by certain factors described below. First, the marine industry in New York harbor, and the tugboat business in particular, had been shrinking for years because of containerization, decreased cargo volumes, the use of larger ships and barges, and a general reduction in the amount of barge towing work. These circumstances had a significant negative impact on financial conditions. Respondent lost some \$1.9 million in 1987, and was significantly delinquent in payments to the Union's pension and welfare funds, as well as to other creditors. As a

¹In view of my ultimate conclusion that a lawful impasse was reached prior to such strike vote, it would appear that the strike as to Respondent was in any case, an economic strike.

result of Respondent's poor economic condition, Respondent took a prebargaining position that economic concessions from the Union were necessary. Subsequently, during the 1988 negotiations, the Union acknowledged it was aware of this necessity.

As a result of Respondent's poor economic situation it decided to reduce the scope of its operations and to concentrate on ship docking in New York harbor, where it performed a significant portion of the work. In the ship docking segment of the market, Respondent held a 44-percent market share. Two other competitors, Moran and Turecamo, held 40 and 15 percent of the market, respectively. However, both Moran and Turecamo were much larger companies; most of their business being in the general and oil barge towing segment of the market, from which Respondent had withdrawn.

The competition for the New York harbor ship docking business was aggressive. Respondent's major competitor, Turecamo had even gone so far as to hire away McAllister's entire 12-man cadre of ship docking pilots in 1987, as well as a senior salesman, in an effort to capture McAllister's ship docking business. Kallop testified that such competition had to be considered in Respondent's upcoming bargaining negotiations with the Union.

Another factor influencing Respondent's bargaining strategy was the unprecedented presence into the New York harbor of New York Towing, a tug company that was not a signatory with Local 333 and whose employees received significantly lower wages and other benefits than Respondent's employees.

Contract negotiations between Respondent and the Union began in January 1988, at the same time as Respondent and the Union commenced negotiations for a new contract to succeed the one expiring on February 15, 1988, the Union was involved in negotiations with many other tug companies whose agreements with the Union were also to expire on February 15, 1988. One group of these companies was a coalition of employers commonly referred to by the Union as the "Gang of Seven" and included Moran and Turecamo, as well as five others. This group, was bargaining with Local 333 on a group basis. In addition, the Union was bargaining with at least 10 other, smaller companies at the same time.

In January and early February 1988, as the negotiations between Respondent and the Union were getting under way, it was common knowledge in the industry that the coalition was making proposals involving the "scope" of bargaining unit provision that had precipitated the Union's last strike in 1979, and that they also wanted to remove tug captains from the bargaining unit. It was also common knowledge that these demands were regarded with hostility by the Union. A strike seemed likely. It was also expected that the coalition employers would try to continue operations with replacement workers if the Union struck.²

Kallop testified that Respondent viewed the above situation as presenting an opportunity to achieve a competitive edge on its rivals. Since Local 333 is an affiliate of the International Longshoremen's Association (ILA). Thus Respondent concluded that a Local 333 strike would probably succeed in halting all ship docking. Even if a ship were successfully docked by a strike-breaking tug, it was unlikely that

²That strike was in 1979, and lasted 3 months. The strike arose over provisions concerning the geographic scope of the agreement.

ILA stevedores would load or unload it. Kallop testified that the Union's president and various ILA officials had said as much to him during informal conversations around their offices. The Union's offices are on the floor below McAllister's offices at 17 Battery Place, and the ILA's offices are on the same floor as McAllister's offices.

Kallop testified that Respondent concluded that if it were the only one of the three ship docking companies with a union contract, it would be well positioned to increase its market share from its struck rivals. Thus it was to Respondent's advantages to reach agreement with the Union if that were at all possible.

The parties' first bargaining session was held on January 20. Respondent's bargaining team consisted of Raymond McGuire and Kenneth Margolis Respondent attorneys, and Cesare Del Greco, a respondent official. The Union's bargaining team consisted of Seymore Waldman and Daniel Engelstein, attorneys, Albert Cornette, president of the Union, Peter Gale, secretary/treasurer of the Union, and delegate Joseph Fitzgerald. In addition, the Union's bargaining committee was generally present at most sessions. The meeting consisted of the parties' initial presentation of the concepts that each believed necessary to the conclusion of an agreement.

For Respondent, McGuire stressed that his client was bargaining independently of the other companies. He assured the Union that, unlike the coalition, Respondent did not intend to exclude captains from the unit and that his client fully intended to execute a contract by February 15. McGuire stressed that Respondent as well as the industry in New York in general, faced serious financial problems, including competition from out-of-town companies and from New York Towing, that would have to be addressed. McGuire explained that as Respondent saw it, any solutions would have to involve curtailing overtime and reducing the manning levels on the boats.

