Sterling Fluid Systems (USA), Inc. d/b/a Peerless Pump Company *and* District No. 90, International Association of Machinists & Aerospace Workers, AFL–CIO, a/w International Association of Machinists & Aerospace Workers, AFL–CIO. Case 25–CA–26448

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 1, 2000, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in reply.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As discussed below, we agree with the judge's finding that the Respondent violated Section 8(a)(3) by: (1) failing to reinstate or place on a nondiscriminatory recall list, former strikers on whose behalf the Union made an unconditional offer to return, and (2) failing to maintain and use a nondiscriminatory recall procedure by giving preference for recall to (a) employees who abandoned the strike prior to its conclusion and (b) former striking employees encompassed by the Union's unconditional offer to return who complied with the Respondent's unlawful signup requirement. We reverse the judge's findings that the Respondent (1) violated Section 8(a)(5) and (1) by unilaterally implementing discriminatory procedures which adversely affected the recall rights of former striking employees, bypassing the Union and dealing directly with former strikers about the terms and conditions of reinstatement, (2) violated Section 8(a)(3) and (1) by failing to provide notice and an opportunity for former striking employees to apply for nonequivalent positions posted in the plant, and (3) violated Section 8(a)(1) by threatening former strikers with loss of their reinstatement rights.[1]

[1] Members Liebman and Schaumber form the majority for affirming certain of the 8(a)(3) and (1) violations as detailed above. Chairman Battista would reverse, as explained in his separate dissent. Chairman Battista and Member Schaumber form the majority for reversing another of the judge's 8(a) (3) findings, as well as his findings of 8(a)(5) and (1) violations. Contrary to the majority view, Member Liebman would not reverse and dismiss any portion of the 8(a)(3) allegations or the 8(a)(1) threat allegation, as explained in her separate dissent. She does not reach the 8(a)(5) issue. See fn. 8 infra.

I. FACTS[2]

The Respondent, Peerless Pump Company, manufactures and distributes industrial pumps. The Union, District 90 of the International Association of Machinists, has represented Respondent's production and maintenance employees for many years in a bargaining unit of approximately 150 employees. Three witnesses testified at the hearing: Respondent's Labor Relations Manager Thomas Dagon, Machinists' Representative Don Stella, and Local Union President John Soladine.

Unsuccessful negotiations for a successor collective-bargaining agreement led to the Union's calling a strike on June 6, 1997, when the prior agreement expired. The Respondent continued to operate during the strike through the use of replacement employees. During the course of the strike, some unit employees abandoned the strike and offered to return to work. These employees, referred to as "crossovers,"[3] signed a preferential rehire list maintained by the Respondent.

By September 23, 1997, the Respondent employed a sufficient number of replacements and crossovers to be at full complement and so notified the Union. Respondent's attorney sent the Union a letter dated December 10, 1997, while the strike was still in progress, stating that it wanted to work out an agreement as to "how employees who have indicated a desire to return to work and who have signed the preferential hiring or recall list, will be returned to work." The letter set forth a four-step procedure, outlined below:

> When a position in the bargaining unit becomes available, and there are persons who have indicated an interest in returning to work, and who have signed the Preferential Hiring List, Peerless Pump Company ("Company") will fill the available position as follows:
>
> 1. Company will follow the procedures set forth in Article VI[4] of the collective bargaining agreement between the Company and the IAM dated February 20, 1993.
>
> 2. If no currently-working employee is selected for the position, the Company will consult the Preferential Hiring List. The Company will then contact the first employee on the list who has previously

[2] The facts of this case are largely undisputed. Most were either stipulated by the parties or substantiated by documents entered into the record jointly.

[3] The term "crossover" is used to distinguish former strikers who individually abandoned the strike both from newly hired replacement employees and from employees who remained on strike until the Union made an unconditional offer on their behalf to return.

