

Acme Wire Works, Inc. and Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract. Case 29-CA-4866

April 28, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND
WALTHER

On January 19, 1977, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent and the Party to the Contract filed exceptions and supporting briefs, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Acme Wire Works, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

¹ Respondent and the Party to the Contract have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard before me on September 7, 1976, in Brooklyn, New York, upon a complaint which issued on April 20, 1976, alleging that Respondent violated Section 8(a)(5) and (1) of the Act by its untimely withdrawal from multiemployer bargaining and thereafter refusing to abide by the agreement reached by its bargaining agent, Wire Works Manufacturers Association, and the Union;¹ Section 8(a)(3), (2), and (1) of the Act by recognizing and entering into a collective-bargaining agreement with Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter Local 810), which agreement requires membership in Local 810 as a condition of employment, notwithstanding that Local 810 did not represent a majority of employees in the appropriate multiemployer bargaining unit; and Section 8(a)(3) and (1) by failing and refusing to reinstate striking employees upon their unconditional offer to return to work after a strike against Respondent. The Respondent denied the critical allegations in the complaint, and Respondent and the General Counsel filed briefs.

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Respondent is a corporation organized under the laws of the State of New York and at all times material has maintained its principal office and place of business in the Borough of Brooklyn, city and State of New York, where it is engaged in the manufacture, sale, and distribution of various metal and wire products.

Wire Works Manufacturing Association, Inc., herein called the Association, is a membership corporation organized under the laws of the State of New York and at all times material has engaged in the function of negotiating and executing bargaining agreements with labor organizations and in administering said agreements on behalf of its members located and operating in the city and State of New York. During the past year, prior to the issuance of the complaint, the employer-members of the Association, collectively, in the course and conduct of their business operations, purchased and caused to be transported and delivered to their various New York State locations, wire, metal, and other goods and materials valued in excess of \$50,000. Such materials were transported and delivered to said plants in interstate commerce directly from other States of the United States. Accordingly, I find that the Association, and each of its employer-members, including Respondent, are, and have been at all material times

¹ Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.

herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, and Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

For many years the Union has represented the production and maintenance employees of the employer-members of the Association and has negotiated collective-bargaining agreements with the Association. The most recent contract with the Association expired on June 30, 1975. Also on that date the Union's contracts with two other associations of employers, Allied Building Metal Industries, Inc. (Allied), and the Independent Association of Steel Fabricators, Inc., as well as a group of about 60 independent companies with whom the Union bargained separately, expired.

In April 1975, the Union notified the Association of its desire to negotiate a new contract to replace the one that was expiring on June 30, 1975. In May 1975, the Union informed the Association by letter that it wished to know who the Association would be representing in the upcoming negotiations. It also told the Association that if it had any new members the Union would "need confirmation from them that your association is authorized to represent them." In response to the Union's letter, the Association forwarded a list of the employer-members of the Association that it would be representing in the upcoming negotiations. Included in that list was Respondent, which has been a member of the Association since at least 1964.

The first negotiating session between the Union and the Association was held on June 16, 1975. By that first meeting or by the next one, which was held on June 24 or 26, 1975, the Association had the Union's proposals for a new contract. There was little discussion of these proposals at either of the first two bargaining sessions. The proposals sought in very general terms increases in wages and contributions to fringe benefit funds covering the employees.

The first two bargaining sessions were primarily concerned with a discussion of the industry in general. The employer-members of the Association pleaded that their economic situation was bad. More specifically, at the second June bargaining session, there was discussion on the subject of providing better schooling for wire workers. Also discussed at some length was the Association's desire to reduce certain vacation benefits. The Association also raised the issue of whether the Union would permit the employer-members of the Association to purchase certain prefabricated panels. In addition, at this second negotiating session, the Union asked the Association to make a wage proposal. The Association stated it had no wage proposal to make at that time, and that there was no sense in making any economic offer until the Union completed negotiations with the Allied employers. Association repre-

sentatives also stated that most of their employer-members would be closed for the first 2 weeks in July. It was agreed that Union Representative William Matienzo would contact Association representatives towards the middle of July.

