Allied Mechanical Services, Inc. *and* Plumbers and Pipe Fitters Local 337, United Association of Journeymen and Apprentices of the Pipe Fitting Industry of the United States and Canada, AFL–CIO. Cases 7–CA–34274, 7–CA–34798, and 7–CA–34967

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On July 19, 1994, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief in response to the cross-exceptions. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief in response to the exceptions.

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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions, except as modified below, and to adopt the recommended Order as modified.[1]

1. The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by clarifying its existing company policy on overtime pay for employees. We agree.

In adopting his finding, we note the following undisputed facts. For several years, the Respondent has maintained a formal, written overtime policy in its employee handbook whereby an employee may receive overtime pay of time and one half after completion of 40 hours per week. In mid-1991 or early 1992, the Respondent began paying an employee double time for Sunday work on ''reimbursable'' jobs whenever the customer had agreed in advance to reimburse the Respondent for certain weekend overtime work. In mid-1993, some employees began abusing the system by taking time off during their regular workweek only to make up their hours by receiving double pay for Sunday reimbursable work. Recognizing that this abuse was unfair to its customer, the Respondent issued a written clarification of its overtime pay policy. The clarification indicates that an employee must complete the requisite 40 hours before overtime pay (including Sunday double pay on reimbursable jobs) will be paid.[2]

Here, the Sunday double pay practice on reimbursable jobs appears to have emanated from the handbook overtime policy. The clarification, which issued only after employee abuse was discovered, is fully consistent with the Respondent's overall overtime pay scheme. Consequently, we agree with the judge that the Respondent's August 1993 notice to employees that they had to meet the basic 40-hour workweek requirement set forth in the employee handbook was fully encompassed within its existing overtime policy. We, therefore, find that the Respondent was not obligated to bargain with the Union before it issued this clarification.

2. The judge found that on October 16, 1992, employees Ted Fuller, Harold Hill, Grant Maichele, Gil Ragsdale, Mac Rognow, and Steve Titus participated in an economic strike against the Respondent. He also found that on June 24, 1993, employees Jim Bronkhorst, Ken Falk, Marty Preston, and Brian Rowden participated in an economic strike against the Respondent. The judge concluded that these striking employees were engaged in protected concerted activity under Section 7 of the Act.[3]

The judge also found that the above strikers made unconditional offers to return to work after the October 16 and June 24 strikes ended on November 10, 1992, and July 6, 1993, respectively. He further found that the Respondent subsequently refused to reinstate the strikers, pursuant to their offers, when jobs became available on or after June 14, 1993, but it instead hired new employees which was contrary to these strikers' recall rights set forth in *Laidlaw Corp.*, 171 NLRB

[1] In fn. 2 of his decision, the judge inadvertently omitted the citation for *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[2] The clarification, signed by the Respondent's president, reads, in pertinent part:

POLICY ON OVERTIME PAY

As stated in our Employee Handbook our policy on overtime pay is as follows:

''Overtime is authorized work performed in excess of forty (40) hours per work week at time and one half (1 1/2) the regular straight time hourly rate.''

The only exception to this policy is as follows:

> When an owner agrees to reimburse the company for all overtime and the company receives this reimbursement, we in turn will pass this on to the employee. Employees will, however, be penalized this overtime pay until they reach 40 hours if they ''play the game'' of missing work during the week only to make it up on the weekend with overtime. This is considered unfair to both the company and to the owner we are working for.

If the company, for whatever reason, has to authorize overtime and it is not reimbursed by the owner the rule as stated in the policy manual will be followed.

[3] We find no merit in the Respondent's contention that the October 16 and June 24 strikers did not have employee status because they were paid union organizers or ''salts.'' See *NLRB v. Town & Country Electric*, docket No. 94-947 (Nov. 28, 1995) (job applicants who are also paid union organizers are nevertheless employees within the meaning of Sec. 2(3) of the Act and are entitled to its protection).

Member Truesdale agrees with the judge that the employees' work stoppages constituted protected activity within the meaning of Sec. 7 of the Act. Cf. *DeMuth Electric*, 316 NLRB 935 (1995) (an employee who walked off the job without explanation to take a better paying job elsewhere did not engage in a protected strike but rather quit his employment).

1366 (1968). The judge concluded that the Respondent thereby violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate these strikers as jobs became available on and after June 14, 1993.

The Respondent argues that the October 16 and June 24 strikes do not constitute protected concerted activity by employees and that it had no obligation to reinstate any striker after the strikes ended. We adopt the judge's findings and conclusions, which are summarized above, except that we agree with the Respondent that it did not unlawfully refuse to reinstate Gil Ragsdale. As more fully discussed below, the record evidence shows that an unconditional offer to return to work on behalf of Ragsdale was never submitted or effectively communicated to the Respondent, and therefore no reinstatement obligation involving Ragsdale ever arose.

Six employees, including Ragsdale, participated in the October 16 strike which was sponsored and supported by the Union. The other unit employees continued to work unimpeded by the strike. By letter dated October 16, 1992, the Union informed the Respondent that Fuller, Hill, Maichele, Ragsdale, Roggow, and Titus were on strike because of the Respondent's purported unfair labor practices. The strike continued until November 10, 1992.

