

Ace Tank and Heater Co. and Lionel Richman.
Case 21-CA-6262

October 2, 1967

SUPPLEMENTAL DECISION AND ORDER

**BY CHAIRMAN McCULLOCH AND MEMBERS
BROWN AND ZAGORIA**

On March 24, 1965, Trial Examiner Wallace E. Royster issued a Decision and Recommended Order in the above-entitled case, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and directing it, *inter alia*, to offer immediate reinstatement to certain employees who were unlawfully discharged while on strike, and to make these employees whole for any losses sustained as a result of any denial of reinstatement. No exceptions having been filed, the National Labor Relations Board issued an Order on April 22, 1965, adopting the Recommended Order, and the Order of the Board was enforced by the United States Court of Appeals for the Ninth Circuit on August 11, 1966.

On October 10, 1966, the Regional Director for Region 21 issued and served upon the parties a Backpay Specification and Notice of Hearing. The Respondent filed an Answer to the Backpay Specification on October 24, 1966.

On December 15, 1966, Trial Examiner James R. Hemingway conducted a hearing to determine the sufficiency of Respondent's conduct in respect to reinstatement and to ascertain the amounts of backpay owing under the Board's Order as enforced. On March 15, 1967, the Trial Examiner issued his Supplemental Decision, attached hereto, which awards backpay to one employee and denies an award of backpay to another. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Supplemental Decision and a brief in support of these exceptions. No exceptions or brief was filed by Respondent.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the exceptions and the brief, and the entire record in the

case, and hereby adopts the findings, conclusions, and recommendations¹ of the Trial Examiner, to the extent consistent herewith.

On October 12, 1964, Jose Ramirez and other employees of Respondent began a strike in protest against Respondent's failure to reach an agreement with their bargaining representative. Three days later Respondent discharged the strikers without having first hired replacements. The Trial Examiner, in the first proceeding of this case, found that the discharges were unlawful, but that they had not prolonged the strike. Thus, pursuant to established Board practice, he ordered the reinstatement of the striking employees with backpay only from the dates on which they had made unconditional requests for reinstatement.² His order was subsequently adopted by the Board and enforced by the United States Court of Appeals.

Respondent's employees were covered by a non-contributory group health insurance policy. Under the terms of the policy any employee who was terminated would cease to be covered after the last day of the month in which his employment ceased. The policy provided that discontinuance of active work was to be deemed termination of employment for insurance purposes. Exceptions to this rule were specified for employees absent because of sickness, temporary layoffs, or leaves of absence,³ but there was no mention of strikers.

When Respondent sent in its monthly premiums for November 1964, it omitted from the list of covered employees the names of the strikers, all of whom had theretofore been unlawfully discharged, and no premiums were paid for them. As a result, their insurance lapsed on November 1, 1964. The evidence does not show that the strikers were notified of Respondent's failure to pay the premiums or of the cancellation of their insurance.⁴

While Ramirez was on strike, his wife was hospitalized. She was released on January 24, 1965, the day before Ramirez applied for reinstatement with Respondent. Ramirez returned to work on January 26. On January 31, 1965, his wife was again hospitalized with a heart attack. She remained in the hospital until March 6, 1965, and then was under almost constant medical care until the following January.

Ramirez sought compensation from the insurance carrier for the medical expenses incurred by his wife's two hospitalizations. Both claims were denied—the first because his insurance was not in effect at the time; the second because the policy deferred coverage of dependents who were confined in a hospital on the effective date of coverage,

¹ In the absence of exceptions thereto, we adopt *pro forma* the Trial Examiner's award of backpay to Ronald Priefer in the amount of \$188.29 plus interest.

² See *Gopher Aviation, Inc.*, 160 NLRB 1698, *The Celotex Corporation*, 146 NLRB 48, *enfd.* as modified 364 F.2d 552 (C.A. 5).

³ Where an employee was laid off or on a leave of absence, the policy required that coverage cease in the case of a layoff at the end of the first

and in the case of a leave of absence at the end of the 12th month following the month in which the layoff or leave began.