Respondent's representative, J. P. Batthaney, was present at both of the June 1975 negotiating sessions. He participated in the discussions that occurred at both of these meetings. Neither the Respondent nor the Association suggested that Respondent was not participating as a member of the Association.

By letter dated June 19, 1975, the Association informed the Union that its proposals for a new contract were unacceptable. The Association proposed that the expiring contract be extended for another 3 years. At the second June bargaining session this request for a continuation of the expiring contract for another 3 years was repeated by the Association. The proposal was rejected by the Union.

On July 1, 1975, the Union commenced a strike against those employers who had not signed a new contract with it, including the eight employer-members of the Association. On or about July 15, 1975, Union Representative Matienzo called Joseph Bardy of the Association and informed Bardy that the Union had new proposals for a contract. Matienzo delivered the new proposals to Association representatives. In a letter dated July 23, 1975, the Association acknowledged the new proposals for a contract and rejected them, stating its hope that the union position "will become more receptive." The letter ended by requesting that the Union let it "know of any changes."

Sometime in August, while on the picket line, Matienzo spoke with Association President Kennedy and Bardy and was again told by them that the Association would not sign the Union's latest proposal and that they were waiting for the Allied group to settle with the Union before further negotiations. The Association and the Union had followed this same course of conduct, i.e., suspending final negotiations until Allied reached a new contract, for over 20 years. Historically, the Allied negotiations have established the pattern for settlements in the industry for the other employers in the industry who were not members of Allied.

From June 24, 1975, through mid-January 1976, there were no face-to-face bargaining sessions between the Union and the Association. During that period of time, the Allied negotiations continued and neither the Association nor the Union asked for bargaining meetings.

In late December 1975 or early January 1976, Respondent recognized Local 810 as the representative of all of Respondent's employees. It entered into a collective-bargaining agreement with Local 810 dated January 1, 1976, covering these employees. The bargaining agreement also requires that, as a condition of employment, all of Respondent's employees become and remain members of Local 810.

The next negotiating session between the Union and the Association occurred on January 13, 1976, about 1 week after Allied had reached an agreement with the Union. At this session, the Union further modified its two earlier sets of proposals. Discussion ensued on the subject of the purchasing of certain types of prefabricated panels and other issues. The Association indicated a willingness to

agree to the same wage and economic provisions agreed to by Allied.

At this January 13 meeting, Respondent had no representative in attendance. Union President Colavito inquired of Kennedy and Bardy as to the whereabouts of Respondent's representative. Kennedy stated that he had heard that Respondent "was finished with us." Colavito asked where he heard that from but all Kennedy would say was that he had heard it. Colavito then asked Kennedy to let him know positively what the Respondent's position was and Kennedy agreed he would let him know at the next meeting.

The next bargaining session was held on January 19, 1976. Respondent did not attend. After discussion on various topics, agreement was reached on a new contract and it was executed by the Union and the Association. During the course of this meeting, Colavito again inquired about Respondent. Colavito was informed by Bardy that the Association had just received a letter that day from Respondent informing it that Respondent had resigned from the Association. Colavito asked Bardy to indicate on the letter that he had just received it and he did so. He wrote that he received the letter of resignation, which was dated August 11, 1975, on January 16, 1976.²

It is uncontroverted that at no time prior to the January 1976 meetings was the Union told or made aware of any desire or decision of Respondent to withdraw from bargaining through the Association.

On January 20, 1976, Union Representative Matienzo spoke to Respondent's representative, Batthaney, and told him that the Union had reached an agreement with the Association and that he wanted Respondent to honor it and to send his men back to work. Batthaney told Matienzo that Respondent had resigned from the Association and that he had nothing to do with the Union anymore. In late March 1976, the Union sent a copy of the agreement that had been reached between it and the Association to Respondent and noted again that it considered Respondent to be bound by it.

The Union's strike against the employer-members of the Association, except for Respondent, ended after the agreement was reached with the Association.

