

ABC Prestress & Concrete and Peter McDermott.
Case 19-CA-5608

February 12, 1973

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND
PENELLO

On July 7, 1972, Administrative Law Judge¹ Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Peter McDermott, Daniel O'Donnell, and Harold McClanaghan filed exceptions and a supporting brief, and the Respondent filed a brief in reply to the exceptions.

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, and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

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 complaint be dismissed in its entirety.

¹ The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

² Member Fanning deems it unnecessary to rely on *Claremont Polychemical Corporation*, 196 NLRB No. 75 Member Penello, who was not a member of the panel which decided *Claremont Polytechnical Corporation*, also believes that the cases may be distinguished

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Trial Examiner: This case was tried at Billings, Montana, on May 2 and 3, 1972. The charge was filed by Peter McDermott, an individual, on January 20 and the complaint issued on March 13, 1972. The primary issues are: (1) whether eight employees of ABC Prestress & Concrete (herein called Respondent) quit their employment, engaged in a strike that was protected activity under Section 7 of the Act, or engaged in a strike to force Respondent to pay retroactive and current wage increases that would have been in violation of the Economic Stabilization Act of 1970, and (2) whether Respondent violated Section 8(a)(1) of the Act by discharging those eight employees and by refusing to reinstate six of them who offered to return to work.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine

witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Montana corporation engaged in the manufacture of prestressed concrete at its plant in Billings, Montana. During the past year, it purchased goods and materials valued in excess of \$50,000 directly from points outside the State of Montana. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Events

1. The background

Respondent employs some 19 employees who work on various aspects of manufacturing reinforced concrete building components such as panels, columns, and bridge and building beams. These employees are not represented by any union. In the past, Respondent has usually granted wage increases on January 1 and July 1 of each year after negotiating with a group of employees who were informally selected by the employees to represent them. In May 1971, employees Juell Davisson, Ron Becker, Sheridan Becker, and Steve Ketterling were involved in such negotiations with Respondent's general manager and vice president, Robert L. Eardley. It was agreed that changes would be made as of July 1, 1971. Also in May, Sheridan Becker brought Eardley a list of demands from the employee committee. One of these demands was for a 30-cent-an-hour increase effective July 1, 1971. No agreement was reached because of economic difficulties that Respondent had encountered. About that time, Respondent had suffered a loss of business that was so severe as to require a substantial layoff. Respondent was even giving serious consideration to closing the plant. Thereafter, a large number of employees were laid off. Business picked up and gradually the employees were recalled in August and September 1971. By the end of September, all were recalled.

On August 15, 1971, phase 1 of the wage freeze under the Economic Stabilization Act mandated an absolute freeze on wages. Though in May 1971, Respondent had agreed to a change that would be effective on July 1, negotiations had not been completed and the raise had not been granted because of the business conditions set forth above.

On September 29, 1971, while phase 1 of the freeze was still in effect, employees Ron Becker, Sheridan Becker, Juell Davisson, and Steve Ketterling met once again with Eardley. The employees asked for an immediate 50-cent-an-hour raise. Eardley replied that he thought a 25-cent-per-hour raise retroactive to July 1, 1971, would be a fairer approach. Ron and Sheridan Becker stated that they

hadn't worked very much during the summer, that the retroactive pay didn't mean much to them and they felt that a 50-cent-an-hour raise was a better solution. It was finally agreed that Respondent would pay a 25-cent-an-hour increase at the end of the freeze retroactive to July 1, 1971.¹

On or about November 9, 1971, which was still during the pendency of phase 1 of the wage freeze, Respondent's general superintendent, Russell E. Egosque,² told employee Daniel O'Donnell in the presence of other employees that Eardley would give them a 25-cent raise as soon as the freeze was off and another 25 cents January 1, 1972.³

Sometime prior to November 13, 1971, which was the last day on which phase 1 of the wage freeze was in force, Eardley came to the conclusion that he could not lawfully pay any retroactive pay and could legally only pay a 5-1/2-percent increase at the end of phase 1. On November 14,⁴ he raised the pay scale by 5-1/2 percent, which for employees such as Daniel O'Donnell raised the pay by 23 cents an hour from \$4.20 to \$4.43 an hour. Though it was his understanding that no retroactive pay could lawfully be given, Eardley wrote to the Internal Revenue Service on December 20, 1971, as follows:

Would you please give us an interpretation of the following pay adjustment situation:

(A) ABC Prestress management had informed our employees in November, 1970 that pay adjustments would be negotiated prior to July 1, 1971.

