

Pinnacle Metal Products Company f/k/a The Wilkie Company and Local Lodge 670, District Lodge 97, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 7-CA-42013, 7-CA-42030, 7-CA-42083, and 7-CA-42106

July 19, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND COWEN

On October 6, 2000, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified below.²

This case involves an unfair labor practice strike. As the judge explained, unfair labor practice strikers who make an unconditional offer to return to work are entitled to reinstatement. The judge correctly found that the Union made such an offer on behalf of all striking employees.

Respondent contends that the Union's offer of April 30 regarding a return to work was unambiguous, i.e., that the Union was making an offer only with respect to those who would show up on May 3. (Only 21 of 35 showed up.) We disagree.

The Union's April 30 letter said that:

The members of [the Union] offer to make an unconditional return to work Pickets will come down effective Saturday May 1, 1999. Members of [the Un-

ion] will be returning to work on Monday, May 3, 1999.

The Union's offer of "an unconditional return to work" was *explicitly* made on behalf of "the members" of the Union: that is, all represented employees. The reference to the prospective date on which employees would return to work (May 3) cannot fairly be read as limiting the category of employees on whose behalf the offer was made. Certainly, the Union did not say that its offer was so confined. The fact that only 21 employees ultimately reported on May 3, in turn, does not retroactively establish any limitation on the offer, or indicate that the offer to return had been rescinded by the other 14 employees.

The judge concluded that the Union's offer of return was, at most, ambiguous. In this regard, he relied on the language of the April 30 letter and a conversation on May 10. As noted above, we find no ambiguity in the April 30 letter. As to May 10, Respondent purportedly asked whether additional strikers would be attending the orientation session held that day. (Only 5 had shown up.) In our view, that question does not establish that Respondent was confused about some supposed ambiguity in the Union's offer. Indeed, Respondent does not even contend that there was an ambiguity.³

³ We adopt the judge's finding that the Respondent was not privileged to apply its drug testing policy to returning strikers. In contrast to our dissenting colleague, we do not find that the strikers are reasonably encompassed within the terms of the policy. The scope of the policy is quite specific. It applies to "employees returning from a leave of absence or layoff in excess of two (2) weeks." According to the terms of the Respondent's February 14, 1998 final offer (which it implemented), a "leave of absence" is an exception to the Respondent's absenteeism policy. It is a form of leave that "shall not be considered an absence occurrence," provided that "proper arrangements . . . must be made in advance of the absence and . . . the employee must present satisfactory evidence to substantiate his reason for absence on the first day he returns to work." A layoff, which occurs at the sole discretion of the Respondent, is a "discontinuation of or reduction in any scheduled . . . [40-hour] workweek." The strikers do not fit within either class of employees covered by the drug testing policy. In any case, we agree with our colleague that the Respondent discriminatorily applied to strikers a drug testing requirement that differed significantly from the terms of the final offer and, accordingly, violated the Act.

In adopting the judge's findings and conclusion that the Respondent failed to make a valid, unconditional acceptance of the offer of immediate reinstatement, Chairman Hurtgen particularly relies on the findings that: (a) the Respondent's May 4 letter was no more than an offer of consideration for employment, preconditioned upon passing a drug test; (b) the Respondent was not privileged to implement its drug testing policy, which was not reasonably encompassed within its pre-impasse proposal; and, (c) the drug testing policy was a discriminatory condition of employment unlawfully imposed upon employees who had engaged in concerted, protected strike activities. This is not to say that an employer may never require returning unfair labor practice strikers to take a drug test pursuant to a lawfully promulgated, non-discriminatory testing policy, once the strikers have been unconditionally reinstated. In the instant case, the "drug-testing" condition was not

¹ 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There were no exceptions to the judge's dismissal of allegations that the Respondent unlawfully changed the job classification and duties of striker David Bates Jr., and unreasonably required him to memorize certain policies within a limited time period not required of nonstriking employees.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pinnacle Metal Products Company f/k/a The Wilkie Company, Muskegon, 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(d) of the recommended Order.

“(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

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

MEMBER COWEN, concurring and dissenting in part.

Contrary to my colleagues I find that the Respondent was privileged to apply its drug testing policy to returning strikers. In this regard the record clearly shows that during the term of the strike the Respondent lawfully implemented a revised drug policy that states, in part, that “employees returning from a leave of absence or layoff in excess of two (2) weeks may be required to submit to urine and/or blood tests or other similar testing methods.” In my view, employees who have been on strike for over 12 months are reasonably encompassed within this revised drug testing policy and therefore Respondent was privileged to apply this policy to returning strikers. Nevertheless, I agree with the judge’s further finding that the Respondent did not actually apply its revised drug testing policy to the returning strikers. To the contrary, in its May 4 letter to returning strikers, Respondent went beyond its existing revised drug policy and announced that returning strikers would be required to *pass* a drug screen prior to being reinstated. According to the testimony of Respondent’s production manager, Respondent’s revised drug policy did not preclude reinstatement for a positive drug test, but such an employee would be allowed to pursue rehabilitation after reinstatement. Because the evidence demonstrates that the Respondent imposed more onerous conditions on returning strikers than were contained in its revised drug

a lawful one. Thus, the Respondent did not make a timely, valid, unconditional offer of reinstatement to the striking employees and, thus, violated the Act.

policy, I agree with my colleagues that Respondent did not fulfill its obligation to reinstate striking employees who had made an unconditional offer to return to work.¹

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge, delay reinstatement, or fail to make a valid offer of immediate reinstatement to bargaining unit employees who joined in the unfair labor practice strike that commenced on February 2, 1998, and who thereafter made an unconditional offer on April 30, 1999, to return to work.

WE WILL NOT unilaterally and discriminatorily condition consideration of the above strikers upon the successful passing of a drug and alcohol abuse test without prior notice to or bargaining with Local Lodge 670, District Lodge 97, the exclusive bargaining representative under the Act for employees in the following appropriate unit:

All production and maintenance employees of Respondent at our Muskegon, Michigan plant; excluding office or clerical employees, professional employees, foremen and guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce 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 to those employees who joined the unfair labor practice strike that commenced February 2, 1998,

¹ With regard to the identity of the returning strikers, I disagree with my colleagues’ interpretation of the union’s April 30 offer to return to work. In my view, the Respondent reasonably interpreted the union’s letter as indicating that the employees that wished to return to work would show up on May 3. Since only 21 of 35 employees actually presented themselves on that date I would limit the remedy in this case to those employees.

and for whom unconditional offers to return to work were made on April 30, 1999, including those whom we discharged, 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, discharging if necessary any replacements, and make whole those employees, including those for whom we delayed reinstatement, for any losses of earnings or benefits suffered as a result of our conduct.

WE WILL rescind the discriminatory and unilaterally imposed drug and alcohol abuse policy of May 4, 1999, which required the taking and successful passing of a drug and alcohol abuse test as a precondition for reinstatement consideration of bargaining unit striking employees who have made an unconditional offer to return to work.

WE WILL bargain in good faith with the Union about the terms and conditions and applicability of drug and alcohol abuse tests for striking bargaining unit employees who make an unconditional offer to return to work.

PINNACLE METAL PRODUCTS COMPANY F/K/A
THE WILKIE COMPANY

A. Bradley Howell, Esq., for the General Counsel.
Robert W. Sikkel, Esq. and *Robert A. Dubault, Esq.* (*Warner Norcross & Judd LLP*), of Muskegon, Michigan, for the Respondent.
William C. Rudis, of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The original unfair labor practice charges and amended charges in the above-captioned cases were filed on numerous dates commencing on May 7 and ending July 30, 1999, by Local Lodge 670, District Lodge 97, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), against The Wilkie Company and Pinnacle Metal Products Company f/k/a The Wilkie Company (the Respondent).

On July 30, 1999, the Regional Director issued a consolidated complaint against the Respondent.

