Pacific Mutual Door Company *and* General Drivers, Helpers and Truck Terminal Employees, Local Union No. 120, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 18–CA–7598

28 February 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 29 December 1982 Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs. The Respondent filed a brief in answer to the General Counsel's exceptions.

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 only to the extent consistent with this Decision and Order.

Of four economic strikers alleged to have been unlawfully refused reinstatement because permanent replacements had not been hired at the time of their unconditional request for reinstatement, the judge found that the Respondent violated Section 8(a)(3) and (1) with respect to three of them and that the fourth had not been entitled to reinstatement because of strike misconduct. We agree with the Respondent that one of the three discriminatees engaged in serious strike misconduct justifying the Respondent's refusal to reinstate him. Further, while we find in accord with the judge that the Respondent engaged in unlawful discrimination by failing to reinstate the two remaining discriminatees, we do so on the basis of a somewhat altered rationale. We also agree with the Respondent that the reinstatement offers made to the two remaining discriminatees in May 1982 were valid offers which tolled the Respondent's backpay obligation and its reinstatement obligation arising from the unlawful conduct.[2]

The facts, more fully set forth in the judge's decision, are as follows. The Charging Party, General Drivers, Helpers and Truck Terminal Employees, Local Union No. 120, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) represented a unit of four truckdrivers at the Respondent's facility. The Respondent and the Union had had a collective-bargaining relationship for approximately 30 years; the most recent contract covering the drivers expired 15 July 1981. All four drivers went on strike on 2 September 1981 after the Respondent and the Union failed to reach agreement on economic issues for a new contract. On 11 September 1981 the Respondent entered into a contract with a driver leasing company, Transportation Services, Inc. (TSI), and throughout the strike used the services of the drivers provided to replace the striking drivers. There is no dispute that these replacements were temporary. The contract stated on its face:

> This agreement shall become effective on *11 Sept. 1981* and shall continue in force and effect for one year and thereafter until terminated by either of us by giving to the other not less than *30* days prior written notice.[3]

In the margin of the contract next to this paragraph were the handwritten words "Does not apply" with an arrow pointing to the line beginning "effect for one year . . . ." The Respondent's branch manager who signed the contract, Lambert Imse, testified that the notation was placed by him on the contract on the day the contract was signed and during a conversation with the officer from TSI who signed the contract; Imse "could not say," however, whether the notation was made before or after the contract was signed. Imse further testified that the TSI officer agreed to relinquish the 1-year duration term of the contract but not the 30-day cancellation term. Imse stated that the marginal notation referred only to the 1-year term and that he had agreed to go along with TSI's demand for the 30-day provision.[4]

On Friday, 20 November 1981, the picketing ceased, and the Union sent a telegram to the Respondent stating that the strike had ended and

[1] The Charging Party 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.

The last sentence of fn 10 of the judge's decision is corrected to the following to reflect more precisely the record testimony· "During the first week of the strike, there had been some periodic violence outside the plant"

[2] As discussed below, on rejecting the reinstatement offers, the discriminatees retained their status as strikers and attendant reinstatement rights to that status.

[3] The "11 Sept. 1981" and "30" were typed in on the lined spaces.

[4] Questioning about the import of the duration clause, the notation, and the surrounding conversations was initiated and pursued by the General Counsel. There was no objection to the receipt of this testimony.

making an unconditional offer, on behalf of the four striking drivers, to return to work the following Monday. On 20 November the Respondent, by telegram, stated its understanding that the Union's telegram represented an unconditional offer to return to work, stated that its contract for replacements during the strike did not allow for cancellation on such short notice, stated that it had been considering permanent subcontracting, stated that it was putting the drivers on temporary layoff while it considered its long-term options, and stated that it was continuing to investigate the possibility of discharging certain drivers for strike misconduct on the picket line. On 23 November 1981 the four drivers reported to the Respondent's facility, but were not permitted to work. On 25 November 1981 the four drivers applied for state unemployment compensation; the Respondent's answer to the claims was that the temporary drivers were hired on a contract basis and the Respondent had to lay off the strikers until the contract was completed.

On 1 December 1981 the Respondent notified the Union that it had made a tentative decision to permanently subcontract the driving work. Thereafter, the Respondent met with the Union and offered to discuss the decision and effects of permanently subcontracting the drivers' work, but no agreement was reached. On 18 December, the Respondent entered into a 1-year contract with TSI to provide driving services, effective 14 December 1981. On 23 December 1981 the Respondent notified the Union of the 1-year contract. The Union made no further request for bargaining about that issue.

On 23 February 1982 the drivers resumed picketing claiming an unlawful lockout.[5] On 10 and 17 May 1982 the Respondent made written offers of reinstatement to drivers Thurstin and Kraus, respectively. Record evidence shows that the Union, on behalf of those drivers, rejected the offers claiming that they were invalid because they bypassed the drivers' collective-bargaining representative and that they were discriminatory because they did not follow contractual seniority. No similar offers were made to strikers Lenhart and Huberty; the Respondent took the position that they engaged in serious strike misconduct which did not entitle them to reinstatement.

1. The judge found Huberty's conduct during the strike—firing a weapon while at the plant—not sufficient to remove him from the protection of the Act because it could not be concluded with certainty that Huberty aimed at the plant facility.

There is no dispute that on the evening of 29 September 1981 strikers Huberty and Kraus were at the plant. Huberty was in possession of an "air pistol" or "BB gun" and while he was at the plant entrance he discharged the gun more than once. A security guard called the police, and Huberty was charged with possession of a dangerous weapon. Huberty subsequently pleaded guilty to the charge.

While one of the guards on duty testified that shots were fired which hit the Respondent's property, he also testified that an examination of the building the following day did not reveal any damage. Huberty denied shooting in the direction of the plant.

