

Wilder Construction and General Teamsters Local No. 231, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 19-CA-16367

30 September 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
DENNIS AND JOHANSEN

On 11 September 1984 Administrative Law Judge Richard D. Taplitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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, and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wilder Construction, Bellingham, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In affirming the judge's conclusion that the Respondent lacked a reasonable, objective basis for doubting the Union's majority status, we rely solely on his findings that the Respondent has not shown that any of the original complement of 14 employees rejected continued representation by the Union. We accordingly find it unnecessary to pass on his discussion regarding a presumption under *Pennco, Inc.*, 250 NLRB 716 (1980), supplementing 242 NLRB 467 (1979), enfd 684 F.2d 340 (6th Cir 1982), as to the sentiments of the 12 permanent striker replacements. Even assuming they objected to continue representation by the incumbent, this would be an inadequate basis in these circumstances to justify the Respondent's withdrawal of recognition.

Ronald J. Knox and Martha A. Barron, Esqs., of Seattle, Washington, for the General Counsel.

Bruce Bischof, Esq. (Bischof and Hungerford), of Sunriver, Oregon, for the Company.

Bruce Heller, Esq. (Davies, Roberts, Reid, Anderson and Wacker), of Seattle, Washington, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Seattle, Washington, on June 14, 1984. The charge was filed on December 14, 1983, by General Teamsters Local No. 231, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. (the Union). The complaint,

which issued on January 24, 1984, and was amended at the hearing, alleges that Wilder Construction (the Company or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act.

Issues

1. The primary issue is whether the Company refused to bargain with the Union in violation of Section 8(a)(5) of the Act by withdrawing recognition from the Union after the expiration of a collective-bargaining agreement at a time when the Company did not have a good-faith reasonably based doubt that the Union continued to represent the majority of its employees.

2. If the Company had a continuing duty to bargain with the Union, whether the Company further violated Section 8(a)(5) of the Act by failing to honor the Union's request for certain information concerning employees in the bargaining unit.

3. Whether an economic strike was converted to an unfair labor practice strike.

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 the Company.

Upon the entire record¹ of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Washington State corporation with an office and place of business in Bellingham, Washington, is in the construction industry. During the 12 months immediately preceding issuance of complaint, the Company had gross sales of goods and services valued in excess of \$500,000. During the same period of time, the Company purchased and caused to be transferred and delivered to its facilities within Washington goods and materials valued in excess of \$50,000 directly from sources outside of Washington, or from suppliers within Washington which in turn obtained such goods and materials directly from sources outside of Washington. The Company 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 Agreed-Upon Facts

At the commencement of the hearing all parties entered into the following stipulation of facts:

¹ The quality of the transcript is extremely poor. However, most of the critical facts were stipulated to in writing. The General Counsel filed a motion to correct the transcript dated July 20, 1984. On July 25, 1984, I received a revised transcript from the reporter. The General Counsel's motion is geared to the original and not the revised transcript. There is no opposition to the motion and in his brief the General Counsel requests that the motion be granted. Though the motion appears to be somewhat meaningless, as it is addressed to the original rather than to the revised transcript, in the absence of any objection it is granted. The motion and related papers have been added to the exhibit file as G C Exh 6.

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

All employees employed by Respondent in the classifications described in Appendix 1 of the 1980-1983 Building, Heavy and Highway Construction Labor Agreement between Respondent and the Charging Party Union.

The above-described 1980-1983 Building, Heavy and Highway Construction Labor Agreement is attached hereto as Joint Exhibit 1(b). [G.C. 2(b).]

2. Since on or about 1974, and at all times material herein, until October 11, 1983, the Union has been the designated exclusive collective bargaining representative of the Unit and since 1974, until October 11, 1983, the Union has been recognized as such representative by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period June 1, 1980 through May 31, 1983.

3. At all times material herein, until October 11, 1983, the Union, by virtue of Section 9(b) of the Act, has been the exclusive representative of the Unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. By letter dated October 11, 1983, Respondent withdrew recognition of the Union as the representative of the employees in the Unit. The letter is attached hereto as Joint Exhibit 1 [G.C. 2(c).] Since October 11, 1983, Respondent has refused to recognize the Union as the representative of the employees in the Unit and has refused the Union's requests to meet and bargain.

