

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

Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Falcon Tank Corp. Cases 29-CA-1973, 29-CA-2022, 29-CA-2163, and 29-CB-771-1

November 24, 1971

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

On June 21, 1971, Trial Examiner Thomas S. Wilson issued the attached Decision in this proceeding. Thereafter, the Respondent Union and General Counsel filed exceptions and supporting briefs.

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 Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings,¹ and conclusions² as modified herein.

We agree with the Trial Examiner that on or about January 23, 1970,³ the Respondent Company violated Section 8(a)(1) of the Act by advising that enforcement of company policy as to tardiness and work breaks would be changed in the event the employees voted for the Union.⁴ We also agree that the Respondent Company violated Section 8(a)(1) by individually calling employees into the company office and then asking each employee whether he had signed a union card⁵ and whether he knew who had brought the cards in to be signed.⁶ Unlike the Trial Examiner we do not find such violations to be mere technical violations based on isolated or ambiguous incidents. Nor do we agree with the Trial Examiner's statement to the effect that the Union's election

victory absolved the Respondent from its intent to violate the Act. Accordingly, we are of the opinion that an order and remedy are necessary to dissipate the continuing effects of the Company's unlawful interrogation, polling, and threats concerning changes in the enforcement of its work rules.⁷

Following certification of the Union on March 5 and during negotiations,⁸ the Company offered a 5-cent-per-hour wage increase. This was subsequently raised to 8 cents per hour conditioned upon the Company being relieved of the expenses of uniforms. Because of the employees' dissatisfaction with the Company's negotiating position, a strike began on April 3. The strike lasted 3-4 weeks.

On June 1 the Union requested that an auditor be allowed to examine the Company's books to determine whether the Company was financially able to make a further offer. While this request was pending, the Respondent Company granted five of its employees increases which ranged from 10 to 50 cents per hour.⁹

Under the aforementioned circumstances and even assuming, *arguendo*, that an impasse existed on April 3 and, further, that the Union's June 1 request did not break the impasse, the Company, nevertheless, violated the Act in granting the June 7 increases since the increases exceeded those offered by the Company to the Union at the bargaining table.¹⁰ Accordingly, unlike the Trial Examiner, we find that the Respondent Company's granting of wage increases is in violation of Section 8(a)(1) and (5) of the Act and that a bargaining order is required.¹¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Falcon Tank Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Warning its employees, because of their union activities, not to engage in conduct previously approved or condoned.

orders and it is authorized to restrain other violations, the danger of whose commission in the future is to be anticipated from conduct in the past *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426; *May Department Stores d/b/a Famous-Barr Company v. N.L.R.B.*, 326 U.S. 376.

⁸ Bargaining sessions were held on March 11, 18, or 20, 24, 30 and April 2.

⁹ The increases were granted June 7 and effective for the payroll period ending June 5

¹⁰ *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, rehearing denied 337 U.S. 950. We further note that the unilateral increases were granted only 3 months after the Union had been certified. See *Ray Brooks v. N.L.R.B.*, 348 U.S. 96.

¹¹ See our decision in *C & G Electric, Inc.*, 180 NLRB No. 52.

¹ We disavow the Trial Examiner's general comments concerning procedural matters and his irrelevant, gratuitous opinion of New York labor lawyers.

² The Trial Examiner inadvertently erred in finding that on June 7, 1970, Epstein answered a letter for the Company pertaining to the Union's request for financial information. The record indicates that the correct date of the letter was June 11, 1970, and we hereby make this correction

³ All dates hereinafter refer to 1970.

⁴ Cf. *Martin Electronics, Inc.*, 183 NLRB No.4; *The Dalf Corp., d/b/a Hoffman Bros.*, 188 NLRB No. 57.

⁵ *Struksnes Construction Co.*, 165 NLRB 1062.

⁶ *N.L.R.B. v. Syracuse Color Press, Inc.*, 209 F.2d 596 (C.A. 2, 1954), cert. denied 347 U.S. 966.

⁷ The Board has broad power to determine the necessary scope of its

(b) Coercively interrogating or polling its employees concerning union membership or activities.

(c) Granting wage increases to its employees in order to induce them not to support Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers of America, AFL-CIO, or any other union, as their bargaining representative.