By letter dated November 10, 1992, the Union made an unconditional offer to return to work on behalf of Fuller, Hill, Maichele, Rognow, and Titus. This letter did not mention Ragsdale's name and identified only the above five employees as having ended their ''unfair labor practice strike'' against the Respondent. The judge concluded without explanation that Ragsdale's name was omitted from the letter ''due to an oversight by the Union.''[4] But the Union never notified the Respondent that Ragsdale's name had been omitted by mistake and that he, like the other October 16 strikers, wanted to return to work.[5]

Ragsdale testified that on November 17, 1992, he went with the other strikers to meet with John Huizenga, the Respondent's president. He testified that before that meeting occurred, the strikers first met with Vince Cristiano, the Union's business agent, for coffee. Ragsdale testified that on that day he saw and read a copy of the November 10 letter before it was later presented to Huizenga. There is no indication from the record that Ragsdale ever objected, then or at any time thereafter, to the fact that the letter had omitted his name from the list of returning strikers who wanted to return to work. The record also provides no explanation why Ragsdale or Cristiano took no action to add Ragsdale's name to the list of strikers set forth in the letter as the Union had earlier done, as detailed at footnote 4, supra.

During the meeting with Huizenga later on November 17, 1992, striker Hill served as the employees' spokesperson and gave a copy of the November 10 letter to Huizenga. Ragsdale testified that Hill ''said something in the way of saying we was there to go back to work'' and that Huizenga replied that ''he didn't have no work for us.'' As far as the record shows, this exchange between Hill and Huizenga was the full extent of this meeting. Ragsdale did not speak up, but was standing in a position to see Huizenga. Ragsdale, however, testified that he did not know whether Huizenga could see him too. Whether Huizenga was actually aware that Ragsdale was among the gathered strikers is not known.

We find that Ragsdale did not effectively communicate a valid unconditional offer to return to work based on the fact that he was present with the other strikers during the November 17 encounter with Huizenga when Hill announced that ''we was there to go back to work.'' This fact alone fails to take into account all the circumstances surrounding the relevant events.

In this regard, the Union's November 10 letter specified only five returning strikers, and this same written message was given the Respondent on two separate occasions. Before the second time, Ragsdale had even read the November 10 letter, but it was never corrected or supplemented to include his name before it was handed to Huizenga on November 17. Thus, the clear written message submitted to the Respondent from the Union and the strikers themselves was that Ragsdale was not among the strikers who were making an unconditional offer to return to work on November 17.

Furthermore, we find that the Respondent had no reason to doubt the accuracy or completeness of the striker list in the November 10 letter. As revealed by the record, throughout this period the Union had adopted a bargaining strategy in which it encouraged striking by some unit employees while allowing other unit employees to continue to work unimpeded during the strike. In this context, then, the omission of Ragsdale's name from the November 10 letter probably would not have raised any suspicion on the part of the Respondent because the omission could have just as easily meant that Ragsdale remained on strike with the Union's blessings.

Nor do we consider Hill's comment to Huizenga on November 17 to be sufficient notice of an unconditional offer to return on behalf of Ragsdale. First, Hill's statement was not made in isolation but in the context of the November 10 letter provided to

[4] There is no indication from the record when the Union first discovered the alleged mistake.

[5] This is in contrast to the situation after an earlier strike by 12 employees on July 20, 1992. There, the Union initially made an unconditional offer to return to work, on August 4, 1992, on behalf of 10 of the 12 employees. On September 8, 1992, the Union corrected this error by making an unconditional offer to return on behalf of the two other employees who had earlier struck.

Huizenga during the same meeting. Thus, the ''we'' referred to by Hill in his statement could have reasonably been interpreted by Huizenga as only encompassing the five strikers named in the November 10 letter. This interpretation is most likely for several reasons. First, at no time during the November 17 meeting did the strikers indicate that the ''we'' was broader than the five strikers named in the November 10 letter. Second, Ragsdale's name was never mentioned and no explanation was provided to Huizenga as to why the November 10 letter did not include Ragsdale's name. Finally, Ragsdale himself was not even sure that Huizenga was even aware that he was with the other strikers that day. Ragsdale never made his presence known by speaking up during that meeting, and he did not know whether Huizenga could even see him.[6]

Finally, we find that the circumstances of this case are different from the situation presented in *Harowe Servo Controls*, 250 NLRB 958 (1980), where the Board found that the union had made an effective unconditional offer on behalf of all striking employees to return to work. In that case, the union representative, like Hill in the instant case, orally told company officials that the strikers wanted to return to work. But, unlike Hill, the union representative in *Harowe*, supra, never gave the company officials a written notice individually naming the returning strikers. Rather, the union representative in Harowe took the opposite approach by clarifying to the company that the union was making an unconditional offer to return to work for every striker as far as he knew. Then, in his official notice to the company sent the following day, the union representative again confirmed that ''the strikers . . . have elected to end the strike and *all* are requesting to be put back to work . . . .'' (Emphasis added.) *Harowe*, supra at 1061. Thus, both the oral and written communication from the union to management in *Harowe*, unlike the present situation, conveyed the same clear message that *all* strikers wanted to return to work unconditionally.

