

**Eads Transfer, Inc. and General Teamsters, Chauffeurs, and Helpers Union Local 378, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.** Case 19-CA-19949

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

Exceptions filed to the judge's decision in this case<sup>1</sup> present the question of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate seven economic strikers on their unconditional offers to return to work.

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

The Respondent, a moving and storage company, is located in Olympia, Washington. The Union has been the exclusive bargaining representative of the Respondent's drivers, packers, and warehousemen for over 15 years. The last collective-bargaining agreement between the parties expired on March 30, 1985. Since that time, the parties have not been able to reach agreement on a new contract. For 2 years after the expiration of the last contract, the parties treated it as extended while they bargained over a new contract. On July 30, 1987, when the most recent contract extension expired, the Union called an economic strike and began picketing at the Respondent's "base of operations" as well as at sites where it made pickups and deliveries. While the Respondent's three on-call employees did not honor the picket line, its seven "regular" employees went out on strike and remained on strike into June 1988.<sup>2</sup> During this time, the Respondent also hired a number of replacements who also worked on an on-call basis.<sup>3</sup>

During the first 10 months after the strike began, the parties continued to meet and to bargain over a new contract. During this time, the Union filed a number of unfair labor practice charges against the Respondent, many of them concerning the Respondent's alleged bad faith at the bargaining table.<sup>4</sup> By June 1988, how-

ever, the Union was engaged in implementing a new strategy that was aimed at both insulating its status as the 9(a) bargaining representative of the unit employees and enhancing its strength at the bargaining table. Believing that it could not file another representation petition,<sup>5</sup> the Union and the strikers planned to have a unit employee (striker Christensen) file a decertification petition. To forestall the possibility that the Respondent would hire enough permanent replacements to dilute the Union's voting strength in the election, the Union and the strikers also planned that a number of them would offer to return to work prior to the filing of the petition.

On June 2, 1988, Linch, the Union's business agent, and five of the seven strikers met in a negotiating session with Marc Conrad, the Respondent's president, and Richardson, the Respondent's labor relations spokesman. After Richardson's confirmation at the end of the meeting that the Respondent's replacements were temporary employees, four of the five strikers (Christensen, Kirkland, Nelson, and Sorby) submitted identical, signed return-to-work offers to Conrad. Conrad read at least one of the letters before setting them aside without comment and the session ended. Immediately after making his return-to-work offer, Christensen filed the decertification petition.<sup>6</sup>

At the June 21 hearing on Christensen's decertification petition, the Respondent sought to establish that there was no proper basis for an election since there was no doubt of the Union's continuing majority status. In this regard, the Respondent contended that the petition was a "sham" since Christensen and a majority of employees still supported the Union. The Respondent also stated that it considered the four strikers' offers to return to work to be part of the "sham" and a part of the Union's overall bargaining strategy.<sup>7</sup>

On July 20, Sorby, one of the four strikers who requested reinstatement on June 2, came to the Respond-

spendent without the Union's approval. As part of the settlement agreement, the Respondent agreed (a) to bargain in good faith with the Union; (b) not to unilaterally discontinue payments into appropriate contractual benefit funds; (c) to cure its failure to make payments into a pension fund by making back-owed payments; and (d) to confirm in a notice that it had returned to the pre-August 1987 bargaining proposals. On August 11, 1988, the Regional Director determined that the Respondent had complied with all the terms of the settlement agreement and closed the settled cases.

<sup>5</sup>In April 1987, prior to the strike, the Union filed a representation petition and received a new certification after winning a Board-conducted election.

<sup>6</sup>The Region processed the petition and a hearing was held on June 21, 1988. The petition was later dismissed. Two attempts had been made prior to June 2 to file a decertification petition. The Region dismissed those petitions as premature.

<sup>7</sup>The hearing officer ruled "out-of-bounds" any challenge to the Region's prior administrative determination that a question concerning representation had been raised by the showing of interest that accompanied the petition. (Although an election was held on an unspecified date, the General Counsel contends that the Region eventually dismissed the petition on the ground that it was blocked ab initio by the pendency of the settled cases as the notice-posting period had not yet run when the petition was filed in early June, and was later independently blocked by the filing of the charge in the present case on August 8.)

<sup>1</sup>On February 7, 1990, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup>The seven strikers were Nelson, Sorby, Kirkland, Christensen, O'Hare, Wood, and Terry.

<sup>3</sup>At the hearing, the Respondent stipulated that the nonstriking workers were "temporary replacements" and admitted that it was ready to replace them with returning strikers if and when a new contract was reached.

<sup>4</sup>The Regional Director dismissed most of the charges, but three became the basis of a consolidated complaint that was later dismissed as part of a settlement agreement entered into in May 1988 between the Region and the Re-

ent's facility and submitted to General Manager Tenney three more identical letters offering to return to work signed by the remaining strikers (O'Hare, Terry, and Wood). No words of significance were exchanged. When Sorby left the office, Tenney opened and read the letters.

On August 8, the Union filed its charge in the instant case. The charge alleged that the Respondent had unlawfully "refused to reinstate striking employees who have unconditionally requested to be reinstated."

On August 23, the parties met for the first bargaining session since June 2.<sup>8</sup> At this session, the Respondent announced for the first time that it was not prepared to reinstate the strikers until a contract was reached. The Respondent also made it clear that it wanted the strikers to return, that no striker was deemed ineligible for reinstatement, and that a condition of reinstatement would be a signed contract with the Union. Although the Union maintained that the strikers had a legal right to reinstatement, the Union did not then or later agree to a contract with the Respondent. The record does not reveal if or when the strike ended and if the Union ceased its ambulatory picketing.

In concluding that the Respondent did not violate Section 8(a)(3) as alleged, the judge found that from June 2 the Respondent had, in effect, intended to conduct an economic lockout,<sup>9</sup> and that the lockout was therefore lawful under *Harter Equipment*, 280 NLRB 597 (1986), petition for review denied 829 F.2d 458 (3d Cir. 1987).<sup>10</sup> The judge also considered and rejected the General Counsel's argument that the nearly 3-month delay between the initial offer to return to work and the Respondent's declaration of the lockout rendered the lockout unlawful.<sup>11</sup> For the reasons set out below, we disagree with the judge's conclusion that the lockout was lawful and find that the Respondent violated Section 8(a)(3) by failing and refusing to reinstate the strikers on their unconditional offer to return to work.

