Rose Printing Company *and* Graphic Communications Workers Union, Local 241-B. Cases 12–CA–12303–3 and 12–CA–12303–4

September 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case presents two separate issues involving the reinstatement rights of former economic strikers. The first issue is whether an employer must offer former strikers reinstatement to their prestrike positions, on the departure of permanent replacements, if the former strikers have acquired employment elsewhere. The second issue is whether an employer must offer former strikers reinstatement to jobs which they are qualified to perform but which are not the same or substantially the same as their prestrike jobs. The administrative law judge found that the Respondent's failure to offer reinstatement in both situations violated Section 8(a)(3) and (1) of the Act.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified.

For the reasons set forth fully in the judge's decision, we affirm his conclusion that the failure to offer reinstatement to Winfred Posey and Bradford Bowman was unlawful.[3] We disagree, however, with the judge's finding that the Respondent violated Section 8(a)(3) by failing to offer Peggy Sue Nichols, Peggy Powers Hamm, and Gary Powell reinstatement to vacant entry level general worker positions.[4] As discussed below, we hold that an employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform.

Nichols, Powers Hamm, and Powell each held positions in the Respondent's bindery department prior to the commencement of an economic strike by bindery unit employees on January 20, 1986.[5] During the strike, the Respondent hired permanent replacements for the three striking employees. On about May 5, the Union made an unconditional offer to return to work on behalf of all strikers. The next day all strikers were placed on a preferential hire list.

It is undisputed that vacancies arose after October 27 in entry level general worker positions in the bindery department. Nichols, Powers Hamm, and Powell were qualified to perform the work required in these positions, which were not substantially equivalent to their prestrike jobs because of lower pay and skill levels. The Respondent hired at least nine individuals to fill general worker vacancies. It did not offer to reinstate Nichols, Powers Hamm, or Powell to any of these vacancies.

The judge found that Nichols, Powers Hamm, and Powell were entitled to an offer of reinstatement to any available position for which they qualified, specifically including the general worker bindery jobs. He relied on *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), in which the Court stated:

> the status of the striker as an employee continues until he has obtained ''other regular and substantially equivalent employment'' . . . . *If and when a job for which the striker is qualified becomes available*, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show ''legitimate and substantial business justifications.'' *N.L.R.B. v. Great Dane Trailers*, [388 U.S. 26, 34 (1967)]. [Emphasis added.]

Fleetwood does not address the issue in this case. The issue in *Fleetwood* concerned the *time* for determining rights to reinstatement. In *Fleetwood*, there were no available positions when the strikers asked for reinstatement. Two months later, however, job vacancies arose as the employer returned to prestrike production levels. The employer argued that the time for determining rights to reinstatement was restricted to the time of the request for reinstatement. Because there were no available positions at that time, the employer contended, the right to reinstatement was lost. The

[1] On July 24, 1990, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

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

[3] We affirm the judge's finding that the Respondent failed to prove that these former strikers had abandoned their status as the Respondent's employees. The Respondent argues that Posey and Bowman obtained regular and substantially equivalent employment elsewhere. Even if they did, however, that would not per se establish that Posey and Bowman had abandoned interest in their prestrike jobs. In addition, regular and substantially equivalent employment was not shown. In this regard, we note that Posey's and Bowman's prestrike wages and benefits are the appropriate measures for comparison with the wages and benefits at employers for which they worked during and after the strike. The Respondent argues that diminished poststrike wage and benefit levels for Posey's and Bowman's former jobs should provide the basis for comparison. The diminished poststrike wages and benefits are not relevant here, however, because they resulted from the Respondent's unlawful unilateral changes. See *Rose Printing Co.*, 289 NLRB 252 (1988).

[4] There are no exceptions to the finding that the Respondent did not violate the Act by failing to offer to reinstate Powers Hamm and Powell to temporary roundbacker/liner machine work in November 1986.

[5] All dates are in 1986 unless otherwise indicated.

Court disagreed and held that the right continued and therefore existed when positions became available 2 months later. Significantly, there was no discussion concerning the issue now under discussion, that is, whether strikers are entitled to any jobs for which they are qualified or whether the reinstatement obligation extends only to their former jobs or substantially equivalent jobs. There was no discussion of this issue because it was not before the Court. Hence, the Court's reference to ''a job for which a striker is qualified'' cannot be viewed as a resolution of that issue.[6] Although the Supreme Court has not resolved the issue under discussion in this case, the Board has done so. As explained below, we regard it as implicit in the Board's decision in *Laidlaw Corp*., 171 NLRB 1366 (1968), that economic strikers' reinstatement rights concern their former jobs or substantially equivalent positions; and, as we further explain, the Board in cases subsequent to *Laidlaw* has expressly applied such limitations in determining employers' obligations respecting the reinstatement of economic strikers.[7]

