

The parties met again on April 20, 2004.⁴ At the meeting, the Employer attorney and negotiator stated that he would not meet face-to-face with the Union unless the meeting was tape recorded. As a result, the parties communicated through FMCS mediator Numair, who had participated in all the bargaining sessions since October 2001. The Union representative gave the Employer a letter, through Numair, containing an unconditional offer to return to work on behalf of the striking employees. At the Union's request, Numair also told the Employer that the Union was withdrawing its opposition to the Employer's proposals on all open bargaining issues except wages and contract duration, and that it wanted to bargain on those subjects. The Union's letter provided as follows:

The Union, by this letter, is making an unconditional offer to return to work effective immediately. All of the employees of VPF who initiated the strike on December 20, 2002 want to return. I am ready and willing to meet to work out logistical details with you and VPF.

The Employer attorney responded that he wanted to discuss the striking employees' return to work and to defer discussions on open contract issues. He also stated that he wanted to set up a separate date to discuss the return to work, and provided a list of available dates for the purpose of discussing that issue.

On April 21, the Employer faxed the Union a letter "in response to your letter dated April 20, 2004, wherein you made an unconditional offer to return to work at the [Employer] effective immediately." The letter listed the employees who went on strike, and the shifts on which they worked prior to the strike. The letter then stated that since the Employer was an acute care facility,

certain requirements must be met prior to employees returning to work First, a tuberculosis test or proof thereof that it has been taken within (1) one year of their return date. Secondly, employees will be required to have an updated CPR certification. Thirdly, employees will be required to present a current respiratory therapy license for the state of New Jersey. An original must be presented and a copy will be made by the facility. All of the aforementioned are required prior to employees returning to work.

⁴ Herein all dates are 2004 unless otherwise indicated.

The letter further stated that "due to the necessity of continuity of patient care, I suggest that employees prepare to return with the May 11, 2004 scheduling period and that they complete the aforementioned requirements in the interim. They can contact either Ed Bachelor or Patricia Cunningham for scheduling and other matters."

Finally, the letter stated that "[i]n view of the acuteness of the situation, I would appreciate your prompt response regarding my proposal listed herein and above. I am available to meet regarding the return to work procedure, if necessary, on the following dates: April 26th, 28th and 29th. Since I have been informed by the Mediator that you are unavailable on the aforementioned dates, I am also available anytime on either May 3, 2004 or May 4, 2004. Once we iron out the reinstatement we can attempt to schedule further bargaining. I await your response"

On April 27, the Union rep contacted mediator Numair and told him that the Union could meet on the striker return issue on April 27, 28, 29, May 4, 5, or 6. According to Numair's non-affidavit statement to the Region, Numair reached the Employer attorney on his cell phone and gave him the Union's available meeting dates. The Employer attorney responded that he had nothing to write the dates on, and told Numair to leave him a voice mail message at his office. That same day, Numair left a voice-mail message for the Employer attorney with the Union's available meeting dates. The Employer did not respond.

On about May 4, the Union rep spoke with Numair, who told him that the Employer had not returned his calls regarding the scheduling of the meeting. Numair continued to leave messages with the Employer, who did not return his calls. In early June, the Union rep again asked Numair about the scheduling of the meeting, and Numair stated that he still had not heard back from the Employer. On June 7, Numair reached the Employer attorney and the parties agreed to meet on June 29. Shortly before June 29, the Employer canceled the meeting, and a new meeting was scheduled for July 12.

Meanwhile, in early to mid-June, an employee left six to eight voice mail messages with the Employer spokesperson whom the Employer's April 21 letter directed employees to contact. The employee's messages stated that he was interested in returning to work, and wanted to make arrangements to get the CPR certification completed at the Employer's facility. The Employer did not return these

calls. During the third week of June, the employee reached the Employer spokesperson directly on the telephone and reiterated that he wanted to return to work and to make arrangements to take the CPR class at the facility. The Employer spokesperson told the employee that she would have answers for him by the end of the day, but she did not call back. On June 25, the employee left another voice mail, followed by a July 2 email. On July 7, the Employer spokesperson emailed the employee that she had been informed by counsel that the employee should address these issues at the parties' July 12 meeting.

The parties met on July 12. The Union representative asked whether the Employer was going to permit striking employees to obtain CPR certifications and tuberculosis tests at its facility. The Employer attorney responded that he did not know and had not thought about it. The Union rep then raised contract issues and asked the Employer whether it had a proposal for the Union. The Employer attorney responded that the Employer needed to caucus. In response to a note from the Union providing available meeting dates, the Employer told the Union, through mediator Numair, that it could not meet until August 19; that it would have a contract proposal on that date; and that it would respond in writing with the information on the CPR classes and tuberculosis tests.

