Harvey Manufacturing, Inc. ***and*** **International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 376FW, affiliated with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO.** Cases 16–CA–14245–2, 16–CA–14327, 16–CA–14419, and 16–CA–14464

November 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On February 12, 1992, Administrative Law Judge James S. Jenson issued the attached decision. The General Counsel filed exceptions and a supporting brief.[1]

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

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

I. OVERVIEW

The issues in this case arose from an economic strike by the Respondent's production employees, and the Respondent's refusal to reinstate the strikers immediately on the Union's unconditional offer for them to return to work. The judge concluded that replacements retained in their stead were permanent, and this conclusion led him to find that only a small fraction of the Respondent's denials of reinstatement were unlawful. As fully set forth below, we do not agree with major aspects of the judge's analysis. Unlike the judge, we find that the Respondent has not established that any of the disputed replacement employees were permanent. Thus they could not lawfully be retained following the offer to return, and the Respondent has violated the Act substantially as alleged in the complaint.

The Respondent manufactures and assembles television sets and related equipment. Its business demands are cyclical, with more production employees needed from July through December than in the first half of the year. The Respondent and its predecessor have had a long-term collective-bargaining relationship with the Union, which represents the production employees. The parties' collective-bargaining agreement during the events of this case was effective from August 1, 1987, until August 1, 1990. Pursuant to a wage-reopener provision, the parties began midterm negotiations in January 1989.[3] With the parties unable to reach agreement on a new wage schedule, 279 production employees initiated an economic strike on February 3. In light of the strike, the Respondent and the Union agreed that the collective-bargaining agreement would remain in effect except for the no-strike/no-lockout clause and the relevant wage provisions.

In mid-February, the Respondent warned the strikers that they would be permanently replaced if they did not return to work. Between late February and July, the Respondent, through its own direct efforts, hired about 200 replacement workers. Under the terms of the collective-bargaining agreement, these replacements began as probationary employees and ''became permanent'' after a 30-working-day probationary period. The status of these 200 employees as permanent replacements is not at issue in this case. In addition, of the approximately 300 employees who were on layoff when the strike began, 100 returned to work during the strike.

The Respondent, because of its cyclical production requirements, estimated that it would need an additional 300 employees during the fall months. On August 31, it entered into a written agreement with First Employment Agency, d/b/a First Temporaries of Athens (First Temp) for the referral of these additional employees. First Temp began interviewing in the first week of September and began referring employees to the Respondent soon afterward.[4] There is no dispute that the First Temp-referred employees were to fill vacancies which would have been available to the striking employees were it not for the strike, and that they were thus, effectively, striker replacements.

On September 13, the striking employees voted to end the strike, and the Union communicated to the Respondent an unconditional offer for them to return to work. There is no dispute that this offer was effective the morning of September 14. First Temp continued to refer replacement workers to the Respondent until September 29. Between August 31 and September 29, the period during which the Respondent and First Temp maintained their agreement, First Temp referred, and the Respondent employed, approximately 265 employees. After September 29, the Respondent, having taken the position that all the First Temp workers were hired

[1] The Respondent filed no exceptions to the judge's decision.

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

[3] All subsequent dates are in 1989 unless otherwise noted.

[4] No joint-employer issues are before us concerning the relationship between the Respondent and First Temp. First Temp was, however, at the least, an agent of the Respondent with respect to the hiring and employment of these employees. See, e.g., *Storall Mfg. Co.*, 275 NLRB 220 fn. 3 (1985), enfd. mem. 786 F.2d 1169 (8th Cir. 1986).

for permanent employment, began to reinstate former strikers as vacancies became available.

In mid-November, as its production needs decreased, the Respondent initiated economic layoffs. The layoffs, which involved both reinstated strikers and First Temp employees, were conducted pursuant to the relevant provisions of the collective-bargaining agreement. Subsequently, both reinstated strikers and First Temp employees were recalled from layoff. The First Temp employees were recalled ahead of former strikers who were still awaiting reinstatement following the strike.

The train of events summarized above led the Union to file several unfair labor practice charges, and the General Counsel to issue a complaint alleging violations of Section 8(a)(3) and (1) with respect to, inter alia, both the failure to reinstate all strikers immediately pursuant to the September 14 offer to return and the subsequent failure to recall unreinstated strikers instead of laid-off First Temp employees. In his decision the judge concluded that certain violations occurred, but within a scope significantly narrower than that alleged by the General Counsel. We find merit in the General Counsel's exceptions to the judge's refusal to find the violations as alleged.

II. DISCUSSION

As explained below, we are reversing the judge on three basic issues. First, applying the rule that an employer has the burden of establishing that replacements for economic strikers were hired as permanent, rather than temporary, employees in order to establish a sufficient business justification for refusing to reinstate strikers who have unconditionally offered to return, we find that the Respondent has not carried its burden with regard to the First Temp employees; and it has therefore violated the Act as alleged in the complaint in denying strikers reinstatement to the First Temp employees' positions. Second, we find that the judge erred in finding, on the basis of a l0-day termination notice provision in the contract between the Respondent and First Temp, that the Respondent's reinstatement obligation did not become effective until l0 days after the strikers' unconditional offer to return. Finally, because we have found that the First Temp employees were not permanent replacements, we find that the Respondent violated Section 8(a)(3) and (l) of the Act when, after a short-term economic layoff of these replacements, it recalled them, rather than former strikers awaiting reinstatement, to their positions.

Preliminarily, we note the following points of reference for our review of the issues. In *Zapex Corp.*, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980), the Board summarized the essential, settled principles governing the reinstatement rights of economic strikers:

> In *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer ''refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act . . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer.'' The Court in *Fleetwood* relied on its decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that ''once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.'' In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:
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> > 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.

235 NLRB at 1238. In this proceeding, the General Counsel established a prima facie case of unlawful discrimination by proving that the economic strikers, through their Union, made an unconditional offer to return to work on September 14, and that the Respondent failed to reinstate them, thereby presumptively discouraging the exercise of their rights under the Act. It was the Respondent's burden to show that its failure to offer reinstatement was due to ''legitimate and substantial business justifications.'' The Respondent's primary ''business justification'' defense in support of its denial of immediate reinstatement to the strikers was that they had been permanently replaced by the First Temp employees.

A. *The Status of the First Temp Employees*

The judge agreed with the Respondent that the First Temp employees, for the most part, were legitimate permanent replacements for the striking employees. In making this finding, the judge relied on evidence that the Respondent, through First Temp, made statements of a commitment to that effect to the applicants at the time they were hired.[5] The judge was convinced of the

[5] Although, as explained below, we believe the judge's finding that the offers were for permanent employment was erroneous on this

adequacy of this commitment primarily by the credited testimony of Christine Wilbanks, a principal of First Temp, and Melba Grissin, an applicant for a replacement job with the Respondent.

Wilbanks testified that during the job interviews she told each of the applicants that the openings at the Respondent's facility were permanent positions, and that those hired would be converted to permanent employees of the Respondent on their satisfactory completion of a 30-working-day probationary period. Grissin, a witness for the General Counsel, testified that, in response to her question at the interview whether the job offer with the Respondent was permanent or temporary, she was told that it was a permanent position subject to a 30-day trial period. In addition, although he did not specifically rely on it in support of his finding, the judge noted the testimony of Personnel Coordinator Benny Garza that he told all of the First Temp employees on their arrival at the Respondent's facility that they were permanent replacements for the strikers.

