

**Noel Foods Division of the Noel Corporation and General Teamsters Local 524, International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Cases 19-CA-21094 and 19-CA-21330

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND DEVANEY

On March 18, 1993, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.

The issues before us concern certain allegedly unlawful actions taken by the Respondent in response to an economic strike called by the Union and engaged in by approximately 50 employees. The complaint alleges that the Respondent effectively discharged numerous employees, in violation of Section 8(a)(3) and (1) of the Act, when several of its supervisors informed them that if they chose to strike they would be permanently replaced, in effect as soon as they began to withhold their services, even though the Respondent had not obtained permanent replacements for all the potential strikers at the time the statements were made. The complaint also alleges that the Respondent constructively discharged many of the employees, again in violation of Section 8(a)(3) and (1), by informing them that the Respondent would become, or had become, "nonunion" when the strike commenced. The complaint further alleges that, because of the numerous unlawful discharges, the Respondent did not bargain to a lawful impasse and consequently violated Section 8(a)(5) and (1) by unilaterally implementing the terms of its final bargaining proposal some 2 weeks after the strike had begun. Finally, the complaint alleges that the Respondent violated Section 8(a)(3) and (1) by refusing to pay strikers accrued vacation pay unless they

resigned, while continuing to pay vacation benefits to nonstrikers.

The judge found that the Respondent did not violate the Act in any respect.<sup>3</sup> The General Counsel has excepted, and contends that each of the alleged violations should be found. For the reasons discussed below, we find merit in some of the exceptions. Thus, we find that the Respondent unlawfully terminated numerous employees who engaged in the strike after being threatened with permanent replacement, constructively discharged an employee who quit his employment because he was informed that the Respondent was operating nonunion, and unilaterally changed terms and conditions of employment of unit employees without first bargaining to a valid impasse.

Facts

The Respondent is a wholesale grocery distributor with operations centered in Union Gap, Washington, a suburb of Yakima. It serves businesses in other cities in Washington and other States. The Union represents a unit of the Respondent's warehouse employees (with certain exceptions), truckdrivers, and service and sales personnel. The parties' collective-bargaining relationship extends back for about 10 years. The most recent collective-bargaining agreement was effective from August 29, 1987, until August 29, 1990.

The parties negotiated during the late summer of 1990 for a successor agreement.<sup>4</sup> By late August, the parties still had not reached agreement on three issues: the amount of the Respondent's contributions to the Union's pension plan, the type of health benefit plan for unit employees, and the exclusion of salesmen from the bargaining unit. On Wednesday, August 29, the parties agreed to substitute a company health care plan for the existing union health benefit plan, and apparently also agreed that salesmen would be excluded from the unit. They were still some distance apart on the pension contribution issue, however; the Union proposed a 15-cent-per-hour increase for each of the 3 years of a new contract, and the Respondent countered with an offer of a one-time increase of 7 cents an hour. The Union put the Respondent's offer to a vote of the membership late that afternoon. The employees voted to reject the offer and to strike at midnight. The strike that began that night is conceded to be an economic strike; there is no allegation or contention that it was either caused or prolonged by the Respondent's alleged unfair labor practices.

The Respondent was notified of the outcome of the strike vote about 8 p.m., and immediately took steps

<sup>1</sup>The name of the Charging Party has been changed to reflect the new official name of the International Union.

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

<sup>3</sup>The judge rejected the Respondent's contention that the strike was unprotected because the Union allegedly failed to comply with the notice requirements of Sec. 8(d). No exceptions were filed to the judge's decision in that regard.

<sup>4</sup>Unless otherwise stated, all dates refer to 1990.

designed to enable it to continue to operate as normally as possible during the anticipated strike. Shortly before 9 p.m., Human Resources Manager Dave Cummins telephoned Employment Plus, a personnel agency that already had been seeking applicants on the Respondent's behalf for possible use as striker replacements. The agency's co-owners, Chris Wellner and Erin Hale, were told by Cummins and Mike Noel, the Respondent's general manager, to get as many potential striker replacements as possible to the Respondent's facility by midnight. Wellner and Hale began contacting individuals who had responded to the agency's help-wanted advertisement for the Respondent during the past 2 days. They ultimately obtained 15 replacements that night; those individuals reported for work around midnight.

Meanwhile, at about 9 p.m., Mike Noel called a meeting of the Respondent's managers. Noel informed the managers that the Respondent intended to obtain permanent replacements for the strikers, and discussed the legal and practical consequences of doing so. He also told the managers to telephone the unit employees and find out who intended to strike and who did not. Pursuant to that instruction, Operations Manager Rod Robbins, Traffic Manager Ed Shirley, Day Warehouse Supervisor Don Miller, and Chemical Beverage Manager Jim Foster called numerous unit employees during the night of August 29–30. Robbins, Shirley, Miller, and Foster made a number of statements during those telephone calls that are alleged to be unlawful. The gist of those statements was that anyone who went on strike would be permanently replaced; some employees testified that they were told that they would be permanently replaced if they did not report for work on their next scheduled shift. Employees were also informed that, as of midnight, the Respondent would be operating nonunion.<sup>5</sup>

At about 10:15 p.m. on August 29, Robbins called a meeting attended by employees on the night shift at the warehouse, as well as by several swing shift workers who had not yet gone off duty. At that meeting, Robbins made further allegedly unlawful statements, again to the effect that strikers would be permanently replaced and that the Respondent would become nonunion at midnight.

After the strike and picketing commenced at midnight, and during the ensuing days and weeks, the Respondent's supervisors made additional remarks to employees that are alleged to be unlawful. Those state-

<sup>5</sup>Not all employees testified that they were told both that they would be permanently replaced if they struck and that the Respondent would become nonunion at midnight. Some testified only as to the former, and others only to the latter.

Several employee witnesses testified that they were informed that, in effect, they would be terminated, lose their jobs, or never work for the Respondent again if they honored the strike. The judge discredited that testimony.

ments again were that strikers would be permanently replaced and that the Respondent was now operating nonunion.

On September 10, the parties held their first bargaining session following the commencement of the strike. A Federal mediator was present, and the parties made their proposals through him, rather than face to face. The union negotiators told the mediator that their chief concerns were for increased contributions to the Union's pension plan and for the reinstatement of all strikers. The Respondent's negotiators testified that they countered by proposing to replace the union pension plan with the Respondent's own pension plan and to delete the union-security provision. They also testified that they told the mediator that some of the strikers had been permanently replaced and that the process of replacing others was continuing. The Union's witnesses testified that the mediator informed them that the Respondent was proposing to end union security and to substitute the Noel pension plan for the union pension plan, and claimed either to have permanently replaced all strikers or to have placed them on a preferred hiring list.<sup>6</sup> In any event, the union negotiators were unwilling to consider ending the strike unless all strikers were reinstated, and left the bargaining session.

By letter dated September 11, the Respondent reiterated its contract proposal of the previous day (with minor modifications), and stated that if the Union had not responded by September 14, the Respondent would deem its offer rejected. The Union did not respond. By letter dated September 18, the Respondent declared impasse and implemented the terms of its final offer, retroactive to September 1, except for the provisions concerning union security and arbitration, which the Respondent did not claim could be implemented without the Union's agreement.

During the strike, several strikers asked representatives of the Respondent if they would be receiving vacation pay at the time of their scheduled vacations. They were informed that they could not receive vacation pay unless they resigned. A few strikers did resign and received their vacation pay; others did not resign and did not receive the payments sought. As for the nonstrikers, Mike Noel announced at the beginning of the strike that all vacations were canceled until further notice; later, however, nonstrikers were allowed to take vacations on a case-by-case basis.

<sup>6</sup>Pursuant to long-established Board practice, the mediator did not testify at the hearing, and the judge did not resolve the testimonial discrepancy. There is no allegation, however, that the Respondent falsely claimed to have permanently replaced any strikers or that it unlawfully refused to reinstate any striker who had not been permanently replaced and who had unconditionally requested reinstatement. Thus, whether the Respondent actually said that it had permanently replaced all or only some of the strikers is immaterial to the issues presented in this case.

## Analysis

### 1. The “permanent replacement” statements

The General Counsel first alleges that the Respondent effectively discharged numerous employees by telling them that strikers would be permanently replaced, at times when insufficient replacements had been obtained to replace all the potential strikers.<sup>7</sup> The judge found that the Respondent’s supervisors made a variety of such statements, but that the statements were not unlawful. The General Counsel excepts. To the extent discussed below, we find merit to the General Counsel’s exceptions.

Operations Manager Robbins testified that he announced at the night-shift meeting on August 29, less than 2 hours before the strike was to occur, and in separate conversations with other employees on the same night, that striking employees would be permanently replaced and that the Respondent had hired permanent replacements.<sup>8</sup> The judge found that at the time these statements were made, “the task of marshalling a measurably complete replacement program was not yet even under way.” Contrary to the judge and to our dissenting colleague, we find that Robbins’ remarks constitute an unlawful threat of termination under the rationale of *American Linen Supply Co.*<sup>9</sup> Accordingly, we find that those night crew employees who did not yield to the unlawful threat and engaged in the strike were effectively terminated in violation of Section 8(a)(3) at midnight on August 29, and that day-shift employees who were threatened by Robbins that evening and who joined the strike on the morning of August 30 were similarly unlawfully discharged.

The Board has held that an employer who informed lawful economic strikers that they had been permanently replaced, when in fact the employer had not obtained such replacements, terminated the strikers in violation of Section 8(a)(3).<sup>10</sup> The Board reasoned that a false statement that permanent replacements had been obtained effectively resulted in withholding from strikers the right to return to their unoccupied jobs solely because they went on strike. In *American Linen*,

the Board extended this rationale to false statements about permanent replacements made to employees shortly before the commencement of a strike. There, the employer distributed a memorandum to employees about 10 minutes before 7 a.m., the starting time for work, informing them that if they did not return to work at 7 a.m., “you are permanently replaced.” The Board found that the employer made a false statement when it indicated that the striking employees would be permanently replaced by 7 a.m., because it was unlikely under the circumstances that the employer actually had obtained replacements for the strikers. The Board concluded that such a false statement constituted an unlawful termination threat, and that the employer unlawfully terminated the employees who did not abandon the strike by the deadline.

The Respondent’s actions in this case are very much like those of the employer in *American Linen*. According to Robbins’ testimony and that of many employees who attended the night-shift meeting on August 29 or received a call from him that evening, Robbins stressed that a strike was called to begin at midnight and that the company would then become nonunion. In emotional terms, Robbins told the employees that they would have to make the choice that was best for them. He told them that if they chose to strike, they would be permanently replaced. Robbins also testified that he told employees at the night-shift meeting and in separate phone calls that the Respondent had hired permanent replacements. Robbins’ remarks were made less than 2 hours before the strike was scheduled to begin.

Robbins’ statement that if the employees struck they would be permanently replaced, viewed in context, is virtually identical to the employer’s statement in *American Linen*. Robbins clearly identified midnight on August 29 as a deadline. The emphasis on a rapidly approaching deadline and the necessity to make a choice at that deadline indicated to employees that a choice to strike would result in immediate permanent replacement.<sup>11</sup> In this regard, we see no significant difference between the *American Linen* employer telling employees that if they engage in a strike which will occur within 10 minutes, they “are” permanently replaced, and Robbins telling them that if they engage in a strike which will begin in less than 2 hours, they “will be” permanently replaced. The message is the same in both cases: if employees join the strike when it begins, they will be permanently replaced at that time.

Our dissenting colleague argues that Robbins did no more than imply that the Respondent intended to exercise its right to replace strikers permanently when it could do so. He relies on *Chromalloy American*

<sup>7</sup>The General Counsel also alleges that the Respondent told several employees, in various ways, that if they struck, they would be out of a job or would never work for the Respondent again. As we have noted, however, the judge discredited the testimony supporting those allegations.

<sup>8</sup>Robbins testified that he did not remember specifically what he had said to all the employees on the telephone, but stated that the conversations were all “very similar.” We construe that testimony as an admission that Robbins told all the employees with whom he spoke that strikers would be permanently replaced and that permanent replacements had been hired.

<sup>9</sup>297 NLRB 137 (1989), *enfd.* 945 F.2d 1428 (8th Cir. 1991).

<sup>10</sup>*Mars Sales & Equipment Co.*, 242 NLRB 1097 (1979), *enfd.* in pertinent part 626 F.2d 567 (7th Cir. 1980), and *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978), *enfd.* on other grounds 617 F.2d 349 (3d Cir. 1980).

<sup>11</sup>For this reason, our decision applies only to statements made to employees who were required to make a decision about striking at the midnight deadline or by the beginning of the morning shift some 6 hours later.

*Corp.*<sup>12</sup> to find that Robbins' remarks were a lawful expression of the employer's right to hire permanent replacements. In that case, the employer sent letters to employees who were already on strike, urging them to return to work and informing them that if they did not return by a certain date, the employer would take steps necessary to exercise its right to permanently replace them. The Board found that the employer's letter merely notified employees who were already striking that it intended to exercise its legal right to obtain permanent replacements if they did not return to work. The letter was consistent with the law and did not threaten that employees would be deprived of their rights in a manner inconsistent with *Laidlaw Corp.*<sup>13</sup>

We are not persuaded by the dissent's argument that the statements at issue here are of the same type as those analyzed in *Chromalloy American*. There, the employees were already on strike. The letter mentioned a specific date for employees to return to work, but that date was not imminent. Further, the letter expressly stated that the employer would take necessary steps to obtain permanent replacements, making it clear to employees that the process of permanent replacement had not yet begun and would not begin until the date mentioned in the letter. Here, in sharp contrast, the employees were not yet on strike. They were told they had to make a decision in a matter of a few hours to either continue in their jobs or to strike and be permanently replaced. There was nothing in Robbins' remarks which expressly indicated that the process of replacement had not yet begun. To the contrary, Robbins admitted that he also told the employees that permanent replacements had been hired. This admission dispels any uncertainty concerning the import of Robbins' statements to the employees that they would be permanently replaced if they engaged in the strike.<sup>14</sup>

<sup>12</sup> 286 NLRB 868 (1987), enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). Chairman Gould finds it unnecessary to address the propriety of *Chromalloy American* at this time because he finds that in any event it does not apply to the circumstances of this case.

<sup>13</sup> 171 NLRB 1366 (1968), enf. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

<sup>14</sup> A number of employees testified that supervisors, such as Miller, Wright, and Shirley, told them on the evening of August 29 that they would be permanently replaced if they joined the strike scheduled to begin at midnight. The supervisors either did not recall making such statements, testified that they told employees that the Respondent would be trying to permanently replace strikers, or denied making threats to permanently replace strikers. The judge did not make express credibility resolutions concerning the alleged statements by supervisors. He did, however, question the suggestibility of the employee witnesses, particularly with regard to statements made by the Respondent's agents during the last days of August. He also found that all the supervisors' word choices concerning permanent replacement amounted to no more than telling employees that the Respondent would take the necessary steps to continue full operations. The judge, therefore, implicitly found that the supervisors did not convey the message that the employees would be permanently

Our dissenting colleague discounts Robbins' admission by "doubting" that Robbins made the statement he claims to have made. He takes this unusual step of questioning an admission in the absence of any showing that Robbins gave contrary evidence at an earlier point in the investigation, left his job holding a grudge against the Respondent, or engaged in any other activity which would give cause to question the veracity of his admission.<sup>15</sup>

The principal reason given by the dissent for rejecting Robbins' admission is that employees did not corroborate his statement. We are not persuaded by this reasoning. It is true that no employees testified that Robbins told them that the Respondent had "hired replacements." On the other hand, the employees did not contradict Robbins' admission. They testified that Robbins told them, shortly before midnight on August 29, that a strike was called for midnight and that if they chose to strike, they would be permanently replaced. In our view, it is not significant that the employees made no reference to the hiring of replacements. In the face of the deadline that was presented to them, the phrases "you will be permanently replaced" and "the company has hired permanent replacements" reasonably could be viewed as conveying the same message of immediate replacement.

For these reasons, we rely on Robbins' statement that he told employees that the Respondent had hired permanent replacements. That statement, made at a time when the Respondent had not in fact hired permanent replacements for all the potential strikers, gives conclusive support for the finding that the Respondent's actions come within the scope of *American Linen* and constitute an unlawful threat of termination.

Of the employees who attended the night crew meeting on August 29, only Tom Glass, Jim Stiltner, Leo Hull, and Bret Lombard joined the strike at midnight. For the reasons explained above, we find that those employees were effectively terminated.<sup>16</sup> Richard Wilson (through his wife Susan), James Doll (through his wife Mary), Marty Layman, Greg Bolin, Roger Layman, and Chuck Foster (through his wife Mardi) were recipients of Robbins' telephoned threats on the evening of August 29, but joined the strike rather than

replaced at the time they joined the strike. This finding does not relate to Robbins, who, unlike the other supervisors, admitted that he told employees they would be permanently replaced if they engaged in the strike and that permanent replacements had been hired.

<sup>15</sup> Cf. *McCotter Motors Co.*, 291 NLRB 764, 768 (1988) (supervisor's admission discredited where admission was not included in investigatory affidavit, supervisor admitted giving a false affidavit, and there was no corroboration of the admission by employees).

<sup>16</sup> Other employees attended the meeting, but they either did not join the strike at all or were not scheduled to work past midnight and were not due back at work until the next afternoon. Those employees were not effectively discharged.

work as scheduled on the morning of August 30. Those employees also were effectively terminated.<sup>17</sup>

## 2. The “going nonunion” statements

According to the credited testimony, the Respondent’s supervisors made statements to numerous employees to the effect that the Respondent was “going nonunion” or would be a nonunion shop, with newly imposed Noel benefits, at midnight on August 29.<sup>18</sup> Other employees were informed by the supervisors shortly after the strike began that the Respondent was now operating nonunion. Although the judge found that those statements were made, he rejected the General Counsel’s contention that they constituted constructive discharges of the employees to whom they were addressed. He reasoned that the remarks were made in a context free of union animus, and that the Respondent in fact continued to recognize and bargain with the Union. He concluded that “the context does not therefore support an unlawful sort of rebuke to statutory rights, but must instead be thought of only as reasonably and objectively meaning that a collective-bargaining relationship, which by its terms was to expire, did expire that night.” The General Counsel excepts.

With one exception, which we discuss below, we agree with the judge that the Respondent did not constructively discharge employees when its supervisors told them the company would operate nonunion as of midnight on August 29. We do not adopt the judge’s reasoning, however. An employer may not unilaterally abrogate its relationship with an incumbent union unless the union has lost the support of a majority of the employees, or unless the employer has a good-faith doubt, based on objective evidence, that the union has lost its majority status.<sup>19</sup> In the absence of either condition, the employer may not lawfully inform the employees that it will no longer recognize the union, because if it does, it effectively forces them to choose between continued employment and the continued exercise of their statutory right to representation.<sup>20</sup> Faced with such a Hobson’s choice, an employee who quits rather than accept the loss of his bargaining representative is constructively discharged in violation of Section

8(a)(3) and (1).<sup>21</sup> That the Respondent may not have acted out of animus against the Union, as the judge found, is immaterial.<sup>22</sup> The judge’s finding that there was no “unlawful sort of rebuke to statutory rights” because the Respondent’s supervisors meant only that a collective-bargaining *relationship* was to expire is altogether inexplicable. Contrary to the judge, the parties’ collective-bargaining *relationship* did not end on August 29; only their contract did. We do not find it reasonable to suppose that the employees, on being informed that the Respondent was about to start operating “nonunion,” would infer that the supervisors were merely telling them something they already knew, i.e., that the contract was about to expire. We think the only reasonable construction to place on the supervisors’ statements was that, as of midnight on August 29, the employees would no longer be represented by the Union.<sup>23</sup>

Despite our disagreements with the judge’s analysis, however, we adopt (with one exception) his finding that the employees were not constructively discharged when the Respondent’s supervisors told them the company was going nonunion. Although it is unlawful for an employer to force his employees to abandon either their bargaining representative or their jobs, an employee who is presented with that choice nevertheless is not constructively discharged unless he does, in fact, quit.<sup>24</sup> With few exceptions, the Respondent’s employees did not quit.<sup>25</sup> Many of them participated in the strike, but striking is not the same as quitting.<sup>26</sup> Some of the strikers testified that they eventually obtained employment elsewhere, but going to work for another employer does not, ipso facto, establish that they quit their jobs with the Respondent.<sup>27</sup>

<sup>21</sup> *Ibid.*

<sup>22</sup> *Watt Electric Co.*, 273 NLRB 655, 659 (1984).

<sup>23</sup> Although, as the judge found, the Respondent actually continued to bargain with the Union, that fact would not have been apparent to the employees at the time most of the remarks in question were made.

<sup>24</sup> *White-Evans Service Co.*, supra, 285 NLRB at 82 fn. 6; *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 368–369 (1987).

<sup>25</sup> A few strikers testified that they resigned but indicated that they did so in order to receive vacation pay. They did not claim that their resignations were prompted by the Respondent’s “going nonunion” statements. Because they apparently quit for other reasons, we find that they were not constructively discharged. See *S. E. Nichols-Dover, Inc.*, 167 NLRB 832, 834 (1967).

