

**Kurz-Kasch, Inc. and United Electrical, Radio and Machine Workers of America (UE).** Case 9-CA-15429

February 27, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On November 30, 1987, the National Labor Relations Board issued a Decision and Order in this proceeding<sup>1</sup> in which it found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers after they had made unconditional offers to return to work and jobs became available for them. Thereafter, the Respondent filed with the United States Court of Appeals for the Sixth Circuit a petition for review of the Board's Order. The General Counsel filed a cross-application for enforcement of the Board's Order.

On January 13, 1989, the court denied enforcement of the above-mentioned portion of the Board's Order<sup>2</sup> and remanded the case to the Board to consider evidence that the court found the administrative law judge had ignored bearing on whether the Respondent had vacancies to which to recall the economic strikers.

On June 1, 1989, the Board remanded the case to an administrative law judge for further hearing and the issuance of a decision in accordance with the court's opinion.

On June 18, 1990, Administrative Law Judge Wallace H. Nations issued the attached decision on remand. 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 on remand and the record in light of the court's decision, which the Board accepts as the law of the case, the exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions and to adopt the

<sup>1</sup> 286 NLRB 1343.

<sup>2</sup> 865 F.2d 757.

<sup>3</sup> 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), enf'd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record, including the testimony and documents that were not discussed in the judge's original decision, and find no basis for reversing the findings.

Judge Nations, at fn. 6, found that the record does not support the claim that Respondent had a practice of shifting employees temporarily to deal with its volatile business. We agree with this finding.

We have examined the Fannin and Stephenson testimony and the document the court found were ignored in the original judge's decision. The document only provides information about the size of the work force on the 16th of each month. Stephenson's testimony, which related to the introduction of the docu-

recommended Order as modified and set forth in full below.<sup>4</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Kurz-Kasch, Inc., Wilmington, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting employees to remove union insignia from their clothing, unless such request is justified by safety or other legitimate business considerations.

(b) Coercively interrogating employees about their or other employees' union activities and intentions to engage in a lawful economic strike.

(c) Maintaining unlawful no-solicitation and no-distribution rules.

(d) Issuing reprimands to employees for engaging in union or other protected, concerted activity.

(e) Discharging or otherwise discriminating against employees because they engaged in a lawful economic strike.

(f) Failing to reinstate economic strikers after they have made unconditional offers to return to work and jobs become available for them.

(g) 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) After determination in the compliance stage of this proceeding of the date on which the following employees should have been recalled but for Respondent's discrimination against them, make them whole for any loss of earnings they may have suffered as a result, in the manner set forth in the remedy section of the judge's decision:

Osa Mae Valentine	Joan Akers
Brenda Johnson	Karen Green
Sharon Lorenzo	Donna J. Taylor
Sharon Osborne	Lisa Keller
Sandra Drake	Vicki Hamilton
George Twine	Tanya Huff
Frances Wilkinson	Herschel Baker
Kathy S. Burton	David M. Swearingen
Betty Beam	Margery L. Callahan

ment, speculates that the work force could have expanded and contracted from month to month. The document, however, because it shows only the work force size on a particular day each month, cannot be used to corroborate Stephenson's opinion. We find that the document and Stephenson's speculation fall far short of demonstrating that the Respondent's business repeatedly grew and shrank to meet demand. Having found that Stephenson's testimony and the documentary evidence fail to sustain the Respondent's burden, we conclude there is no basis for reversing the judge's discrediting of Fannin.

<sup>4</sup> We have modified the judge's recommended Order to include provisions which were included in the Board's original Decision and Order reported at 286 NLRB 1343.

Marian A. Tufts      Shirley R. Morris  
Teresa A. White      Aquila I. Shaw

(b) Remove from its files any reference to the unlawful March 20, 1980 reprimand to Karen Green and the unlawful discharges of Osa Valentine and Brenda Johnson and notify the employees in writing that this has been done and that the reprimand and discharges will not be used against them in any way.

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

(d) Post at its Wilmington, Ohio facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

(e) 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.

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 request employees to remove union insignia from their clothing, unless such request is jus-

<sup>5</sup>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."

tified by safety or other legitimate business considerations.

WE WILL NOT coercively interrogate employees about their or other employees' union activities or intentions to engage in a lawful economic strike.

WE WILL NOT maintain any rule that does not clearly permit employees to solicit or engage in other protected activity under Section 7 of the National Labor Relations Act during break periods, meal periods, and other times when employees are not required to be working, or that does not clearly permit employees to engage in distribution during such times in nonwork areas.

