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**Sierra Bullets, LLC and United Steelworkers of America, AFL-CIO, CLC.** Cases 17-CA-20255 and 17-CA-20368

September 19, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On May 8, 2000, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a brief in support, and the Charging Party filed cross-exceptions and a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, only to the extent consistent with this Decision and Order.<sup>1</sup>

The judge found that the Respondent violated Section 8(a)(5) of the Act by implementing its "best and final" contract proposal. The judge found that, at the time of the implementation, the parties were not at impasse as to mandatory subjects of bargaining and that there was room for movement on critical subjects. Because the parties were not at impasse, the judge found that the Respondent lawfully could not implement its final offer. The judge additionally found that the Respondent's failure to provide relevant information pursuant to the Union's request further precluded it from lawfully declaring impasse. Finally, the judge found that the strike that followed the Respondent's implementation of its contract proposal was an unfair labor practice strike from its inception, that the Respondent unlawfully refused to reinstate the strikers on their unconditional offer to return to work, and that it unlawfully threatened employees with permanent replacement if they continued to engage in an unfair labor practice strike.

The Respondent excepts, arguing that the first basis of the judge's decision—that the parties were not at impasse when the Respondent implemented its proposal—exceeds the scope of the General Counsel's theory that

<sup>1</sup> No party excepted to the judge's dismissal of the allegation that the Respondent discharged employee Eddie Nevils in violation of Sec. 8(a)(3).

was proffered at the hearing. The Respondent contends that the sole litigated theory of violation was that, under *Decker Coal*, 301 NLRB 729 (1991), the mere pendency of the Union's information request, involving an issue in bargaining, precluded implementation of a final contract offer.<sup>2</sup> The Respondent argues that this was the General Counsel's only contention, and the parties agreed to limit the litigation to this issue. The Respondent claims, "[t]his is how the parties were able to reduce the bargaining evidence in this case to a stipulation and about fifteen minutes of trial time." Accordingly, the Respondent argues that there could be no 8(a)(5) violations premised on the view that there was *in fact* no impasse. We find merit in this exception.

The complaint alleges that the Respondent implemented its "best and final" contract proposal, including the wages and benefits proposed by the Respondent on July 17, 1999,<sup>3</sup> without bargaining to impasse with the Union with respect to the Respondent's final contract proposal. On its face, the complaint language is sufficiently broad to permit litigation of whether, at the time the Respondent implemented its proposal, the parties were in fact at impasse on the so-called "four pack" of bargaining issues.<sup>4</sup> However, in his opening remarks at the hearing before the judge, counsel for the General Counsel (General Counsel) expressly limited his theory of violation by stating:

[T]he Section 8(a)(5) allegation, [] is an allegation that the Employer implemented its last, best, and final offer[] which it could not, because there was an information request outstanding, which the Respondent agrees, it did not supply. The General Counsel bases his theory on *Decker Coal* and similar cases. And that is the Section 8(a)(5).

When the Charging Party Union's representative was asked by the judge if he cared to make an opening statement he replied, "The Union doesn't. I think the General Counsel stated it for us."

Consistent with this representation made on the record, the parties proceeded to litigate the case under the narrow *Decker Coal* theory of violation. As a consequence, the record contained only a bare outline of contract negotiations and the contours of the disagreement between the

<sup>2</sup> The Respondent notes that there was no contention that it refused to provide the information the Union requested on mandatory overtime, or that it failed to timely provide it. Rather, it argues, the General Counsel's sole theory was that as long as the information request was outstanding, a valid impasse could not be reached.

<sup>3</sup> All dates are in 1999 unless otherwise indicated.

<sup>4</sup> The parties agreed that as of the June 22 bargaining session they had narrowed their focus to four key issues that were outstanding: management rights, clean-slate attendance, union security, and union dues checkoff.

Respondent and the Union over the “four pack” of bargaining issues. The parties did not place into evidence their notes of meetings or descriptions of the 19 bargaining sessions, which spanned an 8-month period. Indeed, on the issue of bargaining, only two witnesses testified, and their testimony was limited to descriptions of the final few bargaining sessions. As to those last sessions, both witnesses testified that the parties were deadlocked on union security and dues checkoff, and had been so for the full 8 months of negotiations, and that there was an outstanding information request on the unrelated issue of overtime.

The entire transcript in the unfair labor practice hearing consisted of 127 pages, about 31 of which concerned the parties’ bargaining. The remainder of the transcript was devoted to the 8(a)(3) allegation that the judge dismissed, and to which there are no exceptions. Thus, the record evidence confirms that the theory litigated was the narrow one noted above.

Finally, in his posthearing brief to the judge, the General Counsel argued, for purposes of the 8(a)(5) allegations, only that the outstanding information request precluded a finding of impasse. Similarly, the Union based its posthearing arguments on the same theory. Neither the Union nor the General Counsel argued that the parties were not at impasse because there was movement at the bargaining table on the “four pack” of bargaining issues.