A substantial amount of documentary evidence was also considered by the judge in evaluating the status of the First Temp employees. The most significant documents for purposes of our review break into three categories. First are the written agreements between First Temp and those it hired, signed by every employee referred by First Temp to the Respondent. Each such document stated, in relevant part:

TEMPORARY AGREEMENT

> I will be working as a temporary through the efforts of 1ST TEMPORARIES. Salary will be paid me by 1ST TEMPORARIES.
>
> I understand there are no company benefits involved.
>
> It is understood that failure to report to work and absence without proper notification will be considered a voluntary leave of employment.
>
> Date _____
> Applicant's Signature _____

Next are the referral slips given by First Temp to each referred employee and presented to the Respondent on first reporting to work. Below the First Temp logo and its address and telephone number is the heading ''Receipt For Introduction—Referral For Temporary Position,'' followed by the employee's name and specific referral information. The final category of documents consists of a statement concerning terms and conditions of employment with the Respondent given to each of the referred employees by First Temp. The statement, in relevant part, is as follows:

TO: ALL NEW EMPLOYEES WORKING AS TEMPORARIES FOR HARVEY INDUSTRIES, INC.

> You will be working for us as a temporary employee for 30 working days (count Monday thru Friday only). If you work on Saturdays, you do get paid but it does not go toward your count. This takes approximately 6 weeks to complete. During this time you will receive your paycheck from us, but we deliver them to Harvey Industries, Inc. for you to have when everyone else is paid. You will receive your first paycheck on [date] and you will be paid every Friday thereafter. If you have any questions about mistakes on the check, call us—if you have any questions about your hours, talk to your foreman or to us.
>
> At the end of the 30 working day period, if you like the job and if your work performance is satisfactory, Harvey Industries, Inc. will transfer you to their payroll. You are up for review and possible raise every 4 months. You will receive insurance benefits on the 1st. (first) day of the month after your 30 working days.
>
> You will be paid overtime after 40 hours are reached. Lateness and absences are rarely excused and you will be terminated if you are late or absent. To report absences or lateness, call Harvey Industries, Inc., at 673–2121 well before your shift begins.

At some point in the middle of September—the exact date was not established—the references to ''temporaries'' and ''temporary'' on this document were changed to read ''probationary.''

Concerning the last of the documents above, the judge found that the reference to terms and conditions of employment with the Respondent after the 30-working-day period tended to support the conclusion that a permanent employment commitment had been made when the First Temp employees were hired and referred to the Respondent. Otherwise, it is apparent that the judge did not view the documents above as having any significant impact on the sufficiency of the Respondent's asserted commitment to the First Temp employees for permanent employment.

We disagree with the judge's evaluation of the evidence concerning the status of the First Temp employees, and we reverse his conclusion that these employees were permanent replacements for the strikers. The permanent replacement of economic strikers, a substantial and legitimate business justification for refusing to reinstate former strikers, is an affirmative defense and the employer has the burden of proof. See, e.g., *Asso-*

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record, we do not fault his legal conclusion that if the Respondent, through First Temp, had offered the employees permanent employment status on the satisfactory completion of a 30-working-day probationary period, the employees who knowingly accepted such offers would be permanent replacements for the economic strikers. See, e.g., *Solar Turbines*, 302 NLRB 14 (l991). Member Oviatt, who was not on *Solar Turbines*, agrees with this analysis.

ciated Grocers, 253 NLRB 31, 31–32 (1980), affd. mem. sub nom. *Transport Drivers Local 104 v. NLRB*, 672 F.2d 897 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982). Significant in meeting this burden is an adequate showing that there was a mutual understanding between the employer and the replacements that the nature of their employment is permanent. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987).

In this case, we recognize that oral representations were made at various points to the First Temp employees that they were being offered permanent replacement positions. This is clear from the credited testimony of Wilbanks and Grissin. However, during the course of the hiring and referral process the employees were given a series of documents which consistently contradicted those representations. Thus, everyone of the 265 employees referred by First Temp to the Respondent not only received but signed a document entitled ''*Temporary* Agreement,'' the first sentence of which began ''I will be working as a *temporary* . . . .'' Further, each of them received and presented to the Respondent a referral slip identifying their employment as a ''*Temporary* Position.'' In addition, every First Temp employee referred to the Respondent until sometime in the middle of September received an explanation of terms and conditions of employment which, although referring in part to longer term employment conditions with the Respondent after the 30-working-day period, still was addressed to ''New Employees Working As *Temporaries* for Harvey Industries, Inc.,'' and began with the statement ''You will be working for us as a *temporary* employee.''[6]

Taking account of the evidence submitted concerning the First Temp employees' understanding of the nature of their employment with the Respondent, we find that, at best, they received an array of mixed signals: oral statements asserting to them their status as permanent employees, contradicted by documents given to them consistently stating that they were temporary hires. The resulting impression, judged in its entirety, is necessarily ambiguous. Accordingly, we cannot find on this record that the First Temp employees clearly understood when they were hired that the Respondent's intention was that they be permanent employees. In these circumstances we further find that the Respondent did not sufficiently establish that there was a mutual understanding between itself and the First Temp employees that they were being hired on a permanent basis.[7] We conclude accordingly that the First Temp employees were no more than temporary strike replacements. See *Hansen Bros.*, supra, *Associated Grocers*, supra. See also *J. M. Sahlein Music Co.*, 299 NLRB 842 (1990); *Augusta Bakery Corp.*, 298 NLRB 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992).

Apart from its asserted permanent-replacement justification, the Respondent defended its failure to reinstate the strikers immediately—specifically, its delay in beginning the reinstatement of strikers until after September 28—by asserting that the Union subsequently placed ''conditions'' on its September 14 unconditional offer for the strikers' return which slowed down the initiation of the reinstatement process. We agree with the judge's rejection of this position, which is fully detailed in his decision. The Respondent did not raise any other ''legitimate and substantial business justifications'' to counter the General Counsel's showing that it unlawfully failed to reinstate the strikers immediately following the unconditional offer. Accordingly, consistent with the principles of *Fleetwood*, *Great Dane*, and *Laidlaw*, supra, we conclude that the Respondent's conduct in this regard violated Section 8(a)(3) and (1).

B. *The Agreement Between the Respondent and First Temp*

Although the Respondent did not raise its contract with First Temp as a business justification for delaying or denying reinstatement to strikers, the judge found, sua sponte, that certain provisions of the contract made it reasonable for the Respondent to delay to some extent in reinstating the strikers. Thus, in the context of his finding that the First Temp employees were permanent replacements, he permitted the Respondent a 10-

[6] We place no weight on the fact that this document was amended to state ''probationary'' instead of ''temporary'' in the middle of September, because the Respondent did not prove whether this occurred before or after the end of the strike on September 14. If it occurred after September 14, the amendment is irrelevant because, as explained below, no First Temp employee hired after the end of the strike acquired any legitimate status, either as a permanent or a temporary replacement for a former striker. Given the absence of proof that it occurred before September 14, and in consideration of the Respondent's burden to establish the nature of the replacements' employment as permanent, we find that each First Temp employee hired to work for the Respondent before September 14 received the version of the working-conditions statement which referred to them as temporary employees.

