

Waveline, Inc. and Vinvent Venditto, Jr. and Todd Needham. Cases 22-CA-9900 and 22-CA-9942

September 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On March 31, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and a brief supporting the cross-exception and answering Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein.¹

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate probationary employees Vincent Venditto, Jr., and Todd Needham after the conclusion of an economic strike in which they had participated. Like the Administrative Law Judge, we reject Respondent's contention that employees who have not completed a probationary term *ipso facto* do not have the same rights to reinstatement after economic strikes as regular employees.² As found by the Administrative Law Judge, Respondent, in refusing to reinstate Venditto and Needham, deviated from its normal practice of allowing such employees to complete their probationary terms before deciding whether to retain them. Respondent admitted that it had not made any decision before the strike concerning the retention of Venditto and Needham. It seized upon the strike as an opportunity to evaluate them and find

¹ In sec. III, pars. 5, 6, and 7, of his Decision and in his Conclusion of Law 3, the Administrative Law Judge indicated that Respondent had violated Sec. 8(a)(3) and (1) of the Act by "discharging" the Charging Parties. However, Respondent's conduct was alleged and litigated as an unlawful refusal to reinstate economic strikers. Therefore, we disavow such references to Respondent's conduct as constituting discriminatory discharges, and we shall amend Conclusion of Law 3 accordingly.

We do not agree with the Administrative Law Judge that Respondent's unfair labor practices warrant a broad remedial order to effectuate fully the purposes of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Accordingly, we shall narrow the scope of the Order to provide that Respondent cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Sec. 7 of the Act.

² See, e.g., *Freezer Queen Foods, Inc.*, 249 NLRB 330 (1980); *Compacted Powdered Metals, Inc.*, 231 NLRB 68 (1977), enfd. 98 LRRM 2438, 84 LC ¶10,645 (3d Cir. 1978) (unpublished opinion).

them unsuitable for reinstatement. Under these circumstances, Respondent's refusal to reinstate Venditto and Needham unlawfully penalized them for participating in the strike.

We also agree with the Administrative Law Judge that Needham did not abandon his job with Respondent by taking a temporary job with another employer during the strike. Respondent's argument in this regard is particularly unconvincing because Needham was discharged by the other employer before the strike ended, and he subsequently informed Respondent of his interest in returning to work for it. Similarly, the evidence does not support Respondent's contention that Venditto's job was eliminated after the strike.

Despite finding such refusal to reinstate Venditto and Needham to be a violation of Section 8(a)(3) and (1), however, the Administrative Law Judge did not order backpay for Needham, instead leaving that contingency to a backpay proceeding. He did so because a permanent replacement for Needham had been hired during the strike, and the evidence was insufficient to determine whether any substantially equivalent position for which he was qualified became available after the strike ended. We find merit in the General Counsel's exception to this failure to order backpay.

Economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon the departure of the replacements or when jobs for which they are qualified become available, unless the employer can sustain its burden of proof that the failure to offer them reinstatement was for legitimate and substantial business reasons.³ The General Counsel sought to prove herein that Respondent hired new employees after the strike for substantially equivalent positions that Needham could have filled. Respondent refused to provide the records, which were subpoenaed by the General Counsel, that would have established whether such vacancies occurred. This unexplained refusal to provide relevant evidence within its control warrants the adverse inference that a position became available after the strike that Needham could have filled.⁴ Inasmuch as we have already rejected Respondent's asserted business reasons for refusing to reinstate Needham, we shall therefore order that he receive backpay in the

³ *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 636 (1973). See also *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

⁴ See *Laher Spring & Electric Car Corp.*, 192 NLRB 464, 466, fn. 4 (1971); *Mid States Sportswear, Inc.*, 168 NLRB 559, 560 (1967), enforcement denied on other grounds 412 F.2d 537 (5th Cir. 1969).

manner specified in the section of this Decision and Order entitled "Amended Remedy."