This case addresses the competing rights of economic strikers to reinstatement on their unconditional

offer to return to work<sup>12</sup> and of employers to lockout and temporarily replace employees for legitimate economic or business reasons under *Harter*, supra. In *Laidlaw*, the Board held that economic strikers are entitled to full reinstatement on the departure of permanent replacements unless the employer can sustain its burden of proof "that the failure to offer full reinstatement was for legitimate and substantial business reasons."<sup>13</sup> The Board also held that an employer's unlawful refusal to reinstate economic strikers is conduct so inherently destructive of employee rights that evidence of specific antiunion motivation is not necessary to establish a violation of the Act.<sup>14</sup> In *Harter*, the Board held that an employer has the right to hire temporary employees after lawfully locking out permanent employees in order to bring economic pressure to bear in support of its bargaining position. The Board further held that, absent specific proof of antiunion animus, an employer does not violate Section 8(a)(3) and (1) of the Act by hiring temporary replacements in order to engage in business operations during a lawful lockout.<sup>15</sup> In reaching this conclusion, the Board found that the employer's use of temporary employees had "only a comparatively slight adverse effect on protected employee rights."<sup>16</sup>

In balancing these competing interests, we conclude that an employer can only justify its failure to reinstate economic strikers "for legitimate and substantial business reasons" based on a "lockout" by its timely announcement to the strikers that it is locking them out in support of its bargaining position. For only after the employer has informed the strikers of the lockout can the strikers knowingly reevaluate their position and decide whether to accept the employer's terms and end the strike or to take other appropriate action. In the absence of notification, we conclude that an employer's failure to reinstate economic strikers based on a claimed lockout on their unconditional offer to return to work is inherently destructive of employee rights under *Laidlaw* and is a violation of Section 8(a)(3) and

<sup>8</sup>The Union canceled three negotiating sessions scheduled in the period between June 2 and August 23.

<sup>9</sup>The judge considered the Respondent's motives for refusing to reinstate the strikers and concluded that from June 2 to August 23 the Respondent's reasons for not reinstating the employees were its conviction that genuine labor peace would not result from reinstatement and its desire that the parties sign a new contract before the strikers returned to work. In this regard, the Respondent believed that its "economic leverage" over the Union would be undermined if it reinstated the strikers without a contract.

<sup>10</sup>In reaching this conclusion, the judge observed that under *Harter* the Board will not infer an unlawful motive when an employer declares a lockout and continues to operate with temporary replacements and that such conduct is not inherently destructive of employee rights. Thus, the judge reasoned that in order to establish a violation, the General Counsel had to prove that the Respondent acted from an unlawful motive in refusing to reinstate the strikers. Because the judge, as noted above, had already found that the Respondent's motive in refusing reinstatement was not unlawful, he dismissed the complaint.

<sup>11</sup>Although admitting that he was not entirely convinced by the Respondent's reasons for failing to notify the Union of the lockout prior to August 23, the judge reasoned that the belated notification did not establish that the Respondent had an unlawful motive for refusing to reinstate the strikers.

<sup>12</sup>See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

<sup>13</sup>Id. at 1370. As explained above, the replacements in the present case were temporary employees, not permanent replacements as in *Laidlaw*. The Respondent, therefore, was obligated to immediately reinstate the strikers upon their unconditional offer to return to work in the absence of proof of a legitimate and substantial business justification. See, e.g., *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987).

<sup>14</sup>Id. at 1369.

<sup>15</sup>*Harter*, supra at 600. In *Harter*, the respondent notified the union during negotiations for a new contract that it would not allow its employees to work without a contract. When the current contract expired, the respondent locked out the employees. Approximately 6 weeks later, the respondent began hiring temporary employees so that it could continue its operations and meet fixed expenses.

<sup>16</sup>Id. In this regard, the Board reasoned that it did not see "how any effort to remain in operation after a lawful lockout could be 'inherently destructive' of employee rights and per se violative of the Act without inquiry into the employer's motivation." Id. at 599 (emphasis in original).

(1) of the Act.<sup>17</sup> Thus, we find that the judge's decision finding lawful the Respondent's failure to reinstate economic strikers in the context of an unannounced lockout<sup>18</sup> represents not simply an application of *Harter*, but a considerable and unwarranted extension of that decision that substantially impairs economic strikers' *Laidlaw* rights.

In the present case, without making any reference to a lockout or to bargaining demands, the Respondent, who had hired temporary replacements during the strike, simply refused, without explanation, to reinstate seven economic strikers when they made an unconditional offer to return to work. More than 2 months after the initial offer to return, and after the Union filed unfair labor practice charges regarding the failure to reinstate the employees, the Respondent, for the first time, announced that its failure to reinstate the employees was related to its insistence on its bargaining position. In dismissing the complaint, the judge found that the Respondent's refusal to reinstate the strikers on June 2 and after was motivated by its intention to conduct an "economically-inspired 'lockout'" although it did not specifically use the term "lockout." In our view, it is irrelevant whether the Respondent had decided to lock out the strikers in June. If the Respondent wanted to invoke the benefits of *Harter* to suspend effectively the *Laidlaw* rights of the strikers to return to work, it was obligated to declare the lockout before or in immediate response to the strikers' unconditional offers to return to work.<sup>19</sup>

Since we find that the Respondent's extended silence regarding its reason for failing to reinstate the employees renders the Respondent's conduct unlawful under *Laidlaw*, we conclude that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers on their unconditional offers to return to work. Further, we find that the Respondent's unlawful refusal to reinstate the strikers prolonged the strike and that the economic strike was therefore converted to an un-

fair labor practice strike on June 2, 1988, when the first strikers offered to return to work.

#### REMEDY

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

We shall order the Respondent, inter alia, to offer the unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges previously enjoyed. Backpay shall be computed by calculating for each of the strikers a sum equal to his individual wages as of the date of his unconditional offer to return to work up to the date of the Respondent's offer of reinstatement, less any net earnings during that period, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.<sup>20</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Eads Transfer, Inc., Olympia, Washington, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing without justification to reinstate economic and unfair labor practice strikers on their unconditional offer to return to work.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dennis Nelson, Dan Sorby, Kenneth Kirkland, Jerry Christensen, Roger O'Hare, Ted Wood, and George Terry 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 in the manner set forth in the remedy section of this decision.

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

(c) Post at its facility in Olympia, Washington, copies of the attached notice marked "Appendix."<sup>21</sup> Cop-

<sup>17</sup>We find that the Board's decision in *Harter* supports such a conclusion. In this regard, we note that in finding that the hiring of temporary employees after a lawful lockout is conduct which has only a "comparatively slight effect" on employee rights, the *Harter* Board relied in part on the fact that "[T]he Union or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work." *Id.* at 600. This view of the lockout presumes that the employer has announced the reason for its action so that the union and the employees then know what choices are left to them.

<sup>18</sup>No party appears to argue that the lockout was unlawful because it affected less than the full unit. See *Harter Equipment*, 293 NLRB 647 (1989).

<sup>19</sup>William Conrad, the Respondent's chairman of the board, testified that the Respondent thought it would be best to discuss the matter of the strikers' return with the Union's representatives face to face at a bargaining session and that the August 23 negotiating session presented the first such opportunity to discuss the matter. We agree with the judge that Conrad's explanation "retains a certain lameness." Indeed, we emphasize that the Respondent's explanation fails completely to explain or justify its protracted silence regarding the strikers' offers to return to work. In this regard, we note that the Respondent could have informed the Union at any time of its decision to lock out its employees and that such an announcement was not contingent on the holding of a bargaining session or any other condition.

<sup>20</sup>283 NLRB 1173 (1987); *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

<sup>21</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 for the Ninth Circuit." *Continued*

ies of the notice, on forms provided by the Regional Director for Region 19, 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.