[7] The General Counsel contends that an adverse inference should be drawn against the Respondent because of its failure to call First Temp employees to testify to their understanding of their employment status. We think such a finding unwarranted in the circumstances, although we note that in light of the contradictory character of the evidence, some showing of this sort would have been useful in evaluating the extent of the First Temp employees' understanding of their employment status at the time they were hired. It is also worth noting that there is a distinct limit on the value of Melba Grissin's testimony concerning the ''mutual understanding'' issue. She was an applicant at First Temp but chose *not* to be hired; she never became a replacement employee; and she did not receive the documents given to the First Temp referrals. Finally, even if the judge had clearly credited and relied on Personnel Coordinator Garza's testimony concerning his statements to the First Temp employees that they were permanent replacements, the Respondent's showing would still be insufficient because the evidence overall would still be ambiguous as to the employees' status.

day period after the unconditional offer to continue to hire permanent replacements for the former strikers, consistent with the 10-day termination-notice provision set forth in paragraph 4 of the agreement.[8] (A copy of the original contract is attached to the judge's decision as ''Appendix A.'') The judge's reasoning appears to have been guided implicitly by *Pacific Mutual Door Co.*, 278 NLRB 854 (1986), a case addressed not by the Respondent but by the General Counsel, both in his posthearing brief to the judge and in his exceptions brief before the Board. As explained below, we find *Pacific Mutual Door* inapplicable in this case, because the Respondent failed to establish or even assert this as an affirmative defense.

In relevant part, *Pacific Mutual Door* involved an economic strike by the employer's employees and a contractual arrangement between the employer and an employee-leasing company to supply temporary replacements for the strikers. The contract had a 30- day cancellation-notice provision. The Board concluded that the employer's obligation to reinstate the economic strikers ''arose'' on the date of their unconditional offer to return to work, but it did not ''mature'' until approximately 30 days after the unconditional offer because of the cancellation-notice provision. In effect, the employer's reinstatement obligation was postponed for the duration of the notice period. The Board found that the notice provision constituted a ''legitimate and substantial business justification'' for the delay where it was established that the leasing company had declared the necessity of the provision and that the provision represented a condition on the employer's ability to obtain the temporary replacements in order to continue operations during the strike. Id. at 855–856.

Pacific Mutual Door is distinguishable from the instant case in view of the Respondent's failure to raise the provisions of its contract with First Temp as a business justification defense for its delay in reinstating the strikers and for its continuing to fill vacancies with replacement employees after the unconditional offer.[9] Reviewing the available relevant evidence, it would appear that, on the face of the contract, two provisions might be applicable: the agreement to employ each worker for 30 working days, and the agreement to provide 10 days' written notice of termination of the contract. There is scant evidence in the record, however, shedding light on the contracting parties' intentions with respect to these provisions, and absolutely no basis to find that these provisions were necessary in order to induce First Temp to provide replacements.[10] Moreover, there is no showing that there was a *guarantee* of 30 working days' employment for each First Temp employee or that the contract *required* that employees continue to be referred during the 10-day termination-notice provision.[11] Accordingly, under no view of the evidence in this case can it be perceived that the Respondent satisfied its burden with respect to a ''legitimate and substantial business justification'' of the kind set forth in *Pacific Mutual Door*.[12]

Additionally, in the circumstances presented here, the terms of the Respondent's contract with First Temp do not provide any legitimate basis for altering the normal remedy for the Respondent's unlawful refusal to reinstate the economic strikers. The First Temp employees were temporary replacements and, given that status, the economic strikers' reinstatement rights are identical to those of unfair labor practice strikers under *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). Specifically, they have a right to immediate reinstatement ''because even economic strikers are enti-

[8] The judge found that the Respondent improperly waited for 5 days after the September 14 unconditional offer before filing its termination notice with First Temp. Accordingly, in the judge's view, the Respondent, through First Temp, should have ceased hiring replacements on September 24 rather than on September 29.

[9] See, e.g., *Great Dane*, supra 388 U.S. at 34.

[10] The 10-day termination-notice provision is particularly ambiguous. It could be read as extending the process of hiring replacements for 10 days. That appears to be how the judge interpreted it and is consistent with the parties' conduct. The point here is that even giving the Respondent the benefit of this facial ambiguity, the record does not provide adequate support for a defense under *Pacific Mutual Door*.

[11] In fact, rather than a guaranteed employment period, the documentary evidence indicates that the Respondent terminated many of the First Temp employees long before the end of the 30-working-day period, apparently consistent with its view of them as ''at will'' employees under art. IV, sec. 5 of the collective-bargaining agreement, i.e., dischargeable ''with or without cause.'' The absence of a minimum guaranteed period of employment is further reflected in First Temp's statement given to referred employees that they could be terminated if they were late or absent on days they were to work for the Respondent. Further, the significance of the 10 day termination-notice provision is questionable in light of the Respondent's 5-day delay in acting on it and the implication in its termination-notice letter of September 19 that no more First Temp employees should be hired as of that date.

[12] We do not view the General Counsel's discussion of *Pacific Mutual Door* in his briefs to the judge and to the Board as a ''concession'' of its applicability in this case. First of all, there is no evidence of any conduct on the part of the General Counsel on which the Respondent might have relied, or which might have misled the Respondent, in choosing not to raise the contract as a defense. The General Counsel's briefing of *Pacific Mutual Door* was, in our view, a matter of professional responsibility concerning possibly applicable extant case law. More significantly, his discussion of the case is conditioned on the judge's and the Board's determination of its applicability, a condition which the General Counsel never conceded had been met. In short, the General Counsel's primary position—most clear in its posthearing brief and with which its exceptions brief is consistent—is that the strikers were entitled to reinstatement and backpay as of the date of the unconditional offer. This primary position, entailing a full backpay remedy, is tenable only on the basis that *Pacific Mutual Door* is not a controlling authority. In any event, it would be inappropriate for the Board to consider itself bound by the representations of the General Counsel concerning a matter of law, as compared with a concession or admission by the General Counsel regarding a purely factual matter.

tled to reclaim their jobs—not just be placed on a rehire list—if the jobs are vacant or are occupied only by temporary replacements when they make their unconditional offer to return.'' *Teledyne Still-Man*, 298 NLRB 982, 985 (1990), enfd. mem. 938 F.2d 627 (6th Cir. 1991). Routinely, the economic strikers' entitlement to immediate reinstatement comprehends the discharge of temporary replacements occupying the strikers' prestrike or substantially similar jobs. See *Covington Furniture Mfg. Corp.*, 212 NLRB 214, 220 (1974), enfd. 514 F.2d 995 (6th Cir. 1975). See also *Hansen Bros.*, supra at 741 (''where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate'').

Further, clear Supreme Court precedent supports the Board's authority to nullify private contractual rights to the extent that they obstruct the purposes of the Act. In *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Court reaffirmed its view of the Board's remedial power to order reinstatement of employees whose discharges constituted unfair labor practices under the Act, finding no conflict with Fifth Amendment protections for private contractual rights:

> We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48. The Board's order there sustained required the reinstatement of discharged employees. The requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employee in the case of a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision.

304 U.S. at 347–348. In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court sustained the Board's Order setting aside individual employment contracts to the extent that their terms interfered with the employer's bargaining obligations and employees' rights under the Act. The Court broadly stated:

> ''The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.'' *National Licorice Co. v. NLRB*, 309 U.S. 350, 364. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

321 U.S. at 337. More recently, in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Court declined to preempt a state court suit claiming damages for misrepresentation and breach of contract filed by discharged strike-replacement workers against their former employer. In passing on the issues, the Court reaffirmed its view expressed in *J. I. Case* that the Board has the authority to set aside private contracts to the extent they conflict with the purposes of the Act, 463 U.S. at 506, and it reaffirmed the *Mastro Plastics* principle of immediate reinstatement for former unfair labor practice strikers, 463 U.S. at 508. By implication at the very least, the Court endorsed the Board's authority to disregard private employment contracts between strike replacement employees and an employer to the extent necessary to carry out a remedy of immediate reinstatement for unfair labor practice strikers, id. at 507–512.

