

Lehigh Metal Fabricators, Inc. and Frank Illigasch, and Joseph Burns. Cases 4-CA-12076-1 and 4-CA-12076-2

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 14 October 1982 Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Lehigh Metal Fabricators, Inc., Bethlehem, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions 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 his findings.

² In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act, Member Hunter does not pass on the Administrative Law Judge's reliance on *Oshkosh Ready-Mix Co.*, 179 NLRB 350 (1969), which is unnecessary to the resolution of the instant case.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions,

267 NLRB No. 96

the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances.

WE WILL NOT discourage our employees from engaging in union activity, including participation in an economic strike, by refusing to reinstate strikers to vacancies which they are qualified to fill after termination of the strike, or in any other manner discriminating with respect to wages, hours, and other terms and conditions of employment.

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 grant immediate reinstatement to Frank Illigasch and Joseph Burns to their former positions without loss of seniority and other benefits or, if not available, to substantially equivalent positions, discharging if necessary persons hired to such positions since 22 September 1980, and **WE WILL** make them whole for earnings lost since 4 November 1980, by reason of our discrimination against them, with interest.

LEHIGH METAL FABRICATORS, INC.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Allentown, Pennsylvania, on May 18, 19, and 20, 1982, upon an original unfair labor practice charge filed on May 4, 1981, and a consolidated complaint issued on June 26, 1981, which, as amended, alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing, since September 22, 1980, to reinstate the Charging Parties to their former or substantially equivalent positions upon termination of an economic strike. In duly filed answers, Respondent denied that any unfair labor practices were committed. Following the close of the hearing, briefs were filed on behalf of the General Counsel and Respondent.

Upon the entire record in this proceeding, including consideration of the post-hearing briefs,¹ and direct observation of the witnesses while testifying as well as their demeanor, it is hereby found as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with a facility in Bethlehem, Pennsylvania, from which it is engaged in the fabrication of steel products, including large dampers. During the calendar year preceding issuance of the complaint, a representative period, Respondent in the course of said operations sold and shipped goods and materials valued in excess of \$50,000 directly to points located outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that United Steel Workers of America, herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issue

This case gives rise to unprecedented issues concerning application of protective guarantees afforded to economic strikers pursuant to *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *Laidlaw Corp.*, 171 NLRB 1366 (1968). The scope of the job protection provided such strikers was defined succinctly in *Brooks Research & Mfg.*, 202 NLRB 634, 636 (1973), wherein it was stated as follows:

[E]conomic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon departure of replacements or when jobs for which they are qualified become available, unless . . . the Employer can sustain its burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Of prime concern in this proceeding is the question of whether or under what circumstances an employer may decline to rehire strikers in filling post-strike vacancies on grounds that the latter are unable to perform at required levels of skill. Thus, the Charging Parties herein, Frank Illigasch and Joseph Burns, during the summer of 1980 participated in a 10-week economic strike against Respondent. As of the date of the hearing, neither had

¹ Following the close of the hearing, Respondent on August 30, 1982, filed a "Reply Brief." Thereafter, by letter dated August 30, 1982, counsel for the General Counsel urged rejection thereof, pointing out that the Board's Rules and Regulations do not authorize such filings. In the circumstances, the reply brief has not been considered.

been recalled. In the interim, however, Respondent had engaged in extensive hiring.

Respondent explains that its refusal to recall Illigasch and Burns was founded on legitimate business considerations in that demands on the skill level of its work force increased since inception of the strike and vacancies which developed thereafter were confined to positions as to which Illigasch and Burns lacked minimum qualifications. In the alternative, Respondent points to a strike settlement agreement entered with the Union on September 19, 1980, as deferring termination of the strike until October 7, 1980, and as embodying an intent of narrowing the statutory rights of the strikers to Respondent's good-faith determination as to whether or not they were needed. Beyond the foregoing, Respondent's defenses raise an issue which impacts primarily on the scope of any remedy. Thus, it is argued that, pursuant to Section 10(b) of the Act, Respondent may not, under any circumstances, be deemed to have violated Section 8(a)(3) and (1) of the Act on the basis of vacancies filled more than 6 months prior to May 4, 1981, the date on which the initial unfair labor practice charge was filed. Finally, and again in the alternative, Respondent contends that no discrimination could attach with respect to two vacancies filled on September 22, 1980, for, according to its view of the facts, said nonstrikers were hired pursuant to a "commitment" made prior to the strike's termination and hence held the status of permanent replacements.

B. Concluding Findings

1. The termination of the strike and related issues

Respondent was founded in late 1977. In that year it commenced operation as a small "job shop" engaged in steel fabrication and producing a variety of "commercial" items. Illigasch was hired by Respondent on November 11, 1978. Burns was hired on January 7, 1980. The Union was certified as the representative of Respondent's employees on December 20, 1979. Thereafter, a lawful strike commenced on July 14, 1980, apparently in furtherance of the Union's position during initial contract negotiations. Illigasch and Burns participated in the strike. Picketing ceased in September 1980, and on September 19, 1980, the parties executed a "Memorandum of Agreement" which expressly stated "the Union will end the strike and be available to return to work unconditionally." That agreement did not sanction immediate return to payroll status of any of the strikers.² It was expressed, however, that Illigasch and Burns would be among a group of four strikers who would be "recalled as needed."³

² It did provide that four strikers would be reinstated but immediately placed on permanent layoff status.

³ Respondent contends that the strike may not be viewed as having terminated on September 19, 1980. In this regard Respondent cites a provision in the aforescribed agreement which stated that "employees must sign a release prepared by the Company." It is argued that since the releases in question were not returned to Respondent until October 7, 1980, a condition of the strike settlement agreement was not fulfilled and the strike did not end until this later date. Contrary to Respondent, as of September 19, with entry of the memorandum of agreement, the Union assumed an enforceable obligation to "end the strike and be available to

Continued

2. The motion to dismiss

Respondent now reiterates its assertion first made at the close of the General Counsel's case-in-chief that the evidence developed failed to make out a *prima facie* case of discrimination. In assessing this contention it is noted that the General Counsel proved beyond question that no less than 21 new employees were added to Respondent's payroll after termination of the strike in the classifications of welder, welder-fitter, fitter, truckdriver, and utility employee. It was further established that unreinstated striker Burns was hired initially as a "welder trainee" and that prior to the strike he had performed some welding work. Indeed, Respondent now describes Burns as a "utility" employee. Furthermore, the employment application completed by Burns at the time of his hire by Respondent plainly disclosed an employment history of some 9 years as a truckdriver.⁴ It is further noted in this connection that that same application summarizes the background and training of Burns in welding.

