

**Zimmerman Plumbing and Heating Co., Inc. and Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.** Case 7-CA-41389

July 18, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN AND TRUESDALE

On June 2, 1999, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent, Zimmerman Plumbing and Heating Co., filed exceptions and a supporting brief. The General Counsel filed an answering brief, in which the Charging Party, Plumbers and Pipefitters Local 357, joined.

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, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to offer former unfair labor practice strikers Tim O'Brien and James Fogoros reinstatement to newly created positions that were substantially equivalent to their prestrike positions. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) by failing to offer O'Brien and Fogoros certain of these new positions because of their union activity. The judge found the violations, and the Respondent has excepted to those findings.

II. FACTS

The Respondent fabricates sheet metal products at its facility in Kalamazoo, Michigan, and installs these products at various construction sites in Michigan. Certain of the Respondent's employees engaged in an unfair labor practice strike against the Respondent from August 22 to September 6, 1995.<sup>1</sup> Among the unfair labor practice strikers were O'Brien, an apprentice sheet metal worker, and Fogoros, a journeyman sheet metal worker.

<sup>1</sup> Contrary to the Respondent's contention, we agree with the judge's finding that the strike was an unfair labor practice strike. The strike was motivated in part by the Respondent's discharge of employee Steve Stone, which the Board found unlawful in a prior related case. See *Zimmerman Plumbing Co.*, 325 NLRB 106, 119 (1997), *enfd.* in pertinent part 188 F.3d 508 (6th Cir. 1999) (unpublished table decision) (*Zimmerman I*). We do not rely, however, on the judge's incorrect statement that the Board in *Zimmerman I* found that the strike was an unfair labor practice strike.

O'Brien began working for the Respondent in 1991. As an apprentice sheet metal worker, O'Brien spent approximately 70 to 80 percent of his time fabricating sheet metal in the shop at the Respondent's Kalamazoo facility. In early 1995 the Respondent promoted O'Brien to a working foreman position in the shop. In this position, O'Brien continued fabricating sheet metal, but also operated the "Vicon" machine<sup>2</sup> and other tools, including brakes and drills. In addition, O'Brien drove a truck on four or five occasions in 1995 to deliver supplies to a particular jobsite.<sup>3</sup> Immediately prior to the strike, O'Brien was earning \$11 per hour and receiving health benefits partially funded by the Respondent. O'Brien also was eligible to participate in the Respondent's 401(k) retirement plan.

The Respondent hired Fogoros in 1986. As a journeyman sheet metal worker, Fogoros worked primarily in the field. He performed some sheet metal work himself and oversaw a crew of two to five workers as they installed sheet metal and heating, ventilation, and air-conditioning (HVAC) equipment. Fogoros rarely drove any of the Respondent's trucks. He earned between \$14 and \$20 per hour and apparently was also eligible to participate in the Respondent's health and retirement plans.

As stated, the August 22, 1995 unfair labor practice strike ended on September 6, 1995. On that day the strikers, including O'Brien and Fogoros, made an unconditional offer to return to work. The Respondent informed O'Brien and Fogoros that it had no available work for them, but that the Respondent would place them on a preferential hiring list and recall them when work was available in their respective job classifications.<sup>4</sup> O'Brien followed up with the Respondent in January 1997, but was told that no work was available for him.

In the meantime, O'Brien and Fogoros each worked for other employers. Between September 6, 1995, and February 1997, O'Brien worked for several sheet metal

<sup>2</sup> The vicon machine is a computer-guided tool used for cutting fittings for sheet metal ductwork.

<sup>3</sup> On May 15, 1995, the Respondent transferred O'Brien from the sheet metal shop to the field. On September 27, 1995, while O'Brien was on layoff after the strike, the Respondent removed him from a sheet metal apprentice program and reclassified him as a "helper." The Board in *Zimmerman I* found that all of these actions were unlawful. See 325 NLRB at 112-114, 120, 122. Consequently, O'Brien's work in the sheet metal shop is the appropriate reference point for our discussion of the issues presented in this case. Cf. *Rose Printing Co.*, 304 NLRB 1076, 1076 fn. 3 (1991) (in analyzing question of whether strikers obtained substantially equivalent employment elsewhere, the Board will not consider unlawfully diminished wage and benefit levels in the strikers' prestrike classifications).

<sup>4</sup> The Respondent unlawfully discharged several of the other strikers, and one striker resigned his employment with the Respondent. See *Zimmerman I*, 325 NLRB at 121-122.

contractors and completed his apprenticeship. In February 1997 O'Brien obtained a job as a journeyman sheet metal worker with W. Soule, Inc. Fogoros also worked for several contractors following his layoff. In June 1997 he began working for Diversified Mechanical, Inc. as a journeyman sheet metal worker.

As of the February 9–10, 1999, hearing in this case, the Respondent had not recalled either O'Brien or Fogoros. The Respondent claimed that, between September 1995 and the hearing, it had no openings for apprentice or journeymen sheet metal workers. However, the Respondent acknowledged that it hired new employees during that time period. In particular, the Respondent hired several new employees in 1998, including Ed Weese, Bill MacPherson, Matthew Bielski, Austin Wielenga, Benjamin Emery, and Tammy Ickes.

The Respondent hired Ed Weese on January 20, 1998, as a "material expediter," a new classification, at a wage rate of \$8 per hour.<sup>5</sup> Weese mostly performed truck driving duties until he resigned in early February 1998. On February 16 the Respondent hired Bill MacPherson as a material expediter at a wage rate of \$12 per hour. MacPherson spends most of his time in the Respondent's sheet metal shop, where he performs sheet metal work,<sup>6</sup> coordinates deliveries to various jobsites, keeps track of the Respondent's power tools, and sends the tools out for repair or repairs them himself on occasion. He also occasionally drives a truck with supplies to a jobsite.