The consolidated complaint,¹ as amended at trial, alleges that the Respondent has engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by failing to offer reinstatement to returning unfair labor practice strikers since May 3, 1999, after the Union

¹ GC Exh. 1(q). In the transcript, the formal papers are incorrectly referred to as GC Exhs. 1(a) through (b), with 1(b) being the index and description of formal documents. This is a typographical error. The transcript should state that formal papers are GC Exhs. 1(a) through (v) with 1(v) being the index of formal documents. The record is corrected to reflect that the formal papers are GC Exhs. 1(a) through (v), with GC Exhs. 1(v) being the index and description of formal documents.

had made an unconditional offer on behalf of all of them to return to work; by delaying the reinstatement of strikers; by terminating strikers who did not respond to an invalid offer of reinstatement; by placing conditions upon their return such as requiring returning strikers to take a drug screening test and to sign an individual at-will employment agreement; by changing the job classification and duties of a returning striker; and by unreasonably requiring a returning striker to memorize job qualifications within a limited time period not required of non-striking employees. Further, the consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing terms and conditions of employment without bargaining in good faith, such as the implementation of the drug screening requirement, the implementation of the "at-will" employment term as a condition of the strikers being reinstated, and changing an employees' job classification and job duties.

The Respondent filed its answer on August 13, 1999. The Respondent denied the commission of unfair labor practices and argues that the Union made a limited offer of reinstatement on behalf of only those strikers who appeared for work on a certain date; that the Respondent made a timely valid offer of reinstatement to those who did appear; that only a few of those strikers responded to its offer of reinstatement and that those few either failed to report for work or rejected its offer; that the Respondent imposed no discriminatory condition upon returning strikers; and that its delay in the offer of reinstatement to three strikers was the consequence of a reasonable investigation of their alleged strike misconduct. The Respondent further argues that the requirement of a drug test for returning strikers was imposed pursuant to a revised drug policy which had been negotiated and tentatively agreed upon with the Union in contract negotiations, which subsequently resulted in good-faith impasse. The Respondent argues that it thus lawfully implemented the drug test on a nondiscriminatory basis to all employees returning from work absence, including earlier returning crossover strikers.

The issues raised by the pleadings were tried before me on November 3, 4, and 5, 1999, and April 10 and 11, 2000, in Grand Rapids, Michigan, at which time and place all parties were given opportunity to adduce relevant evidence, to argue orally, and to submit posttrial briefs. Briefs by the General Counsel and the Respondent were received at the Division of Judges on May 22, 2000.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs, and my observation and evaluation of the witnesses' demeanor, I make the following findings

I. JURISDICTION

At all material times, the Respondent, a corporation, has maintained a place of business at 2281 Port City Boulevard in Muskegon, Michigan (the Muskegon place of business). The

Respondent is, and has been at all material times, engaged in the manufacture and nonretail sale of metal stampings and related products. During the calendar year ending December 31, 1998, the Respondent, in conducting its business operations, sold and shipped from its Muskegon place of business goods valued in excess of \$50,000 directly to points outside the State of Michigan.

It is admitted, and I find, that, at all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted and I find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Facts

The Respondent is a metal stamping company located in Muskegon, Michigan. It employs approximately 48 persons in its pressroom. A production and maintenance unit consisting of pressroom employees is represented by Local Lodge 670, District Lodge 97, International Association of Machinists and Aerospace Workers, AFL-CIO. The Respondent and the Union have had a collective-bargaining relationship covering the pressroom employees since sometime before 1993. The most recent collective-bargaining agreement between the parties expired in February 1997 and was extended by mutual agreement until February 1, 1998, without modification. In late 1997, the Union notified the Respondent of its desire to meet and discuss terms for a new collective-bargaining agreement. The parties met several times in January 1998 and on January 31, 1998, they reached agreement on a tentative contract. Included within the tentative agreement was a revised drug and alcohol abuse policy (revised drug policy). Paragraph B of the revised drug policy states, in part, that "employees returning from a leave of absence or layoff in excess of two (2) weeks may be required to submit to urine and/or blood tests or similar testing methods." The union committee unanimously approved the tentative agreement and agreed to present it to the union membership with a recommendation for approval on February 1, 1998. Despite the recommendation, the membership rejected the agreement and authorized a strike.

There were 46 employees in the unit on February 2 at the start of the strike and all but 2 went out on strike. This strike was in support of the Union's bargaining demands and was also allegedly caused and prolonged by the Respondent's unfair labor practices. These unfair labor practices were the subject of earlier filed unfair labor practice charges in Cases 7-CA-40537, et al., which were tried before Administrative Law Judge Marion C. Ladwig. On April 21, 1999, Judge Ladwig issued his decision and recommended order in *The Wilkie Company*, Cases 7-CA-40537, et al., in which he concluded that the Respondent committed numerous unfair labor practices both before and during the strike which caused and prolonged the strike. He, therefore, concluded that the strike was an un-

fair labor practice strike.² The Respondent filed exceptions, and the case is pending before the Board.

The collective-bargaining negotiations during the strike did not lead to a new agreement. On February 14, 1998, the parties tentatively entered into a new collective-bargaining agreement and a strike settlement agreement when the Union accepted the Respondent's final offer, subject to ratification. However, the membership failed to ratify the agreement, and the final offer and strike settlement agreement expired by their terms. The Union did submit the proposal for ratification again in early March and attempted to accept the proposals by letter dated March 5. The Respondent rejected this attempt in its letter of March 13, 1998, in which it stated in pertinent part:

I am in receipt of your . . . letter of March 5. As you were aware, the Proposal for Settlement and Strike Settlement Agreement was available as a package on or before February 14, 1998. Since no acceptance was received prior to that date, the Proposal for Settlement and Strike Settlement Agreement expired by their terms.

As we explained to you, this package was made expressly conditional on its acceptance on or before February 14, 1998, because of the conditions present at that time. As conditions have materially changed since that time, as we predicted, and as it is clear that the Union did not accept the Agreement on or before February 14, 1998, and in fact the membership on that date voted against ratifying the proposal and the Strike Settlement Agreement we do not have an agreement. Further, we understand that your statement of returning to work is conditioned on the premise that there is an agreement on the expired proposal and the strike settlement agreement and therefore is not an unconditional offer to return to work.

The February 1, 1998 Summary of Tentative Agreements and Company Final proposal which was unanimously recommended by you and your committee, continues to remain available for ratification acceptance.

We, of course, would honor any unconditional offer to return to work pursuant to applicable law and would continue to be available to work out with you any strike settlement issues . . .³

² Specifically, Judge Ladwig found that before the strike, the Respondent coercively interrogated employees about the strike sentiments of other employees; made several threats that employees would be discharged and suffer unspecified reprisals if they struck; told employees that other employees suffered pay cuts and job reassignments because they filed NLRB charges; cut the pay of and reassigned employee Jeff Pugh, a union bargaining committee member, to another shift and a more onerous job because of his union activity and because he filed NLRB charges; and unlawfully and unilaterally denied leave and contractual benefits to union officials. He also found that after the strike commenced, John Robert (J. R.) Boos Jr., the Respondent's manufacturing manager, violated the Act by destroying picket signs and other union property, assaulting a picket by spitting in her face, confiscating lawful picket signs, and threatening pickets with physical violence. (GC Exh. 2.)

³ The Union filed a prior unfair labor practice charge alleging that the Company's refusal to honor the February 14 proposal was unlawful

Thereafter, the parties met only a few times, the last being in September 1998. When the Union asked about negotiating a strike settlement agreement, the Respondent's counsel indicated that it would be negotiated after they reached an agreement on a collective-bargaining agreement. No agreement was reached on a collective-bargaining agreement, and no new strike settlement agreement was discussed or proposed. No progress at all was made toward a new agreement during these meetings, and there have been no meetings or requests to meet and/or bargain since September 1998.