By letter of July 27, the Employer sent a letter to the Union stating that the Employer had responded to the Union's unconditional April 20 offer to return by making a "specific, unequivocal and unconditional offer of reinstatement to all striking employees. All employees were instructed to prepare to return to work with the May 11, 2004 scheduling period and to contact either Ed Bachelor or Patricia Cunningham for scheduling." The letter continued:

To date, I have not received a response. The only contact was an attempt by an employee to obtain CPR certification over (60) days after our offer of reinstatement. Furthermore, not one employee has even attempted to contact either Mr. Bachelor or Ms. Cunningham for scheduling Based on the aforementioned, it has become evidently clear that the striking employees are not interested in accepting our offer of reinstatement and returning to work. Accordingly, the Employer takes the position that all striking employees have waived their rights to reinstatement."

By letter of July 28, the Union responded to the Employer that the Employer's offer had set out specific requirements that the employees needed to fulfill before returning to work, and that the Employer had spoken of the "urgency of a meeting to discuss the return to work." The Union's letter noted that there was still a question as to whether the Employer would provide CPR certification and tuberculosis testing for the striking employees. The letter further stated that the employees would have been on the job for two weeks had the Employer responded on July 12, or "for months if you would have responded to phone calls from [Mediator Numair] to have a face to face meeting."

By letter of July 29, the Employer wrote that "[w]ith regard to your inquiry concerning whether the Employer will provide CPR certification, it is the Employer's policy not to provide certifications for non-employees."

ACTION

We conclude that the Employer unlawfully refused to reinstate the unfair labor strikers after they had made an unconditional offer to return to work.

An employer violates Section 8(a)(3) by refusing to offer unfair labor practice strikers immediate reinstatement upon their unconditional offer to return to work.⁵ When an employer has an obligation to reinstate employees, its offer must be specific, unequivocal, and unconditional, and the employer carries the burden of demonstrating a good faith effort to communicate the offer to the employees.⁶ The employer is relieved of its duty to

⁵ Capitol Steel and Iron, 317 NLRB 809, 814, enfd., 89 F.3d 692 (10th Cir. 1996).

⁶ A-1 Schmidlin Plumbing, 312 NLRB 191, 192 (1993) (backpay obligation for discriminatory discharge is tolled only if employee unequivocally rejected employer offer of reinstatement); EDP Medical Computer Systems, 302 NLRB 54, 57 (1991). Here, the Employer's obligation to reinstate the employees is based on their status as unfair labor strikers, and on the 3rd Circuit Court of Appeal's judgment against the Employer requiring it to offer the striking employees, upon their unconditional offers to return to work, immediate and full reinstatement to their former jobs.

reinstate only if its offer of reinstatement is unequivocally rejected by the employees.⁷

In the instant case, there is no dispute that on April 20, the Union made an unconditional offer for the strikers to return to work. At that point, the Employer became obligated to reinstate the strikers absent their unequivocal rejection of the Employer's reinstatement offer. As discussed below, at no time following the Union's unconditional offer to return did it reject an offer of reinstatement by the Employer; rather, it merely sought to expedite the return process by agreeing to the Employer's demand, made in response to the Union's offer to return, that the parties meet to work out the details of the reinstatement. Indeed, it was the Employer that stymied the reinstatement process by delaying the meeting time until well after the Employer's proposed date of return, and then refusing to reinstate the employees because they failed to appear to work by that proposed date.

Specifically, at the parties' April 20 bargaining session, the Union submitted an unconditional offer on behalf of the employees to return to work. The offer included the statement that the Union was "ready and willing to meet to work out the logistical details" of the strikers' return. The Employer responded to the Union's unconditional offer by demanding a meeting to "discuss the striking employees' return to work before discussions on the contract," and offering a list of proposed dates. The Union representative agreed to the meeting, and the session ended with the understanding that he would call the mediator with a list of dates so that the parties could hold the meeting.⁸

⁷ See W.C. McQuaide, Inc., 239 NLRB 671, 671 (1978) (employee's statement to ALJ that he did not want to go back to work because he did not know whether the employer would fire him after he testified at an unemployment hearing was not an unequivocal rejection of offer to return); EDP Medical Computer Systems, 302 NLRB 54, 57 (1991) (employer's letter offering unconditional reinstatement was insufficient to toll employee's backpay entitlement or employer's continuing obligation to offer reinstatement: employer's bland reliance on its own letter, and its failure to reply to employee's inquiries asking that the terms of her unconditional reinstatement be precisely defined, compel finding that it had no intention of affording employee a considered choice as required).

⁸ There is no merit to the Employer's contention that the Union was obligated to call the Employer directly, rather

The Employer's April 21 letter offering to reinstate the striking employees not only made clear that the Employer was ready to meet with the Union, but also raised specific issues to be resolved that highlighted the need for a meeting between the parties. First, the letter made clear that the Employer was ready to meet because it listed five available meeting dates to discuss "the return to work procedure," and it also stated that the Employer would not "attempt to schedule further bargaining" until after the parties "iron[ed] out" the reinstatement issues. That statement was a reiteration of the Employer's April 20 statement seeking a meeting to discuss the return to work and a deferral of discussions on the contract. Second, the letter added new issues to be resolved regarding the reinstatement process that strengthened the need for a meeting. Specifically, the letter listed three requirements that returning strikers had to meet "prior to . . . returning to work,"⁹ but then failed to specify how employees were expected to complete those requirements, e.g., whether the Employer would provide for CPR certification at its facility or the employees would have to secure certification on their own.¹⁰ Those questions

than use the mediator to arrange a meeting. The parties had been using the mediator since 2001; the Employer insisted on communicating through the mediator at the parties' April 20 bargaining session, including using the mediator to inform the Union of its available meeting dates; and the Union representative specifically agreed to call the mediator with the Union's available dates at the April 20 meeting.

