The Laidlaw Corporation *and* Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO

The Laidlaw Corporation *and* Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO. Cases 25–CA–2399 and 25–CA–2450

June 13, 1968

DECISION AND ORDER

On July 14, 1966, Trial Examiner Louis Libbin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that these allegations be dismissed. Thereafter, the General Counsel and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs. Thereafter, the General Counsel filed a reply brief and Respondent filed an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner as modified herein.[2]

In affirming the Trial Examiner we take particular note of that part of his Decision which in effect holds that replaced economic strikers who have made an unconditional application for reinstatement, and who have continued to make known their availability for employment, are entitled to full reinstatement to fill positions left by the departure of permanent replacements. In arriving at this conclusion, we specifically find that Respondent has not shown any legitimate and substantial business justification for not offering full reinstatement to these strikers and, that, accordingly, the failure to make such an offer constitutes an unfair labor practice even without regard to Respondent's intent or union animus.[3]

The facts surrounding the issues of reinstatement rights are relatively free from dispute. On January 10, 1966, the Union voted to reject the Company's wage offer and notified the Company of an intent to strike on January 12. As noted by the Trial Examiner, on the day before the strike Plant Manager Johnston read a speech to employees emphasizing that if they went out on a strike and were replaced, "you LOSE FOREVER your right to employment by this company." On January 12 approximately 70 employees began the strike with the pickets bearing signs indicating that the strike was for "fair wages."

One of the strikers was William Massey, an employee since 1961. On January 14 Massey made an unconditional request for reinstatement but was told his job had been filled and that if he were reemployed it would be as a new employee at the rate of $1.895 per hour as opposed to the $1.995 Massey made before the strike. On January 18 Massey was called by the Company and asked to return, as a vacancy had occurred in his classification. Massey was offered his old rate of pay, but was informed he would otherwise be treated as a new employee, without his seniority and vacation rights. When he expresssed concern about these terms, Plant Manager Johnston promised to see that the rights were restored in 60 days, but reiterated that Massey would have to come back as a new employee. Under these circumstances Massey refused to return and continued on strike.

At a union meeting on February 10, attended by about 50 of the employees, the strikers voted to return to work. On Friday, February 11, Union Representative Rains and some 40 strikers appeared at the plant and made an unconditional request to return to work. The unconditional offer to return was made on behalf of all the strikers, not just those who accompanied Rains. In addition, each of the workers who accompanied Rains presented a signed statement offering to return immediately and unconditionally. After consulting his

[1] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's dismissal of the allegation that the discharge of employee Eva Whitaker was discriminatorily motivated, and his dismissal of the allegation that Respondent's conduct with respect to termination of the strikers' group insurance coverage was violative of the Act.

Member Brown would hold in abeyance a decision on the legality of the discharge of Carmon Brown, pending the outcome of the arbitration proceeding in this matter See his dissenting opinion in *Producers Grain Corporation*, 169 NLRB 466, and his concurring opinion in *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410.

[2] We do not agree with the Trial Examiner's conclusion that there was no showing that Patricia Viertal was one of the strikers The unrebutted testimony of Betty Houk, recording secretary of the Union, was that Viertal pulled strike duty. Moreover, while G. C. Exh 47, Respondent's seniority list of March 1966, upon which the Trial Examiner relies for his finding, does include Viertal's name, it also includes the names of a number of acknowledged strikers. They, like Viertal, have the notation "NW" (not working) alongside their names. It is clear, therefore, that this list has little if any probative value in determining the strike status of Viertal. In view of the unrebutted testimony on Viertal's strike activities, we conclude she was one of the strikers Accordingly, we shall add her name to Appendix C, as a striker entitled to reinstatement and backpay.

[3] *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375; *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U S. 26.

attorney, Plant Manager Johnston read a prepared statement to the effect that many of the strikers had been "permanently replaced and are not entitled to reinstatement," and that those for whom there was a job would be notified on or before Monday. The Trial Examiner found, and we agree, that as of February 11 the strike was an economic one, and that as of that date all but five of the economic strikers' jobs were filled by replacements who were assured of permanent status if their work proved satisfactory. As the five strikers who were not replaced were thereafter offered jobs, Respondent's actions were proper and not in violation of the Act.

In addition to the written applications for reinstatement which were submitted on February 11, other written applications were made, between February 11 and 21, by about 16 employees who had not been present at the February 11 meeting. On the dates these later applications were received Respondent checked to see if vacancies existed at that time, and, if they did, some of the applicants were hired. However, new applicants were hired if the vacancies exceeded the number of striker applicants. By February 22 a total of 10 strikers had been reinstated and 8 others had been offered reinstatement, but had declined and remained on strike. The Respondent did not check over the earlier reinstatement applications of February 11 before making new hires, and reinstatement applications were considered only on the date of application. Plant Manager Johnston's testimony[4] established that this hiring policy was newly inaugurated after the strike and apparently conformed with and implemented Respondent's previously voiced threat that once replaced, strikers "lose forever" their right to employment by the Company. Beginning on February 16 Respondent sent strikers, except those who had been reinstated or had declined reinstatement, termination notices that they had been replaced as of the date of their written reinstatement applications and that no jobs were available. However, Respondent continued to advertise for permanent help and a number of new employees were hired due to turnover, which included the departure of some permanent replacements.

At a union meeting on February 20 a group of strikers who had been reinstated, or offered reinstatement, protested the employment termination notices to the strikers and the failure to reinstate the bulk of the strikers. The employees decided to renew their strike over this alleged unfair labor practice and on February 21, 16 of them continued or rejoined the strike. Thereafter, no other strikers were offered reinstatement.

The Trial Examiner found that when Massey first applied on January 14, his job was occupied by a permanent replacement and Respondent was not obligated to reinstate him. He further found that Massey remained an employee by virtue of Section 2(3) of the Act, and when he again applied at the time the position was vacant he was entitled to full reinstatement, and Respondent's failure to grant him full reinstatement was violative of Section 8(a)(3) and (1) of the Act.

The Trial Examiner also concluded that Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment status of strikers and discharging them after February 11, contrary to their rights under Section 2(3) of the Act which preserved their status as employees, thus depriving them of their rights to full reinstatement at times when vacancies in their jobs arose; the applications for reinstatement were continuous; sufficient vacancies subsequently arose to enable reinstatement of all the strikers; and the filling of vacancies by hiring new employees rather than by offering the positions to strikers was discriminatory. Moreover, the Trial Examiner reached the same conclusion; i.e., that the failure to recall was discriminatorily motivated, even if the reinstatement applications were not regarded as continuous, because of certain conduct and statements by Respondent's representatives and because of its failure to recall the older employees with long experience while at the same time advertising for new help to fill vacancies. As the Trial Examiner concluded that the strike continued after February 11 due to Respondent's unfair labor practice in terminating strikers and failing to reinstate them, he found that the strike became an unfair labor practice strike on and after that date.

As for the 16 strikers who were reinstated or offered reinstatement and who continued or rejoined the strike, the Trial Examiner found that their action was precipitated by Respondent's unfair labor practices in terminating and failing to reinstate the remaining strikers, and that these 16 became unfair

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[4] At p 429 of the record, Plant Manager Johnston was questioned about Respondent's recall and hiring policy and testified as follows

Q You do follow seniority in all departments?

A Yes But we worked out the first and foremost *after the walkout* [Emphasis supplied]

Q You felt no obligation whatsoever on the 15th [February] to fill these other five slots with people who applied just two or three days before that, when they were former employees?

A We were handling this on the basis of the dates they applied for reinstatement

Q If they didn't apply on the right day you weren't going to call them the next day, so to speak?

A Yes, sir

labor practice strikers on and after February 21 when they decided to continue or rejoin the strike, and as such they were entitled to reinstatement upon unconditional application.

We concur in the conclusions of the Trial Examiner and in the relief granted Respondent's employees. In so doing we rely particularly on the principles set forth in *N.L.R.B.* v. *Fleetwood Trailer Co.*,[5] in which the Supreme Court discussed the rights of economic strikers to reinstatement and the responsibility of employers to fully reinstate economic strikers, absent "legitimate and substantial business justifications," in a situation where production increased and more jobs were reestablished.

In *Fleetwood*, the employer was held to have violated the Act by failing to reinstate strikers and by hiring new employees for jobs which were reestablished when the employer resumed full production some 2 months after the strikers applied for reinstatement. In so finding, the Court pointed out that by virtue of Section 2(3) of the Act, an individual whose work ceases due to a labor dispute remains an employee if he has not obtained other regular or substanitally equivalent employment, and that an employer refusing to reinstate strikers must show that the action was due to legitimate and substantial business justification.[6] The Court further held that the burden of proving such justification was on the employer and also pointed out that the primary responsibility for striking a proper balance between the asserted business justifications and the invasion of employee rights rests with the Board rather than the courts. The Court also noted that an act so destructive of employee rights, without legitimate business justification, is an unfair labor practice without reference to intent or improper motivation. Furthermore, the Court explicitly rejected the argument, asserted by the employer in *Fleetwood* (389 U.S. at 380–381) and relied upon by the Respondent in the instant case, that reinstatement rights are determined at the time of initial application.

> It was clearly error to hold that the right of the strikers to reinstatement expired on August 20, when they first applied. *This basic right to jobs cannot depend on job availability as of the moment when applications are filed.* The right to reinstatement does not depend upon technicalities relating to application. On the contrary, *the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment."* [Emphasis supplied.]

Application of these principles to the case before us makes it evident that the results reached by the Trial Examiner were correct, even though he did not have the benefit of the Supreme Court's *Fleetwood* decision, which issued subsequently.

Thus, in the case of Massey, he remained an employee when he rejoined the strike after his first effort to be reinstated was rejected even though at that particular moment he had been replaced. The right to reinstatement did not expire when the original application was made. When the position again became vacant, Massey, an economic striker who was still an employee, was available and entitled to full reinstatement unless there were legitimate and substantial business justifications for the failure to offer complete reinstatement. However, it is evident that no such justifications existed, for in fact Respondent needed and desired Massey's services, and it was Respondent who sought out Massey when the vacancy occurred. But its offer of employment as a new employee or as an employee with less than rights accorded by full reinstatement (such as denial of seniority) was wholly unrelated to any of its economic needs, could only penalize Massey for engaging in concerted activity, was inherently destructive of employee interests, and thus was unresponsive to the requirements of the statute, *N.L.R.B.* v. *Erie Resistor Corp.*[7] In these circumstances there was no valid reason why Massey should not have been offered complete reinstatement, and Respondent's failure to do so was in violation of Section 8(a)(3) and (1) of the Act.

Similarly, we are guided by *Fleetwood* and *Great Dane* in our consideration of the strikers whom Respondent terminated and did not recall after their application for reinstatement on February 11 and thereafter. As in the case of Massey, they remained employees, and their right to reinstatement did not expire on the date they first applied, even though replacements filled most of the positions at the precise time they sought reinstatement. As employees with outstanding unconditional applications for reinstatement at the time the strike changed into an unfair labor practice strike, on and after February 11,[8] these strikers were entitled to full reinstatement as vacancies arose in their old positions. This conclusion was foreshadowed long ago by, and is consistent with, the Supreme Court's

[5] Fn 3, *supra*

[6] Citing *N L R.B* v *Great Dane Trailers*, fn 3, *supra*.

[7] 373 U S 221

[8] As we have found in accord with the Trial Examiner that the strike herein was converted to an unfair labor practice strike on and after February 11, 1966, none of the striking employees could have been permanently replaced by new employees hired on or after February 11. Therefore, the Trial Examiner's conclusion that some 16 strikers could have been replaced until February 21 is modified accordingly

decision in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*[9]

Furthermore, we would so hold even if we did not concur in the Trial Examiner's finding that the strike was converted from an economic to an unfair labor practice strike on February 11. As economic strikers their situation would have been essentially the same as Massey's; i.e., they remained employees who had offered to abandon the strike and who were available to fill openings as such arose. As Respondent brought forward no evidence of business justification for refusing to reinstate these experienced employees while continuing to advertise for and hire new unskilled employees, we find such conduct was inherently destructive of employee rights.[10] This right of reinstatement continued to exist so long as the strikers had not abandoned the employ of Respondent for other substantial and equivalent employment. Moreover, having signified their intent to return by their unconditional application for reinstatement and by their continuing presence, it was incumbent on Respondent to seek them out as positions were vacated. Having failed to fulfill its obligation to reinstate the employees to their jobs as vacancies arose, the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

In arriving at our decision we are cognizant of a number of earlier cases in which the Board stated or implied that replaced economic strikers were thereafter entitled only to nondiscriminatory treatment as applicants for new employment.[11] In *Brown* and Root, Inc., et al.,[12] a backpay proceeding, the General Counsel alleged that vacancies occurred after applications were made and contended they should have been assigned to strikers as they arose. The Trial Examiner, finding no vacancy *on the date* applications were made, rejected this approach as improperly assuming respondents had a duty to seek out economic strikers as vacancies became available. The Board affirmed this holding on the grounds that it was the normal practice of respondents to hire the first available person and that there was no obligation to seek out or prefer the strikers for vacancies which occurred after their application.[13]

In essence, therefore, these earlier cases held that an economic striker's right to full reinstatement is determined at the time application for reinstatement is made, and that if a replacement occupies the position at that particular moment, the striker is henceforth entitled only to nondiscriminatory consideration as an applicant for new employment. But, as we have noted previously, the Supreme Court in *Fleetwood* and *Great Dane* has now held that the right to the job does not depend on its availability at the precise moment of application, and that strikers retain their status as employees who are *entitled to reinstatement* absent substantial business justification, and regardless of union animus.

