

**Bud Antle, Inc. and Fresh Fruit and Vegetable Workers Local 1096, United Food & Commercial Workers International Union.**<sup>1</sup> Cases 32–CA–21181 and 32–CA–21596

May 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On February 17, 2005, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent filed a reply brief. The Charging Party filed exceptions, and the Respondent filed an answering brief.

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 in part and reverse them in part and to adopt the recommended Order as modified and set forth in full below.

This case arises from the end of a 14-year-long lockout, pursuant to an agreement among the Respondent, the Charging Party Union, and a second union. Each union sought, ultimately unsuccessfully, to represent the Respondent's employees. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by delaying reinstatement, without a legitimate and substantial business justification, from December 19, 2003, through February 23, 2004, of 24 formerly locked-out employees who had timely accepted its offer of reinstatement. The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act by treating the returning formerly locked-out employees as new employees during their first 4 weeks back on the job for the purpose of assignment of overtime.

Contrary to the judge, we find that the Respondent possessed a legitimate and substantial business justification for its delay of reinstatement for the period of December 19, 2003, through January 22, 2004. However, we agree with the judge that the Respondent did not possess a legitimate and substantial business justification for its delay of reinstatement for the period of January 23 through February 23, 2004, and therefore violated Section 8(a)(3) and (1) of the Act. We also find, contrary to the judge, that the Respondent did not violate Section 8(a)(3) and (1) of the Act by treating the returning formerly locked-out employees as new employees for the

purpose of the assignment of full overtime during their first 4 weeks back on the job, because the Respondent possessed a legitimate and substantial business justification for this treatment.

I. FACTUAL BACKGROUND

The Respondent, a California corporation, processes and distributes lettuce and other salad products and vegetables. It operates three refrigerated warehouses, called "coolers," in Marina and Huron, California, and in Yuma, Arizona. The Respondent and the Charging Party Union have had a collective-bargaining relationship since 1976, with the Union representing a unit of the Respondent's cooler, dock, warehouse, cold room, and loading employees working at its coolers.

In June 1989, the parties began negotiating for a successor agreement; however, with negotiations unsuccessful, the bargaining unit employees commenced an economic strike in August. The Respondent immediately hired temporary replacements, and, in November 1989, it locked out its employees. That month, the Union, on behalf of the striking employees, made an unconditional offer to return to work. In response, the Respondent advised the Union that the lockout would continue until a successor contract was signed. The lockout continued for 14 years.<sup>2</sup>

In mid-2003, Teamsters Local 890 began an organizing campaign among the Respondent's replacement employees. On August 6, 2003, the Teamsters filed a petition in Case 32–RC–5174 to represent these employees. A representation hearing was held in the matter on August 19, 2003. On that same date, the Respondent, the Union, and the Teamsters entered into a Stipulated Election Agreement and an accompanying "Letter of Agreement." The voting unit agreed upon consisted of all "current and locked-out" employees.<sup>3</sup> The "Letter of Agreement" provided that:

1) Following certification of the results of the election

. . . the Company will offer reinstatement to those employees who were locked out as of 1989 . . . .

2) The offers of reinstatement, which will be open for 30 days, shall include the opportunity to return to work at the current terms and conditions of employment and retention of seniority (defined as actual years of service as of the date of the lockout). Such seniority will be honored for all purposes, as

<sup>2</sup> The legality of the lockout is not at issue in this proceeding.

<sup>3</sup> Absent the parties' agreement, the Respondent's temporary replacements would not have been eligible to vote in the representation election. *Harter Equipment (Harter II)*, 293 NLRB 647 (1989).

<sup>1</sup> We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

will the seniority accumulated by the replacement workers since the commencement of the lockout.

Pursuant to the parties' election agreement, a mail-ballot election among the locked-out and replacement employees was held in September, November, and December 2003. On December 3, 2003, a tally of ballots was issued which showed that neither Union received a majority of the 253 ballots cast during the election.<sup>4</sup> On December 15, 2003, the Regional Director for Region 32 issued a certification of results of the election.

On or about December 19, 2003, the Respondent sent identical letters offering reinstatement to the 133 formerly locked-out employees. Those letters read in their entirety:

We are pleased to inform you that the Company is formally ending the lockout of its cooler employees. This decision follows the NLRB's certification of election results issued on December 15, 2003.

In accordance with this decision, we hereby offer you reinstatement to your former position of employment with Bud Antle. If you are reinstated, you will return to work under the Company's current terms and conditions of employment. In addition, your pre-lockout seniority will be used for all purposes.

If you are interested in reinstatement, you must notify the Company by returning the enclosed form with the requested information by January 22, 2004. Please bear in mind that the date of reinstatement and the job to which you will be reinstated will depend on (1) the number of locked-out employees seeking reinstatement, (2) your seniority relative to other employees, including both locked-out and replacement employees, and (3) your being qualified to perform the job to which you are recalled.<sup>5</sup>

Between December 19, 2003, and January 22, 2004, the Respondent received hand-delivered and mailed letters from 24 formerly locked-out employees requesting reinstatement. The earliest request was received on De-

<sup>4</sup> The tally of ballots showed that 80 votes were cast in favor of the Teamsters, 7 votes were cast in favor of the Union, and 146 ballots were cast against representation by either labor organization. Twenty ballots were challenged, a number insufficient to affect the results of the election.

<sup>5</sup> The Charging Party excepts to the judge's failure to find that the reinstatement offer was invalid, because it was not immediate, and to provide a remedy for the allegedly deficient offer of reinstatement. However, we do not pass on these allegations because they were not included in the complaint and therefore were not properly before the judge. "It is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change that theory." *Raley's*, 337 NLRB 719 (2002).

ember 22, 2003, and the latest ones were received on January 22, 2004.

On January 28, 2004, the Respondent sent identical letters to each of the 24 formerly locked-out employees from whom it received reinstatement requests. Those letters confirmed receipt of their acceptance of the Respondent's offer and informed the employees that the Respondent had established February 23, 2004, as the return-to-work date for all formerly locked-out employees. The letters went on to inform the employees that they would be required to spend their first 4 weeks at the Respondent's Yuma cooler undergoing mandatory training and orientation and that they would be entitled to travel pay to Yuma and weekly per diem while there. Of the 24 employees who accepted the Respondent's reinstatement offer, only 7 reported to work at Yuma on February 23, 2004.<sup>6</sup> The Respondent treated those seven returning employees as new employees for purposes of training and orientation and restricted the amount of overtime work they performed during their 4-week training period.

## II. THE JUDGE'S DECISION

The judge found that the Respondent's 2-month delay in reinstating the 24 formerly locked-out employees who accepted its offer of reinstatement was not "inherently destructive" of employee statutory rights under *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). He, thus, concluded that, at most, the Respondent's conduct had a "comparatively slight" impact on employee rights. Nevertheless, the judge concluded that the Respondent violated Section 8(a)(3) and (1) because it did not have a legitimate and substantial business justification for its delay. He recommended that the Respondent be ordered to make whole the 24 formerly locked-out employees who accepted its offer of reinstatement, from the date of their individual acceptances of the Respondent's offer until February 23, 2004.

The judge also found that the Respondent's treatment of the seven returning formerly locked-out employees as new employees for the purpose of assignment of overtime during their first 4 weeks back on the job was "inherently destructive" of employee statutory rights. The judge found that the Respondent violated Section 8(a)(3) and (1) because it did not have a legitimate and substantial business justification for its denial of overtime. He recommended that the Respondent be ordered to make

<sup>6</sup> Charles Collenback also appeared at Yuma on February 23, 2004, but advised the Respondent that he had not been working because of a workers' compensation claim. Collenback participated in the first day's orientation but did not report for work thereafter.

those employees whole for their lost overtime opportunities.

### III. DELAY IN REINSTATEMENT

It is well settled that locked-out employees cannot be permanently replaced. Employers may use only temporary replacements in order to engage in business operations during an otherwise lawful lockout. *Harter Equipment (Harter I)*, 280 NLRB 597 (1986), *affd. sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). As a result, once a lockout ends, temporarily replaced locked-out employees are entitled to reinstatement. *Id.* Therefore, under extant law, once the election results in Case 32-RC-5174 were certified, the Respondent's lockout was officially over under the terms of the parties' agreement, and the Respondent was obligated to reinstate all of the locked-out employees.

Nevertheless, the parties entered into a "Letter of Agreement" which effectively placed the Respondent's replacement employees and the locked-out employees on equal footing in the bargaining unit. The seniority that the replacement employees accumulated during the lockout was honored. However, the replacement employees were entitled to continue working only so long as they had greater seniority than any of the locked-out employees seeking reinstatement.<sup>7</sup>

In *NLRB v. Great Dane Trailers*, 388 U.S. at 33, the Supreme Court set forth guidelines for assessing employer motivation in the context of asserted 8(a)(3) violations. Specifically, the Court explained that there are two categories of discriminatory conduct which, depending on the nature of their impact on employee rights, require a different analysis in assessing employer motivation. If an action is deemed "inherently destructive" of employee rights, antiunion motivation is inferred and the conduct may be found unlawful, even if such conduct was based on legitimate and substantial business considerations.<sup>8</sup> In determining whether conduct is inherently destructive of employee rights, the Board examines: (1)

"the severity of the harm suffered by the employees for exercising their rights as well as the severity of the impact on the statutory right being exercised"; (2) whether the conduct "is potentially disruptive of the opportunity for future employee organization and concerted activity"; (3) whether the conduct "exhibits hostility to the process of collective bargaining"; and (4) whether the conduct "discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees." *International Paper*, 319 NLRB 1253, 1269-1270 (1995), *enfd. denied* 115 F.3d 1045 (D.C. Cir. 1997). However, a finding that an employer's conduct is inherently destructive does not conclude the inquiry. Rather, the Board must additionally weigh in each case the asserted business justification—"justifying or characterizing [the employer's] actions as something different than they appear on their face"—against the "invasion of employee rights in light of the Act and its policy" in order to weigh whether under the circumstances it will find that an employer has committed an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. at 33. See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963).

On the other hand, if the action is deemed to have only a "comparatively slight" impact on employee rights, once the employer establishes a legitimate and substantial business justification for its action, no violation of the Act may be found unless the General Counsel makes an affirmative showing of antiunion motive. *NLRB v. Great Dane Trailers*, 388 U.S. at 34. An employer's action has only a comparatively slight impact on employee rights if its impact is some measure less than inherently destructive. See *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 761-762 (D.C. Cir. 1988).

For the reasons set forth in his decision, we agree with the judge that the Respondent's delay in reinstating the 24 formerly locked-out employees who accepted its offer of reinstatement was not "inherently destructive" of employee statutory rights and that it had only a "comparatively slight" impact on them.<sup>9</sup> As a result, the Respondent bears the burden of showing that its delay in reinstating the formerly locked-out employees had a legitimate and substantial business justification.

The Respondent has bifurcated its defense for its failure to immediately reinstate into two time periods: (1) December 22, 2003, through January 22, 2004, the period from the date the Respondent received the first acceptance of its reinstatement offer to the agreed-upon cutoff date for accepting its reinstatement offer; and (2)

<sup>7</sup> The General Counsel did not challenge the legality of the parties' agreement.

<sup>8</sup> The Court said:

That is, some conduct carries with it unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent. . . . If the conduct in question falls within this inherently destructive category, the employer has the burden of explaining away, justifying or characterizing his actions as something different than they appear on their face, and if he fails, an unfair labor practice charge is made out. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. [*NLRB v. Great Dane Trailers*, 388 U.S. at 31 (citations and internal quotes omitted).]

<sup>9</sup> The Charging Party excepts to the judge's failure to make a finding that the delay in reinstatement was "inherently destructive" of employees' Sec. 7 rights. For the reasons stated by the judge, we find no merit in this exception.

January 23 through February 23, 2004, the period from the date the Respondent had all of the acceptances of its reinstatement offer to the return-to-work date. We address these two time periods in turn.

*A. December 22, 2003–January 22, 2004*

The judge found that the Respondent did not possess a legitimate and substantial business justification for delaying reinstatement until January 22. He concluded that the Respondent should have reinstated the formerly locked-out employees immediately upon receipt of their individual acceptances. We disagree. While we find that the Respondent's obligation to reinstate the formerly locked-out employees arose on the date that each individual accepted its offer to return to work, given the unusual circumstances surrounding this case, we conclude that the Respondent's obligation did not mature until January 23, 2004, the date the Respondent knew how many formerly locked-out employees wanted to return to work and their varying degrees of seniority. See *Pacific Mutual Door Co.*, 278 NLRB 854 (1986).