(B) During the late spring and summer, ABC Prestress was in the midst of a low-production period and a heavy layoff of employees. The employees were informed that negotiations would be delayed until full production was resumed and retroactive pay back to July 1, 1971 would be considered.

(C) Production began to pick up in September and negotiations were resumed. A joint decision was reached on September 29 to increase all scales \$.25 per hour retroactive to July 1. I believe that this is the same decision that would have been reached in June if business had been normal. At the end of the freeze period we were told that the increase could not exceed 5-1/2 percent with NO retroactive pay.

(D) A 5-1/2 percent increase was instituted on November 14, 1971.

On page 2 of your General Information pamphlet it is indicated that "pay adjustments resulting from agreements . . . negotiated prior to November 14, 1971 . . . may be put into effect . . . during the period of November 14, 1971 to January 1, 1972" without notification to the Board being required.

May ABC Prestress pay a \$.25 per hour increase

¹ Eardley credibly testified that this was the agreement, at least in his mind. There was no conflicting evidence.

² Egosque is directly under Eardley in Respondent's chain of command. He has general responsibility for production at the plant. As he, among other things, uses independent judgment in responsibly directing employees, he is a supervisor within the meaning of the Act.

³ This finding is based on the credited and uncontradicted testimony of O'Donnell.

Employee Juell Davisson credibly testified that on January 5, 1972, he saw a notice posted on the bulletin board which stated that effective July 1, 1972, rates would be increased 25 cents per hour. However, Bookkeeper Karen Shankle also credibly testified that the notice was a retyping of an

with retroactive pay to July 1, 1971 as was agreed and as the above quoted paragraph would indicate?

If not, this is a real injustice to workers who are denied a reasonable increase because business was poor and they had been temporarily laid off.

2. The employee meeting of January 6 and the work stoppage of January 7, 1972

A number of the employees had expected a wage raise on January 1, 1972. They did not receive it and on January 6, a large majority of the employees met in the plant's lunchroom at 4:30 p.m., which was the end of the workday. The employees discussed what action they might take to obtain retroactive backpay (backdating the November 14 raise to July 1, 1971) and a new wage increase (to start January 1, 1972). The employees talked about the possibility of not going to work the next morning until they had something settled on the backpay and pay raise issues but nothing was decided.

At 8 a.m. on January 7, 1972, which was the beginning of the workday, only two of the employees had begun work. The other 15 or 16 were in the lunchroom where they held a meeting. Once again, the retroactive pay and a January 1 raise were discussed. Some of the employees who were present were Davisson, Carr, McDermott, O'Donnell, and Ketterling. O'Donnell asked, "Are we going to see about our raise this morning, our retroactive backpay?" Juell Davisson replied that he thought they should. Davisson, who was a leadman, believed that it was his obligation to tell General Superintendent Egosque that no one was going to work that morning until something was settled. Davisson then saw Egosque in the plant and told him that they wanted to get something settled about their retroactive backpay and pay raise.⁵ Egosque replied that Eardley had not come to work yet, so Davisson went back to the lunchroom. About 15 minutes later, Egosque went to the lunchroom and said that Eardley had arrived. Eardley then came into the lunchroom and asked what the problem was. Davisson replied that they wanted something settled about their retroactive backpay and the raise for 1972. Davisson also said that he had been down to the Iron Workers Union and discussed it with them. Eardley then asked Davisson to come into his office. Davisson asked which of the employees wanted to come. Ketterling, O'Donnell, and Ron Becker went along.

The meeting in the office took place about 8:30 a.m. while the other employees were waiting in the lunchroom.

old notice to show the current wage rates and that the 1972 date was a typographical error. She also credibly testified that Eardley told employees that the date was in error and that the copy with the error was then destroyed.

⁴ There was testimony that the increase was granted on November 13, but it is undisputed that the raise was given when phase 1 expired, which was midnight of November 13.