<sup>26</sup> “Failure to work during the pendency of a strike cannot be construed as a termination of employment.” *United States Cold Storage Corp.*, 96 NLRB 1108, 1109 (1951).

<sup>27</sup> *Schmidt-Tiago Construction Co.*, supra, 286 NLRB at 368 fn. 49. Sec. 2(3) of the Act defines “employee” as including individuals whose work has ceased because of a current labor dispute and who have not obtained any other regular and substantially equivalent employment. The Board has interpreted that provision as requiring evidence of intention to abandon the struck job. See *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359–1360 (1962); *Rose Printing Co.*, 304 NLRB 1076 fn. 3 (1991).

<sup>17</sup> Other employees were threatened by Robbins but either were not scheduled to work the morning of Aug. 30 or worked that morning and joined the strike only later. Those individuals were not effectively discharged.

<sup>18</sup> The new conditions were not implemented immediately, however. As noted previously, they were implemented only after the Respondent declared impasse, and were made retroactive to September 1.

<sup>19</sup> See, e.g., *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). There is no contention here that the Respondent could lawfully have withdrawn recognition of the Union.

<sup>20</sup> See, e.g., *White-Evans Service Co.*, 285 NLRB 81, 81–82 (1987).

We find, however, that striking driver Mitch Cruz did indicate to the Respondent that he had abandoned any interest in returning to work if the company was operating nonunion. Cruz testified that in early December, Ed Shirley called him and said that a driver was quitting and that Shirley wanted Cruz to come back to work. Cruz asked Shirley whether it would be a union or nonunion situation, and Shirley replied that “it’s a nonunion shop from now on.” Cruz then said that they had nothing more to talk about, because he did not want the job.<sup>28</sup> Thus, Cruz turned down Shirley’s job offer, apparently for the sole reason that Shirley had said it would be a nonunion job. We find that, in declining Shirley’s offer of employment under these circumstances, Cruz did not simply indicate that he intended to remain on strike, but instead stated, in effect, that he had no intention of returning to work for the Respondent—in short, that he quit. Because he quit rather than work under nonunion conditions, Cruz was constructively discharged in violation of Section 8(a)(3) and (1).<sup>29</sup>

Strikers Charles Wickenhagen, Jerry Cooper, and Tom Hamel, in response to statements or inquiries by the Respondent’s agents, made remarks similar to Cruz’ regarding their unwillingness to work under nonunion conditions. We find, however, that none of those employees were constructively discharged.

Wickenhagen testified that his supervisor, Pat Stump, told him that if he did not return to work he would be permanently replaced, and that the shop would be nonunion; Wickenhagen replied that he would not come back under those circumstances. Wickenhagen had already joined the strike,<sup>30</sup> however, and Stump did not make him a tangible job offer of the sort Shirley made to Cruz. We find that Wickenhagen’s comment, in this setting, can as readily be construed as an intention to remain on strike as it

<sup>28</sup> Shirley testified that he wanted Cruz back and that he told Cruz in early December that a job was available and asked if Cruz was interested, but that Cruz said he was not. Although Shirley’s account lacks the outright job offer reflected in Cruz’ version, we find that, under either man’s account, the job was Cruz’ for the asking.

Shirley denied having told Cruz that the job was nonunion. The judge, however, discredited several of the Respondent’s witnesses (though not, specifically, Shirley) who denied saying that the company would be operating nonunion. We infer that the judge intended to discredit all such testimony, including that of Shirley.

<sup>29</sup> The complaint does not specifically allege that Cruz was constructively discharged as a result of Shirley’s statement. The complaint does allege that Cruz was effectively or constructively discharged as a result of earlier statements by Robbins, and it also alleges that numerous employees were constructively discharged as a result of the Respondent’s various “going nonunion” statements. Shirley’s constructive discharge of Cruz thus is closely related to other allegations of the complaint, and was fully litigated at the hearing. Consequently, our finding that Cruz’ discharge violated the Act does not deprive the Respondent of due process.

<sup>30</sup> At least, he visited the picket line on the night of August 29 and did not report for work on August 30.

can an abandonment of his prestrike job, and we therefore find that the General Counsel has not shown, by a preponderance of the evidence, that Wickenhagen quit rather than work under nonunion conditions.

Both Cooper and Hamel testified that they indicated to Supervisor Wright that they would not return to work under nonunion conditions; however, neither testified that any representative of the Respondent had previously informed them that the company was going to operate nonunion. As the General Counsel does not contend that any employee was wrongfully treated on the basis of statements he may have heard from sources other than the Respondent (even though the substance of the statements, as in the cases of Cooper and Hamel, may have originated with the Respondent), we do not find that either employee quit because of any unlawful statement made by the Respondent.

In summary, we find that only Cruz was unlawfully constructively discharged when informed that the Respondent was operating nonunion, because we find that he, alone among the employees, quit because the Respondent forced him to make the choice between working and retaining his union representation. Although others were similarly informed, the record does not support a finding that they quit in response; hence they were not constructively discharged.

### 3. The unilateral implementations

As we have noted, the Respondent declared impasse and implemented most of the terms of its final offer to the Union on September 18.<sup>31</sup> The General Counsel argues that a lawful impasse could not be reached because of the 8(a)(3) violations allegedly committed by the Respondent before it declared impasse, and therefore that the implementation of the Respondent’s offer violated Section 8(a)(5) and (1). Having found no 8(a)(3) violations, the judge found that the Respondent had lawfully declared impasse, and dismissed the 8(a)(5) allegation. In his exceptions, the General Counsel argues only that the 8(a)(3) violations alleged preclude the finding of a lawful impasse. In this regard, the General Counsel stresses that the Union broke off negotiations in September over the Respondent’s refusal to agree to reinstate all the strikers on the ground that some or all had been permanently replaced, despite the General Counsel’s contention that most if not all of the strikers had been discriminatorily discharged

<sup>31</sup> The Respondent did not purport to implement the terms of its offer regarding arbitration or union security. (The Respondent proposed replacing the expired union shop clause with a maintenance of membership provision.) As the Respondent stated in its September 18 letter, however, those are matters of contract; see, e.g., *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987); *Chemical Workers Local 112 (American Cyanamid)*, 237 NLRB 864 (1978). Hence, they could not lawfully be imposed unilaterally by the Respondent, even after impasse, and the General Counsel does not contend otherwise.

and thus could not have been lawfully denied reinstatement.<sup>32</sup>

We find merit in the General Counsel's exceptions. Although an employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations.<sup>33</sup> Here, the negotiations foundered in part because the Respondent refused the Union's demand that all strikers be reinstated as a group. That refusal was based on the Respondent's representation that some or all of the strikers had been permanently replaced. As we have found, however, numerous strikers had been unlawfully discharged and could not lawfully be permanently replaced. The breakdown in negotiations thus was the proximate result of the Respondent's serious unremedied unfair labor practices. Accordingly, we find that the Respondent was not entitled to declare impasse and that it violated Section 8(a)(5) and (1) when it unilaterally implemented portions of its final contract proposal.

#### 4. The requirement that strikers resign in order to receive accrued vacation pay

It is undisputed that a number of strikers requested that they be paid for their accrued vacation time during the strike, and that the Respondent informed them that they would have to resign in order to receive the requested payments. The complaint alleges that by refusing to pay the strikers their accrued vacation pay, while paying for the vacations of nonstrikers, the Respondent discriminated against the strikers in violation of Section 8(a)(3) and (1). The judge rejected this contention. He found that the Respondent's actions were dictated solely by the needs of the operation; that "the status of being a paid vacationer and, simultaneously, an active economic striker, cannot coexist"; and that there is no evidence that strikers who returned to work were denied their vacation rights.<sup>34</sup> The General Counsel accepts. Again, we agree with the judge's finding but not with his reasoning.

The judge's finding that the Respondent's actions were dictated solely by the needs of the operation is

<sup>32</sup> On brief, the General Counsel seems to suggest that the strikers were unfair labor practice strikers who, like the employees who had been unlawfully discharged, may not be denied reinstatement on request. At the hearing, however, counsel for the General Counsel made clear that the complaint did not allege an unfair labor practice strike (indeed, the portion of the charge alleging an unfair labor practice strike was dismissed; see R. Exh. 1) and that the nature of the strike would not be an issue in the case.

<sup>33</sup> See, e.g., *Columbian Chemicals Co.*, 307 NLRB 592, 592 fn. 1, 596 (1992), enf. mem. 993 F.2d 1536 (4th Cir. 1993); *J. W. Rex Co.*, 308 NLRB 473, 473, 496 (1992), enf. mem. 998 F.2d 1003 (3d Cir. 1993).

<sup>34</sup> The judge erroneously identified Bonlender, rather than Reed, as the returning striker in question. We correct the inadvertent error.

not borne out by the record. Although the Respondent canceled all vacations at the outset of the strike, it began to allow at least some of the nonstrikers to take their accrued vacations once the strikers' functions had been covered. Just how the needs of the operation would be served by denying vacation pay to strikers, who were performing no services for the Respondent, while allowing some nonstrikers to take paid vacation, is not explained by the judge. The judge's assertion that one cannot be a paid vacationer and an economic striker at the same time is wrong as a matter of law. In the leading case on this subject, *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Supreme Court enforced the Board's finding that the employer had violated Section 8(a)(3) by denying vacation benefits to strikers while providing them to nonstrikers. That the Respondent did not punish returning strikers by denying their claims for vacation benefits is some indication of a lack of animus on the Respondent's part, but, as we shall see, that fact is not dispositive of this matter.

The appropriate analysis of this issue is set forth in *Texaco, Inc.*, 285 NLRB 241 (1987). In *Texaco*, the Board announced that the question of whether an employer violates Section 8(a)(3) or (1) by withholding benefit payments from disabled employees on commencement of a strike will be resolved by applying the test for unlawful conduct set forth in *Great Dane*. Under that test, the General Counsel bears the prima facie burden of proving some adverse effect of the benefit denial on employee rights. That burden can be borne by showing that the benefit was accrued—i.e., that it was due and payable on the date it was denied—and that it was withheld on the apparent basis of a strike. If the General Counsel makes the required showing, the burden then shifts to the employer to prove that it had a legitimate and substantial business justification for withholding the benefit. The employer may make that showing by proving that the employees' collective-bargaining representative explicitly waived their right to be free from such discrimination or coercion, or by demonstrating reliance on a non-discriminatory contract interpretation that is reasonable and arguably correct. Even if the employer proves business justification, the Board still may find that it acted unlawfully if the conduct is found to be "inherently destructive" of important employee rights or motivated by antiunion intent.<sup>35</sup> Although *Texaco* concerned the denial of disability, health insurance, and pension benefits, the analysis is equally applicable to the withholding of vacation benefits from strikers.<sup>36</sup>

To determine whether the General Counsel has carried his prima facie burden of establishing that the strikers were denied vacation benefits that were ac-

<sup>35</sup> 285 NLRB at 245–246.

<sup>36</sup> *Nuclear Fuel Services*, 290 NLRB 309 (1988).

*crued*—that is, due and payable—we must first specify exactly what benefits are alleged to have been withheld. The complaint alleges that the Respondent refused to pay strikers accrued vacation *pay* on their request. It does not allege a refusal to allow strikers to take accrued *paid vacations*. The strikers who testified that they had asked about receiving vacation benefits all stated that they had asked for vacation *pay*, not to take paid vacations.<sup>37</sup>

We must, therefore, determine whether the General Counsel has proved that the right to receive vacation pay (in lieu of taking paid vacation) was an accrued right. To make that determination, we turn first to the language of the collective-bargaining agreement. Article 6 of the agreement (which was unchanged in the Respondent's final offer) provides that employees shall accrue vacation benefits according to their tenure of service. Paragraph 6.2 states that "Pro-rata vacation shall be paid to all employees with one (1) year or more of service who are laid off, quit, or are discharged . . . on the basis of one-twelfth (1/12th) of vacation pay earned per month." There is no indication in Article 6 that employees may receive vacation pay in lieu of vacation under any circumstances other than those listed in paragraph 6.2.

We find that the contract does not provide for employees' receiving vacation pay in lieu of vacation except in the above-enumerated circumstances, but instead contemplates their taking time off from work with pay. Both Mike Noel and Human Resource Manager Dave Cummins testified without contradiction that it is the Respondent's established policy that employees are paid for vacation when they take vacation, and that employees could not get vacation pay without taking vacation unless they resigned or were terminated. The General Counsel does not dispute that testimony,<sup>38</sup> and the evidence does not establish that the Respondent ever previously deviated from its stated policy. On this record, we find that the benefits the strikers sought—vacation pay in lieu of taking vacation—were not contained in the contract and had not been conferred in the past. We therefore find that the General Counsel has failed to carry his *prima facie* burden of establishing that the benefits the Respondent denied were accrued.<sup>39</sup>

Moreover, even assuming for the sake of argument that the General Counsel had established a *prima facie*

case, the Respondent established a legitimate and substantial business justification for refusing to pay vacation pay to strikers who did not resign. The Respondent showed that it relied on a nondiscriminatory contract interpretation that is reasonable and arguably correct. Article 6 of the collective-bargaining agreement provides for vacation with pay, but does not provide for vacation pay in lieu of taking time off except for employees who have resigned or been laid off or discharged. In this regard, "vacation" is commonly understood to be a respite from work. Because the Respondent's interpretation of the contract is reasonable on its face and consistent with the common understanding of the meaning of "vacation," and because there is no contrary contract language and no evidence of contrary past practice or interpretation, we find that the Respondent has established a sufficient rebuttal, even assuming the General Counsel had made out a *prima facie* case.<sup>40</sup>

Finally, we find that the Respondent's refusal to pay vacation pay to strikers unless they resigned was not "inherently destructive" of employee rights, nor was it motivated by antiunion animus. The Respondent's refusal was not discriminatory; as we have noted, there is no evidence that the Respondent ever deviated from its policy, reflected in the language of the contract, of not paying vacation pay to employees in lieu of their taking vacation, and there is no evidence that nonstrikers were treated more favorably than strikers in this respect. As the judge found, returning strikers apparently were not denied their vacation rights, and one witness (Berghoff) testified that he was told that to receive vacation pay he would have to either resign or wait until the strike was over. Thus, it is clear that the Respondent was attempting not to divest the strikers of their vacation benefits, but to postpone their enjoyment of those benefits until they returned to work (and could take vacations from work)<sup>41</sup> or, pursuant to the contract, resigned.

The General Counsel relies on *Great Dane Trailers*, supra, and on *Texaco, Inc.*, 291 NLRB 508 (1988), and *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989), in support of this allegation of the complaint. We find those cases distinguishable from this one. In *Great Dane*, unlike this case, the parties' contract explicitly provided that employees could continue to work and receive vacation pay in lieu of taking vacation; thus, vacation pay arguably was an accrued benefit for strikers.<sup>42</sup> Moreover, the employer in *Great Dane*, unlike the Respondent, proffered no legitimate business justification for its actions.<sup>43</sup> In *Glover Bottled Gas*, the employer denied vacation (and bereavement) benefits

<sup>37</sup> The record establishes that many employees had accrued vacation time under the terms of the collective-bargaining agreement.

<sup>38</sup> In fact, the General Counsel wholly ignores this testimony. So did the judge.

<sup>39</sup> See *Nuclear Fuel Services*, 290 NLRB 309 (1988), in which the Board, on almost identical facts, found that the General Counsel had not made out a *prima facie* case that vacation pay in lieu of vacation was an accrued benefit. Cf. *Seeburg Corp.*, 192 NLRB 290 (1971) (unlawful to deny vacation pay to strikers where contract provided for money to be paid in lieu of actual vacation).

<sup>40</sup> *Nuclear Fuel Services*, 290 NLRB at 310.

<sup>41</sup> See *Detroit Edison Co.*, 206 NLRB 898 (1973).

<sup>42</sup> 388 U.S. at 28, fn. 3.

<sup>43</sup> *Id.* at 34.

to strikers *after they had returned to work*, and did so on the basis of a contract interpretation that was neither reasonable nor arguably correct.<sup>44</sup> The employer in *Texaco* was found to have acted lawfully when it canceled all vacations (for both strikers and nonstrikers) at the outset of a strike, because it relied on a reasonable and arguably correct interpretation of the collective-bargaining agreement and also on established practice which the Board found to have evolved into a term and condition of employment.<sup>45</sup>

For the foregoing reasons, we find that the Respondent's refusal to pay vacation pay to strikers in lieu of vacation unless they resigned was not a denial of an accrued benefit, and that even if it was, the Respondent has shown that it had a legitimate and substantial business justification for its action. We further find that the Respondent was not motivated by antiunion intent and that, because it did not treat strikers differently from nonstrikers in this respect, its actions were not "inherently destructive" of important employee rights. Accordingly, we affirm the judge's dismissal of this allegation of the complaint.

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. At all times material to these proceedings, the Union has been the exclusive collective-bargaining representative of employees of the Respondent in the bargaining unit described in article 1 and appendix C of the parties' collective-bargaining agreement that expired on August 29, 1990.

3. By informing employees during the evening of August 29 that they would be permanently replaced if they went on strike at midnight or at the beginning of the day shift on August 30, and that permanent replacements had been hired, when permanent replacements had not been obtained for all the potential strikers, the Respondent unlawfully threatened the employees with termination if they joined the strike, and effectively terminated the employees who heard the threat but nevertheless joined the strike, in violation of Section 8(a)(3) and (1) of the Act.

4. By informing Mitch Cruz that it was operating nonunion, with the result that he quit his employment with the Respondent, the Respondent constructively discharged Cruz in violation of Section 8(a)(3) and (1) of the Act.

5. By unilaterally changing terms and conditions of employment of employees in the bargaining unit without first bargaining to a valid impasse with the Union, the Respondent failed to bargain in good faith with the

Union in violation of Section 8(a)(5) and (1) of the Act.

6. The violations found are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise violate the Act as alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by effectively discharging Tom Glass, Jim Stiltner, Leo Hull, Bret Lombard, Richard Wilson, James Doll, Marty Layman, Greg Bolin, Roger Layman, and Chuck Foster because they engaged in a lawful economic strike, and by constructively discharging Mitch Cruz, we shall order the Respondent to offer those employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, discharging if necessary any replacements.<sup>46</sup> We shall also order the Respondent to make those employees whole for any loss of earnings and other benefits incurred from the date of their discharges to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of employees in the unit without first bargaining with the Union in good faith to a valid impasse, we shall order the Respondent, at the Union's request, to rescind the unilateral changes and to make the employees whole for any losses of wages and benefits they may have incurred as a result of the unilateral changes, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971). We shall also order the Respondent to remit all payments it owes to employee pension and health care funds, with interest, as provided in *Merryweather Optical Co.*, 240 NLRB 1213 (1979),<sup>47</sup>

<sup>46</sup>The General Counsel reports that the Respondent closed its doors on January 29, 1993, "apparently forever," and that its goods and equipment are being liquidated. Accordingly, the General Counsel states that a reinstatement order is improper. We find that this issue is better suited to resolution in the compliance process. Accordingly, we shall order the Respondent to reinstate the discriminatees, unless it can show at compliance, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that that action would be unduly burdensome. See *We Can, Inc.*, 315 NLRB No. 24, slip op. at 6-8 (Sept. 30, 1994).

<sup>47</sup>That the Respondent may have made payments on the employees' behalf to its own health and pension programs does not absolve it of its responsibility to make the union funds whole for contribu-

<sup>44</sup>292 NLRB at 873, 881-882.

<sup>45</sup>291 NLRB at 511-512.

and to make the employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981).

All make-whole payments to employees shall be made with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Noel Foods Division of the Noel Foods Corporation, Union Gap, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees that they will be permanently replaced if they join a strike scheduled to begin within a few hours and that permanent replacements have already been hired, if the Respondent has not hired permanent replacements for all potential strikers at the time the statements are made.

(b) Discharging its employees who join a lawful economic strike in the face of the unlawful statements described above.

(c) Informing its employees that it is, or will be, operating nonunion, when those employees are represented by a labor organization as their exclusive collective-bargaining representative.

(d) Constructively discharging its unionized employees when they quit rather than accept employment under nonunion conditions.

(e) Unilaterally changing the terms and conditions of employees represented by General Teamsters Local 524, International Brotherhood of Teamsters, AFL-CIO (the Union), in the bargaining unit described in article 1 and appendix C of the parties' collective-bargaining agreement that expired on August 29, 1990, without first bargaining with the Union in good faith, to a valid impasse.

(f) 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) Offer Tom Glass, Jim Stiltner, Leo Hull, Bret Lombard, Richard Wilson, James Doll, Marty Layman, Greg Bolin, Roger Layman, Chuck Foster, and Mitch Cruz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any em-

tions it unlawfully withheld from them. See *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201 (1990), enf. denied 942 F.2d 151 (2d Cir. 1991); *Stone Boat Yard*, 264 NLRB 981, 983 (1982), enf. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984).

ployees hired to replace the discriminatees, without prejudice to their seniority or any other rights and privileges previously enjoyed, unless it can show at compliance, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that that action would be unduly burdensome, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges, and notify the discriminatees in writing that this has been done and that the discharge will not be used against them in any way.

