Dayton Newspapers, Inc. *and* General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL–CIO. Cases 9–CA–36894, 9–CA–36981, and 9–CA–37385.

July 14, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On November 14, 2000, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief to each of the answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

This case involves a 1-day economic strike by the Respondent's drivers. At the time of the strike, the Respondent was in the process of gradually transferring its operations to a new plant, pursuant to a transition plan made before the strike and discussed with the Union. Several days after the strike, the Respondent laid off 13 drivers and locked out 18 others. As explained below, the judge found, and we agree, that the Respondent made several statements in connection with the strike that violated Section 8(a)(1), dealt directly with the drivers in violation of Section 8(a)(5) and (1), laid off 13 drivers and withheld their bonuses in violation of Section 8(a)(3) and (1), and refused to reinstate 9 of the locked-out drivers in violation of Section 8(a)(3) and (1).

[1] 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.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform to our findings and the Board's standard remedial language. In addition, we do not believe that a broad cease-and-desist order is warranted under the test set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and we shall modify the judge's recommended Order accordingly.

I. FACTUAL BACKGROUND

The drivers are represented by Teamsters Local 957 (the Union). In 1998, the Respondent notified the Union of its plans to transfer operations to a new plant. The new plant would use larger trucks and therefore require fewer drivers. The Respondent anticipated that it would have positions for 18 drivers at the new plant, but that the 13 least senior drivers would be laid off. In October 1998, the Respondent offered the Union a "stay to the end" bonus for the drivers who would eventually be laid off. The terms of the bonus offer provided in part:

> This offer is contingent upon the employees staying actively at work, and in good standing, until their release date. Release dates will be determined periodically, by seniority, based on operational needs and the transition schedule.

The Union appears to have agreed to the offer.

The Respondent planned that the 13 layoffs would be staggered, corresponding with the gradual transfer of its printing operations to the new facility. As of early 1999,[3] the Respondent predicted that the layoffs would start in April. At least by June 10, however, that date had changed, and the layoffs were not anticipated to start until about July 19.

Meanwhile, since August 1998, the parties had been negotiating for a new collective-bargaining agreement. Negotiations were unsuccessful. In May 1999, the union membership voted to authorize a strike, but did not set a date. During an employee meeting in early June 1999, employee Tim Hehemann mentioned the possibility of a strike to Director of Operations Mike Joseph. Hehemann testified that Joseph said that if the drivers struck, "you won't be working here any more, and that would be it for you."

On June 26, the Union began a strike that lasted 24 hours. During the strike, Joseph came to the picket line and told Hehemann that the union representatives "just cost you guys all—cost all you guys your jobs."

On June 27, the Union made an unconditional offer to return to work. When the drivers reported to work, however, Joseph did not allow them to work. Joseph told Hehemann that the Respondent was "not in need of [Local] 957's services" and that Joseph would contact Hehemann if or when he was to work again. Hehemann restated his desire to return. Hehemann testified that Joseph then said, "[W]ell, the problem isn't with you as a driver, but as long as you have 957, and he mentioned John Burns' name, in particular, he didn't see how the problem could be resolved."[4]

[3] All dates are in 1999 unless otherwise specified.

[4] John Burns is the Union's business agent.

On July 1, the Respondent sent a letter to the Union rejecting its offer to return to work. The Respondent attached copies of two form letters, which the Respondent sent to two separate groups of drivers that same date. One letter, sent to each of the 18 most senior drivers, informed these drivers that they were being placed on unpaid leave until they gave an "acceptable commitment" to make deliveries without disruption.[5] The other letter, sent to each of the 13 least senior drivers, informed these drivers that they were being laid off. In contrast to the letter sent to the drivers placed on unpaid leave, the letter to the laid-off drivers said nothing about the possibility of returning to work upon making an "acceptable commitment." Therefore, for purposes of this case, the drivers fall into two groups: the 13 drivers who were laid off, and the 18 drivers who were locked out and placed on unpaid leave.

Also about July 1, Joseph began calling the 18 locked-out drivers and asking them to come in for one-on-one meetings with him. During those meetings, Joseph told the drivers that they could return to work if they promised to work without interruption. Joseph said that this would include crossing future picket lines. One driver testified that Joseph asked him for a "verbal agreement . . . not to honor any job action called upon by the Teamsters 957." Some drivers agreed and returned to work on these terms, others did not agree, and still others declined to come in for a meeting.[6]

About July 11, the Respondent began advertising for new drivers. It did not recall the 13 laid-off drivers, although it rehired two of them as new employees. Furthermore, it did not pay the laid-off drivers their "stay to the end" bonuses.

During July and August, the parties continued to negotiate for a new agreement and over the conditions for ending the lockout. The Respondent continued to demand that the Union give assurances against further work stoppages, but the Respondent was reluctant to define what those assurances should be. For example, on July 19, the Respondent said it would need "notice" of future strikes and some assurance regarding intermittent strikes, but "did not want to say something specific that would sound like a demand, when in fact there is so much uncertainty about what we legitimately need . . . ." On July 21, the Respondent stated: "At this point we have little information or time, and no input from you, to make a meaningful demand . . . . For now, as an opening proposition, we are asking for some assurances that work and new plant transition can continue with little or no interruption until the transition is complete—after that, some type of advance notice (a few weeks might be enough, maybe less) before striking would be required."

About July 19, the Respondent added a second condition for reinstatement of the remaining locked-out drivers: in addition to giving assurances against further work stoppages, the Union must agree to accept "operational changes" the Respondent had made since the strike. When the Union asked what operational changes the Respondent had made, the Respondent gave a partial list, but stated that the list would keep changing in the coming weeks and months.

Meanwhile, the Respondent continued its transition to the new plant. On August 28, the Respondent transferred the last of its printing to the new plant.

On December 23, the Union made a written offer to return to work on behalf of the locked-out drivers. It offered to return "with the assurances that there would be no work stoppages, strikes or other slowdowns for the same period of time agreed to by the locked out drivers that the Company has allowed to return to work [i.e., the drivers reinstated after meeting with the Respondent on an individual basis], and providing the same notification agreed to by those same locked out drivers that the Company allowed to return to work."

The Respondent did not accept the Union's December 23 offer. Instead, on December 27, the Respondent sent a letter to the Union claiming that there were "a number of changed circumstances in recent months" that "may impact our position regarding a return to work for the employees locked out." The Respondent listed the alleged changed circumstances, which included, among other things, "[h]iring of replacement workers who are already trained to work in the new operation," "[c]hanges in relative bargaining strength as a result of the failed strike," and "[c]ontinued operational changes tied to the new plant."

On December 28, the Union responded with a letter reiterating its assurances against work disruption, noting that none of the "changed circumstances" listed by the Respondent should affect a return to work, and emphasizing that the locked-out drivers were all long-term,

[5] The Union filed an unfair labor practice charge alleging that the Respondent violated Sec. 8(a)(3) and (1) by locking out the drivers on June 27, and refusing to allow them to return to work. The Regional Director dismissed the charge, and the General Counsel denied the Union's appeal, on the basis that the Respondent's need for timely delivery of its newspaper was a legitimate and substantial business justification for locking out the drivers and conditioning reinstatement upon their assurances that they would not engage in additional strikes during the transition to the new plant. With regard to the lockout, the complaint in this case alleges that the Respondent unlawfully refused to reinstate the locked-out drivers as of December 27. Therefore, we presume, as the judge did, that a lawful lockout was in place until that time.

[6] Eventually, 9 of the 18 were reinstated through these meetings.

capable employees who were qualified to perform the Respondent's work. The letter also stated in part:

> In regard to the 'operational changes tied to the new plant,' while those changes might be subject to further negotiations between the Company and the Union, they have absolutely nothing to do with the unconditional offer to return to work made by Local 957 and the drivers who have not yet been allowed to return to work.

On February 4, the parties met to discuss the reinstatement issue further. At that meeting, the Respondent distributed a memorandum stating that "nothing in the union's recent correspondence reasonably permits or requires" reinstatement of the locked-out drivers. The memorandum then set forth a long list of additional issues the parties would need to address before the reinstatement issue could be resolved, including such issues as whether the Union or the drivers "might be lying," how the Respondent could be sure the Union would not "secretly authorize" a wildcat strike, and whether the Union would post a bond to secure its promise against unannounced work stoppages.[7] The February 4 memorandum was the Respondent's last communication regarding the conditions for reinstatement of the locked-out drivers. The Respondent has not reinstated the locked-out drivers, other than those drivers discussed above who met with the Respondent on an individual basis in July.

The judge found that the Respondent violated Section 8(a)(1) by threatening employees with job loss for striking and by inducing the employees to rid themselves of the Union. He also found that the Respondent violated Section 8(a)(5) and (1) by bypassing the Union and dealing directly with the drivers to reinstate them in exchange for a waiver of their right to strike. The judge further found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the 13 drivers upon the Union's June 27 offer to return to work, by laying them off and failing to recall them because they struck, and by denying them the "stay to the end" bonus. Finally, he found that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the 9 remaining locked-out drivers upon the Union's December 23 offer to return to work. As stated below, we agree that the Respondent committed each of these violations.

[7] The relevant portions of the Respondent's February 4 memorandum are quoted in par. 37 of the judge's decision.

II. ANALYSIS

A. Alleged Threats of Job Loss and Inducement to Employees to Rid Themselves of the Union, in Violation of Section 8(a)(1)

1. Threat of job loss at June 1999 employee meeting

The judge found that the Respondent violated Section 8(a)(1) when Joseph told Hehemann during an early June meeting that if the drivers struck, "you won't be working here any more, and that would be it for you." We agree with the judge that this statement was a threat of job loss in the event of a strike and therefore violated Section 8(a)(1).

The Respondent argues that the judge erred in finding this violation because his finding was based on Hehemann's uncorroborated testimony, which the Respondent contends was contradicted by the testimony of employee Terry Glueckert. The Respondent relies on the Sixth Circuit's decision in *NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 fn. 5 (6th Cir. 1995). In that case, the court stated that it has declined "to uphold unfair labor practice findings that rest upon the uncorroborated testimony of persons who stand to receive backpay if the findings are upheld." Not only were the witnesses in *Cook* uncorroborated, but their version of events was contradicted by all of the disinterested witnesses who testified on the issue. See id. The court therefore found that "the evidence as a whole" did not support the finding of an unfair labor practice. Id.

The principles of *Cook* do not preclude us from finding an unlawful threat. First, we do not agree that Glueckert clearly contradicted Hehemann's testimony that the threat occurred. Glueckert testified that he "did not hear" any threats. Second, as noted by the judge, Joseph did not deny that he made the threat. Joseph testified generally about the meeting and stated that the possibility of a strike was discussed, but he was never asked to confirm or deny making the statement that Hehemann attributed to him. Under these circumstances, considering the evidence as a whole, we agree with the judge that the Respondent violated Section 8(a)(1) by threatening employees with job loss if they were to strike.