The underlying principle in both *Fleetwood* and *Great Dane*, *supra*, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.[14] Specifically in *Fleetwood*, the Court found that hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers. A similar parallel exists here which requires application of the same principle. When job vacancies arose as the result of the departure of permanent replacements, Respondent could not lawfully ignore outstanding applications for reinstatement from strikers and hire new applicants absent legitimate and substantial business reasons,[15] irrespective of intent. Moreover, we find, in accord with the Trial Examiner, that Respondent was in fact discriminatorily motivated when it implemented its avowed policy of not considering or hiring strikers once they had been replaced or if no vacancy existed on the date of application.[16]

We hold, therefore, that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent

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[9] 304 U.S 333, 347:

> It [Respondent] might have resorted to any one of a number of methods of determining *which of its striking employees would have to wait* because five men had taken permanent positions during the strike. [Emphasis supplied.]

[10] *N.L.R B.* v. *Fleetwood Trailer Co., supra; N.L.R.B.* v *Great Dane Trailers, supra; N.L.R.B.* v. *Erie Resistor Corp., supra.*

[11] See *Bartlett-Collins Company*, 110 NLRB 395, 397, 398, affd *Sub nom. American Flint Glass Workers' Union of North America*, 230 F.2d 212 (C.A D.C.), cert. denied 351 U.S 988.

[12] 132 NLRB 486, enfd. 311 F.2d 447 (C.A. 8).

[13] For a decision of similar import see *Atlas Storage Division*, 112 NLRB 1175, 1180, fn. 15, enfd. *Sub nom. Chauffeurs, Teamsters and Helpers "General" Local No. 200 AFL.* 233 F.2d 233 (C.A. 7).

[14] See also *N.L R.B.* v *Erie Resistor Corp., supra*

Even if a finding of antiunion motivation is necessary, the employer's preference for strangers over tested and competent employees is sufficient basis for inferring such motive, and we, in agreement with the Trial Examiner, would do so if we considered motive material.

[15] E.g., as may be justified by a change in an employer's operations or where striker applicants lack requisite skills.

[16] A refusal to consider or reinstate strikers once they have been replaced when vacancies thereafter occur is in effect a "delayed" discrimination which does not assume a mantle of lawfulness merely because certain lawful conduct, the hiring of a permanent replacement, intervened.

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. Accordingly, to the extent that *Bartlett-Collins, Atlas Storage Division, Brown and Root, supra*, and cases of similar import hold or infer otherwise, they are hereby overruled.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that Respondent, the Laidlaw Corporation, Peru, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

Appendix C is modified by adding the name of Patricia Viertal.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

LOUIS LIBBIN, Trial Examiner: Upon charges filed on December 13, 1965, on January 14 and 27, 1966, and on February 23 and March 23, 1966, by Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO,[1] herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 25 (Indianapolis, Indiana), issued two complaints against The Laidlaw Corporation, herein called the Respondent. The complaint in Case 25–CA–2399 is dated February 28, 1966, and the complaint in Case 25–CA–2450 is dated March 23, 1966. The Regional Director also issued an order, dated March 23, 1966, consolidating the two cases. With respect to the unfair labor practices, the complaints, as amended at the hearing, allege that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act. In its duly filed answers, as amended at the hearing, Respondent denies all unfair labor practice allegations.

Pursuant to due notice, a hearing was held before me at Peru, Indiana, on April 11 to 13, 1966. All parties were represented at the hearing and were given full opportunity to participate and to adduce all relevant evidence. On May 25, 1966, the General Counsel and the Respondent filed briefs, which I have fully considered. For the reasons hereinafter stated, I find that Respondent has violated only Section 8(a)(1) and (3) of the Act in certain respects.

Upon the entire record in the case,[2] and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, The Laidlaw Corporation, an Indiana corporation, maintains a plant in Peru, Indiana, where it is engaged in the manufacture and sale of wire and related products. During a 12-month period, Respondent has shipped material, valued in excess of $50,000, from its Peru plant to points outside the State of Indiana.

Upon the above-admitted facts, I find, as Respondent admits in its answers, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaints allege, the answers admit, the record shows, and I find, that Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Summary of Relevant Events;*[3] *the Issues*

Since 1962 the Union has been recognized by Respondent as the exclusive collective-bargaining representative of the production and maintenance employees at the Peru, Indiana, plant and has had collective-bargaining contracts with the Respondent for the employees in said unit. The current contract is for a 2-year period from December 14, 1964, with a 60-day annual automatic renewal clause. Pursuant to a reopening clause for negotiations on wages after the first year, the Union notified Respondent in October and November 1965 of its desire to reopen the contract for wage negotiations and submitted a schedule of its new wage proposals. On December 7, 1965, Respondent

[1] The General Counsel's motion, in his brief, to amend the complaint so as to name Local 681, rather than the International, as the Charging Party in Case 25–CA–2450, is unapposed and is hereby granted.

[2] Inadvertent errors in the typewritten transcript of testimony are noted and corrected in "Appendix A," attached hereto. [Omitted from publication.]

[3] Unless otherwise indicated, the factual findings set forth throughout this Decision are based on documentary evidence and testimony which are either admitted or undenied.

discharged Carmon Brown, who was vice president of the Union and the chairman of its grievance and bargaining committee, allegedly for violating a company rule against interfering with the work of other employees and a provision in the contract prohibiting union solicitation on company time. Negotiating meetings on wages were held on December 17, 1965, and on January 7, 1966, without any agreement having been reached. At noon on January 12, 1966, certain employees of Respondent went out on strike and began picketing Respondent's plant. The strike and the picketing were still in progress at the time of the instant hearing.

On January 15 and 18, William Massey, one of the strikers, made unconditional applications for reinstatement. He was denied reinstatement on January 15 on the ground that his job had been filled, and was offered reinstatement on January 18, because his job had become vacant again, but as a new employee without his full vacation rights and seniority. Massey refused the offer under these circumstances. Commencing February 11, 1966, wholesale unconditional requests for reinstatement were made by strikers. Respondent reinstated only a small number of the strikers, contending that the others had been permanently replaced. Eva Whitaker, one of the strikers who was reinstated on February 16, was discharged 2 days later allegedly because she was a slow operator. On February 21, most of the reinstated strikers again went out on strike and joined those who had remained on strike.

The principal issues litigated in this proceeding are whether (1) the discharge of Carmon Brown was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act; (2) the Respondent failed to bargain in good faith with the Union on and after January 7, 1966; (3) the strikes which began on January 12, 1966, were caused and/or prolonged by Respondent's unfair labor practices; (4) the failure to reinstate Massey without qualification was violative of Section 8(a)(3) and (1) of the Act; (5) the discharge of Eva Whitaker was motivated by her union and strike activity in violation of Section 8(a)(3) and (1) of the Act; (6) the failure to reinstate all the strikers and other conduct with respect to the strikers was violative of Section 8(a)(3) of the Act; (7) shortly before and during the strike Plant Manager John Johnston, and Foremen Leonard Krile and Elza Buttram, admitted supervisors within the meaning of the Act, engaged in unlawful interrogation and made threats of discharge violative of Section 8(a)(1) of the Act; and (8) Respondent has maintained and enforced an unlawful no-distribution rule on its premises in violation of Section 8(a)(1) of the Act.

B. *The Discharge of Carmon Brown*

The complaint alleges that Respondent discharged and thereafter refused to reinstate Carmon Brown because he was the vice president and principal bargainer for the Union and because he joined and assisted the Union and engaged in other union activity and concerted activities for the purposes of collective bargaining or mutual aid or protection. Respondent's answer admits the discharge and refusal to reinstate but denies that it was for the reasons alleged in the complaint.

1. The relevant facts

Carmon Brown was employed by Respondent from September 25, 1957, until his discharge on December 7, 1965. He worked in the racking department, in the maintenance department, and for a time as a foreman in the plating department. Brown was very active on behalf of the Union. Before the 1962 union election, he asked about 70 or 80 employees to sign union cards, admittedly some of them during company time. After the election, he became vice president of the Union, was chairman of its grievance and bargaining committee, and presented grievances to Respondent on behalf of other employees. He admittedly made no secret of his union activities. In the summer of 1963, Brown was promoted to foreman in the plating department, a position outside the bargaining unit. He admitted that at the time of his promotion, Respondent was well aware of his union activities. Upon becoming foreman, he resigned from the Union and ceased his union activities. In the fall of 1964, Plant Manager Johnston authorized the hiring of a private tutor for Brown, with one-half the cost to be borne by Respondent, in order to bring his education up from the fifth to the eighth grade. Although Brown was at first receptive to this program, he later refused to go along with it. In January or February 1965, Brown, at his own request, was relieved of his position as foreman and assigned to maintenance work as a rank-and-file employee. After his transfer as a maintenance employee, Respondent offered to stand the full cost of raising Brown's education from the fifth to the eight grade. A tutor was in fact engaged, but Brown only took two lessons. About 2 months after he ceased being a foreman, he rejoined the Union and again became active in union affairs. In the summer of 1965, he successfully solicited about five or six employee signatures to checkoff authorizations during his lunch period. That day he was informed by Respondent that he would receive a wage increase. He admittedly did not try to conceal his union activities. On August 20, 1965, Brown's foreman, Cliff Hammer, at the direction of Plant Manager Johnston, gave Brown a written warning notice for "not following instructions, standing around, and delaying other employees." As a result of a grievance filed by Brown pursuant to the contract, Johnston had the written warning "retracted and considered verbal" because Hammer "indicates no recorded previous verbal warnings to this man." In November, he was again elected vice president and

was also chairman of the Union's negotiating and grievance committee, which was one committee. The vice president was the highest union office at Respondent's plant, as the Union's president was employed at another plant. He also began the processing of grievances for other employees. On December 6, 1965, he spoke to Foreman Krile about a grievance filed by Rhea Bowman, the union steward.

About 8:30 or 9 a.m., on December 7, 1965, Brown was working on a machine along the aisle. Harold Stone, employed by Respondent in the toolroom as a samplemaker, was in the aisle on his way to the fabrication department to get a safety guide for a machine welder. This was in the performance of his normal functions. Stone stopped at Brown's work station and started the conversation by telling Brown about Stone's wife working at Essex Wire and having been nominated for union steward there. Brown asked Stone if he had signed a union card. Stone replied that he had not but that he would like to. Stone left and returned about 10 minutes later to ask Brown if it was compulsory for everyone at the plant to join the Union. Brown replied that according to the contract it was not compulsory. Stone then turned around and walked away.[4]

That morning, Plant Manager Johnston happened to observe Stone and Brown being engaged in the two conversations hereinabove described. He knew that Brown was doing a job as a maintenance employee at that particular time and that Stone "apparently was passing" by. He asked Foreman Donat to check into the matter because he allegedly had received many complaints about Brown. Donat, who was Stone's immediate foreman, spoke to Stone as the latter was returning to the toolroom, and asked what he and Brown were talking about. When Stone did not answer, Donat asked if they were talking about the Union. Stone replied that he supposed that is what they were talking about, and admittedly stated that Brown had asked him if he had joined the Union. Meanwhile, Johnston, who was returning to his office, stopped to see Cliff Hammer, Brown's immediate foreman, to relate what he had observed. At that point, Donat returned and reported that Stone had related that he had been delayed by Brown and was asked about joining the Union.

About a half hour later, Stone was summoned to Johnston's office. Foreman Donat and Trainee Employment Manager Grayson were also present. Johnston stated that he had been advised that Stone had been delayed in his work by Brown and was asked to join the Union on company time. Johnston asked if Stone would be willing to give a statement to the effect. Stone replied that he would. Johnston thereupon prepared a written statement which he read to Stone and which Stone signed. On cross-examination, Stone admitted that he was "certain" that the statement which he signed and which Johnston read to him was as follows: "I the undersigned Harold D. Stone was approached by employee Carmon J. Brown on this date about 8:30 a.m. on company time and tried to sell me on joining the union. He was delaying me in my work." Stone further admitted on cross-examination that at the time when he signed it, he though it was a true statement, and that he had signed it "of my own free will."[5]

Johnston then called Foreman Hammer into the office, and they reviewed the Company's policies and rules. Based on the Company's rules and the union contract, Johnston directed Hammer to discharge Brown. At the end of the shift, Brown was summoned to the office by Foreman Hammer. There Grayson read a letter to the effect that Brown had been "molesting" the help trying to get employees to join the Union on company time, that he had previously been warned against such conduct, and that they regretted having to let him go. Grayson then gave Brown a copy of the "Eligibility Information Report" required by the Indiana Employment Security Division, which stated as the reason for Brown's unemployment, "Disobeying Company Rules." Brown stated that he would file a grievance and left.