[4] Art. VI involved an in-plant posting procedure, as explained in greater detail below.

held the position and notify the employee of the available position. ("1st employee" means the employee who has signed the list on the earliest date.) If the 1st employee (or subsequent employees) indicates that he or she does not want the position or if the employee fails to report for work within seven (7) calendar days from the date of notice the employee will be disqualified and stricken from the list and will not be eligible for employment with the Company except as a new hire.

3. If the employee (or subsequent employees) is disqualified, Company will go down the list and contact each person who has previously held the position in the order the person signed the list until the position is filled.

4. If no person on the list had previously held the position or if all persons who previously held the position are disqualified, the Company may hire an employee from outside who is trained on the position or whose experience indicates that he or she could become productive on the position with minimal training.

On December 17, 1997, Union Representative Stella replied to the Respondent's counsel, stating:

> The Union is unable at this time to respond to your proposal regarding the preferential hiring list. We are confused by your proposal, you have consistently told us that the language in the expired agreement was totally unacceptable, yet your proposal says the company will follow the procedures set forth in Article VI of the expired agreement.
>
> If this means that you are now willing to enter into good faith negotiations, then the union is willing to meet and negotiate.

The Respondent did not reply to the Union's letter.

On September 17, 1998,[5] Stella sent the Respondent (Labor Relations Manager Dagon) a letter stating that the Union was making an unconditional offer to return to work on behalf of the remaining strikers:

> On behalf of the striking employees represented by [the Union] effective at 12:01 AM Monday, September 21, 1998, I am hereby making an unconditional offer to return to work. Therefore, based upon your position (that there is no work available for any of the striking employees) taken on September 23, 1997 and reaffirmed at the December 1997 unemployment hearing, all striking employees will be placed on a preferential list to be recalled as soon as openings are available. I have notified the striking employees that they will be contacted by the Company and notified when to return to work.

Learning that the Respondent failed to receive its letter, the Union resent this letter, which was delivered on October 2.

Thereafter, without prior discussion with the Union, the Respondent (by Dagon) notified the Union on October 23 that it had sent the following letter to all employees covered by the offer to return from the strike:

> We have been informed by the IAM that it has made an unconditional offer to return to work on behalf of all employees who went on strike in June of last year and who have not already signed our preferential rehire list.
>
> If you are interested in being reinstated at the earliest possible date, we need for you to come to the plant and sign the preferential rehire list. We also need for you to provide us with your most current home or mailing address and telephone number. We need you to sign the list and we need the requested information so that we can contact you when we have job openings in the future.
>
> If you are interested in reinstatement, it is important that you come to the plant as soon as possible, but no later than November 6, 1998, and sign the preferential rehire list because we plan to fill any available positions, not filled through the normal bid procedure, in the order that employees' names appear on the preferential rehire list as long as the employee has previously held the open job classification.

The Respondent requested the Union to review the recipient list to ensure that no employee was omitted. Stella responded for the Union on November 3, in pertinent part, as follows:

> This is to inform you that . . . I made an unconditional offer to return to work for all striking employees. It is the Union's position that [if] for some reason an employee does not sign your *preferential rehire list,* this does not relief [sic] you of your responsibility to *offer striking employees reinstatement as vacancies occur.* To make it very clear, it is your responsibility to *offer* former striking employees reinstatement to positions as these positions become available.
>
> Should you have any questions, comments, or concerns regarding this subject, please do not hesitate to contact the undersigned. [emphasis in original]

The Respondent's November 6 reply read, in full:

[5] Dates hereafter refer to 1998, unless otherwise indicated.

> This is to acknowledge receipt of your November 3, 1998 letter. We understand your position, and do not disagree with you.

A number of former strikers covered by the Union's offer to return signed the recall list pursuant to the Respondent's October 23 instruction. On November 6, Respondent added the names of former strikers who did not sign the list themselves, placing their names after those who had personally signed.[6] This resulted in a composite list consisting of three categories of employees seeking reinstatement set out in the following order:

- the names of unreinstated crossovers who had signed the list prior to the end of the strike
- the names of those covered by the Union's unconditional offer who signed the list
- the names of those covered by the Union's unconditional offer who did not sign the list.