In light of the principles above and mindful of our remedial obligations under Section 10(c), we find that any delay in the reinstatement of the economic strikers in this case assertedly required by the terms of the private contract between the Respondent and First Temp, and any consequent limitation on the backpay owed to the discriminatees, would be an unsupportable restraint on the Section 7 and Section 13 rights of the strikers and an obstruction of the appropriate remedy for the Respondent's 8(a)(3) violation. Private contractual arrangements between an employer and temporary strike replacement employees, or, more specifically here, a contract with an employment agency for the supply of temporary strike replacements, are valid only for the purpose of filling vacancies left by striking employees while they are on strike. Once an appropriate offer to return is made, such contractual arrangements cease to have any legitimate purpose within the parameters of the Act, because there is no longer a need to hire replacements in view of the strikers' availability for work, and, more significantly, because the strikers have a fundamental right to immediate reinstatement. It is difficult to conceive of a device more disruptive of industrial stability and collective-bargaining than one allowing an employer to replace economic strikers *after* they have offered to return to work, either permanently or for some other determinate period.[13] Accordingly, the Respondent's contract with First Temp is set aside to the extent its provisions may be inconsistent with our remedy. We will order reinstatement and backpay for all of the former economic strikers referred to in the complaint,[14] with backpay dating from September 14, the effective date of the unconditional

[13] After the strikers offered to return to work, the Respondent, through First Temp, made commitments to hire approximately 100 purported permanent replacement employees, and thereafter allowed strikers to return only as vacancies arose.

[14] Specifically, the second consolidated complaint, dated May 10, 1990, is relevant here.

offer to return. See, e.*g.*, *Murray Products*, 228 NLRB 268 (1977), enfd. 584 F.2d 934 (9th Cir. 1978).

C. *The Layoff and Subsequent Recall of First Temp Employees*

The judge found that the Respondent initiated economic layoffs in mid-November which included employees hired through First Temp, and that it subsequently recalled these employees when work became available instead of offering the positions to former strikers awaiting reinstatement pursuant to the September 14 unconditional offer. In addition to the unfair labor practices discussed above, the complaint alleged that the Respondent violated Section 8(a)(3) and (1) by this conduct. The judge, based on his prior finding that most of the First Temp employees were permanent replacements vis-a-vis the strikers' September 14 offer, concluded that a violation had in fact occurred but was limited to those vacancies filled by First Temp employees who were outside the scope of his finding of permanent status and who were recalled from layoff instead of former strikers awaiting reinstatement.

In light of our finding above that the Respondent failed to establish that any of the First Temp employees were legitimate permanent strike replacements, we disavow the judge's analysis of the recall issue here. See *Aqua-Chem, Inc.*, 288 NLRB 1108 fn. 6 (1988), enfd. 910 F.2d 1487 (7th Cir. 1990), cert. denied 111 S.Ct. 287 (1991). Because the First Temp employees were temporary strike replacements whose employment ceased to have a legitimate basis at the time of the unconditional offer, as explained above, it follows that by subsequently recalling from layoff any First Temp employees instead of offering the vacancies to the former strikers awaiting reinstatement, the Respondent violated Section 8(a)(3) and (1) under *Laidlaw* principles. A separate remedial order for this 8(a)(3) violation is unnecessary in light of our conclusion that all the strikers were unlawfully denied reinstatement as of September 14. Our Order, including reinstatement and backpay, for the first 8(a)(3) and (1) violation encompasses any remedy we might order for the subsequent 8(a)(3) and (1) violation.

AMENDED REMEDY

We have found, inter alia, that the Respondent unlawfully refused to reinstate economic strikers immediately following the Union's September 14, 1989 unconditional offer on their behalf to return to work. Therefore, in addition to the judge's recommended remedy with respect to the independent 8(a)(1) violation committed by the Respondent, we shall order the Respondent to offer those employees immediate and full reinstatement to the positions that they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. In order to make room for them, the Respondent shall dismiss, if necessary, any persons hired to replace them through First Temporaries of Athens prior to the end of the strike, and any persons hired in their place after the strike terminated. We shall further order the Respondent to make whole these employees for any loss of earnings and other benefits they may have incurred by reason of the Respondent's discrimination against them, including backpay from the time of their application to return to work. Backpay, with interest, shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Harvey Manufacturing, Inc., Athens, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 376FW, affiliated with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization, by unlawfully failing and refusing to reinstate or otherwise discriminating against its employees because they have engaged in protected strike or other concerted activity for their mutual aid or protection.

(b) Telling employees that employees hired through First Temporaries of Athens would receive more favorable treatment under the bid process than strikers.

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

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

(a) Offer the employees referred to in the second consolidated complaint, dated May 10, 1990, who engaged in a strike beginning on February 3 and ending on September 14, 1989, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired to replace them through First Temporaries of Athens prior to the end of the strike, and any persons hired in their place after the strike ended, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this Decision and Order.

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

(c) Post at its Athens, Texas facility copies of the attached notice marked ''Appendix B.''[15] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

MEMBER RAUDABAUGH, concurring.

I concur in the results reached by my colleagues. However, with respect to the asserted conflict between statutory rights and private contract obligations, I have a separate view. As set forth below, I believe that my colleagues have failed to draw certain distinctions. In addition, I do not adopt all that they have said. Accordingly, I write this separate opinion.

There are two separate matters involved here. First, the Respondent *continued to hire* temporary replacements from First Temporaries (First Temp) after the September 14 request for striker reinstatement. As to this matter, the contract between Respondent and First Temp presents no conflict with statutory obligations. That is, the contract, as of September 14, did not require Respondent *to hire* anyone from First Temp.[1] Thus, the Respondent's hiring of more replacements, after the strikers had asked to come back on September 14, was clearly unlawful and was not required by the contract.

A second matter *does* raise a potential conflict between the contract and statutory obligations. After the September 14 request for reinstatement, the Respondent *continued to employ replacements hired prior to September 14.* The contract provides that an employee's ''period of employment will be for 30 days from hire date.'' Because these employees had not worked 30 days as of September 14, the contract, on its face, appears to forbid their discharge so as to make room for returning strikers. In this respect, the contract may well be in conflict with the statutory rights of strikers who wish to return. However, Respondent failed to raise this matter as an affirmative defense. It is clear that an employer who fails to reinstate economic strikers on request must plead and prove a legitimate and substantial justification for failing to do so. Because Respondent did not plead the contract as an affirmative defense, I conclude that its failure to reinstate strikers, from and after September 14, was unlawful. I do not reach or pass on any issues that would be raised if Respondent had raised this defense.

[15] 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.''

[1] The exclusive hire provisions would not begin until September 30, 1989. See item 3 of the contract. I do not rely on the 10-day termination provision (item 4) in this respect.

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.

WE WILL NOT discourage membership in International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 376FW, affiliated with International Union of Electronics, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization, by unlawful failing to reinstate or otherwise discriminating against our employees because they have engaged in a protected strike or other concerted activity for their mutual aid or protection.

WE WILL NOT tell employees that employees hired through First Temporaries of Athens will receive more favorable treatment under the bid process than strikers.

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

WE WILL offer the employees referred to in the second consolidated complaint, dated May 10, 1990, who engaged in an economic strike beginning February 3 and ending September 14, 1989, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired to replace them through First Temporaries of Athens prior to the end of the strike and any persons hired in their place after the strike ended, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the dis-

crimination against them, less any net interim earnings, plus interest.

HARVEY MANUFACTURING, INC.

