

Schenectady stores, excluding the head cashier,⁴ tailor shop employees,⁵ and all other employees, and supervisors as defined in the Act.

If a majority of the employees in both voting groups select the Petitioner, they will be taken to have indicated their desire for a single bargaining unit, and the Regional Director conducting the elections directed herein is instructed to issue a certification of representatives to the Petitioner for such unit which the Board in that event finds to be appropriate for purposes of collective bargaining. In the event that a majority of the employees in voting group 1 select the Intervenor and a majority of the employees in voting group 2 select the Petitioner, the employees in each will be taken to have indicated their preference for a separate bargaining unit, and the Regional Director is instructed to issue a certification of representatives to the Petitioner or Intervenor, as the case may be, for the separate unit which the Board finds in such circumstances to be appropriate for purposes of collective bargaining.

[Text of Direction of Elections omitted from publication in this volume.]

⁴ We find, in accordance with the Employer's contention, that the office employee classified as head cashier in each store should be excluded from the unit as a confidential employee. The record shows that only this employee has access to all confidential memoranda sent to the store manager concerning labor relations policy and all other instructions concerning employment conditions and rates of pay. See *B. F. Goodrich Co.*, 92 NLRB 575.

⁵ The parties have stipulated to exclude the tailor shop employees.

BROWN AND ROOT, INC., WUNDERLICH CONTRACTING COMPANY, PETER KIEWIT SONS COMPANY, WINSTON BROS. COMPANY, DAVID G. GORDON, CONDON-CUNNINGHAM CO., MORRISON-KNUDSON COMPANY, INC., J. C. MAGUIRE & COMPANY, AND CHAS. H. TOMPKINS CO., DOING BUSINESS AS JOINT VENTURERS UNDER THE NAMES OF OZARK DAM CONSTRUCTORS AND FLIPPIN MATERIALS Co. and FORT SMITH, LITTLE ROCK & SPRINGFIELD JOINT COUNCIL, A. F. L. *Case No. 32-CA-111.*
June 27, 1952

Decision and Order

On August 15, 1951, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding finding that the Respondents¹ had engaged in and were engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act and

¹ As used herein, Ozark is Respondent Ozark Dam Constructors; Flippin is Respondent Flippin Materials Co.; Respondents are Flippin and Ozark, jointly, and severally; Joint Council is Fort Smith, Little Rock & Springfield Joint Council, A. F. L.; and IAM is International Association of Machinists.

recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not discriminated against Harry Hermanson and L. A. Shankler, and recommended the dismissal of the complaint as to them. Thereafter, Respondent Ozark and Respondent Flippin separately filed exceptions to the Intermediate Report and jointly filed a supporting brief. The Respondents' request for oral argument is denied, as the record, exceptions, and brief, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed.² The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the conclusions and recommendations of the Trial Examiner with the following additions and modifications.³

1. The Joint Council strikers⁴

We agree with the Trial Examiner that the Joint Council strikers were unfair labor practice strikers. On August 19, 1948, the Joint Council was certified as the exclusive bargaining representative with respect to two of the four units of Ozark employees found appropriate by the Board.⁵ Thereafter, on December 3, 1948, the Joint Council employees struck because of an alleged unlawful refusal to bargain on the part of Ozark. A finding that Ozark had in fact refused to bargain collectively with the Joint Council in violation of Section 8 (a) (5) was subsequently made by the Board on October 13, 1949,⁶ and

² We agree with the Trial Examiner's exclusion of evidence offered by the Respondents regarding the alleged failure of the Regional Director to advise the Respondents upon their request which strikers to reinstate and what steps to take relative to their obligations under the Act. It is not the function of the Board to furnish such advice regarding alleged unfair labor practices under investigation, and evidence of settlement negotiations are not admissible in the formal complaint proceedings.

³ The following corrections and clarifications of the Intermediate Report are noted, without otherwise affecting our agreement with the findings of the Trial Examiner: (1) The charge filed on October 1, 1948, in the earlier complaint proceeding was only against Ozark, but was later amended to include Flippin; (2) from December 1 to 3, 1949 (not 1948), the parties held conferences in Mountain Home, Arkansas; (3) the reference to "Respondents" is intended, as in the Decision and Order, to refer to Ozark and Flippin, jointly and severally.

⁴ As used herein, Joint Council employees or strikers are those in the two bargaining units of Ozark employees as to which the Joint Council was certified by the Board; IAM employees or strikers are those in the two bargaining units of Ozark employees as to which the IAM was certified by the Board; Flippin employees or strikers are those appearing on the Flippin payroll as of December 3, 1948, when the strike was called, and who were not included in the IAM or the Joint Council units.

⁵ Specifically, the units for which the Joint Council was certified consisted of (1) millwrights, and (2) a residual unit of "all employees at the Bull Shoals Dam." As more fully discussed below, the IAM was certified generally for units of mechanics and machinists. See *Brown and Root, Inc., et al.*, 77 NLRB 1136.

⁶ *Brown and Root, Inc., et al.*, 86 NLRB 520.

by the Court of Appeals for the Eighth Circuit on July 5, 1951.⁷ Indeed, we note that the Respondents in the course of their dealings with the Joint Council after the strike, and in the positions they took in the present proceedings, apparently have not disputed the fact that the individuals under discussion were entitled, as unfair labor practice strikers, to displace the replacements hired in their jobs.⁸

2. The Flippin strikers

The Trial Examiner found, and we agree, that the Flippin strikers were unfair labor practice strikers. However, we rely particularly upon the considerations which are discussed below. The strike called by the Joint Council on December 3, 1948, was participated in by certain of the Flippin employees, and a picket line was erected at the Flippin plant. As already noted, the Flippin employees were not included in the Joint Council units; nor were they represented in any other bargaining units. In resolving the immediate question whether the Flippin strikers were economic or unfair labor practice strikers, it is necessary, we believe, first to consider the nature of the relationship between Flippin and Ozark. The facts are fully developed in the Intermediate Report.

Flippin and Ozark are separate joint ventures made up of the same participating venturers. In April 1947 Ozark commenced operations for the purpose of constructing the Bull Shoals Dam under special Government contract. In November 1947 the Flippin operations were begun, on the basis of a different Government contract, specifically to provide Ozark with crushed stone aggregate to be mined by Flippin from a nearby quarry. Although the quarry was located 7 miles from the Ozark dam site, a conveyor belt line, constructed and maintained by Flippin employees and teams of Ozark employees on loan to Flippin, served to connect the two plant locations. Both ventures employed the same project superintendent, shared in the employment of other supervisors, and jointly utilized, among other facilities, a personnel office located on the Ozark premises. The cost of the personnel and facilities used in common was allocated between the two joint ventures. Of particular significance is the fact that one of the participating joint venturers, i. e., Brown and Root, was designated and empowered as attorney-in-fact to direct all the operations of both joint ventures, and to exercise control of their personnel and labor relations.

⁷ *N. L. R. B. v. Ozark Dam Constructors and Flippin Materials Co.*, 190 F. 2d 222 (C. A. 8).

⁸ See, for example, Ozark's note of December 14, 1949, in reply to the Joint Council's application for the reinstatement of certain strikers, expressly stating "You are aware that this will require Ozark Dam Constructors to replace existing employees, who have been hired for the first time since December 4, 1948. . . ."

In the prior complaint proceeding involving these Respondents, there was not presented before the Board or the court an issue, such as we have here, of whether Flippin and Ozark constituted a single employer or separate employers. There, the violation of Section 8 (a) (5) was charged against Ozark alone; under the circumstances that was all that was deemed necessary to litigate the particular unfair labor practice and to effect a remedy. However, the violation of Section 8 (a) (1) was charged and found by the Board against both Flippin and Ozark. As ultimately decided by the court, the latter violation was essentially confined to statements made by a carpenter foreman, only to Ozark employees, on the same day that Board elections among such employees were to be held. Although the carpenter foreman was in the employ of both Flippin and Ozark, under the allocation arrangement described above, the court enforced the Board's Order only against Ozark with respect to the conduct found violative of Section 8 (a) (1), because, as it stated, the "election in no way involved the employees of Flippin," and because there was no evidence that the carpenter foreman in these circumstances "was speaking for or on behalf of Flippin," or that his remarks in any way affected the rights of the Flippin employees.

But we believe that the resolution of this question, whether Ozark and Flippin constituted a single employer, is necessarily dependent upon the nature of the issue ultimately to be decided. Here, the basic issue to be decided concerns the rights of the Flippin strikers⁹ whether they are to be regarded as economic or unfair labor practice strikers for reinstatement purposes under Board law.

As indicated above and in the Intermediate Report, the evidence in the present record demonstrating the close unity of ownership and control of all the operations and labor relations of Flippin and Ozark is overwhelming. From the standpoint of the employees, it has also been clearly shown that the working personnel of both ventures could and did reasonably regard Ozark and Flippin as their common employer, notwithstanding the incidental fact that their pay checks were made out by one or the other, depending upon the particular job they were performing at a given time. Such factors as the common supervision of Flippin and Ozark employees and their joint use of the same personnel office were important in this regard. We are impressed, too, with the evidence of interchange and transfer of the employees between Ozark and Flippin. Stipulations in the record show that of a total of some 1,373 persons employed over an average recent period of approximately 11½ years, there were 595 instances of interchange and transfer of employees from Flippin to Ozark and from Ozark to Flip-

⁹ Distinguish, for example, Board cases involving issues of appropriate bargaining units, and questions of the *liability* of commonly owned or controlled companies for the commission of unfair labor practices by one such company.

pin.¹⁰ Likewise significant, in our view, is the fact that after the strike Flippin strikers were reinstated to Ozark jobs, and Ozark strikers to Flippin jobs. Thus, it is amply evident that the Flippin employees, though they were not included in the Joint Council units limited as they were to Ozark employees, had been transferred at substantially frequent intervals to and from employment embraced in such units, and could reasonably contemplate the continuation of such interchange and transfer practices.¹¹

Consequently, in view of the foregoing considerations, we reach the same conclusion as the Trial Examiner, i. e., that Ozark and Flippin are a single employer for the purpose of determining the remedial status of the Flippin-strikers. We further conclude that the Flippin strikers, as unrepresented employees of the same employer, whose interests, as already shown, were closely interwoven with those of the Joint Council strikers, were substantially affected and aggrieved by Ozark's unlawful refusal to bargain with respect to the Joint Council units; that they had a "sufficiently immediate relation" to the unfair labor practices described; that such practices constituted the direct cause of their participation in the strike, and that they were entitled, like the Joint Council strikers, to the full reinstatement remedy of unfair labor practice strikers.¹²

3. The Section 10 (b) contention

The Respondents contend that a finding that any of the strikers were unfair labor practice strikers is precluded by the proviso in Section 10 (b) of the Act which restricts the issuance of a complaint ". . . based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." Specifically, the Respondents assert that the present case is analogous to the *Greenville Cotton Oil Company* case,¹³ in which the Board held that the finding of an unfair labor practice strike was precluded under Section 10 (b), where the charge was filed more than 6 months after the unfair labor practice which caused the strike, although timely with respect to that company's failure to reinstate the strikers upon application. However, like the Trial Examiner, we find a very basic dis-

¹⁰ From Ozark to Flippin there were 300 instances, and from Flippin to Ozark 295 instances of transfer between payrolls. These figures include cases involving severance from the payroll of one venture because of resignation, termination, or reduction in force, and subsequent rehire in the same or in a different classification on the payroll of the other venture. Data were derived from General Counsel's Exhibits Nos. 11, 15, 16, 19, and 20.

¹¹ Cf. *Ocala Star Banner*, 97 NLRB 384.

¹² See *N. L. R. B. v. Biles Coleman Lumber Co.*, 98 F. 2d 18 (C. A. 9), (cited and discussed in the Intermediate Report) similarly involving a strike caused by an unlawful refusal to bargain in which the sole pertinent holding of the court, as relates to the present case, was that certain unrepresented nonunit strikers (i. e., the two foremen) were unfair labor practice strikers.

¹³ 92 NLRB 1033, enforced 30 LRRM 2289 (C. A. 5), June 12, 1952.

inction between the two cases. In the case before us, unlike the *Greenville* case, a separate timely charge was filed with respect to the unfair labor practice causing the strike which, indeed, culminated in a finding of a violation of Section 8 (a) (5) of the Act by the Board and the court in another proceeding.¹⁴ The construction offered by the Respondents is wholly untenable, i. e., that the proviso under Section 10 (b) applies here merely because our finding of an unfair labor practice strike is literally "based upon" Ozark's unlawful refusal to bargain, which antedated the present charge by more than 6 months. For the undoubted purpose of the Section 10 (b) proviso, as is apparent in its express terms, was merely to discourage dilatory filing of charges.¹⁵

4. The IAM strikers

On August 19, 1948, following the Board elections, the Joint Council was certified to represent two of the Ozark units, as already indicated, and the IAM was certified in respect to the remaining two bargaining units, generally consisting of (a) machinists, and (b) mechanics, including "mechanical repairmen." As of December 3, 1948, when the strike was called by the Joint Council, the IAM was in the process of negotiating for a contract to embrace the employees in the two units it thus represented. Some of these IAM employees participated in the Joint Council strike, albeit with no sanction or authorization of the IAM.

The Respondents contend that the IAM strikers were not at all entitled to reinstatement, because they violated an alleged "no-strike, no-lockout" provision in a contract between the IAM and Ozark. This issue was not raised or litigated at the hearing. It was contended for the first time by the Respondents in their brief to the Board. Although there is some evidence in the record that a contract was ultimately executed with the IAM as of about November 17, 1949, some 11 months after the strike, the contract itself was not introduced in the record. More particularly, as the Trial Examiner found, there is nothing, parol or in writing, as evidence of the alleged no-strike clause. Consequently, because of the Respondents' failure factually to support its contention, we do not reach the question whether a no-strike clause executed, as it is alleged here, long after the strike had begun, had the effect of converting employees covered by the contract who continued in their strike into misconduct strikers not entitled to reinstatement.

The Respondents also contend that, under the *Draper* doctrine,¹⁶

¹⁴ *Ozark Dam Constructors*, 86 NLRB 520, enforced *N. L. R. B. v. Ozark Dam Constructors, et al.*, 190 F. 2d 222 (C. A. 8); also cited *supra*.

¹⁵ Senate Report No. 105 on S. 1126, p. 27; House Conference Report No. 510 on H. R. 3020, p. 53.

¹⁶ *N. L. R. B. v. Draper Corporation*, 145 F. 2d 199 (C. A. 4).

the IAM strikers forfeited their right to any reinstatement because their unauthorized strike interfered with the representative authority of the IAM. The Trial Examiner properly rejected this contention. The *Draper* case involved a wildcat strike undertaken for the express purpose of affecting the position of the strikers' authorized representative then engaged in collective bargaining negotiations, which conduct, it was found, was in derogation of the exclusive bargaining authority of such representative. The strike was therefore held an act of misconduct which justified the refusal on the part of the employer to reinstate the strikers. But the *Draper* doctrine certainly was not intended to deprive minority strikers of their ordinary protection in striking, with or without the consent of their bargaining representative. There is clearly no *Draper* situation under the present facts. In this case the IAM strikers joined the strike for a purpose entirely unrelated to the collective bargaining authority and activities of their own representative, the IAM. They struck to support and sympathize with the unfair labor practice strikers in the Joint Council units. For such a purpose, as we have already shown, they were entitled to the protection afforded by the Act to strikers generally.

However, the Trial Examiner held that the IAM employees who struck were themselves unfair labor practice strikers to whom the full reinstatement rights available under the Act should be granted. With this conclusion we cannot agree. Unlike the Flippin strikers, the IAM strikers were affirmatively represented in separate certified units *with respect to which Ozark was properly bargaining collectively with the IAM*. This minority group of IAM employees, unauthorized by their own representative, undertook to strike in conjunction with the Joint Council strikers as to whom Ozark did unlawfully refuse to bargain. It is therefore clear that the strike was not caused by any unfair labor practices directed at the IAM employees, and that they were not immediately affected or aggrieved by Ozark's conduct relating to the Joint Council units. Nor are we able reasonably to conclude that Ozark's unfair labor practices, rather than a desire to express sympathy and support for the Joint Council strikers, constituted the actual reason for the work stoppage on the part of the IAM strikers.

The *Biles Coleman* case, *supra*, is cited by the Trial Examiner as authority for the proposition that employees in the position of the IAM strikers have the same rights as those employees (the Joint Council strikers here) who are directly affected by the commission of unfair labor practices. That is not our view of the court's holding in the *Biles Coleman* case. The nonunit strikers in that case who were held by the court to have been unfair labor practice strikers, in circumstances otherwise similar to those in the present case, *were not affirm-*

actively represented in different units as were the IAM strikers here. Moreover, the seemingly sweeping language used by the court in that case, upon careful analysis, reveals that the court confined itself to the narrow facts there in question, and specifically refrained from considering "the ultimate limits of the Board's authority to order reinstatement of strikers against whom an unfair labor practice is not directly committed." Thus, the court's holding there was not that all employees of an employer who participate in an unfair labor practice strike are necessarily unfair labor practice strikers, but simply that the particular strikers under consideration in that case had a "sufficiently immediate relation" to the unfair labor practices to be entitled to full reinstatement.¹⁷ Accordingly, it is our view that the IAM strikers did *not* have a "sufficiently immediate relation" to the Respondent's refusal to bargain to support a finding that they were unfair labor practice strikers,¹⁸ like the Joint Council and Flippin strikers whom we have found were directly affected by the unfair labor practice.¹⁹

5. The Joint Council's applications for reinstatement

The General Counsel alleged in the complaint that on December 2, 1949, and at various dates thereafter, the striking employees made unconditional offers to return to work. The Trial Examiner did not specifically pass upon this allegation. The record shows that on about such date, at one of the bargaining conferences with Ozark, the Joint Council orally requested that all the strikers be put back to work. Ozark's counsel refused this broad request but handed the Joint Council's representatives a note, which is in evidence, stating in substance that it would reinstate the strikers upon their discontinuance of the strike, "to the extent required by the Labor Management Relations Act."²⁰ Although as of December 2, 1949, all picketing

¹⁷ There appears no evidence to support the implied finding in the Intermediate Report that all or any of the IAM strikers attended the Joint Council strike meeting and voted with the others to go out on strike; we cannot accept such an inference from the fact that the Joint Council meeting was "open to all employees of the Respondents." Nor would we attach significant weight to such a conclusion even if supported. And we do not deem it valid or at all persuasive that the IAM employees were uncertain of their classification, or that they had not become accustomed to the differences between the units, in particular view of the hearing, elections, and certifications in the representation case, *supra*, and the stipulations in the record showing clearly that the employees in question held IAM classifications at the time of the strike.

¹⁸ Member Houston dissents from this portion of the decision; his dissenting opinion appears separately, *infra*.

¹⁹ The stipulations in the record reflect a pattern of interchange and transfer of employees to and from classifications embraced in the IAM units in the same manner as that shown above with respect to the Flippin employees. However, in view of the distinct considerations affecting the IAM strikers, as shown herein, we do not regard this factor sufficient to find that their strike was caused by an unfair labor practice.

²⁰ Testimony on behalf of the Joint Council that Ozark agreed to reinstate strikers only "as vacancies occurred" cannot be accepted as the precise or final position of Ozark in view of the documentary evidence of Ozark's note, described in the text above, which the Joint Council admitted it received.

had long since been abandoned, it is entirely clear that the parties viewed the strike as continuing.²¹ Nor is it contended, and it does not appear, that any of the strikers presented themselves for reinstatement and were rejected on or about December 2, 1949. As of such date the record establishes merely that the parties commenced negotiations looking toward an agreement between them on the subject of the settlement of the strike and the reinstatement of the strikers.²² Accordingly, we find no support for the allegation in the complaint that strikers were discriminatorily denied reinstatement beginning December 2, 1949.

However, on December 14, 1949, a formal memorandum was delivered by the Joint Council to Ozark, reading in pertinent part:

As a result of the action on the part of the *Ozark Dam Constructors* in violating the provision of the Management Relations Act of 1947, a large number of the employees *who participated in the certification election* went on strike under date of December 2, 1948. Many of these employees have been either totally or partially unemployed since December 2, 1948, suffering severe loss and privation to themselves and their families. The undersigned now formally demands these employees, *or those of them who present themselves*, be immediately employed by the *Ozark Dam Constructors*. (Emphasis added.)

Ozark accepted this offer of the Joint Council in the form of a note submitted on the same day, stating *inter alia*:

In accordance with the demand in your letter of this date for the reinstatement of those persons who went out on strike on December 3, 1948, and who were employed on December 2, 1948, by Ozark Dam Constructors, this is to advise that we will re-employ such persons *to the extent required by the Labor Management Relations Act of 1947* and in the manner required thereby *upon their application to Ozark Dam Constructors* for such re-employment. You are aware that this will require Ozark Dam Constructors to replace existing employees, who have been hired for the first time since 4 December 1948 with such employees who have been out since 3 December 1948 and who re-apply for such jobs. (Emphasis added.)

²¹ The Respondents contend in their brief that the strike was over when the picketing was called off about August 1, 1949. We disagree. The strikers did not return to work after the cessation of the picketing on August 1, 1949. And apart from other considerations the understanding and actions on the part of the parties themselves, as clearly revealed in the record, wholly negate this contention. Thus, for example, Ozark conceded in its negotiations with the Joint Council on December 2, 1949, and at subsequent dates, that the strike was still in progress. Cf. *Kallaher & Mee*, 87 NLRB 410.

²² Among other things, the conferees at the December 2, 1949, meeting designated a committee to make a spot check of Ozark's payroll to determine the approximate number of strike replacements hired. Such a check was made and was taken under consideration by the parties.

The Trial Examiner rested his reinstatement and back-pay findings upon the conclusion that a proper unconditional application for reinstatement on behalf of *all* employees who participated in the strike, i. e., Joint Council, Flippin, and IAM strikers, was made by the Joint Council in its letter of December 14, 1949, as set forth above. We are able to draw no such conclusion from the Joint Council's December 14, 1949, letter. The unmistakable language in this offer of the Joint Council clearly restricts the applicants to considerably fewer than all of the strikers. The letter is addressed specifically to Ozark; refers to those employees "who participated in the certification election," which excludes, of course, the Flippin employees, and may be construed in the context of the letter to exclude the IAM employees as well; and demands employment in the alternative for "*those of them who present themselves.*" Ozark's letter of acceptance of the same date, revealing its own interpretation of the content of the offer, plainly shows its agreement only to take back such strikers "*upon their application for re-employment.*"

The sequence of the developments which ensued upon the agreement of the parties in their exchange of notes on December 14, 1949, as related in detail in the Intermediate Report, also amply demonstrates that the intent and understanding of the parties was that the strikers were to make *individual* applications for reinstatement. The pertinent events may be recapitulated as follows:

(a) The strike was formally terminated by the Joint Council on December 14, 1949, and the strikers were advised to report to the union hall to register for employment.

(b) From December 14, 1949, until January 3, 1950, the parties undertook and carried out, in part, a joint reinstatement program.

(c) During such period, numerous strikers bearing referral slips from the Joint Council made application for reemployment at the dam site; some were reinstated, some rejected.

(d) At about the beginning of the joint reinstatement program, the parties agreed that only 25 referrals a day should be made by the Joint Council.

(e) The parties mutually agreed to postpone any reinstatement of strikers between December 22, 1949, and January 3, 1950, for reasons owing to the holiday season.

(f) Under the joint program, lists of available applicants were submitted by the Joint Council to Ozark on December 21, 1949, and on January 3, 1950.

(g) On January 3, 1950, at a meeting with the Joint Council, Ozark indicated, over the protest of the Joint Council, that it considered its reinstatement obligations completed, except in respect to the reemployment of laborers and the existence of some 38 vacancies in specific classifications, a list of which it furnished the Joint Council.

(h) On January 15, 1950, the Joint Council sent to Ozark and to Flippin separate formal letters with attached lists of available strikers employed by each respective joint venture, stating *inter alia*:

The following employees . . . having abandoned their strike, *hereby unconditionally apply for employment.* (Emphasis added.)

(i) On January 24, 1950, Ozark and Flippin replied, rejecting the demand of the Joint Council. However, Ozark instructed the Joint Council to direct any of the employees on the January 15, 1950, list to its employment office, and it would "endeavor to employ as many of such men as possible."

In the recent case of *American Manufacturing Company of Texas*,²³ the Board had occasion to pass upon a similar question. The Board held there that an *incomplete* application for reinstatement was made in the following circumstances: (a) The union agreed that the men should report individually to indicate their availability and to ascertain whether or not jobs were still available; (b) the union informed the strikers to make individual application; (c) the union itself filed back-to-work applications.

Likewise in the present case, we do not find support in the evidence that a proper blanket application on behalf of all or any of the strikers was made and rejected by the Respondents on *December 14, 1949*.

6. The authority of the Joint Council to make application

However, the record shows that personal applications were made by many of the strikers. In addition, as previously indicated, there were separate lists of available strikers submitted to Ozark by the Joint Council on December 21, 1949, January 3, 1950, and January 15, 1950, and submitted to Flippin on January 15, 1950.²⁴ As regards the December 21, 1949, and January 3, 1950, lists, it appears that they were compiled largely on the basis of the registration of strikers at the union hall in connection with the joint reinstatement program. The January 15, 1950, lists compiled, as has been shown, after the collapse of the joint reinstatement program, were comprehensive in coverage and named all but a few of the strikers who had not theretofore been reinstated.

The named strikers on all of the afore-mentioned lists submitted to the Respondents were thus represented by the Joint Council to be applicants available for immediate reinstatement. The Respondents did in fact reinstate many of the strikers named on the lists; such

²³ NLRB 226. (*Member Styles* dissenting.)

²⁴ Respondents Exhibits Nos. 3, 7, and 5, and General Counsel Exhibit No. 7, respectively.

strikers for the most part are not complainants in this case. However, in determining whether those strikers who are complainants herein can be said to have made proper application for reinstatement, by reason of their appearance on the Joint Council's lists, we must first examine the Joint Council's authority to make such application on their behalf.

The *Joint Council strikers* were, of course, represented by the Joint Council as their certified bargaining agent in respect to all matters of collective bargaining, as well as those matters which pertained solely to the strike. Although, when the strike was finally terminated by the Joint Council after about 1 year, there were strikers who had of necessity located themselves long distances from the area of the dam site, the record does reflect that a number of such strikers maintained communication with the nearest office of the Joint Council or with one of its constituent unions; and many corresponded with friends or relatives living near the dam site who registered for re-employment in their behalf at the union hall. In any case, we believe that the Joint Council, as the statutory bargaining representative of the Joint Council strikers, did have the necessary authority to make proper application for the reinstatement of these strikers.

With respect to the *Flippin strikers*, although they were not in the Joint Council units, the record supports a finding that the Joint Council received proper authorization to make application for the reemployment of a number of these strikers from the registration of their names at the union hall, by personal appearance, or through instructed intermediaries. It is entirely clear, in any event, that the strike was organized and conducted in the name and authority of the Joint Council and that the unrepresented Flippin strikers submitted themselves to such authority and participated in the various strike activities and procedures within the framework of the Joint Council's strike organization. Under these circumstances, we are of the opinion that the Joint Council may properly be regarded as the representative of the Flippin strikers respecting all matters which pertained to the strike, including their agreement to terminate the strike and their applications for reinstatement.