Based on the foregoing, it is clear that the General Counsel expressly chose to litigate only the narrow *Decker Coal* theory of violation, i.e., that impasse was precluded by the outstanding information request. Further, the General Counsel’s express representations on the record, his conduct in litigating the case, and his arguments on brief to the judge, reasonably led the Respondent to believe that it would not have to defend its decision to declare impasse on a different theory, such as the theory that there was still a potential for movement on the four-pack at the final bargaining session.<sup>5</sup> Notwithstanding the assertions and conduct of the General Counsel, the judge proceeded to find an 8(a)(5) violation of the Act on the theory that the parties were not at impasse and, accordingly, that the Respondent unlawfully implemented its final contract offer. In so doing, the judge deprived the Respondent of due process. In these circumstances, and on this record, we find that the unfair labor practice finding predicated on the theory that the

parties were not in fact at impasse cannot stand. We therefore reverse this finding.

Our conclusion is supported by the Board’s decision in *Paul Mueller, Co.*, 332 NLRB 1350 (2000). In *Paul Mueller*, although the complaint allegation was broad, the General Counsel made clear at the hearing that he was proceeding on a narrow theory of violation. The Board found that the General Counsel’s representations on the record reasonably led the Respondent to believe that it would not have to defend on a broader theory. In *Paul Mueller*, the Board, as we here, reversed the judge, rejected the analysis on the broader theory, and dismissed the complaint allegation.

We reject the Union’s argument that the complaint was sufficient to inform the Respondent that the broader impasse issue would be litigated, and that the judge was free to resolve the 8(a)(5) allegation on any theory—regardless whether it was advanced by the parties. *Paul Mueller* holds otherwise. Further, the cases cited by the Union do not support this broad contention. For example, in *Louisiana Pacific Corp.*, 299 NLRB 16, 18 (1990), the Board concluded that the failure of the General Counsel to argue a theory of violation in the posthearing brief to the judge did not preclude the judge from making a finding on that theory where it was encompassed by the complaint allegations and the General Counsel elaborated on this theory at the hearing with evidence to support it. These facts contrast sharply with those here, where the General Counsel distinctly limited the theory of the 8(a)(5) violation. This representation by the General Counsel signifies what he is alleging to be unlawful, and the Respondent should not be expected to defend against other theories that are not part of the General Counsel’s case.

We turn now to the judge’s alternative finding of an 8(a)(5) violation based on the Respondent’s implementation of its final offer while an outstanding information request was pending (i.e., the *Decker Coal* theory of violation). We find that the record does not support a violation on this theory. Specifically, we find that the subject of this information request, made late in the course of bargaining, was unrelated to the core issues separating the parties in negotiations such that this unfilled information request was insufficient to preclude a bargaining impasse.

The Union was certified as the employees’ bargaining representative in September 1998. Thereafter the parties met in contract negotiations 19 times between December 1998 and July 17, 1999. By June 22 the parties reached a point where they were concentrating on four issues. On cross-examination, union witness, Terry Harlan, agreed that this so-called “four pack” of issues, that the Union

<sup>5</sup> Further, while it is the General Counsel and not the Charging Party who controls the theory of a case, see, e.g., *Raley*’s, 337 NLRB No. 116 (2002), the Union likewise never argued that the theory of violation was other than that asserted by the General Counsel.

considered necessary to reaching agreement, included clean-slate attendance, union security, dues check-off, and a limited management rights clause. The Respondent's position was that there would be no clean slate, no union-security clause, and no dues check-off and that the management-rights clause should be the one it proposed.<sup>6</sup> Harlan acknowledged that at the next session on July 16th both parties continued to hold tightly to those positions. Thus, the record testimony establishes that the parties were deadlocked, and had been for the entire 8 months of bargaining, on the "four pack" of issues. No movement was made on any of these issues prior to the Respondent's declaration of impasse. Unrelated to this deadlock, at the July 16 bargaining session the Union requested information regarding the amount of Saturday overtime worked in 1998 and 1999. (The overtime proposal was first made at the prior meeting.)

On July 17 the Respondent presented its "best and final" contract offer and advised the Union of its intention to implement the wage and benefit terms of that offer as of July 19.

At a meeting after the July 17 session, the Union informed the employees that the Respondent had declared impasse and would implement its final offer. The Union took the position that the parties were not at impasse and that there was an outstanding request for information that the Respondent had not provided.<sup>7</sup> The next day the Union faxed the Respondent a letter stating that the membership had rejected the offer and had voted to strike. On July 19 the strike began.

On these facts we find, contrary to the judge, that the Union's outstanding information request did not preclude a finding that the parties were at impasse at the time the Respondent implemented its best and final offer. Accordingly, this case is distinguishable from *Decker Coal*, supra, on which the judge relied.