AMENDED REMEDY

Having found that Respondent has engaged in unfair labor practices violating Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

We shall order Respondent to offer Venditto and Needham immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings they may have suffered as a result of Respondent's discriminatory refusal to reinstate them by paying Venditto a sum of money equal to what he would have earned from March 25, 1980, to the date of Respondent's offer of reinstatement to him, less his net earnings during that period, and by paying Needham a sum of money equal to what he would have earned from April 22, 1980,⁵ to the date of Respondent's offer of reinstatement to him, less his net earnings during that period, with backpay and interest to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁶

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 3 and substitute the following:

"3. By refusing to offer Vincent Venditto, Jr., and Todd Needham reinstatement to their former positions or to substantially equivalent positions that became available after their unconditional offer to return to work from an economic strike, Respondent has discriminated against them with respect to their hire, tenure, and terms and conditions of employment, discouraging membership in the above-named labor organization, and has thereby violated Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

⁵ Because Respondent refused to provide the records that would indicate exactly when a vacancy became available for Needham, we shall begin the backpay period from April 22, 1980, when the last striker was recalled by Respondent.

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on the backpay due in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

Waveline, Inc., Fairfield, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of Local 77A, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, by refusing to reinstate probationary employees to their former positions or to substantially equivalent positions that became available after their unconditional offer to return to work from an economic strike.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Offer Vincent Venditto, Jr., and Todd Needham immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, in the manner set forth in the section of this Decision and Order entitled "Amended Remedy," for any loss of earnings they may have suffered as a result of Respondent's discriminatory refusal to reinstate them.

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

(c) Post at its plant in Fairfield, New Jersey, copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT discourage membership in or activities in behalf of Local 77A, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, by refusing to reinstate probationary employees to their former positions or to substantially equivalent positions that become available after their unconditional offer to return to work from an economic strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Vincent Venditto, Jr., and Todd Needham immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings they may have suffered as a result of our discriminatory refusal to reinstate them.

WAVELINE, INC.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard before me in Newark, New Jersey, on January 5 and 6, 1981. The complaint in this matter was issued by the Regional Director for Region 22 on June 19, 1980,¹ based on charges filed by Vincent Venditto, Jr. and Todd Needham on April 11 and, 30 respectively. In substance, the complaint alleges that the Respondent, Waveland, Inc., since on or about March 17, 1980, has failed and refused to reinstate the aforesaid employees who engaged in a strike by Local 77A, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (herein called the Union), after the strike ended and after an unconditional offer to return to work was made on their behalf.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I make the following:

¹ Unless otherwise indicated all dates are in 1980.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that the Respondent is a New Jersey corporation with its principal office and place of business in Fairfield, New Jersey, where it is engaged in the manufacture, sale, and distribution of microwave equipment and related products. It is further admitted that, during the past year, the Respondent sold and distributed products valued in excess of \$50,000 which were shipped in interstate commerce directly to States other than the State of New Jersey. The Respondent concedes and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It also is conceded 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

In the autumn of 1979, the Union became the collective bargaining representative of certain of the Respondent's employees pursuant to a secret-ballot election conducted by Region 22 of the Board. Subsequent thereto, negotiations commenced and a collective-bargaining agreement was ultimately reached on March 10. Prior to the agreement, a strike was conducted by the Union from January 28 until March 10. It is agreed by the parties that the strike in question was an economic strike. As part of the strike settlement agreement of March 10, the Union notified the Employer that the strike was terminated and the Company agreed to recall the strikers on a staggered basis in order to accomplish their return to work in a manner consistent with the Company's need and ability to reemploy them. The two individuals involved in this case participated in the strike. However, at the time the strike started, they had not yet completed their probationary terms.² Venditto was employed as a drill press operator and Needham was employed as a trainee for numerically controlled (NC) machine tools.³ Both began their employment on December 17, 1979.

The evidence clearly establishes and there is no real dispute that subsequent to the strike, the Respondent decided that neither Venditto nor Needham would be allowed to return to work. It is evident therefore that the Company, in effect, terminated their employment. The Respondent's position is as follows:

² Prior to the execution of the collective-bargaining agreement, the Company had a policy of hiring all employees on a 60-day probationary period. The collective-bargaining agreement sets the probationary period for 90 days.

