

William O. McKay Company, Inc. and Local 44, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent. Case 19-CA-5911

June 22, 1973

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On February 22, 1973, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and a motion for reconsideration, and the General Counsel filed cross-exceptions and a brief in support of the Decision and cross-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, briefs, and motion for reconsideration and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified below.¹

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 herein and hereby orders that Respondent, William O. McKay Company, Inc., Seattle, Washington, shall take the action set forth in said recommended Order, as so modified.

¹ Contrary to that part of the recommended reinstatement order as to the order of recall of Nordaker and Wendt, we are of the opinion, in agreement with Respondent, that such order of recall is best left to the compliance stage of this proceeding

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was tried at Seattle, Washington, on December 7, 1972. The complaint, based on a charge filed on June 26, 1972, by Local 44, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, herein called the Union, issued on September 29, 1972, alleging that William O. McKay Company, Inc., herein

called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

The primary issue is whether Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers Frank Nordaker and Wilhelm Wendt when work became available substantially after the end of a strike.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENT

Respondent, a Washington corporation, with its place of business in Seattle, Washington, is engaged in the sale and service of automobiles. During the calendar year preceding the issuance of complaint, which was a representative period, Respondent's sales exceeded \$500,000 and Respondent purchased goods valued in excess of \$50,000 from directly outside Washington. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

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

III THE ALLEGED UNFAIR LABOR PRACTICES

A. The Events

1. The setting and the strike

Respondent is a member of the Automotive Employers Council, herein called the Council. Through the Council, Respondent has a longstanding collective-bargaining relationship with the Union and Local 910, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The Union and Local 910 jointly represent a group of Respondent's employees which includes parts countermen.

Respondent, under a franchise with Ford Motor Company, sells and services Ford automobiles, and as part of its operation maintains a parts department. The countermen sell parts in that parts department. The primary duties of the countermen are to take orders for parts both in person and on the phone, find the parts numbers so that they can be located, and pull the parts from the correct bin. The parts are sold to customers or are given to mechanics from Respondent's own shop. In the past the countermen also stocked the bins, but as is set forth in detail below, some of that work is now performed by a noncounterman.

On about May 18, 1971, the Union and Local 910 jointly began an economic strike against Respondent and other

members of the Council. Countermen Frank Nordaker and Wilhelm Wendt, both of whom are members of the Union, as well as other employees of Respondent represented by the Union, participated in the strike. On about June 18, 1971, a collective-bargaining contract was signed and the Union, on behalf of all the economic strikers, made an unconditional offer to return to work. On the same day the Union and Local 910 jointly agreed with the Council that the Council's members would rehire the economic strikers when work became available. By this agreement the parties intended to confer on the Council and the strikers only those obligations and rights which the parties had under existing law and no other obligations or rights. On or about Monday, June 21, 1971, Nordaker and Wendt each made unconditional offers to return to work.¹

Prior to this strike, Respondent employed nine employees in its parts department. Seven of these were countermen. After the strike four countermen were recalled. Neither Nordaker nor Wendt was recalled.²

The General Counsel does not contend that the reduction in the number of parts department employees after the strike was an unfair labor practice. In addition, there is neither allegation nor proof that Nordaker and Wendt were unlawfully discriminated against because of their membership in the Union or their participation in the strike. The only issue raised by the General Counsel relates to the reinstatement rights of Nordaker and Wendt as economic strikers who had unconditionally offered to return to work.

2. The availability of jobs for Nordaker and Wendt after the strike

During 1970 Respondent's parts department showed a loss of \$4,477 on net sales of \$565,313. Each of the first 3 months of 1970 showed a loss. In the early part of 1970 W. L. Green, Respondent's president and general manager, discussed the situation with Clifford A. Hollenbeck, the parts sales manager. Green had decided to let two or three people go from the parts department but Hollenbeck thought that in a couple of months the volume would be up enough to justify the number of people then employed. At about the same time there was an economy drive going on through Respondent's entire organization. Overall employment was reduced from about 100 to about 65 employees. On a number of occasions Green told Hollenbeck that costs were running too high based on volume. After comparing costs with other dealers, Green decided that in order to show a profit everyone in the parts department had to average about \$7,000 a month in sales. During 1970 the average sales per month per employee in the parts department was