We recognize that the Board has held in the context of a strike that after an unconditional offer to return to work, a failure to be able to predict with certainty which strikers would accept reinstatement to unfilled jobs does not relieve an employer of the obligation to reinstate those who desire to return to work in a timely manner. *Coca Cola Bottling Works*, 186 NLRB 1050, 1051 (1970), *enfd.* in relevant part sub nom. *Retail Wholesale Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). However, the facts in *Coca-Cola Bottling Works*, *supra*, are quite different from the facts presented here. In *Coca Cola Bottling Works*, the employer insisted that the union first provide it with a list of the names of all strikers who desired reemployment and waited until the receipt of the list before it offered reinstatement to any striker. The union considered the employer's request unreasonable but complied under protest. The Board found that the employer's action was unlawful because the employer unlawfully demanded that the union assume obligations which properly rested with the employer. Here, by contrast, we find that the Respondent had a legitimate and substantial business justification in delaying postlockout reinstatement based on the need to determine the identity and the number of returning employees and to dovetail their seniority with the seniority of the replacement workers; and the efficiencies created by starting and training a potentially large number of returning workers all at once.

On December 19, 2003, the Respondent sent a letter offering reinstatement to 133 locked-out employees. On the same date, the Respondent's facility was operating with approximately 90 replacement employees. There-

fore, there was a potential to have more than 220 employees seeking to fill between 90 and 100 jobs. As a result, the December 19 letters offering reinstatement did not guarantee the locked-out employees an immediate job. Instead, those letters provided that "the date of reinstatement and the job to which you will be reinstated will depend on (1) the number of locked-out employees seeking reinstatement, (2) your seniority relative to other employees, including both locked-out and replacement employees, and (3) your being qualified to perform the job to which you are recalled."

Responses to the reinstatement offers arrived between December 22, 2003, and January 22, 2004. The Respondent had no way of knowing how many formerly locked-out employees would accept its offer of reinstatement until January 22.<sup>10</sup> This point is important because it explains why the Respondent did not reinstate high seniority employees and/or bump replacement employees immediately upon receiving their responses. If enough employees opted to return to work, the Respondent plainly would not have been able to accommodate a full complement of both the returning formerly locked-out employees and replacements. This scenario would have resulted in the Respondent bumping a number of employees.<sup>11</sup>

Thus, rather than bump employees who might not need to be bumped and/or bump a number of employees who ultimately would be needed if and when formerly locked-out employees failed to return as they said they would, the Respondent waited until January 22 before taking steps that earlier might have unnecessarily disrupted its work force. As it turned out, because only 24 formerly locked-out employees accepted the offers to return to work, there was no need to bump any employees. Yet, as of December 22, 2003, when the first acceptance was received, the Respondent did not know whether that would be the case. Indeed, it was only on January 22, when all the acceptances were received, that the Respondent was able to conclude that it did not need to bump any employees. We therefore find that the Respondent had a substantial and legitimate business justification for

<sup>10</sup> The judge points to the fact that a union official told the Respondent's manager of labor relations that "less than 30, around 30" of the locked-out employees would accept reinstatement. This statement was made at the preelection hearing—before any voting took place—and arguably was contradicted by the large number of locked-out employees who voted in the election. Apart from the fact that the Respondent knew that several of the locked-out employees were either dead or disabled or had left California, there is no evidence of how many returning locked-out employees the Respondent expected as of December 2003.

<sup>11</sup> In this case, "bumping" could encompass both shifting work assignments and/or layoffs.

its decision to consider all offers of reinstatement at the same time rather than on a piecemeal basis.

Furthermore, given the length of the lockout and the uncertainty surrounding the number of employees who would return, we accept, as a legitimate and substantial business justification, the Respondent's desire to train all the returning employees together. It is undisputed that the Respondent's operations had changed during the 14 years of the lockout. Unlike a more typical lockout situation, in which employees return to work when there can be little doubt that they are still qualified to perform their jobs, each returning formerly locked-out employee would need to be trained on all aspects of the Respondent's modernized operation. Although the Respondent could have trained all the returning employees individually, it was reasonable for the Respondent, given the circumstances, to want to train the potentially large number of returning employees as a group.

We also find that it was reasonable for the Respondent to believe that the 30-day response period in the August "Letter of Agreement" gave it the right to delay making reinstatement (and possible bumping) decisions until January 22.<sup>12</sup> Although the letter does not explicitly state that the Respondent could wait until the end of the 30-day period to reinstate the formerly locked-out employees, it does not require the immediate reinstatement of all locked-out employees upon the acceptance of the Respondent's offer. Further, delaying until all employees desiring reinstatement responded to the Respondent's offer appears evident from the provision of the "Letter of Agreement" whereby the Respondent would honor both the seniority of the returning employees as well as the seniority earned by the replacement workers from the date of the lockout. As mentioned, in order to do so, the Respondent would need to know the identity of all the formerly locked-out employees desiring reinstatement before it commenced putting them back to work.

In conclusion, we find, contrary to the judge, that the Respondent had a legitimate and substantial business justification for delaying the reinstatement of its formerly locked-out employees from December 22, 2003, through January 22, 2004. Because no party submitted independent evidence that the Respondent's actions were motivated by an antiunion motive, we find that the Respondent did not violate Section 8(a)(3) and (1) of the Act.

<sup>12</sup> The judge found that the Respondent did not timely raise this argument, which he characterized as a "waiver-based defense." While the Respondent did not present its defense in terms of "waiver," we find that the argument was raised because it forms the basis of the Respondent's second separate and additional defense in its answer. Also, the Respondent explicitly made this argument during the trial. Contrary to the assertion of the General Counsel, this argument was not raised for the first time on exceptions to the Board.

### *B. January 23–February 23, 2004*

Despite the foregoing, we agree with the judge that the Respondent did not have a legitimate and substantial business justification for further delaying reinstatement of the formerly locked-out employees from January 23 through February 23, 2004. We find, as explained below, that the Respondent's later decisions about the timing and procedures for reinstatement are insufficient to justify its failure to reinstate the formerly locked-out employees at an earlier date.

The Respondent advanced several reasons why it delayed reinstating the formerly locked-out employees until February 23, 2004. First, the Respondent wanted the employees to begin working on a Monday, as it was the beginning of a pay period. Monday, February 2, was ruled out because it was too soon after the employees received the January 28 letter. The following Mondays, February 9 and 16, were also considered and rejected. As to the former, the Respondent felt it needed to give employees a reasonable amount of time to give their current employers' 2 weeks notice. When Dave Davis, the Respondent's director of cooler operations, was asked at the trial if he ever inquired as to whether any of the 24 individuals actually needed to give 2 weeks notice to a current employer, he admitted that he had no personal knowledge but based his decision on what he heard from someone else. As to February 16, there were two reasons advanced for its rejection: first, the Respondent posited that a February 16 start date did not give the returning employees enough time both to give their current employers 2 weeks notice and to travel to Yuma; and second, Plant Manager Terry Chappell was on vacation that week and he was the only supervisor who had also been a supervisor in 1989. The Respondent apparently wanted him to be involved in training because he presumably knew the prior skill level of the returning employees and what needed to be done to get them performing on the same level as current employees.

Examining the Respondent's proffered reasons for further delay, we find that the Respondent has failed to justify its actions. The Respondent's desire to have the formerly locked-out returning employees return on a Monday was nothing more than an administrative convenience that does not rise to the level of a legitimate and substantial business justification. Also, other than uncorroborated hearsay, there is no evidentiary support for the Respondent's assumptions regarding the need for all formerly locked-out employees to give their current employer 2 weeks notice before quitting or regarding requests for additional time to move.

Finally, concerning the necessity of Plant Manager Chappell's presence for training, the record evidence is

that he was available for training during the entire month of January, and during the weeks of February 2 and 9. Moreover, the Respondent admitted that other managers could have performed the training for the returning employees. Davis testified that although the plant manager customarily performs this training, if he is unavailable one of the other managers does it. Asked why that was not done on this occasion, Davis answered, "I guess it could have." In fact, when asked if Chappell actually did the safety training for the returning locked-out employees, Davis replied that there "were probably two or three supervisors and Terry that were in the room together," and he did not know who in fact conducted the safety session. In this regard, the record discloses that other supervisors, department foreman, and senior employees performed at least some if not all of the training.<sup>13</sup>

Nor do the Respondent's proffered reasons for delaying reinstatement for this second month find support in Board law. See *Anaheim Plastics*, 299 NLRB 79, 98 (1990) (2-week delay in reinstating strikers justified in part because, the day before application for reinstatement, tornado rendered production machines temporarily inoperative, left plant full of standing rainwater, and created a danger of injury from electrical malfunctioning); *Sonoma Mission Inn & Spa*, 322 NLRB 898, 900 (1997) (justification for a 1-day delay in reinstating economic strikers found where employer was faced with the difficulty of getting the hotel rooms ready, room keys and housekeeping carts were already assigned, and replacement employees were already in transit); *Snowshoe Co.*, 217 NLRB 1056 (1975) (justification for a 1-day delay in reinstating economic strikers found where strikers' suddenly offered to return to work on morning when newly hired employees had already commenced work); *Randall, Burkart/Randall*, 257 NLRB 1, 6-7 (1981), enforcement granted in part and denied in part on other grounds 687 F.2d 1240 (8th Cir. 1982) (justification for at least a 30-day delay in reinstating economic strikers found where inventory build up in anticipation of strike, and poststrike production levels, obviated need for the immediate employment of a substantial number of the strikers); *Mercy-Memorial Hospital*, 231 NLRB 1108, 1113-1114 (1977) (justification for an approximately 20-day delay in reinstating economic strikers found where complete physical examination of returning hospital workers mandated by State law and due to problems necessarily occasioned by the sudden termination of 3-year-old strike).

<sup>13</sup> Jim Kesinger conducted the safety tailgate meeting and the reports accounting for the forms and documents given to the returning employees were executed by either Rosie Keeton or Vera Martinez.

In conclusion, we find, in agreement with the judge, that the Respondent did not possess a legitimate and substantial business justification for delaying reinstatement of its formerly locked-out employees from January 23 through February 23, 2004. Therefore, we find that the Respondent violated Section 8(a)(3) and (1) of the Act.<sup>14</sup>

### C. Appropriate Remedy

Based on our findings, we must modify the judge's recommended backpay remedy. The judge recommended that the Respondent be ordered to make whole all 24 formerly locked-out employees from the date of their individual acceptances of the Respondent's reinstatement offer until February 23, 2004. As we have found that the Respondent possessed a legitimate and substantial business justification for its December 22, 2003, through January 22, 2004 delay, we conclude that the Respondent is obligated to make the employees whole only for the time period of January 23 through February 23, 2004.

Further, the judge recommended that the Respondent be ordered to make whole all 24 employees who accepted the Respondent's offer of reinstatement, regardless of whether they reported for work on February 23, 2004. We disagree with the judge and find that backpay is an appropriate remedy only for those seven employees who requested reinstatement and actually reported for work on February 23. Therefore, Danny Gutierrez, Gary E. Jackson, Rigoberto Lopez, Rod Kenneth Penny, Alejandro Rivas, John C. Rodriguez, and Robert D. Tully are entitled to backpay for the time period of January 23 through February 23, 2004, to compensate them for the Respondent's undue delay in reinstating them.<sup>15</sup>

The Supreme Court has stated that "Section 10(c) . . . charges the Board with the task of devising remedies to effectuate the policies of the Act," and that its remedial power is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964), citing *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953).<sup>16</sup>

<sup>14</sup> The Charging Party excepts to the judge's failure to make a finding that the delay in reinstatement from January 23 through February 23, 2004, was a separate and distinct violation of the Act. As we have found this delay to be the Respondent's only violation of the Act, we need not pass on this exception.

<sup>15</sup> Employee Charles Collenback appeared at Yuma on February 23, 2004, and advised the Respondent that he had not been working because of a workers' compensation claim. Collenback participated in the first day's orientation but did not report for work thereafter. Therefore, backpay for Collenback, if any, is limited to that portion of the period from January 23 to February 23, 2004, when Collenback's ability to work for the Respondent was not negated by his earlier work-related injury.

<sup>16</sup> Furthermore, in devising an appropriate remedy, the Board is not limited by the parties' failure to request or oppose any specific remedy.

In devising an appropriate backpay award, we are mindful that a “backpay remedy must be sufficiently tailored to expunge the actual rather than the speculative consequences of the unfair labor practices.” *Sure-Tan v. NLRB*, 467 U.S. 883, 900 (1984). The relief granted “is to be adapted to the situation which calls for redress.” *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1939).

By using our broad discretion to limit backpay only to those employees that reported for work on February 23 we are devising an award that is sufficiently tailored to expunge actual rather than speculative consequences of the unfair labor practices at issue. Those employees who actually reported for work on February 23, were the employees who were directly affected by the Respondent’s unfair labor practices. In the absence of evidence to the contrary, it was incorrect for the judge to presume that the Respondent’s unlawful delay in reinstating the formerly locked-out employees caused 16 other employees not to report for work. Significantly, there is no evidence that the date of reinstatement affected their decision to return.