Those employees who signed were listed in chronological order of their signing, whereas those who had not signed were listed at the end of the list by seniority.

When vacancies occurred, the Respondent sought to fill them by turning first to an in-plant posting procedure, based upon article VI of the expired collective-bargaining agreement.[7] This involved placing notices of the vacant position on three bulletin boards inside the plant for a period of 3 working days. No other effort was made to notify others of these vacancies. The Respondent referred to the preferential rehire list only if no one successfully bid on a posted position. This resulted in actively employed employees receiving first consideration for vacant positions.

II. ANALYSIS

We begin with the Respondent's affirmative defense that the complaint allegations involving 8(a)(5) are time-barred. Next, we deal with the various 8(a)(3) allegations relating to the reinstatement of strikers, and then with the 8(a)(1) alleged threat.

[6] There is no evidence that the Respondent advised the Union or the affected employees either that it intended to or that it did add those names.

[7] Art. VI is entitled "Promotions and Transfers." By its own terms, the article's intent was to promote bargaining unit employees to vacancies in higher classifications than they currently occupied. In addition, Sec. 6.2 states, in part, "open jobs will not be posted as vacancies so long as any employees have been laid off or transferred from such classification because of or during a layoff."

A. The Respondent's Section 10(b) Defense to the Section 8(a)(5) Allegations [8]

The judge found that the Respondent violated Section 8(a)(5) in two respects: first, by announcing and unilaterally implementing a striker recall system following the Union's unconditional offer ending the strike; and second, by circumventing the Union and dealing directly with employees through its October 23 letter describing the recall process. The judge rejected the Respondent's contentions that, in December 1997, the Union waived its right to bargain over the striker reinstatement procedure and that the Respondent's October 23 letter to employees was merely a permissible communication about its lawfully established reinstatement policy.

In exceptions, the Respondent argues, inter alia**,** that the refusal to bargain allegations are time barred, under Section 10(b) of the Act. We agree.[9]

The original charge, filed March 1, 1999, alleged only a violation under Section 8(a)(3); specifically, that the Respondent's recall policy unlawfully interfered with the right of former strikers to be recalled to work following the Union's unconditional offer to return. On July 28, 1999, the Union filed a second 8(a)(3) charge, alleging that the Respondent's failure to notify former strikers of job postings additionally violated the Act. On August 6, 1999, the Union for the first time alleged a violation under Section 8(a)(5), charging that the Respondent's implementation of the recall procedure was done unilaterally and without regard to its bargaining obligations.

The ensuing complaint set forth two 8(a)(5) and (1) allegations: first, that the Respondent unilaterally implemented the recall system without affording the Union an opportunity to bargain (the conduct cited in the charge); and second, that the Respondent bypassed the Union and dealt directly with employees concerning the operation of the recall procedure. Both aspects of the Respondent's conduct are described as having occurred in October 1998, some 10 months before the 8(a)(5) charge was filed in August 1999.

The question presented is whether the 8(a)(5) charge (filed more than 6 months after the alleged unlawful conduct occurred) is itself sufficiently closely related to the 8(a)(3) charges to qualify as timely. For the reasons explained below, we find the August 1999 8(a)(5) charge

[8] Member Liebman does not join in this section of the decision. She finds it unnecessary to pass on the disposition of the 8(a)(5) allegations because a remedy for such violations would be cumulative to other relief granted.

[9] Because we are dismissing these allegations on procedural grounds, we do not reach the merits of these allegations or of the Respondent's other defenses.

was not closely related to the pending 8(a)(3) charges and therefore was untimely under Section 10(b).