2. Threat of job loss on picket line

The judge also found that the Respondent violated Section 8(a)(1) when Joseph told Hehemann on the picket line that the union representatives "just cost you guys all—cost all you guys your jobs." The judge found that Joseph's statement was a threat that the employees had lost their jobs by striking. For the reasons stated by the judge, we agree that Joseph's statement violated Section 8(a)(1).

3. Inducement to employees to rid themselves of the Union in order to return to work

The judge further found that the Respondent violated Section 8(a)(1) by inducing the drivers to rid themselves of the Union when they sought to return to work the day after the strike. The judge relied on Joseph's statement to Hehemann, as Hehemann was attempting to return to work, that the Respondent was "not in need of 957's services" and that Joseph did not see how the "problem" could be resolved as long as Hehemann was represented by Teamsters Local 957 and its business agent, John Burns. For the reasons stated by the judge, we agree that Joseph's statement violated Section 8(a)(1).

B. Alleged Direct Dealing with Employees in Violation of Section 8(a)(5) and (1)

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(5) and (1) by bypassing the Union and dealing directly with employees through a series of one-on-one meetings beginning about July 1, in which Joseph asked for each driver's commitment to work without interruption, including crossing picket lines, in exchange for being allowed to return to work.

The Respondent argues that it was simply communicating an offer of reinstatement directly to the drivers, and that its conduct was therefore lawful under *U.S. Ecology Corp.*, 331 NLRB 223 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001). We find *U.S. Ecology* distinguishable. In that case, employees engaged in a strike prior to impasse. In response to the strikers' inquiries, the employer sent a letter to the strikers stating that they could return to work and "for the time being" receive the same wages and benefits they had received before the strike. The Board found that the employer did not engage in unlawful direct dealing, emphasizing that the employer could not lawfully offer the strikers any terms other than those existing before the strike, because the parties had not bargained to impasse. The Board reasoned, "We do not believe that, merely by stating (in response to employee inquiries) the only employment conditions it could lawfully offer under the circumstances, the Respondent can reasonably be found to have 'eroded the Union's position as exclusive representative.'" 331 NLRB at 226.

Here, the Respondent went far beyond merely communicating an offer of reinstatement. As of July 1, the approximate date the Respondent began contacting the drivers for one-on-one meetings, the Respondent had made only a general demand from the Union for an "acceptable commitment" to make deliveries without disruption. Rather than clarifying to the Union what an "acceptable commitment" would involve, the Respondent instead discussed this issue directly with the drivers. It sought to obtain from each driver individually, in exchange for returning to work, a broad and open-ended waiver of their Section 7 right to support future union strikes or picketing. We find that such conduct clearly erodes the Union's position as exclusive representative. We agree with the judge that the Respondent's one-on-one meetings with the drivers violated Section 8(a)(5) and (1).

C. Alleged Failure to Reinstate, Permanent Layoff, and Failure to Recall 13 Drivers in Violation of Section 8(a)(3) and (1)

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate, permanently laying off, and thereafter failing to recall 13 drivers after the June 26 strike.[8] As explained below, we agree.[9]

1. The Respondent did not prove a legitimate and substantial business justification for not reinstating all 13 drivers on July 1

The Union made an unconditional offer to return to work on behalf of the striking drivers on June 27. In a letter to the Union dated July 1, the Respondent denied the offer and stated, in part, that it had laid off 13 drivers due to recent changes to its operation. On the same date, the Respondent sent letters to the 13 drivers notifying them that they were being laid off. We agree with the judge that these 13 drivers were not part of the lockout, which encompassed only the 18 drivers placed on unpaid leave.

It is well settled that an employer violates Section 8(a)(3) and (1) if it fails to reinstate strikers on their unconditional offer to return to work, unless the employer can establish a "legitimate and substantial business justification[]" for failing to do so. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The Respondent argues that it had already decided, before the strike, to lay off the 13 drivers in connection with its new plant

[8] The Respondent argues that the failure-to-recall allegation is barred by the 6-month time limitation of Sec. 10(b), because the allegation was not expressly included in the charge and was not added to the complaint until May 2000. However, the Respondent failed to raise its Sec. 10(b) defense until its posthearing brief, and has therefore waived it. See *Public Service Co.*, 312 NLRB 459, 461 (1993).

[9] In finding the layoffs unlawful, we do not rely on the judge's finding, in par. 23 of his decision, that the layoffs were inherently destructive of employee rights. Furthermore, we do not rely on his finding, in par. 20 of his decision, that even assuming the 13 drivers were part of the lockout, the Respondent permanently replaced them and therefore made the lockout unlawful as to these 13 drivers.

transition, and that it simply accelerated the transition (and, consequently, the layoffs) after the strike. Therefore, the Respondent claims that it had a legitimate and substantial business justification for not reinstating the 13 drivers.

The Respondent's transition plans called for layoffs on a staggered basis as the Respondent transferred printing operations to its new facility. Brett Thurman, the Respondent's General Counsel and Human Resources Manager, testified that "printing the newspaper [at the new plant] is what triggers our ability to drive bigger trucks and that triggers the layoffs." Under the Respondent's transition plan, transfer of the printing was to occur in stages. Thurman testified that the Respondent did accelerate the transition and begin some printing at the new plant immediately after the strike. The judge found, and we agree, that it was lawful for the Respondent to change its transition schedule in view of the strike. However, it is uncontested that the Respondent continued some printing at the old plant through August 28. In addition, Thurman testified that the Respondent did not completely switch over to using larger trucks until mid-August at the earliest. Therefore, because there was at least some driving work available when the employees offered to return to work on June 27, we reject the Respondent's argument that its transition to the new plant was a legitimate and substantial business justification for not reinstating any of the 13 drivers on July 1.

We also reject the Respondent's argument that it was justified in not reinstating the drivers on July 1 because they lacked the class A commercial driver's license endorsement necessary to drive the large trucks used at the new plant. The record shows that the Respondent was not certain that all of the drivers lacked class A endorsements. Furthermore, as noted above, the Respondent did not completely shift its operation to the large trucks until at least mid-August, well after the July 1 refusal to reinstate.

As stated above, it was the Respondent's burden to show a legitimate and substantial business justification for its conduct. The Respondent's asserted justifications—that the drivers were unnecessary because of the plant transition, or unqualified because they lacked class A endorsements—were not true for all 13 drivers as of July 1. That is, the Respondent has not shown that all 13 of the drivers were unnecessary or unqualified as of July 1. Therefore, we find that the Respondent has not shown a legitimate and substantial business justification for failing to reinstate any of the 13 drivers on that date, and we agree with the judge that the Respondent violated Section 8(a)(3) and (1).[10]

2. The layoffs were unlawful under a *Wright Line* analysis

We further find that the layoffs violated Section 8(a)(3) and (1) under *Wright Line*.[11] In *Wright Line*, the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employment decision violated Section 8(a)(3) and (1), the General Counsel must first persuade, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. Once the General Counsel makes such a showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The elements commonly required to show discriminatory motivation are union activity, employer knowledge, and employer animus. See *Sears, Roebuck & Co.*, 337 NLRB 443 (2002).

We find that the General Counsel has met his burden to show that protected activity was a motivating factor in the layoffs. At the time of the layoffs, the employees had just engaged in a strike, and therefore the Respondent was well aware of their union activity. The Respondent displayed its antiunion animus on June 26, when Joseph threatened employees on the picket line that the Union had just cost them their jobs, and again on June 27, when Joseph told Hehemann that he did not see how matters could be resolved as long as Hehemann (and, by implication, the other drivers) was represented by the Union. Just days after these unlawful statements, the Respondent laid off 13 drivers. In addition, during the period July 1999 through February 2000, the Respondent advertised for and hired 11 new drivers, presumably to replace the group of drivers it had locked out. However, the Respondent did not recall any of the laid-off drivers. The Respondent rehired two laid-off drivers, but as new employees with no seniority. See *Lear Siegler, Inc.*, 277 NLRB 782 (1985) (laying off and failing to recall union-represented employees while simultaneously hiring new employees was evidence that protected activity was motivating factor in the layoffs). Therefore, we find that the

[10] We leave to the compliance stage of this proceeding to determine how many and which of the 13 drivers would have been reinstated on that date absent the Respondent's discriminatory conduct.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

General Counsel has met his burden of showing that protected activity was a motivating factor in the layoffs.[12]

We further find that the Respondent failed to prove it would have laid off all 13 drivers on July 1, even in the absence of their protected conduct. The Respondent argues that all 13 drivers were unneeded or unqualified due to the new plant transition. We reject this argument for the reasons stated in section C,1 above. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by laying off the drivers and thereafter failing to recall them. See *Wright Line*, supra at 1089.

D. Alleged Denial of Bonus to the 13 Drivers in Violation of Section 8(a)(3) and (1)

The judge found that the Respondent violated Section 8(a)(3) and (1) by denying the 13 drivers their "stay to the end" bonuses. We agree. The test for determining whether denial of a benefit to strikers violates Section 8(a)(3) and (1) is set forth in *Texaco, Inc.*, 285 NLRB 241, 245–246 (1987). Under *Texaco*, the General Counsel has the prima facie burden to show some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued, and (2) the benefit was withheld on the apparent basis of the strike. The burden then shifts to the employer to show a legitimate and substantial business justification for denying the benefit.

We find that the bonus was accrued. In doing so, we reject the Respondent's argument that the bonus was not accrued because the drivers failed to meet the condition that they remain "actively at work, and in good standing, until their release date" (that is, until the Respondent laid them off). The drivers were "released," or laid off, on July 1. On its face, the bonus provision says nothing about a strike precluding the drivers from being "actively at work and in good standing." Further, there is no evidence that the parties intended a 1-day strike to disqualify drivers from being "actively at work and in good standing." To the contrary, several employees testified that they were never told the bonus would be unavailable if they struck. The Union's business representative testified that when the bonus was proposed by the Respondent and discussed in bargaining, there was no discussion of what impact a strike might have on the bonus. Therefore, we find that as of July 1, the drivers remained "actively at work and in good standing." Accordingly, the bonus was accrued.

We also find that the bonus was withheld on the apparent basis of the strike. Thurman testified that "it wasn't the strike for one day" that resulted in denial of the bonus, but "the combination of missing one day unannounced and then not giving any reasonable work assurance afterward." However, as the judge found, the Respondent clearly stated after the strike that work assurances would have "no effect on the layoffs." Thus, on July 22, the Respondent stated in a memorandum to the Union: "There is no change in our position. The layoffs are unconditional, and are based solely on the changes in our operation since the strike. Assurances regarding disruptions will have no effect on the layoffs, but are important concerning employees who have not been laid off." Furthermore, the July 1 letters to the 13 laid-off drivers (in contrast to the letters to the 18 drivers placed on unpaid leave) said nothing about the possibility of returning to work after giving work assurances. The Respondent cannot fault the laid-off drivers for failing to give work assurances when it made clear that such assurances would have no effect. Having rejected the Respondent's argument that it withheld the bonus because the drivers failed to give work assurances, we find that the Respondent withheld the bonus on the apparent basis of the strike. Therefore, the General Counsel has met his burden under *Texaco* to show that the denial of the bonus adversely affected employee rights.

