

**Aluminum Cruisers, Inc. and Larry T. Wayne, William D. Colvin III, Joseph Hollenkamp,<sup>1</sup> Edward Hollenkamp, Sr.,<sup>1</sup> Mark Steven Tucker, Michael C. Leasor, Blaine Morgan, Jr., and Lawrence J. Wesley.** Cases 9-CA-11047-2, 9-CA-11047-3, 9-CA-11047-4, 9-CA-11047-5, 9-CA-11047-6, 9-CA-11047-7, 9-CA-11047-8, and 9-CA-11047-9

February 21, 1978

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND MURPHY

On September 30, 1977, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions of the Administrative Law Judge, to modify his Remedy,<sup>3</sup> and to adopt his recommended Order,<sup>4</sup> as modified herein.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below, and hereby orders that the Respondent, Aluminum Cruisers, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified.

1. Substitute the following for paragraph 1(b):

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

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> In his Decision, the Administrative Law Judge misspelled the names of Joseph Hollenkamp and Edward Hollenkamp, Sr. The correct spelling is as shown.

<sup>2</sup> In its exceptions, the Respondent contends that the Administrative Law Judge denied it its right to a fair and impartial hearing by exhibiting bias and prejudice towards it and by directing an ethnic slur against the Respondent's president. We have carefully reviewed the entire record. An Administrative Law Judge has the duty—as set out in Sec. 102.35 of the Board's Rules and Regulations—"to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice . . . ." To fulfill that duty, an administrative law judge has the authority—as set out in subsection (k) of Sec. 102.35—"to call, examine, and cross-examine witnesses . . ." Thus, it is fully proper for an Administrative Law

Judge to question witnesses, when necessary, to elicit relevant facts and to develop a full record. We reject the Respondent's contention that the Administrative Law Judge herein, by questioning witnesses and attempting to forestall improper questions and answers, assumed the role of a prosecutor and departed from his role of impartiality. While there are instances in the record before us in which the Administrative Law Judge exhibited impatience and made somewhat intemperate observations, we conclude that, viewing the proceedings as a whole, the Respondent had a fair and impartial hearing. Further, we do not find that any of the Administrative Law Judge's remarks could fairly be interpreted as an ethnic slur against the Respondent's president.

<sup>3</sup> The Administrative Law Judge, citing *Florida Steel Corporation*, 231 NLRB 651 (1977), inadvertently specified interest to be paid at 7 percent; however, there the Board stated that interest will be calculated according to the "adjusted prime rate" used by the U.S. Internal Revenue Service for interest on tax payments. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>4</sup> In par. 1(b) of his recommended Order, the Administrative Law Judge uses the narrow cease-and-desist language, "in any like or related manner," rather than the broad injunctive language, "in any other manner," which the Board traditionally provides in cases involving serious §(a)(3) discrimination conduct. We shall modify the recommended Order accordingly.

## APPENDIX

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

WE WILL NOT fail or refuse to reinstate economic strikers who have unconditionally requested reinstatement when work for which they are qualified becomes available.

WE WILL NOT offer the stock checker position to a new employee until we have offered the position to the last of the qualified strikers on the preferential hiring list.

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

WE WILL offer one of the following economic strikers whose name appears on the current preferential hiring list immediate and full reinstatement to the job of stock checker or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing if necessary anyone hired on or after January 15, 1977. The five qualified strikers are as follows: Lawrence J. Wesley, Woodrow Smallwood, Orville B. Patterson, Edward Hollenkamp, Sr., and Wade A. Mahoney.

WE WILL make the reinstated strikers whole for any loss of earnings they may have suffered because of our discrimination against them by payment to them of a sum of money equal to that which they normally would have earned until the date on which we make a valid offer of reinstatement, plus interest.

ALUMINUM CRUISERS,  
INC.

## DECISION

## STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: This proceeding arose out of charges filed by employees, Larry T. Wayne, William D. Colvin III, Joseph Hollenkemp, Edward Hollenkemp, Sr., Mark Steven Tucker, Michael C. Leasor, Wayne Morgan, Jr., and Lawrence G. Wesley against Aluminum Cruisers, Inc., referred to herein as Respondent or the Company, pursuant to which the Regional Director for Region 9, on March 30, 1977, issued an order consolidating cases, consolidated complaint and notice of hearing alleging that the Company had engaged in unfair labor practices violative of Section 8(a)(3) and (1) of the National Labor Relations Act, by failing to reinstate an economic striker.

