

M.M.I.C., Inc., d/b/a Marchese Metal Industries, Inc. and Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.
Cases 29-CA-15936 and 29-CA-16070

March 31, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 31, 1993, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, M.M.I.C., Inc., d/b/a Marchese Metal Industries, Inc., Holbrook, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹In adopting the judge's finding that the Respondent failed to meet its burden to prove that there was a substantial business justification for refusing to reinstate the unfair labor practice strikers, we do not rely on the contents of a prior settlement offer made by the Respondent.

It appears that the judge misspoke in concluding that the "[Respondent] has the burden of rebutting the presumption that the employees . . . unequivocally intended to abandon their employment with Respondent." In light of his analysis preceding this conclusion, the judge presumably meant to say that the Respondent has the burden of rebutting the presumption that the employees did not intend to abandon their employment with Respondent.

Matthew T. Miklave and Catherine Creighton, Esqs., for the General Counsel.
Robert S. Nayberg, Esq. (Law Offices of Martin H. Scher), of Carle Place, New York, for the Respondent.
Belle Harper, Esq. (Sipsper, Weinstock, Harper & Dorn), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the Union), the Regional Director issued complaints in Cases 29-CA-15936 and 29-CA-16070 on October 4 and December 19,

1991,¹ respectively, alleging in substance that Marchese Metal Industries, Inc. violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain with the Union over the terms of a new collective-bargaining agreement, and by refusing to reinstate certain unfair labor practice strikers, subsequent to an unconditional return to work made on their behalf by the Union.

At the opening of the hearing before me on June 4, 1992, the General Counsel amended the complaints to reflect the correct name of Respondent as M.M.I.C., Inc., d/b/a Marchese Metal Industries, Inc., and to delete one of the alleged discriminatees. The hearing was completed on July 9, 1992.

Briefs have been filed by the General Counsel and Respondent, both of which I might add were excellent and extremely helpful to me in reaching my decision herein. Based on the entire record,² including my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation with its principal place of business at 1126 Lincoln Avenue in Holbrook, New York, where it is engaged in the manufacture of iron and steel staircases and related products. Annually, Respondent purchases and receives at its Holbrook, New York plant iron, steel, and other materials valued in excess of \$50,000 directly from other enterprises located outside of the State of New York. Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRIOR RELATED CASES

A. *Cases 29-CA-10055 and 29-CA-10055-2 (270 NLRB 293 (1984))*

On April 30, 1984, the Board issued its decision in the above cases, affirming the decision of the administrative law judge that Respondent violated Section 8(a)(1), (3), and (5) of the Act by various instances of interrogation, threats of physical harm, discharge and closure of the plant, promising and granting benefits, denial of a wage increase, assigning employees more arduous job tasks, the discharge of two employees because of their membership and activities on behalf of the Union, and the refusal to bargain with the Union.

That decision found that Respondent had refused to bargain with the Union in a unit of production and maintenance employees employed by Respondent, which consisted of five employees. The decision did not disclose what job classifications the employees had at the time, nor specifically what job functions they performed on a regular basis.

In a footnote to the Board decision, Chairman Dotson dealt with Respondent's contentions with respect to turnover,

¹All dates herein are in 1991 unless otherwise indicated.

²While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Therefore, any testimony in this record that is inconsistent with my findings is discredited.

and Respondent's offer of proof that it hired two additional employees after the election, raising the number of employees in the unit to seven.

B. Case 29-CA-14299 (302 NLRB 565 (1991))

The Board on April 15, 1991, affirmed an administrative law judge's decision, which had issued on September 21, 1990, and found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to execute a collective-bargaining agreement which had been agreed-to with the Union.

That decision disclosed that Respondent and the Union had been parties to a collective-bargaining agreement which by its terms ran from October 8, 1984, to October 7, 1987, with a recognition clause defining the unit covered by the contract as follows:

All production and maintenance employees, including plant clericals, employees of Respondent engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel, and other metal products, including plastic products, and all maintenance employees of Respondent engaged in maintaining machinery and equipment and other maintenance work in or about Respondent's shop or shops, and work performed by such production and maintenance employees, but not including office clerical employees, superintendents, or employees represented by any other union affiliated with the AFL-CIO with whom Respondent has signed a collective bargaining agreement, or to erection, installation, or construction work, or to employees engaged in such work.

It was also found that over the course of bargaining for a new agreement to replace that contract, agreement was reached on all terms, which consisted of a draft contract prepared by the Union and submitted to Respondent in January 1988, together with pages of corrections given to Respondent in July 1988 by the Union.

It was further found that Respondent, despite numerous requests and meetings with the Union, never executed the agreed-on contract, and that after another refusal to sign, the employees of Respondent went out on strike on June 27, 1989.

The Board's decision was subsequently enforced by an unpublished decision on January 23, 1992, of the Court of Appeals for the Second Circuit.

III. THE ALLEGED REFUSAL TO BARGAIN

A. Facts

As noted above, the Board affirmed the administrative law judge's decision which found Respondent had refused to execute a new collective-bargaining agreement. The hearing in that case was held on May 1 and 2, 1990.

On August 9, 1990, while the administrative law judge's decision was still pending, Respondent by its attorney sent a letter to the Union, which reads as follows:

August 9, 1990

HAND DELIVERED
William Colavito, Pres.
Shopmen's Local Union No. 455

of the International Association of
Bridge, Structural and Ornamental
Iron Workers, AFL-CIO
40-05 Crescent Street
Long Island City, NY 11101

Re: Marchese Metal Industries

Dear Mr. Colavito:

Our office is labor counsel to Marchese Metal Industries. Since there is a current dispute between Marchese and your Union as to whether there is a current valid contract between them which would expire by its terms on October 7, 1990, the Company is covering all contingencies by providing you with this letter as notice that it intends to terminate such alleged contract and that it rejects an automatic renewal of said alleged agreement in the event of a determination that such contract exists.

This notice to you is within the 90 to 60 day period prior to the expiration of such alleged current agreement, but should not be taken as an acknowledgement of the existence of a current collective-bargaining agreement between Marchese and Local 455.

Moreover, this notice is specifically without prejudice to Marchese's contention before the National Labor Relations Board in 29-CA-14299 that no agreement between Marchese and the Union exists.

Very truly yours,

Martin Scher

The Union did not respond to Respondent's letter, nor did it initiate a request for bargaining over the terms of a new agreement until May 20, 1991. At that time, the Union sent a letter to Respondent reminding it that the Board had issued its decision on April 15 ordering Respondent to execute the 1987-1990 agreement. The Union requested that Respondent do so, and advise the Union of a convenient date and time for a meeting to negotiate a new agreement, to be effective October 8, 1990.

On June 6, 1991, Respondent's attorney replied to the Union's letter. The letter essentially responds that the Union's requests are both premature, since the court of appeals had not as yet enforced the Board's Order. Respondent also referred in the letter to its August 9, 1990 letter to the Union, terminating the prior alleged agreement; and asserted that the Union waived its rights to request bargaining by its inaction of failing to respond to that letter until May 20, 1991.

On July 22, 1991, the Union sent another letter to Respondent, again referring to the Board decision, and requesting a date to meet and bargain. Respondent did not reply to this letter. The Union filed its initial charge in Case 29-CA-15936 on August 21, 1991.

B. Analysis

Respondent does not dispute that it refused the Union's requests made in writing on May 21 and July 24 to meet and bargain over the terms of a new contract. However, Respondent argues that the Union waived its rights to bargain with Respondent by its failure to respond to Respondent's August

9, 1990 letter and its failure to request bargaining between that date and May 21, 1991. I do not agree.

Initially, I would note that it is well settled that a waiver of a statutory right to bargain over mandatory subjects of bargaining must be clear and unmistakable. *Metromedia, Inc. v. NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978); *Minnesota Mining Co.*, 261 NLRB 27, 42 (1982); *Southern Florida Hotel Assn.*, 245 NLRB 561, 567-568 (1979).

No such clear and unmistakable waiver of the Union's rights to bargain has been demonstrated by Respondent. Respondent's reliance on its August 9, 1990 letter to trigger an obligation on the part of the Union to request bargaining at that time is misplaced and disingenuous. I note that although Respondent's letter indicated that it intended to terminate the alleged contract, it is clear that the only purpose of such a letter was to forestall the automatic renewal clause of that agreement, and was not an offer by Respondent to bargain with the Union over a new contract. Indeed, Respondent made no offer to bargain with the Union in that letter, and indeed its insistence in the letter that it was still contending that there was no valid contract in effect between the parties, demonstrates clearly that any request by the Union to bargain with Respondent over the terms of a new contract would have been futile. *Lauren Mfg. Co.*, 270 NLRB 1307, 1309 (1984); *Unoco Apparel*, 215 NLRB 89, 91 (1974); *Bay Area Dealers*, 251 NLRB 89 (1980). (Bargaining against a background of unremedied unfair labor practices would have been an exercise in futility.)