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

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the said Shopmen's Local No. 455 as the exclusive representative of its employees in the appropriate unit found herein with respect to rates of pay, wages, hours, and all other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Brooklyn, New York, copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent Company's representative, shall be posted by 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

¹² 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 be changed to 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

WE WILL NOT refuse to bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, as the exclusive representative of our employees in the appropriate unit. The appropriate unit is:

All production and maintenance employees

employed by us at our Brooklyn, New York, plant; exclusive of office-clerical employees, watchmen, guards and all supervisors as defined in Section 2(11) of the Act.

WE WILL bargain, upon request, with the above-named Union as the exclusive representative of all employees in the unit described above with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL NOT grant our employees wage increases in order to induce them not to support the above-named Union as their bargaining representative.

WE WILL NOT warn our employees not to engage in conduct previously approved of or condoned, because of their union activities.

WE WILL NOT interfere with, restrain, or coerce our employees by illegally interrogating or polling them about union membership or activities.

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

All of our employees are free to become, remain, or refrain from becoming or remaining members of the above-named or any other labor organization.

FALCON TANK CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and MUST not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Fourth Floor, 16 Court Street, Brooklyn, New York 11201, Telephone 212-596-3535.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THOMAS S. WILSON, Trial Examiner: Upon charges duly filed on April 7, June 3, and October 23, 1970, by the Respondent Union and upon a charge filed on May 6, 1970, by Respondent Company, the General Counsel of the

National Labor Relations Board, herein referred to as the General Counsel¹ and the Board, respectively, by the Regional Director for Region 29 (Brooklyn, New York), issued its second amended consolidated complaint dated January 13, 1971, against Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, herein called Respondent Union or Union, and against Falcon Tank Corp., hereinafter referred to as Respondent Company or Company.

The second amended consolidated complaint (complaint) alleged that Respondent Company had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and that Respondent Union had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Each Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing hereon was held before me in Brooklyn, New York, from March 15 to March 19, 1971, inclusive. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross-examine witnesses, and to introduce evidence material and pertinent to the issues.² At the conclusion of the hearing Respondent Company argued the case orally. Respondent Union waived oral argument. A brief was received from General Counsel on April 26, 1971.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT COMPANY

The complaint alleged, the answers admitted, and I therefore find:

Falcon Tank Corp. is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York. At all times material herein, the Company has maintained its principal office and place of business at 8 Lexington Avenue, in the Borough of Brooklyn, city and State of New York, herein called the plant, where it is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of sanitary tanks and related products. During the past year, which period is representative of its annual operations generally, the Company in the course and conduct of its business operations manufactured, sold, and distributed at its plant products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from said plant in interstate commerce directly to the States of the United States other than the State in which it is located.

¹ This term specifically includes the attorney appearing for the General Counsel at the hearing

² General Counsel's unopposed "Motion to Correct the Record" dated May 3, 1970, is hereby granted

Accordingly, I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION INVOLVED

Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, is a labor organization admitting to membership employees of the Company.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. A Few Procedural Problems

In oral argument on the merits of the case Respondent Company counsel referred to the instant matter as a "perversion of justice." A more appropriate word probably would have been "travesty." This would be applicable not only to the merits but also to some procedural matters.

Item 1. Prior to hearing the Regional Office consolidated for the purposes of hearing the complaints in Cases 29-CA-1973, 2022, and 2163 with that in Case 29-CB-771-1. The only palpable excuse for this consolidation was that the CA cases ended with the strike of April 3, 1970, while the CB case began with that same event. The result of this action was to create procedural problems during the hearing due, in large measure, to the fact that Respondent Company attorney and Respondent Union attorney were unavailable at various times during the 5-day hearing. This in turn required the Trial Examiner to order General Counsel to proceed with his presentation of evidence in accordance with which Respondent counsel would hopefully be available on the day in question. In fact this procedural problem became so acute on one occasion that the Trial Examiner even, by request, asked certain specified questions for and on behalf of Respondent Company counsel. Necessarily the Trial Examiner's order in this regard completely disrupted the normal and natural presentation of testimony and, no doubt, handicapped General Counsel in the presentation of his case.

It is a well-known historical phenomenon that New York labor lawyers are, or consider themselves to be, a breed apart so far as their availability for Board hearings is concerned. This reluctance to appear seems to stem from more remunerative employment elsewhere or perhaps, in some cases, from bad advice previously given to the client.³ However, it would seem that a little more care in setting hearing dates so that attorneys can, and will, be available throughout would eliminate many of the difficulties such as occurred in the instant matter.

