

Harvey Engineering & Manufacturing Corporation and UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 26-CA-9020

21 June 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

On 9 July 1982 Administrative Law Judge Howard I. Grossman issued the attached decision.¹ The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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,² and conclusions only to the extent consistent with this Decision and Order.

1. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate striking employees Donald Bradbury, Tommy Kemp, Hank Meeks, Teddy Orrell, Jewell Shields, Melvin Thompson, Roy Tracy,³ Michael Rigsby, and Robert Lewis.⁴

¹ On 2 August 1982 the judge issued an Erratum to his decision.

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

³ The Respondent contends that Bradbury, Kemp, Meeks, Orrell, Shields, Thompson, and Tracy were involved in nail strewing at the Respondent's driveway while on the picket line.

The credited evidence reflects that Kemp, Meeks, and Shields were not on the picket line 17 July 1980 when tacks were discovered in the Respondent's driveway. Chairman Dotson and Member Dennis therefore find it unnecessary to rely on the judge's analysis set forth at sec. III.D,1 of his decision.

Chairman Dotson and Member Dennis also find it unnecessary to rely on the judge's analysis with respect to the 17 July 1980 allegations involving Tracy or the 28 July 1980 allegations involving Bradbury, Orrell, and Thompson. There is no record evidence identifying those responsible for placing tacks in the driveway. Chairman Dotson and Member Dennis therefore find that Tracy, Bradbury, Orrell, and Thompson did not engage in strike misconduct.

⁴ The Respondent contends that while on the picket line Rigsby hit a nonstriking employee (Teodor Morcan). The Respondent further contends that Lewis blocked Morcan's car while Morcan was returning home from work.

Chairman Dotson and Member Dennis rely on the judge's findings that Rigsby and Lewis did not engage in the asserted misconduct. They therefore find that the Respondent violated Sec. 8(a)(3) and (1) of the Act by failing and refusing to reinstate them. In crediting Rigsby's version of the events, Chairman Dotson and Member Dennis find it unnecessary to rely on the judge's apparent finding that Morcan's statement that he was "among" the pickets suggests that he sympathized with their cause.

2. The judge ultimately concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers Larry Jackson, J. R. Harvey, and Brian Michael Scroggins. We agree. The judge based that conclusion on his finding that the Respondent did not establish that Jackson's and Harvey's jobs were filled by permanent replacements. The judge therefore found that Jackson and Harvey were entitled to immediate reinstatement on their unconditional request. The judge further found that Scroggins had been permanently replaced. The judge reasoned, however, that the Respondent should have offered Scroggins the first available job for which he was qualified as interim employment. The Respondent excepts, inter alia, to the judge's findings set out above. We find merit in certain of these exceptions.

The Facts

The Respondent's employees engaged in an economic strike between 8 July and 8 August 1980.⁵ By letter dated 10 August the Union informed the Respondent that the strike had ended 8 August and that the strikers were "available for work upon notification." Jackson, Harvey, and Scroggins each received an 8 October letter from the Respondent stating:

Hemco [Harvey Engineering and Manufacturing Corporation] now has a job vacancy in your classification. If you desire to accept this job offer, report to Sid Sewell at the plant ready for work at 5:00 P.M., Wednesday, October 15, 1980. If you do not present yourself in the manner and at the time specified above, Hemco will assume that you do not want reinstatement.

The Respondent maintains two work shifts: a day shift beginning at 7:30 a.m. and ending at 5 p.m. and a night shift beginning at 5 p.m. and ending at 2:30 a.m. At the strike's inception, Jackson, Harvey, and Scroggins were all working on the day shift in their respective classifications: laborer (Jackson), machine operator/cut-up (Harvey), and machine operator/lathe (Scroggins).

The credited testimony reflects that Jackson, Harvey, and Scroggins each responded to the letter by contacting the Respondent's vice president, Sid Sewell. Jackson asked why there was no available day-shift vacancy and reminded Sewell that he had been hired for that shift. Sewell stated that only night-shift jobs were available, and Jackson replied that he would not accept Sewell's offer.

⁵ All dates occurred during 1980 unless otherwise indicated.

Harvey reminded Sewell that he had received a transfer to the day shift just prior to the strike and requested a day-shift position. Sewell replied that he had no day-shift positions, but that he would call Harvey when one became available.

Scroggins inquired whether the available job was on the night shift, and Sewell confirmed that it was. Scroggins reminded Sewell about his wife's illness, which required that Scroggins be at home in the evenings. Sewell responded that there were no openings on days at that time. Scroggins replied that he wanted to return to work, and Sewell reiterated that there were no openings on the day shift. Scroggins contacted Sewell in June 1981 and was again informed that there were no day-shift openings.

On 27 October the Respondent hired two laborers (Jackson's classification) to work on the day shift: Dennis Betts and Eston Henry. On 5 July 1981 the Respondent transferred Betts and Henry to machine operator/cut-up (Harvey's classification) on the day shift. The Respondent "re-hired" Mike Baka 27 October as a night-shift machinist and then transferred Baka to day-shift machine operator/lathe (Scroggins' classification) 7 January 1981.⁶

Procedural Errors in the Judge's Decision

The judge concluded that the Respondent unlawfully failed and refused to reinstate Jackson and Harvey 10 August, the date of the unconditional request for reinstatement. The judge based this conclusion on his finding that the Respondent did not establish that Jackson's and Harvey's jobs were filled by permanent replacements. The judge also found that the Respondent failed to provide evidence of any business justification to support its failure to reinstate Jackson and Harvey to their prestrike jobs.

We find merit in the Respondent's contention that the permanent replacement issue was not alleged or litigated. Paragraph 11 of the complaint alleges that "[s]ince on or about October 20, 1980, and continuing to date, Respondent failed and refused to reinstate [Jackson and Harvey]" because they engaged in an economic strike. Counsel for the General Counsel clarified this allegation at the hearing:

At the time . . . the Company made the offers of reinstatement to work on the second shift, *there were no first shift jobs available for those individuals*. However, it is our position that first shift jobs for these individuals opened sub-

sequently, and that they were entitled to offers of reinstatement to those jobs at times that they became open. [Emphasis added.]

Contrary to the judge, counsel for the General Counsel did not contest the Respondent's failure to reinstate Jackson and Harvey at the strike's conclusion. He conceded that Jackson and Harvey had been permanently replaced and he thus limited the complaint allegations to the Respondent's failure to reinstate Jackson and Harvey to their prestrike jobs when those jobs became available. The record also shows that the parties litigated the case as delineated by the General Counsel. We therefore conclude that the issue of whether the Respondent hired permanent replacements was not alleged or litigated, and we do not adopt the judge's conclusion that Jackson and Harvey were entitled to reinstatement to their prestrike jobs as of the Union's 10 August request.

The judge further found that the Respondent unlawfully failed to reinstate Scroggins 27 October. Scroggins' day-shift machine operator/lathe job had been filled by permanent replacement John Gray. The judge reasoned that Scroggins was qualified to fill one of the two day-shift laborer jobs which became available 27 October. The Respondent, however, had hired two new employees, Betts and Henry, to fill the day-shift laborer openings. The judge recognized that the laborer job was not substantially equivalent to Scroggins' prestrike job, but nevertheless held that the Respondent was obligated to offer it to him.

We find merit in the Respondent's contention that this issue was not alleged or litigated. We therefore do not rely on the judge's discussion of whether Scroggins should have been reinstated to any day-shift job for which he may have been qualified. The General Counsel stated his position that "by declining the offer of reinstatement to the second shift, [Jackson, Harvey, and Scroggins] did not waive any future right to recall *to their positions* on the first shift when *those positions* became open on the first shift." (Emphasis added.) The General Counsel thus confined the scope of the complaint to the unlawful failure to reinstate the discriminatees to their prestrike positions and did not allege that the Respondent violated the Act by failing to offer them jobs that were not substantially equivalent to their former positions. We therefore do not adopt the judge's conclusion—or rely on its underlying rationale—that Scroggins was entitled to reinstatement 27 October.

⁶ On that date permanent replacement John Gray (day-shift machine operator/lathe) left the Respondent's employ.

The Merits

The Respondent did violate Section 8(a)(3) and (1) of the Act as described below. The Respondent's 8 October letter offered night-shift employment to Jackson, Harvey, and Scroggins in their respective classifications. Each had previously worked on the day shift, and each declined the offer of a night-shift job. The threshold issue is whether the Respondent's offer of night-shift jobs to Jackson, Harvey, and Scroggins—within their respective classifications—constituted an offer of "substantially equivalent" employment.

