A-1 Schmidlin Plumbing & Heating Company and Schmidlin, Inc. *and* Local Union No. 1076, International Brotherhood of Electrical Workers, AFL–CIO. Cases 8–CA–18288[1] and 8–CA–20688

September 20, 1993

SUPPLEMENTAL DECISION AND ORDER AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 24, 1991, Administrative Law Judge David L. Evans issued the attached supplemental decision. The Respondent and the Charging Party filed exceptions, supporting briefs, and reply briefs.

The National Labor Relations Board has considered the portions of the decision relating to Case 8–CA–18288 and the record in light of the exceptions and briefs.[2] The Board has decided to affirm the judge's rulings, findings as modified, and conclusions as modified, to adopt a portion of the recommended Order, and to remand for further proceedings, as set forth below.

1. The judge found certain backpay amounts due to discriminatees Roger Duncan, Kenneth Kuchinski, James Neary, Edward Vaculik, Mark Warmath, Roy Williams, and Steve Wood. In awarding backpay to the discriminatees, the judge found that ''the amounts set forth in this supplemental decision are the net backpay and benefit fund amounts due these employees through the end of the first calendar quarter of 1989, the date used as a cutoff for purposes of issuing the specification.'' However, the judge's recommended Order, adopting the specification's allegations, awards backpay to discriminatees Mark Warmath, Kenneth Kuchinski, and Steve Wood covering time periods after the first quarter of 1989. We agree with the judge that backpay should be awarded only through the first quarter of 1989, as the record contains no documentation to substantiate the specification's allegations after April 15, 1989. We shall therefore deduct from the judge's recommended award backpay amounts to Warmath, Kuchinski, and Wood for the second and third quarters of 1989.[3]

2. The judge found that helpers James Cousino, Patrick Cousino, John Couture, James Schmidlin, and Erol Smolenski and students Chris Strause, Douglas Lynch, and Richard Bartkiewicz were not entitled to backpay, because the General Counsel failed to show that they had ever performed bargaining unit work. The Union excepts to the judge's exclusion of those individuals in his backpay award. Contrary to the judge's finding, the payroll records, and the testimony of witnesses, including Schmidlin President Charles Schmidlin, indicate that some helpers and students performed heating and air-conditioning work. Accordingly, we shall remand to the judge to determine which of these individuals are properly included in the bargaining unit and performed bargaining unit work, the appropriate rate at which helpers should be compensated, and the proper backpay amounts due.

3. The Respondent excepts to the judge's calculation of James Neary's backpay on the basis of the hours he worked during the 2 years prior to the unfair labor practices. The Respondent proposes instead that Neary's backpay be based on the hours all journeymen worked after January 1985, divided by the number of journeymen employed, plus Neary. Although the Respondent's alternative formula may not be unreasonable, we believe the formula used by the judge was reasonably designed to approximate what Neary would have earned had he not been unlawfully denied employment. We, therefore, find no merit to the Respondent's contention. See *Am-Del-Co, Inc.*, 234 NLRB 1040, 1042 (1978).

We further agree with the judge's finding that Neary was entitled to backpay based on the hours worked in Toledo and outside of Toledo, notwithstanding his failure to obtain a Toledo journeyman's license. While Neary's lack of a license might have mitigated the Respondent's obligations during the entire backpay period, the Respondent failed to produce records admittedly within its possession to substantiate its assertions as to the number of hours worked by journeymen outside of Toledo.

4. The Respondent excepts to the judge's finding that the Respondent did not make a valid offer of employment to Neary on September 1, 1987.[4] We find no merit to this exception.

The evidence shows that Neary, Union Representative Thomas Curley, and the Union's attorney met with

[1] On December 27, 1989, the instant backpay case, Case 8–CA–18288, was consolidated with Case 8–CA–20688, an unfair labor practice case alleging that the Respondent unlawfully prohibited discriminatee James Neary from handbilling in its parking lot. As explained below, we have decided to remand Case 8–CA–18288 for further proceedings. We have also decided, in order to issue Case 8–CA–20688 most expeditously, to sever it from Case 8–CA–18288.

[2] The Respondent has requested oral argument. This request is denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

[3] As to James Neary, we award him backpay through the second quarter of 1989, inasmuch as the General Counsel contends that his backpay period continued until he was offered employment on May 31, 1989, and as the backpay specification with respect to Neary does not rely on payroll records subsequent to the first quarter of 1989. The figures for the second quarter are supported by other record evidence, as explained in sec. 3, below.

[4] The Respondent also excepts to the judge's finding that the Respondent's letter of August 18, 1987, failed to constitute a valid job offer. In rejecting the Respondent's contention, we rely on *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988). On its face, the letter made clear that the offer would lapse if Neary failed to report within 3 days, an unreasonably short period of time.

co-owners/officers Charles and Walter Schmidlin and the Respondent's attorney on September 1, 1987, to discuss various matters regarding compliance with the Board's Order in the underlying unfair labor practice case, including Neary's employment.[5] Charles Schmidlin asked if Neary had a Toledo license to work as a heating and air-conditioning mechanic. Neary replied that he did not. Curley became upset because he had allegedly asked Charles Schmidlin to assist Neary in securing a city license but Schmidlin refused. At that point, Curley threatened to institute an unfair labor practice strike and consumer boycott and the meeting broke up. Curley testified that he became angry because he thought that the Respondent's insistence on Neary's obtaining a license was just another means of denying Neary employment.

Neary testified that Curley told him to go to work the next day and that he reported at the Respondent's premises on September 2, 1987, to go to work ''if there was work for me.'' On September 2, 1987, the Union established a picket line at Schmidlin's premises. When Neary arrived, he joined the picketing.