Item 2. Strangely enough as this 5-day hearing wound up General Counsel moved to hold the hearing open so that he, whose Regional Office had set the case for hearing, could present a witness, apparently theretofore unavailable for undisclosed reasons, at some unspecified date so that this witness could testify to matters alleged in the complaint

³ This opinion is a generalized one formed from many years of past experience in hearing labor cases in New York and is not applicable to the attorneys appearing here.

and thus be a part of General Counsel's case-in-chief. This seems to be a strange method of trying a case.

Item 3. The strike of April 3, 1970, which played a part in both the CA and the CB aspects of this matter was all but 1 year old when this hearing was held. The cause for this delay was not explained at the hearing. However, it does create the impression that a dead horse was being whipped.

Item 4. Paragraphs 8 and 9 of the complaint allege that "on or about November 25, 1969," Respondent Company made certain promises of benefit and threats of reprisal "to induce [the employees] to refrain from becoming or remaining members of any labor organization, and to refrain from giving any assistance or support to any labor organization, and to induce them to abandon their membership in and activity on behalf of any labor organization." These promises and threats would constitute well recognized unfair labor practices except for the fact that the testimony adduced here proves, beyond a peradventure of a doubt, that there was neither union nor concerted activity among Respondent's employees until January 1970. The pleading thus appears to be, at best, a *non sequitur*.

B. The Case Against the Company

1. The facts

About July 1969 First Machinery Company, a previous customer of Ace Stainless Tank Co., purchased the assets of Ace Tank under the Bulk Sales Law. First Machinery then created a corporation known as Falcon Tank Corp., Respondent Company here, to operate these purchased assets in the same business as Ace had previously conducted and under the general managership of Lloyd Dawe, formerly the owner of Ace, and the foremanship of Angelo Ortiz, formerly the foreman for Ace.

From August 22, 1969, to January 16, 1970, Respondent Company increased the wages of its 10 employees by 15 to 50 cents per hour even though Respondent Company claimed, without challenge, that it lost some \$20,000 in its first 6 months of operation.⁴

At some indefinite date in January, "about 3-4 weeks" before January 22, 1970, employees Alfredo Ortiz⁵ and Ramond Valois, during a lunch period in the plant with the other eight employees of Respondent Company, suggested to the employees that they join a union. The employees seemed agreeable. So some 3 weeks thereafter Alfredo and Valois visited the union hall where they saw Business Agent William Colavito who explained to them the benefits the employees could expect from union membership, such as a raise in wages, a welfare plan, insurance, etc. At this time Colavito gave them cards to be signed by those employees desiring a union. At lunchtime on January 22, Ramon and Alfredo passed out these union membership cards after

⁴ The allegation of paragraphs 8 and 9 in the complaint is in effect that "on or about November 25, 1969," Respondent Company's officials "offered and promised to its employees wage increases . . . to induce them to refrain from becoming or remaining members of any labor organization . . . and to induce them to abandon their membership in and activities on behalf of any labor organization." As there is no oral testimony to this effect in this record and there is undenied testimony that the employees engaged in no union or concerted activities known to or suspected by the Company until January 22, 1970, any finding in accord with the above

explaining to the employees the union benefits. Every employee signed.

These executed cards were then delivered to Colavito, who on January 23⁶ wired Respondent Company as follows:

SHOPMEN'S LOCAL UNION NO. 455 HAS BEEN DESIGNATED BY A MAJORITY OF YOUR SERVICE AND MAINTENANCE EMPLOYEES AS THEIR COLLECTIVE BARGAINING REPRESENTATIVE. AND ACCORDINGLY REQUESTS A MEETING FOR THE PURPOSE OF DISCUSSING TERMS AND CONDITIONS OF EMPLOYMENT.

IF YOU HAVE ANY QUESTION AS TO ITS MAJORITY STATUS, LOCAL 455 IS WILLING TO DEMONSTRATE THE SAME TO YOU AND/OR ANY IMPARTIAL PERSON AGREED TO BY THE PARTIES WITHIN THE NEXT 24 HOURS. AT ANY REASONABLE PLACE AND HOUR SELECTED BY YOU.

PLEASE CALL THE UNDERSIGNED AT GR-5-2226 AND ADVISE OF YOUR POSITION.

