

**American Olean Tile Company, Inc. and Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, Case 9-CA-14573**

December 16, 1982

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On January 13, 1982, Administrative Law Judge Walter J. Alprin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a brief in answer to Respondent's exceptions and in support of its cross-exceptions, and Respondent filed an answering brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>4</sup>

Respondent in its exceptions contends that the limitations period of Section 10(b) of the Act constitutes a bar to this proceeding since, *inter alia*, it had determined its reinstatement and transfer policy on or before January 24, 1979, and that later acts in implementation of that new policy are barred inasmuch as they occurred more than 6

months after the policy change. The Administrative Law Judge rejected Respondent's arguments in this regard, and found that Respondent had not really changed its transfer policy, but had merely attempted to provide a reward to those employees who abandoned the Union's concerted activity by putting into effect the "supposedly new transfer policy" (whereby Cloverport employees first returning from the strike would be employed at Lewisport, but given transfers to the first available jobs at Cloverport) during the period of the strike, and then reverting to its former policy as soon as the strike was over. He further observed that the transfer policy utilized in normal business activity both before and after the strike remained constant and unchanged.

The Charging Party Union disputes Respondent's claim that the proceeding should be barred, asserting in its brief in answer to Respondent's exceptions that it had no way of knowing of Respondent's alleged oral commitments to the 12 transferees until the transfers were consummated. Thus, the Charging Party argues that the 10(b) period could not commence running until the Union was put on notice of the facts constituting the unfair labor practice,<sup>5</sup> and the charge was filed within 6 months of the first transfer.

We have carefully reviewed the record with respect to the parties' assertions and find no evidence that the Charging Party was in fact aware of the oral promises of transfer made to the 12 Cloverport employees prior to the effectuation of those transfers. While Respondent points to a February 5, 1979, letter from the Union's attorney to Respondent's counsel protesting the placement of certain employees on a preferential hiring list, this document in no way establishes that the Union also had knowledge of the oral promises of transfer made to the 12 employees. Indeed, the fact that the Union in its letter did not object to the transfer promises, while strongly objecting to the placement of five employees on a preferential hiring list, suggests that it did not know of Respondent's promises to these individuals. Therefore, irrespective of whether or not Respondent had validly adopted a new transfer plan which it abandoned when the strike ended, and irrespective of whether or not the Union might have been barred by Section 10(b) from litigating the lawfulness of transfers made pursuant to that plan had it been aware of it (a question which we find unnecessary to reach here), the Union cannot be foreclosed from litigating the lawfulness of those transfers where there is no evi-

<sup>1</sup> Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

<sup>2</sup> The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>3</sup> The Administrative Law Judge provided, in his recommended remedy, that Respondent be directed to make whole those former strikers who were discriminated against by the implementation of Respondent's transfer plan by making payment to each of them a sum of money equal to the amount he or she would normally have earned from the date of Respondent's unlawful implementation, on or about January 24, 1979, to the date of Respondent's offer of reinstatement or placement on a preferential hiring list. The discriminatees are not, however, entitled to be made whole from January 24, 1979, but only from the time of Respondent's unlawful transfers giving preference to employees with less seniority. Accordingly, we hereby modify the remedy to provide for payment to each discriminatee of a sum of money equal to the amount he or she would have normally earned from the date of Respondent's unlawful failure to offer reinstatement in accordance with his or her seniority rights to the date of Respondent's offer of reinstatement, less net earnings as prescribed by the Administrative Law Judge.

<sup>4</sup> Applying the standard for broad cease-and-desist orders established in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we do not find such an order to be warranted herein. Accordingly, we shall modify the Administrative Law Judge's recommended Order.

<sup>5</sup> The Charging Party cites the Board's Decision in *Hot Bagels and Donuts of Staten Island, Inc.*, 227 NLRB 1597 (1977), in support of this point.

dence that it was apprised of the alleged plan prior to its manifestation through the actual transfers. Accordingly, we find Respondent's exceptions without merit.

