

Laidlaw Waste Systems, Inc. and International Brotherhood of Teamsters, AFL-CIO,¹ Local No. 222. Case 27-CA-11621

February 22, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On September 22, 1992, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

The Respondent operates solid waste removal facilities throughout the United States, including Sandy and Pleasant Grove, Utah. At Pleasant Grove, it also supplied and serviced portable toilets to customers at various sites until sometime after August 27, 1990, when this portion of its business was sold to another company.³

On August 6, 1990, the Union who represented the Respondent's truckdrivers began an economic strike at the Sandy and Pleasant Grove facilities. On August 27, 1990, Tony Christensen, Mike Lastowski, Timothy Elliott, Korey Jepperson, and Kyle Jepperson were among those strikers who unconditionally offered to return to work. Prior to the strike, they had worked as

drivers at the Pleasant Grove facility. In addition to seeking their prestrike jobs, Christensen, Lastowski, Elliott, and the Jepperson brothers applied for any job opening at the Company for which they were qualified.⁴ Between August 27, 1990, and December 4, 1991, the Respondent hired one new truckdriver at the Pleasant Grove facility and seven new truckdrivers at the Sandy facility.⁵ As of the date of the hearing, Christensen, Lastowski, Elliott, and the Jepperson brothers had not returned to work.

The judge found that the Respondent had violated Section 8(a)(3) and (1) of the Act by failing to recall Christensen, Lastowski, Elliott, and the Jepperson brothers on or after August 27, 1990. She found that the Jepperson brothers were entitled to their prestrike jobs as portable toilet drivers.⁶ She also found that all five returning strikers were entitled to the eight driver jobs that became vacant on August 27, 1990, and thereafter because these jobs were substantially equivalent to the strikers' prestrike jobs at Pleasant Grove. In the alternative, the judge found that the Respondent engaged in hiring discrimination—i.e., made decisions motivated by animus against the strikers' protected activity—when it hired new drivers into those vacated driver jobs rather than the five returning strikers and thereby departed from its prestrike practice of hiring from the outside only if there were no suitable employees within its ranks who sought transfers into such jobs.

The Respondent argues for reversal of the judge's decision on the following grounds. First, the Jepperson brothers were not entitled to their prestrike jobs because the portable toilet business had been sold. Sec-

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The judge found that the exact date of sale was unclear from the record, and she accordingly recommended that this issue be resolved during compliance proceedings. The Respondent contends that the judge erred and that the sale was effective August 31, 1990. We agree with the judge. At the hearing, the parties stipulated that the portable toilet business was sold on or about August 31, 1991. The Respondent claims that the reference to "1991" instead of "1990" was simply a mistake. However, the sales agreement executed by the Respondent was dated April 23, 1991, and indicated that installment payments from the purchaser were to commence in August 1990. Thus, we are unable to determine on the basis of this evidence when these operations were discontinued by the Respondent.

The Respondent also excepts to the judge's implication that its decision to sell the portable toilet business may have been unlawfully motivated. We find merit in this exception because the General Counsel did not allege that the sale itself was discriminatorily motivated. Therefore, in adopting the judge's findings regarding the Jepperson brothers, we do not rely on any suggestion that the reason for the sale may have been unlawful.

⁴ Christensen and Lastowski gave the Respondent a form in which each stated, "I wish to apply for any job opening at Laidlaw for which I am qualified." The form submitted to the Respondent by Elliott and the Jepperson brothers indicated that they were "prepared to work as of August 27, 1990." The credited testimony of Clark Romeril, the Respondent's district manager in charge of the Sandy and Pleasant Grove facilities, shows that the Respondent treated both forms the same, i.e., as an application for reinstatement to any job with the Company for which the striker was qualified.

⁵ The parties agreed that the Respondent hired Ardell Conder as a new residential driver at the Pleasant Grove facility on September 3, 1991. They also stipulated that the following new drivers were hired at the Sandy facility for the position and on the date indicated beside their respective names listed below:

Steve Thacker—rolloff driver	August 27, 1990
Larry Mace—delivery/swing driver	February 4, 1991
Fred Rasmussen—delivery driver	February 27, 1991
Troy Jones—rolloff driver	August 12, 1991
Gary Humes—rolloff driver	August 22, 1991
John Jamison—rolloff driver	November 18, 1991
Lee Greer—swing driver	December 3, 1991

⁶ Prior to the strike, they operated a 1-ton truck with a tank on the back and a drop tailgate. Their job duties included the delivery, cleaning, and removal of portable toilets from various sites.

ond, Christensen forfeited his reinstatement rights by declining an offer for a residential driver position at the Pleasant Grove facility on August 17, 1990. Third, the vacant positions at the Sandy facility were not substantially equivalent to the prestrike jobs at Pleasant Grove held by Christensen, Lastowski, Elliott, and the Jepperson brothers. Finally, the Respondent's hiring criteria was not applied in a discriminatory manner when the eight new drivers were preferred over the five returning strikers.

According to the well-established principle enunciated in *Laidlaw Corp.*, 171 NLRB 1366 (1968), economic strikers who submit unconditional offers to return to work have reinstatement rights to their former or substantially equivalent positions. In *Rose Printing Co.*, 304 NLRB 1076, 1078 (1991), cited by the judge, the Board stated that as an economic striker has no obligation to accept an offer of reinstatement to a position which is not the same or substantially equivalent to his prestrike position, *Laidlaw* and its progeny do not require an employer to offer nonequivalent jobs to former strikers as part of its reinstatement obligation. However, the Board also stated that an employer may not prefer new applicants over former strikers who apply for nonequivalent jobs simply because the latter have been on strike and were on the *Laidlaw* reinstatement list for their jobs.

Applying these principles to the facts of the instant case, we adopt the judge's finding that the Jepperson brothers were unlawfully denied reinstatement to their prestrike positions as portable toilet drivers. Additionally, although we reverse the judge's finding that the eight vacant driver positions were substantially equivalent to the prestrike jobs of the alleged discriminatees, we agree with her conclusion that the Respondent unlawfully discriminated against all five strikers by failing to offer them the vacant driver positions filled by the new hires.

Regarding the Jepperson brothers, the Respondent does not dispute that the poststrike portable toilet jobs are substantially equivalent but rather contends that it denied reinstatement to the brothers because its portable toilet business was sold on August 31, 1990. Even assuming arguendo that the sale occurred on this date,⁷ this does not justify the Respondent's failure to reinstate the Jepperson brothers on August 27, 1990, when they submitted their unconditional offers. The record shows, and the Respondent does not claim otherwise, that the Jeppersons' jobs were not eliminated until after the sale. Thus, they were entitled to recall on August 27, 1990.

With respect to the question of whether the vacancies were substantially equivalent to the prestrike jobs of Christensen, Lastowski, and Elliott, we agree with the judge that the record shows that there is no mate-

rial difference in the duties and functions performed by drivers with the same job classification at either the Sandy or Pleasant Grove facilities. At each facility, the Respondent assigns its drivers different kinds of trucks—rolloff, front load, residential, and delivery—depending on the type of collection service involved.⁸ The drivers of both facilities are included in the same bargaining unit, receive the same or similar wages and fringe benefits, maintain plantwide seniority,⁹ and are subject to the same overtime system, probationary period, and overall supervision by the district manager. The Respondent has also permitted permanent and temporary employee transfers between the two facilities which are located about 25 miles apart from each other. Accordingly, for the reasons given by the judge, we find that the Respondent could not refuse to consider a returning striker for vacant Sandy positions bearing the same classification as his prestrike job on the sole basis that he had been previously assigned to the Pleasant Grove facility prior to the strike.

However, we do find merit in the exceptions to the extent that the Respondent argues that the different driver classifications at each facility are nonequivalent positions.¹⁰ Here, the record shows that the drivers operate different vehicles subject to different licensing and training requirements and they perform different collection services with different physical demands and

⁸ The rolloff driver delivers and removes large waste containers generally from construction sites. By the use of a winch, he pulls the container onto the bed of the truck, and then takes the container to the landfill for emptying like a dump truck. The front load driver empties large containers at commercial establishments. He operates a vehicle which has forks on the front and are inserted into pockets on the side of the container which is then lifted and dumped through an opening in the top of the truck. The residential driver operates side-loading trucks and picks up waste from residential customers. The delivery driver picks up and delivers large containers after they have been reconditioned. He operates either a truck with a crane called a "cherry picker" (at Sandy) or a truck with a fork on the back that lifts and holds the container (at Pleasant Grove).

⁹ District Manager Romeril testified that separate seniority lists are kept at Sandy and Pleasant Grove and a more senior employee at one facility may not bump into a position held by a less senior employee at the other facility. The Respondent argues that the lack of any bumping rights confines its obligation to the five strikers solely to Pleasant Grove job openings. We disagree. This is not a situation in which the returning striker at Pleasant Grove would displace an incumbent employee at Sandy. Rather, the positions in question are vacant positions, and the Respondent's practice is to promote employees from within regardless of current facility assignment. In addition, we observe that the company employee handbook indicates that seniority for an individual employee is determined based on his "service date." "Service date" is defined by the handbook as the date on which the employee begins full-time work with the Company. Thus, it appears that an employee's seniority is plantwide and is carried forward with any transfer or reassignment.

¹⁰ For this reason, we find that it is unnecessary to pass on the Respondent's argument that Christensen forfeited his reinstatement rights on August 17, 1990. The putative offer to Christensen involved a residential driver position which we find nonequivalent to the delivery driver position, his prestrike job. Thus, Christensen was entitled to turn down offers to nonequivalent jobs.

⁷ See fn. 3 above.

job tasks. For example, a residential driver's vehicle is not equipped to perform tasks assigned to the rolloff driver and can only perform regular residential collection duties. The same is true for the other driver classifications. In this sense, the tasks assigned to the rolloff, front load, residential, and delivery drivers are not interchangeable. Cf. *Outboard Marine Corp.*, 307 NLRB 1333, 1344-1346 (1992) (classifications with the same labor grade found to be substantially equivalent positions for reinstatement purposes). Thus, we find that the rolloff, front load, residential, and delivery driver positions are nonequivalent jobs.

As set forth above, however, the five strikers applied for reinstatement to any job, and the Respondent was not free to discriminate against them when filling the nonequivalent vacant driver jobs. In this regard, the judge found the Respondent's discriminatory intent evidenced by the departure from its normal hiring practices to fill the vacant driver positions with less qualified new employees. Thus, prior to the strike, the Respondent's customary practice was to fill a vacant rolloff, front load, residential, or delivery driver job with an incumbent driver in another classification and later provide the necessary training if the driver lacked the requisite work experience. In fact, the company employee handbook encourages promotions from within company ranks. Transferees who did not possess the appropriate driving license were afforded the requisite training and opportunity to take the test to obtain the proper license. Assuming there were no available existing drivers who wanted the vacant position, the Respondent then preferred to hire fully qualified individuals with good driving records and favorable background checks.