³ It appears from this record that the Company operates a number of NC machines as a subdepartment within its machine shop and that the normal complement for this subdepartment would be three employees consisting of a lead man, an NC operator, and a trainee. It also appears that these NC machines are quite sophisticated and require somewhat different skills and abilities than required from a regular machinist, which itself is a highly skilled position. It appears that both NC machinists and regular machinists require extensive on-the-job training (up to 3 years), in order to become fully capable of performing their tasks even if they had gone to trade schools before becoming employed.

(a) As to both individuals, it is asserted that they had completed less than half of their probationary periods and that the Company decided, after the strike ended, that it would not recall them because in management's opinion they would not have successfully completed their probationary terms. This is, in fact, the Company's primary position in this case which includes a premise that probationary employees have a lesser right of recall than regular employees under the Act.

(b) As to Needham, it is asserted in the alternative that he had voluntarily quit his employment to go to work as a machinist trainee for a company called Ryan Machine.

(c) It is additionally asserted in Needham's case that a temporary strike replacement was given a permanent position as the only NC trainee before the strike ended, and therefore this person permanently replaced Needham in the job for which he had been hired.

(c) As to Venditto, it is also asserted that his job as a drill press operator was eliminated after the strike.

Venditto was hired as a drill press operator in the machine shop which was supervised by Foreman Stephen Brozyna. Although a majority of his time was spent doing drill press work, Venditto also performed milling work and an operation called broaching. Venditto had been employed for about 26 days prior to the start of the strike and his strike participation was known to the Respondent.

The Respondent asserts that Venditto was not a satisfactory employee and that at a meeting held some time between March 10 and 14, it was decided, based on the recommendation of Stephen Brozyna, not to recall him.⁴ In essence, it is asserted that Venditto's performance was at such a level so as to warrant the conclusion that he would not have successfully completed his probationary period.

With respect to the Company's policy regarding probationary employees, Plant Superintendent Allen Gregory, testified that in almost all cases new employees have been given the full probationary period before a decision is made as to whether to retain them or to let them go. According to Gregory, the only exceptions to this practice were when new employees had bad work habits such as excessive absenteeism, latenesses, or were accident prone. He asserted that with respect to evaluating probationary employees insofar as technical skills and dexterity, the normal procedure has been to make the final determination at the end of the probationary period. With respect to Venditto, Gregory testified that he did not have much chance to observe his work although he did see that Brozyna spent a good deal of time with Venditto in setting up the work, indicating to him that this employee was having problems. Brozyna testified that in his opinion, Venditto was not particularly skilled in the type of drill press work done by the Company (involving high tolerances), even though he had prior experience as a drill press operator. He therefore offered his opinion that Venditto would not have been able to pass his probationary term. However, Brozyna also testified that, prior to the strike, he never made an assessment of

⁴ The evidence herein establishes that the Company began recalling the strikers on March 18, 1980, and that most returned to work by the last week of March.

Venditto, "because he hadn't really been with me long enough to make a full evaluation as to whether I would keep him on as a full employee or to let him go." As far as reporting his opinion to Gregory, Brozyna stated, "I may have done it in passing . . . but basically, those decisions were mine to make." Brozyna went on to state, "I may have said something to Al Gregory as to not needing his services any longer. I don't know if I had related it to anyone else."

The evidence indicates that after the strike ended, the drill presses were still in operation notwithstanding the Company's refusal to recall Venditto. In this respect, Richard Korinis, a witness called by the General Counsel testified that when he returned to work after the strike had ended,⁵ he observed a person doing the drill press work who had not been employed before the strike started. He further testified that this person left the Company's employ about a week or a week and a half thereafter and that various people were then assigned to operate the drill presses. On the Respondent's behalf, Brozyna testified that after the strike ended various people within the machine shop and also various other employees classified as general factory workers did the drill press work as well as other work that Venditto had performed prior to the strike. Thus, according to the testimony of Brozyna, no one person was classified as a drill press operator after March 10, that job being performed by a variety of different people, including new employees hired after the strike. He testified that these employees did this work in addition to their normal duties when required.⁶

As noted above, Needham was hired as an NC machine trainee and he too was a probationary employee at the time the strike commenced. In addition to the contention that Needham was an unsatisfactory employee, it is asserted by the Respondent that he quit his job and ob-

⁵ He returned to work on March 18, 1980.