The *IAM strikers*, however, were affirmatively represented by the IAM in other than Joint Council units in regard to all matters of collective bargaining. The IAM did not authorize or sanction their participation in the strike. And, as the statutory exclusive representative of these strikers, the IAM formally advised the Respondents' project superintendent by letter, in evidence, shortly after the termination of the strike, not to recognize or deal with any other union than the IAM relative to the reinstatement of IAM strikers. The letter stated in pertinent part:

To avoid any possibility or future misunderstanding, this is to advise that no union or group of unions, other than the I. A. of M. has any authority to authorize or request any change in present personnel or to represent any employee coming within the bargaining units described in the above-mentioned agreement, *regardless of any understanding or agreement which may have been reached or which may be reached in the future with any other union regarding the rehiring of former employees.* (Emphasis added.)

The position of the Respondents in their post-strike dealings with the Joint Council was rigidly and consistently to the effect that the Joint Council had no authority to speak for any of the IAM strikers. Moreover, the Respondents contended then, as they do now, that they would have violated Section 8 (a) (5) of the Act to have dealt with the Joint Council regarding the IAM strikers. We need not pass upon this contention. In view of the afore-mentioned letter of the IAM, and all the circumstances of the strike, we conclude that the Joint Council had no authority to make application for the reinstatement of any of the IAM strikers appearing on the Joint Council's lists described above.²⁵ We find, therefore, that *personal* applications for reinstatement by the IAM strikers were necessary.

Accordingly, in our opinion, the Joint Council and Flippin strikers whose names appeared on the lists of December 21, 1949, January 3, and 15, 1950, submitted by the Joint Council to the Respondents, thereby made effective application for reinstatement.²⁶ Moreover, we find that the Joint Council's letters to the Respondents on January 15, 1950, with the attached comprehensive lists as described above, in clear and unequivocal terms effected a blanket unconditional application for the reinstatement of the Joint Council and Flippin strikers named on the lists. Thus, except in the classifications in which the Respondents indicated vacancies on January 3, 1950, which we shall further discuss below, the rejection by the Respondents of the Joint Council's blanket demand of January 15, 1950, made it unnecessary for these listed strikers to apply personally at the dam site.²⁷

²⁵ The Intermediate Report refers to the existence of an agreement as of December 14, 1949, on the part of the Respondents to reinstate the strikers, and to the Respondents' breach of such an agreement. As regards the Joint Council and Flippin strikers, as unfair labor strikers, they were entitled to reinstatement as a matter of legal right, apart from any agreement by the Respondents. As regards the IAM strikers, we find no evidence that the Respondents agreed on or about December 14, 1949, to reinstate them.

²⁶ Although in a few instances the names of strikers on the lists were misspelled or appeared under inaccurate job classifications, we find that the names of specific strikers on the lists which we shall indicate below were sufficiently clear to be identified by the Respondents.

²⁷ See, e. g., *Pecheur Lozenge Co., Inc.*, 98 NLRB 496.

7. The futility of application theory

Although the Trial Examiner held, erroneously as we have found above, that personal applications by the strikers were not required and that they had a right to reinstatement as of December 14, 1949, when a purported blanket application was made by the Joint Council, he also indicated that after January 3, 1950, individual applications by the strikers would have been futile, citing cases to support a futility of application finding. On January 3, 1950, as has already been shown, the joint reinstatement program undertaken by the parties immediately after the strike was called off when the Joint Council was formally apprised by the Respondents' representative that the reemployment of the strikers had been completed to the extent that permanent replacements had been hired in their jobs, except for some 38 specified vacancies, and all laborers. In regard to the reemployment of the Flippin and IAM strikers, the Respondents' position was that they were not obligated to displace any replacements. It also appears that on or shortly after January 3, 1950, there were many strikers, Joint Council, Flippin, and IAM, who applied personally for reinstatement and were rejected by the Respondents.

Contrary to the Trial Examiner, we do not believe that "a futility of application" theory is supportable in the light of all of the circumstances in this case, e. g.: (a) After the abandonment of the joint reinstatement program on January 3, 1950, the Joint Council nevertheless advised the strikers to continue to go down to the dam site and apply for reemployment at Ozark and Flippin²⁸; (b) the Joint Council was advised there were still job vacancies at the project in many classifications which the strikers could fill; this is significant particularly in view of the interchangeable character of many of the jobs; (c) moreover, the record shows that a substantial number of strikers in various classifications did continue to apply for work at the Respondents' personnel office, or directly to certain of the foremen, and that many of them succeeded in getting reemployment; and (d) on January 15, 1950, the Joint Council itself made application, as we have found, for most of the remaining strikers who were available.

8. The Respondents' "overload" theory

The Respondents contend now, as they did on January 3, 1950, that they had fulfilled their reinstatement obligations on such date when they completed the reinstatement of certain classifications of unfair

²⁸ This is based on the clear testimony of Joint Council Representative Keeler. The Joint Council's allegation that it undertook, after January 3, 1950, to advise all strikers at or away from the project area not to make application, that there were no jobs, is therefore, **not creditable.**

labor practice strikers to the extent and in the amount that permanent replacements were hired during the strike in these classifications— notwithstanding the fact that all such replacements continued to be employed. The Respondents' attempt to justify the retention of the replacements as an "overload" or "luxury" which they chose to indulge in after having satisfied what they construed to be the requirements of the Act. Without deciding the validity of such a legal argument, we find, on the present record this contention, has no factual support. The Trial Examiner found, and we agree, that the strikers who were thus reinstated, i. e., before January 3, 1950, were given jobs which were *vacant*. Thus, among other things, the evidence shows: (a) In about October 1949 the Respondents' total employee complement was drastically reduced by a layoff from a one-time peak of about 1,600 to about 200, made necessary as a result of a strike on the Missouri Pacific Railroad. Many of the laid-off employees thereafter became unavailable, thus indicating a strong probable need by the Respondents for employees when the strike here in question was finally ended in December 1949; (b) the Respondents advised their foremen in regard to the reinstatement of strikers to keep the replacements "if they could afford it," none of the replacements were discharged, all were apparently regularly used at work; (c) shortly after reinstating many of the strikers, the Respondents instituted reductions in force in which the reinstated strikers were given no preference over the replacements; and (d) the Respondents continued to hire *new* employees during the period immediately following the strike in many of the affected classifications.

9. The January 3, 1950, list of vacancies

We have found that the Joint Council was properly the agent for the Flippin and Joint Council strikers in respect to making applications for reinstatement. Likewise we find the Joint Council was the agent for these strikers in *receiving* offers of reemployment from the Respondents. Thus, as previously shown, on January 3, 1950, the Respondents' representative furnished the Joint Council with a list of 38 vacancies in various specified classifications,²⁹ and also made it clear that all laborers could be immediately reemployed. Consequently, we must view this show of vacancies in the existing context as an affirmative willingness to employ, and as offers of reemployment, which necessarily affects the reinstatement rights of the claim-

²⁹ I. e., one truck driver, one euclid operator, one warehouseman, one pipefitter, one plumber, three thin-wall tubing men, one boilermaker, four carpenter apprentices, one iron-worker-rodman, one bellboy, one dozer operator, five oilers, one shovel operator, four electric apprentices, four welders and eight certified welders.

ing strikers who had such classifications.³⁰ For their own economic reasons, the Respondents could, in the circumstances, properly make such reemployment offers to available strikers before receiving their applications for reinstatement. Specifically, we find that the affected strikers were not discriminated against after January 3, 1950, unless the vacancy indicated by the Respondents on such date was timely claimed and filled by a striker thereafter, or unless these strikers applied personally *at the plant* after such date³¹ and were rejected by the Respondents.

10. Violation of Section 8 (a) (1)

We agree with the Trial Examiner that independent violations of Section 8 (a) (1) were committed by the Respondents by the coercive statement of Master Mechanic Estes and the discriminatory conduct of Foreman Walter G. Balleau, as detailed in the Intermediate Report. In these instances, we believe the nature of the proscribed conduct was sufficiently pervasive as to affect coercively the employees on the payrolls of both Respondents Flippin and Ozark.

11. General findings affecting reinstatement and back-pay questions

The Joint Council and Flippin strikers were, as we have found, unfair labor practice strikers. They were therefore entitled, upon proper application, to reinstatement in their own or substantially equivalent positions, and to displace, if necessary, any replacements hired by the Respondents in their jobs, consistent with the formula for effecting the remedy as described and quoted by the Trial Examiner.³² We have found that the IAM strikers were economic strikers. They were therefore entitled to be reinstated to their own or substantially equivalent positions, *if* available upon their proper application. In addition, we agree with the principle applied by the Trial Examiner, that although the legally available jobs in a given classification were less than the number of former strikers making proper application for such jobs, all such applicants who were thus denied reemployment were discriminated against when the Respondents failed to reinstate any of them to the available jobs.³³

³⁰ In the circumstances of this case, as revealed herein, we believe and find that all the parties understood such vacancies to be available at both Flippin and Ozark. As we have already noted, most of the strikers were ultimately offered reinstatement and reinstated without regard to any distinction between their Flippin or Ozark status at the time of the strike.

³¹ Most of these strikers appear on the lists of applicants submitted by the Joint Council to the Respondents on January 15, 1950. This we construe as establishing their availability early in January 1950. In the circumstances, we find that it was incumbent upon them *personally* to present themselves at the dam site to accept and qualify for the vacancies indicated.

³² See footnote 14 in the Intermediate Report.

³³ Cf. e.g., *Luzerne Hide and Tallow Company*, 89 NLRB 989, enforced 188 F. 2d 439 (C. A. 3), cert. den. 342 U. S. 868; *N. L. R. B. v. American Creosoting Company, Inc.*, 139 F. 2d 193 (C. A. 6).

As already indicated, the Respondents ultimately made offers of reinstatement at various times following the termination of the strike to virtually all the strikers in question. In many instances a substantial period of the time elapsed between the date of the offer and the date of acceptance by the striker. As to some of these instances the Trial Examiner recommended back pay until the actual date of reinstatement, where there was no showing of a valid explanation for the striker's delay. Although the strikers were not, of course, in any way compelled to remain at the scene of the strike during the approximate year that it continued, and were free to take employment and residence elsewhere, which the record shows many of them did, the Respondents cannot be held obligated for back pay after their offer of reemployment beyond a reasonable time for the striker to receive and personally accept the offer. We believe and find such a reasonable time in the present situation to have been *5 days*.³⁴

12. Joint Council and Flippin strikers considered individually

The individual complainants in their respective classifications are considered below in compilations and in discussions of particular factual issues from which we draw our conclusions, to accord with the holdings and general principles herein described. The order of consideration shall insofar as practicable conform to that followed in the Intermediate Report.

Carpenters

In this classification, there are 35 former strikers who are complainants herein, all of whom, the record shows, made applications for reinstatement, personally or through the Joint Council, on or before January 15, 1950, which applications were refused by the Respondents. At the time of their applications, the Respondents retained in their employ 21 carpenter replacements. Accordingly, we find, like the Trial Examiner, that on this basis alone the Respondents discriminatorily refused reinstatement to *all* of the carpenter complainants. But the record establishes also that about the time they applied for reinstatement there were additional jobs available to which they would have been entitled. Thus, the stipulations in the record show that there were in this classification 4 promotional replacements; 3 discriminatory replacements on or before January 15, 1950; and 4 discriminatory replacements after January 15, 1950. The parties specifically stipulated that there were 39 new employees hired as carpenters between February 1 and July 25, 1950. As former unfair

³⁴ We are cognizant of the fact that the Respondents' letter to the strikers offering reinstatement (General Counsel's Exhibit No. 5) permits a reply within 14 days. However, we do not construe this to indicate a willingness by the Respondents to assume responsibility for back pay during the whole 14-day period, if taken.

labor practice strikers, the complainants were entitled to a preference as against new employees with respect to any such jobs after first having made proper application. Thus, we find the 39 new employees were also discriminatory replacements.³⁵ In addition, we agree with the conclusion of the Trial Examiner that the Respondents engaged many carpenter apprentices during the strike³⁶ to fill the places of carpenters on strike, and that therefore the Respondents had available jobs to which all of the carpenter strikers were entitled upon their application.

In respect to the compilations below, we find discrimination in the individual cases listed, as follows:

(1) Between the date of application, as indicated, and the date of the offer of reinstatement, where the offer was not accepted.

(2) Between the date of application, as indicated, and the date of actual reinstatement where the later date is not more than 5 days from the date of the offer.

(3) Between the date of the application, as indicated, and the date of the offer of reinstatement, plus 5 days where reinstatement took place in excess of 5 days from the offer.

(4) From the date of application, as indicated, up to and including the present, where no offer of reinstatement was made.

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Bailey, Benjamin W.		³⁷ 12-21-49	10-26-50	11- 1-50
Bevens, J. N., Jr.	1- 3-50	1- 3-50	3- 8-50	-----
Blecker, Robert R.	^{37a} 1- 3-50	-----	-----	3- 8-50
Bonner, Glen M.	-----	1-15-50	7-25-50	7-29-50
Brents, J. B.	-----	1-15-50	3- 8-50	3-21-50
Cypert, Eugene N.	-----	1-15-50	-----	3-21-50
Drown, William H.	-----	1-15-50	3- 6-50	-----
Flippin, Francis.	-----	1-15-50	7-25-50	-----
Ford, Jason S.	-----	1- 3-50	3- 8-50	-----
Ford, W.	-----	1-15-50	No offer made	-----
Harris, E. E.	-----	1-15-50	7-25-50	7-29-50
Hayes, Herman E.	-----	1- 3-50	3- 8-50	3-15-50
Hudson, Raymond A.	-----	1-15-50	10-26-50	-----
James, John A.	-----	1- 3-50	3- 8-50	-----
Kent, W. A.	-----	1-15-50	7-25-50	-----

³⁵ We adopt the Trial Examiner's definitions of "replacements" and "promotional replacements," the former as *new* employees hired in strikers' classifications during the period of the strike, and the latter as *old* employees promoted into the strikers' classifications during the same period. However, "discriminatory replacements" we define as *all* new employees hired in particular strikers' classifications after these strikers had made application for reinstatement and were not yet reinstated.

³⁶ The stipulations in the record show 13 replacements and 6 promotional replacements.

³⁷ As noted, Bailey's name was on the Joint Council's December 21, 1949, application list, at which time the Joint Council was informed by the Respondents that Bailey would not be reinstated.

^{37a} (Stipulated by parties.)

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Kilfoy, Wilbert A (discussed below).....				
King, Lucian R (discussed below).....				
Landry, C C.....		1-15-50	7-25-50	
Losch, R E.....		1-15-50	3- 8-50	
Lynch, S L.....		1-15-50	7-25-50	
Marberry, F P.....	1- 3-50	1- 3-50	3- 8-50	
Mashaw, Roy.....		1-15-50	3- 8-50	
Miller, Joe (Flippin).....		1-15-50	3- 8-50	
Patton, H. C.....		1-15-50	3- 8-50	
Pfingston, Jake.....	³⁸ 12-23-49		3- 8-50	
Plymate, Donald C.....	1- 3-50	1- 3-50	3- 8-50	
Putney, Clyde S.....		³⁹ 1-15-50	10-26-50	
Rains, Wilhs.....		1-15-50	3- 8-50	
Reedus, Billy B.....		1-15-50	3- 8-50	
Russell, Kern K.....		1-15-50	3- 8-50	
Rutledge, Robert M.....		1-15-50	7-25-50	8- 8-50
Shaw, Hoy.....		1-15-50	3- 8-50	
Smith, Elbert C.....	1- 3-50	1- 3-50		2-16-50
Tulpana, George (discussed below).....	1-10-50			10-23-50
Wood, Russell T. (discussed below).....	1- 3-50			2-25-50

Wilbert Kilfoy's name was on the Joint Council's December 21, 1949, application list. The record shows that it was put on by his father. It also appears that the Respondents' representative approved his name on such list as being eligible for employment but that Kilfoy never showed up to claim the job. As there is no further evidence of an application on his part until after he received the Respondents' offer of October 26, 1950, contrary to the Trial Examiner, we find no discrimination, and shall dismiss the complaint as to him.

Tulipana was on the Joint Council's December 21, 1949, application list. His name was approved by the Respondents' representative. However, he did not immediately present himself for the job because, as he testified, he had to take care of his boys while his wife was out of town. As he did make personal application shortly thereafter, i. e., on January 10, 1950, under the circumstances, we do not find that his application was untimely.

Russell Wood did not testify. However, F. P. Marberry testified that he and Wood made personal application for reinstatement on January 3, 1950, and were rejected. This testimony was not refuted. Wood was also on the Joint Council's January 15, 1950, list.

³⁸ Pfingston's name was also on the Joint Council's December 21, 1949, application list. His personal application on December 23, 1949, we consider as the same application, under the joint reinstatement program

³⁹ Putney's name was also on the Joint Council's December 21, 1949, application list. However, the record shows that his name on this list was approved as eligible by the Respondents' representative, but that Putney did not personally appear to claim the job. Thereafter, his communications with the Joint Council were insufficient, we find, to constitute proper application for reinstatement.

Carpenter Apprentices

There are two former strikers in this classification who are complainants herein, i. e., *T. H. Vickery* and *Troy Williamson*.⁴⁰ Both appeared on the Joint Council's January 15, 1950, application list and both were offered reinstatement on July 25, 1950. However, as noted above, there were vacancies for four carpenter apprentices on the Respondents' January 3, 1950, vacancy list⁴¹ which, as we have found, constituted an offer of reemployment. There is no evidence that on or after January 3, 1950, Vickery or Williamson personally applied for reinstatement and were rejected. In accordance with our findings above, we shall dismiss the complaint as to them.

Aggregate Conveyor Operators

Claiming strikers.....	2
Replacements.....	3
Promotional replacements.....	2
Discriminatory replacements.....	1

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Lamb, Keith (Flippm).....		1-15-50	7-25-50	7-27-50
Kyles, Onimus (discussed below).....				

Kyles earned \$1.25 per hour at the time of the strike. He personally applied for reinstatement on January 3, 1950, and was refused. On July 25, 1950, he was sent an offer of reinstatement and was ultimately reinstated at Flippin as aggregate conveyor operator on August 1, 1950. Continuing his employment, he was transferred to Ozark as a pump operator on September 30, 1950, and remained in this classification until October 10, 1950, when he was discharged by Foreman Balleau allegedly for refusing to clean up after the other men on the job. The Trial Examiner found, and we agree, that his termination was discriminatory.⁴² As shown in detail in the Intermediate Report, the record clearly establishes an animus on the part of Foreman Balleau against the reinstated strikers, and in particular *Kyles*. An independent violation of Section 8 (a) (1) on the basis of such conduct has been found herein. We are of the opinion that Balleau was discriminatorily motivated in instructing *Kyles* to clean up after the other men, which was not his function, and that this alleged basis for his discharge was merely a pretext for Balleau's true

⁴⁰ Included by the Trial Examiner in his discussion of the carpenters.

⁴¹ Only one of these vacancies was filled by a striker, on January 7, 1950.

⁴² This issue was fully litigated at the hearing.

purpose in taking reprisal against Kyles, for engaging in the strike. However, we do not agree with the Trial Examiner that Kyles was *never* properly reinstated. Accordingly, we find that Kyles was discriminated against from January 3, to August 1, 1950, and from October 10, 1950, up to and including the present.

Air Tool Operators

Claiming strikers-----	5
Replacements-----	8
Promotional replacements-----	7
Discriminatory replacements-----	4

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Wells, John D.		1-15-50	7-25-50	
Cutler, Lee R (discussed below).....		1-15-50		5-24-50
Lee, Marion W (Flippin).....	1-3-50		4-13-51	
McCracken, Guy (Flippin).....		1-15-50		1-27-50
Reed, Laurel D. (Flippin) (discussed below).....	1-3-50			4-14-51

Unlike the Trial Examiner, we find that *Cutler* was reinstated on May 24, 1950, to a substantially equivalent position and that his reclassifications thereafter were not discriminatory.

Reed testified he was in a group of former Flippin strikers who applied at the dam site on January 3, 1950, as also testified by Marion W. Lee, *supra*. However, in *Reed's* case, we find, like the Trial Examiner, that the Respondents' refusal to reemploy him, upon his application shortly after the strike, on the ground that he had a hernia was a pretext, and that in fact he was denied reinstatement because of his strike participation. As the Trial Examiner found, the Respondents were aware that *Reed* had a hernia during his employment before the strike. And, indeed, the Respondents ultimately reinstated *Reed* after the strike, despite the hernia. Accordingly, we find discrimination in his case from January 3, 1950, until April 14, 1951.

Batch and Mix Operator

James B. Marler is the only complainant in this classification. He made personal application on January 3, 1950, was offered reinstatement as of July 25, 1950, and was reinstated July 27, 1950. We find, unlike the Trial Examiner, that there was one promotional replacement in this classification, as well as replacements in such classification as jackhammer operator, which the record shows *Marler* was qualified to hold. Accordingly, we find discrimination in his case from January 3 to July 27, 1950.

Cement Finisher

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Freeman, A. D.....		1-15-50	7-25-50	

Compressor Operator

Fenton, J. R. (Flippin) ⁴³	1-5-50			1-23-51
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Crane Operators

Claiming strikers.....	2
Promotional replacements.....	7
Discriminatory replacements.....	2

Marchant, Harvey E. (discussed below).....	1-4-50			7-12-50
Morgan, W. E.....		1-15-50	7-25-50	

Marchant was earning \$1.75 per hour at the time of the strike. He was rehired on July 12, 1950, as an aggregate conveyor operator at \$1.25 per hour. Thereafter, he held several classifications, but not that of crane operator, until the date of the hearing. At the time of the hearing, he was earning \$2.12½ per hour as a structural iron worker. We disagree with the Trial Examiner that *Marchant* was not properly reinstated and was discriminated against up to and including the present. For it appears that he may have been reinstated to a substantially equivalent position some time before the hearing. Accordingly, we find discrimination in his case from the date of his personal application on January 4, 1950, until such time as he is shown to have been reinstated to a substantially equivalent position, if at all, upon compliance investigation of the facts.

Crusher Operator

James Schumacher, a former Flippin striker, did not testify, but *W. E. Higley*, discussed *infra*, testified without contradiction that *Schumacher* was in a group of strikers who personally applied at the plant "early in January" 1950. *Schumacher* was offered reinstatement as of July 25, 1950. It was stipulated by the parties that a new employee was hired as crusher operator between February 1, and July 25, 1950. Accordingly, we find such an employee to have been a discriminatory replacement. The record also shows that *Schu-*

⁴³ Fenton was a compressor operator at Flippin at the time of the strike and not employed at Ozark as inadvertently stated by the Trial Examiner.

macher was qualified to fill other available jobs, e. g., jackhammer operator. We therefore find discrimination from a date early in January 1950, to be determined upon compliance investigation, until July 25, 1950, when Schumacher was offered reinstatement.

Dinkey Operator

Claiming strikers.....	2
Replacements.....	3
Promotional replacements.....	7

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Carlton, H. L.		1-15-50	3-6-50
Hale, R. L. (discussed below) (Jan. 1950, 2nd week)			7-25-50

Hale testified that he applied for reinstatement in the second week in January 1950, and was refused. He made a further unsuccessful attempt to get reinstated in March 1950. He was offered reinstatement on July 25, 1950, as noted, which Hale apparently ignored. In February 1951 he appeared at the personnel office and was offered employment, which he refused to accept because it was to be under his former supervision.⁴⁴ Accordingly we find discrimination from a date during the second week in January 1950, to be determined upon compliance investigation, until July 25, 1950.

Dozer Operators

Howard S. Bidwell and *James Hill*, both former Flippin strikers, were on the Joint Council's January 15, 1950, application lists. Bidwell was reinstated January 27, 1950, and Hill was offered reinstatement July 25, 1950, which he declined. As shown above, there was a vacancy in this classification offered to the Joint Council by Respondents' representative on January 3, 1950. There is no evidence that on or after January 3, 1950, Bidwell or Hill⁴⁵ applied personally for reinstatement and was rejected. In accordance with our findings above, we shall dismiss the complaint as to them.

⁴⁴ The Trial Examiner inaccurately found that this offer of reemployment at the plant was made in February 1950.

⁴⁵ Hill did not testify. Joint Council Representative Wilkerson's testimony that Hill was in the area of the dam site, that he was available and wanted employment, is insufficient upon which to base a finding that Hill personally applied. The Trial Examiner found that Hill could have been reinstated in the classification of air tool operator for which he was qualified and in which there had been available replacement jobs. However, the stipulations show only that Hill had been employed as an air tool operator for not more than 1 day. On this record, we cannot find that Hill was qualified in such other classification.

Electricians

Claiming strikers.....	5
Replacements.....	8
Discriminatory replacements.....	5

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Anderson, Truman E.....	⁴⁶ 1-3-50			3-13-50
Dorell, Charles.....		1-15-50	7-25-50	
Gardner, W. A.....	1-3-50		7-25-50	
Hermanson, Harry.....	^(46a)	^(46a)	^(46a)	^(46a)
Mooney, Carl.....		1-15-50	7-25-50	

Form Setter and Strippers

C. D. Stamps was on the Joint Council's January 15, 1950, application list. There is no showing that there was in this classification a vacancy or a replacement on the Respondents' payrolls at the time of application. However, the parties stipulated that between February 1 and July 25, 1950, a new employee was hired in this classification. As a former unfair labor practice striker, Stamps was entitled to preference for such a job after first having made application. The Respondents offered reinstatement to Stamps as of July 25, 1950, which he refused. Accordingly, we find that Stamps was discriminated against from the date that the *new* employee was hired in this classification, to be ascertained upon compliance investigation, until July 25, 1950.

E. E. Tickle was on the Joint Council's list of applicants submitted to the Respondents on January 3, 1950. He personally applied at the dam site and was reinstated as form setter and stripper⁴⁷ on January 6, 1950. We find, under the circumstances, that Tickle's personal application and that of the Joint Council were correlated and constituted in effect the same application. As he was reinstated upon his application, we find no discrimination against Tickle, and shall dismiss the complaint in his case.

⁴⁶ Anderson did not testify, but W. A. Gardner, *infra*, testified that he and Anderson personally applied on January 3, 1950, and were rejected.

^{46a} The Trial Examiner found no discrimination; no exceptions filed.

⁴⁷ We note that this classification, in which Tickle was reemployed on January 6, 1950, was not on the Respondents' January 3, 1950, vacancy list.

Ironworkers⁴⁸

Claiming strikers.....	8
Replacements.....	3
Promotional replacements.....	6
Discriminatory replacements.....	2

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Choate, Wirt.....		1-15-50	7-25-50	
Marchant, John W. (discussed below).....		1- 3-50		
Beal, Jones R.....	1-3-50	1- 3-50	2-14-50	
Cooper, V. W.....		1-15-50	7-25-50	
Curtis, William I.....		1-15-50	7-25-50	
MacFarland, A. J. ⁴⁹		1-15-50	7-25-50	
Roberts, T. R.....		1-15-50	7-25-50	
Walker, V. B.....		1-15-50	7-25-50	

John Marchant was on the Joint Council's application list of January 3, 1950. At the time of the strike, he was earning \$1.75 per hour. On or about January 21, 1950, he made personal application for reinstatement as an ironworker and was refused. On January 25, 1950, he was reinstated as a mechanical repairman at \$1.50 per hour. Later, he was increased to \$1.67½ as a working foreman. Accordingly, like the Trial Examiner, we find that he was never properly reinstated and that he was discriminated against from January 3, 1950, up to and including the present.