States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### 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 fail and refuse without justification to reinstate economic and unfair labor practice strikers on their unconditional offer to return to work.

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 offer Dennis Nelson, Dan Sorby, Kenneth Kirkland, Jerry Christensen, Roger O'Hare, Ted Wood, and George Terry 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 pay they may have suffered by reason of our unlawful refusal to reinstate them, with interest.

EADS TRANSFER, INC.

*S. Nia Renei Cottrell, Esq.*, for the General Counsel.  
*Gary M. Carlson, Esq.*, of Portland, Oregon, for the Respondent.

*Lawrence Schwerin, Esq. (Hafer, Price Rinehart & Schwerin)*, of Seattle, Washington, for Charging Party Local 378.

#### DECISION

##### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in trial in Olympia, Washington, on June 2, 1989. It is based on charges filed on August 8, 1988, by Teamsters Local 78 (the Union) against Eads Transfer, Inc. (Respondent). The charge, one of many cases between these parties then pending at various stages in Region 19, was first investigated by the Regional Director's staff, and then received renewed consideration by the Office of the General Counsel, on appeal from the Regional Director's dismissal. On April 6, 1989, acting for the General Counsel, the Regional Director issued a complaint alleging that Respondent violated Section 8(a)(3) and (1) of the Act by refusing in June and July 1988 to reinstate seven named former strikers on their unconditional offers to return to work, and by declaring a lockout on August 23, 1988.

Respondent, whose answer has been substantially amended as a consequence of certain extensive trial stipulations, admits that its operations are subject to the Board's statutory and discretionary jurisdiction, and that it has refused to reinstate the named former strikers, but avers that it was entitled as a matter of law to do so, as a legitimate exercise in the circumstances of its right to lock out employees in aid of its position at the bargaining table.

I have studied the record and the parties' briefs.<sup>1</sup> On the record and on my assessments of the witnesses as they testified and of the inherent probabilities, I make these

##### FINDINGS OF FACT

###### BACKGROUND<sup>2</sup>

Since at least 1973 the Union has been the exclusive collective-bargaining agent for a unit of nonsupervisory drivers, packers, and warehousemen employed by Respondent in its Olympia, Washington moving and storage business. For the past 5 years the parties have not been able to reach an agreement to replace one which expired on March 30, 1985. For the first 2 years following that contract's expiration the par-

<sup>1</sup>The General Counsel and Respondent filed posttrial briefs; the Union's counsel succinctly presented the Charging Party's factual and legal positions in oral argument at trial, and further rested on the arguments the Union had previously submitted in a written appeal to the Office of the General Counsel from the Regional Director's dismissal of the charges in this case, a document received in evidence as C.P. Exh. 2.

<sup>2</sup>As will be evident below, this case arose against the background of a lengthy series of charges and countercharges between these parties in other cases, and it blossomed into a distinct case while other cases involving these parties were still pending at various stages of disposition in Region 19. The history of these other cases is only skeletally indicated on this record, often in the form of representations by counsel about the nature and disposition of only some of the more recent of them. Although much of this background is distracting and arguably inconsequential to the outcome, I am not persuaded that any of it is entirely irrelevant to a judgment of the ultimate merits of the complaint, particularly so where the case has no strict factual precedent. For this reason, without adverting to every fact of record pertaining to the history of prior and concurrent charges (and representation petitions) attempt below to summarize the evolving legal and practical settings in which the parties found themselves by the time the matters now in question took shape, beginning in June 1988.

ties treated the expired contract as being extended while bargaining continued. At some point around April 1987, the Union filed a representation petition in Case 9-RC-11540 and eventually received a new certification after winning a Board election by a 7 to 0 vote. On July 30, 1987, when the most recent agreed-on contract extension expired, the Union called an economic strike and began picketing at Respondent's base of operations as well as at sites where it made pickups and deliveries.

Three employees who had worked on a casual or on-call basis in the prestrike work force did not honor the picket line, and have continued to work on an on-call basis throughout the strike. The seven "regular" prestrike employees (Dennis Nelson, Dan Sorby, Kenneth Kirkland, Jerry Christens, Roger O'Hare, Ted Wood, and George Terry) were still on strike in June 1988 when the events underlying the complaint began to ripen. Also by June 1988, Respondent had hired a varying number of additional replacements, also working on an on-call basis, to perform the strikers' former work.<sup>3</sup> Respondent now stipulates that all such nonstriking workers were "temporary replacements" for the strikers as that characterization resonates in labor law, employees whom Respondent admits it was prepared to displace with the returning strikers when and if a new contract could be reached with the Union.

The parties continued to meet and bargain on many occasions in the first 10 months after the strike started, i.e., the strike period which elapsed prior to June 1988. In that period the Union's business agent, Owen Linch, assisted by an informal "committee" of most of the strikers, usually met with Respondent's labor relations consultant and spokesman, Byron Ricardson, himself usually accompanied by one or more of Respondent's chief officers or managers. During that period, the Union filed what the General Counsel has variously characterized as a "plethora" or a "flurry" of unfair labor practice charges against Respondent, many of them impeaching Respondent's good faith at the bargaining table. Most of these charges were dismissed by the Regional Director, but elements of three of them eventually became the basis of a consolidated complaint which was itself later dismissed as part of a settlement agreement which the Regional Director unilaterally entered into with Respondent, formally approving it over the Union's objections sometime in May 1988.<sup>4</sup>

In exchange for the Regional Director's dismissal of the consolidated complaint Respondent made both general and specific commitments to be reiterated in a notice to be posted

<sup>3</sup>For findings concerning the on-call nonstrikers and striker replacements, I rely on various generalized acknowledgments by counsel or the witnesses in this trial which are echoed and particularized in testimony given by Respondent's agents William Conrad and Marc Conrad in a representation case hearing (discussed further below), whose transcript was received by stipulation as Jt. Exh. 1(d). In this transcript Respondent's agents concede, inter alia, that the "regular" prestrike complement was composed of the seven strikers, and that since the strike began Respondent has operated by drawing a varying number of replacements from an on-call pool, ranging from "zero to seven," depending on the daily workload.

<sup>4</sup>The complaint which underlay the settlement agreement is not in evidence, but the parties agree that the consolidated complaint which issued in Cases 19-CA-19287, 19-CA-19426, and 19-CA-19559 was, despite the Union's objections, fully disposed of by the settlement agreement. They further agree that some elements of the Union's underlying charges in those three cases were deemed unmeritorious by the Region and were not pursued in the complaint nor in the settlement.

for 60 days. Principal among these promises were the following: (a) to bargain in good faith with the Union; (b) not unilaterally to discontinue payments into "the appropriate contractual benefit funds"; (c) to cure its (admitted) unilateral failure since July 31, 1987, to have made payments into a pension trust<sup>5</sup> by making back-owed payments into the trust, no later than "the close of business May 13, 1988, with copy of any submission to the NLRB"; and (d) to confirm in a notice what the Regional Director had apparently already determined Respondent had done at the bargaining table to announce that "WE HAVE returned to the pre-August 1987 bargaining proposals which were open to Teamsters Local 378 prior to that time."<sup>6</sup>

By June 1988 the strike had gone on for nearly a year and the parties were still at loggerheads over at least five issues. By then Respondent had settled those of the Union's charge that the General Counsel had determined to prosecute. By then Respondent had implemented its outstanding contract proposal but was still bargaining with the Union over a range of possible alternative terms for a new agreement (all of this lawfully, as I must presume, given the Regional Director's dismissal of the Union's contrary charges in Case 9-CA-19993, and his August 11 determination in closing the settled cases that Respondent had complied with all the terms of the settlement).