In our view, the absence of conclusive evidence that Huberty fired at and/or damaged the Respondent's facility is not determinative of whether his conduct removed him from the protection of the Act. Rather, we find the fact that he discharged a weapon at the plant entrance to be serious strike misconduct which justifies the Respondent's refusal to reinstate him.[6] As we stated in *Clear Pine Mouldings*:[7]

> . . . the existence of a "strike" in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have . . . certainly no right to carry or use weapons or other objects of intimidation.[8]

2. In reaching his conclusion that the Respondent unlawfully refused to reinstate certain of the strikers, the judge made a series of preliminary findings. Thus, he found that on 20 November 1981 the Union made a valid and unconditional offer to return to work on behalf of the striking employees. He found that as of 20 and 23 November 1981 the striking employees had not been permanently replaced and the Respondent was at that time only "contemplating" the prospect of permanently subcontracting its driving operations. He found that it was not until 1 December 1981 that the Respondent informed the Union that it had reached a "tentative decision" to subcontract its driving operation

[5] On that same date, the Union filed the initial charge in this case alleging violations of Sec. 8(a)(1), (3), and (5) in unlawfully and discriminatorily subcontracting out unit work and locking out employees and in engaging in surface bargaining. Subsequently, the charge was amended by striking the prior allegations and asserting only an unlawful refusal to reinstate the four drivers. This allegation was the only one set forth in the complaint, which contained no allegation of an unfair labor practice strike.

[6] See *MCC Pacific Valves*, 244 NLRB 931, 946 (1979).

[7] 268 NLRB 1044, 1047 (1984). Member Dennis relies on her *Clear Pine* concurrence and finds that Huberty's conduct reasonably tended to coerce or intimidate other employees.

[8] We do not rely on the citation of *W. C. McQuaide, Inc.*, 220 NLRB 593 at fn. 18 of the judge's decision.

on a "long-term basis." Accordingly, as he found that the drivers had not been permanently replaced and their jobs were still in existence on 20 November 1981,[9] he recommended that the Respondent be ordered to offer them reinstatement subject to his further determinations on strike misconduct. The judge, however, dated "reinstatement for backpay purposes" from 30 days after 20 November, i.e., 20 December 1981, thereby taking into account the 30-day cancellation provision in the Respondent's 11 September contract with TSI. The judge stated that, although the contract drivers employed during the strike were temporary, the record failed to establish that it was the intent of the parties to abrogate the 30-day requirement.[10] The judge explicitly stated that he saw no need to approach the issue of whether the Respondent and TSI were joint employers by virtue of their 11 September 1981 contract and accordingly found that TSI was not a necessary party to the case; he did not discuss whether the Respondent and TSI were joint employers by virtue of the relationship which ensued from the permanent subcontract of the drivers' work and did not examine the impact of the contract on the Respondent's obligation to reinstate certain striking drivers.

We agree with the judge that the Respondent's obligation to reinstate the striking drivers arose with the Union's unconditional offer, on the strikers' behalf, to return to work, which occurred at a time when their jobs were still in existence and no permanent replacements had been hired. We disagree with the judge's analysis of when the reinstatement obligation matured and the violation occurred. We find that date was 18 December 1981, at which time the Respondent's obligations under the 11 September contract had apparently ceased by agreement between the Respondent and TSI since those parties then entered into the 1-year contract. Thus, to the extent that the judge found the 11 September contract's cancellation provision[11] postponed the Respondent's reinstatement obligation, and therefore its backpay obligation, we agree. The provision gave the Respondent a "legitimate and substantial business justification" for its delay in reinstating the strikers. For it appears that a condition of obtaining the temporary replacements and thereby continuing its operation was agreement to the 30-day cancellation provision.[12]

However, we find that once the 11 September contract, and hence the cancellation provision, was no longer in effect and the arrangement for the services of *temporary* replacements ceased, the reinstatement obligation matured.[13] This does not end our analysis. Since the Respondent's actions in disposing of the services of the temporary replacements and in entering into a 1-year contract for the work of the drivers were simultaneous, we must assess the nature of the relationship that ensued to determine whether there continued to be jobs into which the Respondent could reinstate the former strikers. Both the General Counsel and the Union argue on exception that the Respondent and TSI entered upon a joint employer relationship and, hence, that the jobs of the former strikers had not been eliminated. The Union also contends that the Respondent's contract with TSI was not exclusive and in no way precluded reinstatement of the former strikers. The Respondent maintains that the nature of the relationship between the Respondent and TSI under the 1-year contract is not relevant because it fulfilled its bargaining obligation to the Union about the subcontracting. It nonetheless also

[9] In his Conclusions of Law, the judge dated the violation as occurring on either 20 or 23 November 1981, the latter date being the one when the strikers were actually turned away from work

[10] The judge rejected what he apparently viewed as the General Counsel's and the Union's argument that there was sufficient "parol" evidence to warrant varying or disregarding the 30-day provision. He had earlier found that the contract was for a term of 1 year but provided termination by either party on 30 days' prior written notice

[11] In their exceptions, the General Counsel and the Union argue that the entire duration clause of the 11 September contract, including the 30-day cancellation provision, was effectively deleted by the marginal notation and thus the judge erred in postponing the reinstatement date. Neither the contract nor other record evidence clearly demonstrates that the marginal notation referred to the entire contract clause in issue Rather, contrary both to the argument of the General Counsel and the Union and to the judge's statement of fact about the 1-year duration of the contract, we find that the marginal notation created an ambiguity in the document, that ambiguity being the applicable scope of the marginal notation. For that reason, we consider it appropriate to resort to extrinsic evidence to resolve such ambiguity. See *Memphis Furniture Mfg. Co.*, 252 NLRB 303, 306–307 (1980), *Food Fair Stores*, 202 NLRB 347, 353 at fn. 11 (1973). The extrinsic evidence, the testimony of Imse about the intent of the notation, clearly establishes that the parties sought to delete only the 1-year term and not the 30-day cancellation provision.

[12] An employer who refuses or delays the reinstatement of economic strikers violates Sec. 8(a)(3) and (1) of the Act unless the employer can show "legitimate and substantial business justifications" for such actions. *NLRB v Fleetwood Trailer Co.*, 389 U.S 375 (1967), *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Laidlaw Corp*, 171 NLRB 1366 (1968). While a recognized justification has been the employment of permanent replacements, we believe that this short-term contractual notice provision when the supplier of the temporary drivers declared the necessity of the provision also falls within the category of such justifications. See also *Randall, Burkart/Randall, Division of Textron*, 257 NLRB 1, 6–7 (1981) (in which justification for at least a 30-day delay in reinstating economic strikers was found in the fact that inventory had been built up in anticipation of a strike and poststrike production levels accordingly did not require the immediate employment of a substantial number of the strikers); *Mercy-Memorial Hospital*, 231 NLRB 1108, 1113–1114 (1977) (in which justification for an approximately 20-day delay in reinstating economic strikers was found in the need for a complete physical examination of returning hospital workers and in problems necessarily occasioned by the sudden termination of a 3-year-old strike).

