

Toledo (5) Auto/Truck Plaza, Inc. and Hotel Employees and Restaurant Employees Union, Local 84, AFL-CIO, CLC and Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.
Cases 8-CA-19507 and 8-CA-20815

October 31, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On June 12, 1990, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and one of the Charging Parties, the Teamsters Union, filed an answering brief.

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,¹ findings,² conclu-

¹ After the hearing, the judge amended the complaint at his own discretion by adding Cindy Hollie's name to conform the pleadings to the evidence. The Respondent argues that the judge erred by amending the complaint in the absence of a motion by one of the parties. The original complaint alleged that Respondent discriminated against Debbie Sleek, Jill Czerniejewski, "and other employees whose identities are presently unknown." Because Cindy Hollie is a member of the class of persons described in the complaint, and the relevant evidence pertaining to the violation was fully litigated, we adopt the judge's 8(a)(3) finding. We therefore find it unnecessary to pass on whether the judge properly amended the complaint.

² The Hotel Employees and Restaurant Employees Union filed its charge on September 22, 1986, and the Teamsters Union filed its charge on March 14, 1988.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging Shelly Shields for being on the Teamsters' picket line while she was on maternity leave. In agreeing with the judge's conclusion, we rely only on the fact that Shields was on maternity leave during the entire period of the strike and not withholding services from the Respondent and therefore was not an actual striker. We note that *Emerson Electric Co.*, 246 NLRB 1143 (1979), cited by the judge, has been largely superseded by *Texaco, Inc.*, 285 NLRB 241, 245 (1987).

The judge's finding that the Respondent's reinstatement offers to Barbara Smith and Cindy Hollie were invalid is consistent with the holding in *Esterline Electronics Corp.*, 290 NLRB 834 (1988). In that case the Board held that when a discriminatee receives a letter offering reinstatement and also states a report back date, the Board will not find the offer invalid simply because the time period in which to report appears unreasonably short. The offer will be treated as invalid, however, if the letter on its face makes it clear that reinstatement is conditioned on the employee's returning to work by the specified date or the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date. In this case, by letter dated May 30, 1987, Respondent informed Barbara Smith that she was being recalled to work and that she must report to work by June 3, 1987. The letter stated, "If you fail to report to work within the scheduled time, your recall rights will be terminated." Under *Esterline*, Smith's recall letter was invalid on its face because it gave her an unreasonably short time in which to report to work and made it clear that her reinstatement was conditioned on her reporting by that date. The fact that Smith did not respond to the letter (which she did not receive until June 5 because she had moved) does not alter our conclusion.

sions, and remedy as modified,³ and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Toledo (5) Auto/Truck Plaza, Inc., Stoney Ridge, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the remaining paragraphs accordingly.

"(a) Rescind its termination of the recall rights of Jill Czerniejewski, Cindy Hollie, Debbie Sleek, and Barbara Smith and preserve the recall rights of those employees. In addition, offer immediate and full reinstatement to any of those employees who would have been recalled but for the unlawful termination of their recall rights, without prejudice to their seniority or any other rights or privileges, and make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, in the manner set forth in the remedy section of this decision.

"(b) Offer Shelly Shields immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

"(c) Remove from its files any reference to the unlawful discharge and termination of recall rights and notify the employees in writing that this has been done and that these actions will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

Under *Esterline*, Smith had no duty to respond to the offer because it was invalid on its face.

By letter dated June 26, 1987, and received on June 30, Respondent notified Cindy Hollie that she was being recalled, that she must report to work by July 3, and concluded, "If you fail to report within the scheduled time, your recall rights will be terminated." Under *Esterline*, Hollie's recall letter was invalid on its face because it gave her an unreasonably short time in which to report to work and made it clear that reinstatement was conditioned on her reporting by that date.

³ We shall modify the judge's remedy to make it clear that the backpay period for Debbie Sleek, Barbara Smith, Jill Czerniejewski, and Cindy Hollie commences on the dates on which their respective prestrike positions or substantially equivalent positions became available. Determination of these dates shall be left to the compliance stage of this proceeding. The backpay period for Shields commences on September 2, 1986, the date on which her doctor authorized her to return to work.

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.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discriminate against employees by terminating them or their reinstatement rights after tendering to them inadequate and invalid offers of reinstatement or after failing to tender offers of reinstatement to persons identified as expecting recall.

WE WILL NOT discharge any employee for engaging in activities protected by Section 7 of the Act.

WE WILL NOT engage in surveillance by photographing employees as they lawfully and peacefully picket outside our facility.

