A.P.A. Warehouse, Inc.; Sea-Jet Trucking Corporation; Affiliated Terminals, Incorporated; Sea-Jet Trucking and A.P.A. Warehouse Incorporated *and* Quilvio Taveras

Sea-Jet Trucking Corporation; APA Warehouses, Inc.; Affiliated Terminals, Incorporated; Sea-Jet Industries Incorporated; and Sea-Jet Trucking & APA Warehouses, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO *and* Martin Sosa

A.P.A. Warehouse Inc./Sea-Jet Trucking Corporation/Affiliated Terminals Incorporated/Sea-Jet Industries Incorporated/Sea-Jet Trucking and APA Warehouses Incorporated *and* Diego Davila. Cases 29–CA–13505, 29–CA–13505–2, 29–CA–13556, and 29–CA–13935

March 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On January 17, 1990, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party (the Union) filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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,[1] and conclusions[2] as modified below.

In concluding that the Respondent unlawfully failed to reinstate employees Facindo Ruiz, Francisco Baez, Elba Battista, and Crescencio Vergara, the judge found that the Respondent failed to make a good-faith offer of reinstatement to these employees by relying solely on placing an order with Western Union for mailgrams offering reinstatement, particularly when it was aware of at least two instances where mailgram delivery had failed. The judge stated that the Respondent could have sent certified letters, or could have notified the Union that these employees could report to work, or, with Ruiz, could have asked Ruiz whether he had received the mailgram when he returned to the Respondent's premises to vote in the election several weeks after the mailgram had been ordered. The judge further noted that there was nothing on the confirmation copies of the mailgrams sent to these employees which indicated that the mailgrams had actually been sent.

Contrary to the judge, we find that the Respondent's attempt to communicate valid reinstatement offers to Ruiz, Baez, Battista, and Vergara by a mailgram sent to their proper addresses constituted a good-faith attempt to tender such an offer,[3] and that the confirmation copies of the mailgrams placed in evidence by the Respondent are a sufficient basis to infer that at least a good-faith attempt at delivery of the offer was made. Thus, under established Board precedent, we find that the Respondent's good-faith reinstatement offers have tolled its backpay liability as to Ruiz, Baez, Battista, and Vergara,[4] although the Respondent is still obligated to reinstate these four employees.[5]

AMENDED REMEDY

Add the following to the end of the second paragraph of the judge's remedy:

''Backpay shall be tolled, however, for Ruiz, Baez, Battista, and Vergara as of the date of the Respondent's good-faith attempt to communicate reinstatement offers to these employees.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A.P.A. Warehouse, Inc.; Sea-Jet Trucking Corporation; Affiliated Terminals, Incorporated; Sea-Jet Trucking and A.P.A. Warehouse, Incorporated; Sea-Jet Industries, Incorporated, Brooklyn, New York, its officers, agents, successors, and as-

[1] In sec. II,C, of his decision, in the last sentence of his discussion of Diego Davila, the judge inadvertently referred to ''Aurich'' rather than ''Davila.''

[2] In adopting the judge's conclusion that the Respondent unlawfully failed to reinstate employee Michael Kiernan, we do not rely on the judge's rationale that the Respondent's reinstatement offer to Kiernan was invalid because it provided for an unreasonably short period of time in which Kiernan could accept it. Rather, under the Board's reasoning in *Esterline Electronics Corp*., 290 NLRB 834 (1988), we find that the Respondent's reinstatement offer to Kiernan was not invalid on its face because the offer was not expressly conditioned on compliance with the report-back date. *Esterline*, supra at 835. Thus, we rely on the judge's alternative rationale that the Respondent's treatment of Kiernan when he reported to work on March 28, 1988, demonstrated that the offer had been dependent on his accepting it by March 25, 1988, and thus was invalid on that basis. See *Esterline*, id.

In adopting the judge's conclusion that the Respondent unlawfully failed to reinstate employee Thomas Pringle, we do not rely on the judge's application of the rationale he used in finding that the Respondent unlawfully failed to reinstate employee Alfredo Amigon. Rather, we find that the situation involving Pringle was more similar to that of Kiernan, who also received the Respondent's reinstatement offer while he was out of town. Accordingly, we apply the rationale used for Kiernan, set forth above, to Pringle, and we find that the Respondent failed to reinstate Pringle since March 17, 1988, rather than March 28, 1988.

The Respondent in its exceptions contends that the judge erred in stating that the Respondent failed to produce evidence to rebut the General Counsel's prima facie case regarding the discharge of Lauro Sosa and the alleged failure to reinstate Taveras to his former position of employment. Even considering the Respondent's evidence, however, we adhere to the judge's conclusions regarding Sosa and Taveras.

[3] *Champ Corp*., 291 NLRB 803, 806 fn. 9 (1988).

As discussed in fn. 2, above, we note that under the Board's reasoning in *Esterline*, above, the Respondent's reinstatement offers to these four employees were not invalid on their face.

[4] We have amended the judge's remedy in accordance with the tolling of backpay for these four employees.

[5] *Champ Corp*., id.; *O.K. Machine & Tool Corp*., 279 NLRB 474, 475 (1986); *Burnup & Sims*, 256 NLRB 965, 966 (1981).

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

1. Insert the following at the end of paragraph 2(a), before the period.

''(except that for Ruiz, Baez, Battista, and Vergara, backpay shall be tolled as of the date the Respondent made a good-faith attempt to tender them offers of reinstatement).''

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

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.

WE WILL NOT fail to reinstate unfair labor practice strikers to their former positions of employment on their unconditional application.