The Respondent did not adequately explain or justify its reason for its deviation from those practices. In this regard, the Respondent did not show that the new hires at Sandy and Pleasant Grove had qualifications comparable to or better than Christensen, Lastowski, Elliott, and the Jepperson brothers. Thus, the judge reasonably inferred that the changes were made because the former strikers had been engaged in protected concerted activity. We adopt the judge's findings.¹¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Laidlaw Waste Systems, Inc., Sandy and Pleasant Grove, Utah, its officers, agents, successors, and as-

¹¹ We leave to the compliance stage of this proceeding the determination of which of the eight driver positions vacant on August 27, 1990, and thereafter would have been filled by these five returning strikers had there been no discrimination.

signs, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a) and reletter the subsequent paragraph as 1(c).

“(a) Refusing to offer to reinstate our former striking employees Corey Jepperson and Kyle Jepperson to their prestrike positions or substantially equivalent positions when those positions became available commencing August 27, 1990.

“(b) Refusing to offer the former striking employees Tony Christensen, Mike Lastowski, Timothy Elliott, Corey Jepperson, and Kyle Jepperson work in other jobs for which they were qualified and had applied because of their status as former strikers.”

2. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

“(a) Offer Corey Jepperson and Kyle Jepperson full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges, discharging, if necessary, any employee hired as a replacement in any positions formerly worked by such employee from August 27, 1990, to the present.

“(b) Offer Tony Christensen, Mike Lastowski, Timothy Elliott, Corey Jepperson, and Kyle Jepperson driver positions at the Sandy and Pleasant Grove facilities for which they are qualified and which became available on or after August 27, 1990, or if those jobs no longer exist, substantially equivalent positions, without prejudice to their seniority or any other rights or privileges, discharging, if necessary, any employee hired for these positions which became vacant from August 27, 1990, to the present.

“(c) Make whole Corey Jepperson, Kyle Jepperson, Tony Christensen, Mike Lastowski, and Timothy Elliott for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.”

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

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to offer to reinstate our former striking employees Korey Jepperson and Kyle Jepperson to their prestrike positions or substantially equivalent positions when those positions become available.

WE WILL NOT refuse to offer our former striking employees Tony Christensen, Mike Lastowski, Timothy Elliott, Korey Jepperson, and Kyle Jepperson work in other jobs for which they are qualified because of their status as former strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Korey Jepperson and Kyle Jepperson full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any employee hired as a replacement in any positions formerly worked by such employee from August 27, 1990, to the present.

WE WILL offer, in a nondiscriminatory manner, Tony Christensen, Mike Lastowski, Timothy Elliott, Korey Jepperson, and Kyle Jepperson driver positions at the Sandy and Pleasant Grove facilities for which they are qualified, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any employee hired for these driver positions that became available from August 27, 1990, to the present.

WE WILL make whole Korey Jepperson, Kyle Jepperson, Tony Christensen, Mike Lastowski, and Timothy Elliott for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

LAIDLAW WASTE SYSTEMS, INC.

William J. Daly, Esq., for the General Counsel.

Julius M. Steiner, Esq. (Obermeyer, Rebmann, Maxwell & Hippel), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on March 12, 1992,¹ at Salt Lake City, Utah. The charge was filed by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222 (the Charging Party or the Union) on Feb-

¹ All dates are in 1990 unless otherwise indicated.

ruary 27, 1991, against Laidlaw Waste Systems, Inc. (Respondent or the Company). On April 26, 1991, the Regional Director for Region 27 of the National Labor Relations Board, issued a complaint and notice of hearing against Respondent, which was amended. The amended complaint alleges Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by failing and refusing to reinstate former employees who had made unconditional offers to return to work after an economic strike² because these employees engaged in protected concerted activities.

Respondent's timely filed answer to the amended complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent's answer to the complaint admits, and I find, they meet one of the Board's jurisdictional standards and that the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Preliminary Matters

Paragraph 5(c) of the complaint alleges Respondent violated Section 8(a)(1) of the Act, as follows:

On and after August 27, 1990, the Respondent took the position that any striking employee who did not complete a form stating a preference for work positions had thereby indicated an intent to only be considered for his/her former position.

The General Counsel moves to withdraw this allegation admitting on brief "there is no evidence to show that Respondent communicated such a position to any employee."

The General Counsel also moves to withdraw paragraph 5(d) of the complaint, which alleges:

On or about mid-February, 1991, Respondent hired Larry Mace, a person who was not a former employee who had unconditionally offered to return to work, and thereafter transferred Mace to a position for which striking employees were qualified and available.

The General Counsel claims the hiring of Mace as a new hire "is relevant to the allegations of the refusal to offer reinstatement to strikers and the refusal to hire certain striking employees;" he does not contend that such activity constitutes an independent violation of Section 8(a)(1) . . . and move(d) to withdraw paragraph 5(d) of the complaint.

² The parties stipulated the strike is to be considered an economic strike for the purposes of determining the employees' reinstatement rights.

The record fails to support these allegations and the motions to withdraw, which are unopposed, should be and are granted.

B. Background

Respondent is a national company, and in Utah is engaged in nontoxic solid waste removal from residential customers and commercial businesses and operations incidental to these functions such as repair and maintenance of trucks and containers. Laidlaw has four facilities in Utah located at Ogden, St. George, Sandy, and Pleasant Grove. The Utah district is supervised by Clark Romeril, district manager. The Ogden facility does not employ any drivers. Sandy is in or near Salt Lake City and is about 25 miles from Pleasant Grove. St. George is about 278 miles from Pleasant Grove and 300 miles from Sandy. This proceeding involves only the Sandy and Pleasant Grove operations.

Respondent uses three different types of trucks to service its customers; front-load and rolloff trucks are used to deliver and pick-up large waste containers³ and a residential truck which is loaded from the side and is used to collect waste from residential customers. The residential trucks only require one employee to operate a route, as do the rolloff, front-load and delivery trucks. Residential service is provided only at the Pleasant Grove facility, Sandy does not provide any residential service. Sandy and Pleasant Grove have trucks that pick up and deliver large containers after they have been reconditioned. The Sandy delivery truck is a truck with a crane, also called a "cherry picker" and the Pleasant Grove delivery truck has a fork on the back that lifts the waste container and maintains it in place. Pleasant Grove operates a waste container maintenance and repair facility which is operated by one employee.

Respondent also operated a portable toilet business at Pleasant Grove. This operation placed and serviced portable toilets at various sites. The parties stipulated "that on or about August 31, 1991, or September 1, 1991, the portable toilet business was sold to the John & Company." There is no evidence John & Company has any affiliation with Respondent. The portable toilet operation had a staff which included two brothers as drivers, Korey and Kyle Jepperson. These employees drove a 1-ton truck which had a tank on the back of the truck and a drop tailgate. These employees delivered and removed portable toilets from "various types of sites. And when he is servicing the toilets, pulls up to them, he has a hose that sucks the refuse out of the toilet and another hose refills it with a new chemical and he cleans up the toilet, makes sure all the supplies are there and goes on to the next site." There is no evidence Respondent intends to resume a portable toilet operation.

³ According to Romeril, a rolloff driver delivers and removes from 15 to 50 containers from large stores and, generally, construction sites. The truck backs up to the container, a cable is hooked to the front of the container to secure the load, and by use of a winch, the container is pulled up onto the bed of the truck. The container is then taken to a landfill where it is emptied like a dump truck. The empty container is then returned to the customer location.

A front-load driver operates a vehicle which has forks on the front. The forks are inserted into pockets on the side of the container and the container is lifted and dumped through an opening in the top of the truck.

C. Events

It is undisputed on August 6, 1990, some of Respondent's employees began striking at both Sandy and Pleasant Grove. The parties stipulated the following employees were employed by Respondent immediately prior to strike: at Sandy; Robert Andrew, front load; Lynn Barry, front load; Tom Bremer, roll off; John Ferrando, roll off; Marvin Hansen, roll off; Ray Johnson, roll off; Robert Kelly, roll off; John Kelly, front load; John Maycock, delivery; Paul Miller, front load; David Moore, roll off; Steve Rasmussen, roll off; Joe Robertson, roll off; Jay Sievert, front load; Rex Tanner, mechanic; and Rick Vierra, delivery; at Pleasant Grove: Dale Baxter, residential; Tony Beard, front load; David Carter, residential; Brian Chipman, front load; Tony Christensen, delivery-container repair; Tim Elliott, residential; Cameron Frampton, swing; Alberto Gonzales, mechanic; Ed Goodwin, residential; Don Hayes, residential; Mickey Joe Howard, residential; Kyle Jepperson, portable toilets; Korey Jepperson, portable toilets; Blake Johnson, residential; Randy Johnson, mechanic; Herman Kehl, roll off; Mike Lastowski, residential; Fred Rasmussen, front load; Wes Smith, welder; Keith Syndegaard, front load; Randy Teal, portable toilets; and Shawn Williams, front load.

On or about August 27, 1990, Marvin Hanson, David Moore, Tony Christensen, Mickey Joe Howard, Tony Beard, Blake Johnson, Don Hayes, Mike Lastowski, T. Elliott, Korey Jepperson, Kyle Jepperson, and Wes Smith filed one or more form letters expressing their unconditional willingness to return to work. Christensen, as discussed in greater detail, infra, initially made an unconditional offer to return to work on August 17, 1990. It was stipulated Respondent reinstated striking employees to positions on the indicated dates at Sandy as follows: Marvin Hansen, February 5, 1991, roll off; and, David Moore, May 21, 1991, roll off. At Pleasant Grove, Respondent reinstated the following striking employees on the indicated dates: Mickey Joe Howard, September 3, 1990, residential; Tony Beard, September 4, 1990, front load; Don Hayes, December 21, 1990, residential; and Blake Johnson, January 9, 1991, residential.

The parties stipulated Respondent hired new employees, as follows:

Steve Thacker, August 27, 1990, roll off at Sandy; Larry Mace, February 4, 1991, delivery/swing at Sandy; Fred Rasmussen, February 27, 1991, delivery at Sandy; Don Allen, June 20, 1991, welder at Pleasant Grove; Troy Jones, August 12, 1991, roll off at Sandy; Gary Humes, August 22, 1991, roll off at Sandy; Ardell Conder, September 3, 1991, residential at Pleasant Grove; John Jamison, November 18, 1991, roll off, at Sandy; Lee Greer, December 4, 1991, swing at Sandy.

