

Towne Ford, Inc. and International Association of Machinists and Aerospace Workers Peninsula Lodge No. 1414. Cases 20–CA–26250 and 20–CA–26447

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 16, 1996, Administrative Law Judge Jay R. Pollack issued a decision in this case. On February 22, 1996, the judge issued an errata to his decision and the attached revised decision. The Respondent filed limited exceptions and a supporting brief and the General Counsel and the Union (the Charging Party) filed exceptions and supporting briefs. Thereafter, the Respondent filed an opposition to the General Counsel's and the Union's exceptions and the Union filed a brief in reply to the General Counsel's 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 and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions

¹ The Respondent has excepted, inter alia, to the judge's failure to grant its motion to revoke subpoena ad testificandum, its motion for suppression of evidence, and its motion for sanctions against the General Counsel and the Regional Director. We deny these exceptions as lacking in merit.

On the last day of hearing, August 28, 1995, counsel for the General Counsel moved to amend the complaint to allege that the mid-August 1994 statement of Ben Kopf, the Respondent's president, to service advisor Ray Haverson, that Kopf didn't like unions and he would not be union, regardless of how much it cost and how long it took, violated Sec. 8(a)(1). That allegation was supported by the testimony of Haverson, and the General Counsel contends that the judge erred by refusing to permit Haverson's recall to permit the Respondent to cross-examine him regarding his testimony on this issue, which Haverson gave on the third day of hearing, June 22, 1995, and by failing to find an 8(a)(1) violation based on Haverson's testimony. We find the General Counsel is foreclosed from making these arguments here because counsel for the Union, in apparent agreement with counsel for the General Counsel and the Respondent, ultimately agreed on the last day of hearing that counsel for the General Counsel and the Union were "not going to pursue the 8(a)(1) on Haverson as an independent 8(a)(1) at this point" and that the General Counsel and the Union reserved the right to reopen the issue if the Board were to remand the case to the judge in the future.

² Apprentice painter Jack Flanagan spoke to Dave Haley, the Respondent's body shop manager, on August 23, 1994, not August 16 as the judge found. This inadvertent error does not affect the results of our decision.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to their dissenting colleague, Member Fox and Member Liebman agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act by attempting to blacklist service advisor Ray Haverson through the statement of Tim Toland, the Respondent's service manager, to a potential employer, Angelo Tufo, that Haverson was a strong union supporter who "would do whatever the Union said." Although

only to the extent consistent with this Decision and Order.³

1. On August 28, 1995, the judge issued an Order Granting Partial Dismissal, attached as Appendix A to this decision, in which he granted in part the Respondent's motion to dismiss certain complaint allegations in Case 20–CA–26250. In this regard, the judge dismissed all the allegations which alleged that the Respondent had violated Section 8(a)(5) of the Act by refusing to bargain in good faith with the Union. We agree with the judge that under *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the 8(a)(3) and (1) allegations contained in the amended charge in Case 20–CA–26250 are not sufficient to support the 8(a)(5) allegations contained in the complaint.⁴ The judge further found that since he lacked jurisdiction to find that the Respondent refused to bargain, he could not find that such alleged unfair labor practices converted the economic strike, discussed below, into an unfair labor practice strike. We agree with the judge and find that the strike which began on July 27, 1994,⁵ and ended on August 5, was an economic strike from its inception.⁶

Toland gave Haverson a good recommendation as a worker, we find that Toland's unsolicited statement regarding Haverson's union loyalties constituted a warning that Haverson was someone with unquestioning loyalties to the Union, and was therefore likely to interfere with Haverson's application for employment. The fact that Tufo had already offered Haverson a position is immaterial because Tufo could simply withdraw that offer after learning that Haverson was a strong union supporter.

³ We shall modify the judge's recommended Order to include provisions that are in accord with our decision in *Indian Hills Health Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.*, 325 NLRB 17 (1997).

⁴ In adopting the judge's dismissal of these 8(a)(5) allegations, Member Fox and Member Liebman do not rely on his discussion of *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994).

⁵ All dates hereafter refer to 1994 unless otherwise stated.

⁶ The General Counsel and the Union have excepted to the judge's dismissal of these 8(a)(5) allegations and his failure to find that the strike was an unfair labor practice strike. The General Counsel and the Union contend that the judge erred in failing to find that the requirements of Sec. 10(b) of the Act are satisfied here because the complaint in Case 20–CA–26250 was filed within the 10(b) period and the 8(a)(5) allegations contained in the complaint in Case 20–CA–26250 are closely related to the allegations contained in the charge, as amended, in that case. We find this exception without merit because, as explained by the judge in his Order Granting Partial Dismissal, although the amended charge in Case 26–CA–26250 (unlike the initial charge) mentioned Sec. 8(a)(5), it failed to include any factual allegations indicating "specifically or generally that Respondent had failed to bargain in good faith"; and because the General Counsel solicited a withdrawal of the one charge (in Case 20–CA–26222) that did include a refusal-to-bargain allegation. That withdrawal occurred on July 27, 1994, a little less than a month before the amended charge in Case 26–CA–26250 was filed. Thus, the possibility of a refusal-to-bargain allegation was known to the Charging Party and the General Counsel when the amended charge was being filed and the failure to include it in the amendment excludes that as a theory of the case, even when, as here, a complaint containing the refusal-to-bargain allegation issued within the 10(b) period. Further, contrary to the Union, it is irrelevant that the Union initially brought the issue "to the attention" of the Regional Office, because a determination whether complaint allegations are

2. The judge found, and we agree, that the Respondent violated Section 8(a)(3) of the Act by laying off, or refusing to reinstate in the absence of substantial business reasons, strikers Ray Haverson, Ron Cosgrove, and Steve Stewart at the end of the economic strike on August 5. The issue here is whether apprentice painters Jack Flanagan and Patrick Heffernan were entitled to be recalled to the newly created polisher position after the strike. Contrary to the judge, we find that they were.

The judge's factual findings, as supplemented by uncontroverted testimonial evidence, establish that prior to the strike there were three classifications of employees in the Respondent's paint shop, helpers, apprentice painters, and journeyman painters. The helpers performed prep work (rough sanding, masking, priming, "jamming" (painting the inside of door jambs), and blocking). The painters spray painted cars and performed some polishing work. Apprentice painter Flanagan testified without contradiction that apprentice painters "[took] a job all the way through," i.e., they performed all three tasks, prepping, painting, and polishing.⁷ After the strike, however, as the judge explained, Haley, the Respondent's new body shop manager, reorganized the paint shop into three separate operations, prepping, painting, and polishing. The recalled journeyman painters and helpers performed the painting and prep work respectively. Instead of immediately recalling the apprentice painters, however, the Respondent hired new employees to fill the newly cre-

barred by Sec. 10(b) depends on analysis of charges that were filed and remained on file.

We deny the Respondent's motion to strike certain portions of both the General Counsel's and the Union's briefs "related to the facts giving rise to the improperly alleged Section 8(a)(5) allegations."