Section 10(b) empowers the Board to issue and serve complaints upon persons who have been charged with committing an unfair labor practice, "*Provided,* that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." It is well established that allegations in a complaint are not limited to the specific unfair labor practices outlined in a charge. The Board may consider complaint allegations not precisely set forth in a charge if those unfair labor practices are "related to those alleged in the charge and grow out of them while the proceeding is pending before the Board." *National Licorice Co.*, 309 U.S. 350, 369 (1940). See also *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). Further, the Board and the courts have traditionally permitted the General Counsel to add complaint allegations beyond the 6-month 10(b) period if they are closely related to the allegations of the timely filed charge.[10] That same standard applies when determining whether otherwise time-barred allegations in an amended charge are sufficiently related to a timely pending charge,[11] the question to be decided here.

In *Redd-I, Inc.*, 290 NLRB at 1118, the Board enunciated the factors to be considered in making the determination of whether allegations are "closely related":

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violation alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act . . . .
>
> Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object. . . .
>
> Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Applying *Redd-I* here, and relying on the first and third of these factors, we find that the 8(a)(5) allegation fails to meet the "closely related" test.[12]

First, the allegation is based upon an entirely separate legal theory from the timely 8(a)(3) charges. The 8(a)(3) charges deal with the rights of strikers. They challenge the substance, mechanics, and impact of the Respondent's recall procedure for former strikers. In particular, they raise the issue of the right of former strikers to be recalled to their jobs following their involvement in protected activity and the Respondent's obligation to satisfy that statutory right. The 8(a)(5) allegations, on the other hand, relate to the Union's right as the employees' exclusive representative to be apprised of and participate in the formulation of policies that affect employees' terms and conditions of employment and the Respondent's obligation to bargain with the Union in good faith. While the recall procedure is a common factual aspect of both allegations, the Respondent's bargaining obligations to the Union are distinct from its legal duty not to discriminate against strikers. Because the legal theories are fundamentally different, we find that the belatedly filed Section 8(a)(5) charge fails to meet the first prong of the "closely related" test.

Next, because both the 8(a)(5) and the 8(a)(3) allegations were litigated, we are able to review the nature and substance of the Respondent's attempted defenses. With regard to the 8(a)(5) allegations, besides its 10(b) defense**,** the Respondent presented evidence attempting to show that (1) the Union's conduct had resulted in a waiver of its bargaining rights, (2) the Respondent was acting out of business necessity both in implementing the recall system and in asking for employee expression of interest in returning, and (3) the Respondent was communicating with employees pursuant to its statutory obligations rather than excluding the Union from its representational role. As for the 8(a)(3) issues, the Respondent argued that (1) there was no showing of animus underlying its actions, (2) its recall system was consistently applied and facially nondiscriminatory, and (3) it was using the same system and applying its terms to all former strikers irrespective of when they offered to return to work. It is apparent that the Respondent defended these allegations on entirely separate legal and evidentiary grounds. Thus, these allegations also fail to qualify as closely related under the third prong of the test.

For these reasons, we find that the 8(a)(5) charge filed on August 6, 1999 fails to qualify as closely related to the timely-filed 8(a)(3) charges. We therefore conclude

[10] *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988).

[11] *Citywide Services Corp*., 317 NLRB 861 (1995).

[12] We therefore find it unnecessary to analyze the allegations under the second criterion (common factual situation or sequence of events).

that the complaint allegations under Section 8(a)(5) and (1) are time-barred; we reverse the judge's findings of violations, and dismiss all allegations under Section 8(a)(5) and (1).

B. The 8(a)(3) Issues

The judge determined that the Respondent violated Section 8(a)(3) in four respects:

> (1) failing to reinstate the former strikers or to place them on a nondiscriminatory recall list, including those covered by the Union's unconditional offer to return to work;
>
> (2) granting preference to crossover employees, by placing them on a recall list ahead of other employees;
>
> (3) granting preference in recall to former strikers who came to the Respondent's facility and signed the preferential recall list; and
>
> (4) posting and filling jobs without giving strikers who had not been recalled the opportunity to bid on job vacancies.