Upon the basis of the entire record herein, including my observation of the witnesses, and after due consideration of the posthearing brief filed by the Company, and the General Counsel's statements of position in a telegram, I hereby make the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF THE RESPONDENT

Respondent, a Kentucky corporation with principal office and plant at Louisville, Kentucky, manufactures aluminum cruisers. In the course and conduct of its business, Respondent annually sells and ships goods and materials valued in excess of \$50,000 from its Louisville, Kentucky, facility to points located outside the State of Kentucky.

I find on the basis of the foregoing admitted facts that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Company's answer admits, and I find that Shopmen's Local Union No. 682, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, referred to herein as the Union, is and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

A. *The Issue Presented and The Facts*

The issue presented herein is whether, as alleged in the complaint, the Company violated Section 8(a)(3) and (1) of the Act by hiring a new employee, Donald Hill, as a stock clerk instead of selecting one of 20 employees whose names appeared on a preferential hiring list following their economic strike against the Company. The facts regarding this issue are as follows:

On October 10, 1976, the Company's production and maintenance employees who, at all times material herein,

were represented by the Union commenced an economic strike at the Company's Louisville plant. On January 15, 1977, the Union, on behalf of the Company's production and maintenance employees, made an unconditional offer to terminate this strike and to return to work in accordance with a settlement proposal containing the following provision for the economic strikers:

There will be contract language to provide that the company shall have the right to determine which employees will be called back and when these employees will be called back to work. With respect to the employees who will be called back at the conclusion of the strike, the company will notify these employees by telephone. Likewise, with respect to employees who have been permanently replaced, the company will notify these employees in writing of their replacement. It is anticipated that all employees who will be returning immediately to the company will report back for work on or before Tuesday, January 17, 1977.

On January 24, the Company and the Union agreed upon a preferential hiring list containing the names of 20 striking employees who had been permanently replaced during the strike. The list which was to be effective as of January 15, contained the names of all of the Charging Parties and the following additional employees:

Henry Kaminski	John Hauck
Jerry Knight	Willard Keeling
Wade Mahoney	Michael Owen
Orville Patterson	Woodrow Smallwood
Joseph L. Yates	Ronald E. Gordon
David M. Compton	Thomas Burns

At the time of the hearing in this matter, the Company had recalled six of the strikers on the preferential hiring list.

The incident which gave rise to the complaint occurred on January 31. On that date, the Company hired Donald Hill as a stock clerk or as setout in the collective-bargaining agreement "stock checker" to fill eventually the vacancy left by Eldon Todd who was a stock clerk class A, and who did not return to work following the strike. According to the applicable descriptions of the Company work's classifications set forth in Section 10 of the current collective-bargaining agreement, Todd's duties and those for which Hill was hired were as follows:

## STOCK CLERK-CLASS A

Whose duties require orderly stock keeping functions in stock room. Receive stock and dispense a variety of supplies, raw materials parts, tools or finished stock. Responsible for initiating orders to replenish and maintain

\* \* \* \* \*

## STOCK CHECKER

Count out, handle and deliver stocks and supplies in a stock room under direction of stock clerk. Sort and distribute stock to and from manufacturing, processing

or storage areas. Includes knowledge of identity of materials and follows prescribed quantity and timing schedules. Accumulate orders and take inventories.

Hill came to the attention of Company President Garcia through the recommendation of Company Personnel Manager Jerry Howard. Hill worked for an automotive parts supplier, and waited on Howard on several occasions, when the latter was purchasing parts for the Company. Howard advised Garcia that Hill was conscientious and helpful to customers. Prior to hiring Hill as a "stock checker" the Company posted a notice on the plant bulletin board announcing that the Company was seeking a stock clerk class B. The duties of that classification as set out in the current collective-bargaining agreement were as follows:

**STOCK CLERK B**

Whose duties required orderly stock keeping functions in stock room. Receives stock and dispenses a variety of supplies, raw materials, parts, tools or finished stock, etc. Includes knowledge of identity of materials, follows prescribed quantity and timing, schedules, keeps inventory. Works under a minimum of supervision.