After the judge dismissed these 8(a)(5) allegations, the General Counsel moved to amend the complaint to restore the allegation that the Respondent violated Sec. 8(a)(5) by eliminating the classification of apprentice painter, a mandatory subject of bargaining, without notifying or bargaining with the Union. The General Counsel contends that the judge erred by refusing to grant its motion to reinstate this 8(a)(5) violation. In this regard, the General Counsel argues that the Respondent waived the dismissal of this allegation because in defending against the 8(a)(3) allegation that it had discriminatorily refused to recall the apprentice painters after the strike, the Respondent raised and litigated an 8(a)(5) defense by, in effect, asserting that it had legitimate business reasons for the elimination of the apprentice painter classification. Thus, the General Counsel apparently contends that the Respondent has waived the application of Sec. 10(b) by its conduct in defending against this 8(a)(3) allegation. We deny the General Counsel's exception because we cannot agree that the Respondent, in defending against an alleged violation of Sec. 8(a)(3) of the Act, somehow "waived" its 10(b) defense to the 8(a)(5) allegations contained in the complaint.

⁷ Flanagan also testified without contradiction that polishing involved color sanding with fine sandpaper to get dirt or a run out of the new paint and polishing to bring back the shine. Flanagan further explained that there was a danger of burning through the paint, in which case the car would have to be repainted. Body Shop Manager Haley testified that "polishing in itself is an art. Even good polishers can burn a paint job."

ated position of polisher.⁸ As noted above, the apprentice painters had performed this work prior to the strike.

The judge found that the Respondent was not obligated to reinstate Flanagan and Heffernan because there was no work for the apprentice painters to perform at the conclusion of the strike. The judge further found that while the apprentice painters were qualified to perform the work of polisher, the Respondent was not obligated to reinstate them to the polisher position. In this regard, the judge, citing *Rose Printing Co.*, 304 NLRB 1076 (1991), found that the newly created polisher position was not substantially equivalent to the apprentice painter position because the job of polisher was less skilled and paid less than the job of apprentice painter. The judge also observed that performing the polishing work would not help the apprentices become journeyman painters.

We acknowledge that Board law, as stated in *Rose Printing*, supra at 1076, defines an employer's reinstatement obligation to former economic strikers (its so-called *Laidlaw* obligation)⁹ as limited to the offer of reinstatement to "vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs." Contrary to the judge, however, we find that, given the changes which the Respondent had made in its organization of the work, the polisher position was substantially equivalent to the apprentice painter position which Flanagan and Heffernan had held before the strike, and they were therefore entitled to be reinstated to vacant polisher positions on their offers to return following the strike.

It is undisputed that polishing work was a not insignificant part of the job that apprentice painters had performed before the strike, and had the three been working as apprentice painters at the time the reorganization of the operation into three separate functions occurred, they would logically have been moved to the polisher position. Only they and the journeyman painters did polishing work, and under the reorganization, the journeyman painters moved to the job that was exclusively painting. (We take the reorganization as the logical framework for analysis because there is no non-barred allegation that this was undertaken unilaterally in violation of the Act.) Thus, in finding substantial equivalence, we are not running afoul of the *Rose Printing* rule that there is no *Laidlaw* obligation to reinstate strikers to *any* position for which they are qualified, without regard to what they did before the strike. Rather, we are carrying out what was acknowledged in *Rose Printing* as the Board's duty: "to ensure that strikers who have unconditionally offered to return to work are . . . treated the same as they would

⁸ R. Exh. 29 indicates that polisher Ian Deal left the Respondent's employ on March 1, 1995, not in November 1994 as the judge found. We leave to compliance the resolution of this issue for backpay purposes.

⁹ *Laidlaw Corp.*, 171 NLRB 1366 (1968).

have been had they not withheld their service.” *Id.* at 1078.

The circumstances here are somewhat similar to those in *Medallion Kitchens*, 277 NLRB 1606 (1986), *enfd.* in relevant part 811 F.2d 456 (8th Cir. 1987), in that the prestrike positions were changed by virtue of circumstances not alleged as discriminatory, and the employer was required to offer the strikers the modified positions because they involved the same work that the strikers had done before the strike. There, the new circumstance was damage suffered by the plant in a fire and the employer’s decision to move to a new plant a great distance away. As the operations at the old plant wound down and replacements left, certain limited duration positions came open, and it was to these that the Board required reinstatement offers, even though the pre-strike positions had not been temporary. 277 NLRB at 1614.¹⁰ Had the employees not gone on strike, they would have been filling those positions.

Accordingly, the Respondent was obligated to reinstate apprentice painters Flanagan and Heffernan to polisher positions unless the Respondent “[could] sustain [its] burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.” *Laidlaw Corp.*, 171 NLRB 1366, 1370 (1968). Since the Respondent has failed to present such legitimate and substantial business reasons here, we find that the Respondent violated Section 8(a)(3) by failing to reinstate apprentice painters Flanagan and Heffernan to the newly created polisher position.

ORDER

The National Labor Relations Board orders that the Respondent, Towne Ford, Inc., Redwood City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Attempting to blacklist an employee by telling other employers about that employee’s union activities or union sympathies.

(b) Threatening employees with reprisals for engaging in union activities or other protected concerted activities.

(c) Laying off employees for engaging in an economic strike or failing and refusing to reinstate employees upon

¹⁰ For the same reason, the difference in pay between the prestrike apprentice painter positions and the poststrike polisher positions does not automatically defeat a finding of substantial equivalence. The change in pay was not alleged as unlawful, so presumably Flanagan and Heffernan would lawfully have been paid at this rate once the division of work had been altered, even if they had never gone on strike. We note that in *Medallion Kitchens*, the employer also paid lower wages and benefits to employees hired into the temporary positions, and the judge nonetheless found substantial equivalence, noting, *inter alia*, that the “pay and benefits [for the temporary positions] were set unilaterally by [the employer] after the strike ended.” Although, as our dissenting colleague points out, the reviewing court assumed that the strikers would have been paid their regular wages and benefits if they had been reinstated into the temporary positions, the court’s main point was that a determination of “substantial equivalence” rests on many factors. 811 F.2d at 460.

their unconditional offer to return to work from a strike without substantial business justification.

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

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

(a) Within 14 days from the date of this Order, offer Ron Cosgrove and Ray Haverson 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.

(b) Make Steve Stewart, Jack Flanagan, Patrick Heffernan, Ron Cosgrove, and Ray Haverson 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 judge’s decision.

(c) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Redwood City, California facility copies of the attached notice marked “Appendix.”¹¹ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting in part.

I agree with my colleagues’ findings, except as follows: I would not find that the Respondent violated Section 8(a)(1) of the Act by attempting to blacklist service

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.”

advisor Haverson; further, contrary to my colleagues, I would adopt the judge's finding that the Respondent did not violate Section 8(a)(3) of the Act by refusing to recall two former economic strikers, apprentice painters Flanagan and Heffernan, to the newly created polisher position. I shall discuss these issues in turn.

1. As to the alleged blackballing of Haverson, the judge has fully set out the facts. In brief, in July 1994,¹ Tufo, the service manager of another dealership, offered Haverson a job. After the economic strike at the Respondent's facility, which began on July 27 and ended on August 5, the Respondent refused to reinstate Haverson on the ground that he had been permanently replaced. In mid-August, Tuvo called the Respondent's service manager, Toland, to obtain a reference for Haverson. Toland gave Haverson an excellent recommendation. As found by the judge, Toland also stated that Haverson was a strong union person who "would do whatever the Union said." Emphasizing that Toland had volunteered this information, the judge found that the Respondent violated Section 8(a)(1) by attempting to blackball Haverson. My colleagues adopt the judge's finding of this violation. I disagree.