With respect to unreinstated striker Illigasch, evidence adduced on behalf of the complaint indicated that he was considered to be a welder-fitter by Respondent, that he performed as a fitter and welder during the period prior to the strike, that he received regular increases progressing from a \$5 starting rate to \$7.60 hourly when the strike began, and that, when Respondent established a second shift in 1980, Illigasch was named as foreman or leadman to head that shift.

On the foregoing, I find that the General Counsel substantiated the initial burden so as to shift the onus on Respondent to demonstrate that the failure to accord preference to the Charging Parties during the time frame covered by the complaint was supported by material considerations other than their participation in a legitimate economic strike. Contrary to Respondent's motion,

return to work unconditionally." There is no evidence, whatever, that picketing or any withholding of labor continued beyond that date. In the circumstances, delivery of the releases was a collateral contractual matter which neither in fact nor in law could be considered as a basis for extending the effective date on which the economic strike ended. In sum, as of September 19 management's capacity to maintain operations with continuity was no longer impaired or influenced by any withholding of labor by its employees, and hence it no longer could assert the privilege of replacement articulated in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). Nor do I find persuasive Respondent's contention that the strike settlement agreement in any fashion limited the statutory reinstatement rights of Illigasch and Burns. The fact that they were to be recalled by virtue of the agreement on an "as needed" basis is not irreconcilable with the statutory duty to reinstate in vacancies for which the former strikers were qualified. Unquestionably, the rights of economic strikers guaranteed by *Laidlaw* are subject to the bargaining process and may be "waived" by the statutory representative. See, e.g., *United Aircraft Corp.*, 192 NLRB 382, 385-388 (1971), *enfd.* in part 534 F.2d 422 (2d Cir. 1975), on remand 247 NLRB 1042 (1980). However, according to settled authority such waivers are not to be "lightly inferred" absent "clear and unequivocal language" sufficient to evidence a conscious yielding by the statutory representative with respect to rights guaranteed represented employees. See, e.g., *Perkins Machine Co.*, 141 NLRB 98, 102 (1963). Accord: *Machinists Lodges 743 and 1746 v. United Aircraft Corp.*, 534 F.2d 422, 452 (2d Cir. 1975). Here, the language of the strike settlement agreement is perfectly consistent with the fact that the Employer's obligation under *Laidlaw* matures only as work becomes "available." And the ordinary meaning of the term "as needed" is synonymous therewith and failed to confer discretion in the Employer to grant preference to new hires over former strikers as vacancies arise during the post-strike period.

⁴ See G.C. Exh. 9.

the requisite inference of discrimination arises simply on the showing that the Employer hired employees in classifications of its own designation which correspond to work performed and positions held by the strikers. That evidence, if unanswered, would suffice to warrant a reasonably founded conclusion that *Laidlaw* rights were violated in the filling of post-strike vacancies. Furthermore, the true reason behind any preference accorded new hires over the economic strikers would be within the peculiar knowledge of the managers who made that choice. As the preference evolved from their state of mind, the law properly calls upon them to in the first instance establish through credible and substantial proof the basis for their action. To hold otherwise would require the General Counsel as part of his case-in-chief to speculate as to any business justification possibly behind the Employer's preference, to refute any that might occur to imagination, and to encumber the proceeding through a premature and wasteful process whereby defenses are to be negated before they are raised.

3. The basic defense based upon legitimate business justification

Respondent claims it declined to recall the Charging Parties because they failed to meet minimum qualifications for any vacancy that arose after conclusion of the strike. It is argued that this lack of qualification was an outgrowth of legitimate and substantial business considerations whereby the nature of Respondent's operation had changed during the 67-day strike which ran from July 14 to September 19, 1980. In this regard it appears that Respondent was established in 1977 out of the ashes of another engineering firm. During the early stages of Respondent's development, according to the testimony of Joseph Wildman, Respondent's president, the level of experience within its work force was low as it was engaged essentially as a job shop performing little in the way of quality assurance work. Later, however, this was to change. In the fall of 1978, Respondent became associated with Damper Design Incorporated (DDI), a design and engineering firm which operated as a supplier of large gas control dampers and expansion joints to public utilities and heavy industry. In November 1978, Respondent began building dampers for DDI on a contract basis. In the ensuing period, DDI, having no production capacity of its own, sought such capability by attempting acquisition of a nominal interest in Respondent. Agreement was reached between DDI and Respondent in this regard in April 1979.

Respondent offered testimony to the effect that competitive considerations in the industry served by DDI required suppliers in the late 1970's to bid on the basis of increasingly more precise specifications, quality assurance standards, and material tracing capacity. As a manufacturer for DDI, Respondent was required to make adjustments enabling the construction of dampers under such conditions. Thus, in order to perform quality assurance jobs, quality procedures had to be defined, established, endorsed, and followed strictly. Welders could not work on such jobs until certified to perform various welding processes with different materials contemplated

by job order specifications and quality procedures. The burden to upgrade skills which was placed on welders stemmed from the use of corrosive resistant "super alloys" which were less adaptable to the welding processes than carbon steel and other metals and the utilization of the more difficult gas tungsten arc welding process (TIG). Accordingly, prior to the strike and beginning in January 1980, Respondent's employees were told that welders would have to be certified in the various welding processes using carbon steel and alloy materials.