WE WILL NOT assign returning unfair labor practice striking employees to more onerous work and to fewer work hours than they were assigned before they commenced to strike.

WE WILL NOT discharge any of our employees to discourage their support for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.

WE WILL NOT promulgate or enforce a lateness policy in order to discourage employees from supporting the above Union.

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

WE WILL offer

Christopher Grant	Rene Pinell
Michael Kiernan	Justo Saldivar
Alfredo Amigon a/k/a Socorro Ponce	Miguel Jarrin
Thomas Pringle	Lauro Sosa
Facindo Ruiz	Jorge Collado
Senon Tapia	Luis Pineda
Elba Alvarez Battista	Quilvio Taveras
Crescencio Vergara	Christino Sosa
Francisco Baez	Roberto Rodriguez
Miguel Aurich	Aldwin Skeete
Diego Davila	

and all other returning striking employees full and immediate reinstatement to the positions of employment held by them at the start of the strike and WE WILL make them whole, with interest, for all losses (including those resulting from fewer working hours) they incurred by our unlawful failure to have so reinstated them at the end of the strike (except that for Ruiz, Baez, Battista, and Vergara, backpay shall be tolled as of the date the Respondent made a good-faith attempt to tender them offers of reinstatement).

WE WILL offer Lauro Sosa, Martin Sosa Torres, and Diego Davila full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole with interest for all losses they suffered as a result of our having unlawfully discharged them.

WE WILL remove from our files all references to their discharges and notify those three employees in writing that this has been done and that their discharges will not in any way be used against them.

WE WILL make whole all employees who suffered losses by reason of the unlawful lateness policy we promulgated.

A.P.A. WAREHOUSE, INC.; SEA-JET TRUCKING CORPORATION; AFFILIATED TERMINALS, INCORPORATED; SEA-JET TRUCKING AND A.P.A. WAREHOUSE, INCORPORATED; SEA-JET INDUSTRIES, INCORPORATED

Elias Feuer, Esq., for the General Counsel.
Horowitz & Pollack, P.C., of South Orange, New Jersey, for Sea-Jet Trucking Corporation, et al.
Eugene G. Eisner, Esq. and *Nicholas Fish, Esq. (Eisner, Levi, Pollack & Ratner)*, of New York City, for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The first three cases listed in the caption above had been consolidated for hearing with two representation cases, Cases 29–RC–6841 and 29–RC–6844. The hearing as to those five cases opened in late October 1988 and continued on various dates until January 30, 1989, when it was recessed indefinitely, pending ruling on a motion to sever. On February 15, 1989, I granted the motion to sever Cases 29–RC–6841 and 29–RC–6844 from the unfair labor practice cases. On that date, I had issued a Report on Challenged Ballots and Objections in those two representation cases (JD–NY–01–89).

On May 15, 1989, the hearing resumed in the three unfair labor practice cases. On that date, I granted the General Counsel's motion to consolidate Case 29–CA–13935 with them. The hearing continued for 6 more days on various dates in May and June 1989 and closed on June 20, 1989.

The issues presented by the amended pleadings in these four unfair labor practice cases are whether A.P.A. Warehouses, Inc. and the other Companies named in the caption above (who are concededly a single business enterprise and are referred to here as an entity under the name, Respondent)

has sought to discourage its employees from supporting the labor organization named above (the Union) by various actions alleged to be unfair labor practices under Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Specifically, Respondent is alleged to have engaged in the following conduct aimed at discouraging its employees from supporting the Union:

(1) Failed to reinstate 11 unfair labor practice strikers on their unconditional application therefor.

(2) Failed to reinstate 13 other unfair labor practice strikers to their former positions of employment and instead assigned them to more onerous, less desirable jobs.

(3) Discharged three employees.

(4) Reduced the wage rates of employees.

(5) Promulgated a notice informing employees that they will be subject to a more stringent lateness policy and enforced that policy.

On the entire record, including my observation of the demeanor of the witnesses, and on consideration of the briefs filed by Respondent and the Union, and of the oral argument of the General Counsel at the conclusion of the hearing, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

As found previously in the representation cases referred to above, Respondent is engaged in commerce and it will effectuate the purposes of the Act to assert jurisdiction here. Also as found previously in those representation cases, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union) is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The general background of these cases has been set out in the Report on Challenged Ballots and Objections (JD–NY–01–89), discussed above.

The specific background, immediately relevant to most of the issues under consideration now, is contained in footnote 14 of the Supplemental Decision on Objections and Challenges which issued in Cases 29–RC–5841 and 29–RC–6844. There, it was recited that Respondent admitted in a settlement agreement approved, in another series of cases, by Administrative Law Judge Raymond Green on April 11, 1988, that a strike which had commenced by its employees on November 8, 1987, was an unfair labor practice strike.

B. *Alleged Failures to Reinstate 11 Strikers*

On March 14, 1988 (all dates hereafter are for 1988 unless stated differently), the Union sent a telegram to Respondent informing it that the strike was over and that the employees on strike will report for work on March 17. About 65 striking employees came to Respondent's facility on March 17. Respondent's controller, Harold Pretter, gave them sheets on which they wrote their names, addresses, and telephone numbers. He told them that they would be notified as to when they were to report for work.

A number of the strikers were reinstated in the following week. The General Counsel contends however that 11 strikers were unlawfully denied reinstatement.[1] Only 7 of those 11 testified. The respective merits of the claims of the seven who testified are considered first.

1. Christopher Grant

Grant had begun working for Respondent on October 19, 1987, as a picker-packer on the day shift, earning $4 an hour. He described the work he did as assembly line work which was not at all strenuous.