The next day, Brown filed a grievance pursuant to the terms of the contract. In grievance form step 2, the Respondent's answer, dated December 14, 1965, and signed by Johnston, states, "you have been interfering with work by bothering other employees on company time (during working hours) including the soliciting of employees to join the union. You have been previously warned that this violates the company rules, violates the contract agreement, increases production costs and delays production. For these repeated violations, you have been terminated." In grievance form step 3, the Respondent's answer, which was received on December 24, 1965, and signed by President Mueller, states, "Article 1 Section 2 of the current collective bargaining agreement provides: 'Neither the Union nor the members shall solicit Union membership or conduct union activities on com-

[4] The testimony of Brown and Stone with respect to these incidents is in accord except in one respect Brown denied Stone's testimony that on the first occasion he asked Stone if he had signed a union card The demeanor of the witnesses and the probabilities from all the surrounding circumstances lead me to credit Stone in this respect Stone was a relatively new employee at that time Brown testified that he did not remember whether he said anything to Stone However, his admission that Stone returned to inquire if it was compulsory to join the Union is more consistent with Stone's version that Brown had first asked him if he had signed a union card Moreover, Stone's admitted report of the conversation to Foreman Donat and Plant Manager Johnston, almost immediately thereafter, included this inquiry by Brown, as hereinafter found Finally, Stone testified as a friendly witness for the General Counsel, having signed a union card and joined in the strike It is difficult to conceive of any reason why Stone would have engaged in a fabrication in this respect

[5] On direct examination Stone had testified that he had "said something to Mr Johnston that I had approached Mr Brown" and that he had not told Johnston that Brown was delaying him In view of Stone's admissions, I credit his testimony on cross-examination where inconsistencies may appear

pany time. . . .' Plant rules provide: 'Violation of any of the following major plant rules may be cause of immediate dismissal. . . . 12. Interference with work of or molesting other employees.' Your employment was terminated for repeated violations of the above." As of the date of the instant hearing, the grievance had not yet been processed through the fourth step, calling for arbitration.

2. Concluding findings

Plant Manager Johnston testified that in discharging Brown, he relied on rule 12 of Respondent's plant rules and on article 1, section 2 of the current collective-bargaining agreement. Respondent's plant rules, which were well publicized in the plant and admittedly known to Brown, appear on a sheet with the following heading on top: "VIOLATIONS OF ANY OF THE FOLLOWING MAJOR PLANT RULES MAY BE CAUSE OF IMMEDIATE DISMISSAL." Sixteen rules are listed under this heading. Rule 12 states: "Interference with work of or molesting other employees." Johnston testified that he was relying on the first part of this rule which relates to "interference" with the work of other employees. Article 1, section 2 of the contract provides that "Neither the Union nor its members shall solicit Union membership or conduct Union activities on Company time, except as in Agreement otherwise specifically provided."[6]

Certain factors render Johnston's true motive highly suspect. Chief among these are the severity of the penalty meted out to Brown for such a brief and momentary infraction under circumstances where Stone initiated the conversations and where there was no real interference with Stone's work; the manner in which the evidence against Brown was obtained, including the failure to interview Brown and obtain his version of the conversations; the fact that there were some variations in the reasons given for his discharge by Grayson and by other management personnel, as previously set forth; and the fact that in March 1965 Lawrence Howard, Respondent's then director of production, regarded Brown as an employee who would be missed if he were to find employment elsewhere. However, management's judgment in invoking the discharge penalty is not in issue or subject to review, unless it were to indicate disparate or discriminatory treatment. The foregoing are matters which, under the circumstances disclosed by this record, may more appropriately be considered by an arbitrator in the processing of Brown's grievance. For the equities surrounding Brown's discharge are not under consideration here; the sole issue is whether the discharge was in fact motivated by his union and concerted activities. I am convinced that the record warrants a finding that there is nothing more than suspicion to sustain that allegation.

In the first place, what is relevant is what was reported to Plant Manager Johnston, and not what actually happened, about the incidents which precipitated the discharge. Thus, the fact remains, as previously found, that Stone admittedly attested in writing that he was approached by Brown and delayed in his work by Brown's attempt during company time to "sell" him "on joining the Union." There is nothing to indicate that Johnston should not have accepted Stone's statement as reflecting what actually occurred.[7] Indeed, Stone testified that he himself believed this to be a true statement at the time when he signed it. Stone further admitted that he signed this statement "of my own free will" without any threats or promises having been made to him. Brown's conduct, as thus reported by Stone, could therefore reasonably be interpreted as a violation of plant rule 12 in that it interfered with the work of another employee, and also a violation of the agreement in that it involved union solicitation on company time. Such conduct could therefore form the basis for a discharge for cause, unless the record were to demonstrate that it was merely used as a pretext to conceal a discriminatory motive. No such demonstration is established by this record. The Respondent and the Union had been operating under collective-bargaining agreements since 1962. As of the time of Brown's discharge, the record discloses no antiunion conduct by Respondent or any unfriendly relations between the parties since the Union's certification in 1962. A date for the negotiations under the wage reopening clause had already been set for December 17, 1965. There is no showing of any union animus directed specifically against Brown or that Brown's union position and protected union activities, which admittedly were known to Respondent, were resented or looked upon with disfavor or regarded as being obnoxious. On the contrary, despite Brown's well-known union position and activities, he was promoted to the position of foreman and offered a private tutor, with one-half the cost to be borne by Respondent, to bring his educational level up from the fifth to the eighth grade. There is not one iota of evidence to indicate that Brown was made a foreman in order to get him out of the Union and the bargaining unit, and the General Counsel makes no contention to the contrary. Even after he had ceased being a foreman and again became a rank-and-file employee, when it would be reasonable for Respondent to expect him to rejoin the Union and resume his union activities, he was

[6] In contending in his brief that Johnston testified on cross-examination that "soliciting" had nothing to do with Brown's discharge, the General Counsel is relying on an obvious error in transcription by the Reporter. It is readily apparent from the context that the word "soliciting" on page 444 of the typewritten transcript of testimony should be "molesting." The record is accordingly corrected, as set forth in Appendix A, attached hereto. [Omitted from publication.]

[7] The record does not support the General Counsel's assertion in his brief that Johnston testified that he had observed that "it was Stone who stopped Brown's work by starting the conversation."

still offered a private tutor, with the full expense to be borne by Respondent, to upgrade his education. Brown admittedly was aware of the posted plant rules and of the contract prohibition against union solicitation on company time, and also that an employee could be fired if he were caught violating them. Furthermore, the record shows that other employees had been disciplined and discharged for violating the plant rules and the provisions of the contract. Indeed, Brown himself had authorized such a discharge when he was foreman, as he admitted at the instant hearing. Moreover, although Johnston did not mention who had made complaints about Brown, the record discloses that in the summer of 1965 Brown had on three occasions solicited three different employees to join the Union, on each occasion while Brown and the employee were working.[8] Finally, Brown had been given a verbal warning in August 1965 for "not following instructions, standing around and delaying other employees."

Upon the basis of the entire record considered as a whole, I find that the General Counsel has not sustained his burden of proving by a preponderance of the credible evidence that Brown's discharge was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.[9] Accordingly, I will recommend dismissal of this allegation.

C. *The Refusal To Bargain*

The complaints allege, the answers admit, and I find (1) that all production and maintenance employees at the Respondent's Peru, Indiana, plant, exclusive of all clerical employees and all guards and professional employees, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; (2) that, as a result of an election conducted by the Board's Regional Director on June 7, 1962, the Union was certified on June 15, 1962, as the exclusive collective-bargaining representative of the employees in said unit; and (3) that at all times since June 7, 1962, the Union has been, and now is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act.

The complaints further allege, and the answers deny, that Respondent refused to bargain collectively with the Union as the exclusive collective-bargaining representative of all the employees in the aforestated appropriate unit in that, in substance, (1) it refused to bargain on the subject of wages on December 17, 1965, January 7, 1966, and at all times thereafter, (2) commencing on or about January 7, 1966, and at all times thereafter it knowingly made unacceptable contract proposals in purported negotiations, (3) commencing on and after January 11, 1966, it unilaterally changed the hiring rate of unskilled female employees, (4) it refused the Union's request to furnish relevant data, and (5) it offered strikers and applicants for employment premium pay to cease striking and return to work.

1. The relevant facts

On December 14, 1964, the Union and the Respondent executed their second 2-year collective-bargaining agreement, which provides in section 4 of article II that either party shall have the right, upon appropriate written notice, "to require the other to negotiate during the period beginning December 14, 1965, and ending January 13, 1966, with respect to changes then proposed by either in the minimum hourly rates of pay of employees then in effect or to be in effect during the remainder of this Agreement." The section further provides that "such negotiations shall not extend beyond January 13, 1966."

By letter dated October 1, 1965, International Representative McMahon advised Plant Manager Johnston that the Union "desires to open the present Labor Agreement for wages as set forth in that Agreement." Respondent Attorney Duck replied by letter dated October 8, 1965, that the negotiating period prescribed in the contract began in the "middle of December," and suggested that he contact Duck about the first of December to arrange "a meeting for the middle of the month." Shortly before November 22, 1965, International Representative Wentz telephoned Attorney Duck and asked for a meeting date to negotiate on the wage reopener. Duck stated he would look at the contract, then replied that the contract was open on wages from December 14 to January 13, and suggested a meeting for December 17. They agreed

[8] This finding is based on the credited testimony of employee Richard Greer, a witness for Respondent who gave the specific details pertaining to each incident. Brown was not called in rebuttal to deny these incidents, although he had testified on the General Counsel's case-in-chief that the only time he had talked to anyone about the Union was on his lunch hour and breaks. On cross-examination, Greer first testified that he had not reported these incidents to any company representative and later admitted that he had volunteered this information to the Company in 1966, long after Brown's discharge. I do not regard this as impugning Greer's veracity with respect to the incidents set forth in the text In addition, there is no affirmative showing that the other employees involved may not have reported them at the time when they occurred

[9] There has been considerable delay in the processing of Brown's discharge grievance pursuant to the terms of the contract. This has been due partly to a misunderstanding by the parties relating to a proposed submission agreement pertaining to the fourth step, which is arbitration As of the date of the instant hearing, the parties had not yet agreed on such a submission agreement to set the arbitration proceeding in motion Under all the circumstances disclosed by this regard and the fact that resolution of Carmon Brown's discharge issue has a bearing on the refusal-to-bargain allegation, I find that the policies of the Act will be effectuated by entertaining jurisdiction with respect to the discharge allegation of Brown *Greenwood Farms, Inc.*, 140 NLRB 649, 650, fn. 1

to meet at 2 p.m. on that date. By letter dated November 22, 1965, to Attorney Duck, Wentz confirmed that the "union representatives will be prepared to meet with company representatives at the offices of the Company in Peru, Indiana, at 2 p.m. on December 17." The letter then named the bargaining committee which would be present, and called attention to the Union's proposed schedule of wage rates which was attached "for your advanced consideration." These wage proposals called for an increase of 30-1/2 cents per hour in the minimum starting rate for production employees.

The parties met on Friday, December 17, 1965, as scheduled. The Union was represented by International Representative Wentz, the Union's president and vice president, Chester Spencer and Carmon Brown, respectively, and an employee committee comprised of Mary Green, Polly Bowman, Rhea Bowman, and Virginia Durham. Respondent was represented by Attorney Duck, Plant Manager Johnston, the director and assistant director of production, Lawrence Howard and Kenneth Cook, respectively, Trainee Employment Manager John Grayson, and Walter Iber. Wentz was the spokesman for the Union and Duck was the spokesman for Respondent.

Wentz stated that the Company had had sufficient time to consider the Union's proposals and wanted to know what its response or counterproposal was. Duck stated that he first wanted to explain the procedure which had been followed in previous negotiations because Wentz and some of the employee committee members had not been present during prior negotiations with Respondent. Duck then explained that the parties had decided as far back as 1962 that insofar as economic issues were concerned they did not want to engage in protracted negotiations, that the procedure they followed in the past was to have the union representatives at the first meeting or meetings give their reasons and explanations in support of their proposals for economic changes, that the Company's representatives then presented to the Company and its board of directors as faithfully as they could the Union's reasoning in support of its proposals "for the Company's consideration in coming up with what it believed was its full and complete and the best solution for these proposals," and that the Company's representatives then submitted the Company's proposals at the next meeting. Duck stated that they would proceed on this basis unless someone objected or stated that they should proceed in a different way. No objection was voiced to this approach.