5. It is Counsel for the General Counsel's allegation and position that Respondent's October 11, 1983 withdrawal of recognition was invalid, that the Union's majority status and representative status has continued from 1974 and is continuing, and that Respondent has a duty to bargain with the Union. It is Respondent's position that its October 11, 1983 withdrawal of recognition was valid and, as of that date, it no longer had a duty to bargain with the Union.

6. At the time the strike began on August 29, 1983 the Unit consisted of 14 employees, all of whom initially went out on strike. Between August 29, 1983 and October 11, 1983 three of the striking employees crossed the picket line and returned to work, and Respondent hired 12 permanent replacements.

7. On November 18, 1983 the Union, on behalf of the striking employees, made an unconditional offer to return to work. Respondent notified the striking employees to inform Respondent if they wanted to be placed on a preferential hiring list. Five of the

striking employees responded in the affirmative and were placed on a preferential hiring list.

8. On May 11, 1984, the Union wrote to Warren Bestwick, president of Respondent requesting certain information about bargaining unit employees. That letter is attached hereto as Joint Exhibit 1(d). [G.C. 2(d).] Since May 11, 1984 Respondent has failed and refused to provide the requested information. Counsel for the General Counsel hereby amends the Complaint to include an allegation that Respondent's failure and refusal to provide the requested information violates Section 8(a)(5) of the Act. Respondent denies that allegation.

In addition, during the course of the hearing, the parties entered into stipulations which established the following facts: The 14 employees in the bargaining unit, all who went out on strike on August 29, 1983, were members of the Union. The Union initially went on strike because the parties were unable to reach a full agreement on the terms of a collective-bargaining agreement. Once recognition was withdrawn by the Company, the Company foreclosed the possibility of entering into a signed collective-bargaining agreement.

There is no allegation by the Union that employees on the preferential hiring list were denied preferential recall rights. Though the Company contends that there was substantial violence on the picket line during the strike, there is no contention that any individual striker was disqualified from employment by strike misconduct.

The final stipulation was that there were negotiating sessions between the Company and the Union between June and September 27, 1983.

There is no contention by the Company that the Union was disqualified from representing the employees because of any strike misconduct. There is also no contention by the Company that at the time it withdrew recognition from the Union, the Union in fact failed to represent a majority of the employees. The Company contends in substance that it withdrew recognition on the basis of its reasonable, objectively based belief that the Union no longer represented a majority of the employees. In support of that position the Company adduced evidence relating to strike misconduct, various statements made by employees to company officials concerning their lack of desire to be represented by the Union, and the abandonment by certain individuals of their employee status.

The General Counsel rested on the basis of the stipulations and the testimony of Marvin Eggert, the secretary-treasurer of the Union. He credibly testified that the strike would have ended if the parties had reached a collective-bargaining agreement.

B. *The Company's Defense*

1. The strike violence

During the first 2 weeks of the strike there were a number of incidents on the picket line. After 2 weeks the Company obtained an injunction in a state court proceeding. Video tapes taken by the Company during that time, which were received in evidence, in general sub-

stantiate the testimony of Company Dispatcher Rick Niebruege who testified to the following incidents that he saw: a striking teamster named Dick Willsey² threw an egg at a truck; there were a number of threats; strikers hit dump trucks with picket signs; strikers yelled at truckdrivers and gave them the finger; and pickets yelled many obscenities.

Though Niebruege saw trucks coming into the company premises with broken windshields, he could not testify to his own knowledge how the windshields were broken. Picketers followed the automobiles of strike replacements. Though Niebruege never saw Marvin Eggert, the secretary-treasurer of the Union, on the picket line, he did see that union official's brother and son on the picket line.

R. J. La Plante, an airplane pilot for the Company, credibly testified that on the third day of the strike Chuck Eggert, the son of Secretary-Treasurer Marvin Eggert, threatened to kill him and threatened to sabotage his airplane. There were no strike replacements present during that conversation and La Plante did not tell any of the strike replacements about the incident.