He participated in the strike which began less than a month after he started work. Then the strike ended in March 1989, he reported to Respondent's facility and, on March 17, 1989, he put his name and other data on one of the sign in sheets. Shortly afterwards, he received a mailgram, instructing him to report to work.

Grant testified as follows to the events that occurred when he reported. Pretter assigned him to work on the loading dock. Grant, who is 60 years old, told him that he could not do that work. It involved the pulling around of manual jacks for 3 hours. Pretter then wanted him to sign a paper which stated that he did not want to work. Grant did not sign it. He left and has not heard from Respondent since then.

Payroll records of Respondent which were subpoenaed by the General Counsel show that Grant was assigned to department 10, pick and pack, just prior to the strike and that, when the strike ended, Respondent had at least one employee in that department who had been hired during the strike.

Pretter's testimony did not controvert Grant's account. Instead, he related that Respondent had difficulty in spreading the work around to its employees in March 1988 with the influx of the returning strikers.

Respondent asserts that Grant was not entitled to decide which job he would perform and that he left Respondent's employ voluntarily in March 1988. Those assertions do not address the issue before me. It is Respondent's burden to show that it offered Grant reinstatement to his former job or, if that job no longer exists, to a substantially equivalent one. See *American Gypsum Co*., 285 NLRB 100 (1987). Respondent has not met that burden. Its failure to offer Grant reinstatement to the pick and pack department in March 1988 is thus unlawful.

2. Michael Kiernan

Kiernan began working for Respondent on October 7, 1987, in its shipping and receiving department. He took part in the strike called about a month later by the Union. At its conclusion, Respondent sent Kiernan a mailgram which read, ''Please report for work any afternoon at 3PM no later than Friday March 25, 1988.''

Kiernan testified credibly that he first learned of the mailgram when he returned home on March 26 after having been working out of the state.

Kiernan went to Respondent's facility the next workday, March 28. He showed the mailgram to the security guard sta-

[1] The complaint originally alleged at par. 18 that only one striking employee had been unlawfully denied reinstatement. When the hearing resumed on May 15, 1989, the General Counsel moved to add the names of 11 other striking employees to par. 18. I had reserved ruling on the motion in order to be able to determine whether Respondent might have been prejudiced by so large an increase in the named alleged discriminatees at such a late point in the proceeding. I now grant the motion as there has been no prejudice. Later in the hearing, the General Counsel withdrew 1 of the 11 from par. 18.

tioned at the plant entrance. The guard made a telephone call to the personnel department. A short while later, a man came to the gate and informed Kiernan that there were no openings and that he was not needed. Kiernan has not heard from Respondent since then.

Respondent contends that Kiernan abandoned his job when he failed to appear for work on March 26. It is clear from the wording of the mailgram that Respondent's offer depended on Kiernan's returning to work by that date. As that date was unreasonably short, the offer to Kiernan was not a valid one. See *Esterline Electronic Corp*., 290 NLRB 834 (1988). See also *A & T Mfg. Co*., 280 NLRB 916, 918 (1986). I therefore find that Respondent unlawfully failed to reinstate Kiernan on and since March 17, 1988.

In the event the Board were to find, under its reasoning in *Esterline* as to an otherwise facially valid offer, that Kiernan had to respond to the offer, I would find that Respondent's treatment of him on March 28 clearly demonstrated that the offer had been dependent on his accepting it by March 26, clearly an unreasonable requirement under the circumstances. I thus would find that offer invalid on that basis.

3. Alfredo Amigon

Amigon has used another name, Socorro Ponce,[2] while in Respondent's employ. He worked there since October 13, 1985, in the shipping and receiving department until the strike began in November 1987. He took part in the strike. Although the Union, as noted above, sent Respondent a telegram on March 14 that the striking employees will report on March 17, there is no evidence that Amigon did report on that date. To paraphrase language quoted by Administrative Law Judge Wieder in *Champ Corp*., 291 NLRB 803 (1988), there is no basis for finding that the union's letter was a proper blanket application for reinstatement of all strikers without further need for their individual appearances on March 17, particularly as the union had notified respondent on March 14 that the strikers would personally report to the plant. Thus, it cannot be found that Respondent unlawfully failed to reinstate Amigon on March 17. I note, in making this finding, that there is no allegation that Respondent had violated the Act by failing to communicate with the Union to respond to the Union's March 14 telegram and by, instead, communicating directly with the employees involved in the strike. In that regard, cf. *Gitano Distribution Centers*, 294 NLRB 695 (1989).

However, as is also evident from the holding in *Champ Corp*., supra, Respondent was obliged to offer Amigon reinstatement if he applied for it after March 17. In that regard, Amigon testified uncontrovertedly that, in April 1988, he went to Respondent's facility and asked its general manager, Pedro Maona, for work. Maona replied that there was no work for him and that he should go to the Union for work. Amigon was not reinstated and has not heard from Respondent since then.

I find that Respondent has unlawfully failed as of April 1988 to reinstate Amigon to his former position of employment.

[2] The General Counsel also had referred to him as Secorro Ponce when par. 18 of the complaint was first amended.

4. Thomas Pringle

Pringle began working for Respondent in October 1987, sorting clothes. He went out on strike in November 1987. In December, he went to South Carolina, returned in February when the strike was still on, left again in March for South Carolina on a short visit, and returned home on the afternoon of March 27, 1988. Waiting for him there then was a mailgram from Respondent instructing him to report for work at 8 a.m. that same day, i.e.—over 4 hours earlier. Pringle went to Respondent's facility that day, showed the guard the mailgram that he had received and was told by the guard that he was no longer working there. Respondent has not communicated since then with Pringle. In its brief, Respondent stated that Pringle voluntarily had given up his job by having gone to South Carolina.