J. O. Dodson and Elizabeth Kilpatrick, for the General Counsel.
Robert G. Mebus and William A. Finnegan, of Dallas, Texas, for the Respondent.
Marvin Menaker, of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. These cases were heard in Tyler, Texas, on December 4 and 5, 1990, pursuant to a second consolidated complaint which issued on May 10, 1990. The consolidated complaint alleges, in substance, that the Respondent violated Section 8(a)(1) and (3) by refusing to reinstate certain economic strikers following an unconditional offer to return to work. The Respondent denies engaging in any unlawful conduct and claims it hired permanent replacements for the striking employees and is therefore not obligated to rehire replaced strikers. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel, the Union, and the Respondent, all of which have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Harvey Manufacturing, Inc., a Texas corporation, is engaged in manufacturing products for the television industry in Athens, Texas. It is admitted and found that in a 12-month representative period it purchased and received at its Athens plant goods and materials valued in excess of $50,000 directly from suppliers located outside Texas, and also shipped products valued in excess of $50,000 from its Athens plant to customers located outside the State of Texas, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 376FW, affiliated with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Whether, and when, unconditional offers to return to work were effective.

2. Whether the hiring commitment made to employees hired through First Temporaries was sufficient to effect the permanent replacement of strikers.

3. Whether Respondent unlawfully recalled laid-off striker replacements rather than recall former strikers.

4. Whether Personnel Director Garza threatened employees that laid-off replacement employees would receive more favorable treatment than strikers with regard to filling job openings, transfers and/or promotions.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent is engaged in manufacturing and assembling television sets and home entertainment theaters for a variety of customers. It and its predecessor have had a collective-bargaining relationship with the Union for over 30 years, the collective-bargaining agreement in effect when this matter began being effective from August 1, 1987, to August 1, 1990. Article XXI of the agreement, entitled Wage Re-Opening Provision,'' provided that 18 months after the start of the agreement, either the Company or the Union could request midterm renegotiating of the wage schedule, and that upon failure to reach an agreement within 30 calendar days from the start of such negotiations, the Union would have the right to strike and article XIII, no strike, no lock-out provision would be suspended. Pursuant to the Union's October 1988 notification that it wished to negotiate a new wage schedule, the parties began negotiating in January 1989.[1] Failing to reach agreement, the employees voted to strike. On February 3, the employees struck and the parties met with a Federal mediator and, unable to agree on a new wage schedule, signed an agreement that the current collective-bargaining agreement would ''remain in full force and effect during the entire term of the strike now in progress, with the exception of the no strike, no lockout clause and negotiable wages.'' Approximately 279 employees became strikers.

By letter dated February 13, Respondent informed each of the strikers and employees on layoff that it intended to restore the Company ''to full production as soon as possible'' and that if they did not return to work by 4 p.m., Friday, February 17, Respondent would ''begin actions to fill your jobs with permanent replacements.'' By letter dated February 14, Union President Lonnie Eldridge advised the Respondent that based on the agreement signed on February 3, the layoff and recall provisions of their collective-bargaining agreement were still in effect, that the seniority clause would have to be honored whenever the strikers returned to work, and that the Company had ''no right to hire replacements, because seniority shall prevail when the strike is terminated.'' Of approximately 300 employees on layoff, 100 returned to work and Respondent took steps to hire an additional 200 ''permanent employees'' through local newspaper ads.[2] The status of those employees hired as permanent employees through newspaper ads between February and July are not at issue in this proceeding. They started working as probationary employees and, as provided in the collective-bargaining agreement, became permanent upon satisfactory completion of a 30-working-day probationary period.

[1] All dates hereafter are in 1989 unless stated otherwise.

[2] Respondent's staffing requirements were cyclical with fewer employees needed from January through June than from July through the rest of the year.

In anticipation of the need for an additional 300 production employees during the fall months, Georgia Melton, Respondent's vice president, contacted Frieda Doolen and Christine Wilbanks, co-owners of First Employment Agency d/b/a First Temporaries of Athens (First Temporaries). On Friday, August 31, Respondent and First Temporaries entered into a letter agreement by which First Temporaries was to supply Respondent with temporary employees.[3] The agreement provides for a 10-day cancellation by either party, that First Temporaries was to be responsible for paying the employees, securing worker's compensation insurance, paying unemployment tax, and withhold FICA and income taxes for each worker for a 30-day period. Respondent was to be billed for the workers' wages plus a 10-percent markup in accordance with a schedule attached to the agreement. Melton testified that over the weekend following the signing of the agreement with First Temporaries, she realized she had made a mistake in signing a contract containing the word ''temporaries,'' so when she returned to work Tuesday, September 5, she called Doolen and asked that the agreement be changed by substituting the word ''probationary'' for ''temporaries'' wherever it appeared. Doolen made the ''correction'' and an agreement identical to the August 31 agreement with that ''correction'' was signed by both parties on September 6, backdated to August 31.

Wilbanks commenced interviewing applicants for employment with Respondent on or about September 5. She testified she told each applicant ''that we had openings at Harvey Industries'' and that the job was permanent after 30 working days. Melba Grisson, a witness for the General Counsel, testified that when she made inquiry at First Temporaries in response to a newspaper ad, she was told that Respondent was the employer, and in response to her question whether the job was temporary or permanent, she was told ''there was like a 30-day trial period and after the 30 days it could be permanent if I wasn't late or . . . if I worked well.'' In the beginning, Wilbanks gave each individual hired a sheet entitled ''To All New Employees Working As Temporaries for Harvey Industries, Inc.,'' which set forth the first payday and the fact that the individual would be transferred to Respondent's payroll after 30 days of satisfactory service, at which time he or she would be entitled to receive insurance benefits. It also set out other rules and conditions of employment. Apparently around the middle of September, the handout was changed by substituting the word ''probationary'' in place of ''temporary.'' The record shows that during September, First Temporaries referred approximately 265 employees to Respondent, each of whom signed an application stating as follows:

TEMPORARY AGREEMENT

> I will be working as a temporary through the efforts of 1ST TEMPORARIES. Salary will be paid to me by 1ST TEMPORARIES.
>
> I understand there are no company benefits involved.
>
> It is understood that failure to report to work and absence without proper notification will be considered a voluntary leave of employment.
>
> Date _____
>
> Applicant's Signature _____

[3] A copy of the agreement is attached hereto as Appendix A.

Each employee also received from First Temporaries a ''Receipt for Introduction—Referral for Temporary Position'' setting forth the job position applied for, which the employee in turn delivered to Respondent. Timecards utilized by referred employees were marked ''1st Temp'' and they were paid on First Temporaries' checks. While no employees were called to either corroborate or refute his testimony, Respondent's Personnel Coordinator Benny Garza testified he told all employees referred by First Temporaries that they were permanent replacement for the strikers.

The union membership voted to end the strike and ''offer themselves back to work unconditionally'' on September 13. Accordingly, union officials left the following letter with Respondent's plant guard that evening:

> On behalf of International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO, Local 376FW, its members, and those employees it represents, this letter is to notify you that the work stoppage against Harvey Industries has ended as of September 13, 1989.
>
> This letter is to further inform you that the members of IUE Local 376FW, and those employees it represents, who have engaged in this work stoppage, hereby unconditionally offer to return to work for Harvey Industries.