Taking the position that it was at impasse with the Union, the Respondent implemented aspects of its tentative agreement/final proposal, but without prior notice to the Union. This included the return-to-work testing requirement of the revised drug policy, a revised attendance policy, work rules, pay increases, and the beginning phases of a "certification program." J. R. Boos, the Respondent's production manager, testified that all employees who crossed the picket line and returned to work during the strike were required to undergo a drug screening test as a condition of reinstatement. Of the nine strikers who crossed the picket line during the strike, all but three were tested prior to May 3, 1999, but only one was actually tested prior to his return to work.⁴

On Friday, April 30, 1999, about 7 p.m., shortly after receiving Judge Ladwig's decision, the Union ended the strike and faxed a letter to the Respondent and its attorney making an unconditional offer return to work. The unconditional offer to return stated:

The members of Local Lodge #670, IAMAW, AFL-CIO, (The Wilkie Press) offer to make an unconditional return to work at Wilkie Metal Products, Inc. Pickets will come down effective Saturday May 1, 1999. Members of Local Lodge #670 will be returning to work on Monday, May 3, 1999.

On Monday, May 3, the next workday, about 21 of the 35 remaining strikers either reported to the plant to be reinstated or called and advised the Respondent that they wanted to be reinstated. However, the Respondent recorded the striking employees' names and did not immediately reinstate them, but sent them away.⁵ On May 4, the Respondent sent certified

and that the parties had an agreement. This allegation, however, was investigated and dismissed.

⁴ Of those nine strikers, only one, Brent Duerlo, was given a drug test before the date of his return. He was tested on December 17, 1998, and returned on January 4, 1999. One crossover, John Shine, was tested on March 5, 1998 on the day of his return. Two returning strikers, Christine Riley and Larry Vauters, were given drug tests several days after their return to work. However, five of the crossovers were not required to take drug tests until many months after their return to work and after the Union had made its unconditional offer to return on April 30. In this vein, Michelle Holt returned on February 17, 1998, and was tested on May 3, 1999. Dennis Webb returned on March 18, 1998, but was not tested until May 3, 1999. Joe Raider returned on January 8, 1999, but was not tested until May 17, 1999, and Mike Trevino returned on January 8, 1999, and was not tested until May 17, 1999.

⁵ The 20 returning strikers to whom the Respondent sent the May 4 letters are Bruce Baldwin, John Barr, David Bates Jr., David Bates Sr., Gary Binkley, Nihl Brannam, Mary Jane Cunningham, David Doyle,

letters to only those 20 strikers who had reported on May 3 or who had individually advised the Respondent on that date that they wanted to return to work but made no further effort to contact them. The Respondent did not send any reinstatement letters to returning strikers who did not appear at the Respondent's premises on May 3 or who did not individually advise the Respondent telephonically on that date that they desired to return. The May 4 letter sent by the Respondent to those who did appear on May 3 provided, in pertinent part:

Following the IAM's termination of its strike against Wilkie and its unconditional offer on behalf of its members to return to work on May 3, 1999, *you have applied for reinstatement. The purpose of this letter is to outline the requirements which must be met before you are eligible for reinstatement consideration and to explain what will happen upon your return.*

First, consistent with Wilkie's past practice, you must report to the Hackley Occupational Health Center for a Company-paid return-to-work drug screen. *Individuals who do not submit to the test or who test positive for illegal use of controlled substances are not eligible for reinstatement consideration.* Because it takes 24 hours to receive preliminary test results, please report for this test no later than Thursday afternoon. *Upon receipt of our drug-screen results, we will notify you if you are eligible for reinstatement.*

Second, for those who are reinstated, the first day of work will be Monday, May 10, 1999. That day will consist of orientation training sessions at the Comfort Inn on Sherman Avenue and U.S. 131. The meeting will begin at 7 a.m. for all reinstated individuals and will cover quality and benefits and other items of importance.

All individuals who applied are being sent this letter. Receipt of this letter does not mean that you will automatically be reinstated. The Company is reviewing its legal rights and responsibilities and it is possible that some employees will be denied reinstatement for legitimate and appropriate reasons. You should also know that Company is current planning to appeal the NLRB's recent decision.

A copy of this letter is being sent to Pete Jazdyk at the Union hall. [Emphasis added.]

Judge Ladwig's order provided a 5-day grace period for striker reinstatement. J. R. Boos testified that it was he who would have to coordinate the reinstatement process but he was out of the office on business until Thursday, May 6.

Thus, the May 4 letter on its face provided that as a precondition of being considered for reinstatement, the returning strikers had to take and pass a drug screening test some time before Thursday (May 6) of that week. Requiring returning strikers to take a drug test had never been discussed according to the tes-

David Eaves, Judy Johnson, Leo Krieger, Don Longmier, Vicki McClure, Luanne McElfish, Kim Navarinii, Rock Sundquist, Al Sturgis, Kim Sturgis, Opaline Taylor, and Karl Tazelaar. Additionally, returning striker Cliff Taylor credibly testified that he called in on the morning of May 3 and left a voice mail message for J. R. Boos that he was ready to return to work and requested that Boos contact him but he was never offered reinstatement.

timony of Union Business Representative and Chief Negotiator Pete Jazdzyk. J. R. Boos testified that the Respondent's chief negotiator and attorney, Robert A. Dubault, explicitly stated to Jazdzyk and union business representative, David Caughy, during the February 11 meeting that it would apply to returning strikers. Neither Caughy nor Dubault testified.

The May 4 letter also indicated that after employees took the drug screening test and the Respondent received the results, the Respondent would advise them if they were eligible to return. The Respondent admittedly did not follow this latter step and did not advise the former strikers who had taken and passed the test that they were eligible to return.

Jazdzyk first learned of the May 4 letter and the drug testing requirement from his members on or about May 5. By letter to the Respondent dated May 6, 1999, and in a telephone conversation with the Respondent's counsel, Jazdzyk protested what he considered to be the unilateral implementation of the drug testing requirement for returning strikers. Jazdzyk did advise some of the striking employees to take the test but only under protest, and he continued to object to its implementation.

Attorney Dubault did not testify as to the May 6 conversation and, thus, did not contradict Jazdzyk. The Respondent attempted contradiction in the form of J. R. Boos' testimony that he overheard a telephone conversation between Dubault and another person in an office in the stamping plant. He claimed that he was able to identify the person on the other end of the line as being Jazdzyk despite the fact that the telephone receiver was at most 2 inches from Dubault's ear (not a speakerphone), and that the loud background of a stamping plant in full operation outside Boos' office did not interfere with his hearing because the phone volume was increased to compensate for background noise. Dubault did not testify in corroboration. I find that there was insufficient convincing foundation for J. R. Boos' uncorroborated testimony that Dubault told Jazdzyk that returning strikers could take the drug test under protest but they could return to work and take the test "after the fact" because it was "not important." Jazdzyk, whom I credit, denied having been so informed.

Robert Sikkel, the Respondent's counsel, faxed Jazdzyk a reply on May 7 in which he asserted that the implementation of this drug screening requirement on returning strikers was appropriate. He stated, in pertinent part:

You will recall that a revised drug testing policy—which included the return to work testing—was negotiated and tentatively agreed upon prior to February 1, 1998. The policy states in part, "any employee who becomes injured on the job and employees returning from leave of absence or layoff in excess of two weeks may be required to submit to urine and or blood tests or similar drug testing methods."

Inasmuch as the parties have been deadlocked in their positions for a substantial period of time and inasmuch as there have been no meetings or discussions between the parties for more than seven (7) months, it is clear that we have been at impasse. Therefore, the Company has lawfully implemented the tentatively agreed upon revised policy. The policy is and has been applicable to all employees, including cross overs

and replacements. Therefore, the Company's reasonable request is neither discriminatory nor retaliatory.

Sikkel's letter is silent as to the alleged reassurance of co-counsel Dubault to Jazdzyk on May 6. It does nothing to modify the clear mandate of the Respondent's prior May 4 letter setting forth a successful passing of a drug test as a precondition of reinstatement consideration, and that the employee would be so informed. The clear implication of that May 4 letter is that the employee would be notified of the test results and, accordingly, his or her prospective reinstatement eligibility. The May 4 letter asserts that the drug testing requirement of returning strikers was consistent with the Respondent's past practice which had been applied to striker crossovers.