⁴ The policy provided for certain conversion privileges which would have allowed the strikers to obtain individual policies, if they had submitted applications within 31 days of the termination of their coverage. The individual policies would have provided only a portion of the benefits available under the group plan.

until such time as their release from the hospital. The insurance company said that the effective date of coverage for Ramirez was February 1, 1965,⁵ and that since Mrs. Ramirez was hospitalized on January 31, she was not covered by the policy.

The backpay specification alleged that Respondent had the obligation to make Ramirez whole under the Board's Order and the court's decree by compensating him for the amount that he would have recovered under the insurance policy if Respondent had not canceled it and had not failed to renew it until February 1, 1965. The Trial Examiner in this proceeding found that Ramirez was not entitled to insurance benefits while he was on strike, and that Respondent had reinstated the insurance coverage at as early a date as was possible under the terms of the insurance contract. Consequently, he dismissed Ramirez' claim. We agree with the Trial Examiner that Respondent is not obligated to compensate Ramirez for medical expenses incurred while he was on strike. However, we find that Respondent is liable for those expenses incurred after Ramirez' reinstatement, which he was unable to recover from the insurance carrier.

Although Ramirez was unlawfully discharged while he was engaged in a strike, he was not entitled to backpay until January 25, 1965, the date on which he requested reinstatement. Despite the discharge, he was in no better situation than an unfair labor practice striker. As we have stated, an employer is not required to finance a strike by paying wages for work not performed,⁶ and we have found that wages include such deferred benefits as retirement and vacation benefits and health insurance premiums.⁷ On several occasions, we have required that employees be made whole for insurance benefits lost as a result of the employers' discrimination against them.⁸ But in those cases the employees were entitled to backpay for the periods in which the medical expenses were incurred. Since Ramirez was not entitled to wages or insurance coverage before January 25, the Trial Examiner was correct in denying the claim for his wife's first hospitalization.

The General Counsel contends, however, that Respondent's failure to pay the premiums for November and the months thereafter, coming as it did on the heels of the unlawful discharges, was in itself a discriminatory act for which Ramirez was entitled to be made whole. We cannot agree. The discrimination here was in the discharges. But as

found in the unfair labor practice proceeding, the discharges did not prolong the strike. The Respondent cannot, therefore, be said to have committed a further act of discrimination by failing to pay premiums, for, as we have noted, it was not obligated to pay either wages or premiums for those employees who were on strike. Its failure to pay premiums was no more discriminatory than its failure to pay wages.

However, upon his return to work Ramirez was entitled under the remedial order in the unfair labor practice proceeding to full reinstatement with all rights and privileges which he had enjoyed before he went on strike.⁹ Before October 12, 1965, he and his dependents had been fully covered by the group health insurance policy. This was a condition of employment to the immediate restoration of which he was entitled upon his return to work.¹⁰ Respondent, however, had unlawfully discharged him. When he went back to work, Ramirez was treated as if he were a new employee with respect to his insurance coverage. As a result, he was subject to a delay in the reinstatement of this coverage—a delay which, short as it was, was critical in this case. His reinstatement was thus incomplete.

The Trial Examiner concluded that Respondent was not responsible for the delay in the restoration of the insurance coverage since such delay was compelled by the terms of the insurance contract; he therefore held that Respondent had no obligation to make Ramirez whole for his losses. Assuming that the same situation would have prevailed under the insurance contract even if Ramirez had not been terminated, the fact remains that Respondent was a party to that contract and must bear responsibility for provisions which unjustly penalize strikers and prevent their complete reinstatement. In *Cone Brothers Contracting Company*, *supra*, and *C. B. Cottrell & Sons Company*, *supra*, we held employers to be responsible for the restoration of returning strikers' insurance benefits, despite the terms of the policies themselves.

In *Cone Brothers*, we stated:

. . . at the time of the discriminatory terminations and the strike which followed as a result, the right to insurance coverage had accrued to the employees. This insurance coverage represented a job benefit which arose from the employment relationship and which had vested in the employees as of the date of the unlawful

⁵ Although it was not clearly stated in the certificate of insurance, which was admitted into evidence, an employee's coverage apparently began on the first day of the month following the date on which he began employment. In any event, the policy did provide that an employee's dependents' coverage was to begin on the date that the employee first became eligible for the insurance or the first day of the month following the date that the employee filed a request for dependent coverage, whichever was later.