In *Decker Coal*, the Board agreed with the judge's finding that no impasse existed because the employer had not fully complied with the union's relevant information request. However, unlike here, the information requested in *Decker Coal* concerned the precise issues over which the parties had been bargaining for months, namely pension plans and job security. Although the employer had supplied some of the requested information, as of the date it declared an impasse in negotiations and implemented its last, best offer, the employer had not provided all the information.

<sup>6</sup> Also at the June 22 session the Union, for the first time, proposed that Saturday overtime be limited to three consecutive Saturdays a month. The Respondent rejected this proposal.

<sup>7</sup> The General Counsel did not allege that the Respondent's failure to provide the information violated the Act.

In *Decker Coal* the judge found, and the Board agreed, that it was reasonable to assume that, armed with the information it had requested, the union would have begun making subsidiary deals on the pension matter that could have led to total agreement. Thus, on the specific facts of *Decker Coal* the outstanding unfilled information requests precluded a finding that the parties were at impasse. In reaching this conclusion, the Board found it unnecessary to "rely on the judge's reasoning to the extent it may be read to suggest that in no event can there be impasse where information requests are outstanding." *Decker Coal*, 301 NLRB at 729 fn. 2. The case at hand presents that precise issue, whether the mere existence of any information request, regardless of its relevance to the core issues that separate the parties at the bargaining table, precludes a finding of impasse. We find, as discussed below, that in the circumstances of this case, it does not.

Thus, as stated above, the Union's information request was not made until the 17th bargaining session on July 16. The overtime proposal itself was not made until the 16th session. Up till then, the parties agree, they had focused their negotiations on the "four pack" of issues that the Union believed was essential to the signing of any contract, and they had made no progress towards any agreement on those issues. The information request, unlike that in *Decker Coal*, had no bearing on the parties' failure to agree on the "four pack."

To the contrary, had the Respondent provided all the requested information, there is no convincing argument that this would have changed the fact that the parties were deadlocked on the "four pack." We therefore cannot find that the unfilled information request alone precluded a lawful impasse in this case.

Accordingly, we find that the Respondent's implementation of its final contract proposal did not violate Section 8(a)(5). Because the strike was therefore not caused or prolonged by any unfair labor practice it was not an unfair labor practice strike. See, e.g., *CalMat Co.*, 331 NLRB 1084 (2000).

Further, since the strikers were economic and not unfair labor practice strikers, the Respondent did not violate Section 8(a)(1) of the Act, as alleged, by informing its employees that they could be permanently replaced while on strike. *Eagle Comtronics*, 263 NLRB 515, 516 (1982); *Quirk Tire*, 320 NLRB 917, 925-926 (2000), *enfd.* in part 241 F.3d 41 (1st Cir. 2001). Nor did it violate Section 8(a)(3) of the Act by failing immediately to reinstate the economic strikers on receipt of their uncon-

ditional offer to return to work.<sup>8</sup> We shall therefore dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 19, 2003

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Frank Molenda, Esq.*, for the General Counsel.

*Stanley E. Craven, Esq.*, of Kansas City, Missouri, for the Respondent.

*John Hurley, Esq.*, of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on February 9, 2000, in Sedalia, Missouri.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On consideration of the entire record and briefs filed by Respondent, Charging Party, and General Counsel, I make the following findings.

Respondent is a corporation with an office in Sedalia, Missouri, where it is engaged in the manufacture and distribution of bullets and ammunition. Respondent annually sells and ships goods valued in excess of \$50,000 to and from its Sedalia location directly to points outside Missouri. Respondent admitted that it has been an employer engaged in commerce at material times. Respondent admitted that United Steelworkers of America, AFL-CIO, CLC has been a labor organization at all material times.

There are disputes as to whether a letter from Respondent to its employees contained comments in violation of Section 8(a)(1); whether Respondent discharged Eddie Nevils in violation of Section 8(a)(3); whether Respondent unlawfully declared an impasse in negotiations and implemented unilateral changes while there was a pending request for information from the Union; and whether its employees' strike was caused or prolonged by unfair labor practices.

The parties stipulated that the Union was certified as bargaining representative for production employees<sup>1</sup> at Sedalia on

September 14, 1998; that the parties met in contract negotiations 19 times between December 1998 and July 17, 1999; that before July 1999 the Union made several substantial requests for information and Respondent responded to each of those requests by supplying the requested information; that Respondent made a complete contract proposal to the Union on June 22, 1999, and that proposal did not include union security or checkoff of union dues which the Union had demanded since the first negotiating session; that on making its June 22 offer Respondent advised the Union that the Union had supported politicians that favored gun legislation and Respondent advised its employees of the Union's support of those politicians; that the Union rejected Respondent's June 22 offer and a negotiation session was set for July 16; and that General Counsel does not contend that Respondent's above-mentioned acts constituted unfair labor practices.