My conclusion in this regard is reinforced by Respondent's response to the Union's demand for bargaining, after the Board decision was issued. In its June 6 letter, Respondent referred to the fact that it was contesting the Board's findings in Federal court, and asserted that the Union's request to bargain was premature. This position of Respondent is clearly unlawful, as its bargaining obligation to the Union is not suspended by virtue of its appeal to the Federal court of the Board's decision. *Bryan Memorial Hospital*, 282 NLRB 235, 236 (1986); *Getzler Tool & Dye Corp.*, 275 NLRB 881, 882 (1985).

Accordingly, I conclude that the Union has not waived or abandoned its rights to bargain with Respondent and that Respondent has violated Section 8(a)(1) and (5) of the Act by its refusal to meet and bargain with the Union, after the Union's request to do so on and after May 20, 1991.

IV. THE ALLEGED UNLAWFUL REFUSAL TO REINSTATE

A. Facts

On or about June 28, 1989, certain employees of Respondent went on strike. Respondent concedes and I find that the strike was caused by the unfair labor practices committed by Respondent in the prior Board case involving Respondent's refusal to execute an agreed to collective-bargaining agreement. The issues presented are which employees should be considered strikers, whether certain of the employees lost their employee status as a result of obtaining substantially equivalent employment, whether one of the employees by rejecting an offer of employment by Respondent has lost his rights to reinstatement, and whether Respondent has established substantial business justification for its refusal to reinstate the strikers.

Prior to the strike in June 1989, Respondent employed employees in two job classifications, finishers and mechanics. The primary job of a finisher is and was to read the blueprints or drawings and specifications for a job, measure and layout the job by marking on the steel where the cuts should be made, and supervise the mechanics in the welding and cutting or fabrication of the steel. Additionally, the finisher prior to the strike, when time permitted, would also perform the fabricating of the steel. The record does not disclose how much time prior to the strike finisher's spent performing fabricating work.

The primary job of the mechanic is to perform the fabricating of the metal products in the shop under the direction of the finisher. However, it is undisputed that a substantial portion of the worktime of mechanics prior to the strike was spent performing work which would be considered "laborers" work under the contract such as painting, cleaning up, and driving the Respondent's truck or nonbargaining unit work, such as erection work and other work performed at jobsites outside the shop.³ Mechanics performed work for Respondent at a number of specific jobsites such as the East Hampton Fire House, Kennedy Airport, office buildings, and Brookhaven Labs on a regular basis, sometimes for months at a time on a particular job. One employee, Miguel Rivera, was injured while working on one of these jobsites. The mechanics employed by Respondent would work on these outside jobs along with their fellow mechanics employed by Respondent, one of the Marchese's or employees represented by another labor organization, Local 580.⁴

The number of mechanics and finishers employed by Respondent would fluctuate, with as much as three or four finishers, and seven or eight mechanics, being employed at particular times. The fewest number of mechanics employed by Respondent, prior to the strike was five.

In May 1989, Respondent laid off mechanics Miguel Rivera, Howard Jarrett, and William Deleyer, each of whom had been employed by Respondent for at least 30 days prior to their dates of layoff. Jarrett began working for Respondent in October or November 1988, was laid off about a month later, and was subsequently recalled by Respondent prior to being laid off along with the other two mechanics in May 1989.

The collective-bargaining agreement between the parties provides that in "all cases of increase or decrease of forces, employees shall be given preference in their classification in accordance with their length of continuous service."

Respondent at the time of the strike on June 28, 1989, employed Leroy Popp as foreman. Popp's responsibilities as foreman included overall responsibility for the production in the shop, receiving calls from outside jobs, arranging for deliveries of equipment, and making sure repairs are made. Additionally, Popp as foreman would also perform work as a finisher, and in fact would spend from 50-75 percent of his time performing finisher's work. Popp's salary was \$19.35 per hour.

Respondent employed Richard Smith as an assistant foreman and finisher. Most of his time was spent as a finisher,

³ The collective-bargaining agreement specifically excludes work performed outside the shop.

⁴ The record does not reflect the full name of this labor organization. However, the Local 580 employees received \$23 to \$24 per hour.

and he would have the foreman's responsibilities as described above, in the foreman's absence. The record does not disclose Smith's salary prior to the strike.

As of June 28, Respondent also employed Jacob Frank, William Waltrap, Jerry Cimino, and Timothy Clark as mechanics.

On the day of the strike, June 28, Frank, Waltrap, Cimino, Clark, Popp, and Smith all did not report to work and picketed outside Respondent's premises. Picketing was conducted at the facility for a period of between 3 and 5 weeks, with these employees participating at various times.

Rivera, who as noted was on layoff at the time of the strike, did not picket, but on one occasion when he was not working, visited the picket line and spoke to the other employees present on the line. Rivera was told by the pickets that Respondent had nonunion employees working inside the shop. Rivera made no attempt to cross the picket to go to work for Respondent. Nor did Respondent contact Rivera to offer to recall him to work, although it hired replacement employees at various times subsequent to the strike's commencement.

Rivera worked at North Shore Fabricators & Erectors (North Shore) for 3 weeks in May 1989, after his layoff, but prior to the strike. He worked again for North Shore for 3 weeks in early November 1989. However, Rivera was employed at North Shore according to North Shore's records, as a "vacation replacement only."

After his layoff from North Shore, and at some point subsequent to the commencement of the strike, but not disclosed by the record, Rivera took a job with Martin Manufacturing. The record does not disclose how long Rivera worked for Martin Manufacturing, or what benefits or salary he received at that company.

While Deleyer did not testify, I credit the testimony of Frank and Popp that he picketed at Respondent's premises for some period of time during the strike. Deleyer also did not attempt to cross the picket line, and was also not offered by Respondent the opportunity to return.

The record does not disclose Deleyer's work history prior to or after the strike, except that a W-2 form from North Shore showed that he received \$2,704.80 in wages from North Shore for that year, plus a statement that he, like Rivera, was hired by North Shore as a "vacation replacement only."

Jarrett did not learn of the strike until August 1989, when someone whom he didn't recall told him about it. He never picketed or went to the picket line. He also did not attempt to go to work for Respondent, nor was he offered the chance by Respondent to do so. Jarrett testified that he is interested in returning to work for Respondent.

Jarrett was not employed at or prior to the commencement of the strike. In October 1989, Jarrett was employed by Kurtz Iron Work, a Local 455 shop, at a salary of \$15.25 per hour as a mechanic, wherein he received all the benefits under the union contract. He was laid off from Kurtz in or about January 1990. He subsequently found a job at Martin Iron Works as a finisher-mechanic at a salary of \$13 per hour, which was not a Local 455 shop and wherein he received no medical plan, pension, vacation, or annuity plan. Jarrett was subsequently laid off from Martin and has not worked since that time.

Leroy Popp, after picketing at Respondent's facility for approximately 2 weeks, began employment at North Shore on July 11, 1989, as a layout or finisher employee. North Shore is a company under contract with the Charging Party Union. At North Shore, Popp would have under the union contract received a salary of \$16.75 per hour from July 1989-1990, \$17.59 from July 1990-1991, and \$18.47 from July 1991 through May 1992. North Shore made contributions into the Union's welfare, pension, vacation, apprentice, annuity, and severance funds. Under Respondent's contract with the Union, contributions were required to be made only to the Union's welfare and annuity funds.

Jacob Frank and Timothy Clark, after picketing at Respondent's facility for various periods of time, obtained employment at North Shore as mechanics on May 24, 1990, and September 1989, respectively. Both Clark and Frank had been receiving \$14.90 per hour while employed by Respondent. At North Shore, their salary would have under the contract ranged from \$15.44 per hour to \$17.02 per hour as of August 1991. Both Clark and Frank also had contributions made on their behalf to the various union funds, as described above with respect to Popp by North Shore.

Clark and Frank were laid off from their jobs at North Shore from May 1 to June 1, 1992. Clark also testified that he was laid off on another occasion from North Shore for 3 weeks, the dates of which he could not recall.

Richard Smith returned to work for Respondent in July 1990 to his former position of assistant foreman and finisher. The circumstances of his return to work was not disclosed by the record. His salary was \$20 per hour after his return to work.

The Local 455 employees employed by North Shore, including Popp, Clark, and Frank were on strike against North Shore and did not work for North Shore from July 16 to August 30, 1991.

By letter dated July 22, 1991, the Union requested on behalf of employees Popp, Frank, Cimino, Clark, Deleyer, Rivera, Jarrett, and S. Pazanin to return to work at their same or to substantially equivalent jobs without prejudice to any rights or privileges previously enjoyed by them. The letter concludes by asking that the Union be notified when the employees may report.