In April 1998 the Respondent hired Matthew Bielski as a co-op student. He resigned in June. The Respondent also hired Austin Wielenga, a student, to work dur-

ing the summer of 1998 as a general laborer. Wielenga left the Respondent in August 1998 to return to school. Although the Respondent classified Wielenga as a sheet metal shop helper, he actually performed only general cleanup duties in his limited time with the Respondent. On November 30 the Respondent hired Benjamin Emery as a material expediter at a wage rate of \$8.25 per hour. Emery spends most of his time driving a truck and also does general labor work.

Finally, the Respondent hired Tammy Ickes on December 2, 1998, as a "Vicon machine operator," also a new classification, at an hourly wage of \$10.25. There is no evidence that Ickes had any prior experience operating a vicon machine or even performing sheet metal work. Indeed, Ickes's job application shows that her experience was in providing customer service and performing clerical duties.

### III. THE JUDGE'S DECISION

The judge found that certain of the material expediter positions that became available in 1998 were substantially equivalent to O'Brien's and Fogoros' prestrike positions. The judge reasoned that, by assigning O'Brien and Fogoros truck driving duties in the past, the Respondent unilaterally expanded their respective job classifications to include such activities. Thus, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall O'Brien to the material expediter positions filled by MacPherson and Weese. Similarly, the judge found that the Respondent unlawfully failed to recall Fogoros to the positions occupied by Bielski, Wielenga, and Emery. The judge also found that Ickes' vicon machine operator position was substantially equivalent to O'Brien's prestrike job. As a result, the judge concluded that the Respondent further violated the Act by failing to offer O'Brien reinstatement to this position as well. The Respondent has excepted to these findings.

The judge rejected the Respondent's affirmative defense that it had no duty to recall O'Brien and Fogoros in 1998 because, allegedly, they previously had obtained "regular and substantially equivalent employment" elsewhere within the meaning of Section 2(3) of the Act.<sup>7</sup> The judge concluded that this defense is unavailable to cut off the reinstatement rights of former unfair labor practice strikers, as opposed to economic strikers. The

<sup>5</sup> According to the Respondent, employees in the "material expediter" classification are responsible for transferring materials from the Respondent's shop to and between construction sites. The term appears to be a loose synonym for "truckdriver." In any event, we agree with the General Counsel's contention that the "material expediter" title does not accurately describe an employee's actual job functions. Therefore, we refer to this classification only for identification purposes.

<sup>6</sup> MacPherson's time reports show the Respondent changed his classification to "apprentice" at some point. The Respondent's office clerk, Teresa Hazzard, claimed the reports were incorrect. She conceded, though, that she is not in a position to know why the reports show MacPherson as an apprentice. Richard Mahoney, the Respondent's vice president and operations manager, testified that MacPherson did not do sheet metal work, but failed to address either MacPherson's reclassification or why he billed 9 hours to the sheet metal shop on a recent time report. Mahoney supervises MacPherson and approves his time reports. In these circumstances, we infer that, had Mahoney testified about the reports, his testimony would have been adverse to the Respondent. See *USF Dugan, Inc.*, 332 NLRB No. 36, slip op. at 5 (2000); see also *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988) (unpublished table decision). Consequently, we find that the Respondent treats MacPherson as an apprentice sheet metal worker and assigns him sheet metal work.

<sup>7</sup> Sec. 2(3) of the Act provides, in pertinent part:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

Respondent has also excepted to this aspect of the judge's decision.

The judge alternatively found under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent unlawfully failed to offer O'Brien and Fogoros reinstatement in 1998 because of their union activity. The Respondent has excepted to this finding as well.

#### IV. ANALYSIS

It is settled that both economic strikers and unfair labor practice strikers retain their status as "employees" under Section 2(3) of the Act. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). As a result, an employer violates Section 8(a)(3) and (1) of the Act by failing to immediately reinstate strikers upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Marchese Metal Industries*, 313 NLRB 1022, 1032 (1994); *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).<sup>8</sup>

The Board has recognized that one legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions. See, e.g., *Randall, Burkart/Randall*, 257 NLRB 1, 6–7 (1981), enfd. in pertinent part 687 F.2d 1240 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983) (employer lawfully delayed reinstatement of strikers where employer proved that prestrike inventory buildup required by its customers temporarily eliminated need for the strikers). However, a striker's right to reinstatement does not expire simply because no suitable work is available when he unconditionally offers to return to work. His right to reinstatement continues until his position or a substantially equivalent position becomes available. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. at 380–381; *Consolidated Dress Carriers, Inc.*, 259 NLRB 627, 635–636 (1981), enfd. in part 693 F.2d 277 (2d Cir. 1982).<sup>9</sup>

A former striker awaiting reinstatement may accept interim employment elsewhere. Indeed, the Board has

recognized that the right to seek interim employment is a vital adjunct to the exercise of the right to strike and is itself protected activity. See *Christie Electric Corp.*, 284 NLRB 740, 759 (1987). Accepting interim employment normally will have no effect on a former striker's reinstatement rights. One exception is that if a former striker accepts other "regular and substantially equivalent employment," within the meaning of Section 2(3), then he forgoes his reinstatement rights with the employer. See *Marchese Metal Industries*, 313 NLRB at 1028–1031; *Little Rock Airmotive, Inc.*, 182 NLRB 666, 667 (1970), enfd. in pertinent part 455 F.2d 163 (8th Cir. 1972).