For the Union, Cornette stated that Respondent's financial problems were caused not by labor costs but by mismanagement, and that the best thing for Respondent would be to sign a wage freeze contract like one he said Local 333 had signed with a few of the other smaller companies. The parties concluded their initial probing by agreeing that pension and welfare fund issues also had to be addressed. They agreed to meet on January 27.

The next bargaining session took place on January 27, Respondent had previously delivered a set of written proposals to the Union for their review. These proposals involved reducing manning levels, instituting a new system of flat, per diem wages rather than hourly rates plus overtime, adopting a new approach for retirement provisions, and various other changes.

The meeting opened with the Union's flatly rejecting Respondent's proposals. McGuire explained that these proposals were necessary because Respondent had been losing money for years. Respondent offered to show the Union its books. However, the Union did not pursue Respondent's offer.

McGuire stressed that Respondent's losses were a reality and that the company had to do something about them. Respondent's per diem pay proposal had been advanced, he said, in order to "restructure the contract to reduce excess manning and get a handle on the overtime, which was a serious problem for the company." McGuire, then proposed that

the employees receive a guaranteed monthly wage and a month's severance pay when someone was laid off, instead of a daily "shape-up" that frequently resulted in lost work for individual employees. McGuire stressed that he wanted to work out new concepts to try to deal with the new competitive realities that Respondent faced now that its business was focused on ship docking. Gale testified that the Union understood that he was "not trying to put down hard and fast demands on the economics as much as trying to hear some proposals. 'Let's see if we can work out a way of reducing the labor costs.'" McGuire stressed that Respondent wanted to be on the same level as its competitors. At this point the session ended.

A third session was scheduled for January 29. Immediately before the January 29 meeting, McGuire met privately in the kitchen off the negotiating room with union representatives Waldman and Cornette. Waldman and Cornette said that for political reasons, they themselves could not make a concessionary proposal, but that if McAllister were to propose a 10-percent wage reduction and certain other concessions they outlined, the Union would be willing to discuss it. McGuire agreed with Cornette's suggestion to "just run through the paces today, get it over with, and then . . . think about this other business."

The formal negotiations then began in another room, in the presence of the Union's negotiating committee. Greco expressed the basis for Respondent's assertion of financial distress. The parties discussed such issues as the presence of New York Towing Co. in the harbor, "excessive manning, overtime, and . . . a guaranteed monthly wage." However, there was no bargaining over the substance of McAllister's economic proposals of January 26. The meeting ended at this point.

According to McGuire, Respondent believed there was going to be a strike and that its competitors would be able to operate with strike replacements working for wages substantially below those of Respondent's employees even assuming a 10-percent wage cut as proposed by the Union. Such a circumstance would threaten Respondent's continued existence. It was with the possibility in mind that Respondent drew up position proposals.

In preparation for the next negotiating session, Respondent drafted a new comprehensive economic proposal. These proposals increased the per diem for captains from \$175 to \$300 and changed the proposed ratio of their days worked to days off from 2-for-1 to 1-for-1, resulting in captains working 182 days per year instead of 240.

Respondent also prepared a set of "protective clauses," separate from its substantive proposals. These were designed primarily to protect Respondent from the possibility of having to compete with companies operating with low-wage strike replacements. According to Kallop, Respondent was concerned about the possibility of contracting for labor costs of as much as \$1500 to \$1800 per day and then having to compete with tugs operated by Moran and Turecamo, using striker replacements with labor costs of as little of \$800 per day.

These protective clauses included a traditional "most favored nations" clause. They also allowed Respondent to reopen the agreement (a) if a non-Local 333 union tug, such as New York Towing engaged in ship docking, or (b) if a tug company operating with replacements for Local 333 em-

employees engaged in ship docking in the port of New York. These clauses provided that if one of these conditions occurred and Respondent could reopen the agreement, and if the parties could not reach agreement within 25 days from the date of such notice, then either party could declare the contract terminated on 7 days' notice.

The next negotiation was held February 12, 1991. The session began with McGuire's handing to the Union, Respondent's new proposals, including the protective clauses. The Union had no objection in principle to provisions that would protect Respondent from strike replacement, competition, however, Waldman said that Respondent's proposals were too loose and open-ended for the Union.

Cornette then outlined a union proposal similar to one the Union had proposed to the coalition several days earlier. It contained the 10-percent wage reduction that Waldman and Cornette had suggested to McGuire on January 29, as well as a few other relatively minor concessions. There was no discussion at this meeting concerning the economic provisions of either this proposal or the Respondent's revised proposal. Eventually, McGuire and Sanborn a respondent negotiator, left the Union's offices to speak with their principals.

On their return, Sanborn presented certain ideas concerning the starting time for "day boats" and the length of the day before overtime began. These ideas essentially constituted modifications of the existing contract or the proposals Cornette had presented. Cornette conceded Respondent had made a meaningful proposal but stated the Union could only ask the unit employees to accept so many givebacks at one time. He proposed tabling Respondent's proposal.