⁵ This finding is based on the credited testimony of Davisson. Davisson also credibly testified that he told Egosque that he (Davisson) was quitting until the matter was settled and that he didn't know about the rest of the employees but that they were going to stay in the lunchroom until something was settled.

Davisson asked Eardley about a new 25-cent-an-hour raise and Ketterling said they wanted their retroactive pay.⁶ When retroactive pay was discussed, it was understood that it referred to making July 1, 1971, the effective date of the 5-1/2-percent increase that was granted on November 14, 1971. Eardley then showed the employees a copy of the letter he had written to IRS (the text of which is set forth above). He said that he hadn't received a reply from IRS but that he had called them after writing the letter and had been told that IRS was waiting for a clarification of what the new law meant. O'Donnell told Eardley that he thought that if they got retroactive pay to July 1 they wouldn't have had a raise that year and that they would be eligible for the January 1 raise under the wage freeze. Eardley asked Davisson whether he wanted to talk directly to the IRS agent and a telephone call was placed for an agent named Don Torske. Torske could not be reached and a message was left to have him call back. Eardley then gave the employees papers he had received from IRS and told them to read them. The employees took the papers back to the lunchroom.

In the lunchroom, the employees were told that Eardley was checking with the IRS and that he would let Davisson talk to the IRS man when he could be reached on the phone. McDermott said that he didn't care if they got the retroactive pay but that he was interested in the 25-cent raise. Most of the employees agreed. When the employees were discussing the letter from the IRS, Egosque came into the lunchroom and called Davisson to the office to speak to the IRS agent. Davisson went to the office about 9:15 a.m. and spoke to the IRS agent on the telephone for 10 or 15 minutes during which time Eardley was out of the office. The IRS agent told him that no decision had been reached on the retroactive backpay and they were waiting for word from their superiors.

Davisson went back to the lunchroom and reported this conversation with the IRS agent to the employees. McDermott said that they should get something in writing and that they weren't really concerned about the retroactive pay. However, Davisson felt that in order for them to get the current 5-1/2-percent increase, they would also have to receive the retroactive backpay to July 1. He was of the opinion that if the retroactive backpay was given effective July 1, which was before the price freeze, then another 5-1/2-percent raise could be granted legally in January 1972.⁷

Sometime before 10 a.m., the employees sent Davisson, together with Sheridan Becker and Steve Ketterling, to speak to Eardley once again. Davisson told Eardley: "Not only do we want our retroactive pay right now but we want

another 5-1/2 percent effective 1 January." Eardley replied that he couldn't promise that because he didn't have a determination from IRS on whether the retroactive pay was allowable. Davisson asked Eardley to come out and explain that to the men. Eardley replied that he had explained it to Davisson, who was their representative, and that he didn't see any point in talking any more about a legal issue. These findings are based on the credited testimony of Eardley. Neither Sheridan Becker nor Ketterling testified about this conversation. Davisson testified that he asked for something in writing to the effect that they would get another 5-1/2-percent raise if the retroactive pay went through. I do not credit Davisson's assertion that the employees were seeking a conditional commitment for future action on the part of Respondent.

One of the employees said that they felt they were not being properly represented. Eardley replied that it might be to their purpose to have a contract and that, if they needed a lawyer, he would help them. After saying that he would not take action without the IRS's approval, Eardley asked Davisson what he was going to do in the meantime, while they were waiting for a determination. Davisson replied that he would have to go back to talk to the men. The employees then went back to the lunchroom.

Davisson reported to the employees in the lunchroom what had occurred in his meeting with Eardley. He told the employees that he was ready to quit until everything was settled to his satisfaction and that he was going home. O'Donnell told Cole Graham that they might as well go home because it was evident they weren't getting the raise.

Sheridan Becker then went to the office to pick up the paychecks for all the employees. January 7 was the regular payday and the checks were prepared even though they were not normally distributed until later in the day. The secretary gave Becker his check and said that the other employees would have to pick up their own. Some of the employees did pick up their checks and the balance of the checks were distributed by Egosque.