No evidence was presented by the General Counsel or Charging Party that the Union consulted with or notified the above-described employees before requesting reinstatement on their behalf. In fact, Clark, who was the shop steward for the Union at Respondent, testified that he was not contacted by the Union prior to the Union requesting reinstatement on his behalf and that he did not know in July 1991 that the strike at Respondent was over. Jarrett, who as noted was on layoff status with Respondent at the time the strike began, also did not know in July 1991 that the Union had made a request on his behalf to return. Furthermore, Panazin whose name also appeared in the Union's letter as requesting reinstatement, resigned his employment from Respondent in writing on June 9, 1989, which suggests that Panazin was also not consulted by the Union before it included his name as an employee requesting reinstatement. I would note, however, that the Union did not include the name of one striker, William Waltrap, as requesting reinstatement, which further suggests that the Union did consult with Waltrap about his desires to return to work for Respondent.

Respondent did not reply to the Union's letter and did not offer reinstatement to Clark, Frank, Cimino, Rivera, Jarrett, or Deleyer. However, Dennis Marchese, Respondent's president, contacted Popp and offered him a job as a finisher. Marchese offered to pay Popp \$23 per hour, which was more than he had previously been paid as a foreman, wherein as noted he spent 50-75 percent of his time performing finisher's work. Marchese also offered him a medical plan, but not the union medical plan provided for in the contract. Marchese also did not offer to contribute to the union annuity or welfare fund on behalf of Popp, as the collective-bargaining agreement required.

Popp asked Marchese why he wasn't being offered his old job as foreman. Marchese replied that he was satisfied with the man he had in that position. In fact, Respondent had hired Julius Kovacik as foreman in May 1990, who was paid a salary of \$1000 per week.

Popp told Marchese that he would think it over. After several telephone conversations, Popp told Marchese that he would "rather stay with the Union in the shop he was in."

Other than its attempt to reinstate Popp, Respondent did not contact or offer reinstatement to any of the other employees named in the Union's letter. Nor did Respondent respond to the Union's letter in any way, or explain to the Union its reasons for not offering jobs to the other employees. In this proceeding, Respondent adduced no evidence as to who or when the decision was made not to offer jobs to these employees, or precisely why the decision was made.

Marchese did testify, corroborated by Smith and Kovacik, that from July 22, 1991, to the start of the trial on June 4, 1992, Respondent employed five full-time employees, four "finishers" (Smith, Kovacik, Michael Sabina, and Steven Heins), and only one mechanic, Algy Patterson. Respondent also presented some generalized testimony, not supported by any records or documentary evidence that business was poor or bad from July 1991 on, as compared to 1989. However, no testimony or other evidence was offered that established any connection between these events and Respondent's decision not to offer reinstatement to the returning strikers. Indeed, Respondent did not explain what changes in the type or amount of work that its employees were performing was responsible for its alleged decision to change the composition of its work force from two finishers and four mechanics in June 1989 when the strike began to four finishers and one mechanic in July 1991 when the strike ended. In fact, Respondent introduced no evidence as to the composition of its work force between June 1989 and July 1991; or as to when why or how it decided that it would now reduce the number of mechanics from four to one or increase the number of finishers from two to four.

Marchese also testified that after July 22, 1991, Respondent had "on occasion, for a couple of days, one day, two days, whatever, there's short periods of time, hired people to finish up work in the shop and get it out or hire them to erect something that needed to be done right away." Smith corroborated Marchese by testifying that other employees were hired to do a "day's work, a couple of days' work."

However, Respondent's payroll records paint an entirely different picture with respect to the frequency of employment of these additional employees. These records, which incidentally list all these employees under the title of "shopmen," reveals that for the period between July 22, 1991, and June

3, 1992, Respondent employed in addition to its alleged "regular" crew of five employees a total of nine employees who worked a total of 2484.5 hours (60 full workweeks) during this period of time.

Moreover, although Marchese testified that from the date of the request to the trial Respondent employed Heins and Sabina as part of its allegedly "regular" crew, in fact neither Heins nor Sabina were employed by Respondent on the date that the Union requested reinstatement on July 22, 1991. For that payroll period, which ended July 24, Respondent employed Kovacik, Smith, Patterson, plus employees George Brabant, Harold Price Jr., and Carl Rogers. Significantly, Respondent did not establish when it first hired Brabant, Price, or Rogers, so conceivably they could have been employed for some period of time prior to July 24, 1991. These same employees were all regularly employed by Respondent for the next six payroll periods, until the period ending September 11, when Respondent added Heins and employee Ramon Chinaea.

For the next payroll period, ending September 18, Timothy Dugan was added, raising Respondent's complement to nine employees, eight employees listed as "shopmen," plus Kovacik. For the next payroll period, ending September 25, Rogers was listed as receiving only vacation pay with no hours of work, which indicates that his employment terminated at that time, reducing Respondent's complement to eight. The next week, ending October 2, revealed 2 more new hires, David-Leigh Manuell and Donald Vincent, raising the number of Respondent's employees to its highest level of 10 for that 1 week. The week ending October 9 revealed no hours worked for Brabant, Price, or Vincent, plus vacation pay for Vincent and Brabant. Thus, for that week, Respondent's employees who worked totaled seven, six "shopmen" plus Kovacik. The week ending October 16 showed another new hire, Robert Ruland, raising Respondent's total to eight employees for that week. Respondent finally hired Sabina (its other alleged "regular" employee) for the week ending October 23, which gave Respondent nine employees for that week. The week ending October 30 revealed that Dugan worked no hours and received vacation pay, reducing Respondent's complement for that week to eight. The very same eight employees all worked for Respondent for the weeks ending November 6 and 13. For the week ending November 20, Chinaea, Leigh-Manuell, and Ruland all received vacation pay from Respondent, reducing the complement of employees to five, where it remained from that date through the payroll period ending May 13, 1992, when Robert Ruland was rehired. For the next week, May 20, 1992, James Van Laar was hired and he and Ruland worked that week, as well as the week ending May 20, 1992, raising Respondent's level of employees to seven. For the week ending June 3, 1992, which is the week before the trial started herein, Respondent laid off Patterson, Van Laar, and Ruland, and then recalled them to work a week or two later.

My findings above pertaining to the payment of the vacation pay to employees is derived from my assessment of the designation VCH on the payroll along with no designation of hours worked for that week. Marchese initially agreed with that interpretation of VCH, but later on his testimony surmised it might have referred to termination. However, since employee Heins was paid for the week ending December 4, 1991, with the symbol VCH and no hours worked, and was

not terminated, I conclude that Marchese's original belief was correct and VCH on Respondent's payroll stands for vacation.

Respondent did adduce testimony from Marchese and Kovacik as to the work performed by the additional hires whom it employed at the time of and subsequent to the Union's request for reinstatement. According to Respondent's witnesses, these nine employees were for the most part hired either to perform "outside" work, which is as noted excluded from unit work by the contract, or helpers' or laborers' work, which Respondent does not construe as "mechanics" (fabrication) work. Marchese further testified that although Respondent's payroll records classified all of these employees as shopmen, "the shopmen in this period of time is a non-union group," which includes both employees working in the shop and outside the shop on jobs that are not subject to the jurisdiction of Local 580.

Marchese and Kovacik contend that only one of the nine employees, David-Leigh Manuell, who was employed by Respondent for 7 weeks between October 3 and November 21, 1991, worked as a mechanic performing welding in the shop. They contend that Leigh-Manuell was hired primarily to work on one particular "railing" job that Respondent was in a rush for, although no testimony or records were introduced to further identify the name, nature, customer, or duration of this job. Nor was any testimony offered that when Leigh-Manuell was hired he was told that his employment at Respondent was temporary, or that it would end when that particular job was completed. Moreover, Marchese admitted that Leigh-Manuell also performed some work outside the shop, in addition to his mechanics' work on the one particular job that Respondent had at the time.

As noted, in the payroll period ending July 24, 1991, the date wherein Respondent received the Union's request for reinstatement, Respondent employed Brabant, Rogers, and Price, in addition to Patterson, Smith, and Kovacik. According to Marchese, corroborated in part by Kovacik, these three individuals characterized as "helpers" performed outside erection work, and laborers' work (painting, loading, moving iron, and driving a truck). Although these individuals applied for positions as welders, and some of them had welding experience, Marchese asserts that they "thought they could weld," but they couldn't, so Respondent used them as helpers and/or outside erectors.

Respondent's witnesses also placed employees Chinaea, Ruland, Vincent, and Van Laar in the same category. They allegedly were hired and worked as helpers, outside erectors, and/or driving a truck. However, both Kovacik and Smith, who were Respondent's witnesses, testified that at times Robert (Ruland) and Ramon (Chinaea) both performed "mechanics" work.

As to the final employee, Timothy Dugan, he was hired solely as an outside erector, and performed only work outside the shop. However, Kovacik conceded that at times, Dugan would be called on to do some fabrication work (i.e., mechanics' work) while at the jobsite. Kovacik also conceded that there were other times when some of the other "helper" employees involved would be called on to perform "minor" fabrication work at the jobsite, rather than bring the material back to the shop for a regular mechanic or finisher to perform the work.

