

California Distribution Centers, Inc. and Thomas DeAnda, Jr. Case 20-CA-23301

July 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case¹ present the issue of whether the Respondent has violated Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers on their unconditional offer to return to work.²

The Board has considered the decision and the record in light of the exceptions³ and briefs and has decided to affirm the judge's rulings, findings,⁴ and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to offer reinstatement to 12 economic strikers as their former positions became available following the strike's termination. On review of the record, we disagree with the

¹On January 15, 1992, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed exceptions with supporting argument.

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

²There are no exceptions to the judge's resolution of the 10(b) issue.

³The General Counsel contends in its exceptions that the judge erred in failing to find that the Union made an unconditional offer to return to work on October 31, 1988, and that, therefore, the Respondent unlawfully failed to reinstate the strikers to all positions for which other employees were hired on October 31, 1988, and thereafter. The General Counsel further contends that the Respondent's failure to reinstate the economic strikers following their unconditional offer to return to work converted the employees' economic strike into an unfair labor practice strike. We find no merit in these contentions.

The General Counsel's contentions seek to raise matters occurring well outside the 10(b) period. The charge was filed on April 18, 1990. Therefore, the complaint could reach only those refusals to reinstate which occurred after October 18, 1989.

The Respondent filed a letter in response to the General Counsel's exceptions which stated, in part, that it was not until November 1, 1988, that the Union, by telegram of that date, submitted its unconditional offer to return to work. The General Counsel filed a motion to strike that part of the Respondent's letter which referred to the purported November 1, 1988 telegram, on grounds that the telegram was not offered into evidence by the Respondent at the hearing and that the judge had granted the General Counsel's motion to strike the purported telegram, which had been attached to the Respondent's brief to the judge. In agreement with the judge, we find the disputed part of Respondent's letter to constitute "an irregular attempt to enlarge this record," and we grant the General Counsel's motion to strike.

⁴The Respondent contends, inter alia, that certain findings made by the judge demonstrate that his decision is "rampant" with bias. On our review of the judge's decision, we find no evidence of bias in his analysis and discussion of the evidence, or in his findings.

judge and find that the Respondent did not violate the Act by failing to reinstate the strikers.

The Respondent operates a public warehouse and storage facility in Sacramento, California, where it stores merchandise pending delivery to customers located primarily in the northern part of the State. Until November 1989, the Union was the representative of the Respondent's employees classified as warehousemen and driver-warehousemen.⁵

In April 1988, negotiations between the parties began for a new collective-bargaining agreement. Approximately six bargaining sessions were held between that date and October 27, 1988, when the Union commenced an economic strike. The Union terminated the strike less than a week later and unconditionally offered to return to work. The Respondent, having permanently replaced its work force during the strike, declined to reinstate any strikers at that time.

Operating with permanent replacements, more than a year passed before the Respondent hired another employee. In early November 1989, the Respondent notified former strikers on its "driver-warehouse part of the preferential hiring list" that a position was available. Only one former striker responded and he was hired on November 13. Thereafter, seven additional positions became available beginning on December 11, 1989, and continuing through November 26, 1990. The Respondent filled them all with driver-warehousemen obtained from "off the street" rather than with the warehousemen on its preferential hiring list.

The issue in this case is whether the Respondent unlawfully failed to offer the seven positions to the warehousemen who had been on strike. We conclude that the Respondent did not violate the Act in this respect because we agree with the Respondent that it had legitimate and substantial business justifications for eliminating warehousemen positions.⁶

It has long been held under Board law that economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement on the departure of the replacements or when substantially equivalent jobs for which they are qualified become available, unless the employer can sustain its burden of proof that the failure to offer them reinstatement was for legitimate and substantial business reasons.⁷ The

⁵In November 1989 the Respondent withdrew recognition from the Union, and the Union's unfair labor practice charge regarding this withdrawal of recognition was dismissed by the Regional Director.