On September 3, 1987, the Respondent's attorney sent a letter to the Union stating that Neary was supposed to report for work ''if at all'' at 8 a.m. on September 2 and that he had failed to report. The letter does not claim that an offer of employment was made on September 1, 1987. Rather, the letter refers to the ''notice of recall [of August 18]'' and to ''our subsequent meeting on September 1.'' Charles and Walter Schmidlin both testified at the hearing, but neither testified that they had offered Neary employment at the September 1, 1987 meeting.

It is well settled that an employer bears the burden of establishing that it has made a valid offer of reinstatement tolling its backpay obligation. *Garment Workers*, 300 NLRB 507, 514 (1990). In order to sustain its burden, the employer must show that its offer of employment was specific, unequivocal, and unconditional. *Jones Plumbing Co.*, 277 NLRB 437, 449 (1985); *Pace Motor Lines*, 260 NLRB 1395 fn. 2 (1982), enfd. 703 F.2d 28 (2d Cir. 1983). The employer must also demonstrate a good-faith effort to communicate the offer to the discriminatee. *Chromalloy American Corp.*, 263 NLRB 244, 246 (1982). Applying these well-established principles to the facts here, we find that the Respondent has not met its burden.

Charles and Walter Schmidlin, who were present at the September 1, 1987 meeting, testified about what the parties discussed, and yet neither mentioned that they had offered Neary employment at the meeting. The meeting broke up because of a dispute over Neary's qualifications for work. We find this inconsistent with an inference that the Respondent made an offer at the meeting.

Moreover, even assuming the Respondent discussed an offer of employment at the meeting, there is no evidence as to what specific job was allegedly offered—whether it was to Neary's former job, or if that was unavailable, to an equivalent position; whether Neary would work only non-Toledo jobs; what terms of employment were allegedly agreed on; or any other details of the alleged offer. The lack of specificity is of even greater concern here than in most cases because the offer was allegedly made orally, because there was a dispute at the meeting as to Neary's qualifications to work Toledo jobs as he had done in the past, because the Respondent is a successor employer, who had never employed Neary, and because the Respondent had refused to adhere to contractual wage rates and made unilateral changes in employees' terms and conditions of employment.

Accordingly, we find, in agreement with the judge, that there is insufficient evidence that the Respondent made a valid offer on September 1, 1987. Further, even if, arguendo, one or more of the parties may have believed that some employment offer had been made, we would not agree that the circumstances present here constitute proof that the Respondent made a specific, unequivocal, and unconditional offer. See *Chromalloy American Corp.*, supra.

Finally, we disagree with the Respondent's contention that Neary's backpay should be tolled when interim employer, Pant Heating, ended his employment. The evidence merely showed that Pant Heating was dissatisfied with the speed of Neary's work. This is insufficient to sustain the Respondent's burden of establishing that Neary willfully incurred a loss of earnings. See *Allied Lettercraft Co.*, 280 NLRB 979, 983 (1986); *L'Ermitage Hotel*, 293 NLRB 924, 926 (1989), enfd. mem. 917 F.2d 62 (D.C. Cir. 1990).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Schmidlin, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Pay the employees listed below the sums set opposite their respective names, with interest,[6] in accordance with appropriate deductions for taxes that are required to be withheld by Respondent under Federal and state laws:

[5] The Respondent excepts to the judge's finding that the September 1, 1987 meeting was set up after the August 18 offer was sent to Neary. We find that even if the Respondent is correct that the meeting was scheduled after Neary received the August 18 offer, this would have no effect on the judge's finding that the Respondent failed to show that Neary received a valid reinstatement offer on September 1, 1987.

[6] See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Employee	*Amount*
Roger Duncan	$8,629.80
Kenneth Kuchinski	9,536.59
James Neary	27,519.83
Edward Vaculik	1,607.76
Mark Warmath	2,755.62
Roy Williams	27,602.35
Steve Wood	3,170.96

2. Pay the International Brotherhood of Electrical Workers' funds listed below, on behalf of the employees indicated, the amounts set opposite each such employee's name.[7] If any of the funds refuse to accept such moneys on behalf of each such employee, the amounts indicated shall be paid to the individual employees.

Employee	*Health and Welfare*	*Apprenticeship Administration*	*National Electrical Benefit*	*Pension*
Roger Duncan	$7,336.15	$756.53	$2,003.18	$3,982.20
Kenneth Kuchinski	4,033.82	510.95	806.70	2,673.60
James Neary	4,806.71	493.67	1,310.40	2,598.20
Edward Vaculik	1,915.93	197.08	528.88	1,037.25
Mark Warmath	1,146.54	117.76	315.13	619.75
Roy Williams	6,040.61	620.43	1,651.00	3,265.25
Steve Wood	3,109.89	255.68	701.37	1,345.65
	$28,389.65	$2,952.10	$7,316.66	$15,522.00

3. 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 this case is remanded to Judge Evans for further proceedings, including additional hearing, if necessary, consistent with this decision. The judge shall prepare and serve on the parties a Second Supplemental Decision setting forth the resolution of such issues, findings of fact, and recommendations, including a recommended Order, where appropriate, regarding the issues on remand. Copies of the Second Supplemental Decision shall be served on all parties after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that Case 8–CA–18288 is severed from Case 8–CA–20688.

Richard F. Mack, Esq., for the General Counsel.
Terrance L. Ryan, Esq. (Porter, Wright, Morris & Arthur), of Cleveland, Ohio, for the Respondent.
John M. Roca, Esq. (Gallon, Kalniz & Iorio), of Toledo, Ohio, for the Charging Party.

SUPPLEMENTAL DECISION AND DECISION AND ORDER

DAVID L. EVANS, Administrative Law Judge. This matter was tried before me on December 19 and 20, 1990, in Toledo, Ohio.