On March 29, 1976, the Union also sent a letter to Respondent unconditionally requesting on behalf of Respondent's employees that they be returned to work. At this time, Respondent employed four employees. Respondent never responded to that request.

B. Discussion and Analysis

Multiemployer bargaining is a consensual arrangement. Under Board law, employers and unions may withdraw

² The above is based on the credited and mutually corroborative testimony of Colavito and Matienzo. The only other witness in this proceeding was Bardy, whose testimony I discredit to the extent it is inconsistent with the findings set forth above. Bardy's testimony is that Respondent mentioned possible withdrawal from the Association in July 1975. There was no evidence, however, that this was a firm resignation or that it was communicated to the Union. Bardy also testified he believes he handed the resignation letter to union representatives on January 13 and received it from Respondent's representative the day before. Bardy conceded, however, that he wrote that he had received the letter on January 16 on a copy of the letter received into evidence in this case. Although he

from multiemployer bargaining only under certain conditions. Prior to the beginning of negotiations, withdrawal can only be effected by an unequivocal written notice expressing a sincere intent to permanently abandon the multiemployer unit and to pursue negotiations on an individual employer basis. Once negotiations begin, however, withdrawal can only be effected on the basis of mutual consent or "unusual circumstances."³

In the instant case, General Counsel urges that Respondent's withdrawal, allegedly discussed in July 1975 but not formalized or transmitted to the Union until January 19, 1976, was untimely. Respondent does not seriously dispute that the withdrawal, whenever it occurred, was untimely, insofar as it occurred after negotiations began on a new contract. It urges, however, that it was entitled to withdraw from multiemployer bargaining because of the following "unusual circumstances": (1) an impasse occurred sometime after the June 1975 meetings of the parties; (2) the Union had engaged in unlawful surface bargaining; and (3) a combination of factors existed amounting to "dire economic circumstances" within the meaning of *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973), enforcement denied on other grounds 500 F.2d 181 (C.A. 5, 1974). I find that Respondent's withdrawal was untimely and that the record herein does not show unusual circumstances which would permit such untimely withdrawal. Furthermore, I find that Respondent violated the Act by coupling its withdrawal from the Association, whose members were obligated to bargain with the Union as the exclusive representative of its employees, with recognition of Local 810, another labor organization which did not represent a majority or, so far as the record shows, any of its employees. I further find that the strike of Respondent's employees—after the attempted withdrawal and unlawful recognition of Local 810—was converted into an unfair labor practice strike and Respondent's refusal to offer three strikers their jobs back upon their unconditional request to return to work was unlawful.

1. Negotiations had commenced and withdrawal was untimely

In the instant case, bargaining—at least opening negotiations—began in June 1975. The Union submitted its proposals and the Association called for extension of the existing agreement. The Association also made proposals on vacation, subcontracting, and training programs. On July 15, the Union submitted modified proposals which were rejected. Thereafter, according to the credited testimony, the parties mutually agreed to suspend bargaining until the Union had reached agreement with the Allied employer group, whose negotiations were in progress. This

testified that he was mistaken when he affixed the January 16 date on the letter, I find his testimony incredible. This is not only because I give greater weight to the notation made contemporaneously with the relevant events herein and to the testimony of Colavito and Matienzo, but also because Bardy's testimony was confusing and imprecise and his demeanor convinced me that he was deliberately attempting to show that Respondent had not given an untimely withdrawal from the Association. Accordingly, I am unable to credit Bardy's testimony on this or any other crucial issue in this case.

³ *City Roofing Co.*, 222 NLRB 786 (1976); *Bill Cook Buick, Inc.*, 224 NLRB 1094 (1976); *Retail Associates, Inc.*, 120 NLRB 388 (1958).

had been the traditional course of bargaining in the industry. Thus, it is clear that, at this point, negotiations had commenced and withdrawal without the consent of the Union would have been untimely.⁴

As I have found above, neither the Respondent nor the Association informed the Union of Respondent's decision to withdraw from the Association until the final negotiating session on January 19, 1976. This was clearly untimely, as the Allied agreement had been concluded and the Respondent, again without notifying the Union, had concluded an agreement with another labor organization. Accordingly, in the absence of "unusual circumstances," Respondent violated Section 8(a)(5) and (1) of the Act by its untimely withdrawal from the multiemployer unit after bargaining had commenced.