All of these nine employees including Leigh-Manuell, who admittedly performed what Respondent considered to be "mechanics" work, received salaries between \$10 and \$11 per hour, except for Ruland who received \$8 per hour. Patterson, Respondent's admitted mechanic, received a salary of \$15 per hour. Heins and Sabina, Respondent's alleged "finishers" received salaries of \$14 and \$14.50 per hour respectively. Smith as noted received \$20 per hour.

The record does not disclose how much time, if any, Patterson spent performing painting, tacking, loading, or other traditionally "laborers" work, or whether he performed any work outside the shop.

Although Heins and Sabina were allegedly "finishers," the record also does not disclose how much time they spent performing traditional mechanics' work such as fabrication. Smith, who as noted was also a finisher, according to Kovacik, spent about 25 percent of his time after July 1991 performing "mechanics" work. It is not clear whether that percentage of time spent doing mechanics was more or less than the amount of time he spent performing mechanics' work prior to the strike.

Two weeks prior to the trial the Respondent and the Union met to discuss a possible overall settlement of both the instant matter and the prior case. During that meeting, part of Respondent's offer to settle, was a proposal to retain a work force consisting of two finishers and three mechanics. The Union rejected Respondent's offer.

B. Analysis

1. Status of the employees on layoff at the time of the strike

Respondent asserts that the three employees who were on layoff status at the time the strike commenced in June 1989, Rivera, Deleyer, and Jarrett, were no longer employees of Respondent and were not strikers, entitled to reinstatement when the strike ended in July 1991.

Section 2(3) of the Act, defines the term employee as follows:

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

Respondent relying on the latter portion of the statute, initially argues that Rivera and Deleyer when they prior to the strike accepted employment at North Shore, which was substantially equivalent to their former job, lost their employee status. However, since it is clear that their employment at North Shore was as vacation replacements only, these positions cannot be construed as substantially equivalent under any circumstances, and I find that their acceptance of these jobs has no effect on their employee status, vis-a-vis Respondent.

Respondent also argues that the General Counsel has not met its burden of establishing that the laid-off employees

should be considered strikers. This contention raises serious issues. The applicable law is set forth by the Ninth Circuit:

The critical question about individuals on layoff status when a strike is called is whether they are in fact "strikers" and thus continue to be "employees" under the NLRA. See *Brinkerhoff Signal Drilling Co.*, 264 NLRB 349 (1982); *Conoco, Inc.*, 265 NLRB 819, 821 (1982), *enfd.* 740 F.2d 811 (10th Cir. 1984). In other words, the employees who were on layoff from the Company before the strike must be shown to have been individuals "whose work has ceased as a consequence of, or in connection with, any current labor dispute." 29 U.S.C. Section 152(3). To fall within this definition, these laid-off individuals must have had their ability to work for the Company curtailed by the strike. If the laid-off individuals fall within this definition, they are entitled to reinstatement. *NLRB v Rockwood & Co.*, 834 F.2d 837, 839 (9th Cir. 1987).

I conclude that the evidence is sufficient to conclude that the laid-off employees did have their ability to work for Respondent curtailed by the strike, and that they should be considered strikers, along with the employees who were not on layoff status at the time of the strike. Generally, where a laid-off employee is involved, the General Counsel is required to show that the employees engaged in some overt action giving the Employer reasonable notice of their strike support. *Brinkerhoff*, *supra* at 349.

Here, Delayer engaged in picketing of Respondent's premises, *Rockwood*, *supra*, and Rivera, although he did not picket, visited the picket line and thereby also publicly supported the strike. Cf., *Dalton Sheet Metal*, 207 NLRB, 188, 191-192 (1973). Significantly, Deleyer, Rivera, and Jarrett⁵ all knew about the strike and did not offer to break the strike by requesting to return to work for Respondent.

More importantly, however, I find that the record is clear that Respondent at all times material herein considered and believed that all three of the laid-off employees were strikers. Thus, although Respondent, after the strike began, continued to operate and staff its business with replacement workers, it made no effort to recall these employees from layoff, even though it was contractually required to do so. Moreover, Respondent made no attempt to contact these employees to ascertain whether they might be interested in working, notwithstanding the Union's strike. Therefore, in the absence of any other explanation for Respondent's failure to recall them, I conclude that Respondent believed that these employees, as union members would not break the strike and return to work. Therefore, because the employees did not offer to return to work, and Respondent did not ask them to do so, both the employees and Respondent construed them to be strikers. *Connecticut Distributors*, 255 NLRB 1255, 1266 (1981) (employee Shepard), *enfd.* denied on other grounds 682 F.2d 127 (2d Cir. 1982).

Moreover, when the Union requested reinstatement on behalf of these three employees, along with the other employees who had not been on layoff status at the time of the strike, Respondent made no reply to the Union. Respondent

⁵Although Jarrett did not know about the strike at the time the strike started, he subsequently found out and did not offer to return to work for Respondent.

did not inform the Union that it considered that these three employees who were on layoff at the time of the strike, were not strikers, and not eligible for reinstatement for that reason. Indeed, Respondent never furnished any reason to the Union, or even at the hearing as to why it did not reinstate them, or that it questioned their status as strikers. In fact, Respondent treated the laid-off employees the same as it treated the other strikers; i.e., it refused to reinstate any of them. Therefore, since an employer violates Section 8(a)(1) and (3) of the Act when it discharges or otherwise discriminates against an employee because the employer believes that the employee engaged in union or protected activity, *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987), *S & R Sundries*, 272 NLRB 1352, 1356-1357 (1984), or because it believes that the employee was a striker, *Pleasant View Rest Home*, 194 NLRB 426, 431 (1971), even though the employee may not have engaged in any union or strike-related activity, I conclude that since Respondent believed that these employees were strikers, and treated them as such, that they should be considered to be strikers and have the same reinstatement rights as the other strikers herein.

2. Whether strikers lost their status as employees by obtaining substantially equivalent employment

Respondent contends that employees Popp, Frank, and Clark lost their status as employees under Section 2(3) of the Act by their obtaining substantially equivalent employment. *NLRB v Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Lone Star Industries*, 279 NLRB 550, 553-554 (1986), *affd.* and vacated in part 813 F.2d 472 (D.C. Cir. 1987); *Woodlawn Hospital*, 233 NLRB 782, 791 (7th Cir. 1979), *enfd.* and vacated in part 596 F.2d 13, 20 (7th Cir. 1979).

As noted above, Section 2(3) defines an employee as including individuals whose work has ceased as a consequence of a labor dispute or because of an unfair labor practice and who has not obtained any other substantially equivalent employment. On its face, this provision would seem to substantiate Respondent's position. However, as will be described more fully below, the Board has been most reluctant to apply this section of the statute to foreclose the reinstatement rights of returning strikers. Although the Board's decisions in this area are not a model of clarity or consistency, this may be in part due to two seemingly inconsistent Supreme Court opinions on this subject.

While initially the Board construed the statute literally, by not ordering reinstatement for workers who had secured substantially equivalent employment, *Matter of Rabhor Co.*, 1 NLRB 470, 481 (1936); *Matter of Jeffrey-DeWitt Insulator Co.*, 1 NLRB 618, 628 (1936), it changed its position in *Matter of Eagle-Picher Mining & Smelting Co.*, 16 NLRB 727, 783 (1939), and found that, although certain discriminatees and strikers had obtained substantially equivalent employment prior to their request for reinstatement or after their discharges, it was nevertheless appropriate to order reinstatement and backpay for these employees. The Board did not discuss or distinguish the prior cases cited above, but simply relied on its remedial authority under Section 10(c) of the Act, and held, that "we do not believe that those claimants who have obtained regular and substantially equivalent employment thereby become remediless, either for purposes of backpay or for purposes of future employment by the Respondents." *Id.* at 833. Notably it did not order rein-

statement for employees who testified that as a result of their obtaining substantial and equivalent employment, they did not desire reinstatement with the Respondent, and ordered no backpay to these employees subsequent to the date of their obtaining such employment. This decision was followed in *Virginia Electric Power Co.*, 20 NLRB 911 (1940), but interestingly was modified slightly. There, although an employee had obtained a job at a higher salary after his discharge, he had also stated at the hearing that he desired reinstatement with the employer. The Board then concluded, "We are of the opinion that Stanton's desire to be reinstated at the Respondent's plant should be given weight in determining whether he has obtained substantially equivalent employment. We find that he has not." *Id.* at 930.

In *Phelps Dodge Corp.*, 19 NLRB 547, 598-599 (1949), the Board, citing *Eagle Picher*, supra, reiterated its position that even if a striker obtains other regular and substantial employment, reinstatement is still an appropriate use of the Board's remedial powers under Section 10(c) of the Act. The Second Circuit reversed the Board's finding in this regard concluding that if the employees obtained substantially equivalent employment they "ceased to be employees subject to reinstatement." *Phelps Dodge v. NLRB*, 113 F.2d 202, 205 (2d Cir. 1940).