James Anderson, vice president of the Company, gave an affidavit which was used in obtaining the state court injunction. The information in that affidavit was given to him personally by the people involved in the incidents. Though the affidavit was hearsay with regard to the truth of the matters set forth in the affidavit, the fact that the information was given to Anderson, who was a party to the decision to withdraw recognition, was admissible to indicate Anderson's state of mind in connection with the "good faith doubt" defense. The affidavit indicated that pickets threw eggs at company vehicles; there was mass picketing which forced employees and customers to avoid their normal route and swerve around the scene; drivers of vehicles were told "you are dead meat" and "we are going to get you and your family"; there was gross profanity; the antenna was broken off the car of employee Ted Fisher and his windows were hit by a picket sign; coffee was thrown in the window of his car by pickets Ken Eggert and Pete Sanders; pickets Chuck Eggert and Doug McClintock forced a truck to stop and hit the truck with a pick or wooden ax handle; two vehicles driven by union members stopped in front of a company truck and forced the driver to flee; an employee's car tires were slashed at his home on September 6, 1983; on September 7 picket Doug McClintock approached a company truck with a sledge hammer; on September 7 an employee of the Company had his car struck as he was leaving work; on the same day union member Wade Anderson threatened a company employee by saying "You are dead when it's dark"; Anderson physically threatened to assault other employees; members of the picketing group threatened to burn down the residences of company employees; rocks and eggs were thrown at company trucks; and company employees were harassed at home and going to and from work.

² About the third week of the strike Dick Willsey was rehired by the Company as a truckdriver and he was still working at the time of the trial.

2. Statements by employees about union representation

Gale Schwiesow is operations manager for the Company's Washington division. He was directly involved in hiring the 12 strike replacements. All 12 replacements were hired within the 2-1/2- to 3-week period after the strike began. When they were hired Schwiesow told all of them that there was a strike in progress. A number of the new hires asked what would happen to them if the Company reached an agreement with the Union and many of them said that as far as they were concerned they owed nothing to the Union. Schwiesow spoke to a number of the strike replacements at various times. Most of them told him that they were satisfied with the conditions they were operating under and that they were exceptionally dissatisfied with the harassment they were going through on a daily basis for the first 2 or 3 weeks of the strike. A number of the strike replacements said they hoped the Company never came to any kind of conclusion or reached an agreement. Schwiesow participated with other company officials in deciding to withdraw recognition. He told the other company officials that his feeling, based on what the replacements told him, was that it would be ridiculous to assume that the Union was in any way representing those employees.

3. The three strikers who allegedly retired

Company Vice President James Anderson credibly testified that in November 1983 he was notified by the insurance carrier who ran the Company's pension plan that three individuals had requested disbursement of the pension plan funds. Those individuals were employees Metsner, Martin, and Bailey. Anderson testified that he received the information that those three employees were retiring during the period of the strike but he did not recall the day he received it. He was not informed by the men themselves if they had retired. The strike lasted from August 29 to November 18, 1983, and the withdrawal of recognition occurred on October 11, 1983. Anderson's testimony was far too equivocal to establish that he knew that those three employees were retiring at the time recognition was withdrawn on October 11. Moreover, Anderson gave the Board an affidavit in which he detailed the reasons that the Company withdrew recognition. The retirement of those employees was not mentioned as one of those reasons. In addition, Anderson testified that for an employee to take his money from the pension plan he must notify the insurance carrier of either his retirement or his termination from the Company but that an employee can say he is retired and then change his mind and return to work. The evidence is insufficient to establish that those three employees either lost their status as employees or as strikers as of the date that the Company withdrew recognition.

4. The employment of a striker by another employer

Gale Schwiesow, the Company's operations manager, testified that one of the Company's truckdrivers, Rod

Bruland, went to work for a different employer while the strike was still on or shortly thereafter and that Bruland was still working for that employer shortly before the trial. There is no indication whether that employment was temporary or permanent or whether Bruland accepted that employment before or after recognition was withdrawn. The Company has failed to establish that Bruland should not be counted as a company employee as of the date of the withdrawal of recognition.