Therefore, in light of all the circumstances, we conclude that the Respondent did not violate Section 8(a)(3) and (1) by refusing to reinstate Ragsdale. Accordingly, we shall reverse the judge, dismiss this portion of the complaint, and exclude his name from paragraph 2(a) of the Order.

[6] Our dissenting colleague takes the position that Ragsdale, through employee Hill, made a sufficient offer to return to work. However, the dissent ignores the fact that Ragsdale admittedly read the November 10 letter, which was resubmitted on November 17, but he never complained nor questioned the omission of his name from the striker list. Instead, by doing nothing and remaining silent, both before and during Hill's presentation of the striker list to Huizenga, Ragsdale himself created whatever confusion now exists over his status. In our view, the Respondent could not have anticipated such confusion given the Union's clear written message that only five strikers wanted to return.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Allied Mechanical Services, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer Jim Bronkhorst, Ken Falk, Ted Fuller, Harold Hill, Grant Maichele, Marty Preston, Mac Rognow, Brian Rowden, and Steve Titus immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.''

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

MEMBER BROWNING, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate certain former strikers when jobs became available on and after June 14, 1993. Contrary to my colleagues, however, I would adopt the administrative law judge's finding that the Respondent also unlawfully refused to reinstate employee Gil Ragsdale, and would reverse the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act by changing its premium pay policy without first bargaining with the Union.

The Failure to Reinstate Ragsdale

It is not disputed that six employees including Ragsdale attended a November 17, 1992 meeting with John Huizenga, the Respondent's president, at which employee Harold Hill served as spokesman and orally made a collective, unconditional offer to return to work. Huizenga responded that he had no work for the former strikers, and made no subsequent offer of reinstatement to any of them.

My colleagues find that Ragsdale's presence at this meeting, and Hill's collective offer to return, did not effectively communicate Ragsdale's unconditional offer to return to work. Specifically, my colleagues contend that the communicative effect of the November 17 oral offer to return—as it pertained to Ragsdale—was compromised because Ragsdale's name was inadvertently omitted from the Union's November 10, 1992 letter, a copy of which was presented to Huizenga at the November 17 meeting, which made an unconditional offer to return on behalf of the striking employees. I disagree.

I find that Ragsdale, through employee Hill, made a sufficient offer to return to work at the November 17 meeting. Although the November 10 letter may constitute additional proof of an offer to return on behalf of the other five employees, the omission of Ragsdale's name on that letter does not nullify Hill's oral offer to return on behalf of Ragsdale. At most, the only conclusion to be drawn under these circumstances was that the omission of Ragsdale's name was an inadvertent, technical error. To the extent that the letter, viewed alone, caused any confusion concerning Ragsdale, that confusion was clarified by the oral offer to return.[1]

I find unpersuasive my colleagues' contention that their finding is supported by Ragsdale's testimony that, at the November 17 meeting with Huizenga, Ragsdale stood in a position to see Huizenga but did not know whether Huizenga could see him too. Such testimony does not establish that Huizenga was not aware of Ragsdale's presence at the meeting, or that Huizenga perceived the offer to return as only on behalf of the five employees other than Ragsdale. Indeed, there is no testimony that Huizenga did not see Ragsdale at the meeting, or that the Respondent understood Hill to be speaking only on behalf of the five employees other than Ragsdale.

In finding that the inadvertent omission of Ragsdale's name from the November 10 letter effectively nullified the November 17 oral offer on behalf of Ragsdale, my colleagues have, in essence, found that there is ambiguity concerning the subsequent oral offer to return, and that such ambiguity should be resolved in favor of the Respondent. Assuming arguendo the inadvertent omission caused any confusion that was not resolved by the oral offer to return, that confusion would have been clarified had the Respondent acted lawfully with respect to the other five discriminatees. Indeed, under lawful circumstances, the Respondent would have offered reinstatement to the other five discriminatees when work became available, and any legitimate, good-faith confusion by the Respondent concerning Ragsdale would have become apparent and properly dealt with by the parties. Thus, to the extent that there was any confusion over Ragsdale's status, the Respondent, by its unlawful conduct, prevented that confusion from being resolved. By resolving such uncertainty against Ragsdale, my colleagues have allowed the Respondent to benefit from its unlawful conduct.

Accordingly, because Ragsdale made an unconditional offer to return to work, I would find the Respondent's failure to offer him reinstatement when work became available violated Section 8(a)(3) and (1) of the Act as alleged.

[1] I find irrelevant the fact that Ragsdale read the Union's November 10 letter but did not object to the omission of his name on the letter. Because Hill made a clear, oral offer to return on behalf of all the employees including Ragsdale, there was no need for Ragsdale to mention the omission.

The Change in Premium Pay Policy

My colleagues find, in agreement with the judge, that the Respondent did not violate the Act by changing its policy and practice of paying employees premium pay for reimbursable work on Sundays. I disagree.

