Horsehead Resource Development Co., Inc. *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3–990. Cases 10–CA–27467 and 10–CA–27578

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On July 31, 1995, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge that the Respondent violated the Act by bargaining in bad faith, by locking out unit employees, and by engaging in surveillance of employees' union and protected concerted activities. In adopting the judge's findings that the Respondent bargained in bad faith, we conclude, for the reasons below, that the Respondent engaged in dilatory tactics that undermined the bargaining process in violation of Section 8(a)(5) and (1).

At the outset of bargaining, the Respondent reneged on a tentative agreement with the Union to commence negotiations in mid-January 1994.[4] As a result of the Respondent's unwillingness to meet in a more timely fashion, the parties did not commence negotiations until February 7, 3 weeks before expiration of the existing contract on March 1. The Union presented a wage proposal at the initial February 7 bargaining session. The Respondent, however, did not present its wage proposal until February 25, only 4 days before contract expiration. When the Union presented its wage rate counterproposal on February 25, the Respondent's negotiators informed the Union that they were having ''problems'' communicating with their superiors and that higher management in New York ''won't return our calls'' regarding the Union's counterproposals. Although the Union wanted to meet again on February 26, the Respondent refused to do so. Instead, the Respondent put off negotiations until February 27. The Respondent then cancelled the February 27 session, leaving one day, February 28, to conclude bargaining before the contract was set to expire. On the evening of February 28, following lengthy bargaining that day, the Union made new concessions and repeatedly emphasized that it was available and ready to continue negotiations. Instead of responding to the Union in a timely fashion, the Respondent's chief negotiator, Martha Koletar, drafted a letter declaring that an impasse had been reached.[5] Koletar then left town. This brought negotiations to a halt for over a week. In the interim, on March 1, the Respondent implemented a lockout.

It is evident from the foregoing that the lockout occurred in a context marked by conduct that undermined the negotiating process: reneging on agreements to meet and bargain; cancelling and refusing to schedule bargaining sessions in a timely manner; the refusal of upper management to respond to union counterproposals at a critical juncture of bargaining; and, ultimately, an erroneous declaration of a bargaining impasse that did not exist and the untimely departure and absence of the Respondent's chief negotiator at contract expiration.

In these circumstances, we agree with the judge that the Respondent breached its bargaining obligation at the time of the March 1 lockout and that the lockout was a product of this unlawful bargaining conduct.[6] Accordingly, we find, in agreement with the judge, that the Respondent violated Section 8(a)(5), (3), and (1), as alleged.[7]

[1] No exceptions were filed to the judge's dismissal of 8(a)(3) and (1) allegations that four employees were unlawfully discharged for acts of violence and/or threats after the Respondent's March 1, 1994 lockout of employees.

[2] The Respondent's motion to supplement the record with a posthearing affidavit purporting to describe contract negotiations following the close of the hearing on October 21, 1994, is denied. Moreover, even if admitted, such posthearing evidence is immaterial to the issue of whether the Respondent violated the Act by the conduct referred to in the complaint, which occurred in early 1994.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We have also substituted a narrow cease-and-desist provision for the broad provision ordered by the judge.

[4] All dates are in 1994 unless stated otherwise.

[5] As the Respondent concedes in its brief, Koletar's declaration of an impasse was erroneous: there was no impasse on February 28. By letter dated March 15, however, the Respondent again asserted that major issues were still ''at impasse'' following a March 10 negotiation session.

[6] For the reasons set forth by the judge with respect to the Respondent's reactions to the bomb threat at the Holiday Inn hotel and to the trailer fire, and based on his credibility resolutions, we adopt the judge's finding that the decision to lock out was not motivated by these events or by any objectively based fears of violence. Rather, as indicated above, we find that the lockout was related to the Respondent's prior bad-faith negotiating conduct, which prevented the parties from having sufficient time to explore proposals and counterproposals before contract expiration. Thus, when Koletar informed the Union, on February 28, of the upcoming lockout (i.e., that without a contract there would be no work), she did not rely on concerns about violence, but rather stated that unless the Union agreed to the Respondent's bargaining demands before contract expiration, or by the end of a proposed 24-hour extension of the contract, there would be no work for unit employees. *Compare Redway Carriers*, 301 NLRB 1113 (1991).

[7] In finding that the Respondent did not meet its statutory bargaining obligation, we find it unnecessary to rely on the judge's charac-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Horsehead Resource Development Co., Inc., Rockwood, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain in good faith with Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3–990 as the exclusive bargaining representative of the employees in the bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

The appropriate collective bargaining unit is:

> All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its Rockwood, Tennessee facility, but excluding all office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act.

(b) Locking out or otherwise discriminating against their employees because of the bargaining position of their designated bargaining agent and in furtherance of their own unlawful bargaining conduct calculated to frustrate the bargaining rights of employees, as mandated by the Act.

(c) Engaging in surveillance of its employees' union and protected concerted activity by video recording such activity.

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

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

(a) On request, bargain in good faith with Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3–990 as the exclusive representative of the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer each and every employee on Respondent's payrolls as of March 1, 1994, whom they unlawfully locked out on March 1, 1994, full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, employees hired from other sources to make room for them, and make them whole for any loss of wages, holidays, including personal days and vacations; any expenses incurred to retain and/or secure replacement health coverage; and any disbursements made by them from all medical expenses that would have been covered by the existing health coverage, all of which were caused by the unlawful March 1, 1994 lockout, to be calculated in the manner set forth in the remedy section of the judge's decision.

(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, timecards, personnel records and 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 Rockwood, Tennessee facility and mail to each employee on its payroll as of March 1, 1994, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be mailed to each employee and be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director 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.

MEMBER COHEN, concurring.

Although I concur in the result, I do so on a limited basis.

My colleagues assert that Respondent reneged on an agreement to commence negotiations in mid-January. They ignore the fact that the agreement was only tentative. More importantly, they ignore the fact that Respondent gave a reason for the cancellation. Thus, Martha Koletar, the Respondent's chief negotiator, had just been hired, and she needed more time to study a possible restructuring of the Respondent's ''anti-

terization of the Respondent's substantive bargaining proposals as deficient. We also disavow any implication in the judge's decision that in order to be deemed lawful, a lockout must be preceded by an impasse in bargaining.

[8] 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.''

quated'' health plan. This explanation was given to the Union at the time. It was neither rebutted nor discredited at the hearing. Accordingly, I do not rely on Respondent's change of the initial bargaining date from mid-January to February 7.

My colleagues also rely on the fact that Respondent did not present a wage proposal until February 25. They ignore the fact that the parties had agreed that economic issues would not be discussed until noneconomic issues were resolved. Notwithstanding this agreement, and although noneconomic issues were never resolved, Respondent agreed to discuss economic issues on February 22. Economic issues were discussed on February 22, 23, and 24, and Respondent made a wage proposal on February 25. In light of these facts, I would not fault Respondent for not making a wage proposal until February 25. If Respondent had insisted on adhering to the original agreement, no wage proposal would have been forthcoming even on February 25.

However, I do agree that Respondent engaged in dilatory tactics after February 25. The contract was due to expire on February 28. Respondent's negotiators tried to contact upper management in New York regarding the Union's revised wage offer. The New York officials, for whom Respondent is responsible, would not speak to their negotiators. Thus, the Respondent's negotiators could not negotiate wages on February 25. In addition, the Union sought meetings on February 26 and 27. However, Respondent refused to meet on February 26 and canceled a meeting scheduled for February 27 for reasons that the judge found to be suspect. On February 28, the Union made new concessions and emphasized its willingness to negotiate further. However, Respondent said that impasse had been reached, and its chief negotiator left town. A lockout began on March 1.

In these circumstances, I agree that Respondent violated Section 8(a)(5). However, the only indicia on which I rely are (1) the unwillingness of New York officials to respond at a critical time in the negotiations; (2) Respondent's unwillingness to meet on February 26 and 27; and (3) the premature declaration of impasse on February 28.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE 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 and protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and bargain in good faith with the Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3–990 as the exclusive collective-bargaining representative of the employees in the bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

The appropriate collective bargaining unit is:

All full-time and regular part-time hourly production and maintenance employees employed by us at our Rockwood, Tennessee facility, but excluding all office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT lock out or otherwise discriminate against our employees because of the bargaining position of their designated bargaining agent and in furtherance of our own unlawful bargaining conduct calculated to frustrate the bargaining rights our employees.

WE WILL NOT engage in surveillance of our employees' union or protected concerted activity by video recording that activity.

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 on request bargain in good faith with our employees' chosen collective-bargaining representative as required by law and if agreement is reached embody that understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, offer all our employees whom we unlawfully locked out on March 1, 1994, reinstatement to their former positions or, if those positions no longer exist to substantially equivalent ones and WE WILL make them whole for any loss of earnings or benefits they may have lost by reason of our unlawful lockout.

HORSEHEAD RESOURCE DEVELOPMENT CO., INC.

Gaye Nell Hymon, Esq., for the General Counsel.

William F. Kaspers, Esq. (Fisher & Phillips), of Atlanta, Georgia, and *Stafford McNamee Jr., Esq. (Bass, Berry & Sims)*, of Nashville, Tennessee, for the Respondent.

John Williams, of Johnson City, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. The testimony and evidence relevant to adjudicating the issues raised by the pleadings in these cases, consolidated for trial, was heard by me October 17–21, 1994,[1] at Kingston, Tennessee. The Regional Director for Region 10 (Atlanta, Georgia) of the National Labor Relations Board (the Board) issued an order consolidating cases, amended consolidated complaint and notice of hearing, on July 6, the operative complaint herein. The complaint alleges that Horsehead Resource Development Co., Inc. (HRD, Respondent, or the Employer) committed acts in violation of Section 8(a)(1), (3), and (5) and Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). The Government alleges that the Respondent violated Section 8(a)(1) by engaging in surveillance of its employees' activities on behalf of the Union by video recording their activities on and after March 1, the date on which the Respondent allegedly illegally locked out its employees, in violation of Section 8(a)(1), (3), and (5) of the Act. It is further alleged that Respondent, on or about April 15, discharged, and refused to reinstate, four of its employees because they engaged in activities on behalf of the Union in violation of Section 8(a)(3) and (1) of the Act. Finally, the Government alleges that the Respondent failed and refused to bargain in good faith with the certified exclusive collective-bargaining representative of its employees from February 7, and afterwards, and on March 1, Respondent locked out its employees in violation of Section 8(a)(5), (3), and (1) and Section 2(2), (6), and (7) of the Act.