One employee bid for the job but was rejected for lack of experience. The Company did not notify any of the strikers on the preferential hiring list of the stockroom vacancy.

Five of the strikers on the preferential hiring list testified as to their work experience in the Company's employ. First to testify was Lawrence J. Wesley, who began his employment with the Company in April 1974 as a helper, sweeping floors, and washing and cleaning boats. For about 1 month the Company employed Wesley to distribute parts from the stockroom to the production area. By the time of the strike, Wesley was an accessory installer, class A, having progressed from accessory installer, class C.

As an accessory installer class A, Wesley was, according to the contract, "to assemble on boat all parts normally installed in final assembly. He [was] capable of installing wiring, engines, consoles, water systems, radios, light plants, air conditioning and any equipment required on the work order." The contract also stated: "Works with a minimum of supervision."

As an installer, Wesley would occasionally go to the stockroom and obtain parts necessary for his work. When his regular work became slack, the Company would assign Wesley to work in the stockroom, 1 day or 2 days at a time. Wesley credibly testified that he could identify at least 90 percent of the parts kept in the Company's stockroom. Since 1974 Wesley has assisted in taking an annual inventory of the parts in the stockroom as well as parts stored elsewhere in the plant.

On May 4, 1976, the Company notified Wesley that he was being placed on 6 months' probation. The notification was as follows:

You were discharged on Friday, April 30th, for taking property belonging to The Louisville and Jefferson County Air Board. It is the Company's position that your conduct in this matter was intolerable and

that your discharge was justifiable punishment for the humiliation you have caused this Company and its management.

However, in consideration of your good work record prior to this incident and of the fact that you have made restitution to the Air Board as well as your apparent sincerity in expressing regret for your wrong doing, the Company is offering you one last opportunity to redeem yourself.

Your discharge is hereby amended to disciplinary lay off with loss of pay of one week and one day beginning Friday, April 30th through Friday, May 7th. Furthermore, you are being placed on probation for six (6) months, beginning May 1, 1976. During such six month period any infraction of Company Rules shall subject you to immediate discharge.

Be it understood that this reduction in the penalty for your offense does in no way exonerate you nor does it reduce the seriousness of the act.

/s/ William J. Howard  
Personnel Manager

Woodrow Smallwood began his employment with the Company on November 8, 1971, as a boat cleaner. His duties at that point were to clean the finished cruiser, wash the windows, and touch up the screws. After approximately 4 months, the Company transferred Smallwood to a position in the assembly area which required that he supply wood and parts to employees assembling cruiser components.

The Company transferred Smallwood to the position of accessory installer class C, 2 months later. According to the contract, his duties required the installation of ornamental trim, horns, glass, cleats, and other components. In this job, Smallwood was required to identify parts. Smallwood also installed gas tanks and flooring and wired engines. Finally, Smallwood became a glass installer. In this assignment, he installed all the glass on the Company's cruisers. From time to time, the Company assigned Smallwood to work in the stockroom on a temporary basis. According to Smallwood's credited testimony, these assignments occurred "once a week." Working in the stockroom, Smallwood issued parts, and received and signed in for them. During his tenure with the Company, Smallwood participated in five annual inventories, identifying and counting parts, and filling out inventory cards.

Orville Patterson spent his first 4 years with the Company as an electrical assembler. He began his employment with the Company in November 1968 as a class C electrical assembler. This job required Patterson to install the wiring of electrical consoles and generally complete all of the electrical portion of cruiser construction. This work also required that he obtain his parts from the stockroom and that he be able to identify all the parts he needed to accomplish his task. Occasionally, when the stock clerks were not available, Patterson would go into the stockroom and obtain his parts. Patterson became acquainted with the bilge pumps, trim tabs, cylinders, running lights, fuses, circuit breakers, spotlights, switches and other fixtures. After 2 months Patterson became a class A electrical

assembler. According to the current collective-bargaining agreement classifications, the requirements of this are:

Wires consoles and instrument panels, makes harness, wires engines, and any electrical component on a boat. Works under a minimum of supervision.

For the second 4 years of his employment, and until the strike, Patterson was an engine installer. His duties were to install engines and connect them to the drive shaft. In this job, Patterson became acquainted with additional components and parts in the Company's inventory, including collars, shafts, propellers, nuts and bolts, and electrical components associated with the engine. Again, in this capacity Patterson was required at times to go to the stockroom and obtain parts necessary to perform his functions. For the last 3 years of his employment, the Company required him to make out written requests for parts, a task which required that he identify parts by name. On occasion, the Company assigned Patterson to work in the stockroom, where he assisted in receiving, storing, and issuing parts.