Essentially based on the same rationale set forth above respecting Amigon's claim, I find that Respondent has unlawfully failed to reinstate Pringle on and since March 28, 1988.[3]

5. Facindo Ruiz

Ruiz, in Respondent's employ since 1979, reported to its plant on March 17 after having been on strike since November 1987. He listed his name, address, and telephone number on one of the sheets Pretter gave him and was told that Respondent would call him. He voted without challenge at the representation case election in April. He testified that he was never called back by Respondent.

Pretter testified that Respondent made arrangements with Western Union to have mailgrams sent to all employees who had engaged in the strike. Respondent placed in evidence, relative to Ruiz, the following document which Pretter identified as a confirmation copy of a mailgram Respondent had requested Western Union to send:

> SEA-JET TRUCKING APA WAREHOUSES H PRETTER
> 140 43 STREET SENDERS RISK
> BROOKLYN NY 11232
>
> THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:
> 7187885526 MGMB TDMT BROOKLYN NY 30 03–21 0640P EST
> ZIP
> FACUNDO RUIZ
> 652 47 STREET
> BROOKLYN NY 11220
> PLEASE REPORT TO WORK ANY AFTERNOON AT 3PM NO LATER THAN FRIDAY, MARCH 25, 1988.
> SEA-JET TRUCKING
> A.P.A. WAREHOUSES, INC.
>
> 19:10 EST
>
> MGMCORP

No explanation has been offered as to the meaning of the words, Senders Risk, in Respondent's address in this document and none as to the significance of the numbers thereon. It may be that Western Union received the order from Respondent on March 21 at 6:40 p.m. EST. It may be, also,

[3] The statement by Respondent's guard to Pringle on March 28 is binding on Respondent, as its substance was confirmed in Respondent's brief. See *Harrison Steel Casting Co*., 262 NLRB 450, 455 fn. 6 (1982).

that, at 19:70 EST Western Union did something with that order. There is no reason given, if 19:10 EST is a reference to time, as to why it was designated in that manner and not simply shown as 7:10 p.m. EST, as the earlier time reference, 6:40 p.m. EST, apparently had been designated. In any event, there is nothing on the document which indicates that the mailgram had been sent to Ruiz.

The evidence is too vague for me to find that Respondent tendered Ruiz a reinstatement offer. Respondent could readily have discharged its obligation to offer Ruiz his former job simply by notifying the Union that Ruiz could report to work. It could itself have sent certified letters to the striking employees and followed these up as to any that were undelivered. Instead, it relied on Western Union and was aware of at least two instances where delivery had failed. Further, Ruiz voted without challenge at the election held on Respondent's premises several weeks after Respondent asked Western Union to send him a mailgram. Respondent could easily have asked him then as to whether he received the mailgram but there is nothing to indicate that it did go. In *Esterline*, supra, the Board has imposed on an employer and a striking employee alike the ''requirement of good faith dealing'' insofar as tenders of reinstatement offers and responses thereto are concerned. The evidence before me as to Ruiz demonstrates that Respondent has fallen far short of that requirement in having simply placed a telephone call to Western Union to relieve itself of its obligation.[4]

I therefore find that Respondent has not established that it made a valid reinstatement offer to Ruiz and that in fact it has unlawfully failed to do so.

Further, I credit Ruiz' testimony that he received no reinstatement offer. Even had Respondent made a valid reinstatement offer, it is still obligated to reinstate him. Cf. *O.K. Machine & Tool Corp*., 278 NLRB 474, 475 (1986).

6. Tomas L. Sosa

Sosa worked for Respondents using the name, Bernardo Flores. He was hired in 1982 and was working as an elevator operator for $5.50 an hour when he went out on strike on November 8, 1987. He reported on March 17 with other strikers, as recounted above. On the following day, he received a phone call instructing him to come back to work later that same day. When he arrived at Respondent's facility, Pretter told him, through an interpreter, that if he wanted to work, he would have to vote in favor of Local 6, a labor organization on the ballot with the Union in the then upcoming representation case election. Sosa told Pretter that he did not have to say then which way he would vote. Pretter told him to leave and that Respondent would write to him. He, in fact, has received nothing in writing from Respondent.

In October 1988 Sosa, using his real name, applied for a job with Respondent and was hired as a new employee in the UPS department at $5 an hour.

The evidence is clear that Respondent imposed an unlawfully discriminatory provision to its reinstatement offer to Sosa in March. I therefore find that it has not made a valid reinstatement offer to him and that it has thus unlawfully failed to offer him reinstatement to his former position of employment.

7. Senon Tapia

Tapia began working for Respondent in December 1985, took part in the strike in November 1987, and reported to Respondent's facility on March 17, 1988, with other striking employees in accordance with the Union's March 14 telegram, discussed above. He next received a telephone call from Respondent instructing him to report for work. However, he informed Respondent then that he was on the way to the hospital with his child, who was ill. He was told to wait until he received a telegram. On the next workday, he went to Respondent's facility where he was told that Respondent would call him when he was needed. He has heard nothing further from Respondent.

There is no probative evidence that Respondent tendered Tapia a valid offer of reinstatement. He was given virtually no time to accept its first offer and when he sought to find out if it was still open, he was politely told in effect that it was not. As Respondent has not met its burden of proving that it made a valid reinstatement offer, I find that it has lawfully failed since March 17 to reinstate Tapia to his former position.