The Respondent's handbook states that employees are paid one-and-one-half times the regularly hourly rate for work in excess of 40 hours per week. In addition, the Respondent's practice was to pay its employees double time for work on Sunday that was reimbursable by the customer. The Respondent paid its employees the double time regardless of whether those employees had worked 40 hours in the previous week.

In July 1993, the Respondent became concerned that certain employees were receiving more than their usual pay by taking time off during the week only to make up their hours by working for double time on reimbursable jobs. To address this situation, the Respondent, without notifying the Union, issued a notice to employees stating that employees would no longer receive double time for reimbursable work if employees took time off, without good reason, during the previous workweek. My colleagues, in agreement with the judge, consider the Respondent's notice to be a clarification of an existing policy. I find, however, that the Respondent, through this notice, announced a unilateral change from its previous practice.

It is clear that the discussion of overtime in the Respondent's handbook applied to situations other than work on reimbursable jobs. Whereas the handbook referred to pay at time and one half for work in excess of 40 hours, the Respondent regularly paid its employees double time on reimbursable jobs without regard to whether the employee had worked 40 hours in a week. Indeed, the Respondent's notice admits by negative implication that the rule set forth in its handbook did not apply to reimbursable jobs. This notice states as follows:

> If the company, for whatever reason, has to authorize overtime and it is not reimbursed by the owner the rule as stated in the policy manual will be followed.

Thus, the Respondent could not address its concerns merely by enforcing its written policy, because that policy did not apply to reimbursable work. Further, it could not rely on its past practice as support for its position because it had paid employees double time on reimbursable jobs even if they had not worked a 40-hour week. Therefore, the Respondent addressed its concerns by changing its policy and past practice. The Respondent was obligated to bargain with the Union

over this change.[2] Its failure to do so violated Section 8(a)(5) and (1) of the Act.

[2] Indeed, that the Respondent had sought to correct what it perceived as a legitimate problem of employee abuse did not absolve it from its obligation to bargain with the Union. Instead of unilaterally implementing its own solution to the perceived abuse, the Respondent was obligated to bargain with the Union concerning possible solutions to the problem.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT fail and refuse to reinstate or to recall economic strikers to their former or substantially equivalent positions because they engaged in union and protected concerted activities.

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

WE WILL offer Jim Bronkhorst, Ken Falk, Ted Fuller, Harold Hill, Grant Maichele, Marty Preston, Mac Rognow, Brian Rowden, and Steve Titus immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

ALLIED MECHANICAL SERVICES, INC.

Joseph P. Canfield, Esq., for the General Counsel.
Barry R. Smith, Esq. and *Gary A. Chamberlin, Esq.*, of Kalamazoo, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Grand Rapids, Michigan, on February 8 through 10, 1994. Subsequent to an extension in the filing date briefs were filed by the General Counsel and Respondent. The proceeding is based on a charge filed February 22, 1993,[1] by Plumbers and Pipe Fitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. The Regional Director's complaint dated July 14, 1993, as amended and consolidated with the two embraced cases, alleges that Respondent, Allied Mechanical Services, Inc., of Kalamazoo, Michigan, violated Section 8(a)(1) and (3) of the National Labor Relations Act by hiring new employees while refusing to reinstate or recall striking employees who made unconditional offers to return to work and violated Section 8(a)(1) and (5) of the Act by changing its premium pay policy without first bargaining with the Union.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the fabrication and nonretail installation of heating, plumbing, and air-conditioning systems in the construction industry in the Kalamazoo area and it annually purchases and receives goods and materials valued in excess of $50 directly from points outside Michigan. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Pursuant to a settlement agreement in Case 7–CA–32727 the Respondent since July 30, 1991, has recognized the Union as the collective-bargaining representative of Respondent's employees in the following ''unit'':

> All full-time and regular part-time plumbers, plumber apprentices, pipe fitters, pipe apprectices, welders, plumbing and pipe fitting service employees and shop employees employed by the Employer at and out of its facility located at 2211 Miller Road, Kalamazoo, Michigan; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

While collective-bargaining negotiations have occurred and continue to occur, no contract has been agreed to.

On two occasions in 1992, the Union struck the Respondent and, at least in part, it appears that the purpose and timing of the strike related to a perceived lack of progress in negotiations.

The first strike occurred on July 20 when 12 employees struck to protest Respondent's coercion and intimidation of employees, constructive discharges of employees, and discrimination against employees (as reflected in the fourth amended complaint in Cases 7–CA–32727, et. al) thus, for example, the employees struck to protest written disciplinary

[1] All following dates will be in 1993 unless otherwise indicated.

warnings issued to employee George Vincent, and because of threats by Respondent to reduce its size and lay off employees.

On August 4, the Union made a written unconditional offer to return to work on behalf of 10 of the 12 striking employees (strikers John Powers and Jim Bronkhorst were omitted from this offer by error). On September 8, the Union attempted to rectify its error, making a written offer to return to work on behalf of Powers and Bronkhorst. On September 11, the 10 employees listed were returned to work but Powers and Bronkhorst were not returned until October 19.