(c) At the Union's request, rescind the unilateral changes the Respondent made in the terms and conditions of employment of the unit employees.

(d) Make the employees whole, with interest, for any losses of pay or benefits they may have suffered as a result of the Respondent's unilateral changes, and for any expenses they may have incurred as a result of the Respondent's failure to make the required payments into the union pension and health care plans, in the manner described in the remedy portion of this decision.

(e) Reimburse the union pension and health care plans, with interest, for unpaid contributions to those plans.

(f) 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.

(g) Post at its facility at Union Gap, Washington, copies of the attached notice marked "Appendix."<sup>48</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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.

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

<sup>48</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER STEPHENS, dissenting in part.

Unlike my colleagues, I do not find that Rod Robbins' statements on the evening of August 29 constituted threats to terminate employees who joined the strike that night, or that employees who heard those statements and walked out that night or early the next morning were unlawfully discharged. Because I agree with my colleagues that no other employees were discharged, either actually or constructively, until long after the Respondent declared impasse and unilaterally implemented most of the terms of its final offer on September 18, I find that the impasse was lawful and that the Respondent did not violate Section 8(a)(5) by making the unilateral changes.<sup>1</sup> In all other respects, I agree with the majority.

When the Respondent informed the employees that they would be permanently replaced if they walked off the job, or if they failed to report for work as scheduled, it did no more than inform them of its intention to exercise its right to hire permanent replacements for economic strikers. Unlike my colleagues, I find that such statements do not falsely imply that the strikers would be replaced immediately, but only that the Respondent intended to replace them when it could do so. In *Chromalloy American Corp.*,<sup>2</sup> the Board found that the employer lawfully informed its striking employees that if they were not at their jobs at the beginning of certain specified workdays, "then management will take the necessary steps to permanently replace those who have not returned to their jobs." The Board found that the employer had simply informed the employees that they were subject to permanent replacement.<sup>3</sup> In this case, as in *Chromalloy American*, the Respondent's statements do not imply that strikers who fail to report by a date and time certain, or who walk off the job at the commencement of the strike, will be, in effect, terminated. In this regard, the cases are distinguishable from *American Linen Supply*,<sup>4</sup> in which the employer warned strikers that if they did not report to work by the starting time for work (which was only some 10 minutes away), "you *are* permanently replaced." Such a statement falsely implies that they have no "right to return to their unoccupied jobs simply because they have gone out on strike." *Id.* Here, however, Robbins made his statement further in advance, and the statements had some basis in fact, since

the Respondent had made arrangements to obtain qualified replacements from a temporary employment agency, and some of those replacements in fact arrived around midnight. I therefore agree with the judge that the Respondent did not threaten to discharge employees by telling them they would be permanently replaced if they honored the strike, or effectively discharge the employees who joined the strike in spite of hearing those statements.<sup>5</sup>

Hence, Robbins' testimony that he announced at the night-shift meeting on August 29 that the Respondent had *hired* permanent replacements and that he made similar statements in individual conversations that evening with Susan Wilson and with employees Bolin, Mullinex, and Lombard does not—in the circumstances here—require a finding of unlawful threat of termination under the *American Linen* analysis because the statement to which he testified did not falsely indicate to employees that they would be immediately precluded from returning to their jobs if they went on strike. In any event, I doubt that Robbins phrased the statement in the way to which he testified. Susan Wilson, Bolin, Mullinex, and Lombard all testified at the hearing, and none of the four corroborated Robbins' account. None of the witnesses who attended the night-shift meeting on August 29 testified that Robbins stated on that occasion that permanent replacements had been hired.<sup>6</sup> I think it highly unlikely that statements as powerful as those Robbins claims to have made would not be remembered by any of the employees to whom they were supposedly addressed.<sup>7</sup> And even if Robbins did make those statements and the employees forgot them, I think it logically impossible to find that employees were effectively given notice of discharge by statements they did not recall having been made.

<sup>5</sup> In adopting the judge's finding, I do not rely on his statement that "It is too sterile a contention to look literally at the essential message, and say that mere word choice supersedes all the complex realities of a major business setting." Although the context in which words are spoken may be significant to an understanding of their meaning, the speaker's choice of words also may be critical, as myriad decisions make clear. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–620 (1969). In this case, the words spoken by the supervisors did not constitute threats of discharge.

<sup>6</sup> Employee Leo Hull testified that Robbins told the group that strikers would be permanently replaced and that "they had people to replace them. There was [sic] plenty of workers." That version of Robbins' remarks, however, falls short of an assertion that permanent replacements had already been hired. It also allows for the possibility that strikers could be replaced temporarily (as, indeed, they were) by employees from other parts of Noel's operations.

<sup>7</sup> I think that Robbins actually stated in effect that the Respondent was in the process of obtaining replacements, as some witnesses testified.

<sup>1</sup> The General Counsel concedes that, should the 8(a)(3) allegations of the complaint be dismissed, the Respondent cannot be found to have acted unlawfully by declaring impasse. He does not contend, in other words, that the impasse was tainted by any of the Respondent's statements that might be found independently unlawful.

<sup>2</sup> 286 NLRB 868 (1987), enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989).

<sup>3</sup> 286 NLRB at 871.

<sup>4</sup> 297 NLRB 137 (1989), enf. 945 F.2d 1428 (8th Cir. 1991).

## 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.

WE WILL NOT inform employees that they will be permanently replaced if they join a strike that is scheduled to begin in a few hours, or that we have hired permanent replacements for strikers, at a time when we have not hired permanent replacements for all potential strikers, and WE WILL NOT effectively discharge employees who join the strike in the face of such statements.

WE WILL NOT inform our employees who are represented by a union that we are, or will be, operating nonunion, or constructively discharge them when they quit rather than work under nonunion conditions.

WE WILL NOT make unilateral changes in the terms and conditions of employees represented by General Teamsters Local 524, International Brotherhood of Teamsters, AFL-CIO in the bargaining unit described in article 1 and appendix C of our collective-bargaining agreement with the Union that expired on August 29, 1990, unless we have first bargained with the Union in good faith to a valid impasse.

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

WE WILL offer Tom Glass, Jim Stiltner, Leo Hull, Bret Lombard, Richard Wilson, James Doll, Marty Layman, Greg Bolin, Roger Layman, Chuck Foster, and Mitch Cruz 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 any other rights or privileges previously enjoyed, unless we can show in compliance proceedings, on the basis of evidence that was not available at the time of the unfair labor practices hearing, that that action would be unduly burdensome, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify those employees that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL, at the Union's request, rescind the unilateral changes we made in the terms and conditions of employment of our unit employees.

WE WILL make our employees whole, with interest, for any losses of pay and benefits they may have suf-

fered as a result of our unilateral changes in their terms and conditions of employment, and for any expenses they may have incurred because of our failure to make the required contributions to the Union's fringe benefit plans.

WE WILL reimburse the union pension and health care funds for all unpaid contributions, with interest.

NOEL FOODS DIVISION OF THE NOEL  
CORPORATION

*James C. Sand, Esq.*, for the General Counsel.  
*Gary E. Lofland (Lofland & Associates)*, of Yakima, Washington, for the Respondent.  
*Kenneth Pedersen (Davies, Roberts & Reid)*, of Seattle, Washington, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. These consolidated cases were tried at Yakima, Washington, over a course of 12 trial days spanning March 5, 1991–May 3, 1991, inclusive. Charges on which the proceeding was based were filed August 31, 1990, and January 31, 1991 (amended February 6, 1991), by General Teamsters Local 524, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union). A third amended consolidated complaint was subsequently issued February 14, 1991. The primary issues are whether Noel Foods Division of the Noel Corporation (Respondent) (a) effectively and in the alternative, constructively, discharged various striking employees in order to discourage them from being members of, or acting in support of, the Union, (b) discriminatorily refused to pay striking employees their accrued vacation pay, and (c) unilaterally implemented certain terms and conditions of employment, while contemporaneously terminating all contributions to certain joint trust funds, this in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On the entire record,<sup>1</sup> including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Respondent is an operating division of a Washington corporation. Its office and place of business is in Union Gap, Washington, where it engages in wholesale food distribution. During the 12-month period preceding February 14, 1991, Respondent, in the course and conduct of its operations, and

<sup>1</sup> The General Counsel's unopposed motion to correct transcript is granted in its many particulars. (The correction proposed at p. 516 is actually on L. 4.) On my own motion the transcript is further corrected by attached appendix listing, which shall be omitted from publication. See *Airlines Parking*, 197 NLRB 762 (1972). Finally, R. Exhs. 18, 19, and 23 are confirmed to be rejected from admission to the record, as the General Counsel observed in his motion should be done and separately bound.

as representative of all times material to these cases, (a) both sold and shipped goods or provided services from its facilities within the State of Washington to customers outside the State, or sold and shipped goods or provided services to customers within the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means, and collectively of a total value in excess of \$50,000; and (b) purchased and caused to be transferred and delivered to its facilities within Washington goods and materials valued in excess of \$50,000 directly from sources outside Washington, or from suppliers located within Washington, which suppliers in turn obtained such goods and materials directly from sources outside the State of Washington.

On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and, as is also admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Setting*

Union Gap is a small, commercially orientated community abutting, and commonly viewed to be within, the urban bounds of greater Yakima. In realistic terms, Respondent is one autonomously managed component of an umbrella corporation having several such community-sited business units. The Union is an amalgamated Teamsters local representing bargaining units throughout at least the general metropolitan area. The parties have had a collective-bargaining relationship extending back for about 10 years.

### B. *Nature of the Business*

Respondent is a grocery distributor, with the size and resources sufficient to serve customers situated in large and not-so-large cities or towns throughout the Pacific Northwest, plus operations of lesser concentration. The main band of customers is within greater Yakima, or its immediate surroundings, while distinctively specialized food wholesaling is provided at other cities of the Pacific Northwest. The largest city of all that are served is Portland, Oregon, and the second largest business venue is Spokane, Washington. Smaller communities, reachable in satellite-like fashion as offshoots from established out-of-town (non-Yakima) routes, are served by modified delivery schedules reflecting a lower sales volume to fulfill customer needs.

This geographically grid-like wholesale food distribution enterprise ran in all compass directions from Yakima; with some sales, delivery, and specialized employees having a permanent duty station at significant business locations such as distant Spokane, "Tri-Cities," Walla Walla, and Wenatchee, Washington, and in Portland. Minor customer locations, some served weekly and some less than weekly, included the towns of Brewster, Goldendale, Hermiston, and Moses Lake, Washington, the Dalles and Pendleton, Oregon, and Lewiston, Idaho. A separate, thrice-weekly shipment was picked and loaded at the Union Gap warehouse, transported to the West Coast, and shipped by container to Alaska customers.

The divisionalized business structure of the Noel Corporation permits various interconnections of function. Thus over-

the-road, tandem semitrailer driving is done variously by Respondent's employees, by drivers of nonunion Noel Transportation, or by privately engaged independent carriers.<sup>2</sup> A centralized vehicle repair and maintenance shop exists at the main Union Gap facility. Here, too, the function is split between Respondent's mechanics and those on the payroll of Noel Transportation, in essentially undifferentiated manner as between vehicles and mechanical equipment of Respondent versus that of a sister division.

Movement of goods from warehouse to customer is accomplished by closely planned trucking capacity. In greater Yakima local delivery drivers regularly supply retail customers after direct loading at Respondent's dock. Distant venues receive bulk delivery at an established transfer point in the given community; a place where semitrailers, usually doubles, have been hauled by over-the-road drivers for a tractor unit switch between Yakima and local personnel there. Two long distance "shuttle" drivers, regularly pulling tractor-trailers to Spokane each night, worked a longer, more specialized shift.

An array of job classifications exists to accomplish the overall business mission. Fundamentally three shifts are utilized, however time variations and overlapping are present for functional purposes. When understood as such the day shift may be thought of as commencing from 5 to 8 a.m., the swing shift from 1 to 2 p.m., and the night shift from 6 to 10 p.m.

In the course of round-the-clock, essentially weekday, operations, the more numerous jobs are those of warehouseman, local, yard, or long-haul drivers and mechanics. The yard drivers respotted trailers during their shift, to best position them for loading and relieve vehicle congestion near the warehouse dock. Other titled occupations also exist, such as chemical beverage specialist in the field, and a related bench technician position at the main location. Finally, a sales force was deployed in parallel to overall product distribution personnel.<sup>3</sup>

### C. *The Triggering Labor Contract*

The most recent collective-bargaining agreement between the parties was one of 3 years' duration, effective from August 29, 1987, until August 29, 1990. In this the Union was recognized as exclusive representative of all employees, except for those listed by their individual capacity, those in named occupations, those in both the meat and produce departments, and supervisors. The contract provided for a wage reopener after the first and second year, plus a typical clause to permit forestalling renewal by timely notice of desired change, modification, or termination given at least 60 days prior to expiration.

The Union first gave effective notice of wage reopening in early summer 1989. Negotiations following that notice resulted in unfair labor practice proceedings as Case 19-CA-20737, that verged on a formal hearing scheduled for July

<sup>2</sup>A yet different entity named *Noel Transport* also exists; it is known only to be a unionized entity of the overall enterprise, and associated to trucking needs of the Pepsi-Cola division which does business mostly in many of the communities served by Respondent.

<sup>3</sup>Respondent's industry, and essentially its own operation, is exemplified by reference to a comparably "large wholesale grocer" with Teamsters-represented "warehouse work force," all as described in passages of *Associated Grocers*, 253 NLRB 31, 36 (1980).

17, 1990. The complaint in this case had alleged that an unlawful refusal “to execute a written contract” embodying such “full and complete agreement” as assertedly reached on or about October 11, 1989, had occurred. Soon subsequent to issuance of this complaint the parties exchange correspondence, as a written debate of contractual status, conflicting positional claims between them, and potential evolution of the situation as a labor-management relations matter.

This exchange originated with a letter dated March 23, 1990, from Union Secretary-Treasurer M. A. “Mel” Tanasse to Respondent’s general manager, Mike (Michael) Noel. It read:

Local 524 was informed yesterday by a representative of Region 19 of the National Labor Relations Board that a complaint will issue upon the charge filed by the Union against Noel Foods, Inc., on or about February 6, 1990.

In view of this development, and given Noel’s continuing refusal to sign the collective bargaining agreement agreed to in October, 1989, Local 524 hereby gives notice of its intent to terminate the collective bargaining agreement (which the National Labor Relations Board has determined to be enforceable) on its scheduled expiration date, midnight on April 30, 1990.

Prior notice was, of course, futile in view of Noel’s repudiation of its contractual obligations. Noel has waived any entitlement to prior notice, inasmuch as it has refused, and continues to refuse, to execute its agreement with Local 524.

This notice will be effective, for Section 8(d), sixty (60) days after you receive it. Please contact me in order that a schedule of negotiations toward a successor agreement may be established.

In reply, Mike Noel answered with the following letter dated March 26, 1990.

I am in receipt of your letter of March 23, 1990. That letter requires a response and the correction of some of the statements you have made.

The National Labor Relations Board has not determined that a contract was reached in October, 1989, or that it is enforceable. The matter will go to a hearing before an Administrative Law Judge. The basis for issuing the complaint is the conflict in the testimony as to whether the company reserved the right to approve the Collective Bargaining Agreement. That determination will be made by an Administrative Law Judge after a hearing, which will likely take place in six (6) months to a year.

Assuming your position to be correct that there was a contract in October, 1989 (and we do not agree that there was), that agreement would have been effective and enforceable on that date. There is no legal obligation that it be in written form. Our refusal to acknowledge a contract existed, in no way prevented you from fulfilling obligations under the agreement. You cannot avoid the obligation of opening, as required by the terms of the agreement you claim existed, by trying to place the blame on us. Your intent to open the agree-

ment (if it exists) some thirty (30) days late, is ineffective and would not be honored. The contract would have renewed itself for one year.

Further, you need to consider the effects of your decision. If you are correct that there was a contract reached October, 1989, then your failure to have opened that contract will have caused it to rollover. Thus, the union will have negotiated a contract for employees, which would last until May 1, 1991, with a 10 cent/an hour increase.

The union’s failure to open the agreement in a timely matter severely effects [sic] our employees: The current language in the existing contract, with the “CAP” on the health and welfare, you have just increased out of pocket costs to our employees.

We intend to open the contract and negotiate a successor agreement upon the expiration of the contract on August 29.

Subsequently, by letter dated July 3, 1990, Respondent’s attorney, Gary Lofland, wrote to the Union’s attorney, Kenneth Pedersen, extensively treating legal, labor cost, and employee benefits factors of the situation. This letter closed with a solicitation toward prompt, mutual efforts at “resolving” the matter without litigation.

Ultimately a written settlement agreement of the imminent litigation was reached between the parties, and necessary signatures secured by July 17, 1990. It provided certain retroactive wage rate adjustments, and recited that the “underlying agreement” would terminate on August 29, 1990. In this last respect of how the contract would terminate on August 29, 1990, the parties also agreed to “immediately move forward with timely good faith negotiations.” Further, the settlement agreement contained an express acknowledgment by Respondent that the Union had “fully complied” with notice provisions of Section 8(d) of the Act.

#### *D. Resumed, and Ultimately Unsuccessful, Negotiations*

Separate and apart from legal and tactical positions of the parties, as then unspoken or yet to be developed, the settlement agreement in fact avoided immediate litigation. Its achievement was, however, a somewhat tortuous process.

In an approximate 24-hour period immediately preceding the typically 9 a.m. commencement of a formal unfair labor practice hearing, settlement activity unfolded progressively, albeit haltingly.<sup>4</sup> During the morning of July 16, a transmittal letter of that date from Mike Noel to Union Business Representative Mark Rogstad was hand-delivered to the Union’s office. This letter enclosed a brief, proposed “Letter of Understanding and Settlement Agreement” covering procedural, concessionary, and notice (8(d)-type waiving) language suitable to winding up Case 19-CA-20737. Brisk dealings on July 16 included Rogstad’s telephone communications with the Union’s attorney in Seattle, plus an assumed role as settlement agent by the Region’s trial counsel James Sand; he later also to be counsel for the General Counsel here. Thus a three-way undertaking, including actual visit to the office of Attorney Lofland, conveniently close by in Yakima,

<sup>4</sup> All dates and named months hereafter are in 1990, unless otherwise indicated.

moved the parties toward resolution. Such process generated the new, more detailed settlement agreement, as drafted by James Sand. When the business day of July 16 ended an approving signature of Tanasse for the Union had resulted, but only a failed expectation that Respondent would also join in disposing of the case.

Early on the morning of July 17 the parties girded for trial, with Respondent's position manifesting in Mike Noel's perplexity about why "we were still going to court." After the parties actually assembled at the place of hearing, a short delay in starting the trial was taken for Mike Noel and his attorney to contact enterprise owner Roger Noel about making the agreement as tendered. Roger Noel ostensibly approved, for Mike Noel signed the more elaborate settlement agreement, it an enlargement on his own simpler proposal of the day before, and the need for a hearing dissolved.

Turning to the present case, this record is barren as to particular bargaining dynamics over the next several weeks, except as to a few subjects such as additional unit exclusions, optional mileage rate and minor language matters, all as associated to the date August 15. However, by late August a growingly intense negotiation process was under way, this attempting an actual full contract renewal by addressing key bargaining issues then still in dispute. As to respective teams the union spokesperson was Rogstad, accompanied by an employee bargaining committee of varying composition, and perhaps also fellow Business Representative Anton Jones. Respondent's chief negotiator had been David (Dave) Cummins to start, with Mike Noel "step[ping] in later" and Cummins remaining at the table to assist him.

A generally favorable status existed in the negotiations as the last full week of August was reached. The parties met on Monday of that week, August 27, and again the next day, making "a lot of progress" on both occasions according to the perception to Mike Noel. At this point the principal unresolved issues concerned (1) pension fund contribution by the Employer, (2) the basis of a health benefit plan, and (3) potential exclusion of "salesmen" from the bargaining unit of which they had been a part.

On August 29 the parties met to negotiate further at both 10 a.m. and 3 p.m. In the morning session, an agreement was reached to immediately substitute a comprehensive company health care plan for the Union's health care benefit plans of the past. By this point the salesmen exclusion issue had been tacitly agreed to by the Union, leaving the pension subject still the only primary topic in dispute.

The afternoon session of August 29 focused on the disputed amount of company payment into the Western Conference of Teamsters Pension Trust Fund, expressed as a benefit amount per employee hour worked. The Union's proposal called for an increase of 15 cents per hour worked in each year of a new contract. After extensive bargaining Respondent's negotiators caucused for discussion with a corporate official. The upshot was movement to an offered 7-cent-per-hour increase over an existing 70-cent-per-hour base. This amount, if established, would have brought that benefit cost in line with the comparable feature available to employees of the Pepsi-Cola Division of the Noel Corporation. Rogstad was provided a written assurance of this concession, for his display later that day at a scheduled strike vote by the membership.