### ORDER

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

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

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

2. 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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT grant preferential transfer rights and preferential seniority rights to jobs and rates of pay to those of our employees who abandoned a strike with Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, or to those who made unconditional offers to return to work separate from that made by the Union for all strikers, and deny seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those of our employees who remained on strike until the strike's end, or who relied on the unconditional offer to return to work made by the Union on behalf of all strikers.

WE WILL NOT maintain or give effect to the preferential transfer system, found unlawful by the Board, or any other reinstatement system which discriminates against those of our striking employees who remained on strike with the above Union until the strike's end, and to those who relied on the unconditional offer to

return to work made by the Union on behalf of all strikers.

WE WILL NOT discourage membership in said Union, or any other labor organization, by discriminating against our employees with respect to their hire or tenure of employment or any term or condition of employment.

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

WE WILL rescind in full our preferential transfer system and any implementation thereof, as found unlawful by the Board, and restore all of our striking employees to the seniority and other rights and privileges they would have enjoyed absent this transfer system and implementation thereof.

WE WILL, insofar as we have not already done so, offer to all of our striking employees of the Cloverport plant, who applied unconditionally for reinstatement, including those who abandoned the strike before the strike's end and those who made unconditional offers to return to work separate from that offered by the Union on behalf of all the strikers, immediate and full reinstatement to their former or substantially equivalent positions at the Cloverport plant, without prejudice to their seniority or other rights and privileges, displacing if necessary any transferred reinstated employees who returned to work before the strike's end or who made unconditional offers to return to work separate from that made by the Union on behalf of all the strikers. If there are not enough positions for all the remaining strikers, including any as displaced above, the available positions will be distributed among them without discrimination because of their union membership, activity, or participation in the strike, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of our business. Those striking employees for whom employment is not immediately available after such distribution will be placed on a preferential hiring list, as provided in the Board's Decision.

WE WILL make whole, with interest, those of our striking employees who were discriminated against by unlawful implementation of our preferential transfer system for any loss of

earnings sustained by them, as provided in the Board's Decision.

AMERICAN OLEAN TILE COMPANY,  
INC.

## DECISION

### STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge: This case was heard at Owensboro, Kentucky, on August 13-14, 1981, and September 1, 1981. The charge was filed by the Union on November 21, 1979, and the complaint issued on November 28, 1980.<sup>1</sup> The primary issues are whether the preferential interplant transfer of reemployed strikers back to the location of their original jobs constitutes a violation of Section 8(a)(1) and (3) of the National Labor Relations Act, and, if so, whether this proceeding is barred by Section 10(b) of the Act.

Upon the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, Respondent, and the Union, I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a New York corporation, is engaged in the manufacture and sale of ceramic tile and related products at plants in Lewisport and Cloverport, Kentucky, about 20 miles' distant from each other. It annually ships goods valued in excess of \$50,000 directly to customers located outside the State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. OTHER FACTS

Respondent's employees were at the pertinent times represented by Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. On termination of their contract on June 16, 1978, the workers began an economic strike, and were all permanently replaced by late December 1978. Seven of the Cloverport employees abandoned the strike and returned to work at Lewisport, the only jobs available at the time being at that plant. The Employer assured them, however, that they would be transferred to Cloverport as soon as vacancies occurred.

On the evening of January 23, the striking employees met and voted to end the strike and unconditionally offer to return to work. Union officials advised the membership that the Union would transmit the offer. However, the Union was unable to reach Western Union to telegraph the Employer and, sometime between 1 and 2 a.m. on the morning of January 24, they phoned the Employ-

er's Kentucky plant manager, identified themselves, and, in a conversation lasting only a minute or two, read him a short statement containing the offer. This they confirmed by telegram the same morning, the telegram being delivered between 9:20 and 9:49.

The plant manager had been under a strain during the strike period, including the frequent receipt of crank or harassing phone calls in the middle of the night. He testified that on awakening the morning of January 24 he had no recollection of the early morning phone call from the Union, but upon receiving the telegram his memory was jogged, and he recalled that he had in fact received the call.