2. Respondent's claim of unusual circumstances

In view of the circumstances of the withdrawal, none of the reasons now offered by Respondent provide a defense to its conduct. It is axiomatic that the decision to withdraw from multiemployer bargaining must be made in good faith with the utilization of a different course of bargaining on an individual basis.⁵ Respondent's decision did not satisfy these prerequisites. First of all, none of the asserted reasons were advanced at the time of the withdrawal in January 1976, a factor which the Board views as undercutting an asserted defense to untimely withdrawal.⁶ The rationale for this view is sound since it is unlikely that a circumstance allegedly justifying untimely withdrawal from a multiemployer unit is truly "unusual" if it is not asserted at the time but rather awaits the onset of litigation. Indeed, in this case, no reason was given for the withdrawal when Respondent's resignation was transmitted to the Union. From all that appears, the reason for the withdrawal was that Respondent was dissatisfied with the contract concluded with Allied which it knew would be significant in the final contract concluded with the Association. Respondent waited, however, to withdraw until after negotiations were almost completed and after the Allied contract was concluded. Moreover, here Respondent sought to withdraw from multiemployer bargaining in the context of unlawful recognition of another union as the representative of its employees with no attempt to bargain with the Union on an employerwide basis. There is no evidence that the contract with Local 810 was entered into after ascertainment of the desires of a majority of Respondent's employees. Nor did Respondent make any attempt to bargain with the Union on an individual basis, even though it is fair to presume that the Union's representative status in the single-employer unit continued. See *Tahoe Nugget, Inc.*, 227 NLRB 357 (1976).⁷

⁴ See *The Carvel Company, and C and D Plumbing and Heating Company*, 226 NLRB 111 (1976).

⁵ See *Retail Associates, Inc.*, 120 NLRB at 394.

⁶ *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487, 1488 (1964), *enfd.* 367 F.2d 55, 58 (C.A. 10, 1966); see also *N.L.R.B. v. Central Plumbing Company*, 492 F.2d 1252, 1254, fn. 3 (C.A. 6, 1974).

⁷ Respondent only had four employees and they all engaged in the strike; there is no evidence that any did not wish the Union to represent them.

⁸ An impasse was defined as follows in *Taft Broadcasting Co., WDAF AM-FM IV*, 163 NLRB 475, 478 (1967):

Respondent's asserted reasons for its withdrawal are insufficient to constitute "unusual circumstances" warranting untimely withdrawal. First of all, the evidence herein does not support Respondent's contention that there was an impasse.⁸ Although there was a hiatus of several months in bargaining between the first sessions and the last ones, there was no single overriding issue which divided the parties and made it unlikely that there would be agreement in the foreseeable future. It appears that both parties were satisfied with the decision to wait for conclusion of the Allied bargaining, which had been traditional. Moreover, as indicated below, the Allied negotiations continued during this period and their successful conclusion led, in some measure, to the agreement of January 19, 1976. Until the litigation of this case there had been no suggestion by the Association or its members that there was an impasse in negotiations. In any event, Board law is quite clear that impasse alone is no excuse for untimely withdrawal from the multiemployer bargaining obligation. *Bill Cook Buick, Inc., supra.*

