Gimrock Construction, Inc. *and* International Union of Operating Engineers, Local Union 487, AFL–CIO. Case 12–CA–17385

August 27, 1998

DECISION AND ORDER

By CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On May 31, 1996, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel, the Union, and the Respondent filed exceptions and supporting briefs. The General Counsel and the Union filed answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order, as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gimrock Construction, Incorporated, Hialeah Gardens, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"Within 14 days after service by the Region, post at its facility in Hialeah Gardens, Florida, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and formeremployees employed by the Respondent at any time since September 7, 1995."

Maria C. Perez, *Esq.,* for the General Counsel.
Donald T. Ryce, *Esq.,* for the Respondent.
Kathleen M. Phillips, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Miami, Florida, on March 20 and 21, 1996. The charge in this proceeding was filed by the Union on September 7, 1995, and the complaint was issued by the Regional Director on January 18, 1996. In substance, the complaint alleges as follows:

That on March 3, 1995, pursuant to a Stipulated Election Agreement, the Union won an election conducted by the Regional Director and was certified as the bargaining representative on March 20, 1995, in a unit consisting of

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida, *excluding* all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. That on or about June 2, 1995, the Union and the employer reached a complete agreement.

3. That since June 2, 1995, the Respondent has refused to sign the above contract and has demanded and insisted, as a condition of executing the proffered contract, that the Union agree to limit their collective-bargaining relationship to a "project agreement" covering only those unit employees working at the Port of Miami.

4. That a strike which ensued at the Respondent on May 31, 1995, was converted to an unfair labor practice strike on June 2, 1995, because of the Respondent's conduct described above.

5. That on June 6, 1995, the Union by its business agent, James Allbritton, made an oral request to return to work on behalf of:

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his decision the judge erroneously states that: (1) the Union presented the Respondent with one contract proposal at the first bargaining session after the Union's certification, whereas the record indicates that the Union presented the Respondent with two contract proposals; (2) the strike commenced on May 30, 1995, whereas the record indicates that it commenced on May 31, 1995; and (3) the series of three-way conversations initiated by Company Vice President Lloyd Hunt to break the impasse and end the strike occurred on June 1, 1995, whereas the record indicates they occurred on June 2, 1995. These apparently inadvertent errors do not affect our decision. We have modified the Order to provide that the notice be posted at the Respondent's Hialeah Gardens, Florida facility.

In its exceptions, the Union objects to the judge's characterization of the dispute between the Union and the Employer as being about whether certain work would be performed by the Union's members or by "non-bargaining unit" or "non-union" employees. The Union notes that it was certified in 1995 following a Board-conducted election as the bargaining representative of "all equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties" and that this certification encompasses all employees of the Employer performing work in those classifications, not just employees performing such work who may be members of the Union. Contrary to various statements by the judge to the effect that the Union was seeking to have all oiler and mechanics' work assigned to its members, the Union states that its bargaining position was simply that any employee (union or nonunion) performing oiler or mechanic's work should be covered by the contract and paid contractual wages and benefits, in accordance with the bargaining unit certification. We find merit to these exceptions. Thus, in adopting the judge's conclusions with respect to the unfair labor practices alleged, we do not rely on these statements by the judge.

Ronnie Chinners	Al Duey
Joseph MacNeill	Joseph Robinson
Barney Sims	James Wilkerson
James Wolf	

6. That since June 6, the Respondent has failed and refused to reinstate the aforementioned employees.[1] The Respondent denies that an agreement was ever reached. The Respondent also denies that it insisted, as a condition of agreement, or that it insisted to the point of impasse, that the only agreement it would sign was a "project" agreement limited to the Port of Miami.

As to the strike, the Respondent asserts that at best, the strike was an economic strike. It also contends that inasmuch the strike was motivated by an object of having the employer reassign certain work from nonbargaining unit employees to employees within the unit, the strike was a jurisdictional strike outlawed by Section 8(b)(4)(D) of the Act, and therefore constituted unprotected activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company is a heavy civil contractor that specializes in harbor and marine construction in South Florida and the Caribbean. Among other things, it is engaged in foundation work for bridges and seawalls and also does construction work in relation to harbor dredging. In the course of its business, the company has a category of workers that it calls construction specialists. Because some of its work often involves the use of cranes and other types of heavy equipment such as backhoes, front-end loaders and pile drivers, the Company has also employed operating engineers who it has obtained through the Union's hiring hall.

From about 1987 to 1995, the Company and the Union entered into a series of contracts covering "operating engineers." These contracts which were made pursuant to Section 8(f) of the Act (prehire agreements), were limited to specific projects that the Company was engaged in at the time that the agreements were executed. Nevertheless, it appears that if operating engineers were moved to another project during the term of the contract, they were paid in accordance with the executed agreements and appropriate contributions were made to pension and welfare funds.

Operating engineers are a group of people who operate heavy construction equipment such as cranes, bulldozers, backhoes, front-end loaders, etc. The people represented by various locals of the Operating Engineers Union, have differing skills and have a wide range of competency in operating construction machinery. At one end would be those employees who by dint of experience and training can operate all or most of the equipment that is used in construction, including cranes. At the other extreme is a group of people who are called "oiler/drivers" who essentially are unskilled people who do general work associated with the machines operated by and maintained by operating engineers.[2]

The basic problem in this case revolves around the definition of "oiler" work and to a lesser extent to work done by mechanics.

Apart from the operating engineers that the Company has employed and obtained from the Union's hiring hall, the remainder of its work force has never been represented by a labor organization. The work of operating cranes has always been done exclusively by operating engineers. Also the work of operating machinery, such as backhoes and front-end loaders, has preferentially been assigned to operating engineers. There has usually been one or at most two mechanics who are members of the Operating Engineers Union who work with operating engineer type of equipment. The Company has also employed a couple of other nonunion mechanics who, although generally assigned to other equipment, can and have been assigned to perform work on equipment used by operating engineers.