\$5,234. Green concluded that Respondent had to either do more volume or have less people employed doing the same volume. However, no action was taken to reduce the number of countermen until the strike. During the strike Green met with Hollenbeck and they decided that only four of the seven countermen who had been employed before the strike would be allowed to return. Though Hollenbeck testified that the decision to reduce the number of countermen to 4 was a permanent one and that there was no intention to reinstate Nordaker or Wendt, Green credibly testified that no decision in the automobile business was permanent and that it would be all right to have 20 men if volume justified it. He further averred that the idea was to see where they were and what business they were doing; that there was no fixed decision as to the number of men; and that the number employed would be based on the \$7,000 per month per man sales figure. Respondent had lost business during the strike and according to Green, he had no idea of how much business they might recapture. As the reduction in force which took effect at the end of the strike is not alleged to have been an unfair labor practice, and as the uncontested testimony of Green and Hollenbeck establish that the decision to reduce force was made on the basis of ordinary business reasons, I must find that the reduction in force was based solely on economic considerations.³

Respondent recalled four countermen after the strike. It was not until June 12, 1972, that a fifth counterman was put to work. On that date Respondent hired Robert Erwin as a full-time counterman. Erwin had not previously worked for Respondent. The job that Erwin took was not offered to Nordaker, Wendt, or any other economic striker. Though Hollenbeck testified that Erwin was hired for summer relief while employees were on vacation, he acknowledged that Erwin stayed on because he was an excellent worker, volume was improving, and Respondent was starting to show a profit. Hollenbeck also acknowledged that Respondent was not considering laying off Erwin. Though Erwin may have originally been hired as a temporary employee, it is clear that he thereafter became a permanent one. General Counsel contends that Respondent violated the Act by not offering Nordaker or Wendt the job that was filled by Erwin on June 12, 1972.

Though Erwin was the first counterman hired after the four striking countermen had been recalled, some of the work previously done by countermen was assigned to Daniel Benson. General Counsel contends that Respondent violated the Act by not offering the work performed by Benson to Nordaker or Wendt. Benson began to do the work in question on March 16, 1972. Benson was hired to do general work by Respondent in May of 1971. In early May he spent 10 hours putting up fences, between May 17 and 25 he spent 20 hours washing cars, and between May 26 and 28 he spent 9 hours working on errands for the parts department. He then left Respondent's employ to go back to school. On March 16, 1972, Benson returned to work at

¹ The findings set forth in this paragraph are based either on stipulations or on allegations in the complaint which were admitted in Respondent's answer.

² W. L. Green, Respondent's president and general manager, testified that the employees who were not recalled were Nordaker, Wendt, and Max Christianson. The record does not disclose whether Christianson was a counterman. However, only the status of Nordaker and Wendt is in issue. The General Counsel in its brief states that one of the three strikers who was not recalled has retired. Clifford A. Hollenbeck, Respondent's parts sales manager, credibly testified that before the strike there were seven countermen employed and that four were authorized to come back after the strike

³ When Respondent's counsel asked Green what effect the strike had on his decision, counsel for the General Counsel stated his position by offering to stipulate "that the reduction in the number of parts department employees was economically motivated, or at least that counsel for the General Counsel does not contend that the reduction in the number of parts department employees was an unfair labor practice

Respondent's premises. This time he was not hired by Respondent, but was sent by Seattle Labor Supply, an organization that supplies workers pursuant to contract. On that date Respondent reached an oral agreement with Seattle Labor Supply to use Benson's services. Benson was to do general work helping wherever he was needed. The agreement between Respondent and Seattle Labor Supply provided that Benson was to work at Respondent's premises by the month. Each month the purchase order for his services has been renewed. Benson is told what to do while on the job by Respondent's supervisors. He works full time, 8 hours a day. Benson spends some of his time in the service department but about 75 percent of his working day is spent in the parts department. Benson's principal duty is to stock the bins in the parts department.⁴ The parts come from various suppliers in packages. Benson receives the parts and puts them in bins where they are stored. Until Benson began doing that work on March 16, 1972, the stocking of bins had been done by counter men and other employees in the parts department. John D. Nurney, vice president and general sales manager of Respondent, acknowledged that some of the work that Benson does had formerly been done by journeymen counter men, but he went on to explain that it was not journeymen counter men's work, that counter men usually did it on overtime, that the counter men didn't like that kind of work, and that it was less expensive for the company to have someone like Benson do it. Benson does not sell parts and according to Nurney does not do any journeyman parts counter man work. Under the current collective-bargaining contract journeymen counter men with over 5-years' experience (which was the category that Nordaker and Wendt had been in) earn \$5.07 an hour which would be \$202.80 for a 40-hour week. Benson is paid approximately \$490 a month.