McGuire then said that Respondent would accept Cornette's proposal if the Union would accept Respondent's reopener provisions contained in its proposals. Waldman, acknowledging that the concerns motivating these proposals were legitimate, stated that he needed to think about Respondent's proposals a little more. He then said at least for purposes of discussion, he could accept the "most favored nations" provision, and that the Union could live with Respondent's proposal concerning the operation of non-Local 333 union tugs, so long as Respondent could not invoke the reopener until such a company or companies had garnered 10 percent of the market. Waldman stated however, that the provision which would permit Respondent to reopen if tugs using strike replacements operated in the harbor was something the Union simply could not accept.

Waldman counterproposed instead that he might recommend the Union's agreeing to Respondent reopening after a year if during that time any company or companies operating with striker replacements were to acquire a 30-percent share of the ship docking market. McGuire's response was that Respondent was reluctant to sign a contract committing it for so long a period of time to labor costs which, if a union strike against Moran and Turecamo failed, might be more than double those of its competitors, particularly when Respondent already was losing substantial money. Waldman, then proposed that perhaps the formula could be tied to Respondent's market share rather than that of its competitors. Waldman then proposed if Respondent's market share were to drop from 44 to 35 percent, perhaps the Union could agree to permitting Respondent to reopen after 6 months.

Waldman testified that while Respondent's proposals were not encouraging, "it was not a turn down because we then

proceeded to draft the union's position before the next meeting in written form so that they would have it in front of them."

The parties met again on February 14. The Union opened the meeting by presenting its proposals in the form of a Memorandum of Agreement. Those proposals included the same "most favored nations" clause that Respondent had sought, and a reopener which would be triggered (a) immediately if a non-Local 333 union tug operator acquired 10 percent of the ship docking work in the port of New York, or (b) after a year if one or more companies operating with replacements for striking Local 333 workers achieved 30 percent of the market share of ship docking work in the port of New York. As in Respondent's proposed "protective provisions," the reopener procedure contained in the Union's proposal provided that the contract could be terminated on 7 days' notice if an agreement could not be reached within 25 days after notice of reopening was first provided.

Waldman stated the Union's position was that a reopener should not be based on the "mere fact that there is somebody else out there operating in a certain way. It should be related to some harm or damage that McAllister was suffering by reason of that fact." He further stated that the market share concept the Union had proposed was a way to measure the presence and extent of such harm. Waldman suggested at the same time that Respondent's reopener proposal would make the contract "illusory." His primary concern was that he did not want to "be sending everybody in the port out on strike except McAllister's employees."

McGuire indicated Respondent was concerned about the risks it would face if the Union struck Moran and Turecamo unsuccessfully. Respondent was losing money, and the potential loss of operating with union wages while the coalition employers used low-cost strike replacements and cut the rates they charged for ship docking could put Respondent out of business. Respondent had calculated its losses would be about \$600,000 a month, which would amount to more than \$3.5 million if it were to agree to a reopener in 6 months, and twice that if the reopener could not be invoked for a whole year. Further, Respondent's vessels were cross-mortgaged, such that a default on one would trigger default and possible foreclosure on all the other vessels. Respondent wanted to be able to reopen immediately in order to avoid financial disaster if a strike against Moran and Turecamo failed. McGuire pointed out that the Union was aware of its vulnerability since Respondent owed more than \$300,000 to the Union's welfare and pension funds.

Waldman responded, again, by asserting that an immediate reopener would make the contract "illusory." Waldman said he would not let Cornette send the other companies out on strike in circumstances in which the membership could look at the agreement and say that it was a "makebelieve" contract and you're letting Respondent's people work and making us all strike and they didn't give you anything."

The parties went back and forth over the Union's proposal. The Union attempted to reach agreement by proposing alternatively a 1-year reopener formula tied to the market share of Respondent's competitors, and a 6-month reopener formula tied to a reduction in Respondent's market share. Respondent tried to persuade the Union that its reopener proposal would not make the contract at all "illusory" because it would not permit the contract to be terminated until: first,

another company or companies had acquired the agreed-upon market share; second, 25 days had elapsed while the parties negotiated, and third, 7 days' notice of termination had been given. McGuire pointed out it was possible that Respondent might not have to exercise its right to reopen.

Significantly, the parties never discussed the substance of Respondent's economic proposals of February 12. At some point in the negotiations, Waldman suggested that Respondent's desire for an immediate reopener would result in an "illusory" contract. McGuire replied, "[I]f you want a real contract without any of this other stuff, sign our contract with our proposals." Waldman declined.

McGuire then proposed that Respondent would sign the Union's proposal right then and there if only it would eliminate the 1-year clause and permit Respondent to invoke the reopener procedure immediately if the agreed-upon market share target was reached. The Union then proposed that it could not agree to any reopener triggered by the use of striker replacements on tugs unless Respondent was precluded from reopening for at least 6 months.