C. Analysis and Conclusions

1. The withdrawal of recognition

Upon expiration of a collective-bargaining agreement, an employer may not withdraw recognition and refuse to bargain with an incumbent union unless certain circumstances exist. As the Board held in *Robertshaw Controls Co.*, 263 NLRB 958 (1982):³

... we agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) by refusing to bargain with the Union. We have consistently held that a union enjoys a presumption of continuing majority status. In order to rebut that presumption, an employer must either show that the union in fact no longer retains majority support, or that its refusal to bargain was based on a reasonably grounded doubt as to the union's majority status. As to a reasonably grounded doubt, the doubt must be based on objective considerations and must be raised in a context free of unfair labor practices. *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22, 23 (1977), enfd. 604 F.2d 606 (9th Cir. 1979).

The Company performs work in the construction industry. As certain contracts are lawful, even in the absence of majority status by the union in that industry, the presumption of continued majority does not always apply. However, in the instant case, the parties clearly had a contract to which Section 9 of the Act applied. The parties so stipulated. In addition, they stipulated that at the time of the strike all of the employees were members of the Union. The existence of the recently expired contract therefore does require the presumption of continued majority.

The Company does not contend nor has it offered any proof that the Union in fact lost its majority status. It did present evidence in support of its contention that it had an objective basis for reasonably doubting the Union's continued majority. Such a defense can be raised in a context free of unfair labor practices. Here, there is no indication that the Company engaged in any unfair labor practices prior to the withdrawal of recognition. However, the Company has a difficult burden in rebutting the presumption of the Union's continued majority. As the Board held in *Pennco, Inc.*, supra, 250 NLRB at 717: "... the employer's burden is a heavy one. Thus, 'it is

insufficient ... that the employer merely intuits nonsupport,' and 'good-faith doubt 'may not depend solely on unfounded speculation or subjective state of mind.'"

In order to determine any question relating to majority status, a computation must be made as to the total number of employees. That number must include both the strikers and the strike replacements. *Crimptex, Inc.*, 211 NLRB 855, 856 (1974), enfd. 517 F.2d 501 (1st Cir. 1975); *Cantor Bros.*, 203 NLRB 774, 779 (1973), enfd. 86 LRRM 2572 (9th Cir. 1974).

When the strike began on August 29, 1983, there were 14 employees in the bargaining unit, all of whom were members of the Union and all of whom went out on strike. Between August 29 and October 11, 1983, when the Company withdrew recognition, 3 of the striking employees crossed the picket line and returned to work, and Respondent hired 12 permanent replacements. The total work force at the time of the withdrawal of recognition was therefore 14 and 12 or a total of 26. In order to prevail, the Company would have to establish by credible evidence that it had a reasonable, objectively based belief that 13 or more employees did not want the Union to represent them.

Under controlling Board law replacements are presumed to support an incumbent union in the same ratio as the employees they replaced. The presumption is rebuttable, but it cannot be rebutted merely by showing that strike replacements crossed the union picket line. *IT Services*, supra, 263 NLRB at 1186; *Pennco, Inc.*, supra, 250 NLRB at 717.

As indicated in the statement of facts above, the Company appears to rely on four separate matters for its position that it had a reasonable, objectively based doubt as to the Union's continued majority as of the date of withdrawal of recognition. In effect, the Company contends that it could reasonably assume that strike replacements, against whom pickets directed violent activity, would not want the Union who represented the pickets to also represent them; that statements by employees about their distaste for the Union indicated a lack of majority; that three strikers who retired should not be counted in the employee complement; and that one striker should not be counted as an employee because he accepted employment for another employer.

The last two contentions require little discussion. As is set forth in more detail above, there was no probative credible evidence as to when the three strikers retired or when the striker accepted employment elsewhere. The strike continued well after the Company's withdrawal of recognition and the Company has not established that the events in question took place before the withdrawal or that the Company relied on those events in deciding to withdraw recognition. The Company has the burden of producing evidence to rebut the presumption of continued majority and, at least in this regard, it has failed to do so. Even if it were not for the question of critical date, the Company would have failed in meeting its burden. There is no showing that any of those employees permanently severed their employment relationship or abandoned their strikers' status. Such proof must be unequivocal. *Harowe Servo Controls*, 250 NLRB 958, 964

³ See also *IT Services*, 263 NLRB 1183 (1982), *Pennco, Inc.*, 250 NLRB 716 (1980), supplementing 242 NLRB 467 (1979), enfd. 684 F.2d 340 (6th Cir. 1982), *Beacon Upholstery Co.*, 226 NLRB 1360, 1367 (1976); *Bartenders Assn. of Pocatello*, 213 NLRB 651 (1974)

(1980); *S & M Mfg. Co.*, 165 NLRB 663 (1967); cf. *Coca-Cola Bottling Co. of Memphis*, 269 NLRB 1101 (1984).