Probably on January 23, the same day as the above telegram was received by the Company, Angelo Ortiz joined the employees on the company balcony during the lunch break. With all the employees present Angelo mentioned the receipt of the above telegram, said he thought the employees had made a mistake in joining the union and inquired as to why the men wanted a union because the Company was giving such good benefits to its employees. Angelo stated on this and possibly other occasions,⁷ that Respondent Company bosses intended, if the Union got in, to see to it that the employees returned from their morning and afternoon breaks on time and not to allow them to drift back at their leisure from such breaks as they had been doing in the past. He added that if the men did not report for work on time in the event the Union got in, such employees would be fired and that lateness in reporting for work would not be condoned as it had been in the past. In short, Angelo insisted that the lax ways of the past, about which he had criticized the employees over a long period of time, would be stopped in the event the employees voted for the Union. These statements constituted threats and interference, restraint, and coercion in violation of Section 8(a)(1) of the Act. After Angelo had made his statements, Alfredo asked the employees if they still wanted the Union. In Angelo's presence each employee answered "Yes" to the question.

After the receipt of the above telegram, company officials called an employee, if not all the employees except Alfredo, one by one, into the company office where the employee was asked if he had signed a union card and who had brought the cards in to be signed. Under proper safeguards an employer faced with a request to bargain is entitled to

allegations of the complaint would necessarily have to be based upon pure speculation. Accordingly, these paragraphs of the complaint will have to be dismissed, which I hereby do.

⁵ Alfredo is the brother of Foreman Angelo Ortiz. First names will therefore be used.

⁶ All dates herein are in the year 1970 unless otherwise specified.

⁷ It is difficult, if not impossible, to tell from the testimony of the witnesses whether there was one or more similar meetings on the balcony during the lunch period.

investigate the truth or falsity of the respondent's claim of majority representation. The proper safeguards were not present here. The inquiry as to who was responsible for bringing the union cards into the plant is obviously interference, restraint, and coercion in clear violation of Section 8(a)(1) of the Act.

Thereafter the parties agreed to a consent election in a production and maintenance unit. The election was held on February 13 and was won by the Union by an 8 to 1 vote. On March 5 the Union was certified as the exclusive bargaining agent for the employees in the production and maintenance unit.

Following the certification the Company and the Union negotiated on March 11, 18, 24, and 30 and April 2 in sessions which lasted from 9:15 a.m. to 1 p.m., according to the Union, or several hours later, according to the Company.

The negotiations began on March 11 when Business Agent Colavito, representing the Union, presented Attorney Epstein, representing the Company, with a proposed collective-bargaining agreement consisting of 29 sections encompassing some 58 pages of typewritten material which purported to cover the wages, hours, and working conditions of Respondent's 10 employees. It was suggested that the parties go over the proposal section by section and page by page. This the parties started to do.

The trouble began on the first two lines of page 1 of section 1 which read, "This agreement shall be applicable to all production and maintenance employees including plant clerical employees. . . ." The Company had no "plant clerical employees" among its 10 employees and had no plans to have any such. Epstein said that under these conditions he could not understand why plant clerical employees were included. Undaunted, Colavito answered that if and when the Company had any plant clericals, the Union wanted them and, besides, such plant clericals were included in all of the 200 contracts that Local 455 had in the industry and so they would be in this contract. The debate on this question waxed so hot and heavy, as well as so inconclusively, that it was decided to leave that section and discuss section 2.

Section 2 provided that the International Union "is not a party to the contract" but before the contract or amendments thereto could "become binding and effective," the International had to approve the contract and the amendments. Epstein objected that the contract was to be between Local 455 and the Company and that the International had no part therein, especially as the International had not been on the consent-election ballot. Undaunted, again Colavito answered that this was the way it was in all of the 200 contracts the Local had and that was the way it was to be in this contract. Again the debate waxed hot, heavy, and inconclusive so that it was again decided to pass on to section 3 on "union recognition."

Section 3 provided that the Company was recognizing the Union as the exclusive representative of the Company's "production, maintenance and plant clerical employees as defined in section 1" of the proposal. The long argument over section 3 was, of course, a mere reiteration of that over section 1 and with the identical result, so that the parties decided to pass on to section 4.