In the interim, five of the Cloverport strikers came to the plant and were interviewed by the personnel director, to whom they made unconditional offers to return to work separate from that made by the Union on their behalf. The personnel director advised that they would be returned to work as vacancies occurred, which would undoubtedly first be at the Lewisport plant, but that they would be transferred to Cloverport as openings occurred there.

The first workers returned from Lewisport to Cloverport were the 12 mentioned above; i.e., those returning to work in abandonment of the strike, and those having made their individual offers to return separate from the general offer made through the Union. The remaining strikers were put on a hiring list according to their pres-trike plant seniority, and were, and in some instances still are, awaiting recall to work and/or reassignment to the Cloverport plant.

Prior to the strike, vacancies at both plants were filled in order of plant seniority before being opened to transferees or new employees. The 12 employees involved here were permitted to transfer based on a preferential list established by the chronological order of their return to work. The Employer's reasons for permitting this were that its September 7, 1978, letter to strikers promised to return workers abandoning the strike to their "regular job"; that it made oral "commitments" to those abandoning the strike and to those who had made an unconditional offer to return to work separate from that made by the Union on behalf of all employees, to return them to positions at Cloverport; and that it was in the Employer's interests to have the workers return to the plant the operations of which they knew best. After the strike ended the Employer reestablished its practice of using plant seniority as the basis of filling vacancies. However, by reason of their early return to Cloverport, some of the 12 workers here involved were eventually advanced to better paying jobs without the positions being offered to available strikers who had greater seniority. As of the time of hearing, some 80 percent of those on the Lewisport list and some 15 percent of those on the Cloverport list had been recalled to work.

Of the 12 reinstated Cloverport employees involved here, the first was placed in a Lewisport job on January 15, and the last on April 2. The first transfer of one of these employees to Cloverport took place on June 20. The charge in this matter was filed by the Union on November 21, prior to its being decertified on November

<sup>1</sup> All dates are in 1979 unless otherwise stated.

<sup>2</sup> The General Counsel's unopposed motion to correct the transcript, dated October 15, 1981, is granted and received in evidence as G.C. Exh. 4.

27. The last of the 12 employees was returned to Cloverport on March 24, 1980.

#### Discussion

It is certainly beyond dispute that status as an "employee" is retained by an economic striker while his position is filled by a permanent replacement, and that, absent legitimate and substantial business justification, he is entitled to an offer of reinstatement to a regular and substantially equivalent position as it becomes available.<sup>3</sup> In viewing alleged violations of such right, the Courts have considered whether the activities complained of had arisen from a provable antiunion motivation,<sup>4</sup> but also recognized that certain actions were of themselves so inherently destructive of important employee rights as to constitute discrimination within the meaning of the Act even though proof of union animus was lacking.<sup>5</sup> The status and rights of the strikers continue at least until such time that permanent replacement workers have "for one reason or another departed from their jobs subsequent to the strike's termination,"<sup>6</sup> and the rights of a replaced economic striker are not adversely affected by waiting for reinstatement until such a vacancy occurs.

The rehired and transferred employees here fell into two distinct categories, but are entitled to the same rights and are subject to the same restrictions *vis-a-vis* transfer. The first category, those workers abandoning the strike prior to January 23, returned to work for the Employer at the Lewisport plant. Their employment was not "substantially equivalent" to their previous positions at Cloverport, in that it was at a less desirable location and resulted in a loss of intraplant seniority, especially to bid on higher paying jobs. They therefore are entitled to the status of continuing Cloverport employees until reinstated to jobs substantially equivalent to those held prior to the strike. Conversely, they are entitled to no preferential treatment over other strikers.

I find that the second category of returning strikers made their independent offers to return to work subsequent to that made by the Union on behalf of all the strikers. While I credit the testimony of the plant manager that on the morning of January 24 he had no recollection of the nocturnal phone call, I also credit the testimony of the union officials that such a call was made proffering an offer on behalf of the strikers. Such an offer is effective on behalf of each individual striker<sup>7</sup> including those in the second category of returnees, those who later made independent offers to the Employer on the morning of January 24. Just as with the first category of returning strikers, the employment of these strikers was not "substantially equivalent" to previous employment, leaving them with rights exercisable to the extent they are not given preferential treatment.