Respondent's officials acknowledge its receipt the following morning. That morning, September 14, the former strikers traveled from the union hall to the plant en masse where they were denied entrance. They then returned to the union hall where they were instructed to go to the unemployment office to sign up for benefits. Later in the morning Georgia Melton, Respondent's vice president of industrial relations, called the union hall and arrangements were made to send the former strikers to the plant in groups of three to six to submit individual offers to return to work as required by Texas law in order to be eligible for unemployment benefits. While the Union had each striker sign an unconditional offer to return dated September 13, the Respondent had them sign another one on its own letterhead with the employees' current phone and address and bearing the date of reporting. As the collective-bargaining agreement provided in article V, section 2, that ''In all cases of recalling employees to work, seniority shall be the controlling factor . . . [and] shall be by occupational classification of work,'' the Respondent started compiling a preferential reinstatement list from the individual applications to return. The list was not finally completed until September 28 when the Union informed the Respondent that all of the strikers wanting to return had made individual applications. Until that time, Respondent continued using First Temporaries as its source for employees instead of using seniority data already in its possession for recall purposes.

By letter dated September 19, Respondent gave First Temporaries the required 10-day notice of cancellation of the August 31 agreement. As noted immediately above, First Temporaries continued furnishing employees until the preferential reinstatement list was completed. Approximately 180 employees were sent by First Temporaries from September 13 to September 29.

In mid-November, with its busy season slacking off, Respondent began laying off employees for lack of work in accordance with article V of the collective-bargaining agreement. Both reinstated strikers and employees hired through First Temporaries were affected. All employees subject to layoff, including those employees that had been supplied by First Temporaries that had completed its 30-day probationary period and were therefore considered by Respondent to be permanent replacements, were given the opportunity to ''bump'' into the same or lower grade level, depending upon seniority, or if bumping wasn't possible, were laid off. All laid-off employees were told they would be recalled when needed. Both reinstated strikers and permanent replacements hired through First Temporaries were recalled.

B. *Effectiveness of Unconditional Offers to Return to Work*

The General Counsel contends that since the Union made an unconditional offer to return on behalf of all strikers on September 13, the Respondent was obligated to reinstate the strikers without requiring them to give it individual unconditional notices. It is argued that Respondent already had current addresses for all strikers in its files and that it chose to misinterpret and misuse the strikers' attempt to safeguard their unemployment benefits in order that it could delay reinstatement and fill their positions with employees referred by First Temporaries. It is claimed Respondent's decision to delay preparation of the preferential hiring list until every former striker had filed his or her individual offer was done without consultation with the Union, constituted an illegal requirement, and that Respondent should not be permitted to rely on the confusion it created in order to escape its legal reinstatement obligations.

The Respondent contends that even if the Union's September 13 request was unconditional, on the morning of September 14, ''the Union set forth demands that made the prior evening's offer conditional: first, that individual strikers would submit unconditional offers to return and, second, that the preferential reinstatement list would be created from the individual offers.'' Therefore, it is argued, the Respondent had to wait until all strikers had been notified by the Union and submitted their individual offers to return to work before the preferential hiring list could be created, a process that took until September 28 when the Union informed it that all returning strikers had reported.

All that is necessary to satisfy the requirement of an unconditional offer to return to work or application for reinstatement is an undertaking to abandon the strike and notify the employer of the offer or request. It is axiomatic that a union can make this commitment on behalf of the employees it represents. Here, however, the Respondent argues the offer to return was not unconditional but instead conditional on the submission of individual offers to return and the final preparation of a preferential reinstatement list. In my view, the Respondent's reasoning is fallacious.

The record evidence does not show, as Respondent claims, that the Union insisted upon the final preparation of a reinstatement list to be made from the individual offers to return. Rather, the Respondent relied on the recall provisions in article V, section 2 of the collective-bargaining agreement that in recalling employees, seniority was to be the controlling factor and was to be by ''occupational classification of work.'' Further, the record shows that the purpose in submitting individual unconditional offers to Respondent was for the purpose of preserving a right to unemployment benefits as required by the State of Texas. I fail to see how meeting the Texas requirement for the preservation of unemployment benefits could in any circumstances be construed as a limitation on an unconditional request for reinstatement of the strikers. Further, Melton testified, she asked returning strikers to sign requests to return ''because we felt like we needed new addresses and telephone numbers in which to contact the people.'' Thus, it can be seen that the individual offers had a twofold purpose: to preserve unemployment benefit rights, and to update the Respondent's personnel records. Neither the preparation of the reinstatement list in accordance with the contract, or the submission of individual offers in any way detracted from the effectiveness of the Union's September 13 unconditional offer to return.

C. *Whether the Hiring Commitment Made to Employees Hired Through First Temporaries Was Sufficient to Effect the Permanent Replacement of Strikers*

The General Counsel contends Respondent failed to establish there existed a ''mutual understanding'' between it and First Temporaries that the employees hired through First Temporaries were permanent, and that the change in the contract from ''temporary'' to ''probationary'' was merely cosmetic. The General Counsel claims Melton told Union Agents Esparza, Eldridge, and Plumbtree that the employees furnished by First Temporaries were temporaries. It is also argued that the various forms utilized by First Temporaries made reference to, and shows they were, e.g.:

(1) First Temporaries' employment application contains the following statement which is signed by the applicant:

> *TEMPORARY AGREEMENT*
>
> I will be working as a temporary through the efforts of 1ST TEMPORARIES. Salary will be paid me by 1ST TEMPORARIES.
>
> I understand there are no company benefits involved.
>
> It is understood that failure to report to work and absence without proper notification will be considered a voluntary leave of employment.[4]

(2) Employee referral slips from First Temporaries (G.C. Exh. 16), recite that they are ''For Temporary Position.''

(3) The first two statements for wages submitted by First Temporaries, dated September 8 and 13, state they are for ''temporary employee'' and ''temporary employees'' respectively.[5]

The General Counsel also argues that Respondent's failure to call the replacements to testify to their understanding they were permanent replacements supports the inference they didn't understand they were and therefore they were not permanent replacements.

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[4] The employment applications, in evidence as G.C. Exh. 15, also show the date the applicant started working for Respondent, whether the applicant was terminated, quit, or ''went permanent'' after 30 workdays.

[5] The rest of the statements are for ''Employees for the week of ____.''

Respondent claims that from the beginning of the strike it indicated its intent to continue its operations and on February 13, within 10 days after the strike was initiated, it informed both the strikers and employees on layoff that if they failed to report for work by 4 p.m., February 17, it would begin to fill their jobs with permanent replacements.[6] Through the months of March, April, May, June, and July, it hired permanent replacements through its own efforts, which the General Counsel concedes was not unlawful. In August it became apparent that it would need an additional 300 employees in a short time to staff new product lines in September. Having exhausted its own bank of applications, Respondent entered into an agreement with First Temporaries to fill vacancies. In these circumstances, Respondent claims, utilizing an employment agency was clearly justified, legitimate, and a substantial business practice. Indicative of its intent to hire permanent rather than temporary employees, it is argued, was the fact the agreement with First Temporaries was amended to state the agency was providing ''probationary'' employees rather than ''temporary'' employees. This was done before any replacements were hired. A sheet handed to employees hired by First Temporaries initially referred to the employees as temporaries, but was subsequently changed to read probationary.[7] The details of the employment relationship in both versions is identical and states the employee would be transferred to Respondent's payroll after a 30-day working period and become eligible for insurance benefits and for review and raise every 4 months. Respondent also claims the replacements hired through First Temporaries understood their employment was permanent, relying on the testimony of Wilbanks and Melba Grisson, the latter a witness for the General Counsel. Wilbanks testified she told all applicants for employment through First Temporaries:

> that we had openings at Harvey Industries; it was a permanent position as long as they performed within the 30 working days, I told them it is basically a trial period, as long as they showed up, worked hard, they were at that point able to go over permanent after the 30 working days were done with as long as Harvey was happy with them and they were happy with Harvey.
>
> . . . .
>
> I told all the applicants that and I also had a spanish woman who told the spanish speaking people that also.