Boos testified that under the Respondent's policy and practice, a returning employee would not have been obliged to pass the drug test prior to reinstatement. He testified that failure of the test ought not to involve a rejection of reemployment but would rather oblige rehabilitation after reinstatement. He testified that any striker who might have failed the drug test ought to have been returned to work and provided with counseling as had been provided for returning employees absent for other reasons under the drug testing program. Neither he nor any other witness explained the inherent inconsistency in the policy as had purportedly been implemented and the clear statement of the Respondent's letter which set forth the passing of a drug test as a precondition not merely for reinstatement, but a precondition for consideration for reinstatement. Even had the Respondent's intentions to interpret the testing requirement as applicable to returning strikers been stated to Jazdzyk and Caughy, the purported letter of reinstatement did not encompass that policy, but rather was a deviation from it which had never been discussed with the Union even under J. R. Boos' version of the facts.

In view of the Respondent's failure to explain, modify, or rescind the reinstatement-consideration drug-test precondition of its May 4 letter in subsequent written communications to the Union or the strikers, I find Jazdzyk's testimony more credible on this issue. If Dubault had explained the Respondent's drug testing policy to Jazdzyk, as Boos claimed in his testimony that he did so, Jazdzyk most certainly would have pointed out the inconsistency with the May 4 letter and demanded a clarification letter. Further, there is no evidence that Jazdzyk gave such explanation to any returning striker but, instead, told all strikers to take the test "under protest," in compliance with the May 4 letter, and report to work. He did not tell them to report to work and thereafter to submit to the test. I find that there never was any such oral explanation to Jazdzyk. The Respondent unconvincingly argues that J. R. Boos must be credited because several employees did in fact report on May 10 without having been tested. However, the vast preponderance did not do so, and their last official notification direct from the Respondent was the May 4 letter.

Boos testified that as of May 1999, the Respondent employed about 40 or more employees and was in need of at least 10 or 15 more employees. He testified that 20 returning strikers would all have "fitted right in" because of their prior training and experience.

On May 10, only five of the former strikers, including David Bates Jr., Bruce Baldwin, Al Sturgis, Nihl Brannam, and John Barr reported for the orientation at 7 a.m. with Jazdzyk.⁶ The Respondent immediately refused to reinstate three of the five returning strikers. The Respondent's counsel and J. R. Boos conferred with Jazdzyk and advised him that Bruce Baldwin, David Bates Jr., and Al Sturgis would not be allowed to stay because the Respondent wanted to investigate their alleged picket line misconduct. Jazdzyk then informed these employees that they had to leave. Jazdzyk testified that before he was also required to leave, he told the Respondent's counsel, Dubault, that former striker Don Longmier was unable to report that day due to a family emergency but he wanted to return. Jazdzyk testified that he also advised Dubault that striker Connie Ellis wanted to return but that he was unable to contact her. J. R. Boos testified that Jazdzyk made no reference to Longmier and merely said that he had been able to contact Ellis.⁷

When he initially testified as an adverse witness for the General Counsel, J. R. Boos claimed that on the morning of May 10, Jazdzyk told Boos and Dubault that those five employees, with the exception of Ellis, were the total number of returning employees. As a witness for the Respondent, Boos testified somewhat differently, i.e., in response to their inquiry as to whether those five were "everybody who is coming," Jazdzyk answered, "yes," and again "yes, this is everyone." Jazdzyk testified that he responded that those five returning strikers were "all that are here today." A certain ambiguity attaches to all versions. Neither of Boos' versions constitutes a clear statement by Jazdzyk of relinquishment of a reinstatement request by all other strikers as distinguished from a recognition of non-appearance to what may or may not have been a valid offer of reinstatement. However, if the Union's reinstatement request is to be construed as a request for reinstatement only for strikers who actually appeared for work, then even Jazdzyk's version would have particular significance.

With respect to Bates Jr., Baldwin, and Sturgis, Jazdzyk was also told that the Respondent would interview the three individuals to "get their side of the story." Jazdzyk then stated that he intended to sit in on the training meeting. Dubault informed him that it would not allow him to do so, inasmuch as the meeting was solely for employee training and he saw no reason for him to be there. This conversation took place in a separate room—away from and outside the hearing of the four individuals who had reported for work. Jazdzyk then walked away and met with the four returning strikers.

Nihl Brannam, a returning striker and a union steward who had appeared at the orientation on May 10 at the scheduled

⁶ Barr arrived at 7:30 a.m.

⁷ Of the five returning strikers who reported, only one—Brannam—had taken the drug test before May 10. Baldwin testified that he refused to do so because Jazdzyk had told him it was a violation of Judge Ladwig's recommended order. Bates Jr. testified that he recalled no conversation with Jazdzyk prior to May 10 regarding the drug test. Sturgis claimed that he had not personally received the May 4 recall letter, which had been sent in error to his mother's address. She is an employee. Barr did not testify. There is no record of a blood test for Barr. Longmier, who did not report on May 10, did take a blood test prior to that date. Ellis did not.

time, was made to wait while the Respondent's counsel met with Jazdzyk to tell him that Al Sturgis, David Bates Jr., and Bruce Baldwin would not be allowed to stay. He told Jazdzyk that he did not want to go into orientation without Jazdzyk who had promised to accompany him.

A short time later, Jazdzyk returned with Brannam and informed Dubault and Boos that Jazdzyk would not leave and that he intended to sit in on the meeting. Hotel management was notified of Jazdzyk's unwelcome presence, but Jazdzyk remained. A few minutes later, Barr reported and approximately 30 minutes after that, a state police officer arrived and asked Jazdzyk to leave. He complied with this request. Only Brannam and Barr were present at this time. They had to wait for the Respondent to call the police to have Jazdzyk ejected from the meeting. Further, the orientation was delayed because the Respondent had not arrived with the orientation materials and Boos had to telephone Controller James Johnson to have him bring the orientation materials to the meeting. The start of the orientation was delayed for several hours.

Brannam testified that about the time the orientation was to finally commence, he became extremely upset and told Boos that the way the Respondent was treating returning strikers was a "bunch of crap" and "who was to say" how they would be treated upon reinstatement, to which Boos responded, "[W]ell I can get you for insubordination." Brannam testified that he then "really got upset" and told Boos that he could take his job and "shove it up his ass." According to Brannam, Boos "softly" asked him if that meant he was quitting, to which point Brannam repeated his statement. Brannam testified that Boos then made a kissing gesture to him which further infuriated Brannam to tell Boos, "and I also got something you can kiss." Because of Brannam's evasiveness and demeanor, I credit Boos that at this point Brannam grabbed his own crotch. Brannam then walked out the door. Boos' account is very much the same and does not explicitly contradict Brannam as to details testified to by Brannam, but to which Boos was silent.

Thereafter, the Respondent sent Brannam a quit slip and asked that he sign and return it, which he never did. Boos started the orientation with Barr. After about 10 minutes, Barr asked for a cigarette break. He left and never returned.

Former striker Don Longmier telephoned the Respondent on May 11 and confirmed that he was ready to return to work but had not been able to do so because a family emergency required him to be out of town on May 10. James Johnson, the controller, said that he would have Boos call Longmier. Boos never called him. The Respondent did not offer Longmier reinstatement until some time later.⁸

About a week later, the Respondent terminated Longmier by letter dated May 19 for not reporting for work on May 10. On May 19, 1999, the Respondent sent letters to strikers who had reported or called on May 3 but who had not reported on May 10; these letters terminated their employment and advised them that they were not eligible for reinstatement. These termination

⁸ Johnson did not effectively contradict Longmier, whom I credit as the more detailed and convincing witness.

letters were sent to David Bates Sr.,⁹ Judy Johnson, Kim Sturgis, Karl Tazelaar, Opaline Taylor, Mary Jane Cunningham, and LuAnne McElfish. In addition, the Respondent sent John Barr a letter on May 19 terminating him for “walking off of the job.” The General Counsel takes the position that the Respondent had never really made them unconditional offers of reinstatement but, rather, simply advised them of the steps that they were required to take in order for the Respondent to consider them eligible for reinstatement.