The Cases Presented

On July 29, 1987, by Decision and Order of that date, 284 NLRB 1506, the Board found that Schmidlin, Inc. (the Respondent or Schmidlin) was a successor employer to A-1 Schmidlin Plumbing & Heating Company (A-1), and that Respondent was obligated to consult with Local Union No. 1076, International Brotherhood of Electrical Workers, AFL–CIO (the Union) in establishing initial terms and conditions of employment of its employees ''from the time it began operations'' on January 1, 1985. In the remedy section of the decision, the Board concluded (284 NLRB at 1508):

> Because Schmidlin unlawfully refused to recognize and bargain with the representative of its employees and unilaterally changed terms and conditions of employment, we shall order it to bargain on request and to restore the conditions it unilaterally changed and continue them in effect until it fulfills its bargaining obligation, and to make whole employees for any loss of wages due to Schmidlin's unilateral action . . . and for any benefits it unilaterally discontinued.[1]

And the Board ordered Respondent to ''[r]estore the terms and conditions of employment that it unilaterally changed and continue them in effect until it fulfills its bargaining obligation.'' 284 NLRB at 1509.

The Board further found that Respondent had discriminatorily denied employment to James Neary when it began operations, and it ordered Respondent to offer employment to Neary and make him whole.

Finally, the Board ordered Respondent to recognize the Union as the collective-bargaining representative of the employees in the following unit:

[7] Any additional amounts due the funds shall be paid in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[1] Citation and footnote omitted.

> All employees engaged in the installation and service of automatic heating and air conditioning equipment and controls, including all types of oil burners, gas burners, stokers, electric furnaces, air conditioning and automatic control systems, solar heat systems, and the installation and service of refrigeration systems. Such defined work shall be limited as follows:
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> Heating Systems—1,000,000 B.T.U.
> Air Conditioning Systems—30 Tons
> Commercial Refrigeration Units—5 H.P. (Combination not to exceed 10 H.P.)

At footnote 11, the Board notes:

> The bargaining unit described in [A-1's last] collective-bargaining agreement covers employees engaged in heating and air-conditioning installation and service operations without designating particular job classifications. It appears to include heating mechanics, plumbers, warehousemen, and helpers who the record shows engaged in installation and service work.

On January 3, 1989, the Court of Appeals for the Sixth Circuit entered its judgment enforcing the Board's Order.

On December 1, 1989, the General Counsel issued a compliance specification alleging that, in certain respects, Respondent had not complied with the Order of the Board. (That matter will be referred to herein as the compliance case.) On December 27, 1989, the General Counsel issued an order that consolidated the compliance case with an unfair labor practice complaint that had issued against Respondent on April 20, 1988, in Case 8–CA–20688. (That matter will be referred to herein as the complaint case.) Respondent filed answers to both the specification and the complaint, admitting jurisdiction and the status of certain supervisors, but denying the commission of any unfair labor practices, and setting forth what it contends is required for compliance with the outstanding Board Order.

On the specification and the complaint, and the answers to each, and the record herein, and the demeanor of the witness who appeared at trial, and after consideration of the briefs that have been submitted by all parties, I make the following

FINDINGS OF FACT

A. *The Compliance Case*

1. The issues presented

Respondent and the Union signed a collective-bargaining agreement on February 1, 1990. The issues of compliance antedating that point are:

a. Which of Respondent's employees are entitled to recovery under the Board's Order, and on what standard (journeyman, apprentice, or neither) is the remedy for each to be calculated?

b. When did Neary's backpay period end?

c. Is Neary's gross backpay computation to be reduced because he did not hold a Toledo city license to work as a journeyman?

2. Discussion and conclusions

a. *The employees covered by the Board's Order and the appropriate standards of recovery*

(1) Employees not covered by the Board's Order

Although the Board's unit description is quite specific, the General Counsel would include all employees employed by Respondent, except office clerical employees, in the purview of the remedy. The General Counsel further contends that since A-1's contract with the Union provided only for journeyman and apprentice wage scales, and since no employee was registered in a union-approved apprentice program, all employees are entitled to journeyman wage rates.

The record discloses that, although A-1's contract did not provide for it, A-1 regularly employed individuals other than journeymen and apprentices to do work, some of which could have been unit work. These included high school cooperative students, helpers, and others, whom A-1 paid less than apprentice wages and no (other) contract benefits.

The General Counsel has the burden of proving entitlement to gross backpay. To do this the General Counsel must show that an employee named in a specification was within the purview of the Board's Order. In this case it is incumbent on the General Counsel to show that the named employees did at least some of the work covered by the Board's unit description.

For some of the employees listed in the specification, the General Counsel made no attempt to show that they ever did work covered by the unit description. Accordingly, I find and conclude, consistent with testimony of Charles Schmidlin, and, in some cases, the employees themselves,[2] that the following individuals are not entitled to be ''made whole'' under the Board's Order: James Cousino; Patrick Cousino; John Couture; James Schmidlin and Erol Somolenski, field helpers; Thomas Dollison and Mark Fergusen, store helpers; Jim Lewis, shop helper; Chris Strause and Douglas Lynch, cooperative students who alternated between themselves working as a helper; and Richard Bartkiewicz, a student and part-time serviceman. Schmidlin could not remember Todd Hendricks, but payroll records indicate that he was a shop employee, and there is no reason to believe that he did any of the installation or service work that is covered by the unit description.

Additionally, according to the credible testimony of Charles Schmidlin, Bruce Day, Jim Madru, Richard Malewski, George Streepy, and Jeffrey Rogge did plumbing work unrelated to any of the work covered by the unit description, above. Schmidlin also could not remember Joe Miller; the records indicate that Miller worked during 2 weeks of the fourth quarter of 1985 as a plumber or plumber's helper; there is no reason to believe that he did any work covered by the unit description.

(2) Employees who are covered by the Board's Order, other than Neary

Respondent's first contention is that, while the Board ordered a return to the status quo before the unfair labor prac-

[2] Douglas Lynch, Bruce Day, and Richard Bartkiewicz testified consistently with Schmidlin, and I found the employees to be credible.

tice was committed, the status quo was a situation in which the employees who are covered by the Board's Order were receiving less than contractual wage rates and other benefits because A-1 had not been complying with its agreement with the Union. Therefore, Respondent contends, it owes nothing to any employee covered by the Board's Order because the benefits of the covered employees remained unchanged, or essentially unchanged, when they were hired by Respondent.