The 12 employees involved in this strike were the nucleus of the Union's support and received a monetary stipend from the Union for engaging in organizational activity among Respondent's other employees. That payment was the difference between the rate received from Respondent and the hourly rate of journeymen employees working in that area under a union contract (one example demonstrated a union rate of $27 versus Respondent's rate of $16 an hour).

The second strike occurred on October 16, when the Union faxed a letter to Respondent announcing the strike and stating that employees Steve Titus, Grant Maichele, Harold Hill, Mac Ragnow, Gil Ragsdale, and Ted Fuller were going on strike due to Respondent's unfair labor practices. On that same date, Respondent faxed a letter to the Union informing the Union that it did not acknowledge or agree that the employees were engaging in an unfair labor practice strike and that it did not recognize the strike as being protected. Assertedly unbeknownst to the Union and strikers, on the day the strike started, Respondent sent a letter to Bronkhorst and Powers accepting the Union's unconditional offer to return to work on their behalf, but, stating they were not to start until October 19.

The purpose of the strike was said to be because of the Respondent's failure to return strikers Powers and Bronkhorst and employee complaints regarding the Respondent's asserted poor treatment of the employees returned to work on September 11 (including Respondent's treatment of employee Steve Titus when he returned to work and its asserted forcing of returning striker Grant Maichele to work in a ditch), and Respondent's conduct during contract negotiations.

Titus had worked on the Respondent's Upjohn project before the strike but when he returned to work Respondent's president, John Huizenga, assigned Titus to a more remote location, the Hercules plant in Portage, Michigan. Titus testified that the Respondent initially declined to provide him with a hardhat and safety glasses and also required him to work in an isolated manner he considered to unsafe. Titus testified that Huizenga said he had never had problems with Titus before, and asked why Titus was doing this to him. Titus asked Huizenga what he meant and Huizenga said the employees were puppets of the Union and they were not acting for themselves. When Titus asked Huizenga why he did not want to ''go Union'' and Huizenga answered that he had been a union man for 16 years and it was because of the Union that they had to close their doors. Huizenga also told Titus that if Titus had given him a chance, Titus would have come up the ladder also.

On November 10, the Union sent Respondent a letter making an unconditional offer to return to work on behalf of five of the six employees who went on strike on October 16. Employee Gil Ragsdale's name was omitted from the letter, again due to an oversight by the Union.

On November 16, the Union and Respondent signed an informal settlement agreement regarding the fifth amended consolidated complaint, and it was Union's business agent, Vince Cristiano's, understanding that the striking employees would be returned to work (the terms of this agreement were negotiated by Respondent's attorney, Smith, and counsel for the Genral Counsel John Ciaramitaro and the Union was not a direct party to these negotiations).

On November 17, all six of the employees who went on the October 16, strike (including Gil Ragsdale), went to Respondent's facility and met with Huizenga. Employee Harold Hill, acting on behalf of the employees present, informed Huizenga that they were making an unconditional offer to return to work. Huizenga's reply to the employees was that he had no work for them, the employees left the premises and Hill told Business Agent Cristiano what Huizenga had said.

On November 30, the Regional Director approved the settlement agreement negotiated on November 16. As far as the Union knew at that point Respondent had not hired any striker replacements and believed that the reason the strikers were not being returned to work at that time was because Respondent had no work for them.

On June 14, 1993, Respondent began hiring new employees and it has hired 26 new employees since that time. Respondent never informed the Union that it did not intend to recall the striking employees when work became available. The Union first found out the employees had been replaced several months after the strike when Respondent's attorney mentioned it during negotiations in a side bar conversation to Business Agent Cristiano. Meanwhile, employee Bronkhorst called Cristiano and urging him to take some action against Respondent because of its hiring of new employees before returning the strikers to work. The 12 employees who were the nucleus of the Union's support met with Cristiano and discussed their grievances, including Respondent's failure to return the October 16 strikers and the hiring of new employees.

On June 24, 1993, Cristiano faxed a letter to Respondent informing Respondent that employees Jim Bronkhorst, Ken Falk, Marty Preston, and Brian Rowden were going on strike because of Respondent's unfair labor practices, and they started a strike the same day. The striking employees were referred to jobs by the Union at the start of this strike (as they were at the time for the October 16, strike), but the Union did not know how long those jobs would last.

On June 25, 1993, Respondent sent a letter to the Union informing the Union tha it considered the June 24 strike to be unprotected. On July 6, 1993, the Union sent Respondent a letter making an unconditional offer to return to work on behalf of the June 24 strikers. To date, Respondent has failed to return any of the employees who went on strike on October 16, 1992, or June 24, 1993.