Determining whether a former striker's interim employment constitutes "regular and substantially equivalent employment" cannot be answered by a "mechanistic application of the literal language of the statute." *Little Rock Airmotive*, 182 NLRB at 666–667. Thus, while the Board compares the terms and conditions of the striker's interim job to his prestrike job, the Board ultimately gives controlling weight to whether the "striker intended to abandon his employment with the employer by accepting interim employment with another employer." *Marchese Metal*, 313 NLRB at 1030. See also *Rose Printing Co.*, 304 NLRB at 1076 fn. 3. Accord: *Alaska Pulp Corp.*, 326 NLRB 522, 524 (1998), enfd. in part and remanded in part sub nom. *Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000). The Board presumes that the striker did not intend to forfeit his reinstatement rights; the burden is on the employer to prove otherwise. See *Marchese Metal*, 313 NLRB at fn. 1 and 1031.

Finally, contrary to the judge's conclusion, this abandonment defense is applicable to unfair labor practice strikers as well as economic strikers. See *Marchese Metal*, supra (applying exception to unfair labor practice strikers). See also *Harowe Servo Controls, Inc.*, 250 NLRB 958, 963–964 (1980).<sup>10</sup>

We shall now apply the foregoing principles to former unfair labor practice strikers O'Brien and Fogoros.

##### A. Tim O'Brien

We find, in agreement with the judge, that the material expeditor position filled by Bill MacPherson on February 16 was substantially equivalent to O'Brien's prestrike position. As described above, MacPherson spends most of his time in the Respondent's sheet metal shop, though he occasionally drives a truck to deliver supplies to jobsites. MacPherson performs sheet metal fabrication work, coordinates deliveries to jobsites, keeps track of

<sup>8</sup> The absence of discriminatory intent or illegal motivation is not a defense. See *Fleetwood Trailer*, 389 U.S. at 378.

<sup>9</sup> An employer may, but is not required to, offer former strikers non-equivalent positions the strikers may be qualified to perform. A striker's acceptance of such a position does not extinguish his statutory right to subsequent reinstatement to a vacant prestrike position or a substantially equivalent one. See *Rose Printing Co.*, 304 NLRB at 1078.

<sup>10</sup> This exception does not apply, however, to unlawfully discharged strikers. See *Marlene Industries Corp.*, 255 NLRB 1446, 1447 (1981), enf. denied on other grounds 712 F.2d 1011 (6th Cir. 1983). See also *Alaska Pulp Corp.*, 326 NLRB at 533 (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193–194 (1941)).

the Respondent's power tools, and sees to their repair. MacPherson started at \$12 per hour.

Prior to the strike, O'Brien spent 70–80 percent of his time in the shop, fabricating sheet metal, regularly operating the vicon machine, coordinating the work of several other employees, and working with the Respondent's tools. Moreover, O'Brien drove the Respondent's truck to deliver materials to a particular jobsite on four or five occasions in 1995.<sup>11</sup> He earned \$11 per hour at the time. On these facts, we find that the material expediter position filled by MacPherson is substantially equivalent to O'Brien's prestrike position.<sup>12</sup>

It is true that the newly created position filled by MacPherson was somewhat broader in scope than O'Brien's prestrike job. In addition to fabricating sheet metal and occasionally making deliveries, MacPherson coordinates deliveries, keeps track of tools, and sees that the tools are repaired. However, in determining whether positions are "substantially equivalent," the Board takes into account "changes which the Respondent ha[s] made in its organization of the work," and considers whether the former striker would logically have been moved to the position in question. *Towne Ford, Inc.*, 327 NLRB 193, 194 (1998).

Here, following the strike, the Respondent curtailed its use of apprentices in favor of using "material expediters" to perform a combination of sheet metal work and other tasks to enhance the productivity of the remaining skilled employees.<sup>13</sup> Given O'Brien's work in the shop, which included coordinating other employees' work and working with the Respondent's tools, we find that the Respondent logically would have moved O'Brien to the material expediter position filled by MacPherson.

We further find, in agreement with the judge, that Tammy Ickes' vicon machine operator position in the sheet metal shop was substantially equivalent to O'Brien's prestrike position. As discussed above, O'Brien too spent most of his working time in the sheet metal shop, where he regularly operated the same vicon machine, at a comparable wage rate. Therefore, we agree with the judge that the vicon operator position as-

signed to Ickes was substantially equivalent to O'Brien's prestrike apprentice position.<sup>14</sup>

Although MacPherson's material expediter position and Ickes' vicon machine operator position were substantially equivalent to O'Brien's prestrike position, this does not end our inquiry. The Respondent contends that O'Brien accepted "regular and substantially equivalent" employment as a journeyman sheet metal worker with W. Soule in February 1997, thereby relieving the Respondent of its duty to offer him reinstatement. As indicated above, the judge erroneously concluded that this line of defense was unavailable to the Respondent because O'Brien was an unfair labor practice striker. As a result, the judge precluded the Respondent from cross-examining O'Brien about his new position and his affinity for the work. This line of questioning might have led to evidence relevant to whether O'Brien unequivocally intended to sever his employment relationship with the Respondent when he accepted employment with W. Soule. Consequently, it is necessary to remand this aspect of the case to the judge for the purposes of reopening the record and making a finding on this question.