Edward Hollenkemp, Sr., began working for the Company on November 20, 1975, as a class C accessory installer. As required by the job description for that classification, Hollenkemp installed cleats, horns, and small accessories on cabin cruisers. After 3 or 4 months, the Company promoted Hollenkemp, Sr., to the class B accessory installer classification. The description of this classification in the current collective-bargaining agreement is as follows:

**ACCESSORY INSTALLER — CLASS B**

Whose duties require the ability to assemble on boats all parts normally installed in final assembly. He works under supervision and assists Group A installers in the more complex installations such as radios, air conditioners, light plants, etc.

In addition to the requirements of his classification, Hollenkemp, Sr., also performed woodworking. Aside from the parts required to do the woodworking, all of the parts used by Hollenkemp, Sr., as a class B accessory installer, were stored in the stockroom. Occasionally, when Hollenkemp, Sr., ran out of work at his regular job classification, the Company assigned him to the work usually for 1 to 3 days. He was assigned to the stockroom for as much as 2 weeks.

On the first occasion, Hollenkemp, Sr., attached drainage cylinders to sink assemblies, a job usually performed in the stockroom by stockroom employees. On other occasions, Hollenkemp, Sr., assembled waterlines and gaslines in the stockroom, also tasks usually performed by stockroom employees. Aside from the assemblies which he made during his assignment in the stockroom, Hollenkemp, Sr., performed other stockroom duties including returning extra parts to their proper place on the shelves.

Hollenkemp, Sr., while assigned to the supply room, also built compartmented wheeled carts, called roll-a-ways, which were used to transport parts from the stockroom to

production areas. Two roll-a-ways were used for each cruiser. One was used to carry woodwork. The second carried the remaining accessories to be attached to the cruiser. Each work classification assigned to construct a given boat had its parts in a separate compartment on the roll-a-way. The roll-a-way compartments were filled by stockroom employees according to a parts list for the specific boat to be constructed. The parts list contained the names and numbers of the respective parts. The number corresponded to the number assigned to the stock item in the Company's stockroom.

Hollenkemp, Sr., was acquainted with the stockroom contents. On the last two occasions, when Hollenkemp, Sr., worked in the stockroom, he received shipments of parts from suppliers which he counted, marked, and shelved, tasks usually performed regularly by the assigned stockroom employees. Hollenkemp, Sr., also issued tools on hand receipts as did the regular stockroom employees. He knew the nomenclature and location of most of the tools stored in the storeroom. He knew the names of most of the parts kept in the stockroom, particularly, the ones with which he had worked. As for those that he was not familiar with, he would ask the regular stockroom employees for assistance in identifying and locating such parts. In addition to the spare parts the stockroom contained chemicals, fiberglass, tubes of glue, and similar materials used in the construction of the Company's cruisers. Of these items Hollenkemp, Sr. was fully aware and also testified as to the uses to which some of these products would be put. The last occasion on which Hollenkemp, Sr., worked in the stockroom was a period of 2 days, October 8 and 9, just prior to the economic strike which began on October 10.

The Company hired, Wade A. Mahoney, on June 21, 1974, and initially employed him as a floor sweeper. His duties were to sweep in and around the plant and pick up scrap and other refuse. After 9 months in that job, the Company transferred Mahoney to other duties which included cleaning cruisers. He cleaned off the sawdust, wiped windows, touched up scratches, and painted screws to match the color of the surrounding material. After 6 or 7 months on this latter assignment, the Company classified Mahoney as a production welder class B. Initially, the Company utilized Mahoney's welding skill on the construction of the bottoms of 28- and 37-foot cruisers. He also welded on superstructures. Occasionally, Mahoney would go to the stockroom to obtain a drill bit or a tool.

On occasion, the Company would assign Mahoney to work in the stockroom for brief periods shelving parts. The total time he spent in the stockroom during his employment with the Company was 2 to 3 weeks.