On February 15, Respondent sent the Union a letter which contained a revised contract offer. The proposals contained in that letter increased Respondent's economic offer of February 12, proposing \$155 per day for mates and deckmates instead of the \$150 Respondent had offered earlier, and \$100 per day for deckhands instead of the \$90 that had been offered earlier. This proposal was not conditioned on the inclusion of any reopener provisions. Respondent also proposed that it would, "[i]n the alternative . . . sign an agreement based on the contract proposal the Union delivered . . . yesterday, provided Respondent could reopen the contract immediately if any of its competitors who use union crews engage in ship docking using strike replacements for their union crews. The letter further stated, "We seem to be one paragraph apart but it appears to be a critical paragraph for both of us. I know my clients have gone as far as they can in compromising what they originally hoped to get out of these negotiations and have, in effect, acceded [sic] almost totally to the Union's positions." It concluded with McGuire's invitation for Cornette to call him, with the assurance that "[w]e are available to talk about any of these matters today."

This letter was not received by the Union until the Union had already voted to strike.

On February 15, the day of the expiration of the contract, the Union held a meeting at the passenger ship terminal, where it conducted a strike vote. The entire union membership was present, and one overall, standup vote was taken by the entire membership; it was not done on a company-by-company basis. During this vote, nothing was ever said about the reopener provisions that the Union and Respondent discussed during their negotiations, and Respondent's proposal was never characterized as a "one day" contract, an "illusory" contract, or anything of that nature by any Union representative.

The membership voted to strike the coalition employers and Respondent, at midnight, February 15, 1991.

The facts concerning the Union's strike vote is based on the credible testimony of Greg Aitken who was a former unit employee of Respondent. However, following the strike he obtained employment by Ekhoft Marine. I was impressed by his demeanor. His testimony was responsive and forthright.

Aitken's testimony also had the ring of truth. In this connection the facts establish that an entire group of some 2000 union members were voting by standup vote on whether to strike an entire group of 10 or more employers. Common-sense dictates that in a raucous, "pep rally" atmosphere like that which prevailed at the Union's strike vote meeting on February 15, minor differences between the proposals of one company and those of the next would neither be mentioned nor paid particular attention to even if they were. All the more would this be so where the Union was fired up to strike the "Gang of Six." Compared with those employers, Respondent, although not quite "small potatoes," was a much smaller player, and any differences between its proposals and theirs would not likely have been highlighted.

Peter Gale and Louis Spadaro did testify that the reopener proposals were mentioned at the strike meeting. I do not credit their testimony, which is wholly at odds with Aitken's testimony.

Aitken is no longer employed by Respondent and was in a sense an objective third-party witness without any financial interest in the outcome of the trial. Spadaro, on the other hand, had been a member of the Union's negotiating committee; Gale, was one of the Union's chief negotiators.

Spadaro's testimony is suspect. It appears tailored to establish an unfair labor practice strike. When asked what was said he testified, as though reciting what he thought he was supposed to say, "Well they gave a synopsis of the offer from Respondent, they also indicated about the reopening clause in there and they specified, you know, they advised the guys that it was like not having any contract at all." However, his memory as to other aspects of the strike vote meeting were almost entirely nonexistent.

Similarly, Gale's testimony on the matter of whether the meeting included a discussion of the reopener proposal is wholly lacking in credibility. On direct examination, he was asked, "What was stated, if anything, with regards to McAllister at the [February 15] meeting?" He testified:

Cornette told the membership that McAllister wanted a contract that wasn't a contract. I think he used the term one day contract that they wanted to be able to get out of, potentially right away.

However, in connection with the Union's charges against the coalition employers, Gale gave an affidavit in which he described the February 15 meeting in the following manner:

On the day of February 15, we held a union membership meeting to present to the membership the most recent offer from management. There were about 2,000 members present. Cornette ran the meeting. He opened up by stating that we had offers from the Gang of Seven, McAllister, Polling, and that they were in his view and in the view of the negotiating committee were unacceptable. And that the only course available was to reject them. . . . He said that the proposals from the Gang of 7, Hess, Polling, and McAllister called for severe reductions in manning, no overtime, elimination of the existing scope of the unit clause . . . and drastic changes in the pension and insurance plans.

Significantly, Gale said not a word about the "protective clauses," in connection with Respondent. Nor did he say

anything about the “protective clauses” in his deposition in the 10(j) proceeding against the coalition employers when he described the state of the Union’s negotiations with Respondent, other than to say, “I don’t think that employees’ protective clauses were a problem.”

During the interim, the strike had proved unsuccessful. The anticipated ILA support of the Union’s strike did not materialize, and Respondent, Moran, and Turecamo were able to conduct ship docking operations with strike replacements. As of March 18, each company had retained approximately the same share of the ship docking market it had enjoyed before the strike.