#### B. Fogoros

Unlike the judge, we find that the positions filled by Bielski, Wielenga, and Emery in 1998 were not substantially equivalent to Fogoros' prestrike job as a journeyman sheet metal worker. Fogoros worked primarily in the field. He did some installation work himself, and oversaw other workers as they installed HVAC equipment. There is no evidence that Bielski, Wielenga, or Emery had similar responsibilities. Moreover, as a journeyman, Fogoros' hourly wage was significantly higher than that earned by Bielski as a co-op student, Wielenga as a summer laborer, or Emery as a truckdriver.<sup>15</sup> We find that the Respondent was not required to offer Fogoros any of these positions. See *Rose Printing Co.*, 304 NLRB at 1078. Therefore, the complaint is dismissed insofar as it alleges that the Respondent unlawfully failed to recall Fogoros to substantially equivalent positions that became available in 1998.

<sup>11</sup> Given that MacPherson only occasionally drives a truck, we find it unnecessary to rely on the judge's finding that the Respondent "regularly" assigned O'Brien truckdriving duties.

<sup>12</sup> Contrary to the judge, we do not find that the material expediter position filled by Ed Weese on January 20 was substantially equivalent to O'Brien's prestrike job. The limited record evidence concerning Weese indicates that he spent the vast majority of his time outside the shop making deliveries. The General Counsel has not excepted to the judge's failure to make a finding as to whether the material expediter positions filled by Austin Wielenga and Benjamin Emery were substantially equivalent to O'Brien's prestrike position.

<sup>13</sup> There is no complaint allegation that this change was unlawful.

<sup>14</sup> The new Vicon machine operator position did not mirror O'Brien's prestrike job. We find, however, that the Respondent logically would have assigned O'Brien to this position, assuming he had not previously been reinstated to a material expediter position. See *Towne Ford, Inc.*, 327 NLRB at 194.

<sup>15</sup> The judge found that the Respondent "regularly" assigned Fogoros truck driving duties. However, while Fogoros testified that he must have driven a truck at some point during his 10 years with the Respondent, he could not recall any recent or specific examples. In any event, Fogoros admitted it "wasn't very often."

### C. *The Wright Line Analysis*

The judge properly recognized that, even if the Respondent was not *required* to offer O'Brien or Fogoros any of the jobs that became available in 1998,<sup>16</sup> the Respondent was not privileged to *exclude* them from consideration for these positions because of their union affiliation. See *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1148 (1994), supplemented by 316 NLRB 629 (1995), *enfd.* 72 F.3d 780 (10th Cir. 1995). As indicated above, the judge, citing *Wright Line*, *supra*, found that the Respondent unlawfully failed to offer these positions to O'Brien and Fogoros because of their support for the Charging Party.<sup>17</sup> The judge, however, did not consider whether O'Brien or Fogoros had previously abandoned any interest in working for the Respondent and, if so, whether the Respondent was aware of the abandonment when it did not recall them in 1998. We find that these issues are relevant to the *Wright Line* analysis.<sup>18</sup> We therefore find that it is also necessary to remand this part of the case to the judge to resolve these questions and to set forth a more complete *Wright Line* analysis in light of his additional findings.

### ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Bruce D. Rosenstein for appropriate action consistent with this Decision and Order.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate, on remand. Copies of the 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.

*Amy J. Roemer, Esq.*, for the General Counsel.

*Timothy J. Ryan, Esq.* and *Elizabeth Welch Lykins, Esq.*, of Grand Rapids, Michigan, for the Respondent-Employer.

*Tinamarie Pappas, Esq.*, of Ann Arbor, Michigan, for the Charging Party.

<sup>16</sup> See fn. 9, *supra*.

<sup>17</sup> The Respondent admitted that O'Brien was qualified to operate the Vicon machine and that both O'Brien and Fogoros could have performed truckdriving duties.

<sup>18</sup> Under *Wright Line*, the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

### DECISION

#### STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on February 9 and 10, 1999, in Grand Rapids, Michigan, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on November 30, 1998.<sup>1</sup> The complaint, based on an original charge filed on September 25 by Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Charging Party or Union) alleges that Zimmerman Plumbing and Heating Co., Inc. (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

#### Issues

The complaint alleges that the Respondent refused to reinstate two employees to their former positions of employment because they engaged in an unfair labor practice strike and engaged in a number of independent violations of Section 8(a)(1) of the Act by interrogating employees about their union activities. Additionally, the complaint alleges that the Respondent rescinded an offer of employment to an employee because of his union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is engaged in the fabrication and installation of sheet metal, piping, and related materials at various construction sites in Michigan. It annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Michigan. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Charging Party Union and Local 7, Sheet Metal Workers' International Association AFL-CIO (Local 7) are labor organizations within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

The Respondent was formed in 1976 by Dan Zimmerman and Richard Mahoney and began business as a contractor performing commercial and residential plumbing and heating work and later added the sheet metal business. In 1978 the Employer was reorganized and Bruce Link joined the business as a part owner. The Respondent performs construction work at various locations throughout Michigan and employs about 40 workers.

<sup>1</sup> All dates are in 1998 unless otherwise indicated.

In April 1995 the Charging Party and Local 7 decided to combine their efforts to organize the Respondent. They formed a joint organizing committee of Respondent's employees and on May 5, 1995, the Charging Party faxed a letter to the Respondent naming Jeff Yeary, Todd O'Brien, and Andy Lytle as employees who were on the organizing committee. On May 15, 1995, Local 7 faxed Respondent a letter naming James Fogoros, Joseph Houseman, Tim O'Brien, and Steven Stone as the sheet metal employees on the committee. Thereafter these seven employees began to openly demonstrate their support for the organizing effort by wearing union stickers on their hardhats and by picketing jobsites during their breaks and lunch. They also engaged in two strikes to protest the Respondent's unfair labor practices. The first strike commenced on June 28, 1995, and ended when the employees made an unconditional offer to return to work on July 28, 1995. The second unfair labor practice strike commenced on August 22, 1995,<sup>2</sup> to protest Steve Stone's termination and ended on September 6, 1995,<sup>3</sup> when the employees made an unconditional offer to return to work. The Board addressed a number of issues including the unfair labor practice strikes, three discharges, and numerous incidents of Section 8(a)(1) conduct in its November 8, 1997 decision, found at 325 NLRB 106. The Respondent filed an appeal of that decision and it is presently pending in the United States Court of Appeals for the Sixth Circuit.