As of the date of the hearing, the General Counsel claims, without refutation, the following striking employees had not been offered reinstatement: Tony Christensen, Mike Lastowski, Timothy Elliott, Korey Jepperson, and Kyle Jepperson. Respondent avers Christensen had been offered reinstatement on or about August 17, 1990.

D. Discussion and Conclusion

The complaint specifically alleges Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to

reinstate former striking employees who had made unconditional offers to return to work and continues to fail and refuse to reinstate these employees to positions for which they are qualified and available because these employees engaged in concerted protected activities and to discourage employees from engaging in similar or other concerted protected activities. The General Counsel claims Respondent's failure to reinstate the five named striking employees is conduct inherently destructive of employee rights.

The Court held in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–381 (1967):

Section 2(3) of the Act . . . provides that an individual whose work 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 Sections 7 and 13 of the Act. . . . Under Section 8(a)(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. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer.

In some situations, "legitimate and substantial business justifications" for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, 345–346 (1938); *NLRB v. Plastilite Corp.*, 375 F.2d 343 (8th Cir. 1967); *Brown & Root*, 132 NLRB 486 (1961).

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 to improve efficiency."

[I]n *NLRB v. Great Dane Trailers*, supra . . . we held that proof of antiunion motivation is unnecessary when the employer's conduct "could have adversely affected employee rights to some extent" and when the employer does not meet his burden of establishing "that he was motivated by legitimate objectives." *Id.* at 34. . . . 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."

A principal Board decision applying the Supreme Court's decisions, *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968), found, consonant with prior precedent:

[T]he Supreme Court in *Fleetwood* and *Great Dane* has now held that the right to the job does not depend on

its availability at the precise moment of application, and that strikers retain their status as employees who are *entitled to reinstatement* absent substantial business justification, and regardless of union animus.

The underlying principal in both *Fleetwood* and *Great Dane*, supra, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed. Specifically, in *Fleetwood*, the Court found that hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers. A similar parallel exists here which requires application of the same principle. When job vacancies arose as the result of the departure of permanent replacements, Respondent could not lawfully ignore outstanding applications for reinstatement from strikers and hire new applicants absent legitimate and substantial business reasons, irrespective of intent. Moreover, we find . . . that Respondent was in fact discriminatorily motivated when it implemented its avowed policy of not considering or hiring strikers once they have been replaced or if no vacancy existed on the date of application.

We hold, therefore, that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (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. [Citations omitted.]

Respondent claims it lawfully failed to offer reinstatement to the named employees for "legitimate and substantial business reasons." Respondent argues it hired permanent replacements to the positions previously occupied by the five strikers. The positions of Kyle and Corey Jepperson were eliminated when the portable toilet business was sold on or about August 31, 1991, which Respondent avers to be "substantial and bona fide reasons other than considerations relating to labor relations," citing *Fleetwood*, supra. Moreover, according to Respondent, Kyle and Corey Jepperson were not qualified to perform any other truckdriving jobs performed by employees at either Sandy or Pleasant Grove.

Since the employees who have not been reinstated all are employees from Pleasant Grove, Respondent contends they have no entitlement to employment in any positions available at its Sandy facility, where there is no evidence any of them ever worked on either a permanent or temporary basis. Also, Respondent claims Elliott and Lastowski are not qualified to drive rolloff and front-load trucks and are not entitled to reinstatement to positions as drivers of these vehicles. Respondent also argues it offered Christensen reinstatement to his former position of residential truckdriver, which he refused because of a back injury. Finally, Respondent argues the General Counsel "presented no evidence that Laidlaw was motivated by Union animus in any of its decisions re-

garding reinstatement of strikers.” As quoted above, *Fleetwood*, and *Laidlaw* decisions specifically found striking employees are entitled to reinstatement “regardless of union animus.”

1. The issues of location and licensing

Respondent asserts the strikers did not meet conditions precedent to eligibility for the positions available after the strike; they did not have the requisite operators’ licenses. In particular, Respondent focused on Christensen, who was only 19 years old on August 20, 1990, and thus, they aver, he could not have acquired the necessary operating license which required the applicant had to be 21 years old. As an additional defense, Respondent avers it offered Christensen reinstatement as a residential driver on or about August 17, 1990. Christensen, immediately prior to the strike, was employed as delivery driver/container.

Interestingly, Respondent argues Christensen, who had performed the job as residential driver in the past, was qualified, while, as discussed below, the Jeppersons, Lastowski, and Elliott were not offered the asserted job; despite the undisputed fact both Elliott and Lastowski were residential drivers before they went out on strike. Respondent failed to show this position was filled during the approximately 10 days between August 17 and the offers to return to work by the Jeppersons, Lastowski, and Elliott. As noted above, Respondent has the burden of proving there were no vacancies on and after August 27, 1990. The only driver hired on August 27 was Steve Thacker as a rolloff driver. There was no evidence concerning the date Thacker applied for employment with Respondent and the date Respondent promised him permanent employment. Also, on September 3, 1991, Respondent hired a residential driver at Pleasant Grove rather than reinstating a striking employee. Respondent failed to explain why a striking employee was not reinstated to this position.

Moreover, I find Respondent modified its normal practice in hiring new employees after August 27, 1990, to fill rolloff and front-load positions. Randy Wilkinson, Respondent’s operation supervisor at Pleasant Grove, testified, if there is a rolloff driver position open, it “goes to our residential drivers,” who are then trained. Wilkinson also testified Respondent trains its residential and front-load truckdrivers. There are two rolloff driver positions in Pleasant Grove. Assuming there are no residential drivers Respondent prefers to hire fully qualified individuals with good driving records and favorable background checks. Respondent failed to indicate how often fully qualified drivers meeting all their criteria are available for employment and applied for employment with Respondent at Sandy and Pleasant Grove in the past and after August 27, 1990. Respondent hired four rolloff drivers on and after August 27. There is no evidence Respondent did not similarly fill front-load and delivery vacancies in a similar manner. With the exception of Christensen, all the other striking employees were over 21 years old and Lastowski and Elliott were residential drivers who would normally have been preferred by Respondent in filling rolloff driver vacancies. Based on Wilkinson’s testimony, I conclude Respondent did not follow its normal practice in considering the striking residential drivers first for any driving positions after August 27, 1990. Thus, Respondent’s only colorably valid business claim is that the only driving positions available were those

at Sandy. As discussed below, I find this is not a legitimate and substantial business consideration.

2. The failure to reinstate Christensen

I conclude, based on the credited evidence, that Respondent did not offer Christensen the position of residential driver on August 17. Financial exigencies drove Christensen to request Respondent return him to work and he signed the offer to return to work. Christensen first spoke with Randy Wilkinson and then with both Wilkinson and Romeril. Christensen credibly testified:

I told Clark [Romeril] that I needed to come back to work. He asked me what it was that I did. I told him I was the container maintenance driver. And he told me that there was a gentleman from Sandy who had transferred from Sandy and was doing that job and that it had been filled. And he asked me if I’d be interested in any other job. I told him that I would. I’d do pretty much anything. And then we started talking about the strike and what we could do to resolve it or get it over with.

After we had talked about the strike, me and Randy had gotten up and were going to leave and Clark said—or asked me how I would feel about doing a residential route. And I told him that I couldn’t do residential full time because I’d hurt my back on a residential route and couldn’t do it full time. I could do it as fill in or, you know, when they—on occasional times when they needed help, but I could not do residential full time. And Randy acknowledged the fact that was true. I did hurt my back.

Q. What, if anything, did Randy say or do to acknowledge that?

A. I think he just told Clark that—he just looked at Clark and said, that’s right.

Q. Was there any mention by Mr. Romeril in that meeting about a specific job?

A. No, there was not.

Q. Was any kind of a starting date or anything like that mentioned?

A. No.

Romeril claims he offered Christensen a position as a residential driver but Christensen declined the offer saying “his back would not allow him to do residential.” Wilkinson was present during the meeting between Romeril and Christensen, and he testified Romeril offered Christensen a job as a residential driver. I find Christensen’s detailed rendition of this meeting the more credible version. Christensen’s recitation of events was accomplished with considerably persuasive detail; he gave the strong impression he was making an honest attempt to accurately recall the facts.

Romeril exhibited poor recall, a portion of his testimony was elicited through the device of leading questions; his testimony was self-serving, exaggerated, and he appeared more interested in supporting a litigation theory than in testifying candidly about the events. When pressed about an answer, he often admitted he did not recall or did not know the answer and on several occasions engaged in speculation, had inconsistent testimony, and at times was disingenuous. For example, he testified a division manager could refrain from dis-

charging an employee who was under the influence of alcohol when driving, even though company policy required the driver be terminated. Only after further examination Romeril admitted the division manager would also be violating company policy and could be terminated for the infraction. Another inherent inconsistency, this one directly concerning the alleged job offer to Christensen is, if there was a residential driver position open at Pleasant Grove on August 17, there is no evidence it was filled by August 27, and there is no claim the other striking employees were not qualified to perform the job on or after August 27, 1990, or that it was not substantially equivalent to their prestrike positions.

I also find Wilkinson was not credible. He had occasional lapses in recall and appeared to be tailoring his testimony to please Respondent rather than manifesting a candid demeanor and manner. He did not appear open and forthright; therefore his testimony will be credited only when it is credibly corroborated or an admission against Respondent's interests.

It is undisputed Christensen injured his back twice during and in the course of his employment with Respondent and was attended by a physician pursuant to Respondent's health insurance plan.⁴ Both Romeril and Wilkinson disclaimed any knowledge of Christensen's injury and his concomitant inability to operate a residential route on a full-time basis. However, there was no claim by either Romeril or Wilkinson that Romeril mentioned a particular route, a starting date, terms or conditions of employment or other details of the professed job offer.

Christensen described his container maintenance job duties as follows:

I fixed and painted all of the garbage bins that were out—you know, out—on service pretty much by a truck the pockets would rip off or have holes in them besides what come apart where the wheels were. So I would take a good refurbished can back out to the location where they knew of a bad one or a dirty one, bring it back, reweld it, clean it, and then paint it.⁵

I conclude, based on the credited evidence, that Respondent did not offer Christensen a job on August 17, 1990. As held in *Holo-Krome Co.*, 302 NLRB 452, 454 (1991): "It is well settled that an offer of employment must be specific,

⁴Christensen's unrefuted testimony referred to the doctor as "Laidlaw's doctor." At the time of the accident, Christensen filed with Respondent an accident report. The doctor told Christensen he had severely pulled back muscles and needed to be off from work for 2 weeks and have physical therapy. About 3 or 4 days after the accident, Cameron Tolman, Respondent's operations manager at Pleasant Grove, requested Christensen return to work and he did under the condition he merely drive his route and Respondent would provide someone to throw the garbage into the truck. Respondent provided a helper to throw the garbage for about 5 days and then Christensen resumed full activities until reinjuring his back about 2 weeks after his initial accident. Tolman sent Christensen back to the doctor. The doctor informed Tolman if Christensen continued to throw garbage his back would never heal. At that time Respondent transferred Christensen to the job of container maintenance/delivery, which was the job he held immediately prior to the strike.