Nurney acknowledged that Respondent did not offer to bargain with the Union before asking Seattle Labor Supply to furnish a man in March of 1972. However, there is no allegation in the complaint that Respondent violated Section 8(a)(5) of the Act by contracting out work that had formerly been done in the bargaining unit. Nor is there any allegation that Respondent contracted out that work as a reprisal against the Union or employees for engaging in protected activity. In his brief, counsel for the General Counsel argues that Respondent deprived the strikers of their work by subcontracting in a manner unlawful under Section 8(a)(5) of the Act. However, the complaint does not allege any such violation and that question has not been litigated. As I cannot presume any unlawful conduct by Respondent in the absence of proof of such misconduct, I must assume that the contracting in itself was not unlawful. The question remains whether the work of stocking the bins which had been done by counter men should have been offered to Nordaker or Wendt on March 16, 1972. That work clearly was available as it was assigned at that time to Benson.

3. Employment by Wendt after the strike

Wendt was hired by Respondent in 1940 as a shop pickup and deliveryman. In 1946 he became a junior counter man and thereafter he was made a journeyman counter man. His employment with Respondent was uninterrupted from 1946 until the strike.

After the strike ended and Wendt had made his application for reinstatement, he returned to Respondent's premises about once a week until October of 1971. After that time he dropped in occasionally. On one occasion in late June or early July 1971, Wendt told Hollenbeck not to forget his telephone number. Hollenbeck replied "I have a whole stack of them over there."

In late September or early October 1971, Wendt decided to go into the real estate business. About that time he spoke to Nurney and said that he thought he would try real estate and that he realized he probably wasn't going to get his job back. He began studying for the real estate exam in the latter part of October and took it in November. After passing the salesman's real estate exam, he started working in December 1971 on a commission basis for Matt Hanley Real Estate. Wendt stayed in the real estate business until May 10, 1972, when he left the real estate firm. During the entire time he worked there he received no salary and his total commissions amounted to \$300. When Wendt started in the real estate business it was his intention to break away from the automotive business and to remain in real estate if he made good at it. Though occasionally Wendt stopped by at Respondent's premises after December 1971, he did not specifically ask for work.⁵

On about June 30, 1972, Wendt became a temporary employee of Sealand Construction. He helped move parts when Sealand moved its parts department and after that he did some maintenance work. His employment with Sealand ended some time before December 7, 1972.

Since the strike, Wendt has not worked as a counter man. He has applied for work in other parts departments without success. In addition, he has asked the Union whether they knew of any jobs and has been told that there were none. Ivor Merryfield, secretary-treasurer of the Union, testified that in August of 1972 he spoke to Vern Pelkey, the parts manager of Riach Central Oldsmobile, who was looking for a qualified journeyman counter man and that he told Pelkey that none were then available. He also averred that he told Pelkey that other dealers were requesting journeymen counter men and he was unable to fill those requests. In his testimony Merryfield explained that dealers normally want a parts man who has worked with the same product that is handled by the dealer and that Pelkey specifically requested a General Motors Corp. parts man. Though it may well be that the Union was remiss in trying to find employment for Nordaker and Wendt, it cannot be said that Nordaker and Wendt lacked diligence in seeking available employment. Nordaker and Wendt had both asked the Union and a number of others to try to help them find jobs. The Union's

⁴ This finding is based on the credited testimony of counter man Ed Hansen, who observed Benson working. Hollenbeck credibly testified that Benson spends 75 percent of his time in the parts department, where he cleans up and puts stock away.

⁵ Nurney testified that Wendt told him that he was thrilled to death to be in the real estate business and that Wendt did not show any interest in having his former job back. However, Nurney's testimony does not establish that Wendt withdrew his outstanding application for reinstatement with Respondent.

allegedly poor efforts in that regard can in no sense be attributed to Nordaker or Wendt. Whatever reinstatement rights may have existed ran to them and not to the Union.

4. Employment by Nordaker after the strike

Nordaker was employed by Respondent from 1960 until 1966 and then again from September 1968 until the strike. He was a counterman.