[13] We do not consider the fact that the 11 September contract's provisions ceased before the 30-day cancellation period as affecting our view of the cancellation provision as a legitimate and substantial business justification for the delay in reinstatement. In this regard, we note that the succeeding 1-year contract was with the same company as the 11 September contract and there is no indication an accommodation on the cancellation provision would have been made under other circumstances

maintains that the Respondent and TSI are not single or joint employers.[14] We agree with the General Counsel and the Union that by virtue of the relationship under the 18 December contract the Respondent and TSI became joint employers and therefore that the jobs of the former strikers were not eliminated.

The Respondent's branch manager testified that the main difference between the distribution operation under the contract with TSI and under the prior operation was that the Respondent no longer had to perform certain bookkeeping work, including salary information or reports to the government for tax purposes or social security.

The contract between the Respondent and TSI was for 1 year and thereafter, until terminated for any reason upon 90 days' written notice. If TSI failed to provide backup or substitute drivers in more than 4 days in any month, the Respondent was free to cancel the contract. Further, any material breach of the contract or failure of TSI to provide sufficient qualified drivers entitled the Respondent to terminate the contract on 1 week's notice.

Under the contract, TSI was to furnish the necessary drivers for the efficient operation of the Respondent's St. Paul, Minnesota operation and the Respondent agreed to pay for such services on a weekly basis. The Respondent was to provide work for four full-time drivers, but reserved the right to increase or decrease the number of drivers used on 24-hour notice; the Respondent was, however, to make every effort to provide 1 week's notice should business conditions dictate a lengthy decrease or increase in the number of drivers required.

The contract stated that the drivers were to be employees of TSI, that TSI is not an employment agency, and that the purpose of the contract is not an attempt to secure permanent employment for the drivers with the Respondent.[15]

TSI was to pay the wages of the drivers, to pay applicable payroll taxes, to carry workers' compensation insurance, and to make such payments to welfare funds for the benefit of drivers as may be required. The Respondent was to pay the expenses incurred by the drivers including gas, oil, vehicle repair, tolls, and telephone calls; on overnight trips, the Respondent agreed to pay lodging expenses and a food allowance of $11 per day. TSI or the drivers were to be responsible for all moving, parking, and zoning violations; the Respondent was to be responsible for any violation of weight requirements and/or vehicle violation.

The Respondent was to pay TSI for the services of the drivers the sum of $12.50-per-hour for any work up to 8 hours and $15.06 per hour for work in excess of 8 hours.[16] The Respondent acknowledged that the hourly rates were based on payroll taxes and workers' compensation rates at the time of entry into the contract and agreed to accept additional hourly costs should such rates change. The Respondent was to pay a $12.50 per hour fee for nine holidays even though drivers were not to work on those days, provided the driver completed 45 working days for the Respondent and provided the driver worked the last scheduled workday before and first scheduled workday after the holiday unless excused for reasonable cause, in writing, by the Respondent. The Respondent was to pay a vacation rate of $12.50 per hour to eligible drivers according to their service to the Respondent as of 1 January of the vacation year; it appears the payment was to be made to TSI. If drivers worked a minimum of 1600 hours for the Respondent during a year prior to 1 January, there was a sliding scale of benefit, from 40 to 160 hours paid time, depending on length of service, from 1 year to 18 years or more. The contract further stated that the Respondent was to assign vacations giving preference to the choice of the driver where practicable and subject to the ability of TSI to provide a replacement driver.

Pursuant to the contract, TSI was responsible for providing ongoing supervision of its drivers "subject to the direction" of the Respondent. The Respondent was to have the right to pass on the experience and qualifications of the drivers and to dismiss any of them from its service if they should fail to meet its requirements which were to be determined in the sole discretion of the Respondent. Subject to such right of dismissal, TSI was to assign the drivers to the Respondent's vehicles on a continuing basis.

The contract stated that the Respondent was to "control the drivers in the operation of their vehicles"; to instruct them in the operation and maintenance of the vehicles, applicable safety and motor

[14] The Respondent acknowleges that at the hearing the General Counsel asserted a joint employer status existed between the Respondent and TSI even though the complaint did not allege such status. Further, there is no question that this issue was litigated with respect to the Respondent and was fully briefed to the judge and to the Board

[15] In the event a TSI driver became employed by the Respondent as a driver within 24 months from the date of the contract, the Respondent agreed to pay TSI $2500 as liquidated damages resulting from TSI's loss of the services of the driver and its training investment.

[16] In a 28 September 1981 letter from TSI to the Respondent, it was explained that the $12 50 per hour charge includes F I C A worker's compensation, state unemployment, Federal unemployment, and hospitalization benefits as well as the drivers' wages and TSI's fee, it also stated that drivers receive time-and-a-half pay for work in excess of 8 hours per day and that TSI drivers "are under [the Respondent's] supervision and control" and backup drivers are supplied when needed

carrier rules, and the procedure to be followed in case of accidents; to instruct them in the proper and safe handling of all property and material entrusted to them; to train them in the special precautions required to be taken in transporting the Respondent's materials and in the assistance they may be called upon to give in loading and unloading the Respondent's materials; and to "assume all responsibility for acts of the drivers as would be assumed for any regular employee" of the Respondent. The Respondent also agreed to release, indemnify, and hold TSI harmless for any liabilities and expenses for any injuries or damages caused by the drivers to the Respondent's property.

The Respondent was to specify the starting point, the destination point, and the route to be traveled in respect to each trip. The Respondent was to see that the drivers submit daily trip reports, accident reports, and trip logs required by the U.S. Department of Transportation (DOT) and/or the Respondent to the Respondent's designated representatives; TSI was to provide the Respondent with a weekly account of the work performed by the drivers and maintain all records required by DOT other than those specifically indicated.