⁶As noted above, there were also driver-warehousemen who had been on strike. The Respondent did not reoffer any of the seven positions to them. However, the General Counsel does not contend that this failure was unlawful.

⁷*Brooks Research & Mfg.*, 202 NLRB 634, 636 (1973). See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

Respondent asserts that it failed to recall the striking warehousemen because their jobs were, in effect, eliminated as a result of a poststrike change in its method of operations. Accordingly, the Respondent urges that it has satisfied its burden of showing a substantial and legitimate business justification for its failure to offer reinstatement to the warehousemen.

Prior to the strike, the duties of the Respondent's warehouse employees included traditional functions such as filling orders, loading and unloading trucks, rotating stock, and attending to customers who came to pick up merchandise orders. When work was slow, they cleaned the facility. The driver-warehousemen also performed warehouse work but spent most of their time (approximately 75 percent) making merchandise deliveries in 48-foot-long tractor-trailers. Under California law the driver-warehousemen were required to have a class I drivers license⁸ to operate the tractor-trailers.

Deliveries by the Respondent both before and after the strike were traditionally made on a scheduled basis. The Respondent also made deliveries pursuant to the "just-in-time" method, a system in which a company uses the Respondent to deliver goods, on an immediate basis, from that company to a customer of that company. Under that system, the Respondent provides no warehousing services. It provides only rapid transportation services.⁹

On the day of the strike, the bargaining unit was made up of 12 warehousemen and 8 driver-warehousemen, including laid-off driver-warehousemen Fred Auld and Harold Amberson. (Amberson was on disability leave.) During the 5- or 6-day period of the strike, the Respondent hired 18 replacement warehousemen, 4 replacement driver-warehousemen, and recalled Auld from layoff.¹⁰ Operations continued essentially unchanged for the next 12 months, during which time no additional hiring took place.¹¹

In November 1989, Mark Container, a new customer which operated on the just-in-time system, began doing business with the Respondent. At this time, a position was offered to all driver-warehousemen on the preferential hiring list. Pat McCarthy was the only one to respond, and he was hired on November 13, 1989. Thereafter, there were seven consecutive "off-the-street" hirings of driver-warehousemen. The judge

found that these positions should have been filled by warehousemen who had been on strike.

The Respondent relies on the addition of Mark Container as a new customer in November 1989 to support its defense for hiring driver-warehousemen "off the street" rather than former warehousemen off the hiring list. In this regard, Mark Container was described as a "major" new just-in-time client whose acquisition, according to Warehouse Supervisor C. J. Standridge, "put more [stress] on us because they had a lot of unscheduled deliveries." Bill Haslett, a driver-warehouseman before and after the strike, corroborated Standridge in this respect, explaining that "our drivers go out in the morning. If we get one in the afternoon [i.e. an order from Mark Container], we're sunk. We don't have a driver." The Respondent argues that assigning a "pure" warehouseman to make the delivery was clearly not an option because warehousemen did not possess the requisite class I licenses to drive the tractor-trailers.

Thus, the Respondent asserts that it made little business sense to recall the warehousemen because they were not needed, and without class I licenses, were legally unqualified to make deliveries. Rather, as stated by Vice President Jim Fletter, the conditions under which the Respondent now operated, compared to before the strike, mandated greater flexibility, "and we felt very strongly that it was very important that we move in the direction of having more driver/warehousemen. . . . We now have the opportunity to use people as drivers and in the warehouse." Standridge explained that the new predominance in driver-warehousemen to service Mark Container further enabled the Respondent to operate with greater efficiency because it would now have a larger pool of driver-warehousemen from which to reassign an employee doing warehouse work to an emergency Mark Container delivery, or to other unscheduled customer deliveries. For example, Standridge explained that "[i]f I have one person that's a driver-warehouseman and he's taking fiscal inventory," he would not "pull him off the fiscal inventory to drive the truck"; instead, he would simply select another driver-warehouseman performing less important work to make the delivery. Haslett concurred that, although there are more unscheduled runs now than before the strike, the company is "running more efficiently now than before the strike . . . because we have more drivers now, and you know more people that we can count on hauling the loads up."