Shortly after the strike ended and Nordaker had made his application to return to work, he went to Respondent's premises and asked Hollenbeck if there was any work and if they were hiring. Hollenbeck replied that they were not. From then to about August 1, 1971, Nordaker came to Respondent's premises weekly and the conversation with Hollenbeck was repeated many times. After that Nordaker came to Respondent's premises about once a month. In mid-August he asked Hollenbeck if they were going to put on more help and Hollenbeck replied that there were no changes as far as management was concerned.⁶

On about August 1, 1971, Nordaker began working for Edwards Auto Parts as a temporary counterman to relieve vacationing employees. When he was hired, Nordaker was told that he was not a permanent employee and Nordaker told Mac Edwards, who hired him, that he would return to Respondent if he was called back. Nordaker was told that if Edwards Auto Parts put in another store, that his job could become permanent. However, the new store did not materialize and Nordaker's job with Edwards Auto Parts ended in mid-September, 6 weeks after it began. While working for Edwards, Nordaker earned \$3.65 an hour or \$146 a week for a 40-hour week, while he had made \$181 a week from Respondent. The health and welfare benefits at Edwards were \$17 a week and at Respondent were \$28.49 a week. Edwards did not pay any bonus or money toward a pension fund while Respondent did pay a bonus and 20 cents an hour toward a pension fund.

Several weeks after he was laid off by Edwards, Nordaker told Hollenbeck that he was no longer working for Edwards.⁷

Nordaker remained unemployed from the time that he left Edwards until April 1, 1972, when he became a service station attendant for William Paulson. During that period of unemployment he visited Respondent and asked Hollenbeck if they were going to hire more help. Hollenbeck replied "Don't call me, I'll call you." At the time of the trial, Nordaker was still working as a service station attendant, but he had been informed that the job would end shortly because of the death of the owner.

Nordaker unsuccessfully applied for work at a number of other dealerships and has also attempted to obtain work through the Union.

⁶ Hollenbeck testified that Nordaker came in on an average of once a week for about a month and a half, that he asked "what's it look like," that Nordaker's visits were social, and that Nordaker never definitely asked for his job back. I credit Nordaker's version of the conversations on which the above findings of fact are based.

⁷ Hollenbeck testified that Nordaker did not ask for his job again after he began to work for Edwards, but Hollenbeck did not deny that he knew that Nordaker had left Edwards' employ.

B. Analysis and Conclusions

1. Preliminary findings

Nordaker and Wendt made unconditional offers to return to work at the end of the strike. Those offers were never withdrawn and I find that they were outstanding at all times material herein. Respondent repeatedly rebuffed Nordaker and Wendt when they made inquiries about returning to work. When Wendt told Hollenbeck not to forget his telephone number Hollenbeck replied that he had a whole stack of them (applications). When Nordaker asked Hollenbeck if Respondent was going to hire more help, Hollenbeck told him "Don't call me, I'll call you." The fact that Nordaker and Wendt were seeking employment elsewhere is explainable more in terms of their need to survive financially than their lack of desire to return to their former employment with Respondent. The law does not require futile gestures. After Nordaker and Wendt had made it clear to Respondent that they wanted to return, there was no need for them to go through the motion of repeating that offer after Respondent had made it clear that the offer was unacceptable to it. Nor did the mere passage of time diminish the vitality of their outstanding offer to return. In *American Machinery Corporation v. N.L.R.B.*, 424 F.2d 1321 (C.A. 5, 1970), the court addressed itself to the problem that a company had in seeking out strikers "several months" or "five years" after their application for reinstatement, by stating:

. . . he (a company) might notify the strikers when they request reinstatement of a reasonable time during which their applications will be considered current and at the expiration of which they must take affirmative action to maintain that current status. A reasonable rule would not contravene *Fleetwood's* assertion that "the right to reinstatement does not depend upon technicalities relating to application." 389 U.S. at 381.

If Respondent was concerned with the length of time that the applications would be outstanding, it was in a position to set an outside date for the renewal of the applications. It did not do so. Cf. *N.L.R.B. v. Hartmann Luggage Co.*, 453 F.2d 178 (C.A. 6, 1971).