Duck then stated that the Union's proposals represented a substantial increase in rates and wanted to have the Union's reasons in support of these proposals for the Company's consideration in arriving at some decision or counterproposal. They first started with a discussion of the janitor's rate and then moved to the rates of the bulk of the female employees. In the latter connection, Duck mentioned a wage survey recently made in the Peru, Indiana, area by the Indiana Employment Security Division; stated that the results of this survey showed that Respondent was paying the bulk of its employees about 5 cents an hour above the average level reflected in the survey for similar work in the area; and wanted to know what justification the Union had for its proposal of a 30-1/2-cent increase for factory production labor. Wentz replied that if that was the wage rate in the Peru area, it was too low; he had negotiated contracts in small towns not far away with a much higher rate for factory labor; he had recently read a report from the U.S. Department of Labor about the average factory labor rate being above $2 an hour; he did not think the Union's proposals were unrealistic; and if the figures which Duck quoted were correct it was time somebody did something about it and that he did not know of any better place to start than here. Duck replied that nothing more could be accomplished that day and that the Company would consider the Union's reasons and proposals and would make a proposal of its own at the next meeting. Duck stated that the Company would need about a week to consider the Union's proposals. Wentz stated that he would not be available until January 5, 6, or 7, 1966, for another meeting. Duck tentatively agreed to meet on one of these dates but stated he would have to check his calendar when he returned to his office to find out which day. The meeting adjourned with the understanding that Wentz would telephone Duck on Monday, December 20, at which time they would set a specific date. The meeting had lasted from 30 to 45 minutes.

When Wentz telephoned Duck on Monday, December 20, they agreed to meet at 2 p.m. on January 7, 1966, at the Company's office in Peru. Duck also stated that he would like to have an opportunity to meet with Wentz alone before January 7 to tell him what the Company's position would be at the January 7 meeting and to show him the records which the Company felt would support its position. Duck, who lives and maintains his office in Indianapolis, asked if Wentz would be in the Indianapolis area on January 5 or 6 or before they met on January 7. Wentz replied that he had no plans to be there but would telephone Duck if he did happen to be there. Not having heard from Wentz, Duck telephoned him at his home on the evening of January 5. Duck stated that there was something he thought Wentz would be interested in knowing before the wage conference on January 7, but did not specifically indicate what it was. Duck asked if Wentz would be available to meet with him on January 6 for that purpose. Wentz replied that he would not be able to do so. Duck then asked if Wentz could meet with him privately in Peru on the morning of January 7, before the general wage meeting, so that Duck could present to him what the Company's position was going to be and the

Company's records in support of it. Wentz replied that, because of a prior commitment, it would be impossible for him to meet Duck before the scheduled negotiating meeting.

The parties met at Respondent's plant in Peru about 1:30 p.m. on Friday, January 7, 1966. The Union was represented by International Representative Wentz, International Vice President Taylor, and the same employee committee. Respondent was represented by Attorney Duck and the same management representatives. Also present was Federal Mediation and Conciliation Commissioner Hughes.

Duck handed Wentz a seniority list of Respondent's employees, with their job classifications and hourly rates, and stated that he was submitting this in response to Wentz' request of Plant Manager Johnston in December. Duck then stated that the Company had considered the Union's proposals and was prepared to make a proposal of its own. He stated that he had an audit of the Company's operations before him and that he wanted to read some information from it, adding that he would prefer that they did not write it down but that they had a right to write it down if they so desired. Duck then stated that in the fiscal year ending September 30, 1963, the Company had sustained an operating loss of approximately $41,000; in the fiscal year ending September 30, 1964, the Company had an operating profit of approximately $22,000; in the fiscal year ending September 30, 1965, the Company had sustained an operating loss of approximately $89,000; and over that 3-year period there was a net accumulated operating loss of approximately $108,000. He commented that the Company had guessed badly on its business operations when it put a wage increase into effect the preceding year, and stated that the Company did not feel justified in increasing labor costs at this time because it was having cost problems in its operations. He then pointed out that for the first 2 months of the new fiscal year, which was October and November of 1965, the operations of the Company showed a profit of approximately $8,800; the operating statement for December had not yet been completed; and the Company hoped this trend would continue. He added that if this trend continued for the first 6 months of the fiscal year, there would be every reason to believe that at that time the Company would feel justified in doing something about a wage increase. During the course of his talk, Duck had not read any other information from the audit reports but had offered to let Wentz look at the reports. Wentz declined, pointing out that he would not understand them and that they probably would not mean anything to him.

Duck then stated that it therefore was the Company's proposal that it be given 6 months' operational experience in its current fiscal year before being required to make a definite answer or proposal about changing its wage rate. He pointed out that this period would end April 1, 1966, less than 3 months away; the auditors had given assurance that the 6-month operational audit would be ready by April 10; and the Company had assured him that by April 15 they could sit down the union representatives and present the Company's proposals with respect to any wage changes. Duck also stated that the Union would be given the same 30-day period right to strike which they now had, in the event of failure to reach agreement in April. Duck concluded with the statement that this was Respondent's first, last, and final offer and that it would not be changed.

Wentz replied that "that had pretty well closed the door to any subsequent or further negotiations," and that the union representatives would caucus and discuss what to do. When the meeting reconvened, Wentz told Duck that "the door had been rather effectively closed to any further negotiations by the Company's position," and that there was therefore not much point in staying around any longer. He explained that a special union meeting had already been scheduled for the next day, and stated that they would submit and explain the Company's offer to the members and let them vote on it by secret ballot but that they would not recommend its acceptance. International Vice President Taylor informed Duck that if the employees voted to strike, they would get a check every week because the International had a substantial defense fund. The meeting ended about 2.45 p.m.

At the union meeting held on Saturday, January 8, the membership rejected the Company's proposal and voted to strike. On the morning of January 10, 1966, Plant Manager Johnston was informed by a telegram from Wentz that the Company's proposal had been rejected by the membership. The next day, January 11, Johnston received a telegram from Wentz that the members of the Union "will be on strike and picketing your plant on and after the strike deadline at 12 noon, January 12, 1966." Approximately 70 employees went out on strike, which began as scheduled.

On Tuesday, January 18, Attorney Duck received the following telegram from Wentz:

> REFERENCE THE LAIDLAW CORPORATION, PERU, INDIANA . . . THE UNION AND MEMBERS OF LOCAL 681 REMAIN UNWILLING TO ACCEPT THE COMPANY'S STATEMENT AS TO ITS ALLEGED OPERATING LOSSES AT FACE VALUE. HOWEVER, THE MEMBERSHIP VOTED LAST NIGHT TO ASK THE COMPANY TO PERMIT THE UNION'S CPA TO CHECK THE COMPANY'S BOOKS AND REPORT HIS FINDINGS TO THE UNION. IN THE EVENT THE UNION'S CPA CERTIFIED TO THE UNION THAT THE COMPANY HAD IN FACT BEEN SUFFERING THE ALLEGED SUBSTANTIAL LOSSES THE POSITION OF THE UNION WOULD BE ALTERED AND A BASIS MAY THEN BE LAID FOR POSSIBLE SETTLEMENT DISCUSSIONS.

By letter dated January 26, 1966, Wentz informed John Mueller, Respondent's president, that

he had sent the above-stated telegram to Attorney Duck, to the Federal Mediation and Conciliation Service and to the Conciliation Service of the Indiana State Department of Labor. The letter concluded as follows:

> As of this date I have received no acknowledgement. I now write to request your personal reply to the above wire. If your reply to the above wire is negative be advised that, in the interest of both parties, we hereby request a conference with you personally present at Peru, Indiana.
>
> May we have your reply on or before January 31, 1966.

By letter to Wentz, dated January 31, 1966, Duck acknowledged the receipt of Wentz' telegram by himself and by President Mueller. Duck then reviewed his unsuccessful efforts to meet with Wentz alone before the January 7 negotiating meeting. He also reminded Wentz that at the January 7 meeting Duck gave him the profit-and-loss figures from the Company's operating statements for the last 3 completed fiscal years and that Wentz stated the figures meant nothing to him. The letter concluded with the statement that "we further regret the necessity of advising you that the Company books and records are not now available for examination by the Union's CPA."

About 3 p.m. on February 2, 1966, the parties met again at the office of the Federal Mediation and Conciliation Service in Indianapolis. The Union was represented by Wentz, Attorney De Wester, and the employee committee. Respondent was represented by Attorneys Duck and McDowell. The Commissioner asked if there was any change in the position of the parties. Wentz replied that there was a change in the Union's position; and that the Union had reduced its proposal of a 30-cent raise for factory labor to a 25-cent raise and had also scaled down its other wage increase proposals. Wentz also proposed that all strikers be reinstated immediately. Duck stated that there was no change in the Company's position that it needed a period of 6 months' operation in the current fiscal year to determine whether it was in a position to make an upward adjustment in wage rates. Duck also told Wentz and the employee committee that the negotiating period had ended on January 13; that he was no longer under a contractual or legal obligation to negotiate; and that he did not want his presence and participation in this discussion to be construed as a waiver of the limitations of the contract on the period within which negotiations might be held on wage changes. With respect to the Union's proposal of immediate reinstatement of all strikers, Duck stated that many of the strikers had already been permanently replaced and that there was no opportunity at that time to reinstate the replaced strikers. One of the members of the employee committee asked Duck why the Company had hired new employees at $1.49-1/2 per hour when the starting rate in the contract was $1.39-1/2 per hour and many of the strikers had been working there at $1.49-1/2 per hour for almost 10 years. Duck replied that he had been informed that some of the new hires during the strike were doing a better job than some of the strikers. The meeting lasted about 15 minutes.

By letter dated February 8, 1966, Wentz requested Plant Manager Johnston to furnish "the following information which is needed by the union for collective bargaining purposes":

> A list of all employees within the bargaining unit as of Monday, February 7, 1966, and showing thereon each employees [sic] hiring date, rate of pay, job classification and the address of the employee.

By letter dated February 25, 1966, Office Manager Bookwalter informed Mavis Noble, one of the employees still on strike, that her "participation in the group [Hospital and Surgical] plan will terminate March 1st," that she "may continue the insurance on an individual basis by using the conversion form which is available" within "31 days immediately following the termination date of the group plan," and that "insurance on a group basis will be reinstated upon the first day of return to work, if within one year." Wentz replied by letter, dated March 4, 1966, in which he took issue with Bookwalter's statement relating to the termination of Mavis Noble's policy; pointed out that as the "sole collective bargaining agent for all your employees in the appropriate bargaining unit," the Union is "duty bound to insure that they, individually and collectively, are not discriminatorily, improperly or erroneously deprived of any benefit due and/or accruing to them"; and requested the following information "in order to enable us to carry out our duty and responsibility": The date of hire and separation of all employees on and after December 17, 1965, the date of each such employee's coverage by and termination of the group insurance plan, the specific reason for the termination of each such employee's group insurance coverage, and a list of all employees to whom Respondent sent a letter similar to the above-described Mavis Noble letter.

Respondent admittedly did not supply the information requested by the Union's letters of February 8. However, by reply letter dated March 17, 1966, Duck informed Wentz that all employees of Respondent are covered by "their group insurance program after ninety (90) calendar days of employment"; "the group insurance contract (as set out in booklets previously furnished to employees and under the section entitled 'Termination of Employee Insurance') provide that the insurance of any employee under any part of the group policy automatically ceases if the employee has failed to make his contributions when due"; because of this provision "the group policy coverage for all striking employees at Laidlaw Corp., in Peru ended at the

time such employees ceased to make their contributions when due on the premium payments"; "no contributions have been received by any striking employees on the insurance premiums due since such employees went on strike"; "it therefore appears to Laidlaw Corp., and to the writer that none of the striking employees have been covered by the group policy since February 1, 1966"; and "perhaps the best source of information concerning questions of Company group insurance coverage, termination of benefits or cancellation of coverage, or other provisions of the group insurance contract" is from the district agent of the insurance company, listing the latter's name, address, and telephone number.

Since the commencement of the strike, Respondent has posted in laundrymats and in other places "HELP WANTED" notices for "PERMANENT JOBS," calling attention to the $1.49-1/2 per hour rate for "Unskilled Female Help." During the same period, Respondent has also run ads in the local paper for employees in the production unit. Beginning with January 13, the day after the commencement of the strike, and continuing through March 31, the Respondent hired about 92 new production employees at the starting rate of $1.39-1/2 per hour and about 38 production employees at the $1.49-1/2-per-hour rate, with the overwhelming majority being female employees in the fabrication department. The current collective-bargaining agreement lists $1.39-1/2 per hour as the minimum starting rate for these classifications, with an automatic 10-cent increase after 160 hours of work.

2. Concluding findings

The General Counsel asserts in his brief that "the following listed acts by the Respondent reveal its fixed plan of conduct designed to undermine the Union and avoid its duty to bargain with the Union." The brief then lists seven acts which I will set forth and treat, *seriatim:*

(1) "The discharge of the Union's leading in-plant spokesman and officer less than two weeks before the first negotiation meeting and after receipt of the Union's proposal."

All that need be said in this regard is that I have already found that the General Counsel has failed to sustain the allegation that the discharge of Carmon Brown was discriminatorily motivated in violation of the Act.

(2) "Arrival at the first negotiation meeting with no offer and a refusal to do anything except demand Union justification for any change in the status quo."

However, this was the same procedure which had been followed with the Union in negotiating economic issues in 1962, 1963, and 1964. There is no evidence that the Union had previously objected to this procedure. Moreover, this bargaining procedure was fully explained to the union representatives and the employee committee at the first meeting on December 17, 1965, and the union representatives were given a specific opportunity at that time to reject this approach if they so desired. However, no objections were voiced to proceeding in the same manner as the parties had in the past. Finally, in addition to asking the Union to justify its demands, Attorney Duck at this meeting communicated to the Union the results of a wage survey made by the Indiana Employment Security Division as indicating that Respondent's rates were above the average level in the Peru area.