Absent proof that the Union had agreed to something else, A-1's last contract with the Union memorialized the lawful status quo. The unit employees' lawful terms and conditions of employment were the terms specified in the A-1 contract, regardless of whether A-1 had been living up to that contract. Certainly, the Board did not intend, in its status quo Order, to return the employees to a point at which they would continue to be denied their lawfully established terms and conditions of employment. That is, that A-1 had not been living up to the established terms and conditions of employment of the unit employees affords Respondent no defense.

Therefore, computations for the employees covered by the Board's Order are properly based on what the last A-1 contract required. For the employees other than Neary, the computations are based on the holding that they are entitled to be made whole for the difference between what they were paid by Respondent[3] and what they should have been paid by Respondent during the backpay period.

The backpay period for those employees begins at January 1, 1985, when Respondent purchased A-1, and ends at February 1, 1990, when Respondent and the Union signed a collective-bargaining agreement, although the specification herein terminated at the first quarter of 1989 for the purpose of issuance.

Wage Rates and Hours Included

The A-1 contract, negotiated in 1982, does not state specific journeyman wage rates to be paid during its last year, 1985. Rather, the contract provides a base journeyman rate of $16.20 per hour for 1982 and package-type increases thereafter which were to be allocated among wages and other benefits determined by the Union. The record does not disclose what the final wage rates were, but the specification alleges that the journeyman rate was $16.77. The Regional compliance officer testified that this amount was calculated by examination of Respondent's records to determine what had been paid to three journeymen during the last eight quarters that A-1 operated. Respondent admits the allegation that ''the appropriate hourly rate for [journeyman James] Neary is $16.77,'' and I accept that figure as the appropriate basis for Neary and the other journeymen found herein to be covered by the Board's decision.

Respondent's records for 1985 and 1986 are broken down according to office, shop, plumbing, heating, and air-conditioning work. Respondent's records for 1987 forward are broken down only according to field work and shop work, the latter always being the less.

I use only the field work to compute the unit employees' hours, as there is no reason to find that the shop work was the unit work of ''installation or service''; conversely, there is no reason to exclude any of the field work because Respondent produced no records to distinguish what field work was, or was not, unit work, although Charles Schmidlin admitted that such records were in Respondent's possession.

Moreover, appropriate contributions to the Union's Health and Welfare Fund, its Apprentice Administration Fund, its Pension Fund, and its National Electrical Benefit Funds shall be required, as they were also established terms and conditions of employment at the time of the unfair labor practice. Although Respondent generally denies any obligation to the benefit funds, it does not specifically dispute, or suggest alternatives, to the specification's allegations that the contributions on behalf of journeymen (all except Kenneth Kuchinski) are properly calculated as follows: Health and Welfare Fund, $1.85 per hour; Pension Fund, $1; Apprenticeship Administration Fund, 19 cents per hour; National Electrical Benefit Fund, 3 percent of gross pay. As discussed infra, fund contributions on behalf of Kuchinski, an apprentice, shall be on a sliding scale according to the amount of apprenticeship he had served.[4]

On review of the voluminous exhibits, I found that certain parts of exhibits proffered by Respondent were missing. Those were records of the following of the Respondent's pay periods:

> 1985: Payroll periods ending April 20, and November 2, 9, 16, and 23.
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> 1986: Payroll period ending April 5.
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> 1987: Payroll period ending February 21 and numbered page 2 of the records for payroll period ending June 6.
>
> 1988: Payroll periods ending January 8, 16, and 23 and September 10.
>
> 1989: Payroll period ending March 25.

I notified counsel for Respondent of the missing exhibits by letter dated June 12, 1991. By letter dated June 27, copies to all parties, counsel furnished the records, except for payroll periods ending November 2, 9, 16, and 23 which, counsel represented, had been destroyed ''in a break-in which occurred some years ago.'' The destroyed records are relevant only in the computations for Duncan. To make a fair and reasonable estimation of the hours that Duncan worked during those pay periods, I have used as substitutes the hours Duncan worked during two payroll periods immediately before the payroll period ending November 2, and the hours that Duncan worked during two payroll periods immediately after the payroll period ending November 23.

The only other employee whose computations are affected by the lacunae in Respondent's exhibits is Kenneth Kuchinski. However, since Kuchinski's backpay period did not begin until the first quarter of 1987, the computations for

[3] What the employees were paid by Respondent during the backpay period is herein referred to as ''interim earnings.''

[4] Respondent contends that the funds involved would not now accept payment on behalf of the employees. That assertion is without foundation; however, if Respondent proves correct, the amounts specified shall be paid directly to the employees. See *Southland Dodge*, 232 NLRB 878 (1977), citing *Rice Lake Creamery Co.*, 151 NLRB 1113, 1129–1129 (1965), enfd. as modified 365 F.2d 888 (D.C. Cir. 1966).

Kuchinski are not affected by the fact that certain of the 1985 records had been destroyed.[5]

(a) *Kenneth Kuchinski*

Charles Schmidlin admitted that Kenneth Kuchinski was a registered heating and air-conditioning apprentice for Respondent, and, for some time which Schmidlin did not know, Kuchinski had been an apprentice for A-1. Respondent's records introduced at the hearing indicate that Kuchinski worked in the store or shop, at or near minimum wage during 1986. Respondent's records indicate that, during the payroll period ending January 10, 1987, Kuchinski began receiving $5 per hour, and he began receiving wage increases at various times thereafter. Therefore, it is reasonable to conclude that Kuchinski began working as an apprentice in January 1987. However, Kuchinski was not paid the full apprentice rate. Kuchinski was paid at rates apparently negotiated between himself and Respondent, and it was a rate less than that in effect for apprentices at the time the unfair labor practices were committed. Therefore, Kuchinski is entitled to be compensated according to the difference between the apprentice wage rate that existed at the time the unfair labor practice was committed and the rate he was actually paid.[6] A-1's contract, the embodiment of the terms and conditions of employment of all employees, including apprentices, specifies various wage rates for apprentices according to the number of semiannual periods that the apprentice has worked, from first through eighth.[7] For example: the wages for an apprentice during the first 6 months of his apprenticeship was $7.56, the second was $9.13, the third was $9.91, etc. Kuchinski's first 6 months as an apprentice, as I have concluded, began in January 1987; computations of his wage scale and benefits recovery shall be made on that basis. (Except for the IBEW Pension Fund, all fund contributions on behalf of apprentices are also on a graduated basis.)