A number of employees then left the plant. One employee returned to work while the others were leaving and other employees returned immediately after lunch. The eight employees named in the complaint did not return to work that day. Those employees were Sheridan Becker, Lawrence Carr, Juell Davisson, Robert Graham, Steven Ketterling, Harold McClanathan, Peter McDermott, and Daniel O'Donnell. These employees engaged in a work stoppage and left the plant in order to put pressure on Respondent to make the November 14 pay raise retroactive to July 1, 1971, and to obtain another 5-1/2-percent increase effective January 1, 1972.⁸ When the

⁶ This finding is based on the credited testimony of O'Donnell. Eardley testified that only retroactive pay was discussed at this meeting. Though I believe that Eardley was a credible witness, O'Donnell's testimony is more consistent with the matters that were discussed at the employee meetings and I believe it was more accurate.

⁷ Davisson also testified that the employees more or less agreed that they should get a contract from Eardley saying that if the retroactive backpay was given then Respondent would agree to grant another 5-1/2 percent. I do not credit Davisson's vague assertion in this regard.

⁸ O'Donnell testified that he knew Respondent was behind in work and he thought that, if the employees left the job for 2 or 3 days, Respondent would become further behind and more apt to give them the raise. Sheridan

Becker testified that he thought he could get the wage increase by leaving the plant. Davisson testified that he walked off in order to get an agreement on the retroactive backpay issue and the raise. Ketterling testified that the employees decided to walk off because they did not have an agreement on their wage increase. Carr testified that he left with the group because they wanted Eardley to talk to them about the 25-cent-an-hour raise and in addition they were talking about retroactive pay back to July 1971.

Weighing this testimony in the light of the credited findings with regard to the discussions among the employees at their various meetings, and the statements made by the employee representatives to Respondent in meetings with Eardley, I believe that the finding is warranted that the object of the work stoppage was to put pressure on Respondent to grant their

employees walked out of the plant, they left their work clothes there.

Though Eardley had asked Davisson at the last meeting what the employees would do, the employees gave Eardley no answer except by their action in walking off the job.⁹

3. Respondent's reaction to the walkout

When the employees walked off the job, Eardley instructed Egosque to make up a list of those employees who had not come back by 1 p.m. so that he would know how many to replace. By 2 o'clock, the eight employees named above had not returned to work and Eardley instructed Egosque to replace them. At that time, Respondent treated those eight employees as quits. Eardley testified that he could have decided as early as 2 p.m. that day not to rehire the eight employees, though at that time he did not think they would be reapplying in the near future as they, in his opinion, had quit. He also testified that in the past he had rehired people who had quit, but at that time the Company had a policy not to make such rehires. He averred that the reason for this was that Respondent had a crew of about 18 men and when 8 of the best men quit, it left Respondent in a bind. Eardley credibly testified, and I find, that at 2 o'clock on January 7 Respondent made the decision to go on the assumption that the ones who did not return had quit. He further credibly testified that if the eight had come back by 1 o'clock, they would have been put to work but that they did not come back.

On Friday and Saturday, January 7 and 8, Egosque spoke on the phone to a number of potential replacements. He hired a few replacements on January 7 and the bulk of the remaining replacements on Saturday, January 8. The last replacement was hired on Sunday, January 9. Though the offers and acceptances were made on the phone, none of the employees reported for work until 8 o'clock Monday morning, January 10. At that time, they filled out application forms and went to work. Also on January 10, Respondent posted a notice at the plant which read:

It is important to the future success of this company that the following two policies be established at this time:

(1) The employees who "quit" on January 7, 1972 and all full time employees who quit in the future will not be rehired under any circumstances.

4. The employees' offer to return

Not all of the employees joined in the walkout. Some stayed on the job and others returned after the lunch hour on January 7. About 2 p.m. on January 8, employee O'Donnell was driving by the plant when he saw the vehicles of two employees who had walked out with him parked in the parking lot. O'Donnell then talked to a number of the employees on the telephone. He told them that some of the employees had not left the job, that others had returned and that he was thinking about calling Egosque and telling him that he was coming back on