I find that neither Nordaker or Wendt accepted regular and equivalent employment elsewhere after the strike. In *Little Rock Airmotive, Inc.*, 182 NLRB 666, *enfd.* in part, 455 F.2d 163 (C.A. 8, 1972), the Board pointed out that such matters as "fringe benefits (retirement, health, seniority for purposes of vacation, retention, and promotion), location and distance between the location of the job and an employee's home, differences in working conditions, et cetera, may prompt an employee to seek to return to his old job," and had to be considered along with the employee's expressed interest in returning to the old job, in determining whether the employee had obtained regular and substantial equivalent employment.

Wendt only had two jobs after the strike. The first involved work as a real estate salesman in which he earned approximately \$300 during 5 months. The second involved temporary work moving parts and doing maintenance work. As found above, Wendt's application to return to work for Respondent was at all times outstanding. Neither of Wendt's jobs after the strike could be considered regular

and substantially equivalent to the job he held with Respondent prior to the strike.

Nordaker also held two jobs since the strike. The first involved temporary work as a counterman which lasted 6 weeks, for which he was paid substantially less in both wages and fringe benefits than he had earned while working for Respondent. The second job involved work as a service station attendant. As found above, Nordaker's outstanding offer to return to work with Respondent was never withdrawn. Neither of the jobs held by Nordaker after the strike was regular and substantially equivalent to the one he had with Respondent.

With regard to the availability of work at Respondent, Erwin was hired on June 12, 1972, for a job that could have been filled by Nordaker or Wendt. Immediately before Erwin was hired, one journeyman counterman's position was available in Respondent's part department.

A more difficult question is presented with regard to the availability of work for Wendt or Nordaker as of March 16, 1972, when Benson began stocking the parts department bins. As the United States Supreme Court said in *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967), "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." Thus a striker must be given any job for which he is qualified rather than the specific job he had before the strike. Cf. *Little Rock Airmotive, Inc. v. N.L.R.B.*, *supra*, fn. 7. As the key to reinstatement rights is the availability of the job, Respondent cannot defend on the ground that it gave the job to a contractor rather than to a striker. If the job were not available it could not have been contracted out. Though the stocking of the parts department bins was only peripherally the work of countermen before Benson began doing it, it was work that both Nordaker and Wendt were qualified to do. In effect Respondent created a new job for Benson by taking one duty away from the countermen. Respondent may well have taken this action for legitimate business reasons in order to effect an economy. However, a similar result could have been achieved had Respondent offered the new job to Nordaker or Wendt at a pay rate appropriate for a general worker who stocked bins in the parts department. Journeyman counterman rates needs not have been paid.⁸ I therefore find that work was available stocking bins from March 16, 1972, and that work was available as a journeyman counterman from June 12, 1972. I further find that both Nordaker and Wendt were qualified to perform those jobs.

2. The legal framework

In *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) the United States Supreme Court held:

Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent." If the conduct in question falls with-

in this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out."

In *N.L.R.B. v. Fleetwood Trailer Co.*, *supra*, the United States Supreme Court applied the *Great Dane* principle to a situation where economic strikers had been refused reinstatement, holding:

Section 2(3) of the Act (61 Stat. 137, 29 U.S.C. § 152(3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (61 Stat. 140 and 151, 29 U.S.C. §§ 157 and 163). Under §§ 8(a)(1) and (3) (29 U.S.C. §§ 158 (1) and (3)) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.*

The Court went on to state that there are some situations where "legitimate and substantial business justifications" justify an employer's refusal to reinstate economic strikers. One is where the jobs which the strikers claim are occupied by workers hired as permanent replacements during the strike in order to continue operations. That situation is not present in the instant case. The Court stated:

A second basis for justification is suggested by the Board—when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations: for example, "the need to adapt to changes in business conditions or to improve efficiency."⁷ [7—Brief on behalf of NLRB 15.] We need not consider this claimed justification because in the present case no changes in methods of production or operation were shown to have been instituted which might have resulted in eliminating the strikers' jobs.