Computations for the wages and other benefits due Kuchinski, or due the various union funds on Kuchinski's behalf, are found in Appendix A [omitted from publication].

(b) *Roger Duncan*

Roger Duncan was employed by A-1 at the time Respondent purchased A-1. Duncan testified that he held a Toledo apprentice card, and that he worked as an apprentice for both companies. Duncan testified that when Respondent became his employer, his wage rate was reduced ''maybe 75 cents to a dollar,'' and he and Respondent agreed that Respondent would pay for his health insurance so, ''it kind of balanced everything out.''

Although, for some reason, Duncan testified that he was hired by Respondent as an apprentice,[8] Charles Schmidlin was clear that Duncan had always worked for Respondent as a journeyman.

Respondent negotiated with Duncan a wage rate lesser than that existing for journeymen on January 2, 1985. Under the Board's Order, as enforced by the court of appeals, Respondent was not free to do this; the terms and conditions of employment of unit employees that existed when Respondent purchased the business, as embodied in the A-1 contract, continued unless and until they were modified by agreement with the Union or impasse was reached. Therefore, for his tenure of employment, Duncan is entitled to be made whole on the basis of the difference between the journeymen wage scale and what he was actually paid.

Duncan was placed on straight salary during the pay period ending March 12, 1988, and the specification makes no claim on behalf of Duncan beyond that point.

The calculations of Duncan's back pay and benefits are contained in Appendix B [omitted from publication]. That appendix requires some explanation. The first part lists, by quarter, the hours of Duncan's work that I have found do not constitute work covered by the Board's Order; i.e., shop work, as opposed to service or installation work. The second part is a computation of backpay due Duncan for the work which, as I have found, is covered by the Board's Order. In the second part, the ''Hours Claimed'' column represents the hours of work per quarter claimed by the specification. Those figures are not set out separately in the specification; they are multiples of the claims for benefits that are based on the hours worked. (Specifically, the specification claims that Respondent should have contributed $197.50 on behalf of Duncan to the IBEW pension fund in the first quarter of 1985; as the required contribution was $1 per hour for that pension plan, the General Counsel is necessarily claiming that Duncan worked 197.50 hours during that quarter.) Respondent has not disputed the number of hours used for such computations. The ''Nonunit Hours'' column represents the number of hours that were included in the specification that I have found are not the type of work that was covered by the Board's Order, as computed in part 1 of Appendix B; i.e., office and shop work. The ''Unit Hours'' column is the difference in the hours claimed and the nonunit hours that I have found to be properly excludable from the computations.[9] The ''Gross Backpay'' column represents those wages which, at $16.77 per hour, should have been paid for the unit hours. The ''Admitted Interim Earnings'' column represents all pay, for unit and nonunit work, that Duncan received, as admitted by the specification. The ''Paid for Nonunit Hours'' represents the pay received by Duncan for the hours that I have determined are not covered by the Board's Order. Duncan's hourly wage during the entire backpay period was

[5] The General Counsel and the Charging Party having raised no question as to the propriety receiving into evidence Respondent's posthearing submission, I receive same, including counsel's cover letter as R. Exh. 15.

[6] I reject the General Counsel's contention that Kuchinski should be made whole at the journeyman rate because he was not in an established apprenticeship program. Schmidlin testified that Kuchinski was worked as an apprentice, whether in a formal apprenticeship program or not, and there was no rebuttal of that testimony.

[7] As established at the hearing, an apprenticeship of 4 years was required for an individual to become a journeyman heating and air-conditioning mechanic.

[8] Duncan had an undisclosed ownership interest in Respondent's business.

[9] A differentiation between regular and overtime hours was not possible; the records in evidence for 1985 and 1986 do not separate regular hours from overtime hours. (Because unit hours, which are used to compute gross backpay, and nonunit hours, which are used to compute interim earnings, are both treated as regular hours, there will be something of a balancing out.)

$14.20 per hour.[10] The ''Adjusted Interim Earnings'' column represents the difference between the admitted interim earnings and the pay that was received for nonunit work; this computation is necessary since, otherwise, interim earnings for hours not covered by the Board's Order would be offset against the gross pay for hours of work that are covered by that Order. ''Net Backpay'' is the quarterly difference between gross backpay and the adjusted interim earnings.

Computations of the benefit fund contributions due on behalf of Duncan (which, of course, are figured on the basis of unit hours) are contained in the third part of Appendix B.

(c) and (d) *Steve Wood and Mark Warmath*

Schmidlin admitted that Mark Warmath and Steve Wood were unit journeymen heating and air-conditioning mechanics; therefore, they are entitled to recover at the wage rates specified by the General Counsel.[11] Moreover, Respondent shall be required to make appropriate benefit contributions on their behalf.

(e) *Edward Vaculik*

Schmidlin testified that Edward Vaculik was a journeyman, but that he had been salaried with A-1, and Respondent continued to keep him on salary. When Respondent hired Vaculik, it hired him as a journeyman; it was not free to negotiate a salary with him individually; it was required to pay him the established journeyman hourly rate and pay on his behalf the other benefits based on an hourly wage.