Section 4 of the proposal, labeled "union security," is a four-page provision of six (A-F) parts providing, among other things, that all employees should be or become members of the Union within 31 days and be discharged if within 3 days after notice of delinquency from the Union the employee did not furnish the Company with documentary proof of compliance and providing for the establishment and financing of a nondiscriminatory hiring hall from which the Company would obtain all its employees. In the past the Company had hired Spanish-speaking employees off the street and so Epstein could see no advantage to the Company to having to hire through a hiring hall and said so. Again section 4 was in all of Local 455's 200 contracts and would be in this one, according to Colavito. At some point during these negotiations Epstein asked to see the 200 contracts of Local 455. The request was refused—at least until the Company signed the agreement. The discussion of section 4 consumed the remaining time of the negotiations that day, whatever time they may have recessed, so that little, if any, agreement had been reached except that the parties agreed to meet again on March 18.

In order not to unduly extend this report by a discussion of each and every one of the 29 sections, it need only be said that the same practice, the same arguments, and the same results followed in the succeeding sessions with a few notable exceptions. For instance the Company agreed to the checkoff proposal although the dues in that proposal had been raised from \$6 to \$8 per month since the time that the proposal had been mimeographed.

At the session of March 18 the parties finally reached section 6 "hours of work" and section 7 "overtime pay"; i.e., money matters. With money matters at issue, Epstein began to argue about the fact that his "tiny, tiny" company had already lost \$20,000 and could not afford to pay any further wage increases after those increases granted during the fall and winter of 1969 without being forced into bankruptcy. From this point on, while money matters were at issue, this argument about Epstein's "tiny, tiny" company was repeated with the same frequency as that regarding the 200 contracts of Local 455 had been previously.

It must be noted here, however, that the union wage and overtime proposals as well as the Union's proposals for a "welfare fund," a "pension fund," and a "sick leave fund" could hardly be classified as moderate. Overtime was either double or triple time according to a complicated formula. The wage proposal provided for a \$1-per-hour across-the-board increase as of February 13, 1970, and a further increase of "not less than" 25 cents per hour across-the-board on July 1, 1970. Further, the proposal provided that the second and third shifts would work 7 hours for 8 hours' pay, thereby providing a shift differential of approximately 50 cents per hour per man. Of course, the Company had never had a second or third shift and had no plans for any but, like everything else in this highly legalistic, complicated union proposal, Local 455 had it in 200 contracts and it would have it in this one regardless of the fact that the Company had no such shifts and planned none. So Epstein reiterated time and again that his "tiny, tiny" company could not afford any of such monetary increases. Epstein did however offer a 5-cent-per-hour increase which he

subsequently increased to 8 cents per hour conditioned upon the fact that the Company would be relieved of the expense of uniforms for its employees.

At one session Epstein for the Company brought in an 11-page counterproposal covering among other things a complicated "management rights" clause with others covering "plant visitation," "call-in pay and report-in pay," "no strike-no lockout," "holidays," "vacations," "leaves of absence," and "miscellaneous." This turned the tables and now it was Colavito objecting and agreeing to nothing but saying that he would "look them over" or "consider them." Colavito never got around to announcing the results of his "consideration."

This in short constituted the negotiations here. There was agreement on the checkoff and on the use of the bulletin boards. There was agreement on little else. Everything else was left in limbo.

The April 2 negotiation session ended before the parties had even gotten to a consideration of the last section of the proposal, section 29 of the Union's proposal labeled "termination." The parties did make an appointment to continue these negotiations on April 7 when section 29 would be considered for the first time.

On the evening of April 2 Colavito met with the company employees and informed them that the Company had not signed the union contract and, therefore, the employees would have to go on strike. The employees began picketing the company plant on April 3. One rather nonenthusiastic union employee purportedly joined the picket line because he was told by Alfredo Ortiz, an enthusiastic union supporter, that, in effect, "this union does not fool, it breaks the leg."

It is noteworthy in this regard that the Union supplied Art Shaffer, whom Colavito had requested to take care of the picket line at the company plant, on or before April 1 and, therefore, prior to the negotiation session of April 2, with picket signs for use at the company premises. It was these signs the employees used when the picket line was set up on April 3.

The meeting scheduled for April 7 was, in fact, held at the request of a Federal mediator in the mediation services offices. The parties were segregated into separate rooms. A few minutes thereafter the mediator reported to the Company that the Union was "standing firm" on its offer. That report ended the meeting. No further meetings have ever been called.