The remaining four employees in this group did not testify. However, it is apparent that three of them did participate in the strike and had applied for reinstatement. The signatures of two of these four, Elba Alvarez Battista and Crescencio Vergara,[5] appear on the March 17 sign in sheets, discussed above. As to the third of these four, Francisco Baez, Pretter testified as noted above that Respondent had placed an order with Western Union to send mailgrams to all striking employees, directing them to return to work. Pretter testified, also as earlier noted, that Respondent received confirmation copies from Western Union as to those mailgrams. There is in evidence a confirmation copy as to Baez; it is evident then that Baez also had applied for reinstatement.

As to the fourth individual in this group, he was originally named in the complaint as Urbano Vergara. At the hearing, the General Counsel stated that his real name is Victor Alvarez and the complaint was amended accordingly. The General Counsel did not refer to him in his oral argument at the conclusion of the hearing and neither the Union nor Respondent referred to him in their respective briefs.

For essentially the same reasons on which I have found that Respondent simply, by placing an order with Western Union, failed to tender to Facundo Ruiz a valid offer of reinstatement, especially as at least two mailgrams admittedly were never delivered, I find that Respondent has failed to meet its burden of showing that it made valid offers to Baez, Battista, and Crescencio Vergara.

As there is no evidence respecting Victor Alvarez, I shall dismiss the allegation that he was unlawfully denied reinstatement.

[4] Moreover, I would think that Respondent could, among other things, have shown that a mailgram to Ruiz was properly posted by Western Union if that is the procedure it uses. Cf. *E. B. Manning & Son*, 281 NLRB 1124, 1126 (1986). Otherwise, one could at best presume that it was and, from that presumption would flow the presumption of delivery. That is one presumption too many, particularly when there were more obvious, direct ways of tendering a reinstatement offer to Ruiz.

[5] He was incorrectly referred to as Eugenia Vergara in the original complaint. His name was amended at the hearing.

C. *Alleged Unlawful Failure to Reinstate Strikers to Their Former Jobs*

Paragraph 19 of the complaint, as amended, alleges that Respondent unlawfully assigned 13 strikers to more onerous and less desirable jobs on their return to work when the strike ended. Only 5 of those 13 testified. The evidence as to those five is discussed next.

1. Miguel Aurich

Aurich began working for Respondent as a floorman in April 1978 and participated in the strike which began in November 1987.[6] When the strike ended in March 1988, he wrote his name, address, and telephone number on one of the sign in sheets that Pretter gave him on March 17, 1988. He returned to work on April 4, 1988, as a floorman but, after 2 days, he was assigned to the packing and repacking department, to a more strenuous job and one which gave him fewer work hours.

Payroll records in evidence disclose that Respondent, after Aurich's return, had a number of employees working as floormen, including two who had started working for Respondent after the start of the strike.

The evidence before me is clear that, when the strike began, Aurich was in Respondent's floormen department and that, when it ended, he was restored temporarily to that department but almost immediately assigned him elsewhere to a more onerous job with less worktime. The General Counsel has thereby made out a prima facie showing that he was not reinstated to his former job. That showing was buttressed by Respondent's own payroll records which disclosed that floorman replacements continued to work after Aurich's return. Respondent offered no probative evidence to rebut that prima facie case. I thus find that Respondent, since on or about April 4, 1988, has discriminatorily failed to reinstate Aurich, an unfair labor practice striker, to his permanent former job as floorman.

2. Diego Davila

Davila began working for Respondent in May 1982 in the repacking department. He joined the Union's picket line in November 1978.[7] As with Aurich, he filled out the data required by Pretter on the sign in sheets on March 17, 1988, and returned to work. For his first week, he was assigned to the receiving department but worked only 4 hours a day. Thereafter his hours were changed to 8 a.m. to 5 p.m.

Respondent's controller testified that Davila's work assignments, after the strike ended, were made solely because of business considerations.

The General Counsel has made out a prima facie case of unlawful discrimination in that Davila, as an unfair labor practice striker, was not reinstated to his former position of employment. Respondent's conclusory evidence is insufficient to rebut that showing. I therefore find that Respondent's failure to reinstate Aurich to its repacking department and its instead assigning him to a more arduous job with fewer work hours were reprisals for his having participated in the unfair labor practice strike.

3. Rene Pinell

Pinell began working for Respondent in February 1983 and, prior to the start of the strike, he performed essentially plant clerical work in Respondent's UPS department.[8] He joined the strike and filled out a sign in sheet on March 17, 1988. On his return, he was assigned to work in the receiving department, unloading trucks. Respondent's payroll records disclosed that Pinell also worked fewer hours then, compared to the hours he worked prestrike.

Here again, I find that the General Counsel has made out a prima facie showing of unlawful discrimination. Respondent offered no probative evidence in rebuttal. I therefore find that Respondent retaliated against Pinell because of his support for the Union.

4. Justo Saldivar and Miguel Jarrin

Salvidar's name was inverted, as Saldivar Justo, when it was first listed in paragraph 19 of the complaint. It was amended during the hearing.

He began working for Respondent in May 1982 and was working in its order preparation department when he went out on strike on November 8, 1987. When the strike ended in March, he returned to work in that same department but he has worked fewer hours than he did during the period antedating the strike. Saldivar's uncontroverted testimony is that striker replacements continued to work in his department after he returned to work and that they worked at least as many hours as he did.