Vaculik worked some nonunit hours in the shop which the General Counsel has included in the specification. In the case of Duncan, I have excluded from the computations his nonunit hours, and I have, of course, excluded from his interim earnings the pay for such nonunit hours. However, because Vaculik was always on salary with Respondent, there is no possible way to segregate his interim earnings for unit, and nonunit work. The burden of the uncertainty shall fall upon Respondent.[12]

Accordingly, Vaculik is entitled to the wages and fringe benefits as set forth in the specification.

(f) *Roy Williams*

Schmidlin testified that Roy Williams had been journeyman for A-1, and he was paid as such by A-1. Schmidlin testified that Williams had a physical problem and could not do all the work of a journeyman, so Respondent negotiated a salary with him and assigned to him shop duties and lighter field duties. Again, Respondent was not free to negotiate separately with any employees. Under the law, if Williams was to get special consideration because of his physical problems, it was properly the subject of negotiations with the Union. Again, the Board's Order to restore the status quo ante requires that Williams be made whole for any wages lost as a result of Respondent's changing his method of pay. Of course, as Williams was a journeyman, he is entitled to recovery at the journeyman rate, and, as in the case of Vaculik, no allowance for nonunit work can be made because of the uncertainties created by Respondent.

Accordingly, I find and conclude that Williams is entitled to the wage and benefits as set forth in the specification.

(3) The remedy as it applies to Neary

James Neary was employed a journeyman heating and air-conditioning mechanic when employed by A-1. He has never been employed by Respondent. It is not contested that any wages and benefits due to him are to be calculated at the journeyman rate. The Board ordered Respondent to offer Neary ''employment to the job he would have received if he had not been discriminated against, or, if that job no longer exists, to a substantially equivalent position . . . and make him whole for any resulting loss of earnings and other benefits . . . from 2 January 1985 to the date it offers him proper employment . . . .'' 284 NLRB at 1508. The General Counsel contends that Neary's backpay period did not end until May 31, 1989, ''when Neary received a valid offer of reinstatement.''[13] Respondent contends that Neary was given a valid offer of ''reinstatement''[14] on August 18, 1987,[15] and backpay liability terminated as of that date. Respondent further contends that Neary was given a second offer of employment at a Company-Union meeting on September 1. Finally, Respondent argues that any backpay determination for Neary should take into account the fact that Neary never possessed a valid Toledo journeyman's license.

On August 18, by hand-delivered letter of that date, Charles Schmidlin notified Neary:

> Schmidlin, Inc. unconditionally offers reinstatement to you of [sic] your former job at A-1 Schmidlin Plbg. & Htg. Company. Please report within three days of receipt of this letter. If not, we will consider you having refused the offer.

Neary did not attempt to report. Neary called Union Representative Thomas Curley. As Curley testified, Curley had previously arranged a September 1 meeting with Respondent to discuss compliance with the Board's Order. On September 1, Curley, a union attorney, and Neary met at Respondent's office with Charles and Walter Schmidlin and Respondent's attorney.

Curley and Neary testified that after other matters were discussed, the discussions turned to the subject of Neary. Curley and Neary testified that Charles Schmidlin asked if Neary had a Toledo license to work as a heating and air-conditioning mechanic. Neary replied that he did not. According

[10] According to C.P. Exh. 1, received at the original hearing, Duncan's hourly wage during 1985 was $14.20 per hour, and according to Respondent's exhibits introduced at the hearing before me, he continued to receive that rate through the end of the backpay period (the first quarter of 1988). The records that would show his 1986 rates, if any different, were not offered by any party; presumably, there was no change in 1986.

[11] At Tr. 240, L. 13, Schmidlin used the word ''or'' to correct himself, not to imply that Warmath was either a plumber ''or journeyman heating and air conditioning [mechanic].'' Also, Schmidlin was specifically asked by his own counsel if Warmath did any plumbing; Schmidlin replied, ''Very little, if any.''

[12] *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (9th Cir. 1982).

[13] Br. 3.

[14] All parties use the term ''reinstatement,'' even though initial employment was actually what was required. The law is the same, and it is clear that all parties understood that initial employment was meant whenever ''reinstatement'' was used in the discourse between them.

[15] All dates in this section are in 1987, unless otherwise indicated.

to Curley and Neary, Curley became upset because he had previously asked Charles Schmidlin to assist Neary in securing a city license, but Schmidlin had refused.[16] Curley walked out, and the meeting terminated.

On the morning of September 2, the Union, pursuant to a membership vote the night before, established a picket line at Respondent's premises. The signs stated, inter alia, that Respondent was guilty of unfair labor practices. Neary testified that he reported to the premises to ''go to work if there was work for me.'' However, he began picketing along with Curley. (Neary picketed regularly until September 25, at which time he began distributing handbills at the premises; the handbilling gave rise to other incidents which are the subject of the complaint case.)

On September 3, by letter of that date, the Respondent's attorney notified the Union's attorney:

> In accordance with the notice of recall made to Mr. Neary by Schmidlin, Inc. and our subsequent meeting on September 1, 1987, Mr. Neary was to report for work, if at all, at 8:00 o'clock a.m. on September 2, 1987. This letter is to advise you that I have been advised by my client that Mr. Neary failed to report at that time.

There is no evidence of record of why Respondent's attorney stated that Neary was expected to report at 8 a.m. on September 2, and there is no evidence of record of why Neary appeared at Respondent's premises as of that date. Apparently, something was said during the September 1 meeting to cause Neary to come to the premises on September 2, but no witness testified as to what that was.

Whatever may have happened at the September 1 meeting, there is no evidence that Neary was offered, unconditionally, his former job, or an equivalent job, as required by the Board Order.

As there was no offer of employment on September 1, Respondent is left with the contention that the written offer of August 18 complied with the Board's Order. The instruction to report ''within three days'' is plainly inadequate. An offer of employment, like an offer of reinstatement, must give an employee a reasonable amount of time to report. ''Within three days'' or, literally, less than 3 days is not such a reasonable period of time.[17]

Therefore, I find and conclude that the backpay period for Neary continued to run until he received an unconditional offer of employment on May 31, 1989, as admitted by the General Counsel.