⁴⁸ This includes the specific classification of structural ironworker, which paid about the same wage rate as ironworker and which we find is substantially equivalent. We note that a vacancy was indicated in the classification of ironworker-rodman by the Respondents on January 3, 1950. There is also the classification of reinforcement ironworker paying substantially less than ironworker. We believe that the vacancy was in the former and not in the latter classification. In any event, it appears that one of the strikers (C. C. Harrison) applied and was reinstated as a structural ironworker on January 6, 1950, thereby claiming and filling the vacancy, if it had been intended in such classification.

⁴⁹ MacFarland worked beyond the date of the strike until January 9, 1949, when he refused to cross the picket line. We find that he was a striker on such date, having then joined in the concerted activities of the other strikers. *Rubin Bros. Footwear, Inc.*, 99 NLRB 610.

Jackhammer Operators

Claiming strikers.....	4
Replacements.....	1
Discriminatory replacements.....	6

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Bailey, D. W. ⁵⁰ (discussed below).....	1-3-50		7-25-50	8-1-50
Jencks, R. H.....		1-15-50	7-25-50	
Killian, D. E.....		1-15-50	7-25-50	
Stone, C. L.....		⁵¹ 1-3-50		4-4-50

D. W. Bailey earned \$0.97½ per hour at the time of the strike. He was reinstated on August 1, 1950, as a wagon drill operator at \$1.25 per hour, which we find, contrary to the Trial Examiner, was substantially equivalent employment. Bailey personally applied on January 3, 1950, and was rejected. The record evidence, in our opinion, is insufficient to find discrimination with respect to Bailey's termination on August 8, 1950, "for failure to report." Accordingly, we find that he was discriminated against from January 3, 1950, to August 1, 1950.

Laborers

There are 12 complainants in this classification. None applied for reinstatement personally. John E. Bailey and Louis Roehrs made no application for reinstatement at all, personally or through the Joint Council. The remainder appeared on the Joint Council's application lists of January 3 or 15, 1950. As has already been shown, the Respondents did not refuse to reinstate any laborers on January 3, 1950, and indicated on such date that vacancies existed in this classification. As none of these former strikers made personal application for the vacancies after January 3, 1950, in accordance with our findings above, we shall dismiss the complaint as to these complainants.⁵²

Millwright ⁵³

Hubert Petty was on the Joint Council's application list of January 15, 1950. He was offered reinstatement on July 25, 1950, which he

⁵⁰ Distinguish B. W. Bailey, carpenter, *supra*.

⁵¹ Stone also applied personally on and after January 6, 1950. We find no merit in the Respondents' exception that Stone did not indicate he was a striker when he applied. Among other things, the Respondents were on notice when Stone made his applications that former unfair labor practice strikers were then seeking reinstatement.

⁵² John E. Bailey; Louis Roehrs; D. R. Strout, C. R. Adams, Lloyd E. Collins, Otis L. Crawford; Troy Engles; Truman Erwin; Charles R. Hodge (Flippin); Alvin Honeycutt (Flippin); Elva Honeycutt (Flippin); and Melvin L. Singleton.

⁵³ The Trial Examiner apparently erred in considering this classification, which is embraced in one of the Joint Council's bargaining units, an IAM classification.

declined. The parties stipulated that one new employee was hired in the classification of millwright between February 1 and July 25, 1950. As a former unfair labor practice striker, Petty was entitled to preference for such a job after first having made proper application. Accordingly, we find that Petty was discriminated against from the date that the new employee was hired in this classification, to be ascertained upon compliance investigation, until July 25, 1950.

Oiler

Lloyd E. Insko was on the Joint Council's application list of January 15, 1950, and was offered reinstatement as of July 25, 1950, which he declined. As noted above, there were five vacancies in this classification offered to the Joint Council by the Respondents on January 3, 1950. There is no evidence that on or after January 3, 1950, Insko applied personally for reinstatement and was rejected. In accordance with our findings above, we shall dismiss the complaint as to him.

Powderman

Claiming strikers.....	1
Promotional replacements.....	1
Discriminatory replacements.....	1

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Bullm, Paul R. (Flippin).....		1-3-50		⁶⁴ 5-23-50

Pump Operators

Claiming strikers.....	4
Replacements.....	2
Promotional replacements.....	2
Discriminatory replacements.....	5

Kilfoy, Jessie A. (discussed below).....				
Lackey, W. W. (discussed below).....				
Lazenby, A. M.....		1-15-50	7-25-50	
Mynatt, Calvin C.....		1-15-50	7-25-50	8-2-50

J. Kilfoy was a regular pump operator employed during the day shift on the "barge" at the time of the strike. On December 21, 1949, Kilfoy applied for reinstatement. Foreman Balleau offered Kilfoy a job as *relief* pump operator "in the hole." As noted in the Intermediate Report, the relief schedule was as follows: Monday—day shift

⁶⁴ The Trial Examiner inadvertently found Bullin was reinstated on July 23, 1950

(8-4) ; Tuesday—swing shift (4-12) ; Wednesday—same ; Thursday—graveyard shift (12-8) ; Friday—same. Also as appears in the record, the job of pump operator “in the hole” required the maintenance of more pumps than on the “barge,” and in other respects carried more onerous conditions of work. We note again the evidence of Foreman Balleau’s discriminatory intent against returning former strikers. Accordingly, we find, like the Trial Examiner, that Kilfoy was not offered substantially equivalent employment, and that he was therefore discriminated against from December 21, 1949, up to and including the present.

W. W. Lackey was a regular pump operator employed during the day shift on the “barge” at the time of the strike. He was reinstated on December 23, 1949, through the joint reinstatement program as a *relief* pump operator on the barge. After 8 days, Foreman Balleau sought to transfer him to the job of relief pump operator “in the hole,” having the duties as described immediately above in the case of Kilfoy. Lackey, an elderly man, refused to accept the transfer to the more difficult job “in the hole.” We have already noted the existence of a discriminatory disposition on the part of Balleau against the reinstated strikers. Under the circumstances, we agree with the Trial Examiner that Lackey’s termination on February 23, 1950, was discriminatory.⁵⁵ However, we believe, his reemployment from December 23, 1949, until February 23, 1950, was in a substantially equivalent position. Accordingly, we find discrimination in this case from February 23, 1950, up to and including the present.

Riggers

Claiming striker.....	1
Replacement.....	1
Promotional replacement.....	1
Discriminatory replacement.....	1

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Dunn, R. O.....		1-15-50	7-25-50	

Sandblaster—Nozzle Man

Claiming striker.....	1
Replacements :	
Sandblasters.....	3
Nozzle man.....	1
Promotional replacements : Sandblasters.....	5

⁵⁵ As specifically alleged in the complaint and fully litigated at the hearing.

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Mashaw, J. W.		1-15-50	7-25-50	

Signal Men

Claiming strikers	2
Promotional replacements	6

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Holden, L. M.		1-15-50	7-25-50	
Cloven, George A.		1-3-50		2-8-50

Truck Drivers

There are three complainants in this classification, i. e., *W. E. Higley* (Flippin); *O. M. Smith* (Flippin); and *Paul J. Williams*. All three appeared on the Joint Council's application lists of January 15, 1950 and they were ultimately offered reinstatement or reinstated on June 12, August 8, and July 25, 1950, respectively. However, as indicated above, there was a vacancy in this classification offered to the Joint Council by the Respondents on January 3, 1950. With respect to *Smith* and *Williams*, there is no evidence that on or after January 3, 1950, they applied personally for reinstatement and were rejected. Consistent with our findings above, we shall dismiss the complaint as to them. However, in the case of *Higley*, the uncontradicted testimony shows that he applied for reinstatement "early in January 1950" and was refused. It appears that *Higley's* personal application postdated the Respondents' offer of January 3, 1950, and that therefore his proper application for the vacant job had been rejected. Accordingly, we find that *Higley* was discriminated against from a date "early in January 1950," to be determined upon compliance investigation, until the date of his reinstatement on June 12, 1950.

Vibrator Operators

Claiming strikers.....	1
Replacements.....	18
Promotional replacements.....	2
Discriminatory replacements.....	2

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Haynes, George W.....		1-15-50		3-25-50

Wagon Drill Operators

Claiming strikers.....	2
Promotional replacements.....	4
Discriminatory replacements.....	2

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Parris, T. H.....	1-3-50	1-3-50		4-10-51
Richardson, Ishmael (Fluppin) ⁵⁷		1-3-50	7-25-50	8-8-50

Welders

There are six complainants in this classification.⁵⁸ All appeared on at least one of the Joint Council's application lists and all were offered reemployment as of July 25, 1950, which they declined, except Russell, who was reinstated on March 22, 1950. However, as noted above, there were some 12 vacancies in the classifications of welder and certified welder offered to the Joint Council by the Respondents' representative on January 3, 1950. The record shows no evidence that on or after January 3, 1950, any of these complainants personally applied for reemployment and were rejected. In accordance with our findings above, we shall dismiss the complaint as to them.

⁵⁸ Haynes was reinstated initially as laborer and reclassified as vibrator operator on May 27, 1950. The Trial Examiner found discrimination until May 27, 1950. However, as it appears that the classification of laborer paid about the same wage rate as vibrator operator, we find the two classifications to have been substantially equivalent.

⁵⁷ The Trial Examiner found that Richardson had never been properly reinstated. Thus he found discriminatory Richardson's reduction in force on August 11, 1940, 3 days after his reinstatement, his rehire on October 30, 1950, as jackhammer operator, and his resignation on November 29, 1950, when he refused an assignment to the day shift after his job on the swing shift had been concluded. We disagree, as we do not find the evidence is sufficient upon which to support a finding of discrimination after Richardson was reinstated to his former position of wagon drill operator on August 8, 1950.

⁵⁸ H. D. Hefley; Billy Lackey; Richard Lamb; Ira E. McGuire; R. H. Rodgers; and Rex Russell.*

Working Foreman

Claiming striker..... 1
 Promotional replacement..... 1

	Application		Offer of reinstatement	Reinstated
	Personal	Joint Council		
Lippe, Frank J.....		1-3-50	7-25-50	

13. IAM Strikers Considered Individually

As economic strikers, these complainants were entitled to reinstatement only if vacancies existed at the time of their proper application for employment. We have already determined that personal applications were necessary on the part of these individuals in the IAM units. Of the total of 36 complainants in IAM classifications,⁵⁹ only 13 made personal applications, *viz*:

Applied

Arnold, Hayes G..... 1-4-40.
 Arrowsmith, Harold... 1-3-50, and "about once a week" thereafter until reinstated on 2-8-50.
 Crosby, Houston D... "In January 1950."
 Davis, Lewis E..... 1-3-50.
 Hotalling, Raymond R 1-2-50.
 Hurst, Thomas E..... 1-4-50, and thereafter spoke to Master Mechanic Estes "on several occasions."
 Langston, Corley O... "Early in January 1950."
 Marchant, T. A..... 1-3-50.
 Miller, V. O..... 1-5-50.
 Pearl, Samuel J..... "In January 1950."
 Smith, Ewell D..... 1-2-50.
 Trivett, Dewey E..... "January 1950."
 Satterlee, Harry Ivan. 1-3-50.

The record does not clearly establish that there were vacancies in any of the IAM classifications at about the time the personal applications were made in the above cases. The stipulations in evidence do show, however, that new employees were hired in these classifications after the strike, as follows: 1 on December 17, 1949; 1 on January 17, 1950; 2 on January 18, 1950; and 2 on January 28, 1950. In addition, some 32 new employees were hired after February 1, 1950. All of the complainants, except Hayes G. Arnold and Quenton E. Dempsey,

⁵⁹ I. e., mechanical repairmen, machinists, maintenance machinists, maintenance mechanical repairman, and heavy duty mechanic. The 36 complainants include L. A. Shankler as to whom the Trial Examiner dismissed the complaint and no exceptions were taken. (See Schedule E, attached hereto, for full list of the IAM complainants.)

were ultimately reinstated, or offered reinstatement which they declined.

Accordingly, we shall dismiss the complaint in respect to the 23 complainants who did not personally apply. As regards the 13 complainants who did apply, as set forth above, it does appear in the record that vacancies in their former or substantially equivalent positions may have existed at the time that any or all of them made their personal applications. In such event, we find that their denial of reemployment was discriminatory, and that they were accordingly entitled to back pay from the date of such denial, on the same basis as prescribed above in the cases of the unfair labor practice strikers. However, we refer these specific questions to be determined upon compliance investigation, to conform with the general holdings and principles stated herein.

The Remedy

We have found that the Respondents have engaged in and are engaging in certain unfair labor practices. Accordingly, we shall order them to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents discriminatorily failed to reinstate, or discriminatorily terminated their employment after reinstating, the employees listed in Schedule A, attached hereto, we shall order the Respondents to offer to such employees full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. If there are not sufficient positions available in appropriate classifications, the Respondents shall make room for the employees ordered reinstated by dismissing or demoting, to the extent necessary, employees occupying such classifications, who were hired or promoted to such classifications after December 3, 1948. If, after such dismissals and demotions, there are still insufficient positions available, all existing positions in the appropriate job classifications shall be distributed among the employees ordered reinstated, and other employees who were hired on or before December 3, 1948, without discrimination against any of them because of their union affiliation or strike or other concerted activities, following such system of seniority or other nondiscriminatory practices as would normally have been applied by the Respondents to determine job retention rights in instituting reductions in force. All employees remaining after such distribution, including those ordered reinstated for whom no employment is immediately available, shall be placed upon a preferential list and offered reemployment as work becomes available in a suitable classification and before other persons are hired for such work, in the order required by the Re-

spondents' normal seniority system or other nondiscriminatory practices.

We have also found that the Respondents discriminated against the employees listed in Schedule B, attached hereto, by refusing them reinstatement upon their proper request following their unfair labor practice strike. However, as all such employees were subsequently either offered or granted reinstatement to their former or substantially equivalent positions on the effective dates as found herein, we shall not order reinstatement as to them. Provision for loss of earnings suffered by them as a result of such discrimination is made below.

If, as determined upon compliance investigation, there were vacancies for which any or all of the employees listed in Schedule C properly made personal application, thus resulting in discrimination as we have found herein, we shall order the Respondents to effect the same remedies as prescribed hereinabove with respect to the employees listed in Schedules A and B, as the case may be.

We shall order the Respondents to make whole each of the employees listed in Schedules A and B, and subject to the conditions described herein, the employees in Schedule C, for any loss of pay he may have suffered as a result of the discrimination against him, during the period of discrimination in each case, as already described herein, by payment to each of them of a sum of money equal to the amount he normally would have earned as wages, less his net earnings during that period.⁶⁰ Such loss of pay shall be computed in accordance with the formula initiated by the Board in *F. W. Woolworth Co.*, 90 NLRB 289. We shall also order the Respondents to make available to the Board, upon request, payroll and other records necessary to facilitate the determination of the amount of back pay due. *F. W. Woolworth Company, supra.*

Not having found the discrimination alleged with respect to the complainants listed in Schedule D, we shall dismiss the complaint as to them.

We have found that the Respondents have violated Section 8 (a) (1) and (3) of the Act. In our opinion, the commission of unfair labor practices generally is reasonably to be anticipated from this unlawful conduct in the past. We shall, therefore, order the Respondents to cease and desist not only from the unfair labor practices herein found, but also from in any other manner infringing upon the rights of the employees guaranteed in Section 7 of the Act.

The Board reserves the right to modify the back-pay and reinstatement findings herein, if made necessary by a change in circumstances since the hearing or in the future, or to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.

⁶⁰ See *Crossett Lumber Co.*, 8 NLRB 440; *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7.

Upon the basis of the foregoing findings of fact, and upon the entire record considered as a whole, the Board makes the following additional:

CONCLUSIONS OF LAW

1. By refusing, upon their proper request, to reinstate, and by discriminatorily terminating the employment after reinstating, the strikers listed in Schedules A and B, and subject to the conditions described herein, employees listed in Schedule C, attached hereto, the Respondents discriminated in regard to the hire and tenure of such employees, thereby discouraging membership in Fort Smith, Little Rock & Springfield Joint Council, A. F. L., in violation of Section 8 (a) (3) and (1) of the Act.

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

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Brown and Root, Inc., Wunderlich Contracting Company, Peter Kiewit Sons Company, Winston Bros. Company, David G. Gordon, Condon-Cunningham Co., Morrison-Knudson Company, Inc., J. C. Maguire & Company, and Chas. H. Tompkins Co., doing business as joint venturers under the name of Ozark Dam Constructors and Flippin Materials Co., Mountain Home, Arkansas, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercing or engaging in the discriminatory treatment of employees because they engaged in a strike or other concerted activities protected by the Act.

(b) Discouraging membership in Fort Smith, Little Rock & Springfield Joint Council, A. F. L., or in any other labor organization of their employees, by discriminating in regard to their hire or tenure of employment or any term or condition of their employment.

(c) Discriminatorily refusing to reinstate, or discriminatorily terminating their employment after reinstating, employees because they engaged in a strike or other concerted activities protected by the Act.

(d) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Fort Smith, Little Rock & Springfield Joint Council, A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any

or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer the employees listed in Schedule A, and subject to the conditions described herein, the employees listed in Schedule C, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, as provided in the section entitled "The Remedy," above.

(b) Make whole the employees listed in Schedules A, B, and subject to the conditions described herein, the employees listed in Schedule C, in the manner set forth in the section entitled "The Remedy," above, for any loss of pay they may have suffered by reason of the discrimination against them.

(c) Upon request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights to employment under the terms of this order.

(d) Post at the construction job at the Bull Shoals Dam, on the premises of both Ozark Dam Constructors and Flippin Materials Co., copies of the notice attached hereto marked "Appendix A,"⁶¹ including Schedules A, B, and C. Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the Respondents' representative, be posted by the Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to the employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by other notices.

(e) Notify the Regional Director for the Fifteenth Region, in writing, within ten (10) days from the receipt of this Decision and Order, what steps the Respondents have taken to comply therewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges discrimination with respect to the employees listed in Schedule D.

MEMBER HOUSTON, dissenting in part:

I agree with my colleagues' disposition of this case with the exception of their treatment of the IAM strikers. The issue as to them is whether they are entitled to the rights customarily given unfair labor

⁶¹ In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

practice strikers or whether they should be classified as economic strikers. In deciding that these strikers fall into the latter category, my colleagues have not given proper emphasis to undisputed evidence relating to terms and conditions of employment common to *all* strikers involved in this case. That evidence shows that the IAM strikers were employed in the same job classifications and in the same manner as were the Flippin strikers. The Employers' illegal refusal to bargain with the Joint Council vitally affected these very conditions of employment. It is particularly upon that basis that the majority has found that the Flippin strikers were unfair labor practice strikers. I should have thought that since the same unfair labor practices affected the same jobs in which both Flippin and IAM strikers worked that therefore both groups would be treated alike. However, my colleagues find a distinction in the fact that the Flippin strikers were unrepresented while the IAM strikers belonged to the Machinists' union. I do not perceive the validity of this distinction as it bears upon the present issue. Its only possible meaning might appear to lie in the idea that the Machinists' Union might have been bargaining about matters over which the strike was called. But such a view has no significance, it seems to me, in deciding the question of what degree of protection these strikers must be given. I cannot view their membership in the Machinists' Union as constituting any waiver in these circumstances of their right to be treated equally with their fellow strikers—the Flippin employees—yet this is what is implicit in my colleagues' decision.

Once granted that the strike in which all were engaged arose because of the illegal refusal to bargain about terms of employment common to all, the fortuity of separate representation of certain strikers can have no possible bearing on their protection, as such, under well-established concepts. Consequently, I would find that the IAM strikers should be given the same status as all other strikers in this case.

MEMBER MURDOCK took no part in the consideration of the above Decision and Order.

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT coerce and engage in discriminatory treatment of employees for engaging in strikes or other concerted activities.

WE WILL NOT discourage membership in FORT SMITH, LITTLE ROCK & SPRINGFIELD JOINT COUNCIL, A. F. L., or in any other

labor organization of our employees, by discriminating in regard to their hire or tenure of employment or any terms or conditions of employment.

WE WILL NOT discriminatorily refuse to reinstate, or discriminatorily terminate after reinstating, any of our employees for engaging in strikes or other concerted activities protected by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist FORT SMITH, LITTLE ROCK & SPRINGFIELD JOINT COUNCIL, A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL, in the manner and under the conditions described in the section of the Board's Decision and Order entitled "The Remedy," offer to the persons listed in Schedules A and C, which is attached hereto and made a part hereof, full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make each of them whole for his loss of pay suffered as a result of the discrimination against him.

WE WILL, in the manner described in the section of the Board's Decision and Order entitled, "The Remedy," make whole each of the persons listed in Schedules B and C, which is attached hereto and made a part hereof, for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named union, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

BROWN & ROOT, INC., WUNDERLICH CONTRACTING Co.,
PETER KIEWIT SONS COMPANY, WINSTON BROS. COMPANY,
DAVID G. GORDON, CONDON-CUNNINGHAM Co.,
MORRISON-KNUDSON COMPANY, INC., J. C. MAGUIRE &
COMPANY, and CHAS. H. TOMPKINS Co., doing busi-

ness as joint venturers under the names of OZARK
DAM CONSTRUCTORS AND FLIPPIN MATERIALS Co.,

Employer.

By -----
(Representative) (Title)

Dated -----

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material. Schedules A, B, and C must be posted with this notice.

Schedule A

Ford, W.	Lackey, W. W.
Kilfoy, Jessie A.	Marchant, John W.
Kyles, Onimus	Reed, Laurel D.

Schedule B

Anderson, Truman E.	Holden, L. M.
Bailey, D. W.	Hudson, Raymond A.
Beal, Jones P.	James, John A.
Bevans, J. N., Jr.	Jencks, R. H.
Blecker, Robert R.	Kent, W. A.
Bonner, Glen M.	Killian, D. E.
Brents, J. B.	King, Lucian R.
Bullin, Paul R.	Lamb, Keith
Carlton, H. L.	Landry, C. C.
Choate, Wirt W.	Lazenby, A. M.
Cloven, George	Lee, Marion W.
Cooper, V. W.	Lippe, Frank J.
Curtis, Wm. I.	Losch, R. E.
Cutler, Lee R.	Lynch, S. L.
Cypert, Eugene N.	Marberry, F. P.
Dorrell, Chas.	Marchant, Harvey E.
Drown, Em. H.	Marler, James R.
Dunn, R. O.	Mashaw, J. W.
Engles, Troy	Mashaw, Roy
Fenton, J. R.	McCracken, Guy
Flippin, Francis	McFarland, A. J.
Ford, Jason S.	Miller, Joe
Freeman, A. D.	Mooney, Carl
Gardner, W. A.	Morgan, W. E.
Hale, R. L.	Mynatt, Calvin C.
Harris, E. E.	Parris, T. H.
Hayes, Herman E.	Patton, H. C.
Haynes, Geo. W.	Petty, Hubert L.
Higley, W. E.	Pfingston, Jake

Plymate, Donald C.
 Putney, Clyde S.
 Rains, Willis
 Reedus, Billy B.
 Richardson, Ishamael E.
 Roberts, T. R.
 Russell, Kern K.
 Rutledge, Robert M.
 Schumacher, James

Shaw, Hoy
 Smith, Elbert C.
 Stamps, C. D.
 Stone, C. L.
 Tulipana, George
 Walker, V. B.
 Wells, John D.
 Wood, Russell T.

Schedule C

Arnold, Hayes G.
 Arrowsmith, Harold S.
 Crosby, Lewis E.
 Davis, Lewis E.
 Hotalling, Raymond A.
 Hurst, Thomas E.
 Langston, Corley O.

Marchant, T. A.
 Miller, V. O.
 Pearl, Samuel J.
 Satterlee, Harry Ivan
 Smith, Ewell D.
 Trivett, Dewey E.

Schedule D

Adams, C. R.
 Bailey, John E.
 Beaty, Clyde K.
 Bidwell, Howard S.
 Boyd, Alvie
 Brandstrup, Albert V.
 Cantrell, Healey Edger
 Collins, Lloyd E.
 Crawford, Otis L.
 Crosser, J. D.
 Crow, E. J.
 Damron, J. J.
 Dempsey, Quentin E.
 Duck, Robert C.
 Engles, Troy
 Erwin, Truman
 Forbes, Herbert
 Hefley, H. D.
 Hermanson, Harry
 Hester, Henry O.
 Hickenbottom, E. D.
 Hicks, Carroll E.
 Hill, James
 Hodge, Charles R.
 Holt, J. E.
 Honeycutt, Alvin

Honeycutt, Elva
 Hudson, Herman E.
 Hughes, R. B.
 Hulet, Wilfred D.
 Insko, Lloyd E.
 Kilfoy, Wilbert A.
 Lackey, Billy
 Lamb, Richard
 McGuire, Ira E.
 Mynatt, Joseph
 Roehrs, Louis
 Rogers, R. H.
 Russell, Rex
 Shankler, L. A.
 Shaw, W. L.
 Shaw, William E.
 Smith, O. M.
 Singleton, Melvin L.
 Strout, D. R.
 Terry, Cecil A.
 Tickle, E. E.
 Vickery, T. J.
 Williams, Paul J.
 Williamson, Troy
 Wood, Waldo James

Schedule E

(List of IAM Complainants)

Arnold, Hayes G.	Hotalling, Raymond R.
Arrowsmith, Harold S.	Hudson, Herman F.
Beaty, Clyde K.	Hughes, R. B.
Boyd, Alvie	Hulet, Wilfred D.
Brandstrup, Albert V.	Hurst, Thomas E.
Cantrell, Healey Edgar	Langston, Corley O.
Crosby, Houston D.	Marchant, T. A.
Crosser, J. B.	Miller, V. O.
Crow, E. J.	Mynatt, Joseph
Damron, J. J.	Pearl, Samuel J.
Davis, Lewis E.	Satterl�e, Harry Ivan
Dempsey, Quenton E.	Shankler, L. A.
Duck, Robert C.	Shaw, W. L.
Forbes, Herbert	Shaw, William E.
Hester, Henry	Smith, Ewell D.
Hickenbottom, E. D.	Terry, Cecil A.
Hicks, Carrol E.	Trivett, Dewey F.
Holt, J. E.	Wood, Waldo James

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon a charge filed January 24, 1950, and amended March 1, 1951, by Fort Smith, Little Rock & Springfield Joint Council, A. F. L., herein called the Union or the Council, the General Counsel of the National Labor Relations Board¹ by the Regional Director for the Fifteenth Region (New Orleans, Louisiana), issued his complaint, dated March 13, 1951, later amended against the above-named companies, herein called the Respondents, doing business as joint venturers under the names of Ozark Dam Constructors, and Flippin Materials Co., herein referred to as Ozark and Flippin, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Copies of the charge, amended charge, complaint, amended complaint, and a notice of hearing were duly served upon the Respondents and the Union.