Respondent also urges that it was privileged to withdraw from the Association because the Union had engaged in a complete failure to bargain in good faith. Assuming *arguendo* that this might be a factor that would excuse an untimely withdrawal in certain factual circumstances, Respondent's contention is not well founded in the circumstances of this case. I cannot conclude from the evidence discussed above that the Union bargained improperly or unlawfully with respect to the Association. The Union's original proposals were general in nature, but contemplated increased benefits. In July, after the Association failed to make an economic offer, the Union asked for a 10-percent wage increase. Thereafter, there was mutual agreement to await the Allied negotiations which continued during this period and resulted in an agreement which led to the Association agreement. By virtue of the entire bargaining—including the waiting period while the Allied negotiations were going forward—the Association was able to obtain the Union's agreement on one of the important issues it raised early in the negotiations, the subcontracting of panels. Thus, neither the hiatus in bargaining nor the Union's lack of specificity, relied upon by Respondent, shows lack of good-faith bargaining on the part of the Union. Moreover, neither the Association nor the Respondent filed charges with the Board alleging that the Union had engaged in surface bargaining. This casts further doubt on Respondent's assertion that the Union was bargaining in bad faith and rather confirms that the Association was content to wait for the conclusion of the Allied bargaining. In these circumstances, it is inappropriate to give weight to defenses which in effect attempt to escape obligations

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

under the Act by dredging up alleged unfair labor practices concerning which charges were not timely filed.⁹

Finally, Respondent's allegations of dire economic circumstances are unavailing. The evidence it cites involved the opening bargaining salvos of Association representatives when they first met with union representatives. The picture of a depressed industry presented by Respondent was as applicable to the other Association members as to Respondent. Yet they continued in the multiemployer unit. Respondent submitted no evidence of its own impending economic doom nor any economic evidence whatsoever. Nor is the fact of a strike sufficient reason for untimely withdrawal.¹⁰

3. Respondent's recognition of Local 810

As stated above, the Respondent has not shown sufficient reason to excuse its untimely withdrawal from the Association. Thus, it was obligated to honor the agreement reached by its agent, the Association, and the Union, and its refusal to do so violated Section 8(a)(5) and (1) of the Act. Furthermore, Respondent entered into a collective-bargaining agreement with Local 810 which carried an effective date of January 1, 1976. Since its bargaining obligation was defined by the Union's majority status in the multiemployer Association, Respondent's recognition of Local 810 and negotiation of a collective-bargaining agreement with Local 810 violated Section 8(a)(2) and (1) of the Act.¹¹ Since the Local 810 agreement contained a union-security provision requiring membership in Local 810, the Respondent's conduct also violated Section 8(a)(3) and (1) of the Act.¹²

4. Reinstatement of strikers

I also find and conclude that, after Respondent's unfair labor practices described above, the economic strike of employees was prolonged by Respondent's unlawful conduct and converted into an unfair labor practice strike at least with respect to the employees of Respondent who remained on strike after the Union came to terms with the Association.¹³ These employees were entitled to immediate reinstatement upon their unconditional offer to return to work, which was made on their behalf by the Union on March 29, 1976.¹⁴ General Counsel concedes that one employee, Dougherty, returned to work before the Union's offer on behalf of all striking employees. There is no evidence that the three other employees were immediately reinstated to their former jobs and the Respondent did not show that it made offers of reinstatement to them. Indeed, in response to Union Representative Matienzo's request that Respondent honor the Association agreement and let

his men come back to work, Batthaney replied that he had nothing to do with the Union. Accordingly, the Respondent's failure to reinstate employees Diaz, Hammel, and Paradise was violative of Section 8(a)(3) and (1) of the Act.¹⁵

Respondent contends that the Union's offer was inoperative because it was simply a *pro forma* statement without knowledge of the circumstances of the particular employees involved. There is evidence that employee Hammel was unable to work because he was ill and that the whereabouts of employee Paradise at the time of the hearing were unknown. Although the evidence is sketchy on this point, I am convinced that Union Representative Matienzo had sufficient knowledge of the desires of the employees to return to work so that the Union's offer on their behalf was a legitimate one in the circumstances of this case. The letter itself makes the offer unconditional. There is evidence that Matienzo spoke to Paradise, who said that he had talked to an official of Respondent about returning to work but was not going back unless "Local 455 is back there"; that he had also spoken to Hammel in February or March 1976; and that he had heard about Diaz returning to work. Moreover, Batthaney had indicated in a conversation with Matienzo that Respondent had nothing to do with the Union. Any further questions concerning the availability of Paradise or Hammel for work and the backpay amounts, if any, due all employees, including Diaz, may be resolved in the compliance phase of this proceeding.