Pretter testified for Respondent only to confirm that Respondent spread the work hours among the returning strikers and their replacements, notwithstanding that the strike was an unfair labor practice strike. His testimony is entitled to no material weight towards rebutting the clear showing by the General Counsel that Saldivar had been unlawfully discriminated against in being given less worktime because he took part in the strike. See *Radio Electric Service Co.*, 278 NLRB 531 (1986), when the Board gave no weight to ''bare'' assertions by the employer there.

Saldivar's testimony further established that a coworker, Miguel Jarrin, on returning to work with him, similarly was given fewer work hours.

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[6] Aurich had been discharged on July 27, 1987. His discharge was alleged as violative of the Act in a complaint that had issued in Cases 29–CA–13150 et seq. He was reinstated in April 1989 and a settlement agreement in those cases was approved on April 11, 1989, by Judge Raymond Green. That agreement contained a broad reservation of rights clause which clearly was intended to allow for the litigation before me. That is obvious too from the fact that no one has urged that litigation of Aurich's discharge or of others similarly situation is barred by that agreement. In an analogous case, the Board adopted a finding that an earlier settlement agreement did not bar related litigation. See *Council's Center for Problems of Living*, 289 NLRB 1122 (1988).

[7] Davila allegedly had been discriminatorily transferred to the receiving department and allegedly discriminatorily discharged, prior to the strike. Those allegations were resolved by the settlement agreement approved by Judge Green in Cases 29–CA–13150 et seq., discussed above. Also as noted above, no one urges that agreement as a bar to this proceeding or seeks to set it aside by reasons of any of the allegations before me. The broad reservation language contained in the settlement agreement and the other factors cited with respect to Aurich's status, noted above, make clear that the only issue before me has been whether Respondent's failure to reinstate Davila to his former position in its repacking department was discriminatorily motivated or due only to economic considerations.

[8] Pinell allegedly had been discriminatorily transferred in August 1987 from the UPS department. That allegation was resolved in the settlement agreement approved by Judge Green, discussed above. Related allegations as to other strikers alleged to have been unlawfully reinstated to different jobs were similarly settled. Those strikers are Jorge Collado, Luis Pineda, and Quilvio Taveras.

Respondent has unlawfully failed to reinstate Saldivar and Jarrin to the positions of employment they held prior to the strike in that their hours of work had been discriminatorily reduced.

5. Lauro Sosa

Sosa was hired by Respondent on August 20, 1987, and worked in the shipping and receiving department, unloading trucks. Prior to the start of the strike, he worked an 8-hour shift and also 4 to 5 overtime hours each week. He participated in the strike and returned to work on March 26, 1988. He was then assigned to another department, receiving, at a location different from the one he worked at before the strike. He was assigned work for only 5 hours a day. Three weeks later, he was laid off. His layoff is a matter considered separately below.

Respondent has failed to reinstate Sosa to his former position of employment and has failed to offer any business justification therefor. Its failure to reinstate him to his regular shift in the shipping and receiving department and its assigning him fewer work hours were unlawfully motivated.

6. Jorge Collado, Luis Pineda, and Quilvio Taveras

None of these three alleged discriminatees testified. However, Luis Pinell, whose status was discussed above, testified as to them. He related that Taveras had worked with him operating a computer in the UPS department before the strike started. Pinell further testified that Taveras, Pineda, and Collado had their jobs changed on their return to work when the strike ended. Respondent's payroll records disclose that Taveras was assigned to the receiving department at the conclusion of the strike and that Pineda and Collado (who had worked in the receiving department before the strike) were assigned to the night receiving department after the strike ended.

In the absence of any evidence from Respondent to negate the prima facie evidence offered by the the General Counsel, I find that Respondent has unlawfully failed to reinstate Collado, Pineda, and Taveras to the jobs they held prior to the strike.[9]

7. Christine Sosa, Sabas Vergara, Roberto Rodriguez, and Aldwin Skeete

These four employees did not testify. They took part in the strike called by the Union and their signatures, addresses, and telephone numbers appear on the sign in sheets filled out by the returning strikers on March 17, 1988.

The General Counsel relies on the data contained in subpoenaed computerized payroll records of Respondent to support the complaint allegation that Respondent unlawfully failed to reinstate them to their former positions of employment.

As to Christine Sosa, these records show that was hired on January 24, 1985, and that, prior to the start of the strike, he worked as a floorman in department 48, usually working 40 hours a week plus considerable overtime. On his return after the strike ended, he was assigned to night receiving department (dept. 51) where he worked only 8 to 12 hours a week. Further, at least two employees who began work for Respondent after the strike started were working in Sosa's former department while Sosa was assigned to the night receiving department after the strike ended. Those two employees then also worked appreciably more hours than did Sosa. I find, from the foregoing, that Respondent has unlawfully failed to reinstate Sosa to his former job as a floorman.

As to Sabas Vergara, the payroll records show that he was hired by Respondent on October 27, 1986, and, prior to the start of the strike, he worked in the platform department (dept. 42), usually for 40 hours a week and receiving considerable overtime work. On his return, he was reinstated to the platform department. His work hours were not then materially at variance with those of the other employees in that department. Nor do the records show that there were any newly hired employees in that department then. I find, from the foregoing, that the evidence fails to establish that Sabas Vergara was not reinstated to his former position of employment.

Concerning Roberto Rodriguez, the records show that he began working for Respondent on May 2, 1981, and that he was assigned to the order preparations department (dept. 43) before the strike began, working usually a 40-hour week and considerable overtime. On returning to work at the conclusion of the strike, Rodriguez was assigned to a different department (the location department, dept. 07), although an employee, hired after the strike began, was then employed in the order preparation department.