The Supreme Court granted certiorari, and in an opinion by Justice Frankfurter sustained the Board's position. *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941). The Court concluded that Section 2(3) and Section 10(c) must be read together, and that Section 2(3) does not limit the Board's power to award reinstatement to an employee even if he obtains substantially equivalent employment. 313 U.S. 190-191. The Court noted that the Board exists to adjudicate public not private rights, including the achievement and maintenance of workers' rights to self-organization. The opinion also recognized the obligation of discharged employees to accept an offer of substantially equivalent employment, or be found to have willfully incurred loss of earnings, and observed that the coercion on employees in such a situation is reduced by the Court's holding that acceptance of such a position by the employee does not disqualify him from returning to his old job. *Id.* at 193.

Subsequently, in *Mastro Plastics Corp.*, 136 NLRB 1342 (1962), the Board set forth various principles in connection with backpay, and citing *Phelps Dodge*, supra, held that employees who have obtained regular and substantial employment are still employees entitled to the Board's remedies. The Board noted the dilemma that employees would be placed in, if a contrary interpretation were to be made. Thus, an employee could be deprived of his claim because he did not make reasonable efforts to find interim employment, and on the other hand would be deprived of his total claim by obtaining the interim employment. Finally, the Board also cited, as did the Supreme Court, the Board's power to vindicate public rights and not merely correcting private injuries. *Id.* at 1350 fn. 20.

It is worth noting at this point that the reasoning of the Board and the Supreme Court, vis-a-vis the dilemma on employees, does not necessarily apply to strikers, who are not always synonymous with discriminatees, and do not have an obligation to look for work in order to preserve their status as strikers. However, since the alleged statutory limitation on employee status, by accepting substantially equivalent em-

ployment, appears in the same section of the Act, it is difficult to argue that strikers and discriminatees should be treated differently in this regard. In any event, it does not appear that the Board has drawn a distinction between the two situations in this area. I note in this regard that although Section 10(c) of the Act is not necessarily implicated by a striker seeking reinstatement, Section 13 of the Act has been interpreted by the Supreme Court as reflecting "repeated solitude" and special "deference" by Congress towards the right to strike, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963). Moreover, the right to seek interim employment during a strike is an important adjunct to the exercise of the right to strike and is itself protected from employer interference. *Christie Electric Corp.*, 284 NLRB 740, 759 (1987); *Kaiser Steel Co.*, 259 NLRB 643 (1981).

In 1967, the Supreme Court in *Fleetwood Trailer*, supra, considered various questions concerning the reinstatement rights of returning strikers, such as whether antiunion motivation must be shown, and whether job unavailability at the time of the request for reinstatement, extinguishes the employees' rights to return. In deciding these issues, the Court observed that "the status of the striker as an employee continues until he has obtained other regular and substantial equivalent employment." 389 U.S. 378. This comment, citing Section 2(3) of the Act, is of course clearly dicta in that case, since the question of substantially equivalent employment never arose therein. More significantly, the Court made no reference to *Phelps Dodge's* contrary finding on this issue.

Shortly after *Fleetwood*, supra, the Board issued *Laidlaw Corp.*, 171 NLRB 1366 (1968), in which it interpreted *Fleetwood*, supra, and found that even if economic strikers are permanently replaced, they are entitled to reinstatement on the departure of the replacements. This was the issue in that case, but the Board added as dicta, as did the Supreme Court in *Fleetwood*, that the employees' rights to reinstatement are lost when they acquire regular and substantially equivalent employment. Supra at 1370. The Board, as did the Supreme Court, totally ignored its prior precedent, such as *Phelps Dodge*, supra, and *Mastro Plastics*, supra, and made no attempt to distinguish or overrule these cases.

Subsequent to *Laidlaw*, not surprisingly a large number of cases issued, wherein the Board simply repeated the *Laidlaw* and *Fleetwood* dicta and analyzed the cases on the theory that the obtaining of substantially equivalent employment does end employee status under the Act. *H & F Binch Co.*, 188 NLRB 720, 725-726 (1971); *Bralto Metals*, 227 NLRB 973, 977 (1977); *Carruthers Ready Mix*, 262 NLRB 739, 740 (1982); *Brinkerhoff* supra at 355 (employee Rask), 356 (employee Brewster), 357 (employee Kelly), and 363; *Oregon Steel Mills*, 300 NLRB 817, 822 (1990).

Thus, it would seem that the Board has abandoned its previous position in *Phelps Dodge* and *Mastro*, that the obtaining of substantially equivalent employment does not end employee status. But see *Rose Printing Corp.*, 304 NLRB 1076 fn. 3 (1991), in which the Board observed that even if the returning strikers had obtained regular and substantially equivalent employment elsewhere "that would not per se establish that they had abandoned interest in pre strike jobs." See also *Daniel Construction Co.*, 276 NLRB 1093 fn. 3 (1985), in which the Board citing *Phelps Dodge* found that the responsibility to reinstate discharged employees does not

terminate in the event the employees obtain substantially equivalent employment elsewhere. Accord: *Standard Materials*, 237 NLRB 1136 (1978). The above two cases suggest that perhaps the Board may in fact be applying different considerations to strikers and discriminatees, vis-a-vis the loss of employee status by obtaining substantially equivalent employment, notwithstanding the fact that the statute (Sec. 2(3)) makes no such distinction. This may be an appropriate case for the Board to clarify its position in that regard, at least to make clear that it does not consider *Phelps Dodge* to be applicable to returning strikers, which I believe to be the Board's view based on subsequent cases.

Thus, while *Phelps Dodge* may not be controlling in the case of strikers, the Board has developed another line of cases which conforms at least to the spirit of *Phelps Dodge* and *Mastro*. Thus, in *Little Rock Automotive*, 182 NLRB 666, 667 (1970), enfd. in pertinent part 455 F.2d 163, 168-169 (8th Cir. 1972), the Board, while accepting the principle of *Laidlaw* that the acceptance of substantially equivalent employment by strikers forfeits their employee status, further defined substantially equivalent employment by injecting and in fact emphasizing the factor of intent of the employee concerned:

The question of what constitutes "regular and substantially equivalent employment" cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an ad hoc basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned. Without attempting to set hard and fast guidelines, we simply note that such factors as fringe benefits (retirement, health, senior-location and distance between the location of the job and an employee's home, differences in working conditions, et cetera, may prompt an employee to seek to return to his old job. As noted hereafter, we not only find contrary to the Trial Examiner that on the facts here presented neither Thompson or Ogden had substantially equivalent employment but note that the Trial Examiner gave no weight to the fact that both Thompson and Ogden expressed a continuing interest in returning to their jobs. [Id. at 666.]

This case provides the cornerstone for the Board's subsequent resolution of the issue, which indicate that it gives significant if not controlling weight to the question of whether the returning striker intended to abandon his employment with the employer by accepting interim employment with another employer. *Woodlawn*, supra at 791; *Service Electric Co.*, 281 NLRB 633, 637 (1986). *Aluminum Welding & Machine Co.*, 282 NLRB 396 fn. 3 (1986); *Christie Electric Corp.*, 284 NLRB 740, 759 (1987); *Axelton, Inc.*, 285 NLRB 862, 876-877 (1987); *Tile, Terrazzo & Marble Contractors Assn.*, 287 NLRB 769, 780 (1987); *Associated Grocers*, 295 NLRB 806, 808 (1989). In this connection, the Board often utilizes the standards set forth in *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962), dealing with striker eligibility to vote, and finds that the acceptance of other jobs, at times even accompanied by a resignation, is insufficient to establish an abandonment of an employee's reinstatement rights, "absent unequivocal evidence of intent to permanently sever

the striker's employment relationship." *Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990), enfd. 957 F.2d 1467, 1475 (7th Cir. 1992); *Christie*, supra at 759; *Harowe Servo Controls*, 250 NLRB 958, 964 (1980); *Axelton, Inc.*, 251 NLRB 282 fn. 5 (1980); *Woodlawn*, supra at 791; *Waveline, Inc.*, 258 NLRB 652, 657 fn. 9 (1981); See also *Wright Tool Co.*, 854 F.2d 812, 814 (6th Cir. 1988); *Bio-Science Laboratories v. NLRB*, 542 F.2d 505, 507-508 (9th Cir. 1976).

Turning to the facts of the instant matter, Respondent's position that Popp had obtained substantially equivalent employment at North Shore, sufficient to disqualify him from reinstatement is totally without merit. Popp was admittedly receiving \$2.38 per hour less in salary at North Shore, than he would have been receiving at Respondent. This is sufficient in itself for me to conclude which I do, that his job at North Shore was not substantially equivalent to his former position with Respondent. *Chicago Tribune Co.*, 303 NLRB 682 (1990); *Hayden Electric*, 256 NLRB 601, 605 (1981), enf. denied on other grounds 693 F.2d 1358 (5th Cir. 1982). In this connection, I reject Respondent's contention that the benefits received by Popp at North Shore such as pension, extra vacation and severance, compensate for the reduction in salary, and establish that "the total package of Popp's employment with North Shore establishes that it was economically the substantially equivalent of his former employment with Marchese." Respondent has not proved this to be the case, nor has it cited any case that permits such a comparison to be made.