The judge found the foregoing testimony too "vague" and "superficial" to establish that changed business conditions after the strike required the hiring of more driver-warehousemen and the elimination of warehousemen jobs. Accordingly, the judge concluded

⁸ Subsequently redesignated as a class A license.

⁹ For example, Willamette Industries, a just-in-time customer of the Respondent before the strike, supplied Hewlett Packard with computer paper. At a moment's notice, a call from Hewlett Packard to Willamette for paper required the Respondent to immediately pick up the paper at Willamette and deliver it to Hewlett Packard. The record does not indicate what percentage of the Respondent's deliveries involved the "just-in-time" method.

¹⁰ Driver-warehouseman Bill Haslett did not strike.

¹¹ Six warehousemen and three driver-warehousemen left the Respondent's employ during this period, and Harold Amberson returned from disability.

that the Respondent failed to prove a business defense for refusing to recall the warehousemen.

Contrary to the judge, we find that the Respondent has demonstrated a legitimate and substantial business justification for eliminating the warehousemen jobs. Through the specific testimony of its management officials, which we find neither vague nor superficial, the Respondent established that Mark Container was a major poststrike acquisition which, because of its just-in-time delivery needs, could not be serviced with the same driver-warehousemen/warehousemen ratio that existed before the strike. As the record makes clear, the nature of just-in-time delivery requires to some degree the adoption of an “on-call” approach in order to adequately respond to unscheduled delivery requests. As a result, the Respondent needed more personnel possessing tractor-trailer driving qualifications who could be utilized in the warehouse while on stand-by to make a delivery. We are thus satisfied that the Respondent has established that acquiring Mark Container required the enhancement of its operational flexibility by adjusting its employee composition to include a greater number of driver-warehousemen and fewer warehousemen, and that these changed business conditions justified the elimination of many of the warehousemen jobs. See *Atlantic Creosoting Co.*, 242 NLRB 192 (1979).

The judge’s basis for rejecting the Respondent’s defense does not withstand scrutiny. The judge credited the Respondent’s economic reasons for failing to reinstate the warehousemen, but was not “persuaded” by them for several reasons. First, he questioned the Respondent’s asserted need to increase the number of driver-warehousemen after the strike in light of Fletter’s and Standridge’s “concession” that even before the strike there had always been a shortage of driver-warehousemen. We do not find that the Respondent’s failure to alleviate the prestrike shortage of driver-warehousemen detracts from its proffered defense, since there is no evidence that its delivery business was as demanding before the strike as it became after the strike with the addition of the just-in-time delivery requirements of its newly acquired customer Mark Container.

The judge was also skeptical of the Respondent’s claim of improved efficiency after the strike when, as he found, newly hired driver-warehousemen drove as little as 15 minutes a day, driver-warehouseman Scott Hambleton¹² was used exclusively in the warehouse, and Amberson spent an entire month working in the warehouse. There is no record support, however, for the judge’s finding that Hambleton spent his entire time working in the warehouse nor for a finding that the driver-warehousemen generally spend as little as 15

¹² The judge mistakenly referred to this individual as Scott Hamilton.

minutes a day after the strike driving a truck.¹³ Finally, although the Respondent used Amberson for a whole month in the warehouse, the judge failed to acknowledge that this took place in March 1989—8 months before the operative event giving rise to the Respondent’s defense, i.e., the acquisition of Mark Container as a customer.¹⁴

We further find that the Respondent had no obligation to reinstate the warehousemen to available driver-warehousemen positions. In *Rose Printing Co.*, 304 NLRB 1076 (1991), the Board recently reaffirmed the principle that an employer’s “obligation is to return [economic] strikers to their former positions or substantially equivalent ones if and when such positions are available.”¹⁵ The Board in *Rose Printing* held that the respondent therein did not violate the Act by failing to offer three economic strikers vacancies which they were qualified to fill but which were not substantially equivalent to their former jobs. Here, the Respondent established not only that the driver-warehousemen jobs were not substantially equivalent to warehousemen jobs but also that the warehousemen were unqualified to fill those positions because they lacked the necessary class I drivers licenses.