⁶ Prior to the hearing, the General Counsel subpoenaed the following records from the Respondent:

1. All books, records and other documents showing names, job classification, and dates of employment of all employees hired by Waveline, Inc., from January 28, 1980, to the present.
2. All books, records and other documents showing the names, job classification, and termination dates of all employees of Waveline, Inc., terminated during the period from March 17, 1980, to the present.

The Respondent, despite the fact that it did not make a timely motion to revoke the subpoena, nevertheless refused to furnish many of the documents requested. In this respect, the Company did turn over the personnel file of David Crossman who is asserted to have permanently replaced Needham as the NC trainee. Additionally, it did offer a list summarizing the people who were recalled after the strike; the names and job categories of people hired after the strike until May 6, 1980; the names of the people hired during the strike and some of their job classifications; and the names of those people who left the Company's employ after the strike ended until May 6, 1980.

Given this situation, in the context of this case I will not, as suggested by the General Counsel, strike the Respondent's evidence regarding that portion of its defense asserting that Needham was permanently replaced inasmuch as documentary evidence concerning that matter was furnished to the General Counsel. I also will not strike the evidence proffered by the Respondent concerning the alleged unavailability of work for Venditto after the strike ended, but I shall accept and rely on the evidence of Korinis (called by the General Counsel), to the effect that the Company hired a drill press operator during the strike who left the Company's employ about a week or a week and a half after March 18, 1980.

tained other employment during the strike with a company called Ryan Machine. In this regard, the Respondent asserts that it did not initially consider recalling Needham when the strike ended as it was their belief that Needham, having obtained other employment, would not return to work. As to this contention, the evidence establishes that Needham did obtain a job as an NC trainee at Ryan Machine during the strike, but that he was discharged from that position prior to the end of the strike. Needham testified that he accepted employment at Ryan because he could not afford to remain without work during the strike and that he told Ryan that he might return to Waveline when the strike ended if the terms and conditions of a contract were favorable to him. Needham also asserted that he made similar statements to Brozyna when he went to Waveline during the strike to pick up his tools. No one from Ryan Machine was called to testify as to the understanding between Needham and that company concerning the latter's hire or as to whether his employment was intended or understood to be permanent, temporary, or conditional. The General Counsel asserts that the mere fact that Needham went to work at Ryan during the strike cannot lead to the conclusion that he voluntarily abandoned his employment at Waveline.

When Needham was not recalled, he went to the Respondent's premises on or about March 16 where he filled out a form in which he indicated his desire to return to work. Thereafter, the Company's management decided to deny Needham's request to return to work essentially on the ground that he, like Venditto, would not have successfully completed his probationary term. In this respect, Brozyna testified that Mirosky, the leadman in the NC subdepartment, had expressed some negative comments about Needham's productivity before the strike had occurred, but that he (Brozyna), had decided to keep Needham on anyway because he had to get the work out. Mirosky was not called to testify in this proceeding and it is apparent from Brozyna's testimony that he had not made any final evaluation of Needham's performance during the period that Needham had worked for the Company before the strike commenced.

With respect to Needham's situation, the evidence also discloses that a person named David Crossman was hired during the strike as a temporary replacement, who at a point before the strike ended, was offered and accepted the position as the NC trainee on a permanent basis. Crossman was still employed by the Company in this position at the time the hearing herein was held. It therefore is evident that he permanently replaced Needham during the strike.

III. ANALYSIS AND CONCLUDING FINDINGS

When discussing the law applicable to economic strikers, it must initially be noted that a violation of the Act may be established even in the absence of discriminatory motive. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), the Supreme Court stated:

[T]he status of a striker as an employee continues until he has obtained "other regular and substantial equivalent employment" . . . If and when a job for

which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications."