Moreover, Popp's position at North Shore was a finisher, while at Respondent his position was foreman. While it is true that his job as foreman also entailed spending from 50-75 percent of his time doing finisher work, the issue of additional responsibilities is a significant factor in assessing whether a job constitutes substantially equivalent employment. *Wonder Markets*, 236 NLRB 787 (1978). I conclude therefore that the fact that Popp was not employed as a foreman with the additional responsibilities that he had at Respondent, is another reason for concluding that his North Shore position was not substantially equivalent to his former job at Respondent. Therefore, I need not even consider the question of intent with respect to Popp, to find that his employment at North Shore did not forfeit his employee status or his right to reinstatement with Respondent.

However, the status of Clark and Frank does require examination of the intent issue, since it is clear as Respondent argues that their jobs at North Shore were the same as they had been at Respondent, and that they were receiving higher wages and better benefits at North Shore than they would have been receiving while employed by Respondent. This presents squarely the question of whether under the criteria in *Little Rock*, supra, and its progeny, Respondent has established that Frank and Clark's employment at North Shore constituted regular and substantially equivalent employment, sufficient to terminate their employee status and their rights to reinstatement by Respondent. This analysis requires as noted significant consideration of the question of the intent of the employees involved.

What is not clear is who has the burden of proving intent or lack of intent of the employees to abandon their job. While it is undisputed that the burden of proof is on Respondent to establish that a striker has obtained substantially equivalent employment, *Salinas Valley Ford Sales*, 279

NLRB 679 (1986); *Arlington Hotel* 273 NLRB 210, 216 (1984), that does not necessarily mean that it cannot argue that by showing that the job at North Shore paid more and had greater benefits, it at least made a prima facie showing that the employees intended to remain at this position, and that absent any affirmative proof from the General Counsel that negates such an intention, Respondent has met its burden of proof.

Some indirect support for such a view can be found by examining some of the cases analyzing the question of intent, including *Little Rock* itself, in which the Board relies at least in part on various kinds of affirmative evidence that the individuals intended to resume their employment with the struck employer. *Little Rock*, supra (employee continued to make his availability for reinstatement known through letter, phone and personal contact); *Aluminum Welding*, supra (employee made prior appearance at facility when solicited by employer for different position); *Tile, Terrazzo & Marble Contractors*, supra (employee continued to participate in union meetings because he was not sure how long his job at a new employer would last); *Associated Grocers*, supra (employee continued to have contact with union and employer).

On the other hand, there is also more persuasive precedent supporting the view that Respondent must present affirmative evidence that the employee did not intend to resume his employment at the struck employer, apart from the fact that his employment at the subsequent job had higher wages and benefits. *K. Van Bourgardien & Sons*, 294 NLRB 268, 275 (1989); *Axelsson*, supra, 285 NLRB at 877; *Aztec Bus Lines*, 289 NLRB 1021, 1026, 1062 (1988)(employee Ozgundez); *Christie*, supra.

As noted, the Board has looked to representation principles to decide issues of abandonment of employment by accepting other jobs during a strike, *Woodlawn*, supra; *K. Van Bourgardien*, supra, because it would be anomalous to impose a different standard for eligibility to vote, than for strikers seeking reinstatement to their jobs at the struck employer. The law with respect to striker eligibility is clear. It is presumed that a striker continues in such status, and the party challenging the vote must show affirmatively by objective evidence that he has abandoned his interest in the struck job. *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359 (1962). It is also clear that the acceptance by an employee of another job even at a higher salary and/or better benefits does not in itself meet the burden of proving abandonment of employment. *Pacific Tile*, supra; *Akron Engraving Co.*, 170 NLRB 232, 234 (1968).

I therefore conclude that the weight of authority supports the view that whether the Board still adheres to *Phelps Dodge* and *Mastro* and finds that the obtaining of substantially equivalent employment in itself does not constitute an abandonment of reinstatement rights, *Daniel Construction*, supra; *Rose Printing* supra, or that the employees' intent must be considered in evaluating whether substantially equivalent employment has been established in the first instance, *Little Rock*, supra, the significant facts necessary to meet Respondent's burden are the same. It has the burden of rebutting the presumption that the employees here, Clark and Frank, have unequivocally intended to abandon their employment with Respondent.

Because all that Respondent has shown is that they obtained jobs at North Shore at higher wages and benefits, and

no other evidence of intent, it has not met its burden of proof in this regard. *K. Van Bourgardien*, supra; *Pacific Tile*, supra; *Aztec Bus*, supra; *Christie*, supra; *Axelsson*, supra; *Alaska Pulp Co.*, 296 NLRB 1260, 1274 (1989).

An examination of some of the cases where abandonment of employment has been found reveals that in each case such additional evidence of intent has been established. *H. F. Binch*, supra at 725 (Board found from the testimony that employees were "satisfied" with their new positions); *Q. T. Tool Co.*, 199 NLRB 500-502 (1972) (employees laid off obtained jobs before the strike began, and declined to respond to employer's letter of recall); *Drug Records*, 233 NLRB 253, 261 (1977) (employee told struck employer that he had another job and was not interested in company anymore); *PBR Co.*, 216 NLRB 602, 603 (1975) (employees told employer they were terminating their employment). Cf., *Roylyn, Inc.*, 178 NLRB 197 (1969), where employees also signed termination slips, but only after being instructed that this was necessary to obtain vacation pay.

Moreover, the record also contains several additional factors which militate against Respondent meeting its burden of proof. It is significant that at no time either before or after the reinstatement request was made, did Respondent make any attempt to ascertain whether Frank or Clark intended to return to work for Respondent. *Associated Grocers*, supra at 809; *Aluminum Welding & Machine Co.*, 282 NLRB 396 fn. 3 (1986). In this connection, I note that at no time did Respondent contend that it knew about their jobs at North Shore, or that its decision not to reinstate them was predicated on its belief that they had abandoned their employment or had taken other jobs.

Indeed, it is also important that at the time of the request for reinstatement, both Frank and Clark were not working at North Shore because the employees of North Shore were on strike from July 16 to August 30, 1991. *Waveline, Inc.*, 258 NLRB 652 (1981). Thus, it can be presumed that they would have accepted employment on and after July 22, if Respondent had agreed to reinstate them pursuant to the Union's request on their behalf.

Finally, I also note that seniority is clearly a factor in determining whether a job is substantially equivalent. *Little Rock*, supra. Here, both Frank and Clark had significantly more seniority at Respondent than at North Shore. Indeed, the record discloses that in fact Frank and Clark were placed at the bottom of the seniority list at North Shore for mechanics; and that they were both consequently laid off from North Shore for a month, and Clark was laid off on another occasion for 3 weeks. Conversely, the evidence does not show that they were ever laid off by Respondent, while at least three other mechanics were laid off by Respondent while Clark and Frank continued to work. Thus, this loss of seniority for Frank and Clark further militates against the conclusion that they obtained substantially equivalent employment at North Shore or that they intended to abandon their employment with Respondent.

Accordingly, based on the foregoing analysis and authorities, I conclude that the fact that Clark, Frank, and Popp for that matter obtained jobs with North Shore after the strike began does not forfeit their employee status, and they were employees of Respondent as of July 22, 1991.

3. The reinstatement offer to Popp

Respondent contends that it offered and Popp rejected a substantially equivalent position of employment. I do not agree.

Although Respondent did offer Popp a position as a finisher at a salary of \$23 per hour, \$3.65 more than his previous salary, it has not established that the job was substantially equivalent to Popp's former position as foreman. The offer to Popp did not include benefits under the union contract that Respondent was obligated to provide, such as the Union's medical plan and payments into the Union's annuity fund. Because Respondent's offer did not include these contractually required benefits, its offer is insufficient to establish an offer of a substantially equivalent position, to which Popp is entitled. *Harding Glass Industries*, 248 NLRB 902, 906 (1980). I reject Respondent's contention that its offer of a higher salary, somehow relieves it of its obligation to provide the other benefits under the contract to Popp. Moreover, as noted above, Popp's position for Respondent was foreman, which entailed additional responsibilities, as well as Popp pending less time performing finishing work than a full-time finisher. Because additional responsibilities are part of the definition of a substantially equivalent position, *Wonder Markets*, supra, I conclude that the failure to offer Popp a foreman's position is another reason to find that the offer was not to a substantially equivalent job.

Accordingly, I conclude that Popp was not obligated to accept the position offered by Respondent and remained entitled to an offer of his prior job of foreman.

4. The authority of the Union to request reinstatement

Respondent argues that it is appropriate to draw on adverse inference that the Union did not consult or discuss with the employees involved its intent to request reinstatement on their behalf, and that the failure to do so invalidates the Union's requests for reinstatement. In this connection, Respondent notes that two of the employees admitted that they did not know of the Union's request, three other employees testified on behalf of the General Counsel and were not asked the question, and two other employees and the union president were not called as a witness at all.