In sum, for the reasons stated above we find that the Respondent has satisfied its burden of showing a substantial and legitimate business justification for its failure to offer reinstatement to the striking warehousemen, and that it did not violate Section 8(a)(3) and (1) by failing to recall the warehousemen.

ORDER

The complaint is dismissed.

¹³ In regard to the latter finding, the only relevant testimony came from Standridge who stated, “I don’t personally keep track of it [the amount of time driver-warehousemen spend driving] but it could be anywhere from fifteen minutes to a full day depending on the needs of that particular, the person et cetera.”

¹⁴ The judge in his analysis cited two articles from “Forbes Magazine” and “Business Week” depicting the just-in-time delivery system as “standard procedure” in many industries and thus was “not so radically new that Respondent was likely free of some effect of it well prior to the strike.” Neither of these articles was submitted into the record or referred to at the hearing. Even if we were to consider this nonrecord evidence, the fact remains that, regardless of how widespread just-in-time delivery may have been in the business community or its effect on the Respondent’s prestrike operations, the Respondent established that when it added Mark Container as a second just-in-time customer in November 1989, it was justified in hiring seven more driver-warehousemen rather than recalling the warehousemen.

¹⁵ Id. at 1077, quoting *Certified Corp.*, 241 NLRB 369 (1979). [Emphasis in original.]

Donald R. Rendall, for the General Counsel.
N. Paul Shanley, of Sacramento, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Sacramento, California, on December 20, 1990. The charge was filed by Thomas DeAnda Jr. on April 18, 1990, and the complaint was issued June 1, 1990. The primary issue is whether California Distribution Centers, Inc. (Respondent) failed and refused to reinstate economic strikers to their former or substantially equivalent positions of employment in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and Respondent,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in West Sacramento, California, where it has been engaged in the operation of a public warehouse and storage facility. In the course and conduct of Respondent's business operations, it annually purchases goods and services valued in excess of \$50,000 directly from points outside the State of California. On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 150, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Case Summary

Respondent's business is to store, load as ordered, and deliver merchandise throughout points primarily located in northern California's central valley. The Union had represented warehousemen and driver-warehousemen engaged in these functions. These parties negotiated for a collective-bargaining agreement during the course of several meetings spanning April to late October 1988. The process did not yield a contract, and a resultant economic strike by practically all represented employees commenced on October 27, 1988. Respondent immediately commenced hiring permanent replacements for the strikers and operated uninterrupted.

After several days an unconditional offer to return to work was made by the striking employees; however, none were reinstated at that time. During the course of employee turnover in the years 1989 and 1990, Respondent shifted to the predominant utilization of driver-warehousemen, but without offering reinstatement to any of the strikers classified only as

¹ I reserved ruling on the General Counsel's posthearing motion to strike all attachments to Respondent's brief. No written opposition to this motion has been filed, and the documents so attached constitute an irregular attempt to enlarge this record. I find no justification to allow such enlargement in the manner attempted. For this reason, and consistent with findings and conclusions relative to the case as written below, I now grant the General Counsel's motion to strike.

warehousemen. Charging Party DeAnda is 1 of 12 individuals so classified, including the work leaders, who had offered their services back but were never called.

B. Case Facts

1. Prestrike matters

Respondent had a fleet of delivery vehicles comprising seven tractor trailers or "big rigs," two bobtail trucks, and a van. A class 1 (recently redesignated class "A") license was required for all off-premises driving of the big rigs. A standard operator's license sufficed to drive the bobtails or van. Possession of the Class 1 license distinguished driver-warehousemen from warehousemen as to title, pay scale, and scope of duties performed. Those classified as warehousemen performed shipping and receiving function that included filling orders, loading and unloading trucks, taking inventory, rotating stock, and helping will-call customers, plus the performance of janitorial duties when work was slow. The driver-warehousemen spent a majority of their time, up to an estimated 75 percent of the workweek, in delivery driving. Their remaining time was spent doing the same warehouse work as performed by DeAnda and others of his classification.