Respondent and the Union continued to hold firm on their respective union security and dues-checkoff positions during the July 16 session and Respondent restated its concern that the Union supported politicians that would hurt its business and the Union explained the need to have financial support from all the individuals it was legally charged with representing; toward the end of a July 17 bargaining session Respondent presented its best and final offer and advised the Union of its intention to implement the economic terms of that offer as of July 18; the Union took the position that the parties were not at impasse; and on July 18 the Union faxed the following to Respondent:

The union has considered the company's best and final proposal which was presented on July 17, 1999 and rejected it unanimously.

A labor strike will begin at 10:00 PM on July 18, 1999.

I again state to you that we are not at an impasse. The Union still has movement on outstanding issues and is willing to meet and continued [sic] negotiations.

I suggest that we meet as soon as possible to continue the negotiating process. I can be contacted at (816) 836-1400.

I would again request information on the Union's proposal regarding overtime.

1. Number of weekends and workers scheduled to work in 1998.

2. Number of weekends and workers scheduled to work in 1999.

Pickets appeared at Respondent's facility on July 19 and most unit employees did not report for work as the Union officially commenced a strike; Respondent implemented the wage and benefit provisions of its final offer; Respondent replied to the Union's fax, and suggested the bargaining committees meet on July 26 or 27; and Respondent advised the Union that striking employees will receive COBRA notices with respect to

<sup>8</sup> The General Counsel alleged in the Second Consolidated Complaint, and the Respondent admitted in its Answer, that about July 27 the Respondent permanently replaced the 53 employees who engaged in the strike.

<sup>1</sup> Respondent admitted the Union represented "all full-time and regular part-time production and maintenance employees employed by Respondent at its facility located at 1400 W. Henry, Sedalia, Missouri, but EXCLUDING office employees, clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act."

their health insurance. In its notice that it was implementing wages and benefits as proposed in its final offer Respondent stated:

With respect to your request for information on weekends that employees were scheduled to work in 1998 and 1999, I have confirmed that this will be a very labor intensive task and will require going to the individual employee time cards. We will be happy to discuss with you at the meeting next week how we best might address your request for this information.

Due to scheduling problems the parties next met in negotiations on August 23 when they discussed the Union's information request and agreed that union bargaining committee member, Terry Harlan, would review 1998 and 1999 individual timecards, and prepare a summary for the Union with a copy to Respondent. Respondent admitted that it declared an impasse and implemented its final offer while there remained a pending information request from the Union; that it treated all striking employees as economic strikers and that it retained replacement employees rather than immediately reinstating strikers on their unconditional offer to return to work; and Respondent's proffered reason for the termination of Eddie Nevils is described in Joint Exhibit 6.

#### Section 8(a)(1)

The parties are in agreement that Respondent wrote its employees on July 21, 1999. That letter included the following paragraph:

We are writing to advise you that the Company is continuing to operate its business with employees who are coming to work. We are in the process of hiring replacements to assist with the work. These replacements will be offered permanent positions beginning July 27, 1999. If you return to work by that date your position will not be filled with a permanent employee.

#### Findings

#### Credibility

There is no dispute as to credibility.

#### Conclusions

As shown below, Respondent engaged in unfair labor practices which caused the employees' July 19, 1999 strike. Board cases have established that unfair labor practice strikers are entitled to reinstatement on their unconditional offer to return to work. By writing the employees they would be replaced by permanent employees, Respondent unlawfully threatened its employees with loss of jobs if they continued their unfair labor practice strike.

#### Section 8(a)(3)

Respondent allegedly discharged Eddie Nevils because Nevils sabotaged its wastewater treatment plant on July 16, 1999. Respondent stipulated that its proffered reason for the termination of Eddie Nevils is described in Joint Exhibit 6. There is no dispute and the evidence showed that Nevils engaged in union activity including soliciting other employees to

support the Union. Moreover, Respondent suspected<sup>2</sup> that Nevils left work at noon on July 16, 1999, in order to support the Union.

Plant Engineer Patrick Daly testified that he discovered the plant wastewater treatment had been deliberately sabotaged immediately after Eddie Nevils left the plant at noon on July 16, 1999. Respondent Attorney David Wing testified in support of Daly. Wing was scheduled to engage in contract negotiations with the Union at 1 p.m. on July 16, 1999. At that time Wing received reports of sabotage.

Daly testified that he initially noticed a high pH (10.04) in the first stage pH tank. He determined that may have been caused by dumping caustic compound 22 in the system at any point in or before that tank. At that time Daly locked down the plant and started a full investigation. He also placed a guard at the wastewater treatment plant.

Daly was joined in the investigation by Terry Belham, the backup operator of the second shift quality control. Daly discovered that the pH was calibrated incorrectly at the first stage pH tank and should have indicated 1.83 instead of 10.04. He then found that the junction box between the pH probe and the coaxial cable was opened and the BNC connector had been unhooked. Also another BNC connector had been removed where the pH probe connected inside a large electrical box.