Although there is evidence that on a few occasions the Company has used the Union's hiring hall to hire an "oiler" the evidence does not show for how long such individuals have worked and whether they have worked exclusively in that classification. By and large, the Company has not employed any persons in the exclusive category of oiler and the type of work generally done by this category has been done either by an operating engineer who is not busy or by one of the Company's other nonunion employees.

Gary Waters became the Business Manager of the Union in September 1994. He testified that at some point in 1994, an audit had been made of Gimrock, and he became aware that although the Company made all payments on behalf of union members, the contract that they were working under was limited to a specific project that had been completed. Technically, the payments were not being made pursuant to the terms of any extant collective-bargaining agreement.[3] Waters testified that he asked Company Representative Lloyd Hunt to sign an agreement and that he sent the standard area contract to Gimrock. He states that he finally caught up with Hunt in January 1995 and was told that he would only sign a project agreement in accordance with the past practice that he had with Water's predecessor.

[1] The Charging Party in its brief, argued that the Respondent committed an additional violation when on or about June 5, it told employees that if the Union signed a project agreement, the Company would pay its workers $1 over scale. The Charging Party contends that this constituted an attempt to deal directly with employees and therefore a violation of Sec. 8(a)(5) of the Act. However, as this is not alleged in the complaint and as this was not, in my opinion, fully litigated, I shall not conclude that these statements, assuming that they were made, constituted an unfair labor practice.

[2] The distinctions are reflected in the contracts. Thus for example, looking at G.C. Exh. 6(d), the highest pay rate is for crane operators and the lowest is for oiler/drivers. (Apprentices are paid at a lower rate than journeymen.)

[3] As Sec. 302 of the Act prohibits such payments in the absence of a collective-bargaining agreement, both the Company and the Union could conceivably have been liable.

As the Company did not respond to the Union's request, the Union filed a petition for an election on January 26, 1995, in Case 12–RC–7816. On February 13, 1995, the Regional Director approved a stipulation Agreement signed by the parties on February 9. An election pursuant to that agreement was conducted by the Board on March 3, 1995. The bargaining unit set out in the Stipulation tracked the bargaining unit described in the Union's standard contract and the Company compiled an *Excelsior* list of eligible voters consisting of 11 individuals who worked a sufficient number of days or a sufficient number of months to be eligible under the formulas for construction work set forth in *Steiny & Co*., 308 NLRB 1323 (1992), and *Daniel Construction* 133 NLRB 264 (1962), as modified 167 NLRB 1978 (1967). Neither side had observers at this uncontested election and apart from 2 people who were challenged because their names were not on the list, the Union won the election. This was not surprising as all the voters were already union members.

On March 20, 1995, the Union was certified in a unit consisting of:

> All equipment operators, oiler/drivers and equipment mechanics employed by Respondent in Dade and Monroe counties in Florida, *excluding* all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Although the certification included the category of "oiler/driver," the facts show that as of the date of the Stipulation Agreement and the date of the election, there was no person who fell within this category in the sense that there were no employees who were exclusively assigned to do this work. As noted above, work traditionally done by oilers was done at this company either by an operating engineer who was not busy or by one of the Company's nonunion employees. Thus, the seeds of the ensuing dispute, were unanticipated at the time that the parties agreed to conduct the election.

B. The Alleged Unfair Labor Practices

Waters testified that on the day before the election, the Company's attorney, Donald Ryce, came to his office and said that the Company would sign a project agreement and pay the operators $1 per hour over scale. Waters states that Ryce said that it would be very hard to reach an agreement after the election and after the Union was certified. According to Waters, he asked why and Ryce did not explain.

The initial bargaining session following the Certification was held in mid-March 1995. Ryce was designated by the Company to represent it and no one else from the Company participated in the negotiations. James Allbritton, Gary Waters, and the Union's attorney, Joseph Kaplan, represented the Union. At this meeting, the Union presented its standard contract. Ryce said he would look it over and come up with a counterproposal.

On April 4, 1995, Ryce forwarded his counterproposal which included a contract draft containing a recognition clause as set forth in the Board's certification. In this letter. Ryce objected to certain provisions in the Union's standard contract and proposed certain new provisions. The most significant of his proposed modifications involved (a) eliminating article 1, section 4 of the standard contract and (b) the proposed addition of article IV, section 10. I note that Ryce's letter *did not* object to either the duration of the standard contract or to the wage rates contained therein. Indeed, from the testimony of both Ryce and Waters, I think that both parties understood that the term of the contract and the wage rates were not an issue.

Article I, section 4 of the standard agreement reads:

> Section 4. Personnel manning levels for equipment and/or job assignments shall be dictated by need. The Union and Employer shall address all issues pertaining to personnel manning levels, except Oiler/Drivers shall be utilized to assist in the erection and dismantling of all cranes and to move or drive all lattice boom mobile cranes.

The proposed article IV, section 10, made by Ryce reads:

> Section 10. The parties recognize that the Employer has an established past practice, essential to its economic viability, of using non-bargaining unit employees to perform work on the following type of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tug etc.) cranes, yard cranes, derricks, derrick barges, and similar items. Notwithstanding the fact that certain of this work is listed in the wage rate provisions of this Agreement, the parties agree that the Employer may maintain its past practice as described herein without violating this Agreement or giving rise to a claim for fringe benefits. To the extent such work is performed by non-bargaining unit personnel, said work shall not be considered as falling within the provisions of this Agreement. To avoid confusion, the parties will agree to and maintain at all times a list of bargaining unit employees, which will be considered conclusive as to the identity of the employees covered by this Agreement. Any claims under this Agreement by Employees or the Union, or any contract or ERISA claims made by the . . . Funds, shall be limited to those persons on the list.