In *Laidlaw*, the Board approved a trial examiner's holding 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*.'' Id. at 1366 (emphasis added). Accordingly, the Board rejected the contention that if there were no such positions available on the particular day the strikers first offered to return, an employer would have no further obligations to the strikers. Thus, in considering the status of strikers who had unsuccessfully applied for reinstatement on a date in February, when there were no vacancies in their positions, the Board held that ''[a]s employees with outstanding unconditional applications for reinstatement . . . these strikers were entitled to full reinstatement *as vacancies arose in their old positions*. Id. at 1368 (emphasis added). In reaching this conclusion, the Board noted that it was overruling earlier cases which had held that ''replaced economic strikers were thereafter entitled only to nondiscriminatory treatment as applicants for new employment.'' Id. at 1369 (footnote omitted). Because *Laidlaw* involved only entitlement to positions vacated by the strike replacements, however, preexisting law was clearly overturned only where reinstatement to such positions was at issue.

In accordance with the implicit assumptions of *Laidlaw*, the Board in *New Era Electric Coop*., 217 NLRB 477 fn. 1 (1975), modified the judge's rationale to find that even if a presumed former economic striker (Hart) was qualified to perform a particular job in which a poststrike vacancy arose, the Respondent did not violate the Act by failing to offer him reinstatement to that position because it was not substantially equivalent to his former job. The Board noted that the disputed poststrike position involved substantially lesser pay and would have entailed working under the charge of an employee in the striker's former job.

Thereafter, in *Certified Corp*., 241 NLRB 369 (1979), the Board adopted a judge's decision finding that an employer did not unlawfully fail to offer permanently replaced strikers reinstatement to a temporary part-time job. The judge in *Certified* reasoned that

> General Counsel ignores the fact that Respondent's obligation is to return the strikers to *their former positions or substantially equivalent ones* if and when such positions are available. The part-time temporary job . . . cannot be characterized as ''substantially equivalent'' to any job formerly held by any striker since the strikers were all employed on a regular full-time basis.[8] [Emphasis in original.]

In *Highlands Medical Center*, 278 NLRB 1097 (1986), the Board adopted the judge's finding that the employer had no obligation to offer former economic strikers reinstatement to vacant jobs that were not substantially equivalent to their former jobs. The judge explicitly rejected the General Counsel's argument that replaced economic strikers should be recalled to any job for which they were qualified.

Finally, in *Oregon Steel Mills*, 291 NLRB 195 (1988), the Board affirmed a judge's finding, inter alia, that the employer was not obligated to recall a striker, who worked before the strike as a chemist, to fill a vacant lab test report clerk job. Citing *New Era Electric*, the judge stated that ''[t]he Board has held that an employee is entitled to a substantially equivalent job, but not a job for which he is overqualified.'' Accordingly, he found no need to decide whether the former chemist possessed typing skills required for the clerk job. 291 NLRB at 192.

Thus, the touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially equivalent to, the prestrike job. To be sure, the striker's qualifications are not irrelevant. The

[6] The Board's trial examiner in *Fleetwood* considered whether each of six former strikers was qualified to perform jobs in vacancies created by the respondent's poststrike expansion of production. *Fleetwood Trailer Co*., 153 NLRB 425, 427–428 (1965). It seems likely that this discussion of qualifications led ultimately to the Court's reference to ''a job for which the striker is qualified.''

[7] Concededly, the Board, in striker-reinstatement cases, has sometimes used the *Fleetwood* phrase ''job for which the striker is qualified.'' These cases, however, either did not involve the issue of the kind of job to which the striker is entitled—see, e.g., *Brooks Research & Mfg*., 202 NLRB 634, 635–636 (1973) (ruling on *length of time* reinstatement rights—or make clear elsewhere in the opinion the underlying assumption that the positions at issue are the strikers' old jobs or equivalent positions (see discussion of *Laidlaw Corp*., infra).

[8] 241 NLRB at 373; see also *Textron, Inc. v. NLRB*, 687 F.2d 1240, 1247–1248 (8th Cir. 1982), and *Coastside Scavenger Co*., 273 NLRB 1618, 1630–1631 (1985).

issue of whether the striker is qualified to perform the job may shed light on whether the job is substantially equivalent to the prestrike job. Indeed, the Board has combined the two requirements. In *Fire Alert Co*., 207 NLRB 885, 886 (1973), the Board said that ''the Respondent's reinstatement obligation here is not limited to the strikers' old positions, but rather includes reinstatement to substantially equivalent positions which the strikers are qualified to fill.'' Thus, it may well be that the job must be substantially equivalent to the prestrike job *and* the striker must be qualified to fill it. But the essential point is that mere qualification to perform the job will not suffice.