The Company has also failed to establish that a majority of the employees informed company officials that they did not want the Union to represent them. There were 26 employees in the bargaining unit as of the critical date. Company Operations Manager Schwiesow spoke to some of the 12 strike replacements who told him that they owed nothing to the Union; that they were satisfied with the conditions they were operating under; that they were exceptionally dissatisfied with the harassment they were going through from the pickets; and that they hoped the Company never reached an agreement with the Union. He did not testify to the actual number of employees he spoke to, but there were only 12 strike replacements and he spoke to only some of them. As the Board held in *Thomas Industries*, 255 NLRB 646, 647 (1981), enfd. as modified 687 F.2d 863 (6th Cir. 1982):

Rejection and/or criticism of the bargaining representative by a minority of the unit employees is insufficient to support a reasonable doubt of the Union's continued majority status.

The statements of displeasure with the Union by a minority of employees could not establish that a majority of the employees no longer wanted the Union to represent them. *Carmichael Construction Co.*, 258 NLRB 226, 230 (1981), enfd. 728 F.2d 1137 (8th Cir. 1984); *Nevada Lodge*, 227 NLRB 368, 376 (1976), enfd. 584 F.2d 293 (9th Cir. 1978).

There are some situations where special circumstances are sufficient to rebut the presumption that strike replacements desire representation in the same proportion as other employees. Such situations arise where there is an extreme conflict of interest between the strikers and the replacements. In *Beacon Upholstery Co.*, 226 NLRB 1360 (1976), the Board held that the presumption was rebutted in a situation where all the striking employees had been lawfully discharged, the interests of those discharged strikers were diametrically opposed to those of the strike replacements, and the strike replacements would have lost their jobs if the strikers returned to work.

In *Pennco*, supra, 250 NLRB at 718 fn. 16, the Board held that violence on the picket line was one factor that could be considered with regard to rebutting the presumption. The Board stated:

... in view of the speculative nature of the employees' reasons for crossing the picket line, the occurrence of some violence on the picket line is, at best, one factor weakening the presumption of majority status but not alone rebutting it.

In *I T Services*, supra, 263 NLRB at 1183 fn. 17, the Board relied in part on picket line violence for finding that an employer had a good-faith doubt as to the union's majority. The Board there held:

We agree with the Administrative Law Judge that Respondent had an adequate objective basis to support a good-faith doubt of the Union's majority.

Our agreement, however, is predicated on all of the factors on which he relied, including the Union's demand that the replacements be discharged, the statements by replacements that they did not want the Union to represent them, and the violence directed against them.

In the instant case, there was no showing that the Union sought to have the strike replacements discharged. In addition the evidence with regard to employee disillusionment with the Union in the *I T Services* case was much more substantial than that adduced in the instant case. Also, in the *I T Services* case the violence continued throughout the course of the strike. In the instant case the strike began on August 29, 1983, and the striking employees made an unconditional offer to return to work on November 18, 1983. The violence and name-calling on the picket line occurred during the first 2 or 3 weeks of the strike.⁴

In the instant case the violence on the picket line was somewhat limited, the indications of employee discontent were somewhat vague, and there is no evidence that the Union demanded that the strike replacements be discharged. The *I T Services* case is distinguishable and the Company has not adduced evidence to rebut the presumption that the strike replacements desired representation in the same proportion as the employees they replaced.