Picketing at the plant lasted for 3 or 4 weeks. Within a few days of the establishment of the picket line some of the employees began drifting back to work for the Company. Some of the employees took jobs with other companies. During the final 2 weeks of picketing Art Shaffer was the sole picket on the line.

While the picket line was in existence, the Company employed a man with a covered carryall truck to pick up the employees then working for the Company, deliver them into the plant, and return them home after work. During this same period of time the Company paid the employees working at the rate of time-and-one-half their regular wages. After the picketing ended, the wages of the employees returned to the regular time rate. As of June 5

Respondent Company increased the wages of five employees from 10 to 50 cents per hour.

Ramon Valois, with Alfredo the leader of the organizational effort, also returned to work and was subsequently discharged. The complaint contains no allegation that this discharge was in violation of the Act.

Alfredo Ortiz never sought to return to work with the Company.

2. Conclusions

In the above statement of facts I have already indicated that Respondent Company committed at least two violations of the Act prior to the holding of the consent election. Although, no doubt, the Company intended thereby to interfere with, restrain, and coerce its employees into abandoning their organizational effort and thus these acts are technically violations of the Act, it is quite obvious from the 8 to 1 vote for the Union in the consent election that the Company's intent was not realized.

During an economic or unfair labor practice strike, the employer enjoys the right to continue operating his business if he can even though he may have to pay higher wages to those employees working than he had previously paid. By the time of the June 7 wage increases, negotiations with the Union had long since ended. An employer is not required to freeze his wage rates forever merely because there had been wage negotiations in progress some months in the past. Life must go on. Hence I see no unfair labor practices in the wage increases granted or paid by Respondent Company.

Nor can I see any refusal to bargain in the instant matter by Respondent Company. At the time of the strike on April 3 the parties to the negotiations had not even completed their original, preliminary survey of the Union's long and technical proposals. In fact the parties had not even considered the question of the duration of the contract, i.e., section 29 "termination." That was to have been considered at the next meeting on April 7. Following that consideration the parties would then have gotten to the nitty gritty of "give and take" bargaining. Of course Respondent Company had voiced innumerable objections to all but two of the Union's proposals and had otherwise agreed to none, not even the recognition clause. But even there Respondent Company had the right to object to the Union's attempt to expand the appropriate unit by the inclusion of "plant clericals" therein. It is also true that this objection may well have been more theoretical than real because the Company employed none such and had no immediate intention of hiring any. But, on the other hand, the Union had no legitimate right to insist upon expanding the unit beyond that in which the consent election had been held, to wit, the production and maintenance employees. If the Company chose to agree to this unilateral expansion of the unit that would be one thing but it also had the right not to agree to such expansion. Throughout Epstein was voicing legitimate objections to a document which was almost worthy of a General Motors negotiation.

Likewise it must be noted that at the time of the strike Colavito had under "consideration" some 11 pages of company proposals to which he had made objection but had given no final answer to or attempted to reconcile with

his objections. His own called strike of April 3 canceled any further talk or bargaining regarding the company proposals—as well as those made by the Union. The Union made no attempt to continue negotiations during the strike or thereafter.

Even if we assume that Company Attorney Epstein intended ultimately to prevent an agreement from being arrived at, which might well be the fact, Colavito's impatience, exemplified by the commencement of the strike on April 3 and the failure to continue negotiations thereafter, effectively prevented any and all proof of any such intent on Epstein's part. There is more to collective bargaining than putting a contract proposal before an employer and saying, "sign here," which appears to have been Colavito's theory of collective bargaining. The Board and the courts universally hold that bargaining collectively is a give-and-take proposition between the union and the employer. The parties here had almost reached the give-and-take portion of these negotiations when Colavito's impatience ended the negotiations. If perchance Epstein's mind was "hermetically sealed" against arriving at any agreement, the cessation of negotiations by the strike prevented Epstein from showing it.

On June 1, Union Attorney Belle Harper requested the right to have an auditor examine the Company's books "to determine whether in fact the Company is financially able to make a further offer." On June 7, Epstein answered that the Company "is prepared to permit the examination of its general ledger, which will reflect its financial condition." When the Company had made its 5-cent-per-hour, or its conditional 8-cent-per-hour, wage offer to Colavito during the negotiations, Colavito had made no similar request to see the Company's books. Although Epstein failed to return one or two telephone calls from Harper, he finally did inform Harper that the General Counsel was then examining the company books and that, if there were more that the Union wanted after that examination, he would be glad to discuss the matter. That ended this exchange which had all the appearance of a belated attempt to shore up a weak or nonexistent case.