During the strike, the Respondent had received reports that Bates, Sturgis, and Baldwin, among others, had engaged in misconduct which it believed might be sufficiently serious as to justify nonreinstatement. The individuals who made such allegations were Todd Pascal, a replacement employee hired during the strike, and Paul Martin, a driver hired to make deliveries for the Respondent during the strike. Pascal alleged that Bates Jr. and Sturgis had followed him and damaged his truck. Boos testified that shortly after having read these reports during the strike, he informally interviewed Martin and Pascal whose complaints were among 40 reports of picket line misconduct complaints. No further investigation was pursued until May 1999, after the reinstatement request.

On May 12, 1999, Boos and Attorney Dubault met separately with Bates Jr., Sturgis, and Baldwin in Dubault’s office. Jazdyk was allowed to sit in on these meetings. During the meetings, each employee was informed of the allegations against him, was shown copies of relevant documents, and was given the opportunity to respond. All three denied wrongdoing. They were told that the Respondent needed to conduct some followup investigation and that when the investigation was complete, Jazdyk would be notified of their return status and that he would then contact them. Boos testified that he needed time to investigate the misconduct allegations but that he had planned to start his own personal vacation on Monday, May 17, and he decided to follow his plans. Thus, he was absent for 7 days until Monday, May 24, which absence delayed the investigation. Although he testified that during and after the strike, he had consulted Dubault and Johnson about the strike misconduct complaints, Boos did not adequately explain why his absence necessarily caused the delay. Boos’ testimony as to just what the post-May 12 interview investigation consisted of is sketchy and obscure.¹⁰ In any event, Boos, upon his return on May 24, in consultation with Dubault, decided that there was insufficient evidence upon which to deny reinstatement to the three accused returning strikers. One complainant, the driver, was not employed by the Respondent and was now unavailable according to Boos. However, Boos must have known that well before the investigation.

The Respondent waited until the morning of May 26 when attorney Dubault telephoned Jazdyk to announce that the Respondent had decided to reinstate Baldwin, Sturgis, and Bates and that each should report for the training sessions at 4:30 p.m.

⁹ David Bates Sr., like his son, David Bates Jr., was an employee of the Respondent and a returning unfair labor practice striker.

¹⁰ Boos testified that in his absence someone in the shipping department had been collecting some undescribed shipping documents relating to Baldwin.

on Thursday, May 27 (just before the start of Memorial Day weekend). Dubault told Jazdyk that they would have to submit to a drug screen test either before or immediately after their return and that they would thereafter be working on Thursday, May 27, and Friday, May 28, and very likely over the weekend.¹¹ Jazdyk objected to recalling these employees so late in the day just before the Memorial Day weekend, but to no avail. Jazdyk mentioned during this conversation that Connie Ellis and Don Longmier wanted to return. The Respondent’s counsel said that Ellis could return on May 27 at 4:30 p.m. but Longmier could not because he had been terminated. Jazdyk related the offer to David Bates Jr., Bruce Baldwin, Al Sturgis, and Connie Ellis by telephone on May 26 and May 27.

About May 26, 1999, Connie Ellis telephoned the Respondent and asked Johnson if she would be allowed to return, and she was told she could return on May 27 at 4:30 p.m. after she had completed a drug test. She took the drug screening test. She testified that she got “cold feet” and did not report.¹²

Except where otherwise noted, Bates Jr. and J. R. Boos testified as to the events of May 27 and June 2. I found Boos’s demeanor more convincing than that of Bates. Boos was corroborated as to his movements in the plant and duration of time spent with Bates by clerical employee Terry Long. She was a spontaneous and convincing witness. Furthermore, Bates’ testimony contained significant inconsistencies. Accordingly, I find that the facts relating to Bates’ attempted reinstatement are as follows:

When Bates Jr. reported on Thursday, May 27, 1999, he was asked by J. R. Boos if he had completed his drug test. Since he had not yet done so, he was told to go take the drug test at the designated clinic and if it did not take too long, to report back to the plant. Bates Jr. did take the test but he did not return that day. He did not report on Friday (May 28) or Tuesday (June 1). Monday, May 31, 1999, was Memorial Day and the plant was closed that entire weekend in observance of the holiday. Bates Jr. did call in on June 1 to see about returning to work. He was told to report on Wednesday, June 2, at 1 p.m. Bates reported on June 2. He was given a packet of papers by a clerical employee, including a State and Federal form W-4, a new form I-9. Included within the packet were also a covenant not to compete and an “at will” employment agreement. Boos testified that the “at will” agreement which had been drafted by the Respondent’s legal counsel was intended for new replacement employees hired during the strike, and was not an appropriate document to have been presented to Bates Jr., a returning striker employee.¹³ Boos entered the conference room and reviewed certain information about the Company’s QS and ISO

¹¹ This was the first notice to the Union or the employees that the test could be taken after reporting to the plant. Nothing was said that the consequence of a test failure would be rehabilitation rather than nonreinstatement as the May 4 letter stated.

¹² I credit Ellis as to any discrepancy between her testimony and that of Johnson who was an evasive, uncertain, and unconvincing witness, and who failed to effectively and explicitly contradict Ellis.

¹³ At first, Bates Jr. testified that he had never before been required to sign a covenant not to compete. He retracted his testimony when confronted with the same type of document he executed in 1997 when he was hired.

9000 quality control program. Throughout the meeting, Boos repeatedly asked Bates Jr. if he had any questions and he only had one: What job would he be doing once he was placed on the floor?

Bates testified that he had been transferred from a press operator position which he had held from his hiring in June 1997 to the position of die setter trainee in October or November 1997 which he held until about 1 month before the February 2 strike. He testified that his training period terminated at that time and he became a full-fledged die setter in early January by virtue of the fact that he began setting dies without the attendance of the shift supervisor, Mitch Piasecki. He admitted that he received no "release papers" (certification documentation) designating him as a die setter and that he was never orally informed that his training had terminated. There is no documentation or any other evidence that his training had ended.

Boos testified that when Bates Jr. questioned Boos as to his reinstatement position, he was told that the die setter position had been abolished, that press operators now set their own press jobs, and that Bates would be assigned to a press operator position. Boos testified that Bates Jr. had never finished his training as a die setter. Bates testified that this is what Boos stated as the reason Bates was to be reinstated as a press operator. At no time did Bates ask about any of the forms. Boos then asked Bates Jr. to review the voluminous QS and ISO 9000 binders and left the room. I credit Boos that he did not order Bates Jr. to memorize those forms. After Boos left the room, Bates Jr. walked out. He neither returned nor called. Approximately 10 days later, J. R. Boos sent Bates Jr. a letter attempting to clarify the various forms Bates Jr. had been given and inviting Bates Jr. to contact the Respondent about coming back to work.

The letter disclaimed the need for Bates Jr. to have signed any forms other than the W-2 form. The letter also asserted, *inter alia*, that he had never completed his die setting training, had not been released to set dies, would be returned to the position of second shift press operator position which he held prior to the strike, and would be provided with the opportunity to continue to train as a die setter. There is no evidence that the die setting position had actually been abolished as Boos testified that he told Bates Jr. The Respondent's June 14 letter suggests that it had not. Accordingly, on this point, I credit Bates that Boos told him that the reason he would not be assigned to a die setting position was that he had not formally finished his training.

The Respondent's June 14 letter to Bates Jr. concluded by soliciting his return to work upon contact with J. R. Boos no later than June 18, 1999. Bates Jr. testified that he felt that it was "pointless" to reply to the letter because he felt that he had been "jerked around."