WE WILL NOT issue reprimands to employees for engaging in union or other protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in a lawful economic strike.

WE WILL NOT fail to reinstate economic strikers after they have made unconditional offers to return to work and jobs become available for them.

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 make whole, with interest, those of the employees named below who are found in a subsequent proceeding to have been entitled to be recalled to their former or substantially equivalent jobs earlier than they were:

Osa Mae Valentine	Joan Akers
Brenda Johnson	Karen Green
Sharon Lorenzo	Donna J. Taylor
Sharon Osborne	Lisa Keller
Sandra Drake	Vicki Hamilton
George Twine	Tanya Huff
Frances Wilkinson	Herschel Baker
Kathy S. Burton	David M. Swearingen
Betty Beam	Margery L. Callahan
Marian A. Tufts	Shirley R. Morris
Teresa A. White	Aquila I. Shaw

WE WILL remove from our files any reference to the unlawful reprimand of Karen Green and unlawful discharges of Osa Valentine and Brenda Johnson and WE WILL notify Karen Green, Osa Valentine, and Brenda Johnson that we have removed from our files any reference to their unlawful reprimand or discharges and that the reprimand or discharges will not be used against them in any way.

KURZ-KASCH, INC.

*Garey E. Lindsay, Esq.*, for the General Counsel.  
*Frank H. Stewart and Timothy P. Reilly, Esq.*, of Cincinnati, Ohio, for the Respondent.

DECISION ON REMAND

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On March 25, 1982, Administrative Law Judge Mary Ellen Benard issued a decision in which she found, inter alia, that Respondent Kurz-Kasch, Inc. (Respondent or Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by failing and refusing to reinstate former economic strikers after they had made unconditional offers to return to work and jobs became available for them. Respondent subsequently filed exceptions to this decision with the Board. By Order dated November 30, 1987, the Board adopted the administrative law judge's findings, conclusions, and recommendations pertaining to the issue involving the reinstatement of the former economic strikers.<sup>1</sup> Thereafter, Respondent filed with the Sixth Circuit United States Court of Appeals a petition for review of the Board's Order; the Board filed a cross-application for enforcement of its Order.

On January 13, 1989, the Sixth Circuit issued its decision remanding the instant matter back to the Board for a "full appraisal of the evidence adduced by [Respondent] that it had no vacancies for substantial and legitimate business reasons."<sup>2</sup> The Board accepted the court's remand and requested that the parties submit statements setting forth their respective positions on the remand issue. Both the General Counsel and Respondent filed statements and thereafter the Board, by Order dated June 1, 5 1989, concluded that "additional fact findings cannot be made on the basis of the evidence in the existing record" and therefore remanded the case to an administrative law judge for the purpose of further hearing and additional findings and conclusions in light of the court's opinion.

In response to the Board's direction, further hearing on this matter was held before me in Wilmington, Ohio, on February 2 and March 19, 1990. Briefs were received from the parties on or about April 23, 1990. Based on the entire record in this proceeding and from my observation of the demeanor of the witnesses, and with consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation engaged in the manufacture of plastic products at various locations, including one at Wilmington, Ohio, the only facility involved in this proceeding. The Board has heretofore found and it is undisputed that the 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 Board has heretofore found and it is undisputed that United Electrical, Radio and Machine Workers of America (UE) (Union) is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> 286 NLRB 1343.  
<sup>2</sup> 865 F.2d 757 (6th Cir. 1989).

III. THE ISSUE OF UNFAIR LABOR PRACTICES ON REMAND

A. *The Issue on Remand as Framed by the Court*

Respondent is engaged in the business of manufacturing molded plastic parts at its facility located in Wilmington, Ohio. By Order dated December 27, 1978, the Board ordered Respondent to bargain with the Union as the exclusive collective-bargaining representative of its production and maintenance employees because Respondent committed pervasive and egregious unfair labor practices which interfered with the conducting of a fair election.

The Union and Respondent commenced negotiations in October 1979. They were unable to reach an agreement for a contract and on March 24, 1980, the Union established a picket line at Repondent's facility in support of its bargaining demands. Respondent's payroll records show that during the pay period immediately preceding the establishment of the picket line, Respondent employed approximately 66 employees in the bargaining unit. Five of the 66 employees were on a medical leave of absence when the strike began: Karen Sams, Yvonne Miller, Theresa Harris, Vicki Hamilton, and Karen Hartsook. Also, three employees quit before the strike: Daphney Addis, Lynn Haynes, and Letha Frisby. Approximately 29 of the 58 active employees honored the Union's picket line. Six of these striking employees returned to work during the strike.