Respondent would rely on two prior decisions which, however, are not supportive of its position. In both *George Banta Company, Banta Division*, 256 NLRB 1197

(1981), and *Randall, Burkhart/Randall (Division of Textron, Inc.)*, 257 NLRB 1 (1981), certain workers were rehired on a chronologically preferential plan based, in one instance, on the date they had become "cross-overs" by abandoning the strike, and, in the other instance, on the date they had made separate representations to the employer that they desired to return to work. In both instances the remaining strikers were placed on a rehiring list by seniority, which had been the prior method of granting preference. The *Banta* decision stated at 1220 that:

... we are concerned with a reinstatement plan which, as implemented, is premised in large part upon a distinction between, on the one hand, the "cross-overs" and, on the other, the strikers who waited until the strike's end. I find and conclude here that Management's reinstatement plan, as applied, was and is *inherently destructive* of employee Section 7 rights.

\* \* \* \* \*

In sum, the Employer's reinstatement plan, as implemented, awarded substantial priority to the "cross-overs."

A reinstatement plan predicated so heavily upon a distinction between employees who abandoned the strike . . . and those employees who remained on strike until the strike's end, is *inherently discriminatory* and unlawful under the *Erie Resistor* rationale. Moreover, although the employer attempted here to show legitimate business reasons for the reinstatement plan—i.e., placing strikers "back to jobs and departments in which they are familiar"; "avoiding retraining" . . . these and related reasons do not privilege a plan which, in effect, discriminates between "cross-overs" and returning strikers at strikes end. . . . Management could have achieved essentially these same business objectives without drawing a line of demarcation between "cross-overs" and returning strikers.

Similarly, *Randall, Burkhart* concluded:

... that Respondent violated Sections 8(a)(1) and (3) of the Act when, with respect to special rated or bid jobs, Respondent filled such jobs by first offering them to employees on the existing payroll rather than to qualified strikers awaiting reinstatement.

In support of its position Respondent cites a later portion of *Randall, Burkhart* decision, dealing with the transfer of both reinstated strikers and strike replacements "into new positions" (emphasis supplied), rather than recalling unreinstated strikers, which the Administrative Law Judge found not to constitute a violation of the Act. The decision notes that:

Thus, it is entirely conceivable that a striker, recalled to a "substantially equivalent job" desires to be transferred to his pre-strike job, and the respondent is willing to do so, but is prevented therefrom

<sup>3</sup> *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967).

<sup>4</sup> *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965).

<sup>5</sup> *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

<sup>6</sup> *The Laidlaw Corporation v. N.L.R.B.*, 414 F.2d 99, 105 (7th Cir. 1969), enfg. 171 NLRB 1366, cert. denied 397 U.S. 920 (1970).

<sup>7</sup> *N.L.R.B. v. Brown & Root, Inc.*, 203 F.2d 139, 147 (8th Cir. 1953).

because there are still some unreinstated strikers awaiting recall who are qualified for his position. Upon what theory could respondent be held to be in violation of Section 8(a)(3) and (1) by transferring the returned striker rather than recalling an unreinstated striker?

This holding is distinguishable from the matter at hand in that it deals with the relative rights of a recalled striker already occupying a "substantially equivalent job," while here we have strikers recalled to a less desirable job. Further, the quoted portion of the decision specifically bases itself on footnote 15 of the more seminal decision of *MCC Pacific Valve*, 244 NLRB 931 (1979), that:

We recognize that not every job opening is one that an unreinstated striker, though qualified, is entitled to fill. There may be circumstances, for example, in which the rights of unreinstated strikers may conflict with the rights of those strikers who have been reinstated or even with rights of permanent strike replacements. However, we find it unnecessary under the circumstances of this case to reach and pass on these issues.

I find it is equally unnecessary to reach those issues in this case, since the transferring strikers had not previously been returned to "substantially equivalent positions."