After he reconnected the two BNC connectors, Daly discovered that the acid pump was not functioning properly. In searching for the cause for the pump not functioning, Daly discovered that a ball valve was closed but the valve's T handle was broken and replaced in position to incorrectly illustrate that the valve was open. By being closed that valve prevented acid from reaching the pump and even though the acid pump continued to run it was not pumping acid.

Daly then discovered that the DAF effluent pumps had not been left in the auto position. That resulted in one of Respondent's backup systems being inoperable. After that discovery Daly, with the assistance of an electrician, discovered fault in the system that controls the pumps in the well. One of the pump wires that controls the valves had been removed.

Finally, Daly discovered an extreme amount of lime, some paper, and an unknown "very slick, very gummy chemical" in a 400-gallon bulk tank.

According to Daly, the only employees with the knowledge and skill to perform the above-mentioned acts of sabotage, were himself and Eddie Nevils. Daly issued a July 26, 1999 report on completing his investigation into the wastewater problems.

#### Findings

#### Credibility

As to this issue there is a direct conflict between Eddie Nevils and Patrick Daly. I was not impressed with Nevils' demeanor or his testimony. For example, Nevils testified both as to what he told Respondent and as to his actual need to leave work at noon on July 16. A number of union supporters left work at noon on July 16 and contract negotiations were sched-

<sup>2</sup> Nevil's supervisor, Patrick Daly, admitted that he suspected that Nevil was leaving work to support the Union.

uled at 1 p.m., but according to Nevils, his leaving work had nothing to do with any of that. Instead, Nevils left work to see someone about repairing an automobile. However, Nevils admitted that he was unable to find that person, he had not made prior arrangements to meet that person, and he did not drive the car that he planned to repair. After failing to find the alleged auto mechanic, Nevils admittedly went to the hotel where contract negotiations were taking place. I am convinced that Nevils was not truthful in that testimony.

As to Daly, I was impressed with his demeanor and his testimony. Moreover, Daly testified that his initial investigation included employee Terry Belham and that testimony was not disputed. In view of my findings in that regard and in view of my finding that Nevils was untruthful, I credit Daly and to the extent there are conflicts, discredit Nevils.

#### Conclusions

In that regard I shall consider whether General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The evidence shows without dispute that Nevils engaged in union activity and Respondent knew that fact.<sup>3</sup> Nevils was fully involved in the strike and served as a member of the strike committee. Nevils was confronted with the police on one occasion for crossing onto plant property. On another occasion he persuaded a job applicant to tear up his application form at the picket line. Moreover, even though Respondent decided to terminate Nevils on July 26, Nevils was not told of that decision until December 13, 1999.

However, Respondent contended that it would have discharged Nevils in the absence of his union activity.

As shown above, Patrick Daly credibly testified that Respondent's wastewater treatment plant was sabotaged at some time before noon on July 16, 1999.

As a result of his investigation Daly concluded that the sabotage involved a series of deliberate acts. Those acts required sophisticated knowledge and skill. Nevils possessed the required knowledge and skill. No one else other than the plant engineer possessed that sophisticated knowledge and skill. Nevils was the only employee working in the wastewater treatment plant immediately before the sabotage was discovered and another employee accompanied the plant engineer Daly while he discovered the sabotage. In view of that evidence I am convinced that Respondent reasonably believed that Eddie Nevils sabotaged its wastewater treatment plant. "Union activity does not insulate employees from the reasonable inferences of circumstantial evidence."<sup>4</sup>

<sup>3</sup> Respondent argued that General Counsel failed to prove it was motivated by union animus in discharging Nevils. Moreover, as shown above, Respondent proved that it would have discharged Nevils in the absence of union activity.

<sup>4</sup> Respondent cited *Affiliated Foods, Inc.*, 328 NLRB 1107 fn. 1 (1999).

General Counsel and the Union argued that Respondent relied on its contention that Nevils was one of the only ones that had keys to the wastewater facility and that contention was proved incorrect by testimony showing that several others had master keys which would work in the wastewater facility. However, as shown above, the credited testimony of Patrick Daly proved that sabotage was discovered immediately after Nevils left work on July 16 and that employee Terry Belham was with Daly when Daly discovered evidence of sabotage. If Nevils had performed his wastewater duties that morning as he told Daly, then he would have discovered all or some of the same things discovered by Daly after 12 p.m. Therefore, I am convinced that the evidence supported Respondent's conclusion that Nevil was involved in the sabotage regardless of evidence showing that others had keys that worked at the wastewater facility.

In regard to the delay between Daly's July 26 investigation report and the discharge, Eddie Nevils was on strike from July 19 until October 1999. Nevils was first interviewed on December 3 regarding the wastewater treatment sabotage and he was actually discharged on December 13, 1999. The record illustrated that Plant Engineer Daly reported on July 26<sup>5</sup> to the effect that Eddie Nevils had sabotaged the wastewater treatment facility but a consideration of reinstatement of Nevils was not processed until after the strike ended. However, Daly wrote Nevils on July 30 that Respondent was investigating "irregularities that were discovered in its wastewater treatment operations after you left work on July 16, 1999." In that letter Daly advised Nevils that Respondent would need to meet with Nevils to further investigate those irregularities and "determine whether or not discipline up to and including termination may be appropriate" prior to Nevils returning to work.