The principles that govern the reinstatement rights of former strikers are well established. In *Laidlaw Corporation*, the Board held that:

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

171 NLRB 1366, 1369–1370 (1968). These principles have consistently guided the Board for decades. See, e.g., *Pirelli Cable Corp*., 331 NLRB 1538, 1539–1540 (2000). Applying *Laidlaw*, we agree with the judge's 8(a)(3) findings, except for the fourth listed above (involving the posting and filling of jobs).

(1) Failing to reinstate the former strikers or to place them on a nondiscriminatory recall list

Upon the Union's October 2 unconditional offer on behalf of remaining strikers to return to work, the Respondent was obliged under *Laidlaw* to reinstate those individuals to their former jobs or, if no vacancy then existed, to place them on a nondiscriminatory recall list until a vacancy occurred. Because its operation was fully staffed with replacement employees and crossovers, the Respondent could not immediately reinstate the former strikers, but it remained obligated to keep their names on some type of nondiscriminatory roster until such time as openings became available, whereupon the unreinstated striker could be recalled to his or her former or substantially equivalent position.

The Respondent's imposition of an affirmative obligation on former strikers to come to the plant to sign the list itself is an unlawful infringement upon these employees' *Laidlaw* rights. We agree with the judge that the Respondent's asserted business reasons are insufficient to overcome its *Laidlaw* obligations. Imposing prerequisites on strikers to preserve their rights to their pre-strike jobs violates employees' Section 7 rights, absent a legitimate and substantial business justification. See *Pirelli Cable Corp*., supra, 331 NLRB 1539 (employer violated Sec. 8(a)(3) by unilaterally imposing requirement that former strikers advise employer of desire and availability for reinstatement as condition precedent to placement on preferential hiring list). The judge correctly rejected the Respondent's asserted business justification—that the list was a means of identifying employees who remained available and interested in recall and for compiling current contact information—as merely an administrative convenience. Because the Respondent apparently already had reliable contact information,[13] shifting the burden to former strikers to facilitate their recall rights was neither necessary nor warranted. By requiring former strikers to take steps beyond their unconditional offer to return to work, the Respondent interfered with their unrelinquished right to be recalled to work upon the conclusion of the strike. Therefore, in agreement with the judge, we find that by initially establishing and announcing a signup requirement the Respondent interfered with former strikers' *Laidlaw* rights under Section 8(a)(3) and (1) of the Act.[14]

[13] There is no evidence that the Respondent lacked valid current addresses for its employees covered by the Union's unconditional offer, as shown by its October 23 mailing. Even assuming that the Respondent needed additional contact information, this does not justify the Respondent's decision to give preference to those who supplied the information and signed the list first. See sec. "C(3)," below.

[14] In dissent, Chairman Battista (1) describes the signup requirement as "simply a reasonable way to ascertain" which employees wished to return to work, (2) points out that employees who did not sign up were not excluded from reinstatement, and (3) distinguishes *Pirelli Cable*, supra, on the ground that the employer there offered no justification for a similar requirement and cut off recall rights if employees failed to comply.

We find these points unpersuasive in light of extant Board law. As explained, the signup requirement did impose an obstacle to recall for former strikers. This obstacle was unjustified, not least because the Respondent could easily have contacted former strikers, rather than require that they take the initiative and come to the plant to sign the recall list. Failure to sign up did disadvantage former strikers relative to those employees who did sign up, even if it did not foreclose rein-

(2) Granting preference to crossover employees

In December 1997, while the strike was ongoing, the Respondent implemented a procedure for recalling employees who left the strike and sought reinstatement but for whom there were no immediate vacancies. It created a preferential hiring list for those employees to sign to indicate their interest in being recalled to work. This provided the Respondent with a ready supply of available workers to meet their staffing needs as the strike continued. The establishment and use of this list was neither objected to by the Union at the time, nor was it challenged as an unfair labor practice.