Grisson testified:

> When I got there there was a lady, she was sitting like at this window and I asked her about the ad in the paper and she told me that it was Harvey Industries and that you know that's what the company was there in Athens. Then I asked her, she asked me, okay I asked her you know what was the starting pay and so forth and so on and so she told me they were starting off at $3.95 to $5.25. And I asked her was it permanent or temporary and she told me that there was like a 30 day trial period and after the 30 days then it could be permanent if I wasn't late or if you know, if I worked well.

Thus, it is seen, Grisson's testimony as to the likelihood of permanent employment substantially corroborates Wilbanks testimony.

The controlling principles were recently set forth in *Solar Turbines*, 302 NLRB 14 (1991), as follows:

> The Board has long held that in the absence of a legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their prestrike jobs. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). One recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that those jobs claimed by the strikers are occupied by workers hired as permanent replacements. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).
>
> Job vacancies created by striking employees are considered to be filled by permanent replacements as of the time the putative replacements accept an employer's offers of permanent employment in the strikers' jobs. *Home Insulation Service*, 255 NLRB 311, 312 fn. 9 1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981). The Board normally regards the employer's hiring commitment as effectuating the permanent replacement of a striker even though the striker may request reinstatement before the replacement actually begins to work. *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971), enfd. as modified 456 F.2d 357 (2d Cir. 1972); *Anderson, Clayton & Co.*, 120 NLRB 1208, 1214 1958); see also *Superior National Bank*, 246 NLRB 721 (1979). Thus, determination of the replacement date turns on when a commitment to hire an employee for a permanent job was made and accepted. [Footnote omitted.]

Contrary to the position of the General Counsel, the commitment for permanent employment was made by First Temporaries, subject to the satisfactory completion of a 30-workday probationary period, after which the probationary employees became permanent employees of Respondent. This conclusion is supported by the testimony of Wilbanks. That the applicants understood this commitment is supported by General Counsel's witness Grisson. It is further supported by handouts given applicants by First Temporaries (G.C. Exh. 6 and R. Exh. 16), and by First Temporaries' employment application records which show the applicants ''went permanent'' after the probationary period. Thus, it is found that the commitment to hire strike replacement applicants was made by First Temporaries; that the offers were offers of permanent employment; and that thereafter the Respondent was committed to hiring them as permanent replacements on the satisfactory completion of the 30-workday probationary requirement. In *Solar Turbines*, supra, relying on *Kansas Milling Co.*, 97 NLRB 19 (1951), the Board stated at 20:

> In that case the Board found that striker replacements who were offered permanent employment, but who were required to complete a 30-day probationary period, were permanent replacements even if they had not completed the 30-day period by the date on which the strikers made unconditional offers to return. Accord: *Guenther & Son*, 174 NLRB 1202, 1212 (1969), enfd. sub nom. *Pioneer Flour Mills v. NLRB*, 427 F.2d 983

[6] See R. Exh. 20.

[7] G.C. Exh. 6 and R. Exh. 16, respectively.

(5th Cir. 1970); *Anderson, Clayton & Co*., 120 NLRB at 1214. The reasoning adopted by the Board in *Kansas Milling* was as follows (id. at 226):

> When hired they were assured that they would retain their jobs not for a period of limited duration but indefinitely, provided only they proved themselves qualified. True, the ultimate determination of whether they were to be retained on a temporary or permanent basis was deferred. But when the qualifying condition was met with the passage of 30 days' employment, it established their status ab initio as that of permanent replacements for the striking employees whom they displaced. Although their status was still probationary on October 18, 1947, the Respondent was not required on that day to discharge them to make room for returning strikers who had unconditionally applied for reinstatement. In hiring these employees originally on a probationary basis, the Respondent was following its normal employment practices, and it was entitled to avail itself of the full qualifying period before determining whether or not these employees should be accorded the status of permanent employees.

Accordingly, it is found that upon the completion of their 30-workday probationary period, the employees hired by First Temporaries established their status ab initio as that of permanent replacements for the striking employees whom they displaced. Thus, the General Counsel's argument that the former strikers should have been reinstated, as the individual First Temporaries' referrals completed their 30 workdays, lacks merit.

The General Counsel argues that Respondent was delinquent in canceling its contract with First Temporaries, claiming the required 10-day cancellation notice should have been made on September 14, when Respondent knew the strike was over, and an unconditional offer been received, instead of delaying until September 19 in which event First Temporaries would have ceased sending its employees to Respondent by September 24. There is merit to this argument. While it is not disputed that First Temporaries was entitled, under its agreement with Respondent, to 10 days' cancellation notice, Respondent could not delay giving notice to the detriment of the reinstatement rights acquired by the strikers when the Union notified Respondent of the strike's end and the unconditional offer to return. Accordingly, it is found that those employees interviewed by First Temporaries on and after September 25, were not permanent replacements.

D. *Respondent's Recall of Striker Replacements Following Layoff in Place of Unreinstated Strikers*

Paragraph 18 of the consolidated complaint alleges, in substance, that in December, Respondent commenced recalling from layoff employees hired through First Temporaries rather than offering reinstatement to strikers in violation of Section 8(a)(1) and (3) of the Act.

Having found that employees hired by First Temporaries prior to September 25 were permanent replacements, the question arises whether they had a reasonable expectancy of recall from a mid-November layoff in preference over the unreinstated strikers. The General Counsel argues they did not and that their relative lack of seniority should have placed them at the bottom of the list behind the remaining unreinstated strikers. The Respondent argues that paragraph 18 of the consolidated complaint should be dismissed in view of the Regional Director's dismissal of the allegation in the charge in Case 16–CA–14464 which asserted that the Company was wrongfully failing to reinstate striking employees by recalling laid-off employees. Specifically, the Regional Director stated: ''The evidence established that the permanent striker replacements were temporarily laid off and had a reasonable expectation of recall, thus were correctly recalled ahead of unrecalled strikers. *Aqua Chem, Inc*., 288 NLRB 1108.'' The General Counsel argues that the dismissal applied only to permanent replacements hired off the street by Respondent and not to those hired through First Temporaries. In light of the General Counsel's argument, I overruled the Respondent's objection to the introduction of evidence regarding the layoff and recall from layoff. That evidence shows all laid-off employees were told the same thing with respect to expectancy of recall.

There is nothing in the charge filed in Case 16–CA–14464 (G.C. Exh. 1(g)) nor the language of the dismissal letter (R. Exh. 19), to indicate either document was limited to any group of employees.[8] As is clear, the General Counsel's theory is premised on a finding that employees hired through First Temporaries were not permanent replacements. Thus, having found that those employees hired through First Temporaries prior to September 25 were permanent replacements, and the Regional Director having already determined ''that the permanent striker replacements were temporarily laid off and had a reasonable expectation of recall,'' it follows that those employees hired through First Temporaries prior to September 25 acquired the status of permanent strike replacements and therefore had a reasonable expectation of recall, but that those hired on and after September 25 did not acquire the status of permanent striker replacements and were not entitled to recall from layoff over the rights of the strikers.