Respondent contends that the increased level of skill demanded of its work force could only be met if future vacancies in the welder classification were filled by new hires who had already demonstrated their qualifications by prior certification. Mark Reynolds, Respondent's shop superintendent, and Wildman did the hiring during the period in question. They claim to have passed over Illigasch and Burns for welding positions because, unlike those hired, their skills in this area did not carry a promise of likely certification in the immediate future, as required by the aforesaid change in production methods.

The defense in this respect depended critically upon parole testimony offered through Wildman and Reynolds. Both downgraded the skills of Burns and Illigasch, contrasting their alleged shortcomings with a highly positive appraisal of those hired after the strike. Reynolds and Wildman were not regarded as credible witnesses. Their testimony collided with objective fact in a number of material respects, at points was internally inconsistent, and in certain areas impressed me as basically contrived and argumentative. The essential thrust of their testimony has been rejected unless corroborated by objective evidence of independent origin.

More specifically, it appears that after the strike the following welders were hired for initial employment on the dates indicated:

Thomas Bartholomew	September 22, 1980
Gerald Kurz	September 22, 1980
Charles Beers	September 29, 1980
James Shireman	January 26, 1981
David Bennett	January 26, 1981
Claude Frable	March 30, 1981
Gywllin Henritz	March 30, 1981
James Bold	May 4, 1981
Larry Kocher	August 10, 1981
Robert Schoenberger	August 17, 1981
David Malozi	September 28, 1981

According to Respondent's evidence these welders, but not the Charging Parties, met "the minimum qualifications" for the post-strike vacancies in the welder classification. As I understand the testimony of Wildman the term "minimum qualifications" was derived ultimately from little more than his own personal assessment as to whether applicants or the Charging Party possessed the requisite ability to obtain certification *quickly*.

Wildman did testify that all hired after the strike had obtained certification elsewhere, an assertion which would tend to heighten the possibility that such individuals would readily obtain certification under Respondent's codes. However, this testimony did not measure up

against fair analysis of documented fact. The employment applications of James Shireman, James Bold, Larry Kocher, and David Malozi, as well as those of Robert Rice, who was hired as a fitter, and Richard Savitt, who was hired as a welder-fitter, specify that each had obtained prior certification in one or more welding skill areas. At the same time, however, the applications of Thomas Bartholomew, Gerald Kurz, Charles Beers, David Bennett, Claude Frable, and Gwyllin Henritz failed to specify previous certification. In view of the testimony by both Reynolds and Wildman that all new hires were retained with full knowledge of the *Laidlaw* rights of Illigasch and Burns, and with full consideration of the statutory preferences of the economic strikers, it is extremely unlikely that Wildman or Reynolds, in making all such entries, would have neglected to note prior certification⁵ on all applications if in fact that had been the case. Indeed, the applications of Bartholomew, Kurz, Beers, and Bennett go so far as to detail relevant welding experience; yet, no reference is made to any certification. Also found discrepant is testimony of Wildman and Reynolds that all hired into the welder classification after the strike were given a weld test at the time of interview. Although remarks entered by either Wildman or Reynolds on the various applications often describe welding experience for those hired in that category, only that of David Malozi includes a reference to the fact that he satisfactorily completed a "weld test." Contrary to the testimony of Reynolds and Wildman I find that Respondent did not require certification as a precondition for hiring all welders, but hired such applicants in most instances solely on the basis of reported experience, without benefit of any form of testing.

The allegation that the hiring of Burns and Illigasch as welders would collide with sound business principle was embellished by further testimony on the part of Wildman and Reynolds that after the strike there was no work for uncertified welders. It is difficult to reconcile this assertion with the fact that James Bold was hired as a welder on May 4, 1981, but did not become certified under Respondent's welding procedures until September 1, 1981. Gwyllin Henritz was hired on March 30, 1981, and did not obtain similar certification until September 1, 1981. Thus, for substantial periods of their initial employment Henritz and Bold were uncertified. It is appropriate to assume that they were engaged in duties during said period which justified their hire and continuing payroll status.

Furthermore, no welder could work on any quality assurance job until certified under Respondent's own quality assurance procedures. Inasmuch as such procedures were not approved for Respondent's shop until several weeks after the strike, not a single welder qualified for work on Respondent's first quality assurance job until October 14, 1980, more than a month after the strike had ended. In fact, three welders were hired after the strike

⁵ The importance of such a notation is highlighted by testimony of Wildman himself. Thus, Paul Dickerson was hired by Respondent on January 11, 1981, as a welder-fitter. When examined as to whether Dickerson held prior certification, Wildman in obvious reference to Dickerson's application responded: "That is not indicated, and I am not sure."

at a time when "immediate" certification was not possible.

Concededly, the defense rests essentially on a subjective judgment that neither Illigasch nor Burns would, if recalled, obtain certification with sufficient immediacy. Yet, both were hired on their completion of a welding program in which both, as part of their schooling, were tested and certified pursuant to the code established by the American Welder Society (AWS). Although prior to the strike neither was engaged extensively in solid welding, both had performed those tasks.⁶ Though Burns was described by Respondent's witnesses as a "utility man," Wildman admitted to filing a tax credit application with the United States Department of Labor which listed him as a welder trainee. Illigasch, who was described by Respondent's witnesses as a "fitter's helper," was listed on personnel records as a welder-fitter.

Notwithstanding my deep mistrust of Respondent's parole testimony, it is entirely likely that the welders hired by Respondent following the strike were more experienced in that range of functions than either Illigasch or Burns, and that the probabilities favored certification under Respondent's quality assurance procedures by the former more rapidly, with less practice, and with less difficulty.⁷ However, there were no guarantees. Thus, Frable, who was hired as a welder on March 30, 1981, never did test for qualification prior to his termination on May 8, 1981. Charles Beers, who was hired as a welder on September 29 and whose employment application shows almost 30 years of experience as a welder, failed to obtain certification in the shielded metal arc weld process involving incoloy, a superalloy, and in fact merely obtained qualification in a single area. Gerald Kurz, another hired after the strike, merely qualified in one area. Furthermore, despite the alleged necessity for enhanced skills on the part of its work force, not a single employee was terminated by Respondent because of his failure to obtain certification. In essence, Respondent's economic defense seeks little more than endorsement of an *assumption* that neither of the Charging Parties could have enhanced his skills to qualifying levels within a reasonable period of time if given the chance.⁸

⁶ Illigasch had more experience in welding than Burns both prior to and after his employment by Respondent. While employed by Respondent, Illigasch had performed solid welds using metal arc and gas metal arc processes and welded using such materials as carbon steel, stainless steel, and Corten-A. He acknowledged that he had not engaged in welding using the TIG process or materials such as inconel and hastelloy. He testified that he did not take the welder certification test that was administered to Respondent's employees in February 1980, before the strike, because he was not given the opportunity to do so.