The burden then shifts to the Respondent to show a legitimate and substantial business justification for denying the benefit. We find that the Respondent has failed to do so. As explained above, the Respondent's asserted business justification is that the laid-off drivers failed to give "reasonable work assurances." We reject that argument for the reasons stated above. Consequently, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by denying the 13 drivers their "stay to the end" bonuses.[13]

E. Alleged Failure to Reinstate Locked-Out Drivers in Violation of Section 8(a)(3) and (1)

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the locked-out drivers after the Union's December 23 offer to return to work. For the reasons stated below, we agree.

[12] In finding animus, we do not rely on Thurman's statements (described in pars. 5 and 6 of the judge's decision) during his hearing testimony or during negotiations with the Union.

[13] We do not rely on the judge's findings, in par. 29 of his decision, that the denial of the bonus was inherently destructive of employee rights and a unilateral change in terms and conditions of employment in violation of Sec. 8(a)(5) and (1).

Member Schaumber agrees that the Respondent's denial of the bonuses to the drivers scheduled for future layoff violated Sec. 8(a)(3) and (1). The sole condition for the drivers' receipt of the bonuses was that they remained "actively at work and in good standing." The Respondent's wrongful layoff of the drivers made it impossible for them to meet this condition.

1. Legal framework

The burden is on an employer to prove a legitimate and substantial business justification for failing to reinstate economic strikers. *NLRB v. Fleetwood Trailer Co.*, supra, 389 U.S. at 378; *Laidlaw*, supra, 171 NLRB at 1368. In the present case, the Respondent's asserted business justification is that it lawfully locked out the striking drivers. The Respondent claims that it was entitled to condition reinstatement on the Union's fulfillment of two requirements: some type of assurance against further work stoppages, and agreement to accept "operational changes" made after the strike. The Respondent argues that it lawfully continued the lockout and denied reinstatement even after the Union's December 23 offer, because the Union did not agree to the operational changes.

As the judge noted, however, a fundamental principle underlying a lawful lockout is that the Union must be informed of the employer's demands, so that the Union can evaluate whether to accept them and obtain reinstatement. The judge cited *Eads Transfer*, 304 NLRB 711 (1991), enfd. 989 F.2d 373 (9th Cir. 1993). In *Eads*, the employer refused to reinstate economic strikers after their unconditional offer to return. Several months later, the employer announced for the first time that reinstatement would be conditioned on a signed contract. Because the employer had not timely informed the strikers that it was locking them out until a contract was reached, the Board found the failure to reinstate unlawful. The Board held:

> [W]e conclude that an employer can only justify its failure to reinstate economic strikers "for legitimate and substantial business reasons" based on a "lockout" by its timely announcement to the strikers that it is locking them out in support of its bargaining position. For only after the employer has informed the strikers of the lockout can the strikers knowingly reevaluate their position and decide whether to accept the employer's terms and end the strike or to take other appropriate action.

The Ninth Circuit agreed with the Board's reasoning and enforced its Order. The court stated:

> Without notice of the lockout, the strikers did not know what was at risk. Had the employees been timely informed of the lockout they could have reevaluated their positions and taken appropriate actions in reaching a new bargaining agreement.

989 F.2d at 377. See also *Ancor Concepts, Inc.*, 323 NLRB 742, 745 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999) (locked-out employees were falsely told they had been permanently replaced, which "could have reasonably caused the strikers confusion in evaluating their bargaining strength"; therefore, strikers "could not intelligently evaluate their position" under *Eads*).[14]

The judge concluded that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the locked-out drivers. In doing so, he found, in part, that the Respondent did not clearly state the conditions the Union must meet to end the lockout, as required by *Eads*.

We agree with the judge that the Respondent's failure to reinstate the drivers was unlawful under this principle. Unlike the employees in *Eads*, the drivers in the present case were informed that they were locked out. See also *NLRB v. Ancor Concepts*, 166 F.3d at 58. Nevertheless, in order for employees to "knowingly evaluate their position" as required by *Eads*, the employees must not only be informed that they are locked out, but they must be clearly and fully informed of the conditions they must meet to be reinstated. In the present case, the Respondent denied the Union's December 23 offer to return to work, claiming that the Union had not accepted the Respondent's conditions. However, we find that the Respondent had not clearly and fully set forth those conditions. Instead, as explained below, the Respondent presented the Union with unclear and changing conditions that, in our view, became a "moving target." Under these circumstances, the Union could not intelligently evaluate its position and obtain reinstatement. The Respondent therefore violated Section 8(a)(3) and (1) by refusing to reinstate the drivers after the Union's December 23 offer to return to work.

2. "Operational changes" condition

One of the Respondent's conditions for reinstatement was that the Union accept "operational changes" the Respondent had made since the strike. The Respondent first made this demand during negotiations on July 19, a few weeks after the strike. In response, the Union asked what changes had been made. The Respondent initially claimed that that information was "not relevant." When pressed, the Respondent gave the Union a partial verbal list of the changes, but emphasized that the list was not complete and was "off the top of [Director of Operations Mike Joseph's] head."[15] The Respondent told the Union that the list would "keep changing in the coming weeks

[14] In denying enforcement in *Ancor Concepts*, the court did not reject the principle that locked-out employees must be able to intelligently reevaluate their position. Significantly, although the court disagreed with the Board's interpretation of, and reliance on, certain facts, it found that the employer clearly conveyed to the employees why it was not willing to take them back.

[15] Although some of the changes on the partial list had been discussed prior to the strike, in negotiations over the new plant transition, the Union's business representative testified that other changes listed by the Respondent had not previously been discussed.

and months." According to the Respondent's July 19 bargaining notes, the Respondent also told the Union that there were various reasons for the changes; some were "driven by the transition, some of it because the transition has been on an expedited basis under the Plan B that was forced on us, other changes by other things . . . ."[16]

On September 13, the Union made an information request seeking, in part, a description of "[a]ll operational changes implemented by the Company since June 27, 1999 up to the present date including, but not limited to, those changes implemented as a result of the Company's move to the Franklin facility." There is no evidence that the Respondent provided this information before the Union's December 23 offer to return to work.

On December 23, the Union made its written offer to return the locked-out drivers to work, offering the same assurances against further work stoppages that had been offered by the individual drivers reinstated in July. The Respondent did not accept the Union's offer. Instead, on December 27, the Respondent sent a letter to the Union claiming that there were "a number of changed circumstances in recent months" that "may impact our position regarding a return to work for the employees locked out." The Respondent listed "[c]ontinued operational changes tied to the new plant" as one of the changed circumstances, but did not specify what those "continued" changes were. Moreover, the Respondent's letter went beyond simply demanding acceptance of those changes and suggested, without further explanation, that the locked-out drivers did not yet have "proper training" and therefore were not even qualified to perform work at the Respondent's "new operation."

[16] The Respondent argues that in a July 21 memorandum, it limited its demand to acceptance of whatever operational changes were not "inconsistent" with its prestrike contract offer. However, the Respondent still did not explain the full array of changes it had made that it considered "consistent" with its contract offer. Moreover, even if the Respondent had done so, and was demanding acceptance only of clearly-delineated operational changes that it had proposed prior to the strike, the Respondent has offered no reason for imposing this condition only on the drivers for whom the *Union* was negotiating reinstatement, and not on the individual drivers reinstated during the Respondent's direct dealing meetings in July. The Respondent stated that it was concerned about potential grievances over the operational changes. However, the Respondent, in its one-on-one meetings with the individually reinstated drivers, did not demand that those drivers agree not to challenge or grieve the changes. Indeed, the evidence suggests just the opposite. The Respondent prepared a written, internal series of questions and answers to guide its discussions during those one-on-one meetings. The only reference to "operational changes" is the following statement: "Until you are allowed to return to work, we are permitted by law to make legitimate operational changes that may not comply with certain seniority procedures. After you return to work, things will go back the way they were."

It is in this context that the Union sent its December 28 response, stating that the operational changes might be subject to further negotiations, but had "nothing to do" with the offer to return to work. Under these circumstances, we reject the Respondent's argument that it lawfully refused to reinstate the drivers because the Union's December 28 letter rejected the operational changes. The Union's letter stated that operational changes were appropriate for future bargaining. Therefore, the letter is consistent with a finding that the Respondent had not yet given the Union a full and complete description of the changes that had been made. Even if the Union's letter was an express rejection of the demand that the Union accept the changes, under the principle of *Eads*, the Respondent cannot deny reinstatement on the basis that the Union failed to meet a condition that was never clearly explained.

3. Assurances against work stoppages and other conditions

Also as a condition of reinstatement, the Respondent demanded that the Union give some type of assurance against further work stoppages. In its December 23 letter, the Union gave such assurances. It offered the same assurances given by the individual drivers whom the Respondent had reinstated through one-on-one meetings in July. In response, however, the Respondent obfuscated the "work assurances" condition and even appeared to add new conditions for reinstatement.

For example, the Respondent's December 27 letter claimed that "changed circumstances . . . may impact our position regarding a return to work . . . ." The Respondent's letter described "just a few" of these changed circumstances. In addition to the "continued operational changes" mentioned above, the alleged changed circumstances affecting reinstatement included the following: "[v]arious union and employee unfair labor practices," "[v]arious union and employee criminal acts," "[h]iring of replacement workers who are already trained to work in the new operation," and "[c]hanges in relative bargaining strength as a result of the failed strike." In the same letter, the Respondent raised several additional issues: (1) that the Union's December 23 offer did not offer any "collateral" or "meaningful remedy" if the Union failed to live up to its promise to refrain from unannounced work stoppages; (2) that the locked-out drivers "have not had proper training for the new operation"; (3) that the Union's offer "comes right before the holidays" and the Respondent's "Y2K adjustments"; and (4) that the parties were "operating in a unique fact and legal situation."

Furthermore, when on February 4, the parties met to discuss the reinstatement issue, the Respondent distributed a memorandum stating that "nothing in the union's

recent correspondence reasonably permits or requires" reinstatement of the locked-out drivers. The memorandum then made the Respondent's demands even more unclear by raising numerous additional issues that would need to be addressed before the reinstatement issue could be resolved. Among other things, the Respondent questioned whether the Union or the drivers it represented "might be lying" in giving their work assurances, how the Respondent could be sure the Union would not "secretly authorize" a wildcat strike, whether the Union would post a bond to secure its promise against unannounced work stoppages, and whether the individual drivers would provide "security" or a "meaningful remedy" against work stoppages. This February 4 memorandum was the Respondent's last communication regarding conditions for reinstatement.