Monday. The result of the telephone calls was that O'Donnell decided to call Egosque and offer to return to work on Monday. Employees Sheridan Becker and Ketterling told O'Donnell to make the request on their behalf also. McDermott authorized Ketterling to tell O'Donnell to make the offer for him and Ketterling relayed that message to O'Donnell. Employee Davisson told O'Donnell that he didn't want to go back. About 6:45 p.m. on Saturday, June 8, 1972, O'Donnell called Egosque on the telephone and told him that he, Ketterling, McDermott, Becker, and Graham would be coming back to work on Monday. Egosque replied that they were blackballed from the outfit and that they would never be hired again by Respondent. Egosque also said that Respondent had been nice to a number of the employees who had been kept on during the summer months when there was nothing to do and that they should not have treated Respondent as they did. In addition, Egosque said that there had been a meeting of management on Friday night and a decision had been reached that none of them would be hired back. He told O'Donnell that there would be a list posted on the bulletin board Monday morning of all the employees who quit and that they could come and look at it if they wanted to. O'Donnell then called the other employees and reported to them what had occurred.

At 8:30 a.m. on Monday, January 10, employee Lawrence Carr called Egosque and said that he had heard on Sunday that they weren't going to be able to come back to work. He asked Egosque if that was true and Egosque replied that it was and that Eardley wanted it that way. Carr went to the plant about 10 o'clock that morning, picked up his equipment, read the notice on the bulletin board concerning the employees quitting, and left the plant.

McDermott also entered the plant on January 10. Egosque told him that he wasn't wanted and that he could leave. When McDermott refused to go without receiving a slip stating the reason he was fired, Egosque answered that he didn't have to give a reason and that Davisson had quit for him. Later McDermott was escorted from the plant by a sheriff.

McClanathan had heard from McDermott on January 8 that his services with Respondent were no longer needed. McClanathan told McDermott that he was going to the plant on Monday. On Monday, January 10, McClanathan was snowed in and could not go to the plant. About 7:50 that morning, he called Egosque and said that he was not reporting in because of the snow. Egosque said that he should stay where he was because he was through.

On January 10 about 8:15, O'Donnell, Ketterling, and Graham went to the plant. O'Donnell spoke to Egosque who told him that they had made a mistake by walking off, that Davisson had gotten them fired, that Davisson and Becker were the instigators, and that if he had known about Davisson before that he would have run him off the job. Graham also spoke to Egosque that morning. He asked Egosque if he could come back to work. Egosque

retroactive pay increase and the current raise. Indeed, the General Counsel acknowledges in his brief that "the eight discriminates' uncontroverted testimony reveals that on Friday, January 7, 1972, they engaged in the strike

to induce Respondent to grant them a wage increase and retroactive pay.

⁹ Egosque asked Lawrence Carr what they were going to do and Carr replied that he didn't know but he guessed they would go home.

answered that Davisson got them all fired and they were all through.

In sum, I find that the eight employees named in the complaint engaged in a work stoppage and walkout on January 7, 1972; that as of 2 p.m. on January 7, Respondent terminated their employment status by treating those employees as quits; that on Saturday, January 8, 1972, at 6:45 p.m., O'Donnell for himself and on behalf of McDermott, Sheridan Becker, Ketterling, and Graham, unconditionally offered to return to work; that on January 10, McClanathan unconditionally offered to return to work; and that the offers to return were rejected by Respondent. Davisson did not offer to return. Carr did not specifically ask to return, though he was told by Respondent that he could not return.

5. Subsequent events with regard to retroactive pay

By letter dated February 3, 1972, IRS answered Respondent's inquiry of December 20, 1971, as follows:

The following is in reply to your letter dated December 20, 1971. As previously communicated to you, our reply was delayed because the Pay Board had not issued the regulations with regard to retroactive salaries.

Based on your letter of December 20, 1971, it is our understanding that a contract was entered into on September 29, 1971, which provided for pay increases in excess of 5.5 percent. In addition, the contract provided for retroactive payment of salaries to July 1, 1971. On November 14, 1971, a 5.5 percent increase in salaries was implemented.

Section 201.14, Title 6, Economic Stabilization sets forth the regulations with regard to wage and salary increases effective after November 13, 1971. Section 201.14 reads, in part, as follows:

Existing contracts and pay practices previously set forth will be allowed to operate according to their terms except that specific contracts or pay practices are subject to review, when challenged by a party at interest or by five or more members of the Pay Board, to determine whether any increase is unreasonably inconsistent with the criteria established by this Board.