The cases relied on by the General Counsel[9] do not support the proposition, contrary to the foregoing precedent, that an employer has an obligation under *Fleetwood* and *Laidlaw* to offer to reinstate replaced economic strikers to vacancies in jobs which they are qualified to perform but which are not substantially equivalent to their former jobs. It is true that in these and other cases,[10] the judge in the underlying opinion has suggested or endorsed the existence of such an obligation, but none of these Board decisions turned on this concept.[11] To the extent that respondent employers unlawfully failed to offer strikers reinstatement to vacancies in lesser skilled positions, there were no express findings that the jobs at issue were not at least substantially equivalent to the strikers' prestrike jobs.[12] In several cases, it is not apparent that the parties expressly contested the issue of substantial equivalence.[13]

In considering whether an employer should be required to offer a replaced striker reinstatement to a nonequivalent job which the striker is qualified to perform, we do not quarrel with the assertion that ''[a] lesser job with less pay and/or reduced benefits may not be as attractive but it is better than no job at all.''[14] Our duty in defining a former economic striker's rights under *Fleetwood* and *Laidlaw*, however, does not entail consideration of strikers' economic needs. Our duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service. They are therefore entitled to return to those jobs or substantial equivalents if such positions become vacant, and they are entitled to nondiscriminatory treatment in their applications for other jobs. As to this latter entitlement, it is clear that, while the former strikers were not guaranteed a preference for the nonequivalent jobs, the Respondent was not free to prefer new applicants over them simply because they had been on strike and were on the *Laidlaw* reinstatement list for their old jobs. The General Counsel, however, has argued simply that the Respondent was bound to offer the nonequivalent jobs to the former strikers as part of its reinstatement obligation. He has not litigated this case on the theory that the Respondent refused to offer employees work in other jobs because of their status as former strikers.

Our holding here confirms coextensive employer and employee obligations under *Fleetwood* and *Laidlaw*. In this regard, we note that an economic striker has no obligation to accept an offer of reinstatement to a position which is not the same or substantially equivalent to his prestrike position. A refusal to accept such an offer does not extinguish entitlement to full reinstatement to the former or substantially equivalent job. *Harvey Engineering Corp*., supra at 1292. In striking the balance between employers' rights to continue business operations and employees' rights to engage in strikes, we think that it would be anomalous to impose on employers a statutory obligation to make reinstatement offers that former economic strikers have no concomitant obligation to accept.

In addition, we note that a striker's acceptance of a position which is not the same as or substantially equivalent to that striker's prestrike position does not extinguish the statutory right to subsequent reinstatement to a vacant prestrike position or a substantially equivalent one.[15] Acceptance of the General Counsel's argument would therefore mean that a striker would have *two* reinstatement rights, and that employers would have *two* correlative obligations. That is, a strik-

[9] *Arlington Hotel Co*., 273 NLRB 210 (1984), enfd. 785 F.2d 249 (8th Cir. 1986); *Medallion Kitchens*, 277 NLRB 1606, 1614 fn. 16 (1986), enfd. 811 F.2d 456 (8th Cir. 1987); *Rockwood & Co*., 281 NLRB 862 (1986) (Ragan, Clouse, and Johnson); and *Wright Tool Co*., 282 NLRB 1398, 1405 (1987) (Eneix and Mann), enfd. 854 F.2d 812 (6th Cir. 1988).

[10] See *Harvey Engineering Corp*., 270 NLRB 1290, 1303–1304 (1984), and *Western Steel Casting Co*., 233 NLRB 870, 874–875 (1977) (Angus and Collins).

[11] In *Harvey Engineering*, supra at 1291, the Board reversed the judge on procedural grounds, finding that the issue of the respondent's failure to reinstate former strikers to jobs that were not substantially equivalent to their former positions had not been alleged or litigated. It further disavowed reliance on the judge's rationale in finding that a former striker was entitled to any job for which he was qualified.

In *Western Steel*, supra at 870–871, the Board reversed the judge to find that former strikers' rights to poststrike jobs in dispute had been contractually waived. The Board further found that these jobs were not substantially equivalent to strikers' former jobs, but in light of the waiver finding it was unnecessary to pass on the employer's exceptions to the judge's conclusion that an employer must offer an economic striker any employment for which he is qualified.

[12] In *Medallion Kitchens*, supra at 1614, the judge expressly found that the jobs involved were substantially equivalent.