4. Conclusion

As the judge recognized, a fundamental principle underlying any lawful lockout is that the union may end the lockout, and return the employees to work, by agreeing to the employer's demands. Therefore, the union must be fully informed of those demands. See *Eads*, supra at 712 (locked-out employees must be able to "knowingly reevaluate their position and decide whether to accept the employer's terms").

In the present case, we agree with the judge that the Respondent failed to give the Union a clear set of conditions for reinstatement. The Respondent imposed the "operational changes" condition without fully explaining what the operational changes were. Furthermore, after the Union's December 23 offer of assurances against further work stoppages, the Respondent, in its December 27 and February 4 correspondence, continued to revise its demands on that issue. Finally, the Respondent's December 27 letter listed new conditions, aside from reasonable work assurances and acceptance of the operational changes, that "may impact our position regarding a return to work." In short, the Respondent's conditions for reinstatement became a "moving target." Because the Respondent's demands were unclear, the Union was unable to intelligently evaluate its position, and therefore was powerless to end the lockout and obtain reinstatement of the drivers. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the locked-out drivers on and after December 27.

ORDER

The National Labor Relations Board orders that the Respondent, Dayton Newspapers, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that they will lose their jobs if they strike.

(b) Telling its employees that General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Union), has cost them their jobs by calling a strike.

(c) Encouraging its employees to rid themselves of the Union by implying that they cannot be returned to work from a strike while the Union and its business agent represented them.

(d) Placing its employees in layoff status, and failing and refusing to recall them, because they have engaged in a strike.

(e) Failing and refusing to reinstate economic strikers in the absence of a legitimate and substantial business justification.

(f) Failing and refusing to pay its employees placed in layoff status bonuses owed pursuant to a "stay to the end" package agreed to with the Union.

(g) Bypassing the Union and dealing directly with its unit employees with regard to waivers of their right to engage in a strike.

(h) Failing and refusing to reinstate its locked-out employees following the Union's December 23, 1999 offer to return to work, without giving the Union clear conditions for reinstatement.

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

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

(a) Within 14 days from the date of this Order, offer James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to replace them, so long as positions exist that have not been filled by Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann (collectively, the "locked-out employees"). In the event that, following the discharge of replacement employees and the reinstatement of the locked-out employees, there are not enough remaining positions available for James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert

Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen, they shall retain their recall rights as they existed on June 27, 1999.

(b) Make James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen 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 the decision.

(c) Make James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen whole for all benefits they were owed under its "stay to the end" package, including the $10,000 bonus, with interest as set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, unlawful failure to reinstate, unlawful failure to recall, and the unlawful denial of the "stay to the end" bonus, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs, failure to reinstate, failure to recall, and bonus denial will not be used against them in any way.

(e) Within 14 days from the date of this Order, offer Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to replace them**.**

(f) Make Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann 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 the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to reinstate Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann, and within 3 days thereafter notify each of them in writing that this has been done and that the failure to reinstate will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Dayton and Franklin, Ohio, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 1, 1999.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

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

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

[17] 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees that they will lose their jobs if they strike.

WE WILL NOT tell our employees that General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Union), has cost them their jobs by calling a strike.

WE WILL NOT encourage our employees to rid themselves of the Union by implying that they cannot be returned to work from a strike while the Union and its business agent represent them.

WE WILL NOT place our employees in layoff status, and fail and refuse to recall them, because they have engaged in a strike.

WE WILL NOT fail and refuse to reinstate economic strikers in the absence of a legitimate and substantial business justification.

WE WILL NOT fail and refuse to pay our employees placed in layoff status bonuses owed pursuant to a "stay to the end" package agreed to with the Union.

WE WILL NOT bypass the Union and deal directly with unit employees with regard to waivers of their right to engage in a strike.

WE WILL NOT fail and refuse to reinstate our locked-out employees after the Union's offer to return them to work, without giving the Union clear conditions for reinstatement.

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, within 14 days from the date of the Board's Order, offer James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to replace them, so long as positions exist that have not been filled by Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann (collectively, the "locked-out employees"). In the event that, following the discharge of replacement employees and the reinstatement of the locked-out employees, there are not enough remaining positions available for James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen, they shall retain their recall rights as they existed on June 27, 1999.

WE WILL make James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL make James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen whole for all benefits they were owed under our "stay to the end" package, including the $10,000 bonus, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff, failure to reinstate, failure to recall, and denial of "stay to the end" bonuses to James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs, failure to reinstate, failure to recall, and bonus denial will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, offer Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employees hired to replace them.

WE WILL make Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to reinstate Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thompson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann, and WE WILL, within 3 days thereafter, notify

each of them in writing that this has been done and that the failure to reinstate will not be used against them in any way.

DAYTON NEWSPAPERS, INC.

Donald A. Becher, Esq., for the General Counsel.
James M. Hill, Esq. (McNamie & Hill Co., L.P.A.), of Beavercreek, Ohio, and *Brett Thurman, Esq.*, of Dayton, Ohio, for the Respondent.
James R. Doll, Esq., for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. At 10 p.m. on Saturday, June 26, 1999, General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 957, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Union), struck and picketed Respondent Dayton Newspapers, Inc., for 24 hours. As a result of this brief strike, the complaint alleges, Respondent laid off and did not recall many of its drivers, withheld benefits from them, and committed other acts in violation of Section 8(a)(3), (5), and (1) of the National Labor Relations Act. Respondent denies that it violated the Act in any manner.[1]

Jurisdiction is admitted. Respondent, a corporation, with its principal office and place of business in Dayton, Ohio, is engaged in the publication of the Dayton Daily News, a daily newspaper. During the year ending March 24, 2000, Respondent derived gross revenues in excess of $200,000, subscribed to various interstate news services, including the Associated Press, published various nationally syndicated features, including Blondie, and advertised various nationally sold products, including automobiles manufactured by General Motors Corporation. I conclude that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Union has for over 40 years represented Respondent's drivers who deliver its newspaper, either the finished one or different sections, such as preprinted advertisements or comics, to branches or distribution centers throughout the Dayton area that are put together and delivered by individual carriers who are independent contractors. Some drivers also deliver papers to hospitals and convenience stores. Respondent has recognized the Union as these employees' exclusive representative in successive collective-bargaining agreements, the most recent of which was effective by its terms from January 28, 1996, through November 15, 1998, and contained a provision that guaranteed the lifetime employment of 13 drivers. I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

In the spring of 1998, Respondent advised the Union that it intended to build a new facility in Franklin, Ohio, about 18 miles from where its 50–60-year-old building in downtown Dayton, with 30-year-old presses, was located. That facility was well past its prime. The paper was published on many floors, and access to the loading docks was through a narrow entrance to the interior of the building, which limited the loading of newspapers to 12-foot trucks. The new facility was to be "state-of-the-art," enabling newspapers to be loaded into 45-foot trucks and distributed to the same centers as before, but requiring many fewer drivers because of the increased capacities of the larger trucks. As a result, Respondent advised John Burns, the Union's vice president and business representative, that 13 drivers who had the least seniority, not another 18 drivers, including those who were guaranteed their jobs, would be laid off. However, to induce those drivers to remain as employees until they were no longer needed, in October 1998 Respondent offered all full-time employees and part-time employees with more than 1 year of service a "stay to the end bonus" of $10,000 or training for an "A" class commercial driver's license (CDL), which would be required to drive the larger trucks and the dollar difference between the cost of that training and $10,000. Part-time employees with less than 1 year of service were offered the same kind of bonus, but a reduced amount of $2500. The offer stated:

> This offer is contingent upon the employees staying actively at work, and in good standing, until their release date. Release dates will be determined periodically, by seniority, based on operational needs and the transition schedule. As now planned, release dates should be in July, 1999.

Burns was advised of this offer and not only did not oppose it but also appears to have agreed to it. On January 18, 1999, Respondent's then human resources director, Madolyn Mumma, advised Burns that Respondent would begin layoffs of employees starting on April 15, 1999, and that additional layoffs were expected, on dates yet to be determined, throughout the rest of the year.

Negotiations between the parties for a new agreement began in August 1998. When and why the otherwise cordial relationship between the parties over many years deteriorated is not wholly clear. The presence of Brett Thurman, Respondent's general counsel and soon-to-be human resources manager, at the negotiating table was not especially welcome because, by his own admission, he "pissed people off." He was replaced by Joseph, who tried to keep him quiet. Thurman clearly showed his distaste for the Union. He complained that the dealings began to deteriorate in 1996 when Respondent attempted to change the way it dealt with its Unions (Respondent dealt with other unions, including a different local of the Teamsters, representing other groups of employees, and the Union, which represented five other units). Those other unions agreed to work with Respondent, but the Union balked. The Teamsters were "pretty proud of the fact that they're different." They "routinely made fun of the other Unions. Called them pussy's and John Burns said you want us to be your hay boy." "[T]the

[1] This case was tried in Dayton, Ohio, on August 7–9, 2000. The Union filed its charge in Case 9–CA–36894 on July 7 and amended it on July 23 and November 29, 1999. The Union filed additional charges on August 12, 1999 (Case 9–CA–36981), and February 8, 2000 (Case 9–CA–37385), the latter being amended on March 16, 2000. The second consolidated complaint was issued on March 24, 2000, and subsequently amended. The allegations of the complaint are supported by duly and timely filed charges, and I reject each of Respondent's contentions, repeated throughout its brief, to the contrary.

Teamsters were just not going to take what the other Unions had agreed to." Thurman noted that he had collective-bargaining agreements with nine of the ten non-Teamsters unions representing Respondent's other employees. Although the Union "didn't stand in the way of everything . . . they certainly didn't cooperate on everything either." He complained that the Union had filed "probably fifty labor board charges . . . in the last two years" and that he anticipated "the possibility of harassment type lawsuit. Not because they really thought they could win but because it would be a way to harass us." He complained of a loud Teamsters' demonstration which had taken place outside Respondent's facility in November 1998. He complained that the Union's leadership was "holding the employees hostage against their will." I discredit Thurman's denial that he bore no "anti-Union animus."

Burns, the Union's chief negotiator, testified that the defining moment in the sour relations between the parties came in late November 1998 when he and Newspaper Manager Mike Joseph agreed, at a session at which Thurman was not present, to resolve the issues that separated them and he agreed to schedule a ratification vote for the members. But, when he received what Joseph wrote, the document was completely inconsistent with what Joseph had promised; and Burns never let the members vote. Joseph seemed to think that what he wrote was exactly what he had offered, and I credit him. What apparently upset Burns so much was omitted in a letter he sent to Joseph shortly after this incident, never complaining that Joseph went back on his word. Indeed, Thurman offered to let Burns pick any offer that Respondent had made on any of the points of contention and schedule a ratification vote. Burns never did that, either, indicating that he understood that he had made a bad deal at the bargaining table. And so I find that what Burns was complaining about was simply not true. On the other hand, Burns apparently realized that what he had agreed to with Joseph would not be ratified and decided to save face by not offering the tentative agreement to the drivers. Whether that alone was what changed the manner in which the parties dealt with one another may be debated. The result was apparent. Burns complained

> on several occasions, Mr. Thurman would look directly at the—the members of the Bargaining Committee who were the Union stewards and refer to John Doll [the Union's counsel] and I and say these guys are not on your side, they're not helping you. They're leading you down the primrose path. If you follow them, you will go down in flames along with them. Your Union is—does a poor job of representing you.