⁵According to Romeril, the container repair employee cleans containers, scrapes the interiors to ensure the removal of all debris inside and out, washes them, and performs minor repairs including fixing lids, pounding out dents, and preparing the containers for painting.

unequivocal, and unconditional in order to toll backpay and satisfy a Respondent's remedial obligation." See also the cases cited by the General Counsel, *L'Ermitage Hotel*, 293 NLRB 924 (1989), and *Associated Grocers*, 295 NLRB 806 (1989).

As the Board found in *Carruthers Ready Mix*, 262 NLRB 739, 749 (1982):

There is no specific rule under Board law requiring that an offer of reinstatement take any particular form. However, it must be reasonably calculated to communicate the offer. In order for an employer to discharge his obligation to offer reemployment to a striking employee who has unconditionally requested reinstatement, the employer "must present probative evidence showing a good-faith effort to communicate such an offer [of reinstatement] to all employees . . . [and] must show that [it] has taken all measures reasonably available to [it] to make known to the striker that he is being invited to return to work." *J. H. Rutter-Rex Manufacturing Company, Inc.*, 158 NLRB 1414, 1524 (1966), *enfd.* as modified 399 F.2d 356 (1968), *reversed* 396 U.S. 258 (1969).

Romeril did not clearly inform Christensen he had a position open on August 17, 1990, which he was then offering to Christensen and which Christensen could assume on that date or in the near future. In this case, Romeril merely asked Christensen if he would be interested in a residential job, he did not specifically offer him the position and thus it was not an express offer of reinstatement.

Even if Romeril's statements on August 17, 1990, were a valid offer of employment, Christensen was entitled to reinstatement to his former position of maintenance/delivery because of his injury. While Christensen was competent to perform all driving jobs at Respondent, he was physically unable to perform the more physically demanding residential driver job which he was physically unable to perform. Thus, if Christensen had refused an offer of reinstatement to a residential position on August 17, 1990, he did not lose his right to reinstatement to his prestrike job or one which was comparable. Christensen testified without contradiction that the rolloff and front-load driver jobs were much less physically demanding than the residential driver position. As noted in *NLRB v Rockwood & Co.*, 834 F.2d 837, 841-842 (9th Cir. 1987), a case cited by Respondent:

The ALJ found that the glue tank cleaning job was not substantially equivalent to Acosta's old job. This finding is supported by substantial evidence. The glue tank cleaning job was more demanding physically, was particularly difficult for Acosta because of the hip surgery he had undergone, and was on a more onerous shift. See *Burton Parsons & Co.*, 242 NLRB 487, 490 (1979). Because the glue tank cleaning job was not substantially equivalent to Acosta's former position, he was entitled to accept or reject it without affecting his status as an employee under section 152(3) or his right to reinstatement.

Respondent next argues it did not have a substantially equivalent position for Christensen up until the day of hearing. According to Respondent, in order to operate a front-

load or rolloff truck, the driver must be 21 years old and possess a particular commercial operator's license, and Christensen did not meet these requirements. The licensing and experience requirements for a delivery driver, if any, were not disclosed during this proceeding. On or after August 27, Respondent hired two delivery drivers and a swing driver, as well as the previously mentioned rolloff and residential drivers. Admittedly, Respondent hired, as new employees, individuals who did not possess the requisite licenses. Respondent's employee handbook does not specifically require particular licenses for eligibility for any positions, and provides for the classification of generic jobs into job families.⁶

According to the Employee Handbook, Respondent also pays for licensing if prior approval is obtained.⁷ Federal regulations, which have an effective date of April 1, 1992, require drivers of rolloff and front-load vehicles to obtain a commercial drivers license (CDL). In order to obtain a CDL, the applicant must be 21 years old. The company handbook and physical qualifications criteria, do not contain an age requirement. Christensen operated all of Respondent's vehicles prior to the strike, even though he was not 21 years old. In August 1990, it appears the Utah Commercial Vehicle Driver law was in effect from October 2, 1989, to the date the Federal Regulations became the operative standard in April 1992. The Utah Classified License System provided for applicants between the ages of 18 and 21 to hold Class A and/or B commercial drivers licenses, limited to intrastate operation, which includes all of Respondent vehicles here pertinent.⁸ There is no claim or evidence any of Respond-

⁶Specifically, the handbook provides:

The classification system is used to group positions sharing the same basic duties and responsibilities into generic job "families." Each job family represents a major and clearly identifiable area of work. Your level within a job family is identified by a classification title and grade. Each employee is assigned a "title and grade."

Respondent failed to provide the classification and grade as described in this section of the handbook for the open positions and for the employees who were not reinstated as of the date of trial. According to the handbook, Respondent also encourages employees to seek promotion, thus, if driving roll offs and front loaders is considered a promotion, Respondent favors filling those position from within the Company and encourages qualified employees to apply for promotion. There is no indication such promotions are limited to particular geographical locations.

⁷The handbook states:

You may be reimbursed for costs incurred while becoming registered, licensed or certified in your field of employment. Examination site, initial registration, application fees, licensing, and renewal fees are covered. You are allowed a maximum of three attempts to pass the required examination.

Approval for reimbursement must be obtained by your Regional Vice President before costs are incurred.

⁸According to the Utah Commercial Vehicle Driver's Manual:

Federal law requires all commercial motor vehicle operators who drive across state lines to be at least 21 years old. Persons between 18 and 21 years of age may be issued a commercial drivers license with a restriction indicating their commercial driving privileges are valid in Utah only intrastate and may not transport passengers for hire or hazardous materials (may not obtain a Class C, CDL). Some cargo, although transported only inside the state by a driver may be considered interstate commerce and may not be transported by a driver under 21. If you are younger than 21 and if you are uncertain about your cargo,

ent's employees at Sandy and/or Pleasant Grove needed to engage in the interstate operation of their vehicles.

Respondent was knowledgeable about the intrastate provisions of the applicable Utah law both by Romeril's admission and Wilkinson's actions. According to Christensen's uncontroverted testimony, about 1 month before the strike, when Christensen was 19, Wilkinson asked him to obtain a "CDL so that I could run back up on roll offs and front ends." Accordingly, I find Respondent considered Christensen was qualified to work as a driver of both front-load and rolloff trucks if he obtained a CDL. Christensen was 21 years old in April 1992. Thus, Christensen's age and lack of a CDL from August 17 to the date he was reinstated do not constitute substantial and legitimate business considerations in the circumstances of this case.

Christensen was working at both Sandy and Pleasant Grove. Until Respondent hired a delivery driver at Sandy, Christensen repaired, maintained, and delivered some of the containers used at Sandy. During this period, Christensen worked at Pleasant Grove Monday, Wednesday, and Friday, and at Sandy Tuesday and Thursday. The delivery driver at Sandy, when Christensen's truck was out of service for maintenance for a 3-week period, came in his truck to Pleasant Grove and he, along with Christensen, who knew the area, delivered containers using the Sandy-based delivery truck. There was no evidence concerning Christensen's qualifications to drive the cherry picker delivery truck based at Sandy.

Pleasant Grove had a maintenance shop, and the Sandy vehicles that needed major repair were sent to Pleasant Grove for mechanical work. At times, a Pleasant Grove vehicle was substituted for the Sandy truck being repaired. Christensen drove the vehicles from Sandy to Pleasant Grove. Respondent did not controvert this evidence and since there were no residential operations in Sandy, I conclude this testimony substantiates Christensen's claim he drove front-load and rolloff trucks for Respondent prior to the strike, when he was 19 years old.

Respondent also claims his job duties, which included driving a pal body truck on the public streets, was not substantially similar to any driver jobs available at Sandy. A pal body truck has forks on the back and the operator backs the truck up so the forks enter slots in the trash bins and the driver lifts the bins with the forks to permit transport to and from the yard. Christensen worked as container maintenance/delivery person for about 2 or 3 months before the strike, but on occasion was directed to fill in for absent residential drivers using their truck or, a truck would break down and Christensen would take a front-end loader⁹ to

check with your employer or the Utah Department of Transportation.

There is no evidence Respondent or any authority considered Respondent's operations at Sandy and Pleasant Grove to be interstate commerce. As noted above, Respondent has the obligation to prove the concerned employees are not qualified for positions.

⁹Christensen describes his use of the front-end loader on residential routes as:

I built a special can that we started with a four yard and I cut it off and then put steps on it. And I used to pull a front-end loader and I'd put it on the forks and then have somebody up on the can on the step and I would just drive through the route and put the can down by the residential stop and whoever

perform the service. He drove the front-end loader on residential routes about three or four times a month. Christensen knew all the residential routes. When he drove a residential route, Respondent provided for another employee to attend to the function of throwing the garbage into the truck.

After about 3 months in the delivery/container repair job, Christensen had a dispute with Tolman and was fired. Approximately 3 months later he returned to work and part of his employment agreement was he would perform less work on residential routes, but he still drove a residential route about once or twice a month with one of these assignments, on average, resulting in the use of a front-load truck. Christensen's job duties continued in this manner until the strike.

Christensen had additional experience driving front-load trucks using them to move containers around the yard and has been driving them on private property since he was 16 years old. His operation of front-load vehicles on routes was corroborated by Elliott, who worked with Christensen and observed his operation of the vehicle on routes where a side-loading residential truck had broken down and Christensen had jerry-rigged a front-load truck and container combination to function in residential service. Christensen also drove rolloff trucks in the yard at Pleasant Grove to move containers to the area where he repaired them. Respondent does not contend Christensen lacks the skills and knowledge to operate rolloff and front-load vehicles; it claims he does not have the appropriate license, is not the requisite age and there were no openings for these positions at Pleasant Grove.¹⁰ To acquire the appropriate license in 1990, Christensen needed the appropriate vehicles to take the test and his lack of employment precluded this testing.

Respondent has hired individuals as drivers of residential, rolloff, and front-load trucks, who did not possess the appropriate CDL¹¹ and afforded them the requisite training and opportunity to take the test to obtain a CDL. Christensen knew his driving a front-loader without the requisite license was illegal, and he asserts Wilkinson also knew it was illegal,¹² but Wilkinson directed Christensen to operate the truck.

was on the can would throw the trash in. And that's how we did it.