**B. Analysis and Conclusions**

The General Counsel contends that this case is governed by the Board's decision in *The Laidlaw Corporation*,<sup>1</sup> which relied on the Supreme Court's decision in *Fleetwood Trailer*.<sup>2</sup> The General Counsel contends in essence that under the Board's *Laidlaw* decision the qualified economic

<sup>1</sup> 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (C.A. 7, 1969), *cert. denied* 397 U.S. 920 (1970).

<sup>2</sup> *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967).

strikers in this case who had made unconditional application for reinstatement were entitled to be offered the opportunity to fill the stock checker position for new employees which Donald Hill was hired.

In its posthearing brief, the Company stated its position as follows: "The evidence in this record is that the Respondent decided to hire Hill *only* after a good faith determination that no qualified person existed on the preferential hiring list. Certainly this is a 'legitimate and substantial business justification' for the Respondent's hiring of Hill."

I agree with the General Counsel that the Company's refusal to offer the stock checker job opening to one of the employees on the preferential hiring list violated Section 8(a)(3) and (1) of the Act. My reasons follow:

In *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 635-636 (1973), the Board observed that the Supreme Court in *Fleetwood Trailer, supra* at 381, had held:

[T]he status of the striker as an employee continues until he has obtained "other regular and substantially 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." *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26.

In *Brooks, supra*, 202 NLRB at 636, the Board in discussing its earlier decision in *Laidlaw, supra*, declared that:

. . . economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon departure of replacements or *when jobs for which they are qualified become available*, unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons. [Emphasis supplied.]

Thus, under Supreme Court and Board doctrine, the Company's reinstatement obligations to the strikers on the preferential hiring list included reinstatement to positions which the strikers were qualified to fill.

The job opening which the Company offered to nonstriker Hill, as described in the collective-bargaining agreement, required the counting out, handling, and delivering of stocks and supplies from the stockroom under the direction of a stock clerk. The job also entailed sorting and distributing stock "to and from manufacturing, processing or storage areas," and required knowledge of the identity of the supplies and parts in the stockroom. The stock checker was also required to accumulate orders for parts and supplies and take inventories. I find from the testimony of strikers Wesley, Smallwood, Patterson, Hollenkemp, Sr., and Mahoney, that each of them had sufficient experience at the Company's plant to qualify them for the stock checker position. In particular, their testimony shows familiarity with the identity and location of a substantial

portion of the Company's parts and materials. Further, it appears that the Company recognized their ability to work in the stockroom at least as stock checkers for, on occasion, the Company employed each of them in the stockroom performing the very tasks described under the classification "stock checker" in the current collective-bargaining agreement. Thus, it appears that the General Counsel has shown that five strikers were qualified for the position which was ultimately bestowed upon Donald Hill.

I find no merit in the Company's claim that striker Wesley was not qualified because he was on probation for an unlawful taking of property, and could not be trusted in the stockroom. First, the plain meaning of the Company's May 4, 1976, notice quoted above, was that the 6-month probationary period would end on November 1, 1976. Further, the notice does not suggest that this probation rendered Wesley unsuitable for work in the stockroom. These facts cast doubt on Company president George C. Garcia's testimony to the effect that the strike tolled Wesley's probationary period until such time as the Company offered him reinstatement, and that the Company found him unqualified for the stock checker position because of his earlier "stealing." Further, for reasons set out below, President Garcia impressed me as an unreliable witness and I have not credited his testimony regarding Wesley's qualifications for the stock checker position.

In an attempt to escape a finding of violation here, the Company sought to establish that before hiring Hill, President Garcia and Personnel Manager Howard carefully considered the personnel records of all of the employees on the preferential hiring list. According to the Company, only after determining that none of the employees on the preferential hiring list were qualified, did the Company turn to Hill whose background satisfied the requirements of the stock checker position. Thus, according to the Company, it has sustained its burden of showing a legitimate and substantial business justification for not selecting a striker from the preferential hiring list rather than Hill. I do not agree.