An employee of the Respondent's accounting department, Judy Kuntzman, testified that Respondent had a system whereby it paid overtime pay for weekend work even if an employee did not work 40 hours in the previous week if the job was what Respondent terms ''reimbursable,'' that is, under a customer contract that authorizes this payment. In July 1993, Kuntzman noticed that on certain jobs some employees were regularly taking off during the week, yet re-

ceiving overtime pay for weekends. She informed Huizenga what was going on and, as a result, Respondent issued a document entitled ''Policy On Overtime Pay,'' in which it stated that overtime would not be paid for weekend work when it appeared that employee missed work during the week without good reason. This statement was announced unilaterally, without consultation or negotiations with the Union. On brief, counsel for the General Counsel renews a motion first proposed during the hearing in this matter to amend the complaint in this matter to allege that since on or about August 1993, and continuing to date, Respondent, through its agent John Huizenga, has withheld overtime premium pay from certain employees working on weekends and that on August 1993, Respondent, by its agent John Huizenga, withheld overtime premium pay from certain employees working at Respondent's project at Upjohn's building 89. As the proposed amendment is based on evidence presented by Respondent during the trial in this matter; the facts are closely related to the allegations presently encompassed in the complaint, are of the same class of violations, arose form the same factual circumstances, involved the same Respondent defenses, and was fully litigated, I will accept the amendment, see *Pergament United Sales*, 296 NLRB 333, 334 (1989); and *Redd-I, Inc.*, 290 NLRB 1115 (1988).

III. DISCUSSION

A. *Alleged Change in Premium Pay Policy*

The Respondent maintains a formal, written overtime policy in its employee handbook. This policy provides:

> 4.05 *Premium Pay*
>
> Overtime is authorized work performed in excess of forty (40) hours perwork week and time and one-half (1-1/2) the regular straight time hourly rate for salaried and non-salaried employees who are non-exempt under the Fair Labor Standards Act.

Kuntzman testified that when scheduled employees for weekend work on a reimbursable job and was paid at premium rates by the owner, the Company had followed a practice of passing the Sunday double time premium pay on to its employees. If weekend work was performed on a non-reimbursable job, however, an employee would not receive overtime until he had exceeded 40 hours per week.

In August 1993 Kuntzman noticed a pattern of apparent employee abuse of the premium pay policy whereby several employees working on a reimbursable job were repeatedly taking time off during Monday through Friday and then, would work on the weekend and receive premium pay, even though they had not worked in excess of 40 hours.

The Respondent addresses this abuse with a policy clarification as follows:

> The only exception to this policy is as follows:
>
> > When an owner agrees to reimburse the company for all overtime and the company receives this reimbursement, we in turn will pass this on to the employee. Employees will, however, be penalized this overtime pay until they reach 40 hours if they ''play the game'' of missing work during the week only to make it up on the weekend with overtime. This is considered unfair to both the company and to the owner we are working for.
> >
> > If the company, for whatever reason, has to authorize overtime and it is not reimbursed by the owner the rule as stated in the policy manual will be followed.

It also was established that employee Brad Wallace worked at Respondent's Upjohn building 89 job in August 1993, but was denied premium pay after being told by his supervisor that he would receive overtime rates for weekend work. The employer showed, however, that Wallace was not working on a reimbursable job and his total hours did not exceed 40 in that pay week. Therefore, he was not entitled to overtime pay and he was specifically informed of this when he first complained to President John Huizenga.

Here, the record shows that the Employer had a premium pay policy that provides for pay at time and one half for all hours worked over 40 in a workweek and that it followed a practice of passing on higher levels of premium pay to employees who work on reimbursable jobs when an owner pays the Company for weekend work. In that case, the employee would receive time and one half for Saturday work and double time for Sundays.

I agree with the Respondent that the employer's notification that it would not bill customers reimbursable overtime (and will not pay premium pay) when in fact employees have missed work during the week but worked on weekend in order to work less for the same or a greater amount of money is a clarification that the policy would be followed except under limited circumstances where there has been ''game playing'' in an employee's missing work and not a change in policy that would be a mandatory subject of bargaining.

Here, as noted by the Respondent, the Employer has not attempted to disavow the Union's authority as exclusive bargaining representative on behalf of employees in negotiations over terms and conditions of employment and it otherwise has solicited input from the Union on even minor proposed benefit changes, and has held off on making these changes when the Union objected.

Moreover, Brad Wallace's complaint did not relate to a reimbursable job contract and resulted in no loss in premium pay and the Union did not make a timely request to bargain with the Employer about this overall matter, even though it was participating in bargaining on these same matters at this time (the Employer's contract proposal mirrored its longstanding premium pay policy contained in the employee handbook and the Union's overtime provisions of its proposal submitted in December 1993 were identical to the Union's previous submission in September 1992, and did not change its proposal in response to any alleged unilateral change in overtime pay).

Under these circumstances, I concluded that the record fails to support a conclusion that the Respondent has improperly withheld overtime premium pay or has changed its premium pay policy or has failed to bargain with the Union over this subject and I find that the Respondent has not violated Section 8(a)(1) and (5) of the Act in this respect, as alleged.

B. *Refusal to Recall Striking Employees*

The Union struck the Employer on three occasions and on each occasion it made valid subsequent unconditional offers to return on behalf of the striking employees. All were returned to work after the first strike, however, six employees were not reinstated after the October 16 strike and four employees were not reinstated after the June 24, 1993 strike.