An employer is obligated to accord economic strikers preferential status and to immediately reinstate them on application when their previous or substantially equivalent positions become available, absent legitimate and substantial business justifications. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The Board has held that an offer of employment for a different shift is not "substantially equivalent." An employee's refusal to accept this offer does not alter his status as a former economic striker desiring reinstatement or operate to remove him from the preferential hiring list. See, e.g., *MCC Pacific Valves*, 244 NLRB 931, 944-945 (1979); *Alcan Cable West*, 214 NLRB 236, 237 fn. 3 (1974). We find that the Respondent's 8 October letter did not offer Jackson, Harvey, or Scroggins substantially equivalent employment. They therefore retained their status as former economic strikers awaiting reinstatement.

On 27 October two vacancies occurred in the day-shift laborer classification. The Respondent hired two new employees on that date and did not offer Jackson his prestrike position. In support of its hiring decision, the Respondent asserted that when Jackson declined the offer of a night-shift laborer job he lost his eligibility for reinstatement to his day-shift laborer position.

As a former economic striker seeking reinstatement to his prestrike job, Jackson occupied a preferential position with respect to any new hires.⁷ Further, the Respondent's assertion that Jackson lost his reinstatement rights when he refused the night-shift laborer job is not a legitimate and substantial business justification within the meaning of *Fleetwood Trailer* and *Laidlaw*. We therefore conclude that the Respondent violated Section 8(a)(3) and (1) of the Act 27 October when it filled Jackson's prestrike job with a new hire and thereby failed and refused to reinstate him.

⁷ *Fleetwood Trailer*, 389 U.S. 375; *Laidlaw Corp.*, 171 NLRB 1366.

On 5 July 1981 two day-shift vacancies arose in the machine operator/cut-up classification. The Respondent transferred the two new employees, Betts and Henry, from their day-shift laborer jobs into the day-shift machine operator/cut-up positions. Harvey was not offered his prestrike job.

Permanent replacement John Gray occupied Scroggins' prestrike job (day-shift machine operator/lathe) until 7 January 1981. On Gray's departure the Respondent transferred Mike Baka from night-shift machinist to the day-shift machine operator/lathe position. The Respondent described Baka as a "rehire" employed 27 October after the strike had ended.⁸

The issue presented is whether the Respondent violated the Act by transferring Betts and Henry instead of recalling Harvey and by transferring Baka instead of recalling Scroggins. The Board's *MCC Pacific Valves* decision⁹ is relevant. At the conclusion of an economic strike MCC began posting jobs for bidding by employees then on the payroll, including permanent strike replacements and reinstated strikers. At the time of posting there remained a number of unreinstated strikers who were qualified to perform the posted jobs. Unreinstated strikers were not permitted to bid on some posted positions. Other posted jobs were offered to unreinstated strikers only if there were no successful within-plant bidders. In a number of cases unreinstated strikers who were not offered an opportunity to bid on the posted jobs were instead invited to bid on jobs which arose as a result of a "chain reaction" effect.

Citing *Laidlaw* and *Crossroads Chevrolet*,¹⁰ the Board pointed out that at least some of the MCC job vacancies resulted from the departure of strike replacements. The Board reasoned that MCC was not entitled to prefer strike replacements then on the payroll to qualified strikers awaiting reinstatement for bidding on, and filling, those vacancies. MCC was thus obligated to make the initial job vacancies available to unreinstated qualified strikers and could not wait until the "chain reaction" bidding procedure had run its course.¹¹

⁸ The Respondent did not define "rehire." Baka's name does not appear on the list of striking employees who returned to work or were recalled. We therefore conclude that Baka was not a reinstated striker.

⁹ 244 NLRB 931 (1979), enf. denied in relevant part without opinion 665 F.2d 1053 (9th Cir. 1981). See also *Randall, Burkart/Randall*, 257 NLRB 1, 4-5 (1981), enf. in relevant part 687 F.2d 1240 (8th Cir. 1982), which involved "special rated jobs" analogous to the *MCC* fact pattern.

¹⁰ 233 NLRB 728 (1977), enf. without opinion 603 F.2d 223 (9th Cir. 1979).

¹¹ The Board rejected MCC's business justification defense as "incredibly general" and "unsupported by either specific facts or documentary evidence." *MCC*, 244 NLRB at 934.

The instant case is even a stronger one for finding a violation because the Respondent filled the vacancies at issue not by transferring permanent replacements, but by transferring employees *newly hired after the conclusion of the strike*. In support of the transfers the Respondent asserts only that Harvey and Scroggins declined the offer of night-shift jobs within their classifications so that they were no longer entitled to reinstatement to their day-shift positions. We have already found that the night-shift positions offered were not substantially equivalent employment. We therefore conclude that the Respondent has not presented a legitimate and substantial business justification for its otherwise unlawful actions. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act when it failed and refused to reinstate Harvey 5 July 1981 and Scroggins 7 January 1981 to their day-shift positions.

The 10(b) Issue

The Respondent contends that certain complaint allegations are barred by Section 10(b) of the Act. The Respondent argues that the operative date for the allegations concerning Jackson, Harvey, and Scroggins is 15 October 1980 when they failed to appear for night-shift work. The Respondent's 8 October letter stated that the Respondent would "assume" that employees not reporting for work 15 October did not want reinstatement. The Respondent therefore contends that the "discriminatory act" occurred 15 October, more than 6 months prior to the service of the charge 21 April 1981.

Contrary to the Respondent, we find that the 10(b) period did not begin running 15 October. As the judge pointed out, the Respondent's 8 October letter was ambiguous and did not state unequivocally that the strikers' recall rights would be terminated unless they reported to work 15 October. Further, when Jackson, Harvey, and Scroggins received the letter, each contacted the Respondent and stated their continuing interest in reinstatement to their prestrike positions. The Respondent falsely informed Harvey that he would be contacted when a day-shift job became available, and Jackson and Scroggins were merely told that there were no available day-shift vacancies. Under these circumstances, we conclude that the Respondent has not satisfied its burden of showing that the discriminatees had "clear and unequivocal" notice 15 October that the Respondent did not intend to reinstate them. *Strick Corp.*, 241 NLRB 210 fn. 1 (1979).

CONCLUSIONS OF LAW

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

2. UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to reinstate economic strikers Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy because of their participation in an economic strike, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By failing and refusing to reinstate economic strikers Larry Jackson, J. R. Harvey, and Brian M. Scroggins to their former jobs when vacancies in those positions, created by the departure of strike replacements, were filled by employees hired subsequent to the conclusion of the strike, the Respondent violated Section 8(a)(3) and (1) of the Act.

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

REMEDY

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

Because the Respondent has unlawfully failed and refused to reinstate economic strikers Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy for the reasons set out in paragraph 3 of the Conclusions of Law, above, we shall order that they be offered immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).¹²

¹² See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Because the Respondent has unlawfully failed and refused to reinstate economic strikers Larry Jackson 27 October 1980, J. R. Harvey 5 July 1981, and Brian M. Scroggins 7 January 1981 to their former jobs when vacancies in those positions became available, we shall order that they be reinstated to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them by payment to each of them of a sum of money equal to that which each employee normally would have earned as wages from the date of the Respondent's discriminatory refusal to reinstate them, less any net interim earnings. Backpay, with interest, shall be computed in the manner prescribed above.

In accordance with our decision in *Sterling Sugars*, 261 NLRB 472 (1982), we shall order the Respondent to remove from its files any reference to alleged strike misconduct with respect to Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy, and any reference to the Respondent's unlawful failure to reinstate the above-named employees and Larry Jackson, J. R. Harvey, and Brian M. Scroggins. We shall further order the Respondent to notify the above-named employees that this has been done and that the evidence of alleged strike misconduct and the Respondent's unlawful failure to reinstate them will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Harvey Engineering & Manufacturing Corporation, Hot Springs, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate employees because they engage in an economic strike or other concerted or union activities for their mutual aid or protection.

(b) Failing and refusing to reinstate economic strikers to their former jobs when vacancies in those positions, created by the departure of strike replacements, are filled by employees hired subsequent to the conclusion of the strike.

(c) 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) Offer Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Decision and Order.

(b) Offer Larry Jackson, J. R. Harvey, and Brian M. Scroggins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Decision and Order.

(c) Remove from its files any reference to the alleged strike misconduct and failure to reinstate with respect to Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy, and any reference to its unlawful failure to reinstate Larry Jackson, J. R. Harvey, and Brian M. Scroggins, and notify the employees in writing that this has been done and that evidence of the alleged strike misconduct and unlawful failure to reinstate will not be used against them in any way.

(d) 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.

(e) Post at its Hot Springs, Arkansas facility copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 26, 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

¹³ 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."

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.

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

APPENDIX

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

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

WE WILL NOT fail and refuse to reinstate employees because they engage in an economic strike or other concerted or union activities for their mutual aid or protection.

WE WILL NOT fail and refuse to reinstate economic strikers to their former jobs when vacancies in those positions created by the departure of strike replacements are filled by employees hired after the conclusion of the strike.