In explaining his reasons for proposing article IV, section 10, Ryce in his April 4 letter stated:

> [M]y draft . . . was an initial effort to solve the problem of maintaining Gimrock's flexibility of operations and to avoid creating legal exposure to a suit from the Trust Funds. We are very open to any other approach that accomplishes the same goal. As I said yesterday, please consider this proposal as Gimrock's initial effort to draft a contract which accomplishes the goals of both parties. Since the Union and Gimrock are generally satisfied with the status quo, the Union is not seeking to increase the work force of current Operating Engineer employees, at least based on the current work load, we ought to be able to come to some sort of resolution that works for all of us.

On April 12, 1995, the Union responded the Company's position with its own counterproposals. This letter read:

> This is the Union's response to your April 4th counterproposals:
>
> 1. The Union rejects your language changes in Article I, Section 4, Section 6 and Section 7; Article II; Article V; Article VI, Section 1 and Section 13; Article VII Section 2; Article VIII, Section 1, Section 3, Section 7 and Section 8; Article IX; Article X Section 1, Section 3, Section 5 and Section 6.
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> 2. The Union accepts your language changes in Article I, Section 1 and Section 3; Article IV, Section 1; Article VI, Section 3, Section 8 and Section 12; Article VII Section 5 and Section 6.

3. The Union is uncertain of your meaning in your language changes in Article IV, Section 2; Article VI, Section 7.

4. The Union proposes the following language changes in Article IV Section 10:

> Section 10. The parties recognize that the Employer has an established past practice of using non-bargaining unit employees to perform work on the following types of equipment: trucks and boats (tug, etc.). The parties agree that the Employer may maintain its past practice as described herein without violating this Agreement or giving rise to a claim for fringe benefits by the Apprenticeship, Health and Welfare, and Pension funds. To the extent such work is performed by non-bargaining unit personnel, it shall not be considered falling within the provisions of this Agreement.

The next bargaining session was held on May 12, 1995, where the parties mostly talked about article I, section 4 and Ryce's proposed article IV, section 10. In substance, the company viewed article I, section 4 as a means to guarantee makework for a classification of employees it did not employ; namely oilers. In the Company's view, this clause, because it compelled the Company to use "oilers" to assemble, dismantle and move cranes, might compel it, in certain circumstances, to hire additional employees to do work that had previously been done by the Company by its nonunion work force. On the other hand, the Union viewed the Company's position on article I, section 4 and its proposed article IV, section 10, as a means by which the Company could assign work traditionally done by oilers to nonunit employees. As the certification uses the words "oiler/drivers," the Union's position was that when work traditionally done by this category was assigned by the Company, that work should be done by someone in that category who was in the bargaining unit.

The final face-to-face meeting occurred on May 25, 1995. At this meeting, Ryce went down a list of the equipment that the Company used and the Union stated its position whether the work was within its jurisdiction. The Union took the position that the work of monitoring certain pumps and manning power packs for vibratory hammers was oiler work and should be assigned to people within the bargaining unit and not to nonbargaining unit workers. As to cranes, both sides agreed that the operation of cranes should be exclusively assigned to operating engineers. However, as to cranes operated within the yard, the employer took the position that it should be able to assign such work, as it had in the past, to nonunit employees while the Union took the position that any such yard work in excess of 2 hours should be assigned to operating engineers. In addition, the parties had a dispute as to what type of mechanic's work should be included in the unit. At this time, the Company employed three mechanics, one of whom was in the Union and was generally assigned to work on operating engineer type of equipment. The Company took the position that the two nonbargaining unit mechanics had, in the past, worked on all types of equipment and that it wanted to continue this practice. The Union's position was that when the nonbargaining unit mechanics worked on operating engineer equipment, they should be covered by the contract.

Although virtually all other issues were settled as of May 25, including in my opinion, a tacit agreement regarding wage rates and the duration of a contract, everyone agrees that there was no full and final agreement by the end of this meeting.

Ryce testified that on May 26, 1995, he called Union Attorney Kaplan and after explaining the Company's position, asked for another meeting. He testified that Kaplan said that the Union was going to stand firm on its last position and that the parties were at impasse unless the Company agreed to the Union's position. Ryce states that he told. Kaplan that the Company was not going to concede on the "jurisdictional" issues and that Kaplan told him that there was no point in having another meeting.

. Waters testified that on May 30, 1995, he called Ryce and told him that the Union was willing to give up its claim that the jet pump and the power pack should be exclusively done by an oiler but that it could not remove article I, section IV which, as noted above, assigned the work of assembling, disassembling, and moving cranes to oilers. Waters told Ryce that if the oiler issue could not be resolved, there would be a strike. Ryce said that he would call back if there was any change in the Company's position. He didn't and a strike ensued on this date.