[13] In *Arlington Hotel*, supra, the respondent unsuccessfully contended that it had an obligation to recall strikers only to their specific prestrike positions. Although the judge in that case referred to the fact that the employees had been cross trained and had multiple capabilities, this reference was not in support of a conclusion that strikers were qualified for the positions. Rather, the reference was in support of a conclusion that the employer's position on recall of strikers unlawfully precluded offering a striker a job that was ''substantially equivalent to his or her prestrike position.'' *Arlington Hotel*, supra at 215. In other cases—*Wright Tool*, supra; *Rockwood*, supra; and *Transport Service Co*., 302 NLRB 22 (1991)—the employers argued that the strikers were not qualified for the vacant positions. The employers did not make the additional argument that, even if strikers were qualified for vacant positions, they were not entitled to such positions based on a bare showing that they were qualified to fill them. Hence, the Board did not even address that issue.

[14] *Arlington Hotel*, supra at 215.

[15] E.g., *David R. Webb Co*., 291 NLRB 236 fn. 3 (1988), enfd. 888 F.2d 501 (7th Cir. 1989), cert. denied 110 S.Ct. 2560 (1990).

er would have a right to reinstatement to any job which the striker is qualified to perform, even if that job is not the same as or substantially equivalent to the striker's prestrike position. In addition, as soon thereafter as the striker's former job or a substantially equivalent one became available, the striker would have a right to transfer to that job. Similarly, even though an employer has acted lawfully in replacing a striker, the employer would be obligated to reinstate the striker to a vacant nonequivalent job which the striker is qualified to perform. The employer would also be required to transfer the striker to a prestrike job or to a substantially equivalent one when it became available and to hire another person to fill the vacancy left by the transferring striker. In our view, a striker is not entitled to such preferential treatment and an employer need not suffer such dislocation simply to preserve the striker's continuing statutory employee status.

Based on the foregoing, we conclude that the Respondent did not violate the Act by failing to offer to reinstate former strikers Nichols, Powers Hamm, and Powell to poststrike jobs which were not substantially equivalent to their prestrike jobs. We dismiss the complaint allegation relating to this issue, and we will modify relevant terms of the judge's recommended Order and notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rose Printing Company, Tallahassee, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter subsequent paragraphs.

2. Substitute the following for paragraphs 2(a) and (b).

''(a) Offer Winfred Posey and Bradford Bowman full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any employee hired as a replacement in any positions formerly worked by such employees from September 26, 1986, to the present.

''(b) Make whole Winfred Posey and Bradford Bowman for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to offer to reinstate our former striking employees reinstatement to their prestrike positions when those positions become available.

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

WE WILL offer Winfred Posey and Bradford Bowman full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any employee hired as a replacement in any positions formerly worked by such employees from September 26, 1986, to the present.

WE WILL make whole Winfred Posey and Bradford Bowman for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

ROSE PRINTING COMPANY

Andres Rivera-Ortiz, Esq., for the General Counsel.
Mark E. Levitt, Esq. (Hogg, Allen Norton & Blue, P.A.), of Miami, Florida, for the Respondent.
Peggy Nichols, General President, of Crawfordville, Florida, for the Union.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on June 5, 1989, in Tallahassee, Florida, based on charges filed by Graphic Communications Workers Union, Local 241-B (the Union), on November 18, 1986, and a consolidated complaint issued by the Regional Director for Region 12 of the National Labor Relations Board on Feb-

ruary 17, 1989.[1] The complaint alleged that Rose Printing Company (Respondent or Rose), violated Section 8(a)(1) and (3) of the Act by refusing to reinstate or offer to reinstate certain employees following an unconditional offer made by the Union on behalf of all the employees. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by General Counsel and Respondent. Both briefs were duly considered.

On the entire record[2] in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Rose Printing Company is a Florida corporation engaged in the publishing and binding of books in Tallahassee, Florida. Jurisdiction is not in issue. Rose Printing Company, in the past 12 months, in the course and conduct of its business operations derived gross revenue in excess of $500,000 and purchased and received at its Tallahassee, Florida facility goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. I conclude and find that Rose Printing Company is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

In 1986, the Union represented Respondent's bindery and maintenance department employees. On January 20, the Union called a strike in Respondent's bindery department. On January 23, the Union called a strike in Respondent's maintenance department. Both strikes were called due to unsuccessful contract negotiations. The strike in the bindery department remained an economic strike but on March 5 the strike in the maintenance department was converted into an unfair labor practice strike due to Respondent's unfair labor practices.[4] On or about May 5, the Union made an unconditional offer to return to work on behalf of all strikers. On or about May 6, Respondent placed all strikers on a preferential hiring list. Two maintenance employees, Posey and Bowman, had been participants in this maintenance department strike before and after its conversion to an unfair labor practice strike, however, both had been permanently replaced prior to the unfair labor practice strike conversion on March 5.