⁶ *General Electric Company*, 80 NLRB 510.

⁷ *Mooney Aircraft, Inc.*, 148 NLRB 1057, enfd 366 F 2d 809, (C A 5, 1966), *General Electric Company*, *supra*, *W W Cross and Company, Inc.*, 77 NLRB 1162, enfd 174 F 2d 875 (C A 1), *Inland Steel Com-*

pany, 77 NLRB 1, enfd 170 F 2d 247 (C A 7), cert denied on this issue 336 U.S. 960 (1949). See dissent in *Quality Castings Company*, 139 NLRB 928, enforcement denied 325 F 2d 36 (C A 6, 1963).

⁸ *Rice Lake Creamery Company*, 151 NLRB 1113, enfd as modified 365 F 2d 888 (C A.D.C.), *Deena Artware, Incorporated*, 112 NLRB 371, enfd 228 F 2d 871 (C A 6), *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, enfd 218 F 2d 917 (C A 9).

⁹ *Tennessee Packers, Inc.*, 158 NLRB 1316.

¹⁰ *Cone Brothers Contracting Company*, 158 NLRB 186, *C B Cottrell & Sons Company*, 34 NLRB 457.

discharges and protest strike. It could not, of course, be lost to employees thereafter by virtue of an unlawful termination, or forfeited by participation in an unfair labor practice strike. In the latter connection, it is true that strikers may incur certain economic losses, such as wages whose sole aspect is monetary compensation for work performed during the employment relationship. But strike activity does not entail acceptance after the strike of a smaller quantum of vested job rights and privileges.¹¹

If Ramirez' insurance rights had been restored to their prestrike status immediately upon his reinstatement on January 26, 1965, his wife would not have been excluded from coverage under the policy. Because of his incomplete reinstatement, Ramirez sustained losses for which he should be reimbursed in this proceeding. We shall therefore order that he be made whole for those expenses he would have recovered under the group insurance plan but for such incomplete reinstatement, with interest thereon at the rate of 6 percent per annum, from the date on which the medical expenses were paid.

ORDER

On the basis of the foregoing Supplemental Decision and the entire record in this case, the National Labor Relations Board hereby orders that the Respondent, Ace Tank & Heater Co., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall:

1. Pay Ronald Priefer backpay in the amount of \$188.29 with interest thereon at the rate of 6 percent per annum from January 18, 1965, until paid.

2. Reimburse Jose Ramirez in the amount of \$2,613.05,¹² representing the medical expenses incurred by his wife following his reinstatement on January 26, 1965, until December 31, 1965,¹³ which expenses would have been recovered by him under Respondent's group medical insurance plan if his right to benefits under the policy had been immediately and fully reinstated, with interest thereon at the rate of 6 percent per annum, from the date on which such medical expenses were paid.

¹¹ Footnotes omitted. Although the quoted portion speaks of an unfair labor practice strike, the same would hold true for an economic strike.

¹² This figure includes \$612 for hospital room and board, \$732.83 for extra hospital charges, \$140 for physicians' visits in the hospital, and \$1,128.22 for nonscheduled health benefits. We order that Respondent reimburse Ramirez for expenses recoverable under the nonscheduled benefits portion of the policy, even though that provision excludes pre-existing conditions, for full reinstatement requires that strikers not be precluded from recovering benefits for conditions which arose while they were on strike.

¹³ The General Counsel claimed compensation only until December 31, 1965, on which date Respondent's insurance contract was replaced with another.

TRIAL EXAMINER'S DECISION IN SUPPLEMENTAL BACKPAY PROCEEDINGS

STATEMENT OF THE CASE AND OF PRIOR PROCEEDINGS

JAMES R. HEMINGWAY, Trial Examiner: On March 24, 1965, Trial Examiner Royster issued a Decision and Recommended Order herein. No exceptions having been filed, the National Labor Relations Board, herein called the Board, issued an Order on April 22, 1965, adopting the Recommended Order, and the Order of the Board was enforced by the United States Court of Appeals for the Ninth Circuit on August 11, 1966. Thereafter, a controversy having arisen over the amount of backpay due to two of the discriminatees, the Regional Director for Region 21, pursuant to authority conferred upon him by the Board, on October 10, 1966, issued backpay specifications, and the Respondent, on October 24, 1966, filed an answer thereto wherein it admitted most of the allegations of the backpay specification, but took issue with the amount of backpay claimed to be due to one of the two employees involved and denied liability for the amount of loss claimed under a health insurance plan claimed for another. Pursuant to notice, a backpay hearing was held before me on December 15, 1966.