Moreover, even if that presumption had been rebutted, the Company would be in difficulty because of the numbers involved. There were 26 employees in the bargaining unit. Only 12 of those were strike replacements. The 14 strikers were all union members; 11 of those strikers remained on the picket line and there can be no question about their union loyalty. Three of the strikers returned to work. However, there is no indication that they dropped out of the Union. Strikers can be forced by economic circumstances to cross their own picket line and return to work even where they ardently desire union representation. As is discussed above, the fact that an employee crosses a picket line does not establish that the employee desires to be free of union representation. The three union members who crossed the picket line were in a very different position from the strike replacements. It is not uncommon for strike replacements to be discharged at the conclusion of a strike when the strikers return to work. The Company would have to almost double the available jobs to keep both the strikers and the replacements working at the same time. However, with regard to strikers who returned to work, that problem does not exist. There is no replacement who has to

⁴ Though the violence was serious in that it involved threats, name-calling, and some damage to equipment, there was no evidence that anyone was physically injured. As was held in *I T Services* at 1187.

In order to put the matter in perspective, some consideration must be given to the nature and extent of violence. While some people when hit on one cheek may be able to turn the other cheek and love their aggressor, it is likely that the love will vary in inverse proportion to the strength of the blow.

In that case the strike lasted from November 1979 to October 1980 and during that entire time the violence and threats directed by pickets against replacements was ubiquitous.

leave to make room for the returning striker. The striker who returns has a much greater assurance of continued employment than the strike replacement. The striker who returns to work also benefits from any improved contract the union is able to obtain from the company at the termination of the strike. In short there is no basis for assuming nor is there any evidence that the three strikers who returned to work no longer wanted the Union to represent them. Thus, even if it could be assumed that all 12 of the replacements wanted to be free of union representation, there were still 14 union members who did want representation out of the employee complement of 26. The Company had no reasonable basis for doubting that those 14 employees, which constituted a majority of the bargaining unit, continued to want union representation. Its defense must therefore fall. I find that the Company violated Section 8(a)(5) of the Act by withdrawing recognition from the Union on October 11, 1983.

2. The refusal to furnish information

The controlling law was set forth in the *New York Times Co.*, 270 NLRB 1267, 1273 (1984), in which the Board adopted the decision of Administrative Law Judge Howard Edelman which held:

An employer has a duty to provide upon request information relevant to bargainable issues. The law in this area is clear and well settled. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). Where the requested information concerns wage rates, job descriptions, and other information relating to employees in the bargaining unit, the information is presumptively relevant to bargainable issues. *Fawcett Printing Corp.*, 210 NLRB 964 (1973); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965); *Timken Roller Bearing Co.*, 138 NLRB 15 (1962), enfd. 325 F.2d 746, 750 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964).

In the instant case the parties stipulated and I found that the Union requested certain information about bargaining unit employees. The Union's letter, which is dated May 11, 1984, requests a list of names of unit employees together with their social security numbers, hire and termination dates, and addresses. That information is presumptively relevant to bargainable issues and there was no evidence offered to rebut that presumption. It was stipulated and I find that since May 11, 1984, the Company has failed and refused to provide the requested information. As found above, the Company's withdrawal of recognition was in violation of Section 8(a)(5) of the Act and the Company had a continuing duty to bargain with the Union. It follows that the Company further refused to bargain in violation of Section 8(a)(5) of the Act by failing to furnish the requested information.

3. The conversion of the economic strike to an unfair labor practice strike

The Company's employees went out on strike on August 29, 1983, because the Company and the Union were unable to reach a full agreement on the terms of

the collective-bargaining agreement. It was an economic strike. On October 11, 1983, the Company unlawfully withdrew recognition from the Union. By that time 12 strike replacements had been hired and 3 strikers had returned to work. The strike continued until November 18, 1983, when the Union, on behalf of the striking employees, made an unconditional offer to return to work. The General Counsel contends that the unlawful withdrawal of recognition on October 11, 1983, converted the economic strike to an unfair labor practice strike. Union Secretary-Treasurer Marvin Eggert credibly testified that the strike would have ended if the parties had reached a collective-bargaining agreement. Once recognition was withdrawn by the Company, the Company foreclosed the possibility of entering into such a collective-bargaining agreement. The General Counsel's position is well taken. As the Board held in *Pennco, Inc.*, 242 NLRB 467, 469 (1979).⁵

... although there can be no certitude that a collective-bargaining contract would have been agreed upon had Respondent not refused to bargain, such refusal to recognize or meet and bargain with the Union clearly precluded any possibility of reaching agreement on a contract and tended to impede any possible settlement of the strike. Accordingly, we agree with the General Counsel that Respondent's refusal to bargain converted the Union's economic strike into an unfair labor practice strike as of November 5, 1977. Therefore, on that date, the strikers assumed the status of unfair labor practice strikers.