With respect to the unfair labor practices, the complaint as amended, alleged in substance that: (1) On December 3, 1948, the employees of the Respondents ceased work concertedly and went on strike; (2) on October 13, 1949, the Board issued a Decision and Order finding that Respondents under the name Ozark from September 23, 1948, and at all times material thereafter, had engaged in and were engaging in unfair labor practices by refusing to bargain with the Union, and that the Respondents under the name Ozark since September 23, 1948, have continued to engage in this unfair labor practice; (3) the strike referred

¹The General Counsel and his representative at the hearing are referred to herein as the General Counsel; the National Labor Relations Board as the Board.

to above was caused and prolonged by the unfair labor practices of the Respondents. On December 2, 1949, and at various dates thereafter, a number of employees whose names are listed in the complaint, made unconditional offers to return to work abandoning their strike; (4) the Respondents on or about December 2, 1949, and at various dates thereafter, refused and has continued to refuse to reinstate the employees previously on strike, or refused to reinstate the employees until certain specified dates; (5) after reinstating certain employees the Respondents laid off or terminated their employment because said employees had assisted or become members of the Union and had participated in the strike above described; (6) the Respondents, through their officers, agents, and supervisors made statements, threats, and warnings, and engaged in conversations with employees which interfered with and restrained the employees in their concerted activities for the purpose of collective bargaining and other mutual aid and protection; (7) by these acts, the Respondents have committed unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act.

The Respondents filed separate answers on behalf of Ozark and Flippin. These answers alleged that: (1) The operations of the Respondents constitute original construction wholly within the State of Arkansas which has not as yet been used in commerce and that because of this and other considerations the operations of the Respondents are not subject to the jurisdiction of the Board; (2) Ozark and Flippin are separate entities and separate employers and that the complaint violates the Respondents' rights under the due process clause of the constitution because the complaint is directed against Ozark and Flippin jointly, and seeks to hold both jointly responsible for acts alleged to have occurred in the relations between *only* Ozark and its employees, and that the complaint fails to allege which acts were committed by Ozark and which committed by Flippin; (3) that the complaint was issued in violation of Section 10 (b) of the Act which requires that charges of unfair labor practice be filed with the Board within 6 months of their commission; and (4) denies generally that the Respondents have committed any unfair labor practices.

Pursuant to notice a hearing was held at Mountain Home, Arkansas, between April 3 and 14, 1951, before David F. Doyle, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. At the close of oral evidence, pursuant to a stipulation of counsel, the hearing was adjourned to give counsel for the parties sufficient time to prepare certain exhibits which were to be offered in evidence by the parties. Pursuant to the stipulation made at the close of the hearing, the exhibits referred to were prepared and submitted to the Trial Examiner on May 8, 1951, together with a stipulation that the hearing might be closed. The undersigned thereupon closed the hearing as of that date.

At the hearing at Mountain Home, Arkansas, the Respondents and the General Counsel were represented by counsel and the Council by three of its officers. A full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties. At the conclusion of the oral testimony, counsel for the General Counsel and the Respondents presented oral argument and after the submission of the exhibits referred to, filed briefs with the Trial Examiner.

At the opening of the hearing various motions, based on the pleadings were made by counsel for the Respondents. These motions and the ruling of the Trial Examiner thereon will be discussed hereafter. In the course of the hearing the General Counsel made several motions to either delete or add names to the complaint. These motions for deletions were granted with the consent of counsel for the Respondents; additions were granted over the objections of counsel for the Respondents, with a statement by the Trial Examiner that in

the event counsel for the Respondents claimed that he was surprised by the addition of any name, that additional time would be afforded the Respondents to investigate the merits of the claim of the named employee. Counsel for the Respondents did not ask for any such additional time. At the close of the hearing, the General Counsel moved to conform the pleadings to the proof as to minor variances such as the spelling of names, dates, and other minor details. The motion was granted.

Upon the entire record in the case and from my observation of the witnesses, I make the following :

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS ; THE JOINT VENTURE ; THE ASSUMED NAMES OF THE RESPONDENTS

Brown and Root, Inc., a Texas corporation, with its principal office at Houston, Texas; Wunderlich Contracting Company, a Nebraska corporation, with its principal office at Jefferson City, Missouri; Morrison-Knudson Company, Inc., a Delaware corporation, with its principal office at Boise, Idaho; Peter Kiewit Sons Company, a Nebraska corporation, with its principal office at Omaha, Nebraska; J. C. Maguire & Company, a family copartnership, with its principal office at Los Angeles, California; Winston Bros. Company, a Minnesota corporation, with its principal office at Minneapolis, Minnesota; David G. Gordon, of Denver, Colorado; Condon-Cunningham Co., a copartnership, with its principal office at Omaha, Nebraska; and Chas. H. Tompkins Company with its principal office at Washington, D. C., are companies engaged in some phase of the construction business.

In April 1947 the above-named companies, herein referred to collectively as the Respondents, by agreement among themselves became joint venturers or special partners for the purpose of bidding upon, and building if awarded the contract, Bull Shoals Dam, a construction project then planned by the United States Government. The Respondents submitted a bid for the job and were awarded the contract. For this phase of their business and the purpose of this project they assumed the name of Ozark Dam Constructors. Certificates *that the Respondents were doing business under the assumed name of Ozark*, were filed in the two counties in Arkansas, where the construction job was to be built.

In November 1947 the above-named Respondents continuing to act as joint venturers or special partners submitted a bid to the Government to supply crushed rock aggregate to be used in the construction of the dam. This contract was also awarded to the Respondents. For the purpose of this bid and the performance of this contract the Respondents *assumed the name, Flippin*. As in the case of Ozark, *certificates of doing business under an assumed name* were filed in the two counties in Arkansas, where the work was to be performed.

It is important to note that the special partners or joint venturers, who assumed both names, Ozark and Flippin, are the same.

Among the Respondents, Brown and Root, Inc., occupies the position of lead contractor, with primary authority over the operation of the joint venture. By virtue of two powers of attorney executed by all the joint venturers in favor of Herman Brown, that officer of Brown and Root, Inc., has blanket authority to bind all the joint venturers, within the scope of the common purpose. Brown and Root, Inc., as the lead contractor has authority to direct the labor relations incident to the joint venture.

Bull Shoals Dam, concerning which the Respondents have these contracts, is part of a flood control and electrical power development of the War Department. Its situs is the White River Watershed in the State of Arkansas, near

the town of Mountain Home. Under existing laws the Secretary of War must deliver all electricity not required to operate the project to the Secretary of the Interior, who is required to transmit and dispose of the same in such manner as to encourage the most widespread use of the power at the lowest possible rate to consumers.

The total contract price of the aforesaid project is approximately 22 million dollars and the total cost, including materials furnished by the United States Government, is approximately 37 million dollars.

Prior to April 1948, the Respondents purchased materials and services in the amount of approximately \$3,000,000, of which \$2,000,000 worth was purchased outside the State of Arkansas and delivered to the dam site. As of that date the Respondents had placed further orders amounting to approximately \$3,000,000 for materials, of which amount 90 percent was ordered from outside the State of Arkansas. Materials valued at approximately \$16,824,000 will be shipped into the State of Arkansas from without that State for incorporation into the dam.

These facts, and many other facts of the Respondents' business have been found in prior cases before the Board.² On a petition of the Board for enforcement of its order in 86 NLRB 520, the Court of Appeals for the Eighth Circuit, found that the Board has jurisdiction over the operations of the respondents.³

Upon the facts here presented and the prior decisions of the Board and the court, I find that the Respondents are engaged in commerce within the meaning of the Act.

II. THE ORGANIZATIONS INVOLVED

Fort Smith, Little Rock & Springfield Joint Council, A. F. L., is a labor organization composed of the various building trades unions in Little Rock and Fort Smith, Arkansas, and Springfield, Missouri, affiliated with the Building Trades Department of the American Federation of Labor which admits employees of the Respondents to membership.

The International Association of Machinists, is a labor organization which admits to membership employees of the Respondents.⁴

III. THE UNFAIR LABOR PRACTICES

A. *Background, including prior decisions of the Board which are basic to the present controversy*

The labor relations of the present parties first gave rise to a Board case early in the year 1948, in Case No. 32-RC-33. This proceeding ended in the Decision and Direction of Election in *Matter of Brown and Root, Inc., et al.*, 77 NLRB 1136, decided June 11, 1948.

In that proceeding, the Council was petitioner. It sought certification as the representative of a unit composed of all the employees of Ozark, excluding office and clerical employees, guards, professional employees, supervisors, and machinists.

The International Association of Machinists intervened in the proceeding and requested certification as the representative of a craft unit which would include machinists, millwrights and welders, auto, truck, and heavy duty equipment mechanics, and mechanics' welders, then classified on Ozark's payroll as mechanical repairmen and helpers.

² *Brown and Root, Inc., et al.*, 77 NLRB 1136 and 86 NLRB 520.

³ *N. L. R. B. v. Ozark Dam Constructors and Flippin Materials Company*, 190 F. 2d 222. (C. A. 8).

⁴ This finding is based on facts in the instant case, and on the findings in 77 NLRB 1136.

The Board in the decision, *supra*, directed an election in four units of employees as follows:

Unit 1. All employees at the Employer's Bull Shoals Dam construction project, including welders but excluding machinists, millwrights, mechanic repairmen and their helpers, office and clerical employees, guards, professional employees, and supervisors as defined by the Act.

Unit 2. All machinists, being those employees of the Employer who operate lathes, shapers, billing machines, drill presses, planers, boring machines, and any other machines used in the manufacture of metal products within a shop, excluding supervisors as defined by the Act.

Unit 3. All millwrights excluding supervisors as defined by the Act.

Unit 4. All mechanics, auto mechanics, truck mechanics, and heavy duty equipment mechanics now classified on the Employer's payroll as mechanic repairmen and their helpers, excluding supervisors as defined by the Act.

On July 28, 1948, and thereafter, elections by secret ballot were conducted under the supervision of the Regional Director. On August 19, 1948, the Board certified the Council as bargaining representative for units 1 and 3, and the I. A. M. as representative for units 2 and 4.

On August 25, 1948, the Council by its attorney, wrote Ozark, requesting a meeting for the purpose of discussing a contract. This action instituted negotiations. Ben H. Powell, Jr., the present attorney for the Respondents, was the principal representative of Ozark during all of the negotiations which ensued. These negotiations were not productive of a contract and on *December 3, 1948*, the employees at the Bull Shoals Dam project went on strike. Thereafter, negotiations were resumed but were finally broken off by the Company on January 8, 1949.

Feeling aggrieved by the tactics and apparent lack of faith displayed by the Company in these negotiations, the Union on October 1, 1948, had filed with the Board a charge of unfair labor practices against the Respondents doing business under the names Ozark and Flippin. This procedure instituted the second proceeding between the parties which ultimately resulted in an Order of the Board on October 13, 1949.⁵ The charge as filed was subsequently amended and on January 11, 1949, the Regional Director issued a complaint against Brown and Root, Inc., and the other Respondents doing business under the names Ozark and Flippin. Pursuant to notice a hearing on the complaint was conducted from January 27 to 31, 1949, at Mountain Home, Arkansas, before a Trial Examiner of the Board duly appointed by the Chief Trial Examiner. On July 12, 1949, the Trial Examiner issued his Intermediate Report in which he found that the Respondents, doing business under the name Ozark during negotiations with the Union, beginning on September 13, 1948, and ending in January 1949, had not bargained in good faith with the Union. The Trial Examiner also found that both Ozark and Flippin had interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed to them by Section 7 of the Act.⁶

On October 13, 1949, in issuing its decision in *Brown and Root, Inc., et al.*, 86 NLRB 520, the Board adopted the findings, conclusions, and recommendations of the Trial Examiner with the modifications set forth below:

1. We agree with the Trial Examiner that the Respondents interfered with, restrained, and coerced their employees in violation of Section 8 (a) (1). However, we do not rely on Foreman Milam's speech, as the record does

⁵ This unfair labor practice case is *Brown and Root, Inc., et al.*, 86 NLRB 520.

⁶ In *N. L. R. B. v. Ozark Dam Constructors and Flippin Material Company, supra*, this finding of the Board as to Flippin was dismissed by the court of appeals on the ground of insufficient evidence.

not show that the speech was made less than 6 months before the service of the charge on the Respondents, as required by Section 10 (b) of the amended Act. Nor do we rely on Superintendent Lucas' speech, except to the extent that he stated that if the Union won, the job would be cut down from a 6-day to a 5-day week, and that the job would be "rougher" than previously.

2. We also agree with the Trial Examiner's conclusion that Respondents Constructors refused to bargain collectively with the Union, and thereby violated Section 8 (a) (5). This Respondent not only refused to bargain in good faith, but in addition insisted that the Union post a drastic performance bond, and granted unilateral wage increases during the course of the negotiations. That Respondent Constructors did not fulfill its statutory duty to bargain in good faith is amply evidenced by its "take it or leave it" attitude, its failure to invest real authority in its only negotiator, and its insistence upon sole control over matters affecting wages, hours, and other conditions of employment, all of which are proper subjects for collective bargaining.

During all the time that the parties were engaged in these legal proceedings before the Board the employees of the Respondents were continuously engaged in the strike which had begun on December 3, 1948.

B. The strike; its character; negotiations leading to its termination; and its termination

The findings in the last section of this Report are based on the prior cases between the parties herein. It was with this background that the instant case was begun. The General Counsel in the present case requested that the Trial Examiner take judicial notice of these prior proceedings before the Board. This request was granted.

At the hearing herein, counsel for the Respondents moved to dismiss the complaint on the ground that it was issued in violation of Section 10 (b) of the Act, and cited *Greenville Cotton Oil Company*, 92 NLRB 1033, as authority on that point. The motion is hereby denied. In the instant case, unlike the *Greenville* case, the Respondents have been found guilty of unfair labor practices in a prior *timely* prosecution.

In the instant hearing the undersigned ruled that evidence pertaining to the violation of Section 8 (a) (5) of the Act, covered in the Board's decision of October 13, 1949, was not relevant to the instant issues, that those matters had been finally determined even though the Order of the Board was then pending before the United States Court of Appeals for the Eighth Circuit upon an application for enforcement of its order by the Board, and to that extent was not final.⁷ At the time of the instant hearing, the Order of the Board had not been complied with by the Respondents, Ozark, or Flippin, nor had the unfair labor practices therein found, been remedied. There is no dispute between the parties on that point.

In the instant case the General Counsel adduced testimony from several union officials as to the beginning of the strike of December 3, 1948. The uncontradicted testimony of the union officers was to the effect that the council called a meeting of all employees on the Bull Shoals Dam and their union representatives at a hall at Cotter, Arkansas, for December 2, 1948. Prior to the date of the meeting the Union notified its members of the meeting, and passed out handbills

⁷ *N. L. R. B. v Ozark Dam Constructors and Flippin Materials Company, Inc.*, footnote 3, *supra*. Decision in this case, directing enforcement of the Board's order as to Ozark and dismissing as to Flippin was handed down July 5, 1951.

to *all* the men engaged in the construction of the dam and in the quarrying operations. On December 2, approximately 400 employees and business agents of the various trades met at the appointed time at Cotter, Arkansas. In the meeting which ensued the various business agents reviewed, for the benefit of the men, the history of the negotiations which the Union was then conducting with Ozark. After several business agents, who were members of the negotiating committee, had spoken, someone among the employees made a motion that the men not return to work until Ozark negotiated in good faith with the Union. This motion was put to the meeting and unanimously passed by a voice vote. Thereafter, the men did not return to work. This evidence as to the inception of the strike given by the union officials is uncontroverted in the record.

Consequently, in view of the prior Order of the Board in *Brown and Root, Inc., et al.*, 86 NLRB 520, and this evidence, I find that the strike of employees was an unfair labor practice strike caused by Respondents' refusal to bargain.

At the time of the strike there were approximately 1,000 employees on the payrolls of the Respondents. The strike appears to have been effective as to approximately half of the employees. In the early days of the strike picketing was conducted at all places where the operations of Ozark and Flippin were taking place. As the months passed in stalemate, the extent of the picketing lessened until the pickets finally disappeared around August 1, 1949. However, the strike continued while the parties engaged in their legal proceeding before the Board.

On September 26 and 27, 1949, representatives of the parties met at the Lamar Hotel at Houston, Texas. At this meeting the Respondents were represented by Messrs. Herman Brown, J. D. Moore, and Attorney Ben H. Powell, Jr. The Union was represented by Folsom, Lindsley, Clause, and Smith, four of its officials. It is undisputed that at this conference the representatives touched upon the differences between the parties only casually. The greater part of their time was spent in a discussion of generalities. However, it appears that at this meeting the first tentative proposal that the strike be terminated was made.

On December 1 to 3, 1948, representatives of the parties again met at the Virginia Lee apartments in Mountain Home, Arkansas. Ozark was represented by Messrs. J. D. Moore, Pat Earnest, and Attorney Powell; the Union by a group of business representatives. At these conferences the parties again tried to negotiate a contract to no avail.

In the course of the conferences, however, the union representatives offered to call off the strike provided the Respondents would reinstate the strikers. At that time Powell said that if the Respondents *had some vacancies* they would take back *some* of the men. That was not satisfactory to the union representatives, but it was agreed that Representatives Keeler and Folsom would go with Powell to the personnel office at the dam, and spot-check the payroll, to see how many employees had been hired since the beginning of the strike. The conferees at that time did not know the approximate number of men who had been hired to replace strikers, nor did they know the number of strikers who sought reinstatement. After a spot-check of the company records the three representatives reported to the conference that about 50 percent of the working force at the dam had been hired since the beginning of the strike. No final agreement to call off the strike and to reinstate the strikers was reached at these conferences but the proposition had received very serious attention. At one of these conferences Powell gave the Council a memorandum dated December 2, 1949, which reads as follows:

Whenever you decide to allow your men to return to work, if you do decide to call off the strike, we will reinstate those employees who went out on

strike and apply for reinstatement to the extent required by the Labor Management Relations Act.

On December 14, 1949, the representatives of the parties again met at the Grady-Manning Hotel, Little Rock, Arkansas. Messrs. Moore and Powell again represented the Respondents; Richard Gray, president of the Building Trades Department, AFL, Washington, D. C., was the spokesman for the union representatives. The proposal to call off the strike and to arrange the reinstatement of the men by agreement, was discussed, but the parties could not agree on the terms of such an agreement.

After a recess in the conference, Gray and the other Council representatives handed to Respondents' representatives the following letter, dated December 14, 1949, addressed to Ozark:

Under date of July 28, 1948 an order was issued by the National Labor Relations Board that an election would be held under the supervision of the National Labor Relations Board representative for the purpose of determining and certifying an appropriate unit as the bargaining representative of the employees employed by the Ozark Dam Constructors on the construction of the Bull Shoals Dam.

The Election was held on August 19, 1948, and as a result of said election the National Labor Relations Board under date of August 19, 1948 certified the Little Rock, Arkansas Building and Construction Trades Council and the Springfield, Missouri Building and Construction Trades Council known as the Joint Council as the bargaining representative of the employees employed by the Ozark Dam Constructors on the Bull Shoals Dam, with the exception of the employees specifically noted in the official order of the Board known as Case No. 32-RC-33.

On receipt of such notification the Building Trades Council named held a number of meetings with the representatives of the Ozark Dam Constructors for the purpose of trying to negotiate a Management-Labor relation contract as to wages, hours, and working conditions.

The unions involved charged the Ozark Dam Constructors failed to bargain in good faith and filed such charges with the National Labor Relations Board.

After a hearing on these charges held on July 29, 1949, the National Labor Relations Board issued an order dated October 17, 1949 directing the Ozark Dam Constructors to desist from refusing to bargain in good faith.

As a result of the action on the part of the Ozark Dam Constructors in violating provisions of the Management-Relations Act of 1947 a large number of the employees who participated in the certification election went on strike under date of December 2, 1948. Many of these employees have been either totally or partially unemployed since December 2, 1948, suffering severe loss and privation to themselves and their families. *The undersigned now formally demands these employees, or those of them who present themselves, be immediately employed by the Ozarks Dam Constructors.*

When these employees are again employed by the Ozark Dam Constructors on the Bull Shoals Dam project, we the undersigned, certified bargaining representatives, will meet with the representatives of the Ozark Dam Constructors for the purpose of carrying out orderly collective bargaining processes. [Emphasis supplied.]

Powell, chief negotiator for the Respondents, then prepared and gave the union representatives the following letter, dated December 14, 1949:

In accordance with the demand in your letter of this date for the reinstatement of those persons who went out on strike on December 3, 1948, and who were employed on December 2, 1948, by Ozark Dam Constructors, this is to advise *that we will re-employ such persons to the extent required by the Labor Management Relations Act of 1947 and in the manner required thereby* upon their application to Ozark Dam Constructors for such re-employment. You are aware that this will require Ozark Dam Constructors to replace existing employees who have been hired for the first time since 4 December 1948 with such employees who have been out since 3 December 1948 and who re-apply for such jobs.

We will continue our bargaining with you at an agreed time after hearing further from you. [Emphasis supplied.]

After the parties had assumed the positions expressed in the exchange of letters, some further discussion ensued. It is clear that *all representatives understood that the exchange of letters constituted a termination of the strike, and the beginning of a procedure by which the strikers would be reinstated.* It is clear from the evidence of union officials that the strike was called off on that day, and it is likewise clear from the letter of the Respondents that they understood that the Respondents had a duty under the Act to reinstate the strikers, even to the extent of discharging replacements where necessary. At the conference, therefore, there was considerable discussion as to how, and when, the strikers would be reinstated. Powell and Moore agreed that a committee of the Council could examine Respondents' payroll to determine how many men then working, had been hired *after* the commencement of the strike in the classifications of the strikers, and that the Union would start a program of sending the men to the job for reinstatement.

That night, the Union by paid spot announcement over a local radio station, announced that the strike was terminated and that the men were to apply for reinstatement. Local newspapers also carried a story that the strike was called off.

In the next few days several groups of strikers were sent by the Union to the dam site with referral slips. The Respondents, as part of the reinstatement procedure, directed that these men be given physical examinations by the company physician. These men were required to stand around outside in wintry weather, while they awaited examination. Moore, acting for the Respondents, and Keeler, acting for the Union, agreed that to relieve that hardship, that in the future the Union would send 25 referrals a day to the dam site until the program was completed. It was estimated that 25 examinations was the maximum number that could be given daily by the examining doctor. Thereafter, the Union referred men at this rate.

Of the men so referred, some were immediately reinstated and some men rejected. On the whole, however, this reinstatement program was going forward as a joint effort of Union and Respondents, when the Christmas holidays of 1949 intervened. Both the Union's and Respondents' representatives desired to suspend the program over the holidays, so on December 19, 1949, the parties entered into the following stipulation:

Agreement by and between ODC⁸ and Joint Council Representatives for the re-employment method to be followed.

It has been agreed between J. D. Moore, Jr., Administrative Superintendent, and Council Representatives that the Company will re-employ on the days of December 21 and 22 such employees that have been on strike that it is

⁸ Ozark Dam Constructors was frequently referred to in the testimony by its initials, O. D. C.

possible to process through the office and give their physical examination.

It is further agreed by both parties to this agreement that re-employment will be discontinued until January 3, 1950, and that on this date re-employment process will continue as previously agreed.

This agreement is brought about for the convenience of Company Representatives as well as Council Representatives due to the holiday season and prior plans made by both parties.

Meanwhile union representatives had completed the check of the payroll mentioned previously, and from time to time had submitted lists to the Respondents, which contained the names of some of the men who sought reinstatement.

On January 3, 1950, Union Representatives Hendricks, Keeler, and Wilkerson went to the personnel office of the Respondents to continue the reinstatement program. They saw Moore who told them that Pat Earnest had been designated by the Company to handle the reinstatement program. Moore told the union officials that they were to deal with Earnest and, in the event any disagreement arose, that the union officials could then see him. In this conversation, Keeler, representative of the carpenters, complained that Knight, one of the carpenters, had been rehired and then terminated. Also Wilkerson told Moore that there were rumors on the job, and in the neighboring villages that the union men were to be reinstated and later run off the job. Wilkerson pointed out that such rumors were harmful to the program. Moore agreed, and stated that he had told his foreman not to discriminate in any way against the union men who were reinstated.

At a conference with Earnest which followed, the union representatives furnished to Earnest a list of people they desired to reinstate who were available at that time for reinstatement. Earnest accepted the list, and stated that he would check the company records to see if the men could be reemployed, and would phone the union representatives his decision.

He then stated to the union representatives that the reinstatement program was completed as far as the Company was concerned, except for some 30-odd men of special skills, who would be accepted by the Company. He informed the union representatives of the number and classification of these men.

That the Company considered the reinstatement program completed came as a shock and a surprise to the union representatives. They demanded to know how the Company reached that conclusion. In the discussion that followed, Earnest stated several propositions for the first time, which are defenses of the Respondents in this proceeding. He said that no more carpenters would be hired because the Company had reinstated strikers in a number equal to replacement carpenters then on the job. He also said that the Respondents were not obligated to reinstate employees on the payroll of Flippin, and that since the I. A. M. represented the units of mechanics and mechanic repairmen, none of these men would be reinstated through the intercession of the Union. Earnest concluded the conference by saying that he would notify the Union by phone as to which men on their list the Company would employ, and that the Company would employ men only in the classifications and to the extent mentioned to the representatives. Later in the day he phoned the union representatives and informed them which men on their list would be accepted for employment.

This state of affairs was not acceptable to the Union, so it sought a conference with the Respondents.

On January 10, 1950, representatives of the Council met with Moore and Powell, representing the Respondents, at the Grady-Manning Hotel at Little Rock, Arkansas. The principal topic of this conference was the failure of the Company to reinstate more of the strikers. Powell stated that the Company had employed 74 persons from the various lists supplied by the Council. The

Council representatives told Powell and Moore that Earnest had informed them that as far as the Company was concerned the reinstatement program was finished. The union representatives claimed that there were approximately 350 to 400 strikers eligible for reinstatement and that the 74 reinstated up to that time did not fulfill the Respondents' obligation to the strikers under the Act. Powell stated that he could not believe that Earnest had said that no more men were to be reinstated. He told the union representatives that he would phone Earnest, who was not at the conference, and check with him as to what Earnest had said to the union representatives. After making this phone call, Powell reported to the conference that Earnest's version of his conversation was that he had told the union representatives that the rehiring program was completed as to *some classifications* of workers. In the light of later events this difference in the reported conversation is of minor importance.

In the course of determining the number of places to which strikers had a right to reinstatement, certain differences had arisen between the parties. At this conference these differences were discussed. These differences are basic to the controversy, so for the sake of clarity and brevity I will discuss them here at length and make a finding as to each.

1. Disagreement as to the reinstatement of employees of Flippin Materials Company

At the conference of January 10, 1950, at the hearing, and in their briefs, the Respondents contended that they were under no duty to reinstate former employees of Flippin who, it was contended, could not possibly have been unfair labor practice strikers. The Respondents argued that some of the employees of Ozark had chosen the Council as their bargaining representative, and that some of the employees of Ozark had chosen the IAM as their bargaining representative but that the employees of Flippin had never chosen a bargaining agent because the employees of Flippin were not covered by the original representation case before the Board. Also that though collective bargaining had taken place to some extent between the Council and Ozark with regard to Ozark employees, no collective bargaining had taken place between the Council and Flippin with regard to any Flippin employees. Respondents also pointed out that though the General Counsel in the unfair labor practice proceeding had "sought to ignore all of the facts in its treatment of Flippin and Ozark as one and the same employer, and to obtain orders against both Ozark and Flippin, the order which the Board entered in that prior case held that Ozark had not bargained in good faith with the Joint Council and entered no such order against Flippin." Further, counsel for the Respondents contended that all bargaining conducted had been between the Council and Ozark, and that Flippin was not involved.