Accordingly, Respondent asserts that "no inference may be drawn that the July 1991 letter represented or comported with desires of the individuals whose names were listed." I disagree.

Where as here the Union is clearly the representative of the employees, and supervised and called the strike, a general agency is created which empowers the Union to offer to return to work on behalf of all the striking employees without obtaining specific authorization from the employees to do so. *Daniel Finley Allen & Co.*, 303 NLRB 846 (1991); *Consolidated Dress Carriers*, 259 NLRB 627, 636 (1981), enf. in pertinent part 693 F.2d 277 (2d Cir. 1982); see also *Hotel Roanoke*, 293 NLRB 182, 200 (1989).

Therefore, even were I to draw the adverse inference requested by Respondent and find that the Union did not consult with or obtain authorization from any of the employees to make a request on their behalf to return to work for Respondent, its position would not be upheld. As the above cases clearly establish, the Union was authorized by virtue of its representative status and its supervision of the strike

to make the offer to return on behalf of the employees. If there was any doubt about whether as Respondent claims the letter comported with the desires of the employees, such doubts could easily have been tested by the Respondent by having offered the employees reinstatement at that time. Respondent cannot refrain from doing so, and speculate what would have occurred had such an offer been made. *Alaska Pulp*, supra at 243.

Accordingly, I find that the Union's letter of July 1991 was a valid and sufficient offer of reinstatement on behalf of the employees covered by the letter.⁶

5. Whether Respondent established substantial business justification for refusing to reinstate the employees

Unfair labor practice strikers are entitled to immediate reinstatement at the conclusion of the strike, even if the employer must discharge permanent replacements in order to do so, unless it establishes legitimate and substantial business justification for refusing to do so. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Hotel Roanoke*, 293 NLRB 182, 185 (1989).

The burden of proving legitimate and substantial business justification falls on the employer. *Oregon Steel Mills*, 300 NLRB 817, 820 (1990); *Fleetwood Trailer*, supra; *Wright Tool*, supra at 814. Moreover, the right to reinstatement does not expire when an unconditional offer is made, although a job may have been eliminated or been unavailable for a legitimate bona fide reason. The right to reinstatement continues when the job becomes available. *Consolidated Dress*, supra at 636, *Fleetwood*, supra at 1369-1370.

The touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially, equivalent to, the prestrike jobs. While the issue of whether a striker is qualified to perform the job may shed light on whether the job is substantially equivalent to the prestrike job, mere qualification to perform the job will not suffice to establish substantial equivalency. *Rose Printing*, supra, 304 NLRB 1076 at 1077 (1991).

In applying these principles to the instant case, since I have concluded above that Popp, Cimino, Frank, Jarrett, Clark, DeLeyer, and Rivera were and continued to be unfair labor practice strikers at the time of the Union's request for reinstatement made on their behalf, the issue becomes whether Respondent has met its burden of establishing legitimate and substantial business justification for its refusal to do so. I conclude that Respondent has fallen far short of meeting its burden in this regard.

While Respondent argues in its brief that the employees were not reinstated because there were no jobs available for them, it failed to substantiate this position by record evidence. Indeed, Respondent introduced no evidence or testimony as to who, when, and most importantly why it was decided not to reinstate the employees. In fact, Marchese, who was Respondent's chief witness, and who presumably made the decision with respect to staffing, admitted that during the period of time, after the request for reinstatement, the category of "shopmen" on Respondent's payroll was a "non-union group." This admission suggests that, in fact, Re-

⁶It was stipulated that employee Danazin, whose name was included in the letter, had quit prior to the strike. His name was withdrawn as a discriminatee herein.

spondent had no intention of reinstating any of the strikers, because it intended to operate “non-union.” Thus, the assertion that it refused to reinstate to the strike because of the unavailability of work is specious.

This conclusion is fortified by the fact that Respondent admittedly employed at least one mechanic, Algy Patterson, at the time of the request for reinstatement, and yet it failed to replace Patterson with a returning striker, which it was obligated to do.

Even apart from this admission by Marchese, Respondent still has not come close to establishing the requisite, legitimate, and “substantial business justification” for failing to reinstate the returning strikers. As noted, Marchese claimed that from the date of the request to the date of trial, it employed five full-time employees, four alleged “finishers,” Smith, Kovocik, Heins, and Sabina, and “on occasion for a couple of days, one day, two days, whatever, there’s a short period of time, hired people to finish up work in the shop or get it out or hire them to erect something that needed to be done right away.” However, this testimony of Marchese, unsubstantiated by any records or other supporting evidence, is significantly contradicted by even a cursory examination of Respondent’s payroll records.

Thus, Respondent’s records, which as noted lists all the employees involved herein as “shopmen,” demonstrates that contrary to Marchese’s testimony neither Heins nor Sabina were employed by Respondent on July 22, 1991, when the Union made the request for reinstatement, and that they did not become employees until several months later. Moreover, rather than employing an additional “occasional one or two day employee” as testified to by Marchese, its records reveals that Respondent employed in addition to its alleged “regular” crew of five, a total of nine different employees over a period of a little over 10 months, who worked a total of .2484 hours or over 60 full workweek as a “shopmen.”

On the payroll period which covers the request for reinstatement, Respondent employed six employees, five “shopmen” plus Foreman Kovacik, which is the identical number of employees that it employed immediately prior to the strike, and which is consistent with Respondent’s work force from as far back as 1984, when the initial unfair labor practice case found the unit to consist of from five to seven employees. Thus, since its work force immediately prior to the strike consisted of two finishers (Popp and Smith) and four mechanics (Frank, Clark, Cimino, and Waltrap), it is Respondent’s burden to establish that on the date of the request, its work force had changed so that it had “legitimate and substantial business justification” for not reinstating the strikers.

In an attempt to resurrect Marchese’s contrived and obviously less than candid testimony, Respondent attempted to show that the additional employees hired were either not performing “mechanics” work and/or were employed on only a temporary basis. I find that Respondent has been unable to substantiate these contentions. Thus, the three additional employees on Respondent’s payroll on July 21, 1991, Brabant, Price, and Rogers, as well as the other employees hired subsequently, were according to Marchese and Kovacik “helpers” who for the most part did not perform “mechanics” (i.e., fabrication) work and/or were considered “temporary” employees.

Brabant, Price, and Rogers, according to Marchese, performed no “mechanics” work, and although they applied for jobs as welders, they were incapable of welding, and spent their time at Respondent performing “laborers” work such as painting, tacking, loading, moving iron, and driving a truck, and/or nonunit outside erectors work. Similar testimony was adduced with respect to all but one of the additional hires, Leigh-Manuell, who Respondent conceded performed “mechanics” work. Respondent argues that it is irrelevant that these additional employees performed “laborers” or “outside” work, since that is not “mechanics,” work which would have been available for the returning strikers. However, I have found above that prior to the strike a substantial amount of the work performed by Respondent’s mechanics prior to the strike, consisted of what Respondent now contends is “laborers” and/or nonunit outside work. Thus, since Respondent regularly assigned such work to its mechanics before the strike, it has in effect unilaterally expanded the job classification of mechanics to include both laborers and outside erection work. Whether or not this action violates the contract, or whether as Respondent argues that the employees could have rejected the work assignment and filed a grievance⁷ is surely beside the point. The fact is this work was regularly performed by the mechanics prior to the strike, and became part of that job description by virtue of Respondent having assigned such work to them. *Arlington Hotel Co.*, 273 NLRB 210 (1984). I therefore conclude that as of July 22, 1991, employees Brabant, Price, and Rogers were performing “mechanics” work under Respondent’s system of how that job was defined. I similarly find that the various other alleged “helpers” hired subsequently by Respondent also were regularly performing such “mechanics” work during their employment. It is also noteworthy that Respondent’s own witness, Kovacik, and Smith concede that two of these alleged “helpers” Ruland and Chinae performed regular “mechanics” work. Chinae was employed from September 1991 to November 31, 1991, for a total of 385.25 hours. Ruland was employed by Respondent from October 1991 to November 13, 1991, and once again from May 13 to 20, 1992, when he, along with another alleged “helper,” Van Laar, who had just been hired, plus Patterson were laid off for a “week or two.” This layoff interestingly coincided with the start of the instant trial, during which Marchese testified that Respondent didn’t employ any mechanics at the time of the trial. However, Marchese admitted that Respondent recalled Patterson, Ruland, and Van Laar a week or two after their layoffs. Particularly, in the absence of any evidence as to the economic reasons for this unprecedented layoff, i.e., Patterson had never been laid off and Van Laar had just been hired, I conclude that this action of Respondent was nothing more than a clumsy attempt to demonstrate its lack of available work for mechanics, by enabling Marchese to testify that it didn’t employ any mechanics at the time of the trial.