⁷ In connection with welding it does not appear that any *training* was extended to Respondent's welders to foster qualification. Materials, equipment, and physical facilities were offered through which these skills could be upgraded through practice. Thus, it would seem that the type of qualification contemplated here was more a function of experience and practice than training and education.

⁸ Hardly inspiring confidence in Respondent's good faith was testimony by Wildman and Reynolds concerning the hiring of James Kuhs and Edward Rogers. The former was interviewed by Mark Reynolds on December 14, 1981. Reynolds signified in writing that Kuhs was hired as a welder-fitter on the employment application and testified that Kuhs performed as such after his employment. Reynolds denied that Respondent had a classification called millwright, but indicated that Kuhs' background as a millwright "became very valuable during his employment." Notwithstanding the plain evidence as to the job for which Kuhs was

Yet, Respondent's lack of good faith in making that evaluation was strongly evident in the preference accorded by Respondent to new hires in the fitter and welder-fitter classifications. Apart from the question of whether *Laidlaw* was violated with respect to the welder classification, it further appears that Illigasch was classified on Respondent's own records as a welder-fitter and himself testified that prior to the strike he performed as a "fitter." In this connection, Respondent hired the following new employees as fitters and welder-fitters on the dates indicated.

Fitter	
Dallas Miller	September 29, 1980
Robert Rice	May 4, 1981
Ira Werkheiser	June 1, 1981
Richard Spangler	July 27, 1981
John Spess	August 19, 1981

Welder-Fitter	
Richard Sabet	October 26, 1981
James Kuhs	December 21, 1981
Paul Dickerson	January 11, 1982

Illigasch was rejected for the above vacancies because, according to the testimony of Reynolds and Wildman, he could not meet minimum qualifications. To further this view, Reynolds and Wildman denied that Illigasch worked as a fitter prior to the strike, claiming that he was simply a fitter's helper who worked under the direction of others, and who lacked the skills and competence necessary to be considered a fitter.⁹

In evaluating this testimony it is noted that basically the duties of a fitter in Respondent's operation consisted of the interpretation and application necessary to convert

hired, Wildman testified that Kuhs was hired as a millwright. Obviously, Illigasch, who was listed in Respondent's records as a welder-fitter, could not qualify for a millwright position. At the same time, the application of Kuhs shows no experience in private employment in the field of "fitting." In my opinion, the conflicting testimony was born of a dual need, first, to obscure the lack of justification for Kuhs' being hired into a classification for which Illigasch had greater experience and, second, to make it appear that the latter was not qualified for the vacancy filled by Kuhs. Wildman took a similarly unbelievable stance in connection with Edward Rogers. The hiring data on the application of Rogers appears to have been described thereon by Reynolds, and indicates that he was hired for the position of "utility." Rogers' personnel jacket also indicated that he was a utility man. This is the very position which, according to Respondent's own evidence, Burns held prior to the strike. It is also clear that Illigasch was suitably qualified to hold that job. Wildman neatly spun aside this apparent breakdown through sworn testimony that Rogers was hired as a carpenter, a position for which Illigasch and Burns were not shown to qualify. Wildman's testimony in the above particulars impressed me as a blatant effort to tailor facts to fit within the framework of the defense and represented the more grievous mistruths contributing to my overall distrust of the testimonial foundation of the defense.

⁹ Despite Respondent's utilization of what appears to be the traditional nomenclature of classifications, it does not appear in any form of documentation that the term "fitter's helper" was employed by Respondent as descriptive of any employee's work. Indeed, Reynolds testified that anyone considered to be within that category would be classified as "utility or shop." However, on his application, his personnel jacket, and workmen compensation reports made out in two different periods, namely, September 12, 1979, and May 9, 1980, by Mark Reynolds, Illigasch's position was defined as welder-fitter. See G.C. Exhs. 12(a) and (b).

blueprint drawings to finished products, including material preparation and the determination of the sequence of assembly operation. Some overlap appears to exist between this craft and the more sophisticated position of "layout man." The latter develop raw materials into components which do not have natural or predetermined form. It is inferrable from this record that the layout man is looked upon to provide assistance and support to the fitter in connection with complex aspects of a job. According to the testimony of Reynolds, a qualified fitter must be able to read, understand, and apply blueprints so as to convert raw materials into finished products. He must be able to measure and prepare basic components and determine assembly sequence. He must have a knowledge of fitter terminology and possess specialized tools of that craft. In sum, together with the welder, a fitter should be able to take a set of blueprints and reproduce therefrom the product performing all functions, including grinding, burning, drilling, shearing, bending, and assembly.

Nonetheless, it is clear that the fitter craft is not structured through uniformly recognized codes. In other words, there is no test, objective or otherwise, which is recognized nationally as a means for ascertaining the qualifications of fitters. Accordingly, as between industries, and as between employers, latitude exists to make one's own definition of what a fitter is and does with no objective criteria against which such determinations might be tested. While there is some evidence that educational curricula have been devised and are available to provide schooling in the fitter craft and that the United Association of Plumbers and Pipefitters Union currently administers with employers an apprenticeship program designed to develop skills in that area, it is not shown that a single fitter or combination fitter-welder hired by Respondent since the strike had such a background. That on-the-job training provides the basic seedbed for skilled fitters was confirmed by testimony of Joseph Kozo, a former supervisor and layout fitter employed by Respondent, and Robert Wiswesser, a qualified expert called by Respondent. Kozo worked for Respondent from September 18, 1978, to November 30, 1979. He possessed 14 years of experience in fitter work. It was the sense of his testimony that one becomes a fitter through on-the-job experience. Consistent therewith, Wiswesser acknowledged that few fitters would have come out of any formal apprenticeship program, or completed the type of training program offered through schools such as the highly acclaimed Hobart School. Kozo testified that despite his experience he is still learning and broadening his skills as a fitter. Indeed, he still finds it necessary to ask questions concerning a particular job.