In its answer to the operative complaint, the Respondent admits all procedural allegations including the Board's jurisdiction in this case. The Respondent also admits in its answer and at trial that on February 24 it engaged the services of an outside security firm and that since March 1, that firm, as its agent, video recorded activities of its employees, but that such video recordings were ''on strictly limited occasions'' and were made ''for the purpose of anticipatory evidence gathering in the event legal action should become necessary.'' The Respondent also admits that it discharged the four employees, as alleged, but that it did so because of their unlawful activities in connection with their picketing and other activities, in protest of the lockout. The Respondent further admits that at 7 a.m., March 1, it locked out its employees, but that the lockout was defensive, after reaching impasse in negotiations and the expiration of the collective-bargaining agreement which expired at 7 a.m., March 1. The Respondent argues that it bargained in good faith to impasse with the Union. However, it contends it did not implement the terms of its last offer, but instead temporally replaced the locked-out employees with salaried employees from other of its plants.[2]

As set forth below, I find the General Counsel established by a preponderance of the evidence that the Respondent failed and refused to bargain in good faith with the Union with a sincere desire to reach an agreement, but instead engaged in surface bargaining thus frustrating the bargaining process envisioned by Section 8(a)(5) and Section 8(d) of the Act. Inasmuch as Respondent failed to bargain in good faith and declared impasse on February 28 and on March 1, locked out its employees refusing to let them work either under the terms of the expired collective-bargaining agreement or the terms of the agreement on the table when the Respondent declared impasse, but rather imported from its other plants replacements in violation of Section 8(a)(1), (3), and (5) of the Act. I also find that by indiscriminately video recording employees both at and away from the plant Respondent violated Section 8(a)(1) of the Act.

However, I find that the discharges of Eugene Hayes, Thomas Crabtree, Ricky Brown, and Keith Helton on or about April 15 did not violate Section 8(a)(3) and (1) of the Act. The evidence is overwhelming that they engaged in conduct in connection with their picketing in protest of the unlawful lockout which clearly warrants termination and such conduct is not protected by the Act.

The charge in Case 10–CA–27467 was filed on March 18, and the charge in Case 10–CA–27578 was filed on April 28. Both charges were filed by Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3-990 (OCAW, the Union, or the Charging Party). The charges were properly served on the Respondent.

On the entire record in this case, including consideration of able briefs and oral arguments by the parties, and my observation of the testimonial demeanor of the witnesses testifying under oath, and on the entire record and substantial reliable evidence I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and has been at all times material, a Delaware corporation, with an office and place of business located at Rockwood, Tennessee, where it is engaged in the recycling of electric arc furnace dust and the sale of products recovered therefrom. During the 12-month period preceding the issuance of the complaint, which is a representative period, Respondent sold and shipped from its Rockwood plant finished and unfinished products valued in excess of $50,000 directly to customers located outside the State of Tennessee. The complaint alleges, the answer admits, the evidence establishes, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the answer admits, the evidence establishes, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

As noted above, the Respondent is in the business of recycling electric arc furnace dust, a byproduct of the steel industry, to recover zinc and other products. In 1989 it purchased the facility at Rockwood, Tennessee, and averred that it invested $10 million converting the plant to more modern technology to recycle steel industry furnace dust. This industry

[1] All dates herein are 1994 unless otherwise indicated.

[2] Since the Employer brought salaried employees from its other facilities as replacements as opposed to hiring new employees, the record does not precisely disclose what the wages, terms, and conditions of employment these replacement employees are working under.

is an EPA-listed hazardous waste industry and subject to strict regulations by various Federal and state agencies. The Respondent also operates similar plants near Chicago, Illinois, called the Calumet plant, and a plant at Palmerton, Pennsylvania. Thomas Knepper became director of operations for both the Calumet and Rockwood plants in 1991. Charles L. Holiway is the plant manager, at material times here, of the Rockwood plant, the only plant involved in this case, William Quirk is president of the corporation, and John William Brown is now vice president of human resources on a contract basis. During much of the time relevant here, Martha Koletar, was assistant vice president of human resources and was hired just a short time, November 1993, prior to the expiration of the collective-bargaining agreement primarily to implement a new insurance plan involving employee participation in the payment of premiums, and to head the Employer's negotiating team for a successor collective-bargaining agreement at Rockwood.

The employees at the Calumet plant are represented by another local of OCAW and the employees of the Palmerton plant have been represented since 1947 by the United Steel Workers. Both the Palmerton and the Calumet plants were organized prior to becoming a part of HRD. Director of Operations Thomas Knepper testified that he was involved in the negotiation in 1984 and 1987 at the Palmerton facility and the last two negotiations at Calumet. He was also a part of the negotiating team in 1991 at Rockwood and also in 1994 at which time Martha Koletar was the chief negotiator until March 1, at which time she returned to New York and her employment was terminated by HRD President Quirk. Quirk testified that he had instructed her to return with an executed ''no cost'' or ''low cost'' contract and she failed to do so. Accordingly, he terminated her employment.

Pursuant to a Board-conducted election the Union was certified on January 18, 1991, in a unit of:

> All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its Rockwood, Tennessee facility, but excluding all office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act. [R. Exh. 4.]

After 10 negotiating meetings which totaled about 48.80 hours, the parties executed a collective-bargaining agreement effective from March 1, 1991, to March 1, 1994. (R. Exh. 3.) This agreement very closely parallels the agreement between the Union and the Company in effect at the Calumet plant with the notable exception of wage rates. (G.C. Exh. 9.) The rates of pay for identical classifications proposed by the Company at Rockwood were 35–40 percent below the rates of pay at the Calumet facility. (G.C. Exh. 9, p. 21; R. Exh. 3, p. 16.)

On December 8, 1993, John Williams, International representative of District 3, OCAW, notified the Employer that the Union would terminate the current collective-bargaining agreement on its expiration, March 1, 1994. By copy of the letter and other required forms he notified the Federal Mediation and Conciliation Service and the Tennessee Department of Labor, as required. Williams requested that the parties meet and commence negotiations for a successor agreement as early as possible and suggested several dates in January. The Respondent did not acknowledge receipt of the letter, or respond to it, until December 29, 1993, some 3 weeks later.

The Respondent, by Koletar, initially indicated a willingness to commence negotiations in mid-January. However, prior to that time she notified the Union (Williams) that the Employer would not meet for negotiations until February 7. The only reason indicated for this decision was that Martha Koletar, who would be their chief negotiator, had been hired just a short time earlier and was working on restructuring its ''antiquated'' health plan in preparation for negotiations at Rockwood. In fact the Respondent flatly refused to meet before February 7. International Representative John Williams strongly objected to waiting until February 7, stating ''Going to February 7th, that's kind of crowding it. That's not very much time to negotiate a contract if you're going to have an extensive proposal.''[3] Koletar stated that's the best they could do, they had made the decision. Most of the 10 bargaining sessions were held at the Holiday Inn in Harriman, Tennessee, in facilities provided or rented by the Respondent.

Heading the Union's negotiating team was International Representative John Williams and on the employee committee was Local Union President Harold Youngblood and employees Roy Summers, Wade Summers, Hugh Jacks, and Ricky Brown. The Employer's team was headed by Assistant Vice President of Human Resources Martha Koletar, Director of Operations Thomas Knepper, Plant Manager Charles Holiway, and notetakers Ralph Karras and John Aulenbach who were also part of the Employer's team. Except as noted all were present at each of the sessions. At the end of each session the notetakers would provide copies of the notes to all the Employer's team and fax a copy to Respondent's recovery group president, Bill Smelas, and possibly to its president, Quirk.

Prior to the first formal session on February 7, Koletar had informed Williams that employee health contributions would be an issue in negotiations. Williams replied that such a proposal might be a ''strike issue,'' and according to Koletar said that it would be a ''cold day in hell'' before the Union would agree to such. Respondent's president, Quirk, states that prior to the commencement of bargaining he gave Koletar full authority to negotiate within the aforementioned parameters, a ''no-cost or low-cost'' (i.e., 5 percent) increase over 3 years and to incorporate the new employee-participation health care plan already applied to nonunion employees. That plan required an employee contribution of 15 percent of the premium cost of the insurance.

Preliminary the Respondent argues that the 1994 negotiations took place at a difficult time for the Company. Zinc prices had plummeted from roughly 90 cents per pound to less than half that amount at the time of the negotiations. (Knepper 347.) This price collapse was due largely to the breakup of the Soviet Union, which resulted in an enormous glut of zinc flooding the market. Zinc prices were as low as 39 cents a pound—the worst in 20 years. However, at the time of the hearing, zinc prices had recovered to about 48 cents a pound.

The Company also contends that it faced increased competition from landfills, an alternative method of disposing of

[3] Koletar had advised Williams earlier that the Company planned to make major proposals for changes from the current contract.

furnace dust. Lower landfill costs were making this option more attractive, and proposed E.P.A. regulations would further encourage landfill disposal. These pressures collapsed the Company's stock price from $14.50 a share down to $4.20 a share. (Knepper 347.)