¹⁰ Christensen testified the operation of front-load and rolloff vehicles are not physically demanding jobs and he could perform these duties with his back injury. Respondent does not refute these claims.

¹¹ As used herein, CDL refers to vehicle operators' licenses.

¹² Wilkinson denied any knowledge of Christensen driving a front loader on residential routes. For the previously stated reasons, I do not credit this self-serving denial. Romeril also denied Christensen operated front-load and rolloff trucks on the streets, however, I previously found he is not a credible witness. Also, Romeril did not exhibit reliable knowledge of the Pleasant Grove operation. For example, Romeril did not believe there was an employee who was performing container repair at Pleasant Grove before the strike, and only after repeated questioning did he recall Christensen held that position. Romeril did not know Christensen also repaired containers from the Sandy location. Romeril did not know the working hours of the different driver classifications at Pleasant Grove before the strike. He also did not know the details of how the rolloff and front-load drivers were compensated at Pleasant Grove, the rate per cubic yard. The following excerpted testimony further demonstrates Romeril's lack of knowledge concerning Respondent's policies and practices in hiring drivers:

Respondent admits the permanent replacements hired after the commencement of the strike did not have the appropriate licenses and had to be trained, but claims the exigencies caused by the strike necessitated this course of action. However, Respondent failed to present personnel files demonstrating Christensen and Wilkinson were in error or that it had a policy of hiring experienced, appropriately licensed individuals to operate rolloff and front-load trucks. Respondent also failed to explain the references to licensing in the Handbook. Moreover, Respondent failed to adduce evidence, either through personnel files or other documentation, demonstrating an established policy of hiring only driver applicants who are at least 21 years old and hold the requisite licenses. On the contrary, Respondent admitted to hiring individuals who did not have the requisite licenses, training them under a learning permit and then having them acquire the CDL, consonant with the provisions of its Employee Handbook, quoted above. I conclude Respondent, by custom and practice, hires individuals without experience and appropriate licenses. Respondent failed to place into evidence any statistics concerning what percentage of its work force is hired as inexperienced and not properly licensed drivers.

Accordingly, I conclude Respondent has not established experience and appropriate licensure were conditions precedent to employment as front-load, rolloff, or any other category of driver. Based on the references to obtaining licenses in Respondent's Employee Handbook, Christensen's testimony and Wilkinson's admission Respondent tries to move residential drivers to rolloff driver positions, corroborates Christensen's testimony; and requires the determination Laidlaw hires individuals who have no experience driving rolloff and front-load vehicles and trains them. This training usually takes between 1 and 2 weeks.

Similarly, Respondent has not produced any clear and convincing policy concerning the age of its drivers. When he was 18 and 19 Christensen operated residential and delivery trucks regularly and when needed, was directed to operate a front-load vehicle on the streets to replace side-loading residential trucks that had broken down. Respondent's lack of a written age requirement and the absence of convincing testimony it had an age requirement, lead me to conclude Respondent did not have an age policy and Christensen's age on August 27, 1990, was not a valid basis for Respondent's

Q. Okay. Now let's talk about residential driver. You have an opening for—let's assume you have an opening for a residential driving position and an individual wants to come in off the street to apply. Does that individual have to have any specific qualifications?

A. You're asking if he's going to come in and drive?

A. He would have to have the proper license.

Q. And what would that license be? Do you know?

A. I do not know.

Q. You don't know? Okay. And the age requirement for the residential driving position?

A. At least 18.

Q. Are you sure?

A. I don't know.

Q. You don't know about the age either?

A. No.

Finally, Romeril claimed he did not know the class of CDL employees needed under Utah law, prior to April 1, 1992, to drive rolloff and front-load vehicles, yet he also asserted he was familiar with the state and Federal licensing provisions.

failure to offer him a position at either Pleasant Grove or Sandy.

The next question is whether Respondent had an obligation to offer Christensen a job at Sandy since he principally had been employed at the Pleasant Grove location, and if so, was the job substantially equivalent to his Pleasant Grove position. As noted above, Respondent hired six drivers at Sandy on or after August 27, 1990, including Larry Mace on February 4, 1991, as "delivery/swing" and Fred Rasmussen on February 4 as delivery, the same position Christensen held at Pleasant Grove and performed on occasion at Sandy before the strike, in addition to his container repair duties. The General Counsel claims, while location is a relevant consideration in determining if a job is substantially equivalent, it is not a per se test and under the circumstances of this case, the Sandy jobs are substantially equivalent to the employees' prestrike jobs. Further, there is no showing by Respondent that compared to the striking employees, the replacements at either Sandy or Pleasant Grove had comparable or better qualifications.

Respondent claims it has no obligation to reinstate any striking employee of Pleasant Grove to positions at Sandy, where positions for which they are qualified are available. According to Respondent, there have been only two or three transfers of employees from Sandy to Pleasant Grove which were pursuant to the employees request, after approval by management. Respondent also avers there is no established entitlement to transfers under the collective-bargaining agreement or otherwise. According to Laidlaw, Sandy and Pleasant Grove are two separate divisions with "separate seniority lists and separate schedules, including vacation schedules, and that employees of one plant are not permitted to bump into the other." Each division prepares its own payroll and the division managers have the following operational responsibilities:

A division manager on a day-to-day basis can set the time that a driver starts; which route they handle; minor disciplinary problems; who does what jobs; discrepancies in payroll; right down to which—if he wants a driver to take a different truck on a certain day or if he needs to help someone else. Any item like that he can handle himself. He does that all himself.

Respondent admits there were occasions when an employee of one plant temporarily worked at the other facility but maintains these instances are infrequent.

It must therefore be decided whether positions at Sandy were substantially equivalent to that Christensen and the other strikers held at Pleasant Grove. Respondent failed to adduce evidence concerning the pay rates and hour of work for the different positions at both Pleasant Grove and Sandy. While the vehicles were different, there was no indication compensation, benefits, and other terms and conditions of employment were not substantially equivalent. While Respondent claimed front-load drivers were paid at a piecework rate, it did not provide actual earnings records so a comparison could be made. Respondent admitted employees of both divisions receive the same fringe benefits. Romeril supervises both divisions and has final approval of disciplinary measures and hiring decisions. Prior to the acquisition of a delivery truck at Sandy, Christensen made deliveries to both the

Pleasant Grove and Sandy areas of service. Romeril admitted Sandy and Pleasant Grove employees were subject to the same overtime system and probationary period as well.

Moreover, Romeril admitted Norris Northrup, a residential driver hired at Pleasant Grove on August 6, 1990, transferred to the Sandy location on January 7, 1991, to become a rolloff driver. Romeril did not know if Northrup had any rolloff experience prior to his transfer to Sandy. Subsequently, on April 1, 1991, Northrup transferred back to Pleasant Grove to become a residential driver.¹³ Such transfers require Romeril's approval.

Another transfer involved Fred Rasmussen, who worked at Pleasant Grove as a front-load driver. After the strike, Rasmussen was hired at Sandy on February 27, 1991, as a delivery driver. In March 1991, Rasmussen transferred to Pleasant Grove as a delivery driver, the position Christensen had immediately prior to the strike. Similarly, Paul Miller, prior to the strike, was a front-load driver at Sandy and in March 1991, Respondent authorized his transfer from Sandy to Pleasant Grove as a delivery driver and also in March 1991, Respondent transferred Miller back to Sandy as a delivery driver. Again these are positions which are substantially equivalent to Christensen's prestrike job. Respondent failed to adduce any evidence demonstrating they were not substantially equivalent. Furthermore, Respondent failed to demonstrate why, if front-load drivers would transfer to delivery and residential-driver positions, residential and delivery drivers could not transfer to front-load and rolloff positions. Respondent failed to demonstrate there were differences in training, or other factors making them not substantially equivalent to Christensen's and the four other striking employees' jobs.

The Board held in *Rose Printing Co.*, 304 NLRB 1076, 1077-1078 (1991):

Thus the touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially equivalent to, the pre-strike job. To be sure, the striker's qualifications are not irrelevant. The issue of whether the striker is qualified to perform the job may shed light on whether the job is substantially equivalent to the prestrike job. Indeed, the Board has combined the two requirements. In *Fire Alert Co.*, 207 NLRB 885, 886 (1973), the Board said that "the Respondent's reinstatement obligation here is not limited to the strikers' old positions, but rather includes reinstatement to substantially equivalent positions which the strikers are qualified to fill." Thus, it may well be that the job must be substantially equivalent to the prestrike job and the striker must be qualified to fill it. But the essential point is that mere qualification to perform the job will not suffice.

Our duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld

¹³ Thus, I find that on or about April 1, 1991, there was an opening for a residential driver at Pleasant Grove, which Respondent did not offer to any of the five striking employees. This is the second opening at Pleasant Grove for a residential driver; on September 3, 1991, Ardell Conder was hired at Pleasant Grove to be a residential driver.

their service. They are therefore entitled to return to those jobs or substantial equivalents if such positions become vacant, and they are entitled to nondiscriminatory treatment in their applications for other jobs. As to this latter entitlement, it is clear that, while the former strikers were not guaranteed a preference for the nonequivalent jobs, the Respondent was not free to prefer new applicants over them simply because they had been on strike and were on the *Laidlaw* reinstatement list for their old jobs.

Here, Respondent transferred a Pleasant Grove residential driver to a rolloff driver position at Sandy,¹⁴ and the striking residential driver employees are equally entitled to consideration for similar jobs. Respondent hired three rolloff drivers at Sandy and did not offer any of the five striking employees the positions. There were also two delivery positions and a swing job given to new hires at Sandy after the striking employees unconditionally offered to return to work. The new hires' qualifications were not shown to be any better no less comparable to those of the striking employees. Again, Respondent permitted Pleasant Grove employees to transfer between Sandy and Pleasant Grove as delivery drivers. Further, Respondent failed to present any evidence any of the permanent replacements or other nonstriking employees were ever denied a request for transfer; transfers were encouraged in the Employee Handbook, quoted above; in a section entitled "Your Growth and Development."