The Board's decision is specifically relevant to the subject case as it found both strikes to be unfair labor practice strikes,<sup>4</sup> and two of the employees named in the complaint were found to have been the subject of unfair labor practices visited on them by the Respondent. In this regard, Respondent was ordered to rescind the no solicitation, no sticker-rule on hardhats and to rescind the attendance related disciplinary warning letters to Fogoros and O'Brien. It was also ordered to reinstate O'Brien to the apprenticeship program with no loss of credit and to remove any reference to his September 1995 removal from the program.

### B. The 8(a)(1) and (3) Violations

#### 1. Allegations concerning James Fogoros

The General Counsel alleges in paragraph 9 of the complaint that since about January 20, Respondent has failed to reinstate Fogoros to his former position of employment.

<sup>2</sup> The strike notice stated in pertinent part: Please be advised because of Zimmerman's continuous unfair labor practices, the following employees, Timothy O'Brien, Andy Lytle, Jeff Yeary, James Fogoros, Joe Houseman, and Steve Stone, as of 6 a.m. August 22, 1995, are on strike (GC Exh. 5).

<sup>3</sup> The unconditional offer to return to work stated in pertinent part: Please be advised that the following employees have ended their strike and are making a unconditional offer to return to work, Tim O'Brien, Todd O'Brien, Andy Lytle, Jeff Yeary, James Fogoros, Joe Houseman, and Steve Stone. The date of return to work will be Wednesday, September 6, 1995 (GC Exh. 6).

<sup>4</sup> I also note that the Respondent admitted par. 8 of the complaint which as amended now states: About September 6, 1995, by letter, the employees named above in par. 7(b) who had engaged in the unfair labor practice strike described above in pars. 7 (b) and (c), made an unconditional offer to return to their former positions of employment.

Fogoros commenced employment with Respondent in June 1986, and had approximately 9 years of experience before he made an unconditional offer to return to work on September 6, 1995. During his tenure at Respondent, Fogoros achieved journeyman sheet metal status and for a period of time was promoted to the position of job foreman. He also drove the Respondent's truck on occasions and made deliveries of sheet metal materials to the Respondent's jobsites. By letter dated September 6, 1995, Respondent acknowledged Fogoros offer to return to work but noted that because there was no work currently available, he was placed on a preferential hiring list and would be called when work became available in his classification (GC Exh. 8). Between September 6, 1995, and May 1997, Fogoros worked sporadically on a number of construction jobs before becoming permanently employed in June 1997, at Diversified Mechanical as a journeyman sheet metal worker.

The record confirms and Respondent admits that since January 20 it hired seven employees.<sup>5</sup> In this regard, Ed Weese was hired on January 20 as a truckdriver, Bill MacPherson was hired on February 16 as a truckdriver but is now classified as a material expeditor,<sup>6</sup> Matthew Bielski was hired as a co-op student in April 1998, Austin Wielenga was hired as a summer student cleanup worker on June 1, Russel Keller was hired on June 13 as a pipefitter, Benjamin Emery was hired on November 30 as a truckdriver, and Tammy Ickes was hired as a vicon machine operator on December 2. MacPherson, Keller, Emery, and Ickes are still employees of Respondent while Weese, Bielski, and Wielenga resigned in February, June, and August 1998, respectively.

As it concerns Fogoros, the Respondent stipulated that he was qualified to perform the duties of a truckdriver but that he was not hired on January 20 or February 16, because he had acquired regular and substantially equivalent employment elsewhere that pays significantly more than what he was earning. Additionally, Respondent opines that it had no obligation to reinstate Fogoros because it did not hire any employees during the relevant time period in the sheet metal classification. The Respondent asserts that the Board's decision in *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), supports such a defense. While I would tend to agree with Respondent's position, if Fogoros was an economic striker,<sup>7</sup> the Board specifically

<sup>5</sup> All of the seven employees were hired at Respondent despite a January 1998 sign on the door, which is still posted, that said no applications are being taken.

<sup>6</sup> All truckdrivers are entered into the Respondent's computer payroll system as material expeditors. Employees, other than truckdrivers, are classified in Respondent's job class listings as either pipefitters or sheet metal workers (GC Exh. 11-12). Sheet metal workers are further broken down into positions of shop helper, apprentice, and journeyman. The vicon operator is also carried in a sheet metal job class listing.

<sup>7</sup> The *Laidlaw* Board held that *economic strikers* who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

found and I independently find that Fogoros at all times since August 22, 1995, was an unfair labor practice striker.<sup>8</sup> As an unfair labor practice striker, Fogoros was entitled to immediate reinstatement at the conclusion of the strike, even if the employer must discharge so-called permanent replacements, unless it establishes a legitimate and substantial business justification for refusing to do so. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Hotel Roanoke*, 293 NLRB 182, 185 (1989).

The burden of proving legitimate and substantial business justification falls on the employer. Moreover, the right to reinstatement does not expire when an unconditional offer is made, although a job may have been eliminated or been unavailable for a legitimate bona fide reason. The right to reinstatement continues when the job becomes available. *Consolidated Dress Carriers*, 259 NLRB 627, 636 (1981), *enfd.* in pertinent part 693 F.2d 277 (2d Cir. 1982).

The touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially, equivalent to the prestrike job. While the issue of whether a striker is qualified to perform the job may shed light on whether the job is substantially equivalent to the prestrike job, mere qualification to perform the job will not suffice to establish substantial equivalency. *Rose Printing Co.*, 304 NLRB 1076, 1077 (1991).

In applying these principles to the instant case, since I have concluded that Fogoros is and continues to be an unfair labor practice striker, the issue becomes whether Respondent has met its burden of establishing legitimate and substantial business justification for its refusal to reinstate him.

Although the Respondent admits that Fogoros previously performed and is capable of performing truckdriver duties, it defends its refusal to reinstate him on the basis that it did not hire any employees during the relevant time period in the sheet metal classification. I find, however, that prior to the strike a portion of the work performed by Fogoros involved truckdriver duties. Thus, since Respondent regularly assigned such work to Fogoros before the strike, it has in effect unilaterally expanded the job classification of his sheet metal position to include truckdriver duties. Therefore, when the Respondent hired Weese and McPherson as truckdrivers, it had an obligation to offer those positions to Fogoros.

Accordingly, for the above reasons, I conclude that Respondent has not met its burden of establishing a legitimate and substantial business justification for failing to reinstate Fogoros. I further conclude, based on the Board's finding that Respondent committed unfair labor practices against Fogoros, that he was also not hired because of his support for the Union.<sup>9</sup> In this regard, I note that the Respondent hired seven employ-

ees not affiliated with the Union after January 20, despite the fact that a sign was posted that the Respondent was not taking employment applications.

For all of the above reasons, I find that Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act when it refused to reinstate Fogoros to a truckdriver position in January or February of 1998. I also find that Fogoros was qualified to perform the duties of the positions Bielski and Wielenga were hired for that are classified as sheet metal positions in Respondent's job class listings, and the truckdriver position that Emery was hired for in December 1998.

## 2. Allegations concerning Tim O'Brien

The General Counsel alleges in paragraph 9 of the complaint that since about January 20, Respondent has failed to reinstate O'Brien to his former position of employment.

O'Brien commenced employment with Respondent in August 1991 as a sheet metal helper, became a sheet metal apprentice in April 1992 and ultimately was promoted to the position of job foreman after receiving a favorable performance appraisal.

While employed at Respondent, he operated the vicon machine and also occasionally drove a truck when making deliveries of sheet metal materials to various jobsites. By letter dated September 6, 1995, Respondent acknowledged O'Brien's offer to return to work but noted that because there was no work currently available, he was placed on a preferential hiring list and would be called when work became available in his classification (GC Exh. 7). By letter dated September 27, 1995, Respondent changed O'Brien's status from apprentice to helper (GC Exh. 16). Between September 6, 1995, and January 1997, O'Brien worked sporadically on a number of construction jobs before becoming permanently employed in February 1997 as a sheet metal worker at W. Soule.

As it concerns O'Brien, the Respondent stipulated that he was qualified to perform the duties of a truckdriver and vicon machine operator but that he was not hired on January 20, February 16, or December 2, because he had acquired regular and substantially equivalent employment elsewhere that pays significantly more than what he was earning. Additionally, Respondent opines that it had no obligation to reinstate O'Brien because it did not hire any employees during the relevant time period in the sheet metal classification. The Respondent asserts that the Board's decision in *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), supports such a defense. While I would tend to agree with Respondent's position, if O'Brien was an economic striker, the Board specifically found and I independently find that O'Brien at all times since August 22, 1995, was an unfair labor practice striker.<sup>10</sup> As an unfair labor practice striker, O'Brien was entitled to immediate reinstatement at the conclusion of the strike, even if the employer must discharge so-called permanent replacements, unless it establishes a legitimate and

<sup>8</sup> I credit the testimony of Fogoros that on August 22, 1995, he went on strike to protest the discharge of coworker Steve Stone that the Board ultimately found to be a violation of the Act. The picket sign stated, "Zimmerman commits ULP and in violation of federal law."

<sup>9</sup> In *Wright Line*, 251 NLRB 1083 (1990), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the Board announced a causation test in all cases alleging violations of Sec. 8(a)(3) or violations of Sec. 8(a)(1) turning on employer motivation. I find that the Respondent would have reinstated Fogoros on September 6, 1995, but for his support for the Union.

<sup>10</sup> I credit the testimony of O'Brien that on August 22, 1995, he went on strike to protest the discharge of coworker Steve Stone that the Board ultimately found to be a violation of the Act. The picket sign stated, "Zimmerman commits ULP and in violation of federal law."

substantial business justification for refusing to do so. *NLRB v. Mackay Radio & Telegraph Co.*, supra; *Hotel Roanoke*, supra.

The burden of proving legitimate and substantial business justification falls on the employer. Moreover, the right to reinstatement does not expire when an unconditional offer is made, although a job may have been eliminated or been unavailable for a legitimate bona fide reason. The right to reinstatement continues when the job becomes available. *Consolidated Dress Carriers*, 259 NLRB 627, 636 (1981), enfd. in pertinent part 693 F.2d 277 (2d Cir. 1982).

The touchstone for determining reinstatement rights is ascertaining whether the job is the same as, or substantially, equivalent to the prestrike job. While the issue of whether a striker is qualified to perform the job may shed light on whether the job is substantially equivalent to the prestrike job, mere qualification to perform the job will not suffice to establish substantial equivalency. *Rose Printing Co.*, 304 NLRB 1076, 1077 (1991).