In an effort to return the Company to profitability, the Company instituted a salary freeze for all nonunit employees in February 1993. Despite this measure, as well as a 10-percent reduction in the work force during 1993, the Company still lost money that year. (Knepper 348.) Quirk gave new Human Resources Vice President Martha Koletar a mandate to restructure the entire Company's health care program, which was ''quite antiquated.'' (Quirk 964.) The new health insurance plan Koletar devised, which required health insurance contributions from all employees, became effective for all nonunion employees starting January 1, 1994. These employees were required to contribute 15 percent of the premium cost of this new insurance from the same wages that had been frozen since February 1993. The president of the metals recovery division, Bill Smelas, at the beginning of the February 7 meeting advised the Union that this was the position from which the Company would be bargaining. The Calumet facility is approximately twice the size of the Rockwood plant. It operates two kilns, whereas the Rockwood plant operates only one. There are approximately 36 employees in the unit at Rockwood and there are 14 classifications. The kiln operator classification is the highest paid at both Calumet and Rockwood. At the expiration of the contract the kiln operator at Rockwood was earning $10.90 per hour and at Calumet the same classification was earning $14 an hour and under the terms of the contract would go to $15 an hour on March 1, 1995, and to $15.75 on March 1, 1996. (R. Exh. 3; G.C. Exh. 9.)

The Respondent argues that during the 1994 negotiations the Union was trying to achieve instant parity with the Calumet employees who performed essentially the same functions. The Government and the Union argue that the Union desired only to close the gap in wages by some degree and that this is evidenced by the Union's proposals. At or before the first meeting on February 7, as is not unusual, the parties tentatively agreed to resolve all noneconomic issues prior to addressing economic issues, although it appears that the Union incorporated its wage proposals in its first proposed agreement which the parties exchanged on February 7. The Respondent did not make a wage proposal until February 25, 3 days before the expiration of the then-current agreement, leaving little time for negotiations prior to the expiration of the agreement.

As noted above, the Respondent had two notetakers, who also participated in the negotiations at all of the sessions, the Union did not have a designated notetaker and consequently there were essentially no notes reflecting the Union's views of the exchanges during those meetings. John Williams, the Union's chief negotiator, stated that he did not take any notes but left that up to the ''committee.'' Contrary to Respondent's statement in brief that the Union did not object to deferring the commencement of negotiations until February 7, it appears that Williams strongly objected having so little time before the expiration of the then-current agreement, but he observed in trial he had no choice and could not force the Company to come to the bargaining table sooner.

Williams had first written the Employer on December 8, 1993, with respect to the termination of the contract on March 1. The Employer, by Assistant Human Resources Manager Koletar replied on December 29, 1993, some 3 weeks after receipt of Williams' letter, stating they would contact him within the ''next several weeks.'' Notwithstanding Williams' strenuous objection to the delay of the commencement of bargaining, the Respondent refused to start negotiations until February 7, a mere 3 weeks before the expiration of the contract.

A brief synopses of each of the bargaining sessions, as taken primarily from the notes taken by Respondent's notetakers will be related below. In view of the fact that these notes were made by a very partisan side of the negotiations their objectivity is somewhat more than a little suspect. There was only scant testimony from memory or authenticated records. Essentially all the testimony in this regard given by Respondent's witnesses, particularly Koletar, was elicited by leading questions and a review of the notes. Nonetheless they will be briefly related here seriatim.

Unlike most cases where ''surface'' or ''sham'' bargaining is alleged there is little testimony of any probative value reflecting the tenor or rapport of the negotiation. There is little to indicate what one side would give for a concession from the other. With the little reliable testimony concerning the issue-by-issue exchanges and the parties respective positions with respect thereto it is difficult to assess their demeanor or the reasons advanced for the positions taken. The Government concluded its case in 1-1/2 days and dealt very little with the specifics of the bargaining sessions.

B. *The February 7 Meeting*

Notwithstanding Koletar's initial tentative agreement to commence formal negotiations in mid-January, about the first part of January she advised Williams that the Company was canceling any meeting in January and the earliest they could meet would be February 7. Williams objected saying,''Going to February 7th, that's kind of crowding it. That's not very much time to negotiate a contract if you are going to have an extensive proposal.'' (Tr. 28.) During a meeting between Williams and Koletar, apparently some time in December, Williams had told her the Union would have a ''normal proposal'' and she had told him they, the Company, were going to have major contract change proposals.

The meeting was scheduled to begin at 9 a.m., but due to problems with a copying machine at the plant the company representatives did not arrive at the scheduled place, the Holiday Inn, Harriman, Tennessee, at that time and Respondent's notes show the meeting commenced at 10:05 a.m. (R. Exh. 11.) Respondent's president of the metals recovery division opened the meeting by reading a statement. (R. Exh. 10.) He asserted, inter alia, that the Company's financial condition was not good due in part to the drastic drop in the price of zinc. He also alluded to a $15 million lawsuit which had been filed against HRD by a community of citizens living adjacent to the plant alleging that HRD had caused dangerously high levels of zinc concentration in their community. The name of the community is ''Clymbersville,'' and will be alluded to again below.

As noted above, the Union presented its entire contract proposal including economics and wages for a period of 3 years. It appears that the Respondent presented its proposals

in the form of proposed changes in various sections of the existing contract. It appears from Respondents notes that there was no agreement with respect to any changes in the contract language proposed by the Company. The Company made no economic proposals at this meeting. The parties agreed to dispose of the noneconomic issues first. After several breaks for the parties to caucus and a break for lunch, the meeting adjourned after agreeing to meet at 10 a.m. on February 8.

C. *The February 8 Meeting*

The meeting on February 8, started at 10 a.m. at the same location with the same individuals present and lasted about 6 hours excluding breaks for lunch and caucuses. This meeting appears to have focused largely on various disciplinary policies and proposed changes by both parties. Again there was no agreement on the Employer's proposed changes. The Respondent asserts that OCAW was not cooperative about the noneconomic issues raised by HRD. It appears that HRD was just as noncooperative with OCAW. Koletar asserts that at this meeting she was told that the Union had already taken a strike vote.[4] (Tr. 399.) In any event there was no agreement, or ''sign-off'' on any of the proposed noneconomic changes by either party and they adjourned at 5:10 p.m. after agreeing to meet at 10 p.m. the following day.

D. *The February 9 Meeting*

The February 9 meeting was held at the same location with the same individuals present. Given the lack of progress in the two previous meetings. HRD withdrew or modified a number of noneconomic issues and the Union, while making some new noneconomic proposals, also withdrew or modified others. However, no definitive agreement was reached on any of the issues then being considered.

The Respondent totally mischaracterized the Union's position concerning the number of meetings or the length of time it would take to complete negotiations. The Respondent avers in brief that ''[t]he Union stated at that time that negotiations could be completed with five (5) additional sessions and proposed that the next meeting occur on the following Wednesday, February 16,'' the Respondent also by footnote adds:

> This was not an unrealistic schedule. Williams testified that he had completed negotiations in other contracts in as little as two and one-half days. [Williams 69–70.] Williams thought as of February 9 that he still had plenty of time to negotiate an agreement. [Williams 71.]

During a discussion concerning the date and time for the next meeting, according to Respondent's own notes of that meeting the following occurred:

> **Williams**—Asked about date/time of next meeting
> **Koletar**—Next WED (16) and Thurs. (17)
> **Williams**—I have a meeting I must attend on the afternoon of 17 FEB @ 1:00; I gotta be there
> **Koletar**—Wed. & Thurs. w/ a 0700 start
> **Williams**—In the following week I can't start until Tues (22) of that week
> **Williams**—There ain't no way we'll reach agreement in that time with all of the proposals we have
> **Williams**—I hate to get squeezed in (on this side of the table) I really wanted to get started before this; most of my contracts meet the 1st month of a 60 day advance of a contract
> **Williams**—Basically I don't have a problem with the days except for those two (17/22) -- hopefully we can do it.
> **Koletar**—We may be able to get a lot done, especially w/ drug policy, via faxing info back and forth at least to look at it prior to our next mtg.

From the foregoing it is clear that Williams had a grave doubt and concern that negotiations could be successfully completed with five additional sessions. February 9 was a Wednesday and it appears that it was the Employer who could not meet on Thursday and Friday of that week. In any event Williams never stated that negotiations could be completed in five additional sessions. Moreover, throughout Williams testimony he strongly insisted that he knew they would be cutting it close. Williams, on February 9, had no idea what kind of economic proposals the Employer would make and therefore could not have any confidence of completing, successfully, the negotiations prior to the expiration of the contract.

E. *The February 16 Meeting*

This meeting convened at approximately 7 a.m. and lasted until approximately 7:30 p.m. During the course of the meeting the Respondent withdrew 12 of its noneconomic proposals relating to subcontracting, rights, and duties of employees, seniority, the savings clause, hours of work, safety and health, and a miscellaneous provision. The parties also reached agreement on 13 noneconomic issues including provisions relating to the rights and duties of employees, seniority, safety and health, and grievances. The Company also withdrew its proposed change to the preamble of the agreement. However, with this progress there were still many unresolved noneconomic issues. Respondent's assertion that Koletar testified, ''The parties decided that day that they would reach economic issues on the 22nd of February'' is not entirely accurate. While there did appear to be some optimism that the parties would resolve all noneconomic issues the following day, there was no firm decision made that such would be the case.

John Williams recommended that they try to complete negotiations by 1 p.m. Friday, February 25, so he could take it to his membership for a vote.

F. *The February 17 Meeting*

This meeting was held at the Rockwood Community Center and was scheduled to start at 9 a.m. However, it was delayed slightly because Williams went to the wrong location. At this session more noneconomic issues were discussed including drug polices, grievances, and seniority. The parties scheduled the next meeting for Tuesday, February 22, and although all noneconomic issues had not been resolved, there appears to have been a tentative agreement to set those aside and get to economics on February 22.

[4] It is very common for the Union to take a strike vote early in negotiations.