In attempting to make out its defense, the Company introduced into evidence as "Respondent's Exhibit 1" a typewritten list dated February 8, 1977, bearing the names of 19 of the 20 strikers whose names appeared upon the preferential hiring list. Next to and under each name are set forth facts regarding the individual's experience with the Company and with other employers. On direct examination, President Garcia testified emphatically that Respondent's Exhibit 1 was compiled on February 8, 1977, "for recalling people. We wanted to know what different classifications were available." Again, under my examination and cross-examination, Garcia testified that, in determining whether any employee on the preferential hiring list was qualified for the stock checker's job, he consulted Respondent's Exhibit 1 and determined from that list that none of the employees were qualified for the stockroom position. Once again, on cross-examination, President Garcia agreed that on January 31 he consulted Respondent's Exhibit 1. On redirect examination the following exchange occurred:

Q. Now Respondent's 1 is dated February 8, 1977, which is some days after Mr. Hill was employed. Will

you tell us whether or not all the information which is set on Respondent's 1 was considered by you at the time you reviewed the list of all employees on the preferential list?

A. Yes sir.

Q. Where did you get that information?

A. We got this from personal experience and the others was from their personal applications.

Q. From their personnel records?

A. Yes.

When confronted with his unlikely chronology, Garcia seemed surprised. Later, when I examined President Garcia, he denied that he used Respondent's Exhibit 1 when he decided that he would not hire any of the employees listed on that exhibit. He testified that he did not look at that list "because we hired Hill prior to this". Under my questioning, Garcia testified that he compiled the data on Respondent's Exhibit 1 after Hill was hired and that he had prepared the information in longhand and given it to his secretary for typing. However, he could not remember when he had prepared the longhand listing. Then, after testifying that he probably gave the pencil notes to his secretary on February 8, he admitted that he did not remember doing so as a matter of fact. In an apparent attempt to establish the existence of a penciled version of Respondent's Exhibit 1, at the "proper" time counsel for the Company posed the following ambiguous question:

In any event, Mr. Garcia, regardless of the date on which you handed the longhand list to your secretary, tell us whether or not the longhand list containing this information was made up prior to the time you hired Mr. Hill?

Garcia's answer was "Yes sir." However, the Company did not come forward with either the longhand list or the secretary's testimony.

President Garcia's hasty attempt to replace his incredible chronology with more plausible testimony regarding Respondent's Exhibit 1 cast serious doubt upon his credibility. His repeated attempts to use self-serving declarations to answer questions posed by counsel for the General Counsel also detracted from his reliability as a witness. On occasion, Garcia also detracted from his credibility when he sought to avoid answering questions through the diversionary tactic of engaging in verbal fencing with counsel for the General Counsel. His generally defensive attitude while testifying under cross-examination provided further ground for my impression that Garcia's testimony regarding the Company's decision to fire Donald Hill was wholly unreliable as a source of credible evidence.

Nor did Personnel Manager Howard's testimony aid the Company's defense. Howard first testified that after the class A stock clerk position was vacated, the Company posted a vacancy notice on the plant bulletin board seeking a class B stock clerk. The Company rejected the one employee, a spray painter, who responded to the plant notice. When asked what he did next about filing the vacancy, without mentioning the preferential hiring list Howard answered "at that time I called Mr. Hill." At this point, counsel for the Company then asked the following

question: "Prior to or after calling Mr. Hill, did you give any consideration to the eligibility or qualifications of employees on the replacement list?" Thereafter, following my ruling on an objection that the quoted question was leading, counsel for the Company rephrased the question. Howard answered that at about the same time that the job was posted, the Company considered the qualifications of the employees on the preferential hiring list. Howard then went on to testify that prior to determining that none of the employees on the preferential hiring list were qualified for the stock checker job, the Company had prepared a typewritten list showing their qualifications, including their experience in the Company's employ and their experience as shown on their application. He also testified that after viewing that list he and Garcia determined "that we had no one on that list with the qualification that we needed in the stock room." On cross-examination, Howard, as did President Garcia, without hesitation selected Respondent's Exhibit 1 as the list that he and President Garcia had used to appraise the strikers' qualifications.