In applying these principles to the instant case, since I have concluded that O'Brien is and continues to be an unfair labor practice striker, the issue becomes whether Respondent has met its burden of establishing legitimate and substantial business justification for its refusal to reinstate him.

Although the Respondent admits that O'Brien previously performed and is capable of performing truckdriver and vicon machine operator duties, it defends its refusal to reinstate him on the basis that it did not hire any employees during the relevant time period in the sheet metal classification. I find, however, that prior to the strike a portion of the work performed by O'Brien involved truckdriver and vicon machine duties. Thus, since Respondent regularly assigned such work to O'Brien before the strike, it has in effect unilaterally expanded the job classification of his sheet metal position to include truckdriver and vicon machine operator duties. Therefore, when the Respondent hired Weese and McPherson as truckdrivers and Ickes as a vicon machine operator, it had an obligation to offer those positions to O'Brien.

Accordingly, for the above reasons, I conclude that Respondent has not met its burden of establishing a legitimate and substantial business justification for failing to reinstate O'Brien. I further conclude, based on the Board's finding that Respondent committed unfair labor practices against O'Brien, that he was also not hired because of his support for the Union.<sup>11</sup> In this regard, I note that the Respondent hired seven employees not affiliated with the Union after January 20, despite the fact that a sign was posted that the Respondent was not taking employment applications.

For all of the above reasons, I find that Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act when it refused to reinstate O'Brien to a truckdriver position in January or February of 1998 and the vicon machine operator position in December 1998. I also find that O'Brien was qualified to per-

<sup>11</sup> In *Wright Line*, 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced a causation test in all cases alleging violations of Sec. 8(a)(3) or violations of Sec. 8(a)(1) turning on employer motivation. I find that the Respondent would have reinstated O'Brien on September 6, 1995, but for his support for the Union.

form the duties of the positions Bielski and Wielenga were hired for that are classified as sheet metal positions in Respondent's job class listings,<sup>12</sup> and the truckdriver position that Emery was hired for in December 1998.<sup>13</sup>

### 3. Allegations concerning Richard Grosser

The General Counsel alleges in paragraph 10 of the complaint that about June 4, Respondent's secretary/treasurer, Bruce Link, stated to Grosser that the Employer has a policy against hiring union employees and interrogated him concerning his union membership, sympathies, and activities. Also, it is alleged that about June 15 Respondent's vice president, Richard Mahoney, interrogated Grosser concerning his union membership, sympathies, and activities. Additionally, in paragraph 11 of the complaint, the General Counsel alleges that about June 15 Mahoney rescinded an offer of employment to Grosser because he joined and assisted Local 7.

Grosser testified that because he heard that work was available, he applied for a sheet metal position at Respondent on June 2. Additionally, Grosser sought work because he was unable to pass the sheet metal apprenticeship examination at his previous employer (W. Soule) and he was scheduled for layoff on August 14. Grosser asserted that he went to Respondent's facility on June 2, obtained an application from Teresa Hazzard (secretary) and filled it out in the foyer area. He was able to briefly speak with Mahoney who took his resume and told Grosser to return on June 4. Grosser returned to Respondent's facility on June 4, and met with Link in Mahoney's absence. According to Grosser, Link looked over the application and resume and "asked several questions about why Grosser was leaving W. Soule." Additionally, Grosser testified that Link, "asked him why he no longer wanted to be a member of the union, and said that Respondent had a policy of not having union employees, and that the Employer did not like Local 7 in general." Link told Grosser that his qualifications were good and he would check with Mahoney about the possibility of a job. Link requested that Grosser return to Respondent's facility on June 8.

Grosser returned to the facility on June 8, and testified that he met with Mahoney in his office that was located across the hall from Link's. According to Grosser, "Mahoney asked him why he was leaving the Union" and Grosser replied, "that he was sick of the Union and he did not pass the apprenticeship examination." Mahoney then asked Grosser, "whether he has done any organizing for Local 7," and Grosser replied, "no." After their conversation, Grosser testified that Mahoney offered him a position with the Respondent and Grosser asked to start on June 22, as he needed to give 2 weeks notice to W. Soule. Mahoney told Grosser that "he could fill out the necessary paperwork on June 22, when he started work."

On June 13, while at the Point gasoline station, Grosser testified that he met an individual by the name of Keller who was driving one of Respondent's red trucks. Grosser introduced

<sup>12</sup> By letter dated September 27, 1995, the Respondent changed O'Brien's status to that of a sheet metal helper (GC Exh. 16).

<sup>13</sup> In light of my finding regarding Fogoros and O'Brien, it is not necessary to reconsider my ruling involving the subpoenaed documents as requested by the General Counsel at the hearing and in brief.

himself and informed Keller that he would be starting shortly as an employee. Keller told Grosser that he recently started work at Respondent as an apprentice pipefitter and he liked it so far.

On June 15 Grosser testified that he called Mahoney to confirm that he would be starting work in a week but spoke with Hazzard in his absence. According to Grosser, Mahoney returned his telephone call on June 15, and left a message on his voice mail that he would not be hired. Grosser asserted that he tried to reach Mahoney to discuss the message but was referred by Hazzard to Mahoney's voice mail and he left a message. Grosser never received a return telephone call from Mahoney and he did not start work on June 22.