G. *The February 22 Meeting*

This meeting started late, at 3:35 p.m., because Knepper and Aulenbach were delayed by snow at the airport of their departure, but met until 7:25 p.m. There was further discussion of noneconomic issues including the drug policy, seniority, and recall rights. Some economic issues were addressed including 12-hour shifts and double time for over 12 hours, and for the first time the Employer officially demanded employee contribution to the health care plan. The Employer had still not made a wage proposal although the Union had submitted its wage proposal at the February 7 meeting. That proposal was $2.85 per hour the first year. The Union was strenuously opposed to employee contributions to the health care plan. Negotiators on both teams lost their tempers and harsh words were exchanged. No progress was made. The parties agreed to meet at 9 a.m. the following day.

H. *The February 23 Meeting*

They essentially took up where they left off. There was a discussion of the retirement plan and the Employer agreed to the same retirement benefit plan in effect at the Calumet facility. There were also discussions of the sick and bereavement leave and vacations. Again there was little progress. The Employer claimed that Williams became very volatile and hostile because of the lack of progress and stated that ''his Union was trained in wars and if that's what we wanted that he had gone through bloodshed.'' On the evening of February 23, Koletar asked Knepper to call Williams and tell him that the Employer had brought salaried employees in from other plants to operate the plant in the event of a strike. It appears that at about this time the Company also brought in security guards, which it had hired from an Ohio firm, Southeastern Security, which specializes in providing security during labor disputes. All of these employees and guards were being lodged at the Harriman Holiday Inn where most of the meetings were held and where John Williams, the Union's chief negotiator was staying.[5]

I. *The February 24 Meeting*

This meeting lasted a total of 7 hours and it appears that for the first time a Federal mediator was present. Again, little progress was made although the Company did withdraw or alter some of its proposals. These included reduced recall rights, extension of the probationary period, and reduction in shift premiums. The Company also agreed to a slight increase in meal allowances and the number of hours of severance pay and the definition of family bereavement pay. The Employer also agreed to increase the quarterly production guarantee from $175 to $200. The meeting adjourned at 5:45 p.m. with an agreement to meet again on Friday, February 25, at 8 a.m.

J. *The Meeting of February 25*

The Employer, at this meeting, made its first wage proposal of a 25-cent-per-hour increase the first year, 15 cents the second year, and 10 cents the third year, thus leaving only 3 days before the expiration of the agreement to resolve the remaining noneconomic issues and to reach agreement on wages and other economic differences. The Union began capitulating like a house of cards in the wind immediately by reducing its initial first year proposal by 85 cents per hour to a $2-per-hour increase and leaving the second and third year as it was originally proposed. They took a caucus for the Company's representatives to call their home office in New York. A short time later the mediator returned, telling the Union that the company negotiators were having problems getting anyone in New York to talk to them. Later, Koletar and party returned and told the Union that the Respondent's executives, presumably Smelas and Quirk, would not talk with them. Koletar suggested that if the Union would give another proposal they might reap some benefits. The Union reluctantly obliged and reduced its first year wage increase proposal to $1.60 per hour which amounted to $1.25 below their initial proposal. All else remained the same. The Company then caucused and returned a short time later and told the union team the New York officials would still not talk to them.

There was an evening session which started at 8:08 p.m. and ended at 8:50 p.m. Koletar did not attend and Knepper assumed the role of chief of the Company's negotiating team. Koletar testified that she had taken the flu and had gone to bed. She added, without any explanation, that she had been sick throughout the month of February. William complained that the foremen were already telling the men that their replacements were already there. Knepper said the same offer was still on the table and that he had still not been able to reach his supervisors in New York. He indicated that he would continue to try over the weekend and Williams said he would be available.

Williams urgently proposed that they meet again Saturday in view of the short time remaining before the expiration of the contract. Notwithstanding the obvious positions the parties were in, Knepper, without stating a specific reason flatly refused to meet on Saturday. With urging from the Union the Employer did finally agree to meet on Sunday at noon. Williams then went to his home in Johnson City, Tennessee.

K. *Other Incidents on February 25*

The Respondent argues that a series of rather curious if not mysterious events not directly related to negotiations occurring in the evening of February 25 and the early morning hours of February 26, were the major motivational factors considered in Respondent's decision to lock out its employees at 7 a.m., March 1. The Employer argues, without a scintilla of evidence in support thereof, that the Union or its adherents were responsible for these incidents with the motive being to pressure the Employer in negotiations.

The first of these incidents involves an alleged telephone call bomb threat to the Harriman Holiday Inn where the parties had been negotiating.

Billy Joe Arrowood, the 19-year-old night clerk at the Harriman Holiday Inn testified that at about 9:30 p.m. on February 25, a middle-aged man called and told him there was a bomb at the hotel set to go off about 10 or 10:05 p.m. and he said, ''[E]verybody need to get out of there, so you

[5] It is noted that this action was taken before the Employer had made its first wage proposal and 5 days before the expiration of the agreement.

better be out of there.''[6] It isn't clear whether Arrowood called the police or fire department first or whether he called his manager first. In any event he called both. At about 9:45 p.m. three police cars and a firetruck arrived at the parking lot with emergency lights and sirens on. According to Arrowood, the police checked all suspicious packages and suitcases in the lobby, however, he did not say if there were any packages or suitcases in the lobby. In any event the only action taken by the manager was to evacuate the restaurant, which was closing or in the process of closing anyway. The police apparently made no recommendation as to what action to take. The police only checked out the lobby. There is no evidence that any search was made elsewhere and certainly not the guestrooms.

Thomas Knepper, who was a guest at the hotel, testified that shortly before 10 p.m. he saw lights flashing outside his room. He went to the hotel office and was told by someone that they had just received a bomb threat. The record does not disclose how many guests were in the hotel. However, it is clear that Knepper and Koletar were there as well as at least four security guards which Respondent had hired from the Southeastern Security Company, and a sufficient number of Respondent's salaried employees which it had brought in to replace 35 unit employees in the event of a strike. It is not known how many, if any, other guests there were.

I merely observe at this time that I find the reaction of the hotel management and of Knepper, on behalf of the Respondent, more than a little perplexing, if indeed, they had taken the alleged bomb threat seriously. The alleged caller had not indicated where at the hotel the bomb might be or that the restaurant was its target or in any more danger than the rest of the hotel, particularly the guestrooms. This hotel is rather spread out with guestrooms located in at least two separate wings. None of the guests were even notified of the incident and given the opportunity to take whatever action they chose. No reason was advanced by hotel management or Knepper as to why the guests were not notified of this incident. Indeed, Respondent had imported quite a number of people who were lodged there, but no effort was made to notify them so that they might protect themselves.[7]

Knepper testified, in effect, that he was greatly upset and concerned about the alleged threat. However, his actions belie such emotion. Had Knepper taken the bomb threat seriously or believed there was any danger to the guests, he would have had all those employees and guards, as well as Koletar evacuated. He would also have urged the hotel management to advise all other guests.

In short I find that, for whatever reason, neither the hotel management nor Knepper took the alleged bomb threat seriously.

The second mysterious incident and Respondent's reaction to it is just as perplexing. The Respondent maintained what it called ''the engineering trailer'' on its property.[8] Apparently, this trailer was used primarily for storage of various engineering records. There is another building on the property designated the office/engineer building. For several days prior to February 25, the Respondent had been removing the records kept there. Respondent contends it was removing these records so that it could prepare the trailer for occupancy by the security guards it had hired in the event of a strike in order that they could remain on the property at all times. It appears that the trailer at one time was also used as an office for one supervisor and the health and safety director. Harold Youngblood testified that about 2 weeks before February 25, he was told by his supervisor, Murphy, to remove three boxes of old records and give them to the former plant manager. There was also some testimony, including Youngblood's, that the trailer was not in good repair. Youngblood testified that about a week or so earlier his supervisor, Murphy, told him ''that they were going to have to put a new roof on it because it was leaking and might set itself on fire.''

Second-Shift Foreman Danny Wayne Foster testified that the lights around the bag house and the engineering trailer inexplicably went out on the evening of February 25 at about 8 p.m. They were off for about 10 minutes and then just as inexplicably came back on. According to Foster, the lights went out again about 10:30 p.m., but again came back on. Shortly after the 11 p.m. shift change, Foster testified that he noticed what he first thought to be a reflection coming off the engineering trailer. Shortly thereafter he looked out and saw flames coming out of the window of the trailer. Foster ran to the control room and called the fire department. He then called on the radio for all employees to come and asked the employees on duty in the plant to bring him some fire extinguishers. They brought two extinguishers which were empty and then two more which were also empty.[9]

The fire department arrived about 11:35 p.m. with Shift Captain Randall Howard and two other firemen who then received backup from three on-call firefighters. When they arrived according to Howard, fire was shooting out one corner of the trailer and over the roof. It was extinguished in about 10 minutes. Howard testified that he concluded that a window had been knocked out before the fire began since the glass lying on the ground did not have smoke on it. He said further that there was a strong smell of diesel fuel and presumed that an accelerant had been used because the fire progressed quickly. After inspecting the wiring he ruled out an electrical problem as the source of the fire.[10]

Howard gave Plant Manager Holiway the phone number of the state arson inspector. Holiway called the inspector the next day. The inspector said he was not authorized to come out on the weekend except in the event of a death or serious injury. The inspector also told Holiway that he could not ex-

[6] Arrowood does not say how he knew it was a ''middle-aged'' man.

[7] In making lodging reservations one might ponder the wisdom of including in questions concerning various amenities available at the facility the question of the management policies concerning notification to guests in the event of a terrorist bomb threat which management took seriously. Similarly, an employee might inquire of the employer who was providing lodging what its policy in that respect might be.

[8] R. Exh. 2 is a diagram of its Rockwood property. The engineering trailer is marked with an X.

[9] The Respondent would have me infer that the fire extinguishers were empty due to sabotage by the employees. Such inference is not warranted.

[10] It would appear that if a window had been broken with an object from the outside, as suggested that the glass would have fallen inside the structure. Further, Howard did not indicate what, if any, qualifications he had to determine whether or not the fire could have started from the electrical wires.

amine the structure if it was moved and that it should be preserved with as little activity in the area as possible. The Company, apparently Holiway, decided that it was more important to get another trailer for the security guards it was intended to house onto the property. The old trailer was moved so the new trailer could be installed and the guards brought onto the property. There could, therefore, be no further arson investigation.