On May 31, 1995, Ryce faxed a letter to Waters which read as follows:

> I have described our telephone conversation of yesterday to Gimrock. Unless I misunderstood you, the Union's current position is that there is no point in meeting, and we are at impasse, unless Gimrock agrees to the language of article I, section 4, of the Union's standard agreement, providing that "Oiler/Drivers shall be utilized to assist in the erection and dismantling of all cranes and to move or drive all lattice boom mobile cranes," and further agrees that in the future, its two non-bargaining unit field mechanics will no longer work on all of the Company's equipment. It was my further understanding that if the company agrees to this language, the Union is willing to meet in order to discuss such questions as whether an oiler would be required to operate the company's jet pumps and the power packs for its vibratory hammers.
>
> We feel there a several problems with the approach you have suggested. First, the Company would have to agree to key union demands without any assurance that the Union would reciprocate by backing off of its other jurisdictional claims. Second, as Gimrock does not employ any oiler/drivers, the Company would be committing to adding one or more superfluous employees to its payroll. Finally, the Union's approach, as a whole, totally disrupts the status quo by removing significant job duties from its present nonbargaining unit work force and likely would lead to layoffs of some of these personnel.
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> Gary, it was always our understanding that the Union was generally content with the status quo, and wanted a contract with Gimrock primarily to comply with certain legal requirements concerning fringe benefit payments and to provide to employees some protection, such as access to a grievance procedure, that would not exist without an agreement. As you know, Gimrock has not been adverse to this approach and has been willing to make accommodations to reach an agreement that would satisfy the concerns of the Union as well as those of the company. The fact remains, however, that Gimrock's employees do not normally operate along the strict jurisdictional lines contended for by the Union, and the company has deviated from its practice of using a flexible workforce only with

respect to projects for which it signed specific project agreements. This is one reason why the issue of jurisdiction must be cleared up before the company can commit to a mandatory rather than a permissive hiring hall. Gimrock was a non-union company until the Union obtained the NLRB certification, and therefore cannot and should not be compared to those Union companies which chose to sign company-wide collective bargaining agreements long ago and arranged their operations accordingly.

We are mindful of the concerns you have raised regarding the other companies which have agreements with the Union. One possible solution is for Gimrock to pay bargaining unit employees $.50/hr. over normal scale, something the company is willing to agree to. This premium pay, plus the fact that no existing Union company can claim to have the same past practice as Gimrock's should alleviate any concern that these other companies can invoke the most favored nations clause to the Union's detriment. In any event, Gimrock remains willing to meet to hash out its differences with the Union in negotiations. Therefore please let me know if the Union changes its mind about declaring impasse.

On June 1, 1995, Kaplan called Ryce. According to Ryce, Kaplan said that the Union probably would drop its claims over power pack/vibratory hammers and the jet pumps if the Company would agree to the other jurisdictional claims. (That is, the claims regarding the mechanics and the oiler work in relation to the cranes.) Ryce states that he responded that he did not think that the Company would change its position, but he would let him know.

Lloyd Hunt testified that the strike put a severe strain on the Company's work in the Port of Miami. He testified that as a result he decided, without consulting his attorney, to contact the former business manager of the local union who in turn referred him to a Benny Splain, who is a representative of the International Union covering Region 4. There then ensued on this date, a series of conversations between. Hunt, Splain, and Waters, with Splain acting as the go-between.

The series of phone calls was initiated by Hunt who, after contacting Splain, told him that in the past the Company had project agreements with the past presidents of the local union and that with this new guy (Waters), the Union wanted an agreement covering the entire operation. Hunt explained that the strike was very damaging and he asked if it was possible to first work out a project agreement covering the Port of Miami and then to work out a systemwide contract.

Splain called Waters and reviewed the situation with him. He asked Waters if he would be willing to put the men back to work for 1 week and give him an opportunity to try to work things out.

Splain then called Hunt and told him that Waters was willing to have the men go back to work for 1 week, but that this idea was rejected. Splain states that when he asked Hunt what his problem was, Hunt said that he didn't need an oiler who would sit around and do nothing and that he didn't want to have all of the mechanics being covered by the contract.

According to Splain, when he related Hunt's concerns to Waters, the latter said that oilers could be employed at the option of the Company but that if oiler work needed to be done, (in accordance with art. 1, sec. 4), it would have to be done by one of the operating engineers and could not be done by any of the nonbargaining unit workers. Waters also said that as to the two nonunion mechanics, the Company could classify them as mechanic helpers under the contract.

Splain thereupon called Hunt and relayed Water's latest position. There is no dispute that Hunt replied, in effect, that he could agree to Water's position on oilers and mechanics if it was limited to the Port of Miami project, but that he could not agree if this was incorporated in a companywide contract. According to Splain, he said that Waters wanted an agreement covering the unit set forth in the certification, whereupon Hunt said that having a project agreement was his hold over the Union in that he could assert that the contract did not cover other jobs if the Union gave him problems at those other jobs.

At some point during the week of June 5, 1995, Waters had a phone conversation with Ryce wherein Waters offered a contract [on the Union's terms], that could be canceled upon 24 hours' notice. Ryce said that this was not acceptable. In the meantime, Ryce had not been told by his client of the phone conversations between Waters, Splain, and Hunt.

A final meeting was held in July 1995, under the auspices of a Federal mediator, but this meeting did not produce an agreement.

The General Counsel asserts that on June 6, 1995, the Union made an unconditional offer to return to work and that the Respondent refused to reinstate the strikers and continued to hire replacements thereafter. (At least two, and possibly four crane operators had been hired as permanent replacements before the alleged offer to return to work.)

James Allbritton, the Union's president, testified that he was directed by Waters on June 6, to talk to the people on the picket line and to make an unconditional offer to return to work. He states that he did so and that he spoke to Douglas Calais who is the Company's marine superintendent assigned to the Port of Miami. Allbritton testified that he told Calais that the strikers were making an unconditional offer to return to work, whereupon Calais said that he had to call Lloyd Hunt. According to Allbritton, when Calais returned, he said that Hunt said that he would not have the people back.

Murray Chinners, one of the strikers also testified about this transaction. He states that Allbritton arrived at the site at about 8 or 8:15 a.m. and that while talking to the strikers, Calais drove up and asked what was going on. He states that Allbritton said that we were unconditionally going to go back to work whereupon Calais said that he had to call Hunt. According to Chinners, as he and others were putting on their work boots, Calais returned and said that Hunt didn't want them back to work.