#### *E. Union-Side Preliminaries to Contract Expiration*

The participating employee bargaining committee of the Union included delivery driver (Yakima area) Chuck Foster, Wenatchee area delivery driver Don Reed, day warehouseman Raul Murillo, day freezer stocker Matt Loran, truck maintenance (utility) employee "Tom" (Charles) Wickenhagen, forklift maintenance employee (truck shop-utility) Greg Bolin, Alaska order picker Roman Barczyszyn, and vending serviceman Wally Hull. Reed testified that a union meeting had been held on Saturday, August 25, intimating it to be only of bargaining unit members at Respondent. He recalled that during this meeting, and in context of potential strike action, Rogstad "tried to explain to us what the law . . . said about [possibly being] permanently replaced." Reed added credibly that this particular subject, rife as it was with uncertainties and variables, "had been mentioned a time or maybe twice" at a prior meeting too. The membership meeting of August 25 resulted in a vote giving strike authorization to the bargaining committee.

As prearranged, a final strike vote meeting began in late afternoon of Wednesday, August 29. Both the starting time and meeting length were tailored to permit widest possible participation as among Yakima-area employees and those at distant points. The approximately 6 p.m. meeting start readily served departing day (first) shift employees, and, for the most part, those arriving for night (third) shift work. The numerically fewer swing (second) shift employees did not, insofar as known, personally appear at the meeting. A loose understanding permitted augmentation of voting by informal proxy of, or telephone communication from, members regularly stationed at outlying business locations.

A main structure to the meeting was secret-ballot voting by the members, plus informally allowable augmentations. In the course of this Rogstad had occasion, or was drawn, to speak out loudly across the mingling assemblage of members. He sought continuing orderliness to the event, cautioned of the serious occupational and financial considerations that were at stake, answered questions, and reiterated governing notions about the subject of an employer permanently replacing its striking employees in their jobs. By about 8 p.m. an overwhelming, final strike authorization vote had been given, and the Union conveyed notice of this to Respondent's facility, plus girding for the start of picketing at midnight.

#### *F. Prior Employer-Side Strike Planning*

Mike Noel was in career transition when the "triggering" labor contract of 1987-1990 was reached. Prior to September 1987 he had been a cost accountant for nearly 2 years with Respondent, although actually working on a finance project for the sister enterprise named Noel Canning. After appointment as general manager in September 1987 Mike Noel participated in finalizing the new collective-bargaining agreement.<sup>5</sup> He testified that a "handout" intended for employees

<sup>5</sup>This contract was technically between Respondent as employer and, on the other hand, the Union jointly with Teamsters Local 839 of Pasco, Washington. Its actual date of execution by representatives of all three entities, along with collateral letters of understanding, was on June 16, 1988.

had been created by Attorney Lofland at that late 1987 point in time, and in anticipation of a possible strike then.

When the 1989 wage reopener dispute and resultant unfair labor practice proceedings of Case 19-CA-20737 occurred, Respondent also made certain strike contingency plans. This involved utilization of the Yakima business entity named Employment Plus, an employment service co-owned by Chris Wellner and Erin Hale. Employment Plus screened striker replacement prospects at that time, and a training program was deliberately carried out in order to have moderately competent backups for Respondent's mainstream warehouse and delivery functions. Wellner herself is a former administrative employee of Respondent and had associated with Employment Plus in September 1989 at just about the time this strike contingency training originated.

As negotiations of summer 1990 approached the August 29 contract expiration date, Respondent again turned to Employment Plus for a standby program. During managers' meetings as early as August 9, a possible strike was discussed by partial reference to such 1987-authored handout on the subject. At this point in time management hierarchy under Mike Noel (Noel) at Respondent's Union Gap-centered facility was headed by Operations Manager Rodney (Rod) Robbins. Others were Sales Manager Douglas Englund, Traffic Manager Ed Shirley, Day Warehouse Supervisor Don Miller, Night Warehouse Supervisor Michael (Mike) Wright, Chemical Beverage Manager Jim Foster, and Truck Shop Manager Pat Stump.

By mid-August Employment Plus had a verbal commission from Cummins to reactivate old applicant files, and generally anticipate more intense activity should a strike actually ensue. As more August days passed without a firm expectation of settlement, Employment Plus ran a "blind" help wanted advertisement on Tuesday, August 28, and repeated it in the area's morning newspaper on August 29. These first 2 days yielded about 20 applicants which Employment Plus tentatively screened. It segregated those with a combination class A license necessary for truck driving and those with forklift experience useful to warehouse positions, from prospects for general laboring. This preparation led to certain hasty job substituting as evening events of August 29 unfolded.

#### *G. Essentials of Evening, August 29*

Noel testified that advice from the Union of its intention to strike jarred his "pretty good feeling" about having a new agreement before the midnight deadline. When so informed, however, he returned to his office and became principally active in planning to continue operating insofar as would be possible. His general sequence of activity was imparting advisories to corporate and sister company officials, conducting a mid-evening managers' meeting to fulfill a four-point strike response presentation, relatedly contacting Employment Plus for urgent exhaustion of available strike replacement personnel, and maintaining running communication with Attorney Lofland for legal guidance.

In the course of all this Rogstad reached Noel by telephone to inquire if a last minute get-together yet that night might "avert the strike." This suggestion ran afoul of Noel's emergency commitments with his own people. At approximately 11 p.m. he called back to Rogstad per expectations between the two of them. Noel declined to meet, saying that

the Company would simply accept the strike commencing at least for then. With this inevitability established, Rogstad went directly to the facility where about 40-45 members were setting up to picket.

Inside the premises Noel had conducted his managers' meeting over approximately three quarters of an hour beginning around 9 p.m. Most affected managers were present, along with Cummins. Robbins attended on a call-in basis from the second week of a vacation, while Englund was away in Spokane that night for a meeting. Noel started with a short "pep talk," then expressing likelihood to the concerned managers that strike disruption would certainly mean "late trucks" to Respondent's customers. He testified that his most critical instruction to managers concerned the intention to acquire permanent replacements for strikers, and his discussion of both the legal and practical consequences of doing so. Finally, Noel directed that immediate telephone surveying of employees be done, to get a "read on" who would strike and who would not. He concentrated this assignment with Robbins and Shirley, who together supervised, directly or indirectly, the main bargaining unit contingent of warehousemen and drivers.

Implementation of Noel's directions took several forms. The telephoning was actually done that night by Robbins, Miller, Foster, and Shirley. Robbins made the greatest number of calls, concentrating on both warehouse employees and Yakima-area delivery drivers. Miller called day warehouse personnel of his department, plus miscellaneous employees such as a swing shift warehouseman and the receiving clerk. Foster telephoned to a few chemical beverage servicemen under his supervision. As agreed between Robbins and Shirley the latter called to outlying-based drivers with whom he was more familiar. In all cases the telephoning also involved leaving of messages with spouses or others, intended to quickly draw out job intentions from individual employees.

In late day around 10 p.m., Robbins determined to conduct a night crew meeting. With Wright's assistance this was quickly arranged to precede the group's usual 10:30 p.m. break. The basic night crew was called away from their duties, and, along with several swing shift workers who were then nearing their own normal quitting time, plus truck shop personnel, this entire group of at least 18 persons assembled in the breakroom to hear from Robbins. He spoke for about 10 minutes, testifying that he said the decision to strike was one of great consequence and could mean anyone leaving "would [or] can be permanently replaced" (Tr. 1440-1442, 1925). Robbins took a few questions from employees, but soon became tearfully emotional as he compared any strike disruption to the divorce he was experiencing at the time. Wright then stepped in to make concluding remarks. These were more practically geared to operational consequences of a strike, and reminders such as for strikers to turn in freezer suits and boots.

There were also episodal conversations and events both before and after the official time of actual strike commencement at midnight. These included (1) what several rank-and-file employees overheard of the home telephoning activity being carried out by management, (2) various exchanges as night crew employees prepared, or leaned toward preparing, to commence their strike, (3) remarks made by supervisors of Respondent who ventured outside to the picket line after midnight, and (4) unique episodes covered in testimony of

particular General Counsel witnesses. In all regards the context was originating strike action by employees, versus a concerned management group making unprecedented adjustment to minimize its business effects.

#### H. Profile of the Period August 30–September 4

##### 1. Strike commencement and Employer response

While the tensions of an imminent strike began building in earnest by around 10 p.m. on Wednesday, August 29, as a calendar matter the first day of the strike is commonly and conveniently considered to be the 24-hour period beginning at midnight, or 12:01 a.m., on Thursday, August 30. From postmidnight of Wednesday, August 29, into the daylight morning hours of Thursday, August 30, different activities occurred that were both separate and interrelated. There was first a typical scene outside the facility with several dozen strikers, some of whom had gathered earlier, remaining through all the wee hours of that initial picketing. Other strikers arrived after the exact hour of midnight, and still others chose to leave at various times before dawn. Remotely based members, particularly those supportive of the strike, strove to learn the true situation during telephoned communications as advocates of both sides spread factual or merely persuasive information.

Second, several of Respondent's supervisors remained at the facility in a form of special duty that ranged from a few extra stay-over hours, or time spent after call-in, to Traffic Manager Shirley who was up some 30 consecutive hours in connection with company-side needs of the strike having started. The presence of the supervisors also reflected a monitoring of strike-related operational adjustments, plus rudimentary training and break-in of the dozen plus individuals drawn from initial help wanted advertising.

A third main dynamic concerned call-up of substitutional and supplementary personnel to operate tractor-trailer loads out to daily delivery venues as this would be expected by customers on a routine weekday (Thursday) morning. Here the reach was to supervision, sales employees, truck shop employees, Noel Transportation drivers, or other persons available and qualified licensed.

##### 2. Extent of the strike

A principal business disruption on the first day was the few key departures by striking night crew members, coupled with extensive strike solidarity among Yakima-area delivery drivers. The night crew strikers who left during that first affected shift were yard driver Jim Stiltner, dry warehouse picker Bret Lombard, and freezer picker Tom Glass. Additionally, the significant distant locale of Portland was affected by striker vacillation, while at at Spokane it was from strike unity of regular, long-haul, tandem tractor-trailer shuttle drivers Sam Denton and Chris Tracy. The early effectiveness of the strike was also felt in several specific areas or functions, as at Wenatchee and the Idaho runs where, respectively, withholding of services or inexperience of replacement employees impaired normal business. Finally, the specific activity categories of truck maintenance, chemical beverage servicing, and computer routing were hit by the strike.

##### 3. Variables to extent of the strike

Generally the individual prestrike information, apparent solidarity of purpose, and participation in strike voting were spotty as among bargaining unit members. In the immediately early times following their midnight deadline, the financial, domestic, and career realities of striking affected actual behavior of particular strikers. This was essentially true with members of the Union not present at the picket line, whose awareness of developments came mostly from telephone networking calls, plus the early, persistent inquiries of management officials. The results were instances of indecision and delay among some employees as to just what they would do, and the more complicated activity of providing partial work service or only promising to do so.

##### 4. Extent of striker replacing

The strike planning efforts of Employment Plus Co-Owners Erin Hale and Chris Wellner had changed abruptly from active to urgent as of late evening on Wednesday, August 29. Cummins, as directed by Noel, attempted, and by about 9 p.m. had completed, telephone contact to the personnel agency. Hale and Wellner went directly to their client's premises, arriving about when Noel's managers' meeting ended. The coordinating duo of Noel and Cummins quickly instructed them to marshal up potential strike replacements by midnight. Hale and Wellner immediately returned to commence telephoning from their office, and through this means canvassed availables from the past 2 days of help wanted advertising. They obtained statements of intention from 17 people to show up by midnight. Cummins had meanwhile notified Respondent's security firm about the strike, and this agency provided extra guards for midnight and beyond as required.

Hale and Wellner arrived back at the facility by around 11:30 p.m. with a list of names keyed to job functions anticipated by Respondent as its immediate replacement needs. Of the 17 persons expected to appear, 15 actually showed up just before, or at around, midnight. On arrival, and after some coordination of movement by the augmented security personnel, they were shunted directly into operational areas for orientation, break-in and training. The effective result was a spreading of not fully initiated, supplementary employees to continue with the nightly cycle of overall order picking and truck loading.

##### 5. Variables to extent of striker replacing

A complete depiction of oddities and adjustments as this initial group phased into the operation cannot be made, because many details of such a process were not, as would be so overly difficult to do, developed for this record. What is known includes first that a number of the striker replacements did not stay long or were soon terminated.<sup>6</sup> In some

<sup>6</sup>G.C. Exh. 5, Employment Plus' 14 name applicant list indicating actually hire at 12:01 a.m. of Thursday, August 30, subordinates in accuracy to a summarizing "Attendance Record" (G.C. Exh. 11) and its foundation in semimonthly "Payroll Time Ticket[s]" (G.C. Exh. 13) for the pay period ending August 31. In turn, G.C. Exh. 13 has more probable accuracy than G.C. Exh. 11, the latter known to be a document prepared for litigation and not a basic business record (Tr. 1283). The situation of replacement employee Frank Marazita needs special comment, because I take the facts of his

*Continued*

cases, as with warehousemen James Aills, Monty Owens, and Idaho driver Lawrence Nicholls, only a day or so were lasted. Somewhat comparably and as to persons hired after the help wanted advertising for reading on the morning Thursday, August 30, “barraged” Employment Plus with applications, warehouseman Jeff Schlepp and driver James Cheney, plus William Englebert at Spokane, resigned or were terminated.

An internal situation involved several persons employed in the entry level, nonbargaining unit position of checker.<sup>7</sup> After assessment of business needs at an operational meeting held by Wright around 1:30 a.m. on August 30, three of these checkers on duty at the time were upped to order pickers. This decision triggered another minor change whereby “floating” warehouseman Howard (Russ) Powell replaced departed night crew striker Tom Glass. Powell’s special category as a floater meant that he was qualified for freezer work if called on, and paid a 15-cent-per-hour “premium” (not shown or traceable from payroll time ticket markings) over wage rate. In other instances, as treated below, the particular replacement dynamics as to bargaining unit members were affected by special circumstances, unique to their individual situations.

#### 6. Labor management dealings

The next significant contact between key representatives of each party occurred on August 31. Early that morning Rogstad telephoned Noel and the two of them agreed to an “off-the-record” meeting at a Yakima restaurant that afternoon.<sup>8</sup> The ensuing meeting’s remarks were candid and showing mutual concern, with both Rogstad and Noel expressing rather dismayed surprise over the strike having commenced. Beyond this nothing of substance was achieved in regard to Respondent’s then current, and rejected, contract offer. Rogstad did lightly probe whether Respondent would be willing to tinker with the economics, such as by “shuffl[ing]” dollars to show an increase in pension contribution. Noel made a guarded reply in the subject of economics, as well as larger issues of contract renewal as a whole, which remained inconclusive.

Before such off-the-record and discreet meeting of these two ended, the topic of striker replacements was raised. Rogstad’s testimony on the point reads:

Mike then raised the issue of the rights of the permanent replacements. He said that they had hired a few

poststrike utilization to be neither G.C. Exhs. 11 or 13-based, but instead the detailed and acceptingly creditable testimony of Wright (Tr. 1953–1954, 2009).

<sup>7</sup>The record does not explain whether “Warehouse Clerical,” as expressly excluded from the collective-bargaining agreement, was synonymous with “checker.” Other suggestive job title terminology is also found in the testimony, such as inventory control (“we called it”) or quality control (for “customer service” purposes). I sense from the overall facts, and testimonial implications, that this “checker” position was excluded from the bargaining unit by usage and understanding (see Tr. 1920, 1936–1937, 2014).

<sup>8</sup>I fix the date of the meeting as Friday, August 31, based on Noel’s precise, persuasive, and seemingly more correct testimony; thus crediting it over the contrary implication by Rogstad that they had talked over coffee on Thursday, August 30. This factual finding also controls an immediately following sequence of telephoning between them.

but not that many, that there had been some hired, and I told him that from my viewpoint, I would recommend that they make them temporary, not make them permanent to avoid problems down the road. He said that he would get on his car phone on the way after that meeting and see what he could do to set up something formal.

Noel testified more succinctly as follows:

And Mark asked me flat out, “How many permanent replacements have you hired?” And I didn’t know and I basically didn’t discuss it.

Demeanor factors between these two witnesses are essentially equal as to the just-quoted versions of conversation regarding striker replacement. I am persuaded to accept the detailed testimony of Rogstad, and believe it to be accurate.

What did eventuate at the restaurant meeting was a tentative agreement between Rogstad and Noel to meet later that day at Yakima’s Towne Plaza Motor Inn. Rogstad went there at the proposed time with colleague Jones, but no meeting of an anticipated “more formal” variety happened. Instead, after Noel had conferred expediently with Attorney Lofland and Corporate Official Larry Estes, he arranged for the waiting Rogstad to get a telephone message calling off that late afternoon meeting.

Soon afterward, by now approaching 5 p.m. of Friday, August 31, Rogstad and Noel did have direct telephone contact with each other. Rogstad testified that in this conversation, confirming as it did that Respondent’s representatives had “changed their minds,” Noel also added how “the company . . . instead wanted to work through a mediator rather than go face-to-face that day.” Noel’s version of this telephone conversation fixed it as one originating from a “disappointed” Rogstad. He recounted an exchange focusing on the holiday weekend which the strike was about to span, and his own emphasis to Rogstad that Respondent intended “to reevaluate this thing [and] look at it next week.” Noel strongly denied making reference to Federal mediation services during this conversation.<sup>9</sup> On this direct point of contradiction between these chief representatives of the opposing parties, I am persuaded to fully credit Noel. This is based on his generally convincing demeanor, his well-detailed recollection of the exact remarks exchanged, and the inherent probabilities of how the overall course of negotiations had, and was to be, unfolded, plus Noel’s consistent reliance on legal counsel’s advice throughout.

Noel testified further that a decision was hatched on September 3, at a long meeting where he was present with Attorney Lofland and corporate officials including Roger Noel. As commissioned to make “the best move . . . to protect the company” Attorney Lofland proceeded to arrange a meeting of the parties for September 10, at the Towne Plaza “to resume negotiations.” He confirmed this scheduling by letter to FMCS Commissioner Norm Beatty dated September

<sup>9</sup>The parties were well familiar with functions of the Federal Mediation and Conciliation Service (FMCS) as applying to their long-running contractual dispute. Matters of mediation function and procedure were first touched on back in summer 1989, and continuingly so throughout the first 8 months of 1990. This will be treated in section Q below (headed Respondent’s Affirmative Defense).

4, in which he wrote that representatives of the Union had been appropriately notified.

#### I. Selected Witnesses of the General Counsel

The synopsis of testimony that follows is made in the same order in which numerous witnesses were called by the General Counsel during trial. This includes, in addition to alleged discriminatees, a few auxiliary witnesses called during the General Counsel's case in chief, but for whom no violation is claimed or as to whom a listing in the third amended consolidated complaint has been effectively withdrawn. Where testimony of a witness connects to information relayed by a spouse, the assertions of both persons are combined under one numbered heading for convenience and brevity.

1. *Dick Martin*—He was a vacation relief warehouseman and worked as scheduled on August 29 from 2:30 to 11 p.m., plus an hour later added on as overtime. According to Martin he attended a night crew meeting with about 30 other employees at 10:30 p.m. by his approximation, knowing at the time from coworkers that a strike was to start at midnight. Martin testified to hearing Robbins say (1) that as of midnight Respondent would be a nonunion shop, (2) that anybody walking out would be permanently replaced, and (3) that this would all result in strikers not having (“will lose”) their jobs, which were “tough right now to find.” He also recalled hearing Robbins say how those who stayed to continue working “will go under Noel’s insurance and pension plan.” Martin, as well as numerous witnesses following him, described Robbins’ emotionalism as he spoke of crying a little and referring to his own problems of a divorce proceeding.

Martin elected to strike starting the next afternoon, and has not worked since then for Respondent. At the time he had 2 weeks of accrued vacation scheduled in early fall. As the case with many other strikers Martin believed from word of mouth that he would have to terminate from employment by resignation to obtain money in lieu of vacation pay. On this basis Martin has neither requested vacation pay, nor resigned, as of the time he testified.

2. *Dan Bonlender*—He was a local delivery driver working at Portland along with Jeff Taylor, the other driver at that location. According to Bonlender he had learned from Taylor during the evening of August 29 that a strike by the Union had been planned to start at midnight. Bonlender testified that around 10 o’clock that evening he was telephoned at his home by Robbins, who wanted to know if he was going to join the strike or was going to stay working for the Company. Bonlender recalled Robbins saying that he would “be nonunion” if he were to stay and work, but would be permanently replaced if he did not. Bonlender asked for time to think over a decision, and did so while discussing it both with his wife and with Taylor. Both drivers decided to work the next day, one on which the route schedules had them riding together and he telephoned back to Robbins with this decision.