In view of the fact that Respondent persisted in accusing the Union or some of its members of this alleged arson fire, I cannot understand why it precluded a thorough professional investigation by removing the trailer from the site. When asked if another site for the trailer could not be found, Plant Manager Charles Holiway replied simply to the effect that they felt it more important to get another trailer on the site to house the guards in the event of a strike. However, as more fully discussed below, Respondent did seize upon this incident to cancel the scheduled Sunday, February 27 meeting.

The Respondent argues that the evidence establishes that union members were responsible for both the bomb threat at the Holiday Inn and the arson fire of the engineering trailer, even though the Union may not have sanctioned or been aware of these activities by its members. It appears to contend that even if there is no hard or direct evidence connecting an employee union member to these incidents, an inference is clearly warranted that they were the culprits. It also cites in support of this theory a number of incidents of alleged sabotage it experienced in the operation of the equipment at the plant on February 28. And, further on March 1, after the lockout, Respondent alleged that it found a conveyor belt cut; clothes jammed into recycling pipelines; feed tanks stuffed with vacuum hoses and chutes between feed bins stuffed with ax handles. These allegations, of course, cannot be refuted by the employees who had, at that time, been locked out and had no access to the premises.

In view of the fact that the Union and the employees clearly intended to continue working after the expiration of the contract and were not expecting a lockout I find it improbable that the employees would have sabotaged the equipment in the plant thus preventing them from working and perhaps giving the Employer a reason or excuse to fire them.

It appears that the bomb threat allegedly made to the Holiday Inn was not taken seriously by either the lodging management or Respondent not withstanding the Respondent's averred distress about the incident, for the reasons stated above. The arson fire of the engineering trailer on Respondent's premises, if indeed it was arson, was by far the more serious, inexcusable, and dangerous of the two. The Respondent does not contend that it lost anything, records or other items, that could not be replaced. It appears the only thing of value lost was the trailer. With respect to responsibility for the fire, Thomas Knepper suggested to the Union that it could likely have been someone from the adjacent Clymersville community who had filed a lawsuit against HRD, as noted above. However, he testified that he made that suggestion to some members of the bargaining committee only to try to alleviate the apparent stalemate in negotiations.[11]

It appears that the Respondent's premises (R. Exh. 2) is enclosed by a chain link fence and that there was a guard on duty at the only entrance then open.[12] However, the Respondent admits that the premises could have been fairly easily accessed by someone not authorized to be there, and that the security of the premises was by no means ironclad.

Notwithstanding these facts the Respondent proceeds on the assumption that one of the employees, union members, then on the premises must have been the arsonist. While such acts and other violence is certainly not unheard of during a labor dispute, the status of negotiations, while not progressing as the Union desired, had not reached a point of impasse in the minds of the union negotiators, or other condition that usually precipitates such acts. Indeed the Respondent had just that day presented its first wage proposal which had been rejected by the Union. There were 3 days left for negotiations until the contract expired and negotiation will normally continue after that barring a strike or lockout, and even then, as here, the parties most often continue to negotiate.

The Respondent, while refusing to schedule a Saturday bargaining session, notwithstanding the constraint of time before the expiration of the contract, seized on the trailer fire and bomb threat at the Holiday Inn as the reason to cancel the Sunday noon meeting. Thomas Knepper and Charles Holiway testified generally that they, and apparently all other supervisory personnel, were totally consumed by removing the burned trailer and obtaining a replacement in order to have a place to house its hired security guards on premises in the event of a strike. It appears that a couple of the Respondent's supervisors obtained a replacement trailer using their personal credit cards to purchase it.

Charles Holiway was not responsive to a question concerning whether Respondent had another location on its property for the new trailer. He said in affect that they had to replace it as quickly as possible. Had Respondent been so certain that the trailer fire was arson and most likely started by a union supporter in order to intimidate it, Respondent would not have precluded the professional arson investigator for the State of Tennessee from performing such professional investigation by removing the trailer from the premises. Shift Captain Randall Howard was a fireman and not an arson investigator, or indeed, trained in that field. A professional examination and investigation would likely have determined conclusively whether or not it was in fact arson and perhaps even locate evidence pointing to the individual or individuals responsible. I find that Respondent's precluding such professional investigation for the reasons it gave to be very suspect. It could well be that Respondent did not really desire such an investigation since it might establish the fire to have been caused by something other than arson; simply an accidental fire not intentionally caused by anyone.

I also find somewhat suspect that management personnel not on the negotiating team could not have handled the matter of replacing the trailer, but that it took all of management to accomplish this.

Respondent, having canceled its Sunday meeting. I shall now address the February 28 session.

[11] Both Knepper and Koletar in their testimony referred to the monetary loss of the trailer as $100,000. However, there is no valid basis, i.e., an insurance claim, or other available data for establishing the value of the loss.

[12] The guard on duty was not called by Respondent to testify.

L. *The February 28 Meeting*

The final prelockout meeting was held at the community center, rather than the Holiday Inn, at Williams' insistence. As noted above, on February 23 or 24, the Respondent had hired ''security'' guards from the Southeastern Security Co. located at Marietta, Ohio, and not later than February 24 some of them were already at Harriman, Tennessee, lodged at the Holiday Inn where most of the bargaining sessions had been held. And, I am convinced that not ''coincidentally'' were assigned a room adjacent to that occupied by John Williams, the Union's chief negotiator, and the room in which Williams and his committee caucused during their meetings. Williams had complained that each time he and his committee went to the room to caucus they had to run a gauntlet of these men who were on the walkway in front of the room.[13] Williams had complained that during the February 23 and 24 meeting that the parking lot area for the motel was almost crowded with these individuals brought in by Respondent and that he had gotten off-duty employees to come to the motel to watch the cars of the committee members. This was 5 days before the expiration of the contract.

The Respondent seized on the alleged bomb threat at the Holiday Inn and the arson fire of the trailer office on its premises to cancel the February 27, Sunday meeting.[14] The only reason advanced for this cancellation was that the operational problems caused by the fire required the attention of all members of the employers negotiating team, presumably even that of Koletar. It should also be remembered that at the time of Respondent's refusal to meet on Saturday, February 26, there is no evidence that any alleged misconduct by the Respondent's employees had occurred nor does the record reveal that Respondent had any reason to believe that any such misconduct would occur.

Notwithstanding the delays and the implied accusation by Koletar that the Union or its members were responsible for the alleged Holiday Inn bomb threat and the fire, both parties made some concessions and signed off on typed copies of previously agreed-on items. Near the beginning of the session, according to Respondent's notes (R. Exh. 19), Thomas Knepper acknowledged in that regard that ''[w]e realized it could also have been a visit by Clymersville personnel as they have already demonstrated their ability.'' There was no further explanation as to what he meant by this statement. There were further acrimonious comments by both the Union and the Respondent. The items signed off by the parties are shown on Respondent's Exhibit 19, pages 6–10.

There was movement on both sides and some concessions on the part of both. The contributions by employees to health care sought by the Respondent, which amounted to approximately the amount of the first year hourly wage increase offered, 25 cents per hour, or about $10 per week for a regular 40-hour workweek, was waived by the Employer for the first year. Instead it offered a one time $500 signing bonus, which was about the equivalent. The Employer also offered an alternative pay formula tied to the price of zinc as reported on the LME (London Metal Exchange). As noted above, the Respondent asserted that its economic plight was largely due to the plummeting price of zinc on the LME from about 90 cents per pound to about 39 cents per pound.[15] This proposal was to give each employee a bonus of $50 per year for each cent per pound above 45 cents to 60 cents, thus permitting each employee to earn an additional $750 per year in lieu of the first year 25-cent-per-hour wage increase first offered. The Employer also reaffirmed its offer to raise the life insurance coverage by $3000 the first year and $2000 the second and third year. The Company also offered an additional 5 cents per hour on the second and third year.

In return the Union reduced its wage proposal over the 3-year period by approximately 10 percent. Williams reiterated to the Employer that the employees were not going to strike, but would report for work at 7 a.m. on March 1.

Koletar told the union team that without a contract there would be no work. The Union took the Company's final proposal back to the membership and it was rejected. However, about 9 p.m. that evening Harold Youngblood, president of the local and other members of the team, took a new proposal to Koletar's room at the Holiday Inn. This proposal was for $1.30 increase the first year, 60 cents in the second year, and 50 cents in the third year. This represented more than a 50-percent reduction from the Union's initial proposal. The record does not reveal whether Koletar consulted with any other management official before rejecting this proposal. This was the last contact between the negotiating teams prior to 7 a.m., March 1, at which time the Respondent locked out its employees.

III. THE MARCH 1 LOCKOUT AND SURVEILLANCE

Early in negotiations the Respondent had advised the Union that it had, as was its policy, developed a strike contingency plan. On February 23, the Respondent also advised the Union that it had salaried employees from other plants at or near the site to assure continued operation of the plant in the event of a strike and a security force to assure that there was no violence.[16]

Bradley Linn Reed was in charge of the four to six ''guards'' that Respondent had obtained from Southeastern Security, a firm located at Marietta, Ohio, said by Reed to specialize in protection during labor disputes. At about 6:57 a.m. on March 1, Reed set up video cameras at the plant entrance[17] and began video-recording the employees as they arrived to report to work. The employees found the gates locked and their activities being surveilled by the video camera. In addition to the video cameras at the gate, Reed had two roving guards in vehicles equipped with a camera recording the scene at the gate. The road leading to the plant

[13] On February 23, Koletar had asked Thomas Knepper to advise Williams that the Employer was concerned about a strike and was bringing in salaried employees from other plants to keep the facility operating in the event of a strike. However, Williams was not advised that they too would be lodged at the Harriman Holiday Inn.