By then also the Union, in consultation with the strikers, had arrived at a strategy admittedly calculated to insulate the Union's status as the 9(a) representative of the unit employees for another year, and likewise to enhance its relative strength in ongoing negotiations with Respondent. As the Union's Linch acknowledged, the strategy contemplated at least two interrelated tactical elements: Apparently believing that could not again file its own "RC" petition for a conventional certification election, as it had done roughly a year earlier, the Union and the strikers planned that a unit employee (Christensen, a striker, became the instrument) would soon file a petition for a representation election to be conducted before the strike had lasted a year; indeed, the specific procedural vehicle would be a petition for a "decertification" election.<sup>7</sup> Before filing such a petition, however,

<sup>5</sup>Respondent stipulated that, "commencing on or about July 31, 1987, and continuing for a period of time, Respondent, prior to having reached impasse, discontinued pension trust contributions." Other factual elements of the three settled cases were adverted to in this trial, but not genuinely litigated.

<sup>6</sup>Linch concedes that in January 1988 Respondent had modified its position so as to conform its bargaining offer to the one on the table when the strike started—leaving "5 basic issues" (unspecified on this record) for resolution. He concedes that Respondent implemented that conforming offer at that time. He sought to testify that Respondent thereafter slipped again into a "regressive bargaining" posture. The General Counsel represents that the Union filed a separate charge (Case 19-CA-19993) sometime in August 1988 alleging that Respondent was again engaging in regressive bargaining, and that the Region dismissed this charge. Relatedly, the General Counsel represents that on August 11, 1988, despite the same objections by the Union, the Regional Director closed the three previously settled cases on compliance, an implicit determination not only that Respondent had affirmatively complied with all terms of the settlement agreement, but also that the Union's charges that Respondent had engaged in postsettlement "regressive bargaining" were without merit. I ruled at trial that these claims could not be reintroduced nor litigated in this trial without intruding unduly on the General Counsel's broad prosecutorial discretion. I thus disallowed any testimony Linch proffered to establish that Respondent had not bargained in good faith since the May 1988 settlement agreement.

<sup>7</sup>The Union hoped to win such an election and get a new Board certification—tantamount to a bar against any challenges to the Union's representa-

*Continued*

and to forestall the possibility that Respondent might begin to hire enough "permanent replacements" to dilute the Union's voting strength in such an election, the Union and the striker planned that a significant number of the strikers would soon offer to return to work.<sup>8</sup>

#### Undisputed Events of June through August 1988

On June 2, 1988, with these plans in place but not yet executed, Linch, accompanied by five of the seven strikers (Christensen, Kirkland, Nelson, Sorby, and Terry), entered a collective-bargaining meeting with Respondent's president, Marc Conrad, and Labor Relations Spokesman Richardson. At the end of the meeting, Linch received Richardson's confirmation that Respondent regarded the replacement employees as "temporary." This issue thus clarified to the Union's satisfaction, four of the strikers (all just named but Terry) submitted identical, signed return-to-work offers to Conrad.<sup>9</sup> Conrad read at least one of the letters before setting them all aside without comment, and the session ended.

Apparently immediately after making his offer to return work, Christensen filed the decertification petition (docketed as Case 19-RD-2744), something which Respondent's agent learned about within a day or two after June 2.<sup>10</sup>

On June 7 Linch wrote to Richardson, announcing that a bargaining meeting previously scheduled for June 10 was being "cancelled" by the Union because "there appears to be a question regarding representation." Linch also expressed the "hope" that if the Union were "still the bargaining representative after the election," the parties could "continue with negotiations . . . ."

On June 9, Linch again wrote to Respondent, this time to Marc Conrad, reminding him that four strikers had offered

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tive status for another 12 months after certification. The timing of the filing was intended at a minimum to preserve the strikers' voting eligibility in the hoped-for election, an eligibility which the Union apparently feared would be in doubt if the strike had lasted more than a year before a new election could be held. I note also that the "certification year" arising from the Union's earlier certification in Case 19-RC-11540 was about to expire, and I assume that this also influenced the Union's plans in June 1988 promptly to seek new certification.

<sup>8</sup>As Linch explained, the Union's intention here was to "freeze the [e]mployer's ability to hire permanent replacements ahead of strikers in the event of an election." Because the legal soundness of the Union's overall strategy or any of its elements does not affect my recommended disposition of this case (it only matters, if at all, that the strikers' offers to return to work were an element in the Union's (re)certification strategy), I will not make any further attempt to rationalize that strategy, much less to harmonize it with the arcane of Board representation-case law and procedure. Similarly, I will refrain from commenting about other ways in which the submission of at least four offers by strikers to return to work might have been seen by the Union as necessary to ensure that the planned "decertification" petition would be processed by the Regional Office.

<sup>9</sup>The letters, prepared in advance by the Union, stated,

This is to inform you that I am offering unconditionally to return to work in my former position, effective immediate Linch explained that the four who submitted offers on June were deputized for this role because they had the most prestrike senior.

<sup>10</sup>The record does not disclose more precisely when Christensen filed the decertification petition. As noted below, the Region processed the petition, including by holding a hearing on June 21, but much later dismissed it. Respondent's agents say that they had anticipated such a move even before June 2, and I recognized it for what it was when they learned of it. Counsel for the General Counsel at trial tended to confirm that Respondent had a basis for anticipating it. Thus, the General Counsel represented that two other attempts had been made before June 2 to file a decertification petition (whether Christensen was the petitioner is not clear) but that the Region had dismissed those attempted filings as legally premature.

to return to work on June 2, advising him that Respondent "should have already returned those employees to work," and requesting that Respondent "do so at once."