(3) "Presentation of a 'take-it-or-leave-it' offer at the second meeting which, in reality, was a refusal to make any proposal except that the Union wait until the lay off season to bargain."

What has been said before concerning the procedure of bargaining on economic issues applies here also. Attorney Duck had explained that the past procedure was for the Union to submit its proposals and supporting reasons at the first meeting or meetings, and that the Company at the next meeting had submitted its counterproposal as its first, last, and final offer. As previously stated, the union representatives agreed to follow the same procedure on this occasion. Indeed, as early as December 21, 1965, Union Representative Wentz referred in a letter to International Vice President Taylor to the meeting scheduled for January 7, 1966, as the "final conference." *General Electric Company*, 150 NLRB 192, cited by the General Counsel, turned on its own facts and is inapplicable to the facts in this case. Nor is it correct to say, as the General Counsel asserts, that Respondent's position was tantamount to a refusal to make any proposal except that the Union wait until the layoff season. Respondent's proposal was that it was in no economic position to give any wage increases at that time because of the net operational losses sustained in the past 3 fiscal years. It supported its position by the figures from its audit reports which it offered to show to Wentz. Respondent was under no duty to grant a wage increase and could have given the Union a definite and unqualified negative answer to its proposals because of Respondent's economic position. As an alternative to a flat rejection of the Union's request for wage increases at that time, Respondent proposed to defer the wage reopening period to April, a period of 3 months, in order to give the Respondent a 6 months' test of its operations in the current fiscal year, and promised that if at that time the trend of a profit shown by the first 2 months had continued it would then make a specific offer of a wage increase adjustment. That April was the period when there had been a seasonal slack in the past was coincidental. There is nothing in the record to warrant any inference that this was a tactic to enable Respondent to rely on an alleged seasonal slack. Respondent's unwillingness to make an offer of a wage increase at the meeting of January 7, 1966, "is hardly sufficient to warrant the conclusion that Respondent

violated Section 8(a)(5) in bargaining with the Union. Such a finding would require a preponderance of evidence that Respondent did not, in fact, have an honest intention of reaching agreement rather than foster the processes of collective bargaining." *American Sanitary Wipers Co.*, 157 NLRB 1092. No such finding is warranted by this record.

(4) "The plea of poverty without supporting data at the second meeting coupled with (1) a later refusal to permit financial checking and (2) a contemporaneous raise granted by Respondent at its California plant."

Contrary to the General Counsel's assertion, the supporting data for Respondent's economic position appeared in the audit reports for the last 3 fiscal years and for the first 2 months of the current fiscal year. Attorney Duck read the operational losses and profits from these reports which he had before him at this meeting and which he tendered to Wentz for his perusal.

As for the Union's request for permission to have its CPA examine Respondent's books, such a request was first made on January 18, 1966. The reopening clause in the contract placed two specific limitations on Respondent's duty to bargain. The first one was that the obligation to bargain was only "with respect to changes . . . proposed by either [party] in the minimum hourly rates of pay of employees." The second one was that the duty to bargain was only "during the period beginning December 14, 1965, and ending January 13, 1966." The last sentence of section 4 of article II of the contract emphasizes that "such negotiations shall not extend beyond January 13, 1966." It was Wentz' unavailability during the Christmas–New Year's holidays which was responsible for the short time during which the parties could negotiate during the period provided in the contract. At the January 7 meeting, Wentz declined Duck's proffer to examine the audit reports on the ground that he would not understand them. However, he made no request at that time that they be submitted to the Union's CPA; nor did the Union make any such request during the full week which still remained of the negotiating period. The Union's request on January 18, 1966, came too late and was untimely. Under these circumstances, Duck was legally justified in declining to make Respondent's books and records "now available for examination by the Union's CPA."

The General Counsel's further assertion that Respondent at the same time granted a wage increase to the employees at its California plant, without more, has no bearing on and is completely irrelevant to the refusal-to-bargain issue in this case.

(5) "The unilateral modification of the starting wage rate for female production employees during the strike."

The rates set forth on Schedule A of the current agreement are minimum hourly rates. Section 2 of article II gives Respondent "the right to pay the employees an hourly rate in excess of the rate shown on Schedule A" when, "in the opinion of the Company, the employee possesses skill, experience or efficiency of operation on the job which justifies a higher rate." As previously found, during the period from the beginning of the strike until March 28, 1966, Respondent hired about 92 new production employees at the contract minimum rate of $1.39-1/2 an hour and about 38 new production employees at $1.49-1/2 per hour. The higher rate was paid to employees whose applications showed prior factory experience, even though the work involved was unskilled work. The determination of how much prior factory experience was required to obtain the higher rate was left entirely to the discretion of the employment manager and the particular supervisor involved. It is clear, and I find, that hiring at the $1.49-1/2 rate did not constitute a modification of the contract but was specifically permitted by its express terms. Thus, Respondent acted within its lawful rights in hiring at the increased rate without consulting the Union.[10] Nor did this constitute the offer of a higher minimum rate directly to employees than had been offered to the Union during the negotiations on the wage reopener. For, as previously noted, negotiations during the wage reopener were by contract expressly limited to "minimum hourly rates" and could not deal with Respondent's right under section 2 of article II to pay employees a higher rate when justified, in its opinion, by prior experience. Finally, the higher rate did not reflect adversely on Respondent's good faith in refusing during the negotiation to grant a wage increase at that time because of past operational losses. For, Respondent's labor costs were not increased over their prestrike level by the payment of $1.49-1/2 to 38 employees. Thus, the current contract provides for an automatic increase to $1.49-1/2 after 160 hours of work, and at the time of the strike there were very few production employees who were still receiving $1.39-1/2 per hour. Indeed, as of December 31, 1965, only 2 weeks before the strike, there were only six production employees who were receiving the $1.39-1/2 rate, as appears from the seniority list which Duck gave to Wentz at the meeting of January 7, 1966. If anything, the Respondent's labor cost was less during the strike because there were fewer employees who were receiving the $1.49-1/2 rate.

(6) "The threat of and refusal to reinstate any of the various long-term employees that made up the Union committee and held office in the Union."

The General Counsel has not specified in his brief what threats he is referring to. Some statements by Respondent's supervisors are hereinafter found to be violative of Section 8(a)(1) of the Act.

[10] *California Portland Cement Company*, 101 NLRB 1436, 1437

Respondent's refusal to reinstate strikers who applied was based on its claim that they had been permanently replaced during the strike. Although this is hereinafter found not to be a valid defense in all instances, and considering the violations hereinafter found, they do not justify or warrant a finding that Respondent was not bargaining in good faith during the required period.

(7) "The adamant refusal to bargain about anything at the February 2, 1966 meeting."

As previously noted, the negotiating period had ended on January 13, 1966, by the express terms of the current agreement. Respondent was therefore no longer under any legal or contractual obligations to bargain on "minimum hourly rates" during the term of the contract. Attorney Duck emphasized at that meeting that he was not waiving the contract's limitation on the period within which negotiations on wages might be held. Nevertheless, he did reiterate Respondent's proposal to defer the negotiations to April, as detailed by him at the previous meeting. I find nothing in Duck's action or conduct at this meeting which indicates that Respondent had not been bargaining in good faith.

I find no merit in any of the General Counsel's arguments in support of the refusal-to-bargain allegation. Nor do I find any adequate record support for the additional allegation in the complaint that Respondent "knowingly made unacceptable contract proposals in purported negotiations for the purpose and with the intention of preventing agreement and avoiding and evading its obligation to bargain with the Union" and the allegation that "Respondent has offered strikers and applicants for employment premium pay to cease striking and return to work."

There remains for consideration the allegation that "on or about February 8, 1966, and on March 4, 1966, and at all times since, the Union has requested the Respondent to furnish to the Union data relating to the names of employees, seniority, job classifications, group insurance of employees and related matters, and the Respondent has refused to furnish said data." The first request, made in Wentz' letter of February 8, 1966, specified that the requested information was "needed by the Union for collective bargaining purposes." The only subject matter for which it appeared that the Union at that time desired to bargain was the wage rate. As the Respondent was under no legal or contractual obligation to bargain on wages at that time for the reasons previously detailed, its failure to furnish the requested data was not violative of the Act.

The second request, dated March 4, 1966, stands on a different footing. Information and data was requested with respect to the group insurance plan coverage and termination for all the employees in the bargaining unit in order to enable the Union to "insure that they, individually and collectively, are not discriminatorily, improperly or erroneously deprived of any benefit due/or accruing to them." It is well settled that the certified collective-bargaining representative is entitled to have such information in order to police the contract by determining whether any inequities or meritorious grievances existed and by processing such grievances through the grievance provisions of the contract.[11] However, Duck's reply letter of March 17, 1966, though in general terms as previously detailed, constituted substantial compliance with Wentz' request. Wentz thereafter made no complaint that this did not comply with his request or seek any further clarifications or specific data in this regard.

Upon consideration of all the foregoing and the entire record as a whole, I am convinced and find that the General Counsel did not sustain his burden of proving by a preponderance of the credible evidence that Respondent failed to bargain in good faith within the meaning of Section 8(a)(5) and (1) of the Act. I will accordingly recommend dismissal of this allegation of the complaint.

D. *The Strike Commencing January 12, 1966*

On Saturday, January 8, 1966, a scheduled union meeting was held and attended by approximately 50 of Respondent's employees. Wentz reported in detail what had taken place at the negotiating session of the preceding day, and explained Respondent's proposal. Other committeemen filled in on this report. Mary Green, an employee member of the negotiating committee, expressed the opinion that to wait until April would place Respondent in a much stronger position because that was the beginning of the slow season when "they won't care whether we are working or out on the street." As a result of a secret ballot vote, the Respondent's proposal was rejected. A strike vote was then taken by secret ballot, and result was virtually unanimous to strike.

On the morning of January 10, Plant Manager Johnston was informed by a telegram from Wentz that the Respondent's proposal had been rejected by the membership. The next day, January 11, Johnston received a telegram from Wentz, advising that "since no agreement has been arrived at in current wage negotiations initiated pursuant to the terms of the current labor agreement the members of Local 681 will be on strike and picketing your plant on and after the strike deadline at 12 noon, January 12, 1966." The strike began as scheduled, with the pickets carrying signs that "Local 681 on strike for fair wages." The strike and the picketing

[11] See, e.g., *B. F Goodrich Company*, 89 NLRB 1152, 1162, *Westinghouse Air Brake Company*, 119 NLRB 1118, 1126, and cases cited therein

was still in progress at the time of the hearing in this proceeding.

The complaint, as amended at the hearing, alleges that the strike was caused by Respondent's alleged refusal to bargain. In his brief the General Counsel states: "Thus, if the Respondent had failed to bargain at this point in time [referring to the date when the strike vote was taken], the strike was an unfair labor practice strike from its inception." As I have previously found that the General Counsel has not sustained the allegation that Respondent's conduct in connection with the negotiations constituted an unfair labor practice, I find that the strike was an economic strike at its inception. However, as hereinafter found, the strike was converted into an unfair labor practice strike after February 11, 1966.

E. *Discrimination With Respect to Strikers*

1. The refusal to reinstate William Massey

a. *The relevant facts*

William Massey was first employed by Respondent on June 5, 1961. When the strike began on January 12, 1966, Massey was a straight-and-cut operator at $1.99-1/2 per hour. He went out on strike on January 12 and joined in the picketing. On Friday evening, January 14, Massey telephoned to Foreman Bridges and made an unconditional request for reinstatement. Bridges told him to come in at 7 o'clock the next morning. When Massey reported the next morning, he was told by Bridges to see Grayson, who was the trainee employment manager. Massey reported to Grayson in the latter's office. Grayson told Massey that his job had been filled and that the positions of all male help had been filled at that time. He also told Massey that if Massey were to be reemployed, he would have to come back as a new employee with his rate reduced to $1.89-1/2 per hour. This is the minimum starting rate set forth in the contract for a new employee in the classification of a straight-and-cut operator.

The following Tuesday, January 18, Grayson telephoned Massey at the latter's home and asked him to come back to work. Massey inquired about his rate of pay, and Grayson assured him that he would get the same pay which he was receiving when he went out on strike but that he would otherwise be treated as a new employee. Massey then inquired about his seniority and vacation pay. Grayson replied that he did not know and that Massey would have to talk to Plant Manager Johnston about that.