This contention that Ozark and Flippin are separate entities has a certain amount of surface plausibility. At the hearing the undersigned gave counsel for the Respondents full latitude to develop evidence supporting this contention. However, it was only late in the hearing⁹ that the true relationship of the Respondents, Ozark and Flippin, was disclosed in the testimony of Ben H. Powell, Jr., attorney for the Respondents. He testified that the Respondents conduct their operations under the names of Ozark and Flippin by virtue of *certificate of doing business under an assumed name*, filed in the proper counties in Arkansas. Certainly this filing did not create new legal entities, separate and distinct from the joint venturers, who in legal contemplation constitute a partnership. Flippin and Ozark are merely different names for the same partnership, and are not legal entities in their own right.

⁹ Testimony of Ben H. Powell, Jr.

The facts of Respondents' operation prove that the Employer here is the joint venture or special partnership. Evidence adduced at the hearing discloses that the Government through the Corps of Engineers has let two contracts. The contract for the dam itself and the appurtenant works thereto, was let on May 8, 1947. The contract for the furnishing of the aggregate to be incorporated into concrete used in the construction of the dam was let on November 3, 1947. The terms of these contracts provide that the aggregate will be furnished by the Government to the contractor constructing the dam.

The Respondents as stated previously, bid and were awarded the construction contract. For the purposes of this contract they assumed the name Ozark. Using the name Flippin, they bid for and were awarded the contract to supply aggregate.

The aggregate used in the manufacture of the concrete of which the dam is being built is produced in a quarry located approximately 7 miles from the dam site. The joint venturers, as Flippin, quarry stone, crush it to aggregate of various size, and deliver it to themselves, doing business as Ozark at the dam site. The joint venturers, as Ozark incorporate the aggregate into the dam.

Separate payrolls are maintained by the joint venturers for Ozark and for Flippin. However, employees are shifted from one payroll to the other, with great frequency and without any apparent limitation.

The contract for the supply of aggregate is a lump sum contract with a *savings clause*. This necessitates accurate cost accounting to the Government with regard to the aggregate contract. The construction contract is on a cost-plus 10-percent basis. The joint venturers maintain a *common* office for the performance of work under *both* contracts. Hiring and firing is effected through a *common* personnel office.

The common overhead costs are originally charged to Ozark, but 30 percent of those costs are later carried over, and attributed on the books to Flippin. The salaries of all supervisors and management officials are handled in the same way, 70 percent is carried on Ozark's books, and 30 percent on Flippin's. The time of hourly paid employees is prorated between Ozark and Flippin, in accordance with the actual time spent on either phase of the work. Thus some employees have received checks from both Flippin and Ozark for part of a week's work. Employees testified they were shifted from one payroll to the other at the will of the joint venturers.

From all the evidence, it is obvious, and I find, that the Respondents constitute a single employer within the meaning of Section 2 (2) of the Act, and that Ozark and Flippin are mere assumed names for this single employer.¹⁰

¹⁰ In making this finding, I am mindful of the fact that in the prior unfair labor practice proceeding between these parties, 86 NLRB 520, the Board by *inference* treated Ozark and Flippin as separate entities. I am also mindful of the fact that the Court of Appeals for the Eighth Circuit, continued by *inference* to recognize a distinction between Ozark and Flippin. However, since this proceeding raises directly the question of legal entities for the first time, on facts which clearly compel a finding that Ozark and Flippin are mere names for the single employer, Root & Brown, Inc., et al., I feel constrained to disregard these inferences. When the question here raised is directly before the Board and the court on this evidence, I believe the question will appear in such a light that the Board and court will remove the inferences of their prior decisions.

Sa-Mor Quality Brass Company, 93 NLRB 1225; *Home Furniture Company*, 77 NLRB 1437; *Salter Mills Company*, 76 NLRB 930; *Vivtor Hosiery Corporation, et al.*, 86 NLRB 195; *Atlas Imperial Diesel Engine Co., et al.*, 89 NLRB 372; *L. W. Hayes, Inc., et al.*, 91 NLRB 1408; *Gerber Products Company*, 93 NLRB 1668; *Vulcan Tin Can Company*, 94 NLRB 10; *Merchants Express Corporation, Inc.*, 92 NLRB 107; *Lloyd A. Fry Roofing Company, et al.*, 92 NLRB 1432; *Laundrepair Company*, 90 NLRB 778; *Federal Engineering Company, Inc., et al.*, 153 F. 2d 233 (C A 6); *American National Bank and Trust Company of Chicago*, 71 NLRB 503; *Orleans Materials and Equipment Company, Inc.*, 76 NLRB 48; *Ecusta Paper Corporation*, 66 NLRB 1204.

It follows from this finding that the Respondents are a single employer; that all the men who went on strike December 3, 1948, were unfair labor practice strikers. The *employer of all men involved* had previously been adjudged guilty of a refusal to bargain with a group of these employees, and at a meeting of the employees in the unit aggrieved and some employees not in the unit, unanimously voted to strike. They maintained their strike until it was called off by the certified representative for the unit aggrieved. Under these circumstances, I find that all the strikers, regardless of whether they were on the payroll of Ozark or on the payroll of Flippin, were entitled to be reinstated when they called off their unfair labor practice strike and unconditionally offered to return to work.

2. Respondents' contention as to men in the I. A. M. unit

As previously noted in the elections conducted by the Board, the Council had won the right to represent two units of employees. These units were comprised generally of those craftsmen usually affiliated with the AFL Building Trades, such as carpenters, electricians, boilermakers, operating engineers, pipefitters, ironworkers, plumbers, and laborers. The IAM had won the right to represent two units composed of machinists and the crafts generally associated with machinists such as auto, truck, and heavy duty mechanics, mechanic repairmen, and their helpers. In the conference of January 10, 1950, and at the hearing, the representatives of the Respondents stated that the IAM was the certified bargaining representative of many individuals who were on strike with the Council. Men classified as mechanical repairmen were included in the unit represented by the IAM. Powell stated at the conference that Ozark had received a letter from the IAM dated December 28, 1949, which reads as follows:

Article 1, Section 1, Paragraphs 2 and 3 of the current agreement between the Ozark Dam Constructors and The International Association of Machinists clearly defines the jurisdiction of the I. A. of M. as regards the Bull Shoals Project as awarded by the National Labor Relations Board.

To avoid any possibility of future misunderstanding, this is to advise that no Union or group of Unions, other than the I. A. of M. has any authority to authorize or request any change in present personnel or to represent any employee coming within the bargaining units described in the above-mentioned agreement, regardless of any understanding or agreement which may have been reached or which may be reached in the future with any other Union regarding the re-hiring of former employees.

Powell said that Ozark had received this letter shortly after December 28, 1949, and that in view of the fact that Ozark had a contract with the IAM covering the machinists-mechanics unit, that Ozark could not and would not, reinstate employees in the IAM unit who were on strike with the Council.

The Union on the other hand took the position that all the men were unfair labor practice strikers and that upon abandonment of their strike they were eligible for reinstatement upon request by the Council, the IAM, or the individual strikers themselves. In examining this difference between the parties some general facts and general considerations are helpful. It must be remembered that the division of these craftsmen into separate units with different certified representatives had been effected only a short time before the strike. The customs and practices of collective bargaining had not been used by the employees in the specific units for such a length of time that the distinction between the units had been impressed upon the minds of the employees. It is also apparent that Ozark's refusal to bargain with the Council as representative of many crafts, was regarded as a serious matter by a large number of employees.

The meeting at which the strike vote was taken was open to *all employees of the Respondents regardless of craft, and regardless of whether the individual was on the payroll of Flippin or Ozark*. Acting in concert they all voted not to return to work until Ozark bargained in good faith with the Council, and thereupon they put their resolution into effect by concertedly stopping work. The purpose of *all*, was to force the Respondents to cease their unfair labor practice directed at *some* of them. An employee need not wait until he is the object of his employer's unfair labor practices before he can resort to strike. This was the right that all these employees exercised when they struck on December 3, 1948.

It must be pointed out that the only part of the contract between the Respondents and the IAM which is before us in that contained in the letter quoted above. There is no proof of any union-security clause or "no-strike" clause in this contract. The Respondents could and actually did hire whom they chose without reference to the IAM or the Council, and none of the employees were bound by a "no-strike" clause or a union-security clause in any contract. The Respondents' position, therefore, is based on the certification of the IAM for the employees in the unit, and not on the contract between the Respondents and the IAM. A similar situation was before the Board and the courts in *The Texas Company*, 93 NLRB 1538. In commenting upon the refusal of the company to hire a person who had formerly been discharged by the company for his union activities as a supervisor in a rank-and-file position, the Board said:

The situation before us is not unlike those cases in which employees join sympathetically in protected concerted activity initiated by a union in which they are not and perhaps even could not become members. This Board and the courts have held that reprisal against such employees necessarily discourages not only their participation in concerted activities but also *active* union membership on the part of employees on whose behalf they acted.

The Court of Appeals for the Ninth Circuit has very clearly held that employees in the position of the mechanical repairmen have the same rights as those employees directly affected by the unfair labor practice. In *N. L. R. B. v. Biles Coleman Lumber Company*, 98 F. 2d 18, 23 (C. A. 9), employees had engaged in a strike because of the company's refusal to bargain. The strike was an unfair labor practice strike and the Board in its Order, ordered the company to reinstate, upon application, all employees on strike. Among these striking employees were employees who were not included in the unit because of their supervisory status and location in a group of employees not in the units. The court said:

The reinstatement remedy is designed to vindicate the policy of the Act and to compel observance of its purpose and spirit. There is nothing in the Act which limits the reinstatement remedy to members of a labor organization or even to striking employees who are primarily and directly aggrieved by an unfair labor practice which causes a strike. An entire crew, union or non-union, may strike by reason of an unfair labor practice involving the discharge of only one man. It could hardly be contended that reinstatement of the entire crew in such case would not be a reasonable measure for effectuating the policies of the Act, under Section 10 (c). We need not consider the ultimate limits of the Board's authority to order reinstatement of strikers against whom an unfair labor practice is not directly committed. It is sufficient here to hold that any of these 600 employees of this single employer who strikes by reason of unfair labor practices [in this

instance a violation of Section 8 (5)] directed against any of the 600 had a sufficiently immediate relation to such practices to warrant the Board in requiring its reinstatement.

The Respondent takes the position that to reinstate the men at the request of the Union, or the men themselves, would be an infringement upon the rights of the IAM under the certification of the Board. Respondents cite *N. L. R. B. v. Draper Corporation*, 145 F. 2d 199 (C. A. 4), as authority for its position. That case involved a "wildcat" strike, called by a "minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all employees." The instant case is far different. This was a strike in protest of the unfair labor practice of the employer. Workmen, regardless of union affiliation or the lack thereof, refused to work until the Employer bargained in good faith with the certified representative of a large group of them. They attended the meeting of the Council and *in concert heard the report* of the Council's negotiating committee and *in concert they unanimously voted* not to work until the Employer discontinued his unfair labor practices.

I have found that the strike was an unfair labor practice strike. I find, therefore, that these employees in the unit represented by the IAM who engaged in the strike were unfair labor practice strikers, and just as entitled to reinstatement, as the employees in the unit directly affected by the unfair labor practices.

3. Disagreement as to which employees were replacements for strikers

At the January 10, 1950, meeting the Respondents took the position that in ascertaining how many jobs were available for the strikers that any employee who was on the payroll of the Respondents at any time prior to the strike and who was rehired after the strike, was a *continuous employee* and not subject to replacement by a striker. The Union, on the other hand, took the position that the only employees not replaceable by strikers were employees who were on the payroll at the time of the strike, who had not struck, and whose employment had been uninterrupted or continuous during the time of the strike. These contentions presented a problem because of the nature of the Respondents' working force.

The Bull Shoals Dam, as noted before, is being built in a relatively remote section of Arkansas. Within a radius of 60 miles there are no cities or towns which have a population above 5,000 people. The relatively few communities within that area are small villages with a few hundred inhabitants. It is mainly a hilly agricultural area. Main lines of the railroads are distant from the dam site. The people in the vicinity derive their livelihood from the land, either by farming or some very small lumbering operations.⁶ The labor requirements of the Respondents, at times approximately 1,500 men, was in excess of the normal supply. In consequence, its labor force for the larger portion was made up of residents of the community within a radius of 60 miles, and a few skilled workers who came to the dam site from such places as Fort Smith and Little Rock, and a few itinerant craftsmen. The great bulk of the labor force, therefore, were farmers, sons of farmers, or people who resided in the community and who had some indirect interest in farming. Employment at the dam was a source of added income to these people. Work on the dam and work in their own interests, were used by these men to complement each other. The work on the dam lent itself to such an arrangement, for the labor force of the Respondents rose and fell as certain operations of the dam were completed. Thus, the farmers were able to work at the dam and still attend to their crops or follow their agricultural occupations. Those indirectly interested in agriculture could do likewise. The natural result of these activities was that the Respondents were forced to accom-

modate themselves to having workmen take temporary layoffs, during which the workmen followed agricultural pursuits for a period of weeks, and then returned to the Respondents. Likewise, the Respondents laid off some of its force when a particular section of the dam was completed, and a few weeks later hired the same men when a new phase of the operations was begun. In all the operations unrestricted interchangeability among the crafts and among the employees was used. In one operation an employee might be classified as a mechanic but on another operation, if he was qualified, he might be hired and classified as a truck driver.

During July 1949, the mid-point of the strike, the *entire labor force* at the dam was laid off because a strike on the Missouri Pacific Railroad prevented the delivery of materials to the dam site. After the use of stored materials, all men were laid off for the duration of the Missouri Pacific strike.

The payroll records of the Respondents followed an accounting procedure required by the Government. This procedure required that men, in fact, laid off temporarily, be designated as "terminated" because the accounting procedures would not permit employees to be carried on the payroll who were not actually working and being paid.

As a result of this procedure the payroll records show a man as "terminated," every time he quit to farm or follow his own pursuits even temporarily, or when he was laid off at the end of some phase of the construction, or when he was laid off temporarily at the time of the Missouri Pacific strike. This procedure had been followed since the beginning of the project. Before the strike some of the strikers had conducted their employment in this general fashion.

This situation caused severe disagreement in the conference of January 10, 1950, as to which employees should be discharged and replaced by the returning *unfair labor practice* strikers. Some union representatives took the position that "terminated" was exactly and literally used in the payroll records, and that every man on the job was subject to replacement by a striker, since all had been terminated at least once in the Missouri Pacific strike. Others, of the union representatives believed that "terminated" should be construed in the light of custom and usage. The Respondents' position was that "terminated" meant laid off; that it established the employee as an "old employee," and that if he was terminated before the strike and rehired after the strike began, he could not be considered a "new hire" and subject to replacement by a returning striker.

On the evidence before me, I find that the employees laid off or terminated during the Missouri Pacific strike were not rendered subject to displacement by that break in their employment. There is no evidence before me that the Respondents recruited men, formerly employed by the Respondents to come to the plant and work in the strikers' job at the time the strike occurred. After the strike, men who were formerly employed by the Company returned to the payroll of the Respondents but it appears that this was part of the normal and natural ebb and flow of employment of these individuals. I find also, that those individuals were not subject to displacement by the strikers. However, in regard to the last finding there is one notable limitation. Some of these men were hired and later promoted, or hired at a classification other than their former classifications, and thus given a striker's job. As to those cases where an "old employee" was rehired during the strike at a classification different than the one previously held by him or promoted to a classification formerly held by a striker, I find that despite his previous employment, the "old employee" was subject to demotion or transfer to his former job or classification, thus making room for a striker to also resume his former position. In the order which I will hereafter recommend, I will direct that these "old employees"

who were promoted into the positions or classifications of strikers or rehired after the strike in a striker's classification rather than their own, be reduced in classification or demoted or transferred to the classification which they held before the strike, and that their present positions be given to the unfair labor practice strikers who are hereafter determined to be eligible for reinstatement.

In making the above finding in regard to these "old employees" and the unfair labor practice strikers, I have endeavored to lay down a realistic rule which observes the rights of strikers and nonstrikers alike.

4. The disagreement as to the right of the Respondents to "overload" their payroll

At the meeting of January 10, 1950, at the hearing, and in their brief, the Respondents contended that their obligation to reinstate strikers was limited to reinstating strikers in a number equal to the number of replacements which they had hired in the course of the strike. This contention was demonstrated by the treatment of the carpenters on reinstatement. In the course of the strike, the Respondents had hired 21 carpenters as replacements. The Council sought reinstatement for approximately 56 striking carpenters. The Respondents reinstated 22 strikers and continued to employ the 21 replacements. They claimed this fulfilled their obligation under the Act despite the fact that this procedure left 34 striking carpenters not reinstated. The position of the Respondents under their interpretation of the Act was that they had fulfilled their duty under the Act, and were carrying the replacements as an "overload" or a "luxury" at their own expense. It is manifest that this interpretation of the Act worked a discrimination against the striking carpenters not reinstated. It left them without jobs while the Employer had replacements performing the duties of carpenter. This procedure of "overloading" worked an additional discrimination against the men, because in some instances after reinstatement had taken place, the Respondents, in a reduction of force, laid off reinstated strikers and kept on their payroll those replacements retained as an "overload" or "luxury."

The correct legal principle governing this situation is that the strikers, being unfair labor practice strikers, were at all times the employees of the Respondents. When the strikers called off their strike and unconditionally offered themselves for employment, they had a right to reinstatement superior to the right of any replacement in their classification on the payroll of the Respondents.

When the Respondents refused reinstatement to the claiming unfair labor practice strikers in a certain classification, and retained replacements in that classification, the Respondents discriminated against all claiming unfair labor practice strikers in that classification.¹¹

These points constitute the principal controversial issues in the case, and were the points on which the parties could not agree on January 10, 1950.

On January 15, 1950, Folsom, as president of the Council, wrote letters to Ozark Dam Constructors and Flippin Materials Company. Attached to each letter was a list of employees for whom the Union demanded reinstatement. These letters which were identical were as follows:

The following employees, who went on strike December 3, 1948, having abandoned their strike, hereby unconditionally apply for employment. The Undersigned organization offers its assistance in effecting employment for these people who left their jobs due to labor dispute.

The following individuals comprise most of the balance of the employees abandoning their strike, partial lists of whom have been presented as applicants for employment on December 21, 1949, and January 3, 1950.

¹¹ *Luzerne Hide and Tallow Company*, 89 NLRB 989.

Regardless of the action taken by the Company in regard to these applications the Joint Council requests that meetings continue in an effort to reach an agreement with the Company covering the wages; hours and other conditions of employment of the employees whom it represents.

On January 24, 1950, Powell replied by letter on behalf of Ozark as follows:

We have received your letter of January 15, 1950, addressed to Ozark Dam Constructors.

As you have heretofore been informed at conferences in Little Rock, Arkansas, and by Ozark Dam Constructors personnel at the dam site, Ozark Dam Constructors has re-employed many of the persons whom you have referred to Ozark Dam Constructors for employment on the list which you have heretofore submitted. You are also aware that the jobs which were held and the work which was being performed on December 2, 1948, when the strike commenced have, as a result of the progress which has been made in the construction of the job during the past thirteen months been terminated and no longer exist and that the overall employment by Ozark Dam Constructors has been reduced approximately 50%. As you have heretofore been advised, we suggest that you direct any employee on the list enclosed in your letter of January 15, 1950, who desires employment, to the Ozark Dam Constructors employment office and *their application for employment will be accepted in the order of their appearance. Ozark Dam Constructors will endeavor to employ as many of such men as possible.*

With regard to your request for a further meeting to negotiate an agreement between your organization and Ozark Dam Constructors, we have always met and bargained with you upon your request, and so long as there is any possibility that an agreement might be concluded, we will be glad to continue to meet with you. [Emphasis supplied.]

On the same date, Powell replied on behalf of Flippin as follows:

We have received your letter dated January 15, 1950, addressed to Flippin Materials Company.

As you do not represent the employees of Flippin Materials Company, we feel that it is inappropriate to confer with you with regard to those employees. As you know, Flippin Materials Company employs men required for its operations at the employment office on the job site, and Flippin Materials Company gives preference in employment to those persons who have heretofore worked for the company and who are qualified to perform the work which Flippin Materials Company is performing.

This exchange of letters brought to a conclusion all efforts on the part of the parties to reinstate the men by a joint program. The Union instructed some of the strikers to present themselves for employment, which they did. Some of them were hired; others for the reasons mentioned above, were refused employment. Other employees, who were available for work, heard that fellow employees had not been employed, and so did not present themselves for employment. In the course of the strike a great many strikers had sought employment at distant places and would not return without a firm assurance that their jobs were available.

From time to time thereafter, while the charges here involved were being investigated by the Board, the Respondents made various offers to employees of reinstatement to their jobs. Most of these offers occurred from approximately March 6 to July 15, 1950. The offers, on the stationery of Ozark, were in the form of the following letter:

DEAR SIR: We now have an opening for you as a carpenter.¹² If you are interested please report to our employment office at once and not later than Monday, March 20, 1950.

OZARK DAM CONSTRUCTORS.

Some of the men to whom these offers were directed applied for reinstatement and were reinstated. Their names appear in the complaint, and the date of their reinstatement is shown. Some others did not apply for various reasons.

The individual cases will be discussed hereafter.

5. The availability of jobs for the strikers

Though an employer must reinstate unfair labor practice strikers who call off their strike and unconditionally offer themselves for employment, he is under no duty to reinstate strikers for whom he has no job. As indicated previously in this Report, one of the contentions of the Respondents was that the working force at the dam had been curtailed by about 50 percent and that therefore it did not have jobs available for the strikers at the time they called off their strike. Counsel for the parties exhibited extreme diligence in analyzing payroll records and payroll data pertinent to this subject. Much of this data was reduced to certain exhibits which were offered in evidence by stipulation. It was for the preparation of these exhibits that the hearing was adjourned. These exhibits are the source of all information on this subject.

General Counsel's Exhibit No. 11 shows the active employees on the payroll of Ozark as of December 18, 1949, including each employee's work history as on file at the Company's office. Basically this document was prepared from the Respondents' records by the members of the Joint Council, with the help of some company employees on December 17, 18, and 19, 1949, with certain additions and deletions, which were later made upon comparison with the actual payroll of December 18, 1949. There are approximately 700 names on this exhibit.

General Counsel's Exhibit No. 15 shows the employees on the payroll of Flippin as of the payroll period ending December 18, 1949, and the work histories of the men. There are approximately 130 employees listed on this exhibit. General Counsel's Exhibit No. 11 shows the work histories of each employee named in the complaint as amended. These work histories show work done both for Ozark and for Flippin. There are approximately 150 men listed on this exhibit.

In addition to the above exhibits the parties stipulated as follows:

At sometime between February 1, 1950, and July 25, 1950, new employees were hired by Ozark and Flippin in the following classifications and in the following numbers: Carpenters—39, carpenter apprentice—2, laborers—11, bell-boy—1, form setter and strippers—1, pump operators—4, conveyor operator—2, euclid driver—2, dinkie operator—2, oilers—2, welders—7, jackhammer—5, air tool operator—6, wagon drill—2, and 1 each in the following classifications: rigger, millwright, cement finisher, vibrator operator, bulldozer operator, crusher operator, powderman, compressor operator and truck driver.

General Counsel's Exhibit No. 19 is compiled from the Company's records and shows new employees hired between December 18, 1949, and February 1, 1950, in all classifications held by employees named in the complaint. On employees hired during this period who had prior work histories with either Ozark or Flippin, work histories are also given. General Counsel's Exhibit No. 20 is an

¹² The letters usually designated the appropriate craft for the specific employee.

exhibit compiled from company records which shows new employees hired since the payroll date of December 18, 1949, in the classifications as follows: mechanical repairman, ironworker, electrician, blacksmith, crane operator, battery car operator.

These exhibits I have studied and analyzed. These records establish two fundamental facts that: (1) employees were shifted between the payrolls of Ozark and Flippin at the will of the Respondents without any limitation whatsoever; and (2) employees possessing more than one skill were transferred or shifted from one skilled job to another, so that in the course of employment, they filled practically all jobs for which they were qualified.

It is also apparent and I find from these records that if the Respondents had fulfilled its duty under the Act toward the returning unfair labor practice strikers, that *all* the strikers named in the complaint could have been reinstated with reasonable promptness. The Respondents had an ample number of jobs occupied by replacements, or vacant, to accommodate all the strikers in every classification. This is especially true, since some strikers had skills in more than one classification. This finding is based on an analysis of the payroll exhibits, covering the various types of replacements, and the stipulation of the parties as to new employees hired between February 1, 1950, and July 25, 1950.

To determine the payroll situation as of December 14, 1949, I have analyzed the payroll exhibits, to find the number of replacements on the payroll, on and shortly after that date. This analysis was as follows: From the work histories of the men on the payroll of December 18, 1949, the date of original hire was determined. If the man had been hired previous to the strike by either Ozark or Flippin he was considered to be "an old employee" and not subject to being discharged to make room for a striker. If the employee hired after the strike was a new employee, he was considered a "replacement," if he was an old employee but promoted into a striker's classification, he was considered a "promotional replacement" in the strikers' classification; if he was a "new hire" at or near the time that the strike was called off, he was considered a "discriminatory replacement" inasmuch as he was hired rather than a striker at a time when the strikers were asking for reinstatement. These categories of replacements are totaled in the column marked total replacements. This figure is the number of positions which were available for the strikers on December 14, 1949, at the time the strike was called off. It will be noted that in some of the classifications hereafter set forth there appear to be replacements and no strikers claiming these jobs. I have set out these classifications nevertheless, to show the amplitude of construction jobs available for the returning unfair labor practice strikers.

In addition to the jobs occupied by replacements at the time the strike was called off, the Respondents had the jobs of the new employees hired between February 1, 1950, and July 25, 1950, which are enumerated in the stipulation mentioned above. These jobs must be considered in any assessment of the job situation, for these men were hired at the same time the Respondents refused employment to some of the strikers.

In discussing the individual cases hereafter, I will give the replacement situation as of December 18, 1949, for each classification immediately after each heading. I will refer to the stipulation as to "new hires" when I think it is pertinent.

Before making specific findings as to the individual strikers named in the complaint, I think it proper to make general findings at this point in the Report.

General Findings

Upon all the evidence, I find that the employees of Brown and Root, Inc., Wunderlich Contracting Company, Peter Kiewit Sons Company, Winston Bros. Company, David G. Gordon, Condon-Cunningham Co., Morrison-Knudson Company, Inc., J. C. Maguire & Company, and Chas. H. Tompkins Co., doing business as joint venturers under the names of Ozark Dam Constructors and Flippin Materials Company, engaged in a strike beginning December 3, 1948, which was caused and prolonged by the unfair labor practices of the aforesaid Respondents.

I find that the employees aforesaid called off their unfair labor practice strike on December 14, 1949, and that on that date the Union made a demand on behalf of all the striking employees that the Respondents reinstate them, and that on that date the Union on behalf of all the striking employees made an unconditional offer to return to work.

The Respondents contend that before the Employer was under any duty or obligation to reinstate the unfair labor practice strikers, the strikers themselves had to make individual applications for reinstatement. Upon the evidence in this case, that contention is without merit for several reasons. In this case, a blanket application for the reinstatement was made by the Union on behalf of all strikers and the Respondents agreed to the reinstatements, a great many of which it later failed to make. In *Indiana Desk Company*, 56 NLRB 76, the Board said:

"A blanket application by the union on behalf of strikers for reinstatement cannot be ignored by the Employer and makes individual applications *unnecessary*." [Emphasis supplied.]