The Board decision in *MCC Pacific Valve* noted that the Administrative Law Judge "saw this case as one of balancing the relative equities between the rights of unreinstated strikers, who by law remain employees on a preferential hiring list, and the rights of those employees who are currently working and on the payroll." The Administrative Law Judge's conclusion that the preference to those already on the payroll was justified was based on findings of legitimate and substantial business reasons, occasioned by imbalance in production resulting in internal restructuring, revised job classifications, and "commitments" made to job holders. (*Supra* at 932.) The Board, however, did not agree with the findings of legitimate and substantial business reasons for the changes, and it ruled as follows:

Accordingly, guided by legal precedent which protects the rights of unreinstated strikers and having rejected Respondent's business justification defense, we find that Respondent has violated Section 8(a)(1) and (3) of the Act by denying initial job vacancies, created when replacements departed, to qualified strikers awaiting reinstatement in preference to strike replacements then on the payroll. [*Supra*, page 934.]<sup>8</sup>

<sup>8</sup> It might be noted that both the Administrative Law Judge and the Board referred by footnote to *United Aircraft Corporation (Pratt & Whitney Division)*, 192 NLRB 382 (1971), appealed *sub nom. Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corporation*, 534 F.2d 422 (2d Cir. 1975). The Second Circuit of New York found there that "lateral transfers, demotions, and promotions made for the purpose of correcting production imbalances and avoiding layoffs where work in a particular area ceased to be available did not constitute breaches of the Strike Settlement Agreement. Personnel adjustments made for other reasons that had the effect of blocking reinstatement altogether or causing a striker's reinstatement to a lower position, on the other hand, did violate the agreements." *Supra*,

In sum, the strikers here who abandoned the strike, or who made offers to return at the end of the strike separate from that made by the Union on behalf of all, were, in the absence of legitimate and substantial business reasons, granted a preference by being assigned through transfer to a job substantially equivalent to their former employment while more senior former strikers were either unemployed or employed at jobs not substantially equivalent to their former employment. This preference was inherently destructive of the rights of the senior workers, and hence, even without proof of union animus, is unlawful.

Respondent claims, as a complete defense, that the limitations period of Section 10(b) of the Act constitutes a bar to this proceeding. It raises two arguments on this basis—first, that it changed its transfer policy on or before January 24, prior to the 6-month period, and that acts in implementation of that new policy are barred, and, second, that in any event the legal effect of the transfers is inescapably grounded in the rehiring of the involved employees, which was likewise prior to the 6-month period. As discussed below, I reject both arguments.

The supposedly new transfer policy was put into effect during the period of the underlying strike, and Respondent reverted to the former policy as soon as it believed the strike was over. Rather than a change in policy, I find this to constitute no more than an attempt to provide a real and highly discernible reward to those employees who abandoned the Union's concerted activity, while the transfer policy utilized in normal business activity both before and after the strike remained constant and unchanged.

The charge in this case was filed on November 21, so that activities occurring prior to May 21 cannot be considered. The rehiring of the 12 involved employees, at the Lewisport plant, was completed by April 2, and as recognized by the parties was outside the period of limitations. Actions prior to the limitations period can be introduced into evidence to shed light on the character of later events,<sup>9</sup> but cannot be utilized to "cloak with illegality that which was otherwise lawful."<sup>10</sup> If this case involved the transfer of employees unlawfully reinstated to substantially equivalent jobs on a preferential basis, the unlawfulness of which was protected by the passage of time, I would agree that the transfer was a continuation of the original offense, and equally protected. But, to the contrary, I find that the rehiring of the employees at Lewisport was *not* a reinstatement to a substantially equivalent position, and that it was only at the time of their transfer to the Cloverport plant that they were reinstated into positions substantially equivalent to those held prior to the strike. Thus, the transfers of the 12 employees constituted the first preferential employment, detrimental to the rights of the more senior striking em-

534 F.2d at 444. There is no evidence in this matter of such imbalances or impending layoffs.

<sup>9</sup> *Motor Convoy, Inc.*, 252 NLRB 1253 (1980).