Douglas Calais testified that Allbritton approached him by a crane and in the presence of one of the strikers and one of the strike replacements, said that he could send these people home because Allbritton was sending the strikers back to work. According to Calais, Allbritton did not use the work "unconditional" and he replied that he would have to call his office. Calais testified that he spoke to Hunt who said that they would have to call his attorney which he believes he related to Allbritton. Calais also testified that he saw one of the strikers putting on his work boots (either Chinners or McNeil), and when he asked what he was doing, was told that he was going back to work.

While it is clear that some kind of offer to return to work was made on June 6, the issue here is whether that offer was conditional or unconditional. The Union did not follow up with a letter setting forth its offer to return to work. And the Company

also failed to send the Union a letter explaining its position regarding the events of June 6, 1995. (Indeed, it appears that Hunt did not notify Ryce of what had taken place.)

Chinners testified that about a week after June 6, he and a few of the other strikers had a conversation with Hunt at the picket line. He states that when Hunt was asked what it would take to resolve the situation, Hunt said he was willing to pay $1 over scale if Waters would send over a project agreement for the Port of Miami.

III. ANALYSIS

Sometimes it is better to let sleeping dogs lie. For many years, the Company and the Union have had a satisfactory relationship pursuant to which the company employed members of the Union and paid them in accordance with the terms and conditions of project agreements that tracked the standard contracts it had with other employers. At the same time, the company employed a far larger group of employees who were not union members but whose work, at times, overlapped with work done by the members of the Union. Although historically, there has always existed some ambiguity as to the type of work covered by previous 8(f) agreements, the parties essentially applied the contracts to those employees of the Company who were members of the Union. They, therefore, got along without dispute.

When the Union filed its election petition, it sought a unit which I surmise is a standard unit for them. The Company agreed to this unit description and an election was held, in which employees who were members of the Union were the only persons who cast unchallenged ballots. The problem is that at the time of the election, and despite the unit description set forth in the Consent Election Agreement, there were no people who could be classified as oiler/drivers as these functions had been done at times by members of the Union and at other times, or simultaneously, by other employees of the Company. Similarly, although the Company employed one mechanic who was an operating engineer and who voted in the election, it also employed two other mechanics who were not members of the Union and who did not vote in the election but whose jobs overlapped with the job of the union member mechanic.

In effect, what happened was that a series of de facto members-only contracts was transposed into a de facto members only election. When bargaining commenced, it soon became clear that instead of solving an old problem, the certification had created a new one. In this respect, the Union in its contract proposals was seeking to have any work traditionally assigned to oiler/drivers and mechanics assigned *exclusively* to its members. On the other hand, the Company wanted to keep its preelection practice which allowed flexibility in assigning union *or* nonunion workers to the same types of jobs as needed. (Except for the operation of cranes.) As oiler work and mechanic's work had, in the past, been shared by both Union and nonunion employees, this difference of opinion, became an unbridgeable gap.

There is no question but that the Respondent would have preferred to continue its past practice of having project agreements. Thus, after the petition was filed but before the election, the Company's attorney told the Union that the Company was willing to pay $1 over scale if the Union would sign a project agreement.

Nevertheless, once the certification was issued, it is clear that the Company, by its attorney, Ryce, entered into negotiations and agreed that any contract be consistent with the unit set out in the certification. Thus, all of his proposals and counterproposals were made in the context of having a contract covering the Company's Florida operations as a whole.

As noted above, the sticking point in the negotiations was related to whether the Company could continue its preelection practice of assigning certain "oiler" and mechanical work to both union and nonunion employees or whether it would agree to assign such work exclusively to people who would be in the bargaining unit and therefore be members of or represented by the Union.

After the meeting of May 25, 1995, Ryce called the Union's attorney, Kaplan, and was told that the Union was going to stand on its last position and that the parties were at an impasse. On May 30, Waters called Ryce and told him that although the Union was willing to make some concessions on the oiler issue, it could not withdraw from its position that the work of assembling, disassembling, and moving cranes should be given exclusively to oilers. By letter dated May 31, 1995, Ryce wrote back and stated, in substance, that he could not agree to the Union's position on oilers and mechanics and offered to pay bargaining unit employees 50 cents per hour over normal scale if the Union would accede to the Employer's being given the right to assign this type of work to nonunion as well as union members.

The strike which commenced on May 30, 1995, began at a time when no agreement had been reached. It also occurred *before* the Company's alleged insistence on a nonmandatory subject of bargaining.

On June 1, 1995, a continuous series of three way conversations were initiated by Company Vice President Lloyd Hunt who tried to break the impasse and end the strike by dealing directly with the Union. Accordingly, on this date, a regional representative of the Union, Splain, acted as an intermediary between Hunt and Waters. Ryce, the Company's attorney, was not informed of these conversations until much later. The General Counsel claims that during the course of these conversations, an agreement was first reached between the Company and the Union and then that this agreement was conditioned on a nonmandatory subject of bargaining, namely insistence on having a project agreement.

Without rehashing my previous description of these conversations, I conclude contrary to the assertion of the General Counsel, that although Hunt ultimately agreed to the Union's position on the oiler issue (in accordance with the Union's proposed art. 1, sec. 4), and that both parties agreed on having the two nonunion mechanics classified as mechanic helpers, Hunt's agreement on these terms was explicitly conditioned on the agreement being a project agreement. That is, I would *not* conclude based on the evidence as a whole that a full contract was first agreed to and then subsequently conditioned on a nonmandatory subject.