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

WE WILL offer Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL offer Larry Jackson, J. R. Harvey, and Brian M. Scroggins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions as of the dates they would have been reinstated, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL notify Donald Bradbury, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin Thompson, and Roy Tracy that we have removed from our

files any reference to the alleged strike misconduct and failure to reinstate with respect to them; WE WILL notify Larry Jackson, J. R. Harvey, and Brian M. Scroggins that we have removed from our files any reference to our unlawful failure to reinstate them; and WE WILL notify the above-named employees that the alleged strike misconduct and/or unlawful failure to reinstate will not be used against them in any way.

HARVEY ENGINEERING & MANUFACTURING CORPORATION

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The original charge was filed on April 20, 1981, and an amended charge on June 5, 1981, by UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union). Complaint issued on June 4, 1981, alleging that Harvey Engineering & Manufacturing Corporation (the Respondent) refused to reinstate 12 economic strikers,¹ because of their union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing was conducted before me on these matters in Hot Springs, Arkansas, on October 27 and 28, 1981. Upon the entire record, including briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business located at Hot Springs, Arkansas, where it is engaged in the manufacturing of sawmill equipment. Respondent annually sells and ships from its Hot Springs, Arkansas facility goods and materials valued in excess of \$50,000 directly to points outside the State of Arkansas; and annually purchases and receives at said facility other products, goods, and materials, similarly valued, from points outside the State of Arkansas. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ Donald Bradbury, J. R. Harvey, Larry Jackson, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Brian M. Scroggins, Jewell Shields, Melvin (Joe) Thompson, and Roy Tracy.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Strike, its Termination, and Respondent's Failure to Rehire Some of the Strikers*

The Union was certified in July 1978 as the collective-bargaining representative of Respondent's production and maintenance employees. In October 1978, Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1). *Harvey Engineering Corp.*, 240 NLRB 699 (1979). From about July 8, 1980, to about August 8, 1980, certain of Respondent's employees engaged in an economic strike. By letter dated August 10, 1980, the Union informed Respondent that the strike had been discontinued the prior Friday, August 8, at 3 p.m. The letter further informed Respondent that the strikers would be "available for work upon notification." (G.C. Exh. 4.) With respect to nine of the alleged discriminatees, Respondent asserts that they engaged in strike misconduct which warranted Respondent's refusal to reinstate them. With respect to the remaining three, the Company contends that they were offered reinstatement but declined.

B. *The Alleged Strike Misconduct*

1. The distribution of tacks in Respondent's driveway

a. *Summary of the evidence*

(1) The July 17 incident

Respondent's vice president Sid Sewell testified that the Company refused to reinstate seven of the strikers² because they were present on the picket line when tacks were discovered in a driveway leading to Respondent's plant. Respondent does not contend that any of the alleged discriminatees were responsible for the tacks.

Company President Fletcher testified that he observed four pickets³ moving their feet from side to side shortly after 1 p.m. on July 17, 1980. There was a rainstorm about 2 p.m. which lasted 20-30 minutes. A red or white Mercury, which Fletcher did not recognize, came through the picket line, made a circle at a fast rate of speed, and left.

Fletcher suspected that the car had distributed tacks in the parking lot, and conducted an examination about 4 p.m. He discovered a flat tire, with a tack in it, on a non-striking employee's car. He also discovered hundreds of tacks, many in an upright position, on the driveway near the main road and the picket line. Fletcher and another individual swept up the tacks, and noted that the driveway was muddy because of the rain. A county patrolman was called by the Company, and corroborated Fletcher's

² Donald Bradbury, Tommy Kemp, Hank Meeks, Teddy Orrell, Jewell Shields, Melvin Thompson (called Joe Thompson in the record), and Roy Tracy. Respondent's personnel records show that these employees were not recalled "due to acts of violence during the strike." This is the same reason given for the failure to recall Michael Rigsby, who assertedly hit Teodor Morcan, and Robert Lewis, who supposedly blocked Morcan's route (G.C. Exh. 2).

³ Roy Tracy, Tommy Kemp, Hank Meeks, and Ross Humphries (not an alleged discriminatee).

testimony. Although Fletcher claimed to have identified Tracy, Humphries, Kemp, and Meeks as pickets about 1 p.m., he said that he could later identify only Humphries and Shields. The latter was on the "plant side" of the road, according to Fletcher.

Sewell averred that employees Kemp, Meeks, Shields, and Tracy were not reinstated because they were on the picket line on July 17, when tacks were discovered in the driveway.

Kemp testified that he could not remember whether he was on the picket line on July 17, but denied that he was present the day that Fletcher swept the driveway. Kemp asserted that he usually picketed in the forenoon.

Meeks testified that he saw tacks on the driveway, but denied placing them there or seeing anyone else do so. He usually picketed in the afternoon, but did not believe that he was on the picket line about 4 p.m. one afternoon, when Fletcher swept the driveway. However, Meeks testified that he was picketing when a state patrolman drove across the picket line.

Shields affirmed that he saw tacks in the driveway, but denied placing them there or seeing any other individual do so. He normally walked the picket line in the morning. Shields was present one day when Fletcher swept the driveway, but was not on the picket line. Together with other employees not picketing at that time, he was "across the highway," where the police directed non-picketing employees to park their cars. Shields stated that he saw some people with brooms sweeping the driveway and stirring up so much dust that he could not see anything. He observed no tacks that day. Asked on cross-examination whether there was a rainstorm, Shields agreed that there was a storm in July, but not on the day that Fletcher swept the driveway.

(2) The July 28 incident

Company Vice President Sewell further testified that employees Bradbury, Orrell, and Thompson were not offered reinstatement because they were present on the picket line on July 28, when a state police officer discovered tacks in the driveway. The police officer testified that he damaged three of his tires with tacks one day when he drove across the picket line. He directed the pickets to remove the tacks from the driveway, but did not determine who had placed them there and made no formal report.

Orrell and Bradbury both agreed that they had seen tacks in the driveway, when picketing, but denied that they had placed them there or had seen anyone else do so. Both agreed that they were picketing on the occasion that the state police officer discovered tacks. Bradbury added that Meeks was picketing on that day, thus corroborating the latter's testimony. Bradbury further asserted that he questioned Meeks, Orrell, and another picket about the source of the tacks, and that none of them knew. Bradbury was uncertain whether the fourth picket was Thompson.

(3) Respondent's evidence on responsibility for the tacks

Respondent called Jerry W. Hill, a former company employee and former union vice president. In response to leading questions from company counsel, Hill denied that he had ever heard Bradbury advocate acts of vandalism, "but . . . would say probably Jewell [Shields]." However, Hill testified as follows on further direct examination:

I might hang myself by saying this, but I know where the tacks came from. They came from our ex-President [of the Union]. I guess he's completely out of the picture now as far as this right here, but none of these guys . . . that are going against Harvey right now on this suit, they didn't bring the tacks. But now, as far as who dropped the tacks I don't know.

On further direct examination, Hill testified that he did not know whether Shields or Orrell dropped tacks, although he was aware of "hearsay" that Orrell "got caught putting a tack under a woman's tire." Hill further affirmed that members of a different union described "what they had done."

b. *Factual analysis*

There is some conflict in Fletcher's testimony as to the identity of the pickets on the afternoon of July 17. Although he originally testified that Tracy, Humphries, Kemp, and Meeks were the pickets at some time after 1 p.m., by 4 p.m. he could recognize only Humphries and Shields, the latter of whom he had not identified previously.

I credit the denials of Kemp and Meeks that they were present on the picket line on the day that the driveway was swept (July 17), and note Meeks' candid admission that he was there on July 28. I credit Shields' testimony that he was one of the pickets on the morning of July 17. It is unlikely that he would have been on the picket line for the entire day, since the evidence suggests half-day shifts of picketing. Because of this, and the contradiction in Fletcher's testimony about Shields, I credit the testimony of the latter that he was across the street, rather than on the picket line, on the afternoon of July 17. I have considered the county patrolman's corroboration of Fletcher about the rainstorm, and Shields' denial that there was a storm at that time, but deem the contradictions in Fletcher's testimony to be more significant for credibility purposes. Although Fletcher's testimony concerning Tracy was not entirely consistent, I conclude that Tracy picketed on July 17, in the absence of any contrary evidence.

Orrell, Bradbury, and Meeks agree that they were on the picket line on July 28, when the state police officer came through the line. I credit that testimony. There was a fourth picket whose identity Bradbury could not recall, and I therefore credit Sewell's testimony that Thompson was on the picket line on July 28.

The evidence establishes that the pickets saw tacks in the driveway, and did nothing about them except when ordered by a police officer to remove them, on July 28. I

credit the pickets' testimony that they did not place the tacks there themselves, and did not know the identity of the persons who did so. In this connection, I accept Bradbury's testimony that he questioned three of the pickets about the tacks.