The effort to impugn Illigasch's work history as a fitter began with testimony by Reynolds.¹⁰ He related

¹⁰ Reynolds never supervised Illigasch directly. Kozo, until he left Respondent's employ, was the immediate supervisor. Kozo, because of his prior experience with dampers, worked almost 90 percent of the time on such products. As Illigasch was Kozo's right-hand-man, he, too, was engaged primarily in damper work. Reynolds was responsible for a different area, which handled different products. It does not appear that, after the departure of Kozo, Illigasch became subject to the immediate supervision of Reynolds.

that from his observation Illigasch worked as "a very limited fitter." He claimed that Illigasch worked directly with Kozo and that although the former could assemble with the assistance of a tack welder, if materials were laid out for him, "he could not take from a blueprint and commit it into steel and make a product without it first being laid out by someone else."¹¹

Wildman testified that Illigasch was not qualified to perform as a fitter in that he was unable to establish cut lengths and mark pieces.¹² He acknowledged that Illigasch was capable of performing many assembly functions, but denied that he possessed the knowledge necessary to take on a job by himself. In referring to Illigasch's lack of capacity in developing jobs on his own, Wildman described Illigasch's primary weakness as follows: "The interpretation of blueprints . . . some of them are very difficult."¹³

¹¹ Although Reynolds earlier had testified that "a fitter's helper doesn't have the direct responsibility for the interpretation or reading of the blueprint," he related that Illigasch frequently would approach him and question him concerning the meaning of segments of a blueprint. If true, it should have been apparent to Reynolds from such inquiries that Illigasch was interpreting blueprints *independently*, and without the aid of an acknowledged fitter. To make matters worse, Reynolds, under leading examination by Respondent's own counsel compounded the matter by suggesting that a fitter's helper is permitted to act independently with respect to basic and simple design interpretations. Since Reynolds would only be aware of questions raised to him by Illigasch, he would not be aware of the degree of complexity involved in or nature of independent interpretation actually performed by Illigasch without the assistance of an acknowledged fitter. The bootstrap testimony continued with Reynolds attempting to convince me that he would have known whether Illigasch was engaged in complex or rudimentary interpretation because of his own familiarity with "the skill levels and requirements of every employee in the shop." However, when Reynolds was asked to identify other fitters functioning in the work area of Illigasch, he was plagued by a lack of independent recollection. Indeed, he attempted to respond to this line of inquiry only upon leading questions by Respondent's counsel. But of the five he identified as fitters, the personnel jackets of only two indicated that they were classified as welder-fitters, with two listed as welders and a fifth listed as a layout man.

¹² Some confusion exists on the record as to the difference between fitting and layout. The ambiguity was particularly acute in the area of material preparation. Thus, it was conceded by Reynolds that the layout man develops and lays out forms too complex for the fitter. Nonetheless, Respondent argues that, since Illigasch testified that the layout function includes the marking of materials for length and holes to be drilled, and since this is fitting work, Illigasch's own testimony reveals that he was not a fitter. I was not persuaded. The line between layout and fitter work depends upon degrees of complexity which were not subject to clear demarcation on this record. Furthermore, if the work of the layout man were as limited as Reynolds describes, one wonders if there would be sufficient work to justify their payroll status. Instead, it would seem more likely that those recognized to be layout men in Respondent's shop had performed more rudimentary measurement functions simply as a means of keeping busy and in the interest of efficient utilization. In any event, aside from confusion that may exist in consequence of such a practice, Illigasch testified that he performed some layout work which might well have included the marking of materials. The fact that he might have considered this to be layout work may well have been honestly held opinion growing out of the absence of any source of reference for precise definition as to who performs exactly what.

¹³ Respondent's brief includes an inexplicable representation to the effect that "when this charge was filed, Respondent had no idea that Mr. Illigasch claimed to be a fitter, and when informed to that effect by an agent of the National Labor Relations Board, immediately sent a telegram to Mr. Illigasch offering him an opportunity to take a test administered by an independent testing agency." (Resp. br. p. 30.) That telegram was dated March 16, 1982. (Resp. Exh. 7.) Wildman testified, however, that in June 1981 Illigasch told him directly that he was a welder-fitter

Continued

As indicated, neither Wildman nor Reynolds ever directly supervised Illigasch. Instead, he worked initially under the direction of Kozo, whose bailiwick almost exclusively related to the building of dampers. Kozo's responsibility in this respect was understandable. Thus, there is strong evidence that Kozo's work history contributed significantly, if not decisively, to DDI's initial contact with, utilization of, and eventual acquisition of a proprietary interest in Respondent. Donald Hagar, the president of DDI who was called as a witness for Respondent, testified that he believed that Respondent could handle the production of dampers because "they had one employee who had experience with dampers, and . . . making duct sections and other simple fabrications, which was the type of fabrications which we were accustomed to at that time." Kozo was the individual Hagar had in mind. Hagar acknowledged that he was "familiar" with Kozo's work. All parties agree that Illigasch worked closely with Kozo until the latter's departure from Respondent's employ on November 30, 1979.¹⁴

Kozo testified that Illigasch was hired as a welder, but, because he had more potential than what would be expected of a welder, Kozo taught him the skills of the fitter trade.¹⁵ Kozo, who impressed me as an accomplished fitter, in contrast with Wildman and Reynolds, testified that Illigasch could do anything that pertains to fitting and further "he could do everything I do as a fitter."¹⁶ He described the caliber of Illigasch's work as "quite capable."

and would accept no lesser position. Furthermore, other evidence adduced shows that Respondent described Illigasch as a "fitter's helper and acknowledges that he did some fitter's work." Respondent's own records listed him as welder-fitter. Contrary to the assertion by Respondent's counsel the facts within the Employer's knowledge left little room for confusion. Furthermore, with respect to the substance of the cited telegram, it does not appear that any qualifying test was exacted from fitters and welder-fitters hired after the strike. Indeed, the testimony of Robert Wiswesser, an expert called by Respondent, is to the effect that no nationally recognized certification test for fitters even exists.