They began delivering the route on schedule the next morning, but soon begin experiencing call messages at various stops from union members of the Yakima area wanting to talk with them. They then called to Shirley for information on what was happening around the various operations, and were told by him that in certain outlying areas drivers were

working and delivering. Based on this Bonlender and Taylor decided to quit delivering, and after notifying the area salesman of this decision returned with their truck to Portland while about four undelivered stops still remained. When Bonlender reached his home at around 3 p.m., Robbins called again saying that the route delivery should be completed, and repeatedly said “you’re either in or you’re out.” Bonlender again asked for time to discuss the pressured situation with his wife and was given 15 minutes to do so. He then called back to Robbins telling him that with assistance from his wife, but not from the unwilling Taylor, he would then finish the route. The couple did so, working until about 1 a.m. the following morning in the process.

Bonlender again appeared for work on Friday, August 31, at 5:30 a.m., just as the loaded Portland trailers arrived for that day. The rig was driven by Tom Clark, a salesman from the Walla Walla area, who was accompanied by District Sales Manager Bill Combs. These two sales officials inquired about Taylor’s intentions, and later got an indirect assurance that he would work. Meanwhile Bonlender had pulled out with his own load and proceeded with a normal delivery that day. On his return around 2:30 p.m. he observed the second of the tandem trailers still sitting undelivered where it had been dropped that morning. Bonlender made a routine check-in call to Shirley, who inquired of him about Taylor’s undelivered route. Shirley also asked Bonlender to make that delivery, but he declined based on his own fatigue at the moment adding that he could not even do it the following day because of personal plans that Saturday. After the full labor day weekend had passed, Bonlender in fact elected to join the strike and has not worked since then for Respondent. At the time he had 1 week of accrued vacation scheduled for the end of November, but has ultimately received no pay for it after receiving a letter from Respondent that a resignation would be necessary to get this money.

3. *Tom Glass*—He was last actively employed as a freezer picker on the night shift, ordinarily working scheduled hours of 6 p.m. to 4 a.m. He also attended the night crew meeting, recalling that it began around 10:15 p.m. in the lunchroom with approximately 25 employees present. Glass testified that Robbins stated Respondent would become nonunion, the employees would be permanently replaced if they commenced a strike, and they would never work for Respondent again. As Martin had generally done, Glass attributed the statement to Robbins that anybody staying to work in face of the strike “would be covered under the Noel benefits package.” Glass recalled Robbins ending his remarks with repetition that Respondent would become nonunion, and saying employees who walked off the job would experience an unemployment line.

After this assembled meeting of employees ended, Glass started on his way out to begin striking accompanied by coworker Jim Stiltner. Before actually leaving the premises Wright spoke to them, reminding Glass that his freezer coat should be left and that telephoning was already being done to arrange replacements. Glass added how Wright then intimated that this permanent replacing meant that he would never come back with Respondent.

4. *Cecil Wilson*—He was actively employed as a night-shift freezer picker on August 29. He had attended the Union’s strike vote meeting late that afternoon, and learned the results of it later while at work. Wilson was present at

the night crew meeting with numerous others, and recalled that during the course of it Robbins said the Teamsters would be through at the Company as of midnight. Wilson added that Robbins said if a walkout occurred such employees would be terminated, but that those employees staying on the job would be working for "new contract wages." He also recalled Robbins saying that it would be hard to find jobs in the vicinity at wages Respondent was paying, and how it would be a serious thing to inform a spouse of no longer being employed. Wilson did not go on strike, but continued working and around January 1991 became a day-shift cooler stocker. He took a paid vacation in October based on his accrual of this benefit.

5. *Jim Stiltner*—He was last actively employed as a night-shift yard driver, with scheduled hours of 7:30 p.m. to 6 a.m. The job involved shuttling trailers at Respondent's warehouse premises, and setting up loaded tandems. As to driving qualifications he testified to prior experience and that shuttling of trailers at and around the docks was equivalent to over-the-road driving. Stiltner added that once in the course of employment he went on a public road because of a truck breakdown to switch equipment. When he had to be replaced for time off it was ordinarily employee Chuck Baladez who did so.

He attended the Union's strike vote meeting, and later learned from a committeeman at work that the membership had rejected Respondent's last contract offer. Stiltner recalled that during the Union's strike vote meeting Rogstad had stated the Company could replace strikers permanently, and would likely do so as applications were already being taken.

Stiltner had been late arriving at the night crew meeting, recalling that it was announced to begin around 10 p.m. and had approximately 18 employees present. According to Stiltner, Robbins talked right up to the time of the ordinary lunch break for night shift, saying that Respondent would no longer be a union shop, that strikers would be replaced, and that "Noel Foods retirement and insurance" would come into effect.

At about 11:30 p.m., as Stiltner continued working, Wright approached him in the yard to ask about intentions. When he advised of planning to strike, the supervisor only said "to do what I think was right." Stiltner testified that when midnight came he went on strike, and experienced more remarks from Wright as he and Glass were exiting premises immediately after the midnight deadline. Stiltner recalled Wright's closing remarks were simply the informal advice to "take it easy." Stiltner has never since asked for his job back, nor been offered it.

6. *Leo Hull*—He was lastly actively employed as a night mechanic, with scheduled hours of 4 p.m. to 2:30 a.m. He altered his work to attend the Union's strike vote meeting, but was uncertain whether or not Rogstad had said anything about the possibility of members being permanently replaced for going on strike. He did recall comment that Respondent was taking applications for replacements, that they were advertising in the newspaper, and that "a risk" was involved in going on strike.

Hull attended the night crew meeting, recalling that it began around 10:30 p.m. with approximately 22 employees present. According to Hull, Wright spoke first, saying that he had enjoyed working with us all but the Company was strong and serious as it approached the strike deadline. Robbins

then made emotionally charged remarks in which he said there were plenty of people ready to work, that those going on strike would be permanently replaced with those they had, and that as of midnight Respondent would no longer be a union Company.

Hull joined the strike at midnight, walking out with co-worker Bret Lombard. Before doing so he twice experienced further remarks from management officials while still at the premises. One was with his supervisor, Pat Stump, who advised him to "think about" his decision and its effect on his ever coming back, as the Company would "not fall" under strike circumstances. The second occasion was when Noel said simply that if the striking employees changed their minds to notify him. Noel explained this as meaning he would see about their coming back, and, answering Lombard's inquiry, that there was no time limit on this option. Hull has not had any further contact with Respondent regarding employment, nor had his job been offered back to him.

7. *Bret Lombard*—He was last actively employed as a night picker in the warehouse, with regular hours of 6:30 p.m. to 2:30 a.m. He attended the Union's strike vote meeting and recalled Rogstad saying that employees could be permanently replaced. Lombard actually learned of the midnight strike deadline from Kelly Phillips, his committeeman, who told him of this around 9:30 p.m. that evening.

Lombard was called to the night crew meeting, which he believed began around 10:15 p.m. with 20 to 25 employees present. According to Lombard, Robbins spoke emotionally, asking for trust in the Company while saying that after midnight it would become nonunion as those employees going on strike would be permanently replaced and not coming back. Lombard recalled that shortly after the meeting ended Robbins spoke to him again, inquiring about his plans and saying that going on strike would be the wrong decision and result in his not coming back. Lombard corroborated the testimony of Hull about remarks of Noel as they left the premises at midnight to commence striking.

8. *Rick Mallonee*—He was last actively employed as a computer router, and ordinarily worked from 1 to 10 p.m. fulfilling an office function called "road net" in which daily delivery plans were scheduled. According to Mallonee, word about a planned strike was going around "pretty wildly" at the facility. He personally learned what was about to go on when Robbins and Shirley came into the office where he was working at some point. He attended the night crew meeting and testified that Robbins said striking employees would be permanently replaced, would no longer have a job with Respondent and would never come back. Mallonee also recalled that withdrawal cards were discussed, with the suggestion to get them from the Union immediately. Mallonee got the impression from remarks that employees could "go to the Noel insurance and pension plan," and he testified that while answering the question of employee Dan Gilcher, Robbins said Respondent could actually "let us go" for striking as when people are fired.

Mallonee also testified that in the course of his last evening at work he overheard several telephone conversations undertaken by both Shirley and Robbins. In Shirley's case these were being made at approximately 9:45 p.m. from a point only about 4 or 5 feet away from the desk where Mallonee himself worked. According to names mentioned by

Shirley, he was conversing in turn with Pat Benesch, Cecil Bixler, Mike Weiler, and Monte Berghoff, all of whom were drivers. In each case the remarks from Shirley's end of the conversation were that Respondent would permanently replace any individuals going on strike. Mallonee could also hear "bits and pieces" of telephone conversations undertaken by Robbins from a point about 15 to 20 feet distant. Here Mallonee recalled no names being mentioned over the course of two or three such calls, while hearing Robbins say loudly to the listener that they "would no longer have a job" but without mention of permanently replacing employees.

Mallonee began the strike along with many others, and has had no contact since with members of management. At the time he had a vacation accrual of 96 hours, apparently effective at the end of October but not scheduled for use. Mallonee has not received vacation pay money, nor requested it from Respondent.

9. *Ernest Reich*—He was last actively employed as a freezer stocker ordinarily working from 1 to 11 p.m. He was scheduled for an hour of overtime work on August 29, and beyond this his next workday would again begin at 1 p.m. He attended the night crew meeting, which he recalled as starting around 10:30 p.m. According to Reich, Robbins stated the Company would become nonunion at midnight, and anybody leaving on strike would no longer have a job to come back to.

Reich later determined to go on strike, but as his extended shift of August 29 ended was still noncommittal. Before leaving the facility that night he had a brief conversation with his immediate supervisor, Don Miller, and later while actually exiting from the premises another one with Noel. He testified that Miller simply said he should make up his own mind about striking, while Noel told him that an answer about whether he would continue working could be made the next day. At about this same point Wright approached him and handed over withdrawal slips from the Union, which he indicated should be returned to Respondent.

Reich has had no further significant contact with Respondent since that time. He had 2 weeks of accrued vacation, with one of them already scheduled in October. He received no money for this vacation accrual, nor did he request it because of hearing that he would have to resign in order to get it such compensation.

10. *Charles (Tom) Wickenhagen*—He was last actively working in Respondent's truck shop as a utility man doing vehicle service on a fluctuating day-shift schedule. He was supervised by Stump, but worked in close coordination with maintenance employees of the nonunion Noel Transportation division.

Wickenhagen attended the Union's strike vote meeting, and recalled some discussion of strike consequences at that time. He stayed at the hall for the entire strike vote and beyond, then went directly to the picket line where he stayed until well after midnight. Wickenhagen did not go into work the following day, and he testified that Stump telephoned him that afternoon to state that those going on strike would be permanently replaced, and that the Company was operating nonunion.

11. *Robert Allen*—He was last actively employed as a day warehouseman, ordinarily working scheduled hours of 5 a.m. to 1:30 p.m. He was present for the Union's strike vote meeting in late afternoon of August 29, and knew from this

of the planned strike at midnight. This meeting was an animated, well-attended one, with much noisy talk among the members, however Allen cannot recall whether Rogstad referred to the possibility of employees being permanently replaced after going on strike. Allen testified that around 10 p.m., on August 29 he was telephoned by Miller, who stated that his going on strike would mean being permanently replaced as of September 1. His answer to this prospect was that Miller should do what he has to do and he, Allen, would do what he had to do. He did in fact go on strike, and on the first Friday, August 31, experienced the receipt of papers from Robbins along with others on the picket line. Beyond this he has had no further contact with Respondent's officials, nor as the case with practically all other strikers offered to return to his job. The handout made by Robbins early in the strike was a question and answer sheet regarding strikes.

Allen further testified that on the morning of August 30 he saw about six exiting delivery trucks, two of which were driven by new personnel and the other four driven by supervision, salesmen, or nonstriking warehousemen familiar to him. The new drivers were accompanied by office personnel of Respondent riding with them.

Allen had 1 week accrued vacation based on his anniversary date of October 21. He has not been paid for such vacation, nor did he request it based on advice from Rogstad that he should wait on this point or it might jeopardize the possibility of any backpay.

12. *Richard Buckley*—He was also last actively employed as a day warehouseman, but ordinarily working scheduled hours of 8 a.m. to 5 p.m. He attended the Union's strike vote meeting, and knew of the membership's contract offer rejection for this reason. Buckley testified that around 10 p.m. that night Miller telephoned him to say that if he did not report for work the next day he will be permanently replaced. Buckley acknowledged this information, saying he will talk to Miller later and hung up. He did, however, simply commence to strike, and he began picketing activity on August 30. He has had no further contact with Respondent's officials since that time.

Buckley testified how on that first morning of picketing he saw three or four delivery trucks exiting the premises, and being driven by either salesmen or management personnel all of whom were familiar to him. Buckley denied ever seeing a document similar to the question and answer handout in evidence as Respondent's Exhibit 2, or that anything of this nature had been given to him on the picket line.

13(a) *Susan Wilson*—She is the wife of employee Richard Wilson. She testified to being telephoned the night of August 29 around 9:30 p.m. by Robbins. The official asked if her husband was at home, and learned he was not. According to Susan Wilson, Robbins stated that as of midnight there was no union at Respondent, but if her husband would call in before that deadline and tell them he was coming to work he could continue as it had always been for him. She recalled that Robbins added Respondent would be "under no obligation to hire [her husband] back after the strike is over." When Richard Wilson returned home at around 9:45 p.m., she told him of Robbins' call and exactly what he had said to her.

13(b) *Richard Wilson*—He was last actively employed as a delivery driver on a shift that ordinarily began at 5 a.m.

He learned of the telephone contact from Robbins to his wife after getting back from the Union's strike vote meeting of August 29. Richard Wilson did not call back to Robbins but simply became a striker by not reporting to work the next morning. He has not had contact with any official of Respondent since then, nor received any offer of reinstatement.

14. *Mike Weiler*—He was last actively employed as a vacation relief driver. August 29 fell in a week that he was temporarily assigned up at Spokane. He learned of the union membership's strike decision by participating in a group vote of Respondent's employees at Spokane, who telephoned in their votes to be combined with the overall total. By this process he and other regular drivers of the Spokane vicinity knew that a midnight strike deadline had been established.

According to Weiler, Shirley reached him by telephone shortly after 10 p.m. that day, and stated that should he honor the strike he would be permanently replaced. Weiler asked if it seemed the situation would really go that far, and Shirley surmised that it probably would. Weiler then said that he would appear for work at 5 a.m., but not cross a picket line should it be present. Shirley answered by saying he had talked with the other three Spokane vicinity drivers, and was told they were all planning to work.

The next morning Weiler arrived at the regular delivery pickup point and found that in fact the other three drivers were picketing. On this basis he did not perform service, but instead also joined the strike. Later that morning he telephoned Englund at Respondent's Union Gap warehouse. Weiler recalled Englund stating in the course of this conversation that if he wanted to work for Respondent he should resume his assignment, and it would be on a nonunion basis with the Company-offered pay and benefits. Weiler promptly returned to the Yakima vicinity where he resides, and within 2 or 3 days was telephoned by Shirley who stated he did not want to lose him as an employee. Shirley also stated Respondent was then operating on a nonunion basis, and to this Weiler remarked that he wanted to give the strike some time so as to see what might happen.

According to Weiler, Robbins called him sometime during the second week of the strike, to reiterate Respondent's hope that it not lose his services because he was one of the "key people" they had. Robbins repeated the phrasing that Respondent was operating a nonunion shop, and Weiler could work on that basis if he wanted to. Weiler answered that he still wanted to take more time. Robbins telephoned again about 2 or 3 days later, and on this occasion simply communicated information, as though reading from a piece of paper, about how strikers should return any company property. Weiler emphasized the tone of this communication by adding that when Robbins finished he simply hung up without further comment. Weiler had accrued vacation of about 1 week at the time, scheduled to be taken in November. He has neither received such vacation pay nor requested it because of not wanting to resign from Respondent's employ.

15(a) *Mary Doll*—She is the wife of employee James Doll. According to her two telephone calls were received at their home during the evening of August 29, the first from Robbins around 7:30 p.m. and the second from Miller within an hour later. In Robbins' call she was advised that Respondent would become a nonunion shop at midnight, and her husband would be permanently replaced if he did not appear for work. In the second call Miller just asked to have her hus-

band telephone back to him. James Doll called his wife around 10 o'clock that evening to say he would go on strike at the picket line, and she referred the two messages to him including passing on the phrasing of Robbins' remarks.

15(b) *James Doll*—He was last actively employed as an Alaska order selector, working day shift hours of 6 a.m. to 5 p.m. on Mondays, Tuesdays, Fridays, and Saturdays. Because of this he was not scheduled to work on either Wednesday, August 29, or Thursday, August 30. He attended the Union's meeting of late afternoon on August 29, recalling that a strike authorization resulted after membership rejection of Respondent's last contract offer. He then learned from his wife of the two telephone calls made to his home with the intention of reaching him, and believed the time of such information was around 8:30 p.m.

Based on this he called Robbins, and then went to the plant around 9:30 p.m. to meet with him for private discussion in a breakroom. According to James Doll, Robbins said in the course of this meeting they needed him in the morning, and if he did not come to work then he would be permanently replaced in the nonunion operation that Respondent would become. Robbins advised him to give the matter strong consideration if he wanted to still "have a job with Noel Foods." Additionally, Robbins asked him to talk with other employees so Respondent would not lose key people, meaning by this that James Doll was likely to have influence among his coworkers because of being a former supervisor. Robbins' remarks were made as applying to all strikers generally, including the danger "that we would lose our jobs."

The next day Robbins telephoned him at home with the same remarks as made the night before. James Doll answered that he would not jeopardize his "union job," meaning that he would not abandon the strike and return on the basis that Robbins was projecting.

James Doll testified about picketing on the first night of the strike with about 40 or 50 other individuals, and how a "little bit of shock" existed among them concerning how few of the night-shift personnel had come out at midnight. He recalled that on this first night Englund, Wright, and Shirley came out on the picket line at around 3:30 a.m., with Wright telling picketers they would be permanently replaced for continuing to strike and that reporting back to work would be "under nonunion conditions." James Doll also testified that as part of this episode in a private side conversation with Wright, this supervisor added further comment about how "he hated to see" it come down to this. He testified further that on the first Sunday of the strike Robbins passed out religious pamphlets to persons on the picket line, along with blank withdrawal cards from the Union which he urged be filled out and used to return to work on a nonunion basis. At the time of the strike James Doll had accrued, but unscheduled, vacation entitlement, which he has not asked be paid to him because of not wanting to resign from "all ties" with Respondent.

16. *Mike Cingle*—He was last actively employed as a day warehouse stocker, ordinarily working scheduled hours of 6 a.m. to 2:30 p.m. He attended the Union's strike vote meeting of August 29, and testified that later in the evening at around 10:30 he was telephoned by Miller. According to Cingle, this official inquired if he would come into work that night for a few hours, which he declined to do. Miller then ascertained how this meant Cingle was going to strike with

the rest, and said in conclusion that Respondent was “going nonunion” at midnight.

Cingle has had no further contact from Respondent or a job offer since that time. He commenced picketing at around 11:30 p.m. on August 29, at which time 50 or 60 strikers were present. There was extensive talk among them about the various calls and employer contacts each had received earlier that evening.

Cingle testified that during that day’s earlier union meeting, Rogstad had advised members they were considering a “very serious matter” and said something to the effect of permanent replacing that might affect strikers. He also recalled questions being raised on this point, but none of the details concerning them. He recalled seeing the question and answer sheet which is in evidence as Respondent’s Exhibit 2 about a week or two into the strike.

17. *Marty Layman*—He was last actively employed as a Yakima-area delivery driver, ordinarily scheduled to begin work at 6 a.m. He learned from fellow delivery driver Mitch Cruz about occurrences at the Union’s strike vote meeting of August 29, and later that night Robbins telephoned him at home. According to Layman, Robbins asked if he had made a decision about the strike, and on finding he had not asked him to “side with the Company” as Layman was considered a good employee. Robbins followed this by saying that to side with the Union would mean being “permanently replaced with a nonunion worker.” Layman then asked for the clarification if this meant being terminated, and Robbins repeated that the result of not coming to work would mean being “permanently replaced.” Cruz was directly present at Layman’s home during the course of this conversation, and Robbins asked to also speak with him. However, Cruz would not take the telephone, so Robbins was content to just ask that his remarks be relayed. Before the episode ended Robbins emphasized how they should “bear in mind” that after midnight Respondent would be a nonunion shop. Robbins soon called back still seeking an answer about whether he would have the driver next morning, but Layman did not have an answer for him.

The next morning Layman did decide to commence on strike by not reporting for work. At the time Layman had 2 weeks of accrued vacation, with one already scheduled for late September. He did not receive pay for such accrued vacation, nor request it, knowing from Robbins that he would have to quit first.

18. *Mitch Cruz*—He was another route driver in Yakima, and had attended the Union’s strike vote meeting of August 29. Cruz recalled that during this meeting Rogstad had advised members how they had “a serious matter” under consideration, and that something was said about permanent replacements meaning people who would take the jobs of strikers. He had no personal contact with Respondent’s officials on that date; however, Layman did relay the essence of a telephone call intended for him at the Layman home from Robbins that evening. Cruz refused to speak with Robbins, and went on strike the next day. He was aware that the parties continued in negotiations even after the strike commenced.