In early June 1999,[2] during a meeting called by Respondent to discuss with the drivers the transition to the new Franklin facility, driver Tim Hehemann asked about the status of negotiations. According to Hehemann, Joseph complained that he had quite a bit of trouble with Burns and Doll: "he didn't have much use for them, and they were leading us to our own demise." Hehemann said that matters were serious: the Union had taken a strike vote, and the strike could take place at any time. Joseph said that the drivers did not want to do that: "you won't be working here any more, and that would be it for you." One other witness, driver Terry Glueckert, testified to this on behalf of the General Counsel; but he recalled only that the subject of contract negotiations did arise and that an employee advised Joseph that a strike vote had been taken. Glueckert denied that Joseph threatened that employees who struck would be fired, but recalled that Joseph was not happy hearing about the strike vote and said that it would be a mistake. One would think that, at a meeting of drivers, someone would have been able to corroborate Hehemann's testimony and that, if a direct threat had been made, that would certainly be remembered. On the other hand, Joseph never directly denied that this occurred.

Although the Union had taken a strike vote in May, a fact that Respondent certainly expected because it had contingency plans in place in case there was a strike, the Union never advised Respondent of when it would call a strike. Its strike on June 26 was without notice and caused a flurry of activity among Respondent's management. Simply put, a newspaper is a perishable, which loses its value unless it is distributed timely to its readers. Especially on Sundays, it is important that the paper be delivered early. No one likes to read the Sunday paper that evening. So Respondent put its contingency plans into effect, using alternate means to distribute its paper, and that was for the most part successful, although some distribution was late. No advertiser made a claim for a return of its costs, however; but the impact of repeated "quickie," unscheduled strikes, without notice, was surely of the utmost concern to Respondent.

That showed when Joseph arrived at the picket line at Respondent's downtown facility and threatened Hehemann that the Union had just cost the strikers their jobs. "These guys [the Union representatives] just cost you guys all—cost all you guys your jobs," Joseph said, according to Union Business Agent Ellis Wood. Business Agent Fred Romine essentially corroborated Wood's recollection. Hehemann's somewhat different recollection of Wood trying to intervene on his behalf, and Joseph stating to Wood, "So you're the son-of-a-bitch responsible for the drivers losing their jobs" is not really substantial, because the import of Joseph's statement was the same. The Union called the strike, and the result of that strike was that Hehemann and the strikers were going to lose their jobs. Respondent tried to justify this blatant threat that the strikers had lost their jobs, repeated by Joseph to Burns in the presence of driver Brian Acton at the Penske lot where Respondent parked its trucks, with a convoluted explanation of Joseph's thought processes to explain what he remembered saying, "You're putting people at risk," which, even if I believed his testimony, which I do not, might also be considered threatening. That is unavailing. Whether Joseph's comments violated the Act must be evaluated by an objective test of what a reasonable listener would hear, *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733 (4th Cir. 1998); *Multi-Ad Services*, 331 NLRB 1226, 1228 fn. 9 (2000); and what was heard was clearly the announcement that, by engaging in a concerted, protected activity, a strike, the drivers had lost their jobs. Finally, Joseph never denied his conversation with Burns directly, but testified only that he might have had a conversation with Burns, but "with everything that was going on" and his admission that "there was no

[2] All dates are in 1999, unless otherwise indicated.

sleep that entire period," he did not "really recall." I find that Joseph made these threats.

The following morning, June 27, Burns, having exercised his muscles in attempting to stop the paper's distribution, notified Respondent that the Union was advising its member-drivers to return to work at 10 p.m. that evening. The drivers who had been scheduled to work on Saturday night were primarily (with two or three exceptions) the ones with the least seniority, and so were the ones who were scheduled to be laid off and not transferred to Franklin in any event. When those drivers returned, as well as other drivers who had not been scheduled to work the 24 hours of the strike, Respondent refused to permit any of them to work (with the exception of three who had crossed the picket line the night before), wanting time, Respondent contended, to understand the ramifications of the Union's stoppage. But the employees' recollections were different, with Joseph clearly stating that their loss of work opportunities was caused by Respondent's not wanting to deal with the Union. Thus, Joseph told Hehemann that the Company was "not in need of 957's services" and that Joseph would contact him when or if he was to work again. When Hehemann restated his desire to return, Joseph said that the problem was not with him as a driver; but, as long as the Union and Burns represented him, Joseph could not see how the problem could be resolved. Joseph repeated to each driver as they arrived for work that evening the same statement—that "957's services" were not needed. Hehemann's testimony was essentially corroborated by Glueckert and driver James Lawson. Joseph substantially admitted that he said that the Union's services were not needed at that time; and, although Mumma denied much of this testimony, she also conceded that she was tired at that time and that she could not recall much of what was said. Finally, I note that, when Joseph telephoned driver Brian Acton the next day, Joseph repeated that Respondent no longer needed the services of "Local 957 drivers."

Joseph's statement to Hehemann on June 27 that Joseph could not see how the problem could be resolved as long as Hehemann and, by implication, the other drivers were represented by the Union constituted an inducement to rid themselves of the Union, in violation of Section 8(a)(1) of the Act. Implying that employees could wind up in better work circumstances if they rid themselves of their bargaining representative violates the Act. *Marshalltown Trowel Co*., 293 NLRB 693, 697 (1989). Joseph's statement to Hehemann that the Union's strike had cost the employees their jobs constituted an unlawful threat of discharge for engaging in a strike. Because I found Hehemann (who was not credible in denying that picketers blocked ingress and egress of trucks on the night that the strike began) more credible than Joseph in his testimony about these events, I similarly credit the final allegation involving Joseph's threat at the June meeting that, if he struck, he would not be working for Respondent anymore. I note, particularly, that what followed the June meeting was the very fact that Joseph threatened: the strike did result in the loss of the employees' jobs. Indeed, his earlier comments about Doll and Burns leading the employees to their own demise implied that, if the employees abandoned the Union, they would have no more problems. I thus conclude that Respondent committed these additional violations of Section 8(a)(1) of the Act.

Respondent, having rejected the attempts of various employees to return to work on Sunday night, continued in operation utilizing its contingency plans. It also followed up with correspondence. On July 1, Thurman wrote to Burns, declining his offer to return to work, noting: "We cannot meet the needs of our readers and advertisers on a reliable basis under the offer you have made [for reinstatement] and therefore must continue under the operational plan adopted since the strike began . . . ." He added that "due to recent events, we have been forced to make a number of changes to our operation"; and, "[a]s a result of these changes," Respondent placed on unpaid leave the 18 drivers (including those guaranteed employment), who were the ones slated to be transferred to Franklin, stating to them that Respondent "had retained an alternate source for delivery of its newspapers until we receive an acceptable commitment from [the Union] to make our deliveries without disruption. Therefore, work will not be available to drivers unless they can be relied on." Respondent also laid off the 13 employees who were not going to be transferred to the new Franklin facility, by seniority: Lawson, Jack Truxel, Steve Watkins, Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan, and Thomas Dineen. There was no mention in that letter that the Union could make any "acceptable commitment" to ensure their recall.

In addition, on or about June 30 or July 1, Joseph began calling the 18 drivers on unpaid leave to ask them to meet privately with him. Many agreed to do so; some did not. Those one-on-one sessions with Joseph, without notice to the Union, were held with the purpose of reinstating the drivers, conditioned on their personal promise to work steadily. Employees were asked if they would work despite the fact that there was a picket line. Those who answered that they would were seen by Stan Richmond, Respondent's vice president of operations, who exacted the same promise. Drivers, such as Gerald Kratzer, made the commitment that Joseph sought. About six or seven were taken back. Others, such as Peter Thomson, Kenneth Marshall, and Dale Dorsten, were asked for their commitment not to cross the picket line and refused to give that commitment. Some explained that they were members of the Union and would have to follow the Union's direction. They were not offered employment. On July 9, Respondent followed up with 7 of the 18 drivers who had not waived their right to strike that they remained on unpaid status until they gave "proper work assurances."

In making these findings, I have rejected Joseph's testimony that he did not discuss strikes or work stoppages with any of the drivers and that the subject of a potential picket line arose only in a conversation with one employee. Directly contrary to Joseph's testimony are forms that Respondent filed when the employees made claims for unemployment benefits, declaring that employees were put back to work if they promised to report to work on a reliable basis and would not engage in intermittent work stoppages. The reason that Respondent set up these meetings was to get its drivers to return to work and to make deliveries without disruptions, as Respondent stated in its

July 1 letters, and to work and deliver on schedule, as Joseph testified. I was not impressed with Joseph's denial that he was even aware that the Union had offered to return to work, especially because Thurman testified that Joseph had shown him Joseph's copy of the Union's June 27 offer to return to work.[3] Kratzer, in particular, had no reason to misstate the facts, because he was allowed to come back to work after meeting with Joseph and had resigned from the Union. Finally, drivers testified that dispatcher Mike Manzo attended their meetings, yet Respondent did not call Manzo or Richmond, whom Kratzer saw, to refute the testimony of the General Counsel's witnesses. I draw an adverse inference from that failure to call those witnesses.

Respondent's July 1 letter, replying to the Union's June 27 letter, stated, as quoted above, that Respondent had hired others to deliver its newspapers until it received "an acceptable commitment from [the Union] to make [its] deliveries without disruption." Respondent thus recognized that it was the Union, as the employees' exclusive bargaining agent, that had to give the commitment. Instead of dealing exclusively with the Union, however, Joseph presented Respondent's conditions—not to strike or to engage in a work stoppage, a waiver of the employees' Section 7 right—directly to the employees in individual meetings. Respondent was not, however, privileged to bypass the Union and negotiate with individual employees concerning such a condition, thereby driving a wedge between the employees and their representative,[4] threatening to erode the position of the Union, and impairing the employees' enjoyment of the benefits of their collective strength and bargaining power. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975); *NLRB v. Triple A Fire Protection*, 136 F.3d 727, 735 (11th Cir. 1998). I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

Contrasted with Respondent's treatment of the 18 drivers placed on unpaid leave, Joseph did not contact the 13 drivers placed on layoff about any one-on-one meetings to see if they would give assurances that would allow them to return to work, nor did Respondent send them letters about how they could get their jobs back. It will be remembered that the 13 drivers comprised the majority of those who struck on June 26. When they ended their strike and requested to return to work, Respondent had not replaced them, except to the extent that their work was being performed by Vance International Companies (Vance), the company that Respondent had retained to hire drivers and security as part of its contingency plans in the event that there was a strike. Respondent does not contend that those drivers employed by Vance were permanent replacements; yet Respondent first threatened on the evening of June 27, when the drivers reported to work, that it was not going to use any of the drivers represented by the Union. It was 4 days later, on July 1, that Respondent first advised the Union that it was laying off the 13 drivers, at which time Respondent was still using Vance to deliver the papers. There was no proof that any of their jobs had been abolished during the strike or the succeeding 4 days.