On June 21, a Region 19 hearing officer conducted a representation hearing pursuant to Christensen's petition in Case 19-RD-2744. At that hearing Respondent's counsel sought to make a record that there was no proper basis for an election to be conducted where Respondent itself did not doubt the Union's continuing majority status and where the petition itself was a "sham" insofar as Christensen was portraying himself as wishing not to be represented by the Union and insofar as he claimed that a majority of his fellow employees shared this sentiment.<sup>11</sup> Respondent's counsel also adverted to the fact that Christensen and three other strikers had recently tendered offers to return and that these were part of the "sham," and simply additional elements in the Union's overall "bargaining strategy."<sup>12</sup> The hearing officer ruled out-of-bounds any challenge to the Region's prior "administrative determination" that a "question concerning representation" had been raised by the "showing of interest" which accompanied the petition. The hearing proceeded, focusing on questions affecting how, when, and among which employees, an election should be conducted, but not on whether there should be one.<sup>13</sup>

On July 11, Richardson wrote to Linch, stating his (apparently mistaken) belief that Christensen's petition had been dismissed, and requesting "a meeting this week or the week of July 18th where in [sic] we can meet and discuss the issues presented to you in the Company proposal of June 2." On July 12, Linch replied that he was "not available until the week of July 25," but offered to meet at certain times in that week "provided Bev Rinehart is available."<sup>14</sup>

On the morning of July 20, Sorby (one of the June 2 would-be returning strikers) came to Respondent's office and handed to General Manager Lawrence Tenney three more identical letters offering to return to work, these signed by the remaining strikers, O'Hare, Terry, and Wood. Sorby and Tenney exchanged no words of significance and Sorby left the office. Tenney then opened and read the letters.

On August 8, the Union filed the instant charges, alleging specifically that, "Within the last six months the Employer

<sup>11</sup> Under Sec. 102.61(c)(6) of the Board's Rules and Regulations, a decertification petitioner must aver that the union currently certified or recognized by the employer is "no longer the representative in the . . . unit[.]"

<sup>12</sup> Christensen replied to these contentions in the hearing by saying, "I don't think I would like to comment other than the point that out seven in the bargaining unit four of us have tendered unconditional return to work [sic] which shows some disgruntlement between the Union and the union membership."

<sup>13</sup> The Regional Director eventually issued a Decision and Direction of Election, and an election was conducted at some later point (certainly before January 19, 1989, when Respondent's counsel wrote a position letter to the Regional Director responding to challenges made to certain voters in the by then already completed election). Counsel for the General Counsel now states that the Region erred in processing the RD petition, not because it was a "sham," but only because it was "blocked" ab initio by the not-yet-fully remedied cases which had been settled earlier (the notice-posting period in the three settled cases had not expired when the petition was filed in early June), and later "blocked" independently by the pendency of the charge here, filed August 8. The General Counsel represents that the Region eventually dismissed the RD case when it realized its error in having proceeded in the face of the blocking charges.

<sup>14</sup> I presume that "Bev Rinehart" was acting as the Union's attorney in bargaining. Anticipating findings below I note also that the parties did not meet again until August 23. William Conrad testified without contradiction, and I therefore find, that the Union canceled three separate bargaining meetings in the period June 2 through August 23.

has legally refused to reinstate striking employees who have unconditionally requested to be reinstated.”

On August 23 the parties met for their first bargaining meeting since June 2. The meeting was lengthy, but touched at one or more times on the subject of the strikers’ pending offers to return to work. Respondent agents disclosed for the first time that the company was not prepared to reinstate the strikers until a contract was reached. Also, blending the harmonious testimony on the subject, I find that Respondent’s agents made it clear that they wanted the strikers to return, that no striker was deemed ineligible for reinstatement, but that a condition of reinstating any of them would be a signed contract with the Union.<sup>15</sup>

While continuing then and thereafter to maintain that Respondent owed a legal duty to reinstate the would-be returning strikers, the Union did not then, nor at any time since, signal its assent to a contract based on Respondent’s announced terms. Whether the Union ever thereafter formally declared an end to the strike, or ceased its ambulatory picketing campaign, are questions which this record does not answer.

#### Respondent’s Professed Reasons for not Accepting the Offers to Return; the General Counsel’s Counterassertions

As I discuss below, the General Counsel has put into issue what Respondent’s real motives were in refusing to reinstate the first four would-be returnees on June 2 and the remaining three on July 20. In doing so she has raised what is, at bottom, a question of fact. I address it here as such.

Explaining the refusal to reinstate the seven strikers, Respondent’s agents testified harmoniously about their own deliberations on the subject. Their testimony was uncontradicted and by no means implausible, a judgment which I elaborate on in concluding paragraphs of this section. I therefore credit them on the following points of fact: Immediately after receiving the first four offers to return at the conclusion of the June 2 meeting, Marc Conrad and Byron Richardson retired to a restaurant to discuss the offers. They considered many factors detailed below; they concluded not to accept the strikers’ offers to return under circumstances where the Union was not simultaneously prepared to accept Respondent’s terms for a new contract. That same day or shortly thereafter they told Board Chairman William Conrad of their decision and he concurred. General Manager Tenney, also a corporate vice president, was similarly consulted and he concurred.

Although their conclusion was not to reinstate strikers without a contract, and although this conclusion was the only message conveyed to the Union on August 23, Respondent’s agents also acknowledge that they voiced a additional concerns in their private deliberations on the subject as early as June 2. Thus, they say they viewed the offers as less than they might seem as not genuinely reflecting strikers’ disaffection with the Union or its bargaining goals, but simply

<sup>15</sup>Linch credibly quotes Respondent’s chairman of the board, William Conrad, as saying that as long as the strikers still had valid drivers’ licenses, they had the necessary “qualifications” to return to work. Linch credibly quotes Respondent’s bargaining agent Richardson as saying that “they’d like to have them back, but not till we signed the contract.” And see General Manager Tenney’s harmonious acknowledgement, “we have constantly been trying to get a signed contract so that all of them could go back to work.”

as a tactic calculated to enhance the Union’s standing and, to that extent, as no real indication that the offerors would not rejoin the ongoing strike, should the Union determine later that their renewed presence on the picket line would be tactically advantageous.<sup>16</sup> They particularly questioned whether, if the anticipated election were held (and won by the Union, as all expected), the returning strikers could be counted on to stay on the job, rather than to simply renew striking and thus disrupt Respondent’s operations by forcing it again to seek replacements.

As early as June 2 Respondent’s agents also admittedly considered various reports they had received over the course of the strike that one or more strikers had harassed the replacements and employees of customers in various ways, some of them arguably protected by Section 7, others arguably not, even if committed on the picket line in the heat of a labor dispute. (The latter category includes alleged menacing comments, displaying a knife, racist and sexist epithets and remarks (unwitnessed), tire slashings, and at least one confrontation in which a striker allegedly got into a kind of arm-twisting match with a nonstriker attempting to cross the picket line.)<sup>17</sup> These reports caused company officials to wonder whether, if allowed to return without a contract, the returning strikers might not try to disrupt operations with slowdowns or acts of “sabotage” from the “inside” in order to achieve the Union’s ongoing bargaining goals.

All of these considerations, I find, were reasonably related to and in fact formed the basis of Respondent’s conclusion not to reinstate the first four offerors without a signed contract. They also animated Respondent’s refusal to accept the remaining three strikers’ later offers to return, presented after Christensen’s “decertification” petition had been filed, and a hearing thereon had already been conducted at which Respondent had conspicuously challenged the petition—and the related offers to return to work—as “sham,” promoted by the Union to further its own “bargaining strategy.”