The Respondent sent Al Sturgis, Bruce Baldwin, and Connie Ellis letters on June 2, 1999, advising each of them that they were being terminated for failing to report for work for 3 consecutive days. The 3 days apparently included May 27, 28, and June 1, inasmuch as the plant did not operate Saturday through

Monday. Al Sturgis and Bruce Baldwin never received their discharge letters.¹⁴

Longmier was eventually recalled to work and reinstated on October 11, 1999. The Respondent characterizes the delay in his reinstatement as the result of an "administrative oversight." There was no testimony sufficient to explain the "administrative oversight." Longmier had taken his drug test on May 6, 1999. There is no explanation why the Respondent did not act upon Longmier's telephone communication to controller Johnson that he was ready and willing to return to work after a family medical emergency had subsided.

B. Analysis

In part, Section 7 of the National Labor Relations Act (the Act) gives employees the right to "self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1994). Participating in a strike is protected activity under Section 7. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Section 8(a)(3) of the Act prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1994). An employer who fails to reinstate returning strikers without a legitimate business justification violates Section 8(a)(3). *Fleetwood Trailer Co.*, *supra*. Legitimate business justifications for delaying or denying reinstatement include the fact that economic strikers have been replaced, *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and that the returning striker(s) have engaged in serious picket line or strike-related misconduct. *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enfd.* 632 F.2d 721 (9th Cir. 1980).

It was clear in this proceeding that some, if not all, strikers had been replaced. Whether or not their replacements were hired permanently was not litigated. Only three of the strikers were accused of misconduct to have been deemed by the Respondent sufficient to delay their reinstatement. Both economic strikers not permanently replaced and unfair labor practice strikers retain their status as employees under the Act. *NLRB v. MacKay Radio & Telegraph Co.*, *supra* at 345.

Judge Ladwig concluded that the strike, which began on February 2, 1998, was an unfair labor practice strike in that it was, in part, caused by and prolonged by the Respondent's unfair labor practices. The rights of unfair labor practice strikers are well settled in the law. Upon their unconditional offer to return to work, an employer's obligation is to immediately offer them reinstatement to their former positions, even if that requires the discharging of permanent replacements. *NLRB v. MacKay Radio & Telegraph Co.*, *supra* at 347.

Generally, an employer is entitled to a grace period of up to 5 days to reinstate strikers to accommodate its administrative

¹⁴ Bruce Baldwin credibly testified that he never received the letter. The letters were sent certified mail, and the Respondent had no return receipt indicating that Baldwin had, in fact, received it. Sturgis' letter was sent to his mother's address even though it was not his address at the time and he had given the Respondent a later address. While he was not living at this later address, he was still receiving his mail at the address at the time.

preparations. *Drug Package Co.*, 228 NLRB 108, 113 (1997), modified 570 F.2d 1340 (8th Cir. 1978), on remand 241 NLRB 330 (1979). However, following an unconditional return to work offer, there will be no such grace period permitted where the employer “unduly ignores, rejects, or unduly delays making a valid reinstatement offer.” *La Corte ECM, Inc.*, 322 NLRB 137 fn. 2, 140–141 (1996); *Dorsey Trailers, Inc.*, 327 NLRB 835, 856–857 (1999); *Beird Industries*, 311 NLRB 768, 770–771 (1993); *Newport News Shipbuilding*, 236 NLRB 1499, 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979). The failure to reinstate within the grace period is not excused by administrative difficulties, and reinstatement of the returning strikers must be effectuated as a group and not on a “piece-meal” basis. *Dorsey Trailers, Inc.*, supra. See also *Gitano Distribution Center*, 294 NLRB 695 fn. 3 (1989).

The first issue to resolve is whether the Union’s offer to return to work, faxed on April 30, was an unconditional offer on behalf of all 35 remaining strikers, or whether it was an offer only on behalf of those specific 21 strikers who actually reported for work at the plant on Monday, May 3, or who otherwise communicated with the Respondent by telephone on that date. The union offer stated:

The members of Local Lodge #670, IAMAW, AFL–CIO, (The Wilkie Press) offer to make an unconditional return to work at Wilkie Metal Products, Inc. Pickets will come down effective Saturday May 1, 1999. Members of Local Lodge #670 will be returning to work on Monday, May 3, 1999.

The Respondent argues that the offer was clear on its face as one limited to workers who would be returning to work, i.e., appearing at the plant. It argues in the brief that this is the necessary interpretation because “[t]he Union did *not* state that ‘all’ members would be returning that day, nor did it indicate that ‘all’ members were ready, willing and able to return upon notice from the Company [but] [i]nstead, the Union used very specific terms which clearly indicate that only those strikers who were interested in returning would personally report for work that day.”

In practice, the Respondent, however, recognized that not all strikers who desired a return to work personally appeared at the plant by virtue of its acceptance of return-to-work offers by telephonic communication of some strikers on the same date. That fact, alone, should have raised some doubt as to the supposed limitation of the offer to actual personal appearances at the plant. Furthermore, although the offer did not state in the first sentence “all” members, it also did not limit the offer to some members. “The members” is closer to encompassing the meaning of “all members” than “some members.” Furthermore, although the offer did not state in the last sentence that “some” members will be reporting, it also did not state that only those members desiring reinstatement would appear at the plant. Certainly, it was silent as to telephone reporting.

The Respondent argues in its briefs as follows:

The Board has previously held that where a union makes an offer that returning strikers will report for work, only those employees who actually report are entitled to reinstatement. See *Mississippi Steel Corp.*, 169 NLRB 647, 662 (1968), enforced 405 F.2d 1373 (D.C. Cir. 1968) (“[T]here is no basis

for finding . . . that the Union’s letter [stating that strikers will report on a given date] was a proper blanket application for *all* strikers without further need for their individual appearance or application for work . . .”) (emphasis added); *Elmira Machine & Specialty Works, Inc.*, 148 NLRB 1695, 1696 (1964) (union’s letter seeking reinstatement for all employees on an attached list was sufficiently clear as to the employees who were eligible for reinstatement); *Brown & Root, Inc.*, 99 NLRB 1031, 1038–41 (1952); *enforced in part*, 203 F.2d 139 (8th Cir. 1953) (union which requested reinstatement for employees who participated in strike or who presented themselves to the employer made incomplete blanket application on behalf of *all* employees).

The *Brown & Root, Inc.* decision cited and relied upon in *Mississippi Steel*, however, was premised upon unequivocal language which specifically excluded certain employees and alternatively demanded reinstatement for “those of them who present themselves.” The Board concluded “that the strikers were to make individual applications for reinstatement,” supra at 1040. In *Elmira Machine*, the other case cited by *Mississippi Steel Corp.*, the employer made an offer for specific-named individuals. The actual offer of reinstatement was not quoted in the *Mississippi Steel Corp.* decision, but it was characterized by the administrative law judge as a letter which stated that “the bulk [i.e., not all] of the strikers immediately available would return to work unconditionally on August 8 as they were instructed.” The judge, affirmed by the Board, as cited by the Respondent, concluded that the letter was not a “proper blanket application.” However, the letter had some explicit limiting language, i.e., “the bulk of the strikers.” In this case, the first sentence of the Union’s letter has no similar explicit limiting modification. A similar factual issue was addressed in *Champ Corp.*, 291 NLRB 803, 884–885 (1988). The offer in that case was on behalf of “the employees of *Champ Corporation* currently on strike . . . to return to their former positions.” However, it went on to state “The striking employees will be reporting at the start of the scheduled shift on Monday, April 21, 1980.” The letter invited questions. The administrative law judge, who was affirmed by the Board, evaluated the *Mississippi Steel Corp.*, *Brown & Root, Inc.*, and *Elmira Machine* decisions. She concluded that the employer raised a valid question about the status of employees who failed to appear on April 21. She further concluded that ensuing correspondence between the employer and union revealed employer confusion about the coverage of the offer and that the employer had asked questions about it. However, she also found that at a certain point, the employer became obliged to ask further clarification. She cited and quoted from the Board’s holding in *Home Insulation Service*, 255 NLRB 311, 312 (1981):

[W]here any such ambiguity remains unclarified due to Respondent’s decision to ignore the offers and not seek clarification, Respondent may not be heard to complain, if such uncertainty is resolved against its interest. *Haddon Home Food Products, Inc., and Flavor Delight, Inc.*, 242 NLRB 1057 fn. 6 (1979).