He had contacts with Respondent after passage of considerable time from the start of the strike. About 2 months later he telephoned Shirley to ask for a necessary waiver concerning his relicensing as a commercial driver. In the course of

this conversation Shirley stated there were no hard feelings about the situation and he would be glad to have Cruz back. Still later, around December 1, Shirley telephoned him to advise that a driver was quitting, and he would like him to come back to work. Cruz asked if it would be on a union or nonunion basis, and when Shirley advised that Respondent had become nonunion and was operating on that basis Cruz declined.

19. *Robert Young*—He was also a Yakima vicinity delivery driver with a Tuesday through Friday work schedule of 4 10-hour days starting at either 5:30 or 6 a.m. He attended the Union’s meeting of August 29, both learning of the midnight deadline and deciding to join the strike himself. Following this he went into Respondent’s facility to turn in receipts from the previous day and encountered Robbins there, who asked to have private discussion with him in the upstairs driver’s room. According to Young, Robbins stated that Respondent would no longer be a union shop as of midnight. He said Young could keep his job as a “nonunion member” by stopping at the office of Cummins to pick up a document which gave the “do’s and don’t” of such employment, adding that Young would be paid a 25-cent-per-hour raise if he would stay and continue to work.

Young picketed only briefly for 2 days and then around late September telephoned Cummins to inquire about sick leave and vacation matters. His question about sick leave was based on a slight heart attack he had suffered just shortly before the strike commenced, and the vacation subject related to an unscheduled accrual he had at the time. Young made an appointment to discuss these matters and did so a couple of days later, however Cummins soon informed him by telephone that there would be no benefits in either regard.

20. *Edward Thomas*—He was last actively employed as a day-shift warehouseman, but was actually on short-term sick call for Wednesday, August 29. Thomas was notified by a fellow employee around 10:30 p.m. that date that a vote had been made for the Union to strike at midnight. The next day of Thursday, August 30, he was again ill, and called in to advise a secretary that he could not appear for his scheduled 9 a.m. start time. According to Thomas, he was soon telephoned by Miller for questioning about his sickness and any doctoring. Miller referred to the strike then in progress, saying he did not want anyone “riding the fence.” Thomas said he would probably honor the strike (which he did), and was told by Miller he “will be permanently replaced” for doing so.

21. *Sam Denton*—He was last actively employed as one of the shuttle drivers based in Spokane. His normal run was to Yakima for pickup and return to Spokane, pulling a double trailer in convoy with fellow shuttle driver Chris Tracy. The overall span of time on this run was approximately 12 hours, from 7 p.m. departure to 6 a.m. return with loaded trailers.

Denton participated in the group telephone voting of Spokane-area employees (as had Weiler, noted above), and knew the results of it before leaving on his evening run of August 29. When Denton reached Yakima he saw employees standing along the front of Respondent’s premises shortly before midnight, and he spoke briefly to Rogstad who confirmed the strike was about to start. Denton entered the premises with his rig, deciding at that point to actually go on strike, and had a brief conversation with Shirley at the fuel pumps.

When Denton answered Shirley's question about whether he would join the strike that he would, Shirley stated that he "will be permanently replaced" and had 20 minutes to clear off the premises with his personal belongings. After inconsequential brief conversation with Wright, Denton (as well as Tracy) obtained a ride back to Spokane that night.

In the morning Denton joined the picketing at Respondent's Spokane location, and later observed the Spokane loads being brought in by two drivers from the Noel Transportation division. The following day the two loads again arrived, one being driven by the Noel Transportation driver familiar to him, and the other being hauled by an independent trucking company. The same pattern he had observed on Friday August 31, was repeated with the following Tuesday's loads.

Approximately 2 weeks after the start of the strike, Denton telephoned Shirley to inquire about his vacation entitlement. He had 1 week accrued, but unscheduled, at the time. In this conversation Shirley advised that Denton had already been replaced and was on a preferential hiring list. Shirley further advised that in order to obtain vacation pay he would have to submit a resignation. Denton did in fact do so, ending 8-1/2 years of employment, and on this basis received his vacation pay.

22. *Chris Tracy*—He was the other shuttle driver in Spokane, and pulling runs in convoy with Denton. He similarly participated in the voting at Spokane, and from this knew before leaving for Yakima of the small group's support for a potential strike at midnight. The pair of drivers arrived in Yakima as usual about 11:35 p.m. with Tracy leading. He pulled into the yard, and by CB radio call to Denton established that numerous assembled employees by the gate were about to go on strike. Tracy then encountered Shirley at the fuel line, where this official asked if he would work or join the strike. Tracy answered that he would not cross a picket line, and to this Shirley stated that other Spokane drivers were going to work, making Tracy and Denton the only two Spokane-area drivers intending to go on strike. According to Tracy, he repeated his intentions and Shirley then gave him 15 minutes to clear out from the premises, stating he "should consider [himself] permanently replaced" for joining the strike. Tracy also recalled that before leaving the premises he met Wright, who stated to him that because of the strike Respondent "will now be a nonunion shop."

Tracy testified that after he and Denton traveled back to Spokane that night, arriving at Respondent's facility there around 6 a.m., they found about six other Spokane-area employees already picketing. Tracy recalled that he observed loads coming in later that morning, one of them brought by a Noel Transportation driver familiar to him. As to takeover and breakdown of the shuttled loads for local delivery on the first 2 days while Tracy picketed, he did not recognize any of the drivers newly involved in this function at Spokane.

Tracy had no further contact with officials of Respondent until the following Tuesday, when he was telephoned by Robbins wanting him to return uniforms, keys, and all company property. Tracy advised Robbins that he had already done so by giving such items to Spokane salesman Frank Plummer. Tracy had a week of accrued vacation at the time, which was scheduled to be taken in November. Tracy later eventually telephoned Shirley to inquire about this benefit, and when advised how he would have to resign in order to obtain the vacation pay money, did so.

23. *Pat Benesch*—He was last actively employed as one of the local drivers at Spokane. He learned of the strike by a telephone call to his home from Shirley about 9:15 p.m., on the evening of August 29. According to Benesch, Shirley went into economic details of Respondent's last contract offer, and asked if he would continue working. When Benesch answered that he would honor a picket line, Shirley said Respondent will be hiring permanent replacements for anybody not coming back. Shirley added that company employment would become a nonunion situation because of the strike.

Benesch went to Respondent's warehouse at Spokane the next morning at his usual pre-6 a.m. time. He learned from a fellow employee that the Union was on strike, and began picketing for what eventuated as about 1 week's time. Benesch testified that he saw the Spokane loads come in late that Thursday morning around 10 or 11 a.m., but did not recognize any of the tractor drivers. The various Spokane-centered delivery routes were set up and departed that day with management personnel and Spokane-area salesmen as drivers.

On the Saturday immediately following Robbins telephoned Benesch at home. This time Robbins focused on explaining Respondent's own insurance package, advising Benesch that he was considered a valued employee and wanted him back at work. Benesch protested the call being made to him directly while on strike, and this seemingly aggravated Robbins who concluded the conversation saying Benesch would be permanently replaced.

Benesch had accumulated but unscheduled vacation at start of the strike. He eventually furnished a letter of resignation in order to receive vacation money, however the amount paid was less than he claimed because of disagreement over an earlier absence when his child was born. Benesch' last contact with Respondent was up in November, when he called Shirley to inquire about returning. The official simply said he could list for preferential hiring as one permanently replaced, but the chances of employment were "zero."

24. *Doug Vantine*—He was last actively employed as a chemical beverage serviceman, installing and repairing coffee equipment, dishwashers, and chemical systems. He performed this work in the field using a Company-owned van and as based at Spokane. Vantine also participated in voting at Spokane, but left that small group meeting knowing only of a local split being seven to five not to strike. At this point in time his next scheduled start of work was 8 a.m. the following morning.

According to Vantine he was telephoned late in the evening of August 29 by Foster, who said that the strike was scheduled for that night. The supervisor inquired whether Vantine would tell by midnight if he would honor the strike, stating that to do so would mean he would be terminated. Vantine answered that he would let Foster know later, and he did call back to say he would work the next day. By morning Vantine determined that he would not go to work, and left an early telephone message for Foster to that effect. He then proceeded to picket for 3 or 4 days with other Spokane-area employees, during which time he observed his service truck being loaded by a salesman or another Spokane chemical beverage specialist.

Vantine testified that Foster telephoned him again early in the first full week after the strike to ask if he would return

to work. Vantine's answer to Foster was that if Respondent had permanently replaced him the question seemed odd, because this intimating that picketers "still have our jobs" conflicted with earlier saying he was already terminated. He recalled that Foster did, however, add that should he return to work it would be under Respondent's contract offer involving provisions for the Company's medical insurance and pension plans.

At the time of the strike Vantine had certain accumulated, scheduled vacation time, and learned in a conversation with Foster that he would need a withdrawal card from the Union and a letter of resignation in order to obtain vacation pay. As it eventuated Vantine did not pursue this subject.

25. *John Blake*—At time of the strike he was as a swing-shift supervisor within the bargaining unit, and ordinarily scheduled at work from 2 to 10:30 p.m. at Respondent's main Yakima warehouse. Blake did not attend the Union's strike vote meeting of August 29, and only became aware a strike would take place from hearsay information passing around the facility that night. He testified that around 10:30 p.m. Robbins spoke to him in the warehouse, stating that at midnight Respondent would become nonunion and he could guarantee Blake the day-shift job he had always wanted if he would work. Blake declined the proposal, and became one of the strikers by not thereafter going back to work. Before leaving the premises that night, Blake overheard Supervisor Miller making the commonly used remark about permanent replacement in a telephone conversation with employee Frank Fernandez.

26. *Bruce Angeloff*—He was last employed as a chemical and beverage bench technician at Respondent's main Yakima location, for which his job was the reconditioning of equipment that Respondent provided to customers. Angeloff ordinarily worked from 8 a.m. to 5 p.m., having Foster as his immediate superior. Angeloff testified that he had been to the Union's strike vote meeting of August 29, where an estimated 30 to 35 members were present. He stayed for the entire time, recalling that Rogstad referred to their deliberations as "a very serious matter" and that the concept of strikers being permanently replaced was discussed.

About 10 p.m. on the evening of August 29, Foster telephoned him to inquire of his intentions about working. Angeloff said he would go on strike if that was what the Union decided to do, and testified that to this Foster stated if he did not show up at his usual 8 a.m. starting time the next day he would be permanently replaced and never work for Respondent again.

27. *Greg Bolin*—He was last actively employed as a day-shift forklift maintenance and utility employee, having Stump as his supervisor. He attended the Union's strike vote meeting of August 29, recalling that Rogstad referred to the situation as "a very serious matter" and that strikers could be permanently replaced. He did not believe that Company advertising for applicants was discussed, and was not previously aware that permanent replacement of strikers could occur. He recalled that the membership's decision was to go on strike at midnight.

Late that evening Robbins telephoned Bolin to ask whether he would be at work the next morning. According to Bolin he expressed uncertainty about this, causing Robbins to say that by not showing up he "would be out of a job." Bolin then went down to the premises just before midnight

with 20 or 30 other employees to help set up picketing in his capacity as a committeeman. During that first night he recalled there was conversation among the several dozen strikers about telephone calls they had received from various managers, and what Robbins had said inside at the night crew meeting. He then observed Wright, Shirley, and Englund come out to the picket line around 1:30 a.m. and speak with various strikers; however, Bolin himself could not hear what was being said.

28. *Mike Mullinex*—He was last actively employed as a Yakima-area delivery driver with Thursdays as his routine day off. He had not attended the Union's strike vote meeting on August 29, and August 30 was a scheduled day off for him. A coworker notified him at midevening of August 29 that the Union had set a strike for midnight. He testified that Robbins later telephoned him at home around 10 p.m. and stated that Respondent would become a nonunion shop after midnight, adding that he had work for Mullinex in the morning at a \$11.80 hourly rate under the Company's health and pension plans.

He went to the picket line that night around 11:30 p.m. and stayed until 5 a.m. Mullinex testified to telling fellow picketers of Robbins' call and that there was cross talk about similar calls some of them had also received. Soon after arriving back from picketing Shirley telephoned Mullinex around 6 a.m. at home, asking what he was going to do and adding that Robbins' telephone offer to him was a "one shot deal." Mullinex testified that he actually formed the intention to go on strike by midevening of August 29. Accordingly, he advised Shirley that he would not be coming into work, and since then has had no further contact from Respondent nor offered to go back.

29. *Tim Alderman*—He was last actively employed as head receiving clerk at Respondent's warehouse, working on a day shift of 7:30 a.m. to 4 p.m. He was at the Union's strike vote meeting of August 29, and knew from this of plans for that midnight. He left home around 10:45 p.m. on the evening of August 29 and went to Respondent's premises, where he met Miller at the warehouse dock around 11:30 p.m. The two of them conversed briefly, with Miller saying he had attempted to reach Alderman by telephone earlier that evening. According to Alderman, Miller told him that had his attempt been successful he would have advised that employees not showing up for work would be permanently replaced. Alderman then proceeded through the plant for the purpose of urging employees to join the strike and generally support them in the process. While doing so he encountered Robbins, who said he should leave the premises. Although he told Robbins he was only there for coffee and to pick up sweatshirts, he realized that Robbins knew of his true purpose. Alderman had accrued vacation time as of August 29 with at least 1 week of it scheduled for December; however, he has had no further contact with Respondent knowing he must sign a "waiver" of employment to receive this money.

30. *Gerald Schwindt*—He was last actively employed as a floating relief warehouseman, who worked varying hours of the day or swing shift. His particular schedule for August 29 was 10:30 a.m. to 7 p.m., with 2 hours later added on as overtime. He had voted on the strike question by telephone, and was later told by a committeeman that a strike was scheduled that night. According to Schwindt he encountered Wright as he was leaving work, who told him the shop

“may be” going nonunion if the strike commenced. Schwindt then went home, knowing at the time that he was again scheduled to start work at 10:30 a.m. on Thursday. Early the next morning he went to the picket line to commence being on strike, and there had discussion with other picketers about calls they had received from members of management the previous evening. He has had no contact with Respondent since that time, except to inquire about his accrued 6 days of vacation for which he has taken no action on learning it was necessary to resign.

31. *Frank Fernandez*—He was last actively employed as a warehouseman on swing shift, and normally scheduled to work from 2:30 to 11 p.m. On the date of Wednesday, August 29, his special schedule was 8 a.m. to 5 p.m., which he worked and then proceeded directly to the union meeting at which a strike vote was taken. He returned home around 10:30 p.m. where Miller telephoned. According to Fernandez, Miller said that if he did not report to work the following day on his regular swing shift he would be permanently replaced. Fernandez asked if this only applied to him, and Miller ended the conversation saying that everyone was being told the same thing. Fernandez telephoned back to Miller in a few moments, and asked if he was going to lose his job. He testified that Miller answered by saying he would be permanently replaced, which was what Miller had been told to tell employees generally.

Fernandez did not report for work the following day, nor has he since had any contact with Respondent regarding employment. He had accrued vacation of 2 weeks scheduled to be taken in late October, but has neither been paid for it nor inquired about this benefit because of having been told at a union meeting that he must resign in order to obtain it.

32. *Carl Keeler*—He was last actively employed as a delivery driver based at Wenatchee. He had learned from a co-worker during the evening of August 29, that the Union planned a strike based on the vote of its membership. According to Keeler, he was telephoned around 11:30 p.m. that night by Shirley, who told him that other truckdrivers were not planning to honor the strike and he wanted to know of Keeler’s intentions. Keeler testified to telling Shirley that he himself would go on strike, and recalled that on this Shirley said he would “be permanently replaced at that time.” In the process Shirley tried to talk him out of going on strike, describing that if he continued to work it would mean better pay and benefits. Following this Shirley again asked if he would honor the strike, to which Keeler gave the same answer. Keeler recalled Shirley then saying if he was not out for his trailer the next morning he “would lose [his] job.”

Keeler’s usual trailer pickup time for his delivery route was 4:30 to 5 a.m. On the morning of August 30 he went instead to the home of fellow Wenatchee delivery driver Don Reed, getting there around 7 a.m. While in the Reed home District Sales Manager Russ Teeple telephoned, and after speaking with Reed then spoke with Keeler. The conversation was very brief with Teeple assertedly saying that if loads, as then running late, were not picked up the drivers would be replaced. Following this Englund called to the Reed home around 9 or 10 a.m., also first speaking with Reed and then with Keeler. Englund referred to them as excellent workers whom he did not want to lose, and he explained the Company’s pending contract offer. By this time

Don Summers, another Wenatchee-area driver, was at the Reed home, and he too spoke by telephone with Englund.

Following this Keeler was present while Reed telephoned Rogstad seeking information on whether Wenatchee drivers were the only persons on strike as they had been told by company officials. Keeler then left the Reed home around 10:30 a.m. and went to the Wenatchee truckstop where pickups were made. At approximately 11:30 a.m. two shuttle drivers arrived with the four trailers used for route completion in that area. Keeler recognized one of them as affiliated with company operations, but was not familiar with the other driver. He left that area around noon, while arrival details of the loads were still unsettled. On August 31 Keeler, accompanied by Reed, traveled to Respondent’s premises in Yakima and picketed there for an afternoon. He has had no further contact with Respondent’s officials since then, nor has he offered to return to work. At time of the strike Keeler had accumulated vacation scheduled to be taken in late October, but has not been paid for this benefit.

33. *Don Reed*—He was originally a resident of the Portland, Oregon vicinity, but at time of the strike actively employed with Respondent as a local delivery driver for its Wenatchee customers. Prior to the strike Reed had been a member of the Union’s bargaining committee, and recalled a union meeting in Yakima on Saturday, August 25, at which the status of negotiations was discussed. In the course of this Rogstad stated, as he had done at prior meetings, that permanent replacement of strikers might occur and he attempted to explain the applicable law on the subject about which there was “pretty good discussion” (noted above). Reed also testified that Keeler and Summers had verbally committed to him they would support the strike, and that when he returned home from the meeting of August 25 Keeler and Summers were waiting at his home. According to Reed the Wenatchee-area drivers did not specifically vote on the last contract offer the following Saturday, and he himself learned in early evening by telephone from Rogstad of the final strike vote as taken on August 29.

Reed testified that Shirley telephoned him about midnight of August 29 to ask if he would continue to work, saying that the employees at Wenatchee would be the only out-of-town drivers not to do so. Reed answered that he would go with the Union, and the conversation ended. Reed did not go to work the next day, recalling that Keeler and Summers came early to his house following which local salesman Wayne Schatz and Englund telephoned. Reed did not recall Russ Teeple calling, and testified that Englund’s call to him, an attempted coaxing back to work, occurred after both Keeler and Summers had left. Reed recalled that much discussion in this conversation with Englund covered the Company’s proposed new medical insurance plan, and while some comment about permanently replacing was mentioned he cannot remember any particular manner of wording.

After approximately 2 months of looking for work while still in strike status, Reed was contacted by Shirley and offered a driver job at Portland effective November 1 comparable to the one he had been performing in Wenatchee. Reed accepted this offer, including a restoration of his seniority, and relocated to Portland immediately.

34. *Don Summers*—He was last actively employed as one of the local delivery drivers at Wenatchee. He recalled voting on the Employer’s last offer by telephone on August 29, and

during the wee hours of that night learned from Reed that members of the Union had voted to strike. He then telephoned to Shirley asking for status information. At this 3:30 a.m. point in this time Shirley said drivers who did not come back "could be possibly replaced," and that this policy applied to everybody. When Shirley asked if he would work that day Summers said he would have to think more about the situation. He then went to Reed's home at around 5 a.m., and stayed there all morning after dropping needed business keys at the truckstop. In the course of time Englund called, and the three drivers present, including Keeler, talked to him in turn at around 8:30 or 9 a.m. Summers recalled that about the same conversation ensued as had occurred with Shirley, by Englund saying that striking employees "could be replaced" if they went out like the others. Englund did some coaxing of them in an attempt to have them work, but in the end simply said good luck and ended the conversation.

Summers equivocated about his strike status over the next 2 weeks. He testified that after a mediation meeting the Union sent a letter to members saying Respondent was probably going nonunion and "our jobs would be replaced." Shortly after this he contacted Shirley to ask about returning to work, and accepted an available route. In connection with this return to work Shirley also arranged for him to obtain a week of vacation pay against the two which he had accrued at the time.

35(a) *Elvira Lorz*—She is the wife of employee Matt Lorz, and was acquainted with Supervisor Miller. She recalled receiving a telephone call at home from Miller around 11:40 p.m. on August 29, asking for her husband. When she advised he was not there, Miller stated that Respondent would be a nonunion shop as of midnight, and requested that she relay this information to her husband. That conversation ended abruptly; however, Elvira Lorz' husband soon called her and she informed him of Miller's remarks.

35(b) *Matt Lorz*—He was last actively employed as day-shift freezer stocker, ordinarily working scheduled hours of 5 a.m. to 1:30 p.m. He was a member of the Union's bargaining committee, and attended the strike vote meeting of August 29. In the course of this Rogstad mentioned the possibility of permanent replacements for strikers, and commented about "a preferential hiring list."