The enforcement proceedings in the Court of Appeals for the Seventh Circuit, left untouched this holding of the Board. In the *Rapid Roller Company* case, *supra*, the Board said:

There is no testimony that any of the strikers made individual applications for reinstatement. However, in view of the general application made by Local No. 120 on May 9, in behalf of all the strikers *and the Respondents' refusal to displace new employees in order to put the strikers back to work*, a subsequent individual application would have availed the employees nothing. It cannot be said that because the strikers did not make individual applications to go back to work they were not refused reemployment. To require the strikers to make individual applications in this situation would place a penalty upon them for not doing what *they knew would have proved fruitless in the doing*. [Emphasis supplied.]

It is obvious that after the unilateral termination of the reinstatement program by the Respondents on January 3, 1950, that individual application by the strikers would have been futile.

Despite this conduct of Respondents, many strikers in ensuing months made personal application for reinstatement. Also, the Union made repeated demands for the reinstatement of the strikers, furnishing to the Respondents lists containing the names of striking employees who sought reinstatement. Under the evidence here, I find personal applications and such demands were not required by the Act, and that the unfair labor practice strikers had a right to reinstatement beginning on December 14, 1949.

I further find that on December 14, 1949, Respondents agreed to reinstate said employees but thereafter failed and refused to reinstate certain employees hereafter named in this Report, and failed and refused to reinstate certain other striking employees until later dates; the names and dates being hereinafter set forth.

The violations of the Act found above in most instances were caused by the Respondents' discriminatory refusal to grant to the striking employees several rights and benefits conferred on them by the Act.

Since these employees of Brown and Root, Inc., *et al.*, were unfair labor practice strikers, they all remained employees of the Respondents during the strike and were entitled to reinstatement at any time that they called off their strike. *The Texas Company, supra; N. L. R. B. v. Biles Coleman Lumber Company, supra; Spencer Auto Electric Co., Inc., 73 NLRB 1416, 1421*, in which the Board said:

As we have already noted the strikers were engaged in protected concerted activity for which they could not lawfully be discharged or punished. Under the express provision of Section 2 (3) of the Act, they retain their status as employees. Therefore, when they abandoned their strike, the Respondent was duty bound to reinstate them on application.¹³

To provide employment for the strikers, if necessary, the Respondents were obligated to discharge replacements hired after the strike began; and to demote or transfer other employees who had been promoted or transferred into the positions of strikers, back to their former positions or classifications. In *Industrial Cotton Mills Company, Inc., supra*, the Board adopted the Trial Examiner's language on this proposition as follows:

All new employees hired by the Respondent on and after June 11, 1942, the date of the commencement of the strike in question, shall, if necessary, to provide employment for those to be offered reinstatement, be dismissed. *If thereafter, despite such reduction in force, there is not sufficient employment available for all the employees to be offered reinstatement all available positions shall be distributed among the remaining employees, including those to be offered reinstatement, without discrimination against any employee because of his union affiliation or concerted activity, following such system of seniority or other practice to such extent as has heretofore been applied in the conduct of Respondent's business.* In this process, if necessary, the spare hands and other employees who were placed in the jobs of the employees to be offered reinstatement shall be removed from such jobs back to the jobs they held prior to June 11, 1942, before distribution of the positions is made among the regular weavers including the persons named herein. Those employees if any remaining after such distribution for whom no employment is immediately available shall be placed on a preferential list and offered employment to their former or substantially equivalent positions as such employment becomes available and before other persons are hired for such work in the order to be determined among them by such system of seniority or other practice as has been followed heretofore by the Respondent. [Emphasis supplied.]¹⁴

Though the Respondents stated on December 14, 1949, that they would reinstate all strikers in accordance with the provisions of the Act, it is patent, and I find, that they never intended to observe those provisions of the Act which required the discharge or demotion of replacements. *This is conclusively established by the fact that in this entire record and the voluminous exhibits, there is no evidence of one replacement being discharged or demoted to make room for one striker.*

¹³ See also *Dalton Telephone Company, 82 NLRB 1001; Industrial Cotton Mills Co., Inc., 50 NLRB 855, 869; Twelfth Annual Report of the National Labor Relations Board, page 31; Fourteenth Annual Report of the National Labor Relations Board, page 63.*

¹⁴ See also *Fast Trucking, Inc., 56 NLRB 1826, 1843; Palmer-Lee Company, 65 NLRB 492, 506-507; Rapid Roller Company, 33 NLRB 557.*

Further, those employees who were reinstated were given jobs which were vacant, and in many instances the reinstated strikers were treated as *new employees*. It is obvious that to a certain extent, the Respondents used the reinstatement program as an accommodation, whereby they filled their existing labor requirements and then terminated the program by unilateral action.

Under the law the Respondents were required to rehire the strikers in any classification for which they were qualified, if their services were not required in their primary classification.

The Board in *Lewis & Holmes Motor Freight Corporation*, 63 NLRB 996, 998-999, ordered the respondent to reinstate the discriminatees to other jobs for which they were qualified, and to return them to their jobs when they again opened up. In that case, the company had claimed that it could not reinstate the 8 (a) (3)'s because their jobs had been eliminated. The Board, in effect, stated that this defense of the company's was not sufficient *inasmuch as there were jobs in the company for which the employees discharged were qualified*. It further stated that the discriminatorily discharged employees were entitled to those jobs, until such time as the company found a need to reopen the eliminated jobs.

I find that this principle applies to unfair labor practice strikers as well as to discriminatorily discharged employees and that they both had the same status as employees before the law. In the instant case, Respondents observed this rule in only a few cases.

Upon all the evidence including that hereafter referred to in the subdivision entitled "Specific Findings as to Individuals," I find that the Respondents violated Section 8 (a) (1) and (3) of the Act by not reinstating the employees listed in Schedule A, attached hereto, and by not reinstating until the date set opposite each name the employees listed on Schedule B, attached hereto.

Specific Findings As to Individuals by Classifications

Carpenters

Claiming strikers.....	37
Replacements.....	22
Discriminatory replacements.....	12
Total replacements.....	34
Stipulated: New employees hired 2/1/50-7/25/50.....	39

Bailey, Benjamin W.: Rehired 11/1/50 as carpenter; registered letter sent 10/26/50 offering job as carpenter.

This employee testified that on January 3, 1950, he and employee Pfingston presented themselves at the employment office and requested reinstatement. Pat Earnest, in charge of the reemployment program for the Company, told the men that the Respondents had hired all the men they were required to hire. Bailey had a referral slip from the Union, but was not hired. On November 28, after he received a letter from the Company, he again presented himself for employment and was reemployed on that date. I find the Respondents discriminated against this employee from December 14, 1949, to the date of his reinstatement on November 1, 1950.

Bevans, J. N., Jr.: Rehired 12/13/50 as carpenter; quit 1/9/51—going to another job; notified of opening as carpenter on 3/8/50.

This employee testified that between January 3 and 5, 1950, he applied for a job at the personnel office. The man in charge told him that the Respondents had hired as many strikers as it had hired nonstrikers and that therefore they had fulfilled all their obligations to the Union. He was not rehired. Around October 5, 1950, he called Hock, the personnel man from Lake Andes, South Dakota, and asked if he was hiring any men. Hock said a few. When Bevans

got to the dam a few days later, he was told that the Company was not hiring any carpenters. In December he applied to J. D Moore at the dam and was given a job as a carpenter. I find that the Respondents discriminated against this employee from December 14, 1949, to December 13, 1950.

Blecker, Robert R.: A registered letter was sent this employee on 3/8/50 offering him a job as a carpenter. He did not testify. I find that the Respondents discriminated against this employee from 12/14/49 to the date of the above offer of reinstatement.

Bonner, Glen M.: Rehired 7/29/50 as carpenter. Registered letter sent 7/25/50 offering job as carpenter. I find that the Respondents discriminated against this employee from 12/14/49 to 7/29/50, the date of his reinstatement.

Brents, J. B.: Rehired 3/21/50 as carpenter; quit 4/25/50, "going to another job"; registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this employee from 12/14/49 to 3/21/50, the date of his reinstatement.

Cypert, Eugene N.: Rehired 3/21/50 as carpenter; terminated 6/15/50, reduction in force; registered letter sent 7/25/50 offering job as structural ironworker. I find that the Respondents discriminated against this employee between dates 12/14/49 and 3/21/50, the date of his reinstatement.

Drown, William H.: Registered letter sent 3/6/50 offering job as carpenter I find that the Respondents discriminated against this man until the date of his offer of reinstatement

Flippin, Francis: Registered letter sent 7/25/50 offering job as carpenter. I find that the Respondents discriminated against this employee from 12/14/49 until the date of the offer of reinstatement.

Ford, Jason S.: Registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this man to the date of the offer of reinstatement.

Ford, W.: No offer was ever made to this employee. I find that the Respondents have discriminated against this employee from 12/14/49 up to the present.

Harris, E. E.: Rehired 7/28/50 as carpenter; terminated 8/10/50 "failure to report"; rehired 2/5/51 as carpenter. Registered letter sent 7/25/50 offering job as carpenter.

This employee testified he received a letter offering him a job on July 25, 1950, and that he presented himself for employment on July 28, 1950, and was hired. After working 8 days, Harris was terminated. Harris testified that he had broken ribs while working at his home and that this illness was reported to his foreman. About a week later, he reported for work and discovered that his "brass" was off the board. Upon making this discovery he talked to his foreman and after being sent back and forth between company officials, was told that he could return to work. However, upon reporting the next day his "brass" had not been returned to the Board; without further inquiry he "picked up" his tools and went home. I find that the Respondents discriminated against this employee from December 14, 1949, to July 28, 1950, when he was reinstated. I find that his subsequent termination on August 10, 1950, was not proven to be discriminatory.

Hayes, Herman E.: Rehired 3/15/50 as carpenter; fired 4/25/50—"too slow"; registered letter sent 3/8/50 offering job as carpenter. I find that this employee was discriminated against between 12/14/49 and 3/15/50, the date of his reinstatement.

Hudson, Raymond A.: Registered letter sent 10/26/50 offering job as carpenter. I find that the Respondents discriminated against this employee from 12/14/49 to the date of the offer of reinstatement.

James, John A.: Rehired 5/23/50 as carpenter; registered letter sent 3/8/50 offering job as carpenter.

This employee testified that he received a letter offering him a job around March 10, 1950, and that he went to the office of the Respondents. The employment manager, Hock, seemed very anxious to sign him up for the job, but the employee inquired as to working conditions. After some discussion of working conditions, James said, "Well, if working conditions aren't any better than they were when I quit, I don't care anything about going to work." Hock said that he didn't think conditions were any different than they were prior to the strike. James then excused himself and left the office. Later James talked to Stone, a foreman on the job, who gave James a requisition and he went to work. James stated that at the time he first went to the Company he was working at the Arkansas State Highway Department. I find that the Respondents discriminated against this employee from December 14, 1949, to March 8, 1950, the date on which he was offered reinstatement as a carpenter. The fact that he was not hired pursuant to the Respondents' offer, was entirely due to his own choosing not to work under the "rough" conditions on the job. It is apparent that having a more desirable job at the time, this employee refused reinstatement.

Kent, W. A.: Registered letter sent 7/25/50 offering job as carpenter. Replied, would not report. I find that the Respondent discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Kilfoy, Wilbert A.: Registered letter sent 10/26/50 offering job as carpenter. Rehired 1/16/51 as carpenter.

This witness testified that he went on strike December 3, 1948, and received no offer of reinstatement until he received a letter dated October 26, 1950. When he received this letter, he was in Canyon Ferry, Montana. He wrote back and asked the Company the wage scale and hours per week. The Company answered that the scale and hours were the same as when he went on strike. He testified that he then went to the job and was hired. At the time of his testimony he was foreman of carpenters. I find, in accordance with Kilfoy's testimony, that the Respondents discriminated against him between the dates of December 14, 1949, and January 16, 1951, the date of his reinstatement.

King, Lucian R.: Rehired 10/26/50 as carpenter.

This employee testified that he was never offered reinstatement and that he was not reemployed until he made personal application at the office of the Company on November 5, 1950. On that date he was given a job as carpenter.

This witness testified that he knew when the strike was called off in December 1949. However, at that time, he and his father owned and operated a shoe shop at the town of Flippin. He did not wish to go back to work until after he had disposed of the shoe shop. In February 1950, when he had disposed of the shoe shop, he applied for a job to Mr. Hock who told him that the Company was not hiring any men. He did not again apply for employment until November 26, 1950. Reinstatement of this man had been demanded by the Union early in the reinstatement program. I find that the Respondents discriminated against this employee from December 14, 1949, to October 26, 1950, the date of his reinstatement. Though he delayed his personal application for reinstatement, he cannot be penalized for that delay. At all times from December 14, 1949, until his ultimate reinstatement, the Respondents' position was that of denying him reinstatement.

Landry, C. C.: Registered letter sent 7/25/50 offering job as carpenter. I find that the Respondents discriminated against this employee between 12/14/49 and the date of the offer of reinstatement.

Losch, R. E.: Registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this employee between the dates 12/14/49 and 3/8/50, the date of offer of reinstatement.

Lynch S. L.: Registered letter sent 7/25/50 offering job as carpenter. I find that the Respondents discriminated against this employee between the dates 12/14/50 and 7/25/50, the date of the offer of reemployment.

Marberry, F. P.: Registered letter sent 3/8/50 offering job as carpenter; rehired 5/18/50 as carpenter.

This employee testified that Keeler, the representative of the carpenters, sent him to the Company's office on January 3 or 5, 1950, to apply for reinstatement. He was accompanied by *Russell Wood*, another carpenter. The men talked to Pat Earnest who told them that the Company had reinstated 22 carpenters and that was all the Company was obligated to reinstate. Neither Wood nor Marberry were employed. He testified that he received a letter offering him employment about March 6. This employee was offered reinstatement on March 8, 1950. He did not obtain employment until May 18, 1950. In the absence of any explanation of his delay in accepting reinstatement, I find that the Respondents discriminated against him from December 14, 1949, to March 8, 1950, the date of the offer of reinstatement.

Mashaw, Roy: Registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this employee from 12/14/49 to 3/8/50, the date of the offer of reinstatement.

Miller, Joe: Rehired 11/3/50 as carpenter; registered letter sent 3/8/50 offering job as carpenter. Though this employee testified, he made no explanation of the long delay between the offer of reinstatement and his acceptance of the same. I find, therefore, that the Respondents discriminated against him between the dates of 12/14/49 and 3/8/50, the date of offer of reinstatement.

Patton, H. C.: Registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this man between the dates 12/14/49 to 3/8/50, the date of the offer of reinstatement.

Pfingston, Jake: Rehired 2/7/51 as carpenter; registered letter sent 3/8/50 offering him job as carpenter.

This employee testified that he was referred for employment by the Union on approximately December 23, 1949. On his first trip to the personnel office he did not have his referral slip with him and so was not employed. He returned to the Respondents' office on January 3, and was referred to Pat Earnest who said that the Respondents would not hire Pfingston as they had filled their quota of carpenters. On the following day, Pfingston talked to Earnest again, who told him to go back to the Union, that the Company was not hiring any more men. Thereafter, Pfingston contacted several people on the job and finally obtained employment on February 7, 1951, as a carpenter through the efforts of Foreman Freeman. Pfingston testified that on March 8, 1950, he received a letter offering him a job but at that time he had made other arrangements about another job. I find that Respondents discriminated against this employee between the date of December 14, 1949, and the date of offer of reinstatement, March 8, 1950.

Plymate, Donald C.: Registered letter sent 3/8/50 offering job as carpenter.

This employee testified that he applied in person for reinstatement on January 3, 1950, with a group of employees but he was told by the Respondents that they were not hiring any more men. He received a letter offering him a job as carpenter approximately March 6, 1950, but he did not go back to work. I find the Respondents discriminated against this employee between the dates December 14, 1949, and March 8, 1950, the date of offer of reinstatement.

Putney, Clyde S.

Putney testified that he was a carpenter employed by Ozark at a rate of \$1.35 an hour before the strike. After the strike, he kept in touch with his union representative. On October 26, 1950, he received a registered letter from the Company offering him reinstatement as a carpenter. He went to the dam site and the foreman offered him a job as a carpenter at \$1.75 an hour which was journeymen carpenter's pay. But the foreman wanted him to do layout work. Prior to the strike Putney had been doing layout work and receiving journeymen carpenter's pay. At the time he sought reinstatement, Putney told the foreman that unless he received an additional 5 cents an hour for doing layout work, he would not return to work. At this time, the carpenters doing layout work on the job were being paid \$1.75 an hour, the same as all other carpenters. During the time he was on strike, this employee had been employed by a local carpenter at the rate of \$1.85 an hour. I find that at the time of his application for employment, this employee demanded more than reinstatement to his former position and that he voluntarily chose not to accept reinstatement unless he was paid more than the other carpenters doing the same kind of work. I find, therefore, the Respondents discriminated against this man from December 14, 1949, to the date of the offer of reinstatement, October 26, 1950. On this man, the records are apparently incomplete.

Rains, Willis: Registered letter sent 3/8/50 offering him job as carpenter. I find that the Respondents discriminated as to this employee between the dates 12/14/49 and the date of offer of reinstatement, 3/8/50.

Reedus, Billy B.: Registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this man between the dates 12/14/49 and the date of offer of reinstatement, 3/8/50.

Russell, Kern K.: Registered letter sent 3/8/50 offering job as carpenter. I find that the Respondents discriminated against this man between the dates 1/14/49 and the date of offer of reinstatement, 3/8/50.

Rutledge, Robert M.: Rehired 8/8/50 as carpenter; quit 12/28/50—"going to better job." Rehired 1/22/51 as carpenter; registered letter sent 7/25/50 offering job as carpenter.

This employee testified that after the strike he went to Texas, but kept in touch with both his foremen at the dam and various union representatives in regard to the strike and its progress. When the strike was called off he read of it in the papers and called the Union, who told him that the Company had agreed to put men to work, but were not doing it. Under these circumstances he did not apply for reinstatement. In July he received a letter offering him reinstatement. He replied to the letter and requested a few days time to straighten out his business before applying for reinstatement. A short time thereafter, he went to the office of the Company and was reinstated. I find that the Respondents discriminated against this employee between the dates December 14, 1949, and August 8, 1950, the date of his reinstatement.

Shaw, Hoy: Registered letter sent 3/8/50 offering him a job as carpenter. I find that the Respondents discriminated against this man between the dates 12/14/49 and 3/8/50, the date of offer of reemployment.

Smith, Elbert C.: Rehired 2/16/50 as carpenter; quit 4/17/50—"dissatisfied with 5-day workweek"; rehired 1/23/51 as carpenter.

This employee testified that he applied personally for reinstatement on January 3, 1950. He went to the job seeking reinstatement with a group of men among whom was *James R. Marler*. Smith asked the man at the employment office for reinstatement. This official told the assembled men that the Company had reinstated 23 carpenters, and that they had replaced strikers with only 22

carpenters, so the Company had hired one more carpenter than necessary, and they didn't feel obligated to take any more men back. Smith went back several times and talked to his foreman with the result that on February 16, 1950, he was reinstated as a carpenter. I find that the Respondents discriminated against this man between the dates December 14, 1949, and February 16, 1950, the date of his reemployment.

Tulipana, George: Rehired 10/23/50 as carpenter; quit 11/27/50—"refused to transfer to the day shift" Rehired 1/17/51 as carpenter.

This employee testified that he applied for reinstatement a few days after January 3, 1950. He went to the personnel office where there was quite a crowd of returning strikers. The word was passed around among them that no more union men were to be hired, so he went home. For some time thereafter, he did not apply for reinstatement because he heard that men were not being hired, or were being fired. In October he talked to his former foreman, Joe Stone, and asked him to see about his reinstatement. Shortly thereafter, he was reemployed by the Company on October 23, 1950, as a carpenter. I find that the Respondents discriminated against this employee between the dates December 14, 1949, and October 23, 1950, the date of his reinstatement.

Vickery, T. J.: Registered letter sent 7/25/50 offering job as carpenter apprentice; replied WILL NOT REPORT. (Note: was carpenter apprentice third year at time of strike.) I find that the Respondents discriminated against this man between the dates 12/14/49 and 7/25/50, the date of offer of reinstatement.

Williamson, Troy: Registered letter sent 7/25/50 offering job as carpenter apprentice. (Was carpenter apprentice third year at time of strike.) I find that the Respondents discriminated against this employee between the dates 12/14/49 and 7/25/50, the date of offer of reemployment.

Wood, Russell T.: Rehired 2/25/50 as carpenter; quit 4/12/50—"going to another job." Rehired 12/12/50 as carpenter; reclassified 2/8/51 as carpenter foreman; quit 2/15/51, leaving State. I find that the Respondents discriminated against this man between the dates 12/14/49 and 2/25/50, the date of his reinstatement. (Note this is the employee who accompanied Marberry when they sought reinstatement.)

Carpenter Apprentices

Claiming strikers.....	0
Replacements.....	13
Promotional replacements.....	1
Discriminatory replacements.....	5
Total replacements.....	19
Stipulated: new employees hired 2/1/50-7/25/50.....	2

An examination of the payroll records discloses that in the classification of carpenter apprentices, there were 19 replacements on the payroll at the time the strike was called off or shortly thereafter. This is a factor which I believe can be properly taken into account when evaluating the ability of the company to reinstate all the striking carpenters and carpenter apprentices. At the time the strike was called off, the Company had replacement positions for 34 carpenters in addition to these carpenter apprentices. It is obvious that in the course of the strike when the Company could not obtain the services of carpenters to the extent desired, they hired more apprentices and thus filled out their carpenter force. In view of this replacement situation, the Company actually had a place for each of the returning carpenters and apprentices. However, the Respondents did not choose to reemploy all these strikers. They reinstated 22 and retained 21 replacements on the payroll. Obviously, this did not fulfill Respondents' obligation under the Act as the retention of these replacements as an "overload" or

"luxury" deprived some of the strikers of prompt reinstatement. This refusal to give these available jobs to any of the strikers was a *discrimination against all of them in this classification.*¹⁵

Mechanical Repairmen

Claiming strikers-----	34
Replacements -----	7
Promotional replacements-----	11
Discriminatory replacements-----	40
Total replacements-----	58

Arnold, Hayes G.: No offer made. "Never an employee of Ozark Dam Constructors."

This employee testified that he was on the payroll of Flippin as a welder's helper at \$1.07 an hour before the strike. On January 4, 1950, he applied for reinstatement. Pat Earnest told him that the Respondents did not need any welder's helpers at that time, and that the Respondents were not required to reinstate him because, in the first place, the Respondents were not obligated to hire any Flippin men; and in the second place, that if Arnold was to be reinstated, it would have to be through the International Association of Machinists which was the bargaining representative of men in that unit. He told Arnold to see a representative of the IAM. In the group which had this conversation with Pat Earnest were five or six employees with classifications similar to that of Arnold. Arnold testified that he saw *J. D. Gray* applying for reinstatement while he was at the Company. On several later occasions he asked his former foreman, Joe Estes, for reinstatement. This employee was never offered reinstatement or reinstated. I find that the Respondents discriminated against him in failing to reinstate him, beginning December 14, 1949, and that this discrimination has continued from that date up to and including the present.

Arrowsmith, Harold S.: Reinstated 2/18/50 as mechanic repairman (shop); fired 4/14/50—(unsatisfactory).

This witness testified that he made several applications for reinstatement and was finally reinstated on February 18, 1950. He was fired on 4/14/50 because he was blamed for an unsatisfactory repair job on a truck transmission. I find that the Respondents discriminated against this employee between the dates December 14, 1949, and February 18, 1950, the date of his reinstatement.

Beaty, Clyde K.: Registered letter sent 7/25/50 offering job as mechanical repairman.

Boyd, Alvie: Registered letter sent 7/25/50 offering job as mechanical repairman.

Brandstrup, Albert V.: Registered letter sent 7/25/50 offering job as mechanical repairman.

I find that the Respondents discriminated against the three last named employees between the dates December 14, 1949, and July 25, 1950, the date of the offer of reinstatement to each.

Crosby, Houston D.: Rehired 7/18/50 as laborer; fired 12/29/50, reduction in force. Offered job as mechanical helper 4/13/51.

This employee testified that in January he obtained a referral slip from the Union and took it to the personnel office of the Respondents. The man in charge of the office told him that the Council did not have jurisdiction over the men in the shop and that the Respondents could not reinstate him. At the time of the strike, Crosby was an acetylene generator attendant at a rate of \$1.25 an hour.

¹⁵ *Luzerne Hide and Tallow Company, supra.*

In July, on his personal application again, he was employed by the Respondents as a laborer at 85 cents an hour. The payroll records reveal that on January 18, 1950, one Robert Grimshaw, a new employee of the type which I have classified as a discriminatory replacement, was employed in the classification of mechanical repairman. It is obvious from this set of facts that the Respondents did not reinstate this employee to his former position or to one that was an equivalent. I find that this employee was discriminated against beginning December 14, 1949, and that the discrimination continued until April 13, 1951, the date on which he was offered reinstatement as a mechanical helper.

Crosser, J. D.: Registered letter sent 7/25/50 offering job as mechanical repairman. I find that this employee was discriminated against between the dates 12/14/49 and 7/25/50, the date of offer of reinstatement.

Crow, E. J.: Registered letter sent 4/13/50 offering job as plumber. The work history of this employee shows that he was employed installing cooling pipe. Because of the great interchange ability of the employees as to crafts on this job and because of the lack of other evidence, I will find that the offer of 4/13/50 was an offer of an equivalent position. On that basis I find that the Respondents discriminated against this employee between the dates 12/14/49 and 4/13/50, the date on which he was offered a job as a plumber.

Damron, J. J.: Registered letter sent 7/25/50 offering job as mechanical repairman. I find that the Respondents discriminated against this man between the dates 12/14/49 and 7/25/50, the date of his offer of reinstatement.

Davis, Lewis E.: Rehired 8/3/50 as aggregate conveyor operator; transferred 9/30/50 to cement finisher; transferred 9/30/50 to pumper; notified 7/25/50 that Respondents had job for him as mechanical repairman.

This witness testified that he began work for Ozark as a plasterer in 1948. At the time of the strike he was a mechanical repairman. He was engaged in laying cooling pipe and hooking up water meters. After the strike was called off, around January 2, 1950, he applied for reinstatement in a group in which were *Ray Hotalling* and *Ewell Smith*. The man at the employment office informed these men that the IAM had taken over the men's craft and that the Respondents were not obligated to hire them. Davis testified that he was hired on August 3, 1950, as an aggregate conveyor belt operator on the Flippin payroll at \$1.25 an hour. His rate at the time of the strike was \$1.50 an hour. About 6 weeks later he was laid off in a reduction in force and he protested to Mr. Slocum, who was in charge of all operations on the dam. Slocum arranged for him to work as a cement finisher at \$1.67½ cents an hour. A week later, he was transferred to work on the pumps and classified as a pumper at \$1.25 an hour. Three weeks later, he was raised to \$1.50 an hour and has continued working since that time. I find that this man was not hired as a mechanical repairman although the letter of July 25, 1950, offered him a job in that classification. Though his employment has been continuous since that time he has still not been reinstated to his former or equivalent position. I find, therefore, that the Respondents have discriminated against this employee from December 14, 1949, up to and including the present.

Dempsey, Quentin E.: No offer was ever made to this employee. I find therefore, that Respondents have discriminated against him from the date 12/14/49 to the present.

Duck, Robert C.: Registered letter sent 7/25/50 offering job as mechanical repairman.