Massey had a telephone conversation with Johnston later that afternoon. Massey wanted to know about being reinstated. Johnston replied that a vacancy in Massey's classification had occurred that afternoon and that he would be happy to have Massey back. Johnston admitted that he further stated that Massey would have to come back as a new employee, without his seniority and vacation rights. When Massey expressed concern about his seniority and vacation rights, Johnston promised to see to it personally that those rights be restored to him after 60 days, but he reiterated that Massey would have to come back as a new employee. Massey refused to come back under those circumstances, and continued to participate in the picketing.

b. *Concluding findings*

The complaint alleges, and the General Counsel contends, that Respondent's failure to reinstate Massey was violative of the Act. Respondent contends that Massey was an economic striker, that when he first applied for reinstatement on January 14, 1966, his job was occupied by a permanent replacement, and that there was no obligation on Respondent to discharge the permanent replacement in order to reinstate Massey. With this position and these well-established principles I agree and find that Respondent's refusal to reinstate Massey on January 15, 1966, was not violative of the Act.

Respondent further contends that Massey's right to reinstatement on January 18, 1966, when a vacancy in his position arose because of the resignation of an employee, was controlled by the same situation which had existed on January 15; Massey's employee status was terminated during the strike when his permanent replacement was hired; and once a person who is striking has been permanently replaced, he assumes the status of a new applicant when a vacancy thereafter occurs even though he continued to be on strike in the interim. Therefore, Respondent further contends, its offer on January 18, when Massey's position became vacant again and he was inquiring about reinstatement, to hire him as a new employee without his vacation and seniority rights was not violative of the Act. I do not agree.

The Board has held that a returning economic striker, whose job is vacant at the time when he makes an unconditional request for reinstatement, may not, without violating the Act, be denied reinstatement as an employee, without prejudice to his seniority or other rights and privileges, because his job had been interveningly filled by a permanent replacement.[12] When Massey was denied reinstatement on January 15, he continued to participate in the strike and remained an economic striker. As such he continued, by virtue of Section 2(3) of the Act, to retain his status as an employee even

[12] *Union Bus Terminal*, 98 NLRB 458, 459, enforcement denied on other grounds 211 F.2d 820 (C.A. 5).

though he was permanently replaced during the strike.[13] That an economic striker occupying the status held by Massey at the time when he again inquired about his job on February 18 is entitled to be treated as an employee under the Act, has been decided by the Supreme Court in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, the leading case on the employee status of economic strikers under the Act. In that case, the Supreme Court held, in substance, that five strikers whose permanent replacements were still working at the time of the unconditional request for reinstatement "remained employees for the purposes of the Act and were protected against the unfair labor practices denounced by it" (304 U.S. p. 345). The controlling criterion as to whether an employee who is engaging in an economic strike is entitled to reinstatement upon request is determined by the situation which exists at the time of each request for reinstatement.

In the instant case, Respondent was free to replace Massey in order to carry on its business and was not obliged to discharge his replacement to make room for Massey on January 15. But Respondent's privilege not to have to discharge Massey's replacement to make room for Massey as a returning striker is no longer operative once the job is again vacant, as was the case on January 18 when Massey again asked Plant Manager Johnston about his job. Under these circumstances the sole ground for the privilege—i.e., "to carry on his business"—disappeared and there is no bar whatever to the full implementation of the rights of a returning economic striker. Departmental seniority was recognized by Respondent pursuant to the contract. Johnston admitted that as a new employee, Massey would have been in the category of a probationary employee during the first 60 days. The seniority and vacation rights had accrued to Massey and were vested rights of which he could not be deprived because of his participation in the strike.[14] Respondent was therefore obligated on January 18, 1966, to offer Massey full reinstatement to the status quo which he occupied at the time when he went out on strike. Respondent's refusal to reinstate Massey except as a new employee without immediate seniority and vacation rights did not fulfill this obligation and constituted discrimination with respect to his hire and tenure of employment in violation of Section 8(a)(3) and (1) of the Act.

2. The discharge of Eva Whitaker

a. *The relevant facts*

Eva Whitaker was first employed by Respondent on November 4, 1965, at $1.39-1/2 per hour, the minimum starting rate provided in the contract. She was a production worker in the fabrication department under Foreman Bridges. After 160 hours of work, she received the automatic 10-cent increase required by the contract. The collective-bargaining agreement also provides that "all new employees shall be considered employed on a temporary basis for the first sixty (60) days worked in their new employment . . . and during such period such employees shall be considered on probation and without seniority and their retention as employees shall be entirely within the discretion of the Company."

In accordance with Respondent's practice and procedure for probationary employees, a rating form is prepared after the first 30 days of work. The rating form for Whitaker, dated December 15, 1965, was prepared by her foreman, Bridges. Her rating scale on this form was "poor." Her knowledge of the job was rated as "learning slowly and required attention"; and her work efficiency was rated as "slow, frequent errors. Careless, wastes time." Under the heading of "General Comments," Bridges indicated that he did not consider her progress satisfactory and that he would not like to keep her permanently in his department. He further indicated that he had not discussed the contents of the report with Whitaker. In accordance with Respondent's practice, another rating form is made out after a probationary employee has worked 45 days. The second rating form for Whitaker is dated January 7, 1966, and is also signed by Foreman Bridges. Her rating scale on this form is also "poor." The factors were rated substantially the same as before. Her "work efficiency" is rated as "frequently below standard. Must be proded. Fails to do her best." Under the heading of "General Comments," Bridges had again indicated that he did not consider her progress satisfactory. He also indicated that he was "not sure—doubtful" whether he would like to keep her permanently in his department. Plant Manager Johnston inserted the word "No" after Bridges' remark. Bridges had not discussed the contents of this report with Whitaker.

Whitaker went out on strike with the rest of the employees on January 12, 1965, and engaged in picket duty. During the strike, Plant Manager Johnston asked Foreman Bridges to give him a rating on the employees in his department. Johnston read the names from a list in his hand, and asked Bridges to state in each case whether he regarded the employees as good, poor, or average both as to work and cooperation. Bridges told Johnston that Whitaker was "average" on both counts.

On February 15, Respondent received from Whitaker a written unconditional offer to return to work. She received a telegram from Respondent,

[13] Sec 2(3) of the Act provides that

> The term "employee" shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute and who has not obtained any other regular or substantially equivalent employment

[14] *Cone Brothers Contracting Company*, 158 NLRB 186

requesting her to return to work, reported to Foreman Bridges on February 16, and was put to work in the fabrication department, racking wires which were to be welded. At the end of her workday on February 18, Bridges, pursuant to instructions from Arlin Gallager, Respondent's then director of production, told Whitaker that he was sorry but he had to discharge her. Whitaker admitted that Bridges at that time told her that "the office said it was something about production." She admittedly was still a probationary employee at the time of her discharge. Her termination slip, dated February 18, 1966, and signed by payroll clerk Wells, states that she was "discharged for unsatisfactory performance within the probationary period."

b. *Concluding findings*

The complaint alleges that in discharging Whitaker, Respondent was discriminatorily motivated because of her union and strike activity or in a belief thereof. Respondent contends that she was discharged because of her unsatisfactory work performance during her probationary period.

The decision to discharge Whitaker was made by Arlin Gallager, who became director of production on January 26, 1966, 2 weeks after the commencement of the strike. Gallager testified that he was in the plant about 95 percent of the time, making the rounds and observing the work of the employees; on February 16 and 17 he was spending most of his time in the fabrication department; he observed that Whitaker was a slow operator; he instructed Foreman Bridges to watch her and to keep track of the production on her machine; on February 18 he examined her personnel file and saw that she was rated "poor" on both reports; and, based on these rating forms which indicated no improvement in the 45 days that she worked there and the fact that she was a slow operator, he instructed Bridges to terminate her. He further testified that he has never permitted a probationary employee to acquire permanent status with less than a "fair rating."

As previously noted, the contract gives Respondent the sole discretion in determining whether to retain a probationary employee. This of course would be no defense if Respondent were in fact motivated by discriminatory considerations or accorded Whitaker disparate treatment because of her strike activity. Here, the record shows that during her first 45 days of employment, Whitaker was twice rated by her foreman, Bridges, as "poor," with her work efficiency "frequently below standard" and "fail[ing] to do her best." Moreover, although Bridges had told Plant Manager Johnston during the strike that he would rate Whitaker as "average" both as to her work ability and as to her "cooperation," he testified at the hearing that Whitaker "was a little below average" before the strike and that during the strike, her work was "about the same" as before. The foregoing not only attests to Gallager's good faith in making the above observations but also tends to verify their correctness. Foreman Bridges' testimony that some new hires during the strike were slower than Whitaker has no probative value, as the record does not show who they were, how long they had worked, or what became of them. On the other hand, Gallager credibly testified, without contradiction, that Joe Ann Gillard was also discharged that same day for being too slow. The record shows that she was a new employee who was first hired during the strike on January 26. The termination notices of Whitaker and Gillard list identical reasons for their discharges. That Gallager was indeed concerned with production is further demonstrated by his decision to discharge Foreman Bridges on February 18, about an hour after Whitaker's termination, "because I felt he was incompetent . . . he didn't, I would say, get the proper cooperation from the employees . . . ." On the other hand, of the 13 strikers reinstated by Respondent, only Whitaker was discharged. Her union and strike activity was no different from that of the other strikers. And there is no showing of any animus directed by Respondent to Whitaker.

Upon consideration of the entire record as a whole, I find that the General Counsel has not sustained his burden of proving by a preponderance of the credible evidence that Whitaker's discharge was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act. Accordingly, I will recommend dismissal of this allegation.

3. Discharge of, and failure to reinstate, other strikers

a. *The relevant facts*

On the evening of February 10, 1966, the Union held a meeting which was attended by about 50 striking employees. International Representative Rains recommended that the strikers should return to work unconditionally while the issues were being resolved by the Board with whom the Union had filed unfair labor practice charges. The strikers voted to accept Rains' recommendation and to return to work.

About 8 a.m. on Friday, February 11, Rains and approximately 40 strikers appeared in the reception room at Respondent's plant, prepared to go to work. Rains told Plant Manager Johnston of the vote taken at the union meeting the preceding night and of the strikers' unconditional request to return to work immediately. In addition, each striker handed Johnston a signed statement in which the employee was "unconditionally offering to return to work immediately." Johnston told the group to be seated and stated that he would return shortly. Johnston then left and telephoned Attorney Cook, and the two prepared a statement to be read to Rains and the strikers. Accompanied by Assistant Production Director Cook, Johnston returned to

the reception room and read his written statement that many of the strikers "have been permanently replaced and are not entitled to reinstatement," and that those for whom it will be determined there are any job openings "will be notified on or before Monday to return to work." Rains pointed out that although all the strikers were not present that morning he was emphasizing that the unconditional offer to return to work applied to all members of the Union who were on strike. During the next 10 days, Respondent received in the mail signed letters from about 16 additional strikers, requesting unconditional reinstatement. Only a small number of the strikers had not submitted individual signed requests for reinstatement.

Respondent had reinstated three strikers prior to February 11, 1966.[15] During the period from February 15 to 22, 1966, Respondent reinstated 10 other strikers who had submitted written individual requests for reinstatement on and after February 11,[16] and offered reinstatement to 8 additional strikers who had also submitted such requests during that period but who did not accept the offer and continued to participate in the picketing and strike together with those who had not been offered reinstatement.[17] Thereafter, no other strikers were offered reinstatement despite the admitted very large turnover among the replacements and Respondent's continued advertisement for permanent unskilled help. Instead, beginning with February 16, 1966, Respondent sent all the strikers who had made written individual requests for reinstatement, excluding those herein named who had been reinstated or offered reinstatement, carbon copies of termination notices which listed the date of application for reinstatement as the "date of separation" and gave as the "reason for unemployment" that the person was "permanently replaced while on economic strike and no job available on date of application for reinstatement."[18] The originals were mailed by Respondent to the Indiana Employment Commission.

At a union meeting held on Sunday, February 20, 1966, Union Representative Rains met with a group of about 11 strikers who had been reinstated or offered reinstatement. Among other things, the group was protesting the fact that Respondent had sent the above-described employment termination notices to, and had failed to reinstate, the bulk of the strikers despite the prior unconditional request for reinstatement. Rains told the group that they did not have to go back to work if they did not so desire and that the Union had its "legal rights" to file unfair labor practice charges for terminating "our members." The employees thereupon decided to continue or to renew their strike participation, as the case may be, in protest against Respondent's alleged unfair labor practices in terminating and refusing to reinstate the strikers. Beginning with the next day, Monday, February 21, a group of 16 joined the remaining strikers in the picketing with signs which for the first time stated that the Union was "on strike protesting unfair labor practices."[19] The Respondent was notified that the employees were continuing or rejoining the strike "under the banner of UNFAIR LABOR PRACTICE STRIKE" because Respondent "saw fit to fire more than half of our Brothers and Sisters who were on strike too, and who had made the same effort to return to work." The strike and the picketing with these signs were still in progress at the time of the hearing in this proceeding.