In a discharge or tenure of employment situation such as that involved in this proceeding the Board applies a causation test that requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate or, as here, fail and refuse to reinstate.

Here, the General Counsel has shown that the alleged discriminatees engaged in two union endorsed economic strikes at a time when the Employer and the Union were engaged in ongoing negotiations of a collective-bargaining agreement (here there also is evidence that employees were concerned in the second strike with asserted unfair labor practices regarding alleged poor treatment of employees who returned after the first strike and, in the third strike with the alleged unfair labor practices of the Employer's failure to recall strikers after the end of the second strike).

Under these circumstances, it is shown that both the employees' second strike on October 16, 1992, and their third strike on June 24, 1993, were activities protected by Section 7 of the Act. Accordingly, under the principles laid down by the Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and by the Board in *Laidlaw Corp.*, 171 NLRB 1366 (1968), these strikers had continued status as employees and entitlement, on request, to be returned to their former job, or a substantially equivalent positions, absent proof of ''legitimate and substantial business reasons.'' Moreover, once the strikers made unconditional offers to return to work, it was the Respondent who bore the burden of seeking out and contacting the employee and the mere passage of 3 to 10 months would not limit the employees' fundamental right to reinstatement. See *U.S. Mineral Products Co.*, 276 NLRB 140, 142 (1985).

Otherwise, the Respondent's own argument that it denied reinstatement to the strikers because they were paid union organizers or ''salts'' specifically supports a conclusion that it was motivated by their union activities and, accordingly, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union and concerted activities were a motivating factor in Respondent's subsequent decision to deny them reinstatement. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980). See *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

Under both the *Wright Line* and *Laidlaw* test the burden of proving justification for a failure to recall is on the employer. Here, it is clear that after both the second and third strike and the corresponding unconditional offers to return to work, the employer disregarded its employees' fundamental right to reinstatement and instead, on and after June 14, 1993, hired 26 new employees.

The Respondent first contends that the Regional Director's November 30 approval of a settlement agreement negotiated on November 16 following the second strike (that of October 16) bars litigation of the Employer's presettlement conduct and contend that for this issue to survived it must be specifically reserved citing *Cambridge Taxi Co.*, 260 NLRB 931 (1982).

The General Counsel, however, accurately points out that while the settlement agreement might arguably bar the litigation of the events which led up to this strike as unfair labor practices, it is clear that it does not bar establishing the fact that the strike was a protected economic strike and that Respondent's and postsettlement hiring of new employees and refusal to reinstate the strikers was subsequent conduct that violated the Act. Here, the settlement agreement was silent on the subject of reinstatement and the record shows that prior to the agreement and on the employee November 17 unconditional offer to return to work, the Respondent did not inform the Union that it would refuse to reinstate the strikers and only said that there was no work for them. Therefore, neither the Union nor the General Counsel could have know and they could not have readily discovered that Respondent was refusing to reinstate the strikers. See *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978).

Inasmuch as the settlement agreement negotiated November 16 did not specifically waive the employees' *Laidlaw* rights, it cannot be found that the Respondent's postsettlement conduct in repudiating these fundamental rights is subject to any settlement bar theory and, accordingly, its defense in this respect must fail.

The Respondent theorizes that the strikes were unprotected because the strikes were not motivated by employee concerns over employer unfair labor practices. Here, the employees' *Laidlaw* rights are not dependent on unfair labor practice concerns or on the correctness or effectiveness of the Union's predisposition to use a strike as a tool to influence contract negotiations. Employees may strike for a good or judicious reason or for a bad or unwise reason and the employer's perception of the reason does not control the protected nature of the activity.

Moreover, as pointed out by the General Counsel, the traditional approach by the Board is that if the strike is not an unfair labor practice strike, it is nevertheless an economic strike. See, e.g., *Commercial Candy Vending Division*, 294 NLRB 908 (1989), and when unfair labor practices cease to be the motivating factor for a strike, the strike is viewed as economic *Trident Seafoods Corp.*, 244 NLRB 566, 569–570 (1979), enfd. 642 F.2d 1148 (9th Cir. 1981).

The Respondent also implies that the strikes were unprotected because the Union waited to strike until a time when it could place the strikers in other jobs, and because the length of the strikes were related to the length of the interim employment. The Board, however, has found that the timing of a strike to accommodate the Union's interests does not make the strike unprotected. *R & H Coal Co.*, 309 NLRB 28 (1992).

Respondent also contends the strikes were unprotected because the Union did not communicate the reasons for the strike to Respondent and because the strikers had no independent reasons and merely did what the union representative told them to do. Here, I find that the ongoing first contract negotiations by the employees' certified representative provides a valid reason and basis for a protected concerted activity and, as the employees otherwise were not coerced to participate in the strike, I find that their acquiesence in the

Union's decision is irrelevant to any evaluation of the protected nature of their conduct.