Moreover, although Hunt, on June 1, conditioned this particular contract on being a project agreement, this does not mean that he conditioned *any* agreement on this condition. This was Hunt's first and only involvement in the contract talks and there is nothing to say that if the Union refused to accept the nonmandatory condition, that the previous good-faith proposals made by Ryce were no longer applicable.

In *Nordstrom, Inc*., 229 NLRB 601 (1977), the Board stated:

> The issue . . . is whether one party to collective bargaining negotiations can effectively conclude negotiations

> by agreeing only to those demands of the other party which constitute mandatory subjects of bargaining. Citing *N.L.R.B. v Wooster Division of Borg-Warner Corp*., 356 U.S. 342 (1958), the Administrative Law Judge concludes that the Charging Party's acceptance of the mandatory subject and unilateral dismissal of the nonmandatory subjects compel the respondent to execute a contract embodying that acceptance. We believe *Borg-Warner* compels no such result. That a party may not lawfully insist upon the inclusion of proposals nonmandatory in nature is, of course clear. But the general Counsel's case moves, in our view, beyond that proposition to the extent that it negates the considerable relationships which may exist between both mandatory and nonmandatory subjects. Certainly, nonmandatory subjects (for present example, a demand that reinstatement rights of certain discharges and, presumably, backpay for them be waived), can, as a function of cost, bear upon a party's wage-increase proposals. To say that the proponent of the reinstatement/backpay waiver cannot insist upon the inclusion of such a proposal means no more than that. It does not mean that once, out of necessity, the nonmandatory proposal is removed from the table, the proponent of the nonmandatory subject is not permitted to alter those proposals which are mandatory in light of the removal of the nonmandatory subject.
>
> Circumstances may, we acknowledge, exit where a party unlawfully insists on a nonmandatory subject's inclusion at a time when all other matters have previously, and independent of the outstanding nonmandatory subject, been agreed upon. But whether such insistence amounts not only to a refusal to bargain in good faith but, further, as justification for compelling that party to execute so much of the contract as relates to the agreed-upon mandatory subjects is not, on the facts presented, an issue here.

See also *Good GMC, Inc*., 267 NLRB 583, 584 (1983); *Laredo Packing Co*., 254 NLRB 1, 18 (1981), and *Aztec Bus Lines,* 289 NLRB 1021 (1988).

In *Good GMC, Inc*., supra, the Board stated:

> Consistent with the position advanced by the Board in *Nordstrom*, the Board in *Laredo Packing* found that no agreement had been reached on all the terms of a collective-bargaining agreement because the nonmandatory subjects of bargaining advanced by the respondent as a condition for executing a collective-bargaining agreement were part of one collective-bargaining package and were an essential *quid pro quo* for the respondent's contract proposal. Likewise, in the instant case, the Union selectively accepted part of Respondent's package proposal and claimed that an agreement had been reached thereon, in disregard of the fact that Respondent had proposed item 3 as part of a complete package proposal. In these circumstances, the Union was not entitled to pick and choose those contract proposals which suited its needs and demand execution of a collective-bargaining agreement limited to those proposals.

There clearly was no agreement reached by the parties up until June 1, 1995. As the Union did not agree to. Hunt's condition (a project agreement), stated during the June 1 phone conversations, no full and complete agreement was ever reached. Accordingly, the Respondent did not violate the Act by failing and refusing to execute an agreed-upon contract.

By the same token, I do not believe that the evidence is sufficient to establish that the Respondent conditioned reaching agreement or bargained to impasse over a nonmandatory subject of bargaining. As stated above, the fact that. Hunt, on one occasion, conditioned a particular contract on a nonmandatory condition does not establish that the Company had or would condition *any* agreement on such a condition. In fact, the evidence indicates the opposite. Accordingly, in this respect too, I conclude that the Respondent did not bargain in bad faith in violation of Section 8(a)(5) of the Act.

Inasmuch as I have concluded that the Respondent did not violate the Act in regard to the foregoing allegations, I conclude that the strike never converted to an unfair labor practice strike. Thus, assuming that the strike was an economic strike, and putting aside for the moment, the Respondent's contention that it was an illegal and unprotected strike, the employer would have an obligation to immediately reinstate the strikers, except to the extent that it hired permanent replacements, if the strikers or the Union on their behalf made an unconditional offer to return to work. *NLRB v. Mackay Radio & Telegraph Co*., 304 333, 345–346 (1938); *NLRB v Fleetwood Trailer Co*., 389 U.S. 375 (1967); *NLRB v. Augusta Bakery Corp*., 140 957 F.2d 1467 (7th Cir. 1992); *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). As stated by the Board in *Laidlaw,* supra,

> [E]conomic strikers who unconditionally apply for reinstatement at a time when there positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

The Respondent contends that because the strike was called in furtherance of the Union's contract demands that certain work be exclusively assigned to those employees represented by it, that the strike was an unlawful strike in violation of Section 8(b)(4)(i) and (ii)(D) of the Act. As such, the Respondent asserts that the strikers were not engaged in protected concerted activity and therefore were not entitled to their jobs back, even upon an unconditional offer to return to work.

There is some Board precedent for finding that strikers who engage in an illegal strike or illegal picketing are not protected by the Act and therefore can forfeit their jobs. In *Mackay Radio & Telegraph Co*., 96 NLRB 740 (1951), the Board held that strikers forfeited the protection of the Act by engaging in an unlawful strike which was called for the purpose of requiring the employer to agree to an unlawful union-security clause. The Board stated:

> We do not here hold, as our dissenting colleague suggests, that participation in an unlawful strike automatically terminates the strikers' employment relationship. We decide no more than is required by the facts in this case; namely, that the employees who participated in the unlawful strike of the kind herein found may not invoke the protection of the Act because they were denied permanent reinstatement at the end of that strike, even though the Respondents may have failed to assert the illegality of the strike as the basis for denying reinstatement to such strikers. As the question is not now before us, we do not decide whether an employer, after permanently reinstating employees who participated in an unlawful strike,

> may subsequently discharge or otherwise discipline them for having engaged in such activity.