After May 5, positions became available in Respondent's bindery and maintenance departments which strikers could have filled but Respondent failed to recall them.

III. STIPULATIONS OF THE PARTIES

On or about May 5, 1986, the Union made an unconditional offer to return to work on behalf of employees engaged in the strike described in paragraph 6(a) of the complaint, and that the first three employees set forth in paragraph 6(b) of the complaint were among those strikers on whose behalf the Union made an unconditional offer to return.

On May 6, 1986, Respondent placed strikers, including Peggy S. Nichols, Peggy S. Powers, and Gary Powell on a preferential hiring list.

From about October 27 to November 3, 1986, at least nine individuals were hired to entry level positions as general workers in the Employer's bindery department. Parties further stipulate that other positions of general workers became available subsequent to November 1986 and that these positions were filled.

The general workers' positions were not substantially equivalent to Peggy Nichols' position of bookbinder II auxiliary or to Peggy S. Powers' and Gary Powell's positions as bookbinder I, BB-1 roundbacker/liner operator, by virtue of the general workers positions lower pay and skill levels.

Peggy Nichols, Peggy S. Powers, and Gary Powell were qualified to do the work required in the general workers positions.

Respondent did not reinstate or offer to reinstate Peggy S. Powers and Gary Powell to the general workers positions available on October 27, 1986, and thereafter, and that it has not reinstated or offered to reinstate the individuals since that date to general workers positions.

On or about November 1986, there was work available on the roundbacker machine for a period of 2 to 3 weeks on the second shift. Peggy S. Powers and Gary Powell were qualified to perform this work. No one was hired from the outside to do the work. This particular work was performed by a 2(11) supervisor of Respondent. This particular work was not substantially equivalent to the work performed by Peggy S. Powers and Gary Powell prior to the strike by virtue of its temporary nature.

Respondent did not reinstate or offer to reinstate Peggy S. Powers and Gary Powell to the temporary work set forth immediately above, on or about November 1986.

Winfred E. Posey and Bradford Bowman were employed in Respondent's maintenance department as a mechanic and electrician, respectively, at the time the strike commenced on or about January 20, 1986.

Winfred E. Posey and Bradford Bowman were permanently replaced by Mike King on January 27, 1986, and by Dan Bofo in early February 1986, respectively.

Mike King and Dan Bofo resigned their employment effective September 26 and 27, respectively.

Respondent did not reinstate or offer to reinstate Winfred E. Posey or Bradford Bowman to the positions held by King and Bofo, and it has not reinstated or offered to reinstate Bradford Bowman since September 27, 1986.

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[1] All dates are in 1986 unless otherwise specified.

[2] R. Exhs. 1 and 2 were admitted into evidence, however, the exhibits were not included in the formal file. The record as it stands was sufficient for my determination.

[3] General Counsel's motion to correct the record is granted as filed and received into the record as JD Exh. 1.

[4] *Rose Printing Co.*, 289 NLRB 252 (1988), of which I take judicial notice.

Mike King and Dan Bofo were subsequently rehired by Respondent on October 27, 1986, and October 6, 1986, respectively, for the same positions that they resigned from on September 26 and 27, 1986.

The bindery units' employees went on strike January 20, and the maintenance unit employees went on strike January 23.

IV. ALLEGED UNFAIR LABOR PRACTICES

Peggy Sue Nichols testified she was president of the Union in 1986. She sent the Western Uniongram containing the Union's unconditional offer to return to work for all strikers, including Bradford Bowman and Winfred Posey. Since May 5, 1986, Nichols has not worked at Rose Printing nor has she been offered any general workers positions.

In late October, Nichols was called by David Goodwin, personnel director of Rose. Goodwin told Nichols the Company was contemplating opening up a position for a sewing machine operator and wanted to know if she would be interested. Nichols said she was interested but presently she was nursing an injury and would not be available the next 3 to 4 weeks. Nichols' doctor did not release her for work until November 15. Nichols felt she could have done the work anyway but she could also reinjure herself and then she would be on company disability which would not be fair to the Company.

When Nichols sent the May 5 unconditional offer to the Company, she was aware that Posey and Bowman were attempting to get their contributions out of the Company's retirement plan. She also knew that the Company had said they could only get their retirement contributions by resigning from the Company.

Nichols' union represents both bargaining units, one in bindery and one in maintenance. Bindery went on strike first and later maintenance went on strike. Only one telegram comprising an unconditional offer to return was sent by Nichols.

Winfred Posey testified he was head mechanic at Rose prior to the strike. Since going on strike in January Posey has not received an offer for any position from Rose. Since May 5 Posey has not spoken to anyone from Rose concerning a position with the Company.