[14] John Williams and the committee had strongly urged the Respondent to agree to a February 26, Saturday meeting in view of the short time they had to resolve all the economic issues they were so far a part on and also the remaining noneconomic issues and the fact that the collective-bargaining agreement would expire on March 1. The Respondent never gave a meaningful reason for refusing to do so.

[15] At the time of the hearing the price had risen to about 48 cents a pound.

[16] The Respondent conceded that its strike contingency plans had never included having a security force and replacement on the site 5 days before expiration of the collective-bargaining agreement.

[17] It appears that there was only one entrance to the plant property.

entrance is a two-lane road. With the 16 to 18 unit employees attempting to report to work and finding the gates locked it is needless to say there was a resulting traffic congestion. Apparently, prior to this time the guards had escorted vans carrying the salaried personnel from the Holiday Inn at Harriman to the plant located 5 to 6 miles away in Rockwood, Tennessee. It is admitted that the brief congestion necessarily created by the employees locked out did not impede ingress or egress to and from the plant. There was no violence or threat of violence by any employee on March 1.

Notwithstanding the lack of any violence or threat thereof the Respondent, by its hired guards, indiscriminately video-recorded all the activities of its locked out employees. After the brief congestion at the gate the employees dispersed and a short time later set up an informational picket line approximately 50 to 75 feet from the plant entrance and well off company property. All this activity was video recorded by Respondent and continued at least through April 10. The Respondent acknowledged that not only were cameras stationed at the gate leading to the plant, but cameras were carried in vehicles entering and exiting the facility thus recording virtually all activity on that road and points well beyond the facility by the use of continuously roving camera cars thus indiscriminately surveilling all activity.

As stated above when Koletar returned to the home office in New York approximately March 1, her employment was abruptly terminated by Company President William Quirk. Quirk testified that he was greatly surprised that Koletar would return to New York without a signed agreement as she had been instructed to obtain. I find Quirk's surprise that Koletar did not return with a signed agreement to be surprising in view of the fact that once the Company finally made its first wage proposal on February 25, the New York office would not talk to its negotiators in Rockwood. At least this is what Koletar and Thomas Knepper told the Union. It is evident that a great deal of time was spent away from the bargaining table while the company team attempted to communicate with officials in New York. Knepper told Williams that New York simply refused to talk to them or take their calls after repeated attempts to reach them. Knepper expressed the opinion that he did not understand why they wouldn't talk with them so that they could get some direction in the bargaining, and he assured Williams that it was their problem not Williams'. The same also appears to be true during the final meeting on February 28.

Nonetheless the Respondent retained the services of John William Brown, vice president of human resources for Zinc Corporation of America, as a replacement for Martha Koletar as its chief negotiator. At the time of the trial herein, Brown testified that he had presided over six additional meetings with the Union. The last of these meetings was September 13. There had been movement and some concessions by both parties but it did not appear that an agreement was immanent. Under the facts here it is my view that the content of the bargaining sessions subsequent to the March 1 lockout and whether or not Respondent bargained in good faith after the lockout is not critical or essential to the question of whether they bargained in good faith prior to the lockout. The General Counsel argues, but does not concede, that even if the Employer commenced bargaining in good faith its previous bad-faith bargaining and the effects thereof would not be remedied. It is further argued that if this were the case an employer would be free to engage in unlawful conduct until such time as its desired results were achieved without fear of reprisals.

In this regard the Board held in *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022 (1993), that a lockout which is unlawful at its inception retains that initial unlawful taint until the lockout is terminated and the affected employees are made whole. Accordingly, the critical issue is whether the Employer bargained in good faith prior to the March 1 lockout.

By letter dated April 15, Plant Manager Charles Holiway terminated four employees; Eugene Hayes, Thomas Crabtree, Ricky Brown, and Keith Helton for various acts of alleged misconduct in connection with their informational picketing both on or near the plant property and on a road some distance from the plant. The General Counsel alleges these discharges to violate Section 8(a)(3) and (1) of the Act since those employees did not engage in the conduct cited by Holiway. These allegations will be considered and decided in a separate section of this decision.

III. ANALYSIS AND FINDINGS

A. *The Bargaining*

The Respondent disingenuously contends that it was the Union and not the Employer who bargained in bad faith, despite the fact that the Union had only reduced its initial wage proposal by about 50 percent over a 3-year period and was resisting the Employer's proposal that employees contribute to the premiums for their health benefits an amount at least equal to the Employer's first year wage proposal. The Respondent argues that such position amounts to intransigence on the part of the Union and kept the parties from reaching an agreement.

In this regard it should be noted that the Respondent had made absolutely no concessions from its initial wage proposal which in essence required minor concessions since the proposed first year wage increase was more than consumed by the employees contribution to the health insurance premium. Hence, in this respect it was the Employer who was most intransigent and offered the ''take it or leave it'' proposal. The alternative proposals the Employer made, i.e., a $500. signing bonus and waiver for the first year the contributions to the health care plan and the LME bonus with which the employees might receive no wage increase and at the maximum could earn bonuses equal to $750, assuming the price of zinc averaged 60 cents a pound during the course of the year, did not constitute a meaningful change from its initial proposal.

The Respondent repeatedly points out that the parties met 10 times prior to the expiration of the collective-bargaining agreement for a total of 48.80 hours as indicated by its notes of the bargaining sessions. It further points out that in 1991 the parties negotiated a first contract in approximately that length of time and alludes to the fact that John Williams, the Union's chief negotiator had stated that he had negotiated a contract in as little as 2-1/2 days. Respondent further argues, correctly citing *Atlanta Hilton & Towers*, 271 NLRB 1600, 1603 (1984), ''the Board cannot require an employer to make a concession on any specific issue. The Act only obliges the employer to make some reasonable effort and some direction to compose its differences with the Union.''

The Board must scrutinize the employer's overall conduct to determine whether it has bargained in good faith, without passing judgment on the substantive proposals made by the parties. Citing *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

The Respondent further contends that it has not engaged in any conduct which evidences bad faith including delaying tactics, arbitrary scheduling of meetings, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the Union, failing to designate an agent with sufficient bargaining authority or withdrawing already agreed-on provisions. Again citing *Atlanta Hilton*, id. at 1603.

The General Counsel urges that the Respondent's entire conduct, both at and away from the bargaining table must be considered and that in this case it is clear that Respondent did not come to the table with an open and fair mind nor a sincere purpose to find a basis for reaching an agreement. Instead, it came to the table with a fixed and rigid position which was, in essence, ''take this fixed package deal or take a lockout.''

Volumes have been written by the Board, the courts, and innumerable administrative law judges in analysis of Section 8(a)(5) and Section 8(d) and the criterion for finding that a party has engaged in ''surface'' or ''sham'' bargaining with no intention of reaching an agreement and thus frustrating the bargaining process. Here, I shall set forth what I believe to be the applicable principles as enunciated by the Board and various courts.

The broad principles to be applied here are familiar: The duty to bargain in good faith mandated in Section 8(a)(5) and Section 8(d) of the Act requires more than ''going through the motions of negotiating''; it requires instead that both parties approach bargaining with a ''serious intent to adjust differences and to reach an acceptable common ground.'' *NLRB v. Truitt Mfg.*, 351 U.S. 149, 155 (1956). But Section 8(d) of the Act makes it equally plain that good-faith bargaining ''does not compel either party to agree to a proposal or require the making of a concession.''[18]

The determination of whether a bargaining party has engaged in unlawful ''surface bargaining,'' or has instead merely engaged in lawful ''hard bargaining,'' is usually a difficult one, because (a) it involves, at bottom, a question of the ''intent'' of the party in question, and (b) usually such intent can only be inferred from the totality of the challenged party's conduct at the bargaining table, and not from any position it may take on any single bargainable issue or set of issues. Moreover, exactly what features within the challenged party's overall bargaining behavior may properly give rise to an inference that the party had no ''sincere desire'' to reach agreement has been the subject of ongoing debate within the Board.

Such questions were revisited by the Board in its original decision in *Reichhold Chemicals*, 277 NLRB 639 (1985). There, the Board reiterated that it is ''not the Board's role to sit in judgment of the substantive terms of bargaining,'' and stated further that,

> [t]he Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith. [Id. at 640.]

But in a ''supplemental decision'' in *Reichhold Chemicals*[19] a differently constituted Board reconsidered the original decision, particularly the dicta just quoted. Finding these dicta ''imprecise'' as a ''description of the process the Board undertakes in evaluating whether a party has engaged in good faith bargaining,'' the Board (Member Johansen dissenting) stated:

> Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposals in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant . . . . The Board's earlier decision is not to be construed as suggesting that the Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in some instances. That we will read proposals does not mean, however, that we will decide that particular proposals are either ''acceptable'' or ''unacceptable'' to a party. Instead . . . we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, *a demand is clearly designed to frustrate agreement on a collective-bargaining contract*. The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals.

See also, e.g., *88 Transit Lines*, 300 NLRB 177 (1990). There, the Board, reversing the administrative law judge's finding that the employer engaged in unlawful surface bargaining, cautioned on the one hand that:

> [W]e risk running afoul of Section 8(d) if we predicate a finding of bad faith on a party's refusal to agree to the exact language of the other party's proposals. [Id. at 179.]

But on the other hand, the Board acknowledged (id.):

> Of course, if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its ''take-it-or-leave-it'' approach . . . . Furthermore, there may be cases where the substance of a party's bargaining position is so unreasonable as to provide some evidence of bad-faith intent to frustrate agreement.

In *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982), the Board stated:

> Determining whether parties have complied with the duty to bargain in good faith usually requires examination of their motive or state of mind during the bargain-

[18] And see, e.g., *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), holding, inter alia, that it is not within the Board's remedial kit of tools to require parties to agree to any particular bargainable item to which they have not already assented.

[19] 288 NLRB 69 (1988) (*Reichhold II*).

> ing process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent. Hence, in determining whether the duty to bargain in good faith has been breached, particularly in the context of a ''surface bargaining'' allegation, we looked to whether the parties' conduct evidences a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract proposals.