Following the hearing, counsel for the General Counsel and for the Respondent submitted briefs, which have been considered. Upon the entire record in the case I make the following:

I. FINDINGS OF FACT

A. *Backpay Claim of Ronald Priefer*

Priefer's backpay period began on January 18, 1965, the approximate date when he unconditionally requested Respondent to reinstate him to his former position. His backpay period ended on March 18, 1965, the date when he refused Respondent's offer of reinstatement.

At the beginning of the backpay period on January 18, 1965, Priefer had employment as a helper at Advance Galvanizing in Vernon, California, at a wage rate of \$2.35 an hour. In this capacity he helped to galvanize tanks and beams. His work at the Respondent's plant had been as a welder, at a rate of \$3 an hour. Priefer's hours at Advance Galvanizing were 3:30 p.m. to midnight, but he often worked overtime as late as 3 or 4 o'clock in the morning. During the backpay period, Priefer went to the union hall about three times a week to get aid in his search for work, and he went to inquire about work at numerous places of business of employers where he tried to find a job as a welder. Most of Priefer's search was made within 10 miles of his home in Bell Gardens. The Respondent's plant in Santa Fe Springs was about 6 miles from Priefer's home.

Among other places where Priefer sought employment was Downey Welding Manufacturing in Downey, California. The foreman there told Priefer that he would give him a job, but that it would not be until the employer had received a big contract which it was expecting. The rate at Downey Welding would have been \$3.30 per hour, but the job would have lasted only for the duration of the one contract which the employer expected to receive. Downey Welding finally did offer Priefer a job in March 1965, but by this time Priefer had obtained a welding job at Manchester Tank & Equipment, in Lynwood,

California,¹ at the rate of \$2.75 per hour, the starting rate. Because Priefer believed that his job at Manchester Tank would be permanent, whereas the one at Downey would not, he refused the job at Downey Welding, despite the higher rate at the latter.

On one occasion, before Priefer got his job with Manchester Tank on March 5, 1965, he was directed by the Union to a prospective job at United Concrete in Baldwin Park, California, a distance of some 30 miles from Bell Gardens. He testified that he went to the United Concrete plant in Baldwin Park because he did not know how long it would take him to get there and that it was only after he had made the full trip that he had decided that it was too long a trip and that it would cost him too much for transportation. On cross-examination, Priefer testified that he "believed" he could have gotten a job at United Concrete as a welder. It does not appear from the record when the job would have started, had Priefer been willing to take such a job. He testified only that they were not hiring when he reached United Concrete but were only taking applications.

It is the Respondent's contention that Priefer incurred a willful loss by his failure to take employment at either United Concrete or at Downey Welding. I find no merit in the Respondent's contention as to either employer. The record does not show when the job at United Concrete would have started, but even assuming that it would have started during the backpay period, I find that Priefer was not obligated to take work at such a distance. There is no evidence with regard to the availability of public transportation, but from an examination of a map of the Los Angeles area I would conclude that any public transportation to Baldwin Park from Bell Gardens would be unsatisfactory. Priefer was driving a 9-year-old car, and a round trip of 60 miles a day would put 5 times as much wear on his car as would the distance from his home in Bell Gardens to the Respondent's place of business. Even assuming that his automobile would have given him reliable transportation for a long period of time, the cost of such transportation to United Concrete would have been 5 times as great as from his home to the Respondent's place of business. The Respondent argues that "it is a generally accepted fact, and indeed a normal way of life in southern California to drive 30 or more miles to work each way each work day." Even if what the Respondent asserts (for which there is no evidence in the record) is true, it does not appear that the persons who drive 30 or more miles a day are all driving 9-year-old cars and are all making no more than \$3 an hour. Priefer was employed, at the time of his trip to Baldwin Park, at the rate of \$2.35 an hour, which would have been for an 8-hour day, a total of \$18.80. At United Concrete, he could have made \$24 for an 8-hour day, but his transportation would have cost him, at the rate of 10 cents per mile, \$6, or \$4.80 a day more than to Respondent's place of business from Priefer's home. In view of this, the fact that Priefer, although making less money per hour at Advance Galvanizing, was working overtime occasionally at the rate of time and a half,² and that it is not shown that