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

WE WILL rescind our termination of the recall rights of Jill Czerniejewski, Cindy Hollie, Debbie Sleek, and Barbara Smith and WE WILL preserve the recall rights of those employees. In addition, WE WILL offer immediate and full reinstatement to any of those employees who would have been recalled but for the unlawful termination of their recall rights, without prejudice to their seniority or any other rights or privileges, and WE WILL make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, plus interest.

WE WILL offer Shelly (Tate) Shields immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits she may have suffered by reason of our discrimination against her, plus interest.

WE WILL expunge from our files any reference to the discharge or terminations of recall rights which have been found to be unlawful and WE WILL notify the affected employees in writing that this has been

done and that evidence of the actions found unlawful will not be used against them in any way.

TOLEDO (5) AUTO/TRUCK PLAZA, INC.

Paul C. Lund, Esq., for the General Counsel.
Terrance L. Ryan, Esq., of Toledo, Ohio, for the Respondent.
Thomas L. Van Wormer and John M. Roca, Esqs., of Toledo, Ohio, for the respective Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Toledo, Ohio, on December 13, 1989. Subsequent to a requested extension of the filing date, briefs were filed by the General Counsel, Charging Party in the embraced proceeding, and the Respondent. The proceeding is based upon a charge filed March 14, 1988, by Hotel Employees and Restaurant Employees Union, Local 84, AFL-CIO, CLC, and on September 22, 1986, by Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (AFL-CIO) in the second entitled proceeding. The Regional Director's consolidated complaint dated May 25, 1989, alleges that Respondent, Toledo (5) Auto/Truck Plaza, Inc., of Toledo, Ohio, violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee Shelly Tate on or about August 28, 1986, and by failing to recall Jill Czerniejewski, Debbie Sleek, and Barbara Smith to positions in the control center in or about July 1987, because of their union or other protected concerted activities.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the operation of a restaurant and motor vehicle services and fueling facility in Stoney Ridge, Ohio.

It annually derives gross revenue in excess of \$500,000 and receives goods and materials valued in excess of \$50,000 directly from points outside Ohio. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The two involved Unions have represented different units at Respondent's facility for many years. The cases arose out of an economic strike between the Teamsters Union and Respondent and relates to findings and conclusions of law and fact that were made in a previous Board proceeding involving the same parties, see *Toledo 5 Auto/Truck Plaza*, 291 NLRB 319 (1988). In accordance with the request of the General Counsel, I find it appropriate to take official notice of this decision.

It is undisputed that the Teamsters Union engaged in a protected economic strike from June 24 to July 15, 1986. Shelly Tate, whose married name is Shields, worked for Respondent from March 1984 until she went on pregnancy leave on June 9, 1986, and was a member of Hotel Employees Union. In May 1986 Michael Snyder, the Respondent's general manager, asked Shields to sign a waiver because of her pregnancy, however, after consulting with the Hotel Union she refused. She was placed on part-time work but on June 9, she was put on maternity leave by Respondent because, according to Snyder, it was too difficult to schedule her. Shields filed a grievance over being placed on maternity leave because she believed she should be allowed to work until her doctor released her from work. On June 18, 1986, she did receive her doctor's release which she gave to Snyder.

Shields' then fiance, Steve Shields, worked for the Respondent and was a member of the Teamsters unit which went on strike on June 24. Shields visited her fiance on the picket line several times a week, and on one occasion she briefly held a picket sign for another picket who had to use the restroom. Her child was born July 30, 1986.

On August 28, 1986, she called the Respondent and talked to Mel Berman, Respondent's owner, about returning to work on September 2, 1986. Berman asked her if she had been standing on the picket line holding a sign. Shields replied that she had, and Berman then informed her that she could not come back to work because she had been under contract (when she was picketing). Shields responded that she had been on maternity leave but Berman replied that did not matter, she was fired.

Shields filed a grievance over her discharge and at a grievance meeting with Respondent, she and the Hotel Union representative were told that she was being discharged because she had been observed on the Teamsters' picket line even though she was not scheduled to work during that time, maternity leave.

The contract between the Hotel Employees Union and the Respondent contains the following provision which is the alleged justification for Respondent's position:

Section 11. Due to the reasonable procedures for settling grievances under this Agreement, the Union agrees that there will be no strikes, slowdowns or other stoppage of work during the term of this Agreement and the Employer agrees there will be no lockout.

During the grievance meeting over Shields' discharge, Respondent disclosed that it had pictures of Shields on the line. Snyder said that the Respondent engaged in photographic surveillance from the first or second day of the strike and that they photographed "anything that was out there," including the pickets. No suit was filed in any court over striker misconduct and there is no evidence in the record to indicate that the photographs were taken in support of a petition for injunctive relief, or as evidence to establish that the pickets engaged in violence or coercion or that they were taken for any specific purpose. The last contract between the Respondent and the Teamsters Union parties expired on June 23, 1986. The strike lasted until July 15, 1986, after which the Teamsters made an unconditional offer for the return to work of all striking employees.