In a variety of ways the General Counsel challenges Respondent’s claim that it has always intended, in refusing the strikers’ offers to return, nothing more than to use economic

<sup>16</sup>I have no difficulty believing, given the overall background and surrounding circumstances described above, that Respondent’s agents saw the offers as “sham” in the quite limited sense of being tactical elements in a Union-inspired certification strategy calculated ultimately to improve—not undermine—the Union’s bargaining strength. This does not imply a finding that the strikers would not have gone back to work, had their offers been accepted by Respondent. And clearly the testimony of Respondent’s agents shows overall that they expected that the strikers would at least show up for work if their offers were accepted, the only question in the minds of company officials being how long the returnees might be counted on to stay on the job. For this reason I do not take seriously General Manager Tenney’s variant suggestion at one point that the offers were seen by company agents as a sham because the offerors had failed to include their telephone numbers on the offer forms. But neither do I accept the General Counsel’s claim that Tenney’s suggestion (spurious as it was) is enough to demonstrate that Respondent’s claimed reasons for not accepting the strikers’ offers were pretexts that masked a “real” wish simply to punish the strikers for having struck.

<sup>17</sup>Respondent has stipulated that Respondent’s agents would testify, consistent with what Mark Conrad said, that notwithstanding these reported incidents of arguable picket line misconduct, Respondent was prepared to reinstate all strikers in the context of the Union’s acceptance of a new labor agreement, and thus does not deem any striker ineligible for recall simply because of the reported picket line misconduct described in this proceeding. For this reason did not permit litigation about the incidents underlying the report. I find simply that Respondent did, in fact, receive such reports, believed them, and took them into account in deciding, ultimately, that it would gain little benefit in the form of labor peace by accepting the strikers’ offers without the additional protection of a signed labor agreement.

pressure in support of its own bargaining aims. The General Counsel treats that claim as merely a rationalization adopted after the fact to conceal a darker ulterior purpose. Thus she asserts that “the overriding motive in Respondent’s refusal to reinstate the former strikers was retaliation for engaging in protected concerted, i.e., strike activities.” I reject this latter claim and related ones as largely unsupported by this record and, indeed, as contrary to the preponderance of the credible evidence in the record taken as a whole. In making such claims the General Counsel relies most often on a distorted understanding of the record. Thus she has been required to bowdlerize William Conrad’s testimony before citing it as “the most telling and unintentionally candid” evidence of Respondent’s “retaliatory motive.”<sup>18</sup>

Although focusing on the claim that Respondent, in fact, intended nothing more than to “retaliate” against strikers, counsel for the General Counsel shifts ground at another point. Thus she asserts as a separate theory of unlawful discrimination that Respondent intended “to deprive the Union of [election] support by stripping the former strikers of their voting eligibility.” Here again the General Counsel’s claims lack genuine support in the record. The General Counsel concedes that Respondent’s agents would have been “operating under a gross misapprehension of law” if they had believed that refusing the strikers’ offers to return would make them ineligible to vote in the “decertification” election. But she finds proof that they nevertheless believed this in excerpts from the examination of both Tenney and William Conrad. I do not find in the cited testimony of either witness any admission that those agents believed that the would-be returnees would be ineligible to vote if Respondent were to refuse their offers to return. Conrad’s testimony cited by the General Counsel does not even come close to such an admission; indeed, the burden of his surrounding testimony makes it clear that the election was irrelevant to the company’s position, and that it was only “stability” that Respondent wanted, the kind of stability it might expect from a “signed contract.” Tenney’s testimony is to the same effect. Indeed during my examination of Tenney on this point (the portion relied on by the General Counsel), Tenney first replied emphatically that any election benefit the company might gain by turning down the offers to return “was not part of our

conversation whatsoever.” Later, however, replying to my followup question which I now believe was hopelessly vague (“Let me put it this way. You were aware at least of what the stakes were from the standpoint of voting eligibility if you were or were I not to take them back.”), Tenney answered, “Yes, it was brought up a number of times.” In context, Tenney’s reply is ambiguous, referring perhaps only to his previously acknowledged suspicion that it was the *Union’s* purpose to achieve an election advantage by putting strikers back to work. His remarks therefore cannot support a finding that Respondent believed that refusing to reinstate strikers would make them ineligible to vote, much less a finding that Respondent’s decision not to reinstate the strikers was linked to such a legally outlandish “misapprehension of law.”

What seems clearer than anything else in this record (and, strikingly, it was a point counsel or the General Counsel herself labored to establish<sup>19</sup>) is that notwithstanding any other concerns about striker misconduct, or suspicions about the strikers’ intentions in making the offers to return, Respondent would have put aside all doubts and accepted the strikers’ return, if done as part of a strike settlement agreement associated with a new contract. I note moreover that the Union never tested the sincerity of Respondent’s position, for example by accepting Respondent’s outstanding offer or by offering to suspend the strike for a fixed period. In the circumstances I believe it would be impermissibly speculative to presume, as the General Counsel implicitly would have me do, that Respondent’s proclaimed willingness to reinstate the strikers under a contract was merely idle, and that its supposed “retaliatory motive” would have caused it to deny reinstatement to the strikers even if the Union had accepted Respondent’s terms for a contract.

Admittedly, the Union’s failure to test Respondent’s position has very little significance to the events preceding those of August 23. This is because Respondent made no reply whatsoever to the offers to return until the latter date, and certainly the Union cannot be faulted for failing to test Respondent’s good faith prior to that date, when it had never been given notice *why* Respondent was failing to reinstate the strikers. And, to this extent, my finding that Respondent had the same reasons on June 2 that it announced on August 23 for not reinstating the strikers must also rest on my crediting of their testimony to that effect. I have already recorded my judgment that Respondent’s witnesses testified harmoniously and consistently on this point. And nothing in their demeanor persuaded me that they were less than truthful in so testifying. Finally, subject to the question discussed next, I do not find it inherently improbable that the position which Respondent voiced on August 23 was the same position it had arrived at as early as June 2.

In her counterarguments on brief, counsel for the General Counsel makes only one point about the probabilities which is of sufficient strength to warrant further consideration. She observes that if Respondent genuinely intended as early as June 2 only to lock out strikers until a contract was reached, one might have expected Respondent’s agents to have made that position clear to the Union much sooner than it actually

<sup>18</sup>This is what Conrad actually said in a more contextually complete rendition of the portions of his testimony which the General Counsel finds the most “telling” (my emphasis):

We are prepared to take he employees back to work if we have a signed contract. And . . . I guess it’s the economic pressure that we simply had to apply to get a signed contract is not to bring them back to work. And while we recognize that all these activities that Mr. Tenney testified to [reports of picket line activities, including reports of arguable strike misconduct] and I have a couple more here, we recognize that the Union has a right to do a lot of these things. And so, you know that’s just part of the game. But it still has a coloring effect on your decision making process as to whether you want those type of people back on the payroll *without some sort of a guarantee that they’re going to continue on in a stable environment.*

The General Counsel chose to represent Conrad’s testimony at Br. 9 in a more heavily edited form, including by deleting the last underscored passage above, by emphasizing instead the phrase which precedes it, and by distorting in her own bracketed characterization what it was that Conrad was himself referring to. Thus, she purports to quote Conrad as saying (her emphasis):

we recognize that the Union has a right to do a lot of these things [engage in protected strike activities [sic]]. And so, you know, that’s just part of the game. *But it still has a coloring effect on your decision making process as to whether you want those type of people back on the payroll*  
 . . . .