The totality of Respondent's conduct both at the bargaining table and away from the table must be analyzed in accordance with the guidelines established by the Board and court cases indicated above. Thus, the employer's overall conduct must be scrutinized in order to determine whether it has bargained in good faith.

> ''From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.'' A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength force the other party to agree. [*NLRB v. Advanced Business Forms Corp*., 474 F.2d 457, 467 (2d Cir. 1973).]

The following analysis of the Employer's conduct here from the time, December 8, 1993, that John Williams notified Respondent of the Union's intention to terminate the collective-bargaining agreement upon its expiration March 1, and requested Respondent to commence negotiations for a successor agreement as early as possible, the Respondent entered upon a course of conduct designed to frustrate the collective-bargaining process. The Respondent did not respond for 3 weeks, December 29, 1993. Although advising Williams that the Company would have major contract proposals whereas Williams indicated he would have nothing major. The Company refused to meet with the Union until February 7 after first indicating they would commence negotiations in mid-January. This is the first indication that Respondent might engage in dilatory tactics in the negotiations and perhaps frustrate the bargaining process by constraining the length of time the parties had to bargain prior to the expiration of the contract. This tactic is particularly significant here inasmuch as Respondent declined to make a wage proposal until the ninth bargaining session thus leaving little time for the Union and its numbers to have adequate opportunity to exhaust all reasonable expectation of compromise and fully explore the hard core economic position.

The parties had not exchanged any proposals as they might have by mail prior to the February 7 meeting. As a result of the failure to communicate proposals earlier, there was no agreement reached on any of the approximately 66 proposed contract changes made in the Employer's proposal. It appears that most of the discussion at this session involved the Employer's complaints about the number of grievances filed and Koletar's objection to the ''tone'' of the grievances. I do not credit Respondent's contention that at this first meeting Union Representative John Williams and Local President Harold Youngblood were verbally abusive to Koletar, ''unlike anything she had experienced in her doze[n] prior negotiations.''

The parties bargained for a total of 10 sessions, approximately 48 hours, which appears to be the time Respondent allocated for bargaining since this is approximately the length of time involved in negotiating the initial contract. The Union laid all its cards on the table at the first session including its proposal on wages which it realized was unrealistic as evidenced by its major modification of its wage demands immediately when the parties addressed the wage issue at its ninth session. At that session the Union dropped its first year wage proposal from $2.85 per hour to $1.60 per hour. Thus, Respondent was well aware that they were going to be far apart on the subject of wages, assuming that it had formulated its wage proposal prior to the inception of negotiations.

The General Counsel argues in essence that the Respondent belabored many noneconomic proposals for charges in the contract language which was of little consequence but consumed time before addressing, what it knew was going to be the major issue, economics. By the time the parties addressed wages and other economic issues there was little time for either party to thoroughly digest and consider the other's proposals prior to the expiration of the contract and Respondent's lockout of its employees.

During Smelas' opening remarks on February 7, while professing that the Employer was, at that time, in financial difficulty, he did not hint at the fact that the Employer's economic proposals would in substance leave the Union and employees where they were. In addition to Smelas' alluding to what was apparently an extraordinary decline in the price of zinc and the projected incurred costs of disposing of hazardous waste materials he also appeared to place a part of the Company's financial woes on the $15 million civil lawsuit filed by residents of the adjoining Clymbersville community.

Neither did Smelas give the Union advance notice that in addition to the numerous noneconomic proposal the Employer's negotiating team was going to make the authority of the team to negotiate an economic package was limited to a ''no-cost or low-cost'' contract is not more than 5 percent over the 3-year period. Had the Union been put on notice that such was going to be the Employer's economic package it would undoubtedly have more aggressively sought to address economics prior to the ninth session.

The complaint alleges that since February 7, 1994, Respondent failed and refused to bargain with the Union. However, the Respondent's conduct prior to that time, i.e., from the time the Union requested Respondent to bargain, may be considered as background in assessing Respondent's conduct at the bargaining table is appropriate.

It is not crucial in this case to determine precisely the moment Respondent commenced its course of bad-faith bargaining. Whether it was at the time it reneged on its tentative agreement to commence negotiations in mid-January and refused to meet until February 7, thus allowing negotiation for only 3 weeks prior to the expiration of the current agreement or whether it was at the time it assembled replacement employees from its other plants and brought in professional security guards prior to the time it had made its first wage proposal. Early in the negotiations the Respondent told the Union that it always, prior to negotiation devised a strike contingency plan, to continue operating and that it had done

so here. However, at that time it did not indicate just what that plan might be. Nor did it hint that the plan included importing security personnel. At no time did Respondent indicate to the Union that it would lockout its employees if an agreement had not been reached by the expiration of the contract.

The circumstances and bargain positions of the parties here bear some resemblance to those in *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989). In that case the parties bargained for 11 sessions over a period of 2 months over largely noneconomic subjects and first took up the Respondent's wage proposal at the 12th and final session prior to the expiration of the then current collective-bargaining agreement. The Respondent's first wage proposal was a wage cut of $2.77 per hour and was part of a package tying together the remaining open items. In the instant case the Respondent made its first wage proposal at the ninth session and in conjunction with other proposals amounted to no first year wage increase for the Union and only minuscule increases the second and third year.

In the instant case it is significant to note that once the Employer made its wage proposal the Company's negotiating team on the site could not telephonically reach Smelas or Quirk in New York for guidance although the teams authority was limited and inflexible. Knepper told the union team that the officials in New York simply refused to take their calls or talk to them. Thus, the Company's negotiators were bound by the ''take it or leave it'' during that session. Also of significance is the Employer's refusal to schedule a meeting for February 26 and it cancelled the Sunday, February 27 scheduled meeting.

During the Monday, February 28 final prelockout meeting the Employer's negotiators were able to talk with superiors in New York and obtain authority to present alternate equal or inferior wage proposals. None were acceptable to the Union. The Union made further concessions during this meeting and even after this final meeting adjourned the Union delivered proposals making further wage concession to Koletar—which she evidently summarily refused to consider.

It was not until near the conclusion of this final prelockout meeting that Koletar advised the Union that there would be no work if there was no contract. Again, the Union had little time in which to adequately exhaust the opportunity to digest this and have any reasonable expectation of compromise. Although the Union had taken a strike vote early in negotiations, Williams repeatedly advised the Employer that the employees would continue to work after the expiration of the contract and continue to endeavor to reach agreement while continuing to work.

It is evident from the foregoing that Respondent entered into negotiation with no interest of reaching agreement for a successor contract absent a total capitulation by the Union to Respondent's ''take it or leave it'' wage proposals. Thus, the Respondent indicated an adamant refusal to bargain further with the Union prior to its locking out its employees and irrespective of any other events, including major and significant bargaining concessions short of acceptance of the terms and condition of its last offer which it never described as its final offer.

Accordingly, the Respondent failed and refused to bargain in good faith with the Union as alleged in the complaint.

B. *The Lockout*

The above discussion leaves little for discussion of the status of the lockout. The employees did not withhold their services in support of the union bargaining position. Thus, there was no strike. Had they been allowed to report to work as they did under the terms of the expired contract or even under the terms of Respondent's last offer they would have done so. No impasse had been reached but the employees were not permitted to continue to work. Since the Employer had failed to bargain in good faith during negotiation it was not privileged to lockout its employees short of impasse or in support of bargaining position. There is no evidence that the latter was the case. The lockout was motivated by the Employer's desire to rid itself of the Union in violation of Section 8(a)(5), (3), and (1) of the Act. The Respondent's contention that it feared violence or sabotage if the employees continued to work is without merit. There is no credited evidence that, at that time the union supporters had engaged or threatened to engage in such conduct.

C. *The Video-Recording of Employees After Lockout*

That Respondent video recorded its employees beginning on March 1 is not in dispute.

Bradley Linn Reed was in charge of the four to six ''guards'' that Respondent had obtained from Southeastern Security, a firm located in Marietta, Ohio, said by Reed to specialize in protection during labor disputes. At about 6:57 a.m. on March 1, Reed set up video cameras at the plant entrance[20] and began video recording the employees as they arrived to report work. The employees found the gates locked and their activities being surveilled by the video camera. In addition to the video cameras at the gate, Reed had two roving guards in vehicles equipped with a camera recording the scene at the gate. The road leading to the plant entrance is a two-lane road. With the 16 to 18 unit employees attempting to report to work and finding the gates locked it is needless to say there was a resulting traffic congestion. Apparently, prior to this time the guards had escorted vans carrying the salaried personnel from the Holiday Inn at Harriman to the plant located 5 to 6 miles away in Rockwood, Tennessee. It is admitted that the brief congestion necessarily created by the employees locked out did not impede ingress or egress to and from the plant. There was no violence or threat of violence by any employee on March 1.

Notwithstanding the lack of any violence or threat thereof the Respondent, by its hired guards, indiscriminately video recorded all the activities of its locked-out employees. After the brief congestion at the gate the employees dispersed and a short time later set up an informational picket line approximately 50 to 75 feet from the plant entrance and well off company property. All this activity was video recorded by Respondent and continued at least through April 10. The Respondent acknowledged that not only were cameras stationed at the gate leading to the plant, but cameras were carried in vehicles entering and exiting the facility thus recording virtually all activity on that road and points well beyond the facility by the use of continuously roving camera cars thus indiscriminately surveilling all activity.

[20] There was only one entrance to the plant from a two-lane road.

On the facts set forth above it is evident that Respondent was not justified in indiscriminately video recording its employees' activities as admitted herein. Accordingly such conduct violated Section 8(a)(1) of the Act.

D. *The Postlockout Discharges*

These contested discharges requires a minimum discussion and analysis in view of the credibility resolutions here and irrefutable video recording of some of the events. Board and court decisions are overwhelming clear that conduct of pickets and strikers which reasonably tend to coerce or intimidate employees in the exercise of rights protected by the Act or engage in acts of violence or threats thereof or damage to property or injury to persons is not protected activity.