Respondent's management hierarchy at this point was Co-Owner Norvan Travis, Vice President Jim Fletter, and Warehouse Supervisor C. J. Standridge. Respondent's length of operating history is known in terms of driver-warehouseman Bill Haslett, the sole nonstriker as among active employees on October 27, 1988, having worked there for 32 years. Also, Fletter testified that his position dates from the time Respondent "came together" as the current entity in 1974.

2. The immediate strike replacements

The strike commenced at noontime, and by next day Respondent was running a classified advertisement for permanent replacements with a "labor dispute in progress."² This resulted in the hiring of 4 driver-warehousemen on the dates October 28 and October 29, plus the additional hiring of 11 warehousemen on October 28, another 6 on October 31 and 1, Dennis Leverenz, on November 1. None of the warehousemen hired as strike replacements held a class 1 operator's license.

3. Employment changes of 1989-1990

The employment of five replacement warehousemen and a driver-warehousemen ended on January 10, 1989. During the balance of 1989 two additional warehousemen and a driver-warehouseman terminated.

The situations of driver-warehousemen Fred Auld and Harold Amberson were individualized, in the sense that they had been employees on layoff and disability leave, respectively, at the time of the strike. Auld was recalled along with the other immediate replacements and he later terminated on October 5, 1989, while Amberson came off disability in March 1989 and remained until July 3, 1990.

In late 1989 Respondent filled an opening in the classification of driver-warehousemen. It offered such a position in turn to persons on the preferential rehiring-of-strikers list, but

² All dates and named months hereafter are in 1988 unless otherwise indicated.

only Pat McCarthy accepted and he returned effective November 13, 1989. Respondent thereafter undertook "off the street" hiring of driver-warehousemen for additional openings as they occurred, and over the course of December 11, 1989, to November 26, 1990, added seven individuals of this class to its work force. Other changes toward completing a summary of employee turnover in 1990 were when again two warehousemen and a driver-warehousemen terminated. This latter individual was Jeff Schoepflin, whose particular circumstances will be treated below.

4. Operational matters

Respondent strove to improve "flexibility" of its delivery system by consciously increasing the predominance of class 1-licensed driver-warehousemen as compared with a prestrike ratio to warehousemen. This objective was described by both Fletter and Standridge in their testimony. It was reflected most prominently in the exclusive hiring of only new driver-warehousemen, beginning with Graig Galland on December 11, 1989, and continuing up to a total of seven by late 1990.

The objective was generally based on new customer expectations as to promptness of delivery, a related increase in unscheduled delivery requests, and the poststrike acquisition of Mark Containers as a major customer. The new predominance of driver warehousemen made it more likely that sudden unscheduled delivery requests from Mark Containers, or any of Respondent's established customers, could be carried out by simply pulling qualified driver-warehousemen away from warehouse duties. As to a generally more strict allowance for delivery time by business users, this same predominance allowed the added number of truckdrivers that might be needed for most efficient deployment each day. Haslett also testified that he considers the facility running "more efficiently" at present, as contrasted with prestrike conditions.

5. Other considerations

Respondent's smaller vehicles are unsuited by range or capacity to its main delivery services. In fact, the industry trend is toward even larger rigs. Consistent with this Respondent acquired 53-foot trailers subsequent to the strike, in preference to the 48-footers previously in common use. On the other hand skills and ability necessary to acquire a class 1 license do not automatically guarantee that every required task of driver-warehousemen can be accomplished. This was the situation of Schoepflin, the person hired August 27, 1990, as next-to-last among the driving group taken "off the street" that year. Standridge soon found he had no knack for backing a rig as routinely required in the job. Respondent's adjustment to this limitation was to use Schoepflin only in the warehouse. He was ultimately replaced by Eric Brewer, after a 1-week overlap between the two of them.