We accept our dissenting colleague’s contention that the ultimate burden of persuasion rests on the wrongdoer. Thus, if the evidence were in equipoise as to the reasons why these 16 employees failed to report for work on February 23, we would agree that the Respondent had not met its burden of persuasion. However, the burden of going forward with the evidence is a different matter. That burden reasonably rests on the persons who are the likely repositories of the evidence. Where, as here, the evidence concerns reasons for accepting the reinstatement offer but not reporting for work, it is particularly appropriate to have those employees come forward with their explanations which are best known to them. Otherwise, the Respondent is placed in the untenable position of having to introduce evidence of another person’s reasons for inaction. Further, had the delay caused problems for these employees, it would seem that they would have made some effort to contact the Respondent and determine whether alternative arrangements could be made. In sum, where, as here, the record is totally devoid of proof, it is not appropriate to award make-whole relief based on assumptions.

Nor is it appropriate to reserve this issue for later compliance proceedings, as our dissenting colleague would. Doing so would not alleviate the central problem of plac-

ing on the Respondent the burden of going forward with evidence of the employees’ personal reasons for not reporting to work. Further, even if the Respondent could successfully find and subpoena these employees, the Respondent would be placed in the position of calling, as its own witnesses, employees who are adverse to its position. These events arose out of a 14-year lockout. All parties had an opportunity to present all of their evidence as to all of the issues. In these circumstances, it makes little sense to provide another opportunity to present evidence as to why certain employees failed to report to work on February 23.<sup>17</sup>

#### IV. DENIAL OF OVERTIME

It is undisputed that the Respondent routinely considers a newly hired employee’s initial 4 weeks of employment as a training period during which the assignment of overtime is limited. With respect to the application of this policy, the Respondent does not make accommodations for the differing levels of experience that new employees might bring to the job. After this initial period, overtime is distributed evenly among all employees without regard to seniority. Although the parties agreed that the returning workers had acquired the same overtime privileges as other employees before the lockout, they also agreed that it takes 4 weeks for employees with the returning workers’ type of experience to become fully proficient in the Respondent’s operations. Thus, the Respondent limited the overtime opportunities for the returning employees during their initial 4-week training period. During this time, each of the seven returning employees worked some overtime, albeit less than other employees not in their training period.<sup>18</sup> Finally, it is undisputed that at the completion of their training period, all seven returning employees were given the same overtime opportunities as existing employees.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by limiting the overtime worked by the seven returning formerly locked-out em-

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*Nabco Corp.*, 266 NLRB 687 fn. 1 (1983); *Keller Aluminum Chairs*, 165 NLRB 1011 fn. 1 (1967). See also *Shepard v. NLRB*, 459 U.S. 344, 352 (1983) (The Act does not require the Board “to reflexively order that which a complaining party may regard as ‘complete relief’ for every unfair labor practice”).

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<sup>17</sup> For this reason, *Mercy-Memorial Hospital Corp.*, 231 NLRB 1101, 1116 (1977), relied on by our dissenting colleague, is distinguishable. In that case, the Board found that the employer violated the Act by unlawfully delaying the reinstatement of its formerly striking nurses. As noted by our dissenting colleague, the Board ordered backpay to an employee who failed to report to work on her scheduled return to work date and resigned 9 days later. However, the employee reported to work earlier to take a state-mandated physical examination and remained in contact with the respondent when she formally resigned. Based on those facts, the judge found no basis to infer that the employee never had an intention of returning to work. Here, the 16 employees in question made no further attempt to contact the Respondent after purportedly accepting reinstatement.

<sup>18</sup> The Respondent’s payroll records disclose that each of the seven employees worked overtime on multiple Saturdays during the 4-week period commencing on February 23.

ployees during the 4 weeks after they returned to work. In doing so, the judge analogized this case to cases that involve the discriminatory treatment of returning economic strikers and concluded that the Respondent's conduct was "inherently destructive" of employee statutory rights. See, e.g., *Oregon Steel Mills*, 291 NLRB 185 (1988); *Wisconsin Packing Co.*, 231 NLRB 546 (1977); *Transport Co. of Texas*, 177 NLRB 180 (1969), *enfd.* 438 F.2d 258 (5th Cir. 1971). Further, the judge found that the Respondent did not have a legitimate and substantial business justification for its treatment of the returning employees.

We disagree with the judge's finding that the Respondent's conduct was "inherently destructive" of employee statutory rights. Instead, we find that the Respondent's conduct had a "comparatively slight" effect on employee statutory rights in the circumstances of this case. Additionally, and contrary to our dissenting colleague, we find that the Respondent has articulated a legitimate and substantial business justification for briefly treating the seven formerly locked-out employees who returned to work as new employees for the purpose of assignment of overtime during the retraining period. Specifically, in view of the many years that the returning employees had not worked for the Respondent, and given the operational changes that took place between 1989 and 2004, it was reasonable for the Respondent to require these employees to be retrained and not take on full overtime until that training period had been completed.

A careful examination of the evidence, under the "guiding principles" described in *International Paper*, 319 NLRB 1253, 1269–1270 (1995), establishes that the Respondent's actions do not qualify as inherently destructive of employee rights.<sup>19</sup> Although the employees were deprived of overtime opportunities, the severity of the harm suffered by them was not substantial. The Respondent temporarily limited overtime opportunities for the period of time that it would take employees to again become proficient in their jobs. While the returning employees initially did not have the same overtime opportunities as existing employees, they were not completely precluded from working overtime during their first 4 weeks back on the job. Thus, the Respondent treated the returning workers as it treats all workers in need of training—without regard to whether they were locked out. Further, given the short duration of the limitation, the Respondent's conduct did not have a severe or lasting impact on employee statutory rights. See, e.g., *International Paper*, *supra* (permanently subcontracting bargain-

ing unit work during a lockout); *Transport Co. of Texas*, *supra* (treating reinstated strikers as a class first considered for layoff).

We do not find that initially treating the returning employees as new employees for the purpose of overtime assignment can be characterized as potentially disruptive of the opportunity for future employee organization, potentially hostile to the concept of collective bargaining, or discouraging collective bargaining in the sense of making it seem a futile exercise in the eyes of the employees. There is simply no support in the record for the judge's speculation that the Respondent's conduct was seen by the formerly locked-out employees "as nothing less than retaliation for their support for the bargaining unit employees' strike and their Union's bargaining position and, by the existing employee complement, as a warning of the consequences of their support for a union." The Respondent's conduct affected employees for only 4 weeks and cannot be said to have created "visible and continuing obstacles to the future exercise of employee rights." *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973). Given the 14 years of the lockout, we find that the Respondent's temporary limitation of overtime opportunities would not reasonably be viewed as a penalty for exercising Section 7 rights. In sum, we conclude that the Respondent's conduct had only a comparatively slight impact on employee rights.

Further, we conclude, contrary to the judge and our dissenting colleague, that the Respondent had a legitimate and substantial business justification for limiting overtime opportunities for the seven returning employees. We find that the judge failed to properly account for the unique circumstances of this case. The Respondent had a substantial and legitimate business justification for its decision to limit the returning employees' overtime based on: (1) its lack of specific information as to what work the seven employees had performed during the previous 14 years, whether the seven continued to possess the physical skills and abilities needed to perform the work at the Respondent's coolers, and whether the employees would experience difficulty in learning the new systems and methods now utilized at the Respondent's coolers; and (2) the fact that the seven employees would require the training period to enable themselves to perform their work assignments quickly and efficiently.

The cooler operation that the returning formerly locked-out employees returned to in February 2004 was substantially different from the operation that they had left more than 14 years earlier. Specifically, in 1989, loaders were handed a manifest and told to locate boxes of lettuce or other commodities and put them on a truck without considering the age of the product, the location

<sup>19</sup> We note that even our dissenting colleague does not argue that the actions were "inherently destructive" of employee rights.

of the customer, or the location of the product within the cooler. Significantly, one of the Respondent's primary products—bagged mixed salads—essentially did not exist in 1989. Nor did the Respondent use barcoding and scanners to track its various products.

By contrast, these items were critical in 2004. With bagged mixed salads, the Respondent, in selecting products to ship, considers a number of issues, including where the customer is located. To illustrate, according to the Respondent, a customer in New York typically will need a product harvested from the field on that day, while a customer in Los Angeles will accept 3-day old product. Thus, it is incumbent on cooler workers to know the date of the product and whether the particular customer will accept that product. Given these requirements, it is essential that employees know where each product is located within the cooler in order to efficiently fill orders, as well as to satisfactorily rotate raw commodities to ensure that these products are as fresh as possible. It is also important to know the location of products for purposes of combining pallets.<sup>20</sup> Although some of the seven returning employees had relevant work experience during the lockout, they all had to learn these aspects of the work in order to become fully proficient at their jobs.<sup>21</sup> For employees such as these who were unfamiliar with these particular operations, the parties stipulated that it usually took a 4-week period to become fully proficient in: the use of scanners to load and consolidate pallets, how to determine the appropriate age of the product to be loaded, the location of the product in the cooler, and product codes for the Respondent's products.

Apart from teaching the returning employees the new aspects of the cooler operations, the Respondent needed to find out whether they could still perform the jobs they last performed for the Respondent 14 years earlier. Thus, unlike a normal lockout situation in which employees return to work when there can be little doubt that they are still qualified to perform their job assignments, this case involves an enormous gap of time between the commencement of the lockout and the employees' return to work. As of February 23, 2004, the Respondent had no specific information about whether the seven returning formerly locked-out employees still had the physical skills and abilities to perform the cooler work, or whether

they would have any difficulty learning the new systems and methods utilized at the cooler. The Respondent also had no idea how quickly these employees would adapt to the new procedures.

This point is significant with respect to the assignment of overtime. Because employees receive premium pay for this work, the Respondent had an interest in their work being performed as efficiently and quickly as possible. It is primarily for this reason that new employees receive fewer overtime opportunities during their 4-week training period. Once training is completed, overtime is evenly distributed among all employees without regard to seniority.

Our dissenting colleague criticizes us for overlooking several "serious flaws" in the Respondent's argument that it had a legitimate and substantial business justification for initially limiting overtime to the returning employees. She argues that the Respondent was required to treat the returning employees as if they had not been out of the Respondent's work force for 14 years and that the Respondent's failure to formally document their progress during their initial 4-week training period belies its argument that it was necessary to limit their overtime opportunities. We do not agree. Our dissenting colleague argues that we ignore the essential similarities between the operations before and after the 14-year lockout. While the employees still move product from point A to point B, the job changed significantly in the method and technology used to track product, in the location of product, and in the Respondent's customers' needs. Thus, the parties stipulated that it usually takes 4 weeks for individuals like the returning employees to become fully proficient in the use of the Respondent's new equipment and systems, and in locations of products. Further, that the returning employees were working independently within 5 days of their return and were permitted to work some overtime shifts does not detract from the Respondent's justification for its actions. It is undisputed that the Respondent allows new hires to work some overtime during their initial training period, and there is no indication that other new hires do not work independently during their training period. Far from undermining the Respondent's contention, we believe that the Respondent has supported its case by showing that full overtime was restored as soon as employees showed their full abilities. Accordingly, these facts do not imply that the returning employees were fully capable of performing their jobs efficiently without the need for the 4-week training period. And, contrary to our dissenting colleague, there is nothing speculative about the need for this 4-week training period as the parties themselves have stipulated to its necessity.

<sup>20</sup> Because some customers may want different products that do not take up a full pallet, it is the responsibility of the cooler employees to combine properly dated products onto the same pallet.

<sup>21</sup> For example, while Alejandro Rivas had worked as a dispatcher at another produce company which used scanners, he had not worked with the bagged salad product and needed to learn the more complicated dating requirements for the Respondent's products.

Our colleague concedes that the lockout was “a lengthy one.” Indeed it was. In these highly unusual circumstances, it was reasonable for the Respondent to initially treat the returning employees as new ones for overtime purposes, even though ordinarily it might have been appropriate to treat them as if they had not been locked out. They had, after all, not performed those services for the Respondent during the previous 14 years. Similarly, it was reasonable for the Respondent to attempt to ensure that the employees could perform the jobs in question, which were not identical to the ones they left.

This is not a case where an employer has denied recall to an economic striker. Rather, it is a case where an employer, for prudential reasons, has denied some overtime to employees who have returned to work after a 14-year lockout. The cases relied on by our dissenting colleague did not arise in the context of the unprecedented 14-year lockout involved here.