Otherwise it is shown that striker Titus spoke with the Respondent's president about being reassigned to a more remote jobsite after his return from the first strike and it has been found that in similiar circumstances that Respondent cannot blind itself to the surrounding actions and claim that it did not know the walkout was based on a protected activity. See *Eaton Warehousing Co.*, 297 NLRB 958, 961–962 (1990), enfd. mem. 919 F.2d 141 (6th Cir. 1990).

Here, the Union in each instance sent a letter that advised the Employer that they were striking because of ''unfair labor practices.'' Thus, a reason was given and the ultimate validity of unfair labor practice allegations again is not relevant or a justification for a failure to afford striking employees their *Laidlaw* rights. Moreover, in *Scioto Coca-Cola Bottling Co.*, 251 NLRB 766 (1980), the Board said:

> In order to find that a discharge . . . for engaging in protected activity violated Section 8(a)(1) *it is not necessary at the time of the occurrence that the employer knew that the activity is protected . . . if in fact it is.* However, in order for the Board to make such a finding there must be some evidence on the record from whatever source that the activity engaged in was not only concerted but, more significantly, that it was in fact protected. [Emphasis added.]

Finally, the Respondent also contends that the strikers were not employees because they received money from the Union for engaging in organizing activity while in Respondent's employ. The Board, however, consistently has found that paid union organizers are employees within the meaning of the Act, and entitled to the protection of the Act. *Town & Country Electric*, 309 NLRB 1250 (1992); *Sunland Construction Co.*, 309 NLRB 1224 (1992), as reaffirmed in *Sunland Construction Co.*, 311 NLRB 685 (1993), a case which specifically disagrees with an argument citing *H. B. Zachry Co.*, 886 F.2d 70 (4th Cir 1989), a case relied on here by the Respondent.

Here, the so-called salts were regular employees of Respondent and were primarily working for Respondent in order to receive wages for work performed. They engaged in organizing activity only incidental to their work and were paid only the difference between the Respondent's wage level and the area union wage level and I find no persuasive reason why they should be considered to have relinquished their status as statutory employees. Here, it may be inferred that on the negotiation of a mutually agreeable wage level and the entering into a collective-bargaining agreement, a union wage level would be in effect at the Employer and its union employees would no longer receive supplemental stipends from the Union. Thus, contrary to the situation in *Ultrasystems Western Contractors v. NLRB*, 18 F.3d 251 (4th Cir. 1994), also relied on by the Respondent, the employees here were primarily employees of the Company, not the Union, and they intended to remain as plumbers and pipefitters, rather than as union organizers.

As noted above, the burden of showing special circumstances which would justify taking away an employee's protection under the Act is on the Respondent proponent. It is a serious burden that should not be lightly evaluated and here there are no compelling circumstances that would prove that the involved strikers were not primarily employees. Accordingly, it cannot be held that they have lost the protection of the Act by their receipt of supplemental payments for their union organizational activities. Otherwise, the Board's prevailing policy is to consider even those who are union employed organizers to be entitled to the protection of the Act and, under all these circumstances, I find that the Respondent has failed to show that it had legitimate and substantial business reasons for failing to reinstate former strikers at the time it began to hire new employees.

Accordingly, I find that the General Counsel has shown that the employees who struck Respondent on both October 16, 1992, and June 24, 1993, were engaged in an economic strike; that these employees, including employee Ragsdale, made unconditional offers to return to work; that Respondent refused to reinstate these employees pursuant to those offers, but instead hired new employees contrary to the employees *Laidlaw* rights and that it violated Section 8(a)(1) and (3) of the Act, as alleged.

Conclusions of Law

1. Respondent Allied Mechanical Services, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Jim Bronkhorst, Ken Falk, Ted Fuller, Harold Hill, Grant Maichele, Marty Preston, Mac Rognow, Gil Ragsdale, Brian Rowden, and Steve Titus are statutory employees of the Respondent and valid unconditional offers to return to work were made on behalf of each following their participation in a protected strike.

4. By failing and refusing to reinstate the named employees when jobs became available on and after June 14, 1993, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain uunfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policiies of the Act.

Inasmuch as Respondent failed and refused to offer timely recall on and after June 14, 1993, to the following individuals who made valid offers to return to work from an economic strike: Jim Bronkhorst, Ken Falk, Ted Fuller, Harold Hill, Grant Maichele, Marty Preston, Mac Rognow, Gil Ragsdale, Brian Rowden, and Steve Titus, it is recommended that Respondent must offer them reinstatement to their former jobs or substantially equivalent positions, dismissing, if necessary, any employees hired subsequent to June 14, 1993, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date or rein-

statement in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 1173 (1987).[2] See also *Dean General Contractors*, 285 NLRB 573 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Allied Mechanical Services, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate or to recall economic strikers to their former or substantially equivalent positions because they engaged in union and protected concerted activities.

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

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

(a) Offer Jim Bronkhorst, Ken Falk, Ted Fuller, Harold Hill, Grant Maichele, Marty Preston, Mac Rognow, Gil Ragsdale, Brian Rowden, and Steve Titus immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section.

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

(c) Post at its facilities in Kalamazoo, Michigan, and at its jobsites in the Kalamazoo area, and mail to the named employees at their last known address copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

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

[4] 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.''