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Court wrote:

> Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. § 152(3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the 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 §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U.S.C. §§ 157 and 163). Under §§ 8(a)(1) and (3) (29 U.S.C. §§ 158(1) and (3)) it is an unfair labor practice to interfere with the exercise of these rights. 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. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.* It is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." Id., at 33–34. See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228–229, 235–236 (1963).

An employer's unlawful refusal to reinstate economic strikers is conduct so inherently destructive of employee rights that evidence of specific antiunion motivation is not necessary to establish a violation of the Act. *NLRB v. Great Dane Trailers*, supra; *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Respondent contends that it did not discharge the 13 employees, but merely locked them out. Implicit in a lockout is the possibility that, if the Union acquiesced in some conditions that Respondent imposed and the underlying labor dispute were resolved, the employees would get their jobs back. *Eads Transfer*, 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993). But there is no such evidence here. Respondent continued to use drivers supplied by Vance until at least September 19, according to Respondent's records, and into October, according to Charles Rinehart, Respondent's senior vice president. Despite Thurman's concession that the 13 drivers had recall rights under the collective-bargaining agreement, Respondent did not recall or attempt to recall them as positions became available. Rather, on July 11, with these 13 employees on layoff, with recall rights (so Thurman testified) under the expired collective-bargaining agreement, Respondent adver-

[3] I was also unimpressed by Joseph's repeated denials that he was Respondent's principal spokesman at negotiations and that, the night of the strike, after being told that there was a strike going on, he approached Hehemann and some of the union representatives, all wearing signs, and asked, "What's going on?" because he "needed some verification of what was occurring."

[4] Dorsten testified:

> I kind of told him [Joseph], you know, I go I feel like I'm—we're like a pawn in between the Company and the Teamsters. I go if I agree to come back to work, I'm turning against the Teamsters, and if I go with the Teamsters, I'm turning against the news. And he goes, you're right. He goes, I get paid, John gets paid, but you're not going to get paid as long as you're out.
>
> And, you know, I go, that's just not right, you know. And he, well, that's the way it is. He goes it's like Thanksgiving, you're the wishbone.

tised for full-time CDL and class A drivers, offering them signing bonuses. As of July 12, Respondent began to accept applications for drivers. Two were hired on July 21. Two others were hired on July 23 and 29. By February 2000, Respondent had hired 11 new drivers.

Respondent contends that these 13 employees were always subject to recall and that the replacements for them were never intended to be permanent. Respondent did hire two of them, Fleming and Smith, but they first had to quit their employment and then assure Respondent that they would not engage in any strike. Thus, Thurman wrote that

> Drivers currently laid off are eligible for recall only by seniority. You cannot hire someone who is already hired and eligible for recall. This person can be rehired, however, if they quit the company. They will lose their seniority, although that may not mean anything in the future.

He wrote that all applicants, including laid-off drivers who quit and reapplied, are not permanent replacements. Thurman advised Joseph that the hiring could change the ways of the expired collective-bargaining agreement, because seniority would no longer matter; and the "replacement workers (whether re-hired, [like Fleming and Smith] or new employees) would keep their jobs even if the current situation one day were to end." Thurman wrote a memorandum to Joseph, in preparation for his one-on-one meetings, which Joseph never used, stating that, as of July 14, "the replacement workers will not displace any employee who can be trusted to show up for work as scheduled . . . although that can change later on."

But there was little that showed that the replacements were not permanent and were merely temporary. On Respondent's hire forms, there were boxes for regular and temporary employees. None of the forms "temporary" designations were filled in, although Thurman explained that "temporary" really meant that the employee was hired to work a specified period of time. More to the point, Respondent never called any of the people involved in the hiring, either its managers and supervisors, or the employees themselves, to prove the nature of the relationship that resulted from their employment, from which I draw the conclusion that their testimony would not have favored Respondent. As a result, I conclude that the replacements, at least on this record, were permanent as to the laid-off employees, although they might have lost their jobs to those guaranteed jobholders who committed to working and not striking.

Whatever doubt there may have been about the status of the laid-off employees was resolved by the following incident: On July 22, Respondent published in its newspaper an article about the fact that the Teamsters intended to launch a boycott against the newspaper. In the article, the paper's publisher, Brad Tillson, was quoted as saying that "the laid-off drivers would return once the company was assured that they would not disrupt business." Thurman immediately clarified that article. He wrote to Burns the same day that:

> Something got lost in the translation in today's newspaper article. There is no change in our position. The layoffs are unconditional, and are based solely on the changes in our operation since the strike. Assurances regarding disruptions will have no effect on the layoffs, but are important concerning employees who have not been laid off.

As a result, I find that, under *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999), Respondent's hiring of permanent replacements is inconsistent with a lawful lockout. But, no matter what the status of their replacements, these 13 drivers were permanently laid off, which is the equivalent of a discharge. There was nothing that they could do and no assurance that they could give that would enable them to get their jobs back. Because they were not locked out but permanently laid off because they had struck or might strike, their layoff was unlawful. See, e.g., *Jo-Del Inc.*, 324 NLRB 1239, 1244 (1997); *National Fabricators, Inc.*, 295 NLRB 1095, 1096 (1989). Moreover, because they were not a part of the lockout, they should have been recalled to employment prior to Respondent's hiring of employees from the street as required by *Laidlaw*; *Ramada Inn*, 201 NLRB 431, 436–437 (1973); *Daniel Construction Co.*, 264 NLRB 569, 606–607 (1982), enfd. 731 F.2d 191 (4th Cir. 1984); and pursuant to Respondent's contractual requirement to recall them.

Respondent contends that the 13 drivers were due to be laid off, and that is undoubtedly true. Thurman testified that the drivers who struck were the "ones who were about to be laid off in a couple of weeks," and Thurman gave the Union notice that Respondent was to stop using the printing presses at the Dayton facility after August 28, at which time Respondent would no longer need its smaller trucks to enter into the narrow entrance to the downtown building. But it is also true that their layoff dates were permanently and irrevocably accelerated only by reason of the fact that they engaged in a protected activity. Had they not, Respondent would probably have laid them off in due course, but certainly not on June 27. So, on that day, possibly four days later, July 1, the 13 were discharged, because there was nothing that they could do to get their jobs back, except, as in the case of Fleming and Smith, to resign from the job and then reapply as a new employee, without seniority, thus permitting Respondent to avoid the obligation of recalling them. It is hornbook law that an economic strike is deemed to be Section 7 protected and concerted activity, and it was an unfair labor practice for Respondent to discharge these employees for engaging in their strike. *E.g., NLRB v. U.S. Cold Storage Corp.*, 203 F.2d 924 (5th Cir. 1953), cert. denied 346 U.S. 818 (1953). Respondent's discharge is conduct so inherently destructive of employee rights that evidence of specific antiunion motivation is not necessary to establish a violation of the Act. *Laidlaw Corp.*, 171 NLRB at 1369.

Respondent, faced with the possibility of more "quickie" strikes, was entitled to change its production plans to meet the threat of the Union's actions. The original transition plan contemplated that the layoff of drivers would begin on a staggered basis once the newspaper began to be printed at the Franklin facility. Respondent started some of the production at the Franklin facility ahead of the schedule that it had originally planned, but how much affected the trucking work is difficult to establish on this record. As of July 6, the transfer of at least some printing was still not to occur until July 19. On August 9, Thurman stated at negotiations: "We are not at the end yet, in

terms of switching 100 percent of the main sheet down to Franklin." At least some printing continued at the Dayton facility until August 28. Nonetheless, Respondent claims that it had a valid and legitimate reason for not recalling the drivers because they did not have the proper credentials for driving the new, longer trucks.

Thurman's claim is inaccurate, because there is no evidence that a class A endorsement was required for the work that was performed on June 27. Respondent did not completely shift over to trucks requiring a class A license until mid-August at the earliest. Thurman's testimony was contradicted by Joseph, who testified that whether or not a driver had a class A license was not a concern, because Respondent's "fleet was not made up of exclusively Class 'A' trucks." Furthermore, Thurman acknowledged that he did not even know whether the laid-off drivers has class A endorsements, although he did not think that they did. Hehemann, however, testified that he did. Respondent's own newspaper advertisements stated that it was looking to hire both drivers with a CDL license and drivers with class A endorsements and offered two separate levels of signing bonuses for each category of driver. Driver Jack Klause continued to work although he initially did not have the class A license. Others, Fleming and Smith, were rehired after first being given time to get their proper endorsement. For all these reasons, I conclude that Respondent had no legitimate and substantial business justification to lay off 13 of its drivers permanently and that Respondent violated Section 8(a)(3) and (1) of the Act by doing so.

The General Counsel contends alternatively that, even if Respondent's permanent layoff of the 13 employees is not inherently destructive of their rights, Respondent discharged them because of their support of the Union and their protected activity of striking. The General Counsel has established a prima facie Section 8(a)(3) case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Respondent displayed repeated animosity towards the Union and absolute outrage about the unannounced strike. Joseph did not want to rehire drivers who were represented by the Union. Joseph threatened that those who engaged in a strike would not work for Respondent any more and stated, at the time of the strike, that the Union was responsible for the employees losing their jobs. Most of the individuals who actually struck were these 13 employees, and the only reason that they were laid off was that they were "957 drivers" who had engaged in the protected activity of striking. The burden thus shifted to Respondent to show some nondiscriminatory basis for not reinstating or recalling them before Respondent hired permanent replacement drivers. Thurman's assertion that the primary reason for not allowing them return was their lack of class A licenses was false. This was not a factor in who was or was not reinstated or allowed to work. I thus conclude that the only reason that Respondent laid these drivers off permanently was that they engaged in concerted and protected and union activities and that Respondent violated Section 8(a)(3) and (1) of the Act.