In conclusion, we find, contrary to the judge, that the Respondent’s decision to treat the seven formerly locked-out employees who returned to work on February 22, 2004, as new employees for the purpose of the assignment of overtime had only a “comparatively slight” impact on employee rights. Further, we find that the Respondent possessed a legitimate and substantial business justification for its actions. Because no party submitted independent evidence demonstrating that the Respondent’s actions were motivated by antiunion animus, we find that the Respondent did not violate Section 8(a)(3) and (1) of the Act.

#### Conclusion

As emphasized throughout this opinion, the facts of this case are unusual. Given the extraordinary length of the lockout, and the preelection agreement between the parties, we find, contrary to the judge, that the Respondent possessed a legitimate and substantial business justification for delaying reinstatement of its formerly locked-out employees for the period of December 19, 2003, through January 22, 2004. However, we agree with the judge that the Respondent did not possess a legitimate and substantial business justification for its delay for the period of January 23 through February 23, 2004, and therefore violated Section 8(a)(3) and (1) of the Act. Accordingly, because of its undue delay, we have ordered the Respondent to make whole those employees who reported for work on February 23, for their lost wages from January 23 through February 23, 2004. We also find, based on the unique circumstances of this case and contrary to the judge, that the Respondent did not violate Section 8(a)(3) and (1) of the Act by treating the returning formerly locked-out employees as new em-

ployees during their first 4 weeks back on the job for the purpose of assignment of full overtime because the Respondent possessed a legitimate and substantial business justification for this treatment.

#### ORDER

The National Labor Relations Board orders that the Respondent, Bud Antle, Inc., Yuma, Arizona, and Marina and Huron, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to promptly reinstate its formerly locked-out bargaining unit employees who accepted its offer of reinstatement.

(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) Make employees John C. Rodriguez, Charles Coltenback, Danny Gutierrez, Rod Kenneth Penny, Robert D. Tully, Alejandro Rivas, Rigoberto Lopez, and Gary E. Jackson whole for any loss of earnings and other benefits suffered as a result of the Respondent’s failure to reinstate them from January 23 through February 23, 2004, in the manner set forth in the remedy section of the judge’s decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its coolers located in Yuma, Arizona, and Marina and Huron, California, copies of the attached notice, marked “Appendix.”<sup>22</sup> Copies of the notice, in Spanish and English, on forms provided by the Regional Director for Region 32, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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

<sup>22</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.”

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 23, 2004.

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

MEMBER LIEBMAN, dissenting in part.

The majority wrongly reverses the judge's decision in two respects. First, it errs in denying make-whole relief to 16 locked-out employees whose reinstatement was unlawfully delayed by the Respondent, without requiring the Respondent to prove that the failure of those employees to report to work was unrelated to the delay. As the wrongdoer here, the Respondent should bear that burden. Second, the majority errs in permitting the Respondent to treat seven returning locked-out employees as if they were new employees, for the purposes of overtime eligibility. Those employees were analogous to returning economic strikers, who must be treated as qualified to perform their job, unless their inability to perform is actually demonstrated (and not merely assumed).<sup>1</sup>

#### I.

It is well established that a finding by the Board that loss of employment was caused by a violation of the Act is presumptive proof that some backpay is owed. See, e.g., *Cassis Management Corp.*, 336 NLRB 961, 962 (2001). However, despite finding that the Respondent violated the Act by failing to timely reinstate 24 formerly locked-out employees who requested reinstatement, the majority declines to order the Respondent to make whole 16 of those employees. These 16 employees clearly signified their desire to return to work by accepting the Respondent's reinstatement offer, but did not report for work when the Respondent eventually notified them to report.

The only apparent reason for their not reporting is the Respondent's unlawful delay in providing them with a report date. The majority contends that it was incorrect

<sup>1</sup> I agree with the majority that the Respondent possessed a legitimate and substantial business justification for delaying reinstatement of its formerly locked-out employees from December 19, 2003, through January 22, 2004, and that the Respondent violated Sec. 8(a)(3) and (1) of the Act by failing to reinstate the formerly locked-out employees from January 23 through February 23, 2004, because it did not possess a legitimate and substantial business justification during this latter time period.

for the judge to presume that the Respondent's unlawful delay caused the 16 employees not to report for work. But there is no better basis for presuming, as the majority does, that these employees abandoned their jobs for reasons unrelated to the delay in reinstatement.<sup>2</sup> To the extent that their not reporting to work created any ambiguity as to their initial intent to return to work, this ambiguity has no bearing on the legal finding that the Respondent unlawfully delayed reinstatement beyond January 22, 2004. Accordingly, because the employees' reasons for not reporting present, at best, remedial issues, the judge correctly resolved the ambiguity against the Respondent, the wrongdoer.

The judge provided that the Respondent could adduce evidence at the compliance stage that these 16 employees never intended to work for the Respondent again, or otherwise abandoned their jobs for reasons other than the Respondent's unlawful delay in reinstating them. The severance of compliance issues is the Board's standard procedure for addressing alleged unfair labor practices. In a backpay proceeding, the burden is upon the employer to establish facts that would mitigate its liability. See, e.g., *St. Barnabas Hospital*, 346 NLRB 731(2006); *La Favorita, Inc.*, 313 NLRB 902 (1994). The Respondent, therefore, would not find itself in a position different from any other employer that is trying to mitigate its backpay liability.

Further, contrary to the majority, the Respondent would not be put in the difficult position of having to prove, by itself, the nonreporting employees' reasons for not reporting. Rather, it could require the nonreporting employees to testify under oath as to why they did not report for work on February 23.

Because the Respondent would have had the opportunity in compliance to establish that some or all of these employees abandoned their jobs for reasons unrelated to the Respondent's unlawful conduct, the majority's reversal of the judge's make-whole order goes well beyond

<sup>2</sup> The Board has rejected such baseless presumptions in analogous circumstances. In *Mercy-Memorial Hospital Corp.*, 231 NLRB 1108, 1116 (1977), the employer delayed the reinstatement of its formerly striking nurses. The employer scheduled an employee to return to work on April 1. Nevertheless, the employee did not report to work on that date or any other date thereafter, but instead resigned on April 9. The employer argued that the employee was not entitled to any backpay because she did not report to work on April 1. The judge found and the Board agreed that the employer had no basis for inferring from the employee's resignation that she never intended to come back to work. Consequently, the employee was awarded backpay from the date of her acceptance of the reinstatement offer to April 1, the date she was scheduled to return to work.

any need to insure that the Respondent is not deprived of a full opportunity to litigate this issue.<sup>3</sup>

## II.

The judge also correctly determined that the Respondent unlawfully discriminated against the seven returning formerly locked-out employees when it limited their overtime opportunities. The Respondent treated its returning employees as if they were recent hires, and deprived them of the status they would have retained but for the bargaining unit's strike and subsequent 14-year lockout. The judge correctly analogized the Respondent's treatment of the seven employees to cases involving the discriminatory treatment of returning economic strikers. The Board has recognized that returning strikers are *not* to be treated as new employees or entry-level employees, but rather must be treated the same as they would have been, had they not withheld their services. *Detroit Newspapers*, 340 NLRB 1019 (2003); *Rose Printing Co.*, 304 NLRB 1076, 1078 (1991).

In this case, the parties stipulated that each of the seven returning employees had acquired the same overtime privileges as other full-time bargaining unit employees. In an effort to get around this stipulation, the Respondent asserts that it needed to see whether the returning employees were able to perform on the job before assigning them overtime. The majority accepts this argument, finding that it constitutes a legitimate and substantial business justification for not affording the returning employees their full overtime. Unfortunately, they overlook several serious flaws in the Respondent's argument.

First, while the parties stipulated that all seven returning employees needed to learn the location of product in the cooler, product codes, and product dating requirements for the Respondent's product, their need to learn these aspects of the Respondent's cooler operation hardly supports the Respondent's much broader assertion that each of these employees also needed 4 weeks of training to become sufficiently proficient in their work to be entitled to unrestricted overtime. The employees were not akin to new employees, as the majority seems to find, but were in fact old employees returning after a lockout, albeit a lengthy one. The majority ignores the essential similarities between the pre and postlockout operations (i.e., the routine task of loading and unloading product).

An employer may not rely on speculative preconceptions regarding employee qualifications to satisfy its bur-

<sup>3</sup> Cf. *Concrete From Walls, Inc.*, 346 NLRB No. 80 (2006) (holding that the employer may argue in compliance proceedings that its back-pay liability can be reduced under *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002)).

den to show a legitimate and substantial business justification for treating returning strikers as new employees. Rather, as the Board has held in the context of an economic strike, "employer misgivings concerning the qualifications of an economic striker are to be tested on the job through recall, with the employer, later, permitted to take appropriate action if the recalled striker is in fact 'unqualified or cannot do the work.'" *Lehigh Metal Fabricators*, 267 NLRB 568, 575 (1983) citing *Brooks Research & Mfg.*, 202 NLRB 634, 637 fn. 13 (1973).<sup>4</sup> Thus, the Respondent was not permitted to deny the returning employees overtime benefits based on a concern that they would be unable to perform unless the employees had actually demonstrated an inability to perform. The Respondent's contention that it wanted to see "demonstrated ability" to perform is contrary to Board precedent under which employees are properly given the benefit of the doubt.

Further, the Respondent admitted that it failed to document the progress, work performance, or any limitations in job performance of the seven employees during the 4 weeks after February 23. Therefore, the Respondent cannot credibly argue that it made a good-faith effort to ascertain the employees' ability to perform during their initial 4 weeks of reemployment.

Finally, any assertion that the returning employees were unqualified to perform their jobs and, therefore, were not qualified to work overtime is belied by the fact that within 5 days of their return, the seven employees were working independently, and that even during the initial 4 weeks of their reinstatement the Respondent permitted the returning employees' to work overtime, albeit a lesser amount than their replacements. The Respondent's own assessment of the employees' ability to perform was that they had demonstrated an acceptable degree of proficiency. Contrary to the majority, this certainly "detracts" from the Respondent's justification for its action.

Thus, the Respondent's asserted business justification for treating the returning employees as new employees in terms of overtime assignments fails to withstand scrutiny.<sup>5</sup> The judge was correct to find that the Respondent

<sup>4</sup> See also *Alaska Pulp Corp.*, 326 NLRB 522, 562 (1998), enf. granted in part, denied in part on other grounds sub nom. *Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000) ("It is not until the returning striker demonstrates an inability to do the work that the employer may take steps to assure itself that the incumbent needs some sort of special scrutiny.").

<sup>5</sup> Given the judge's determination that the Respondent did not have a substantial and legitimate business justification for restricting the overtime opportunities of the reinstated locked-out employees, the Respondent would still have violated the Act even if the denial of overtime is not seen as "inherently destructive" of employees' statutory rights but

violated Section 8(a)(3) and (1) of the Act by limiting the overtime worked by the returning employees, and to order the Respondent to make these employees whole for any overtime payments they would have earned but for the Respondent's unlawful discrimination.

#### 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 Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to promptly reinstate our employees, whom we locked out in 1989 and who accepted our offer of reinstatement after the lockout.

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 make employees John C. Rodriguez, Charles Collenback, Danny Gutierrez, Rod Kenneth Penny, Robert D. Tully, Alejandro Rivas, Rigoberto Lopez, and Gary E. Jackson whole for any loss of earnings and other benefits suffered as a result of our failure to reinstate them, less any net interim earnings, plus interest for the period from January 23 through February 23, 2004.

BUD ANTLE, INC.

*Michelle M. Smith, Esq.*, for the General Counsel.  
*William D. Claster, Esq. (Gibson, Dunn & Crutcher, LLP)*, of Irvine, California, appearing on behalf of the Respondent.  
*David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld)*, of Oakland, California, appearing on behalf of the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. United Fruit & Vegetable Workers Local 1096, United Food & Commercial

rather, as the majority finds, as only having a "comparatively slight" impact on those rights.

Workers International Union, AFL-CIO (the Union) filed the unfair labor practice charge in Case 32-CA-21181 on January 29, 2004. After an investigation, on June 18, 2004,<sup>1</sup> the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint, alleging that Bud Antle, Inc. (Respondent) engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Thereafter, Respondent filed a timely answer, essentially denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, the unfair labor practice allegations came to trial before me in Oakland, California, on September 9. At the trial, all parties were afforded the opportunity to present, to examine, and to cross-examine witnesses; to offer into evidence any relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. Such briefs were filed by counsel for the General Counsel, by counsel for Respondent, and by counsel for the Union. The Union filed the unfair labor practice charge in Case 32-CA-21596 on August 27, 2004, and, after an investigation, on October 25, the Regional Director for Region 32 of the Board issued a complaint, alleging that Respondent had engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Thereafter, and pursuant to a motion filed by the General Counsel, on November 1, I issued an order, consolidating the above-captioned unfair labor practice cases. Respondent filed an answer, essentially denying the commission of the alleged unfair labor practices. On December 7, counsel for the General Counsel, counsel for Respondent, and counsel for the Union filed a joint motion to approve a stipulated record and a stipulation of facts, and, on December 8, I approved the motion. Subsequently, counsel for the General Counsel and counsel for Respondent filed briefs. Accordingly, based upon the entire record in the consolidated matters, including the parties' briefs and my observation the demeanor of the witness,<sup>2</sup> who testified during the hearing in Case 32-CA-21181, I issue the following

#### FINDING OF FACTS

##### I. JURISDICTION

At all times material, Respondent, a State of California corporation, with its principal office and place of business in Salinas, California, has been engaged in the business of the processing and nonretail distribution of lettuce and other vegetables. In connection with its business operations, during the 12-month period preceding the issuance of the complaint in Case 32-CA-21181, Respondent, in the course and conduct of its business operations, purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California.