Respondent contends that because Neary did not have a license to work in the city of Toledo, computations of his backpay should be reduced accordingly.[18] It was established at the hearing by testimony of the city official in charge that Toledo did not enforce its license requirements of heating and air-conditioning mechanics before September 1, 1987. After that date, it did. Therefore, Neary's lack of a license could not have been a factor in the computation of his gross backpay before September 1, 1987.[19]

Although Neary's lack of a Toledo license could have been a factor in computation of his gross backpay after September 1, 1987, Respondent offered no records that would demonstrate what noncity hours of work would have been available. Charles Schmidlin acknowledged that there was some work outside the city, and Neary would have been assigned to some of that, had he returned to work on September 2, 1987. Walter Schmidlin, corporate treasurer, acknowledged that records indicating the situs of such jobs existed. However, none of those records were produced. Therefore, how many noncity hours were available, and what percentage of such hours Neary would have worked, between September 1, 1987, and May 31, 1989, is left entirely to conjecture. The burden of the uncertainty shall fall on Respondent, who is the wrongdoer and the person who partially created the uncertainty by not producing the relevant records.

The specification assumes Neary would have continued to work a number of hours consistent with that he and other journeymen worked during the 3 years prior to the unfair labor practice. I find that this is a reasonable standard, and in view of the Respondent's failure to establish that any other standard should apply, I shall accept as a basis for concluding what amounts Neary would have worked, absent the unfair labor practice.

The specification alleges, and the answer admits, that Neary worked 262.1 hours per calendar quarter during the eight calendar quarters preceding his unlawful denial of employment. As noted, Respondent further admits that ''the appropriate hourly rate for Mr. Neary is $16.77.'' The specification further projects that Neary would have continued to work 262.1 hours per calendar quarter during the backpay period. As further noted, although Respondent denies the appropriateness of the projected hours per quarter, Respondent has failed to propose, and substantiate, a more accurate standard, and I find it fair, under all the circumstances, to adopt the specification's projection. Accordingly, Neary's gross backpay shall be computed on the basis of $16.77 per hour, for 262.1 hours, per calendar quarter from January 1, 1985, to May 31, 1989.

The specification alleges that Neary is also entitled to $242 as medical expenses incurred during the fourth quarter of 1985 and $1056 as medical expenses incurred during the fourth quarter of 1986. This was denied, and the General Counsel introduced no evidence on the issue. Accordingly, I

[16] At the hearing, the General Counsel attempted to make much of Charles Schmidlin's refusal to assist Neary in his efforts to get certification of his work record during the preceding 4 years. Schmidlin refused, for only the most transparent of reasons. However, even if he had cooperated, the certification would not have gotten Neary licensed as a journeyman; Neary had not, as required by Toledo, performed such work in an established apprenticeship program. (Neary had been in an apprenticeship program from 1971 to 1975; but he did not pass the journeyman's examination; however, he continued to work for A-1 as a journeyman thereafter.)

[17] *A & T Mfg. Co.*, 280 NLRB 916 (1986).

[18] Respondent proposed a formula for determining what portion of the noncity work Neary might have received, but it tendered no admissible records in support thereof.

[19] I do not accept the bare statement of Charles Schmidlin that although A-1 worked unlicensed mechanics inside Toledo, Respondent has never done so. The Schmidlins were corporate officers of A-1; there is no basis that they had a change in attitude about the (unenforced) city regulations when they became principals of Respondent. (However, I do grant Respondent's motion to correct the transcript, Tr. 219, L. 1, to change ''licensed'' to ''unlicensed''; otherwise, the following testimony would be nonsensical, as well as incredible.)

find that the General Counsel has failed to prove Neary's entitlement to those amounts as medical expenses. Finally, the specification alleges that Neary incurred certain expenses which should be deducted from interim earnings. This allegation was denied, and the General Counsel introduced no evidence on the issue other than the hearsay, conclusionary testimony of the Regional compliance officer. Accordingly, I shall not deduct any of the expenses from the interim earnings.[20]

The computations of backpay due to, and benefit fund contributions on behalf of, Wood, Warmath, Vaculik, Williams, and Neary are contained in Appendix C [omitted from publication].[21]

B. *The Complaint Case*

1. Interference with Neary's handbilling

The complaint alleges that on September 25, 1987, Respondent interfered with an employee's right to engage in handbilling under circumstances protected by the Act ''by summoning officers from the Lucas County [Ohio] Sheriff's Department who unlawfully denied said employee [Neary] the right to engage in lawful handbilling at Respondent's premises by directing him to leave, prohibiting his activity, and by threatening him with arrest if he continued the handbilling.'' Respondent admits calling the sheriff's department; it denies that Neary's handbilling was protected and therefore denies a violation of the Act in this regard.

Respondent's place of business premises is located near the intersection of Dorr Street and McCord Road in Lucas County (outside the Toledo city limits). The property lies west of McCord Road, which runs north and south, and north of Dorr Street, which runs east and west. Its facilities consist of a metal building and a parking lot. The building has large signs indicating to the public the nature of Respondent's wholesale and retail business, and there is a large red arrow pointing to the door which prospective customers would use. All doors of the building that are used by the public face east and open into the parking lot. Access to the parking lot, and ultimately to the building, is by a 75-foot-long driveway that connects to Dorr Street. The mouth of the driveway is about 20 feet wide, and it is 108 feet from the intersection of Dorr and McCord.[22]

There is no sidewalk along Dorr Street. It is undisputed that Dorr and McCord are major thoroughfares.