At the onset of the strike, Respondent began to hire replacements for the striking employees. Although the strike lasted only 1 week, Respondent hired replacements for the remaining 23 striking employees before the strike ended. After the strike ended, Respondent reinstated the first former striker on April 7. The last former striker was not reinstated until July 16, 1981<sup>3</sup>

Administrative Law Judge Benard concluded that "26 vacancies occurred between May 5, 1980 and May 5, 1981" and that "there were sufficient vacancies created in the position of molder, hand molder and finisher to recall all the

<sup>3</sup>The names of the striking employees and their dates of offers of reinstatement to them are as follows:

Osa Mae Valentine	7/14/80**
Brenda Johnson	7/14/80**
Sharon Lorenzo	6/13/81
Sharon Osborne	7/07/81
Sandra Drake	6/12/81
George Twine	7/12/81
Frances Wilkinson	6/12/81
David Swearingen	3/09/81
Betty Beam	9/15/80
Marian Tufts	9/15/80
Teresa White	4/15/80
Dan McDowell	4/07/81***
Joan Akers	7/13/81
Karen Green	7/16/81
Donna J. Taylor	7/13/81
Lisa Keller	7/16/81
Vicki Hamilton	7/16/81
Tanya Huff	7/16/81
Herschel Baker	7/15/81
Kathy S. Burton	8/11/80
Margery Callahan	8/11/80
Shirley Morris	5/04/81
Aquila Shaw	6/24/81

\*\* These two employees were discharged during the strike. The discharges were rescinded on 7/14/80 and Respondent contends that the employees did not request reinstatement.

\*\*\* McDowell is not named as a discriminatee in the complaint.

strikers who had occupied those position.” In reaching her conclusion that Respondent had violated the Act by not reinstating the strikers to these vacant positions she observed:

Respondent argues, on the basis of Fannin’s testimony that it has hired no new employees since the end of the strike, its work force is not organized so that each employee has a discrete job, but that not employees perform various task and, thus, when an employee terminates his employment, Respondent does not invariably find it necessary to replace him. Fannin further testified that Respondent’s business has declined since the strike and that the replacements who stayed have improved their productivity, and thus there has been no need to recall all the strikers. Respondent adduced no other evidence either of how it determined when the recall of a striker was warranted or of the purported decline in business since the strike. Fannin’s testimony on this point was vague and conclusory and did not have the ring of truth, and he appeared less than candid. And, although this testimony was not contradicted, it was also not corroborated, although Respondent presumably had records which would demonstrate how much business it was doing during this period. I therefore do not credit Fannin’s testimony on this issue.

As previously noted, the Board adopted the administrative law judge’s findings with regard to the striker recall issue. The court, however, stated (865 F.2d at 759–760):

[W]e come to the narrow question posed by this controversy. A *prima facie* case of a violation is made when it is shown that the employer failed to make an offer of reinstatement “when a job for which the striker is qualified [became] available. . . .” *Fleetwood Trailer*, 389 U.S. at 381. But when is it permissible to conclude that a job has become “available”? We are called upon here to minimize two dangers: first, the danger that the Board might order an employer to maintain a workforce larger than is justified by its genuine economic needs; and second, the danger that an employer—silently and without intimating its real purpose—will postpone reinstating economic strikers until they have found legally equivalent work elsewhere or otherwise lost interest in their old jobs. Further, we must respect, as the Supreme Court has done, the fact that the employer has full and free access to evidence of its own motives and of the current demand for its goods or services. The rule that the employer should shoulder the burden of proving that, for legitimate business reasons, it could not maintain vacancies, balances conflicting interests failure to reinstate.

*Fleetwood Trailer* points clearly towards this application of the rule. The burden of proving vacancies cannot be placed on the General Counsel: “Such proof is not essential to establish an unfair labor practice. It relates to justification, and the burden of such proof is on the employer.” *Fleetwood Trailer*, 389 U.S. at 378 n. 4. And the Court explicitly opened the door to the precise justification advanced in the present case: “the need to adapt to changes in business conditions or to improve efficiency.” *Fleetwood Trailer*, 389 U.S. at 379. The leading Supreme Court case therefore fore-

closes us from concluding, as the Board concluded in another controversy, that “[i]t is the General Counsel’s burden to show that a striker’s former job was available.” *Lincoln Hills Nursing Home, Inc.*, 257 N.L.R.B. 1145, 1158 (1981).