Duck testified that from the time of the strike, he kept in touch with his business representative, Wilkerson, and that when the strike was called off he inquired from Wilkerson about reemployment. Wilkerson told him to keep in touch with him as not many of the men had been reinstated. In July 1950 he

received a letter offering him a job as a mechanical repairman. He wrote an answer to the Respondents inquiring as to the wage scale and other details of the job. Upon receipt of the Company's answer he considered the situation and decided not to return to work because he had started to attend a vocational school at Scotts Hill, Tennessee, where he was then living. I find Respondents discriminated against this employee from December 14, 1949, to July 25, 1950, the date of offer of reinstatement.

Forbes, Herbert: Registered letter sent 7/25/50 offering job as mechanical repairman. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Hester, Henry O.: Registered letter sent 7/25/50 offering him job as mechanical repairman. I find that the Respondents discriminated against this employee between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Hickenbottom, E. D.: Registered letter sent 7/25/50 offering job as mechanical repairman. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50 the date of offer of reinstatement.

Hicks, Carroll E.: Rehired 2/7/50 as euclid truck driver; terminated 11/27/50—reduction in force. I find that the Respondents discriminated against this employee from 12/14/49 to 2/7/50, the date on which he was reinstated to an equivalent position.

Holt, J E.: Registered letter sent 7/25/50 offering job as mechanical repairman; reply stated he was employed in New Mexico. I find that the Respondents discriminated against this employee from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Hotaling, Raymond A.: Rehired 5/11/50 as mechanical repairman (shop); terminated 8/12/50, "can't work graveyard shift" I find that the Respondents discriminated against this man from 12/14/49 to 5/11/50, the date of his reinstatement.

Hudson, Herman F.: Registered letter sent 4/13/51 offering job as mechanical repairman. I find that the Respondents discriminated against this man from 12/14/49 to 4/13/51, the date of offer of reinstatement.

Hutlet, Wilfred D.: Registered letter sent 4/13/51 offering job as mechanical repairman. I find that the Respondents discriminated against this man from 12/14/49 to 4/13/51, the date of offer of reinstatement.

Hurst, Thomas E.: Registered letter sent 7/25/50 offering job as mechanical repairman.

This employee testified that after the strike was called off, he went to the personnel office on January 4, 1950. He talked to Hock, who told him that the Company did not need any men just then. On several occasions Hurst also talked to Joe Estes, master mechanic. On one occasion Estes told him that the Company had sent to Texas to obtain some men to take the place of the strikers as Estes wanted somebody he could depend on. At another time Estes told him that the Company was going to use Flippin men. Hurst stated that he received a letter offering him his job on July 26, 1950, but that he did not take his job, because he thought his reinstatement would not be lasting in view of Estes' attitude. I find that the Respondents discriminated against this man from December 14, 1949, to July 25, 1950, the date of offer of reinstatement. Estes' conduct in this incident was improper, and will be commented upon later in this Report. However, when offered reinstatement, Hurst was legally obliged to accept or decline the offer; he could not decline and still claim to be an unfair labor practice striker, who had called off his strike, and unconditionally offered to return to work.

Langston, Corley O.: Rehired 8/12/50 as dozer operator; fired 9/1/50—reduction in force; rehired 9/6/50 as oiler; reclassified 10/5/50 to dozer operator;

reclassified 7/9/50 to euclid driver; fired 11/27/50—reduction in force; rehired 12/16/50 as laborer; fired 1/27/51—reduction in force; rehired 1/27/51 as air tool operator; reclassified 4/9/51 to carpenter apprentice; quit 5/19/51—"going to better job."

This employee testified that prior to the strike, he was a mechanical repairman installing cooling pipe at the dam. After the strike was called off early in January, he was in a group of mechanical repairmen who went to the personnel office and asked for reinstatement. Earnest told them that the agreement of the Company with the IAM was that, they weren't required to hire any mechanical repairmen. The men were not reinstated. Langston testified that he was never offered a job. In August, he made an application for reemployment and was placed on the Flippin payroll as a bulldozer operator.

It is apparent that this man was never properly reinstated. Originally the Respondents refused to reemploy him because he was in the unit represented by the IAM. When he was rehired it was on his own personal application and he appears to have been accorded the treatment of a new employee. Though he was shifted around to many positions, he never was reinstated to his former or a substantially equivalent position. I find that the Respondents discriminated against this man from December 14, 1949, up to and including the present.

Marchant, T. A.: Rehired 4/11/50 as mechanical repairman; rate increase 7/24/50; reclassified 11/24/50 to mechanical helper; terminated 12/29/50—reduction in force.

This employee testified that he applied for reinstatement on January 3, 1950, but that Hock said the Company did not need mechanics at that time. On April 5, 1950, he was hired on the Flippin payroll as a mechanical helper at a rate of \$1.10 per hour. On July 24, he was raised to a rate of \$1.25 per hour, and later laid off in a reduction in force. It was stipulated by the parties that Marchant was a mechanical repairman as of the time of the strike and that he was rehired as a mechanical repairman on April 11, 1950. However, it appears that his rate of pay was substantially less than his former rate of pay between April 11, 1950, and July 24, 1950. I find that the Respondents discriminated against this employee between December 14, 1949, and July 24, 1950, the date on which his rate of pay was adjusted.

Miller, V. O.: Rehired 10/12/50 as carpenter; quit 11/13/50—"leaving area"; rehired 2/5/51 as carpenter. Registered letter sent 7/25/50 notifying of job as mechanical repairman; replied, "Will not report."

This employee testified that on January 5, 1950, he went to the Company and asked for reinstatement but Hock told him that they were not hiring anybody. Late in August 1950, he received a letter from Flippin offering him a job as mechanical repairman. The witness said that he was classified as an oiler prior to the strike and felt that this offer was not proper because he had not been a mechanical repairman before the strike and because he had been on the Ozark payroll before the strike. He did not accept reinstatement pursuant to the letter because it did not offer him his job. He testified that he is a permanent resident of Gassville, a town close to the dam site, and that at all times he desired reinstatement to his former position. I find that prior to the strike he was classified as a mechanical repairman and that the registered letter sent by the Respondents on July 25, 1950, offered him reinstatement in that classification. I find therefore, that the Respondents discriminated against this employee between the dates December 14, 1949, and July 25, 1950, the date of offer of reinstatement.

Mynatt, Joseph: Rehired 8/3/50 as mechanical repairman; reclassified 11/22/50 to mechanical helper; registered letter sent 7/25/50 offering job as mechanical repairman.

This employee testified confirming the record above. I find this employee was discriminated against between the dates of December 14, 1949, and August 3, 1950, the date of his reinstatement.

Cantrell, Healey Edgar: Rehired 8/2/50 as hoist operator; reclassified 8/5/50 to laborer; reclassified 8/7/50 to vibrator operator; quit 8/11/50—leaving area; rehired 9/13/50 as laborer; reclassified 2/26/51 to reinforcing ironworker apprentice.

This employee testified that before the strike, he was a mechanical repairman's helper at a rate of pay of \$1.10 per hour plus a 5-cent bonus on the graveyard shift. He first learned that the strike was over in July or August 1950. At that time, he was in Melbourne, Arkansas, approximately 60 miles from the dam. At that time he was working on the farm with his father. A week or two later, he came back and asked for reinstatement and was hired, as the record above indicates. I find that the Respondents discriminated against this employee from December 14, 1949, to August 7, 1950, the date on which he was reclassified as a vibrator operator, which I find was an equivalent position to mechanical repairman helper.

Pearl, Samuel J.: Rehired 7/10/50 as laborer; reclassified 9/23/50 to nozzle-man; classified 12/1/50 to laborer; reclassified 1/19/50 to air tool operator.

This employee testified that he was classified as a mechanical repairman at the time of the strike. During the month of January 1950, Pearl, in the company of *Crosby*, both having union referral slips, presented themselves to the Respondents for reinstatement. A company representative refused to reinstate them, claiming that their classification was under the jurisdiction of the IAM. During July, Pearl was rehired as a laborer at 85 cents an hour. During January 1950, there were openings for mechanical repairmen as evidenced by the fact that the Company hired new employees at approximately that time. I find that this employee was never properly reinstated and that the Respondents have discriminated against him from December 14, 1949, up to and including the present.

Shankler, L. A.: The only record on this man shows that he was employed 12/2/48 as mechanic repairman (cooling pipe) and quit 12/7/48—gave no reason.

In the absence of other evidence, I find that this employee was not a striker, but quit on December 7, 1948, and was not discriminated against.

Shaw, W. L.: Hired 8/21/50 as mechanical repairman; reclassified 8/22/50, mechanical repairman (maintenance); reclassified 11/12/50 to mechanic; terminated 1/19/51—reduction in force. Registered letter sent 7/25/50 offering job as mechanical repairman; registered letter 4/13/51 offering job as mechanical helper.

This employee testified that he was a heavy duty mechanic at a rate of pay of \$1.45 an hour before the strike. In July, he received a letter from the Company offering him reinstatement and giving him 12 days to report for work. He answered this letter asking for more time as he was employed, and wished to give notice to his employer. On August 21, he reported at the personnel office and was hired at \$1.45 an hour as a heavy duty mechanic. I find that this employee was discriminated against between December 14, 1949, and July 25, 1950, the date of offer of reinstatement.

Shaw, William E.: Registered letter sent 4/13/51 offering job as mechanical repairman. I find the Respondents discriminated against this employee from 12/14/49 to 4/13/51, the date of offer of reinstatement.

Smith, Ewell D.: Rehired 7/20/50 as oiler; terminated 11/3/50—reduction in force.

This employee testified that before the strike he was a pipeline mechanic helper installing cooling pipe. On January 3, 1950, he obtained a referral card from the Union and presented that to the Company. Employee *Lewis E. Davis* was with

him. The man in the personnel office told the men that the Machinists had taken over their part of the job and that the Company was not obligated to hire them. On July 20, 1950, he was rehired as an oiler in the cooling plant at \$1.07 per hour. Before the strike, his rate of pay was \$1.25 per hour. Later he was terminated in reduction in force, and after that went back to work as a laborer. I find that this man was never properly reinstated and that the Respondents have discriminated against him from December 14, 1949, up to and including the present.

Terry, Cecil A.: Registered letter sent 7/25/50 offering job as mechanical repairman. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Trivett, Dewey F.: Registered letter sent 7/25/50 offering job as mechanical repairman. Replied "will not report."

This employee testified that prior to the strike, he was working on cooling pipe. After the strike was called off, pursuant to instructions which he received at the union hall in Cotter, he saw Pat Earnest who told him that the mechanical repairmen would have to be reinstated through the "shop." In July he received a letter offering him reinstatement, but he was working on his farm and had a crop so he refused reinstatement. I find that the Respondents discriminated against this employee between the dates December 14, 1949, and July 25, 1950, the date of offer of reinstatement.

Wood, Waldo James: Rehired 1/13/50 as mechanical repairman; reclassified 4/20/50 to pump operator; reclassified 11/24/50 to cooling plant pumper; died 12/26/50. I find that the Respondents discriminated against this man between 12/14/49 and 1/13/50, the date of his reinstatement.

It is worthy to note that in the classification of mechanical repairmen, approximately 13 men made personal applications for reinstatement when the strike was called off. All were refused; 9 were refused on the specific ground that the IAM represented the employees in this unit; 1 was refused on the specific ground that he was a Flippin employee; and the remainder were refused on the ground that the Respondents had no need for them, or that the Company was not hiring. This demonstrates the futility of personal application by the strikers. On this point the case is very similar to *Rapid Roller Company, supra*.

Aggregate Conveyor Operator

Claiming strikers.....	2
Replacements.....	3
Promotional replacements.....	1
Discriminatory replacements.....	2
Total replacements.....	6

Kyles, Onimus: Reinstated 8/1/50 as aggregate conveyor operator; reclassified 9/25/50 as pump operator; terminated 10/10/50, "refusing to obey orders."

This employee, who was an aggregate conveyor operator before the strike, testified that on January 3, 1950, he personally presented himself for reinstatement to his former position and was refused on the ground that the Respondents had not employed anybody in his place. In this conversation with Earnest, Kyles said, "Mr., you don't claim to set up a laborer to \$1.25 an hour." By this phrase Kyles meant that other employees had been promoted to fill the positions of some of the strikers including his own. Respondents' payroll data indicates that one Carlis Hurst was promoted from laborer to aggregate conveyor operator on December 7, 1948, 4 days after Kyles went on strike. Under these circumstances, the refusal of the Respondents to reinstate Kyles was discriminatory. In July of 1950, Kyles received a registered letter offering him a job as a laborer.

Upon reporting to Respondents' personnel office, Kyles informed the company representative that he was an aggregate conveyor operator at the time of the strike. Kyles was rehired in the classification of aggregate conveyor operator. However, it is Kyles' undisputed testimony that he was assigned work as patrolman on the belt line, and that he worked there for approximately 6 weeks at which time the work of patrolman on the graveyard shift was discontinued. After receiving a termination slip, this employee sought further work with the Company and was subsequently rehired as a pump operator in the "hole." After working for approximately 2 weeks, Kyles was terminated by Foreman Balleau for refusing to obey orders. Kyles stated that after being shifted to pump operator, on one occasion he was asked to "clean up" after the rest of the men. He told Foreman Balleau that he was not the "clean up man" for the rest of the shift and was thereupon discharged. From a review of the case of Kyles, and the cases of employees Kilfoy and Lackey, it appears that Foreman Balleau was biased and prejudiced against the returning strikers, and treated them more harshly than the other men. Appropriate comment will be made on that point later in this Report. In any event, it is clear and I find, that Kyles was never properly reinstated, and I find that the Respondents discriminated against him from December 14, 1949, up to and including the present.

Lamb, Keith: Reinstated 7/27/50 as aggregate conveyor operator. I find that the Respondents discriminated against this employee between the dates 12/14/49 and 7/27/50, the date of his reinstatement.

Aggregate Screenplant Operator

Claiming strikers.....	0
Replacements	1
Discriminatory replacement.....	1
Total replacements.....	2

Air Tool Operator

Claiming strikers	5
Replacements	7
Promotional replacements.....	2
Discriminatory replacements.....	4
Total replacements.....	13
Stipulated: new employees hired 2/1/50-7/25/50.....	6

Wells, John D.: Registered letter sent 7/25/50 offering job as air tool operator. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Cutler, Lee R.: Rehired 5/24/50 as laborer; reclassified 6/5/50 as vibrator operator; quit 9/13/50—"don't like job"

The above record indicates that the employee named was not satisfied with the position of vibrator operator to which he was reclassified on June 5, 1950. He was reinstated as a laborer. Under the circumstances, I find that he has never been properly reinstated and that he has been discriminated against from December 14, 1949, up to and including the present.

Lee, Marion W.: Registered letter sent 4/13/51 offering job as air tool operator. This employee testified that he was a jackhammer man before the strike. On January 3, 1950, with a group of employees belonging to the Operating Engineers' Union, he went with Wheeler, union representative, to the office of the Company. All the men in the group had been on the Flippin payroll. At the personnel office, the representative of the Company said that the Respondents were not obligated to reinstate any men on the Flippin payroll. He did not apply again

for reinstatement. I find that this employee was discriminated against from December 14, 1949, to April 13, 1951, the date on which he was offered reinstatement.

McCracken, Guy: Rehired 1/27/50 as shovel oiler; reclassified 11/24/50 to mechanical helper; terminated 12/29/50—reduction in force.

In the absence of further proof, I hold that the reemployment of this man as a shovel oiler, was reinstatement to a position equivalent to air tool operator. I find Respondents discriminated against this man from December 14, 1949, to January 27, 1950.

Reed, Laurel D.: Rehired 4/14/51 as air tool operator; offered job day he testified at hearing.

This witness testified that shortly after the strike was called off, he presented himself with a group of men and Wheeler, the union representative, at the Respondents' personnel office. All the men asked for reinstatement, but the official in charge said the Respondents were not reinstating Flippin men. Later he requested and was assigned a job at the quarry, but was turned down on his physical examination because of a hernia. He testified that he has always had the hernia, and had passed three or four prior physical examinations given by the Company. I find that the Respondents discriminated against this employee between the dates of December 14, 1949, and April 14, 1951, the date of the offer of reinstatement.

Beltmen

Claiming strikers	0
Replacements	1

Batch and Mix Operators

Claiming strikers	1
Replacements	0

Marler, James R.: Rehired 7/27/50 as batch and mix operator; terminated 11/4/50—reduction in force; registered letter sent 7/25/50 offering job as batch and mix operator.

This employee's history shows that he was originally hired as a jackhammer operator. Though no replacement is disclosed by the records in the exact classification for this man, it is evident from the over-all payroll situation that the Respondents had replacements in positions which he was qualified to hold. I find that the Respondents discriminated against this employee between the dates December 14, 1949, and July 27, 1950, the date of his reinstatement.

Cement Finishers

Claiming strikers	1
Replacements	3
Discriminatory replacements	1
Total replacements	4

Freeman, A. D.: Registered letter sent 7/25/50 offering job as cement finisher. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Churn Drill Apprentices

Claiming strikers	0
Discriminatory replacements	2
Total replacements	2

Compressor Operator

Claiming strikers.....	1
Replacements	1
Total replacements.....	1
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Fenton, J. R.: Rehired 1/23/51 as carpenter; quit 4/13/51 "to start farming."

This employee testified that he was a boilermaker on the Ozark payroll prior to the strike. After the strike was called off on January 5, 1950, he applied, together with 15 or 16 other strikers, for reinstatement. Pat Earnest told the group that it was not possible for the Respondents to hire the men back at that time. On a later occasion he applied for reinstatement but Hock told him that they were having a layoff at that time. Around February 1951, he again asked for employment and was given a job as carpenter. I find that the Respondents discriminated against this man between the dates December 14, 1949, and January 23, 1951, the date on which he was reemployed in an equivalent position.

Crane Operators

Claiming strikers.....	2
Promotional replacements.....	3
Discriminatory replacements.....	2
Total replacements.....	5

Marchant, Harvey E.: Rehired 7/12/50 as aggregate conveyor operator; reclassified 8/19/50 to heavy duty truck driver; reclassified 12/4/50 to truck driver operator.

Marchant testified that he was a crane operator at the time of the strike. When the strike was called off he applied on January 4, 1950, for reinstatement with a group of approximately 20 employees. He talked to Pat Earnest and asked for reinstatement. Earnest said that the Respondents were not obligated to put anyone on the job except where men had been hired to take a strikers' job. Marchant told Earnest that he knew that some bellboys and signal men had been promoted to the position of crane operator. Earnest said that he would talk to Mr. Slocum about the situation. He came back in a few moments and said that Slocum said if there was anyone on the crane trestle hired after Marchant, that the men would have to be replaced by Marchant. Earnest told Marchant to return the next morning. On the next morning Earnest said that he had talked with Powell, attorney for the Respondents, in the interim, and that as Powell interpreted the law, the Respondents were not required by the law to demote the promoted men to make a place for Marchant. Another crane operator, Dickerson by name, was present. Earnest called Foremen Shipp and Germany, and learned that the Respondents needed the services of one crane operator. Dickerson and Marchant discussed the situation and the men decided that Dickerson should be given the job inasmuch as he had more experience than Marchant. Marchant testified that in July he was reemployed by the Company as an aggregate conveyor operator at \$1.25 an hour. At the time of the strike his rate was \$1.75 an hour. After 5 weeks he was transferred to bulldozer operator at a rate of pay of \$1.45 per hour. At the time he testified in the proceeding he was being paid \$2.12½ an hour as a structural ironworker. On cross-examination, this witness testified that he knew five signal men who were doing crane operating work at the time he applied for reinstatement. On the last-mentioned point his testimony is partially borne out by the employment records. The work history of Freeman W. Bates shows that he was promoted

from dragline operator to crane operator on December 13, 1948, 10 days after Marchant went on strike. Under the rule of *Industrial Cotton Mills Company, Inc., supra*, the Respondents were required to demote a promotional replacement for Marchant. I find that the Respondents discriminated against this employee from December 14, 1949, up to and including the present.

Morgan, W. E.: Registered letter sent 7/25/50 offering job as crane operator. As with Marchant, Morgan's job was evidently taken over by a promotional replacement. I find that the Respondents discriminated against this employee from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Crusher Operator

Claiming strikers.....	1
Replacements.....	0
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Schumacher, James: Registered letter sent 7/25/50 offering job as crusher operator; "never an employee of ODC."

The record of this employee shows that he was originally hired as a laborer; then was reclassified as a jackhammer operator, and then as a crusher operator. On the basis of the general employment situation as of the time the strike was called off, I find that the Respondents had jobs which this employee was qualified to fill. Therefore, I find he was discriminated against between the dates December 14, 1949, and July 25, 1950, the date on which he was offered reinstatement.

Dinkey Operators

Claiming strikers.....	2
Replacements.....	3
Total replacements.....	3
Stipulated: new employees hired 2/1/50-7/25/50.....	2

Carlton, H. L.: Registered letter sent 3/6/50 offering job as dinkey operator. I find Respondents discriminated against this employee from 12/14/49 to 3/6/50, the date of offer of reinstatement.

Hale, R. L.: Registered letter sent 7/25/50 offering job as dinkey operator.

This employee testified that he applied for a job at the personnel office in the second week in January and was told by Hock, the personnel man, that he could have a job at the quarry. Upon his application at the quarry, however, he found that this job was taken by a transferee. Early in February 1950, he again went to the personnel office and talked to J. D. Moore. Moore offered to reinstate this employee, but Hale said that he would not accept a job working under the supervision of Ed Shipp, his former foreman. I find that this employee refused reinstatement because of his personal feelings against Foreman Shipp. I find the Respondents discriminated against this man between the dates December 14, 1949, and February 1, 1950, the date of offer of reinstatement.

Dozer Operators

Claiming strikers.....	2
Discriminatory replacements.....	1
Total replacements.....	1
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Bidwell, Howard S.: Rehired 1/23/50 as dozer operator. I find that the Respondents discriminated against this employee between 12/14/49 and 1/23/50, the date of his reinstatement.

Hill, James: Registered letter sent 7/25/50 offering job as dozer operator. I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement. Note: This man was originally hired as an air tool operator. He was qualified and could have been reinstated in that classification as well as in the classification of dozer operator. See number of replacements in air tool operators above.

Electricians

Claiming strikers.....	5
Replacements.....	8
Promotional replacements.....	1
Discriminatory replacements.....	5
Total replacements.....	14

Anderson, Truman E.: Reinstated 3/13/50 as mechanical repairman (shop); fired 6/7/50, loafing.

Though this man was not reinstated to his exact proper classification, I find that he was properly reinstated on March 13, 1950, on the ground that he was given equivalent employment which he accepted. I find therefore, that the Respondents discriminated against this man from December 14, 1949, to March 13, 1950, the date of reinstatement. See testimony of W. A. Gardener, below.

Dorrell, Charles: Registered letter sent 7/25/50 offering job as electrician. I find Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Gardener, W. A.: Registered letter sent 7/25/50 offering job as electrician. This employee testified that he was a journeyman electrician at a rate of pay of \$1.75 an hour before the strike. On January 2 and 3, 1950, he and *Truman Anderson*, another journeyman electrician, went to the personnel office and asked for reinstatement. The man in the office said that the Respondents had hired all the striking employees that they were going to hire, and that he didn't have room for any more. He said that he was just putting men on that he actually needed to take care of his requirements at that time. Gardener had been working in Oklahoma and had come to the job site to get his old job back. Thereafter, he kept in touch with his business agent but was never employed. In July, he received a letter from the Respondents offering him his job but he didn't know if he would have security in the job, so he did not accept it. I find that the Respondents discriminated against this employee between December 14, 1949, and July 25, 1950, the date of offer of reinstatement.

Hermanson, Harry: This man's record has the following notations. Employed 12/1/48 as electrician; quit 12/8/48—"going to another job." There is no other evidence concerning this man. On the basis of the record, I find that he was not a striker and that the Respondents did not discriminate against him.

Mooney, Carl: Registered letter sent 7/25/50 offering job as electrician. I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Form Setter and Stripper

Claiming strikers.....	2
Replacements.....	0
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Stamps, C. D.: Registered letter sent 7/25/50 offering job as form setter. I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Tickle, E. E.: Rehired 1/6/50 as form setter and stripper; terminated 1/17/50; failure to report; rehired 7/21/50 as form setter and stripper; terminated 12/17/50—"going to better job." I find that the Respondents discriminated against this man between 12/14/49 and 1/6/50, the date of his reinstatement.

Ironworkers

Claiming strikers.....	2
Replacements.....	2
Promotional replacements.....	5
Discriminatory replacements.....	8
Total replacements.....	15

Choate, Wirt W.: Registered letter sent 7/25/50 offering job as ironworker. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Marchant, John W.: Rehired 1/25/50 as mechanical repairman; reclassified 6/18/50 to working foreman; quit 7/17/50—better job.

This employee was classified as an ironworker earning \$1.75 an hour at the time of the strike. He testified that during January, he presented himself at Respondents' office for reinstatement to his former position. Hock, personnel manager, stated to the group of employees that they weren't hiring any ironworkers. After this refusal of employment Marchant saw Estes, the master mechanic, who told him that the Respondents did not need men at that time but that he would send for Marchant later. Three or four days later, Estes called for Marchant. He was reemployed as a mechanical repairman on January 25, 1950, at a rate of pay of \$1.50 per hour. Later he was made a working foreman at \$1.67½ an hour.

The records disclose that at the time Marchant was refused employment as an ironworker, there were replacement ironworkers on the job who should have been displaced to make room for Marchant. I find this employee has not yet been properly reinstated and find that the Respondents have discriminated against him from December 14, 1949, up to and including the present.

Reinforcement Ironworkers

Claiming strikers.....	0
Total replacements.....	2

Jackhammer Operators

Claiming strikers.....	4
Replacements.....	1
Stipulated: new employees hired 2/1/50-7/25/50.....	5

Bailey, D. W.: Rehired 8/1/50 as wagon drill operator; terminated 8/8/50 "failure to report." Registered letter sent 7/25/50 offering job as wagon drill operator.

This employee testified that he was a jackhammer operator employed at a rate of 97½ cents per hour prior to the strike. On January 1, 1950, he went to Respondents' office and saw J. D. Moore who told him that there were no jobs open at that time. In August, Bailey received a letter signed by Moore offering him a job. He went to the dam site and was hired as a wagon drill operator at \$1.25 per hour, and put on the Flippin payroll. At the time of the strike he was on the Ozark payroll. He worked the next 4 days, and then his wife became ill. He told his boss, Roy Cunningham, that he would like to get off to take her to

the hospital. Cunningham said O. K. On the following day, Cunningham told Bailey that Pat Earnest had instructed Cunningham to let Bailey go. Cunningham told him that he was discharged because he had not reported his proposed absence to the Company. The payroll records show that at the time Bailey applied for reinstatement as a jackhammer operator, E. J. Vandeventer was on the payroll as a jackhammer operator. Vandeventer was hired as a new employee on October 31, 1949. Upon all the evidence, I find that Bailey's discharge for his alleged failure to report his absence was discriminatory. Further, I find that Bailey has never been properly reinstated. The Respondents should have displaced Vandeventer to make room for Bailey at the time he applied for reinstatement in January 1950. I find that the Respondents have discriminated against Bailey from December 14, 1949, up to and including the present.