Before October Respondent was not faced with a question of Nevils returning to work. Moreover, there was no showing that Respondent failed to move in an orderly and timely fashion from the Union's offer to return to work until Nevils was interviewed on December 3. Therefore, I find that Respondent proved it would have discharged Eddie Nevils in the absence of his union activity and Respondent did not engage in unfair labor practices by discharging Nevils.

#### Section 8(a)(5)

Respondent and the Union engaged in negotiations for a new collective-bargaining agreement in 1998 and 1999. The parties reached a point around June 22, 1999, where four or more issues were outstanding. Respondent contended that those four issues included the questions of clean-slate attendance, management rights, union security, and union dues checkoff. Terry Harlan testified the four issues included management rights, union security, union dues checkoff, and recognition.

Union committee member, Terry Harlan, testified that the Union made a June 22, 1999 proposal regarding Saturday overtime. The Union proposed that employees work three consecutive Saturdays and then have one off. Respondent rejected that proposal. Thirty-five bargaining unit employees were present during a June 26 meeting and there was lengthy discussion

<sup>5</sup> Jt. Exh. 6.

about Saturday overtime. Discussion on Saturday overtime continued during the July 16 negotiation session and the Union requested information regarding the amount of Saturday overtime in 1998 and 1999.<sup>6</sup> The parties also discussed union dues checkoff with the Union taking a position of 1 year for employees to get out of the Union. Respondent took a position that employees should have more of a window of opportunity to get out of the Union. After a caucus Respondent advised the Union that they were not offering union dues checkoff.

At a union meeting after a July 17 negotiation session, union business agent, Jerry Johnson, told the employees that Respondent had made its best and final offer which Respondent would implement on July 19, but that the parties were not at impasse, there was room for movement on the issues and that the Union had an outstanding request for information which had not been provided by Respondent.

Union committee member, Terry Harlan, reviewed employee timecards at Respondent's facility a few days after the parties August 23, 1999 negotiation session.<sup>7</sup> Ms. Harlan suggested to Respondent that it had not supplied all the timecards and more cards were produced. Despite Harlan meeting and viewing timecards, she has not yet completed her examination.<sup>8</sup>

On October 4, 1999, the Union made an unconditional offer to return the employees to work.

#### Findings

##### Credibility

I was impressed with the demeanor of Terry Harlan. Ms. Harlan demonstrated complete and thorough recall of matters during June and July 1999. Her testimony included Respondent's discussions and ultimate announcement that it was not offering dues checkoff during the July 16 negotiation session and the employees reasoning and vote during the June 26 meeting regarding the Union's information requests for 1998 and 1999 Saturday overtime work. I credit her testimony.

##### Conclusions

The ultimate question must be were the parties at impasse on July 17.

Respondent argued that the parties were at impasse on a "four pack" of issues,<sup>9</sup> that the Union's information request did

<sup>6</sup> After Respondent indicated that it had no records showing mandatory as distinguished from voluntary Saturday overtime, the Union requested records showing all Saturday overtime worked in 1998 and 1999. Respondent offered a sampling of information covering the three union committee members but the Union rejected that offer as not being representative of unit employees' Saturday overtime.

<sup>7</sup> Respondent stated during the August 23 negotiation session that it did not have sufficient manpower to respond to the Union's request for Saturday overtime records. The Union volunteered to have its committee member, Terry Harlan, examine the records and Respondent agreed.

<sup>8</sup> On December 1 Respondent Attorney Wing told the Union that Respondent had the remaining timecards available for Harlan's examination. Harlan's overtime work and transportation problems have prevented her from going to the office and completing examination of the requested timecards.

<sup>9</sup> Respondent argued the four issues were management rights, clean-slate attendance, union security, and union dues checkoff. Terry Harlan testified that Jerry Johnson combined the issues of recognition, man-

not relate to any of those "four pack" of issues and that impasse would have continued in the absence of its failure to supply information. Respondent pointed out that the Board in *Decker Coal Co.*, 301 NLRB 729 (1991),<sup>10</sup> rejected the administrative law judge's determination that "in no event can there be an impasse where information requests are outstanding."

As to the Union's information request Respondent does not dispute that it had a duty to furnish the requested information. That information was relevant in the context of a bargaining issue. The Union proposed but Respondent rejected, restraint on Respondent's assignment of Saturday overtime. The information the Union sought, would reveal how much overtime had been worked in 1998 and 1999 and may have enabled the Union to more fully evaluate both it and Respondent's positions on that bargaining issue (*Orthodox Jewish Home for the Aged*, 314 NLRB 1006 (1994)).