Priefer would have had any overtime work at United Concrete, I conclude that Priefer was not obliged to accept work at United Concrete. On all the evidence I find that Priefer incurred no willful loss in failing to take employment at Baldwin Park.³

I also find no willful loss in Priefer's rejection of an offer of a job at Downey Welding, which job was shown to have been only of a temporary nature. At the time of the hearing, Priefer had been employed at Manchester Tank for nearly 2 years, and his judgment that that job appeared to him, in March 1965, to be permanent appears, in retrospect, not to have been bad judgment. Furthermore, 2 months after he started at Manchester Tank, Priefer was given his first raise, and he received several after that, ultimately receiving more than he had received at the Respondent. He had been earning \$3.30 per hour for about a year and a half before the date of the backpay hearing.

The Respondent contends that the General Counsel failed to prove any expenses for Priefer because "nothing was offered into evidence to show any specific expenses incurred or any method of calculation for arriving at any expenses allegedly incurred." The General Counsel followed the customary method. Priefer estimated the mileage he traveled between his home, from which he started his trips in search of a job as a welder, and the place of the employer he visited. Based on the total mileage of Priefer's trips, the General Counsel computed the cost of such trips by private automobile (the transportation used by Priefer) by multiplying the total number of miles traveled by 10 cents per mile as the cost of operating an automobile. A figure of 10 cents a mile has repeatedly been used by the Board as a reasonable allowance for operation of a private automobile.⁴ The 10-cent rate is based on the regulations of the Federal Government which determine the amount allowable to employees of the government for use of private automobiles in official business. The allowable amount was fixed by Congress after a comprehensive study of the actual cost of operating automobiles by Federal, State, and private agencies. The figure was earlier set at 7 cents a mile (Travel Expense Act of 1949, P. L. 92, 81st Cong., 1st Sess.), but it has been increased since then to 10 cents a mile. In view of the increase in the cost of gasoline, insurance, automobiles, and repairs since the 10-cent-a-mile allowance was adopted, I find that 10 cents a mile has now assumed an aspect of even greater reasonableness to the Respondent than it would have been at the time when the rate of 10 cents a mile was first put into effect.

Respondent's reference to Wigmore on *Evidence* is misdirected because the sections referred to in Respondent's brief deal with failure to produce available corroborating evidence. There was no showing of the existence of any written documents which would have corroborated Priefer's testimony. Priefer's own testimony of his travel in search of work as a welder is competent evidence. Failure to call possible third party witnesses to corroborate Priefer's testimony, at best, would bear on Priefer's credibility. However, from my observation of

¹ Priefer called it Manchester Welding. Actually there are two proprietary names listed in the telephone book at the same address: Manchester Tank & Equipment and Manchester Welding & Fabricating Co. I find no fatal variance between the pleadings and the proof.

² Earnings figures tend to establish that Priefer earned about \$80 between January 18 and March 18 by working overtime.

³ Concerning distance as a factor in justification for turning down gainful employment, see *Nickey Chevrolet Sales, Inc.*, 160 NLRB 1279. In

that case, the discriminatee was not already working, as was Priefer. Yet the Board held that the discriminatee was not required to accept available employment at a considerable distance from his home.

⁴ *Charles T. Reynolds Box Company*, 155 NLRB 384, 387; *Rice Lake Creamery Company*, 151 NLRB 1113, 1114, fn. 5, and 1147; *General Engineering, Inc. and Harvey Aluminum (Incorporated)*, 147 NLRB 936, 942.

his demeanor on the stand, I find him to be an honest witness and I draw no inference from the failure of the General Counsel to subpoena foremen, personnel managers, or other persons to whom Priefer might have spoken about work, particularly since such persons would be no more likely to remember Priefer than any other applicant for employment who made inquiry and was given a negative answer.