Posey's 1985 wages at Rose were $26,205.97 or 965 hours. After the strike, sometime in July, Posey was employed at Gandy Printers as a binderyman. Posey had bindery experience at Rose prior to his mechanic job. Posey is presently working full time at Gandy for $11.25 an hour. His 1987 earnings at Gandy were $24,122.71 and 1988 earnings were $24,657.08. Posey's shift and 40-hour week are the same at Gandy as it was at Rose. If offered employment at Rose now for a position of bindery mechanic presently paying $10.50 hour, Posey would be interested because the benefits at Rose are better, e.g., sick leave, annual leave, and holidays. There is more overtime at Rose. There are designated breaks at Rose. Rose had 11 holidays and Gandy has 6 or 7. Rose pays employees life and health insurance whereas Gandy does not. Rose has call backpay, Gandy does not. Gandy has no sick leave, no funeral leave, no retirement. At Rose he got 6 weeks' vacation, at Gandy its 2 weeks'. Rose also paid for employees' disability benefits but Gandy did not.

Prior to his Gandy employment Posey did a few odd jobs at BMW Printers, a day here, a day there, $10, $15, $25, fixing equipment.

Posey in rebuttal testified that Capps did call him in July 86 but it was only to get the telephone number of his brother, Lester T. Posey. Capps said he needed a folder operator and wanted Lester's phone number because he was a folder operator. Lester was out on strike with the bindery employees and was working at a plumbing company. Winfred Posey gave Capps the telephone number of his mother's home where Lester was living. Lester moved in with his mother shortly after the strike. Winfred Posey has lived at the same address and had the same telephone number for 15 years. The Company has his address and phone number on file.

Peggy S. Powers Hamm testified she was married sometime after the strike. Her prestrike position was roundbacker/liner operator BB-1. Hamm received a letter dated August 17, 1988, from Erwin Robcke at Rose offering her a position as operator on the flat cutter. Hamm responded by letter on August 20, 1988, advising the Company that she was unable to accept the position offered because she could not work the second shift. At the time she was working part time as binder, BB-2, at Artcraft Printers for $7.63 an hour. Her work week varied from 1 to 38. Hamm had a second part-time job with Suncoast Realty and Management doing cleaning work. Hamm was unemployed in October and November 1986 and at that time she could have worked night shift.

When employed at Rose Hamm made $9 an hour on the first shift 8 a.m. to 4:30 p.m. Since Hamm went on strike she has only received one offer of reinstatement from the Company which was in August 1988 as noted above.

Johnny L. Capps testified he is folding and stitch products supervisor in the bindery department at Rose. In July after the strike Capps was shorthanded for a folder operator and was calling anyone he knew who could run a folder. He knew Winfred Posey was qualified so he called Posey. Posey told Capps he did not want to go back to Rose, he was satisfied where he was. Capps knew Posey was working at Gandy.

The folder operator position paid $7 an hour and was on day shift.

Capps stated that he reached Posey late in the evening at what he thought to be his home. He was not positive. Posey had a brother that worked for Capps and he got Winfred's phone number from his brother.

Charles Rosenberg testified he is president of Rose Printing. Rosenberg had suggested to Plant Manager Tabor, during the strike when the folder operators were needed, that Capps call experienced employees, including Winfred Posey.

In September and October 1986, Rosenberg knew that Bowman was working at Coastal Products. Rosenberg assumed Bowman was doing electrical maintenance at Coastal and wouldn't be interested in returning to Rose as Posey was not interested. There was a vacancy in maintenance for an electrician in the fall of 1986 and that's when the Company considered recalling Bowman.

The temporary night-shift work of 2 to 3 weeks' duration was precipitated by a machine breakdown causing a backlog of work that had to go out on schedule. The work was done by Supervisor Jerry Mackin. No hourly employee was hired

to do the job. When the backlog was erased the night work ceased.

Currently the highest paid maintenance employee is $10 an hour with very little overtime now worked compared to what it was. There is a 70-percent reduction in overtime.

Rosenberg stated that 4 weeks' vacation was maximum for all employees including someone with Posey's 24 years at Rose. Since the strike employees contribute to the cost of health care coverage rather than Rose paying it all.

Rosenberg did not know what benefits Gandy gave employees.

Gary Powell testified that in August 1988 he received a letter asking him to return to work in a flatbed cutter position on the second shift. Powell accepted the offer and returned to work at $5.56 an hour September 13. Powell's prestrike position was backer/liner operator on second shift at $9 an hour. Powell was not experienced on the flatbed cutter and had to be trained. He trained as an apprentice on days for a month then went to the night shift. In January the Company put Powell on an automatic printing machine which he was not familiar with. On occasion he had trouble operating the machine. One operation, taking the signatures off the end of the material, he did not know how to do. The Company said he refused to do the operation and sent him home. He has not worked since that separation. The flatbed cutter offer is the only offer Powell received from Rose since the strike began.