<sup>19</sup>See Tr. 85:17 through 89:4.

did.<sup>20</sup> I, too, have wondered why Respondent did not make its position known sooner, and my curiosity on the point was not entirely extinguished by William Conrad's indirect explanation for the Company's nearly 3-month silence. (During questioning by Respondent's counsel, Conrad explained in effect that the company felt it best that the matter of the returnees be discussed face to face at the bargaining table, and that the Union had canceled several bargaining meetings between June 2 and August 23, thereby making August 23 the first "bargaining table" opportunity for Respondent to articulate its position.) It is true that the Union seems to have strained to avoid meeting with Respondent during the period June 2 through August 23, citing at the beginning the alleged "question regarding representation" raised by Christensen's "decertification" petition. And, to this extent, the Union arguably made it more difficult, but certainly not impossible, for Respondent to have communicated its position to the Union, had it wished to do so. But even if Conrad's explanation retains a certain lameness, it simply does not follow from Respondent's temporary silence alone that Respondent could not actually have arrived at its current position as early as June 2; much less does it follow that between June 2 and August 23 Respondent actually possessed unlawfully discriminatory reasons for refusing to reinstate the strikers. At best, the evidence of Respondent's silence in the period June 2 through August 23 is ambiguous, and fuel only for speculation. In the circumstances, I could not discredit Respondent's witnesses when, with apparent candor, they say they had determined as early as June 2 that no member of the striking bargaining unit would be allowed to work until the Union agreed to a contract.

In summary, I find as fact that since June 2 Respondent has refused to accept any offer by strikers to return because (a) for a variety of specific reasons noted above it doubted that genuine labor peace would result from accepting those offers, and (b) relatedly, but more fundamentally, Respondent wanted a signed contract in return for employing the former strikers, and reasoned that its economic leverage over the Union—and, correspondingly, its ability to win a contract from the Union on the terms it wanted—would be undermined by putting the would-be returning strikers (i.e., the entire bargaining unit) back on the payroll while the parties continued to bargain for a new agreement.

#### ANALYSIS; CONCLUSIONS OF LAW

For reasons already thoroughly explored, I must reject any of the General Counsel's claims to the extent they require a finding that Respondent's actual motive was to retaliate against the strikers because they had engaged in a strike, as distinguished from the motive I have found actually inspired its actions—to put economic pressure on the bargaining unit employees in the hopes this would make them more amenable to a contract on Respondent's terms: in short, to conduct an economic lockout.<sup>21</sup> As I now discuss, these findings

<sup>20</sup> Thus, the General Counsel reasons that, "commonsensically, an employer can hardly take action in order to bring economic pressure on a union which does not even know that a lockout has been declared."

<sup>21</sup> Respondent's agents never employed the term "lockout" in their initial deliberations on and after June 2, nor even on August 23. But the General Counsel does not dispute that Respondent declared a lockout in practical fact when, on August 23, without using the term, it told the Union it would not take the would-be returnees back without a contract; indeed, the complaint and

do not entirely dispose of the case but only help to narrow somewhat the focus of the remaining inquiry.

Having found that Respondent intended, in fact, beginning on June 2, to conduct an economic lockout, I must now recognize the primacy of a case that all parties are acutely aware of, the Board's decision in *Harter Equipment*, 280 NLRB 597 (1986). The strict holding of *Harter* is that "an employer does not violate Section 8(a)(3) or (1), absent specific proof of antiunion motivation, by using temporary employees to engage in business operations during an otherwise lawful lockout, including a lockout initiated for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position."<sup>22</sup>

In the course of reaching that holding the Board majority (Member Dennis dissenting) reviewed and harmonized a variety of legal principles established in prior Supreme Court and Board decisions. I will not repeat that extensive review here, but will focus instead on certain ancillary holdings in *Harter* which have obvious application in any consideration of this case.

Among the many points established in *Harter* are these: "Motive" continues to be a significant element in the evaluation of any employer action which directly or indirectly impacts on employees' rights to bargain collectively, or on their right to strike, or on any activities which the Act seeks to protect through the proscriptions in Section 8(a)(1) against "interference, restraint and coercion" of employees, and those in Section 8(a)(3) against "discrimination" against employees "in order to . . . discourage membership in a labor organization." Where "specific proof of antiunion motivation" is associated with a purported "economic" lockout, *Harter* will give the employer no comfort; rather, such proof will suffice to establish the unlawful "discrimination."<sup>23</sup> But the *Harter* majority will not infer an improper "antiunion" motive simply because an employer declares a lockout and continues to operate with temporary replacements. Thus, applying the now-familiar "distill[ation]" of "controlling principles" recited by the Supreme Court in *Great Dane*,<sup>24</sup> the *Harter* majority found that an employer who operates with temporary replacements while maintaining a "lockout in support of a legitimate bargaining position" is acting in furtherance of a "business purpose" the "validity" of which is

all the General Counsel's remaining arguments insist on that point. (See, e.g., G.C. Br. 7 fn. 4.) In finding that Respondent had the same reasons for not returning strikers on June 2 was to conduct what we all recognize as an economically inspired "lockout" even if the word was not then part of its vocabulary. Whether it should affect the outcome that Respondent failed to "declare" a lockout as early as June 2 is a different question than the question of fact what its actual intentions then were. The latter question has been answered; the former question is one I reserve for further discussion in main text below.

<sup>22</sup> 280 NLRB at 600, last paragraph.

<sup>23</sup> And see, e.g., *Union Terminal Warehouse*, 286 NLRB 851 fn. 1 (1987), and *United Chrome Products*, 288 NLRB 1177 fn. 2 (1988), both distinguishing *Harter* and finding that the lockouts were unlawful extensions of the employers' unlawful "unilateral implementation" of certain terms, and thus were not conducted in furtherance of "legitimate" bargaining aims.

<sup>24</sup> *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-36 (1967). There the Court held that if the employer's conduct is "inherently destructive" of employee rights, "no proof of an antiunion motivation is needed, and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations." But if the "adverse effect . . . on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." 388 U.S. at 34.

“unassailable.”<sup>25</sup> Of equal significance, the majority held that conducting an economically motivated lockout while continuing to operate with temporary replacements has only a “comparatively slight” impact on employee rights, and is not “inherently destructive” of such rights. One important consequence of the *Harter* holding, therefore, is that an employer’s operating with temporary replacements during a legitimate economic lockout does not involve such a high degree of interference with employee rights as to require a more delicate “balancing” of employer and employee interests.<sup>26</sup>

I have already found that Respondent did not, in fact, act from impermissible, “antiunion” motives in effectively deciding on and after June 2 to lock out the bargaining unit. And as *Harter* teaches, such an improper motive cannot be inferred merely because Respondent sought to lock out the bargaining unit while continuing to operate with temporary replacements. Under *Harter*, such conduct is not “inherently destructive” and therefore carries with it no evidence of improper motive. Thus, to the extent that Respondent must be shown to have acted from improper “motives” in choosing to lock out the bargaining unit, I may now conclude that this element was not established by the General Counsel, for I have found that Respondent was moved instead by nothing more than a wish to use economic pressure against the bargaining unit—a “motive” which *Harter* has certified as being untainted by impropriety. The foregoing analysis might alone justify dismissal of this complaint, but I will not rest entirely on such reasoning; rather, I will now address those remaining arguments of the prosecuting parties which stress the factual differences between this case and *Harter* as basis for reaching a different result from the one reached in *Harter*.