Moreover, in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), the Board held that "economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements . . . are entitled to full reinstatement upon the departure of replacements."⁷ Accordingly, it may be said that when economic strikers make unconditional offers to return to work, a company is compelled, as a matter of law, to accept such offers unless it can affirmatively establish substantial business justifications for its refusal. Similarly, the fact that the strikers have been permanently replaced does not serve to eliminate a company's obligation to reinstate such strikers, but only serves to delay its obligation until such time as suitable vacancies occur.

It also is established that probationary employees are entitled to the same protection of the Act as permanent employees. Thus, when probationary employees participate in an economic strike, they must be recalled to their former jobs, upon their unconditional offers to return, absent some substantial business justification for refusing to do so. *Freezer Queen Foods, Inc.*, 249 NLRB 330 (1980); *Compacted Powdered Metals, Inc.*, 231 NLRB 68 (1977).

Notwithstanding the testimony of Brozyna and Gregory to the effect that Needham and Venditto would not, in their opinion, have successfully completed their probationary periods, it is clear from Brozyna's testimony that such an evaluation had not been made for either employee before the strike commenced because he had not had the full opportunity to observe and evaluate their performance. Moreover, the decision to disqualify them for reinstatement, which was made after the strike ended, was made contrary to the Company's well-established past practice of waiting the full probationary period before making a final decision as to whether to retain or reject any probationary employee.

Given the above facts, it is my opinion that the Respondent has not established a substantial business justification warranting its decision to disqualify these two strikers for reinstatement.⁸ Moreover, as the decision in

⁷ Also, the fact that a particular striker's job has been filled by a permanent replacement does not excuse a company's failure to recall the striker if other equivalent jobs for which he is qualified become available. *Little Rock Airmotive, Inc.*, 182 NLRB 666, 672 (1970).

⁸ In *Markle Manufacturing Company of San Antonio*, 239 NLRB 1142, 1150 (1979), the Board upheld the opinion of the Administrative Law Judge who concluded that "legitimate business reasons" for refusing to reinstate strikers does not include work deficiencies or undesirable habits known to the employer at the time of the strike. In this respect the Administrative Law Judge stated:

Denial of reinstatement to economic strikers is inherently destructive of important Section 7 rights, including the right to strike. If an employer may seize upon a lawful strike to review strikers' competency and desirability as employees and, if they are found to be less than adequate, assert such finding as a substantial business reason for not reinstating them, where it is not established that such employees would have been forthwith discharged, the result is inherently de-

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both instances was, in effect, that neither would be offered their jobs back at any time, this action was tantamount to the discharge of Needham and Venditto, two employees, who with full knowledge of the Company, had engaged in an economic strike. *Markle Manufacturing Company supra*. As such, the fact that a permanent replacement had been hired during the strike to replace Needham, does not preclude a finding that his discharge violated the Act, although it could serve to mitigate the Respondent's backpay liability as discussed below.

It is also my opinion that the fact that Needham obtained other employment during the strike cannot, in the circumstances herein, be construed as indicating his abandonment of the strike or of his job at the Respondent. Needham credibly testified that he accepted the job at Ryan Machine only because he could not afford to be without an income during the strike and that he specifically indicated to Ryan and to Brozyna that he might return to Waveline after the strike ended.⁹ Accordingly, when the Company decided, in effect, to discharge Needham after he had lost his job at Ryan Machine, and after Needham had unconditionally offered to return to work on March 16, it is concluded that the Respondent violated Section 8(a)(1) and (3) of the Act. Moreover, this conclusion is reached even though the Company may not have had an obligation to immediately reinstate Needham due to the fact that it had hired a permanent replacement. This is so because its decision effectively precluded Needham's future recall in the event that a position for which he was qualified became available.