Moreover, the evidence revealed that the parties' respective bargaining positions were not as clearly defined as argued by Respondent. The credited testimony of Terry Harlan illustrated the parties were not at impasse on the "four pack of issues." Instead, the Union had told Respondent it had room for movement on management rights and recognition and Respondent actually moved from its former recognition position during the July 17, 1999 bargaining session. During that session Respondent dropped its demand to exclude some 800 ballistic technicians from the bargaining unit.

Moreover, regardless of the so-called "four pack of issues," there was evidence that the parties were not at impasse. The parties discussed union dues checkoff at length on July 16 and the discussions included Respondent arguing against the Union's position of employees' resignation from the Union being limited to 1 year. It is true that Respondent returned to negotiations and announced that it did not intend to offer dues checkoff. However, their union dues discussion illustrated that the parties were not locked in hard and fast positions as claimed by Respondent. Moreover, the evidence revealed that the Union was searching for a means of dealing with Saturday overtime. On July 16 the Union requested information that may have permitted it to advance a more palatable proposal regarding Saturday overtime. Respondent's discussion early in that July 16 meeting illustrated there was a potential for agreement especially if the Union was able to advance a new proposal after examination of requested Saturday overtime data. At the time of that request for information Respondent had not declared impasse or announced its best and final contract offer and there was no evidence that the Union suspected Respondent was near a declaration of impasse. However, Respondent did declare impasse and advance its last offer the next day.

As shown above, I credit the testimony of Terry Harlan. Her testimony illustrated that the parties were not at impasse on July 16 or 17 (*Orthodox Jewish Home for the Aged*, supra; *ITT*

agement rights, checkoff, and union security into a "four pack." Harlan testified that the Union told Respondent during the June 22 negotiation session, that the Union could make some movement in the management rights and recognition areas.

<sup>10</sup> General Counsel cited *U.S. Testing Co.*, 324 NLRB 854, 860 (1997).

*Rayonier, Inc.*, 305 NLRB 445 (1991); *Decker Coal*, supra; *Community General Hospital of Sullivan County*, 303 NLRB 383 (1991).) Even though there may have been impasse on some of the "four pack" of issues,<sup>11</sup> the parties were not at impasse as to mandatory bargaining issues.<sup>12</sup> The parties' July 16 negotiations show that Saturday overtime was one issue where agreement remained a possibility. There was movement by Respondent on recognition during the July 17 session and Terry Harlan testified that other issues where movement was expected included wages and health insurance.

The Union requested information that was relevant to the Saturday overtime issue on the day before Respondent declared impasse and announced its intention to unilaterally implement terms of its last offer. That action constituted bargaining in bad faith in violation of Section 8(a)(5) of the Act.

#### Failure to Reinstate Alleged ULP Strikers

The Union made a June 22, 1999 proposal regarding overtime. The Union proposed that employees work 3 consecutive Saturdays and then have 1 off. Respondent rejected that proposal. Discussion on Saturday overtime continued during the July 16 negotiation session and the Union requested information regarding the amount of Saturday overtime in 1998 and 1999. The parties also discussed other matters including union dues checkoff.

Respondent made its final offer on July 17 and, on that same day union business agent, Jerry Johnson, told the employees that Respondent had made its best and final offer, which Respondent would implement on July 19. Johnson told the employees that the parties were not at impasse, there was room for movement on the issues and that the Union had an outstanding request for information, which Respondent had not provided.

A July 18 union fax to Respondent included the following:

The union has considered the company's best and final proposal, which was presented on July 17, 1999 and rejected it unanimously.

A labor strike will begin at 10:00 PM on July 18, 1999.

I again state to you that we are not at an impasse. The Union still has movement on outstanding issues and is willing to meet and continue negotiations.

I suggest that we meet as soon as possible to continue the negotiating process. I can be contacted at (816) 836-1400.

I would again request information on the Union's proposal regarding overtime.

1. Number of weekends and workers scheduled to work in 1998.

2. Number of weekends and workers scheduled to work in 1999.

<sup>11</sup> As to the four pack of issues recalled by Terry Harlan, it appeared that only dues checkoff and union security may have involved impasse. However, Harlan testified that the union spokesman never issued an ultimatum to the effect there would not be an agreement unless Respondent agreed to any or all of the Union's proposals.

<sup>12</sup> The Board has found that even though parties may be at impasse on some issues, there may not be a total impasse in negotiations. See for example *Detroit Newspaper Agency*, 326 NLRB 782 (1998).

Respondent implemented the wage and benefit provisions of its final offer on July 19. On that same day pickets appeared at Respondent's facility and most unit employees did not report for work as the Union officially commenced a strike. In its notice that it was implementing its final offer, Respondent advised the Union:

With respect to your request for information on weekends that employees were scheduled to work in 1998 and 1999, I have confirmed that this will be a very labor intensive task and will require going to the individual employee time cards. We will be happy to discuss with you at the meeting next week how we best might address your request for this information.