As relevant here, in order to establish that a respondent has violated Section 8(a)(1) by attempting to blackball, or blacklist, an individual in violation of Section 8(a)(1), the General Counsel must show that the respondent interfered in the employment process by causing or attempting to cause a potential employer not to hire the applicant because of the applicant's union or other protected concerted activities. In *Madison South Convalescent Center*, 260 NLRB 816 (1982), for example, an official of the respondent had described former employee Freeburger as a "union agitator" to a prospective employer who had called for a reference in regard to Freeburger's employment application. In finding this conduct violative of Section 8(a)(1), the judge explained that

[s]uch labeling of employees would have a natural tendency to impede and interfere with an applicant's employment opportunities. Such interference amounts to blacklisting and has been held by the Board to be a violation of Section 8(a)(1) of the Act.²

In the present case, by contrast, Toland, in responding to Tuvo's request for a reference for Haverson, neither disparaged Haverson's work nor labeled Haverson a union agitator or a union instigator. To the contrary, Toland gave Haverson an excellent reference and spoke highly of him as an employee. In this context, I would not find Toland's statement—that Haverson was a strong union supporter and would do what the Union told him—was unlawful. In this regard, in light of Toland's very

strong recommendation, I find his further observation, to the effect that Haverson was a strong union supporter, could not reasonably be said to be an attempt to cause Tuvo not to hire Haverson.³ Indeed, this would have been impossible in any event because, as the judge himself noted, Tuvo had already offered Haverson a job prior to calling Toland. For all these reasons, I would reverse the judge and dismiss this allegation.

2. As to the 8(a)(3) allegation that the Respondent unlawfully refused to reinstate former economic strikers Flanagan and Heffernan to the newly created polisher position, I agree with the judge that the polisher position was not substantially equivalent to their prestrike positions as apprentice painters, and that therefore the Respondent was not obligated to reinstate Flanagan and Heffernan to the polisher position.

As explained in *Rose Printing Co.*, 304 NLRB 1076, 1077-1078 (1991) (emphasis in original):

[T]he touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially equivalent to, the prestrike job. To be sure, the striker's qualifications are not irrelevant. The issue of whether the striker is qualified to perform the job may shed light on whether the job is substantially equivalent. . . . it may well be that the job must be substantially equivalent to the prestrike job *and* the striker must be qualified to fill it. But the essential point is that mere qualification to perform the job will not suffice.

In determining whether two positions are substantially equivalent, the Board examines, inter alia, the wages, benefits, duties, and skills of the two jobs. Thus, in *Rose Printing*, supra, the Board reversed the judge, who had found that "[t]he Board clearly obligates an employer to offer former strikers any available unit position for which they are qualified,"⁴ and found that the Respondent did not violate Section 8(a)(3) by failing to offer certain former economic strikers who had worked in the respondent's bindery department reinstatement to entry level general worker positions. The Board reasoned that the available general worker positions

³ I find distinguishable the cases cited by the judge in support of his finding of this violation. Thus, in *Springfield Manor*, 295 NLRB 17, 30 (1989), the judge found that the respondent violated Sec. 8(a)(1) by telling a potential employer that the respondent had discharged a former employee because of union activity; in *Truck & Trailer Service*, 239 NLRB 967, 970 (1978), the judge found that the respondent there violated Sec. 8(a)(1) by telling the potential employer of former employee Moody that Moody was a union instigator and was not a desirable person to have working for him; and in *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 642 (1st Cir. 1982), the court upheld the Board's finding that the respondent violated Sec. 8(a)(1) by advising a potential employer not to hire a former employee of the respondent because the former employee had been a "troublemaker" who had caused the respondent grief. By contrast, in the present case, Toland gave Haverson a glowing recommendation and simply noted that he was a strong union supporter.

⁴ Id. at 1083.

¹ All dates hereafter refer to 1994 unless otherwise stated.

² Id. at 823. See also *Advance Window Corp.*, 291 NLRB 226, 228 (1988).

were not substantially equivalent to the former strikers' bindery department jobs because of the lower wages and skill levels required for the general worker position.⁵

Applying this analysis here, the judge found that although the apprentice painters were qualified to perform the work of polisher, the Respondent was not obligated to reinstate the apprentice painters to the polisher position because the polisher position was not substantially equivalent to the position of apprentice painter. In reaching this conclusion, the judge relied on the facts that the polisher position was less skilled and paid less than that of apprentice painter. Since the judge's analysis is in accord with Board precedent, I agree with his finding that the polisher position is not substantially equivalent to that of apprentice painter. Accordingly, I would find that the Respondent did not violate the Act by refusing to reinstate apprentice painters Flanagan and Heffernan to the polisher position.

Finally, I find the majority's analysis of this issue unpersuasive. In finding the polisher position substantially equivalent to the apprentice painter position, the majority professes to find substantial equivalence on the basis of the comparable skills and duties of the two positions. However, as the judge found, this is simply not true. For while the polisher position may require some skill, the skill level needed for polishing cars is not the same as that required for painting, which, after all, was the apprentice painters' primary job. In this regard, as the judge noted, the skills involved in polishing would not help the apprentice painters become journeyman painters. Further, I find unpersuasive the majority's reliance on *Medallion Kitchens*, 277 NLRB 1606, 1614 (1986), enf. in relevant part 811 F.2d 456 (8th Cir. 1987), for the proposition that the fact that an available position offers lower wages than a former job does not establish that the jobs are not substantially equivalent. As the court explained on review, although the 24 new hires who filled the positions at issue received substantially lower wages than did the regular production workers, if Medallion had reinstated former bargaining unit employees to the positions at issue instead of hiring new employees, Medallion would have had to pay each worker regular production wages. *Medallion Kitchens v. NLRB*, supra at 460 fn. 2. Accordingly, there would have been no disparity in wages between the former economic strikers' previous

⁵ See also *Oregon Steel Mills*, 300 NLRB 817, 822 (1990) (position offered to former economic striker Hunker not substantially equivalent to former position because the salary was less and required Hunker to rotate shifts, periodically working nights and weekends, where he had worked straight days before the strike); and *Chicago Tribune Co.*, 303 NLRB 682, 694 (1991) (offer of reinstatement to former economic strikers was not an offer to former jobs or substantially equivalent positions where wages and benefits offered to former strikers was substantially less than wages and benefits set out in applicable contract).

positions and the positions found substantially equivalent.⁶

Thus, stripped of its rhetoric, the majority's analysis is simply that the polisher position must be substantially equivalent to the apprentice painter position because the apprentice painters, having performed polishing work prior to the strike, are obviously qualified to perform that work. But this is precisely the logic which the Board explicitly rejected in *Rose Printing*, supra, and which the judge properly found without merit here.⁷

In sum, I agree with the judge that the polisher position is not substantially equivalent to the apprentice painter position. Accordingly, I would adopt the judge's finding that the Respondent did not violate the Act by refusing to reinstate apprentice painters Flanagan and Heffernan to the newly created polisher position.

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 attempt to blacklist an employee by telling other employers about that employee's union activities or union sympathies.

⁶ In this regard, I observe that the judge in *Medallion Kitchens* appears to have based his finding of substantial equivalence on the ground that the former strikers were qualified to do the jobs which the 24 newly hired temporary employees were to perform. Id. at 1614 fn. 16. As explained elsewhere in my dissent, this is precisely the logic which the Board rejected in its analysis of substantial equivalence in *Rose Printing*, supra.