Subsequent cases, without explicitly addressing the question, have assumed that the lack of vacancies falls to the employer to prove as a business justification. The N.L.R.B. has held that the termination of a worker “*prima facie* create[s] a vacancy” which an employer could rebut by demonstrating a decline in its business. *K-D Lamp Co.*, 229 N.L.R.B. 648, 650 (1977). A similar “legitimate and substantial business justification” was held to have been established where the employer proved that, subject to its contracts with its customers, it was required to maintain an inventory which, in turn, made immediate post-strike replacements unnecessary. *Randall*, 257 N.L.R.B. 1, 6–7 (1981), enforcement granted in part and denied in part on other grounds sub nom. *Randall Div. of Textron, Inc. v. N.L.R.B.*, 687 F.2d 1240 (1982), cert. denied, 461 U.S. 914 (1983). The Eleventh Circuit has explicitly taken *Fleetwood Trailer*’s invitation to find justification in purely economic business decisions, holding that a “legitimate and substantial business justification” was demonstrated where an employer proved that, having eliminated a service during the strike, it made a business judgment after the strike that the change both pleased its customers and saved it money. *N.L.R.B. v. Southern Florida Hotel and Motel Ass’n.*, 751 F.2d 1571, 1583 (11th Cir. 1985).

The ALJ in this case held that vacancies arise whenever a replacement or other worker leaves the employer, and then scrutinized the business justification advanced by Kurz-Kasch. We must conclude that this formulation elides an important step. Where the question is whether vacancies arose, the fact that an employer allows its workforce to decline below the pre-strike level merely creates the presumption that vacancies existed. The employer then bears the burden of proving that no vacancies existed, and one method of proof is to show that it had substantial and legitimate business reasons for deciding that the pot was no longer economical. Once it has advanced such proof, the burden shifts back to the General Counsel to show that, in fact, the business reasons advanced are pretextual and the employer’s real motivation was to discourage union activity.

#### B. Respondent’s Asserted Legitimate and Substantial Reasons for its Failure to Recall Strikers as Vacancies Occurred

The Respondent contend on remand that it did not violate the Act by failing to recall a striker whenever an employee left its employ and presumably a vacancy was created. In support of this position, it advances 10 reasons which it contends are dispositive of the issue:

1. The Company hired no new employees to fill the jobs for which strikers were eligible following the strike.
2. The Company did not subcontract any work which could have been done by strikers following the strike.

3. The Company did not remove any bargaining unit work from its Wilmington plant to any other company plants following the strike.

4. The Company did not work any additional or excessive overtime following the strike.

5. The Company did not use group leaders to perform work for which strikers were eligible following the strike.

6. The Company's business and workload slumped following the strike.

7. The Company used the same criteria and followed the same practice in deciding when to recall strikers as it had in hiring employees prior to the strike. The Company has never had a practice of hiring an employee simply because another employee leaves.

8. The Company followed the same practice regarding the intradepartmental and interdepartmental transfer of employees after the strike that it had followed prior to the strike.

9. The Company did not refrain from recalling strikers when the Company's workload required additional employees following the strike, pursuant to its agreement with the Union.

10. The Company did not need the strikers any sooner than the times it recalled them in 1980 and 1981.

On brief, the first five facts relied on by Respondent as set out above are not contested by General Counsel. Part of the reason he does not contest them is the inability to do so because of Respondent's recordkeeping procedures. The matter of work being shifted to other plants of Respondent or subcontracted to other manufacturers cannot be proven or disproven as records which would have reflected such actions were destroyed by Respondent. Respondent's "reasons" 9 and 10, above, are merely conclusions. The crux of the matter for determination is whether Respondent did suffer a business decline following the strike, and whether it followed its normal production and staffing procedures in that period of time. For the reasons set out below, I agree with General Counsel, and the earlier Board decision, that Respondent did not fail to recall strikers because of declining business. I find that on the contrary, it juggled its production to delay the recall of strikers for reasons related to its previously found union animus. Its ultimate purpose for the delay may not be known, but the one suggested by the court of appeals seems logical, that is, "an employer—silently and without intimating its real purpose—will postpone reinstating economic strikers until they have found legally equivalent work elsewhere or otherwise lost interest in their old jobs."