Upon the strike's conclusion, all former strikers were encompassed by the Union's unconditional offer to return to work. This not only expanded the available work force pool for the Respondent, but also entitled all former strikers who had not yet been recalled to reinstatement to their prestrike jobs or substantial equivalents as openings occurred. At that point, all former strikers were equally entitled to be recalled to their former positions, even if some of them may have declared their individual availability while the strike was still in progress. The Respondent was then required to deal with all available former strikers on a nondiscriminatory basis.

The Respondent, however, failed to recognize the significance of the strike's termination and continued to use the same recall list that the Respondent had used during the strike, as supplemented by those employees whose names were added following the Union's unconditional offer to return. Those employees who remained on strike until the Union's unconditional offer to return were relegated to an inferior placement on the list, following the names of all those who sought reinstatement prior to the strike's end. When a vacancy was filled by resort to the recall list, the Respondent offered the position to the individual who previously held that job (or a substantially similar one) whose name appeared first on the list. This provided crossovers with a continuing advantage over those who remained on strike until its conclusion and delayed—and diminished—recall opportunities for all those covered by the Union's unconditional offer. By continuing to give effect, after the strike, to the list compiled during the strike, the Respondent provided an unwarranted advantage to employees who had abandoned the strike.[15] As stated above, under *Laidlaw*, supra, once a strike ends, all unreinstated strikers are entitled to be considered for recall on a nondiscriminatory basis, without regard to their previous relative levels of commitment to the strike. Absent a legitimate and substantial business justification for using this facially discriminatory system, we find, in agreement with the judge, that the Respondent's reinstatement preference for crossover employees following the conclusion of the strike violated Section 8(a)(3) and (1) of the Act.[16]

(3) Granting preference to former strikers who complied with the respondent's signup instructions[17]

As discussed above, the Respondent notified former strikers covered by the Union's unconditional offer to return to work to take certain affirmative steps—come to the plant and sign the preferential recall list—within a limited time period. Former strikers who complied with this unlawful requirement by personally signing their names on the recall roster thus appeared on the list ahead of all those who failed to follow this instruction, and were thereby ensured of recall advantage over them. However, just as the Respondent could not lawfully grant reinstatement preference to those who left the strike prior

statement. For these reasons, *Pirelli Cable* cannot be meaningfully distinguished.

[15] The Respondent argued before the judge and again in its exceptions that *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), establishes that a chronological recall system, begun during a strike and continued in force following its conclusion, is not inherently destructive of employee rights. We agree with the judge that the Respondent's reliance on that case is misplaced. While not all chronological recall lists are necessarily unlawful, the Respondent's chronological system made a basic distinction between those who abandoned the ongoing strike and those who did not. At the top of that list were those who had abandoned the strike. Next were all those who remained on strike until the Union's offer to return and who had heeded the signup instruction, on a "first come/first served" basis. In last place for recall were those former strikers who did not comply with the unlawful signup requirement, whose names were added by the Respondent in the order of their employment seniority. Clearly, the Respondent's system did not treat all former strikers equally, but operated instead to the permanent detriment of those who exercised their right to strike for a longer period of time as well as those who declined to comply with the Respondent's unlawful signup procedure. The discriminatory nature and effect of the Respondent's system was inherent in its composition.

[16] In dissent, Chairman Battista concedes that the Respondent's "system drew a distinction between those who abandoned the strike before its end and those who held out until the end." He argues, however, that without evidence that the Respondent "acted with the intention of punishing those who stayed with the strike," there can be no violation. In his view, the system's impact on Sec. 7 rights was "slight" and the system "provided a rational method for determining the order of recall," i.e., "first-come, first-served." We disagree.