E. *Whether Garza Threatened That Laid-off Employees Would Receive More Favorable Treatment Than Strikers Regarding Filling Job Openings, Transfers, and/or Promotions*

The General Counsel called two recalled strikers to prove the allegation in paragraph 17 that Benny Garza, Respondent's director of personnel, threatened that laid-off employees would receive more favorable treatment than strikers with regard to filling job openings, as well as transfers and/or promotions. Jacqueline Barker was recalled as a packer on October 20, a position she occupied when she went on strike. Wanting a higher paying job, she signed the ''bid book'' for a job as tester in November. Bidding procedures are found in article XVII of the collective-bargaining agreement. That job, however, was filled by recalling a permanent replacement apparently hired during the strike through First Temporaries. According to Barker, she approached Garza and ''I said why didn't I get the job. I bidded on the job. I say you'd rather let one of those scabs come in and give them a job instead of me. And he say well that's the way it is.

[8] The charge in that case was filed March 5, 1990, the consolidated complaint containing paragraph 18 was issued May 9, 1990, and the dismissal letter dated May 31, 1990.

He say they come first, then you all. Then the ones that's off. And I say well why did you let us bid. He say this is just routine. We have to open the bid book. He said but we don't have to pick any name on it.'' She claimed four other employees, including Jan Dickerson, were standing around. Dickerson, who had been reinstated to the job she held before becoming a striker, testified Garza ''told us that the ones, the replacement workers that they hired from First Temporaries, that they would have the first choice to get the job. And then the strikers that were already back and work[ing]. And then the strikers that were laid off had the last choice, that were still out of work.'' She acknowledged on cross-examination the statement made in a Board affidavit that ''He [Garza] told us that there wasn't no use in our signing the bid book because we couldn't get a job until all the strikers came back to work.'' Garza didn't recall a discussion with either about why she didn't get a particular job through the bid process.

The General Counsel argues that Garza's statement made the former strikers ''aware that Respondent intended to punish them because of their participation in the strike,'' and as such is ''inherently destructive'' and tends to coerce and restrain employees in the exercise of their Sections 7 and 13 rights to organize and strike, and therefore violates Section 8(a)(1) of the Act.

The Respondent argues that the testimony of the General Counsel's witnesses shows that no improper statements were ever made by Garza or, if made, were based on fact and correctly described how the return of strikers and laid-off replacements affected use of the bid books. With respect to Barker, Garza merely explained ''how the bid book works under the Collective-Bargaining Agreement as old lines are reactivated, employees laid off from those lines are recalled before the Company uses the bid book.'' Regarding Dickerson's statement that Garza said there was no use signing the bid book because the jobs would not be available until all strikers returned to work, it is claimed that even if made, does not support the General Counsel's allegation since while reinstating strikers before using the bid book process might, under certain circumstances, violate the collective-bargaining agreement, it is not evidence that strikers were being treated less favorably than the permanent replacements.

It has not been alleged that either Barker or Dickerson was discriminated against with respect to the bidding process. The allegation in paragraph 17 of the consolidated complaint is that Garza threatened that laid-off employees hired through First Temporaries would receive more favorable treatment than strikers with respect to job openings, transfers and/or promotions. I interpret the testimony of both Barker and Dickerson to be that Garza told them that the laid-off permanent replacements hired through First Temporaries would be the first employees to be chosen from the bid book, followed by recalled strikers and then unrecalled strikers. Article XVII, paragraph 6 of the contract regarding the bidding process provides that ''Openings will be filled by the most senior applicant who has the ability to do the job. Jobs will be awarded by the Personnel Department.'' Contrary to the position of Respondent, I do not view Garza's explanation to be that ''as old lines are reactivated, employees laid off from those lines are recalled before the Company uses the bid book.'' The conversation alleged to be unlawful was not made in the context of reactivating lines, but of the Respondent's preferential treatment in the bidding process of employees already working. In my view, by informing employees that employees hired through First Temporaries would receive favorable treatment under the bidding process, Respondent violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Harvey Manufacturing, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, Local 376FW, affiliated with International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Employees hired before September 25, 1989, through referral from First Temporaries of Athens, were hired as, and are, permanent striker replacements.

4. By continuing to hire employees referred by First Temporaries of Athens, on and after September 25, 1989, in place of recalling unreinstated economic strikers, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By telling employees that employees hired through First Temporaries of Athens would receive more favorable treatment under the bid process than strikers, Respondent violated Section 8(a)(1) of the Act.

6. Respondent did not otherwise violate the Act as alleged.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be ordered to cease, as of September 25, 1989, discriminating against unreinstated economic strikers by hiring and/or recalling from layoff employees that had not acquired status as a permanent striker replacement. It is further recommended that economic strikers who would have been recalled on and after September 25, 1989, but for Respondent's unlawful conduct, be reinstated to the positions in which they would have been placed had they been recalled, without prejudice to their seniority or other rights and privileges and made whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

[9] 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.

ORDER

the Respondent, Harvey Manufacturing, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate economic strikers who unconditionally offered to return to work and whose positions were filled by employees referred from First Temporaries of Athens on and after September 25, 1989.

(b) Telling employees that employees hired through First Temporaries of Athens would receive more favorable treatment under the bid process than strikers.

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

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

(a) Offer the economic strikers on whose behalf the Union offered to return to work, and whose positions were filled on and after September 25, 1989 by employees referred from First Temporaries of Athens, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudiced to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this Decision.

(b) Preserve and make available to the Board and 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 and determine the amount of backpay due under the terms of this Order.

(c) Post at its Athens, Texas facilities copies of the attached notice marked ''Appendix B.''[10] Copies of said notices on forms provided by the Regional Director for Region 16, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

Those allegations not specifically found to have violated the Act are dismissed.

[10] 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.''

APPENDIX A

August 31, 1989

Georgia Melton
Harvey Industry
Athen, TX 75751

Re: First Temporaries of Athens Agreement with Harvey Industry

Dear Georgia:

The purpose of this letter is to express our agreement with respect to First Temporaries of Athens providing temporary employment to Harvey Industries.

The following is agreed upon:

1. This agreement contemplates any and all temporary personnel which First Temporaries will make available to Harvey Industry.

2. A worker's period of employment will be for 30 working days, from hire date, at which time, Harvey Industry has the option to hire the worker (for which no fee will be charged).

3. Thirty (30) days after the execution of the contract, First Temporaries will be the exclusive means for the hiring and/or re-hiring of Harvey Industry personnel for Labor Grades 1, 2 and 3.

4. Harvey Industry and First Temporaries have the right to terminate (without liability) this agreement with Ten (10) days written notice; provided, however, that all temporaries on the First Temporaries payroll at the time this agreement is terminated will remain for the full 30 working day period.

5. The billing rate for workers is set forth on Exhibit ''A'' attached hereto. These rates will remain constant for Two (2) months subsequent to the execution of this agreement, except if there is an increase in: social security tax, unemployment tax, or worker's compensation insurance. After 2 months the rates will be reviewed.

6. The procedures for implementing referrals, applications, job descriptions, communications, hiring time accounting, payment, etc. will be worked out on terms mutually agreeable to both parties.

7. Harvey Industry agrees to indemnify and hold First Temporaries harmless from any claim by a worker for: wrongful firing, E.E.O.C. or O.S.H.A. violation, discrimination lawsuits, etc.

8. First Temporaries will secure worker's compensation insurance for each worker for the Thirty (30) day period.

9. First Temporaries will make the proper income tax and FICA withholding, and pay unemployment tax for each worker during the Thirty (30) day period.

10. First Temporaries will use its best efforts to secure good workers, but will not be responsible for any damages to property or injury to persons caused by a temporary worker while on the job. First Temporaries shall not be liable for any consequential or incidental damages whatsoever.

If the above correctly reflects our understanding, please execute a copy of this letter and return it to us at your earliest convenience.

Very truly yours,

/s/ Frieda Doolen
Frieda Doolen, Manager
First Temporaries of Athens