I credit Respondent's witness Hill that a former union president obtained the tacks. I also credit Hill's testimony that he did not know who actually placed the tacks in the driveway. The "hearsay" that Orrell "got caught putting a tack under a woman's tire" has no probative value, since Respondent did not charge Orrell with any such misconduct.

As affirmed by Sewell, Respondent's stated reason for refusing to reinstate the seven strikers was their presence on the picket line when tacks were discovered in the driveway. Respondent does not assert a belief that these seven strikers themselves placed the tacks there. The Company's only stated belief concerning the source of tacks was an unknown automobile, which Fletcher believed had left tacks in the parking lot on July 17.

2. The alleged violence—Michael Rigsby

a. *Summary of the evidence*

Company Vice President Sewell testified that striker Michael Rigsby was not reinstated because Respondent believed that he struck a nonstriking employee, Teodor Morcan, at the picket line. Morcan emigrated to the United States from Rumania, where he was persecuted because of his religious beliefs, according to him. He testified that Shields threatened him that his car would be damaged if he drove it to work. Shields denied this, and Morcan's allegation was not offered by Respondent as a reason for the refusal to reinstate Shields.

For this reason, according to Morcan, he walked to work on the first day of the strike, instead of driving. Michael Rigsby and other employees were picketing, and Rigsby was holding some papers. As Morcan was crossing the picket line, at about 7-7:30 a.m., he heard Rigsby say to the other pickets, "Let's give the Rumanian a paper." Morcan stopped, and was facing Rigsby as the latter approached him with many "papers" in his left hand. Rigsby asked Morcan to look at the paper and see what was written on it. Then, according to Morcan, Rigsby handed him the paper with his right hand, pointing it towards him, and hit him on the left forehead with a downward motion of his right hand. Rigsby then handed him the paper. Asked whether Rigsby told him that he could not go to work that day, Morcan replied that Rigsby told him to sit down. Queried as to how Rigsby stopped him from entering the plant, Morcan replied, "By trying to hand me the paper." Morcan said that he sat down until he "quieted down," then crossed the road and again sat down. He remained there until about noon, when only a few pickets remained, and then went home. Morcan suffered a bruise on his left forehead, according to his testimony, but was not knocked down by Rigsby, and did not require medical attention. He did not try to go to work because he was "among them," i.e., the pickets. Striker Robert Lewis thought

that Morcan was "on the line" the first day of the strike, although he was sitting down.

Walter Darm was a foreman for Respondent, and was admitted by Vice President Sewell to be a supervisor.⁴ Darm testified that Morcan did not work the first day of the strike, but did come to work on the second day. He was late on the second day, "about 30 minutes or so." Darm testified on direct examination that he then noticed a raised welt on Morcan's forehead, slightly off center to the right, about 2-3 inches in length. During the course of the day, Morcan told him that he had been struck with a fist. On cross-examination, however, Darm testified that he only talked to Morcan about the job on the second day of the strike. Asked whether he noticed a mark on Morcan's forehead, Darm replied, "No, he wore a hat." Darm then asserted that it was on the third day of the strike that he noticed the mark on Morcan's head.

Darm described how Respondent got this information from Morcan. "He didn't want to tell me at first," Darm said, "but during the course of the day I got it out of him that he had been struck. And, then he didn't want to tell me what he was struck with. And, in time, the way I understood it, he was struck with a fist." Darm, Morcan, and Respondent's counsel then met in Fletcher's office, with Morcan's daughter as the interpreter, and attempted to get Morcan to repeat what had happened. "You had to persuade him and it took quite awhile to persuade him," Darm averred. "He was afraid to tell."

Rigsby testified that he was walking the picket line on the first day of the strike (July 8), when Morcan appeared on foot. The latter stopped at the picket line for a few minutes and, as Rigsby approached him, asked Rigsby in halting English whether he could cross the picket line. Rigsby replied that he did not care whether Morcan crossed the line or not, but would appreciate it if he did not. Morcan then sat down on a curb, and remained there all day. Rigsby denied striking Morcan. "I never touched him. I never even shook his hand. Why should I hit him? He was a picketer. I mean he wasn't a picketer but he wasn't crossing the picket line, so he was one of us, you know. I had no reason to strike him." Rigsby conceded that the Union had pamphlets for distribution, but denied giving one to Morcan.

According to Rigsby, Morcan appeared again on the second day, and again sat down in the same place. He remained there for about half a day, and then crossed the road and sat in the woods.

b. *Factual analysis*

The combined testimony of Morcan and Darm are improbable and, to some extent, contradictory. Thus, if Rigsby was holding a "paper" (a union pamphlet) in his right hand, with the paper pointed towards Morcan, it is difficult to understand how Rigsby could have struck Morcan a downward blow with his fist of sufficient severity to raise a welt 2-3 inches long, as Darm testified. The alleged blow was performed in so awkward a manner, as to make the testimony improbable. If Rigsby wanted to strike Morcan, the natural blow would have

⁴ The pleadings establish that Sewell and Fletcher were supervisors within the meaning of the Act.

been a straightforward one with the fist, without the impediment of a union pamphlet. But why would Rigsby strike Morcan in the first place, if he wanted him to believe the truth of union literature? Morcan's testimony merges the carrot and the stick into one utensil.

Although Morcan said he was hit on the left forehead, Darm alleged seeing a welt slightly right of center. The severity of the welt described by Darm does not conform to Morcan's description of his "bruise," which required no medical attention. Darm contradicted himself as to the day that he first saw the alleged welt. Although he originally testified that it was on the second day of the strike, he later changed this to the third day, and tried to explain his original testimony by saying that Morcan wore a hat on the second day. Why would Morcan wear a hat on the second day and not on the third day? Darm's testimony is contrived, and I do not credit it.

Morcan was a complex and ambiguous witness. His statement that he was "among" the pickets suggests that he sympathized with their cause. In eliciting evidence of his personal history, Respondent's counsel argued that an individual who had been subjected to communist oppression would have "more fear than a normal American might have from what could or couldn't happen to him," that Morcan had a "fear of authority," and that the pickets were "aware of his situation." If true, however, Morcan's employer was equally "aware of his situation," and at least as authoritative as the strikers. Darm's description of the lengthy efforts that company representatives made to "persuade" Morcan to overcome his "fears," is intriguing. That description suggests, but does not establish, that Respondent attempted to do more. Morcan's appearance on the stand and much of his testimony convince me that he is an extremely passive individual, susceptible to suggestion and influence.

I need not resolve this question, however, because Rigsby's testimony should be credited. As Rigsby put it, why would he have hit Morcan? The latter's actions appeared to put him in sympathy with the strikers, at least on the first day of the strike, and this is how Lewis saw the matter. Respondent points to the discrepancy between Rigsby's testimony that Morcan arrived at the picket line on the second day of the strike, and Morcan's and Darm's assertions that he went to work that day.⁵ This discrepancy simply demonstrates that witnesses frequently disagree on the facts. Rigsby was the more credible witness, and I accept his version of the events that took place on the first 2 days of the strike.

c. *Additional alleged violence*

Vice President Sewell testified that there were additional reasons for not reinstating the alleged discriminatees. Thus, he said that there were tacks in employees' driveways, 16 flat tires on supplier vehicles, 3 or 4 dam-

⁵ Rigsby said that Morcan remained near the picket line for only about half a day, and then "sat in the woods." Darm agreed that Morcan came in late on the second day, about 30 minutes "or so." It may be that Morcan showed up at the picket line for half a day, crossed the road, slipped into the woods, and entered the plant by the rear entrance. Darm in fact testified that Morcan came in "the back way."

aged radiators, and that several pet dogs and rabbits belonging to employees had been killed. However, Sewell also said that the Company was not attributing responsibility for these events to the alleged discriminatees.

3. The alleged blocking of Teodor Morcan by Robert Lewis

a. Summary of the evidence

Sewell contended that Respondent did not reinstate striker Robert Lewis because it believed that he had blocked Teodor Morcan's passage back to his home.

Morcan testified that Lewis and another individual followed Morcan home in an old car which was not Lewis' vehicle. Morcan pulled over to the side to allow Lewis to pass him, and the latter crossed a one-way bridge which leads to "Honeycutt Road"—a name which Morcan remembered because the "lawyer at the factory" told employees to "be careful." Lewis then turned around, entered the bridge again, and stopped his car. Morcan stayed there about a minute, and then backed up. Neither of the occupants of the other car said anything to Morcan or got out of the car. Morcan asserted that he saw Lewis "doing something where the instruments are . . . or maybe it was the glove compartment." Morcan said that this event took place "shortly after" the strike began. In later testimony referring to "the day [he] was hit," Morcan said that he was "stopped on the bridge the next day." He said that the event caused him anxiety.