In*, Motor Freight Drivers Local 707 (Claremount Polychemical Corp.),* 196 NLRB 613 (1972), the Board (with member Fanning dissenting), held that employees who engaged in picketing which was violative of Section 8(b)(7)(B) were not engaged in protected concerted activity and therefore not entitled to reinstatement and backpay. (Under Sec. 8(b)(7)(B), it is unlawful for a labor organization to picket an employer for recognition where a Board election has been held within the previous 12 months.) Similarly, the Board in *Rapid Armored Truck Corp*., 281 NLRB 371 fn. 1 (1986), held that where employees engaged in picketing which was violative of Section 8(b)(7)(C) of the Act, the employer did not violate the act by refusing to reinstate or by discharging the striking employees who engaged in such picketing. (Under Sec. 8(b)(7)(C), a union violates the Act when, for an object of gaining recognition, it engages in picketing, without having filed an election petition for a reasonable period of time not to exceed 30 days.) [4]

Notwithstanding the above, it seems to me that Section 8(b)(4)(D) stands in a somewhat different place. Section 8(b)(4)(D) must be read together with Section 10(k) of the Act which states:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4(D) of Section 8(b) . . ., the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Thus, if a charge is filed alleging that a union has engaged in a strike in furtherance of a jurisdictional dispute, the Board after petitioning the Federal District Court for an temporary injunction under Section 10(l) of the Act, is required to hold a 10(k) hearing where the Board determines which competing labor group should be assigned the work in dispute. It is only after the Board issues a 10(k) award, *and if* the Respondent union fails or refuses to comply with the award, that an unfair labor practice complaint can issue alleging that the Union has violated Section 8(b)(4)(D). Accordingly, there can be no violation of the Act until *after* the Board, through a 10(k) proceeding, determines that employees other than those represented by the defendant union are entitled to the disputed work. And obviously a Respondent union would not violate 8(b)(4)(D) if it was awarded the work even though its strike or threatened strike was the event which caused the unfair labor practice charge and the 10(k) hearing to take place. [5]

Having concluded that the strike was neither an unfair labor practice strike nor an illegal strike, I find that the strike commenced as, and remained as an economic strike. Accordingly, the next question is whether the Union, on the strikers' behalf made an unconditional offer to return to work and whether the employer illegally refused to reinstate them. [6]

The evidence indicates that the Union made some kind of offer, on behalf of the strikers, to return to work on the morning of June 6, 1995. By this time the Company had hired two and possibly four permanent replacements. Subsequently, the company hired additional replacements. The question here is whether the offer to return to work was conditional or unconditional.

James Allbritton testified that on June 6, 1995, and pursuant to the direction of Waters, went to the port of Miami where the picket line was located. He testified that he spoke to Douglas Calais, the employers Marine superintendent, and told him that the strikers were making an unconditional offer to return to work. (He states he used the words "unconditional offer to return to work" because he learned that this was the proper words to use when he attended a business agent school run by the International Union.) According to Allbritton, Calais said that he had to talk to Hunt and that Calais soon returned and said that Hunt said that he would not have the people back.

Calais testified that he was approached by. Allbritton who said that Calais could send these people home (referring to the strike replacements), because he was sending the strikers back to work. Calais states that Allbritton did not use the word "unconditional" during any part of the conversation. He also states that he called the office and spoke to. Hunt who told him that he should tell Allbritton to contact the Company's lawyer. Thus, in the Respondent's view, the Union's offer was conditioned on all of the strikers returning to work and on the company discharging the people who were hired as permanent replacements.

Murray Chinners testified that on June 6, Allbritton came to the picket line and said to the striking employees that they might be going back to work. According to Chinners, when Calais drove up, Allbritton said that "we were going to unconditionally go back to work." He states that Calais responded that he had to call Hunt after which, he said that Hunt did not want us back to work.

While Allbritton testified that he used the phrase "unconditional" in reference to the offer to return to work because he learned it at business agent school, one wonders if he missed the lesson that important verbal transactions should be confirmed in writing. On the other hand, one wonders why Hunt, having been informed that Allbritton was making some kind of offer to return to work, didn't immediately contact his lawyer, who no doubt would have sent a letter to the Union seeking to clarify what the Union intended. The upshot is that we are faced with conflicting versions of a conversation that took place more than one year before the testimony was taken in this case.

Having heard the testimony and evaluating the demeanor of the witnesses, my conclusion is that both sides were essentially telling the truth as they remembered it. Thus, I think it is prob-

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[4] See also *ABC Prestress & Concrete*, 201 NLRB 820, 826 (1973), where the Board held that the Respondent did not violate the Act by refusing to reinstate strikers where the purpose of the strike was to put pressure on the company to require it to make payments in violation of the Economic Stabilization Act of 1970.

[5] Indeed, as most collective-bargaining agreements do not contain an arbitration provision that would allow another union or other group of employees to intervene in a work assignment dispute, a union may have to engage in a strike or threatened strike in order to have the dispute placed before an impartial forum; namely the NLRB pursuant to a 10(k) hearing.

[6] An unconditional offer to return to work by a Union on behalf of strikers is a valid offer and must be honored. *Matlock Truck Body Corp*., 248 NLRB 46l (l980); *Workroom For Designers, Inc*., supra at 861.

able that Allbritton used the word "unconditional" in relation to the offer to return to work and I think that it is probable that he also said that as the strikers were returning to work, the company could send the replacements home.