I find that the economic strike was converted to an unfair labor practice strike on October 11, 1983.

In the instant case there is no allegation that any unfair labor practice striker was wrongfully denied reinstatement upon his application to return to work. The parties stipulated that on November 18, 1983, when the striking employees made an unconditional offer to return to work, the Company asked which of them wanted to be placed on a preferential hiring list. Five of the striking employees responded in the affirmative and were placed on a preferential hiring list. There is no contention that any strike replacement had to be removed to make room for a returning unfair labor practice striker. All the strike replacements were hired before the economic strike was converted to an unfair labor practice strike. The usual Board order in the case of unfair labor practice strikers requires an employer to reinstate, upon unconditional request, all strikers who were not permanently replaced before the date the unfair labor practice strike began, discharging if necessary any replacement hired after that date. Such an order does not seem applicable in the instant situation. The usual order also requires the employer to place employees for whom no employment is available upon a preferential hiring list based upon seniority or some other nondiscriminatory test, for employment if his job becomes available.⁶ The Company has already

⁵ See also *Whisper Soft Mills*, 267 NLRB 813 (1983)

⁶ The reinstatement rights of the unfair labor practice strikers are those set out in *Whisper Soft Mills*, supra

done that and there is no contention that the Company is ignoring the preferential hiring list. It thus appears that no specific order with regard to the unfair labor practice strikers is needed.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Company in the classifications described in Appendix I of the 1980-1983 Building, Heavy and Highway Construction Labor Agreement between the Company and the Union.

4. At all times material herein the Union was the exclusive bargaining representative of the Company's employees in the above-described bargaining unit.

5. By withdrawing recognition on October 11, 1983, and by refusing to recognize or bargain with the Union since that date, the Company has violated Section 8(a)(5) and (1) of the Act.

6. By refusing to supply the Union with requested information concerning employees in the bargaining unit, the Company has violated Section 8(a)(5) and (1) of the Act.

7. The strike which began on August 29, 1983, was converted to an unfair labor practice strike on October 11, 1983, the date the Company unlawfully withdrew recognition and refused to bargain with the Union.

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

REMEDY

Having found that the Company engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I recommend that the Company be ordered to recognize and, upon request, to bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Having found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the information relating to employees in the bargaining unit, I recommend that the Company be ordered to furnish that information.

As is set forth above, I found that the Company's unlawful withdrawal of recognition converted the economic strike to an unfair labor practice strike on October 11, 1983. For the reasons stated above, no further order is needed in that regard.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Wilder Construction, Bellingham, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with General Teamsters Local No. 231, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of its employees in the following bargaining unit:

All employees employed by the Company in the classifications described in Appendix I of the 1980-1983 Building, Heavy and Highway Construction Labor Agreement between the Company and the Union.

(b) Refusing to furnish the Union with information requested on bargaining unit employees which relates to their names, social security numbers, hire and termination dates, and addresses.

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

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

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of its employees in the unit described above, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Furnish the Union with information requested on bargaining unit employees which relates to their names, social security numbers, hire and termination dates, and addresses.

(c) Post at its Bellingham, Washington facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 19, 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.

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"

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

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

WE WILL NOT refuse to recognize and bargain in good faith with General Teamsters Local No. 231, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of our employees in the following bargaining unit:

All employees employed by our company in the classifications described in Appendix I of the 1980-1983 Building, Heavy and Highway Construction

Labor Agreement between the Company and the Union.

WE WILL NOT refuse to furnish the Union with the information it requested on bargaining unit employees which relates to their names, social security numbers, hire and termination dates, and addresses.

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

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive representative of our employees in the unit described above, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL furnish the Union with the information it requested on bargaining unit employees which relates to their names, social security numbers, hire and termination dates, and addresses.

WILDER CONSTRUCTION