Lewis testified that he and Morcan had worked in the same bay for a year. He tried to get Morcan to join the Union by talking to him, but was not successful. However, as noted above, it was Lewis' opinion that Morcan was "on the [picket] line" the first day of the strike. Lewis said that he knew the type of vehicle which Morcan drove. However, he denied driving behind Morcan's vehicle during the strike, denied blocking him in any manner, denied knowing where Morcan lived, and testified that he was not familiar with a "one-way bridge."

Supervisor Walter Darm, called as a witness by Respondent, testified that Morcan worked for him and that, during the first week of the strike, Morcan rode to work with various other employees. After the first week, Darm picked up Morcan and drove him to work.

b. Factual analysis

The testimony of Morcan and Darm is flatly contradictory. It would have been impossible for Morcan to have driven his own car to and from work, and simultaneously to have been driven in other automobiles by other drivers. Lewis was a candid and believable witness. I conclude that Morcan's testimony was a complete fabrication, and credit Lewis' denial that he engaged in any of the conduct attributed to him by Morcan.

4. The Company's decision not to recall strikers for alleged misconduct

Company President Fletcher testified that, in mid- to late September 1980, he made the decision not to recall

Bradbury, Kemp, Meeks, Orrell, Shields, Thompson, and Tracy. He made the same decision concerning Rigsby at an earlier time, after the alleged Morcan incident. There is no evidence of the date that he decided not to recall Lewis. Despite these decisions by Fletcher, however, Sewell's testimony and the documentary evidence establish that Meeks was first notified of the Company's decision on October 27, 1980, Kemp on November 4, 1980, and Bradbury and Orrell in the spring of 1981. According to Sewell, Respondent never notified Rigsby, Lewis, Shields, or Thompson, and there is no evidence that Tracy was ever notified.

C. The Job Offers to Strikers Harvey, Jackson, and Scroggins

1. Employment history

Harvey was employed in December 1978 (G.C. Exh. 2). He testified that he had worked at four or five different jobs for the Company, as a punch operator, "small operator," "cut-off," and laborer. He used various types of equipment, such as a punch press, a drill press, a cut-off press, and a small saw. Harvey testified that he was classified as a "sawyer" at the time of the strike, although Respondent's personnel listings classified him as a "machine-operator/cut up" (G.C. Exh. 2).

Harvey originally worked the night shift. He asked for a transfer to the day shift several times, on the ground that he had to be home nights to take one of his children to the hospital. The Company granted this request about a week before the strike began, and Harvey then began working days. He took a pay reduction of 15 cents hourly, from \$4.47 to \$4.32, in order to get the transfer.

Jackson was hired as a laborer in October 1979, and had always worked the day shift, at the hourly rate of \$4.08. He testified that he trained as a welder, and did "whatever needed to be done." His supervisor was Walter Darm.

Scroggins was hired as a "machine operator/lathe," the only employee with this classification, and began on the night shift in October 1978. Several months later, a vacancy occurred on the day shift, and Scroggins was transferred into that shift. His hourly rate was \$6.84, and his supervisor was Jimmy Harvey.

In February or March 1981, after the end of the strike, Scroggins accepted a daytime job with Arkansas Precision Machine Company, then located in Little Rock, Arkansas, and commuted daily between Little Rock and his home in Hot Springs, Arkansas, for about 2 months except for 1 week of employment after that company moved to Hot Springs. Thereafter, in June 1981, Scroggins took a job with another employer located in Hot Springs, Arkansas Aluminum Alloys.

Vice President Sewell described the employee classifications as machine operators, general laborers, layout employees, lathe operators, milling machine operators, drill press operators, and maintenance employees. According to Sewell, machine operators used machinery ranging from simple drill presses to metal cutting saws, punching devices, settling and burning devices, sheers, and press brakes.

2. The offers and the employees' responses

Respondent sent identical letters to Harvey, Jackson, and Scroggins, dated October 8, 1980, offering them jobs in their "classifications," on the night shift beginning October 15. If the employee did not present himself "in the manner and at the time specified" in the letter, Respondent would "assume" that he did "not want reinstatement."⁶

Harvey received his letter on October 9, and testified that he called Sewell that day. He asked what kind of a job was involved, and the vice president replied, "Doing anything." As Harvey considered himself as having been a sawyer before the strike, he asked whether "a saw was available." Sewell replied in the negative. Harvey pointed out that he had just been transferred to the day shift, and had to be home nights in order to take one of his children to the hospital. Sewell replied that he did not have a day shift job open at that time, but would phone Harvey as soon as one was available.

Called first as a witness for the General Counsel, Sewell denied having any conversation with Harvey about the letter. Under later examination by Respondent's counsel, however, Sewell said that he did have a telephone conversation with Harvey about the offer. According to the company vice president, Harvey had an objection to working the night shift. Sewell denied telling Harvey that he would call him when a day job opened up. Instead, the witness asserted, he told Harvey that no other offers would be made.

Because of the obvious contradiction in Sewell's testimony, and because Harvey was a more credible witness, I accept his testimony on this matter.

Scroggins testified that he called Sewell after receipt of the letter, between October 10 and 15, and ascertained that the offer consisted of the same work he had been doing, but that it was on the night shift. He would have received a "second shift premium" over his day shift hourly rate of \$6.84. Scroggins told Sewell that he wanted "to go back to work for the Company," but that he could not accept night shift work because his wife was diabetic, was receiving treatment for her eyes, and required his presence at night. Sewell replied that the Company did not have a day shift job available at that time. Sewell's testimony is not inconsistent with that of Scroggins, and accordingly, I credit the latter's testimony. Scroggins further testified that he called Sewell again about 4 months before the hearing, i.e., in June 1981, and asked him whether he had an opening on the day shift. Sewell replied that he did not. I credit Scroggins' uncontradicted testimony.

Jackson also called Sewell upon receipt of the offer, and asked why the Company did not have an opening on the day shift, since this was the shift on which Jackson had previously worked. Sewell replied that this was the only job available, and Jackson refused to take it.

Sewell asserted that the Company made no further offers to Harvey, Scroggins, or Jackson, because it felt that they had given up their right to reinstatement by refusing the initial offers.

⁶ G.C. Exhs. 5(a), (b), and (c).

3. Replacement of strikers and availability of work after the strike

In response to a leading question, Sewell asserted that Scroggins' and Harvey's jobs had been "filled" by other employees at the time of his offers to them. He identified the employees who "filled" Scroggins' job as a John Gray, who assertedly remained on the job until January 7, 1981, and was then moved to another job. Sewell repeated his testimony about Gray at two different times in the hearing.

Respondent's records in evidence are incomplete, in that they fail to include a complete personnel roster, a list of new hires, if any, during the strike, or a list of transfers during the strike.⁷ However, the record of post-strike transfers shows that a new employee (Baka) was hired October 27 on the night shift as a machinist, and was transferred to the day shift on January 7, 1981, as a "machine operator/lathe," which was Scroggins' classification. (G.C. Exh. 3(b).) This would at least be consistent with a transfer of Gray to Scroggins' job when the strike began, and tends to corroborate Sewell's testimony, particularly the date of January 7 appearing in his testimony pertaining to Gray, and the same date in the documentary evidence pertaining to Baka and the same job. Accordingly, I credit Sewell's testimony concerning Gray, and conclude that he was a permanent replacement for Scroggins.

With respect to Harvey, however, Sewell's testimony fails to identify the employee who "filled" his job, and fails to aver that this person was a permanent replacement. In light of the indefinite nature of Sewell's testimony, therefore, the contrast to his specific testimony about Scroggins' replacement, and the lack of documentary evidence, I conclude that Respondent has not established that Harvey's job was filled by a permanent replacement at the time of his offer to return to work. The same conclusion necessarily follows concerning Jackson. Because any evidence that Harvey's and Jackson's jobs were filled by permanent replacements was within Respondent's control, its failure to produce such evidence warrants an adverse inference that they were not permanently replaced, and I so find. *Zapex Corp.*, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980).

Sewell admitted that there were openings in the alleged discriminatees' job classifications subsequent to the date of his offers. With respect to Jackson's classification of laborer, company records show that a new laborer was hired on the night shift on October 20, 1980 (Hyatt); two on the day shift on October 27 (Betts and Henry); one on the day shift on November 20 (Thacker); two on the day shift on November 24 (Garner and Sexton); and one (Bishkoff) on the night shift on November 24, 1980 (G.C. Exh. 3(a)).