⁹ We agree with the Region that the imposition of the requirements themselves did not invalidate the offer. See Mercy Memorial Hospital, 231 NLRB 1108, 1113 (1977); Aztec Bus Lines, 289 NLRB 1021, 1024-1026 (1989). However, the Union had a right to clarify or negotiate about the terms without making its offer conditional. See Capitol Steel and Iron, 317 NLRB 809, enfd., 89 F.3d 692 (10th Cir. 1996) (fact that union demanded that employer sit down and discuss order of reinstatement did not make strikers' unconditional offer to return conditional; collective-bargaining representative has statutory right to bargain over procedure for reinstating employees from strike).

¹⁰ The Employer's subsequent refusal to state, first to the employee who had inquired in June, and later to the Union rep at the July 14 meeting, whether it planned to permit returning strikers to fulfill their requirements at the Employer's facility undermines the argument that employees could simply have made their own arrangements to return.

needed to be "ironed out" between the Union and the employer before employees could begin the reinstatement process.

The record further indicates that following the Employer's April 21 letter, the Union did nothing to suggest that the employees' offer to return had become conditional.¹¹ Rather, it simply sought to facilitate the return process by offering available dates that would have enabled the parties to meet well before the Employer's proposed date for the strikers to return. Thus, on April 27, the Union representative called the mediator and offered six dates - all earlier than the Employer's proposed May 11 return date, and three that the Employer had claimed to be available. The Union representative then checked in with the mediator on a number of occasions during May and June to inquire about the status of scheduling the meeting. Indeed, the record indicates that it was the Employer that delayed the reinstatement process after April 21 by ignoring the mediator's repeated attempts to set up a meeting, thus preventing the parties from finalizing the details of the strikers' reinstatement until well after the Employer's proposed date of return. When the mediator finally reached the Employer on June 4, the meeting could not be scheduled until June 29, and that date was postponed, by the Employer, until July 12.

Under these circumstances, there is nothing in the Union's conduct that could be interpreted as a retraction of its unconditional offer to return on behalf of the employees or a rejection of the Employer's offer of reinstatement. In any event, if the Employer believed that the Union's attempts to schedule a meeting after the April 21 made the employees' unconditional offer to return ambiguous, it was incumbent on the Employer to seek a

Indeed, although the Employer's April 21 letter gave returning strikers the names of two personnel officers to call for "scheduling and other matters," it was one of those personnel officers who failed to return the employee's phone calls, and then told him that he needed to wait for the July 14 meeting for a determination regarding whether he could meet the requirements at the Employer's facility.

¹¹ See Haddon House Food Products, 242 NLRB 1057, 1058 (1979), enfd. in relevant part, 640 F.2d 392, 395 (D.C. Cir. 1981) (we note the absence of any evidence that a union spokesman or striker made any demand whatsoever on the employer if it wanted the strikers to return to work).

clarification to resolve the ambiguity, not ignore the Union's offer and refuse to reinstate the strikers.¹²

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully refused to reinstate the unfair labor practice strikers upon their unconditional offer to return to work.

B.J.K.

¹² Dino and Sons Realty Corp., 330 NLRB 680, 686 (2000) (fact that employee put in his retirement papers after strikers made unconditional offer to return did not make his offer conditional: once an employee makes an unconditional offer to return to work, he or she is not obligated to make further ones, and if an employer considers an offer to return to be ambiguous, it must ask for a clarification to resolve the ambiguity, not ignore the offer); Home Insulation Service, 255 NLRB 311, 312 (1981) (union rep's messages that all employees would show up for work, including two lawfully discharged employees, did not modify or retract the union's earlier unconditional offer; employer should have tried to clarify if there was doubt); Capitol Steel & Iron, 317 NLRB at 815 (union rep's statement that it wanted to bargain about the order of reinstatement at most made the offer ambiguous, and placed on employer the obligation to seek a clarification); SKS Die Casting & Machining, 294 NLRB 372 (instead of seeking clarification, employer ignored the offer, thus acting at its peril). See also Prime Laboratories, 313 NLRB 160, 161 (1993), enfd. 43 F.3d 1458 (2nd cir. 1994) (TABLE, No. 94-4050) (employer's mailgram reinstating unlawfully discharged employee not made in good faith, where it told employee to call employer if the date was not convenient, then employer never returned employee's phone calls).