In *Histacount*, 278 NLRB 681, 687 (1986), an offer to return to work by economic strikers was held to be conditional where the Union demanded that all strikers be immediately put back to work. In that case, the Union said that unless all of the strikers were reinstated together, none of them would return to work.

In *H & F Binch Co. v. NLRB*, 456 F.2d 357, (2d Cir. 1972), the court held that a request to return to work was conditional as the request was for group reinstatement which was explicitly conditioned on all being reinstated together. In that case the letter stated: "This is to advise you that all the employees now on strike offer to return to work immediately provided you agree to take everyone back without discrimination. All employees are willing to return provided you are willing to agree not to discriminate against any workers."

On the other hand, in *NLRB v. Okla-Inns,* 488 F.2d 498, 505 (10th Cir. 1973), the employer contended that it had the impression that an offer to return to work was conditioned on the return of all the employees. In that case, the Union's letter said, "We the undersigned, hereby request that we be reinstated to our former positions. . . . This is an unconditional offer to return to work" The court noted that the alleged condition was not stated and to the extent that there was any ambiguity, the employer could have inquired into what the strikers meant by "we the undersigned." The court stated: "Rather than make a reasonable effort to clarify the situation, the employer embarked on a course of unfair labor practices toward workers remaining on the job that perpetuated a long and painful labor dispute. . . . Based on the facts and circumstances, the employer has not borne the burden of proof to show that the offer was less than unconditional. . . ."

In *NLRB v. Augusta Bakery Corp*., supra, an offer was construed as being unconditional despite a demand by the union for simultaneous resumption of negotiations. In that case, the union sent one letter stating that the "employees and the Union are offering unconditionally to immediately return to work," while sending a a second letter demanding that the company return to negotiations immediately. The court stated inter alia;

> The Board's finding of an unconditional offer is a predominantly factual determination, which we must uphold if supported by substantial evidence. Augusta bears the burden of showing that the offer of return was not unconditional. *Soule Glass & Glazing Co., v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *NLRB v. Okla-Inn,* 488 F.2d 498, 505 (10th Cir. 1973).
>
> In support of its claim that the offer was conditional, Augusta cites *International Union, Allied Industrial Workers v. NLRB*, 411 F.2d 249 (7th Cir. 1969) in which we enforced a Board determination that strikers' reinstatement requests were conditioned on the employer's agreement to resume bargaining with the union . . . In that case, the union had informed the company . . . that the strike would be "terminated" on July 20 and, in the same letter, demanded resumption of bargaining—a matter that was subject to a then pending unfair labor practice charge. On July 20, 61 strikers sent . . . letters to the employer which stated, "I make this application for reinstatement with the understanding that [the employer] will continue to recognize and commence bargaining with my duly designated bargaining representative." We upheld the Board's conclusion that the offer to return was conditional, noting that the company had expressly announced its intent to comply with the determination reached through the administrative processes.
>
> The Board rests its determination on the opposite assertion; the Union's decision to distinguish, by way of separate letters, the return-to-work offer from the bargaining demand was a way to ensure, . . . that the issues would remain decoupled.
>
> Were we to view the facts as an original matter and with a somewhat cynical eye, we might be sympathetic to Augusta's argument. A creative union might well attempt to circumvent *Allied Industrial Workers* by separating the tangible link between offer and condition by setting them forth in separate letters. However, the facts do suggest two reasonable (albeit diametrically opposed) inferences, and the substantial evidence standard does not allow us to reject the Board's "choice between two fairly conflicting views."

Assuming that Allbritton, in addition to making the "unconditional" offer to return to work, also said that the Company could send the replacements home because the strikers were going back to work, this does not necessarily constitute a conditional offer to return to work. Clearly, the Union could have requested (but not required), that the Company discharge replacements in order to make room for all of the strikers to return to work. In my opinion, such a request should not, however, be construed as a condition unless it explicitly was intended as a condition. At most, I would construe. Allbritton's comments as amounting to no more than a request which did not condition the return to work on the firing of the replacements or on the reinstatement of all of the strikers as a group. In my opinion the Respondent has not met its burden of showing the offer to return to work was less than unconditional.

CONCLUSION OF LAW

By failing and refusing to reinstate economic strikers upon their unconditional offer to return to work, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

As the evidence shows that the Respondent illegally refused to reinstate at least some of the strikers, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

However, as the evidence shows that at the time that the Union made an offer to return to work, the Company had hired two to four permanent replacements, and as the evidence did not show when replacements left the Company's employ, I shall leave to the compliance stage of the proceeding, the de-

termination of which strikers were unlawfully denied reinstatement and the amount of backpay that would be due to them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Gimrock Construction Inc.,, Miami, Florida, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to reinstate economic strikers to existing vacancies upon their unconditional offer to return to work.

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

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

(a) Upon application, offer to those strikers who have not yet returned, immeditate and full reinstatement to their former or subtantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired as striker replacements after June 6, 1995; and place on a preferential hiring list those striker applicants for whom positions are not immediately available.

(b) Make whole any of the strikers for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them to their former jobs in the manner described in the remedy section of this decision.

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

(d) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 1995.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to reinstate economic strikers to existing vacancies upon their unconditional offer to return to work.

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

WE WILL upon application, offer to those strikers who have not yet returned, immeditate and full reinstatement to their former or subtantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary, all persons hired as striker replacements after June 6, 1995; and place on a preferential hiring list those striker applicants for whom positions are not immediately available.

WE WILL make whole any of the strikers for any loss of earnings and other benefits suffered as a result of, and to the extent that we have illegally refused to reinstate them to their former jobs.

GIMROCK CONSTRUCTION, INC.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."