Respondent's records also show that Betts and Henry, hired October 27, 1980, on the day shift as laborers, were classified as "machine operators/cut up" (Harvey's classification) on July 5, 1981, and continued to work the

⁷ G.C. Exh. 2 is a list of striking employees at the time the strike began, while Exhs. 3(a) and (b) list new hires and job transfers subsequent to the date the strike ended.

day shift (G.C. Exh. 3(b)). However, as noted, Respondent has not established that Harvey's job was filled by a permanent replacement at the time the strike ended. Further, Harvey's testimony indicates that Sewell did not really offer him reinstatement to his former job.

D. Legal Conclusions

1. Respondent's refusal to recall employees because of tacks in its driveway

The Board has recently restated with judicial approval the applicable law when an employer disciplines an economic striker. *General Telephone Co. of Michigan*, 251 NLRB 737 (1980), affd. 109 LRRM 2360 (D.C. Cir. 1981). Such discipline violates Section 8(a)(3) and (1) of the Act. The employer may defend its action by showing that it had an honest belief that the employee was guilty of striker misconduct of a serious nature. Proof sufficient to establish such an honest belief requires more than the mere assertion that the belief caused the discipline. "Rather, it requires some specificity in the record, linking particular employees to particular allegations of misconduct" (id., 251 NLRB at 739).

If the employer establishes such a defense, the General Counsel must come forward with evidence either that the employee did not engage in the asserted conduct, or that the conduct was protected. The burden then shifts back to the employer to rebut such evidence. Although the Act protects striking and picketing, such protection may be lost if an employee engages in acts of "brutal violence" as distinguished from mere "animal exuberance," or otherwise engages in conduct "so flagrant or egregious as to require subordination of the employee's protected rights in order to vindicate the broader interests of society as a whole." The Board's decision continues:

And, while an employer may premise its belief of striker misconduct on reports from its guards and other written reports, it cannot rely upon a mere showing of general violence and destructive activity. It must rely instead on specific misconduct of the strikers whom it disciplined. The mere fact that there may have been misconduct engaged in by some strikers does not without more impute culpability to the individual strikers disciplined. Moreover, unauthorized acts of violence on the part of individual strikers are not chargeable to other strikers in the absence of proof that identifies them as participating in such violence." [Ibid.]

The Board has applied these principles to the strewing of tacks on an employer's property. As usual in such cases, various factual situations are possible. At one extreme, "[t]he Board has consistently found that nail strewing is such serious misconduct that it justifies the discharge of strikers so engaged." *Moore Business Forms*, 224 NLRB 393, 398 (1976), enf. as modified 574 F.2d 835 (5th Cir. 1978). On the other hand, the fact that there are tacks on an employer's property, with no evidence of responsibility on the part of any picket and no evidence of picketing at the time, does not constitute se-

rious misconduct. *QIC Corp.*, 212 NLRB 63, 69-70 (1974).

An intermediate position is presented by the picket who saw nails on the picket line, but did not know who placed them there. At the request of a truckdriver attempting to cross the line, the picket removed some of the nails. The Board concluded with judicial approval that the picket's conduct did not warrant discipline. *Moore Business Forms*, supra, 224 NLRB at 402.⁸ In a somewhat more blameworthy posture, the pickets, although they did not place the nails themselves, knew that this was being done, and appeared to be acting as "lookouts" for other pickets, or engaged in other misconduct. In this situation, the Board approved of the administrative law judge's conclusion that the conduct was protected, but was reversed by the Court of Appeals for the Sixth Circuit, partially on the ground that the Board's decision was not supported by substantial evidence. *Otsego Ski Club*, 217 NLRB 408 (1975), enf. as modified 542 F.2d 18 (6th Cir. 1976).

Respondent herein argues that, since the employees were on the picket line when the tacks were discovered, "strong circumstantial evidence . . . provided the employer with its good faith belief that these employees were guilty of misconduct, or at the very least were guilty of the ratification and adoption of misconduct of others."⁹ I do not agree.

Respondent's asserted belief as to the presence of particular individuals on the picket line was not completely accurate.¹⁰ Of greater significance is the fact that Respondent's belief is merely that they were there, not that they placed the tacks on the driveway, or somehow participated in placing them there. Instead, Respondent states its belief that they "ratified or adopted" the misconduct of others. This is not belief in certain facts, but rather, belief in a legal theory.

I conclude that Respondent's "ratification and adoption" theory is erroneous. It flies in the face of the Board's position that an employer must rely on specific rather than general misconduct to justify discipline, and that it may not without proof impute culpability for violence to particular strikers. The case is indistinguishable from that of the picket in *Moore Business Forms* who knew the nails were there, did not know who placed them there, and removed them on request. The fact that it was a truckdriver trying to cross the line who made the request in *Moore Business Forms*, and a police officer who made the request in this case, is irrelevant. In addition, there is serious doubt that Respondent even believed its own erroneous theory, since it never reconciled Fletcher's stated belief—that the unknown red (or white) Mercury distributed tacks—with Respondent's newly asserted belief at hearing that the pickets were re-

⁸ In its enforcing decree in *Moore Business Forms*, the Court of Appeals for the Fifth Circuit rejected some of the Board's conclusions on employee misconduct, but enforced that portion of the Board's order pertaining to the employee who saw the nails (Mike Lindsey).

⁹ R. Br. 18.

¹⁰ Shields was across the street as an observer on July 17, Meeks was present on July 28 instead of July 17, Kemp was not there on either occasion, and a finding that Tracy and Thompson were there is partially based on the fact that they did not testify.

sponsible. In this respect, it is significant that Respondent's personnel records do not allege nail strewing as the reason for the failure to recall these employees, but, rather, make the general accusation of "acts of violence."

I conclude that Respondent did not have a good-faith belief that the seven strikers allegedly involved in nail strewing¹¹ had engaged in strike misconduct warranting discipline, and, accordingly, that its refusal to reinstate them violated Section 8(a)(3) and (1) of the Act.

2. Respondent's refusal to recall Rigsby and Lewis

Because of the contradictions in Supervisor Darm's and Morcan's testimony regarding Rigsby, and the extraordinary efforts which Respondent engaged in to "persuade" Morcan to tell his story, it is doubtful that Respondent had a good-faith belief in the truth of Morcan's version of the events. With respect to Lewis, Respondent could not possibly have believed that he blocked Morcan's car, since Supervisor Darm knew that Morcan was being driven to work in other cars. In any event, the General Counsel has clearly established that neither Rigsby nor Lewis engaged in the asserted misconduct, and, accordingly, Respondent's refusal to reinstate them violated Section 8(a)(3) and (1) of the Act.

3. The alleged discrimination against Harvey, Jackson, and Scroggins

The Board has recently summarized the rights of these alleged discriminatees, as follows:

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

The underlying principle in both *Fleetwood* and *Great Dane*, *supra*, is that certain employer conduct, standing alone, is so inherently destructive

of employee rights that evidence of specific anti-union motivation is not needed. Specifically in *Fleetwood*, the Court found that hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers. [*Zapex Corp.*, *supra*, 235 NLRB at 1238.]

Respondent herein contends that these principles do not apply to it, because it did offer to reinstate the employees to their former or substantially equivalent positions. The Company thus argues that the night shift jobs which it offered the strikers were substantially equivalent to the day shift jobs which they formerly occupied.

This argument is not in accord with current Board law. In *Providence Medical Center*, 243 NLRB 714 (1979), almost none of the employees was offered a job on his or her former shift, a fact which "would have forced the returning strikers to make substantial changes in their lifestyles, i.e., eating and sleeping habits." (243 NLRB at 739.) One of them, who was offered a third shift job beginning at 11 p.m., rejected it because she had a young daughter who could not be left alone at night (*id.*, 735). "Finally, Respondent required the strikers to either accept these onerous job offers or be terminated as employees . . . Respondent must have realized that the great majority, if not all, of the employees would reject its offers, hence, pursuant to its recall system, they would be terminated as employees and would no longer [be] eligible for preferential recall" (*id.*, 243 NLRB at 739-740). Based on these and other considerations, the Board accepted the finding that the employer violated Section 8(a)(1) and (3) of the Act by requiring employees to accept reinstatement into positions which were not their former or substantially equivalent positions.¹²

The similarities between *Providence Medical Center* and the case at bar are striking, including the striker who rejected the midnight shift for the same reason given by Harvey and Scroggins i.e., the need to care for a family member at night. Respondent herein must also have known that these employees, like those in *Providence Medical Center*, would refuse the offer. Indeed, Harvey had based his prior request for transfer to the day shift on the ground that he was needed at home to care for one of his children. Moreover, as indicated, it is questionable whether Sewell's offer to Harvey involved the same kind of job.

With respect to Harvey and Jackson, Respondent has not supplied any justification for failing to reinstate them immediately to their former jobs, since it has not established that their jobs were filled by permanent replacements. I therefore conclude that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers Harvey and Jackson immediately on their unconditional requests for reinstatement. *Zapex Corp.*, *supra*.