<sup>10</sup> *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. N.L.R.B.*, 362 U.S. 411, 417 (1960), rev. 264 F.2d 575, enfg. 119 NLRB 575 (1957).

ployees and inherently destructive of those rights. It is therefore the dates of the transfers, which were all within the limitation period, rather than the dates of the rehiring to the less-than substantially equivalent positions at Lewisport, which are determinative, and the proposed defense must fail.

#### THE REMEDY

Having found that 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. Respondent will be directed to restore the *status quo* before the implementation of its unlawful transfer plan. Specifically, Respondent will be directed to rescind in full its preferential transfer plan and any implementation thereof; and insofar as it has not already done so, to offer all striking employees of the Cloverport plant who applied unconditionally for reinstatement, including those who had abandoned the strike before the strike's end, immediate and full reinstatement to their former or substantially equivalent positions, at the Cloverport plant, without prejudice to their seniority or other rights and privileges, displacing if necessary any reinstated employee who transferred to the Cloverport plant. If there are not enough positions at the Cloverport plant for all remaining striking employees, including any displaced as provided above, the available positions will be distributed among them following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of the Employer's business. Those striking employees for whom no employment is immediately available at the Cloverport plant after such distribution will be placed on a preferential hiring list by the same system, and, thereafter, in accordance with the list, be offered reinstatement at the Cloverport plant as positions become available and before any other persons are hired for or transferred to such work at the Cloverport plant. Reinstatement, as provided herein, will be without prejudice to the employees' seniority or other rights and privileges.

In addition, Respondent will be directed to make whole those former strikers who were discriminated against by the implementation of Respondent's transfer plan, as found unlawful herein, by making payment to each of them of a sum of money equal to the amount he or she would normally have earned from the date of Respondent's unlawful implementation, on or about January 24, 1979, to the date of Respondent's offer of reinstatement or placement on a preferential hiring list as provided above, less net earnings, to which shall be added interest to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>11</sup>

#### CONCLUSIONS OF LAW

1. American Olean Tile Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>11</sup> See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By denying vacancies to qualified senior economic strikers through preferential interplant transfer of strikers already rehired at jobs less than substantially equivalent with prestrike jobs, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

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

#### ORDER<sup>12</sup>

The Respondent, American Olean Tile Company, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting preferential transfer rights to the Cloverport plant to those of its employees who abandoned a strike with the Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, or who made unconditional offers to return to work separate from that made by the Union on behalf of all strikers, and denying seniority and the benefits of seniority for purposes of job assignment and computation of rates of pay to those of its employees who remained on strike with the above Union until the strike's end or did not make unconditional offers to return to work separate from that made by the Union on behalf of all strikers.

(b) Maintaining or giving effect to its preferential transfer system, as found unlawful in this Decision, or any other transfer system which discriminates against those of its striking employees who remained on strike with the above Union until the strike's end or did not make separate offers to return to work.

(c) Discouraging membership in said Union, or any other labor organization, by in any other manner discriminating against its employees with respect to their hire or tenure of employment or any term or condition of employment.

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

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

(a) Rescind in full its preferential transfer system and any implementation thereof, as found unlawful in this Decision, and restore all of its striking employees to the seniority and other rights and privileges they would have enjoyed absent this transfer system and implementation thereof.

(b) Insofar as it has not already done so, offer to all of its striking employees who applied unconditionally for

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

reinstatement, including those who abandoned the strike before the strike's end, immediate and full reinstatement to their former or substantially equivalent positions at the Cloverport plant, without prejudice to their seniority or other rights and privileges, displacing if necessary any reinstated employees who returned to work before the strike's end or who made unconditional offers to return to work separate from that made by the Union on behalf of all strikers, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Make whole those of its striking employees who were discriminated against by implementation of its preferential transfer system for any loss of earnings sustained in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and make available to the Board or its agents all payroll and other records, as provided in this Decision.

(e) Post at its offices and facilities in Cloverport, Kentucky, copies of the notice attached hereto as "Appendix."<sup>13</sup> Copies of said notice on forms provided by the Regional Director for Region 30, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

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<sup>13</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."