##### II. LABOR ORGANIZATION

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> Unless otherwise stated, all events herein occurred during 2004.

<sup>2</sup> Most of the facts herein are taken from stipulations of the parties.

## III. THE ISSUES

Concerning the allegations of the complaint in Case 32–CA–21181, the parties stipulated that, on December 19, 2003, Respondent offered approximately 130 locked-out employees reinstatement to their former positions of employment. As to the alleged unfair labor practices, the issue involves whether Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act by failing and refusing to immediately reinstate 24 of the individuals, who had accepted Respondent’s offers. The corollary issue, posed by Respondent’s defense, is whether the latter possessed legitimate and substantial business justification for delaying the reinstatement of the 24 individuals until February 23, 2004. There is no dispute that only eight former locked-out employees reported for work on February 23, and the parties stipulated that the issue, raised by the allegations of the complaint in Case 32–CA–21596, concerns whether Respondent violated Section 8(a)(1) and (3) of the Act by limiting the overtime worked by seven of the employees during the 4 weeks after they returned to work on February 23.

## IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent, a California corporation and a wholly-owned subsidiary of Dole Fresh Vegetables, is engaged in the business of the processing and the nonretail distribution of lettuce and other salad products and vegetables, and, in this regard, operates refrigerated warehouses, termed “coolers,” where the above products which, having been trucked from the field, are cooled down to a low temperature and stored for short periods of time while awaiting shipment to distribution centers. Currently, Respondent maintains three coolers in Yuma, Arizona, Marina, California (located near Salinas), and Huron, California (located near Fresno).<sup>3</sup> The record establishes that, given the times of the growing seasons in the surrounding areas, Respondent’s business operations are seasonal in nature with the Marina cooler being in “full operation” from the end of March until the end of November of each year, the Yuma cooler being in full production between the end of November and the end of March each year, and the Huron facility, in which the sole product stored is lettuce, being in operation during two growing seasons from March 15 through April 15 and from October 15 through November 15 each year. While in full production, Respondent normally employs approximately 100 employees at the Marina cooler, approximately 90 employees at the Yuma cooler, and 35 employees<sup>4</sup> at the Huron facility. The record further establishes that, at its Yuma and Marina facilities, Respondent employs a fairly stable work force with employees moving between each as the growing seasons commence and conclude and that, as a growing season in an area begins to wind down, the necessary employee complement at Respon-

<sup>3</sup> In 1989, when the lockout at issue herein occurred, in addition to the facilities in Marina and Huron, Respondent operated coolers located in Guadalupe, Calipatria, and Poston, Arizona. The Yuma facility was opened in 1990 or 1991.

<sup>4</sup> Apparently, only a “few” employees will go from Marina to Huron and, then, to Yuma and from Yuma to Huron and, then, to Marina each year.

dent’s area cooler concomitantly decreases so that, at the end of a season, no more than 8 to 10 employees and 1 supervisor remain working. Dave Davis, who was the only witness at the hearing, is the director of cooler operations for Dole Fresh Vegetables, and Terry Chappell is plant manager of the Yuma cooler.

The parties stipulated that, since about 1976, Respondent and the Union have had a collective-bargaining relationship with the Union acting as the bargaining representative of Respondent’s full-time and regular part-time seasonal and year-round cooler, dock, warehouse, cold room, and loading employees at its Marina, Yuma, and Huron facilities and that the parties had successive collective-bargaining agreements with the last of the agreements having expired in 1989. The parties commenced negotiating for a successor agreement in June 1989; however, with negotiations unsuccessful, the bargaining unit employees commenced an economic strike in August. Respondent immediately hired temporary replacements, and, in November 1989, it locked out its aforementioned employees. That month, the Union, on behalf of the striking employees, made an unconditional offer to return to work; however, in response, Respondent advised the Union that the lockout would continue in effect until a successor contract was signed. The lockout continued for 14 years, and, in 2003, Teamsters Local 890 (the Teamsters) began an organizing campaign amongst Respondent’s replacement employees. On August 6, 2003, the Teamsters filed a petition in Case 32–RC–5174 to represent the employees, and a representation hearing was held in that matter on August 19. On that same date, Respondent, the Union, and the Teamsters entered into a Stipulated Election Agreement<sup>5</sup> and an accompanying letter of agreement. The latter document reads as follows:

This letter confirms the following agreement between [t]he Union and Respondent.

- (1) Following certification of the results of the election . . . the Company will offer reinstatement to those employees who were locked out as of 1989. . . .
- (2) The offers of reinstatement, which will be open for 30 days, shall include the opportunity to return to work at the current terms and conditions of employment and retention of seniority (defined as actual years of service as of the date of the lockout). Such seniority will be honored for all purposes, as will the seniority accumulated by the replacement workers since the commencement of the lockout.

As scheduled, an NLRB representation election was conducted at each of Respondent’s three facilities during September, November, and December 2003, and, on December 3, a tally of ballots was issued, showing that, of approximately 280 eligible

<sup>5</sup> The voting unit consisted of all “current and locked-out full-time and regular part-time seasonal and year-round cooler, dock, warehouse, cold room and loading employees employed by Respondent.”

voters,<sup>6</sup> 80 votes were cast in favor of the Teamsters, 7 votes were cast in favor of the Union, and 146 ballots were cast against representation by either labor organization. Subsequently, on December 15, the Regional Director for Region 32 issued a certification of results of election, stating that a majority of the valid votes were not cast for either labor organization and that no labor organization was the exclusive representative of Respondent's employees in the bargaining unit, which had been formerly represented by the Union.

On or about December 19, 2003, Respondent sent identical letters, offering reinstatement to each of approximately 130 locked-out employees. Said letters read as follows:

We are pleased to inform you that the Company is formally ending the lockout of its cooler employees. This decision follows the NLRB's certification of election results issued on December 15, 2003.

In accordance with this decision, we hereby offer you reinstatement to your former position of employment with Bud Antle. If you are reinstated, you will return to work under the Company's current terms and conditions of employment. In addition, your pre lockout seniority will be used for all purposes.

If you are interested in reinstatement, you must notify the Company by returning the enclosed form with the requested information by January 22, 2004. Please bear in mind that the date of reinstatement and the job to which you will be reinstated will depend on (1) the number of locked-out employees seeking reinstatement, (2) your seniority relative to other employees, including both locked-out and replacement employees, and (3) your being qualified to perform the job to which you are recalled.

Thereafter, and continuing through January 22, 2004, Respondent received hand-delivered and mailed letters, requesting reinstatement, from 24 locked-out employees. Their names and the dates, on which Respondent received the letters, are listed below:

John C. Rodriguez	December 22, 2003
Charles Collenback	December 23, 2003
Ray Valasquez	December 26, 2003
Danny Gutierrez	December 28, 2003
Alvin Anderson	December 29, 2003
John Todd	December 29, 2003
Rod Kenneth Penney	December 29, 2003
Matt Forstedt	December 30, 2003
Cheryl Vaz	December 30, 2003
Robert D. Tully	December 31, 2003
Jerry McBride	January 2, 2004
Loretta Heinz	January 7, 2004
Alejandro Rivas	January 7, 2004
Rigoberto Lopez	January 8, 2004
Eugene Navavoli	January 12, 2004
Salvatore Escobar	January 14, 2004
Gary E. Jackson	January 15, 2004
Thomas O. Norris	January 15, 2004

<sup>6</sup> R. Exhs. 1 and 2 establish that, as of the date of the election, there were 133 locked-out employees and 127 replacement workers.

Joe Flores Olvera	January 15, 2004
Louie Pestoni	January 16, 2004
Michael Kemp	January 17, 2004
Russ Christiansen	January 19, 2004
Larry Joe Azlin	January 22, 2004
Mel Southworth	January 22, 2004

On January 28, Respondent sent identical letters to each of the above-named 24 employees. The letters read as follows:

This letter confirms receipt of your acceptance of our offer of reinstatement to your employment at Bud Antle, Inc. Set forth below are the details of your returning to work.

We have established Monday, February 23, 2004 as the return to work date for all locked-out employees. Because of the amount of time that has elapsed since you last worked for the Company, all returning employees, regardless of seniority, will be required to spend the first 20 days of their re-employment at the Company's Yuma, Arizona cooler where they will undergo orientation and training. After this initial period, you may be reassigned to another facility depending on your seniority. For your information, we have enclosed the seniority guidelines, which include the Company's policy on traveling to different facilities at the end of each season. Please note that this 20-day orientation and training period is mandatory—any employee who fails to attend is subject to termination for job abandonment.

All locked-out employees will be entitled to travel pay to Yuma, weekly per diem of \$225 pursuant to the Company's 2003–2004 per diem policy, and pay and benefits according to the attached exhibits. . . .

We look forward to seeing you at the Yuma Cooler . . . on February 23.

Dave Davis testified that, while the lockout continued for 14 years during which time Respondent continued to operate its coolers with replacement employees, all locked-out employees were permitted to vote in the election; that, at the time Respondent mailed the December 19, 2003 letters to the individuals, its Yuma cooler was in full operation<sup>7</sup> with "about 90" employees working there,<sup>8</sup> and that Respondent was expecting a "relatively high" rate of acceptances. In this regard, when asked why the December 19 letter set forth conditions for reinstatement, Davis, who was involved in the decisionmaking process, replied, "Basically, because if everybody came back, we

<sup>7</sup> Davis testified that, during the prior season at Marina, Respondent hired new hires on different days with each placed on "the same 20 days probation period" as the reinstated locked-out employees. He admitted that the training given to each was similar to that given to the returning locked-out employees and was done on an individual basis for any hired alone. According to Davis, training is on an individual basis "if we hire just one, yeah."

<sup>8</sup> During cross-examination, Davis estimated that, each season, there are between 5 and 10 new hires employed at the Yuma cooler. According to him, the number of new hires and whether or not they are hired as a group or on a piecemeal basis are solely products of necessity.

wouldn't have enough jobs for everybody.”<sup>9</sup> Based upon this uncertainty, according to Davis, Respondent's intent when the January 22, 2004 deadline for reinstatement acceptances arrived was “to determine how many workers we had in total between both the locked-out people and the current employees. And put the seniority list together accordingly. And figure out where everybody stood.”<sup>10</sup> As to why Respondent failed to reinstate each locked-out employee upon receipt of his or her request for reinstatement, Davis reiterated that “. . . until the 22nd or the 23rd when we had them all, we didn't know how many people we were going to have.” He added that Respondent was also concerned about the lack of “efficiency” in reinstating employees on a piecemeal basis—“I didn't . . . think it would be very efficient in the business to bring back two guys and train them today and three more guys tomorrow and train them. It was more efficient to do it one time.”<sup>11</sup> Further, Davis believed that language of the parties' “stipulation,” which held Respondent's offer open for 30 days, permitted it to delay reinstatement of any locked-out employee, who responded to Respondent's offer, for 30 days. With regard to why, after January 22, Respondent failed to immediately reinstate the 24 locked-out individuals, who had requested reinstatement, Davis testified that, shortly after that day, he met with Respondent's human resources personnel, “and we talked about things such as where the reinstatement should be because we were currently operating mostly in Yuma . . . were going to give them travel pay . . . per diem. And . . . what date the training should be . . . because the business has changed quite a bit in 14 years.”

<sup>9</sup> Inasmuch as, given the total number of ballots cast in the election, a significant number of locked-out employees, probably in excess of 100, must have voted, this apparently was not an unreasonable concern. However, during cross-examination, Davis acknowledged being aware that several locked-out employees had left California or were either dead or disabled. Moreover, during the representation case hearing, a company official, Danny Urbano, the head of labor relations, testified that “. . . some people are no longer around . . .” and that a union official told him “less than 30, around 30” individuals would return.