¹¹ Donald Bradbury, Tommy Kemp, Hank Meeks, Teddy Orrell, Jewell Shields, Melvin Thompson, and Roy Tracy.

¹² Accord: *MCC Pacific Valves*, 244 NLRB 931, 944-945 (1979).

With respect to Scroggins, I have found that he was permanently replaced at the end of the strike. However, as an economic striker he had the right to wait for the availability of a job substantially equivalent to his prestrike position, or a job for which he was qualified.

Did Scroggins first acquire this right at such time as a substantially equivalent job became available? Or did that right accrue when a job for which he was qualified became available, even though it was not substantially equivalent to his prestrike job? The question is significant because other jobs became available prior to the time that Scroggins' former position, that of "machine operator/lathe", opened up when Gray left that job on January 7, 1981. Thus, the Company hired two laborers on the day shift on October 27, 1980, and several others prior to January 7, 1981. I conclude that the jobs of "laborer" and "machine operator/lathe" are not "substantially equivalent," if only because of the pay differential of more than \$2 per hour. On the other hand, I also conclude that Scroggins was "qualified" to be a laborer, provided that he would have been willing to step down to that job. His very high hourly rate, and the multitude of duties of machine operators depicted by Sewell, warrant an inference that Scroggins could easily have performed the comparatively simple duties of a laborer.

The Supreme Court stated in *Fleetwood*: "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement" (emphasis added). 389 U.S. 375, 381. The Court of Appeals for the Third Circuit has given two different answers in the same litigation. In its first decision in the long *W. C. McQuaide* case,¹³ the court stated that the presence of permanent replacements would bar an economic striker's right to reinstatement "until substantially equivalent positions became available." 552 F.2d 519, 531. However, in its second decision the court adhered to the *Fleetwood* formula: "The fact that [the striker's] old job is occupied is no excuse for refusing to offer reinstatement if another job for which he is qualified becomes available." 617 F.2d 349, 353.

In *Little Rock Airmotive*, 182 NLRB 666 (1970), enfd. as modified 455 F.2d 163 (8th Cir. 1972), the Board stated:

The question of what constitutes "regular and substantially equivalent employment" cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned.

In *Brooks Research & Mfg.*, 202 NLRB 634, 636 (1973), the Board noted that, in its *Laidlaw* to hold that economic strikers "are entitled to full reinstatement upon departure of replacements or when jobs for which they are qualified become available, unless they have in the meantime acquired regular and substantially equivalent em-

ployment . . ." In *Fire Alert Co.*, 207 NLRB 885, 886 (1973), the Board stated that an employer's reinstatement obligation is "not limited to the strikers' old positions, but rather includes reinstatement to substantially equivalent positions which the strikers are qualified to fill." Two years later, in *New Era Electric Cooperative*, 217 NLRB 477 fn. 1 (1975), the Board appeared to hold that a striker is not entitled to be reinstated to a job for which he is qualified if it is not substantially equivalent to his former job. In finding lack of substantial equivalence, the Board noted that the striker would be working at a lower rate of pay, and as a subordinate to an employee with whom he had formerly been on an equal footing. In *Western Steel Casting*, 233 NLRB 870, 871 fn. 3 (1977), where the administrative law judge had applied the *Fleetwood* formula, the Board decided the case on other grounds and found it unnecessary to pass on the issue. Finally, in *Zapex Corp.*, supra, where the administrative law judge interpreted *Little Rock Airmotive* and *New Era Electric Cooperative*, to mean that the applicable test is not the employee's qualifications, but rather the availability of a job substantially equivalent to his prestrike job, the Board decided the case on other grounds. 235 NLRB 1237, 1240 fn. 16.

I infer from the foregoing authority that the issue is not settled. Although the Board appeared to choose the "substantially equivalent" test in *New Era Electric Cooperative*, its language in *Brooks Research & Mfg.*, adopts the *Fleetwood* formula, while in *Fire Alert Co.*, the Board combined both criteria into one standard.

The administrative law judge in *Western Steel Casting Co.*, faced with the employer's argument that the available jobs were undesirable, involved different supervisory lines of authority, and would place the employees' former peers over them as supervisors, replied that "an undesirable job may be . . . more desirable than no job at all," and considered the employer's other arguments as speculative. He called attention to the absence of any "substantially equivalent" language in the Supreme Court's decision in *Fleetwood*, and regarded the law as requiring an employer to offer an economic striker (1) his former job; or, if that is not available, (2) a substantially equivalent job; or, if neither is available, (3) any other job for which the striker is qualified. 233 NLRB at 875.

I consider the foregoing arguments to be persuasive, particularly the observation that "an undesirable job may be more desirable than no job at all." The Board stated in *Little Rock Airmotive* that the desire and intention of the employee are factors to be considered. In the instant case, at the time that the first laborer job became available on the day shift after the strike, in October 1980, Scroggins had not yet obtained alternative employment. He might well have preferred, at that time, a laborer's job at lesser pay to "no job at all." Although he would have had a different supervisor, he was, nonetheless, under supervisory direction in his old job. Certainly these are matters which Scroggins should have been allowed to decide. Yet the only way to have tested his intentions and desires would have been an offer from Respondent. As I have found above, Scroggins told Sewell

¹³ *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975), enfd. in part and remanded 552 F.2d 519, (3d Cir. 1977); *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978), enfd. 617 F.2d 349 (3d Cir. 1980).

that he wanted to go back to work for the Company—the only requirement that he asserted was that he be placed on the day shift. Under these circumstances I conclude that Respondent violated the Act by failing to offer him a day shift job as a laborer on October 27, 1980, and again on January 7, 1981, when his former job as a machine operator/lathe became available.¹⁴

This is not to say that Scroggins' right to a former or substantially equivalent job would have been terminated if he had rejected the laborer's job. There is nothing inconsistent in treating a striker's rejection of a lesser job differently from rejection of his former or a substantially equivalent job, which terminates reinstatement rights. *Staats Dairy Transport*, 162 NLRB 995 (1967). Upon either rejection or acceptance of the lesser job, Scroggins would have continued to be entitled to reinstatement to his former or a substantially equivalent job, a right which accrued on January 7, 1981. Since Respondent made no offers whatever after its initial offer, Scroggins is entitled to be made whole from October 27, 1980 (when a day shift laborer's job became available), at the laborer's rate of pay, which Respondent never offered him and which he therefore had no opportunity to accept, until January 7, 1981, and thereafter, at the rate of pay of his former job, with interest as described hereinafter. See *Brooks Research & Mfg., Inc.; Zapex Corp.*, supra.

This remedy imposes no undue burden on an employer. The problem of finding an economic striker when a vacancy occurs in a lesser job is no more than the problem of finding him when a vacancy occurs in his former or a substantially equivalent job—a burden which the Board has already found to be reasonable. See, e.g., *Brooks Research & Mfg.*, 202 NLRB at 636. If the employee accepts the lesser job, the problem of finding him when his former or a substantially equivalent job becomes available involves no more than communicating with him at his work station in the employer's plant.

A determination of Scroggins' rights in accordance with the principles set forth herein will effectuate the purposes of the Act. As the Supreme Court stated in *Fleetwood*, an employer's refusal to reinstate striking employees tends to discourage the exercise of their statutory right to organize and to strike. That discouragement will exist regardless of whether the employer refuses to offer an unemployed former striker his prior job, or any job. In either event, the latter is still unemployed, and derives no consolation from the fact that the employer prevented him from considering another job. Finally, this determination of Scroggins' rights simply follows the language of the Supreme Court in *Fleetwood*.

The next issue is the effect on Scroggins' rights, if any, of his employment with Arkansas Precision Machine Company in February or March 1981, and, thereafter, with Arkansas Aluminum Alloys in June 1981. As set forth above, Respondent had already failed to recall Scroggins to work on October 27, 1980, and again on January 7, 1981. For about the first 2 months of his job with Arkansas Precision Machine Company, Scroggins

was required to commute to another city. He thereafter transferred to the other company in about June 1981. In the same month, he called Respondent and asked for a job on the day shift.

The law on the matter may be summarized as follows:

The Board in its decision in *Laidlaw* applied *Fleetwood* to hold that economic 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 they have in the meantime acquired regular and substantially equivalent employment . . .*" [Emphasis added.] *Brooks Research & Mfg., Inc.*, supra, 202 NLRB at 636.

The Board has also stated:

The Trial Examiner found that both [the alleged discriminatees] had acquired regular and substantially equivalent employment prior to the time Respondent hired employees in their respective classifications and had therefore ceased to be employees of Respondent at the time jobs became available for them

As noted hereafter, we not only find contrary to the Trial Examiner that on the facts here presented neither (of the alleged discriminatees) had substantially equivalent employment but note that the Trial Examiner gave no weight to the fact that both (the alleged discriminatees) expressed a continuing interest in returning to their jobs. [Emphasis added. *Little Rock Airmotive*, supra, 182 NLRB 666.]