On March 16 Respondent sent a letter to the Union and a copy of new proposals. The latter pointed out that during the interim period of February 15 and March 16—and because of the obviously changed competitive climate in the harbor, some of Respondent’s new wage proposals were different, and in some cases lower than those contained in its February 12 proposals, which had been withdrawn on February 15. Respondent’s March and April proposals contained no reopener provision of any kind whatsoever.

The parties next met on March 18. The Union rejected Respondent’s proposals out-of-hand as “regressive.” McGuire explained that the parties were bargaining in a much different environment than they were before the expiration of the agreement. McGuire pointed out the tug companies that competed against Respondent had been operating, Respondent had recruited replacement employees at far lower wages, and Respondent could now no longer talk about a contract with a 10-percent reduction. Respondent estimated that Moran and Turecamo were operating with labor costs anywhere from \$800 to \$1000 a day and that included their security costs. Daily labor costs per tug under the Union’s 10-percent reduction proposal.

The Union re-proposed its February 14 proposal and suggested a contract with a 3-month reopener instead of a right to reopen after 6 months or a year. Respondent pointed out that the strike had proved unsuccessful and reopeners and protective proposals were irrelevant. Thereafter protective clauses was never brought up in this on any subsequent negotiation.

Respondent tried to focus on its discussion manning levels, Respondent took the position that to reduce labor cost the Union would have to reduce crew. The Union was willing to think about omitting the cook’s position in exchange for some sort of “buy out.” Respondent took the position that clearly would not be enough to get labor costs down to the neighborhood of the \$800–\$1000 per day in labor costs that Moran and Turecamo were now paying to do ship docking with replacements.

Respondent stressed that it could not sign a contract with higher labor costs than those paid by its competition. Respondent offered not only to sign an agreement for whatever wages Moran or Turecamo was paying, whichever was greater, but also to negotiate an agreement together with those companies exclusively for ship docking work. The Union demurred, observing that Moran and Turecamo did other kinds of work in addition to ship docking, and that it did not feel they would be interested in such an arrangement.

The Union proposed instead that minor adjustments to the expired agreement, such as the overtime provisions, would provide the basis for a contract. The Union stressed that if

Respondent signed such an agreement, the Union would get you 10 shipping companies who will sign up with you immediately. The March 18 meeting ended with Respondent agreeing to check around to see whether, if it had a contract with Local 333, there were shipping companies that would switch to McAllister as a result.

According to McGuire, Respondent did check with the ship docking companies. It did not appear that a significant number of them would agree to use Respondent instead of Moran or Turecamo in the event Respondent became the only tug company doing ship docking operations in the port that was signed on with the Union. According to McGuire, the other companies simply were not interested in making a long-term commitment to any single tug operator.

The parties next met on March 30, with the assistance of Robert Kennedy, a mediator from the Federal Mediation and Conciliation Service. The parties exchanged a series of proposals based on their prior proposals. The parties then caucused to cost out those proposals. Respondent concluded that each proposal the Union made still left it with labor costs of around \$1700 a day, while its competition was then paying only \$900 or \$1000 per day.

The Union pointed out that Respondent would be protected by the most-favored-nations clause it had agreed to sign, but Respondent responded that this clause would apply only if Moran and Turecamo signed with the Union. Respondent proposed signing a contract which provided wages to match those of either of its competitors, at the Union’s option. The Union proposed signing an agreement to pay the same wages that Ekloff (a towing company that was heavily engaged in the lucrative oil barge market and did no ship docking work) was paying its replacements. Respondent refused because it was not competing with Ekloff, but rather with Moran and Turecamo. The meeting concluded with the Union’s asking Respondent to furnish a proposal that set forth exactly what Respondent was willing to offer to end the strike.

On April 4, Respondent sent such a proposal which set forth as follows:

This proposal is for crews involved in ship’s docking work only. We urge you to give this proposal serious consideration. Do not reject it just because it is different. Captains involved in ship docking would get paid \$42,525 per year, plus \$1,215 in the 401K contribution; engineers and deckmates \$37,665 per year plus \$1,215 in 401K contributions, and deckhands from \$19,440 to \$24,300 per year plus \$1,215 in 401K contribution if they worked a full 243 day year. As you know ship docking is not merely as strenuous or demanding work as towing barges, nor does it require as much skill. Although the men will be working more days than under the previous contract, the Captain and crew on McAllister’s tugs have a great deal of “down time” during the working day and would also have at least eight hours of uninterrupted rest each day.

This proposal also included different, higher wage rates for captains and crew members engaged in coastwise towing, although Respondent currently does very little barge towing.

The parties next met on April 5. The Federal Mediator was present. The Union opened the meeting by characteriz-

ing Respondent's proposal as "bullshit." "The parties once again went back and forth, persistently ending far apart, with Respondent looking for labor costs in the area of \$800–\$1000 per day, while the Union's proposals persistently resulted in costs above \$1500 per day." Respondent proposed that reducing crew levels was the only way to bridge the gap between the parties, stating that the cook and the extra deckhand should be eliminated. The Union responded to the proposed elimination of the second deckhand by stating it was out of the question, it was a deal breaker. At this point the session ended.