The judge distinguished *Mississippi Steel Corp.*, supra, on the grounds that the union clarified its offer as requested and the

employer acted on the clarification but that it must suffer the consequences of not seeking further clarification.

The issue was revisited in *Domsey Trading Corp.*, 310 NLRB 777 fn. 3 (1993), where the Board again evaluated a similar *Mississippi Steel Corp.* defense. The Board noted that the failure of certain strikers to appear pursuant to a similar offer did raise a valid question about their status, citing *Champ Corp.*, supra. The Board went on to state:

However, where a request for reinstatement appears ambiguous, the employer bears the burden of requesting clarification. Here the Respondent failed to do so.

The Board went on to cite *Home Insulation Service*, supra. In *Domsey*, the administrative law judge found that the union offered a return to work “on behalf of all employees on strike,” but went on to state that reinstatement workers would report to the facility on August 13. As in this case, some did not report. Those who did report were subjected to unlawful reinstatement conditions, i.e., to execution of unlawful applications for reinstatement and INS forms. The Board affirmed the judge’s finding that the respondent therein did not make valid offers of reinstatement, “collective or otherwise,” to any employees, i.e., either to those who reported or to those who did not. It stated that because the offers of August 13 to reporting employees were invalid, it could not “appropriately inquire” into the reasons for certain strikers to refuse to work on that date.

I conclude that the Union made an unconditional offer of a return to work of its striking employees, unlimited in coverage by the first sentence of its offer. I find that, at most, the reference to reporting in person on May 3 rendered an ambiguity to the offer for which the Respondent was obliged to seek clarification. I find that it failed to seek such clarification before rendering its purported offers of reinstatement which were limited to those who appeared at or telephoned the plant on May 3. The Respondent sought no clarification of any kind until May 10 when it purportedly asked Jazdyk whether any more strikers would appear on that date; under either version of what was stated, Jazdyk did not waive the reinstatement rights of non-appearing strikers.¹⁵

Further, I find that for the following reasons, the Respondent failed to make a valid offer of reinstatement to those strikers who appeared at or called the plant on May 3 and, thus, strikers who failed to appear either on May 3 or May 10 did not waive reinstatement rights. *Domsey Trading Corp.*, supra. An offer or reinstatement must be “specific, unequivocal and unconditional,” and to the same job and starting time, and not merely an invitation to talk about a job. *Page Litho, Inc.*, 325 NLRB 338, 339 (1998); *Deleet Merchandising*, 324 NLRB 1073 (1992); *Sunol Valley Golf Club*, 310 NLRB 357, 375–376 (1993), enf. 48 F.3d 414 (9th Cir. 1995); *Duroyd Mfg.*, 285 NLRB 1, 3 (1987); *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), enf. 617 F.2d 349 (3d Cir. 1980).

¹⁵ If necessary, I would credit Jazdyk’s testimony on this point as being the more convincing and assertive in demeanor and the more probable. It is extremely improbable that he would have so abruptly cut off the reinstatement rights without further communication with non-appearing strikers.

The strikers who appeared at the plant and who telephoned the plant on May 3 were not offered reinstatement. The only strikers to have been tendered some form of reinstatement offer by May 4 were those to whom the Respondent sent the May 4 letter. That letter did not constitute a “specific, unequivocal, and unconditional” offer of reinstatement to the employees’ same jobs and shifts. Instead, it was an offer of consideration of employment, and which offer was itself preconditioned upon the successful passing of a drug test. That precondition had not been encompassed within the revised drug test policy and practice which the Respondent argued had been implemented after bargaining impasse. Thus, even assuming that the drug test was applicable to returning strikers, i.e., testing and rehabilitation, the precondition of a successful passing of the test for reinstatement “consideration” was not. Furthermore, strikers who successfully passed the drug test were informed by the May 4 letter that they had to await notification of the test results before they were even notified of eligibility for reinstatement consideration.

An employer may not condition reinstatement by unilaterally insisting, as the Respondent has done in this case, that returning strikers take and pass a drug test, or impose other conditions on their return. See, e.g., *Marlene Industries Corp. v. NLRB*, 255 NLRB 1446 (1981), enf. denied 712 F.2d 1011, 1018 (6th Cir. 1983) (offer of reinstatement not valid when returning strikers were treated as new hires); *NLRB v. Transport Service Co.*, 302 NLRB 22 (1991) enf. in part 973 F.2d 562, 572 (7th Cir. 1992); *Domsey Trading Corp.*, supra at 777 fn. 3, 794–795 (a valid offer of reinstatement should consist of more than an announcement and an invitation to apply); *CDR Mfg.*, 324 NLRB 786, 791–792 (1997) (requiring returning strikers to fill out absence reports for being on strike, and then terminating them for not doing so violated the Act); *American Cyanamid Co. v. NLRB*, 235 NLRB 1316 (1978), enf. denied 592 F.2d 356 (7th Cir. 1979) (employer may not insist that union sign a strike settlement as a condition of ulp strikers being returned to work); *Scalera Bus Service*, 210 NLRB 63, 63–64 (1974); *Sunol Valley Golf Club*, supra.

I find that as in *Domsey Trading Corporation*, supra, the Respondent failed to make a valid offer of reinstatement to the strikers who did report on May 3 and, accordingly, it is not appropriate to inquire into the reasons why strikers did not appear or refused to work either on May 3 or May 10, including Connie Ellis, John Barr, and Mike Brannam. I further find that the Respondent failed to make any nonselective, non-piecemeal, valid reinstatement offer to 32 strikers in response to the Union’s reinstatement request within the 5-day grace period commencing the first business day after receipt of the Union’s after-hours faxed notice of April 30, i.e., May 3, or, for that matter, any time thereafter.¹⁶

I find that by the foregoing conduct, including discharging employees who failed to respond or refused to work in the absence of a valid offer of reinstatement, the Respondent violated Section 8(a)(1) and (3) of the Act. I find that by delaying the

¹⁶ Those strikers suspected of misconduct will be evaluated separately.

reinstatement of Longmier, the Respondent violated Section 8(a)(1) and (3) of the Act.

With respect to the allegations concerning the delay and non-reinstatement of suspected picket line misconduct perpetrators, the Respondent argues in its brief:

The Union and General Counsel next complain that Pinnacle violated the Act by refusing to reinstate returning strikers David Bates Jr., Al Sturgis and Bruce Baldwin from May 10, to June 2, 1999 This allegation is also unsupported by the fact and the law. It is well-settled that upon receiving a striking employee's unconditional offer to return to work, the employer may refuse such reinstatement if it has a good faith belief that the individual engaged in strike-related misconduct and the employee, in fact, has engaged in such misconduct. See, e.g., *Mohawk Liqueur Co.* [300 NLRB 1075 (1990), enfd. 951 F.2d 1308 (D.C. Cir. 1991)]; *Clear Pine Mouldings* [258 NLRB 1044 (1984), enfd. 632 F.2d 721 (9th Cir. 1980)]. Here, based on reports from various individuals, Pinnacle had such a belief, and when Bates, Sturgis, and Baldwin offered to return to work, the Company sought to determine whether there was support for these allegations. This included interviews with the persons who made the allegations initially, a review of relevant documents, and interviews with the returning strikers themselves. Mr. Jazdyzyk [sic] was informed at the May 10 meeting that the Company was challenging reinstatement of those three individuals based on its belief that they engaged in strike-related misconduct. He was also informed that the Company would further investigate the underlying allegations; interview the three former strikers; and based on its findings, make a determination as to their return. The Company specifically informed Jazdyzyk [sic] that the three individuals might be returned to work following the investigation. Jazdyzyk [sic] also accompanied the three returning strikers during the Company's interviews, which were conducted on May 11, 1999. Due to vacations and unavailability of some witnesses, the Company's investigation took about two (2) weeks to complete. On May 26, 1999, Pinnacle informed Mr. Jazdyzyk [sic] of its decision to reinstate Bates, Baldwin and Sturgis. Of those three individuals, only Bates reported as directed, and neither Baldwin or Sturgis has contacted the Company since.