As will be demonstrated below, much of the evidence offered by Respondent is contradictory, and much is in the form of self-serving testimony. As stated by the court in its remand, the Respondent has the burden of proof with regard to its defense in this proceeding. Thus where Respondent has destroyed records which would support its contentions, and there exists in the record credible evidence on point which either contradicts or places in serious question its contentions, the adverse evidence will be credited. To the extent that self serving testimony has been offered by Respondent, for example, testimony to the effect that it did not subcontract bargaining unit work or shift that work to other plants, such testimony is accorded less weight than evidence backed by records. Respondent's business records on these and other points in issue were not destroyed inadvertently or accidentally, but rather in the ordinary course of business

even though this matter was on appeal. I would also note that such records were not offered by Respondent to support its contentions in the first hearing herein, even though they existed at the time of that hearing.<sup>4</sup>

#### 1. The alleged business decline

As stated above, during 1979, 1980, and 1981 Respondent was engaged in the manufacture of plastic parts. The manufacturing process consist of two stages. The first stage is where the part is formed or molded. The second stage is where the molded part is finished by, e.g., painting, drilling, and tapping a hole.

During 1979, 1980, and 1981, Respondent manufactured two product lines at its Wilmington facility: a "custom" line and a proprietary or "knob" line. The "custom" line is a part for which the customer owns the mold from which it is formed. The "knob" line is described as a part for which Respondent owns the mold.

Respondent contends that during 1979, as reflected by press hours, approximately 40 percent of its production was devoted to the manufacture of "custom" products and 60 percent of its business was devoted to its "knob" products. A press hour is one hour of machine time in the molding department to produce a product. According to Respondent, it reflects the number of employees involved in molding. It would not necessarily reflect demand nor would it reflect work performed by the finishing department. In addition, according to Respondent's president, Neal Alread, some "custom" orders can take anywhere between one to six employees to produce. The record does not indicate how many employees are involved in the production of "knobs"; although, finishing hours are always higher for "knob" production as compared to "custom" production. Thus by concentrating on certain "custom" orders or certain "knob" orders, while delaying others, Respondent can apparently get by with less employees than would be needed to handle a normal mix of work without delay. I believe the evidence reflects that this is what Respondent did for as long as it could before customer pressure required it to resume normal production.

Respondent contends that after the strike ended, its business declined. In support of its position in this regard, Respondent submitted evidence showing that overall profits for 1980 were less than profits for 1979. In addition, Respondent contends that because its profits declined during the periods following the strike, it was necessary to shorten the workweek of some of its molding employees during the months of April and May. In fact, it does appear that there was a shorter workweek for a 1-month period.

Profits and losses are reported by accounting periods; there are 13 accounting periods each year. In 1980, the accounting period which preceded the strike was March 23 and is designated the third period. Respondent's Exhibits 50 and 51 show that poststrike profits declined during 1980 and 1981. However, the profits reported for the first three periods of 1980 appear to be higher than normal. For instance, in 1979 in only one period, the 10th, did Respondent's profits exceed the profits shown for the first three periods of 1980 and only twice did the profits exceed \$70,000 in any period, the first

<sup>4</sup>There was nothing offered in evidence in the hearing held before me which would cause me to change any of the findings, including credibility findings, made by the administrative law judge or the Board on the earlier record in this case and I reaffirm those findings.

and 10th periods. Although Respondent asserts that it did not solicit work or complete work early in anticipation of the strike, the higher-than-normal profits for those period suggest otherwise, especially considering that the records of customer orders were destroyed by Respondent. These records could potentially demonstrate whether orders were solicited in anticipation of a strike.

Further, the amount of profits earned by Respondent does not establish whether Respondent's business declined. Thus, while overall profits declined slightly in 1980, there was a substantial increase in gross sales from 1979 gross sales. In addition, gross sales for "custom" product was higher in 1980 than in 1979. Also, gross sales for the "knob" product in the 8th, 9th, 10th, and 11th accounting periods of 1980 exceeded the prestrike level for the third period of 1980 and the gross sales for the "knob" product in the 5th and 6th accounting periods of 1980 exceeded gross sales in the 12th period for 1980.