Bradford Bowman testified he was an electrician at Rose before the strike. In February 1986 Bowman accepted employment at Coastal Lumber as a millwright in the maintenance department. Four months later an electrician's position became available and Bowman became the electrician at $7.75 hour on night shift. He received increases up to $8.10 an hour until June 24, 1987, when he terminated his employment. Bowman left Coastal to be an electrician in Florida State University's (FSU) central utilities plant on day shift. His wages at FSU to start was $555 biweekly. He is now making $574.62 biweekly, at 40 hours per week.

In 1985 at Rose Bowman made $24,681.85. In 1986 at Coastal he made $21,571.54 and $3021 at Rose. In 1987, his wages at Coastal were $15,707, at FSU he made $7,216. Bowman left Coastal because his second shift was under consideration of elimination and because FSU had better benefits than Coastal. FSU's benefits in some respects are better than Rose's but in other respects they are worse. If Bowman was offered reinstatement at Rose he would consider it.

Analysis and Conclusions

General Counsel's complaint raises three basic issues for determination: (1) Whether Respondent had an obligation to offer reinstatement to Nichols, Powers (Hamm), and Powell to general worker positions which were available after October 27, 1986; (2) Whether Respondent had to offer reinstatement to Powers (Hamm) and Powell to temporary roundbacker/liner machine work in November 1986; (3) Whether Respondent had an obligation to reinstate Posey and Bowman to their prestrike positions on the departure of their permanent replacements on September 26 and 27, 1986.

Respondent contends that it has no legal obligation to offer reinstatement to any striker for vacant positions which are less than substantially equivalent to the strikers prestrike positions.

Respondent further contends that it had no obligation to offer reinstatement to Posey and Bowman when vacancies occurred in their prestrike positions in September 1986 because both had resigned their employment during the strike and before an unconditional offer to return to work was made. An alternative contention is that both Posey and Bowman had substantially equivalent employment elsewhere obviating their entitlement to reinstatement.

With regard to the temporary work in November 1986 Respondent contends that the temporary nature of the work itself relieved it of any obligation to offer the work to any striking employee. The Respondent argues collaterally that temporary work is not substantially equivalent therefore it has no duty to consider offers to striking employees.

Attendant to the basic issues several lesser issues must be determined.

Contrary to Respondent's argument, the unconditional offer made on May 5 by the president of the local union representing both bargaining units does include maintenance employees Posey and Bowman. Suffice it to say that the offer stated, ''on behalf of all striking employees at Rose Printing Co.,'' and I so conclude and find.

Respondent's reliance on Supervisor Capps' phone call to Posey in July 1986 to disqualify Posey for any reinstatement thereafter is unavailing. It is clear to me that Capps' confused his testimony. It was Lester's phone number which had changed making it impossible for Capps to reach him. It was Lester who was a striking folder operator and not working in July 1986. It was Winfred's phone number and address on file with the Company which was unchanged during the strike. Winfred Posey testified that Capps called to get his brother's new phone number and address. I credit Winfred Posey's account of the phone conversation. Not only is his version the most plausible but the supporting substance of Winfred's testimony of his brothers changed personal circumstances and the unchanged nature of his own is uncontroverted. I conclude and find that Capps did not offer a folder operator job to Winfred Posey in July or at any other time. Therefor Respondent did have a duty to maintain Winfred Posey on the preferential hiring list after July 1986.

Respondent continues to maintain that Posey and Bowman resigned employment during the strike and therefore have no reinstatement rights. The resignation argument stems from the fact that Respondent required both to resign in writing to receive what monies they had in the company retirement plan. The Board in *Rose Printing Co*., supra, rejected that argument, thus the reinstatement rights of Posey and Bowman are still extant.

On this record I reject Respondent's contention that both Posey and Bowman had acquired substantially equivalent employment elsewhere relieving itself of any obligation to reinstate either employees. Respondent's evidence did not show their interim employment was substantial nor did it show the employment was equivalent. There is more to Respondent's burden in this regard than mere ascertainment that there is employment. Wages are a factor but are not controlling. Benefits are a factor but are not controlling. Working conditions are a factor but are not controlling. Some collective combination may very well sustain Respondent's burden but none was shown. Indeed, at the time Respondent's obli-