<sup>10</sup> While, during cross-examination, Davis denied that Respondent would have been able to put each of the 24 locked-out employees back to work in his former job immediately after acceptance of Respondent's offer “. . . because . . . there might have been some classifications where by their seniority, they wouldn't have had a position,” analysis of R. Exhs. 2 and 3 discloses that all of the 24 locked-out employees had greater seniority than at least one replacement worker in their respective job classifications. Moreover, several, including Azlin, Christiansen, Escobar, Forstedt, Jackson, Lopez, Navavoli, Norris, Olvera, Penny, Southworth, Tully, and Valasquez, had in excess of 13 years seniority. Specifically, during cross-examination, Davis admitted that John Rodriguez, a forklift operator, who had in excess of 6 years of seniority prior to the lockout, had more seniority than some replacement forklift operators and would have had the right to bump if immediately reinstated. Likewise, Davis conceded that Respondent could have immediately reinstated locked-out employees Robert Tully and Danny Gutierrez to their former positions.

<sup>11</sup> However, during cross-examination, asked if, for training purposes, there would have been any practical problem for training locked-out people if reinstated on the day of acceptance of the offer to return, Davis replied, “We could have,” but “I would have preferred to do it in some kind of groups.”

As a result of their discussion, according to Davis, Respondent mailed its January 28 letter to each of the above 24 employees.

Monday, February 23, 2004, was the date Respondent selected as the reinstatement date for the 24 returning locked-out employees, and Davis advanced several reasons for its choice of that day. First, Respondent wanted the employees to begin working “on a Monday” as “our pay period starts on Sunday.” As to this, Davis explained, Respondent decided against the following Monday, February 2, as the reporting date; for the employees would receive its letter on Thursday or Friday, “and it seemed unreasonable to have them show up on the 2nd, which was two days later.” February 9 and 16 were considered, but, as to the former, “. . . we felt that we needed to give people . . . a reasonable amount of time to . . . give their current employ[ers] notice,” the “standard” 2-weeks notice.<sup>12</sup> As to February 16, according to Davis, “[T]here were two issues with that week. One is our plant manager was on vacation that week,” and “[Chappell, who was the only current supervisor who was also a manager in 1989 and who would be involved with the training,] was the one that knew exactly what the skill level of the 24 people was and what needed to be done to get them from that level to the current requirements.” The other issue was the 2-weeks notice, which the returning locked-out employees presumably would give to their employers—“. . . if some of the people are from out-of-state . . . it seemed maybe unreasonable for them to work at their job on Friday and be in Yuma Sunday night to start on Monday.” Specifically regarding Chappell, Davis testified that the training, which was to be conducted by the plant manager, was to last 20 days and had two aspects. The first was the “usual . . . HR stuff,” such as benefits and policies. The other involved the so-called “current requirements” of the work, the “actual job skills that were required,” many of which had changed since the lockout was instituted in 1989. According to Davis, Respondent's products now are commodities, such as lettuce heads, celery, and cauliflower, and value-added products, which are bagged salads and which did not exist in 1989. Also, the job has become more technologically advanced. In 1989, loaders worked from printed manifests and merely were instructed to load a given amount of product on to a truck “generally” on a first-in-first-out basis,<sup>13</sup> while, currently, “. . . all of our product has a bar code on a pallet. In that bar code is all the information about the history of that pallet. So we know what day it came [in],

<sup>12</sup> Asked if he ever inquired as to whether any of the 24 individuals actually needed to give 2-weeks notice to a current employer, Davis admitted that he had no personal knowledge but based his decision-making on what he heard from another individual, Vera Martinez. She reported that locked-out employee, Danny Gutierrez, had called to say he wanted to give 2-weeks notice in order not to leave his job “on a bad note,” and locked-out employee, Larry Joe Azlin, was then living in Oklahoma and required time to move his “stuff” to Yuma. Of course, the foregoing was uncorroborated hearsay, and Respondent's counsel assured me Davis' testimony was not being offered for its truth.

<sup>13</sup> Bagged salads, in the vernacular of the industry—salad mix, are not shipped on a first-in-first-out basis. Rather, for this, Respondent must ship “today's product” to customers in New York but can ship “three-day-old product” to customers in Los Angeles. Thus, in contrast to lettuce heads or celery, cooler workers must be aware of the product age and shipping location for Respondent's bagged salads.

what crew it came from, what item it is, how many units are on the pallet.” To read the bar codes, employees utilize “hand-held scanners.” A dispatcher types in an order number, which appears on the screen of a scanner, and a loader must scan the bar code on a pallet to ensure he has pulled the correct order.<sup>14</sup> Davis added that the importance of Chappell’s presence was that he alone knew what the employees’ skills were prior to the lockout and what skills each required to learn in order to do his job in 2004.

There is no dispute that, on February 23, 2004, only 8 (Charles Collenback,<sup>15</sup> Danny Gutierrez, Gary E. Jackson, Rigoberto Lopez, Rod Kenneth Penny, Alejandro Rivas, John C. Rodriguez, and Robert D. Tully) of the 24 locked-out individuals, who had requested reinstatement, reported for work.<sup>16</sup> Davis stated that Respondent never again heard from the other 16 locked-out employees and that they were “. . . terminated for job abandonment after two days.”<sup>17</sup> The record reveals that, on their first day of work, the returning locked-out employees filled out forms, including the I-9, the W-4, and benefit enrollment documents, received orientation training on house rules and company policies, underwent drug screens, and attended a safety training session.<sup>18</sup> Subsequent training for the returning employees included receipt of a manual, on use of the company scanners, for each to read, an “interactive” class, regarding use of the scanners, with Chappell, and some “specialized” training on skills, which were different than in 1989, with supervisors or

<sup>14</sup> This is significant inasmuch as Respondent often ships pallets, which contain a combination of product, to customers, and it is important that the correct product mix is in a pallet.

<sup>15</sup> According to Davis, Collenback appeared on February 23, claimed he had not been working because of a workers’ compensation claim, and failed to report for work thereafter.

<sup>16</sup> The parties stipulated that, as of this date, Respondent did not have any specific knowledge about what work the seven returning locked-out employees had performed over the previous 14 years, whether they continued to have the physical skills and abilities to perform the work at Respondent’s facilities, or whether they would have any difficulties learning the new systems and methods utilized at the coolers since the lock-out commenced in 1989. Thus, with regard to returning locked-out employee Rodriguez, Davis admitted that “I had no idea what he’d been doing during the last 14 years,” and “I had no idea what his skills were like.”

<sup>17</sup> Davis testified that, even if all 24 locked-out employees had reported on February 23, “we would not have laid anybody off until the end of the season.” He added that, at that time, “. . . if we had too many people . . . the lowest seniority people would not have been transferred. They would have just been laid off at the season.”

<sup>18</sup> According to Davis, the plant manager customarily performs this training; however, if Chappell was unavailable, it was done by “one of the other managers.” Asked why such was not done on this occasion, Davis opined, “I guess it could have.” In fact, when asked if Chappell did the safety training for the returning locked-out employees, Davis said, “There were probably two or three supervisors and Terry that were in the room together,” and he did not know who actually conducted the safety session. In this regard, GC Exh. 2, the safety tailgate meeting report, shows the instructor as being Jim Kesinger, and GC Exhs. 3(a) through (h), the reports accounting for the forms and documents given to the returning employees, were executed by either Rosie Keeton or Vera Martinez. Finally, Davis stated, during cross-examination, that Chappell would have been available for training on most days in the last 3 weeks of January 2004.

senior employees. During cross-examination, asked if there was anything different as to the treatment of the reinstated employees compared with that given to new hires, Davis said, “[N]o.” He added, and the parties stipulated, that this identical treatment included the 20-day training/probation period, which always begins with “an official-type” training program, a drug screen, and, thereafter, on-the-job training sessions with supervisors and/or senior employees.

The parties stipulated that, when new employees are hired by Respondent, their initial 4 weeks are considered a training period. During this period of time, Respondent limits the assignment of overtime to these employees inasmuch as it wants this work, which involves higher pay, to be done as quickly and efficiently as possible and as the new hires generally are not as adept as existing employees at performing their work assignments in the required manner. After employees have worked their initial 4 weeks, overtime is distributed evenly among all employees without regard to seniority. The parties further stipulated that Respondent treated the seven returning locked-out employees as if they were new employees for purposes of overtime assignments during their initial 4 weeks back at work and that its reasons for doing so were (1) its lack of specific information as to what work the seven employees had performed during the previous 14 years, whether the seven continued to possess the physical skills and abilities to perform the work at Respondent’s coolers, and whether the said employees would experience difficulty in learning the new systems and methods now utilized at Respondent’s coolers and (2) its belief that the seven employees would require the training period to enable themselves to perform their work assignments quickly and efficiently. In particular, based upon its experiences with other employees, Respondent believed that the seven returning locked-out employees would need the entire 4-week training period to become fully proficient in using the scanners to load and consolidate pallets and to learn how to determine the appropriate age (based upon when the product was harvested and produced and customers’ requirements) of the products to be loaded, the location of the products in the cooler, and the various codes for Respondent’s products. Further, the parties stipulated that, after the 4-week training period, the seven returning locked-out employees were given the same overtime opportunities as existing employees.

The parties also stipulated that, of the seven returning locked-out employees, Tully and Penny returned as loaders, Gutierrez returned as a picker, Rodriguez and Lopez returned as inside forklift drivers, Jackson returned as an outside forklift driver, and Rivas returned as a dispatcher<sup>19</sup> and that Respondent failed to expend any effort to ascertain the job experiences, skills, education, or job-related training maintained or acquired by any of the above-seven employees during the time period August 1989 through February 23, 2004.<sup>20</sup> For example, Respondent did not know that, prior to returning to work with

<sup>19</sup> A foreman is always present when employees, new or veteran, work, including overtime.

<sup>20</sup> Respondent has no documents showing the job experience, skills, or job-related training acquired by any of the returning locked-out employees during the period of the lockout.

Respondent, returning locked-out employee Rivas had been working as a dispatcher for many years at Skyview Produce, a Yuma-based company which also runs Dole product, and that, as a dispatcher for Skyview Produce, Rivas utilized the same hand-held scanners used by Respondent and otherwise performed work similar to that which he performed for Respondent upon his return to work on February 23.<sup>21</sup> Also, the parties stipulated that not all employees use the hand-held scanners or computers. For example, returning locked-out employee Rodriguez did not use a hand-held scanner in the performance of his duties as an inside forklift driver. In addition, returning locked-out employees Jackson, Lopez, Penny, Rodriguez, and Tully did not need any training on the mechanical operation of a forklift or the mechanics of loading and unloading product, and they were all operating forklifts for Respondent by February 24. In addition, none of the seven of the former locked-out employees had to learn the location of product in the cooler, product codes, or dating requirements for Respondent's product, and other employees and foremen were available to answer any of their questions.<sup>22</sup>

The parties next stipulated that, prior to the commencement of the lockout in 1989 by Respondent, returning locked-out employees Gutierrez, Jackson, Lopez, Penny, Rivas, Rodriguez, and Tully each had acquired the same overtime privileges as other employees, that they were not probationary employees, that Respondent did not limit their overtime assignments, and that, during the 4-week period commencing on February 23, 2004, while treating each of the seven returning locked-out employees as a new employee and limiting his overtime hours, each of the seven employees worked some overtime.<sup>23</sup> The parties further stipulated that, in connection with the assignment of overtime, Respondent does not possess any documents showing its policy or practice, regarding the assignment of overtime to new employees, to employees returning to work after any kind of absence, or to existing, nonprobationary employees, in effect during the period January 1 through March 31, 2004.

### B. Legal Analysis

The parties agree, and I concur, that the issues presented herein, involving the alleged right of former locked-out full-time employees to immediate reinstatement upon the acceptance, by each, of his employer's offer of reinstatement and their alleged right, upon reinstatement, to be treated, by their

<sup>21</sup> One difference in the work was that Skyview Produce handled only raw commodities; whereas Respondent also handles bagged salad product. Raw commodities are dated and require rotation in order to assure that the first product in from the field is the first product out. Moreover, the dating system used to manage the distribution of bagged salad products is more complicated, and Rivas needed to learn the more complicated dating requirements for Respondent's products.

<sup>22</sup> Respondent failed to document the progress, work performance, or any limitations of the job performance of either Danny Gutierrez, Gary Jackson, Rigoberto Lopez, Rod Kenneth Penny, Alejandro Rivas, John C. Rodriguez, or Robert Tully during the 4 weeks after each returned to work on February 23, 2004.