The last collateral subject of note concerns testimony of Amberson about a remark he overheard Ralph Hammond make to another driver in the dispatch office during June 1990.³ According to Amberson, the driver had questioned

³ At about this same time Respondent notified warehousemen on its reinstatement list about the possibility that openings for "lumper," a position strictly involving the unloading of loose merchandise from a truck and paying \$3 per hour under warehouse scale, might materialize. The prospect eventually faded out as a business matter, making it that all cross-contacts that had occurred were

why he was being put in the warehouse, and Hammond answered how it was a rotation of drivers to "justify [their utilization] to the Labor Board." Hammond had been hired in October as an immediate permanent strike replacement, and became one of three individuals designated as warehouse work leaders. Standridge testified that the poststrike function of this group was the same as previously performed by strikers Michael Luck and Michio Nakamura, who were each classified in the last labor contract as a foreman and paid 50 cents per hour more than the regular warehousemen.

C. Discussion

1. Section 10(b)

Respondent raises the "6-month statute of limitations" in its brief, contending that DeAnda can only complain of replacements hired during the strike. On this basis Respondent believes DeAnda is time-barred by the 6-month count prior to the filing of a charge which Section 10(b) of the Act provides.

The point is controlled by settled doctrine, current to the present time and well exemplified in *Strick Corp.*, 241 NLRB 210 fn. 1 (1979). That case reaffirmed "established Board precedent" that notice to adversely affected strikers must be "clear and unequivocal," with the burden of so showing on the party raising Section 10(b) as an affirmative defense. Even closer precedent is found with *Great Lakes Chemical Corp.*, 298 NLRB 615 (1990), in which applicants as to whom 8(a)(3) and (4) violations were committed were never told ("not expressly denied employment") that they would not be hired and, contrarily, were led to believe that they were still being considered for employment ("their applications continued to be on file"). In these circumstances the Board held that no "clear and unequivocal notice" of the unfair practices, given within 6 months of the filing of the charge, had been shown.

Here neither DeAnda nor other replaced warehousemen were given notice of any nature that the shift to class 1-licensed employees had been made by Respondent. The prestrike negotiations provided no glimmer of such an intent, and nothing in the more than 2-year period that followed gave individuals in this group any indication they were viewed as lacking a specific attribute needed for reinstatement consideration. On these grounds I reject Respondent's Section 10(b) defense, and find the complaint to have issued on a timely charge. Accord: *Oregon Steel Mills*, 300 NLRB 817 (1990).

2. The merits

The case directly invites an application of Supreme Court rationale as set forth in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). As relevant here that case required an employer showing of "legitimate and substantial justification" for refusing to reinstate economic strikers to their former jobs. The court approvingly noted, but found unnecessary to apply, a refinement of this principle under which such a refusal might properly be based on "substantial and bona fide

inconclusive. I do not see sufficient significance to the subject for further treatment, beyond noting the possible and temporary variation from Respondent's traditional utilization only of warehousemen and driver-warehousemen.

reasons," such as "the need to adapt to changes in business conditions or to improve efficiency."

The issue of when the strike actually ended by communication of an unconditional offer that all striking employees would return to work cannot be directly resolved on this record. The General Counsel was content to accept an admission by pleading that the strike ended "on or about" October 31, while Respondent asserted, but put in no proof, that it ended November 1. Aside from more intricate questions as to what time of day a collective return to work offer was made, and when a *commitment* as opposed to a *commencement* of employment might have been made to or by a replacement, the issue relates significantly to whether warehousemen Leverenz was hired before or after strikers established their legal entitlements. I leave that point for treatment below in the remedy section of this decision.