Lorz learned from his wife on telephoning around 11:45 p.m. on August 29 of a contact from Miller, and what this official had said. Later that night while at the picket line, Englund, Shirley, and Wright had appeared outside the plant around 3 to 3:30 a.m. and mingled among various striking employees. Lorz testified that he heard "bits and pieces" of certain conversations, including one with Wright talking to striking night crew employees and saying that the Respondent was now nonunion. When morning came Lorz saw five or six delivery trucks go out from the premises with substitute drivers Chuck Baladez, Kelly Phillips, a sales relief person, an employee of the produce department, and two employees from Respondent's Pepsi-Cola division wearing distinctive shirts.

36. *Monte Berghoff*—He was last actively employed as a Yakima-area relief driver with a varying schedule of hours. He attended the Union's strike vote meeting on August 29, recalling that it had already started when he arrived. Berghoff testified that principal points of the meeting were written out on paper mounted at the front, and that these

points included the subject of permanently replacing strikers. He also recalled Rogstad mentioning this subject in his remarks, and believed he reminded members that they were voting on "a very serious matter." Berghoff had been employed for about 3-1/2 years at that point.

At around 10:30 p.m. on August 29, Berghoff was telephoned at his home by Shirley. He testified that this supervisor said Respondent would try to replace us if employees went on strike, which Berghoff had told him he would do. After the brief conversation with Shirley, he went to the picket line and stayed for over 2 hours that night. Berghoff had a week of accrued vacation at the time, which was scheduled to be taken in early November. He testified that approximately a month after the strike began he telephoned Shirley to inquire on this subject. Berghoff recalled being told that he must either resign or wait for the end of the strike to get his vacation pay.

37. *Roger Layman*—He had been employed 4 months with Respondent, last actively working as a Yakima-area relief driver. His next scheduled shift following August 29, would have commenced early the next morning. After attending the Union's strike vote meeting Layman was at his home, and received a telephone call from Robbins around 9:30 p.m. Layman had attended union meetings prior to the one of August 29, and recalled that in one or more of these Rogstad discussed the subject of permanent replacement for strikers. He testified that Robbins inquired if he knew a strike had been authorized, and said it was "decisionmaking time" for him. According to Layman, Robbins continued by saying that as of midnight the Union would be out and Respondent would operate as a nonunion company. Layman also recalled Robbins inviting him to continue working at a new base pay of \$11.90 per hour with good company benefits. Layman understood at the time that \$11.90 per hour was the top wage rate of Respondent's pending, and largely agreed-on, contract offer. Layman thanked Robbins for the offer and the conversation ended. He then went to the picket line and spent about 2 or 3 hours there that night. Layman did not report for work the following day or thereafter, and has had no further contacts material to the case with any member of Respondent's management.

38. *Mark Schooley*—He was last actively employed as a Yakima delivery driver. He was on vacation as of August 29, and next scheduled to resume work on Tuesday, September 4. He attended the strike vote meeting on August 29, recalling in the course of it that Rogstad stated Respondent could replace employees if they struck. As a final summary on the status of negotiations Rogstad said he thought Roger Noel would agree to perhaps another dime contribution to the pension plan. Schooley also testified that Rogstad said employees were facing "a very serious matter" for which their decision would involve a "risk" to them.

At around 10 p.m. on August 29 Schooley was telephoned by Robbins, who inquired if he knew of the strike vote. Schooley immediately answered he was "going to stick with the guys," meaning commence the strike as scheduled. According to Schooley, Robbins persisted by saying that Respondent would now be nonunion, and that if Schooley did not show up for work when scheduled he would be permanently replaced. Schooley recalled that Robbins reminded him that \$11.65 was good hourly pay in the Yakima area,

and Schooley said in conclusion to the overall remarks that he would consider what to do.

Schooley did in fact join the strike, and about a month later contacted Shirley to ask for a skills test waiver in order to get a combination driver's license. In the course of light conversation between the two, Schooley indicated a desire to have his job back. The vacation he took in late August left him with an additional week, however this has not been paid to him nor has he requested it from Respondent.

39. *Randy Jacobson*—He was last actively employed as a day-shift mechanic. He did not know of the Union's strike plans until telephoned on the morning of August 30 by his immediate supervisor. Stump said the strike was on, and inquired if he was available to drive a truck. Jacobson held a combination driver's license at the time. He told Stump that he would need a day to think about this, and then spent some time merely observing around the strike scene. He did not work again on Friday, August 31, but soon had a significant conversation about that date with Stump. In this the idea developed that Jacobson would quit his employment at Respondent, and immediately start work as a mechanic with Noel Transportation division of the enterprise. After formal transfer arrangements Jacobson commenced such a work status on September 4, without any change in wages from before or effect on his vacation eligibility.

40. *Barry Ross*—He was last actively employed as a receiving clerk at Respondent's warehouse, working on a day shift of 6 a.m. to 2:30 p.m. He was at the Union's strike vote meeting of August 29 and knew from this of plans for that midnight. Ross testified that during the meeting Rogstad mentioned the permanent replacing of employees. Ross recalled a mutual feeling among members at the meeting, and on his part, that they would not lose their jobs for going on strike. Before the vote Rogstad had also emphasized that the decision on Respondent's last contract offer was not "a game," and members should give the subject careful thought.

Ross testified that around 10:30 that day he was telephoned by Miller, a person he described as his personal friend, who stated he had a number of things to say. The first of these was that if Ross did not work the next normal shift he would be permanently replaced, and, second, that as of midnight Respondent would be a nonunion shop. The conversation included expressions of regret between the two participants; however after it ended Ross did commence being on strike and went to the picket line that first night. He recalled discussion among the strikers about the telephoning that was made to many of them that evening, and further talk of the meeting Robbins had held within the plant. Ross has had no further contact with any official of Respondent nor requested a return to his job.

41(a) *Vicki Barczyszyn*—She is the wife of employee Roman Barczyszyn. She recalled receiving a telephone call at home from Miller around 11:15 p.m. on August 29, asking for her husband. When she advised he was not there, Miller stated his message was that if Roman did not report for work the next morning he will be permanently replaced. Miller requested that she relay this information to her husband. Roman Barczyszyn returned home that night about 2:30 or 3 a.m., and she informed him of Miller's remarks.

41(b) *Roman Barczyszyn*—He was last actively employed as an order picker for Alaska accounts, ordinarily working a

scheduled day shift of 6 a.m. to 4:30 p.m. He was a member of the Union's bargaining committee, and present at the strike vote meeting of August 29. He recalled that during this meeting Rogstad said Respondent "could" permanently replace strikers, and if they took such action this might mean they would lose their jobs. In this same connection Rogstad emphasized they were embarking on a serious decision in regard to the strike vote. Barczyszyn does not, in contrast to Reed's testimony, recall this subject being discussed by Rogstad at earlier meetings of the Union's bargaining committee, or that any discussion occurred at the meeting on August 29 about Respondent placing help wanted advertisements in local newspapers. Once he learned of the membership vote results, he had the intention of going on strike along with others who chose that course of action.

Barczyszyn testified that he returned home late that night, and was told by his wife of the message from Miller. He did not report for work the next day and has continued on strike against Respondent since that time. He has had no direct contact with any officials of Respondent, has not had a job offer from it nor made any request to return to work. He had vacation scheduled at the time of the strike for Thanksgiving week, but has received no pay for it nor requested this because of having heard from other members that he would have to resign to obtain such payment.

42(a) *Mardi Foster*—She is the wife of employee Chuck Foster. She recalled receiving a telephone call at home from Robbins around 11 p.m. on August 29 asking if her husband was at a union meeting and whether she would give him a message. She answered affirmatively to both questions, after which Robbins stated that if he did not show up for his next scheduled work he would be permanently replaced. Mardi Foster testified that to this she simply said okay and the conversation terminated. About 4:30 a.m. that night her husband telephoned home, and she informed him of Robbins' message.

42(b) *Chuck Foster*—He was last actively employed as a delivery driver based out of Yakima. He was also a member of the Union's bargaining committee for these negotiations, and recalled attending a "last ditch effort" in which the parties met at Respondent's sales conference room late in the afternoon of August 29. Foster testified that as this meeting ended inconclusively certain members of Respondent's bargaining team stated the Company "would try to do whatever they had to do to continue to operate." He was also aware of talk at the time about newspaper advertisements of the Company for work applications, but had not personally seen such ads.

Foster testified that he then attended the Union's strike vote meeting of August 29, and while not recalling that Rogstad expressly talked about permanent replacements believed that such circumstances were "already known" already the members. The membership vote was completed by around 7:30 or 8 p.m. that evening, and from this point on Foster was resolved to go on strike as he did continuously from that time.

He recalled telephoning his wife around 4:30 a.m. on the first night of the strike, and learning from her the substance of Robbins' earlier message. Consistent with his strike intentions, he did not report for work the next morning and picketed regularly during the first week of the strike. In the

course this he observed the same salesman named by Loranz drive out for his route with the equipment he ordinarily used.

43. *Rick Stump*—He is the son of Pat Stump, and was last actively employed as a yard driver on the day shift. His regularly scheduled hours were 9 a.m. to 5:30 p.m., performing the same type of equipment moving as done by Stiltner on nights. Rick Stump possessed a combination driver's license, and while occasionally making a run to nearby Selah, Washington did not otherwise do over-the-road driving. He testified that his work of repositioning trailers around Respondent's facility involved the same driving skills as would be used for actual highway runs.

Stump testified that on the evening of August 29 fellow employee Mitch Cruz stopped by his home around 10:45 p.m. to tell him of the strike vote. He then went promptly to Respondent's premises, and joined the strike action being engaged in by others. According to Stump, Wright came out from the facility around 1:30 a.m. and engaged various picketers in conversation. In the course of this Stump was closely present to hear Wright say that certain ones on vacation at the time would be permanently replaced if they did not return to work the following week. Other than this experience he also recalled other employees were talking among themselves about the evening telephone calls many had received and about the inside meeting conducted earlier that night by Robbins. Stump has had no significant contact with company officials since going on strike. He testified that in the course of this Miller once jokingly asked if he would come back to work, to which he inconclusively replied that he did not know. Stump had accrued vacation scheduled for late October, which has not been paid to him nor has he requested it because other strikers were not doing so.

44(a) *Chet Cooney*—He was last actively employed as a freezer warehouseman on a swing shift, with ordinarily scheduled hours of 2:30 to 11 p.m. He was on vacation during the week with Wednesday, August 29, but attended the Union's strike vote meeting that evening and learned of the plans for midnight. Cooney did not recall Rogstad making any statement about permanent replacements during this meeting or at any prior ones, but does recall reference to the membership's consideration of Respondent's last contract offer as "a very serious matter." After the strike vote to reject this offer was tallied Cooney's intention was to go on strike, and in fact he appeared at the picket line that evening around 11:30. He was still participating on the picket line by morning of the first day of the strike, and recalled seeing about a dozen trucks go out with the persons driving them who he recognized as sales or inside employees of Respondent.

Cooney testified that around 8 or 9 o'clock on the evening of August 29 a telephone call came at his home, which he answered on the speaker phone with his wife present to hear the other voice. The caller was Miller, who said he was to tell Cooney that if he did not return to work when due he will be permanently replaced. In accordance with his strike intentions Cooney did not report for work on Monday (Labor Day), September 3, as next scheduled from his vacation. He has had no further contact with any member of Respondent's management.

44(b) *Karen Cooney*—She is the wife of Chet Cooney, and was aware of a planned midnight strike at Respondent after he returned to their home from the Union's meeting on

the evening of August 29. In further brief testimony she corroborated her husband, as to what was said by Miller when his telephone call was answered on their speaker phone.

45. *Doug Shelton*—He was currently employed as one of Respondent's Walla Walla, Washington delivery drivers. He had formerly been a driver for the Pepsi-Cola division there. He testified that Respondent's Walla Walla area salesman Tom Clark contacted him on September 1 to inquire if he would switch employers, and take a delivery route previously held by striking employee Mark Lambert. At Clark's suggestion Shelton telephoned Shirley, and ascertained that the switch would result in a 65-cent-per-hour pay increase plus retention of his seniority and company pension plan. A final step by Shelton was to obtain a waiver of 2 weeks' advance notice from Pepsi-Cola Supervisor Stan Taylor, and with these arrangements in place his first day on the job as Respondent's employee was Tuesday, September 4. On that date Respondent's other nonstriking Walla Walla area delivery driver actually took Lambert's former route, which was the heavier of the two. Thus on his first day Shelton actually drove the lighter route for easier orientation in this new work. He also immediately procured a skill waiver certification from Respondent's fleet manager, James Hand. This resulted in Shelton's class A licensing, as needed to drive the trailer rigs used in Respondent's business.

46. *Mark Lambert*—He had been employed by Respondent for more than 4 years, last actively working as a local delivery driver in Walla Walla. His duties involved using a pick-up point at the Pepsi-Cola division bottling facility, where he was acquainted with Shelton. He had been notified of Respondent's last contract offer by Rogstad, and cast a telephone vote on the contract rejection and strike authorization balloting being done during the afternoon of August 29. At around 10 p.m. that evening a person identified only as Tom telephoned him from the Union to advise that the membership vote was to reject Respondent's offer and commence a strike. At 10:30 p.m. Robbins then telephoned to his home saying he understood the employees would go on strike. Lambert answered affirmatively, to which Robbins said everyone that did go on strike would be permanently replaced. He prodded Lambert to consider whether a job paying \$11.90 per hour with benefits could otherwise be obtained in the Walla Walla vicinity. Lambert further recalled that Robbins said if he changed his mind a contact should be made to Miller, and if not Respondent would be a nonunion shop as of midnight and he would have to submit a letter to resume working.

According to Lambert, Englund next telephoned at 3 a.m. to ask if Lambert was willing to talk further about the situation. When Lambert agreed to do so, Englund asked if he was aware that he would be permanently replaced and knew that the Union would not exist anymore at the Respondent. Englund continued by saying that at midnight only a few individuals had gone on strike, and Respondent would be able to get its loads done. He then went over the contract bargaining issues and emphasized Respondent's pension benefits including a Section 401K pension plan, alluding to an interview for a sales position that Lambert was scheduled to have the following week. Englund urged Lambert to think over the situation.

At 5:30 a.m. that morning Lambert was called by Shirley, who told him that he should rethink his decision because 32

of 36 drivers were working and only a few people on strike from the night shift. Shirley advised that the other Walla Walla driver would not go on strike, and when Lambert inquired about relief drivers Weiler and Layman, Shirley answered that neither of them would honor the strike. Shirley urged him to consider the situation and the potential 25-cent-per-hour raise with fully paid insurance and no union dues. After doing so Lambert telephoned back to Shirley saying that he would continue to work.

When he arrived at starting time on August 30 his trailer was present at Walla Walla, and he ran the complete route that day. On returning home from work his wife had a list of coworkers who had called him, including numerous ones that Shirley had named as not honoring the strike. When he contacted them, they told him the strike was on and that in fact they were honoring it. At that point Lambert made a decision to join the strike as of August 31. He testified that at 5:30 a.m. that next morning Shirley telephoned him to ask why he had decided to go on strike. Lambert's answer was that Shirley had lied to him, and he asserted from this that Shirley said he could get someone to replace Lambert that day and had all weekend to make a permanent replacement of him. During this conversation Shirley mentioned that Englund had spoken highly of him, and he alluded to the imminent sales position interview he was soon to have with Bill Combs, sales manager for that district. According to Lambert, Shirley's remark was that he would not get that interview if he did not return to work.

47. *Jerry Cooper*—He was last actively employed as a night-shift picker, with ordinarily scheduled hours of 6:30 p.m. to 5 a.m. He was on vacation during the week with Wednesday, August 29, and due back to work on Monday, September 3. He attended the Union's strike vote meeting of August 29, where he heard Rogstad say that Respondent could permanently replace strikers. He did not otherwise hear discussion of the consequences of strike action, or that Respondent was advertising for replacements. Cooper went to the picket line at around 11:30 p.m. that night, where other members of the Union were talking about telephone conversations they had gotten that evening. Cooper himself was aware of this because he had telephoned various fellow employees from his home that evening before going to the picket line. He recalled that there was also talk of the in-plant meeting held by Robbins. Cooper stayed at the picket line that night until about 4 a.m. During this time span he recalled that both Wright and Shirley came out from the facility, and spoke with various strikers who were present. Cooper testified that Wright made a specific remark to him that he would be permanently replaced if he did not show up for work on Monday after his vacation. Cooper also recalled hearing Wright tell employee Tom Hamel that he must work the next night or be permanently replaced. Cooper answered Wright by saying that he would not work in a nonunion shop, to which Wright said nothing. Cooper had heard from other employees that Respondent was becoming a nonunion shop.

On the morning of August 31, Cooper was at the picket line, and as Wright was driving out he conversed briefly with Cooper. Wright told him he had until Monday to come back and that he would get full vacation pay for the week off. Cooper testified that he again responded he would not work in a nonunion shop. He has had no further contact with any

official of Respondent since that time, nor requested his job back.

48. *Tom Hamel*—He was last employed as a picker and loader on the night shift, with ordinarily scheduled hours of 6:30 p.m. to 5 a.m. August 29 was a night off, for which he was next scheduled to work on August 30. He was present at the Union's strike vote meeting on August 29, and stayed through the vote and tally. He does not recall Rogstad saying anything about permanent replacements, but only that members would have a "fight on their hands." Hamel decided for himself after the strike vote was taken that he would go on strike, but actually believed at the time that the dispute would be settled before it came to actual strike action.

He went to the picket line that first night and stayed 5 or 6 hours, during which other members discussed the telephone calls they had received that night and the Robbins' speech. At about 1:30 a.m. Wright emerged from the facility where several employees were present and spoke with them. Wright said that as of midnight Respondent was a nonunion shop, and he should appear for work that next evening or be permanently replaced. Hamel recalls Wright saying generally the same things to Cooper. He has had no contact with any official of Respondent since that time, and has neither been paid for, nor applied to be paid for, his late October scheduled vacation.

49. *Raul Murillo*—He was last actively employed as a warehouseman working a day shift of 8 a.m. to 4:30 p.m. He was on the Union's bargaining committee and recalled that in the course of various meetings Rogstad had talked about the chances of employees being permanently replaced. Murillo knew ahead of time about this concept because of having been in unions all of his adult life, and knowing it to be an option of employers in strike situations. Shortly after August 29 he saw Respondent's advertisements for replacement workers. He attended the Union's strike vote meeting on August 29, and recalled Rogstad saying that Respondent "could" permanently replace strikers, explaining that there was a chance of this if the strike were to occur. Murillo testified further that Rogstad stated in this event members would have to get their jobs back by asking the Company for them and getting out of the Union. According to Murillo this was said to him in a private side conversation with Rogstad. From the time of the vote onward, Murillo considered himself on strike and that has been his intent at all times thereafter. He has never requested a return to duty.

Murillo had gone to the picket line at around 10 p.m. on August 29, and stayed for about 12 hours. During this period there was various discussion among employees about the telephone calls they had received at their homes and the talk by Robbins in the plant to night-shift workers. Later in the night time hours Wright, Englund, and Shirley came out from the warehouse and talked with the various employees present. He recalls Wright saying that the parties should be able to work the situation out, but if they didn't "you guys" will be permanently replaced. Other than this Wright said that things were going fine for the Company, and he repeated this the next morning saying that operations were getting by.

50. *Donald (Dave) Donovan*—He was last actively employed as the only local delivery driver for Respondent in the Moses Lake, Washington vicinity. He was not aware of the Union's planned strike action on August 29, but shortly after

midnight was telephoned by Shirley who so informed him. Shirley asked if he would show up for work, to which Donovan answered he would not and the conversation ended essentially at that point.

Later in the night Local Sales Representative J. P. Jones contacted Donovan to ask if he would call Englund. Donovan did so around 5:30 a.m., and learned from Englund that he wanted him back at work since his route, two at Wenatchee and two at Spokane were not running. According to Englund these were the only 3 areas out of 25 that were not being worked. Donovan asked him for time to consider the situation, and one-half hour later called back to say that he would work. On August 30 he picked up his trailer after it was about one-half hour late in arriving and driven by a person he did not know. The Moses Lake trailer drop was usually made either by Tracy or Denton, the two Spokane shuttle drivers. By 10 a.m. that morning Donovan was in the town of Ephrata, from which he telephoned Shirley. Donovan advised that he had decided to take the truck back to Moses Lake and park it, to which Shirley simply acknowledged this advice. Donovan started to return, but Jones stopped him and asked that he finish the route.

He then also went to work on August 31, and at Jones' request telephoned Noel about noontime. Noel advised that most routes were running but some were late, and that he was still talking to the Union with matters open between the parties. Donovan telephoned again about 1 p.m. to Respondent, and Robbins happened to take the call. Donovan testified that he told Robbins he would finish the day out, but not work after that Friday. He recalled that to this Robbins first stated he wanted a letter of resignation, but then comprehended Donovan was simply going back on strike. At 5 p.m. that afternoon he telephoned Shirley to report in his mileage as usual, and was told by Shirley that his route job would "never be replaced" and he would always have a job with Respondent. He has had no further contact with officials since that time nor asked for his job back.