Many of the replaced employees, including Christensen and Lastowski, executed a replaced employees interest form which specifically indicated "I wish to apply for any job opening at Laidlaw for which I am qualified." The Jeppersons and Elliott executed a form which all the other striking employees here involved also executed which provides: "I [name], [Laidlaw employee], am prepared to return to work as of August 27, 1990." Also, Romeril testified three other employees, who filled out only the other form, which stated they are "prepared to work as of August 27, 1990," "were applying for reinstatement to any job that was available with Laidlaw for which they were qualified."¹⁵ Based on Christensen's and Lastowski's forms, they applied for any job opening, and Respondent's permission of transfers to and from Sandy to positions these employees held and/or were qualified to hold, and hired new employees after August 27, without demonstrating the new hires were at least as qualified as the striking employees; requires the conclusion Respondent failed to accord them the same treatment as the new hires, for there is no evidence they were given any

¹⁴ There is no evidence concerning who, if anyone, filled the vacated Pleasant Grove residential driver position relinquished by the transfer.

¹⁵ Specifically, Romeril testified:

Q. Okay. Let me ask you again then.

An employee who submitted a form such as General Counsel Exhibit 2-S which is a form which says, to whom it may concern, essentially, I'm prepared to return to work; correct?

A. Yes.

Q. Now if an employee submitted this form, which is 2-S, and did not submit a form which is, as an example General Counsel Exhibit 2-A, did you still consider that employee to be applying for reinstatement to any job that was available with Laidlaw for which they qualified?

A. Yes.

consideration for these positions while the new applicants who were hired clearly were given favorable consideration. I conclude Respondent ignored striking employees awaiting reinstatement and failed to present legitimate and substantial business reasons for these actions when hiring for jobs at both Sandy and Pleasant Grove. *Laidlaw Corp.*, supra at 1369.

The contention by Respondent Sandy and Pleasant Grove are operated as separate and distinct divisions is not fully supported by the record. In stipulated election agreements executed in 1989¹⁶ and 1991,¹⁷ Respondent agreed to appropriate collective-bargaining units which were comprised of the truck drivers at both Sandy and Pleasant Grove. In the 1991 agreement, the delivery drivers were grouped with repairmen by designating the position "delivery drivers-repairmen." Thus, Christensen's position as delivery-container repair, has not been shown to justify or permit Respondent's failure to consider his application for employment in "any job opening at Laidlaw," as rendering him ineligible for the delivery positions filled after he executed this document supplied by Respondent on August 17, 1990.

The temporary transfers of employees between Pleasant Grove and Sandy further dispel any visions that each division was separate and autonomous. Christensen worked on containers from Sandy, major mechanical repairs of Sandy trucks were performed at Pleasant Grove, and when the Pleasant Grove delivery truck was out of service for 3 weeks for repairs Christensen worked with the Sandy delivery driver in the Sandy delivery truck.¹⁸

Respondent admits Cameron Frampton, swing driver¹⁹ at Pleasant Grove, substitutes for absent drivers at Sandy, in-

¹⁶ The June 1989 agreement described the appropriate collective-bargaining unit as:

All drivers, mechanics, welders and bailers employed by the Employer at its facilities located at . . . Pleasant Grove . . . and . . . Sandy . . . BUT EXCLUDING all management employees, office clerical employees, guards and supervisors as defined in the Act.

¹⁷ This agreement, executed by Respondent on May 21, 1991, describes the agreed-on appropriate collective-bargaining unit as:

All roll off, front load, residential and container delivery drivers/repairmen, mechanics, yardmen and dispatchers employed by the employer at its Pleasant Grove and Sandy, Utah facilities, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

¹⁸ The Sandy delivery truck was called a cherry picker which was described by Christensen as:

[T]he cherry picker's got an arm sort of like a crane that folds back behind the cab. And it swings out to where—to where the container's position, the one that you're going to pick up, and then you wrap a chain through each pocket and hook them up into a hook on the crane.

And then you just lift it up and then move it over and set it down on the bed of the truck.

¹⁹ Respondent, by Wilkinson, described Frampton's duties as: "Cameron, basically, knows every job in Utah. He covers front load, covers roll off, covers residential." While indicating he does not frequently work at Sandy, the Company did not present any records and it was not clear Wilkinson was referring to the temporary transfers of Frampton after August 1990. Also, there was no indication if Respondent's practices of temporary transfers were recently altered. I have not credited Wilkinson's testimony except where credibly corroborated or an admission against Respondent's interests based on his demeanor. He appeared to be attempting to obfuscate

Continued

cluding during employees' vacations for periods as long as a week. While Romeril claims this occurs less frequently than once a month, Edgar Don Hayes, whom I find is a credible witness,²⁰ testified:

Q. How frequently would Mr. Frampton work in Sandy, do you know?

A. I think what they did is they scheduled their vacations opposite weeks as so he could go up there and work on their vacation weeks, whatever they needed, and then he'd come back.

Q. Well, during the period that you were employed for Laidlaw how frequently would Mr. Frampton—let me ask you first.

Where was Mr. Frampton assigned on a regular basis, if you know?

A. I don't know because, like I said, he was back and forth so much.

Q. All right. How often would he work in Sandy, if you know?

A. There was times where I wouldn't see him for a couple of weeks. And then we'd all get on the radio and say, well, how does it feel to be back down here among us?

And he'd say, well, sometimes it's a lot better being up in the Sandy yard.

Q. How frequently would he work in Pleasant Grove?

A. Like any vacations or whatever needed to be done. I guess that's why they called him the relief driver because he was anywhere they needed him.²¹

Based on Hayes' testimony, I conclude Frampton was temporarily assigned to Sandy with such frequency that the Pleasant Grove employees could not determine which location was his permanent duty station and which was the temporary transfer. Romeril also admitted an employee at Sandy, David Moore, was temporarily transferred to Pleasant Grove on one occasion when his help was needed.

I conclude that the temporary transfers between Sandy and Pleasant Grove were substantially more frequent than claimed by Respondent, a finding supported by the testimony of David Moore. Moore is a former employee of Respondent who was not shown to have any animus toward Laidlaw. He testified candidly and his testimony was straightforward and believable. Moore was hired prior to the strike, participated in the strike, and then was reinstated. He left Respondent for other employment in July 1991. Moore had been a delivery driver. It took him about 2 days to learn how to operate the delivery truck. He then became a rolloff driver at Sandy. At least twice a month he worked at Pleasant Grove pursuant

any facts perceived as detrimental to Respondent's litigation theory; he did not seem open and honest. Supporting this conclusion is Respondent's admission it hired a new employee to be swing driver at Sandy after August 27, who was not shown to have any specific knowledge of Respondent's operations in the area.

²⁰ Hayes, a former employee of Laidlaw who was terminated on or about November 29, 1991, testified in an open and honest manner, reciting events with persuasive detail and forthrightness.

²¹ On cross-examination, Hayes testified Frampton was gone from Pleasant Grove about half the time during Hayes' employment, which was from December 21, 1990, to November 1991. Frampton told Hayes he was "mostly driving front-end drivers" at Sandy.

to the directions of his supervisor when "someone would call in sick or when they'd get swamped or something they would call us and then they would send me down there." Respondent did not introduce payroll records, testimony from dispatchers, or the supervisor referenced by Moore to refute his testimony.

Hayes also recalled two rolloff drivers from Pleasant Grove would occasionally work at Sandy when "they got backed up or something." These drivers were Herb Kehl and Ned Williamson.²² They worked at Pleasant Grove between two and four times during a 3-month period. Hayes did not have a CDL license when he was hired by Respondent; he obtained a Utah class B CDL about 1 month after he commenced his employment with Laidlaw. Respondent's claim transfers were sporadic and not indicative of a joint operation is not persuasive. Personnel and other records maintained by Respondent were not placed in evidence to controvert Hayes' testimony. Respondent did not explain this failure. Respondent's failure to buttress this bare claim with its own records warrants an adverse inference. *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir. 1988); *SDC Investment*, 299 NLRB 779 (1990).

However, even absent this inference, I find Respondent operated Sandy and Pleasant Grove in a manner that permitted permanent transfers at the employees' request. There is no record of such a transfer being denied. Temporary and permanent transfers were made by the Respondent between Sandy and Pleasant Grove with sufficient frequency to warrant a finding that the assignment of an employee to Pleasant Grove or Sandy included the reasonable possibility they would occasionally be temporarily assigned to work at the other location for a few days or weeks. Thus, I conclude Pleasant Grove employees have been subject to assignments involving working at Sandy at Respondent's discretion or on their request prior to the strike and reinstatement to Sandy would not be precluded or justified, standing alone, as dissimilar and not substantially equivalent under the circumstances of this case.

In sum, Respondent has failed to demonstrate reinstatement of striking employees who had previously been assigned to Pleasant Grove to the Sandy location is not substantially equivalent. As found above, new applicants were assigned to Sandy without the proper licenses, and Respondent considered all the striking employees who filed a request to return to work to be requesting employment at any of Laidlaw's facilities. Respondent failed to demonstrate why the striking employees should be treated disparately from new applicants and be considered ineligible because they were assigned to Pleasant Grove and/or did not possess a CDL. Also, as noted above, Respondent transferred permanent replacements, including a transfer to a residential driver position, after the striking employees offered to return to work. It also hired a new residential driver at Pleasant Grove after August 27. Thus, there were at least two openings at Pleasant Grove for a residential driver which were not given to striking employees, rather they were given to a transferee from Sandy and a new hire without any showing the trans-

²² Wilkinson admitted rolloff drivers occasionally deliver bins to Sandy but claims they do not make such deliveries "often." Wilkinson did not state with specificity how often Pleasant Grove rolloff drivers make such deliveries.

feree and new hire had any experience in driving a residential truck or that there were legitimate and substantial business considerations.

Similarly, Respondent transferred one or more residential drivers to Sandy to operate rolloff trucks without any evidence the transferee had experience or otherwise could be differentiated from the striking employees other than the unreinstated employees were strikers. Respondent has failed to demonstrate with clear and convincing evidence the jobs admittedly available at Sandy were substantially different from the jobs the striking employees held at Pleasant Grove. Unlike *Rose Printing Co.*, supra, here Respondent admittedly refused to offer striking employees work at Sandy in a disparate manner from new applicants and the General Counsel litigated the case by presenting facts of such discriminatory behavior. To hold otherwise would create an entitlement for preferential treatment for new applicants. Based on the facts here present I find Respondent has failed to establish it had "legitimate and substantial business justification" in not recalling any of the five strikers based on licensing and location of job opening considerations. *Laidlaw Corp.*, supra. As the Court found in *Fleetwood*, "hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act." *Laidlaw Corp.*, supra at 1369.

Moreover, Respondent has failed to demonstrate the positions at Sandy had different fringe benefits such as health, retirement, vacation, retention, and promotion. The distance between Sandy and the unreinstated strikers' residences was not presented nor where there any differences in working conditions established. Thus, Respondent failed to demonstrate with a preponderance of the credible evidence that the open positions at Sandy which were filled by new hires were not "regular and substantially equivalent employment." *Associated Grocers*, supra. The evidence of record requires the conclusion Respondent's failure to reinstate Christensen at either Sandy or Pleasant Grove when appropriate openings occurred violated Section 8(a)(3) and (1) of the Act.