The Respondent was to carry public liability and property damage insurance with respect to the operation of its vehicles and was to assume full responsibility to the public for their operation. It agreed to release, indemnify, and hold TSI harmless from all claims, demands, costs, actions, liabilities, and expenses arising out of or resulting from or sustained in connection with the use or operation of the Respondent's trucks in the performance of their duties by the drivers, whether or not the result of negligence or other acts of misconduct by the drivers; this provision explicitly did not deprive the Respondent of any right of action it had directly against the drivers for acts of negligence or misconduct and did not absolve TSI of liability if TSI or the drivers engaged in conduct contrary to the directions or instructions of the Respondent.

In practice, it appears that several drivers are regularly assigned by TSI to work for the Respondent on a full-time basis, while a limited number of other drivers have been assigned to work for the Respondent for several days a week or on an ad hoc substitute basis. It further appears that the regularly assigned drivers have regularly assigned routes. All routes driven, that is, the starting point, the order of stops, and the destination point, have been determined by the Respondent. The routes are essentially the same as those previously assigned to the Respondent's former employees, the equipment used by the TSI drivers is essentially the same as that used by the Respondent's former employees, and the procedure for picking up orders is basically the same as that followed by the Respondent's former employees.

While the testimony indicates that TSI selects the drivers to assign to the Respondent, ensuring they have the proper licenses and have met DOT regulations, and assigns the drivers to certain routes, it is clear that the Respondent retains ultimate authority over both the selection and the assignment. Thus, on one occasion when the Respondent considered a newly assigned driver to be too slow in meeting his stops, the Respondent told TSI it did not want the driver back, and the driver was no longer assigned to the Respondent.

While the Respondent's terminal manager Imse testified that the Respondent does not establish the wage rates for the TSI drivers and has no knowledge of whether TSI drivers are provided with hospitalization insurance, other insurance, or pensions, it appears clear that Imse was informed in September 1981 that TSI's $12.50-per-hour fee includes the drivers' wages and other benefits, including hospitalization benefits. Further, while Imse testified that TSI basically sets the drivers' starting times, he also testified that the Respondent's customers are open from 7 a.m. to 5 p.m. and the drivers are expected to complete a schedule of their routes during that period of time.

The drivers turn in a daily trip record to the Respondent which documents the drivers' stops, the amount of time spent at the stops and unloading merchandise, the mileage covered, and total meals for the day. The Respondent pays TSI weekly for the drivers' meal allowances, but directly advances gasoline money to the drivers. The drivers also turn their delivery tickets into the Respondent; those tickets show customer receipt of the merchandise.

The individual to whom the drivers report at the Respondent's facility is the shipping supervisor. While the TSI drivers report anticipated absences to TSI, the evidence does not clearly demonstrate that TSI exercises daily supervision over the drivers.

Based on the foregoing, we find that although the Respondent and TSI appear to be separate business entities,[17] the Respondent shares sufficient control over the drivers provided by TSI to drive its trucks and deliver its merchandise to evidence joint employer status.[18]

[17] The evidence reflects that the Respondent's officers and stockholders do not own any portion of TSI and TSI's officers and stockholders do not own any portion of the Respondent.

[18] As previously found, the issue of joint employer status is a factual one involving whether separate business entities exercise common control

Continued

In reaching this finding, we note particularly the ultimate direction the Respondent has over the supervision of the drivers; its control over the number of drivers and which drivers work for it; its control over their conduct in operating its vehicles and its responsibility for their conduct in operating its vehicles; its control over the nature of their work and the daily conditions under which they work; its control over the hours they work; its indirect control over the amount of wages they receive and their daily expenses; and its control of the benefits received as paid holidays and paid vacations.

In view of this finding that the Respondent remained an employer and retained control of employees[19] who began to perform the work of the unreinstated drivers on a permanent basis after the unreinstated drivers unconditionally requested reinstatement, we find that the jobs of the unreinstated drivers were not eliminated and that the Respondent in essence hired new employees instead of reinstating Thurstin and Kraus—after their unconditional request for reinstatement. Accordingly, we find that the Respondent's matured reinstatement obligation to Thurstin and Kraus was not obviated by the 18 December contract and conclude that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate Thurstin and Kraus on 18 December.

3. Although the judge described the Respondent's May 1982 reinstatement offers to Thurstin and Kraus, he failed to make any explicit findings about the validity of those offers. However, in his recommended remedy, the judge appeared to take cognizance of the offers; he recommended that the Respondent be ordered to offer reinstatement to Thurstin and Kraus, but limited backpay to the period "from December 20, 1981, to the date Respondent *offered* them reinstatement plus interest." (Emphasis added.) The General Counsel and the Union both except to this apparent tolling of backpay. The General Counsel maintains that the offers were invalid because they were made to less than the total number of former strikers entitled to reinstatement on 20 November 1981, while the Union claims the offers were invalid because they were discriminatory. The Respondent contends that its reinstatement offers were valid and their rejection should not only toll backpay, but should also end the Respondent's reinstatement obligation.

Both offers stated, in pertinent part:

> This is a formal offer of reinstatement to your former position with Pacific Mutual Door Company without loss of seniority and at your former rate of pay. This offer is made without prejudice to any rights that you or the Union or Pacific Mutual Door Company may have in connection with the pending unfair labor practice case against Pacific Mutual Door Company.

Each offer stated that if Thurstin or Kraus, respectively, should desire to accept reinstatement, they should report to work a week from the date on the letter.

On their face, these offers are neither invalid nor conditional. The time period for acceptance of the offers is similar to time periods the Board has found acceptable.[20] Nor has it been shown that the offers were discriminatory. The facts that the offers were made seriatim, not by seniority, and directly to the employees, do not, as argued by the Union, demonstrate discriminatory motive. Finally, the fact that reinstatement offers were made to less than all the eligible former strikers at one time does not render each offer invalid.[21]

Accordingly, we find that the rejection of the Respondent's May 1982 reinstatement offers to Thurstin and Kraus tolled their backpay and satisfied the Respondent's reinstatement obligation with respect to the unfair labor practices alleged here.[22] We shall therefore modify the judge's order to comport with our findings.