Indeed, the troublesome question was asked twice on cross-examination and Howard twice agreed that Respondent's Exhibit 1 was the very list that he and President Garcia had used. It was not until counsel for the Company flagged the date of February 8 by showing Respondent's Exhibit 1 to Howard, asking him to read it and then finally, asking him to "tell us whether you meant this exact document or a typed list containing the information that is on this list?" At this point Howard appeared to be sorting out his options. He hesitated and then testified: "It was Mr. Garcia's translation made up that day." Upon further redirect examination Howard testified: "We had a list that was compiled at the end of the strike that was similar in its appearance to that list [Respondent's Exhibit 1]. It had all these names on it". Thus, as did Garcia, Howard, when faced with the unlikely circumstance that Respondent's Exhibit 1 dated February 8 could have been used in the Company's decision to hire Hill on January 31, attempted to save the day by grasping at the possibility that another document of similar appearance was used to accomplish the task. However, this testimony does not square with President Garcia's assertions that the typewritten Respondent's Exhibit 1 was probably not prepared until February 8 and that prior to that time he had before him a handwritten tabulation showing the names and qualifications of the employees on the preferential hiring list. Howard's contradictory testimony and his attempt to provide a hasty expedient to explain the incongruity between the February 8 date on Respondent's Exhibit 1 and his testimony that he and Garcia used it to make a decision dated January 31 of the same year, persuaded me that he was not trying to provide a full and forthright account of the circumstances surrounding the hiring of Hill.

In sum, I find that the Company has failed to sustain its burden of proving that its failure to offer the stock checker's position to one of the strikers on the preferential hiring list was the legitimate and substantial business reasons. Instead I find from its hasty repudiation on its own exhibit, and the fumbling attempts by witnesses Garcia and Howard to come up with a list predating

January 31, that the Company's defense was an afterthought devised to avoid a finding of an unfair labor practice in this case. Further, that the Company posted the stock checker's job at the plant and afforded no such notice to the strikers on the preferential hiring list suggests that the Company did not consider any of them before recruiting Hill on January 31, and I so find.

The Company's failure to offer the stock checker vacancy to the five qualified strikers before offering the job to Hill was contrary to the authorities cited above. Accordingly, I conclude that the Company violated Section 8(a)(3) and (1) of the Act by refusing to offer that vacancy to any of the five strikers whom I have found qualified for reinstatement to the stock checker position.

#### THE REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall recommend that the Company cease and desist therefrom and takes certain affirmative action designed to effectuate the policies of the Act.

I have found that the Company violated Section 8(a)(3) and (1) of the Act by failing and refusing to offer reinstatement to a qualified striker on the preferential hiring list as a stock checker, a job which became available following the strike. I shall order the Company to seek to fill that position from the following qualified strikers on the preferential hiring list: Lawrence J. Wesley, Woodrow Smallwood, Orville B. Patterson, Edward Hollenkemp, Sr., and Wade A. Mahoney.

I shall order the Company to offer one of the five qualified strikers on the preferential hiring list immediate and full reinstatement to the position of stock checker without prejudice to the employee's seniority or other rights and privileges, dismissing employee Donald Hill or any other employee not hired from the preferential hiring list for that position, if necessary, to make room for him; *provided*, however, that the Company shall not offer the stock checker position to a new employee until the last of the five qualified strikers named above has been offered reinstatement to that position.

I shall also recommend that the Company make whole the employee selected for reinstatement for any loss of earnings he may have suffered by reason of the Company's failure to reinstate him by payment to him of a sum of money equal to that which he normally would have earned until the date on which a valid offer of reinstatement is made to him by the Company. Loss of earnings, as referred to above, shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest at 7 percent per annum as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

#### CONCLUSIONS OF LAW

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

<sup>3</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

3. By failing and refusing to reinstate a qualified economic striker when work for which that striker was qualified became available and after he had unconditionally requested reinstatement, thereby discouraging membership in the Union, Respondent has violated Section 8(a)(3) of the Act.

4. By the foregoing conduct, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed to them by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

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

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>3</sup>

The Respondent, Aluminum Cruisers, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to reinstate economic strikers who have unconditionally requested for reinstatement when work which they are qualified becomes available.

(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 necessary to effectuate the policies of the Act:

(a) Offer one of the following qualified strikers on the preferential hiring list immediate and full reinstatement to the position of stock checker or a substantially equivalent position without prejudice to his seniority or other rights and privileges dismissing employee Donald Hill or any other stock checker hired on or after January 15, 1977, if necessary, to make room for him and make him whole for any loss of earnings in the manner set forth in the section of my decision entitled "The Remedy." The five qualified strikers are as follows: Lawrence J. Wesley, Woodrow Smallwood, Orville B. Patterson, Edward Hollenkemp, Sr., and Wade A. Mahoney.

(b) Preserve and, upon request, make available to the Board's 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 Louisville, Kentucky, facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's autho-

<sup>4</sup> 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."

rized 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

ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.