gation arose to reinstate Posey and Bowman which time is critical to deny an offer of reinstatement, Respondent's only evidence was assumption. Notwithstanding, what I consider to be fatal to Respondent's contention, the record evidence shows a wide variance in benefits between Rose and the two interim employers, Gandy's Printing and Coastal Lumber. Additionally wages were less at both interim employers and the working conditions at Rose were superior to either Gandy's or Coastal's. Respondent's argument that poststrike changes at Rose narrowed the gap between Rose and the interim employers, I do not accept. In my view the yardstick is the prestrike wages, hours, and working conditions enjoyed by the employees who are subject to reinstatement. I therefore conclude and find Posey and Bowman were striking employees with full reinstatement rights throughout the strike, and more particularly on September 26 and 27 when their permanent replacements left Respondent's employ. When the vacancies occurred Respondent was obligated to offer the two positions to strikers Posey and Bowman but refused to do so. I conclude and find that Respondent's refusal violates Section 8(a)(1) and (3) as alleged in the complaint. I shall order the violation remedied as required by the law.

Under the law Respondent can refuse to reinstate if it can show legitimate and substantial business justifications. Respondent has met this test in only one instance. That instance of the temporary night work of 3 weeks' duration. The additional work was precipitated by a machine breakdown which required double work on the working machine. Respondent could have worked replacement employees on overtime to sustain production without incurring any liability to striking employees or could utilize supervisory personnel as it did. The machine breakdown did not create a vacancy in any position but rather a need to get more production from existing machines. Additional employees were not needed and none were hired. I therefor conclude and find that Respondent had no obligation to offer the temporary work to any striker. Accordingly, I shall dismiss complaint paragraph 6(f) as unsupported by General Counsel's proof.

With regard to the general worker positions that became available during the strike and were filled by new hires off the street, the General Counsel has correctly stated the law. The Supreme Court in *Fleetwood Trailer*, specifically and unambiguously held that a striker is entitled to an offer of reinstatement when a job, for which a striker is qualified, becomes available.[5] The Board clearly obligates an employer to offer former strikers any available unit position for which they are qualified. Thus Respondent had a legal obligation to offer the vacancies to the striking employees for their acceptance or rejection. This Respondent refused to do. I therefore conclude and find that Respondent has violated the Act as alleged in the complaint and shall order the violation remedied. I further find that Respondent's action of offering flatbed cutter work to Peggy Powers (Hamm) and a *contemplated* opening of a sewing machine operator position to Peggy S. Nichols while steadfastly refusing any striker a general worker position is incongruous but instructive of Respondent's motivation and intent. Respondent desires to be selective in its offers and reap the benefits of its orchestrated refusals by certain employees. Respondent's use of Capps' testimony viz-a-viz Posey is further evidence of Respondent's unlawful intent. Accordingly, I conclude and find that Respondent's refusal to offer general worker vacancies to Peggy S. Nichols, Peggy S. Powers (Hamm), and Gary Powell is violative of Section 8(a)(1) and (3) of the Act. I shall therefore order the violation remedied.

[5] 389 U.S. 375 (1967).

ADDITIONAL CONCLUSIONS OF LAW

1. Respondent by refusing to offer general worker positions to striking employees Peggy S. Nichols, Peggy Powers (Hamm), and Gary Powell when they became available in October 1986 has violated Section 8(a)(1) and (3) of the Act.

2. Respondent by refusing to offer to reinstate striking employees Winfred Posey and Bradford Bowman to their prestrike positions when they became available in September 1986 has violated Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily refused to reinstate striking employees Peggy Nichols, Peggy Powers, Gary Powell, Winfred Posey, and Bradford Bowman, it must offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, with backpay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[6] from the date of refusal to reinstate, to the date of a proper offer of reinstatement.

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

ORDER

The Respondent, Rose Printing Company, Tallahassee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to offer to reinstate its former striking employees to positions becoming available and for which they are qualified.

(b) Refusing to offer to reinstate its former striking employees to their prestrike positions when those positions become available.

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

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

[6] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

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

(a) Offer Peggy S. Nichols, Peggy Powers (Hamm), Gary Powell, Winfred Posey, and Bradford Bowman full and immediate reinstatement to his or her former job or, if that job no longer exist, to a substantially equivalent position of employment, without prejudice to his or her seniority or other rights and privileges, or to a position for which the former striker is qualified, discharging if necessary, any employee hired as a replacement in any position formerly worked by such employees, or for which such employees qualified from September 26, 1986, to the present.

(b) Make whole Peggy S. Nichols, Peggy Powers (Hamm), Gary Powell, Winfred Posey, and Bradford Bowman for any loss of earnings, plus interest, as outlined in the remedy section of this decision.

(c) Preserve and, on request, make available to the National Labor Relations 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 effectuate the backpay provisions of this Order.

(d) Post at its offices in Tallahassee, Florida, copies of the attached notice marked ''Appendix.''[8] Copies of the notice on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

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