AMENDED CONCLUSIONS OF LAW

Delete paragraph 5 of the judge's Conclusions of Law and substitute the following:

"5. That Respondent Employer, by failing and refusing to reinstate employees Gary Kraus and William Thurstin on 18 December 1981, violated Section 8(a)(1) and (3) of the Act."

over essential terms and conditions of employment of a group of employees. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), *Pacemaker Driver Service*, 269 NLRB 971 (1984); *Browning-Ferris Industries*, 259 NLRB 148 (1981); *American Air Filter Co.*, 258 NLRB 49 (1981); *U.S. Pipe & Foundry Co.*, 247 NLRB 139 (1980)

[19] We reject the Respondent's argument that TSI was a necessary party to this proceeding *Quality Motels of Colorado*, 189 NLRB 332, 334 (1971); see also *Trans-States Lines*, 256 NLRB 648, 649 (1981)

[20] *Woodland Supermarket*, 240 NLRB 295 (1979); *Southern Household Products Co.*, 203 NLRB 881 (1973). We note that the Union's response to both offers, on behalf of the employees, was made several days before the employees were to report to work if they wanted to accept the offers

[21] See, e.g., *National Business Forms*, 189 NLRB 964 (1971); *O'Daniel Oldsmobile*, 179 NLRB 398 (1969); *Southwestern Pipe, Inc.*, 179 NLRB 364 (1969)

[22] We note that Thurstin and Kraus, having declined the offers of reinstatement while continuing to engage in strike activity, retained their status as strikers, with whatever rights are attendant to that status See, e.g., *Seyforth Roofing Co.*, 263 NLRB 368 (1982); *Southwestern Pipe*, supra at 365. We do not now venture an opinion as to the nature of their strike activity.

ORDER

The National Labor Relations Board orders that the Respondent, Pacific Mutual Door Company, Roseville, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in or activities on behalf of General Drivers, Helpers and Truck Terminal Employees Local No. 120, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, or any other labor organization, by discriminatorily failing or refusing to reinstate striking employees to their former positions, or to substantially equivalent positions for which such employees are reasonably well qualified, after their unconditional offer to return to work.

(b) 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) Make employees Gary Kraus and William Thurstin whole for any loss of earnings they may have suffered by reason of the discrimination against them as described herein and in the manner set forth in the remedy section of the judge's decision.

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

(c) Post at its plant and facility in Roseville, Minnesota, copies of the attached notice marked "Appendix C."[23] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

APPENDIX C

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discourage membership in or activities on behalf of General Drivers, Helpers and Truck Terminal Employees Local No. 120, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily failing or refusing to reinstate striking employees to their former positions, or to other substantially equivalent jobs for which such employees are reasonably well qualified, after their unconditional offer to return to work.

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

WE WILL make striking employees Gary Kraus and William Thurstin whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest.

PACIFIC MUTUAL DOOR COMPANY

Mary E. Leary, Esq., for the General Counsel.
James R. Willard, Esq., and *William C. Martucci, Esq. (Spencer, Fane, Britt & Browne)*, of Kansas City, Missouri, for the Respondent Employer.
Jan D. Halverson, Esq. (Robins, Zelle, Larson & Kaplan), of St. Paul, Minnesota, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING, JR., Administrative Law Judge. This case was heard by me in Minneapolis, Minnesota, on October 25 and 26, 1982. The initial charge was filed by General Drivers, Helpers and Truck Terminal Employees, Local No. 120, affiliated with the International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) on February 23, 1982,[1] with an amended charge filed April 9, 1982, and the complaint issued on April, 9, 1982, by the Regional Director for Region 18 of the National Labor Relations Board on behalf of the Board's General Counsel.[2] The complaint alleges that the Respondent Employer (the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act[3] by failing or refusing to reinstate the Company's four striking drivers on November 23, 1981, and after they had unconditionally offered to return to work. The Company defends on various grounds, alleging it had legitimately contracted out its transportation services, and picket line violence by two of the four employees.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and counsel for the Union and the Company, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

The pleadings, admissions, and evidence herein establish the following jurisdictional facts. The Company is now, and has been at all times material, a Washington corporation with an office and place of business in Roseville, Minnesota, where it is engaged in the wholesale and distribution of millwork. The Roseville facility or plant is the only plant directly involved in this case. During the 12-month period ending December 31, 1981, the Company shipped and sold goods and materials valued in excess of $50,000 directly to points located outside the State of Minnesota, and during the same period purchased and received goods valued in excess of $50,000 directly from points located outside the State of Minnesota. Thus, and as admitted, I find and conclude that the Company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Also, and as admitted, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The evidence and testimony in the case established the following history and facts leading to this litigation. The Union represented a unit of four truckdrivers at the Company's Roseville facility (the plant). The Union and the Company have had a collective-bargaining relationship for some 30 years with the most recent collective-bargaining agreement (contract) expiring on July 15, 1981. The Company employed approximately 40 employees at the plant, most of whom were carpenters and who had also been represented by the various unions over the years. During the period involved in this case (approximately mid-1981 to mid-1982) the Company was experiencing business decreases due mainly to the nationwide building slump.

Negotiations for a new contract commenced on or about July 10, but the Union and the Company were unable to reach an agreement on economic issues and the four drivers went on strike September 2, and established a picket line.[5] The carpenters at the plant did not honor the Union's picket line and continued to work. Thereafter the Company did not replace the drivers with its own individual hires but, on September 11, entered into a Driver Placement Agreement with a Minneapolis firm named Transportation Services, Inc. (TSI). This agreement was for a term of 1 year but provided that the agreement could be terminated by either party upon 30 days' prior written notice.[6] The agreement served to furnish drivers for the Company and gave the Company substantial control over the daily at-work activities of the drivers furnished by TSI. By at least mid-October the Union's business agent, Ray Langevin, had learned the Company had subcontracted out its driving and was considering this on a permanent basis. Langevin was again reminded of this on November 13, and during negotiations on November 17 or 18 the Company made a new offer and again reminded Langevin that it was considering contracting out its driving. On November 19 or 20, Langevin met with the drivers to discuss the Company's recent contract offer and current state of affairs, and the drivers told Langevin that they wished to end the strike and go back to work. On Friday, November 20, the picketing ceased and Langevin sent a telegram to the Company stating the strike had ended and that the drivers "unequivocally" offered to return to work.[7] Also on

[1] Hereinafter dates in July through December are in 1981, and those in January through June are in 1982.