⁷ I also reject the majority's assertion that the polisher and apprentice painter positions must be substantially equivalent because the apprentice painters, had they been working at the time of the reorganization, "would logically have been moved to the polisher position." In asserting, in effect, that vacancy establishes substantial equivalence, the majority is assuming what it would prove. That the apprentice painters were left without work and that the polisher position was vacant after the reorganization, do not establish that the polisher position is substantially equivalent to the apprentice painter position. Thus, while the majority's "logic" might apply if this were a case of musical chairs, the issue here is not whether the polisher position, or "chair," was vacant, but whether it is substantially equivalent to the apprentice painter position. For the reasons set out above, I find that it is not substantially equivalent.

WE WILL NOT threaten employees with reprisals for engaging in union activities or other protected concerted activities.

WE WILL NOT lay off employees for engaging in an economic strike or fail and refuse to reinstate employees on their unconditional offer to return to work from a strike without substantial business reasons.

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

WE WILL, within 14 days from the date of the Board's Order, offer Ron Cosgrove and Ray Haverson 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.

WE WILL make Steve Stewart, Jack Flanagan, Patrick Heffernan, Ron Cosgrove, and Ray Haverson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

TOWNE FORD, INC.

APPENDIX A

ORDER GRANTING PARTIAL DISMISSAL

On August 12, 1994, International Association of Machinists and Aerospace Workers Peninsula Lodge No. 1414 (the Union) filed the charge in Case 20-CA-26250 alleging that Towne Ford, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On August 19, the Union filed the first amended charge. On December 30, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act by bargaining to impasse over a nonmandatory subject of bargaining and by unilaterally implementing changes in terms and conditions of employment. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate certain striking employees alleged to be unfair labor practice strikers. Further, the complaint alleges that Respondent violated Section 8(a)(3) and (1) even if the strikers were found to be economic strikers. Respondent filed a timely answer to the complaint, denying all wrongdoing.

On the first day of the hearing, Respondent moved for dismissal of the 8(a)(5) and (1) refusal-to-bargain allegations of the complaint based on its contention that there was no underlying charge to support the allegations. I deferred ruling on that motion until after the General Counsel's and Union's cases. During a recess in the proceedings, on July 14, 1995, Respondent filed a motion to dismiss the refusal to bargain allegations of the complaint, certain 8(a)(3) allegations and the entire complaint in the companion case of 20-CA-26447. On August 14 the General Counsel filed an opposition to Respondent's motion. The Union filed a brief in opposition to Respondent's motion on August 15.

This order deals only with Respondent's contention that the refusal-to-bargain allegations of the complaint in Case 20-CA-

26150 are not supported by a timely charge. The other issues raised by Respondent's motion are deferred, to my decision after the conclusion of the case.

The Charges

The complaint alleges that Respondent insisted, as a condition of reaching any agreement on a successor collective-bargaining agreement, that the Union agree that service advisors be removed from the unit and be established as a separate bargaining unit. The complaint then alleges that Respondent insisted to impasse on this alleged nonmandatory subject of bargaining. Continuing on this line, the complaint alleges that the strike that ensued was an unfair labor practice strike. Further, the complaint alleges that Respondent violated the Act by treating unfair labor practice strikers as economic strikers. The complaint alleges in the alternative that Respondent failed and refused to bargain over the strikers' return to work and that Respondent discriminated against the employees because they engaged in a strike. The complaint further alleges that Respondent failed to bargain in good faith by eliminating the classification of apprentice painters without prior notice to and bargaining with the Union.

The amended charge, which the General Counsel and the Union contend supports the complaint, states that Respondent restrained and coerced employees in the exercise of their Section 7 rights "by various means including, but not limited to, threats, inducements, interrogations, harassment, surveillance." The charge further states that Respondent "discriminated against employees on account of their Union and/or protected activities" and "refused to reinstate striking employees." Finally, the amended charges state that Respondent has refused to reinstate striking employees. The original charge did not include the allegation that Respondent refused to reinstate strikers nor list Section 8(a)(5) among the subsections of the Act allegedly violated. Although the amended charge alleges that Respondent violated Section 8(a)(5) it does not allege a refusal to bargain by insisting to impasse on a nonmandatory subject of bargaining nor does it allege a general refusal to bargain.

The charge in Case 20-CA-26447, the companion case, alleged that Respondent violated Section 8(a)(5), (3), and (1) by discriminating against an employee by blackballing him, refusing to hire him, and by advising other employees of his union activities. The separate complaint which issued in that case only alleges a violation of Section 8(a)(3) and (1) and did not allege a violation of Section 8(a)(5). That complaint did not allege a refusal to bargain generally or specifically.

A charge was filed in Case 20-CA-26222 on July 27, 1994. That charge alleged, inter alia, that Respondent had refused to bargain with the Union. However, that charge was withdrawn and the subsequent charge in Case 20-CA-26250 did not allege a refusal to bargain.

Analysis and Conclusions

Section 10(b) of the Act provides:

Whenever it is charged that any person has engaged in any . . . unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect.

As stated by the United States Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), the Board is not barred from citing in a complaint "unfair labor practices which

are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.” However, the Board does not have “*carte blanche* to expand the charge as [it may] please, or to ignore it altogether.” *Id.* at 309. The charge must form the basis of the complaint because Section 10(b) states a requirement that the Board “not originate complaints on its own initiative.” *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988). In *Galloway* the court held that the Board had exceeded its authority when it issued a complaint alleging that an employer had threatened to terminate employees picketing in front of its plant, whereas the underlying charge had alleged only that the employer discharged an employee for engaging in protected concerted activities.

In *Nickles Bakery*,² 296 NLRB 927 (1989), the Board adopted the reasoning of *Galloway* and reaffirmed the three-part test advanced in *Redd-I, Inc.*, 290 NLRB 1115 (1988), to determine whether the allegations of a complaint are sufficiently related to the allegations of the underlying charge. The test requires an analysis of whether (1) the allegations involve the same legal theory as the allegations of the charge; (2) the allegations arise from the same factual circumstances or sequence of events; and (3) a respondent would raise similar defenses to both allegations. In *Lotus Suites, Inc v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), the circuit court held that an unfair labor practice charge which contained boilerplate language, but stated no facts, could not possibly meet the *Nickles Bakery* standard. As the court stated, where the charge contains no factual allegations at all, there can be no nexus and a complaint cannot issue. The court held that the Board was without authority to investigate and issue a complaint based on an unfair labor practice charge containing only boilerplate allegations that the employer violated Section 8(a)(1) and utterly lacking in factual content. Thus, the court held that to allow the Board to issue a complaint based on a charge containing only a boilerplate 8(a)(1) violation, unbounded by any specific facts, “is tantamount to allowing the Board to enlarge its jurisdiction beyond that given by Congress.”

The charge contains general language alleging violations of Section 8(a)(1) and (3) and the specific allegation that Respondent had refused to reinstate strikers. In that amended charge the Union never alleged specifically or generally that Respondent had refused to bargain in good faith. First, the allegation that Respondent insisted to impasse on a nonmandatory subject of bargaining does not involve the same legal theory as the 8(a)(1) and (3) allegations of the charge. Second, the refusal to bargain does not arise out of the same factual circumstances or events as the 8(a)(1) allegations or refusal to reinstate strikers. Most important, the defense to the refusal to bargain involves evidence of bargaining history, negotiations, and strike votes which evidence would not be required in the 8(a)(1) and (3) case. Thus the amended charge is lacking in any factual content to support a refusal-to-bargain case.