Schedule A, attached to the General Counsel's complaint, lists the names of 77 employees as strikers. The General Counsel's motion at the instant hearing to strike the name of Roanen Nunn was granted. The record shows that Inge Finicle abandoned the strike on February 11, 1966, when she started on a new job for another employer, prior to the Union's request for reinstatement. There is no showing that the following five employees listed on Schedule A went out on strike: Lyle Brown, Dewey Cole, Ronny Craw, Lawrence Lamons, and Patricia Viertal.[20] Excluding the above 7 and the 20 other strikers listed in footnotes 15, 16, and 17, *supra*, as having been reinstated or offered reinstatement, as well as William Massey who has previously been found to have been discriminatorily denied reinstatement, there remain 49 employees listed on Schedule A who were strikers on February 11, 1966, and were never offered reinstatement. A comparison with Respondent's seniority lists as of December 31, 1965, and March 31, 1966 (G.C. Exhs. 17 and 47), shows the following breakdown for these 49 employees: 28 female production workers in the fabrication department, 16 female production workers in the finishing and packing department, 4 male employees as material handlers, and 1 male employee as janitor. An examination of General Counsel's Exhibit 6, which is a list of Respondent's employees, with their department and classifications, newly hired during the first 3 months of 1966, shows that during the period from February 12 to March 31, 1966, inclusive,

[15] Roanen Nunn, Lynn Schofield, and Monnie Wellman

[16] The picket line was removed when these returning strikers entered and left the plant Eva Whitaker, Shirley Garner, Harold Stone, Susan Dodge, Joyce Shultz, Maria Lemasters, Shirley Roberts, Hildred Lempke, Kenneth Miller, and Helen Phillipy

[17] Antoinette Loe, Marylin Stapleton, Myra Ridenour, Elsie Gougenour, Mavis Noble, Ida Gochenour, Edwinda Matlock, and Thelma Hires

[18] February 11, 1966, is listed as the "date of separation" on about 37 of these termination notices

[19] Those who continued or rejoined the strike after being reinstated or offered reinstatement had not again applied for reinstatement as of the date of the instant hearing They are listed in fns 16 and 17, *supra*, except for Eva Whitaker who was discharged on February 18, as previously found, and Helen Phillipy who continued to work

[20] Resp Exh 9 shows that Lyle Brown and Ronnie Craw were employed as of January 12, 1966, as setup men in the fabrication department There is no showing whether they thereafter became strikers or quit or were terminated for other reasons Resp Exhs 9 and 11 show that Dewey Cole was employed as a material handler and Lawrence Lamons as a setup man, and that both were working for Respondent on January 12 and February 11, 1966 G C Exh 47, which is Respondent's seniority list as of the end of March 1966, lists Vera Viertal as employed since January 10, 1966

Respondent hired at least 31 female production workers in the fabrication department, 11 female production workers in the finishing and packing department, 6 male material handlers in the fabrication department, 3 male material handlers in the finishing and packing department, and 1 janitor.

b. *Concluding findings*

The complaint alleges that Respondent's conduct in refusing and failing to reinstate all the strikers after their unconditional request on February 11, 1966, and in thereafter terminating their employment status constituted unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Respondent contends in its brief that at the time of the strikers' request for reinstatement, the positions of all except those who were offered reinstatement had been filled by permanent replacements; and that, as economic strikers who were permanently replaced, they were terminated as employees and Respondent was under no obligation to seek them out when vacancies thereafter occurred. The General Counsel contends in his brief that even if they were economic strikers, the Respondent has not satisfied its burden of showing what replacements were "actually employed in the position formerly held by the individual strikers." Finally, the General Counsel contends that the group of employees who had been offered reinstatement became unfair labor practice strikers when they continued or rejoined the strike on February 21, 1966, and are entitled to reinstatement, upon application.

(1) The request for reinstatement

A valid unconditional request for reinstatement was made by the Union on behalf of all strikers on February 11, 1966, despite the fact that not all the strikers submitted individual applications at that time or thereafter. As the Board recently stated, "under settled law, it is well within the Union's authority, as the employees' bargaining agent, to make an unconditional application for reinstatement on behalf of the strikers. . . ." *Trinity Valley Iron and Steel Co.*, 158 NLRB 890. However, as the strike at that time was an economic strike, as previously found, Respondent was obligated only to reinstate those strikers whose jobs at that time were not occupied by replacements who were assured of permanent status if their work proved to be satisfactory.

(2) The permanent replacements

Respondent's production workers admittedly had not been assigned to any permanent position in their respective departments; all regular employees did not work on the same job every day but were admittedly qualified to, and did, perform all the tasks and operated all the machines in their department, in accordance with production requirements. Thus, some of the tasks performed by the female production employees at various times in the fabrication department were running the presses and benders, welding, cutting, racking, and trimming. Under these circumstances, I agree with Respondent that it was not necessary to show that a specific named permanent replacement occupied the position of a specific named striker. It was sufficient to show the replacement of strikers collectively. An examination of Respondent's exhibits, based on its original employment records which the General Counsel examined during the course of the instant hearing, convinces me, and I find, that at the time of the request for reinstatement on February 11, 1966, all strikers' jobs except five were filled by replacements who were assured of permanent status if their work proved satisfactory. Respondent offered the five unfilled jobs to five of the strikers almost immediately thereafter. Accordingly, I find that the Respondent's failure to offer reinstatement to all the strikers on February 11, 1966, was not violative of the Act.

(3) The discharge of the strikers

Respondent's position that economic strikers whose jobs were filled by permanent replacements at the time of their unconditional offer to return to work lose their employee status even if they continue to strike, is erroneous as a matter of law. When the strikers were not reinstated after their application on February 11, they resumed their strike and picketing activity, with reinstatement obviously becoming the immediate objective of the strike. As previously demonstrated in the case of William Massey, Section 2(3) of the Act preserved to these economic strikers the continuity of their status as employees even though they had already been replaced. Respondent however changed their status from that of employees to exemployees or former employees by their employment termination described in the separation notice which it sent to the State Employment Commission and to the strikers. That this change was intended as an actual and real employment termination, and not merely a matter of semantics, is demonstrated in the case of striker Massey who was treated as a new applicant when he applied again at a time when his job became vacant again, as previously found. Indeed, Respondent admitted that its only obligation was to treat these continuing strikers as new applicants if they applied again when vacancies existed, conduct which I have found to be violative of the Act in the case of Massey. While not entitled to preferential treatment because of their conduct in continuing to strike, they were entitled to be treated as their employee status required. But by terminating their employee status, Respondent deprived these strikers of their right to full reinstatement as employees, without loss of seniority and other rights and privileges, upon application at a time when vacan-

cies in their jobs existed. I therefore find that Respondent's conduct in terminating the employee status of the strikers was violative of Section 8(a)(3) and (1) of the Act.

(4) The failure to reinstate all the strikers after February 11, 1966

The strikers who were not reinstated or offered reinstatement continued their strike activity.[21] The Respondent was well aware that its failure to reinstate all the strikers was the cause of the continuation of the strike, a fact which was very evident, and that therefore the strikers were still desirous of reinstatement. The current contract then in effect required Respondent to follow seniority in the recall of laid-off employees where "skill, efficiency and dependability in the available work" was "relatively equal." This is not a case where Respondent would have been required to seek out former employees in order to offer them jobs in the vacancies which subsequently arose. Here, the strikers were still employees by virtue of Section 2(3) of the Act, were protesting by their strike and picketing activities against Respondent's failure to reinstate them, and were thereby continuously reminding Respondent of their continued desire for reinstatement, a fact of which Respondent was aware.

Under all the circumstances, I find that the unconditional request for the reinstatement of all the strikers, made on February 11, 1966, was in the nature of a continuing application, at least so long as the strike was still in progress, and that this application remained in effect and was still current and operative when subsequent vacancies occurred and hirings were made.[22] As previously found in detail, during the period from February 12 through March 31, 1966, sufficient vacancies arose in jobs performed by the strikers to have enabled Respondent to reinstate practically all the strikers. I further find that Respondent's conduct in hiring new employees to fill these vacancies, instead of offering them to the strikers, was due to the fact that the latter had engaged in the strike and was therefore discriminatory and violative of Section 8(a)(3) and (1) of the Act.

In addition, on the basis of the entire record before me, I reach the same conclusion even if the February 11 request for reinstatement were not regarded as in the nature of a continuing application. Two days before the strike, Foreman Krile told employee Hildred Lempke that he had orders to replace the four or five union members in his department, as hereinafter found. On the day before the strike, Plant Manager Johnston read a speech to the employees, emphasizing, among other things, that if they went out on a strike and were replaced, "you LOSE FOREVER your right to employment by this company." During the strike, Johnston confided to Foreman Bridges of the fabrication department that they should replace the strikers "as fast as we can" to get rid of the employees with the most seniority because they were the "troublemakers."[23] The seniority of the employee members of the bargaining committee ranged from approximately 2 to 6 years. Indeed, many of the strikers had long service records with Respondent, ranging up to 10 years.[24] Also, as previously noted, the contract then in effect required Respondent to follow seniority in the recall of laid-off employees where other factors were "relatively equal." In addition, Respondent concedes, as its records show, that there was a very large turnover among the nonstrikers and strike replacements and that to the date of the instant hearing it was continuing to advertise for permanent unskilled help. Yet, although all the regular employees on strike admittedly were experienced in all the jobs required to be performed in their respective departments, not a single striker who had once been replaced was recalled despite the many vacancies which arose in their jobs. Instead, as previously found, Respondent went to the trouble of continuously advertising for permanent unskilled help and hired approximately 50 totally new employees to fill vacancies which arose because of the subsequent employee turnover, sufficient vacancies to have enabled Respondent to have reinstated practically all the replaced strikers. I am convinced and find that Respondent's failure to recall any of the replaced strikers under the circumstances hereinabove described was discriminatorily motivated because they engaged in the strike

[21] Larry Condon had abandoned the strike as of the date of the instant hearing, having obtained employment elsewhere; Bertha Parham had left the hospital about February 11 and had not been released by her doctor as of the date of the instant hearing; and Alexander Zelinsky ceased being on strike the Thursday before the instant hearing when he enlisted in the Armed Forces.

[22] That an application for reinstatement may, under certain circumstances, be in the nature of a continuing and operative application has been held by the Board in *Container Mfg. Co.*, 75 NLRB 1082, 1086. Although the Court of Appeals for the Seventh Circuit reversed the Board on the facts in that case, it affirmed the principle that under certain circumstances an application may be regarded as in the nature of a continuing application. 171 F.2d 769, 771–772. The cases cited in Respondent's brief are inapposite because they all turned on their own facts. Absent in those cases, as well as in the *Container* case, were the facts present in the instant case that the employees continued their strike and picketing activities in protest against the failure and refusal to reinstate them, that the employees so informed Respondent, and that there was in effect a contract requiring seniority to be followed in the recall of laid-off employees.

[23] This finding is based on the credited testimony of Foreman Bridges. In assessing Bridges' credibility, I have taken into consideration the fact that he was discharged for cause by Respondent on February 18, 1966. He testified in a candid, straightforward, and unbiased manner which convinced me that he was a trustworthy witness entitled to be credited.

[24] The starting dates for some of these strikers are as follows: Elsie Hostetler—April 19, 1956; Betty Houk—August 12, 1957; Mary Barnhill—June 19, 1958; Rhea Bowman—July 28, 1958; Lavone Landis—August 21, 1958; Lois Snow—September 8, 1958; Catherine Wolfe—January 27, 1959; Polly Bowman—July 18, 1960; Mary Lepkojus—April 10, 1961; Eiko Oldham—April 21, 1961; Gertrude Hight—August 28, 1961; Rozena Patterson—November 6, 1961; Betty Crippen—September 14, 1962; about five strikers with starting dates in 1963; and about nine strikers with starting dates in 1964.

and therefore in violation of Section 8(a)(3) and (1) of the Act.[25]

(5) The Unfair labor practice strike and strikers

As previously found, the 16 strikers who were reinstated or offered reinstatement after February 11, 1966, either continued or rejoined the strike because of Respondent's conduct in terminating and failing to reinstate the remaining strikers after their unconditional request for reinstatement. As I have previously found Respondent's conduct in these respects to constitute unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, it follows, as I further find, that these 16 strikers became unfair labor practice strikers.

In addition, it is evident, and I find, that the continuation of the entire strike was attributed to Respondent's unfair labor practices in terminating and failing to reinstate the strikers after their unconditional request for reinstatement.[26] It therefore also follows, as I further find, that the entire strike became an unfair labor practice strike after February 11, 1966, and that all the strikers were henceforth unfair labor practice strikers.

4. Termination of strikers' group medical benefits

The complaint alleges that Respondent also violated Section 8(a)(3) and (1) of the Act by its conduct "on or about February 25, 1966," in notifying the strikers "that their group insurance carried by the Respondent was being terminated." As previously found, Respondent's Employment Manager Bookwalter, by letter dated February 25, 1966, informed Mavis Noble, one of the strikers, that her "participation in the group plan will terminate March 1st" but "will be reinstated upon the first day of return to work, if within one year." In response to Union Representative Wentz' inquiry in this regard, Attorney Duck informed Wentz of the terms of the group insurance contract; expressed the view that by virtue of the provisions of the group insurance contract and the failure of striking employees "to make their contributions when due on the premium payments," "none of the striking employees have been covered by the group policy since February 1, 1966"; and referred Wentz to the district manager of the New England Mutual Life Insurance Company as "the best source of information" with respect to coverage and the Respondent's group insurance contract. It thus appears that whatever changes occurred in the strikers' group insurance coverage was by operation of the express terms of the insurance contract and not by any act of Respondent.