On September 25, the Union stopped its picketing and started handbilling. Neary did the handbilling, starting about 8 a.m. The handbills say ''Do Not Patronize'' and explains that Respondent had been found guilty of ''several labor law violations'' and that it had been ordered to perform five specified acts of compliance which Respondent had failed to do. The handbills argue that such practices affect all workers, and the reader is asked not to do business with Respondent or anyone who does business with Respondent.

Neary testified that he sat in his car in the parking lot until a customer appeared to be approaching the entry to the building. Neary would get out and ask the apparent customer if he/she would take a handbill.

Walter Schmidlin testified that:

> I seen customers bringing in the fliers and they handed them to me. They may say [sic] ''what's this'' and so forth. And as the day proceeded, I had a customer who was here asking for a piece of pipe, and he said he was going to get rid of the guy. I said, ''I don't need that.'' . . . I had a gentlemen say that he had a shotgun in his trunk of the car. I said ''I don't need this kind of stuff.''

Schmidlin further testified that customer Don Tapio recounted his experience with the person distributing the fliers, obviously Neary. Tapio testified that Neary had stood in front of Tapio's vehicle for about 10 seconds in an attempt to get Tapio to take a flier. Tapio took the handbill, wadded it up, and threw it back at Neary.

Walter Schmidlin testified that he had an office employee call the Sheriff's department about 9 a.m.

About 10 a.m., Deputy Sheriff Glen Ray Pitzen arrived and spoke to Walter Schmidlin. Pitzen testified that Walter Schmidlin told him that ''he wanted the gentleman standing out by the door off his property; he was bothering the customers.''

Pitzen approached Neary and asked Neary to leave the premises. Neary replied that he did not have to do so. Pitzen then asked Neary to move to the 8-foot County right-of-way on the Dorr Street frontage of Respondent's property, next to the driveway. Then Pitzen decided that it would not be safe for Neary to handbill there, so Pitzen called for his sergeant. Sergeant Clarence Vaughn arrived a few minutes later. After conferring with Pitzen, and after conferring with the chief of the sheriff's department by radio, Vaughn told Neary that it would be unsafe for him to handbill at the driveway entrance and that Neary would have to leave the premises altogether or be arrested. Neary left.

Pitzen and Vaughn testified that it would be unsafe to handbill at the parking lot entrance because traffic was heavy, and there could be a collision if an automobile stopped so that the driver could take a handbill. Pitzen testified that there are ''a lot of accidents in that intersection,'' referring to the intersection of Dorr and McCord.

None of this testimony was disputed by Respondent.

In *Jean Country*, 291 NLRB 11 (1988), the Board concluded that, in access cases such as this, once the threshold property interest is demonstrated, the availability of reasonable alternative means of communication must be considered in conjunction with a consideration of the Section 7 rights and property rights involved.

Although Respondent owns the property involved, privacy is not a consideration because the public is invited (by the use of large signs) to use the driveway and parking lot to do business with Respondent; indeed, there is no other way for a retail customer to approach the building. Although one customer claimed that he was delayed for about 10 seconds by Neary, there is no showing of any significant obstruction to the operation of Respondent's business by Neary's

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[20] No claims for medical or other expenses are made on behalf of any other employees.

[21] The General Counsel apparently concedes that, during some of Neary's interim employment, equal or greater contributions were made on his behalf to the various IBEW benefit funds; the specification reduces, or omits, claims for such fund contributions during several of the quarters in which Neary had interim employment.

[22] The last measurement is exact, having been made by the deputy sheriff. The other measurements are my estimations based on the exhibits.

handbilling in the parking lot. Certainly, there is no showing that if Neary had been asked by the police (or anyone else) not to engage in such tactics, the requests would have been futile.[23]

In this case there was no alternative to the handbilling in the parking lot. The police forbade Neary from handbilling on the county right-of-way as it would have imperiled Neary or traffic approaching or leaving the hazardous intersection of two busy streets. Respondent suggests that the Union could have continued picketing on the right-of-way as it had done earlier. However, as noted in *John Ascuaga's Nugget*, 298 NLRB 524, 533 (1990),

> We note particularly that the Union's message of protestation of the Respondent's unlawful refusal to bargain is not easily conveyed by picket signs, or at least picket signs alone; handbilling is a reasonable, effective means of communicating this message.

In the instant case, the refusal to bargain was just one of the issues addressed by the handbills; the compliance issues were multifaceted, and the protestation could not be adequately explained in the legend of a picket sign.

The Section 7 right to protest unfair labor practices is, of course, fundamental.

In sum, the Respondent's private property right to restrict handbilling from its parking lot is not strong; the Union's Section 7 right publicly to protest the Respondent's unlawful refusal to bargain and other unlawful conduct is strong; and there was no reasonable, effective alternative means for the Union to communicate its Section 7 message to the audience for which it was properly intended—the Respondent's customers. Therefore, on balance, the degree of impairment of the Union's Section 7 right to protest publicly the Respondent's unfair labor practices if access to Respondent's parking lot were denied greatly exceeds the degree of impairment that Respondent's private property right would suffer if such access were granted.

Accordingly, I find and conclude that Respondent's September 25, 1987 interference with the Union's above-described Section 7 activity on the Respondent's premises violated Section 8(a)(1) of the Act.

2. Other alleged unfair labor practices

The complaint alleges that Respondent's August 18, 1987 tender of an invalid offer of reinstatement violated Section 8(a)(3) and (1). The General Counsel offers no citation or argument that, as well as being invalid, the offer independently violated the Act. I shall recommend dismissal of this allegation.

Finally, the complaint alleges that on September 3, 1987, Respondent discharged Neary because he joined the Union's picketing. Neary could not have been discharged from employment if, as I have found, Respondent never offered, unconditionally, to employ Neary in the first place.

Accordingly, I shall recommend dismissal of this allegation of the complaint, as well.

REMEDY

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

[Recommended Order omitted from publication.]

[23] Neither the threat by the ''gentleman'' to get his shotgun, nor the request for a length of pipe to assault Neary with, constituted wrongful interference with Respondent's property rights *by Neary.*