As explained, the Respondent's system was based entirely on employees' relative levels of commitment to the strike: employees who abandoned the strike early were effectively rewarded, at the expense of those who held out. Contrary to the dissent's view, such a system is unlawfully discriminatory. The rational basis for the system offered by the dissent, which simply turns the vice of the system into a virtue, has no connection to the Respondent's legitimate business needs.

[17] The judge initially determined that because it was imposed unilaterally and unlawfully, the recall procedure was itself tainted and, as a consequence, any preference given to former strikers who complied with the unlawfully imposed signup instructions also violated Sec. 8(a)(3). In light of our dismissal of the 8(a)(5) allegations, we disavow this aspect of the judge's analysis.

to its conclusion, the Respondent could not lawfully place those who complied with its unlawful prerequisite ahead of those who did not comply. Accordingly, we find that by conferring a recall priority upon former strikers who complied with its unlawful instruction the Respondent additionally violated Section 8(a)(3).

(4) Filling job vacancies through the in-plant posting procedure[18]

Finally, the judge found that the Respondent violated the Act by filling job vacancies through an in-plant posting procedure and consulting the preferential recall list only if there was no successful bidder. While the Board has held that filling poststrike job vacancies through an in-plant job posting process may be unlawful,[19] we find that in the circumstances of this case, it has not been established that the Respondent's procedure violated the Act in the manner alleged in the complaint.

The complaint alleges that the Respondent posted jobs for bid and filled such jobs without granting employees who had engaged in the strike and who had not been recalled the opportunity to bid on such job vacancies. The complaint encompasses every job that was posted, irrespective of whether that job was one to which an unreinstated former striker may have been entitled under *Laidlaw* principles. A former striker is entitled to be returned only to his former position or its substantial equivalent. Therefore, the Respondent was not obligated to notify all unreinstated former strikers of the existence of any opening, but rather only to recall an unreinstated striker to his or her former job (or its equivalent) once it became vacant.[20]

Former strikers are not entitled to special notice of job openings to which they have no reinstatement rights. See *Diamond Walnut Growers*, 340 NLRB 1129 (2003). Thus, the Respondent did not have to provide such general notice to unreinstated strikers every time a job vacancy occurred. *Medite of New Mexico*, 314 NLRB 1145 (1994), enfd. 72 F.3d 780 (10th Cir. 1985), relied upon by the judge and Member Liebman in dissent, is not to the contrary. The employer in *Medite* did not merely fail to notify former strikers of job postings, but affirmatively precluded them from entering its premises, thereby foreclosing any opportunity to learn about job vacancies and effectively rendering them incapable of applying for the jobs.

The Respondent's only obligation to the former strikers regarding nonequivalent positions was to refrain from discriminating against them in the manner of filling those positions. We find, contrary to our dissenting colleague, that the Respondent did not so discriminate. The Respondent gave the former strikers the same opportunity to obtain nonequivalent jobs as the replacement workers, crossovers, and reinstated strikers. The Respondent informed all former strikers that it would be using the job posting procedures that had been in effect prior to the strike and did not deny them access to the plant. The former strikers could have bid for and, because of their seniority, presumably obtained, any nonequivalent jobs they wanted. Our dissenting colleague's assertion that the Respondent "effectively prohibited the former strikers from bidding on posted jobs," like the employer in *Medite*, is not supported by the record. In this context, the failure of the former strikers to apply for nonequivalent positions at any time is fatal to the General Counsel's assertion that they were denied consideration for nonequivalent positions. Compare *Zimmerman Plumbing & Heating Co*., 339 NLRB 1302 (2003).

Member Liebman asserts that "[t]he majority decision correctly recognizes that this procedure violated the principles of *Laidlaw Corp.*, 171 NLRB 1366 (1968), insofar as the former strikers' old or substantially equivalent jobs were involved." However, that is not the issue here. As relevant here, the complaint alleges only that the unrecalled strikers were not given an opportunity to bid on posted jobs that were nonequivalent positions. We conclude that they had an opportunity to so bid. The complaint does not allege that a posted job was awarded to an employee other than a bidding unrecalled striker.