One obvious difference is that in *Harter* the employer’s declaration of a lockout came first, followed by notice to the locked-out employees and their union that the employer intended to begin hiring temporary replacements. By contrast here, because the Union had already called the bargaining unit out on strike, the temporary replacements were already working before the employer effectively took lockout action. But if this were the only difference between these facts and *Harter*’s I would dismiss it as a trivial one, for I fail to see any reason the validity of an employer’s lockout should turn on the fortuities of the timing of its hire of temporary replacements vis-a-vis the timing of its announcement of a lockout.<sup>27</sup>

<sup>25</sup> 280 NLRB at 599.

<sup>26</sup> 280 NLRB at 599–600. As the Board implied in the cited passages, and subsequently reaffirmed explicitly in another case, “finding at an employer’s conduct is inherently destructive does not end the inquiry, but requires the Board to then ‘strike the proper balance between the asserted business justifications and the invasion of employee rights.’” *National Fabricators*, 295 NLRB 1095 (1989), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983).

<sup>27</sup> The General Counsel makes much (Br. 10) of the fact that Respondent had not decided to lock out the bargaining unit at any time prior to June 2, when the first four return-to-work offers were submitted. She finds this to be additional “telling” evidence of Respondent’s “retaliatory” motivation. I have already found that Respondent had no such motivation; I record here my difficulty in understanding how in the circumstances, improper motivation could be inferred simply because the Employer did not choose to lock out until faced with a bargaining unit which had apparently decided it wished to return to work. Clearly, so long as bargaining unit employees remained on strike, the “economic pressure” on them was essentially the same as if they had been locked out. Thus, it hardly suggests a “retaliatory” motivation (as

I think another factual difference stressed by the General Counsel and the Union is worth more careful consideration, even though I shall likewise find the distinction they seek to make—and the legal assumption which underlays their emphasis—to be unpersuasive. Thus, here, unlike in *Harter*, it is true that Respondent did not effectively announce its intention to conduct a lockout until a substantial length of time had passed since the striking bargaining unit employees had already made unconditional offers to turn to work. Unlike the prosecuting parties, however, I have found that is pre-August 23 “silence” on Respondent’s part did not signal that Respondent was actually possessed in that period of unlawful motives for failing to reinstate the strikers. Thus, to the extent that those parties have invoked Respondent’s belated declaration of a lockout as evidence of improper motive, I have found that evidence unpersuasive.

But the General Counsel also appears to argue that, regardless of Respondent’s actual motive for failing to reinstate the strikers, it was a per se violation of Section 8(a)(3) and (1) for Respondent to refuse the strikers’ unconditional offers to return. And it is this discrete and supposed per se violation, preceding as it did, Respondent’s declaration on August 23 of a lockout, which the General Counsel argues made it impossible for Respondent to have lawfully declared a lockout on August 23.<sup>28</sup>

Critical to the General Counsel’s claims in this respect is the supposition that *Fleetwood*<sup>29</sup> and *Laidlaw*<sup>30</sup> were intended to establish that strikers who have not been permanently replaced enjoy an indestructible and unconditional right to reinstatement on their submitting unconditional offers to return to work. I observe first that if this were actually the state of the law, I must question why the General Counsel has strained so hard, albeit unsuccessfully, to establish that Respondent acted from “retaliatory” motives in refusing the strikers’ offers to return. But setting that inconsistency aside, it is plain that the prosecution’s supposition is inaccurate; indeed, the point is made clear in *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), the very case invoked by the General Counsel for the supposedly “well-settled” proposition that (her emphasis) “economic strikers who have been only temporarily replaced are entitled to immediate reinstatement upon making unconditional offers to return to work.” The General Counsel has neglected to take into account the footnote which the *Hansen Bros.* Board appended to a statement in the main text which the counsel for the General Counsel relies on in making her just-quoted assertion of law. Thus, in footnote, the Board qualified its statement, saying (my emphasis), “Of course, *even where permanent replacements have not been hired*, an employer may

distinguished from an “economic” one) that Respondent did not find reason to consider playing the lockout card until the bargaining unit employees showed an interest in returning to work. Moreover, as I discuss below, to the extent that the General Counsel and the Charging Party ultimately claim that strikers enjoy an indestructible “right” to reinstatement where they have offered to return to work before they have been permanently replaced, such a position is itself legally unsupportable, and merely begs the very question at issue.

<sup>28</sup> At least this is the only way I can understand the General Counsel’s argument (Br. 12) that “the instant matter involves the *sub silencio* [sic] declaration of lockout only after an unlawful refusal to reinstate economic strikers upon receipt of an unconditional offer to return to work.”

<sup>29</sup> *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

<sup>30</sup> *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf’d. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

*refuse to reinstate* economic strikers who unconditionally offer to return to work *upon proof of a 'legitimate and substantial business justification.'*"<sup>31</sup>

I think it evident that the General Counsel's attempts to limit *Harter's* reach will not pass muster. If, as I have shown, an employer may legitimately refuse strikers' offers to return even where they have not been permanently replaced on a showing that the refusal was based on legitimate and substantial business considerations (*Hansen Bros.* and *Fleetwood*, *supra*), and if an economic lockout is itself deemed to be an action which meets the "legitimate and substantial business justification" test (*Harter*, *supra*), then it is spurious and circular to argue that an employer's failure to reinstate strikers, intended as such a lockout, made it legally impossible for the employer to declare a lockout. The Gen-

<sup>31</sup> 279 NLRB 741 fn. 4 (1986), citing *Fleetwood*, *supra*.

eral Counsel's case rests finally on such circularity of reasoning, or on similarly vaporous a fortiori claims.<sup>32</sup>

I thus conclude as a matter of law that Respondent did not violate the Act as alleged, neither by failing to reinstate the bargaining unit employees after receiving their unconditional offers to return, nor by declaring a lockout on August 23. And, based on the foregoing findings and conclusions, this is my recommended.

[Recommended Order for dismissal omitted from publication.]

<sup>32</sup> Counsel for the General Counsel concludes her argument with the statement (Br. 15) that "If an employer can simply say, 'Sorry, I declare a lockout,' after receipt of unconditional offers to return to work, economic strikers' *Laidlaw* rights would not only be meaningless, *Laidlaw* would be reduced to utter non-existence." The General Counsel here ignores, *inter alia*, that lockouts necessarily impinge on the interests which, in a different context, *Laidlaw* seeks to protect. But they are no less lawful for all that.