The parties did not meet again until August 23, and thereafter again on September 30 and December 12. At each meeting there was no movement by either side from the positions they held on April 5. The same issues were discussed in these three meetings as in the prior meetings, particularly manning levels.

Subsequent to the strike, Respondent continued its operations using strike replacements who were offered permanent positions.

On June 2, the first bargaining unit employee left the strike and returned to work with Respondent. Two more returned on June 8 and 16, respectively, and three more subsequent to February 1990. The terms and conditions of employment of these unit members were not inconsistent with those contained in Respondent's proposal of April 4. These terms and conditions were different from, and less favorable to these employees than those contained in the expired agreement. In addition, Respondent did not make payments to the pension and welfare funds for these returned strikers.

On September 2, the Union telecopied a letter to Respondent which stated:

By this letter Local 333 makes an unconditional offer, on behalf of all members of the bargaining units covered by the expired collective bargaining agreements, to return to work under the terms and conditions that existed under the expired collective bargaining agreement.

The letter also accused Respondent of unspecified unfair labor practices. By letter of September 14, McGuire responded on behalf of Respondent denying that Respondent had committed any unfair labor practices, and advising that the Union's offer on behalf of the employees to return to work was not unconditional because many months ago, Respondent and Local 333 reached a good-faith impasse in bargaining over company proposals for wages, hours, staffing levels, and terms and conditions of employment substantially below those contained in the expired collective-bargaining agreements.

By a letter dated September 14, 1988, McGuire proposed on behalf of Respondent that the men be returned to work under the terms and conditions of Respondent's April 4 proposal without prejudice to either party's right to assert to the Board any positions it or the strikers might wish; that the question of the terms and conditions to which returning strikers are entitled would be resolved by the Board if the parties could not settle it by bargaining; and that the parties would continue negotiating to conclude a new collective-bargaining agreement.

By a letter dated September 26, the Union declined this offer disagreeing as to McGuire's characterization of the pre-

vious bargaining and stating that while the Union might be willing for the men to go back to work under interim terms and conditions less favorable than those of the expired agreement, the terms of the April 4 proposal were unacceptable.

Respondent replied to this letter on September 23, offering to meet and bargain. This offer was made shortly before the parties met to bargain on September 30. No agreement was then reached concerning the reinstatement of striking employees.

Respondent did not use the Union's hiring hall to recruit new employees at any time after the Union's offer of September 2.

Analysis and Conclusions

The facts of this case establish that both parties came into these negotiations with a good-faith effort to reach an agreement. The parties had a long and amicable relationship with each other and there is no evidence that Respondent was trying to rid itself of the Union. Rather there is undisputable evidence that as a result of competition Respondent was losing a tremendous amount of money annually. For example, Respondent had lost \$1.9 million in 1987 alone. Moreover, Respondent was significantly delinquent in its pension and welfare payments to the Union's funds. The parties were aware that an industrywide strike in the tugboat industry in New York harbor was highly probable and Respondent's competitors in anticipation of such strike had made arrangements to operate with strike replacements. It was with this economic climate and with these conditions that Respondent proposed its protective clauses. The first question that must be explored is whether in light of the circumstances of this case, such protective clauses constitute a mandatory subject of bargaining.

The Board has consistently held that duration clauses, reopener clauses and "most favored nations" clauses are mandatory subjects of bargaining *Steelworkers Local 2140 (United States Pipe)*, 129 NLRB 357, 360 (1960), enf. denied on other grounds 298 F.2d 873 (5th Cir. 1962); *Dolly Madison Industries*, 182 NLRB 1037 (1970); *NLRB v. Lion Oil Co.*, 352 U.S. 282, 285–286 (1957). Respondent's proposed protective clauses have elements of each type of the clauses described above. Thus, Respondent's proposed clause would condition the duration of the agreement on Respondent's competitors operating during a strike with nonunion replacements or replacements represented by another labor organization and capturing a specified percentage of the ship docking work normally performed by Respondent. On the happening of either condition, Respondent could reopen the agreement and thereafter terminate the agreement on 7 days' notice, if a new agreement was not reached within 25 days after Respondent's notice of such reopening was first provided.

Counsel for the General Counsel contends that the provisions of the protective clauses as proposed by Respondent provide for an uncertain or unreasonable duration without any reasonable economic justification. In this connection the General Counsel essentially contends that Respondent's proposal assumed that there would be a strike and that Respondent's competitors would operate their tugs with nonunion or other union replacements, and would trigger the economic percentages described in Respondent's proposals. Thus, the General Counsel contends the term of such proposed agreement would be "illusory," resulting in a contract of unrea-

sonably short duration. However, the Board has held that an employer's insistence on a collective-bargaining agreement which contains a short or otherwise unreasonable duration is an indicia of bad faith only where there is no reasonable economic justification for such duration. *Cleveland Sales Co.*, 292 NLRB 1151, 1155-1156 (1989); *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980); *Bagel Bakers Council of Greater New York*, 174 NLRB 622, 630 (1969); *Borg Warner Corp.*, 128 NLRB 1035, 1051 (1960). In *Ellis Tacke Co.*, 229 NLRB 1296, 1302-1303 (1977), the Board held that a contract provision giving the union an exclusive right to terminate the contract at any time upon written notice does not in and of itself make the contract illusory. However, a party's insistence on a contract with no termination date, thus making the contract terminable at will is an indicia of bad-faith bargaining.