The effect of this provision is that contracts entered into after August 14, 1971, and before November 14, 1971, may be paid, beginning November 14, 1971, without regard to the 5.5 percent wage and salary standard set forth in section 201.10.

Title 6, Economic Stabilization, section 201.13(e) sets forth the regulations with regard to retroactive payment of salaries related to contracts entered into after August 15, 1971, and before November 14, 1971. Section 201.13(e) reads as follows:

Payment of wage and salary increases may be made if a determination is made by the Internal Revenue Service, with right of appeal to the Pay Board in the event of an adverse determination, that a wage and salary agreement or pay practice adopted after August 15, 1971, succeeded an agreement, schedule or practice that expired or terminated prior to August 16, 1971, and retroac-

tivity is demonstrated to be an established past practice of an employer and his employees or retroactivity had been agreed to prior to November 14, 1971.

The effect of this provision is that retroactive salaries can be paid without regard to the 5.5 percent wage and salary standard, under the above conditions, if a favorable determination is made by the Internal Revenue Service. This correspondence is not a determination by the Internal Revenue Service. A request for a determination, with supporting documentation, should be filed separately.

If we can be of any further assistance, please do not hesitate to call on us.

Respondent formally requested a determination by letter dated February 10, 1972. IRS replied on February 23, 1972, as follows:

The following is in reply to your letter dated February 10, 1972, with regard to a request for a determination under section 201.13(e), Title 6, Economic Stabilization.

Our letter dated February 3, 1972, sets forth the regulations under section 201.13(e). You have provided documentation supporting the fact that an agreement was reached on September 29, 1971, which provided for a \$.25 per hour wage increase retroactive to July 1, 1971. Since the facts and date of the wage agreement meet the provisions of section 201.13(e), ABC Prestress and Concrete may pay, retroactive to July 1, 1971, the \$.25 per hour wage increase, without regard to the 5.5 percent wage and salary standard set forth in section 201.10, Title 6, Economic Stabilization.

If we can be of any further assistance, please do not hesitate to call on us.

Thereafter, Respondent gave a separate check to each employee for retroactive pay back to July 1, 1971.

B. Conclusions

1. The work stoppages and terminations of employment

The eight alleged discriminatees named in the complaint were engaging in concerted action when they walked off the job on January 7. The employees met, formulated demands concerning retroactive and current wage increases, and, through representatives, made demands to Respondent. Though they did not in words answer Eardley's question concerning what they would do in the event that their demands were not met, their action in walking off the job constituted an unequivocal answer to that question. Unrepresented as well as represented employees who refuse to work and leave their employers' premises in an effort to secure more pay are engaged in "mutual aid or protection" within the meaning of Section 7 of the Act. Even if the walkoff is unnecessary and unwise, as the United States Supreme Court said in *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962): ". . . it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." Though the word "quit" was used by at least one employee, it is

manifest from the context in which the walkout arose that the employees were using the walkout in an attempt to achieve their wage demands and were not voluntarily terminating their employee status. The employees made the purpose of their action plain to Respondent and Respondent was not free to treat the walkoff as a "quit." Cf. *Universal Insulation Corp. v. N.L.R.B.*, 361 F.2d. 406, 408 (C.A. 6, 1966), enfg. 149 NLRB 1397; *Union Camp Corp.*, 194 NLRB No. 160. I find that the eight employees engaged in a strike on January 7, 1972.

At 2 p.m. on January 7, Respondent treated the strike as a quit and in so doing terminated the employees. As I have found that the employees did not themselves "quit," such a termination was in fact a discharge by Respondent. Though Respondent did not notify the employees of the discharges until Egosque spoke to O'Donnell on the telephone at 6:45 p.m. the following day, January 8, the discharges had been in effect since January 7 at 2 o'clock.

2. The status of the strike

An employer violates Section 8(a)(1) of the Act when he discharges employees who engage in concerted activities that are protected under the Act. However, not all concerted activities are so protected. In *Washington Aluminum Co.*, *supra*, the United States Supreme Court distinguished the concerted activities in that case from "the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract." In the absence of special circumstances, a strike to secure higher pay is a protected concerted activity. However, in the instant case, the question is presented whether the strike lost its protected nature because its object was to require Respondent to pay retroactive or current wage increases that would have been in violation of the Economic Stabilization Act.