With respect to Venditto, the evidence establishes that during the strike the Company hired a person to do drill press work and that this person left the Company's employ about a week or a week and a half after March 18. Therefore, applying the principles set forth in *Laidlaw Corporation, supra*, it seems to me that the Respondent, as of about March 25, had an obligation to offer Venditto his former position of employment, which was as a probationary drill press operator. I also do not believe that the evidence presented by the Respondent is sufficient to establish that Venditto's job was thereafter abolished as it is clear from the testimony of Brozyna that the drill press work and the other work that Venditto did before the strike was and is still being performed at the Company by other employees, including employees who were hired after the strike ended. There-

structive of the right to strike. Any employee with less than an exemplary work record, which work record is frequently not known to the employee, would be fearful to engage in this protected activity and afford the employer an opportunity to review his work record and deny him reinstatement. In my opinion, a better rule would be to preclude a struck employer from asserting as a legitimate business consideration any work deficiencies or undesirable habits known to it at the time of the strike as a basis for denying reinstatement to its employees.

⁹ Cf. *Q-T Tool Company, Inc.*, 199 NLRB 500, 501 (1972), where the Board held, in the context of a case involving voter eligibility, that an economic striker is presumed to continue in that status unless it is affirmatively shown by objective evidence that the striker has abandoned his interest in the struck job. The Board went on to state that, "acceptance, of other employment, even without informing the new employer that only temporary employment is sought, will not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote." See also *Woodlawn Hospital*, 233 NLRB 786, 791 (1977).

fore, it is my opinion that the Respondent, as in the case of Needham, terminated the employment of Venditto by disqualifying him for recall. As Venditto participated in the strike, it is my conclusion that the Respondent thereby violated Section 8(a)(1) and (3) of the Act.

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. By discharging Todd Needham and Vincent Venditto, Jr., who engaged in an economic strike, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and 2(6) and (7) of the Act.

THE REMEDY

I recommend that the Respondent cease and desist from its unfair labor practices and post a notice to employees. With respect to Todd Needham, although I have concluded that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging him, I shall not at this stage of the proceeding require the Respondent to make an immediate offer of reinstatement because another employee had been hired during the strike to permanently replace Needham and this person was still employed at the time of the hearing. I shall therefore simply require the Respondent to offer Needham his former or substantially equivalent position of employment, if and when such a position becomes available.¹⁰ Similarly, I shall not at this point order the Respondent to make Needham whole for lost wages because the evidence herein, although not absolutely dispositive, tends to establish that despite his discharge, he would not have been recalled at any time up to and including the close of this hearing as his position was occupied by a permanent replacement.¹¹

¹⁰ Of course if Needham is reinstated, he would resume his status as a probationary employee.

¹¹ In this regard, the fact that the Respondent may have hired machinists after the strike ended would not be relevant to Needham's situation because, as a trainee, he could not have performed the work of a trained machinist in either his subdepartment or in the rest of the machine department. However, because Respondent refused to turn over certain documents subpoenaed by the General Counsel, the record does not disclose whether any trainees, in addition to David Crossman, were hired in the machine department in the NC subdepartment after the strike ended. Therefore, my recommended Order shall not preclude the General Counsel from establishing in any backpay proceeding that additional machinist trainees were hired after the strike ended or that his replacement since the close of the hearing on January 6, 1981, left the Company's employ. In either case, this Order shall then be construed so as to require the Respondent to tender backpay to Needham from such time as his former or substantially equivalent position of employment became or becomes available, if the Respondent at such time, refused or refuses to offer to recall him. Such backpay, if any, would be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). I will further note that based on this record, it appears to me that Needham would be qualified to be a trainee, not only for the NC machines but for the machine department generally. Therefore if a trainee's position becomes available in the machine shop, such a position should be offered to Needham. *Little Rock Airmotive Inc., supra*.

With respect to Vincent Venditto, Jr., I shall order the Respondent to immediately offer to recall him to his former position of employment as it is my opinion that there is no current legitimate impediment to his reinstatement. Also, as I have concluded that a replacement hired to perform his work left the Company's employ on or about March 25, 1980, I shall order that the Respondent

make Venditto whole for any loss of earnings he may have suffered from that date. Here too, backpay shall be computed in accordance with the principals set forth in *F. W. Woolworth Company, supra*, and *Isis Plumbing & Heating Co., supra*, plus interest as set forth in *Florida Steel Corp., supra*.

[Recommended Order omitted from publication.]