I conclude, contrary to the General Counsel's contention, that the facts establish that Respondent clearly had economic justification for bargaining and seeking inclusion of protective clauses in a collective-bargaining agreement, and that the Union was not only aware of such justification, but so sensitive to Respondent's position to the extent that it made counterproposals concerning such clauses. Respondent made the Union aware that it was operating with extreme monetary losses that threatened its continued existence. The Union never disputed this assertion. In this regard, Respondent was delinquent, in significant amounts, to its required union fund contributions. The Union even attempted to accommodate Respondent's proposals for protective clauses by proposing its own protective clauses. However, as Respondent convincingly argued in negotiations, such union proposals, which set forth the same economic conditions for reopening, but proposed different fixed time periods, as the time when such reopener could be activated, could result in such catastrophic losses that Respondent could be out of business long before even the shortest time period of 3 months, proposed by the Union, could take effect. Thus, it is clear that the Union's only dispute concerning Respondent's protective clause proposals was the unlimited time period proposed by Respondent which would activate the reopener. Respondent's February 15 letter to the Union which stated: "We seem to be one paragraph apart but it appears to be a critical paragraph for both of us," accurately describes the state of negotiations as of February 15, the date that the Union took a strike vote and the membership voted to strike Respondent and other employers in the tugboat business operating in New York harbor.

The General Counsel contends that Respondent's proposed protective clause is nothing more than a proposal for a contract, terminable at will, with no fixed term. The General Counsel relies primarily on *Massillon Community Hospital*, 282 NLRB 675 (1987), in support of this contention. However, the instant case is clearly and most significantly distinguishable from the *Massillon* case and other similar cases cited by the General Counsel in his brief. In *Massillon*, the Board held that the employer had bargained in bad faith by insisting on a contract, terminable at will. In this connection the Board stated :

[A]bsent any lawful or reasonable economic justification, a party's unwillingness to enter into a contract for a fixed term raises in and of itself a presumption that

the party is not bargaining in good faith. [282 NLRB at 676.]

However in the instant case, as distinguished from *Massillon*, and the other cases cited by the General Counsel in its brief, Respondent presented to the Union persuasive and compelling economic justification for its proposed protective clause, as set forth and discussed above. Moreover, as also set forth above, the Union was so convinced of Respondent's economic justification, that it counterproposed various other protective clauses, all of which Respondent found unsatisfactory because it failed to meet Respondent's economic needs. The instant case is also distinguishable from *Massillon* and the other cases cited by the General Counsel that in the instant case, Respondent had agreed to a specific 3-year contract term. This protective clause was merely a reopener provision that might not result in a contract of a short term. By its terms, it might not even become necessary to reopen the agreement, the conditions triggering the reopening might not take place within the agreed-on 3-year contract term. Thus, though there was a high probability that a strike would take place and Respondent's competitors would hire strike replacements, this fact does not establish that Respondent would necessarily meet those conditions necessary to trigger the protective reopener provision in issue so as to make the contract terminable at will or of unreasonably short duration.

Thus, by February 15, it appears that agreement had been reached by the parties on essentially all issues but the protective clause. Further, it appears that Respondent was unable to agree to a contract with the Union without such protective clause and that the Union was equally unable to take to its membership an agreement which included Respondent's proposed protective clause. Under these circumstances, I conclude that as of February 15, after the Union obtained strike authorization from its members, a lawful impasse had been reached. *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enf. 395 F.2d 622 (8th Cir. 1968).

The evidence establishes that following the February 15 bargaining session, and the commencement of the strike, Respondent never again proposed the above protective clauses. Accordingly, I conclude that there is insufficient evidence to establish that Respondent insisted to impasse on the inclusion of such protective clause and thus, insufficient evidence to establish that Respondent bargained in bad faith as alleged.

The General Counsel has alleged in its complaint that the strike which took place since February 16, was an unfair labor practice strike caused by Respondent's insistence on inclusion in a collective bargaining between the parties of Respondent's protective clauses described above, an alleged nonmandatory subject of bargaining.

C-Line Express, 292 NLRB 638, 639 (1989), accurately sets forth the Board's objective and subjective considerations that determine whether a strike is an unfair labor practice or an economic strike. The Board in *C-Line* states:

[A]n employers unfair labor practices during an economic strike do not ipso facto convert it into an unfair labor practice strike. Rather, the General Counsel must establish that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.