¹⁴ Illigasch testified that after Kozo's departure he performed as a fitter until January 1980 when he was named "foreman" on the second shift. Illigasch, who received 3 pay raises in 1979, testified that while working as a fitter he was assisted by a welder, Jeff Vogelman.

¹⁵ Kozo's attestation to the potential of Illigasch is confirmed somewhat by the fact that he was designated as leadman or foreman on the second shift. To mitigate this assignment, Wildman and Reynolds related that it was made on the basis of seniority. Although there was a more senior employee on the shift, they testified that the latter was passed over because of an attendance problem. My belief of this effort to "explain away" the Company's own manifestation of confidence in Illigasch was no greater than my belief of previous testimony that Rogers was hired as a carpenter and that Kuhs was hired as a millwright.

¹⁶ Joseph Wildman was recalled as a rebuttal witness in response to the above testimony. He was asked to compare Kozo's skills with fitters presently employed by Respondent. Wildman opined that "the fitters currently in our employ are a step or two above." He went on to explain that "they have more years of experience in more applications." In rejecting this opinionated testimony, Hagar's testimony as to the work reputation of Kozo is noted. Furthermore, Robert Rice, who was hired as a fitter on May 4, 1981, had only 3-1/2 years of fitter experience according to his application. A similar document filed by Richard Spangler, who was hired as a fitter on July 27, 1981, shows only 7 years' experience in fitting work in combination with welding or burning, but at no time was he previously classed exclusively as a fitter. The application of John Spess, who was hired as a fitter on August 19, 1981, shows less than 6 years' experience as a fitter. Wildman's opinion in this respect appeared consistent with a pattern whereby Respondent repeatedly sought to meet

Respondent's testimony that Illigasch was not recalled to a fitter position because he did not possess the minimal qualifications for that job was neither reflective of reasonable action, made in good faith, nor for that matter truthful. The testimony of Illigasch and Kozo is preferred. Based thereon it is concluded that Illigasch possessed the skills requisite to function as a fitter¹⁷ or fitter-welder.¹⁸ Indeed, his familiarity with dampers and the method by which they were built by Respondent,¹⁹ and the fact that skills of others hired in his stead were not subject to precise evaluation under objective criteria, might well have made his recall a more opportune exercise of business judgment. Hence, Respondent by refusing to offer him vacancies as fitter or fitter-helper violated rights conferred by *Fleetwood and Laidlaw*.²⁰

The post-strike vacancies which developed in welder positions present a more difficult issue. In terms of work history, neither Burns nor Illigasch was eminently qualified in that skill. Nonetheless, they were initially hired as welder-trainee and welder respectively. Prior thereto, both had completed training courses and while on Respondent's payroll actually performed welding functions. It does not appear that prior to the strike either was informed that his work as a welder was unsatisfactory.

Yet, both were bypassed pursuant to Respondent's alleged determination to hire more qualified welders. In this regard it is noted that as a general proposition the right to strike guaranteed by Sections 7 and 13 of the Act would be narrowed critically if lawfully qualified by an employer's election to fill post-strike vacancies with more experienced and qualified new hires. Somewhere, somehow, someone could be found who could *impress* as capable of outperforming the reinstated striker. Here, however, the question of whether the Employer was entitled to pick and choose, subjectively, under the guise of relative ability does not arise as a narrow abstraction. For its legality must be construed in the context of Respondent's evolution from unskilled fabricator to quality assurance shop, a change which was naturally to be enhanced by a growth in the skill level of its welders. Thus, recruitment of the finest welders available no doubt would contribute to this otherwise legitimate business objective.

It is plain, however, that impaired reinstatement opportunities are not condoned simply because it is necessary to produce a business gain. Accommodation is necessary "between the asserted business justifications and the invasion of employee rights [considered] in light of

unfavorable facts by argumentative and untruthful explanations and seemingly unverifiable opinion.

¹⁷ "[T]he . . . reinstatement obligation here is not limited to the strikers' old positions, but rather includes reinstatement to substantially equivalent positions which the strikers are qualified to fill." *Fire Alert Co.*, 207 NLRB 885, 886 (1973).

¹⁸ After the strike three new employees were hired as welder-fitters. Not one ever qualified under welding certification codes covering Respondent's operations.

¹⁹ Kozo credibly testified that it takes about a year for a newly hired fitter to become oriented to procedures in a new shop.

²⁰ Beyond additional paperwork, the record does not clearly reflect how or whether demands upon skills of those engaged in fitting are any more intense in quality assurance work than would be true of a shop operating in ordinary job-by-job fabrication.

the Act and its policy." See, e.g., *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967). Indeed, in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311-312 (1965), the Court described the limited weight carried by business justification associated with certain forms of employer conduct as follows:

[T]here are some practices which are inherently so prejudicial to union interest and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.