Respondent offered no rebuttal evidence pertaining to Rodriguez and I thus find that Respondent discriminatorily failed to reinstate him to its order preparation department after the strike ended.

The last employee in this group, Aldwin Skeete, was hired by Respondent, according to its records, on October 20, 1987, several weeks before the strike began. He was working then in the pick and pack department (dept. 10). On his return when the strike ended, he was assigned to the receiving department (dept. 40), notwithstanding that three other employees in his former department than had been hired after the strike began and that those newly hired employees worked appreciably more hours than did Skeete. Based on this uncontroverted evidence, I find that Respondent has discriminatorily failed to reinstate Skeete to its pick and pack department and has unlawfully failed to provide him with his regular work hours.

D. *Alleged Unlawful Discharge of Lauro Sosa*

As found above, Respondent unlawfully failed to reinstate Sosa to the job he held prior to the strike.

Sosa testified that, on his return to work at the end of the strike, Respondent's plant manager, Pedro Maona, stated that he would fire workers in order that the Union would not have any strength. Maona did not testify. I credit Sosa's account.

Sosa was laid off three weeks after his return although there were employees, who had begun working for Respondent during the strike, still working for Respondent after his layoff.

Respondent's payroll records contain a notation, ''T,'' indicating that Sosa was terminated from its employ.

The General Counsel has made out a clear prima facie case of discrimination and, as Respondent offered no pro-

[9] Collado, Pineda, and Taveras had been included in the settlement agreement approved by Judge Green, discussed above.

bative rebuttal evidence, I find that Sosa was unlawfully laid off.

E. *Alleged Unlawful Discharge of Martin Sosa Torres*[10]

Torres began working for Respondent on February 3, 1986; he took part in the strike and returned on March 21, 1988. On March 28, he was ill with a sore throat. He testified that he telephoned Respondent's office several times that morning to notify it that he was unable to go work but that no one answered the phone. He saw a doctor that day who gave him a note, dated that same day. Later that day, he went to Respondent's plant to cast his ballot in the representation case election being conducted that day.

When Torres reported for work the next day, the security guard stopped him from entering the building. Pretter, Respondent's controller, and its plant manager, Maona, came to the security area and asked Torres why he missed work the previous day. Torres replied that he was ill. Maona asked how he could have been sick and yet have come to the plant to vote. Torres explained that his throat had been sore and that dust in his work area would have aggravated it. Maona then told him that he was discharged.

Pretter testified for Respondent that he assumed that Torres had voluntarily left Respondent's employ by not having called in on March 28 to explain his absence.

Maona's questions to Torres indicate that Respondent was more concerned with the fact that Torres came in on March 28 to vote than with the fact that it had no record that he had called in earlier. His summary rejection of Torres' explanation further indicates that he had never been interested in hearing it. Pretter's account that Torres had quit is obviously inconsistent with the fact that he voted on March 28. These factors, along with the uncontroverted account given by Lauro Sosa, as noted above, that Maona had said that Respondent would fire employees to reduce the Union's strength, make out a prima facie showing of unlawful discrimination. Respondent failed to offer any probative evidence that it would nontheless have discharged Torres. I thus find that Respondent discharged Torres because of his support for the Union.

F. *Alleged Discriminatory Discharge of Diego Davila*

As discussed above, Davila began working for Respondent in 1982; he was a member of the Union's organizing committee; he took part in the strike, serving as picket line captain; and returned to work on April 4, 1988.

On about November 1, 1988, Davila began wearing a shirt that had been discarded and which was laying on top of boxes at Respondent's facility. Davila's testimony is that other employees had also been wearing similarly discarded shirts in order to keep warm. Davila testified that, on November 10, Respondent's personnel manager discharged him, telling him that he was using the ''company's garments.'' According to Davila, when he protested that this was a common practice, the personnel manager responded that Davila was discharged on management's orders.

Respondent's controller, Pretter, testified that Respondent's warehouse manager discharged Davila because he was wearing an article of clothing that belonged to one of Respondent's customers. Pretter further testified that Respondent had done time and study motions on Davila which disclosed that he did 60 percent to 70 percent less work than other employees but that Respondent did not discharge him for that reason as it ''bent over backwards to accommodate him.''

The evidence in the record before me makes clear that Davila was an active union adherent; that he was treated disparately as to his discharge from that accorded other employees who wore discarded shirts to keep warm; and that Respondent made little effort to ''accommodate'' him in that regard despite Pretter's assurances thereon. Further, the record is unclear as to just when, or as to who in Respondent's management, made the decision to discharge Davila.

I find that a prima facie showing has been established by the General Counsel that Davila's discharge was due to his having supported the Union and that Respondent's efforts to rebut that showing tend instead to confirm it.

G. *Alleged Discriminatory Promulgation and Enforcement of a Stricter Lateness Policy*

The complaint alleges that Respondent had adopted a more strict lateness policy in order to discourage support for the Union among its employees. In support thereof, the General Counsel offered the testimony of Rene Pinell that, immediately on his return from work at the conclusion of the strike, a notice was posted alongside the employee timeclock which stated that employees would not be permitted to enter the plant if they arrived 10 minutes late for work. Prior to the strike, Respondent's policy had been to dock an employee for a half hour for being 15 minutes late. The new policy was enforced, at least as to one employee, who was working in the ticketing department.

In *S & S Screw Machine Co*., 288 NLRB 235 (1988), the Board adopted a finding that the General Counsel had made out a prima facie case of unlawful discrimination based on the employer in that case having promulgated a stricter tardiness policy immediately after a representation election had been conducted among its employees. The instant case is very closely analogous to that case and I thus find that the General Counsel has made out a prima facie showing of unlawful discrimination by Respondent in its sudden promulgation of a more stringent lateness policy. Respondent has not persuaded me that it would, notwithstanding, have implemented that policy for nondiscriminatory reasons. Accordingly, I conclude that the stricter lateness policy was unlawfully motivated.