Priefer named eight employers where he sought work other than the two where he actually obtained interim employment, and he made trips about three times a week to the union hall to inquire about jobs.⁵ Based on Priefer's estimate of distances, I find that in the 6-week period between January 18 and March 5, 1965, Priefer drove an estimated 426 miles seeking employment. The Respondent did not disagree with Priefer's estimates of distances. The original figure shown for Priefer's expenses in the Backpay Specifications was \$56, but the General Counsel, at the close of the hearing, amended this to \$42.60, based on a total estimated mileage of 426 miles. I find this to be a reasonable calculation, since it does not include trips to Advance Galvanizing and to Manchester Tank, to which Priefer might be presumed to have gone at least once in search of employment before he was hired by those companies.⁶

I find that Priefer's gross and net backpay is as set forth below:

<u>Gross Backpay</u>	<u>Interim Earnings</u>	<u>Less Expenses</u>	<u>Net Interim Earnings</u>	<u>Net Backpay</u>
\$1,056.00	\$910.31	\$42.60	\$867.71	\$188.29

B. Backpay Claim of Jose Ramirez

Ramirez was one of the strikers who was discharged by Respondent on October 15, 1964. He had previously been employed by Respondent as an automatic welding machine operator on the day shift in the tank department. Ramirez applied for reinstatement to his former position on January 25, 1965, and was reemployed by Respondent on the following day. The backpay specifications allege that Ramirez was not reinstated to his former position, which was occupied by a replacement hired after his

discharge. In about August 1965, Ramirez was reinstated to his former position. The failure to reinstate Ramirez to his former position is not of material concern here, however, because the rate of pay for jobs given to Ramirez was the same and he was covered by health insurance from February 1, 1966.

Ramirez' claim is based upon expenses incurred by him as a result of his wife's illness and her hospitalization for two periods, one beginning on January 6 and ending on January 23, 1965, and the other beginning January 31, 1965, and extending to beyond the end of that year. In October 1964, at the time of the strike, Ramirez and his dependents were covered under the terms of a group insurance plan wholly paid for by the Respondent. The claim herein is only for such portions of the expenses occasioned by Mrs. Ramirez' illness as would have been paid under this policy up to December 31, 1965, when the Respondent's insurance contract was replaced with another.

The group health insurance covered hospital benefits, surgical benefits, visits by physicians while the patient was in the hospital, supplementary x-ray and laboratory benefits, and certain nonscheduled health benefits, in addition to other items not material here. The insurance contract contained a provision that the dependent's insurance would terminate on the last day of the insurance month during which the insured ceased to be an insured person. The insured (Ramirez) would cease to be an insured person under the terms of the policy, among other listed ways:

(b) on the last day of the insurance month during which the Insured's employment with his employer in the classes of employees eligible for insurance hereunder shall terminate. Discontinuance of active work by an Insured shall be deemed to constitute the termination of his employment except that in the case of the absence of an Insured from active work because of

(1) sickness or injury, his employment may, for the purposes of the insurance hereunder, be deemed to continue until terminated by his employer, or

(2) temporary layoff, his employment may, for the purposes of the insurance hereunder, be deemed to continue until terminated by his em-

⁵ I have interpreted this to mean three times a week, in full weeks, and twice each in the portions of the weeks at the beginning of the backpay period and in which he obtained employment at Manchester Tank.

⁶ The General Counsel's computation apparently is reached as follows:

Round trips to:

Downey Welding & Manufacturing- 3 @ 8 miles each	24
Conwell	8
Hanson Head	18
Butane Tank	14
United Concrete	60
H. & H. Wilson	10
National Tank	14
Atlas Engineering	12
	<u>160</u>

Trips to Union @ 14 miles per round trip as follows:

Between January 18 and 22	2 round trips	28
Between January 24 and 29	3 round trips	42
Between January 31 and February 5	3 round trips	42
Between February 7 and 12	3 round trips	42
Between February 14 and 19	3 round trips	42
Between February 21 and 26	3 round trips	42
Between February 28 and March 4	2 round trips	28
		<u>266</u>

Total Mileage:

426

ployer, but in no case beyond the end of the insurance month next following the insurance month in which the layoff begins, or

(3) leave of absence, his employment may, for the purposes of the insurance hereunder, be deemed to continue until terminated by his employer, but in no case beyond the end of the twelfth insurance month next following the insurance month in which the leave begins.