In the investigation of the charge, the Regional Director determined that Respondent had refused to bargain by insisting to impasse on a nonmandatory subject of bargaining. The Board's own Casehandling Manual requires that if on investigation it appears that “the allegations of the charge are too narrow, an amendment should be sought, and . . . if amendment is not filed, the case should be reappraised in this light, and the complaint issued, if any, should cover only matters *related* to the specifications of the charge. *Galloway*, *supra*, quoting NLRB Casehandling Manual, Sec. 10064.5. I do not intend to imply

that the Regional Director did anything wrong in investigating the refusal to bargain or in finding a violation thereof. However, as pointed out in *Galloway*, the proper procedure was to seek an amended charge and in the absence of such an amendment, issue a complaint without the refusal-to-bargain allegations.

The General Counsel argues that listing of subsection (5) along with Section 8(a)(3) and (1) in the charge gave notice that the charge alleged an unfair labor practice strike and that the underlying unfair labor practice must have been a refusal to bargain. The inclusion of subsection (5) does not contain any factual allegation at all which would sustain a refusal-to-bargain case. Further, the General Counsel assumes that the charge alleges that the strikers were unfair labor practice strikers when, in fact, the charge merely alleges that they were strikers. Even construing the term strikers in the broadest sense to include economic and/or unfair labor practice strikers, the charge lists unfair labor practices in violation of Section 8(a)(1) and (3) which would more likely form the basis for the allegations that the strike was caused or prolonged by unfair labor practices. While the prior unfair labor practice case, Case 20–CA–26222, did allege a general refusal to bargain, the refiling did not include such an allegation. Thus, the refusal-to-bargain allegation remained withdrawn. Thus, as indicated above, at the time of the issuance of the complaint the Regional Director had no charge alleging that Respondent either generally or by insisting to impasse on a nonmandatory subject of bargaining, refused to bargain in good faith.

Accordingly, based on *Nickles Bakery* and *Lotus Suites* I find that the complaint allegations that Respondent refused to bargain in good faith are not supported by a charge and must be dismissed.

Since I have found that I may not, under Section 10(b), properly decide the complaint allegations that Respondent refused to bargain in good faith, it follows that I may not litigate or consider those unfair labor practices in deciding whether the strikers were unfair labor practice strikers. In *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960), the United States Supreme Court held that where a collective-bargaining agreement was lawful on its face evidence outside the time limitations of Section 10(b) could not be used to revive a legally defunct unfair labor practice. The Court cited with approval *Greenville Cotton Oil Co.*, 92 NLRB 1033 (1950), *affd.* sub nom. *American Federation of Grain Millers, AFL v. NLRB*, 197 F.2d 451 where the Board held that the acts alleged to form the basis for an unfair labor practice strike occurred outside the 6-month limitation period, Section 10(b) of the Act barred the General Counsel from litigating whether the strikers were unfair labor practice strikers. The situation here appears analogous, having no jurisdiction to find that Respondent refused to bargain, I cannot find such unfair labor practices to convert an economic strike into an unfair labor practice strike. To do so would be finding an unfair labor practice unsupported by a charge in contradiction of the holdings of *Fant Milling* and *Bryan Mfg.*

ORDER

It is ordered that complaint allegations paragraphs 9, 10, 11(b), 12(e), (f), and (g), 13, 14, 16(b), and 17 are dismissed.

Marilyn O'Rourke and Shelley Brenner, Esqs., for the General Counsel.

Richard Thesing, and David F. Byrnes, Esqs. (Littler, Mendelson, Fastiff, Tichy & Mathiason), of San Francisco, California, for the Respondent.

David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on June 20–23, and August 28, 1995. On August 12, 1994, International Association of Machinists and Aerospace Workers Peninsula Lodge No. 1414 (the Union) filed the charge in Case 20–CA–26250 alleging that Towne Ford, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).¹ On August 18, the Union filed the first amended charge.² On December 30, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act by bargaining to impasse over a nonmandatory subject of bargaining and by unilaterally implementing changes in terms and conditions of employment. The complaint further alleged that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate certain striking employees alleged to be unfair labor practice strikers. Additionally, the complaint alleged that Respondent violated Section 8(a)(3) and (1) even if the strikers were found to be economic strikers. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The charge in Case 20–CA–26447, the companion case, alleged that Respondent violated Section 8(a)(5), (3), and (1) by discriminating against an employee by blackballing him, refusing to hire him, and by advising other employers of his union activities. The separate complaint which issued in that case only alleges a violation of Section 8(a)(3) and (1) and did not allege a violation of Section 8(a)(5). The complaint did not allege a refusal to bargain generally or specifically. Respondent also filed a timely answer to this second complaint denying all wrongdoing.

On the first day of the hearing, Respondent moved for dismissal of the 8(a)(5) and (1) refusal-to-bargain allegations of the first complaint based on its contention that there was no underlying charge to support the allegations. I deferred ruling on that motion until after the General Counsel's and Union's cases. During a recess in the proceedings, on July 14, 1995, Respondent filed a motion to dismiss the refusal-to-bargain allegations of the complaint, certain 8(a)(3) allegations, and the entire complaint in the companion case—Case 20–CA–26447. On August 14 the General Counsel filed an opposition to Respondent's motion. The Union filed a brief in opposition to

Respondent's motion on August 15. On August 28, 1995, after the General Counsel and Union had rested, I granted Respondent's motion in part and dismissed the 8(a)(5) allegations of the complaint in Case 20–CA–26250. I issued a written decision incorporated in the record as Judge's Exhibit 1. I reaffirm that decision and find, under *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988); *Nickles Bakery*, 296 NLRB 927 (1989); and *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), there was not a charge to support the refusal-to-bargain allegations of the complaint.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Redwood City, California, where it is engaged in the selling and servicing of new and used automobiles. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$5000 which originate outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent operates an automobile dealership and service department in Redwood City, California. It has had a collective-bargaining relationship with the Union for at least 10 years. The most recent collective-bargaining agreement was effective from July 16, 1989, until July 15, 1993. The 1989–1993 bargaining agreement covered the employees in Respondent's body shop and service department.

In September 1993, the parties began meeting in an unsuccessful attempt to negotiate a new contract to succeed the expired 1989–1993 agreement. The parties met on September 10 and 22, 1993, February 25, March 8, and June 23, 1994, without reaching agreement. An impasse occurred and the bargaining unit employees went on strike on July 27, 1994.

Within this factual framework, the General Counsel contends, in Case 20–CA–26250, that the strike was an unfair labor practice strike and that Respondent was obligated to reinstate the strikers on their unconditional offer to return to work notwithstanding that certain strikers may have been replaced. In the alternative, the General Counsel contends that even if the strikers were economic strikers, Respondent violated Section 8(a)(3) by rejecting the unconditional offers of five strikers to return to work. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees with adverse action for engaging in a strike and encouraging employees to withdraw from the Union. In Case 20–CA–26447, the complaint alleges that Respondent violated the Act by refusing to reinstate one of the strikers and by attempting to discourage another employer from hiring that same employee.

¹ A charge was filed in Case 20–CA–26222 on July 27, 1994. That charge alleged, inter alia, that Respondent had refused to bargain with the Union. However, that charge was withdrawn and the subsequent charge in Case 20–CA–26250 did not allege a refusal to bargain.

According to Don Barbe, business representative, the charge was withdrawn because of the Region's "time targets." Barbe was told that the allegations of the July 27 charge would be pursued in Case 20–CA–26250 which was still under investigation.