In the *Fleetwood* case, *supra*, the company could not reinstate the strikers immediately upon application because of the curtailment of production caused by the strike. However, the company did intend to increase production to the full prestrike volume as soon as it was possible. The Supreme Court pointed out that the right of the strikers to reinstatement did not depend on the availability of jobs as of the moment of application. The Court stated:

Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. 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 busi-

⁸ Cf. *Columbia Tribune Publishing Co.*, 201 NLRB No 70

ness justifications." *N.L.R.B. v. Great Dane Trailers, supra.*

In *The Laidlaw Corporation*, 171 NLRB 1366, enfd. 414 F.2d 99 (C.A. 7, 1969), cert. denied 397 U.S. 920 (1970), the Board, based on the dictates of *Fleetwood* and *Great Dane*, held:

. . . that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

The passage of time itself does not change strikers' rights to reinstatement. It is not an undue burden for an employer to maintain preferential hiring lists. Cf. *American Machinery Corp. v. N.L.R.B.*, *supra*. In *N.L.R.B. v. Hartmann Luggage Co.*, *supra*, the court specifically held that economic strikers did not lose their status as employees 12 months after the beginning of a strike. That court found that Section 9(c)(3) of the Act, which under certain circumstances limits the right of an employee to vote, does not take away the employee's status as an economic striker under Section 2(3) of the Act.

Conclusions

As found above, Nordaker and Wendt applied for reinstatement at the end of the strike; the applications were at all times outstanding; they did not obtain regular and substantially equivalent employment elsewhere; and one job with Respondent for which they were qualified became available on March 16, 1972, and another on June 12, 1972. The reduction in force after the strike was based on economic considerations and Respondent's refusal to reinstate them at that time was therefore based on a legitimate and substantial business justification. However, with reference to the dates on which work became available for which Nordaker and Wendt were qualified, Respondent offered no evidence of business justifications which would have warranted its failure to offer them those jobs.

Nordaker and Wendt became economic strikers on May 18, 1971, when they participated in the strike against Respondent. When the strike ended a month later and an unconditional offer to return was made on behalf of all the strikers, they as well as the other strikers were entitled to the reinstatement rights set forth in the *Fleetwood* case. At the time these reinstatement rights vested in Nordaker and Wendt, Respondent, for valid economic reasons, had no work available for them. Respondent was therefore justified in not immediately reinstating them. However, this lack of work did not divest Nordaker and Wendt of their rights as economic strikers. Those rights remained outstanding and reached fruition at the time the valid economic reasons for denying them reinstatement ceased to exist. The controlling law was set forth in *Laidlaw, supra*, where the Board quoted from the Supreme Court's *Fleetwood* decision as follows:

It was clearly error to hold that the right of the strikers to reinstatement expired on August 20, when they first

applied. *This basic right to jobs cannot depend on job availability as of the moment when applications are filed.* The right to reinstatement does not depend upon technicalities relating to application. On the contrary *the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment."* 389 U.S. 375.

There were no valid economic reasons adduced by Respondent to warrant its failure to offer Nordaker and Wendt the work that became available for one of them on March 16 and for the other on June 12, 1972. It is true that in *Fleetwood*, the lack of work available to strikers was caused by the temporary loss of business attributable to the strike while in the instant case Respondent's economic retrenchment was not shown to be related to the strike. However, I do not believe that the distinction requires a conclusion different than that reached in *Fleetwood*. Respondent's reduction in force was not a permanent one, but was merely a reaction to then existing sales volume in the parts department. Green credibly testified that a larger employee complement was acceptable if volume justified it. Respondent did need a larger workforce as of March 16, 1972, when Benson began working and as of June 12, 1972, when Erwin was employed.

Respondent relies on *Arthur H. Sumner, d/b/a Ateco Products*, 109 NLRB 234. In that case a company decided to accommodate a retrenchment program to a strike situation by eliminating the jobs of those on strike at that time, rather than later in the month. The Board found that the strikers were among those with least seniority and would have been included in a subsequent layoff. While holding that the company did not violate the Act, the Board specifically found that the evidence did not disclose that the positions held by the strikers were ever revived after they were eliminated and that the evidence did disclose that the number of employees doing that work continued to decrease. Thus, even if the *Ateco* case is current law after the change in Board policy dictated by *Great Dane Trailers* and *Fleetwood*, it is distinguishable on its facts.