<sup>23</sup> Respondent's payroll records, Jt. Exhs. 9(a) through (kk), disclose that each of the seven employees worked overtime on multiple Saturdays during the 4-week period commencing on February 23.

employer, in the same manner as existing full-time employees, for the purpose of receiving overtime assignments, are matters of first impression. There is also no dispute that, as to whether Respondent's failure to immediately reinstate the 24 locked-out employees, who accepted its offer to return to work, and its treatment of the 7 locked-out employees, who returned to work, as new employees for the purpose of assigning overtime work were, as alleged, violative of Section 8(a)(1) and (3) of the Act, the proper analytical approach is that which has been articulated by the Supreme Court. Thus, the Court holds that "... there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required," and "... that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311-312 (1965). Further, the Court directs that, if an employer's conduct is within this category of misconduct,<sup>24</sup> "the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations," no proof of antiunion motive is needed," and the Board must "... strike the proper balance between the asserted business justifications and the invasion of employee rights" in order to determine whether the employer's conduct is so destructive of said employee rights as to mandate finding a violation of Section 8(a)(1) and (3) of the Act. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *Capehorn Industry*, 336 NLRB 364, 365 (2001). On the other hand, according to the Court, in cases alleging other acts of alleged unlawful discrimination, if the impact, upon employees' statutory rights, of an employer's discriminatory conduct is found to be "... comparatively slight, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justification for the conduct." *Great Dane Trailers*, supra at 34. Once the employer establishes such legitimate and substantial business justification for its actions, its conduct is "prima facie lawful," and no violation of the Act may be found unless the General Counsel makes an "affirmative showing of unlawful motivation." *Id.*

While not specifically deciding the issues posed herein, the Supreme Court, Federal courts of appeals, and the Board have decided numerous cases, involving employer lockouts of bargaining unit employees and related issues, and have utilized the above analytical framework in examining the impact of such conduct upon employees' statutory rights and whether such conduct was violative of Section 8(a)(1) and (3) of the Act. Thus, the Supreme Court has held that, following impasse, the impact, upon employees' Section 7 rights, of an employer's lockout of its bargaining unit employees for the sole purpose of exerting economic pressure in support of a legitimate bargaining position is comparatively slight rather than inherently de-

<sup>24</sup> Such "inherently destructive" conduct is of a type, which has "unavoidable consequences which the employer not only foresaw but which he must have intended." *Erie Resistor*, 373 NLRB 221, 228 (1963).

structive and, absent unlawful motivation, does not violate Section 8(a)(1) and (3) of the Act. *American Ship Building*, supra. Further, the Court has found that nonstruck employers in a multiemployer bargaining association do not engage in inherently destructive conduct and do not violate Section 8(a)(1) and (3) of the Act by continuing operations with temporary replacements after lawfully locking out bargaining unit employees in response to a whipsaw strike against one association member.<sup>25</sup> *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965). Similarly, the Court of Appeals for the D.C. Circuit determined that an employer acted lawfully when it imposed a lockout to force its bargaining unit employees to cease employing a so-called “inside game weapon” during a contract dispute. The court decided that, rather than being inherently destructive of its employees’ Section 7 rights, the lockout, which was an economic response to the employees’ strategy, had a comparatively slight impact upon their rights and was undertaken to support the employer’s bargaining strategy. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000). Likewise, in *Harter Equipment*, 280 NLRB 597 (1986) (*Harter 1*), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987), rationalizing that the employer’s use of temporary replacements in order to engage in business operations during an otherwise lawful lockout had only a comparatively slight impact upon its employees’ statutory rights, the Board held that, absent evidence of unlawful animus, a single employer, such as Respondent, does not engage in conduct violative of the Act by engaging in such a tactic. Also, in *International Paper Co.*, 319 NLRB 1253 (1995), the Board held that an employer engaged in conduct, “inherently destructive of employee rights” and violative of Section 8(a)(1) and (3) of the Act, by permanently subcontracting bargaining unit work during a lawful lockout of its employees; and, in *Ancor Concepts, Inc.*, 223 NLRB 742, 744 (1997), revd. on other grounds 166 F.3d 55 (2d Cir. 1999), which involved a strike, the hiring of replacements, and a subsequent lockout of the striking employees, the Board ruled that, after declaring its replacements were permanent employees, an employer’s failure to reinstate striking employees upon their unconditional offer to return to work was “. . . inherently destructive of employee rights . . . and violates Section 8(a)(3) and (1)” of the Act.<sup>26</sup>

<sup>25</sup> Assessing the impact upon employees’ Sec. 7 rights, the Court concluded that the use of temporary replacements added only slightly to the impact of the lawful lockout upon the employees’ Sec. 7 rights. *Brown Food Stores*, supra at 288.

<sup>26</sup> In her posthearing brief, counsel for the General Counsel correctly argues that “locked-out employees may not be permanently replaced” and that “. . . once a lockout ends, they are entitled to immediate reinstatement.” Then, while recognizing the existence of no exact case precedent for the precise issues involved herein, contrary to counsel for Respondent, she contends that locked-out employees’ rights to immediate reinstatement in place of temporary replacements and to treatment as regular full-time employees after returning to work are akin to those of economic strikers who have been temporarily replaced. While conceptually counsel’s arguments have merit, I do not agree with her in regard to these matters. Thus, it is true that the essential fact of a lawful lockout is the locking out all the bargaining unit employees, with those hired into unit jobs during the lockout necessarily being temporary replacements for the locked-out bargaining unit and not eligible to vote

I believe that, in determining whether Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by failing and refusing to immediately reinstate 24 former locked-out employees upon the acceptance, by each, of its offer of reinstatement at the conclusion of its 14-year lockout and by failing and refusing to treat the 7 returning former locked-out employees the same as regular full-time employees for purposes of the assignment of overtime, I am required to assess the impact of said acts on three statutory rights—the right to bargain collectively, the right to strike, and the right to engage in union activities. *Harter 1*, supra at 597. With regard to Respondent’s failure to immediately reinstate each of the 24 locked-out employees, who accepted its December 19, 2003 offer of reinstatement, at the outset, I note that, inasmuch as such was instituted to induce the Union to enter into a new collective-bargaining agreement presumably upon terms favorable to it, Respondent’s November 1989 lockout of its bargaining unit employees and its hiring of temporary replacements appear to have been typical of such employer actions, which the Supreme Court, lower Federal courts of appeals, and the Board have found lawful. Further, in my view, notwithstanding that the lockout did not culminate with a new contract but, rather, with the replacement employees and the locked-out employees voting against representation by either the Union or the Teamsters, Respondent had been obligated to offer reinstatement just as if the Union had agreed to enter into a new collective-bargaining agreement, and Respondent’s agreement to offer reinstatement to the locked-out employees should be viewed as necessary rather than beneficent. Put another way, as to the bargaining unit employees’ right to immediate reinstatement, I

in a representation election. *Harter Equipment*, 296 NLRB 647, 648 (1989) (*Harter 2*). However, notwithstanding the apparent clear Board law, with the approval of the Regional Director for Region 32, the parties entered into a stipulated election agreement, which effectively placed Respondent’s replacement employees and the locked-out employees on an equal footing in the bargaining unit. In these circumstances, given the agreement of the parties, I am not sufficiently sanguine regarding the status of Respondent’s replacement employees to justify reliance upon those Board decisions, concerning the rights of strikers to immediate reinstatement to jobs occupied by temporary replacements, as precedent for my legal conclusions on the matters at issue herein. Nevertheless, in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), a case involving the right of employees to immediate reinstatement to their jobs, which remained unfilled during the strike, upon their unconditional offer to return to work at the conclusion of an economic strike, the Supreme Court stated that Sec. 2(3) of the Act provides, in part, that the term “employee . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment.” As the administrative law judge in *International Paper Co.*, supra at 1352, noted, “The same language in Section 2(3) preserves the continued employee status (and, therefore, the statutory rights concomitant to that status) of individuals whose work has ceased because their employer has lawfully locked them out in an effort to induce their bargaining representative to accept his contractual proposals.” In these circumstances, I believe Board decisions, involving the asserted right of strikers to be reinstated to jobs which are not filled by temporary replacements, may be utilized as precedent for deciding the right to immediate reinstatement issue herein.

think the vote of the employees against representation was tantamount to a bargaining unit's acceptance of a new collective-bargaining agreement and, if Respondent had refused to offer reinstatement to the locked-out employees, such would have unlawfully converted the status of the replacement workers to that of permanent employees. *Ancor Concepts*, supra.

During the 14 years since 1989, in adamantly adhering to the Union's bargaining position while Respondent perpetuated its lockout of them, the bargaining unit employees had collectively exercised their Section 7 rights to assist the Union and to bargain collectively through the Union as their bargaining representative. In these circumstances, one may persuasively contend that, by delaying reinstatement to the 24 locked-out employees even for a relatively short period of no more than 60 days, Respondent conveyed to the above individuals and to its replacement workers a message of retaliation against its employees' exercising of the rights even after the bargaining unit employees, by voting against representation by the Union or the Teamsters, had signified a desire to cease engaging in the activities. Moreover, Respondent's act of delaying reinstatement of the locked-out employees, to some extent, arguably served to chill the future exercise of the above statutory rights by the returning bargaining unit employees and by the replacement employees. Further, Respondent's locked out employees signaled their desire to return to work by voting against union representation and, while not arising to permanent loss of jobs, Respondent's failure to immediately reinstate those locked-out employees, who accepted its offer, subjected them to continued loss of wages. Finally, the Board has found an employer's delayed, rather than immediate, reinstatement of strikers, who unconditionally offered to end their strike and return to work, to jobs, which remained unoccupied during their strike, to be violative of Section 8(a)(1) and (3) of the Act. *Westpac Electric*, 323 NLRB 1322, 1364 (1996). Notwithstanding the foregoing, the record herein is devoid of any actual evidence, regarding the adverse effect, if any, of Respondent's failure to immediately reinstate each of the 24 locked-out employees upon the above-stated statutory rights of its employees. Therefore, in the context of its payment of weekly per diem payments and travel expenses to the 24 locked-out employees and, after 14 years, the relatively short period of delay in reinstating them, I agree with counsel for the General Counsel that Respondent's actions were not "inherently destructive" of its employees' statutory rights and, at most, had had a "comparatively slight" impact on them.

In these circumstances, the burden shifted to Respondent to establish that it had "legitimate and substantial business justification" for denying immediate reinstatement to each of the locked-out employees, who accepted Respondent's offer, upon receipt of the acceptance. In this regard, Respondent apparently bifurcates its defense into two separate time periods—the 30-day time period, ending on January 22, 2004, which the locked-out employees were afforded in order to accept Respondent's reinstatement offer, and the time period from January 23 through February 23, 2004. With regard to the former time period, Respondent's defense concentrates upon its expectations as of December 19, the date of its offers, and emphasizes two points—that, not until January 22, would it possess specific

knowledge as to the exact number of locked-out employees who would accept its reinstatement offer and that reinstating said individuals on a piecemeal basis would be administratively inefficient and a disruptive business practice.<sup>27</sup> As to the first point, Dave Davis asserted that Respondent expected a "relatively high" rate of acceptances and that, in such circumstances, not only would there be an insufficient number of jobs for all employees but also, if Respondent commenced immediately reinstating those who accepted its offer, by necessity, it would be faced with the burdensome task of reassessing seniority and job bumping rights on a daily basis. However, while, perhaps, an unexpectedly large number of the locked-out unit employees voted in the election, the Board has held, in the context of a strike, that, after an unconditional offer to return, a failure to be able to predict, with certainty, the number of strikers, who would accept reinstatement to unfilled jobs, does not relieve an employer of the obligation to reinstate those, who desire to return to work, in a timely manner. *Coca Cola Bottling Works*, 186 NLRB 1050, 1051 (1970). Moreover, Respondent was aware that several locked-out employees had left California or were either dead or disabled and that, prior to the representation election, a union official had informed Danny Urbano, the manager of labor relations, he thought "less than 30, around 30" of the locked-out employees would accept reinstatement. Further, while, on December 19, 2003, Respondent's facility was operating at full capacity, with approximately 90 replacement employees, and, if all or close to all of the locked-out employees accepted Respondent's offer and sought immediate reinstatement, the availability of jobs may have been a problem, the fact, which Respondent does not dispute, is that most, if not all, of the 24 individuals, who did accept its offer, had sufficient seniority for immediate reinstatement by bumping into jobs currently held by replacements. In any event, according to Davis, Respondent had no plans to lay off any employees even if all 24 locked-out employees returned to work in February. As to Respondent's contention, that reinstating returning locked-out employees on a piecemeal, rather than group, basis would have been an inefficient and disruptive business practice, Davis conceded that Respondent could have given each of the above 24 individuals individual training. Moreover, he admitted that new hires are trained on an individual basis when necessary. Also, while it locked out its bargaining unit employees in response to their strike, notwithstanding the employees' unconditional offer to end the strike and return to work, Respondent acted on its own volition to continue the lockout until the Union capitulated on a new contract, presumably on terms favorable to the former, and must bear the consequences of the act. Therefore, that Respondent may have perceived adminis-