² The amended charge alleged violations of Sec. 8(a)(3) and (1) but did not allege a refusal to bargain or an 8(a)(5) violation.

Respondent contends that the strike was an economic strike and not an unfair labor practice strike. Further, Respondent contends that two of the strikers at issue were permanently replaced and are only entitled to reinstatement on the opening of a position. Regarding the remaining three strikers, Respondent contends that it had no work for them at the conclusion of the strike and recalled the three employees when the volume of business increased and made recall economically feasible.

B. Facts

As mentioned above, the strike began on July 27, 1994. The bargaining unit employees picketed Respondent's facility from 7: until 9 a.m. Two of the picket signs carried drawings of large red rats on them and the words "DO NOT PATRONIZE." The service advisors, including alleged discriminatees Ray Haverson and Ron Cosgrove, stood by the service entrance and asked customers not to patronize Respondent during the strike. The service advisors handed out leaflets and gave the names and addresses of other dealerships for the customers to go during the strike. The leaflets gave consumer tips on buying new or used cars and also the names and addresses of other dealerships. The activities of the service advisors and other strikers were observed by Respondent's managers and supervisors.

Ray Haverson, a service advisor, testified that he was a team leader during the strike. According to Haverson on one occasion while he was explaining the strike to a customer Ben Kopf, Respondent's owner, was nearby. The customer asked Haverson who the owner was and Haverson pointed out Kopf. The customer then went to talk to Kopf. There is no record evidence of what took place between the customer and Kopf.

Haverson also testified that prior to the strike, he had two conversations with Tim Toland, Respondent's service manager, concerning the possibility of a strike.³ Toland asked the employee if Haverson thought the employees were going to strike. According to Haverson, after he said that the employees might be striking soon, Toland replied that it would be a very long strike. Toland testified that on both occasions he asked Haverson whether he (Toland) could safely go on vacation because of concern over a strike.

During the strike, a meeting was held on Friday, August 5, 1994, at the office of a federal mediator. At this meeting Respondent told the union negotiation committee that it had begun hiring permanent replacements. As a result of this meeting, the employee-members of the Union's negotiation team met with the employees. At this meeting the striking employees voted to return to work. Union Steward Louis Baeza appointed Terry Clark, dispatcher, and Andrew Kolchev, service technician, to talk to Toland about the employees returning to work.

Clark and Kolchev told Toland that the employees were reporting for work. Toland asked "In what capacity?" and Clark replied, "All of us." Toland asked the two employees to wait in his office while he spoke with Kopf. Clark and Kolchev waited at the entrance to the shop with the other employees. Toland came back and told the employees, "You can come back." Clark asked if all the employees could come back and Toland answered, "Yes, all of you." Clark asked what Toland wanted the employees to do since there was not much work in the shop. Toland told the employees to punch in anyway and that "Ben [Kopf] would subsidize" the employees. The employees were

to bring their tools back into the shop and prepare for the following Monday.

The employees went inside the shop and punched the time clock at approximately 3 p.m. that afternoon and engaged in cleanup activities. That afternoon, Baeza had a conversation with Kopf about the strike. According to Baeza, Kopf told him that Baeza had cost Kopf a lot of money and grief. Baeza answered that Kopf had done the same thing to him. Kopf then said to Baeza, "I ought to kick your ass." Baeza then told Kopf, "Go ahead, one free punch." Kopf also told Baeza that he wanted everyone back to work on the following Monday morning. Although the words spoken by Kopf sound like a threat, I do not find that they were reasonably taken to be so by Baeza. Baeza is a much larger and younger man than Kopf and Kopf would not seriously challenge Baeza to a fight. Baeza admitted that the remarks were made in jest and that both he and Kopf were smiling and laughing. Under the circumstances, I cannot find that either man took these words seriously.

On the afternoon of August 5, Ron Cosgrove, service advisor, clocked in with the other employees. Between 4:30 and 5 p.m. Cosgrove told Toland that he was going home and would see Toland on Monday morning. Toland replied that Cosgrove could leave and that he would see the employee on Monday morning. However, approximately 2 hours later, Toland called Cosgrove at the employee's home and told Cosgrove that Cosgrove had been replaced. Toland told Cosgrove that during the strike Respondent had hired two service advisors and that Haverson and Cosgrove would not be returned to work.

Patrick Heffernan, an apprentice painter, also returned to work on the afternoon of August 5. Heffernan performed some work in the body shop that afternoon after clocking in. However, after he left work, Heffernan received a telephone message from Pam Bacon, assistant body shop manager, telling him not to come into work on Monday. On August 15, Heffernan went to the body shop and spoke with Bacon. Heffernan asked if there was enough work in the shop for him to return to work. Bacon answered that work was too slow. Heffernan returned to the shop on August 22 and was again told by Bacon that there was not enough work for him. Heffernan went to speak to Toland. Toland also told Heffernan that there was not enough work. On September 5, Heffernan spoke with Dave Haley, Respondent's body shop manager. Haley said, "We have no intention or inclination to bring back the apprentices." Haley further explained that Respondent had journeymen painters and assistants but was interested in "low-tech employees not technical employees." Heffernan was recalled on February 6, 1995.

Jack Flanagan, apprentice painter, also punched in on the afternoon of August 5. Flanagan did some cleanup and then punched out. On Saturday, August 6, Flanagan received a message from Bacon telling him that work was slow and that he should not report to work on Monday. Flanagan called the shop several times before he was told to speak with Haley. On August 16, Flanagan went to the shop and spoke with Haley. Haley told Flanagan that Haley was not interested in hiring back the apprentices but was looking for lower paid personnel. Flanagan then went to speak with Toland. Toland told Flanagan that the employee should start looking for another job. Haley called Flanagan back to work in January 1995, and Flanagan returned to work on February 7.

Steve Stewart, journeyman painter, punched in for a short period of time on August 5. On August 6, Bacon called Stewart and told Stewart not to report for work on Monday because

³ Haverson and Toland were friends at work and away from work. Haverson often took his breaks in Toland's office.

there was not any work for Stewart. On August 10, Stewart went to the shop and spoke with Toland. Toland told Stewart that a painter hired during the strike had more seniority than Stewart. However, on August 11, Respondent recalled Stewart back to work.

Haverson, was not present when the employees returned to work on August 5. He was on a previously scheduled vacation in Reno, Nevada. On August 6, while on vacation, Haverson met another employee who told him that the employees had returned to work on August 5. The following day, Sunday, Haverson called Toland, at Toland's home, and offered to shorten his vacation and return to work the following day. Toland told Haverson that the employee did not have a job because Respondent was "keeping the permanent replacements."

On Tuesday, August 9, Haverson went to the shop and spoke with Toland and Gary Crowe, assistant service manager. Haverson protested Respondent's refusal to return him to work. Toland told Haverson that Haverson had been permanently replaced and that the replacements had seniority over Haverson. Haverson continued to complain that another service advisor with less seniority had punched in and that he had more seniority than the recently hired replacements. According to Haverson, Toland said, "If you quit lighting fires you'll be back here a lot sooner." Both Toland and Crowe deny that Toland made such a remark to Haverson.

Haverson further testified that he complained to Crowe that Toland had made a mistake by telling the employees that they were all welcome back and letting them punch in and move back their tools. According to Haverson, Crowe answered, "Well, if you quit lighting fires and calm your ass down . . . you'll be back . . . We'd have you back." Crowe admitted telling Haverson to "calm down" and "cool it" but denied telling Haverson to quit lighting fires.