In *American News Company, Inc.*, 55 NLRB 1302, the Board was called upon to interpret the rights of employees under the Act in the light of the Emergency Price Control Act of 1942 and the rulings of the National War Labor Board. The Board referred to the admonition of the United States Supreme Court in *Southern Steamship v. N.L.R.B.*, 316 U.S. 31 (1942):

... that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives. Frequently, the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

In the *American News* case, a union struck to obtain an immediate wage increase without approval of such a wage

¹⁰ The Economic Stabilization Act of 1970 was amended on December 22, 1971, in ways not material herein, P.L. 92-210. The amended Act allows certain raises to take place where they were provided for in an agreement executed prior to August 15, 1971. However, the agreement that fixed the wage increase in the instant case took place on September 29, 1971. There was no understanding as to the amount of the raise and certainly no executed agreement prior to August 15, 1971.

increase by the National War Labor Board under circumstances where it would have been unlawful for the employer to grant such an increase. The Board found that the strike was not the kind of collective activity that was protected by Section 7, so that Respondent's action in treating the employees as terminated and in refusing to reinstate them did not violate the Act.

In *Claremont Polychemical Corporation*, 196 NLRB No. 75, the Board reached a similar conclusion with regard to picketing by employees which violated Section 8(b)(7)(B) of the Act, holding "where the activity engaged in by the employee is the participation in an activity which contravenes the policies of the Act the employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with backpay." In discussing the right to strike, the Board found that Section 13 of the Act preserved the limitations on the right to strike that had in the past been set out by the Board and the courts, and cited Senate Rep. No. 105, 80th Cong., 1st Sess., 28, 1 Leg. Hist. 434 as follows:

It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 NLRB 1302, and *Thompson Products*, 72 NLRB 150.) The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B. v. Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other federal law (*Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp. v. N.L.R.B.*, 306 U.S. 240).

This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions.

An evaluation must be made as to whether the wage payments sought by the strike action would have been in violation of the wage price freeze if they had been granted on January 7, 1972.

In the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799, Congress authorized the President of the United States "to issue such orders and regulations as he may deem appropriate to stabilize . . . wages . . ." The President was further authorized to delegate the performance of any function under the Act to such officers, departments, and agencies of the United States as he deemed appropriate. The penalty provided for a willful violation of any order or regulation under the Act is a fine of not more than \$5,000.¹⁰

The President exercised the authority granted to him by the Stabilization Act in Executive Order No. 11615, 36 F.R. 15727, of August 15, 1971. That order stabilized wages by establishing a complete wage freeze for 90 days. Wages were frozen as of August 14, 1971.¹¹ The order provided for the creation of a Cost-of-Living Council to

¹¹ Wages could be higher if a higher wage scale had existed during the 30-day period ending August 14, 1971. The executive order states: ". . . wages . . . shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services."

assist in the administration of the freeze and also provided that any willful violation of the Executive Order or any order or regulation issued under authority of that Order would be fined not more than \$5,000 for each such violation.

On October 16, 1971, which was during the 90-day freeze, the President issued Executive Order 11627, 36 F.R. 20139, which amended and supplemented the previous order. The new order created a Pay Board that was to make rulings and decisions under broad policy lines set by the Cost-of-Living Council. The Order provided that the 90-day freeze was to be extended pending action by the Pay Board and Cost-of-Living Council.¹²

It thus appears that under Executive Order 11627, wage increases were banned until such time as the Cost-of-Living Council and the Pay Board had promulgated rules for allowing such increases. A plethora of orders, circulars, and guidelines followed. Economic Stabilization Circular No. 102 became effective on October 20, 1971 (see CCH Economic Controls, Section 8302.225). That circular dealt in part with retroactive wage increases. Section 502(6) reads:

Retroactive wage increase for work performed prior to the freeze are permitted, provided that the parties can demonstrate they did not change their position during negotiations in order to compensate for or absorb the impact of the freeze. This requires the parties to produce evidence of past practice and the pattern of present negotiations. A procedure will be established by CLC for resolving evidence. However, for work performed after August 15 the actual rate which was in effect during the base period is the ceiling wage for the freeze.