The 1980 decline in profits may be better explained by an increase in expenses, rather than an alleged decline in business. For example, Respondent's expenses for 1979 were \$2,674,679.99 compared to \$2,788,791.75 in 1980. It is not known, however, whether the exhibits in the record reflect all of Respondent's expenses for 1979, 1980, and 1981. The reasons for the increased expenses can be traced in part, at least, to a wage increase granted employees in 1980 and to rising interest rates in that year. Respondent submitted general business data showing rising interest rates in an attempt to bolster its business-decline argument. Clearly, this attempt fails because Respondent's dollar volume of sales for 1980 and the first half of 1981 equal or better its sales for the year preceding the strike. As noted, Respondent has destroyed all the underlying data for its summary exhibits reflecting revenues and expenses and, therefore, it is impossible to determine their completeness or accuracy. For instance, there does not appear to be any expense entry for the purchase of another business, Norton Laboratory, in July 1981. Thus, Respondent's expenses may be greater than shown in the exhibits.

Respondent's records of "orders" during 1979, 1980 and 1981 do not establish a substantial decline in business.<sup>5</sup> Thus, for the third period of 1980, orders for "knobs" was 137. This figure was exceeded in the 4th, 5th, 11th, and 12th periods in 1980 and the 4th, 5th, and 6th periods in 1981. At the same time, the backlog of "knob" order (orders not yet made or shipped to the company's customer) increased after the strike and did not decline to prestrike levels until the ninth period of 1980. It may be inferred that Respondent was diverting its resources to reducing the backlog in "custom" orders that existed at the beginning of 1980. In this connection, at the end of 1979 the backlog for "custom" orders was 295. It increased to 356 at the end of the first period for 1980, and declined to 339 at the end of the second period and to 307 at the end of the third period. This is supported by Respondent's former Wilmington plant manager Waldo Fannin's testimony at the original hearing that during

<sup>5</sup>The record does not reflect whether an "order" is for a uniform amount of product, or whether as would be normal, an order could be for varying amounts of product. Without the actual orders, which Respondent destroyed, the amount of product represented by its summary figures is not discernible. Similarly, the degree of work necessary to process an order is not susceptible of being determined in the absence of the actual orders themselves.

the strike, after the end of the third period, Respondent's "custom" customers were calling inquiring about the late shipment of their orders.

While Respondent was decreasing the backlog in orders for "cutom" parts, the backlog in orders for "knobs" steadily increased above prestrike levels, reaching a high of 500 in the fifth period for 1980. The knob backlog did not decline to below prestrike levels until the ninth period for 1980; the same period that the backlog in custom order began to increase again. In fact, "custom" backlog order fluctuated up and down after the ninth period when it ballooned in the third period for 1981 to 578. It should be recalled that Respondent testified that an increase in "knob" orders usually meant that more finishers were needed.

The data suggests that, in fact, there was work available for employees to perform either completing actual orders or working on backlog. Although it appears that there was a decrease in orders for 1980 compared to 1979, this data alone does not disclose the entire picture. Without the raw data it is impossible to determine whether Respondent delayed producing orders that it normally would have produced earlier by juggling its product mix.<sup>6</sup>

Respondent suggests that two other factors demonstrate that its business declined. The first is that its 1980 press hours were less than the 1979 press hours. While overall press hours for 1980 appear to be less than they were in 1979, the press hours for "knobs" increased after the strike. For example, the fourth, fifth, eighth and ninth periods for 1980 show an increase in press hours from prestrike levels. (The seventh period is Respondent's shutdown period.) It should also be noted that the increase in press hours is consistent with the increase in orders for the fourth and fifth periods of 1980 and the gross sales increase in the eighth and ninth period for 1980.

Press hours for "custom" parts for the first six periods of 1980, three period before the strike and three after it, were greater than the press hours for the comparable period of 1979. This logically could be the result of Respondent's efforts to fill customer orders in advance of the strike since it had no way of knowing how long the strike would last. Unfortunately, Respondent destroyed the records which would show whether Respondent solicited customers to place their orders early, whether the amount of "custom" work performed in advance of the strike was abnormally large, or whether the work may have been shipped out to another plant for production.

Moreover, press hours do not tell the entire story about Respondent's production process. Thus, while overall finishing hours for 1980 were allegedly less than the hours for

<sup>6</sup>Respondent contended at the previous hearing and in this one that at least part of the reason why it was not necessary to recall strikers earlier was its ability to switch workers back and forth between molding and finishing, and thus achieve productivity efficiencies. This argument is not supported by the evidence. First, records in evidence indicate that each of these two departments had an assigned work force, and employees of each department were paid at a different wage level. Employees were transferred from one of these departments to the other on a permanent basis and personnel forms documenting the transfer and change in wage were executed. Temporary transfers were not routine and were not for prolonged periods of time. Employee Joan Akers, called as a witness by Respondent, testified that transfers of employees from molding to finishing were only for the purpose of performing finishing work during shift overlap or when, on a given day, molders would be idle for a period of time. This was an infrequent occurrence. In addition, she testified that employees rarely went from finishing to molding.