Approximately 1 week later, Haverson met with Kopf. Haverson told Kopf that he was sorry that things had deteriorated and asked why he had not been called back to work. During this conversation, Kopf stated that he had objections to the rat picket signs. Kopf said that the rat picket sign was degrading and embarrassing. According to Haverson, Kopf stated that he really did not like unions and that Kopf said, "I won't be union, I don't care how much it costs me. I don't care how long it takes." Kopf told Haverson that Haverson was on a preferential hiring list and if one of the replacements did not work out, Haverson would be recalled.

Haverson began to look for work with other dealerships. Angelo Tuvo, service manager for a Dodge dealership in Redwood City, testified that he called Toland in August 1994, to inquire about Haverson's qualifications. Tuvo testified that Toland told him that Haverson was a very good service advisor. In addition, Toland mentioned that Haverson was a very strong union person and "would do whatever the Union said." Toland testified that Tuvo said, "We're working non-union here, and what type of guy is he?" Toland testified that in response to Tuvo he said that Haverson would do whatever the Union asked. Tuvo was a disinterested witness whom I believe was testifying to the best of his ability. I credit Tuvo's testimony over that of Toland.⁴ As of the trial, Haverson had still not been recalled by Respondent.

⁴ Tuvo had offered Haverson a job in July 1994.

In September Respondent hired two employees in the new classification of polisher. One of these polishers worked only 1 day. The other polisher was terminated in November. On November 7, Respondent hired another polisher. These polishers were hired to perform some of the work previously performed by the apprentice painters. The hiring of the polishers was part of a reorganization of the painting operation put in place by Haley after he became manager of the body shop after the strike. Respondent still employs the polisher hired in November.

Haley set up a separate polishing area outside of the body shop in an effort to improve the quality of this work. This was consistent with Haley's methods of operations at his previous places of employment. Union considerations placed no part in this decision. Haley's decision to have a separate polishing location was based on a decision to have an employee specialize in polishing so as to increase efficiency and quality. A side benefit of this method of operation was also a reduction in labor costs.

Finally, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by the statements contained in a letter sent to the employees by Kopf in October 1994:

Negotiations with [the Union] were held on Wednesday, September 28, 1994.

Towne Ford made one change to its Final Offer. That change was to provide for voluntary Union membership. This proposal was based on several factors including the fact that approximately 5 of our long-term employees have advised us that they have resigned from the Union and do not wish to be members and most of our employees hired since the strike have also indicated they do not desire to become members of the Union.

[T]he Union responded that it will never sign a contract with voluntary membership and its next step is to try to put Towne Ford out of business. We anticipate that there will be picketing and other actions directed against Towne Ford intended to cause it great financial loss and harm to its reputation.

I am sorry that we were not able to reach an agreement and that the situation has deteriorated to the point where the Union has stated that it desires to put us out of business. However, in light of all the circumstances, I believe that voluntary Union membership at the present time is a fair and reasonable position.

Some of you have asked what happens next. The employees hired since the strike have not joined the Union and several employees who went on strike have now resigned from the Union. If we reach the point where the Union no longer represents a majority of Towne Ford employees, Towne Ford will become non-union. In the absence of a loss of majority support, we will continue to recognize the Union as the exclusive bargaining agent of all employees and bargain in good faith with the Union upon request. However, in view of the Union's position at the last negotiation session, we believe the Union has given up on negotiations as a tactic.

Some of you have asked what will happen if Towne Ford becomes non-union. It is very difficult to advise you in these circumstances because the Federal Labor Laws restrict what Towne Ford can say. On the other hand, the Union can lie to you in order to scare you into staying in the Union. For example, in the Union's letter of Septem-

ber 22, 1994, they state that if Towne Ford goes non-union, your pay will be cut and you will lose holidays, vacation and seniority protections.

THIS IS RIDICULOUS! In the event a majority of employees no longer desire union representation, we would put into effect every aspect of the Final Offer as modified by last week's negotiations. The only possible exception is the retirement plan, which might convert to the profit sharing plan which presently is in existence for all non-union employees. We believe that such a change would have little impact since the profit sharing contributions over the last ten years have been roughly equal to your existing plan.

Analysis and Conclusions

1. Independent 8(a)(1) statements

In June and July, Toland asked Haverson whether Toland could go on vacation because the employees might be going on strike. Haverson replied that the employees might be going on strike. Toland responded that it would be a very long strike. The General Counsel argues that Toland's statement was not a prediction but rather a threat of the Respondent's determination to keep the strikers out of work.

As stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969):

If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . [As] stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

Here, I find that Toland was merely stating his opinion as to the length of the strike. In the context of a casual conversation between friends, I do not find Toland's comment to amount to a threat of retaliation.

On August 9, after Haverson complained about not being recalled to work, both Toland and Crowe told him that "if you quit lighting fires" you'll be back to work sooner. I find that by such conduct, Respondent unlawfully threatened Haverson in violation of Section 8(a)(1) of the Act.

The credible testimony of Angelo Tuvo establishes that Toland volunteered the information that Haverson was "a strong union person" and "would do whatever the Union said." I find that by such conduct Respondent attempted to blacklist Haverson in violation of Section 8(a)(1) of the Act. *Springfield Manor*, 295 NLRB 17, 30 (1989); *Truck & Trailer Service*, 239 NLRB 967, 970 (1978); and *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 642 (1st Cir. 1982).

The General Counsel argues that Kopf's October letter denigrates the Union and suggests that employees withdraw from the Union. While Respondent did indicate that some employees had withdrawn from the Union, Respondent also indicated that it would continue to recognize and bargain in good faith with the Union. I do not find that Respondent unlawfully suggested that employees withdraw from the Union. Accordingly,

I find that Kopf's letter was a lawful expression of his opinion of the bargaining situation and lawful under Section 8(c) of the Act.

2. Reinstatement of the strikers

Economic strikers retain their status as employees and are entitled to reinstatement to their former positions at the conclusion of the strike unless the employer can establish legitimate and substantial reasons for the failure to reinstate the strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). During a strike an employer may hire permanent replacements to continue to operate its business, and that proof of such action constitutes legitimate and substantial justification for refusing to reinstate those strikers so replaced. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *NLRB v. Mackay Radio Co.*, 304 U.S. 333, 345-346 (1938). Even if permanent replacements have been hired for the strikers, on the departure of the replacements, the former strikers are entitled to reinstatement to their former jobs unless they have obtained substantially equivalent employment elsewhere or unless their employer is able to sustain his burden of proof that the failure to recall was justified by legitimate and substantial business reasons. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf. 414 F.2d 99 (7th Cir. 1969), cert. denied 379 U.S. 920 (1970). Unless an employer sustains his burden of proof, a refusal to reinstate strikers constitutes an unfair labor practice notwithstanding the absence of animus or bad faith; for such conduct "discourages employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The reinstatement rights of economic strikers may be modified by a strike-settlement agreement. See *United Aircraft Corp.*, 192 NLRB 382 (1971) enf. in part 534 F.2d 422 (2d Cir. 1975).