[2] The term "General Counsel," when used herein, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[3] 29 U.S.C. § 151 et seq. The pertinent parts of the Act provides as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> . . . .
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .
> . . . .
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[4] The facts founds herein are based on the record as a whole and on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Concerning whose testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

[5] The four employee-drivers were Don Huberty, Gary Kraus, Ray Lenhart, and Bill Thurstin. Their seniority varied.

[6] The pertinent parts of the agreement are set out in the attached App. A.

[7] The telegram read as follows:

Continued

November 20 the Company telegrammed Langevin acknowledging receipt of his telegram and again indicating that the Company was considering the permanent subcontracting out of its driving operation and that the drivers would be placed on "temporary layoff status while we consider our long term options."[8] Also during this period of time the Company and the Union had been attempting to settle their differences through the use of a mediator. Notwithstanding the Company's "temporary layoff" reply, the four drivers reported for work the following Monday, November 23, but were not allowed to punch in and return to work.[9] On December 1, the Company wrote Langevin that it had made a "tentative decision" to subcontract its driving on a "long-term basis." On December 9 the Company's president and the Company's attorney met with Langevin and the Union's attorney, and offer to discuss the Company's decision to subcontract its driving, or the effects of that decision. No agreement was reached at that meeting. Thereafter the Company negotiated and signed another agreement with TSI entitled "Contract to Provide Drivers," effective December 14, which provided that TSI would furnish driving services to the Company for 1 year. The Company notified Langevin of this fact by letter dated December 23. The Union has since made no further request for bargaining.

On February 23, 1982, the Union filed its initial charge in this case and on the same date the drivers resumed picketing at the plant, claiming an improper lockout. On May 10 and 17 the Company made formal and written offers of reinstatement to drivers Thurstin and Kraus, respectively. Such offers were not made to drivers Lenhart and Huberty, against whom the Company charged picket line violence during the earlier strike.[10] On behalf of Thurstin and Kraus, Langevin turned down the offers of reinstatement as "invalid," claiming the offers violated the seniority rights of the drivers as set forth in the old contract which had expired July 15, 1981.

With the foregoing rather complex and unusual backdrop or history of basic facts and events, I shall henceforth address what I preceive to be the important and specific issues in the case.

B. *Evaluation of Law and Evidence, and Initial Conclusions*

Striking employees retain their status as employees under Section 2(3) of the Act.[11] It is an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act for an employer to refuse reinstatement of striking employees on their unconditional offer to return to work, unless permanent replacements have been hired or their jobs have been eliminated for legitimate and substantial business justifications.[12] I find in this case that as of November 20 and 23, the four striking drivers had not been permanently replaced, nor had their jobs been eliminated. I further find that the "unequivocal" telegraphic offer by Union Business Respresentative Langevin made on November 20 on behalf of the striking drivers was a valid and unconditional offer to return to work, and was accepted as such by the Company.[13]

The General Counsel is apparently fearful in this case that by virtue of the September 11 Driver Placement Agreement between the Company and TSI the drivers' jobs were either eliminated or that the drivers had been permanently replaced, and thus advances the theory that the Company and TSI became "joint employers."[14] The Union joins in this theory, although it makes alternative arguments, and of course the Company strongly disagrees with the theory of proposition. Much verbiage is, in my opinion, wasted on the subject in the three briefs submitted herein. I find no need to even approach the issue in this case. The September 11 agreement provided for cancellation by either party on 30 days' written notice, and the Company's own branch manager, Bert Imse, who signed the agreement on behalf of the Company as "Lessee," testified that the reason for entering into the agreement at the time was to provide drivers during the strike (which had commenced on September 2).[15] The Company's reply to the Union's reinstatement offer (App. B) on November 20 refers to the September 11 agreement as not providing for cancellation "on such short notice as to allow a recall of strikers on Monday [November 23]," and places the drivers on "temporary layoff status while we consider our long term options."

Please be advised effective Monday, November 23, 1981 the following named persons stand ready, willing and able to work and hereby unequivocally offer to retun to their jobs· Gary Kraus; Don Huberty; Ray Lenhart; Bill Thurstin. At this time, no decision has been made as to whether your latest contract offer will be accepted. Nevertheless, the Local Union is terminating the strike. It will continue to negotiate with you regarding a new collective bargaining agreement Please contact the employees directly regarding what time you want them to commence work on Monday, November 23, 1981.

[8] The body of the telegram is attached and set out in full marked App. B, and made a part of this decision.

[9] On or about November 25 the four drivers applied for state unemployment compensation, and the Company's response to all four claims reads as follows:

Was on strike 9/2/81-11/23/81—No settlement Union informed strikers to go back to work. Temporary drivers were hired on a contract basis—had to lay off until contract is completed.

[10] In the case of Lenhart, the alleged misconduct involved an attempt to slash a tire on a company truck and assaulting a security guard during the evening of September 22. In the case of Huberty, the alleged misconduct involved shooting at the plant facility during the evening of September 29 During the first strike, there had been some periodic violence outside the plant

[11] *NLRB v. Mackay Radio & Telegraph Co*, 304 U.S. 333, (1938).

[12] *NLRB v. Fleetwood Trailer Co*, 389 U.S. 375 (1967). See also *NLRB v. Great Dane Trailers*, 388 U.S 26 (1967).

[13] The Company's telegraphic response of the same date confirms such understanding and acceptance See attached App B

[14] The only other possible reason why the General Counsel would take this position is that during the post-September 11 contract negotiations the Union became aware that the Company was "considering" a permanent subcontracting arrangement, and thus had a duty to bargain about the matter but waived its right to later object to the results of such an arrangement by failing to so bargain. The Company, in its brief, advances a somewhat similar argument, which I find to be without merit in this case It follows in my findings as above noted that TSI is not a necessary party to this case, and thus the Company's motion to dismiss the complaint on these grounds is denied.

[15] The term of the agreement and the termination or cancellation clause are contained in a preliminary and unnumbered paragraph. Appearing in the margin to the left of the paragraph there are the hand-printed words "DOES NOT APPLY" with an arrow pointing to the middle of the paragraph. Imse testified that he made or added the notation at the time the agreement was signed by both parties, and that the notation referred to that portion of the paragraph which recites the 1-year initial term of the agreement No one from TSI testified in the case.