1979, there are no records still in existence, which would show whether there was a decline in finishing hours after the strike ended. Indeed, this is important to know because, as Respondent stated, some finishing work required up to five employees to complete and there usually was more finishing work associated with the production of "knob" parts.

With regard to the reduction of hours for employees during 1980, Respondent submitted two letters, one dated April 23, 1980, and the other May 6, 1980. The April 23 letter was allegedly sent to the Union notifying it that the molding department would be working 3 10-hour days effective the week of April 28 "due to the lack of business and the present economic slump." It does appear that for approximately a 2-week period most of the employees in the molding department worked a reduced workweek. However, it is unclear what economic slump or decline in business Respondent was referring to in the letter. As previously noted, orders for "knobs" increased in the first and second periods after the strike, the periods of the so-called economic slump. Also, although Respondent's molding department worked a reduced workweek, the press hours during this period exceeded prestrike levels.

The May 6 letter allegedly sent to the Union states that "due to the lack of business and the present economic slump, effective the week of May 5, 1980, [the] . . . finishing department will work a 3-day week, 10 hours a day, with the exception of the 10 to 13 most senior people who will work the fourth day. Again, it is noted that orders for "knobs," as well as backlog orders, increased in the periods after strike. Further, Respondent testified during these proceedings that more finishing work is required for knob work. Because Respondent failed to maintain the records showing the number of finishing hours worked by Respondent during 1980, by accounting period, there is no way of determining whether the finishing department, like the molding department, also had an increase in the number of hours worked during the so-called "lack of business" or "economic slump" period.

In conclusion on this point, I find that Respondent did not meet its burden of showing that it suffered an economic slump or a business decline serious enough to affect the recall of strikers as vacancies occurred through separation of employees, especially in the degree exhibited in the ratio of vacancies created to strikers recalled. This ratio increased dramatically and without an equally dramatic decline in business. This will be discussed below.

2. The Company's contention that it used the same criteria and followed the same practice in deciding when to recall strikers as it had in hiring employees prior to the strike

Respondent contends that it does not necessarily hire a new employee each time an existing employee ceases his or her employment. From the exhibits in the record, this does appear to be the case. However, Respondent has historically maintained at least some understandable ratio of employees leaving to those hired. For example, in the year 1979, the year preceding the strike, 68 employees permanently left Respondent's employ and 42 new employees were hired. This is an approximate ratio of two replacements for every three vacancies. In the 8-plus months following the strike, 29 em-

ployees left permanently, but only 5 strikers were recalled.<sup>7</sup> This is an approximate ratio of one replacement for every six vacancies, and one of the positions filled by recall was a maintenance position. Certainly, this drastic reduction in the replacement to vacancy ratio is not justified by Respondent's 1980 sales figures, which are as good as or better than those of 1979, or even its press hours, which show only an approximate 12-percent reduction from 1979.

The table set out below dramatically illustrates the extraordinary delay Respondent exhibited in its recall of strikers to fill vacancies:

<i>Employee Separations from Date of Strike</i>		<i>Recalls of Strikers</i>	
4/4/80	Finisher		
4/4/80	Finisher		
4/10/80	Molder	4/7/80	Maint.
4/16/80	Molder		
4/17/80	Molder		
5/6/80	Shipper		
5/7/80	Molder		
5/8/80	Molder		
5/13/80	Molder		
5/13/80	Molder		
5/27/80	Finisher		
5/29/80	Finisher		
5/29/80	Finisher		
6/5/80	Molder		
6/9/80	Molder		
6/17/80	Molder		
6/28/80	Finisher		
6/28/80	Molder		
7/10/80	Finisher		
8/6/80	Molder		
8/22/80	Finisher	8/11/80	Finisher
8/22/80	Finisher	8/11/80	Finisher
8/22/80	Molder		
9/8/80	Molder		
9/12/80	Molder	9/15/80	Finisher
10/9/80	Finisher	9/15/80	Finisher
12/2/80	Finisher		
12/12/80	Molder		
12/28/80	Finisher		
1/6/81	Finisher		
4/16/81	Molder	3/9/81	Hand Mold
5/4/81	Molder	5/4/81	Hand Mold
5/14/81	Molder	6/12/81	(2) Finishers
		6/13/81	Molder
		6/24/81	Maint.
		7/7/81	Molder
		7/12/81	Finisher
		7/13/81	(2) Molders
		7/15/81	Molder
		7/16/81	Molder
		7/16/81	(3) Finishers

Respondent also argues that it does not lay off employees to adjust its work force when there is a decline in business. Rather, Respondent asserts that it relies on employee attrition. However, reference to the exhibits reflecting employee separations for the year 1979 will show that 31 of the 68 employees separated from Respondent's employment were discharged, with 22 of those discharges coming in the period

<sup>7</sup>One striker was recalled on 4/15/80, but left for military service without returning to work at Respondent's plant.