The Board goes on to point out that:

In many cases the record will afford the Board an opportunity to evaluate the employees knowledge of, and subjective reactions to, an employers unlawful conduct in order to confirm that it interfered with the settlement of a strike and thus prolonged the work stoppage.

I.e., the subjective considerations. The Board states further that:

Certain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding a conversion.

I.e., objective considerations. Application of either standard assumes that Respondent has committed unfair labor practices.

In the instant case, I have concluded that Respondent's demand for inclusion in an agreement negotiated between Respondent and the Union of the protective clause proposed by Respondent was not an unfair labor practice. Since it is not alleged that Respondent has committed any other unfair labor practice prior to February 16, the date the strike commenced, I conclude that at its inception, the strike was an economic strike. As set forth and discussed below, I have concluded that actions by Respondent which took place subsequent to February 15, and alleged by the General Counsel to constitute unfair labor practices, were not unfair labor practices. Accordingly, I conclude that the unions strike, beginning on February 16, 1988, and at all times thereafter was an economic strike.

It was stipulated that following the strike on February 16, Respondent continued to operate with strike replacements. At various times thereafter, a total of six unit employees abandoned the strike and returned to work with Respondent. These employees received terms and conditions of employment which were consistent with Respondent's April 4 proposals, but were lower and less favorable than the terms and conditions set forth in the expired contract. The General Counsel contends that the change in the terms and conditions of the rehired strikers from those set forth were unilateral changes that Respondent could not make unless Respondent bargained in good faith with the Union and the Union agreed to such change or an impasse was reached. *Taft Broadcasting* supra. However, the law is well settled that an employer does not violate the Act if he makes unilateral changes after a legitimate impasse has been reached. *Taft Broadcasting*, supra; *Western Newspaper Publishing Co.*, 269 NLRB 355 (1984). The terms and conditions offered the returning strikers were consistent with Respondent's proposals made to the Union' on April 4, 1988. Although these terms were less favorable than the terms set forth in the expired contract, a lawful impasse had been reached on February 15, Respondent was now in a stronger economic position since it was able to operate with strike replacements. Accordingly, I conclude that such unilateral changes did not violate Section 8(a)(5) of the Act.

The General Counsel contends that following the expiration of the contract on February 15, 1988, Respondent failed to make fund payments to the Union's fund pursuant to the terms of the expired contract, without bargaining with the

Union and in violation of Section 8(a)(5) of the Act. Respondent admits that it did not make fund payments after the expiration of the contract on February 15. In view of my conclusion that a lawful impasse had been reached by February 15, the date the parties contract expired, Respondent was free to make such unilateral change. *Taft Broadcasting* supra; *Western Newspaper Publishing*, supra; *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir 1982); *Excelsior Pet Products*, 276 NLRB 759 762-763 (1985). Accordingly, I conclude Respondent did not violate the Act by its failure to make such fund payments.

The General Counsel also contends that following the expiration of the parties, contract, Respondent thereafter failed to utilize the union's hiring hall as required by the terms of the expired contract, and that such failure constitutes a unilateral change in the terms and conditions of employment in violation of Section 8(a)(5) of the Act. Respondent admits that following the expiration of the contract on February 15, it no longer utilized the Union's hiring hall. Based on the conclusions of law described above relating to Respondent's unilateral changes, I conclude for the same reasons that Respondent did not violate Section 8(a)(5) of the Act by such action. *Excelsior Pet Products*, supra.

The General Counsel contends that Respondent violated Section 8(a)(3) of the Act by its failure to reinstate the strikers pursuant to the Union's letter dated September 2, 1988. The facts establish that such offer to return to work was specifically conditioned on the returning strikers receiving the same terms and conditions set forth in the parties' expired contract. Respondent, by a letter in response to the Union's September 2 letter refused to reinstate the striking employees, claiming the unions offer was conditional.

It is well settled that whether a strike is economic or an unfair labor practice strike, a striker's right to reinstatement is triggered on an unconditional offer to return to work. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-380 (1967). It is equally well settled that a conditional offer, whether the strike is an unfair labor practice strike or an economic strike, does not trigger reinstatement rights of any kind. *Mid-County Transit Mix*, 265 NLRB 782, 788-789 (1982); *Atlanta Daily World*, 192 NLRB 159 (1971). Since it is clear that the offer of reinstatement at issue was conditional on a return under the same conditions as provided in the parties expired contract, and that Respondent was no longer applying such terms and conditions to newly hired employees, I conclude Respondent did not violate Section 8(a)(1) and (3) of the Act by its refusal to reinstate striking employees pursuant to the Union's conditional September 2 offer.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated Section 8(a)(1), (3), and (5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

³If 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

ORDER

The complaint is dismissed in its entirety.

adopted by the Board and all objections to them shall be deemed waived for all purposes.