In the instant case, employees Clark and Kolchev told Toland, Respondent's service manager, that "all of us" are reporting to work. After discussing the matter with Respondent's owner, Toland told the employees that they could return to work, "yes, all of you." Toland told the employees that they could punch the timeclock and prepare for work the following Monday (the next workday). I find that by such conduct, Respondent accepted the unconditional offer of the employees to return to work together and had thereby reinstated them. One could only speculate as to whether the employees would have abandoned the strike had Toland resisted returning the replaced employees. Here the employees agreed to give up the strike and Respondent agreed to reinstate all the strikers including those it had allegedly permanently replaced. Viewed another way, Respondent waived its right to contend that it had hired permanent replacements.

In *Colonial Press*, 207 NLRB 673, 674 (1973), enf. denied in relevant part 509 F.2d 850 (8th Cir. 1975), the Board found that by offering unfair labor strikers re-employment, the respondent-employer had condoned any prior misconduct. The Board then decided that even after the employees declined the offers of re-employment and continued to strike, the prior acts of misconduct were still condoned and that as unfair labor practice strikers, the employees were entitled to immediate reinstatement upon their unconditional offer to return to work. The Board held that the employer could not shift its position and refuse employment to the former strikers. In the instant case, Respondent, having accepted the employees' offer to return to work, reinstated all the strikers including those whom it replaced. Following the logic of *Colonial Press*, I find, that in

this case, Respondent could not shift its position and contend that the employees had been permanently replaced.

On a second independent basis I also find that Respondent has not met its burden of establishing that it had hired permanent replacements for the employees at issue. As mentioned above, during a strike an employer may hire permanent replacements to continue to operate its business, and that proof of such action constitutes legitimate and substantial justification for refusing to reinstate those strikers so replaced. *NLRB v. Great Dane Trailers*, supra.; *NLRB v. Mackay Radio Co.*, supra. It is the employer's burden to prove its affirmative defense that the alleged discriminatees were permanently replaced. *Augusta Bakery Corp.*, 298 NLRB 65 (1990), enf'd. 957 F.2d 1467 (7th Cir. 1992); and *Aqua-Chem, Inc.*, 288 NLRB 121 (1988). Such proof must be specific and must show a mutual understanding between the employer and the replacements that they are permanent. *Chicago Tribune Co.*, 304 NLRB 259 (1991); and *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enf'd. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987). However, the Board has not required an employer to have used "the magic word 'permanent'" in order to establish that it indeed hired replacements as permanent employees. See *Crown Beer Distributors*, 296 NLRB 541, 549 (1989). In *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995), the Board held that in all cases, both representation and unfair labor practice cases, it would presume that replacements for strikers are temporary employees, and that the employer must "show a mutual understanding between itself and the replacements that they are permanent." The Board further affirmed that evidence that a replacement was "full-time" is not sufficient to establish that the employee was hired as a permanent employee.

Respondent offered little evidence to overcome the presumption that the replacements were temporary. Toland testified that he hired three service advisors during the strike, one journeyman painter, and several mechanics. There was no evidence that any of these employees were told that they were permanent employees. None of the employees testified. *Choctaw Maid Farms, Inc.*, 308 NLRB 521 (1992). Toland told the strikers that he had hired permanent replacements but there was no evidence to show a "mutual understanding between the employer and the replacements" that the replacements were permanent. Based on a lack of evidence I find that Respondent did not meet its burden of showing that it had hired permanent replacements.

Although I have found that the strikers were not permanently replaced and had been recalled, it does not follow that Respondent was obligated to employ more employees than was justified by the volume of business. The rights of economic strikers do not require the employer to create jobs or vacancies for the strikers. *Oregon Steel Mills*, 291 NLRB 185 (1988). Thus, I find that Respondent could lay off or delay the recall of employees based on a lack of work in its service department. However, under its last contract with the Union, and under its unilaterally imposed conditions, Respondent laid off employees according to seniority. Here the returning service advisors and the journeyman painter had more seniority than the replacements. Accordingly, the returning strikers were entitled to their jobs. If any service advisors were laid off on a non-discriminatory basis, it would have to be the less senior strike replacements. If a painter needed to be laid off it would have been the less senior replacement and not Stewart. The recently hired replacements could not lawfully be given "superseniarity" over the strikers. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

The record supports Respondent's contention that there was insufficient work in the body shop for the apprentice painters. Respondent reinstated the apprentices when the volume of work increased. However, the apprentices were qualified to perform the work of the polisher. The Board has held that a respondent's reinstatement obligation is not limited to the strikers' old positions but includes reinstatement to substantially equivalent positions which the strikers are qualified to perform. *Rose Printing Co.*, 304 NLRB 1076, 1078 (1991). The issue then becomes whether the position of polisher was substantially equivalent to the strikers' former position of apprentice painter.

As mentioned above, Haley set up a separate polishing area outside of the body shop in an effort to improve the quality of this work. This was consistent with Haley's methods of operations at his previous places of employment. Union considerations placed no part in this decision. Haley's decision to have a separate polishing location was based on a decision to have an employee specialize in polishing so as to increase efficiency and quality. A side benefit of this method of operation was also a reduction in labor costs. I find that the job of the polisher was not substantially equivalent to that of an apprentice painter. While the painter apprentices were qualified to perform the work of the polisher, I find that under *Rose Printing* Respondent was not obligated to reinstate the strikers to this position. I find that the job of the polisher was less skilled and less paid than the job of apprentice. Further, working as a polisher would not help the apprentices become journeymen painters. Accordingly, I find the position of polisher was not the same or substantially equivalent to the position held by the apprentice painters prior to the strike. Thus, I find no evidence of unlawful motivation and further find that the Respondent's conduct was not inherently destructive of the employee's right to strike under Board law.

I find *C&E Stores*, 229 NLRB 1250 (1977), cited by the General Counsel to be inapposite. In *C&E Stores*, the respondent-employer attempted to lay off three unfair labor practice strikers after brief reinstatements. Over a 2-week period, one of the employees worked 8 hours and the other two employees worked only 6 hours each. The Board found that the employees' momentary return to work was not the reinstatement required by the Act and held that the employees had, in effect, not been reinstated. Thus, the unfair labor practices strikers were entitled to their jobs over strike replacements even if the strike replacements had seniority. Here, Respondent treated the apprentice painters (economic strikers) consistent with their *Laidlaw* rights. Respondent simply did not have sufficient work for the apprentice painters at the end of the strike. It reinstated those two employees when the volume of work in its body shop increased. *Oregon Steel Mills*, supra; and *Providence Medical Center*, 243 NLRB 714 (1979). Here whether the two apprentice painters are viewed as having been laid off or as not having been reinstated, Respondent treated them consistently with their rights to reinstatement after an economic strike.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting 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. Respondent violated Section 8(a)(3) and (1) of the Act by laying off two service advisors and one journeyman painter

because the employees engaged in an economic strike or refusing to reinstate those strikers in the absence of substantial business reasons.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of employment or other reprisals for engaging in union activities or other protected concerted activities and by attempting to blacklist an employee because of the employee's union activities.

5. Except as found above, Respondent has not violated the Act as alleged in the complaint.

REMEDY

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

I shall recommend that Respondent offer to Ray Haverson and Ron Cosgrove, full and immediate reinstatement to the positions they held prior to the unlawful layoff or refusal to

reinstate them.⁵ Further Respondent shall be directed to make the Haverson, Cosgrove and Steve Stewart whole for any and all loss of earnings and other rights, benefits, and emoluments of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

[Recommended Order omitted from publication.]

⁵ I have not ordered reinstatement of Steve Stewart, journeyman painter, because he had been reinstated prior to the instant hearing. However, Stewart is entitled to backpay for the short period of time for which he was laid off or denied reinstatement.