In the case of any of the above exceptions, the insurance hereunder on such Insured shall automatically cease on the date of such termination of his employment by his employer, as evidenced to the Company by the employer, whether by notification or cessation of premium payment on account of such Insured's insurance hereunder

The insurance contract also stated the date when the insured and his dependents would become covered by the policy. As to dependents, this provides:

If the insurance is afforded under the non-contributory plan each eligible person who files with the policyholder written request to be insured with respect to his dependents is to be insured for the dependent's insurance from the date he first becomes eligible for such insurance or the first day of the insurance month next following the date he files such request, whichever is later . . . provided, however, that

* * * * *

(b) if a dependent, other than a new-born child, is confined in a hospital at the time the insurance would otherwise become effective, the effective date of the insurance with respect to such a dependent shall be deferred until final discharge from the hospital

The insurance also contained a provision whereby an employee could continue his insurance after his termination from active employment by making written application to the insurance company within 31 days after termination of the insurance under the contract accompanied by the first premium.

When the Respondent paid the monthly premium, it would make out a list of employees covered by insurance, with revisions to include new employees and to omit employees no longer actively employed, and send it to the insurance company. On such a list which was sent in for the month of November 1964, the Respondent omitted the names of the employees who went out on strike on October 14, 1964, and, as a result, no premium was paid for them, and their insurance lapsed as of November 1, 1964. There is no evidence that Ramirez made application for an individual policy under the provisions of the agreement as he was privileged to do, as previously set forth herein.

The General Counsel's theory, as set forth in his brief, is not entirely clear. This is true more because of what he avoids saying rather than what he does say in his brief. He does not say specifically that it was Respondent's duty to pay premiums on Ramirez' insurance in November and December 1964 and January 1965, while Ramirez was on strike, but this may be inferred from the fact that the claim for loss described by the General Counsel includes expenses incurred by Ramirez from January 6, 1965, before he made application for reinstatement. Furthermore, the General Counsel argues that, because the exceptions to termination of coverage stated in the insurance contract do not include the situation where work ceases as a result of a strike, a striker, still having employee status, should continue to be covered by

insurance even though he has discontinued active work. However, by the terms of the insurance contract, only in the excepted cases listed did coverage continue although the employee was not actually working. The General Counsel's argument would require the insurance contract to be rewritten to add another exception - discontinuance of active work because of a strike. This cannot be done.

The General Counsel avoids mention of "lapse" of the insurance for nonpayment of premiums as distinguished from "cancellation" by the Respondent because of an unlawful discharge. In his brief, the General Counsel says: "Since it appears that Respondent cancelled Ramirez' insurance because it unlawfully equated striking with 'termination of employment' that cancellation was, itself, along with his discharge, a discriminatory act. An award to Ramirez for the insurance benefits he lost will, therefore, remedy Respondent's discriminatory act and will not constitute payment to a striker for work not performed." This reasoning is rather difficult to follow when it is to be taken with other portions of the General Counsel's brief, such as his statement that the benefits accruing under the insurance plan are to be considered part of "wages" [citing *W. W. Cross and Company, Inc. v. N L.R.B.*, 174 F.2d 875, 878 (C.A. 1)]. The General Counsel alludes to the principle enunciated in *General Electric Company*, 80 NLRB 510, that an employer is not required to finance a strike by paying strikers for work not performed, but he attempts to avoid application of this principle to the instant case by arguing that the cancellation of the strikers' insurance was a discriminatory act just as much as was their discharge. This argument, however, fails to differentiate lapse from cancellation. It also ignores the fact that if wages are not required to be paid during a strike, insurance premiums should not be required to be paid by Respondent either; yet the General Counsel makes no contention that Ramirez was entitled to any wages between the time he went on strike and the time he made application for reinstatement. The earliest time, therefore, that Ramirez would have been entitled to resumption of insurance benefits as well as wages, was January 25, 1965, the date of Ramirez' application for reinstatement.