CONCLUSIONS OF LAW

1. All production and maintenance employees, including plant clericals employed by the employer-members of the Wire Works Manufacturers Association, Inc., exclusive of all clerical employees, superintendents, guards, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

2. The Union is, and at all material times has been, the exclusive bargaining representative of the employees, including those of Respondent, in the aforesaid appropriate unit.

3. At all times material, Wire Works Manufacturers Association, Inc., has been the authorized negotiating agent of the Respondent authorized to negotiate collective-bargaining agreements on behalf of the Respondent within the meaning of Section 2(13) of the Act.

4. By refusing on and after January 19, 1976, to sign the agreement reached between the Union and the aforesaid Association on that date, the Respondent has engaged in a

⁹ See *International Hod Carriers' Building & Common Laborers' Union of America, Road & Heavy Construction, Local 1298, AFL-CIO (Roman Stone Construction Company)*, 153 NLRB 659, fn. 3 (1965); *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975); see also *N.L.R.B. v. Crimptex, Inc.*, 517 F.2d 501, 505 (C.A. 1, 1975).

¹⁰ *Beck Engraving Co., Inc.*, 213 NLRB 53, 54-55 (1974), enforcement denied on other grounds 522 F.2d 475 (C.A. 3, 1975).

¹¹ *International Ladies' Garment Workers Union AFL-CIO [Bernhard-Altmann Texas Corp.] v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). The obligation to bargain with an incumbent union exacts the "negative duty to treat with no other." *Medo Photo Supply Corporation v. N.L.R.B.*, 321 U.S. 678, 684 (1944).

¹² *Local Lodge No. 1424, International Association of Machinists, AFL-CIO [Bryan Manufacturing Co.] v. N.L.R.B.*, 362 U.S. 411, 412-414 (1960).

¹³ *Tulsa Sheet Metal Works, Inc.*, 149 NLRB at 1503; *Palomar Corporation*, 192 NLRB 592, 598 (1971), enfd. 465 F.2d 731 (C.A. 5, 1972).

¹⁴ See *Southwestern Pipe, Inc.*, 179 NLRB 364 (1969), enforcement denied 444 F.2d 340 (C.A. 5, 1971); *Certified Casting & Engineering, Inc.*, 145 NLRB 572, 573 (1963).

¹⁵ There is testimony that Union Representative Matienzo heard that Diaz had returned to work, but I consider this evidence insufficient upon which to base a finding, particularly since the date and the circumstances of Diaz' return were unspecified.

refusal to bargain, an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

5. By entering into and maintaining a collective-bargaining agreement with Local 810, which agreement contained a provision requiring employees to become members of Local 810, at a time when Respondent was obligated to bargain with the Union as the exclusive representative of its employees, Respondent violated Section 8(a)(3), (2), and (1) of the Act.

6. The strike and refusal to work of Respondent's employees, Manuel Diaz, Martin Hammel, and Frank Paradise, was prolonged after January 19, 1976, by Respondent's unfair labor practices and the strike, which was originally an economic strike, was thus converted into an unfair labor practice strike.¹⁶

7. By refusing and failing, after March 29, 1976, to reinstate its above-named employees upon their unconditional offer to return to work, Respondent discriminated against them in violation of Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

I shall recommend that Respondent cease and desist from the unfair labor practices found and take certain affirmative action which I deem necessary to effectuate the purposes of the Act.

Since it has been found that Respondent refused to bargain with the Union by refusing to execute and abide by the agreement reached between the Union and the Association, I will recommend that Respondent be ordered to sign and honor said agreement and make whole its employees for any loss of wages or other benefits they may have suffered as a result of Respondent's failure to sign the agreement on or about January 19, 1976. Backpay, if any, shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

In addition, since Respondent has been found to have unlawfully entered into a collective-bargaining agreement with another labor organization, Local 810, at a time when it was obligated to bargain with the Union, it shall be ordered to cease and desist from giving effect to said agreement and to reimburse employees the amounts they paid, pursuant to the union-security provisions of that agreement, for union dues or initiation fees, except insofar as employees joined Local 810 prior to the date of said agreement. The amounts of reimbursement, if any, shall carry interest at the rate of 6 percent per annum.