The Company's reply to the drivers' November 25 unemployment compensation claims refers to the drivers furnished under the agreement as "Temporary drivers," adding that the four claimants were laid off until the agreement was "completed." The evidence in the case reflects that by November 20, the date of the unconditional offer to return to work, the Company's prospects of subcontracting out its driving operations had reached the "contemplating" stage at best, and it was not until December 1 that the Company informed Union Business Representative Langevin that It had reached a "tentative decision" to subcontract out on a "long-term basis." Also prior to November 20, negotations for a new contract on behalf of the drivers had been ongoing.[16] As indicated earlier, I find that as of November 20 the drivers' had not been permanently replaced and that their jobs were still in existence, and I will thus recommend that the Company be ordered to offer reinstatement to the drivers subject to my further determinations herein on the subject of strike misconduct.[17]

C. *The Alleged Strike Misconduct of Drivers Lenhart and Huberty*

Generally an employee's misconduct during a strike which is of a minor nature does not remove from the protection of the Act. However, when such misconduct is of a serious and violence nature, it may well deprive the employee of such protection.[18] About 10 p.m. on September 22 strikers Gary Kraus and Ray Lenhart were picketing at the plant when a departing company truck brushed or struck Kraus.[19] At the moment Lenhart pulled a knife from his pocket and attempted to slash a tire on the truck but was halted by security guard Byron Adams. Adams testified that he and another security guard were on either side of the truck, escorting its departure from the plant, an when he saw what Lenhart was about to do he pushed Lenhart on the left shoulder and away from the tire, whereupon Lenhart came at him slashing with his knife. Adams indicated that he then backed up, tripped on a curb, and fell to the ground, but that Lenhart continued slashing at him with the knife and threatening him while on the ground until Kraus grabbed Lenhart and pulled him away.[20] Adams described the knife as a yellow Staghorn knife with a blade approximately 3-1/2 inches long, although Lenhart testified that the knife was merely an average pocketknife. Lenhart conceded that he became angry and attempted to slash the tire but testified that Adams hit him from behind and that he then put the knife back in his pocket, and that at no time did he hit or lunge at Adams, although Adams did trip and fall. The police arrived and arrested Lenhart for assault.[21] I credit the testimony of Adams over that of Lenhart regarding that incident.[22] Lenhart's actions were serious, violent, agrressive, and threatening and relected an intent to damage the Company's property and injure security guard Adams. I thus find and conclude that Lenhart's actions on the evening of September 22 removed him from the protections of the Act and that he is thus not entitled to reinstatement.

On September 29, in the evening, strikers Don Huberty and Gary Kraus were together at the plant, having apparently arrived in Huberty's truck. Security guard Bryan Adams arrived at approximately 8 p.m. to commence his shift and was told by another guard that a "ricochet" of the plant building had been heard. Adams himself then walked around the building, during which time "several ricochets" did occur. Adams concluded that someone was shooting at him or at the building with a high-velocity type weapon, either a "wrist rocket or a .22," and called the police.[23] When the police arrived they searched Huberty and Kraus, and then Huberty's truck where they found a newly purchased "pellet gun" in its original box with "several rounds" that came in the box missing. Huberty was charged with possession of a dangerous weapon and later pleaded guilty. Huberty himself testified that he had purchased the gun earlier in the evening in anticipation of a weekend hunting trip, but that while at the plant entrance he had only shot at a "sign and pop can," denying that he had shot in the direction of the plant.[24] I do not minimize the seriousness of someone firing a weapon at the plant facility but I find the record lacks sufficient evidence from which it could be concluded with any necessary degree of certainty that Huberty actually shot at the plant. I thus find and conclude that as a result of whatever happened on the evening of September 29, Huberty remained under the protection of the Act.[25]

Upon the foregoing findings of fact and inital conclusions, and upon the entire record, I make the following

[16] There is no evidence in the record that these negotiations were not conducted in good faith. However, and in my opinion, both parties at times showed signs of uncertainty in their positions. No doubt the possibility of permanent replacements was a motivating factor in the unconditional return offer, and the Company, some 5 months after it had entered into a permanent subcontracting agreement, offered reinstatement to two of the four drivers.

[17] The date of reinstatement for backpay purposes will be sent 30 days after November 20, taking into consideration the 30-day written termination clause in the September 11 agreement. The General Counsel and the Union urged that there is sufficient "parol" evidence in the case to warrant varying or disregarding the 30-day clause, theus allowing the backpay period to commence on November 20 or 23. I disagree. Although I have found that the contract drivers were temporary at the time, and so considered by the Company, the record fails to establish in my opinon that it was the intent of the parties to abrogate the 30-day requirement.

[18] *Star Meat Co.*, 237 NLRB 908 (1978), enfd. 640 F.2d 13 (6th Cir. 1980); *W. C. McQuaide, Inc.*, 220 NLRB 935 (1975), enfd. in part 552 F.2d 519 (3d Cir. 1977).

[19] Kraus was not hurt. Security guard Byron Adams testified that Kraus had moved to the middle of the road and in front of the truck, which was moving approximately 5 miles per hour.

[20] Kraus did not testify in the case.

[21] These charges were apparently later dismissed.

[22] Adams was a fairly young man but his demeanor and mannerisms while testfying lead me to conclude that he took the matter seriously, was conscientious, and completely truthful. Lenhart's demeanor lead me to question his veracity in the matter. His approach to the matter, i.e., that it was him that had been "put upon," reflected definite signs of insincerity, and was inconsistent with his anger at the time and an incident itself.

[23] The following morning the outside of the building was inspected and no visible damage was found.

[24] As indicated earlier, Kraus did not testify in the case.

[25] I note also that the record lacks evidence that the rights of other strikers were effected or influenced that evening, nor was there any damage or destruction of company property.

CONCLUSIONS OF LAW

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

2. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On September 2, 1981, employees Donald Huberty, Gary Kraus, Raymond Lenhart, and William Thurstin ceased work and concertedly engaged in an economic strike, which strike continued until on or about November 20, 1981.

4. On November 20, 1981, unconditional offers to return to work were made by and on behalf of the employees named in paragraph 3, above.