Free of that complication, the case focuses on a point in time approximately 1 year following the brief strike, when 12 warehousemen and 4 driver-warehousemen (Haslett, Amberson, John Greene, and Charles King) were employed in generally consistent harmony with Respondent's settled ratio from the past. At this point Respondent embarked on its class 1 license only regimen as warehousemen John Dark left on November 30, 1989, followed by Leverenz, Stuart Switzer, and James Graham in February, April, and July 1990, respectively.⁴ These departures led to the string of seven consecutive hirings of driver-warehousemen, beginning with Galland on December 11, 1989, and continuing with the added six at times spaced throughout 1990.

I am not persuaded that Respondent's explanation of this limited view of its reinstatement obligation to strikers amounts to legitimate action under Fleetwood, or that genuinely changed business conditions arose and operational efficiency improved with the change. Respondent never had "pure" drivers, and all were subject to warehouse duties on a random basis. Testimony of Fletter and Standridge about their enhanced flexibility ranged from wistful at best to vague at least. Fletter conceded that lack of class 1 licenses had "always been a problem" (Tr. 141), while Standridge termed the prestrike ratio as never "enough" (Tr. 143) to avoid operational problems. Further to the point Fletter revealed how Respondent abstractly "wanted flexibility," and gave a singularly inconclusive response about his rationale for change, while Standridge oddly associated the root of the problem to inadequate cross-training in warehouse duties. These contrived-seeming explanations, weak or meaningless, resort to slang phrasing ("heck of a lot better"), and abrupt introduction of overstated characterizations ("feather bedding type situation") leave the compelling sense that underlying intention was to disregard striker rights and exploit the non-union setting with shaved wage rates as an added advantage.

Respondent's description of its more current operational needs is too superficial to accord significant weight. Taken as a composite matter, I cannot discern the legitimacy, nor the prospect of improved efficiency, when newly hired driver-warehousemen spend as little as 15 minutes per day in their driving duties, when Amberson was used for an entire month in the warehouse although fully competent to operate big rigs, when, illustratively, newly hired driver-warehouse-

man Scott Hamilton was put exclusively in the warehouse, and when, irregardless of another sinister motive for such deployment, Respondent took over 2 months to replace the incompetent Schoepflin, after being immediately able to employ driver-warehousemen in a lower unemployment labor market nearly 2 years earlier. Neither was there any weakening of DeAnda's credible testimony that his fairly constant prestrike observation of Auld revealed how this individual was typically "just loading trucks." Respondent points to the "just-in-time" distribution principle as affecting its delivery planning to customers adopting this more modern system of inventory control. Valid as that point might be in the abstract, I find insufficient evidence from the scanty showing made by Respondent to show that such new reality made it imperative to achieve a staffing ratio that by the time of hearing had flopped over to that of 10 driver-warehousemen supported by only 8 warehousemen.⁵

This finding leads inevitably to application of controlling doctrine set out in *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd. sub nom. Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969). As drawn from *Fleetwood* and *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), *Laidlaw* holds that irrespective of any antiunion intent the hiring of new employees in the face of outstanding applications for reinstatement from striking employees is so inherently destructive of employee rights as to be, presumptively, a violation of the Act. Application of *Laidlaw* to the evidence here leads me to conclude that Respondent has not shown the requisite justification in legitimate and substantial business reasons for ignoring the reinstatement rights of strikers. Accordingly, I hold that Respondent unlawfully failed and refused to offer reinstatement to these employees, or as many of them for which vacancies would have generally existed after December 11, 1989 (the date of Galland's hire).

Although motive is irrelevant under the *Laidlaw* test, I render findings on the issue of whether work leader, and titled supervisor, Hammond bound Respondent by the statement uncontradictedly attributed to him. The testimony of Amberson relative to Hammond's authority in assigning work and permitting deviation from scheduled work, does not show the requisite independent judgment and discretion to establish that Hammond is a supervisor within the meaning of Section 2(11) of the Act and thus an agent of Respondent. I note that he is more highly paid than both Blaine Carlson and Richard Hess, the two individuals who along with Hammond have claimedly replaced the work leader function formerly fulfilled by Luck and Nakamura. The fact that Hammond is now individually more prominent than work leaders of recent times is significant, but so too is the heavy supervisory presence of Fletter and Standridge among