Jencks, R. H.: Registered letter sent 7/25/50 offering job as jackhammer operator. I find that Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Killian, D. E.: Registered letter sent 7/25/50 offering job as jackhammer operator. I find Respondents discriminated against this employee between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Stone, C. L.: Rehired 4/4/50 as jackhammer operator; quit 7/24/50; "doesn't like the work"; rehired 9/9/50 as laborer; reclassified 9/23/50 to vibrator operator; reclassified 11/30/50 to laborer; reclassified 12/12/50 to jackhammer operator.

This employee testified that he made repeated efforts to be reinstated between January 6, 1950, and April 4, 1950. On the latter date, Norris, excavating superintendent, gave him a job as jackhammer operator. I find that the Respondents discriminated against this man between the dates December 14, 1949, and April 4, 1950, the date of his reinstatement.

Laborers

Claiming strikers.....	12
Replacements.....	44
Promotional replacements.....	1
Discriminatory replacements.....	34
Total replacements.....	79
Stipulated: new employees hired 2/1/50-7/25/50.....	11

Strout, D. R.: Registered letter sent 7/25/50 offering job as laborer. I find Respondents discriminated against this employee between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Adams, C. R.: Registered letter sent 7/25/50 offering job as laborer. I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Bailey, John E.: No offer was ever made to this man. I find the Respondents have discriminated against this man from 12/14/49 up to and including the present.

Collins, Lloyd E.: Rehired 2/15/50 as laborer. Quit 3/30/50—sickness in family; rehired 6/20/50 as laborer; terminated 6/25/50—unsatisfactory work. I find that the Respondents discriminated against this man between the dates 12/14/49 and 2/15/50, the date of his reinstatement.

Crawford, Otis L.: Registered letter sent 7/25/50 offering job as laborer.

Engles, Troy: Registered letter sent 7/25/50 offering job as laborer.

Erwin, Truman: Registered letter sent 7/25/50 offering job as laborer. I find that the Respondents discriminated against Crawford, Engles, and Erwin between the dates 12/14/49 and 7/25/50, the date of offer of reinstatement.

Hodge, Charlie R.: No offer was made to this man, although his name was submitted to the Company in one of the Union's written demands for reinstatement. I find that the Respondents discriminated against this man from 12/14/49 up to and including the present.

Honeycutt, Alvin: Rehired 8/2/50 as laborer; fired 9/15/50—sleeping on job; registered letter sent 7/25/50 offering job as laborer. I find that the Respondents discriminated against this man between 12/14/49 and 8/2/50, the date of offer of reinstatement.

Honeycutt, Elva: Registered letter sent 7/25/50 offering job as laborer; replied working "Kortes Dam." I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Roehrs, Louis: Rehired 11/29/50 as carpenter apprentice; terminated 1/6/50—reduction in force. I find that the Respondents discriminated against this man between 12/14/49 and 11/29/50, the date of his reemployment as a carpenter apprentice.

Singleton, Melvin L.: Registered letter sent 7/25/50 offering job as laborer. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50.

Machinists

Claiming strikers.....	0
Total replacements.....	2

Maintenance Machinists

Claiming strikers.....	1
Total replacements.....	0

Hughes, R. B.: Registered letter sent 4/13/50 offering job as machinist. I find Respondents discriminated against this man between the dates 12/14/49 and 4/13/50, the date of offer of reinstatement.

Maintenance Mechanical Repairman

Claiming strikers.....	1
Replacements.....	0

Satterlee, Harry Ivan: Rehired 9/6/50 as carpenter apprentice; terminated 11/14/50—failure to report.

This employee testified that prior to the strike he was on the Ozark payroll: that he understood his classification to be pipefitter as he answered an ad of the Company for that type of work. The Company classified him as maintenance mechanical repairman at the rate of pay of \$1.45 an hour. Satterlee testified that his classification was not mechanical repairman and that he always performed pipefitter's work. Around January 3, 1950, he went to the personnel office on several occasions. He was told that the Company had nothing for him. He also talked to Balleau, his foreman, who told him that he had a full crew. In the fall, he went to the personnel office, and then to Balleau again, but was not reinstated. Finally, he went to the personnel office, determined to take any job to pay the cost of transportation. On this occasion, the Company employed him as an apprentice carpenter at \$1 an hour. Two or three days later, he heard that the Company was looking for pipefitters again. He went back to Balleau and asked for reinstatement or a job, but Balleau told him that he had a full crew. He was never reemployed as a pipefitter, or as a maintenance mechanical repairman. In November, he was laid off for failure to report on two nights. His wife was sick on one night, and he missed his ride in the car pool on the second night.

The payroll records disclose that during the time that this man was seeking reinstatement from the Company, the Company hired approximately 40 individuals in the classification of mechanical repairmen. Under these circumstances, I find that the Respondents have never properly reinstated this employee, and that they have discriminated against him from December 14, 1949, up to and including the present.

Millwright

Claiming strikers.....	1
Total replacements.....	0
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Petty, Hubert: Registered letter sent 7/25/50 offering job as mechanical repairman.

The discrimination against Hughes, Satterlee, and Petty is obvious. Respondents hired approximately 40 employees in the mechanical repairman classification, while refusing to reinstate these men with similar qualifications and skills. I find Respondents discriminated against Petty from December 14, 1949, to July 25, 1950, the date of offer of reinstatement.

Mix Plant Operator

Claiming strikers.....	0
Total replacements.....	1

Oiler

Claiming strikers.....	1
Replacements.....	4
Promotional replacements.....	1
Discriminatory replacements.....	3
Total replacements.....	8
Stipulated: new employees hired 2/1/50-7/25/50.....	2

Insko, Lloyd E.: Registered letter sent 7/25/50 offering job as oiler. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50.

Nozzle Man

Claiming strikers.....	0
Replacements.....	2

Pipeman

Claiming strikers.....	0
Replacements.....	3
Promotional replacements.....	1
Discriminatory replacements.....	1
Total replacements.....	5

Powderman

Claiming strikers.....	1
Total replacements.....	0
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Bullin, Paul R.: Rehired 7/23/50 as laborer; quit 9/2/50 to seek employment elsewhere.

This employee's work history discloses that he was employed as a jackhammer operator for some time prior to his reclassification as powderman. I find that

the Respondents discriminated against this employee from December 14, 1949, to July 23, 1950. Inasmuch as the payroll data shows no replacement powderman hired, I find that Bullin's reinstatement as laborer was equivalent employment.

Plumber and Steam Fitter

Claiming strikers-----	0
Replacements-----	1
Promotional replacements-----	3
Total replacements-----	4

Painters

Claiming strikers-----	0
Replacements-----	2

Pump Operators

Claiming strikers-----	4
Replacements-----	2
Promotional replacements-----	1
Total replacements-----	3
Stipulated: new employees hired 2/1/50-7/25/50-----	4

Kilfoy, Jessie A.: Offered job 12/21/49 as pump operator; failed to report to work.

At the hearing, the parties stipulated that Kilfoy, if sworn, would testify as follows: At the time of the strike he was employed as pump operator on the barge on the day shift. At the time of the strike, he was in the hospital but upon coming out of the hospital he joined the strike. On or about December 21, 1949, Kilfoy was referred to the Company by the Union and that Kilfoy reported to *Joe Estes*. Estes took Kilfoy to *Balleau* on the job and that Balleau handed him a shift schedule saying, "This is what I have for you, reliefer down in the hole. Schedule, Monday—day—8 to 4; Tuesday—swing—4 to 12; Wednesday—swing—4 to 12; Thursday—night—12 to 8; Friday—night—12 to 8." Kilfoy was told that that job was the only work available, that he was to report at 4 p. m. that day on the swing shift, and that Balleau would see him then. Kilfoy said that he wasn't interested in that job as it was not the job he had when he left. In the job in the hole the pumper has to take care of more pumps than on the barge; that the pumps in the hole are electric, Diesel, and gasoline; the fuel has to be carried to them; the work on the barge is cleaner and more pleasant; that the pay is the same. Kilfoy refused to take the job in the hole because of his physical condition, and because he thought he was entitled to his old job on the barge. Thereupon, Kilfoy left the dam site and did not return to work. I find the Respondents did not, on December 21, 1949, offer Kilfoy his former position as they were required to do under the Act. At the time of his application for reinstatement, the Company had two replacements and one promotional replacement on the job. Under the Act, the Respondents were required to displace one of these men to make room for Kilfoy. This they refused to do. I find the Respondents have discriminated against this employee from December 14, 1949 up to and including the present time.

Lackey, W. W.: Rehired 12/23/49 as pump operator; terminated 2/23/50—"failure to report."

This employe testified that he was working on the barge as a regular pump operator on the *day* shift when the strike was called. On December 23, 1949, Lackey was reinstated as a *relief* pumper on the barge rather than to his former position of a regular pumper. His schedule was similar to Kilfoy's as listed

above—2 days, swing; 2 days, graveyard; and 1 day shift. On these brief facts, it can be seen that Lackey was not reinstated to his former or substantially equivalent position (*Stilley Plywood Company, Inc.*, 94 NLRB 932). It is clear that the Respondent did not fulfill its obligation under the Act since it was required to displace, if necessary, pump operators hired since the date of the strike, to make room for Lackey. After Lackey had worked on the barge as relief pumper for an 8-day period, he was transferred to the position of relief pumper down in the hole. *Balleau*, Lackey's foreman, claimed that Lackey was inefficient as a pump operator and that he had let certain pumps run dry causing damage to the pumps. Lackey denied that he had caused damage to the pumps and attributed the failure of the pumps to an improper repair job which had been done by one of the mechanics. However, *Balleau* blamed Lackey and transferred him to the hole. In this position, Lackey was responsible for the operation of three or four pumps above the dam and four or five pumps below the dam. While on the barge, he was only responsible for the operation of five pumps. Upon being transferred to the hole, Lackey an elderly man, said, 'Shucks, I can't do that; I just can't go it,' and left the job. I credit the testimony of Lackey in this matter. I find that the Respondents did not properly reinstate Lackey and that they have discriminated against this employee from December 14, 1949, up to and including the present.

Lazenby, A. M.: Registered letter sent 7/25/50 offering job as pump operator. I find Respondents discriminated against this man from 12/14/49 to 7/25/50, the date of offer of reinstatement.

Mynatt, Calvin C.: Rehired 8/2/50 as pump operator; quit 9/15/50—going into Army; registered letter sent 7/25/50 offering job as pump operator. I find that the Respondents discriminated against this man from 12/14/49 to 8/2/50, the date of offer of reinstatement.

Plumber

Claiming strikers.....	0
Promotional replacements.....	2

Pipefitters

Claiming strikers.....	0
Promotional replacements.....	1
Discriminatory replacements.....	1
Total replacements.....	2

Riggers

Claiming strikers.....	1
Replacements.....	1
Promotional replacements.....	1
Total replacements.....	2
Stipulated: new employees hired 2/1/50-7/25/50.....	1

Dunn, R. O.: Registered letter sent 7/25/50 offering job as rigger.

This employee testified that after the strike he went to Oak Ridge, Tennessee, where he was employed. On January 4, 1950, he was laid off at Oak Ridge and bought a farm in Tennessee. When he received the letter from the Company offering him a job as rigger, he discussed the proposition with his wife and they decided that he should stay on the farm. They decided that the expense of going to the dam site, and the uncertainty of the reinstatement, made the Company's offer unattractive. I find that the Respondents discriminated against this man from December 14, 1949, to July 25, 1950, the date of offer of reinstatement.

Sandblasters

Claiming strikers-----	0
Replacements-----	2

Sandblaster-nozzle Man

Claiming strikers-----	1
Replacements-----	0

Mashaw, J. W.: Registered letter sent 7/25/50 offering job as an air tool operator. There is no other testimony on this employee. Under the circumstances, I find that the Respondent discriminated against him from 12/14/49 to 7/25/50, the date of offer of reinstatement as air tool operator.

Shovel Operator

Claiming strikers-----	0
Replacements-----	1
Discriminatory replacements-----	4
Total replacements-----	5

Signal Man (Oiler)

Claiming strikers-----	1
Replacements-----	0

Holden, L. M.: Registered letter sent 7/25/50 offering job as oiler; reply "Lester Holden is in Army." I find the Respondents discriminated against this man between the dates 12/14/49 and the date he entered the Army on which date he was withdrawn from the labor market and could not thereafter offer himself for employment.

Signal Man

Claiming strikers-----	1
Replacements-----	0

Cloven, George A.: Rehired 2/8/50 as signal man; quit 9/24/50 to join Army. I find that this man was discriminated against between 12/14/49 and 2/8/50, the date on which he was reinstated.

Structural Ironworkers

Claiming strikers-----	6
Replacements-----	2
Promotional replacements-----	2
Discriminatory replacements-----	2
Total replacements-----	6

Beal, Jones P.: Rehired 2/14/50 as rigger; reclassified 12/11/50 as structural ironworker.

This employee testified that he was an ironworker at \$1.75 per hour before the strike. On January 3, he talked to Pat Earnest who told him that the quota for ironworkers was filled. Around February 15, 1950, Clark, ironworker superintendent, sent for him and he was hired at the same rate of pay. I find that the Respondents discriminated against this employee from December 14, 1949, to February 14, 1950, the date of his reemployment.

Cooper, V. W.: Registered letter sent 7/25/50 offering job as structural ironworker.

This employee testified that he was an ironworker before the strike. During the summer of 1950, he talked with Clark, superintendent of the ironworkers, who

told him, "You was working down here once and quit on account of the strike and they might have another one." He was not reinstated. At the time the strike was called off, he was in California working for the C. F. Brown Company at a rate of pay of \$2.25 per hour. His father notified him that the strike was over around January 1950. I find the Respondents discriminated against this man between December 14, 1949, and July 25, 1950, the date of offer of reinstatement.

Curtis, William I.: Registered letter sent 7/25/50 offering job as structural ironworker. I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50.

MacFarland, A. J.: I find that the Respondents discriminated against this employee between 12/14/49 and 7/25/50.

Roberts, T. R.: Registered letter sent 7/25/50 offering job as structural ironworker. I find that the Respondents discriminated against this employee between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Walker, V. B.: Registered letter sent 7/25/50 offering job as structural ironworker. I find that the Respondents discriminated against this man between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Truck Drivers

Claiming strikers	3
Replacements	4
Total replacements	4
Stipulated: new employees hired 2/1/50-7/25/50	1

Higley, W. E.: Rehired 6/12/50 as laborer; reclassified 7/1/50 to euclid driver; quit 9/10/50—going to another job; rehired 9/23/50 as euclid driver; terminated 11/27/50 reduction in force; rehired 2/18/51 as laborer; reclassified 3/8/51 to carpenter apprentice.

This employee testified that he applied for reinstatement early in January 1950. Pat Earnest told him that the Respondents were under no obligation to reinstate men who were on the Flippin payroll. During March 1950, he was rehired as a laborer at Flippin. He was later laid off and he went to work for Ozark as an euclid operator at \$1.25 an hour. Thereafter, he was successively a laborer at 85 cents an hour and an euclid operator at \$1.15 an hour. This witness also stated that at the time he made his demand for reinstatement there was a group of employees among whom was *James Schumacher*. I find that this man was never properly reinstated to his position. At the time of his application there were truck drivers on the job who had been hired after the strike began. Respondents did not displace one of these men to make room for Higley, which they were required to do under the Act. I find that the Respondents have discriminated against this employee from December 14, 1949, up to and including the present.

Smith, O. M.: Rehired 8/8/50 as euclid driver; fired 8/20/50—reduction in force. I find that the Respondents discriminated against this employee between 12/14/49 and 8/8/50, the date of his reinstatement.

Williams, Paul J.: Registered letter sent 7/25/50 offering job as truck driver. I find that the Respondents discriminated against this employee between 12/14/49 and 7/25/50, the date of offer of reinstatement.

Truck (Tractor Operators) .

Claiming strikers	0
Replacements	1
Total replacements	1

Vibrator in Concrete

Claiming strikers.....	0
Replacements.....	3
Discriminatory replacements.....	9
Total replacements.....	12

Vibrator Operators

Claiming strikers.....	1
Replacements.....	17
Total replacements.....	17

Haynes, George W.: Rehired 3/25/50 as laborer; reclassified 5/27/50 as vibrator operator; quit 11/17/50—going to another job. I find that the Respondents discriminated against this man from 12/14/49 to 5/27/50, the date on which he was reclassified to vibrator operator, his former position.

Wagon Drill Operators

Claiming strikers.....	2
Promotional replacements.....	1
Total replacements.....	1
Stipulated: new employees hired 2/1/50-7/25/50.....	2

Parris, T. H.: Hired 4/10/50 as air tool operator. This employee testified that he had previously been employed as a wagon drill operator, but about a month before the strike he was transferred to a job as a euclid driver, on the graveyard shift. On January 3, 1950, he went to the union hall and was given a referral slip for a job. He went to the job with a group of returning strikers. At the personnel office, one of the Respondents' officials said that he was classed as a wagon drill operator and that there was no job for a man in that classification. He explained that he was an euclid operator at the time of the strike but the official told him that the Respondents had nothing for him. Parris then talked to Norris who was the superintendent over the wagon drillers. Upon his application to Norris, the latter said, "If they won't give you a job, I can't." Parris stated that he went back to the dam site five or six times looking for work. After that he went over to the quarry and again asked Norris about a job. The boss of the wagon drillers was with Norris at that time and he said to Parris that he would give Parris a laborer's job. Parris said he would take the job and one of the officials gave him a slip for a physical examination. Parris went to town, took his physical examination, and returned to the job the next day, but he was told that there was no job for him, as a man had been sent in his place. Parris thought this was peculiar, so he went over to see Norris again. He told Norris that the office had sent somebody out in his place. Norris said, "They ain't sent nobody out here in your place." Parris said to him, "There is something wrong, I can't get the job. Rosy, I believe they have got me culled. I have tried and tried, to get on the job." Norris did not make any reply to this. After that, Parris applied on several further occasions, but was never reinstated.

Parris testified on April 5, 1951. The records show that he was reemployed as an air tool operator on April 10, 1951. I find that the Respondents discriminated against this man from December 14, 1949, to April 10, 1951, the date on which he was reemployed as an air tool operator.

Richardson, Ishmael: Rehired 8/8/50 as wagon drill operator; fired 8/11/50—reduction in force. Rehired 10/30/50 as jackhammer operator; quit 11/29/50—"can't work day shift."

This employee testified credibly that at the time of the strike he was working as a wagon drill operator for Flippin. Though his name was presented for reinstatement by the Union on January 15, 1950, he was not offered reinstatement until he received a registered letter in July 1950 and was rehired as a wagon drill operator on August 8, 1950. Three days and two hours later, he was laid off. When he was rehired, Cunningham, his foreman told him that he would be laid off, in a layoff that was imminent, because he had been a striker. He was laid off and later rehired as a jackhammer operator. Sometime thereafter, the swing shift was changed over to the day shift so he was laid off again.

The testimony of Foreman Cunningham bears out the contention of Richardson that he was never properly reinstated. Cunningham stated that he considered Richardson the same as a new employee and accordingly, terminated him rather than some of the other employees. At the time Richardson was laid off in the reduction in force, the Respondents retained replacements on the payroll. I find that this employee has never been properly reinstated and that the Respondents have discriminated against him from December 14, 1949, up to and including the present.

Warehousemen

Claiming strikers.....	0
Replacements.....	4
Promotional replacements.....	1
Discriminatory replacements.....	1
Total replacements.....	6

Welders

Claiming strikers.....	6
Replacements.....	14
Promotional replacements.....	1
Discriminatory replacements.....	1
Total replacements.....	16
Stipulated: new employees hired 2/1/50-7/25/50.....	7

Hefley, H. D.: Registered letter sent 7/25/50 offering job as welder.

Lackey, Billy: Registered letter sent 7/25/50 offering job as welder.

Lamb, Richard: Registered letter sent 7/25/50 offering job as welder.

McGuire, Ira E.: Registered letter sent 7/25/50 offering job as welder.

Rogers, R. H.: Registered letter sent 7/25/50 offering job as welder.

I find that the above-named employees, Hefley, Lackey, Lamb, McGuire, and Rogers, were discriminated against between December 14, 1949, and July 25, 1950, the date of offer of reinstatement.

Russell, Rex: Rehired 3/22/50 as welder; quit 1/3/51—"going to another job." Registered letter sent 3/14/50, offering job as mechanical repairman. I find that the Respondents discriminated against this man between 12/14/49 and 3/22/50, the date of his reinstatement as a welder.

Working Foremen

Claiming strikers.....	1
Replacements.....	0

Lippe, Frank J.: Registered letter sent 7/25/50 offering job as working foreman. I find that the Respondents discriminated against this man from 12/14/49 to 7/25/50.

C. Interference, restraint, and coercion

From the credited testimony of some of the employees, it is clear that two of Respondents' supervisors were animated by antiunion bias and sought to penalize the strikers for their concerted activities. This animus is most noticeable in the cases of the Master Mechanic Joe Estes, and Foreman Walter G. Balleau. Thomas E. Hurst testified that in refusing him reinstatement, Master Mechanic Estes told him that the Company had sent to Texas for men to replace the strikers, as he wanted men that he could depend on. This statement was obviously coercive.

Though he had replacements in his department at the time the strike was called off, Foreman Balleau put Kilfoy on duty in the "hole." He also blamed W. W. Lackey for some trouble with the pumps and placed him in the "hole." Balleau also designated Kyles as "clean-up" man for the rest of the shift, which led to Kyles' termination. Balleau himself testified that he kept notes on the work of Kyles, Kilfoy, and Lackey, and that he kept no such notes on other employees in his crew. I find that this statement of Estes, and this conduct of Balleau constitute interference, restraint, and coercion and are separate violations of Section 8 (a) (1) of the Act.

D. Rulings on evidence

In the course of the hearing, two major questions as to the admissibility of certain evidence arose. The first question arose when the General Counsel offered in evidence certain proof as to a prior proceeding conducted by the Department of Labor as to a violation of the Davis-Bacon Act by the Respondents, in that certain employees had not been classified properly or paid at the proper rate of wage. Upon objection by the Respondents, the undersigned ruled that this evidence was inadmissible as being irrelevant to the instant proceeding. The General Counsel later submitted the same evidence in an offer of proof, General Counsel Exhibit #21. I hereby again rule that the evidence is irrelevant. We are not determining the rate at which men should have been paid in this proceeding, nor are we enforcing the Davis-Bacon Act in this proceeding. Here, we are limited to the issues of the instant pleadings. However, in *compliance*, the General Counsel might properly raise the point, that the employees who are to be made whole, should be made whole at their proper rate of pay, under the Davis-Bacon Act. A ruling on this contention might then be sought from the proper authority. In this proceeding, such evidence is premature. General Counsel Exhibit #21.

The second question arose when counsel for the Respondents sought to introduce testimony relating to certain conferences which took place between the parties, in which certain employees of the Regional Office participated. The General Counsel objected to the receipt of such testimony on the ground that these conferences were in the nature of settlement conferences in which a compromise of the conflicting claims of the parties was sought, and that such evidence was inadmissible according to established rules of evidence founded on public policy. This objection was sustained by the undersigned.

However, counsel for the Respondents was permitted to make an offer of proof as to this evidence including Respondents' Exhibits Nos. 9, 10, 11, and 13, which constitute correspondence between the Respondents and the Regional Office on this subject. The named exhibits were rejected in conformity with the ruling mentioned above, and are in the file of rejected exhibits. Evidence of offers of reinstatement to some of the men named in the complaint, which in some instances followed these conferences in point of time, was received.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in Section III, above, occurring in connection with their activities described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that the Respondents have engaged in and are engaging in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents discriminated in regard to the hire and tenure of employment of the employees listed in Schedule A attached hereto by discriminatorily refusing, following their participation in a strike caused and prolonged by Respondents' unfair labor practices, to reinstate these employees to their former or substantially equivalent position, although they unconditionally applied for such reinstatement, it will be recommended that the Respondents be ordered to offer to the employees named in Schedule A, full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. If there are not sufficient positions available in appropriate classifications, the Respondents shall make room for the employees ordered reinstated by dismissing or demoting, to the extent necessary, employees occupying such classifications who were hired or promoted to such classifications after December 3, 1948. If, after such dismissals and demotions there are still not sufficient positions available, all existing positions in the appropriate job classifications shall be distributed among the employees ordered reinstated and other employees who were hired on or before December 3, 1948, without discrimination against any of them because of his union affiliation or strike or concerted activities, following such system of seniority or other nondiscriminatory practices as would normally have been applied by the Respondents to determine job retention rights upon a reduction of force. All employees remaining after such distribution, including those ordered reinstated for whom no employment is immediately available, shall be placed upon a preferential list and offered reemployment as work becomes available in a suitable classification and before other persons are hired for such work in the order required by the Respondents' normal seniority system or other nondiscriminatory practices.

It has also been found that the Respondents discriminated in regard to the hire and tenure of employment of the employees listed in Schedule B, attached hereto, by refusing them reinstatement upon request following their participation in the unfair labor practice strike. However, as all on Schedule B were subsequently either offered or granted reinstatement to their former or substantially equivalent positions on the dates appearing alongside their respective names, no reinstatement order is necessary as to them. Provision for loss of earnings suffered by them as a result of such discrimination is made below.

It has also been found that the Union on behalf of the employees listed on Schedules A and B called off the strike of December 3, 1948, which was caused by the unfair labor practices of the Respondents, on December 14, 1949, and on the latter date offered on behalf of all the employees listed on Schedules A and B to return to work without settlement of their grievances, which had caused them to go on strike. I therefore find that the strikers listed on Schedules A and B are entitled to back pay from December 14, 1949.

It will be recommended that the Respondents be ordered to make whole each of the employees listed on Schedules A and B for any loss of pay they may have suffered as a result of the discrimination against them. In the case of each employee listed on Schedule A the back-pay period shall begin December 14, 1949, and run to the date of Respondents' compliance in each case with the reinstatement provisions herein. In the case of each employee listed on Schedule B, the back-pay period shall run from December 14, 1949, to the date of his reinstatement or the date on which reinstatement was offered to him, which date is set opposite the employee's name on Schedule B. Consistent with the policy of the Board enunciated in *F. W. Woolworth Co.*, 90 NLRB 289, it will be recommended that losses of pay be computed on the basis of each separate calendar quarter or portion thereof during the appropriate back-pay period. The quarters shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which these employees normally would have earned for each quarter or portion thereof, their net earnings, if any, in other employment during that quarter.¹⁶ Earnings in any one particular quarter shall have no effect upon the back-pay liability for any other quarter. It is also recommended that the Respondents be ordered to make available to the Board upon request payroll and other records to facilitate the checking of the amounts of back pay due.

It is further recommended that the Board reserve the right to modify the back-pay and reinstatement provisions above, if made necessary by a change of circumstances since the hearing or in the future, and to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.

In accordance with the findings made above, it is recommended that the complaint be dismissed so far as it alleges the Respondents discriminated against Harry Hermanson and L. A. Shankler.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Fort Smith, Little Rock & Springfield Joint Council, A. F. L., is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of the employees named in Schedules A and B attached hereto, thereby discouraging membership in Fort Smith, Little Rock & Springfield Joint Council, A. F. L., and labor organizations generally, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The Respondents did not discriminatorily refuse to reinstate Harry Hermanson and L. A. Shankler.

[Recommendations omitted from publication in this volume.]

¹⁶ See *Crossett Lumber Company*, 8 NLRB 440; *Republic Steel Corp v. N. L. R. B.*, 311 U. S. 7.