No employee who participated in the strike has ever returned to work for the Respondent and the Union otherwise had no dues-paying members at the facility after the strike. Union Business Representative Robert Robaszkiwicz testified that the first time the Union learned that the Respondent had hired three new employees in its control center in July 1987 was at the Board hearing in the previous case in January 1988 (otherwise, the Respondent never complied with the union request for information, including specific information about new hires).

On June 3, 1987, however, Robaszkiwicz sent Manager Snyder a letter signed by 11 employees including Doris Dunlap, Debbie Sleek, Jill Czerniejewski, and Cindy Hollie, which said that they had not found employment equivalent to their former positions and expected to be recalled when their positions became available.

In the prior *Toledo 5*, the Board found that the Respondent had submitted an invalid offer to return to work to Doris Dunlap, in that the offer on its face made it clear that reinstatement was dependent upon a return to work by the date specified in the offer. The Board also found that while Doris Dunlap had no obligation to respond to such an offer, she did so, and that the Respondent gave her an unreasonable time to respond to the offer. Thus, the Board found that the Respondent had violated Section 8(a)(1) and (3) of the Act (the Board also found a violation of Section 8(a)(5) of the Act by the refusal to provide requested information to the Union).

Barbara Smith worked for the Respondent at the control center from 1983 until the time of the strike. She was a member of the Teamsters Union and participated in the strike. On June 5, 1987, Smith received a letter from the Respondent dated May 30, 1987, which advised her that if she did not report for work by June 3, 1987, her "recall rights would be terminated." Smith did not respond to the May 30, 1987 letter because she believed that since she had been requested to report to work on June 3, and had not received the letter until 2 days thereafter that she had been automatically terminated.

Debbie Sleek worked for the Company for approximately 6 years and at the time she joined the strike she was working in the control center. Sleek was named in the Union's letter but never received a recall to work from the Company. The Respondent's general manager testified that he did not recall Sleek because he knew that she had a job that was like the one she just left . . . being a fuel cashier. However, he did not know the details of her new employment and did not know what her wages and benefits were at her new employment. Sleek testified that she was making \$3.80 an hour at her new job, as opposed to the \$5.45 an hour she had received before going on strike and was receiving no benefits, such as the medical benefits she had received from Respondent.

Jill Czerniejewski worked in the control center prior to her going out on strike. On May 30, Respondent sent Czerniejewski a letter advising her that the Company was terminating her recall rights because it believed she had found "substantially equivalent" employment. On June 3, however, Respondent was advised in Robaszkiwicz' letter that she had not found substantially equivalent employment.

Snyder claimed that he did not recall Czerniejewski because she was working for a hardware store, however, he did

not know any of the details of her new employment, such as wages or benefits. He also claimed that Czerniejewski wasn't recalled because it had become aware in 1986 that she had become involved in criminal activities in connection with her new employment. Snyder did not know any of the details of the alleged criminal matters, and made no investigation but based his conclusion on an inquiry from a police sergeant who wanted Czerniejewski's address and who alluded to "something about checks."¹

On June 30, control center employee Cindy Hollie received a recall notice dated June 26, 1987, which stated she was being recalled and must report on Friday, July 3 or have her recall rights terminated. She called Respondent prior to July 3 and asked Snyder for 1 weeks' time to give notice and finish a temporary job, and that she wanted her job back. He said he couldn't do that. She asked why and he said "I have to do what I have to do." She replied that that wasn't right and he repeated "I have to do what I have to do."

The record in the prior hearing shows that Respondent hired Deborah Dickman on July 2 to start July 3, and then also hired Lynn Roberts and Karin Steward to perform work in the control center. It did not send recall letters to any others on the list and made no effort to contact the Teamsters Union concerning their availability notwithstanding the fact that the Union had requested Respondent to do so in its letter of June 3.

III. DISCUSSION

The issues in these cases arose from events which occurred contemporaneously with a strike by the Teamsters Union at Respondent's auto/truck service facility and resulted in the discharge of one nonstriking employee and member of another Union that represented workers at the restaurant portion of Respondent's facility, and the termination of several control employees who did not immediately respond to or were not sent alleged offers of reinstatement.

A. *Photographic Surveillance and Discharge of Shelly (Tate) Shields*

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected, concerted activity was a motivating factor in the employer's decision to terminate or discipline the employee. Here, the record shows that Shields' then fiancée was a striking member of the Teamsters Union and that she was photographed while visiting the picket line and holding a picket sign and then was specifically fired for this conduct.