July-November of that year. The reasons for these discharges are not discernable from the record. Finally, Respondent does not, as it contends, rely exclusively on employee attrition to adjust the size of its work force during a "decline in business." This is demonstrated by Respondent's Exhibits 54 and 55 which show Respondent adjusted the work schedules of employees rather than rely on employee attrition.

There is also the matter of testimony from Respondent's witnesses that indicated that employees who were on medical leave during the poststrike period would have been put back to work if they recovered and requested reinstatement. Moreover, Fannin testified that Respondent had work for every employee separated following the strike up until the last day they worked. Thus, when they left, there was work available that either had to be done by another employee or not done at all.

I find that Respondent has failed to meet its burden. It has not rebutted the presumption that vacancies to reinstate former strikers existed following the departure of other employees after the strike. The reasons advanced by Respondent, as demonstrated above, are neither substantial nor legitimate. It is apparent that Respondent seized on a temporary decline in orders for some of its product line as justification to delay the reinstatement of former striking employees. Respondent was able to accomplish this task by alternating its production between "custom" and "knob" products whenever the backlog increased too much. This juggling act, however, eventually had to cease when, during the third period of 1981, the backlog orders skyrocketed. It was the skyrocketing backlog that caused Respondent to recall the former strikers, not the purchase of the Norton Laboratories in July 1981, as its witnesses stated. Work resulting from the Norton purchase did not begin until after July and there is no specific showing of the impact that this purchase had on Respondent's orders in the latter half of 1981.

Respondent did not reinstate any former strikers between May and July 1980 and October 1980 and February 1981. These lengthy periods of not hiring new employees are unprecedented. If Respondent had reinstated the former strikers there would have been work for them to perform. Thus, Respondent testified that there was work available for the employees who left its employ between May 1980 and May 1981. Respondent also testified that there was work available for employees who were on a medical leave of absence before the strike had they chosen to return to work after the strike ended and, in fact, it did allow some employees on a medical leave of absence to return. Under these circumstances, and given Respondent's proven antiunion animus, I find, as did the administrative law judge and the Board before me, that Respondent's alleged business decline justification for its failure to recall strikers a vacancies occurred is pretextual and without substance.

For all of the reasons set forth above, I find that Respondent has failed to meet its burden of proof on its business justification defense and that its failure and refusal to recall

strikers when vacancies for which they were qualified occurred after the unconditional offer to return to work had been made is in violation of Section 8(a)(1) and (3) of the Act. I further find that there is substantial evidence to support the Board's heretofore made findings, conclusions, and Order remedying these unfair labor practices and will recommend that they be reinstated. Neither Respondent nor the court of appeals questions the Board's findings, conclusions, and Order relating to any of the other unfair labor practices found to have been committed by Respondent in its Decision and Order dated November 30, 1987, and they are incorporated herein by reference.

On the basis of the above findings of fact and the entire record in this case, I make the following

#### CONCLUSIONS OF LAW

1. Kurz-Kasch, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Electrical, Radio and Machine Workers of America (UE) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to reinstate economic strikers after they had made unconditional offers to return to work and jobs became available for them, Respondent has violated Section 8(a)(3) and (1) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practice I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including the posting of the customary notice, designed to effectuate the purposes of the Act.

Having found that the former strikers were entitled to be recalled prior to May 5, 1981, and having further found that Respondent did not offer reinstatement to all such strikers until July 16, 1981, I recommend that Respondent be ordered to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of the amount they normally would have earned from the date of the unconditional offer to return to work until the date of Respondent's offer of reinstatement, less net earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), to which shall be added interest, to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). I shall also recommend that the question of when each of the former strikers should have been recalled be left to the compliance stage of this proceeding. In addition, as some of the reinstated strikers were entitled to be recalled earlier than they were, I shall leave to the compliance stage the question of which strikers were entitled to earlier recall and the amount of backpay due them.

[Recommended Order omitted from publication.]