It follows logically from these findings and conclusions that Respondent unlawfully refused to pay the bonus that it promised to the 13 laid-off drivers for staying until their release date. Respondent contends that the drivers did not satisfy the condition precedent, that they would stay until Respondent had made the transition under the initial plan, thereby obtaining for it the operational stability that was needed to make the transition. Thus, it argues that the bonuses did not achieve their desired objective, namely, to keep a stable, reliable work force. The bonus was not conditioned on a waiver of an employee's right to strike, Respondent contends that the reason that it withheld the bonus was not that the employees engaged in the 1-day strike. Rather, Thurman testified, it was the combination of missing one day unannounced and then not giving any reasonable work assurance afterward. The fallacy of his testimony, as we have seen, is that there was no assurance that the drivers could have given. Respondent's contention that the laid-off drivers did not work until the transition had been completed and that they did not work until the new facility opened is irrelevant. That was not what Respondent committed to. Respondent promised to pay them the bonus at such time that Respondent determined to release them, by seniority, based on its operational needs and transition schedule. The drivers were not to remain until the Franklin facility was completed. Respondent always contemplated that not all drivers would be laid off on the same day, but their layoffs would be staggered as their services were no longer needed. Thus, drivers would receive the bonus if they continued working for Respondent until Respondent laid them off.

Although Thurman conceded that Respondent would not have withheld the bonus because of the 1-day strike, anymore than if an employee had become sick for 1 day or taken a vacation, that in fact was what Respondent did. It was Respondent's unlawful discharge of them that determined that they had been released, and the bonus then became due. It was not paid solely because of the employees' Section 7 activities. Respondent's action was directly related to the strike. Respondent's notice to the Union stated that the "changes to our operation" resulting in the layoffs were "due to recent events." These "events" could be only the strike, except for Thurman's other contention, if not totally false, then partially so, that Respondent determined, because of its fear of more "quickie" strikes, to start production at the Franklin facility. That event, too, would result in Respondent no longer needing the 13 drivers and, under Thurman's alternate theory, they were no longer needed and were released. In such event, the bonus was due.

Because Respondent's conduct was "inherently destructive" of important employee rights, the right to engage in an economic strike, its conduct violated Section 8(a)(3) and (1) of the Act. *NLRB v. Great Dane Trailers*, 388 U.S. at 34; see *Texaco*, 285 NLRB 241, 245 (1987). In addition, Respondent violated Section 8(a)(5) of the Act because it reneged on its obligation to provide bonuses to employees upon their release by Respondent. It thus unilaterally changed the terms and conditions of employment without bargaining with the Union. *NLRB v. Katz*, 369 U.S. 736 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996),

cert. denied 519 U.S. 1090 (1997). Respondent's contention that it bargained with the Union is errant nonsense. It merely denied the existence of this liability, Thurman saying on July 19 that Respondent would pay it if forced to in a legal action.

The final allegation of the complaint relates to the employees—specifically Acton, Edgar Davenport, Dorsten, Martin Pulley, Thomson, Edward Wilke, Michael Howard, Marshall, and Hehemann—who were placed on unpaid leave. From the time that Respondent initially refused to reinstate them, as well as the others who returned to work after giving Respondent the assurances that it sought, the Union proceeded with additional unfair labor practice charges, one of which (Case 9–CA–36894) charged that Respondent "unlawfully locked out or unlawfully conditioned striking employees return to work on their assurance that they would not engage in additional strikes prior to the transition to the new facility, in violation of Section 8(a)(3) of the Act." On December 27, the Acting Regional Director dismissed that charge, finding that the Union would not agree to refrain from additional strike activity and that

> The Employer has established that it possessed a legitimate and substantial business justification for the lockout and for placing restrictions on the reinstatement of the economic strikers. *Bali Blinds Midwest*, 292 NLRB 243 (1988); *General Portland, Inc.*, 283 NLRB 826 (1987).

Additionally, the Acting Regional Director also found that Respondent did not unilaterally change the working conditions of the employees who held guaranteed jobs for life. Because they were placed on unpaid leave, they continued to retain their employee status and might return to work upon giving Respondent reasonable assurances "that they will not engage in future 'quickie' strikes." That was not deemed to be a violation of Section 8(a)(5), because it was a legitimate restriction on their holding their job. This decision was upheld on appeal on April 14, 2000.

As a result of the Acting Regional Director's dismissal, which the Union became aware of a number of days before, perhaps as early as mid-December, Doll, on December 23, on behalf of the Union and the individual drivers who had been locked out and had not yet been permitted to return to work, made

> an unconditional offer to return to work on the same terms and conditions and with the same guarantees and promises as those drivers the Company has permitted to return to work since July 1, 1999. To ensure that there is no misunderstanding about this unconditional offer, Local 957 and the individuals drivers locked out by [Respondent] and have not returned to work agree to return to work with the assurances that there would be no work stoppages, strikes or other slowdowns for the same period of time agreed to by the locked out drivers that the Company has allowed to return to work, and providing the same notification agreed to by those same locked out drivers that the Company allowed to return to work.

On December 27, Thurman replied in a lengthy letter that there had been a number of changed circumstances in the recent months that might impact Respondent's position regarding a return of the locked-out employees, among which,

> just a few of the more important changes:
> - We are now near completion of the transition to the new plant
> - Various union and employee unfair labor practices
> - Various union and employee criminal acts
> - The position taken in state court filings that the union has no control over, and no responsibility over the actions of, the employees in question
> - Hiring of replacement workers who are already trained to work in the new operation
> - Changes in relative bargaining strength as a result of the failed strike
> - Continued operational changes tied to the new plant

Thurman objected to the fact that the Union's unconditional offer was no different from the earlier June 27 offer, made before the lockout, and "We certainly would need to meet and discuss what is different about this 'unconditional' offer before we could act on it." Thurman asked, as an example, what the Union's position was regarding "all the operational changes tied to the new plant," conditions explained at the August 9 bargaining session that stand "separate and apart from the 'reasonable work assurances' issue." He complained that Doll's letter said nothing about whether the Union was offering "reasonable work assurances (such as reasonable advance notice, or assurances that unprotected/intermittent work stoppages are not being threatened)." He complained that the Union did not "offer anything at all as 'collateral' (or a meaningful remedy) should the promises made in your offer not be kept—obviously neither side at this juncture is willing to take very much on faith."

Thurman had more problems with the Union's offer: (1) that it came before the holidays and in the midst of Respondent's attempt to solve problems with Y2K adjustments, and Respondent's representatives involved in decision-making were not available at a moment's notice at that time of year; (2) that the employees for whom the Union had made the offer had not had the proper training for the new operation, and at that time of year it was very difficult to set up training programs so that they could provide services of any value; and (3) and that "we are operating in a unique fact and legal situation" that makes it unreasonable for Respondent to give an "instantaneous response."

Doll responded on December 28 that the changed circumstances were irrelevant to the offer to return to work. He complained that:

> The Company is still utilizing drivers to deliver its papers, these drivers who have not been allowed to return to work have the skills and abilities to perform that work and, up to your December 27, 1999 letter, were under the impression

that all they needed to do was make the same assurances as the drivers who have already been allowed to return to work.

Doll denied that there had been any criminal charges filed against the Union. He insisted that there had been only one criminal charge against one individual for one specific act. He stated that only one unfair labor practice charge had been filed against the Union since July 1 and none against an employee. Doll added that the unconditional offer had been made on behalf of the Union, that the operational changes at the new plant had nothing to do with the offer to return to work, that the Union would provide the same remedy as Respondent had required from the drivers who had been permitted to return to work, and that the drivers on whose behalf the offer had been made were "long-term, capable and efficient employees . . . and should have no trouble performing whatever assignments they receive."

Thurman wrote Doll on January 7, 2000, that he thought that exchanging additional letters was not going to get the parties anywhere and that they should meet later in the month to discuss the logistics involved in returning the guaranteed job holders to work. Doll objected on January 19 that there was no reason that the drivers should not be permitted to return to work immediately, but gave Thurman various dates, and the parties met on February 4. At that time, Respondent, distributing an internal memorandum to the Union, took the position that nothing in the Union's recent correspondence reasonably permitted or required the reemployment of the six guaranteed jobholders, as well as others, who by then had not yet been offered a return to work. Joseph and Richmond were afraid that the Union "might be lying" or "might just be wrong [by] making promises it cannot keep" or that the Union was objecting to any of the changes necessitated by the new plant transition. But Respondent was unsure of the validity of its legal position and wanted to find out from the Union:

1. How do we know that the union is telling the truth? Neither side, understandably, is taking much on faith from each other.
2. Some of the GJ [guaranteed job] holders in question point blank told Mike Joseph in person something very different than what the union is now representing on their behalf. Who should we believe, and why? If you are saying they have changed their minds, on what do you base that claim? What made them change their minds, and why should we trust them? What if they are lying?
3. The union signed an agreed court entry promising, in writing to a judge, that certain things would not be done by unit workers. Then when the promises were broken the union took the position that it has no control over, or responsibility for, the actions of the unit members it made promises about. The union also denied the promises were broken, even when there was *undisputed* testimony from several people (including a police officer) that the promise was broken—there *is* such a thing as a bad faith argument, this is one of them, and it directly affects our willingness to "take you at your word" on this matter. If the GJ holders break the promises the union is making, how do we know the union will not disclaim responsibility and control again, or drag things out by denying things no one is even disputing?
4. How can the union promise there will not be a wildcat strike from a worker? Isn't that something that only a worker can promise? There is a trust issue directly with them, also, based on what they have done and already told Mike. How do we get that information on a reliable basis, without breaking the law. What happens if that promise is broken? What if the union were to secretly "authorize" (or instigate through a trusted lieutenant) a wildcat, surprise quickie strike?
5. Could we terminate a GJ person who breaks the promises being talked about? What about if the action were otherwise protected activity under the Act, even though it is a breach of the promise? If we can, then was the GJ negated by the quickie strike? If not, then what can we do if we "are fooled twice?"
6. By returning to work, is the union agreeing not to challenge (for any reason?) the changes necessitated by the transition to the new plant? Will it withdraw its appeal of the Reg. Director's ruling on this issue?
7. Will the union consider posting a bond? What about some type of security (or meaningful remedy) from the individual GJ holders in question? If not, what is our remedy if once again, the union makes promises and the promises are later broken? Will you pay our legal fees for bad faith or frivolous defenses and arguments in any remedy proceedings?
8. Can we just make return to work, backpay, and other remedies part of the contract negotiations? That way when they return there will be a contractual no-strike agreement, and we are very comfortable with our remedies under federal law with such a contract. If you contend they cannot be combined, why not?
9. If there are some GJ drivers Mike/Stan trust and some they don't, AND the law does not permit this "trust based" differentiation, does the union agree we could just lock out all GJ who actually drive until a new contract is signed? If not, why not (where did the right to lockout [sic] go?) Also if not, see no. 5—you mean they can strike, but we can't lock out?
10. Our new offer might have mandatory buy-outs of GJs. What is the union's position on whether that is a mandatory or permissive subject, and why? If it is mandatory, and we agree to (or implement after impasse) a buy-out with an extra allocation that covers their economic loss during their time off, is the whole thing potentially moot?
11. What about the current lawsuit? If we reinstate with backpay (as per the **backpay** paragraph above), does the lawsuit go away, or will the union still pursue other remedies in court (backpay since 6-7-99, for example?) We hope you understand that a partial settlement of the court claims has little value to us, as is typically the case when settlement is based largely on "nuisance value." [Emphasis in original.]