Finally, since Respondent has been found to have unlawfully failed to reinstate unfair labor practice strikers after their unconditional offer to return to work, it shall be ordered to offer them full reinstatement to their former positions or, if those jobs no longer exist, to substantially

equivalent jobs, and to make them whole for any losses suffered in accordance with the backpay formula mentioned above.

Upon the foregoing findings of fact and conclusions of law, and the entire record of this case, I hereby issue the following recommended:

ORDER¹⁷

Respondent, Acme Wire Works, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to sign the contract negotiated by Wire Works Manufacturers Association on behalf of its members and Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, and agreed upon on January 19, 1976.

(b) Recognizing and bargaining with Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any labor organization or giving effect to its contract with Local 810, dated January 1, 1976, so long as it is obligated to bargain with Shopmen's Local 455 as the exclusive representative of its employees in the above-described appropriate unit.

(c) Refusing and failing to reinstate employees who strike to protest unfair labor practices of Respondent upon their unconditional offer to return to work.

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

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

(a) Withhold and withdraw all recognition from Local 810 as the exclusive representative of its employees in the unit which is represented by Shopmen's Local 455 and cease giving effect to or applying its agreement with Local 810 dated January 1, 1976.

(b) Reimburse all present and former employees, except those who joined Local 810 prior to the execution of the January 1, 1976, agreement between Respondent and Local 810, for all initiation fees, dues, and other monies, if any, paid by them pursuant to the union-security provisions of said agreement, in the manner provided in the section above entitled "The Remedy."

(c) Forthwith sign and implement the agreement reached on January 19, 1976, between the Association and the Union insofar as it applies to employees of Respondent in the above-described unit.

(d) Upon execution of the foregoing agreement, give retroactive effect to January 19, 1976, or such other effective date as appears in the agreement reached between Respondent and the Union on that date, and make whole its employees for any losses that may have been suffered by Respondent's failure or refusal to sign said agreement.

conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁶ There is no evidence that the Union or the employees knew before January 19 that Respondent had signed a contract with Local 810 effective January 1, 1976.

¹⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings,

(e) Offer to employees Manuel Diaz, Martin Hammel, and Frank Paradise immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them from March 29, 1976, the date on which the Union made an unconditional offer to return to work on their behalf, until the date of Respondent's unconditional offer of reinstatement to them, together with interest at the rate of 6 percent per annum, in the manner set forth in the section of this Decision entitled "The Remedy."

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

(g) Post at its plant in the Borough of Brooklyn, New York, New York, copies of the attached notice marked "Appendix."¹⁸ Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹⁸ In the event that 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."

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence, the National Labor Relations Board has

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

This Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all these things.

WE WILL forthwith sign the contract of January 19, 1976, negotiated by Shopmen's Local 455 and the Wire Works Manufacturers Association.

WE WILL give retroactive effect to the terms and conditions of said contract.

WE WILL NOT recognize Local 810, Teamsters as the representative of our employees represented by Shopmen's Local 455, and WE WILL NOT give effect to or apply the January 1, 1976, contract with Local 810.

WE WILL NOT refuse to reinstate employees who have struck to protest our unlawful conduct upon their unconditional offer to return to work.

WE WILL make our employees whole for any losses they may have suffered by our refusal to sign the Wire Works Manufacturers Association agreement or for our failure to immediately reinstate employees who offered to return to work unconditionally after abandoning their strike to protest our unlawful conduct.

WE WILL reimburse any employee for all fees, dues, or other payments to Local 810 which we may have unlawfully deducted from their pay under the union-security provision of our contract with Local 810.

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

WE WILL offer Manuel Diaz, Martin Hammel, and Frank Paradise immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights or privileges, and WE WILL make them whole for any loss of pay they may have suffered because of our discrimination against them, with interest at 6 percent per annum.

ACME WIRE WORKS, INC.