The provisions of Circular 102 set forth above were modified effective November 14, 1971, by Sec. 201.13 of the rules which was published in the Federal Register on November 13, 1971, 36 F.R. 21791. That rule provided:

Payments of scheduled increases in wages and salaries for services rendered by employees after August 15, 1971, and before November 14, 1971, which were not made because prohibited by the freeze, may be made retroactively only if approved by the Pay Board. The Pay Board may approve such payments in the following circumstances applicable to individual cases or categories of cases: . . . (b) It is demonstrated that a wage and salary agreement or pay schedule or practices adopted after August 15, 1971, succeeded an agreement, schedule or practice that expired or terminated prior to August 16, 1971 and . . . retroactivity had been agreed to prior to November 14, 1971.

I found above that one of the purposes of the strike of January 7 was to obtain a retroactive wage increase that would have covered the period July 1 to November 14, 1971. If Respondent had made such payments, it would have paid retroactive payments for work performed during

the 90-day freeze without prior approval of the Pay Board at a time when Sec. 201.13 of the rules allowed such a payment "only if approved by the Pay Board."

The Internal Revenue Service, acting under a delegation from the Pay Board, did authorize such retroactive payments by letter dated February 23, 1972. However, the action of IRS was based on an amended Section 201.13 (Title 6—Economic Stabilization 6 CFR 32). That amendment was published in the Federal Register on January 27, 1972, and was made effective on the same date. 37 FR 1242. The January 27, 1972, rules were not yet in effect and could have had no impact on the legality of the situation as of January 7. However, even if the amended Section 201.13 had been in effect on January 7 and IRS was correct in holding that the wage agreement or pay practice adopted after August 15, 1971 (November 29, 1971), succeeded an agreement or practice that expired or terminated prior to August 16, 1971, the payment of the retroactive wage increase on January 7 would still have been unlawful. The amended Section 201.13 which is cited in the IRS letter provides that such retroactive payments of wages "may be made if a determination is made by the Internal Revenue Service" that the increase meets the requirement set forth in that section. The determination by the Internal Revenue Service in such circumstances is, therefore, as it was before the amendment, a condition precedent to the lawful payment of the increase. The failure to meet this condition precedent cannot be attributed to Respondent. Respondent's request for permission to pay the retroactive pay was made in a letter dated December 20, 1971. Both Respondent and a representative of the employees spoke to an IRS agent in an attempt to get an answer to the letter and they were told that IRS was unable at the time to make a ruling.

In conclusion, I find that an object of the January 7, 1972, strike was to put pressure on Respondent to require it to pay a retroactive wage increase for time worked during the initial 90-day freeze; that the payment by Respondent of such a wage increase on January 7 would have been a violation of the Economic Stabilization Act of 1970 as amended and Orders and Regulations thereunder; and that under the law established by *American News, supra*, and *Claremont Polychemical Corporation, supra*, which is discussed above, the employees who engaged in the strike were not protected by Section 7 of the Act. It follows and I find that Respondent did not violate Section 8(a)(1) of the Act when it discharged the employees named in the complaint because they engaged in that strike.¹³

I find that the credible evidence does not establish that Respondent violated the Act as alleged in the complaint, and I shall therefore recommend the complaint be dismissed in its entirety.

¹² The Order reads "Section 1 (a) The pay board . . . established by this order shall, pursuant to goals of the Cost of Living Council, take such steps as may be necessary, and authorized by or pursuant to this Order, to stabilize . . . wages . . . Pending action under this Order, and except as otherwise provided in Section 202 of the Economic Stabilization Act of 1970, as amended, . . . wages . . . are stabilized effective as of August 16, 1971, at levels not greater than the highest of those pertaining to

a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, or like or similar commodities or services."

¹³ As I have reached this conclusion, there is no need to evaluate the question of whether Respondent would have violated the Wage Stabilization Act if it had granted the January 1, 1972, wage increase which was also demanded by the strikers.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law,

¹⁴ 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, conclusions, and recommended Order herein shall, as provided in Sec.

and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:¹⁴

ORDER

The complaint is dismissed in its entirety.

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.