In other words, even absent a finding of specific illegal intent, "a legitimate business purpose is [not] always a defense to an unfair labor practice charge." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963).²¹ Thus, "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights . . . the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations." *NLRB v. Great Dane Trailers*, 388 U.S. at 34. In my opinion, the instant conduct presents just such a case. First, there is no real quarrel with the underlining business causation assigned by Respondent. Instead, the mischief lies in Respondent's translation of that business purpose into an effect which relegates the post-strike employment opportunities of strikers to the vagaries of management's subjective judgment. Growth in work force skill levels and an ongoing interest in improving the performance thereof through new hires is not peculiar to Respondent's needs but represents a pervasive, commonly held goal of any effective manager. Though salutary, it is not viewed in this quarter as the type of business judgment so special as to reduce an employer's obligation to reinstate the striker, if qualified, as contemplated by *Laidlaw*, to a mere duty to reinstate the striker if he is the *best qualified* that might be recruited from any source. To hold otherwise would countenance a significant impediment to employee exercise of the rights guaranteed in Sections 7 and 13 of the Act.²² Employees would tend to be most hesitant, perhaps to the point of refraining entirely from making common cause in legitimate strike action, were the risk of permanent replacement compounded by legal recognition of a further right

²¹ The point is illustrated by a number of holdings that interference with the right to strike was unlawful even though accompanied by inherent business advantage. Thus, in *NLRB v. Erie Resistor Corp.*, *supra*, seniority for strike replacements was deemed unlawful notwithstanding its utility as an economically desirable means of attracting qualified applicants to a strike-bound plant. The denial of vacation benefits to strikers in *NLRB v. Great Dane Trailers*, 388 U.S. 26, was found unlawful even though it resulted in savings by imposing upon strikers a portion of the cost of a strike. In *Oshkosh Ready-Mix Co.*, 179 NLRB 350 (1969), *enfd.* 440 F.2d 562 (7th Cir. 1971), *cert. denied* 404 U.S. 858 an employer's bargaining lockout while continuing to operate through the utilization of temporary replacements was deemed unlawful notwithstanding that such a tactic could be viewed as promoting satisfactory resolution of a collective-bargaining dispute.

²² *NLRB v. Hartmann Luggage Co.*, 453 F.2d 178, 181 (6th Cir. 1971).

in employers to select from any source, on an unverifiable, subjective basis, the individual whom management deems the most qualified. Suspicion that such authority might be manipulated to effect veiled reprisals would not be farfetched and the mere possibility would serve as a further constraint on employee conduct in this area.

In contrast, however, on the particular facts of this case, recognition by Respondent of the rights of Illigasch and Burns, as welders, would appear simply to require that they be afforded the opportunity Respondent extended to others, including certain welders hired after cessation of the strike, to upgrade their skills. Thus, the effort by Respondent to improve its welding capability did not find its origin during the strike or its aftermath, but began in January 1980, well before commencement of the 10-week strike in July of that year. In the course of this overall process, not a single employee had been terminated for failure to obtain certification. After the strike ended and the first of the vacancies opened, immediate certification was not possible, for Respondent's quality assurance procedures had not even been established at that time. Thus, the Charging Parties would have had time to prepare for certification if reinstated immediately to said positions. Indeed, certain of the welders given preference over Illigasch and Burns did not obtain certification for some 4 to 5 months from the date of their hire and at least one nonstriker never did qualify. In sum, the statute guaranteed Illigasch and Burns the same opportunity to practice and develop dexterity with new methods and new materials as was afforded nonstrikers and as was afforded those hired from the general labor market.

Although it certainly was probable that the new hires possessed background rendering it more likely that they would qualify sooner than the Charging Parties,²³ the opinion of Respondent in this regard did not rise above "speculation." Common experience shows that there are no guarantees that newly hired employees will live up to expectations generated by their references, employment history, and performance during an employment interview. Consistent therewith, Board precedent is not lacking in suggestion that *Laidlaw* preempts the type of speculation as to qualification involved here. Thus, in *Brooks Research & Mfg.*, 202 NLRB 634, the implication strongly appears that employer misgivings concerning the qualifications of an economic striker are to be tested on the job through recall, with the employer, later, permitted to take appropriate action if the recalled striker is in fact "unqualified or cannot do the work" 202 NLRB at 637, fn. 13.

For the foregoing reasons, it is concluded that compelling justification simply does not exist for honoring on these premises Respondent's subjective assessment that its economic goals could only be achieved through post-strike filling of vacancies on the basis of the apparent

²³ In its brief, Respondent represents that "the employees hired after the strike were especially skilled and were hired to perform difficult and highly specialized tasks." The persuasiveness of this point is diminished critically by a number of considerations, including my rejection of testimony by Wildman and Reynolds that all nonstrikers hired to welding positions: (1) enjoyed prior certification and (2) were tested by Respondent in welding skills during the application process.

qualifications of new hires. See, e.g., *Fire Alert Co.*, 207 NLRB 885 (1973). On balance, to preserve the important employee rights under assault by the Employer herein, it is found that Respondent was under an obligation to offer employment to the Charging Parties as welders prior to the hiring of new employees²⁴ and that by failing to do so it violated Section 8(a)(3) and (1) of the Act.²⁵

4. Other defenses

Further contentions on behalf of Respondent relate to the appropriate scope of liability that might be imposed herein. First, it has been asserted that, by virtue of Section 10(b) of the Act, no violation might be predicated upon its hiring of a fitter and two welders in September 1980. In this connection, the initial unfair labor practice charge was filed on May 4, 1981, and, hence, the September hirings took place more than 6 months earlier and beyond the period of limitation prescribed in Section 10(b). Nonetheless, the General Counsel argues that said discrimination was not time barred as the 10(b) period only begins to run from such time as the discriminatees acquired notice of the unfair labor practices. This view of the law is endorsed by holdings in *AMCAR Division*, 234 NLRB 1063 (1978), and *Al Bryant, Inc.*, 260 NLRB 128, 133-135 (1982). Further, the factual burden imposed on Respondent in this respect was articulated by the Board in *Strick Corp.*, 241 NLRB 210, fn. 1 (1979), follows: "[N]otice whether actual or constructive, must be clear and unequivocal, and . . . the burden of showing such notice is on the party raising the affirmative defense of Sec. 10(b)." In the instant case, there is no evidence that the Charging Parties were aware of post-strike hirings on the part of Respondent until April 1981 when an advertisement appeared in local newspapers. Respondent having failed to demonstrate that actual or constructive notice of hirings was acquired by the Charging Parties at an earlier date, it is found herein that Section 10(b) is no bar to the maintenance of the General Counsel's allegations of discrimination based upon hirings on September 22, 1980, and thereafter.