3. The failure to reinstate Korey and Kyle Jepperson

The Jeppersons worked exclusively as portable toilet drivers. Recognizing its obligation to reinstate the Jeppersons, as economic strikers, on application to their former position or substantially equivalent positions, Respondent claims Kyle and Korey Jepperson are not qualified to perform any other job with Laidlaw. There is no evidence concerning the vehicle licenses these employees held or any work experience which may qualify them for other substantially equivalent positions with Laidlaw. There is no claim the Jeppersons were permanently replaced, only that after the strike ended, their jobs were eliminated by the sale of the portable toilet business.

The sales agreement between Respondent and John and Company for the portable toilet business was dated April 23, 1991, about 9 months after the Jeppersons unconditionally offered to return to work. The stipulation entered into by the parties admits the sale of the portable toilet business was not until August 1991.²³ As noted above, the Court in

²³ As reflected above, the parties stipulated:

MR. STEINER: Your Honor, the Employer offers the following stipulation that on or about August 31, 1991, or September 1,

Fleetwood, recognizing the employer possessed the information necessary to establish "his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer." Here, Respondent failed to adduce any evidence concerning the date it ceased operation of the portable toilet business, but admittedly it was after the Jeppersons unconditionally offered to return to work. Further, Respondent failed to adduce any evidence concerning when it determined to sell the portable toilet operation, why it made the decision, and when negotiations for the sale commenced. There is no evidence the decision to sell the portable toilet operation was economically motivated or was based on "the need to adapt to changes in business conditions or to improve efficiency;" it could have been motivated by the desire to eliminate the jobs of strikers or otherwise discourage employees from exercising their rights guaranteed in Section 7 of the Act. *Fleetwood*, supra.

Respondent cited *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757 (6th Cir. 1989), which was quoted extensively in Administrative Law Judge Wallace H. Nation's decision of the issue of economic justification which was remanded by the court in *Kurz-Kasch, Inc.*, 301 NLRB 946, 949 (1991), in part as follows:

The burden of proving vacancies cannot be placed on the General Counsel: "Such proof is not essential to establish an unfair labor practice. It is related to justification, and the burden of such proof is on the employer." *Fleetwood Trailer*, 389 U.S. at 378 n.4. And the Court explicitly opened the door to the precise justification advanced in the present case: "the need to adapt to changes in business conditions or improve efficiency." *Fleetwood Trailer*, 389 U.S. at 379. The leading Supreme Court case therefore forecloses us from concluding, as the Board concluded in another controversy, that "[i]t is the General Counsel's burden to show that a striker's former job was available." *Lincoln Hills Nursing Home, Inc.*, 257 NLRB 1145, 1158 (1981).

Subsequent cases, without explicitly addressing the question, have assumed that the lack of vacancies falls to the employer to prove as a business justification. The NLRB has held that the termination of a worker "prima facie create[s] a vacancy" which an employer could rebut by demonstrating a decline in its business. *K-D Lamp Co.*, 229 NLRB 648, 650 (1977). A similar "legitimate and substantial business justification" was held to have been established where the employer proved that, subject to its contracts with its customers, it was

1991, the portable toilet business was sold to the John & Company. And I would like to offer as evidence Respondent 1 which is a copy of the sales agreement for that business.

MR. DALY: General Counsel will so stipulate.

THE COURT: It will be so stipulated.

I note the sales agreement provides for payments to commence in August 1990, but the Respondent has the obligation to demonstrate clearly when it terminated the portable toilet operation. The stipulation and evidence of record fail to clearly demonstrate the portable toilet operation was terminated by Respondent on or about August 27, 1990. The confusing evidence of record will not support such a decision.

required to maintain an inventory which, in turn, made immediate post-strike replacements unnecessary. *Randall*, 257 NLRB 1, 6-7 (1981) enforcement granted in part and denied in part on other grounds sub nom. *Randall Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240 (1982), cert. denied, 461 U.S. 914 (1983). The Eleventh Circuit has explicitly taken *Fleetwood Trailer's* invitation to find justification in purely economic business decisions, holding that a "legitimate and substantial business justification" was demonstrated where an employer proved that, having eliminated a service during the strike, it made a business judgment after the strike that the change both pleased its customers and saved it money. *NLRB v. Southern Florida Hotel and Motel Assn.*, 751 F.2d 1571, 1583 (11th Cir. 1958).

Respondent failed to advance any business justifications for the elimination of the portable toilet business about 9 months after the Jeppersons offered to return to work. There is no evidence Respondent was negotiating for the sale of this business or otherwise had "substantial and legitimate business reasons" for failing to reinstate the Jeppersons on or after August 27. Furthermore, there is no evidence Respondent ceased providing this service at the commencement, during or after the strike. Thus, Respondent has failed to show there were no vacancies which the Jeppersons were qualified to fill. Accordingly, I find Respondent has failed to show at the time the Jeppersons offered to return to work they were not reinstated for "legitimate and substantial business" reasons.²⁴ See *Carruthers Ready Mix*, 262 NLRB 739. There is no evidence or bare claim the Jeppersons were replaced with new hires promised permanent positions. Thus, I conclude Respondent violated Section 8(a)(3) and (1) of the Act by not offering Kyle and Corey Jepperson reinstatement to their former positions on or after their offers to return to work on August 27, 1990. I recommend the question of when the portable toilet business was sold and their jobs eliminated be deferred to the compliance phase of this proceeding.

The next issue is whether the Jeppersons were entitled to reinstatement after the portable toilet business was sold. Respondent avers there are no substantially equivalent jobs, and if any were so deemed, it had no job openings at Pleasant Grove and, as discussed above, is not required to reinstate any of the Pleasant Grove employees to positions at Sandy. As previously found, Respondent has failed to present legitimate and substantial business justifications for treating striking employees differently than employees both prior to and after the strike, by precluding them from consideration for positions at Sandy. Respondent has also failed to demonstrate that the jobs available at Sandy were not substantially similar to the Jeppersons' prior positions. The surfeit of credible evidence concerning Laidlaw's asserted business justifications such as the failure to disclose the exact date it ceased the portable toilet operations, any differences in wages and other terms and conditions of employment, requires the conclusion Respondent violated the Act by failing to offer Corey and

²⁴I note there is no evidence concerning the number of replacements hired by Respondent prior to the termination of the strike and the positions they were hired to fill. I further note Respondent had a third employee who worked as a portable toilet driver, Randy Teal. There is no evidence concerning his status at the time of trial.

Kyle Jepperson reinstatement to vacant positions at either Sandy or Pleasant Grove.

Wilkinson testified Kyle Jepperson was not interested in other jobs at Respondent and thus did not have to be offered another position. Wilkinson declared:

Q. Okay. Did you ever have any conversation with Kyle or Corey Jepperson about working on any other jobs other than the toilet job that they did?

A. Yes, I did.

Q. Who did you have the conversation with?

A. I had it with Kyle.

Q. And when did you have it?

A. Oh, it was, I'd say, probably July of '90; July, June, something like that. Not sure of the date.

Q. How did this conversation come up?

A. When we get into our summertime it gets heavy. Our garbage gets really heavy. And once in a while we'll need somebody to go out and help—if we get a truck breakdown or something like that we need somebody to go out and throw. And I just mentioned it to Kyle. I says, we ought to get you cross-trained here some day. And he told me that, no way. I'm not a garbage man. I'll quit before I have to go out and throw. I just said, whatever.

Q. He never did, did he?

A. No.

The record does not demonstrate Wilkinson ever related this conversation to Romeril or other manager that made any decisions concerning the recall of the Jeppersons. Also, this conversation, considering the changed circumstances of the strike, is not tantamount to a refusal to accept an offered job, and thus does not excuse Respondent from offering Kyle Jepperson a position. Assuming arguendo, this conversation exculpated Respondent from any obligation to recall Kyle Jepperson to a substantially similar position, it does not establish Corey Jepperson held the same convictions. Moreover, Wilkinson admitted Respondent had cross-training, which reinforces my findings herein that residential drivers have transferred to front-load and rolloff driver positions both at Pleasant Grove and Sandy, with the transfers of location as freely permitted as transfers in driving positions. Thus, I conclude Respondent's failure to reinstate the Jeppersons to driving positions at either Sandy or Pleasant Grove after the strike and after the sale of the portable toilet operation is a violation of Section 8(a)(3) and (1) of the Act.

4. The failure to reinstate Mike Lastowski

As the business justifications for the failure to reinstate Mike Lastowski, Respondent claims he did not have the proper license, and Lastowski was training to become a police officer. The issue of Respondent's business justifications for failing to reinstate Lastowski has been determined to be insufficient. The question therefor, is whether Lastowski obtained "regular and substantially equivalent employment." *Laidlaw Corp.*, supra.

The Board held in *Carruthers Ready Mix*, 262 NLRB at 740:

Although an employer is under no obligation to offer work to an economic striker who has obtained "regular

and substantially equivalent employment” prior to the time a position with the employer becomes available, the employer has the burden of proving that the striker’s new job was in fact substantially equivalent to the job the striker held with the employer. . . . Respondent had the burden to prove that the new job was substantially equivalent, but it failed to present any evidence on this issue. Therefore, we find that Fletcher is entitled to backpay from the first day Respondent had a position open for him after his unconditional offer to return to work until the day . . . he expressly refused to return to work. [Citations omitted.]