#### Findings

#### Credibility

As shown above, I credit the testimony of Terry Harlan.

#### Conclusions

Respondent argued there was no evidence that the Union's strike was caused or prolonged by its information request. However, the credited testimony of Terry Harlan proved that Respondent is not correct.

The Union proposed limiting Saturday overtime on June 22. Then, before there was any indication that Respondent would declare an impasse, the Union made a July 16 request for information after Respondent rejected the Union's Saturday overtime proposal. That evidence illustrated that the Union was logically investigating the Saturday overtime question. At the next negotiation meeting (July 16), after it proposed limiting Saturday overtime, the Union made its information request. The record does not support Respondent's argument that the Union made its information request simply to forestall impasse. There was no showing that the Union knew a declaration of impasse was imminent.

Indeed the undisputed record shows that the parties engaged in give and take discussions on July 16 and 17, and it appeared that Respondent was open to a modified agreement over union dues and recognition. Those discussions tend to show that impasse was not imminent.

The record is not in dispute but that immediately after Respondent made its final offer on July 17, union business agent, Jerry Johnson, held a meeting with employees. Johnson told the employees that Respondent had made its best and final offer, which Respondent would implement on July 19. Johnson said that the parties were not at impasse, there was room for movement on the issues and that the Union had an outstanding request for information, which Respondent had not provided. The employees then voted to reject Respondent's final offer and go on strike beginning July 19.

In view of the above evidence I find that Respondent was incorrect in its argument. Respondent engaged in conduct in violation of Section 8(a)(5) by declaring an impasse on July 17 and instituting terms of its last offer on July 19 and its employees struck on July 19 because of those unfair labor practices. I find that the employees' July 19 strike was an unfair labor practice strike from its inception (*Decker Coal*, supra).

## CONCLUSIONS OF LAW

1. Sierra Bullets, LLC is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by threatening its employees with permanent replacements if they continue their unfair labor practice strike, has engaged in conduct in violation of Section 8(a)(1) of the Act.
4. Respondent, by prematurely declaring an impasse and instituting terms of its last contract offer and refusing to reinstate unfair labor practice strikers on their unconditional offer to return to work, has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

## REMEDY

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

As I have found that Respondent has unlawfully refused to reinstate unfair labor practice strikers on their unconditional offer to return to work, I order Respondent to immediately and unconditionally offer reinstatement and make employees that engaged in the union strike beginning on or after July 19, 1999, whole for all loss of earnings suffered as a result its failure to reinstate them from October 4, 1999. Backpay shall be computed as described in *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979); and *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

## ORDER

The Respondent, Sierra Bullets LLC, Sedalia, Missouri, its officers, agents, successors, and assigns shall

1. Cease and desist from
  - (a) Threatening its employees with permanent replacement if those employees continue to engage in an unfair labor practice strike.
  - (b) Refusing to bargain in good faith with United Steelworkers of America, AFL-CIO, CLC as exclusive collective-bargaining representative of the following described appropriate bargaining unit, by prematurely declaring an impasse in negotiations and instituting terms of its last collective-bargaining contract proposal:

All full-time and regular part-time production and maintenance employees employed by Respondent at its facility lo-

cated at 1400 W. Henry, Sedalia, Missouri, but EXCLUDING office employees, clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(c) Failing to immediately reinstate employees engaged in the unfair labor practice strike on receipt of the Union's unconditional offer to return those employees to work.

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

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

(a) Within 14 days of this Order, offer immediate and full reinstatement to all employees who participated in the July 19 and following unfair labor practice strike and make those employees whole for all loss of earnings and other benefits suffered as a result of its failure to immediately offer reinstatement on receipt of their unconditional offer to return to work, plus interest, in the manner set forth in the remedy section of the decision.

(b) On request, bargain in good faith with United Steelworkers of America, AFL-CIO, CLC as the exclusive representative of employees in the unit described above concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(c) Preserve and within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Sedalia, Missouri business office copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 17, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2000

<sup>14</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."

<sup>13</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.

## APPENDIX

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

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

Section 7 of the act gives employees these rights.

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

WE WILL NOT fail to bargain in good faith with United Steelworkers of America, AFL-CIO, CLC by unilaterally declaring an impasse and implementing changes in your terms and conditions of employment.

WE WILL NOT fail to reinstate employees who engage in an unfair labor practice strike against us on receipt of their unconditional offer to return to work.

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

WE WILL, within 14 days of this Order, offer immediate and unconditional reinstatement to all employees who participated in the unfair labor practice strike which commenced on July 19, 1999, and WE WILL make them whole, with interest, for all wages and benefits denied them from and after the date (October 4, 1999), on which we received their unconditional offer to return to work.

WE WILL, on request, bargain in good faith with United Steelworkers of America, AFL-CIO, CLC as your exclusive bargaining representative concerning terms and conditions of employment; and, if an understanding is reached, embody it in a signed agreement.

SIERRA BULLETS, LLC