The case at hand is distinguishable from such cases as *Deena Artware, Incorporated*, 112 NLRB 371, and *Rice Lake Creamery Company*, 151 NLRB 113, where employers were required to pay losses that would have been covered by insurance but for an unlawful discharge which terminated the insurance company's liability, because in those cases the backpay accrued immediately from the date of the unlawful discharge and was not deferred, as here, until employees on strike made application for reinstatement. It is not contended here, any more than in those cases, that the insurance company in any way violated its contract. Here, too, the responsibility of restoring insurance rights to Ramirez rested upon the Respondent and not upon the insurance company. But since Ramirez was not entitled to backpay before he had made application for reinstatement, I find that the Respondent did not have responsibility to act to restore insurance benefits until January 25, 1965, the date when Ramirez made application for reinstatement.

A question might arise, however, as to whether or not the Respondent's responsibility to restore insurance coverage attached as of January 25, 1965, even though an application for insurance as of that date would not, under the terms of the policy, have resulted in commencing the insurance coverage before the first of February. If the Respondent were to be held responsible for restoring

immediate insurance coverage as of January 25, 1965, regardless of the language of the policy, which made coverage effective on February 1, 1965, then the Respondent would be obligated here to reimburse Ramirez for the expenses incurred following his wife's return to the hospital on January 31, 1965, even though the insurance company, itself, was not liable therefor.⁷ Because Ramirez' wife was in the hospital on February 1, at the time when his group insurance became effective under the terms of the insurance contract, the contract excluded liability as to him or his dependents until such time as he or she should have left the hospital.

Although the Trial Examiner in the original hearing herein found that the Respondent's discharge of strikers was an unfair labor practice, he found that the strike was not prolonged by the unfair labor practices. However, without other discussion of whether or not the strike was converted to an unfair labor practice strike by the discharge, the Trial Examiner applied the remedy customary in the case of unfair labor practice strikes⁸ by requiring reinstatement, upon application, even if it were necessary to discharge any replacement hired after October 15, 1964.

Whether or not the strike here was an unfair labor practice strike, however, the strikers were not entitled to backpay or restoration of other rights and privileges under the Board's Order before they had made application for reinstatement. Except that they could not be permanently replaced, the rights of unfair labor practice strikers upon application for reinstatement would be the same as those of economic strikers. When reemployed, the strikers are entitled to be treated without discrimination in the restoration of their rights. True, when Ramirez was reemployed by the Respondent on January 26, 1965, he was not reinstated to his former position for some months, but such failure on Respondent's part was not causally connected with Ramirez' insurance rights. The Respondent reinstated Ramirez' insurance coverage at

as early a date as it was possible for it to do under the terms of the insurance contract. This is all it could do for any returning striker, whether the strike was an economic strike or an unfair labor practice strike. If Ramirez' dependents were not entitled to reimbursement for medical expenses under the policy, that was not because of any omission on the part of the Respondent to reinstitute group insurance coverage for Ramirez - that was only because, under the terms of the insurance contract, no payment was due to him or his dependents. It is unfortunate for Ramirez that his wife could not delay her entrance into the hospital until February 2, 1965, when she would have had a claim instead of entering on January 31, 1965, when that would bar the claim, but this circumstance was not the result of any discriminatory act or omission by the Respondent.

The General Counsel adduced evidence to overcome the appearance of a delayed filing of Ramirez' claim with the insurance company. Since the insurance company denied the claim because of the fact that Ramirez' wife was in the hospital on the day when the insurance coverage became effective and not because of any delay in filing the claim, whether or not the delay was contributed to by Respondent's conduct, I find this aspect of the evidence to be irrelevant.

Upon all the evidence, therefore, I conclude that Ramirez' claim for payment of hospital and other expenses listed in the backpay specifications must be dismissed.

RECOMMENDED ORDER

I recommend that the Board order Respondent to pay to Ronald Priefer backpay in the amount of \$188.29 with interest thereon at the rate of 6 percent per annum from January 18, 1965, until paid.⁹

I FURTHER RECOMMEND that the Board dismiss the claim of Jose Ramirez.

⁷ See *Deena Artware, Incorporated*, 112 NLRB 371, 375, *Rice Lake Creamery Company*, 151 NLRB 1113, 1129

⁸ See *Tom Joyce Floors, Inc.*, 149 NLRB 896, *Valley Die Cast Corp.*,

130 NLRB 508

⁹ *Isis Plumbing & Heating Company*, 138 NLRB 716