Similarly, in this case there is no substantial evidence establishing Lastowski was a police cadet. Another employee heard he was a cadet; there is no credible evidence he in fact was a cadet or qualified to become a full-time police officer. The source of this information was undisclosed and there is no means to determine the reliability of this hearsay evidence. Further, assuming this hearsay evidence is reliable and should be considered, the terms and conditions of police cadets’ employment and, if appropriate, terms and conditions of police officers’ employment, were not present, and like the Carruthers case, there is no basis to permit a determination of whether Lastowski obtained “regular and substantially equivalent employment.” *Id.*

The elements of “regular and substantially equivalent” were stated in *Associated Grocers*, supra, 295 NLRB at 827, as follows:

The Board declines a “mechanistic application” of such statutory language, and instead determined ad hoc by “an objective appraisal of a number of factors, both tangible and intangible” whether or not such a condition has eventuated. Among the factors noted are “fringe benefits (retirement, health, seniority for purposes of vacation, retention, and promotion), location and distance between location of the job and an employees’ home, differences in working conditions.” *Little Rock Airmotive*, 182 NLRB 666 (1970).²⁵

There is no evidence concerning the distance of the training from Lastowski’s residence, there is no showing the position is regular employment, and the terms and conditions of the position were not adduced nor were Lastowski’s wishes concerning returning to his position at Laidlaw. The failure

²⁵ In determining whether substantially equivalent employment was available to the striking employees or whether one or more of these employees acquired substantially equivalent employment the criteria applied by the Board in *Little Rock Airmotive*, *Id.* will be applied herein, and provides:

The question of what constitutes “regular and substantially equivalent employment” cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an ad hoc basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned. Without attempting to set hard and fast guidelines, we simply note that such factors as fringe benefits (retirement, health, seniority for purposes of vacation, retention, and promotion), location and distance between the location of the job and the employee’s home, differences in working conditions, et cetera, may prompt an employee to seek to return to his old job.

of Respondent to establish Lastowski obtained “regular and substantially equivalent employment” prior to a position becoming available at Laidlaw, requires the finding that Respondent violated the Act by not offering Lastowski a driver position at either Sandy or Pleasant Grove as a driver on the terms and conditions it employed new hires after August 27, 1990, and Lastowski is entitled to reinstatement.

Respondent also argues Lastowski only had a temporary CDL which expired on September 1, 1990, and thus he was unqualified for reinstatement as a driver of front-load or roll-off trucks. Lastowski, as is usual for other new hires, did not have a CDL. After obtaining a temporary CDL, he participated in the strike, otherwise, he would of been scheduled by Respondent to take the test for a permanent CDL, according to Wilkinson. As found to be the case with the other striking employees here under consideration, Respondent failed to demonstrate Lastowski was not as qualified for any of the available positions as the new employees Respondent hired after August 27, 1990, or was otherwise unqualified to fill one or more of these vacant jobs. Respondent violated Section 8(a)(3) and (1) of the Act by failing to offer Lastowski reinstatement to one of the positions which became available at Pleasant Grove and Sandy on or after August 27, 1990.

5. The failure to reinstate Timothy Elliott

Analogously, Elliott was also entitled to reinstatement to a driver’s position when one became available. Respondent claims Elliott failed front-load training, but relied on hearsay rather than its own records.²⁶ I find the record fails to establish Elliott was not qualified to assume a job as front-load driver while employees hired after August 27, 1990, were qualified. As previously noted, Respondent failed to introduce evidence of the experience and qualifications of the drivers hired after August 27, 1990; this failure was unexplained.

Elliott had a Utah class E drivers license, which permitted him to drive front-load and rolloff trucks until the CDL requirements went into effect on April 1, 1992. Also, Elliott has experience driving a front-load truck. In May 1989, Elliott, pursuant to his request, was transferred from Pleasant Grove to a Laidlaw facility in Phoenix, Arizona, and was training for the position of front-load truckdriver.²⁷ Elliott

²⁶ Wilkinson testified:

Q. Did you know about his experience in Phoenix?

A. Yes, I did.

Q. Did you know he failed front-load training down there?

A. Yes, I did.

There is no evidence what was meant by “failed front-load training.” While Respondent provided Wilkinson with Lastowski’s personnel file, there were no documents or other reliable evidence describing or defining the term “failure.” It could mean Elliott failed to complete the training period, not that he failed to acquire the appropriate license or demonstrated a lack of competence to drive front-load vehicles. Accordingly, I find this testimony fails to establish Elliott was unqualified to perform the duties of a front-load driver or that the duties of such a position were not substantially equivalent to his prestrike position.

²⁷ Again, there was no evidence of Respondent denying an employee’s request for a transfer, even if the transfer involved driving a different type of truck for which the transferred employee does not have the requisite training and license.

was fired from his Phoenix position for sleeping on the job. After returning to Utah, Elliott applied for reemployment at Pleasant Grove and was rehired as a residential driver, a duty he continued to perform until the strike.

Thus, I find Respondent's argument that Elliott lacked "the proper background for roll-off or front-load trucks at the time the strike ended" is pretext. In addition to having the appropriate license, he had several months' experience driving a front-load truck in Phoenix, and Respondent failed to adduce any evidence he was incompetent to perform the duties of a front-load driver while working several months in Phoenix. His termination from the Phoenix job was for sleeping, not for failing a test or failing to master the requisite skills to operate a front-load vehicle. Wilkinson admitted Elliott "was a good driver. I had no problem with Tim." Further, if transfers between Sandy and Pleasant Grove were not routine, then the transfer of a Sandy employee to become a residential driver at Pleasant Grove after the strike would not have occurred and the position would have been available to one of the striking employees. Unlike the *Rose Printing Co.* case, supra, here Respondent failed to show the vacant positions at Sandy and Pleasant Grove after August 27, 1990, were not substantially equivalent to the employees' prestrike positions. Respondent's failure to reinstate Elliott, under these circumstances, is violative of Section 8(a)(3) and (1) of the Act.

In sum, Respondent failed to demonstrate driving positions which became available after August 27, 1990, were not the same as or substantially equivalent to the striking employees' positions immediately prior to the strike. The terms and conditions of the driving positions available after August 27, 1990, were not detailed. There were no detailed comparisons of hours of work, or wages and other benefits that would warrant a determination the vacancies were not substantially equivalent to the strikers' former positions. Laidlaw continued to let the employees transfer between Sandy and Pleasant Grove after the strike, and these transfers could be and were to different driving positions without a demonstration it altered its requirements for such transfers since the strike based on valid business considerations or for any other lawful reason. The need for a CDL on and after April 1, 1992, was not shown to have barred the reinstatement of any striker to one or more of the vacancies filled by new hires after August 27, 1990. There was no claim of a diminution of work or other legitimate business reason to hire new employees rather than reinstate the striking employees. The employees hired after August 27, 1990, were not demonstrated by Respondent to have comparable or greater qualifications than the striking employees.

Further, Respondent's reliance to a great extent on self-serving statements rather than personnel and other records requires according such testimony less weight, particularly here, where there is no claim such business records were destroyed or otherwise unavailable. *Kurz-Kasch, Inc.*, supra. Respondent has failed to prove it had an age or license requirement prior to hiring or transferring employees to drive any of its vehicles. Respondent offered no explanation for its failure to mention to the striking employees the positions it transferred Sandy employees into at Pleasant Grove. This failure bolsters the conclusion Respondent's true reasons were unlawful and not due to "legitimate and substantial

business justifications." *NLRB v. Fleetwood Trailer Co.*, supra; *Holo-Krome Co.*, supra.

Respondent has also failed to show: the distance to Sandy from the residences of any of the unreinstated strikers, the effect on their seniority, if any, from offering them jobs at Sandy rather than Pleasant Grove; how seniority is calculated; there is no claim fringe benefits are different between Sandy and Pleasant Grove; the differences in working conditions, if any; and, the desires of these employees to return to their prestrike or similar positions. Thus, I find Respondent's claim the available jobs at Sandy and Pleasant Grove after the strike were not substantially equivalent to the striking employees' prestrike positions has not been supported by credible evidence. Respondent's own transfer and other operating practices require a conclusion the job openings at Pleasant Grove and Sandy after August 27, 1990, were substantially equivalent to the striking employees' prestrike positions.

Assuming I found the jobs open at Sandy and Pleasant Grove were not substantially equivalent to the striking employees' prestrike jobs, the record requires the conclusion Respondent treated the new hires more favorably than the striking employees. As previously noted, Romeril admitted he considered all the striking employees' requests for reinstatement as applications for employment at any facility and three of the applicants, as previously detailed, offered to return to any opening at Laidlaw for which they are qualified. Accordingly, I conclude Respondent's admitted failure to consider the striking employees for any positions at Sandy and all but Christensen for any positions at Pleasant Grove is because Respondent applied its hiring criteria more strictly to the striking employees, which is discriminatory and violative of Section 8(a)(3) and (1) of the Act. *Monfort of Colorado*, 298 NLRB 73 (1990); *Laidlaw Corp.*, supra.

I have also determined that Respondent's failure to offer the striking employees positions at Sandy and Pleasant Grove was not supported by credible reasons that permit a finding it had "legitimate and substantial business justifications" for these actions and this failure buttresses the inference Respondent's true reasons were unlawful. There is no evidence of any changes in business or other conditions which lawfully permitted Respondent to deviate from its established customary and usual practice of permitting residential drivers to transfer to rolloff and front-load driver positions without any licensing preconditions. The new employees were not shown to have been equally or more qualified for the positions than the striking employees; the striking employees were qualified under the Company's normal standards. *NLRB v. Rockwood & Co.*, supra.

Inasmuch as Respondent has the obligation to prove when vacancies in driver positions occurred at Sandy and Pleasant Grove, which it failed to do,²⁸ any conclusions concerning the date former strikers were entitled to reinstatement must be left to the compliance stage of this proceeding.

²⁸ Respondent merely entered into a stipulation as to when new employees were hired, not when a vacancy occurred, and there is no basis to assume the date of hire coincided with the date of a vacancy.

CONCLUSIONS OF LAW

1. The Respondent, Laidlaw Waste Systems, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local No. 222, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to reinstate Tony Christensen, Mike Lastowski, Timothy Elliott, and Korey and Kyle Jepperson to their prestrike or substantially equivalent positions, in a nondiscriminatory manner, when they became available on or after August 27, 1990, Respondent has violated Section 8(a)(3) and (1) of the Act.

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

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found Respondent violated Section 8(a)(3) and (1) of the Act by refusing and failing to offer reinstatement to the replaced strikers, Tony Christensen, Mike Lastowski, Timothy Elliott, and Korey and Kyle Jepperson, when vacancies arose on and after September 27, 1990, without prejudice and on the same basis as new hires, I will order Respondent to offer them immediate and full reinstatement to their former or substantially equivalent positions, with backpay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

²⁹Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

³⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Laidlaw Waste Systems, Inc., Sandy and Pleasant Grove, Utah, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate Tony Christensen, Mike Lastowski, Timothy Elliott, and Korey and Kyle Jepperson to their prestrike or substantially equivalent positions and applying discriminatory job eligibility or other employment criteria, when they became available on or after August 27, 1990.

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

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

(a) Offer Tony Christensen, Mike Lastowski, Timothy Elliott, and Korey and Kyle Jepperson immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them, including those heretofore reinstated, whole, in the manner set forth in the remedy section for any losses they may have suffered as a result of the Respondent's conduct found above to have been violative of Section 8(a)(3) and (1) of the Act.

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

(c) Post at its facility and place of business, in Phoenix, Arizona, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

³⁰If 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."