I find that Respondent violated Section 8(a)(3) and (1) of the Act by failing to offer Nordaker and Wendt the work which became available on March 16 and June 12, 1972.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V THE REMEDY

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

I have found that Respondent violated Section 8(a)(3)

and (1) of the Act by failing and refusing to offer reinstatement to Nordaker and Wendt as work for which they were qualified became available on March 16 and June 12, 1972. The work available on March 16 was general work which consisted primarily of stocking bins in the parts department. The work that became available on June 12, 1972, was journeyman counterman work. The record does not furnish any indication of what criteria Respondent customarily used in recalling employees and the contract with the Union is silent on that matter. As neither Respondent nor the General Counsel put forth any alternative formula, I believe that it is reasonable to use a seniority principle in deciding who was entitled to the journeyman counterman job.⁹ Wendt had uninterrupted employment with Respondent since at least 1946 while Nordaker's hire was in 1960.

I therefore recommend that Respondent be ordered to offer Wendt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing anyone hired on or after June 12, 1972, if necessary to make room for him. I shall also recommend that Respondent be ordered to make Wendt whole for any loss of earnings he suffered, or which he may suffer, by reason of Respondent's failure to reinstate him on June 12, 1972, by payment to him of a sum of money equal to that which he normally would have earned from June 12, 1972, until the date on which a valid offer of reinstatement is made by Respondent. Loss of earnings, as referred to above, shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest at 6 percent per annum as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

I recommend that Respondent be ordered to offer Nordaker immediate employment as a general worker with the primary duty of stocking bins in the parts department, without prejudice to his seniority or other rights and privileges. I further recommend that Respondent be ordered to reinstate Nordaker whole for any loss of earnings he suffered, or which he may suffer, by reason of Respondent's failure to offer him that position, by payment to him of a sum of money equal to that which he would have earned as a general worker whose primary duty was stocking bins in the parts department, from March 16, 1972, until the date on which a valid offer of employment for that position is made by Respondent. Loss of earnings, as referred to above, shall be computed in the manner set forth in *F. W. Woolworth Company*, *supra*, with interest at six percent per annum as prescribed in *Isis Plumbing & Heating Co.*, *supra*. I shall further recommend that Respondent be ordered to reinstate Nordaker to his former position as a counterman if and when work becomes available for a counterman. If such work does become available, and Respondent does not offer it to Nordaker, backpay is to run from the date of such availability at the rate paid to a counterman.

It is further recommended that Respondent be ordered to 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.

CONCLUSIONS OF LAW

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

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

3. By failing and refusing to reinstate economic strikers Nordaker and Wendt on March 16 and June 12, 1972, when work for which they were qualified became available, and after they 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 their 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, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ¹⁰

Respondent, William O. McKay Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

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

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

(a) Offer Wilhelm F. Wendt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing anyone hired on or after June 12, 1972, 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 this Decision entitled "The Remedy."

(b) Offer Frank Nordaker immediate employment as a general worker with the primary duty of stocking bins in the parts department, without prejudice to his seniority or other rights and privileges; offer him reinstatement to his former position as a counterman if and when work becomes available for a counterman; and make him whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll

⁹ Cf. *Buncher v N L R B*, 405 F 2d 787 (C A 3, 1969), *The Laidlaw Corporation*, *supra*

¹⁰ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 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.

records, Social Security payment records, timecards, personnel reports and records, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Seattle, Washington, facility copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms signed by Respondent's authorized 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.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹¹ In the event that the Board's 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 be changed to 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

WILLIAM O. MCKAY COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

We hereby notify our employees that:

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 in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer Wilhelm F. Wendt immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other

rights and privileges, dismissing anyone hired on or after June 12, 1972, if necessary to make room for him.

WE WILL make Wilhelm F. Wendt whole for any loss of earnings he may have suffered, or which he may suffer, by reason of our failure to reinstate him on June 12, 1972, by payment to him of a sum of money equal to that which he normally would have earned from June 12, 1972, until the date on which we make him a valid offer of reinstatement with interest at 6 percent.

WE WILL offer Frank Nordaker immediate employment as a general worker with the primary duty of stocking bins in the parts department, without prejudice to his seniority or other rights and privileges, and we will offer to reinstate him to his former position as a counterman, if and when work becomes available for a counterman.

WE WILL make Frank Nordaker whole for any loss of earnings he suffered, or which he may suffer, by reason of our failure to offer him a position as a general worker with the primary duty of stocking bins in the parts department, by payment to him of a sum of money equal to that which he would have earned for that position from March 16, 1972, until the date on which we make him a valid offer of employment for that position with interest at 6 percent.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Republic Building, 1511 Third Avenue, Seattle, Washington 98101, Telephone 206-442-7472.