Thomas Knepper testified that on March 4, between 9 and 10 p.m., while traveling with Supervisor Murray on U.S. Highway 27, Crabtree ''ran a red light'' and started ''chasing'' them. Knepper also stated that Crabtree kept his high beams on and ''sat on our bumper.'' Murray slowed down, at which point Crabtree got in the passing lane and drove ''side by side'' for a couple of miles. Finally, Crabtree began making ''swerving moves,'' causing Murray's right wheels to run off the road. However, on cross-examination, Knepper stated that he did not actually see Crabtree run the light. In Knepper's written statement, Knepper stated that Murray ''hit the brakes,'' causing the truck to move in front of (ahead of) Murray's truck. Knepper stated that the truck proceeded to turn left into the Kroger parking lot. On cross-examination, Knepper stated that he viewed Crabtree's actions as threatening because Crabtree swerved toward them repeatedly. Knepper testified that Crabtree swerved towards them three times.

Whether Crabtree swerved toward Murray and Knepper one time as Knepper apparently stated in his pretrial affidavit or three times as he testified at trial, such conduct is reckless, dangerous and could very well have caused an accident. However, I do not believe that Crabtree actually intended to run them off the road or physically harm them, such conduct is unacceptable.

Crabtree and Eugene Hayes readily admit to seeing Knepper and Murray in their vehicle at that time and to following them a distance so that Hayes could wave to them. They also admit to passing the vehicle Murray was driving, but deny trying to run them off the road. I credit Knepper's version of those events and find that the conduct of Crabtree, the driver, created a hazard to Knepper and Murray and accordingly warranted their discharge.

The next incident in time sequence also involved Crabtree and occurred on March 7, and the testimony of Security Guard Richard Flanagan is credited. This incident involved the tossing of ''jackrocks'' on to the road at the entrance to the plant.[21]

Crabtree was also discharged due to tossing jackrocks ''onto roadway at entrance to plant causing damage to the tire of a vehicle entering plant.'' This alleged incident occurred on March 7. According to security guard Richard Anthony Flanagan Jr., on March 7, at approximately 10:25 p.m., as he passed the picket shack, he ''heard'' an object hit his car. Flanagan said he backed the car up, got out and picked up three jackrocks. As he backed up, Flanagan stated he heard clicking. Flanagan stated that he had a jackrock in his left front tire, resulting in a flat tire. Flanagan testified that the person who threw the jackrock was Thomas Crabtree. He testified that a foreman, who he believes ''might have been Sub Boles, I'm not really sure on that'' identified Crabtree, based upon Flanagan's description of the clothing worn. Flanagan did not recognize Crabtree. Additionally, Flanagan agreed that several employees on the picket line wore the same type garments, namely, a union jacket and camouflage gear used to identify Crabtree.

I do not credit Crabtree's denial of this conduct and find that Flanagan's identification of Crabtree is sufficient. I also do not credit Crabtree's testimony involving the use of wrist rockets or slingshots occurring on April 10, at the picket shack discussed below. However, I strongly disavow the Respondent's argument that there is strong circumstantial evidence that Crabtree set the trailer fire on February 25. That evidence is the testimony of the duty supervisor that he saw Crabtree in an area between the kiln and the trailer a short time before the fire commenced. There is strong evidence that in the performance of his job he might have reason to be in that area.

I credit Flanagan's testimony here and find that Crabtree's conduct here and the damage to the property it caused warranted his discharge.

But for the most serious misconduct occurred at about the 3 p.m. shift change on April 10, and involves all of the discharges, Brown, Hayes, Crabtree, and Helton.

In support of its contention that these employees were engaged in the alleged misconduct, Respondent placed, in evidence, a videotape which purports to show Brown, Hayes, Crabtree, and Helton throwing and/or propelling foreign objects, thereby breaking a car window and hitting a truck (R. Exh. 41). Brown, Hayes, Crabtree, and Helton adamantly denied engaging in any such or similar conduct. Security Guard and Cameraman Woodrow W. Whitaker testified that he never saw anyone throw anything. Whitaker also testified that he never saw anything striking either vehicle. According to Whitaker, he only recognized employee Thomas Crabtree, on the evening of April 10. Whitaker stated that his supervisor, Brad Reed, identified the other man when viewing the video the following day. Whitaker stated that ''I think his name is Helton.''

Respondent presented former employee Joe F. Brock. Brock was not only present, on April 10, but was a union member and present on the picket line. Brock is currently a jailer and full-time employee with the Roane County Sheriff's Department. At the time of the alleged incident, and while still an employee of Respondent, Brock was a part-time employee of the Roane County Sheriff's Department. Brock was an eyewitness to the alleged misconduct of April 10. Brock was also presented to identify the employees on the tape in evidence. In viewing the tape, Brock could allegedly identify Crabtree, Helton, and Hayes, while not being able to identify another employee. Brock testified that he could not identify the fourth employee on the tape because the door was blocking the person's identity. Brock admitted that Crabtree's identity was similarly blocked on the video, yet he claims to clearly recognize Crabtree. According to Brock's alleged eyewitness account, as a guard car passed the picket shack, Crabtree held the door open, while Brown,

[21] Jackrocks are bent nails welded together in the shape of six pronged Jackstones.

in a crouching position, shot a wrist rocket (slingshot). Brock testified that Brown used ball bearings measuring about one half inch in diameter. According to Brock, at this same time, Hayes ''shot out the window'' of the shack. Brock stated that Brown laughed and said ''We got em.'' On cross-examination, however, Brock added that Brown laughed and stated, ''ha, ha, we broke the windshield.'' Upon further cross-examination, however, Brock admitted that Brown never made such a remark. Brock stated that after the above incident, Helton drove up. According to Brock, Hayes was responsible for hitting the truck. In viewing Respondent's Exhibit 41, Brock testified that as the truck approached the shack, that ''from the way the shirt there looks, which is light blue, there in the door'' that the person holding the door ''looks like'' Helton. On direct, Brock testified that prior to the police arriving, he observed Crabtree outside, placing his wrist rocket in his car, while Brown placed his wrist rocket on an overhead ledge in the shack. Yet on cross, Brock admitted that he remained in the shack and he did not see any wrist rockets being concealed in anyone's car. Even though Brock was employed by the Roane County Sheriff's Department, when questioned, on the day of the incident, he declined to tell the police what he told the court on the day of the trial. Unlike his earlier testimony, on redirect, Brock testified that Crabtree also shot at the incoming truck.

An employer is justified in discharging and refusing to reinstate employees who merely threaten others to the extent that such threats would ''reasonably intend to coerce or intimidate employees in the exercise of rights protected under the Act.'' *Clear Pine Moldings*, 268 NLRB 1040 (1984). In the instant case the evidence was overwhelming that Brown, Hayes, Crabtree, and Helton did not just intimidate others, but actively engaged in acts of violence. The April 10 slingshot attacks and the March 27 assault on Reed were captured on video.

The Board established in *Franzia Bros. Winery*, 290 NLRB 927, 931 (1988), that an employer has the burden of demonstrating an honest belief that the employee has engaged in such misconduct. This burden does not mean that the employer must prove that the employee actually engaged in the misconduct. Rather, once a good-faith belief is established, the burden shifts back to the General Counsel to prove that the striker did not in fact engage in the claimed misconduct. Id. at 931.

In the instant case, the evidence overwhelmingly supports a finding that Brown, Hayes, Crabtree, and Helton engaged in the misconduct of which they were accused. There is no question that Holiday had an overwhelming basis on which to form a ''good faith'' belief as to this misconduct. The General Counsel certainly failed to disprove that they engaged in this conduct. The terminated employees' claim that they knew nothing at all about the attack in light of the video showing they were, at the very least, present when it occurred, brings their credibility and self-serving denial of participation into question.

The eyewitness testimony by Joe Brock, who saw precisely what happened, comes from a credible source with no motivation to lie. Brock was a union member at the time the attack took place. It took a great deal of courage for him to tell the truth in the face of the coercion put on him by his former fellow union members. The police investigator who eventually charged Brown and Hayes relied on Brock's testimony and rejected the belated theory that it was actually Brock who attacked the vehicles.

Apart from the slingshot attacks, there is ample evidence against Crabtree for other misconduct. It is undisputed that it was his Silverado pickup truck that tried to run Knepper and Murray off the road, and that he threw jackrocks at Ferguson's vehicle. While terminating Crabtree was certainly warranted on the slingshot attack alone, there is ample evidence that he engaged in other misconduct which warrants his termination.

Accordingly, I find that Respondent's discharge of Brown, Hayes, Crabtree, and Helton and his refusal to reinstate them does not violate the Act as alleged and I recommend that these allegations be dismissed.

CONCLUSIONS OF LAW

1. Respondent Horsehead Resource Development Co., Inc. is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3-990, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its Rockwood, Tennessee facility, but excluding all office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act.

4. The Union is, and at all times material has been, the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by Respondent.

5. At all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. By since on or about February 7, 1995, refusing to bargain in good faith with the Union as the exclusive representative of the employees in the above-described unit, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By since March 1, 1994, Respondent engaged in surveillance of its employees union activities by video recording such activities both at and away from the picket line while such employees protested Respondent's unlawful lockout Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. By on and after March 1, 1994, engaged in a lockout of its unit employees in furtherance of its unlawful bargaining conduct set forth above Respondent has engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the Act.

9. Respondent has not otherwise violated the Act as alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that Respondent be ordered to cease and desist, and to take certain affirmative action to effectuate the policies of the Act.

Respondent shall be ordered to, on request, bargain in good faith with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

Having found that the Respondent unlawfully locked out its employees, on request, offer reinstatement to all the unit employees it locked out on March 1, 1994. I shall direct that the employees be made whole for any losses of pay and benefits they may have suffered by reason of the lockout, to be calculated as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]