As noted, Respondent does conclude that employee Leigh-Manuell was performing “mechanics” work, but contends that he was just a temporary employee, hired only for the duration of a particular job. Respondent also argues that some of the other additional hires were temporary as well. How-

⁷I note, however, that at the time Respondent was taking the position that there was no contract in existence between the parties.

ever, under Board precedent, supported by the courts, an employee is not considered to be a “temporary” employee unless a definite termination was established at the time of his hire. *U.S. Aluminum Corp.*, 305 NLRB 719 (1991); *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 32–35 (1st Cir. 1978); *M. J. Pirolli & Sons*, 194 NLRB 241, 250 (1972). Cf. *General American Transportation Co.*, 187 NLRB 120, 121 (1970). Here, Respondent introduced no evidence that Leigh-Manuell or any of the other employees hired, were told that their job would be temporary, that it would end on the completion of a particular job or given a specific termination date. Therefore, Respondent has not established that any of the employees were “temporary” employees under Board standards.

Accordingly, turning back to the week of the reinstatement request, the record discloses that Respondent employed Kovacik as foreman and Patterson as a mechanic, two positions for which there can be no dispute were available for returning striker Popp and for at least one mechanic. While Respondent also employed Richard Smith as a finisher, he was also a returning striker who had previously crossed the picket line. His position is of course not available for any of the returning strikers to fill. *TWA v. Flight Attendants*, 489 U.S. 426 (1989). However, Respondent also employed Brabant, Price, and Rogers at that time, and I have found that they were performing “mechanics” work as defined by Respondent’s past practice. Thus, these three jobs were substantially equivalent to their prior position of mechanic and also were “available” for returning strikers. So on the date of the request for reinstatement, I find that Respondent had four mechanics or substantially equivalent positions, and one finisher foreman position available for returning strikers. I conclude that therefore on that date, Respondent was obligated to reinstate Popp, and at least four of the mechanics who applied, terminating replacement employees if necessary. Because Frank, Clark, and Cimino had been employed immediately prior to the strike, they would be entitled to the first three openings, with the final position available for one of the three who had been on layoff status (Rivera, Deleyer, or Jarrett).

However, as noted, Respondent continued to employ additional employees subsequent to July 1991, and as I have found all of the “helpers” were performing “mechanics” work under Respondent’s system, all of the work performed by these “helpers” was available for the strikers. Because at various times Respondent employed as many as 10 employees (classified as “shopmen” by Respondent’s payroll), I find that all the returning strikers should have been recalled on these occasions when the Respondent employed a sufficient number of alleged “helpers” to warrant their reinstatement.

The question of the status of employees Heins and Sabina is more difficult, particularly because for a substantial period of time, Respondent employed only five employees, including these two individuals, who Respondent claims were “finishers.” Here, Respondent could establish a substantial business justification for refusing to reinstate some of the mechanics during this period of time,⁸ by proving that business conditions had changed so that it needed only one mechanic

and four finishers. However, this is a burden that falls on Respondent, which in my view it has failed to meet. Other than the testimony of Marchese, Kovacik, and Smith that Sabina and Heins were “finishers,” Respondent adduced no other evidence or business explanation for its alleged substantial change in the ratio of mechanics vis-a-vis finishers. Respondent produced no testimony as to what business or economic factors motivated it to suddenly decide that it needed four finishers rather than two, and only one mechanic rather than four. Although Respondent did present some unsubstantiated testimony from its witnesses that business was poor, this testimony was not corroborated by any records or documentary evidence, *Drug Research*, 233 NLRB 253, 261 (1977), and more importantly no testimony was furnished as to how this alleged reduction in business translated to a necessity to change the types of employees needed. Moreover, Respondent adduce no evidence as to how much of the work performed by Sabina and Heins constituted “mechanics” work as defined by Respondent’s past practices. Since Respondent adduced no evidence as to what happened to the “mechanics” work that had previously been performed by as many as eight employees, one can only assume that Sabina and Heins performed a substantial portion of such work. Although it is true that even before the strike, finishers performed some mechanics’ work when they were not busy, it is not clear whether Sabina or Heins performed more mechanics’ work than did the finishers employed prior to the strike. Because it is Respondent’s burden to establish a substantial business justification, its failure to so prove leads to the inference that at least one other mechanic’s position may have been available in addition to Patterson’s position, during this period of time, when it employed five employees on a continuous basis. I would also note in this connection the fact that the salaries of Sabina and Heins were \$14.50 and \$14 per hour respectively, which is even less than the salary received by Respondent’s mechanics employed prior to the strike.

Accordingly, for the above reasons, I conclude that Respondent has not met its burden of establishing a legitimate and substantial business justification for failing to reinstate the returning strikers. This is not to say that all the returning strikers are entitled to reinstatement or to backpay for the entire period. I shall leave to the compliance stage of the matter the determination of these issues. *Daniel Finley Allen & Co.*, 303 NLRB 846, 868–869 (1991). Those employees for whom reinstatement is not ordered shall be placed on a preferential hiring list. *Crown Beer Distributors*, 296 NLRB 541, 542 (1989).

CONCLUSIONS OF LAW

1. Respondent M.M.I.C., Inc., d/b/a Marchese Metal Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Shopmen’s Local Union No. 455, International Association of Bridge, Structural, and Ornamental Iron Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to reinstate returning strikers subsequent to their unconditional application for reinstatement.

4. Respondent has violated Section 8(a)(1) and (5) of the Act by refusing on and after May 20, 1991, to meet and bar-

⁸ As noted, at least one mechanic’s position and the foreman finisher were always available for a striker.

gain with the Union as the exclusive representative of its employees in an appropriate unit.

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

THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. Having found that Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to reinstate the unfair labor practice strikers who requested reinstatement, I shall recommend that Respondent be ordered to reinstate these employees for whom it has available positions (consistent with my findings above with respect to what I found to be substantially equivalent positions in Respondent's operation).

Those former strikers for whom no positions are available shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory criteria and they shall be reinstated before any other person is hired for such position or on the departure of any employees filling such a position.

Additionally, I shall recommend that the employees discriminated against be made whole for the discrimination against them subsequent to July 22, 1991. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁹

Further, in view of the past violations of Respondent, demonstrating a proclivity to engage in illegal conduct, I shall recommend that a broad order be issued. *Daniel Finley Allen & Co.*, supra at 869-870. *Hickmott Foods*, 242 NLRB 1357 (1974).

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, M.M.I.C., Inc., d/b/a Marchese Metal Industries, Inc., Holbrook, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate returning unfair labor practice strikers subsequent to their unconditional application for reinstatement to their same or substantially equivalent positions.

(b) Refusing to meet and bargain collectively with the Union, Shopmen's Local Union No. 455, International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO as the representative of its employees in the following appropriate unit:

All production and maintenance employees, including plant clericals, employees of Respondent engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel, and other metal products, including plastic products, and all maintenance employees of Respondent engaged in maintaining machinery and equipment and other maintenance work in or about Respondent's shop or shops, and work performed by such production and maintenance employees, but not including office clerical employees, superintendents, or employees represented by any other union affiliated with the AFL-CIO with whom Respondent has signed a collective-bargaining agreement, or to erection, installation, or construction work, or to employees engaged in such work.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their 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 the following employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, to the extent that these positions are available.

Leroy Popp	Miguel Rivera
Jacob Frank	Howard Jarrett
Timothy Clark	William Deleyer
Jerry Cimino	

(b) Make these employees whole, with interest for any loss of earnings and other benefits suffered as a result of the discrimination against them as set forth in the remedy section of this decision.

(c) On request, bargain with the above-named labor organization as the exclusive representative of its employees in the aforesaid appropriate unit with respect to rates of pay, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amounts owed to the employees under the terms of this Order.

(e) Post at its facility in Holbrook, New York, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 29, 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

⁹ As noted above, I shall leave to the compliance stage of this proceeding to determine which of the strikers should be reinstated, and how much backpay if any they should each receive.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

APPENDIX

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

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

WE WILL NOT refuse to reinstate returning unfair labor practice strikers subsequent to their unconditional applications for reinstatement to their same or substantially equivalent positions.

WE WILL NOT refuse to meet and bargain collectively with the Union, Shopmen's Local Union No. 455, International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO as the representative of our employees in the following appropriate unit:

All production and maintenance employees, including plant clericals, employees of Respondent engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel, and other metal products, including plastic products, and all maintenance employees employed by us engaged in maintaining machinery and equipment and other maintenance work in or about

shop or shops, and work performed by such production and maintenance employees, but not including office clerical employees, superintendents, or employees represented by any other union affiliated with the AFL-CIO with whom we have signed a collective-bargaining agreement, or to erection, installation, or construction work, or to employees engaged in such work.

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

WE WILL offer the following employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, to the extent that these positions are available.

Leroy Popp	Miguel Rivera
Jacob Frank	Howard Jarrett
Timothy Clark	William Deleyer
Jerry Cimino	

WE WILL make these employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL, on request, bargain with the above-named labor organization as the exclusive representative of our employees in the aforesaid appropriate unit with respect to rates of pay, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

M.M.I.C., INC., D/B/A MARCHESE METAL INDUSTRIES, INC.