A further defense raised by Respondent with respect to this time frame concerned the hiring of welders Bartholomew and Kurz. Both actually were placed on the payroll by Respondent on September 22, 1980, several days after termination of the strike. Nonetheless, Re-

²⁴ No different result is required by *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981). There, an economic defense was sustained in circumstances nullifying the employer's obligation to reinstate licensed personnel in a nursing home. However, the economically founded change therein eliminated permanently the position formerly held by striking licensed personnel, and, hence, unlike the instant case, the employer there did not prefer more qualified job applicants over qualified economic strikers in filling post-strike vacancies. Also of no avail to Respondent is the circuit court's decision in *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), since the view "endorsed" by the court in that case related to the "best qualified" striker, and in no way blessed the hiring of new employees.

²⁵ It has heretofore been found that Respondent was also under an obligation to recall Illigasch to the first vacancy in the position of fitter or fitter-helper. As to Burns, it is noted further that, even if he was not entitled to recall as a welder, his rights were violated when Respondent hired Micicke as a truckdriver on September 22, 1981, and Edward Rogers in the utility position on November 16, 1981.

spondent contends that both were replacements of unfair labor practice strikers in that commitments were made for their hire prior to termination of the strike. Here, again, Respondent held the burden of proof. In support, Wildman testified that he hired both Bartholomew and Kurz. He testified that he interviewed Bartholomew on September 10, 1980, and at that time "[W]e committed to hire him . . . we promised him employment." Wildman went on to testify that the Kurz interview occurred on September 16, 1980, at which time he "committed to hire him."²⁶ However, the application of Bartholomew included notations suggesting that he did not accept employment at the time of interview. Said application contained the notation "WILL CALL . . . HOLD POSS . . . POSS. 9-22-80." See General Counsel's Exhibit 10(a). When questioned on cross-examination concerning that notation, Wildman explained that this related solely to a question in Bartholomew's mind as to the extent of notice he had to give his current employer. Though susceptible to interpretation that Bartholomew had in fact accepted any job offer, Wildman's testimony in this respect is ambiguous and fails clearly to disclose that fact. The possibility that there might not have been immediate acceptance is suggested by the fact that the salary offered by Respondent was \$7 an hour while Bartholomew's current employer was paying \$8.75 per hour. In any event, considering my overriding mistrust of Wildman, his uncorroborated testimony as to the basis for the notation on the application is rejected. In the case of Kurz, no evidence whatever was furnished as to when he accepted any offer of employment made to him. Accordingly, Respondent has failed to adduce through credible proof that a "mutual understanding"²⁷ existed whereby the applicants during the strike signified "their acceptance of offers of permanent employment" prior to the strike's termination.²⁸ Accordingly, Respondent's unlawful discrimination in violation of Section 8(a)(3) includes its failure to offer immediate reinstatement to Illigasch and Burns on Monday, September 22, 1980.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act by since September 22, 1980, declining to reinstate economic strikers Illigasch and Burns to vacancies in positions which they were qualified to fill.
4. The above unfair labor practices constitute unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

²⁶ These facts were based upon examination by Respondent's counsel only after the high leading question was put to Wildman: "[D]id you make a commitment to them prior to them beginning?"

²⁷ *Superior National Bank & Trust Co.*, 246 NLRB 721 (1979).

²⁸ See *Home Insulation Service*, 255 NLRB 311, 312-313 (1981), and cases cited at fn. 9.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed to recall Frank Illigasch and Joseph Burns to their former positions, or to vacancies which arose after termination of an economic strike in which they participated, which they were qualified to fill, it shall be recommended that Respondent offer them immediate reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.²⁹ It is further recommended that Respondent be ordered to make the Charging Parties whole for loss of earnings they sustained by reason of the discrimination against them from November 4, 1980.³⁰ Backpay shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest as specified in *Florida Steel Corp.*, 231 NLRB 651 (1977).³¹

Upon the basis of the foregoing findings of facts, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³²

The Respondent, Lehigh Metal Fabricators, Inc., Bethlehem, Pennsylvania, its officers, agents, successors, and assigns, shall:

²⁹ Respondent by letter dated June 22, 1981, offered Illigasch, and by letter dated June 26, 1981, offered Burns, the job of a custodian who was on "indefinite sick leave." Said letters indicated that the duties would be "actually those performed" by the custodian at a wage rate of \$5.50 per hour. Illigasch testified without contradiction that at the time of the strike he was earning \$7.60 per hour. The application of Burns confirms that he was hired in January 1980 at the rate of \$5.50 per hour and thereafter was increased to \$6.35 hourly prior to the strike. The testimony of Wildman that the rate of pay offered in this connection was "at par with that earned by Burns" was at best misleading. It is concluded that said offers to what appears to have been a temporary position were not to a substantially equivalent job, and hence failed to influence the scope of the appropriate remedy herein.

³⁰ Although the discrimination commenced on September 22, 1980, in accordance with the Board's established remedial policy backpay shall not extend to a date earlier than the 10(b) cutoff date which in this instance was November 4, 1980. See, e.g., *Al Bryant, Inc.*, *supra* at fn. 3.

³¹ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

³² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

1. Cease and desist from:

(a) Discouraging employees from engaging in activity on behalf of a labor organization by refusing to reinstate economic strikers to vacancies for which they are qualified or in any other manner discriminating against them with respect to their wages, hours, or tenure of employment.

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

2. Take the following affirmative action which is deemed necessary to effectuate the purposes of the Act:

(a) Offer Frank Illigasch and Joseph Burns immediate reinstatement to their former positions or, if not available, to substantially equivalent positions, without loss of seniority, discharging those hired to such jobs since September 22, 1980, if necessary, and make them whole for any earnings lost by reason of the discrimination against them since November 4, 1980, in the manner defined in the section of this Decision entitled "The Remedy."

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

(c) Post at its facility in Bethlehem, Pennsylvania, copies of the attached notice marked "Appendix."³³ Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³³ In the event that 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."