I conclude that Scroggins' reinstatement rights were not affected by his employment with the other two companies. In the first place, those rights vested when the job vacancies occurred, prior to the time that he took either of the other jobs, and Scroggins continued to be an employee of Respondent at the time he took those jobs. The first position, with its forced commuting to another city, was obviously not substantially equivalent employment. Although the second job was located in the same city where Scroggins lived, there is nothing in the record to show what kind of work he was doing, or his rate of pay. What is clear is that, at about the time he took the second job, Scroggins was still trying to return to his job with Respondent. The evidence therefore does not warrant a conclusion that these jobs constituted substantially equivalent employment terminating Scroggins' reinstatement rights. Any earnings which he derived from such employment would, of course, be deducted from gross backpay.

4. Respondent's 10(b) defense

The pleadings establish that the original charge was served on Respondent by certified mail on April 21, 1981. In its first amended answer, Respondent asserts that its actions which are the subject of the complaint occurred more than 6 months prior to the filing of the

¹⁴ See *Crossroads Chevrolet*, 233 NLRB 728 (1977), enf'd. 603 F.2d 223 (9th Cir. 1979).

charge, and that the charge and complaint are therefore outside the statutory period of limitation (G.C. Exh. 1(h)). In its brief, the Company limits this defense to the cases of Harvey, Jackson, and Scroggins. The Company draws attention to its recall letter dated October 8, 1980, advising these strikers that it would "assume" that they did not want reinstatement if they did not report for work on the second shift on October 15, 1980. Respondent argues that the period of limitation began to run on the date of the letter, or, at the latest, on October 15.¹⁵ None of these contentions has merit.

Considering first the Company's arguments in its brief, the statements in the company letters to Harvey, Jackson, and Scroggins did not constitute an unequivocal repudiation of Respondent's obligation to reinstate them. The Company's purported "assumption" of the employees' intentions (if they failed to report for the second shift) says nothing whatever about the Company's intentions or future actions. The Board has held with judicial approval that a mere statement of the possibility of future refusal to comply with contractual obligations does not constitute an unequivocal repudiation of those obligations sufficient to invoke the provisions of Section 10(b). *City Roofing Co.*, 222 NLRB 786 fn. 1 (1976), enf. 560 F.2d 1370 (9th Cir. 1977). An ambiguous expression of this nature is similar to union acquisition of knowledge about an employer's action which, in itself, does not constitute notice of an unfair labor practice. *NLRB v. Allied Products Corp.*, 548 F.2d 644 (6th Cir. 1977), enf. as modified 218 NLRB 1246 (1975).¹⁶

This ambiguity in Respondent's letter of October 8 is compounded by Sewell's contemporaneous statement to Harvey that he would phone the latter as soon as a day shift job became available. The evidence clearly shows that Sewell had no intention of doing so. He testified that the Company made no further offers to Harvey, Scroggins, or Jackson because it felt they had given up their reinstatement rights. Accordingly, Sewell's promise to Harvey, to call him when a day shift job opened up, constituted misrepresentation of the Company's intentions.

There is no evidence that either Harvey or Jackson knew on October 8 that their former jobs had not been filled. On the contrary, Sewell suggested that those jobs were filled by telling them that he had no day shift jobs available. Under these circumstances, the fact that Respondent's failure to reinstate Harvey and Jackson took place more than 6 months before the filing of the charge does not bar a finding that the Act has been violated. As stated by the Court of Appeals for Sixth Circuit:

The Board has consistently held, with the endorsement of at least two circuits, that the six month limitation period does not begin to run until the employer's unlawful activity, which is the basis for the unfair labor practice charge, has become known to the charging party [authority cited]. This is only a specific application of the general rule that a limitation period begins to run "when the claimant

discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]" [authority cited]. *NLRB v. Allied Products Corp.*, supra, 548 F.2d at 650.]

The same principle applies to Respondent's failure to reinstate the nine strikers accused of misconduct, since the first notification of the Company's intention not to recall them took place on October 27, 1980 (with respect to Meeks), with other such notifications at later dates or not at all.

Sewell's statements to Harvey and Jackson—to the former that the Company would call him when a day job became available, and to both that no day jobs were available—border on fraudulent concealment of the fact that the Company had not filled their jobs with permanent replacements, and that it did not intend to recall them at any time. It is well established the fraudulent concealment of facts constituting an unfair labor practice tolls Section 10(b) of the Act. *NLRB v. Burgess Construction*, 596 F.2d 378 (9th Cir. 1979), enf. 227 NLRB 765 (1977).

With respect to Scroggins, Respondent's initial unfair labor practice took place on October 27, 1980, when a vacancy occurred on the day shift and Respondent failed to offer him the job. This date also was within the period of limitation.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Harvey Engineering and Manufacturing Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. UBC, Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to immediately reinstate economic strikers Donald Bradbury, J. R. Harvey, Larry Jackson, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin (Joe) Thompson, and Roy Tracy, upon their unconditional requests for reinstatement, Respondent thereby violated Section 8(a)(3) and (1) of the Act.¹⁷

¹⁷ In *General Telephone Co. of Michigan*, supra, where the employer disciplined economic strikers for alleged misconduct without an honest belief that they had engaged in same, the Board found a violation of Sec. 8(a)(1) without passing on the 8(a)(3) allegation in the complaint. 251 NLRB 737, 740 fn. 21. However, in *Zapex Corp.*, supra, where the employer failed to reinstate economic strikers, the Board found violations of both Sec. 8(a)(3) and (1). The case at bar combines elements of both *General Telephone* and *Zapex*, in that Respondent failed to reinstate nine of the economic strikers for alleged misconduct without an honest belief that they had engaged in same. In concluding that Respondent herein violated both Sec. 8(a)(3) and (1), I rely on the Supreme Court's rationale in *Fleetwood* and *Great Dane* that certain employer conduct is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed, and that Respondent's failure to reinstate economic strikers upon their unconditional application for same, without any legitimate and substantial reason for doing so and without having permanently replaced them, presumptively violates Sec. 8(a)(3). *Zapex Corp.*, supra, 235 NLRB at 1240 fn. 15; *Dobbs Houses, Inc.*, 197 NLRB 897 (1972).

¹⁵ R. Br. 3.

¹⁶ See also *Allied Products Corp.*, 230 NLRB 858 at 859 (1977).

4. By failing and refusing, on October 27, 1980, to offer economic striker Brian M. Scroggins a job for which he was qualified, and, on January 7, 1981, his former or a substantially equivalent job, Respondent on both such occasions violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Thus, it having been found that Respondent unlawfully failed and refused to immediately reinstate economic strikers Donald Bradbury, J. R. Harvey, Larry Jackson, Tommy Kemp, Robert Lewis, Hank Meeks, Teddy Orrell, Michael Rigsby, Jewell Shields, Melvin (Joe) Thompson, and Roy Tracy, upon their unconditional offer to return to work, it is recommended that Respondent be ordered to reinstate them to their former positions or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed.¹⁸ In addition, it is recommended that Respondent be ordered to make the employees whole for any loss of earnings, benefits, or other rights and privileges they may have suffered as a result of the discrimination against them, by payment to each of them of a sum of money which he normally would have earned from the date of his application for reinstatement,¹⁹ until such time as Respondent

makes a valid offer of reinstatement to him.²⁰ Loss of earnings, as referred to above, shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).²¹

It having further been found that Respondent unlawfully failed and refused on October 27, 1980, to offer economic striker Brian M. Scroggins a job for which he was qualified, and, on January 7, 1981, unlawfully failed and refused to offer him reinstatement to his former position, it is also recommended that Respondent be ordered to reinstate him to the latter position, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. In addition, it is recommended that Respondent be ordered to make Scroggins whole for any loss of earnings, benefits, or other rights and privileges he may have suffered as a result of the discrimination against him, by payment to him of a sum of money which he would have earned if he had been offered, and had accepted, the job of laborer, from October 27, 1980, until January 7, 1981; and, thereafter, the sum which he would have earned if he had been offered and had accepted reinstatement to his former job, until such time as Respondent makes a valid offer of reinstatement to him. Loss of earnings shall be computed in the manner described above.

In addition, it is recommended that all references to alleged strike misconduct be expunged from the personnel records of these employees. I shall also recommend that Respondent be ordered to post appropriate notices.

[Recommended Order omitted from publication.]

¹⁸ *Dobbs Houses, Inc.*, supra.

¹⁹ As Respondent has already failed and refused to reinstate the discriminatees, no useful purpose would be served by delaying commencement

of the backpay period for 5 days. *Newport News Shipbuilding Co.*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

²⁰ *Zapex Corp.*, supra.

²¹ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).