Doll received this document. He did not answer the questions at the meeting, which broke shortly after Thurman's presentation. Although Thurman testified that Doll promised to answer this memorandum and never did, Burns' notes reveal that Doll said only that he would send Thurman "a written response to the extent necessary" and insisted that Respondent reinstate the drivers as soon as possible, and Thurman replied that he wanted the Union's "take on these things."

The complaint alleges that Respondent failed, in response to Doll's December 23 letter, to reinstate immediately the remainder of the 18 employees placed on unpaid leave. The complaint thus assumes, as I will, that the initial failure to reinstate the same employees in July did not violate the Act, notwithstanding Respondent's unlawful discharge of 13 of its drivers and its other unfair labor practices found in this Decision, and that, at least as of December 23, there was a lawful lockout in effect. Indeed, the General Counsel concedes that Respondent, due to the nature of its business, was permitted to lock out its drivers to achieve some assurance of the foregoing of future strikes and would have been privileged to condition the return to work of those individuals who were placed on unpaid leave on some limitation of the Union's ability to strike, be it until the completed transition to the Franklin facility or until the Union accepted its contract proposal. Accordingly, I will not consider the Union's contention that Respondent violated Section 8(a)(5) and (1) of the Act by placing the 13 guaranteed jobholders on "unpaid leave." That was not alleged in the complaint.

As found above, Respondent reinstated more than half of the drivers whom it placed on unpaid leave as a result of Joseph's unlawful one-on-one conversations in July, in which the employees conditioned their return to work on the commitment that they would continue to work without strikes and without honoring picket lines. It is that very commitment that Doll made in his December 23 letter; but, while Respondent willingly accepted the word of the individual drivers in July, it declined Doll's offer made 6 months later on behalf of the exclusive collective-bargaining representative of the drivers. I conclude that Respondent's failure to reinstate these economic strikers on their unconditional offer to return to work is inherently destructive of employee rights under *Laidlaw*.

Laidlaw instructs that an employer can only justify its failure to reinstate economic strikers "for legitimate and substantial business reasons." 171 NLRB at 1370. Respondent defends on the ground that the Union's word could not be trusted for a variety of reasons, among which are that a member, Robert Michigan, was convicted of carrying a concealed weapon, 2 days after the Union had agreed to an injunction against threatening violence on the picket line; that Burns testified that he had no control over a member's behavior at a picket line or even whether a member goes to a picket line; and that Burns had reneged on his agreement to let the membership vote on one of Respondent's contract proposals. Yet another of Thurman's doubts concerned the timing of Doll's offer of reinstatement, only after receiving notice of the dismissal of his unfair labor practice charge. I do not understand that doubt at all. Doll realized that the lockout was lawful and was trying to get the locked-out drivers reinstated.

Assuming, for the sake of argument, that Respondent had good reason to doubt Doll's commitment, Respondent never stated what conditions would satisfy it for the economic strikers to be reinstated. The principle of every decision of the Board dealing with a lockout is that it is a temporary withholding of employment opportunities in order for an employer to get something in return, for example, a contract, *Harter Equipment, Inc.*, 280 NLRB 597 (1986), enfd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (9th Cir. 1987); *Central Illinois Public Service Co.*, 326 NLRB 928 (1998), petition to review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000); or a commitment not to strike, *Bali Blinds Midwest*, supra. Respondent's presentation on February 4, quoted at length above, demonstrates that it had not the slightest idea of what it wanted from the Union. Although it may have been instructive for the parties to discuss ad nauseum the many questions asked and problems raised by Thurman, the Union had no obligation to participate in his musings and ramblings. Rather, Respondent was obliged to announce to the Union in a timely manner that it was locking out the employees and the purpose of the lockout so that the Union could evaluate its position "and decide whether to accept the employer's terms and end the strike or to take other appropriate action." *Eads Transfer*, 304 NLRB 711, 712 (1991). Without that input, the Union is helpless in obtaining the reinstatement to which the employees are entitled. See generally *I.T.T. Rayonier, Inc.*, 305 NLRB 445, 446 fn. 6 (1991). At that point, the lockout is no longer justifiable. It is instead a discharge, from which the workers lose their jobs, merely for engaging in a lawful protected and concerted activity.

In addition, Respondent's fears in February were not legitimate. By then, according to Respondent's brief, "more than half of the unit did in fact manage to climb over the 'work assurance' hurdle and return to work." Even had Respondent reinstated those who were denied their jobs, the Union had effective control over less than half of the drivers, hardly enough to instigate an effective job action. All this assumes that Respondent's distrust of the Union was accurate. I do not find enough in this record. The only arguably valid point is the failure of Burns to present Joseph's proposal to the membership for a vote. That was not what he agreed to. But merely because he broke his word on that occasion, with the legitimate excuse that the proposal would not have been approved by the membership in any event, does not mean that he will forever break his word, particularly when there is no other evidence that the Union ever violated its no-strike commitment under past collective-bargaining agreements for 40 years. Even the 1-day strike in June 1999 breached no agreement. Although there was testimony that Respondent offered to extend the agreement for either 30 days or from month-to-month, and Burns declined the offer by saying the contract would continue from day-to-day, there was no testimony that Respondent agreed to that; and Respondent does not contend that the Union's one-day strike violated any contractual provision. Otherwise, Burns never committed to an extension of the old agreement, and he never committed to giving Respondent notice before calling a strike. Respondent knew that a strike was possible. It was told that a strike vote had been taken and had prepared contingency plans

a half-year before the strike actually happened. Respondent was willing to accept the word of its drivers. I find no legitimate reason that it should not have accepted the word of its drivers' representative.

Respondent also contends that the Union failed, as a condition to the reinstatement, to accept the changes that it made as a result of the transition. Respondent asked for that as early as July 19 and August 9, 1999; and, although the Union was in no mood to make any offer to return at that time, relying instead on its claim that the lockout was illegal, the Union did not make it part of its reinstatement offer in December, either. I reject Respondent's contention for a variety of reasons. In doing so, I do not find that its change of its transition schedule was unlawful or unreasonable, due to the threat of further strikes. Nor do I find unlawful if Respondent had to change its methods of delivery as a result of the new schedule. What is problematic is that the demand that it made on the Union was not a demand that it made on the employees whom it reinstated. They, too, had the right to file unfair labor practice charges with the Board. In addition, Respondent has not made clear what the issue was when the Union made its offer to return in December. By that time, the dispute about the operational changes made by Respondent as a result of its transition to the Franklin facility had been resolved by the Regional Office, which refused to issue a complaint. Because there was no agreement in effect, there was no arbitration machinery.[5] The only matter that Thurman was talking about in his February 4 letter was the withdrawal of the Union's appeal from the Acting Regional Director's decision. But that demand conceivably meant that Respondent was asking the Union to condone Respondent's unfair labor practice of making unilateral changes, if the appeal were sustained; and Respondent has cited no legal authority that that is a legitimate and substantial business reason for and precondition to the reinstatement of the locked out employees. Respondent can operate, no matter whether the appeal is pending. It might be pleasant or convenient for Respondent to finally dispose of the unfair labor practice issue, but surely not necessary to its continued operation and certainly not substantial enough to justify Respondent's refusal to reinstate economic strikers. I reject this defense and find that Respondent violated Section 8(a)(3) and (1) of the Act.

Just as the General Counsel contended that a *Wright Line* analysis required a finding of a Section 8(a)(3) violation regarding the laid-off drivers, so too does he contend that Respondent violated the Act regarding the drivers placed on unpaid leave. Those drivers who made the same promises as the Union did on December 27, were permitted to get their jobs back. But, when the Union made those same promises on behalf of the remaining drivers, Respondent refused to reinstate them. I agree with the General Counsel's contention that there is no lawful reason for this distinction. Rather, Respondent's animus was clear. While reinstating those who accepted Respondent's offer, made in unlawful one-on-one sessions, it declined to reinstate those who refused Respondent's original offer or refused to participate in those unlawful sessions and who continued their allegiance to the Union, solely because of their union activity in exercising their Section 7 right to allow the Union to speak for them with respect to any waiver of their right to strike. Respondent's intended to undermine the Union and to punish the employees for retaining their allegiance to the Union. Respondent's refusal to reinstate the drivers discouraged their union activity and undermined their support of the Union. The General Counsel established a prima facie case under *Wright Line*. Respondent has not proved that, but for the protected and union activities of the remaining employees on unpaid leave, it would still not have reinstated them, as explained above. I conclude that, for these additional reasons, Respondent has violated Section 8(a)(3) and (1) of the Act.

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. Having found that the Respondent discriminatorily laid off and thereafter failed to recall employees James Lawson, Jack Truxel, Steve Watkins, Terry Glueckert, Larry Siscoe, Gary Walter, Jerry Smith, Robert Spreny, Kenneth Gordon, Robert Mays, Johnny Fleming, Robert Michigan,[6] and Thomas Dineen, it shall be required to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions for which they are qualified, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after June 27, 1999, so long as positions exist which have not been filled by the discriminatees named in the following paragraph. In the event that, following the discharge of replacement employees and the reinstatement of the employees in the following paragraph, there are not enough remaining positions available for these employees, they shall retain their recall rights as they existed on June 27, 1999.

Respondent shall also be required to make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, from June 27, 1999, until their reinstatement, unless it is determined at the compliance stage that any such employee would have been displaced by an employee named in the following paragraph had those employees been returned to work on December 27, 1999. At that point the backpay computation shall cease, subject to whatever recall rights the employees may have. Backpay shall be computed on a quarterly basis from June 27, 1999, to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, having found that Respondent unlawfully failed to pay to these 13 employees who were not permitted to return to work on June 27, 1999, and were laid off on July 1, 1999, the $10,000 bonus

[5] I summarily reject Respondent's repeated contention, unsupported by any legal authority, that the alleged unfair labor practices should not be found because the Union failed to grieve about them.

[6] In ordering the reinstatement of Michigan, I note that his conviction occurred on August 11, 1998, long after the layoff, and that Respondent has made no claim that, by reason of his conviction, he ought not be reinstated.

provided for as part of a stay-to-the-end package, Respondent shall make them whole for all benefits they were owed under the package, with interest as provided above.

Having found that Respondent unlawfully refused to reinstate Brain Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, Edward Wilke, Michael Howard, Kenneth Marshall, and Timothy Hehemann following the Union's offer to return to work made on their behalf on December 23, 1999, it shall be required to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after June 27, 1999, including any laid-off employee hired as a strike replacement. Respondent shall also be required to make these employees whole for any loss of earnings and other benefits they may have suffered by reason of the refusal to reinstate them, from December 27, 1999 until the date of their reinstatement. Backpay and interest shall be computed, as set forth above. *TNS, Inc.*, 329 NLRB 602, 611 fn. 40 (1999).

[Recommended Order omitted from publication.]