Initially, I find that the three strikers had never been offered a "specific, unequivocal and unconditional" reinstatement, even after the so-called "investigation" of their suspected strike misconduct was aborted. The condition of a successful passing of the drug test as an employment condition, as so specified in the May 4 letter and orally conveyed through Jazdyzyk, was, at best, deferred for these three strikers to a time immediately after a report for orientation. The orientation for the strikers was not worktime as no strikers who appeared was actually paid for time spent at orientation on May 27, which is contrary to the Respondent's own policy.

Further, I find that the reinstatement that was proffered was unduly delayed. The "investigation" reeks of contrivance and petty harassment. The Respondent had not engaged in any serious investigation prior to the request for reinstatement. A prime witness had no longer been employed. Boos' testimony

as to the actual investigation was so generalized and conclusory as to be meaningless. Boos was well aware of his vacation long before initiating an investigation that he knew required his presence to be of any practical value. The timing of the holiday eve reporting date is highly suspicious. Jazdyzyk, who protested, was told by the Respondent's counsel that the plant would probably operate through the weekend. It did not. Boos certainly must have been aware of the Respondent's plan not to operate that weekend after a delay caused by a meaningless investigation. The Respondent, however, persisted that the three strikers appear at 4:30 p.m. on Thursday afternoon. The only striker who did report on May 21—Bates Jr.—was presented with documents to be executed that admittedly were inappropriate. Bates Jr. was not an applicant for new employment.

Having found that Baldwin, Bates Jr., and Sturgis were not offered a valid and timely offer of reinstatement, I find that it is inappropriate to inquire into the reasons why they failed to report to work or failed to work on May 27 and thereafter. *Domsey Trading Corp.*, supra. I further find that by delaying their reinstatement and discharging them, the Respondent violated Section 8(a)(1) and (3) of the Act.

The Respondent accurately sets forth the following analysis with respect to the 8(a)(5) allegations:

Section 8(a)(5) of the Act makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a) [which requires the parties to bargain collectively over 'rates of pay, wages, hours of employment, or other conditions of employment']." 29 U.S.C. §§ 158(a)(5), 159(a) (1994). Generally, an employer who unilaterally institutes changes in wages, hours or other conditions of employment violates Section 8(a)(5). See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). There are certain exceptions to this rule, however, including where the employer and employee representative are at impasse in their negotiations. Id. As the Board has stated, impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Corp.*, 163 NLRB 475, 478 (1967), affd. sub nom. *Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Among the facts considered in determining whether impasse has been reached are (1) whether there has been a strike; (2) the fluidity of the parties' positions; (3) continuation of bargaining; (4) the duration of hiatus between bargaining meetings; and (5) the number and duration of bargaining sessions. 1 THE DEVELOPING LABOR LAW 693-95 (Patrick Hardin ed., 3d ed. 1992) (citing cases). Once impasse has been reached, the employer is permitted to make unilateral changes in working conditions, provided they are not substantially different than its pre-impasse bargaining proposals. *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enforced, 559 F.2d 1201 (1st Cir. 1977), and which are consistent with the offers the union has rejected. *NLRB v. Plainville Ready Mix Concrete*, [309 NLRB 581 (1992)] 1995 U.S. App. LEXIS 109910 (6th Cir. 1995); cert. denied, 516 U.S. [974 (1995).]

Citing *Johnson-Bateman Co.*, 295 NLRB 180 (1989), the General Counsel correctly states that drug testing programs constitute mandatory subjects of bargaining.

The General Counsel correctly sets forth as a statement of Board law that assuming the existence of good-faith impasse, an employer is not privileged to implement a proposal that is not reasonably encompassed within the preimpasse proposal, appropriately citing *Emhart Industries*, 297 NLRB 215, 217 (1987). As found above, the drug testing obligation imposed upon returning strikers went well beyond that which was purportedly implemented by the Respondent for other employees and required no postemployment rehabilitation upon a failure of a drug test, but rather a successful drug test as a precondition to employment consideration. Not only was such a policy unilaterally announced in violation of the Respondent's bargaining obligation, but it constituted a discriminatory condition of employment solely imposed upon employees who had engaged in concerted, protected strike activities. Accordingly, I find that by its announcement and implementation of the drug test policy for returning strikers as set forth in its May 4 letter, the Respondent violated Section 8(a)(1), (3), and (5) of the Act.

As to the remaining allegations of the complaint relating to Bates, I find that because of the foregoing credibility evaluations, they are without merit.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(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. The Union is, and has been at all material times, the exclusive bargaining agent under Section 9(a) of the Act for purposes of collective bargaining for the Respondent's employees in the following appropriate collective-bargaining unit:
All production and maintenance employees of Respondent at its Muskegon, Michigan plant; excluding office or clerical employees, professional employees, foremen and guards and supervisors as defined in the Act.
4. By discharging, by delaying reinstatement, and by failing to make a valid offer of immediate reinstatement to bargaining unit employees who joined in the strike that commenced February 2, 1998, and who thereafter made an unconditional offer to return to work, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.
5. By unilaterally conditioning reinstatement consideration of the above-strikers upon the successful passing of a drug and alcohol abuse test, and by its implementation of such policy without prior notice and bargaining with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act and Section 8(d) of the Act, and by its discriminatory application of such policy, the Respondent violated Section 8(a)(3) and (1) and thereby committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent has in no other manner violated the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As to all employees who joined in the strike and remained on strike that commenced February 2, 1998, and for whom an unconditional offer to return to work was made, I shall order the Respondent to offer them 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, discharging if necessary any replacements, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their unconditional offer to return to work to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Pinnacle Metal Products Company f/k/a The Wilkie Company, Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, delaying reinstatement, or failing to make a valid offer of immediate reinstatement to bargaining unit employees who joined in the strike that commenced on February 2, 1998, and who thereafter made an unconditional offer on April 30, 1999, to return to work.

(b) Unilaterally and discriminatorily conditioning consideration of the above-strikers upon the successful passing of a drug and alcohol abuse test without prior notice to or bargaining with Local Lodge 670, District Lodge 97, International Association of Machinists and Aerospace Workers, AFL-CIO, the exclusive bargaining representative under the Act for employees in the following appropriate unit:

All production and maintenance employees of Respondent at its Muskegon, Michigan plant; excluding office or clerical employees, professional employees, foremen and guards and supervisors as defined in the Act.

(c) 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 to those employees who joined the strike that commenced February 2, 1998, and for whom unconditional offers to return to work were

¹⁷ 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.

made on April 30, 1999, including those whom it discharged, 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, discharging if necessary any replacements, and make whole those employees, including those for whom it delayed reinstatement, for any losses of earnings or benefits suffered as a result of its conduct in the manner set forth in the Remedy section of this decision.

(b) Rescind the discriminatory and unilaterally imposed drug and alcohol abuse policy of May 4, 1999, which required the taking and successful passing of a drug and alcohol abuse test as a precondition for reinstatement consideration of bargaining unit striking employees who have made an unconditional offer to return to work.

(c) Bargain in good faith with the Union about the terms and conditions and applicability of drug and alcohol abuse tests for striking bargaining unit employees who make an unconditional offer to return to work.

(d) 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 backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Muskegon, Michigan, copies of the attached notice

marked "Appendix."¹⁸ 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. 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 May 10, 1999.

(f) 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.

¹⁸ 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."