5. The Respondent Employer, by failing and refusing to reinstate employees Donald Huberty, Gary Kraus, and William Thurstin on November 20 or 23, 1981, violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices found and concluded in paragraph 5, above, affected commerce within the meaning of the Act.

7. Except for the unfair labor practices set out in paragraph 5, above, the Respondent Employer has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, to post an appropriate notice, and take the following affirmative action designed to effectuate the policies of the Act. My recommended Order will require Respondent to offer employees Donald Huberty, Gary Kraus, and William Thurstin immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. In addition, I shall recommend that the Respondent be ordered to make whole the three employees by paying to them a sum of money equal to the amount they normally would have earned from December 20, 1981, to the date Respondent offered them reinstatement with interest.[26] The amount of money due shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231, NLRB 651 (1977). Payroll and other records in the possession of the Respondent are to be made available to the Board or its agents to assist in such computation.

[Recommended Order omitted from publication.]

[26] The date of December 2, 1981, is chosen because of the 30-day termination clause in the agreement the Respondent had entered into with TSI See fn 17, supra

APPENDIX A

1. Subject to reimbursement from Lessee, Lessor shall pay the wages of the drivers and the applicable payroll taxes and shall carry Workman's Compensation Insurance, and shall make such payments to welfare funds for the benefit of the drivers as may be required.

2. Lessee shall have the right to pass upon the experience and qualifications of the drivers and to dismiss any of them from their service if they should at any time fail to meet their requirements. Subject to such right of dismissal, the driver shall be assigned to the operation of Lessee's vehicle on a continuing basic.

3. Lessee shall control the drivers in the operation of their vehicles and, to this end, Lessee shall instruct them as to the operation and maintenance of the vehicles, as to the applicable safety and motor carrier rules of Federal, State, and Local Authorities, and as to the procedure to be followed in the case of an accident. Lessee shall instruct the driver in proper and safe handling of all property owned or entrusted to Lessee and shall otherwise be assumed for any other regular employee. Lessee agrees to release indemnify and hold Lessor forever harmless from any liabilities and expenses for any and all injuries or damages caused by driver to property of or in the possession of Lessee.

4. Lessee shall specify the starting point, the destination point, and the route to be traveled in respect of each trip.

5. Lessee shall train the drivers in the special precautions required to be taken in transporting Lessee's materials and in the assistance they may be called upon to give in the loading and unloading of the same.

6. Lessee shall determine when the drivers take their vacation periods and shall pay the expenses incurred by the drivers in the course of the operation of the vehicles, including the cost of gas, oil, the repairs of the vehicles, tolls, meals, and telephone calls.

7. Lessee will see that the drivers submit daily trip reports, accident reports and trip logs required by the United States Department of Transportation to Lessee's designated representatives, who shall retain these records in accordance with established regualtions. A weekly accounting for payroll purpose with respect to the work performed by the drivers will constitute the only report with regard to the operation of Lessee's vehicles made to Lessor.

8. Lessee shall carry public liability and property damage insurance with respect to the operation of their vehicles and shall assume full responsibility to the public for their operation. Lessee hereby agrees to release and to indemnify and save Lessor forever harmless from and against all claims, demands, costs, actions, liabilities and expenses whatsoever, including but not limited to personal injury, death, or property damage and attorney's fees, if any arising out of or resulting from or sustained in connection with the use or operation of Lessee's trucks by the drivers furnished by Lessor hereunder, and whether or not the result of negligence or other acts of misconduct on the part of such drivers.

9. In the event legal process is undertaken for collection the sums due hereunder, Lessee agress to pay all costs of collection, including attorney fees. Lessee recognizes that the drivers hired on lease from Lessor have received appropriate tranining in the operations of motor vehicles, are properly licensed operators, and are familiar

with the requirements of the Department of Transportation both of the State of Minnesota and Federal Government and that such tranining and preparation has been through the efforts of Lessor. As a result of the training and a substantial investment by Lessor in making available drivers pursuant to this type of agreement, Lessee agrees that in the event the named driver herein becomes employed by Lessee within *12* months from the date of this agreement, Lessee will pay to Lessor the sum of *$2,500.00* dollars as liquidated damages resulting from Lessor's loss of the services of said driver and the investment therein. Lessee agrees that Lessor is not an employment agency and that the purpose of this lease agreement is not an attempt to secure permanent employment for the driver with Lessee.

APPENDIX B

THIS WILL ACKNOWLDEGE RECEIPT OF YOUR TELEGRAM OF NOVEMBER 20, 1981 [SIC], WHICH WE UNDERSTAND TO ANNOUNCE A TERMINATION THE STRIKE AGAINST PACIFIC MUTUAL DOOR AND AN UNCONDICTIONAL OFFER ON BEHALF OF CERTAIN EMNPLOYEES TO RETURN TO WORK.

WE REGARD THE COUNTER PROPOSAL OF 11-19-81 THROUGH THE MEDIATOR AS A REJECTION OF OUR OFFER OF NOVEMBER 18 WHICH WAS CONFIRMED BY OUR NOVEMBER 19 LETTER AND BECAUSE OF THIS REJECTON THAT OFFER IS WITHDRAWN.

AS YOU KNOW WE HAVE CONTRACTED FOR DRIVERS DURING THE STRIKE AND OUR AGREEMENT DOES NOT PROVIDE FOR CANCELLATION ON SUCH SHORT NOTICE AS TO ALLOW A RECALL OF STRIKERS ON MONDAY. FURTHER YOU ARE AWARE THAT WE ARE CONSIDERING THE PERMANENT SUBCONTRACTING OF OUR DRIVING OPERATING WITHOUT REGARD TO THE STRIKE. FOR THAT REASON WE WILL PLACE THE DRIVERS NAMED IN YOUR TELEGRAM ON TEMPORARY LAYOFF STATUS WHILE WE CONSIDER OUR LONG TERM OPTIONS. AS WE ADVISED YOU IN OUR LETTER OF NOVEMBER 19, 1981 WE ARE CONTINUING TO INVESTIGATE THE POSSIBILITY OF DISCHARGING CERTAIN DRIVERS FOR STRIKE MISCONDUCT WHILE ON THE PICKET LINE.

IF YOU FEEL THAT FURTHER DISCUSSION OF THESE MATTERS WOULD BE HELPFUL, PLEASE ADIVSE ME.