In *Waco, Inc.*, 273 NLRB 746, 747 (1984), the Board stated:

It has long been held that "[i]n the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate." Photographing lawful, peaceful picketing tends to implant fear of future reprisals. [Footnotes omitted.]

¹ At the January 20, 1988 hearing, the Respondent stated that it did not recall Czerniejewski because it believed that she had equivalent employment. At that time it never stated that it had refused to recall her because of any type of involvement in criminal activities.

It went on to find that where there was no showing of anticipated picket line misconduct, as here, the photography reasonably tended to coerce. Here, there also is no showing that the action was for any lawful or otherwise noncoercive purpose and, accordingly, I am persuaded that Respondent's photographing picketers and of those visiting the picket line in these circumstances is shown to be a violation of Section 8(a)(1) of the Act, as alleged.

In light of this finding and the direct tie in of Shields' discharge with the union picketing, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to show antiunion animus and to support an inference that Shields' perceived activities in support of the picketing was a motivating factor in Respondent's decision to terminate her. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The Respondent asserts a justification for its actions based upon Shields' employment in the nonstriking unit of Hotel Union employees and the fact that its contract with that Union includes a no-strike provision and a provision that an employee may be discharged for engaging in an unlawful strike.

Here, I find Respondent's position to be unpersuasive and pretextual. First, there is no showing that the provision in any way relates to a strike by any union other than the Hotel Employees Union and this is not a situation that the Union or any of its members have walked off the job in sympathy with another union. Furthermore, the Board has held that an employee on disability or medical leave, who pickets before she is certified to return to work, is not an actual striker. *Conoco, Inc.*, 265 NLRB 819 (1982); *E. L. Wiegand Division*, 246 NLRB 1143 (1979).

Shields clearly was on maternity leave when present on the picket line. She was not scheduled to work and as she was not withholding her services from the Employer, she was not on strike and was not otherwise engaging in an unlawful strike.

There also is nothing in the record or in the contract language which indicates any clear and unmistakable contractual waiver of the employees' rights to engage in picketing, on their own time, in support of another union's lawful strike, see *Lear Siegler, Inc.*, 293 NLRB 446 (1989), and accordingly, I find that the Respondent has not met its burden of proof. I therefore conclude that the overall record supports the General Counsel's allegation that Respondent discharged Shields for being on the lawful picket line of a union other than her own at a time when she was on maternity leave, and that this action constitutes a violation of Section 8(a)(1) and (3) of the Act, as alleged.

B. *Recall Notice and Termination of Economic Strikers*

As noted above, an issue involving Respondent and the same notice of recall, followed by termination, recently was decided by the Board in the *Toledo 5* case, supra, and I here concur in the Board's findings and further conclude that the factual situations set forth above clearly demonstrate that on June 3, 1987, Respondent was aware that employees Jill Czerniejewski, Debbie Sleek, and Cindy Hollie were listed by the Union as persons who had not found equivalent em-

ployment and who expected to be recalled. Barbara Smith was not named but had been sent a recall notice identical to the one involved in the prior case.

As stated in the prior case:

Economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements remain employees and are entitled to full reinstatement [up]on the departure of replacements unless they have acquired regular and substantially equivalent employment, or unless the employer can establish the failure to offer reinstatement was for legitimate and substantial business reasons. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf. 414 F.2d 99 (1970), cert. denied 397 U.S. 920 (1970). For an offer of reinstatement to be valid, it must provide adequate time for consideration by the employee, based on the circumstances of each individual case. *National Tape Corp.*, 187 NLRB 321 (1970); *Penco Enterprises*, 216 NLRB 734 (1975); *Murray Products*, 228 NLRB 268 (1977), enf. 584 F.2d 934 (9th Cir. 1978).

As noted, Smith's situation shows a clearly inadequate offer for timely reinstatement. The same conclusion applies to Hollie even though the dates involved (letter dated June 26, received June 30, with a reporting date of July 3 or termination of recall rights, and Respondent's refusal to grant a requested 1-week extension), were not the same as Smith's (and Doris Dunlap's in the prior case).

Respondent never sent a notice to Sleek, even though on or after July 2, it hired three outside individuals to perform her same work, and I find its excuse that it knew she had another job to be invalid inasmuch as it had no knowledge of her wages and benefits and its purported knowledge was plainly contradicted by her signing of the Union's letter of June 3, announcing her recall expectations.