So, as there is in this record no proof that Respondent Company was not bargaining in good faith with the Union while the Union wanted to bargain, I must, and hereby do, dismiss the complaint as it pertains to the alleged refusal to bargain by the Company.

Despite the findings above made, I am also going to dismiss the Section 8(a)(1) allegations against the Company here on the ground that at the worst they were isolated, and perhaps even ambiguous, incidents and that it would not, under the circumstances existing here, effectuate the policies of the Act to provide a remedy therefor.

C. *The Case Against the Union*

The Facts and Conclusions

The case against the Union consists of evidence (1) that during the strike a number of padlocks on the plant doors had been jammed with wood or welding wire so that they had to be replaced six or seven times, and (2) of two

incidents where pickets used harsh words or threatened men driving cars or trucks into the plant.

In a case where the picketing continued for 3 or 4 weeks as this one is said to have, the above recitation indicated that these three incidents were, at least, isolated events.

However, during this period of the strike there is evidence that six or seven padlocks used by the plant were jammed with wood or bailing wire and were thus made unusable. Presumptively from the number of jammed locks during the strike period one would assume that probably the Union or the strikers had something to do with the jamming. The closest any testimony came to proving that the Union was responsible for this jamming was the testimony of one employee who, on one occasion, saw a group of employees, including one union agent, Matienzo, looking at a jammed padlock. As a witness Matienzo recalled the incident but denied having had anything to do with the jamming of the lock and, indeed, testified that he told the group looking on that this was "kid stuff" and would do no good. However, there being no evidence showing union responsibility for this—or any other—jammed lock, I must, and hereby do, dismiss this allegation of the complaint.

As for the driving incidents, there is testimony by company officials that on one occasion when the company driver was delivering the employees into a plant one morning during the strike, Union Agent Matienzo threatened the driver as he drove his carryall out of the plant after delivering the employees for work by yelling at him, "We know where you live. We'll get you." The other company official testified that Matienzo shouted at the driver, "We'll fix you up. We'll wait for you in Jersey."

Matienzo also recalled the incident and admitted that he probably called the driver "a scab" or words to that effect. Technically that is a threat and, therefore, a violation of Section 8(b)(1)(A).

Unfortunately conduct and verbage on a picket line is not that which one would expect at a pink tea. Tempers will rise on a picket line and things will be said that should not be said. It is unfortunate but it is also life.

The final incident here is another case of making a molehill into a mountain. A truck made a delivery into the plant. As the truck pulled out of the plant, Shaffer, who was on picket duty as usual, yelled at the driver asking if he had made a delivery to the plant and that he should not have done so because they were on strike. Thereupon either Dawe or Angelo Ortiz or both (depending upon which version of the company testimony one chooses to believe) remarked to the driver that either "you don't have to worry about getting deliveries here because as far as I am concerned, there is no strike in here because I don't see any picket lines in here" or "where are the pickets if we're on strike."⁸ Then, according to company witnesses, Shaffer yelled at the driver, "You make any more deliveries here we'll fix you up" or "You, if you ever come here again that will be the last thing you ever do." In his version Shaffer denied making the threat and merely remarked to the driver that he, Shaffer, "would appreciate" it if the driver did not make any more deliveries.⁹ Thereupon all the witnesses are in agreement that the three individuals involved began

⁸ With picket Shaffer admittedly standing within a few feet, either statement appears factually incorrect.

⁹ This pink tea phraseology seems slightly unrealistic under the circumstances.

choosing each other "for size," as one witness aptly phrased it. However, happily, before any selection was made, cooler heads prevailed and all returned to their respective duties.

Assuming, without deciding, that the threat was made, it would have constituted an unfair labor practice but, like the other matters here, still remained an isolated event in a long strike.

Because of the isolated and picayunish nature of these events, like those found against the Company, I feel that the policies of the Act will not be effectuated by providing a remedy here and wasting more time over that. Too much time has been wasted on this case already. I therefore dismiss the allegations against the Respondent Union.

CONCLUSIONS OF LAW

1. Falcon Tank Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Neither of the Respondents here have engaged in any of the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER

Accordingly, I hereby order this case dismissed *in toto*.