⁵The just-in-time system is not so radically new that Respondent was likely free of some effect of it well prior to the strike. In the article *Are Inventories Really Under Control?*, BUS. WK., July 31, 1989, pg. 71, the writer observes that "over the past 5 years" auto parts suppliers have greatly reduced production runs with a key reason being "the greater flexibility offered by just-in-time systems" (emphasis supplied). A related article on inventory accounting methods in FORBES, May 15, 1989, p. 128, carries in its subheading that "Just-in-time manufacturing is *standard procedure* in many industries. . . ." (Emphasis supplied.) Again the connotation here is that an established motor carrier should have found just-in-time as a business reality well before late 1988.

⁴Driver-warehousemen Auld terminated October 5, 1989, as did Greene and Amberson in February and July 1990, respectively.

this small work force. Overall, I find insufficient evidence to hold, as the General Counsel would contend be done, that Hammond is a supervisor and agent of Respondent for purposes of imputing ulterior motive to its pattern of employee utilization.

CONCLUSIONS OF LAW

1. The Respondent, California Distribution Centers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 150, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by deeming employees classified as warehousemen, and not the holders of a class 1 (currently class A) California motor vehicle operator's license, to be of limited utilization potential.

4. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to offer reinstatement to striking employees classified as warehousemen as their former or substantially equivalent positions of employment became open.

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

REMEDY

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

Having found that Respondent disqualified various employees from their rights as economic strikers, I shall order Respondent to preferentially reinstate, to the extent that it has not already done so, Edward Dotson, Eugene Herrick, Larry O'Keefe, Michael Luck, Michio Nakamura, Richard Gonzales, Robert Savage, Thomas DeAnda, Harry Littlefield, Earl Lundquist, Michael Moore, and Dennis Powers, who each participated in the strike of late October 1988 and who unconditionally offered to return to work on or about October 31, 1988. Preferential reinstatement is to be to their former positions or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. In addition these former economic strikers entitled to preferential reinstatement shall be made whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, as such losses may be determined in a compliance stage of this proceeding, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The Respondent, California Distribution Centers, Inc., West Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disqualifying for preferential reinstatement economic strikers Edward Dotson, Eugene Herrick, Larry O'Keefe, Michael Luck, Michio Nakamura, Richard Gonzales, Robert Savage, Thomas DeAnda, Harry Littlefield, Earl Lundquist, Michael Moore, and Dennis Powers.

(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) Maintain Edward Dotson, Eugene Herrick, Larry O'Keefe, Michael Luck, Michio Nakamura, Richard Gonzales, Robert Savage, Thomas DeAnda, Harry Littlefield, Earl Lundquist, Michael Moore, and Dennis Powers in their positions on Respondent's reinstatement list, and preferentially offer them full reinstatement to their former positions or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.⁷

(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 West Sacramento, California, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 20, 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.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷A compliance stage of Board proceedings is suitable for determinations of striker's rights in terms of whether they "should already have been recalled," "were properly recalled," and "whether recall rights . . . still exist." *Hydrologics, Inc.*, 293 NLRB 1060, 1063 (1989).

⁸If 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."

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 discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 150, AFL-CIO, or any other

labor organization, by denying preferential reinstatement to Edward Dotson, Eugene Herrick, Larry O'Keefe, Michael Luck, Michio Nakamura, Richard Gonzales, Robert Savage, Thomas DeAnda, Harry Littlefield, Earl Lundquist, Michael Moore, or Dennis Powers on the basis that they are deemed by us to be disqualified for reinstatement because of not possessing a class 1 (or "A") motor vehicle operator's license.

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 preferentially reinstate Edward Dotson, Eugene Herrick, Larry O'Keefe, Michael Luck, Michio Nakamura, Richard Gonzales, Robert Savage, Thomas DeAnda, Harry Littlefield, Earl Lundquist, Michael Moore, and Dennis Powers to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

CALIFORNIA DISTRIBUTION CENTERS, INC.