<sup>27</sup> While Dave Davis raised the language of the parties' August 19, 2003 side letter as a justification for delaying reinstatement and while he presumably was raising the matter of waiver, such was not mentioned as an affirmative defense by Respondent in its answer to the complaint in Case 32-CA-21181, and counsel for Respondent, who undoubtedly was aware of and formulated all of Respondent's defenses, never mentioned the putative issue in his posthearing brief. In these circumstances, while agreeing with counsel for the General Counsel's and counsel for the Charging Party's analysis of the issue, I will assume waiver is not a component of Respondent's defense and not discuss it.

trative problems regarding immediately reinstating its locked-out employees is, in my view, irrelevant to its duty to reinstate. In these circumstances, I do not believe that Respondent's lack of knowledge as to the exact number of locked-out employees who would accept its offer of reinstatement or its administrative and efficiency concerns constitute legitimate and substantial justifications for its alleged discriminatory actions. Accordingly, even absent evidence of unlawful animus, I find that, during the time period December 19, 2003, through January 22, 2004, by failing to immediately reinstate each of the 24 locked-out employees upon receipt of his and her acceptance of its offer of reinstatement, Respondent engaged in discriminatory acts and conduct, which impacted upon its employees' statutory rights in violation of Section 8(a)(1) and (3) of the Act.<sup>28</sup>

Turning to Respondent's alleged unlawful discriminatory treatment of the seven<sup>29</sup> returning locked-out employees as new employees for the purposes of overtime assignments after their

<sup>28</sup> Further, assuming arguendo Respondent had legitimate business reasons for delaying until January 22, I believe that it failed to justify its additional delay, from January 23 until February 23, 2004, in reinstating the above 24 locked-out employees. In this regard, I note, initially, that, as stated above, the Board countenances almost no delay in striker reinstatement cases and that Respondent failed to explain why a letter, similar to its January 28 letter, could not have been mailed to each locked-out employee, who accepted Respondent's reinstatement offer, immediately upon receipt of said acceptance in December, why each of the individuals could not have been reinstated as soon as January 26, the first Monday after the January 22 deadline, or why, after the January 22 deadline, Respondent inexplicably delayed until January 28 to send its letter, outlining reinstatement procedures, to the locked-out employees, who had accepted its offer. In any event, ignoring January 26, Respondent asserts that it wanted to have the entire group begin working on a Monday, which day is the start of a pay period, but that Monday, February 2 was ruled out as it was too close to January 28, thereby affording the employees, who were coming from outside Arizona, little time to report after receipt of the January 28 letter. The next two Mondays (February 9 and 16) were considered and rejected as reporting dates, for such would have left no time for the employees to give their current employers the standard 2-weeks notice, and, specifically with regard to February 16, Plant Manager Chappell, who was to be central in retraining the returning employees and who was the only existing manager with knowledge of the bargaining unit employees' skill levels, was scheduled for vacation. As to February 9, other than uncorroborated hearsay, there is no evidentiary support for Davis' assumptions regarding the need for any locked-out bargaining unit employee to give his current employer 2 weeks notice before quitting or regarding requests for additional moving time. In any event, even crediting the basis for Davis' decision regarding February 9, the rejection apparently was based upon the comments of merely 2 of the 24 locked-out employees. Concerning the necessity of Plant Manager Chappell's presence for training, the record evidence is that he was available for training during the entire month of January, and during the weeks of February 2 and 9, 2004. Moreover, Davis admitted that other managers could have performed the training for the returning locked-out employees, and, in fact, the record evidence is that other managers performed some of the training on February 23. In these circumstances, Respondent failed to establish a "legitimate and substantial business justification" for delaying reinstatement after, at the latest, January 26, 2004.

<sup>29</sup> Of course, Charles Collenback, a returning locked-out employee, also reported for work on February 23. I shall further discuss his status in the remedy section of this decision.

reinstatement on February 23, the parties stipulated that, inasmuch as it had no specific information about what work the seven returning locked-out employees performed during the 14 years of the lockout, whether the returning employees had the physical skills and abilities to perform their required job duties, and whether they would have any difficulties learning the new systems and methods, utilized by it, and as it believed that the returning locked-out employees would need a training period to be able to perform all aspects of their jobs efficiently and quickly as the existing employees, Respondent placed the returning locked-out employees on 4-week training periods just as if they were new employees. Specifically as to Respondent's limiting overtime assignments for said employees, citing to cases involving discriminatory treatment of returning economic strikers, with regard to seniority, job assignments, layoff rights, and benefits, such as *Oregon Steel Mills*, 291 NLRB 185 (1988); *Wisconsin Packing Co.*, 231 NLRB 546 (1977), and *Transport Co. of Texas*, 177 NLRB 180 (1969), counsel for the General Counsel contends that, upon their reinstatement, returning locked-out employees "... [should have been] treated uniformly with non-locked-out employees with respect to whatever benefits accrue[d] to the latter from the existence of the employment relationship" and that, therefore, Respondent violated Section 8(a)(1) and (3) of the Act by treating the seven returning locked-out employees as new employees for purposes of assigning overtime. The parties stipulated that, prior to the lockout, each of the seven returning locked-out employees had acquired the same overtime privileges as other full-time bargaining unit employees. Thereafter, even for the short 4-week time period after reinstatement, by treating each as a new employee for purposes of overtime assignments, Respondent placed each returning locked-out employee in a position subordinate to every existing full-time employee, thereby denying him the full and complete reinstatement to which he was entitled. In such circumstances, I believe, Respondent's conduct was seen, by the seven alleged discriminatees, as nothing less than retaliation for their support for the bargaining unit employees' strike and their Union's bargaining position and, by the existing employee complement, as a warning of the consequences of their support for a union. I further believe that, notwithstanding the relatively short period of the limited overtime assignments herein, the adverse effect of Respondent's actions upon its employees' aforementioned statutory rights to engage in support for a labor organization and to bargain collectively may not be characterized as "slight." Rather, and contrary to counsel for Respondent, given the language of Section 2(3) of the Act, I can see no difference between Respondent's treatment of its returning locked-out employees and the employers' inherently discriminatory treatment of returning economic strikers in the above-cited Board decisions. Bluntly put, Respondent treated its seven returning locked-out employees as if they were recent hires and deprived them of the status they would have retained but for the bargaining unit's strike and its subsequent 14-year lockout of the employees. Therefore, counsel for the General Counsel's citations to Board decisions, involving discriminatory actions against returning strikers, constitute binding legal precedent and, in accord with such decisions, I view Respondent's discriminatory treatment of its

the returning locked-out employees as inherently destructive of its employees' statutory rights. *Transport Co. of Texas*, supra at 187; *Oregon Steel Mills*, supra; *Wisconsin Packing Co.*, supra.

As stated above, the Supreme Court directs that the Board balance a respondent's actions with its claimed business justification in order to determine if such may be found violative of Section 8(a)(1) and (3) of the Act. In this regard, I note that, in his posthearing brief, counsel for Respondent argues that the "primary" reason Respondent failed to provide equal overtime opportunities for the seven returning locked-out employees, during their first four weeks back at work, was that "overtime work involves higher pay." Thus, counsel asserts, given that it did not know whether these employees continued to possess the physical skills and abilities necessary for their jobs and that, assuming they did have the requisite skills and ability, it believed they required the short 4-week time period to "get up to speed" so they could perform their job tasks as quickly and efficiently as its existing employees, who do receive premium pay for overtime work, Respondent had a legitimate business reason for temporarily limiting the overtime opportunities for returning locked-out employees. On this point, counsel notes the differences between work at Respondent's Yuma facility in 1989 and work there in 2004, including the necessity today for employees to know how to use the computerized scanners and the exact dates and locations of product within the cooler facility in order to maximize their freshness, especially mixed salads, which product did not exist in 1989, and argues that these changes in operations were something the returning locked-out employees were required to learn in order to perform their job tasks proficiently. While Respondent may have assumed that the returning strikers were in need of training on February 23, in the absence of underlying data, such was unadorned speculation, and the stipulated facts are that, within 5 days of their return, the seven employees were working independently and, while each did need to learn the location of product in the cooler, product codes, and product dating requirements, not all utilized the hand-held scanners to perform their job duties, neither Jackson, Lopez, Penny, Rodriguez, nor Tully needed training on the mechanical operation of a forklift or the mechanics of loading and unloading product and all were operating forklifts the day after their return to work, and other employees and foremen were available to answer questions, if any. Moreover, Respondent failed to document the progress, work performance, or any limitations of the job performance of the seven employees during the 4 weeks after February 23. Further, in a decision involving the analogous aftermath of a strike, the Board held that "it is not until the returning striker demonstrates an inability to do the work that the employer may take steps to assure itself that the incumbent needs some sort of special scrutiny." *Alaska Pulp Corp.*, 326 NLRB 522, 562 (1998). In the above circumstances, Respondent's asserted business justifications are insignificant and without merit when compared to the discriminatory nature of its treatment of the returning locked-out employees. Accordingly, I find that, by

treating the individuals as new employees for purposes of assigning overtime for a 4-week period after their return to work on February 23, 2004, Respondent engaged in conduct inherently discriminatory of employees' rights in violation of Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material herein, an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material herein, an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(5) of the Act.

3. By failing and refusing to immediately reinstate the 24 locked-out employees, who accepted its December 19 offer of reinstatement at the conclusion of its lockout, upon receipt of the acceptance from each, Respondent discriminated against its employees, who exercised their statutory rights, in violation of Section 8(a)(1) and (3) of the Act.

4. By treating returning locked-out employees as new employees for the purposes of assigning overtime during the initial 4 weeks of their reinstatement, Respondent discriminated against its employees, who exercised their statutory rights, in violation of Section 8(a)(1) and (3) of the Act.

5. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

I have found that Respondent engaged in serious unfair labor practices, directly impinging upon employees' statutory rights, within the meaning of Section 8(a)(1) and (3) of the Act. In order to remedy these, I shall recommend that it be ordered to cease and desist from engaging in said acts and conduct and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I have found that Respondent discriminatorily failed and refused to immediately reinstate the 24 locked-out employees, who accepted its December 19 offer of reinstatement, upon receipt of the offers from each of them. Accordingly, I shall recommend that Respondent be ordered to make employees John Rodriguez, Charles Collenback, Ray Velasquez, Danny Gutierrez, Alvin Anderson, John Todd, Rod Kenneth Penny, Matt Forstedt, Cheryl Vaz, Robert Tully, Jerry McBride, Loretta Heinz, Alejandro Rivas, Rigoberto Lopez, Eugene Navavoli, Salvatore Escobar, Gary Jackson, Thomas Norris, Joe Flores Olvera, Louie Pestoni, Michael Kemp, Russ Christiansen, Larry Joe Azlin, and Mel Southworth whole for any wages and other benefits lost from the date on which Respondent received the acceptance from each of its offer of reinstatement until February 23, 2004, the date which Respondent established for reinstatement, with interest to be computed in

accord with the Board's holding in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>30</sup> Also, I have found that Re-

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<sup>30</sup> I have carefully considered whether any of the 15 individuals, who failed to report for work on February 23, 2004, should receive any backpay. In this regard, it may be argued that, by failing to report, they abandoned their right to backpay or that they never had any intention of returning to work for Respondent. However, by accepting Respondent's offer, each of the 15 clearly signified his or her desire to return to work for Respondent. Moreover, one may reasonably argue that Respondent's unlawful delay in reinstating each caused him or her to decide not to return. Traditionally, the Board concludes that any ambiguity be resolved in favor of the aggrieved party. Accordingly, I have fashioned a make-whole remedy for each of the 15 locked-out employees, who accepted Respondent's offer but did not report for work on February 23. *Mercy-Memorial Hospital Corp.*, 231 NLRB 1108, 1116 (1977). Of course, if Respondent possesses any evidence, or is otherwise able to establish, that any of the 15 individuals, who failed to report for work on February 23, actually had no desire of accepting Respondent's offer, it may offer said evidence at the compliance stage. With regard to employees Gutierrez and Azlin, counsel for Respondent acknowledged that Davis' testimony was, of course, uncorroborated hearsay. He did not offer it for the truth, and I have given it no weight.

spondent discriminated against returning locked-out employees Gutierrez, Jackson, Lopez, Penny, Rivas, Rodriguez, and Tully, all of whom reported for work on February 23, 2004, by treating each as a new employee for purposes of the assignment of overtime work. Accordingly, I shall recommend that Respondent be ordered to make each of the employees whole for any overtime payments, to which he would have been entitled but for Respondent's discrimination against him, with interest to be computed in accord with the Board's decision in *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]

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Accordingly, each is entitled to the full backpay remedy; however, during the compliance stage, Respondent is entitled to establish that any backpay for either should be limited with direct evidence regarding his ability to report for work on the scheduled date. Finally, in accord with counsel for the General Counsel, backpay for employee Collenback is limited to the period from Respondent's receipt of his acceptance of the former's offer until the date of his work-related injury while employed elsewhere.