I find that Respondent's conduct with respect to the strikers' group insurance coverage is not violative of the Act.[27] I will accordingly recommend dismissal of this allegation.

F. *Interference, Restraint, and Coercion*

The complaint alleges that Respondent independently violated Section 8(a)(1) of the Act (1) by the conduct of Plant Manager Johnston and Foremen Krile and Buttram in threatening employment termination to employees if they participated in the strike and in interrogating employees concerning their "Union sympathies and allegiances and the Union plans and intentions," and (2) by maintaining and enforcing an invalid no-distribution rule.

1. As to threats and interrogations

a. *The relevant facts*

Plant Manager Johnston read a prepared speech to the assembled employees in the plant cafeteria on the afternoon of January 11, 1964, the day before the strike. Among other things, he admittedly told the employees that Respondent had been advised that a strike was scheduled to "begin at noon tomorrow"; those who wanted to go out on strike had a right to do so; those who wanted to continue to work had a right to do so without interference by the Union and would be afforded ample protection by the mayor and police department; the "Company has decided to continue to operate through the strike and in doing so will provide work for all employees who decide to work and will hire new employees to replace those on strike"; "if you do go on strike and the Company hires a replacement for you, you LOSE FOREVER your right to employment by this company"; and "I want to assure you that such *is* the law."

About 3 days before the strike, Foreman Buttram talked to Virginia Durham, one of the employee members of the bargaining committee, and to employee Dorothy Scotten, about the Union "all day long." He tried to find out what the Union was going to do and when the Union would act. Durham told him that Plant Manager Johnston would be informed at the proper time. As Durham was leaving the plant when the strike began, Buttram told her that Respondent would replace the strikers with "cheap hillbillies" who would cross the picket line, adding that "it's been good to know you."[28]

On January 10, the Monday before the strike, Foreman Krile told Hildred Lempke, one of the employees under his supervision, that he did not know that she belonged to the Union; he did not think that there were "enough that belonged to the Union that could do any good"; there were only four or five in his department who belonged to the

[25] See, e.g., *Marydale Products Company, Inc.*, 133 NLRB 1223, 1234–35

[26] See, e g., *The Philip Carey Mfg. Co.*, 140 NLRB 1103, 1106, fn 6.

[27] See, e g., *The Philip Carey Mfg. Co*, 140 NLRB 1103, 1123.

[28] These findings are based on the credited and undenied testimony of Virginia Durham.

Union; and he had orders to replace them. On the day before the strike, Krile told employee Garnett Good that "it won't do you a damn bit of good to go [on strike] because by the very next morning every damn one of you will be replaced." On the day of the strike, Krile told employee Kenneth Miller that Respondent already had applications and had already hired replacements.[29]

b. *Concluding findings*

I find that the foregoing statements of Plant Manager Johnston and Foremen Buttram and Krile constituted a threat that the employees who went out on strike would immediately be replaced and then *forever* forfeit any right of employment with Respondent. That this is not a correct statement of the law has previously been demonstrated. I further find that such threats reasonably tended to interfere with, restrain, and coerce the employees in the exercise of their rights guaranteed by Section 7 of the Act, and that Respondent thereby violated Section 8(a)(1). I also find that the foregoing does not establish that Respondent engaged in the type of interrogation proscribed by the Act.

2. As to the no-distribution rule

Respondent has maintained a set of "Plant Rules" which are posted on a sheet in the plant and were still in effect at the time of the instant hearing. A copy of these rules is given to each new employee so that he will be aware of them. One of these rules prohibits employees from "circulating petitions or printed matter of any kind on company premises." The sheet specifies that rules of this kind "will be enforced by means of a warning and disciplinary system," which may culminate in dismissal.

It is obvious that the above rule is sufficiently broad to encompass the distribution of union literature on nonworking time in nonworking areas.[30] It is now well settled that broad company rules which prohibit the distribution of union literature during nonworking time in nonworking areas are unlawful, unless it is shown that "special circumstances" make the prohibiting rule necessary to maintain production or discipline.[31] Respondent made neither showing nor claim that any such "special circumstances" were present in the instant case. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by maintaining the above plant rule.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate William Massey with his seniority and vacation rights on January 18, 1966, I will order Respondent to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or vacation or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discriminatory refusal to reinstate him, by payment to him of a sum of money equal to that which he normally would have earned as wages from January 18, 1966, to the date of Respondent's offer of reinstatement, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

I have also found that Respondent violated Section 8(a)(1) and (3) of the Act by failing to offer reinstatement to the replaced strikers when vacancies arose after February 11, 1966. As previously found, there were 49 strikers in this group, consisting of 28 female production workers in the fabrication department, 16 female production workers in the finishing and packing department, 4 male employees as material handlers, and 1 male employee as janitor. Also as previously found, during the period from February 12 to March 31, 1966, inclusive, there were vacancies, filled by new hires, for at least 31 female production workers in the fabrication department, 11 female production workers in the finishing and packing department, 9 male material handlers, and 1 janitor. It is therefore clear that, absent discrimination, all the strikers in this group, except five female production workers in the finishing and packing department, would have been

[29] The findings in this paragraph are based on the credited testimony of Lempke, Good, and Miller. Krile admitted telling Lempke that he did not know how many belonged to the Union. He testified that he did not remember how this subject came up, and denied having made the other statements hereinabove set forth. I do not credit Krile's denials, as he did not impress me as a trustworthy and reliable witness by his demeanor while testifying

[30] *American Coach Company*, 158 NLRB 415, *Lexington Chair Co*, 150 NLRB 1328, 1340–41, enfd 361 F 2d 283 (C.A. 4)

[31] *Ibid.*, *Walton Mfg Co*, 126 NLRB 697, enfd. 289 F 2d 177 (C.A. 5), *Stoddard-Quirk Mfg Co.*, 138 NLRB 615, *Lexington Chair Co*, *supra.*

offered reinstatement or recalled by March 31, 1966. Moreover, in view of the admitted continuous large turnover and Respondent's continued advertising for unskilled help, it is reasonable to infer, as I do, that sufficient vacancies have occurred in the finishing and packing department since March 31, 1966, to have enabled Respondent to reinstate the remaining five female production workers in the finishing and packing department. I will therefore order Respondent to offer to the 49 strikers listed in Appendix C, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them by payment to each a sum of money equal to that which each normally would have earned as wages from the date of the discriminatory failure to reinstate them to the date of Respondent's offer of reinstatement, less the net earnings of each during such period, with backpay and interest thereon computed in the manner prescribed in the preceding paragraph. It is reasonable to infer, and I find, that the order in which these strikers would have been offered reinstatement would have been governed by their departmental seniority. The commencement of the backpay period can therefore be determined by an examination of the seniority rosters and the dates when new hires were made in the respective classification and departments, all of which are presently exhibits in this record.[32]

I have previously found that the 16 strikers who were reinstated or offered reinstatement became unfair labor practice strikers on and after February 21, 1966. I will therefore order that, upon an unconditional application, Respondent shall offer to the 16 strikers listed in Appendix D, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing persons hired by Respondent on and after February 21, 1966, if necessary to make room for them. *Almeida Bus Lines, Inc.*, 142 NLRB 444. I will also order Respondent to make whole those listed in Appendix D, attached hereto, for any loss of pay suffered, or which they may suffer, by reason of Respondent's refusal, if any, to reinstate them in the above-described manner, by payment to each of them a sum of money equally to that which each normally would have earned as wages during the period from 5 days after the date on which the employee unconditionally applies for reinstatement to the date of Respondent's offer of reinstatement, less his or her net earnings during said period, with backpay and interest to be computed in the manner previously described.

I have also found that Respondent violated Section 8(a)(1) of the Act by maintaining an invalid plant no-distribution rule. I will accordingly order Respondent to rescind the rule to the extent that it prohibits the distribution of union literature on nonworking time in nonworking areas on company premises.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is 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. By failing to reinstate William Massey on January 18, 1966, with his seniority and vacation rights, by terminating the employee status of continuing strikers, and by failing to reinstate them when vacancies arose after their unconditional request for reinstatement, Respondent has discriminated with respect to their hire, tenure, and terms and conditions of employment, thereby discouraging membership in the Union, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By the foregoing conduct, by maintaining in effect a rule prohibiting the distribution of union literature on nonworking time in nonworking areas on company premises, and by threatening employees with forever losing any right to employment with Respondent if they went out on strike and were replaced, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent did not engage in any unfair labor practices alleged in the complaint which are not specifically found herein.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

The Respondent, The Laidlaw Corporation, Peru, Indiana, its officers, agents, successors, and assigns, shall:

[32] Larry Condon is included in Appendix C because it does not appear that he abandoned the strike before he would have been reinstated in accordance with his seniority standing. Alexander Zelinsky is included because his status has not been impaired by the fact that he left the strike to join the Armed Forces. Bertha Parham is included because her status as a striker has not been impaired by her illness during the strike. However, Respondent's offer to reinstate her will be conditioned upon her submission of a release from her doctor

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO, or any other labor organization, by terminating the employee status of continuing strikers or failing to reinstate them to existing vacancies, with full seniority and vacation rights, or by discriminating against them in any other manner with respect to their hire, tenure, or any terms or conditions of employment.

(b) Maintaining in effect a rule prohibiting the distribution of union literature on nonworking time in nonworking areas on company premises.

(c) Threatening employees with forever losing any right to employment with Respondent if they went out on strike and were replaced.

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

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

(a) Rescind the plant rule against the circulation of any petitions or printed matter to the extent that it prohibits the distribution of union literature during nonworking time in nonworking areas on company premises.

(b) Offer to William Massey immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or vacation or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Offer to those listed in Appendix C immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Upon application, offer to those listed in Appendix D immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing all persons hired by Respondent on and after February 21, 1966, if necessary to make room for them, and make them whole for any loss of earnings suffered or which they may suffer by reason of Respondent's refusal, if any, to reinstate them, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon 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 Recommended Order.

(f) Notify William Massey and those listed in Appendixes C and D if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(g) Post at its plant in Peru, Indiana, copies of the notice marked "Appendix B."[33] Copies of said notice, with Appendices C and D attached thereto, to be furnished by the Regional Director for Region 25 (Indianapolis, Indiana), after being duly signed by authorized representatives of the Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[34]

I FURTHER RECOMMEND that the complaint be dismissed insofar as it alleges that Respondent violated the Act in respects not herein specifically found.

[33] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

[34] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in or activities on behalf of Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL–CIO, or any other labor organization, by terminating the employee status of continuing strikers or failing to reinstate them to existing vacancies, with full seniority and vacation rights, or by discriminating against them in any other manner with respect to their hire, tenure, or any term or condition of employment.

WE WILL NOT threaten employees with forever losing any right to employment with us if they should go out on strike and be replaced.

WE WILL NOT maintain in effect a rule prohibiting the distribution of union literature on nonworking time in nonworking areas on company premises.

WE WILL rescind our plant rule against the circulation of any petitions or printed matter to the extent that it prohibits the distribution of union literature during nonworking time in nonworking areas on company premises.

WE WILL offer to William Massey immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or vacation or other rights and privileges, and will make him whole for any loss of earnings suffered as a result of the discrimination against them.

WE WILL offer to all those listed in Appendix C immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of the discrimination against them.

WE WILL, upon application, offer to all those listed in Appendix D immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing all persons hired by us after February 21, 1966, if necessary to make room for them, and will make them whole for any loss of earnings suffered by them as a result of our failure, if any, to reinstate them within 5 days after such unconditional application.

THE LAIDLAW CORPORATION
(Employer)

Dated By

(Representative) (Title)

Note: We will notify the above-mentioned employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone Melrose 3-8921.

APPENDIX C

Richard Achey	Elmer Hiers
Steven Achey	Gertrude Hight
Diana Bakke	Elsie Hostetler
Mary Barnhill	Betty Houk
Norma Black	Nellie Hughes
Clara Blackman	Marjorie Johnson
Polly Bowman	Risa Johnson
Rhea Bowman	Marilyn D. Jones
Myra J. (Michael) Bowman	Betty Kline
Christine Brown	Janet Lampkin
Nanola Browning	Lavone Landis
Dorothy Cain	Mary Lepkojus
Larry Condon	Patricia Miller
Betty Crippen	Marie Nichols
Martha Dalton	Eiko Oldham
Virginia Durham	Kathleen Ousley
Dovie Fisher	Bertha Parham
Marjorie Flitcraft	Rozena Patterson
Mildred Glaze	Margaret Pierce
Janice Goll	Wanda Rose
Garnet Good	Dorothy Scotten
Dorothy Graham	Lois Snow
Mary Green	Earlene Watson
Bobetta Harter	Catherine Wolfe

Alexander Zelinsky

APPENDIX D

Susan Dodge	Edwinda Matlock
Shirley Garner	Kenneth Miller
Ida Gochenour	Mavis Noble
Elsie Goughenour	Myra Ridenour
Thelma Hires	Shirley Roberts
Maria Lemasters	Joyce Shultz
Hildred Lempke	Marylin Stapleton
Antoinette Loe	Harold Stone