CONCLUSIONS OF LAW

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

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

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by having:

(a) Failed to make valid offfers, to the following named employees, of reinstatement to their former positions of employment, on their unconditional application therefor, because of their having supported the Union.

Christopher Grant	Tomas L. Sosa
Michael Kiernan	Senon Tapia
Alfredo Amigon a/k/a Socorro Ponce	Elba Alvarez Battista

[10] As amended at the hearing.

Thomas Pringle	Crescencio Vergara
Facindo Ruiz	Francisco Baez

(b) Failed to assign the following named employees to their former job, as noted, on their return to work after their participation in an unfair labor practice strike:

Miguel Aurich	floorman department
Diego Davila	repacking department
Rene Pinell	UPS department
Justo Saldivar	order preparation department
Miguel Jarrin	order preparation department
Lauro Sosa	shipping and receiving department
Jorge Collado	receiving department
Quilvio Taveras	UPS department
Christino Sosa	floorman department
Roberto Rodriguez	order preparation department
Aldwin Skeete	Pick and pack department

(c) Assigned the following named employees to more onerous jobs with fewer working hours because they took part in an unfair labor practice strike:

Miguel Aurich	Lauro Sosa
Diego Davila	Christino Sosa
Rene Pinell	Roberto Rodriguez
Justo Saldivar	Aldwin Skeete
Miguel Jarrin	

(d) Discharged Lauro Sosa, Martin Sosa Torres, and Diego Davila in order to discourage support among its employees for the Union.

(e) Promulgated and enforced a stricter lateness policy in order to discourage support among its employees for the Union.

4. The unfair labor practices described in paragraph 3 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not unlawfully discriminate as to its employees Sabas Vergara and Victor Alvarez.

REMEDY

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

Respondent shall offer to Christopher Grant, Michael Kiernan, Alfredo Amigon, Thomas Pringle, Facundo Ruiz, Tomas L. Sosa, Senon Tapia, Elba Alvarez Battista, Crescencio Vergara, Francisco Baez, Miguel Aurich, Diego Davila, Rene Pinell, Justo Saldivar, Miguel Jardin, Lauro Sosa, Jorge Collado, Luis Pineda, Quilvio Taveras, Christine Sosa, Roberto Rodriguez, Aldwin Skeete, and Martin Sosa Torres, full and immediate reinstatement to their former positions of employment, as found above, and make them and others similarly situated[11] whole for all losses of earnings and other benefits suffered by reason of its unlawful failure to have reinstated them, and/or by unlawfully discharging them, such losses to be computed and accordance with the formula set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest thereon computed in accordance with the principles set out in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall also make whole employees who incurred lost wages by reason of its implementing its discriminatory lateness policy, within interest thereon computed as in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, A.P.A. Warehouses, Inc.; Sea-Jet Trucking Corporation; Affiliated Terminals, Incorporated; Sea-Jet Industries, Incorporated; Sea-Jet Trucking and A.P.A. Warehouses, Incorporated, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to reinstate unfair practice strikers to their former positions of employment upon their unconditional application therefor.

(b) Assigning returning unfair labor practice striking employees to more onerous work and to fewer work hours than they were assigned to before they commenced to strike.

(c) Discharging any employee to discourage support among its employees for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.

(d) Promulgating or enforcing a lateness policy in order to discourage employees from continuing to support the abovenamed Union.

(e) In any other way interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) In accordance with the manner provided for in the remedy section above, offer

Christopher Grant	Diego Davila
Michael Kiernan	Rene Pinell
Alfredo Amigon a/k/a Socorro Ponce	Justo Saldivar
Thomas Pringle	Miguel Jarrin
Facundo Ruiz	Lauro Sosa
Tomas L. Sosa	Jorge Collado
Senon Tapia	Luis Pineda
Elba Alvarez Battista	Quilvio Taveras
Crescencio Vergara	Christino Sosa
Francisco Baez	Roberto Rodriguez
Miguel Aurich	Aldwin Skeete

full and immediate reinstatement to the jobs they held at the commencement of the strike, as found above, and make each of these employees and all other returning unfair labor practice strikers similarly situated whole, with interest as pro-

[11] As Respondent retained striker replacements after the conclusion of the strike and spread available work hours among them and the returning unfair labor practice strikers, it is appropriate to defer to the compliance stage the calculations of the losses suffered by all the returning strikers. Cf. *Suburban Ford, Inc*., 248 NLRB 364, 365 (1980). See also *Champ Corp*., 291 NLRB 803 (1988).

[12] If 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.

vided for in the remedy section here, for any losses in earnings and other benefits they suffered as a result of their either not laving been reinstated in full to their former jobs, or to their have being unlawfully discharged, or to both.

(b) Make whole, with interest as provided for in the remedy section, all employees who suffered losses as a result of the enforcement of the lateness policy, found to have been unlawfully promulgated.

(c) Remove from its files all references to the unlawful discharges of Lauro Sosa, Martin Sosa Torres, and Diego Davila and notify them in writing that this has been done and that their discharges will not be used against them in any way.

(d) 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.

(e) Post at its Brooklyn, New York facility, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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.

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

IT IS FURTHER ORDERED that the allegations of the complaint that Respondent had discriminated against Sabas Vergara and Victor Alvarez are dismissed.

[13] If 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.''