Mahoney testified that his office is in another building and is not across from Link's office or around the corner from Hazzard's desk, and he only has one desk in his office (R. Exh. 2). Additionally, he was certain that he never met Grosser before the subject trial and unquestionably did not have any meetings with him. He did recall talking to Grosser on the telephone sometime in June 1998. In this regard, Link had left him a message that Grosser would be calling him and he took Grosser's call after Hazzard put it through. The telephone call lasted about 2 minutes and Grosser was told that no work was available. Mahoney was positive that he never received any messages from Grosser on his voice mail, as the Employer does not have such a system at its facility. Mahoney also testified that the Respondent has one red truck that has been retired to a jobsite for approximately 1 year since it is not road worthy.

Link also testified that he never had a meeting with Grosser and first saw him at the trial. He does remember having a telephone call with Grosser during the summer of 1998, where Grosser told him he had just completed a 4-year apprenticeship program in pipefitting but he now wanted to get into sheet metal work. Link thought Grosser was a kook for wanting to spend additional time in a different apprenticeship program. Link also testified that while his office is adjacent to the receptionist area, he only has one desk in his office that faces the wall and the Respondent does not have a voice mail system.

Hazzard, who I found to be sincere, forthright, and a very credible witness, is responsible for the majority of clerical tasks at Respondent and takes 99.9 percent of the telephone calls made to the office. Hazzard's desk is located in the reception area and she is in a position to meet all visitors coming into the office. She testified that she never met Grosser before the trial and never gave him an employment application that he filled out in the office. Likewise, as asserted by Mahoney and Link, Hazzard confirmed that the Respondent does not have a voice mail system.

Keller testified that he was hired at Respondent on June 13, as a pipefitter. He asserted that he has never been to the Point gasoline station and while he has driven Respondent's red truck on one occasion, it was on the jobsite. He further testified that he never met Richard Grosser.

Based on the above testimony, I find that Grosser's credibility is highly suspect and his testimony is cast in doubt. Hazzard, credibly testified, as did Mahoney and Link, that they never met Grosser before the trial. This is directly contrary to Grosser's testimony that he personally met all three individuals at Respondent's facility in June 1998. Likewise, Hazzard testi-

fied, as did Mahoney and Link, that the Respondent has never had a voice mail system. Grosser testified that he specifically left a message on Respondent's voice mail system for Mahoney. Additionally, both Mahoney and Link contradicted Grosser's testimony about their respective office locations and descriptions of their office furniture and layout. Respondent's pictures refute Grosser's testimony to this effect (R. Exhs. 2-3). Grosser also testified that he met an individual named Keller at the Point gasoline station on June 13. Keller, whose first name is Russel, directly contradicted Grosser's testimony regarding their alleged meeting. Additionally, both Keller and Mahoney credibly testified that Respondent's red truck is not road worthy and could not have been driven off the jobsite in June 1998. I am also suspect of Grosser's testimony concerning the alleged interrogation of his union activities by Mahoney and Link. While both of these individuals testified that they never met Grosser before the trial, it is virtually inconceivable to me that they would engage in interrogation and make violative statements after having previously been immersed in the Board's processes and found to have violated the Act for making similar statements. Lastly, I note that Grosser was laid off from W. Soule on August 14, because he couldn't pass the apprenticeship exam. Conveniently, Knapp from the Pipefitters Union offered to get him a job if he could "help out the Union." After the subject charge was filed and Grosser gave an affidavit to the Board, he obtained a job as a pipefitter with the Union's assistance.

Based on the forgoing, I reject Grosser's testimony that Mahoney and Link interrogated him as alleged in paragraph 10 of the complaint. Likewise, I find that Grosser was refused employment by Respondent for legitimate business reasons, and note as discussed above, that there were no independent apprentice sheet metal or pipefitting positions available in June 1998. See *Delta Mechanical, Inc.*, 323 NLRB 76, 81 (1997) (no showing made of job openings on date applicants appeared at office or that employer expected to have openings in the future); *Falcone Electric Corp.*, 308 NLRB 1042, 1043 (1992) (lawful refusal to hire where employer had no job openings).

Accordingly, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act with respect to any allegations involving Richard Grosser.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union and Local 7 are labor organizations within the meaning of Section 2(5) of the Act.
3. By failing and refusing to immediately reinstate unfair labor practice strikers James Fogoros and Tim O'Brien to their former or substantially equivalent positions on their unconditional offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.
4. Respondent did not violate Section 8(a)(1) and (3) of the Act with respect to any allegations involving Richard Grosser. This includes coercive interrogation and rescinding an offer of employment.

## 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. Since the Respondent unlawfully failed and refused to reinstate unfair labor practice strikers James Fogoros and Tim O'Brien on their unconditional offer to return to work, I shall recommend that the Respondent be required to reinstate them immediately to their former positions or, if those positions no longer exist to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing if necessary any persons hired after January 19, 1998, and make the strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate them from the date of their offer to return to work. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

## ORDER

The Respondent, Zimmerman Plumbing and Heating Co., Inc. Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to immediately reinstate unfair labor practice strikers James Fogoros and Tim O'Brien to their former or substantially equivalent positions on their unconditional offer to return to work.

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

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

(a) Offer unfair labor practice strikers James Fogoros and Tim O'Brien immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make the strikers whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to immediately reinstate them on their unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a 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.

<sup>14</sup> 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.

(c) Within 14 days after service by the Region, post at its facility in Kalamazoo, Michigan, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

## 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 discriminate against unfair labor practice strikers by failing and refusing to immediately reinstate them to their former or substantially equivalent positions on their unconditional offer to return to work.

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

WE WILL offer unfair labor practice strikers James Fogoros and Tim O'Brien immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our failure to immediately reinstate them on their unconditional offer to return to work, with backpay and interest.

ZIMMERMAN PLUMBING & HEATING CO.,  
INC.

<sup>15</sup> 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."