Finally, I also find that Respondent's notice to Czerniejewski terminating her recall rights because it believed she had found substantially equivalent employment is invalid because Respondent admittedly had no knowledge of her wages and benefits and its conclusions contradicted her announced recall expectations in the Union's letter. Moreover, Respondent's letter of termination said nothing about its purported concern over her alleged involvement in a criminal activity. This new reason was based solely on a police inquiry about her address, without any further timely investigation by Respondent and I find it to be pretextual and irrelevant to Respondent's obligation to make a valid recall offer. To the extent any subsequent, probative information may show that she in fact now has a criminal record that would provide a valid reason for denying her employment which involves handling money (as her former job did), such reason may be offered in the negotiation or litigation of the compliance stage of the proceeding to determine the tolling period, if any, of Respondent's backpay obligation, but it does not affect the determination that Respondent illegally terminated her recall rights by its letter of May 30, 1987.

Under these circumstances, I conclude that the Respondent has failed to show any nonpretextual, substantial, or legitimate business reason for providing for such short notice to report before termination or for its failure to make recall offers because alleged beliefs that employees had found sub-

stantially equivalent employment. Accordingly, I find in each instance, that Respondent's termination of the above-discussed employees' reinstatement rights was discriminatory and in violation of Section 8(a)(1) and (3) of the Act, as alleged.

C. Motion to Strike

By motion filed February 28, 1990, Respondent asks that portions of the Charging Party's brief be stricken insofar as it alludes to employee Cindy Hollie, a person not specifically identified in the complaint. Although the General Counsel did not see to amend the complaint, I find that the unique circumstances surrounding this matter requires that I amend the complaint at my own discretion to conform the pleadings to the evidence. I base this conclusion on the fact that the complaint otherwise refers to "other employees" and that, especially in view of the prior proceeding, Respondent was well aware of its own prior actions and which employees it had sent recall/termination notices such as Hollie received. Moreover, the evidence regarding Hollie was placed on the record after the General Counsel had rested his case. Here, Hollie was called as a witness by the Respondent and she testified regarding the circumstances of her recall/termination notice under direct examination by Respondent's counsel. Accordingly, Respondent's claim that upon proper notice it would have prepared a proper defense is invalid inasmuch as it was fully responsible for testimony provided by its own witness and cannot now hide behind a due process argument because its own direct examination of its own witness, disclosed on the record that Hollie had received a notice essentially the same as that considered in the prior case, and that this disclosure thereby demonstrated a violation of the Act directly related to the "other employee" description set forth in the complaint. Accordingly, Respondent's motion is denied and the complaint is hereby amended to specifically identify Cindy Hollie as an "other employee" embraced within the complaint.

CONCLUSIONS OF LAW

1. The Respondent Employer, Toledo (5) Auto/Truck Plaza, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By photographing employees as they lawfully and peacefully picketed outside the Respondent's facility, the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging employee Shelly (Tate) Shields on August 28, 1986, and by terminating employees Jill Czerniejewski, Cindy Hollie, Debbie Sleek, and Barbara Smith and their reinstatement rights after they failed to meet the conditions imposed in an invalid offer of reinstatement or after failing to make an offer of reinstatement to persons identified as expecting recall, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that the Respondent has committed the above unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act, including the posting of an appropriate notice.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Shelly (Tate) Shields, Jill Czerniejewski, Cindy Hollie, Debbie Sleek, and Barbara Smith immediate reinstatement to their former jobs or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them a sum of money equal to that which they normally would have earned from the date of the discrimination and the record herein to the date of reinstatement (here, in accordance with the first *Toledo 5* case, the date for Hollie, Sleek, and Smith shall be June 3, 1987, for Czerniejewski July 3, 1987, and for Shields August 28, 1986, as adjusted by her constructive return from maternity leave), in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),² and that Respondent expunge from its files any reference to their discharge and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against them.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent Employer, Toledo (5) Auto/Truck Plaza, Inc., Stoney Ridge, Ohio, its officers, agents, successors, and assigns, shall

²Under *New Horizons*, interest is computed at the "short-term Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. 6621.

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discriminating against employees by terminating them or their reinstatement rights without making an offer of reinstatement to persons identified as expecting recall or terminating them after tendering to them inadequate and invalid offers of reinstatement or discharging any employee for engaging in activities protected by Section 7 of the Act.

(b) Engaging in surveillance by photographing employees as they lawfully and peacefully picket outside the Respondent's facility.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 Shelly (Tate) Shields, Jill Czerniejewski, Cindy Hollie, Debbie Sleek, and Barbara Smith immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner set forth in the remedy section of this decision, and expunge from its files any reference to their termination or discharge and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against them.

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

(c) Post at its Stoney Ridge, Ohio facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁴If 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."