#### *J. Summary Evaluation of the General Counsel's Selected Witnesses*

The numerous witnesses whose testimony is summarized above comprised General Counsel's main body of oral evidence regarding primary issues of the case. In general these witnesses testified with a favorable demeanor and appearance of candor. However an impression of permeating suggestibility also arises, particularly as to collective misapprehension among many strikers respecting realities of an employment relationship and the interpretation of inartfully phrased utterances made by various agents of Respondent during the especially eventful days of late August.

Preliminarily, I have determined to limit an accord of credibility as to witnesses Martin, Glass, Cecil Wilson, Mallonee, Tracy, Vantine, Angeloff, Bolin, and Keeler, on grounds of less convincing demeanor, uncertainty as to accuracy of their memories, doubt as to the complete honesty of their renditions, or a combination of such factors. As particular issues of the case are analyzed below, more specific credibility evaluations shall be made in explanation of how legal conclusions were reached.

#### *K. Respondent's Witnesses*

##### *1. Nonsupervisory witnesses*

As part of Respondent's case a dozen witnesses were called who had been rank-and-file employees that did not go on strike. There was a predominance from the Alaska loading group, but otherwise spread among those of the night crew and variously based delivery drivers. For the most part this phase of case testimony related to Respondent's night crew meeting, and to a lesser extent several telephone contacts made by management to ascertain strike intentions.

Among these witnesses there was a uniform recollection that Robbins had told assembled employees they would be permanently replaced if going on strike. While different phrasings of the idea were quoted, the gist was essentially what so many others had described during the General Counsel's case-in-chief. With some of the witnesses the remembered comment was watered down as a probable result, not coupled with the "permanent[ly]" adjective, indirectly stated as a necessary "cover[ing] my route," or simply not voiced at all. On the separate points of permanent replacement meaning automatic and irrevocable job loss, and the strike signifying that Respondent would instantly become nonunion in character, this was generally denied as having been said by Robbins, or at least not recalled.

##### *2. Supervisory witnesses*

Englund was first called from this group. He denied telling Weiler that Respondent was going to be a nonunion shop. He comparably denied telling Lambert that the Union would no longer exist at Respondent, and relatedly testified that Lambert did not appear for a scheduled relief sales position interview. As to a telephone conversation early on the morning of August 30 with Donovan, Englund recalled telling this driver he "could" be replaced, and denied saying that Donovan would not have a job if he did not come back to work.

Robbins covered various episodes in which he was assertedly involved by his testimony. As to a late evening discussion with Bolin on August 29, he attributes himself inquiring about Bolin's work intentions, and saying that "the Company had hired" permanent replacements. Robbins obliquely explained that he "referenced" a permanent replacement of Bolin as sometime "in the future," and he did not expressly deny saying that Bolin "would be out of a job" if he did not work through the strike.

His testimony as to a contact with Mullinex was comparably indirect as far as not denying that he termed the new working conditions available to employees not going on strike as "nonunion." As to telephone communication with Bonlender on the Portland route delivery situation, Robbins denied only that he had ever said an employee might not work for the Company again. Beyond these three instances Robbins does not have much "individual recollection" of further telephone contacts with employees. As to the night crew meeting, Robbins basically conceded the tone and content of his remarks as described by numerous witnesses, save for those who quoted him as saying any of Respondent's employees going on strike would "never come back," or "would be fired or terminated," which he denied. This denial also traversed the specific testimony of Lombard, insofar as factually whether Robbins had said, to the group or later

to Lombard individually, that striking employees would not be coming back.

Foster took guidance from Noel's instructions at the manager's meeting to avoid unnecessary comment when canvassing employees about their intentions. As to attempted telephoning of Vantine at Spokane, he recalled reaching him personally at around 10 p.m. on August 29, and receiving the employee's assurance of working the next day as usual. Foster denied telling Vantine that he would be terminated for honoring the strike, or even mentioning the prospect of permanent replacement. Vantine was the only distantly based serviceman who actually did go on strike, and Foster testified that within several days he telephoned him again to advise that permanent replacements "were being looked for." The two continued in frequent contact until a point about 2 weeks later, when one specific replacement was hired. As to Angeloff, Foster denied saying anything to him once the employee had advised he would start on strike, and that beyond this a known replacement possibility was immediately hired for the single bench technician position.

In Shirley's case his poststrike actions were based principally on the need to determine how his far-flung deliver coverages could be assured. Otherwise his lessons were from Noel's manager's meeting, and by the question and answer ("NLRB . . . list of things") document which he had retained from the past. His approach was to methodically attempt contact with all nonlocal drivers and ascertain their intentions once the strike deadline had passed. Otherwise there was general comparability of substantive exchanges with those testifying about him.

Miller's responsibilities as day warehouse manager also embraced the several employees working connective swing shifts. He had a limited recollection of his telephoning after being called in from home for the manager's meeting of midevening on August 29. His memory ability was also admittedly impaired by the extremely long hours which the strike imposed on him for more than a month following. A specific denial, which Miller tied to a recollection of experiencing sarcasm, was that he did not tell Cingle that Respondent was going nonunion at midnight.

#### L. Resumed Mediation

The meeting under mediation auspices took place on September 10, with each party confined to separate rooms. The Union's bargaining committee and Attorney Pedersen accompanied Rogstad on this occasion, while Respondent had its core bargaining team including Noel, Cummins, and Attorney Lofland for the session.

After a delayed arrival, the mediator by happenstance took his orientation on status of the negotiations from Respondent representatives, learning that the last complete proposal stemmed from the party's final prestrike session in late afternoon of August 29. The mediator then dealt with the Union, where Rogstad expressed their chief concerns of the moment. These were identified as achievement of the Union's proposal for increased pension plan contributions, and full reinstatement of strikers by a simultaneous return to work. The mediator then left for company-side discussion, and soon returned with a company response. Rogstad testified to being told that all strikers had been permanently replaced, that the subject of pension was tied only to Respondent's own plan, and that an open shop provision was introduced in place of

past contractual union-security language. The Union advised that it would not go on further with the negotiations, for no reason other than the employer's unwillingness to return all strikers.

Bolin testified to being among the several employees on a bargaining committee along with union officials attending the negotiation session on September 10 in which a Federal mediator was present. The parties did not negotiate on a face-to-face basis, but were situated in separate rooms to which the mediator went alternately. Bolin testified that the Union informed the mediator of their position, which was to seek the proposals last on the bargaining table, although dropping their demand for pension contributions by 10 cents per hour, and seeking that all strikers be reinstated together. He recalled that the mediator was out of the room for about 20 minutes in a caucus with Respondent, and then returned to say that Respondent had proposed no union security and that strikers would only go on a preferential hiring list under the Company's pension plan. Bolin testified that the Union's committee discussed this information, and advised the mediator it was unacceptable.

This portion of the critical day was covered by the testimony of both Cummins and Noel, who recalled Attorney Lofland being principal spokesman for the Company. The version of these witnesses had him summarizing Respondent's presentation to the mediator as involving a withdrawal of the previous pension proposal, and conditional agreement as to continuing past union-security language. The emphasis made to the mediator was that some, not necessarily all, striking employees had been replaced, and an active program of completing further replacing was under way. After another separate session with the Union the mediator returned, and according to the company witnesses announced to their surprise that the Union was departing the session. Settled public policy clearly prohibits the Board from compelling the testimony of Federal mediators. *J. W. Rex Co.*, 308 NLRB 473 (1992).

Following this Cummins wrote to Rogstad by letter dated September 11 confirming the modified contract proposal in the two major regards, while also adding two minor subjects. The letter was hand-delivered, and set a deadline of close of business Friday, September 14, beyond which silence would be considered as rejection. A complete revised, proposed contract document accompanied the letter. When no response from the Union resulted by the end of that week, an implementation was immediately done retroactively to September 1. The implementation covered Respondent's last wage offer, plus company health care and pension plans. Payments to the Union's trust funds were terminated after the September 1 remittance based on August hours.

#### M. Factual Holdings

The numerous contacts during Respondent's main efforts to assess continued availability of regular employees from the striking bargaining unit termed the whole notion of permanent replacement in a host of word choices. While any familiarity with its significance certainly varied as among the work force, it can be traced for present purposes from a point several days before the strike when, as testified by Reed, the prospect was commented about by Rogstad at a membership meeting. Irregardless of how many members heard or understood the notion at that early time, it was fully

reinforced during the subsequent strike vote meeting, when so many of those present heard a cautionary reference to permanent replacement by Rogstag. Finally the subject was described in writing by a picket line hand-out, and although only a negligible number of strikers even remembered it, the offering was, at least, made.

As to verbal expressions by agents of Respondent the evidence showing these were in a wide range of verb choice and emphasis as to immediacy. I consider it natural that the preferred "risk of being permanently replaced" never even appeared in the testimony as managers spoke more familiarly in their context about what "would," "could," "can," or "will" happen. I do not deem any of the statements on the specific subject equating a strike decision to continued employment status as a constructive discharge from employment. It is too sterile a contention to look literally at the essential message, and say that mere word choice supersedes all the complex realities of a major business setting. I therefore hold first of all that statements about employees being permanently replaced should they choose to strike did not, in any instance, impair the effective ability to make a strike choice. This is notwithstanding that the task of marshalling a measurably complete replacement program was not yet even under way, let alone assessable as to chances of further success.

A second area that affects fundamental case issues is the matter of referencing Respondent as about to become, or having become, "nonunion" in character, or as otherwise often termed a nonunion shop after midnight of August 29. Here I expressly credit the General Counsel's various witnesses, to the extent that such phrasing, or its equivalent, was uttered to them as managers groped to characterize what change their place of employment would undergo following the strike deadline. This belief also involves discrediting Respondent's witnesses Englund, Robbins, Wright, and Miller on the point.

However, the use of such words must be evaluated in context. The case is free of any classic indicators of animus, and the controlling tone of Employer strike responsiveness was set by Noel himself as the highest official handling the near-frantic adjustments. It is noteworthy that no witness quotes Noel himself as making any untoward utterance, even as he moved among and spoke with those departing on strike closely around the midnight deadline. It is odd therefore that Reich, routinely leaving work to start his strike status at midnight, independently speculated that this strike status itself would generally leave "a nonunion shop" (Tr. 237). Furthermore Rogstag was at the emerging picket line even before midnight, at a point that he was seeking quiet summitry about the dispute without repudiation from Noel. Even more, the two faction leaders did meet civilly barely more than 36 hours after the strike started, a solid indication that in real terms any notion of the facility having become union-free did not square with official behavior. The news release on August 31, propagandized the strike's advent, but in the process of only a few succinct paragraphs referred three times to "Union members" of its work force. In illustrative terms, the testimony of Marty Layman may be looked to, where he considered a replacement person, should one be utilized, as a "nonunion worker" (Tr. 408). The context does not therefore support an unlawful sort of rebuke to statutory rights, but must instead be thought of only as reasonably and objec-

tively meaning that a collective-bargaining relationship, which by its terms was to expire, did expire that night.

The record contains testimony about employees hearing comment from management that they would lose their jobs for striking, be terminated, and otherwise not again work for Respondent. This facet of the case is little a matter of context, but more a matter of straight-on acceptance of fact. The source of such remembrance includes testimony of employees Cecil Wilson, Mallonee, Hull, Vantine, and Bolin, who among them attributed job finality intimations to Robbins, Foster, and Stump. I simply discredit the accuracy of these several assertions, noting the small percentage it involves as among all that was spoken, and that, contrarily and again as to Noel himself, Hull recalled the assurance even as he and others were walking out from the facility to start on strike that there would be no time limit on their change of mind. Comparable assurances were received at various times by Marty Layman, Doll, Fernandez, and Donovan. Finally, this subject was raised in colloquy of record, during which the General Counsel expressly stipulated that his legal position was that of an employer attempting permanent replacement rather than terminating employees (Tr. 1608). Overall, and as with conversational references to "nonunion" character of the workplace, I hold that remarks as here discussed do not, independently or supportively, establish the commission of any unfair labor practice.

As to the fact of replacement employees, it was an evolving process, begun, knowingly or not, as early as August 29 when new employee Slagle drove on the Lewiston, Idaho route. It accelerated greatly by the strike aftermath, when more than a dozen applicants were slotted into warehouse work. The following morning brought a crucial array of emergency assignments allowing a substantial fulfillment of Yakima-area deliveries and, where necessary in outlying places, with management, sales employees, intradivisional borrowing and overtime. The long holiday weekend breather advanced the process, with six new employees starting on both Friday, August 31, and Saturday, September 1, while the advantage of sister divisions under this corporate structure invited sly changes such as moving Jacobson into Noel Transportation.

The eventful night had pitted two diametrically different realities, awkwardly juxtaposed against each other. Respondent, facing a strike of only partial participation by bargaining unit employees, but sorely affected by even these consequences given the nature of its business, operated in two principal ways. First, it was done from a position of ample preparation, with the near strike some years earlier as a rehearsal model. Second, its managers were, except for the emotionally distraught Robbins, disciplined as to their role and their communication cues. This combination gave Respondent a solid-seeming, predictable, and essentially consistent expression of its institutional self as an employer under strike.

Members of the Union on the other hand were tactically scattered in one sense as to those away from Yakima. Meanwhile those at the headquarters vicinity were only questionably informed of their status and objectives, as numerous versions, interpretations, and slanting of company remarks passed among the core group of initial picketers, or those indirectly in close touch with events. In this disrupted situation I see essentially an overall reality in which the Union, wisely

or less than that as the future was shown, exercised a classic, a economic strike with plainly predictable consequences for a complex, service-oriented business. Respondent's reaction may have had awkward, officially unintended, or devilishly coaxing aspects to it; the it being the many and continuing verbal exchanges between supervisors laboring under Noel's resolute commission to prevail, and rank-and-file each in their own way seeking to fulfill personal and ideological motives. The query that arises from it all is whether Respondent overstepped permissible bounds of the statute, in both the sense of its letter and spirit. The query is also whether the emergency, increasingly orderly, and basically unpredictable course of keeping the business viable constituted unlawful labor-management behavior as to characterizations made concerning intentions and achievements of the functional replacement process. I answer both questions in the negative, noting prominently that this record has no individual instance of these economic strikers breaking off from that status during any transitional or temporary phase of specifically covering the total array of jobs with replacement persons. On these holdings and my interpretation of events during the controlling 2 weeks following the strike, I turn to argument grounded in Board precedent.

#### N. Respective Legal Contentions

The General Counsel relies chiefly on *American Linen Supply Co.*, 297 NLRB 137 (1989), arguing that its significance must be viewed in the context of earlier cases *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978), and *Mars Sales & Equipment Co.*, 242 NLRB 1097 (1979), enfd. in pertinent part 626 F.2d 567 (7th Cir. 1980). In *McQuaide*, the context was one of weighing factual points about true permanence of replacement employees in terms of the times when strikers effectively offered to return. The Board finding of violations there was influenced by a lack of "bona-fide" showings of permanence as to numerous replacements, and anecdotal evidence such as the "shifting" employment records produced by that employer. *Mars Sales*, also a case finding unfair labor practices, turned on an employer's unequivocal *written* assertion, made nearly a week after start of a strike, that permanent replacements causing no further need of striker services had been made. When the evidence showed this to simply be a false assertion, the consequences flowing from this falsity meant that the strikers eventually involved for remedial purposes had been unlawfully terminated. Enforcement of the Board's Order in *Mars Sales* did not enlarge on case theory as to consequences to an employer of falsifying such information through the formality of a writing.

In *American Linen* the Board explicitly relied on the precedence of *McQuaide* and *Mars Sales*, stating that it was the conflict with *fact* of the matter when claiming permanent replacement had occurred that constituted an unlawful termination of strikers. Among detailed facts and related analysis adopted by the Board in *American Linen* were that the advice to strikers they were permanent replaced was (1) in writing (2) that the word choice of what was written claimed that strikers "are" replaced, a meaning about what has happened in contrast to what consequence "might," "could," or "would" happen as this was comparatively discussed. *American Linen*, supra at 142.

Respondent contends that *Chromalloy American Corp.*, 286 NLRB 868 (1987), is dispositive of the case. In

*Chromalloy*, various forms of communication, done at various points of time following a strike, were in issue. However, for present purposes the case established that "truthfully informing employees that they are subject to permanent replacement" is not a violation of the Act by "well-established" rule. A specific communication scrutinized in *Chromalloy* was in *writing*, which by forceful-type word choice expressed a rather absolute resolve to continue operations in protection of business interests. I am satisfied that the verbal communication made here in so many diverse ways did not go beyond what *Chromalloy* permits. Atmosphere of the imminent strike was well infused with employee awareness of such a prospect, and all word choices used by managers amounted to no more than the formal "are committed to fulfill our orders," "must have adequate manpower," and "take the necessary steps" phrasing of the several letters present in *Chromalloy*.

Furthermore, Respondent recognized the employees' right to engage in strike action in advance of its commencement, in critical moments during actual inception as with Noel's own allowable remarks near midnight, and during the immediate days stringing out into weeks following the strike, as it was maintained with universal consistency by participants. The Board equated permissible statements by an employer as to "job status," in strike or imminent strike context, with Section 8(c) of the Act. This statutory right of expressing views, absent threat of reprisal, would in my view be erroneously undercut were the General Counsel's chief contention to be adopted. This belief specifically includes recognition that the notion of a "nonunion" character to the operation would coincide with the strike; however, I have concluded that such added verbiage could not be reasonable taken other than a reference to an ending of the Union's *contractual* status with Respondent.

#### O. The Implementations

Respondent's implementations respecting wages and working conditions, and its related discontinuance of contributions to union benefit plans, raises an issue hinging on whether it had by then committed unfair labor practices. As to the scope of the implementation, it corresponded to the last offer made through a mediator on September 10, but more significantly as confirming just how negotiations stood by hand-delivered letter the following day. I have found no preexisting unfair labor practices, thus the remaining question becomes that of impasse, as always a mixed matter of fact and law. Here the Union had on August 29 rejected an offer more palatable than the one advanced roughly 10 days later while a strike was actually, and somewhat effectively, in progress. There is no reason to think that further negotiations would have been fruitful in these circumstances, by definition a consequence showing how bona fide impasse had been reached. The finding that this impasse was valid is also supported by the fact that the Union discontinued further prospect of bargaining, because of its own tactical choice of seeking immediate displacement of all newly utilized workers as a precondition as ending the strike. On this basis I find discrete paragraph 13 of the third amended consolidated complaint is not established from the proofs.

#### P. Vacation Pay

The General Counsel contends that Respondent's handling of vacation entitlement as accrued when the strike started led to violations of the Act. This contention is made largely by pointing to disparity of accommodating individual employee situations, and by the claim that Respondent's poststrike policy was inherently destructive of employee rights under the doctrine of *Great Dane Trailer Co. v. NLRB*, 388 U.S. 26 (1967). In more detailed application to the issue, the General Counsel advances *Texaco Inc.*, 291 NLRB 508 (1988), and *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989), as establishing theory for the pertinent test here. At the outset I find the General Counsel's reliance on *Texaco* and *Glover* to be unavailing. Both cases involved contract interpretation of relatively sophisticated contract language on the subject of vacations, a prospect that is totally absent here inasmuch as positions taken on the subject by Respondent were dictated solely by needs of the operation. This means that *Great Dane* may be squarely looked to in terms of its rationale that once an "inherently destructive" impact on protected rights arises, as with the significant value of vacation benefits, any explaining away of effect must show action different than appearing on its face. I believe that to be the situation here, meaning the simple holding of monetary value of accrued vacation will explain any appearance of impermissible intrusion on statutory rights. Thus the fundamental contentions flowing from *Great Dane* in regards this subject lack merit.

The status of being a paid vacationer and, simultaneously, and active economic striker, cannot coexist. Respondent has done nothing more than maintain the status quo, and there is no showing that any striker who did ultimately return to work, as with Bonlender, were punished as to this vacation entitlement because of having struck. The fact that nonstrikers obtained vacation pay when their scheduled time arose, and in one case a return from strike was synchronized with a vacation value payment, does not show disparity of application to any actionable degree.

#### Q. Respondent's Affirmative Defense

Respondent has introduced the argument that in any event these strikers lack protection of the Act by operation Section 8(d). Its contention here is that notice to mediation authorities was not effectively given as required by law. I find this contention to be unavailing, for the bargaining process in this case was a continuum originating early in 1990 based on still-earlier written notice to mediation authorities in summer of 1989. While unique litigation time lines created an unusual hiatus in dealings between the parties, there is no showing that the purposes of alerting mediation authorities to the dispute were either abandoned or made moot. Notably, a mediator responded promptly in September when such services were requested on short notice. Finally, the argument was completely and unmistakably waived by Respondent when it entered into the settlement agreement reached on July 17. I thus reject Respondent's affirmative defense as premised in its brief.

#### CONCLUSION OF LAW

The General Counsel has not established by a preponderance of the credible evidence that Respondent violated the Act alleged as in the third amended consolidated complaint.

#### Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

The third amended consolidated complaint is dismissed in its entirety.

<sup>10</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.