C. The 8(a)(1) Threat[21]

The judge found that the Respondent's October 23 letter independently violated the Act by threatening returning strikers with loss of their reinstatement rights.[22] Cit-

[18] Member Liebman does not join in this section of the decision, except as noted infra. See fn. 20.

[19] See, e.g., *Pirelli Cable Corp.,* supra, 331 NLRB at 1539–1540, citing *MCC Pacific Valves*, 244 NLRB 931 (1979), supplemental decision 253 NLRB 414 (1980), enfd. in part mem. 665 F.2d 1053 (9th Cir. 1981).

[20] Member Liebman agrees with Member Schaumber that, to the extent that it has been shown that the Respondent failed to recall unreinstated former strikers to jobs that they had previously occupied or any substantially equivalent position (and instead awarded those jobs by means of the posting procedure to replacement workers, crossovers, previously recalled former strikers, or new hires), a violation of the Act has been established. A determination as to whether the previous jobs of any unrecalled former strikers, or substantially equivalent positions, were awarded to other employees through the posting procedure will be resolved through the compliance procedure.

As indicated in her separate dissent, Member Liebman would go further and find that the use of the in-plant posting procedure itself was unlawful.

[21] For the reasons explained in her dissent, Member Liebman does not join in this section of the decision.

[22] This allegation was added to the complaint at the opening of the hearing, a date well beyond the 10(b) period. The Respondent asserts that it is time-barred. We disagree and find it qualifies as closely re-

ing *Charleston Nursing Center*, 257 NLRB 554 (1981), he agreed with the General Counsel that by announcing the in-plant signing requirement along with a deadline, the Respondent unlawfully implied that the strikers' failure to comply would result in forfeiting their right to be recalled. He found that the letter's prefatory phrase, "if you are interested in reinstatement," followed by the instruction that former strikers "come to the plant as soon as possible, but no later than November 6, 1998 and sign the preferential rehire list," suggested that noncompliance with these terms would jeopardize their chances for reinstatement. The judge concluded that it was not necessary for the word "termination" to be used, because employees would reasonably infer a threat of job loss.

In exceptions, the Respondent points out: that the letter is devoid of coercive language; that the dubious nature of the " threat " is underscored by the General Counsel's failure to allege the violation prior to the hearing; that, in construing the letter's meaning, the judge failed to take account of the Respondent's actions ensuring the inclusiveness of the list; and that the judge's reliance on *Charleston Nursing Center* is misplaced. We agree with the Respondent and conclude that the Respondent's letter did not unlawfully threaten to terminate former strikers' reinstatement rights.

As an initial matter, we find the Respondent's October 23 letter contains no threatening language. To find a threat in the letter, one must infer it. In contrast, the employer's letter in *Charleston Nursing Home* ended with the statement, "If we do not receive a reply, we will assume you are not interested." That statement, equating inaction with job loss, is a direct and clear warning of consequences resulting from inaction. Here, the Respondent presented employees with no such ultimatum. Instead, by first explaining how the recall system worked (those signing the list first would be the first contacted for recall) and then advising employees to "come to the plant as soon as possible," the Respondent was merely telling employees that the sooner they acted, the sooner they would likely be recalled to work. The Respondent's admonition was instructive, not coercive.

Moreover, the Respondent's contemporaneous actions—not taken into account by the judge—further demonstrate that former strikers' rights were not threatened. Specifically, after the Union countered the October 23 letter stating that *all* former strikers should be offered reinstatement irrespective of whether they signed the list, the Respondent immediately assured the Union, in writing, that it agreed.[23] True to its word, on that very day (which happened to be the conclusion of the signup period) the Respondent added to the list the names of all remaining former strikers who had not already signed. Thus, even assuming some ambiguity in the October 23 letter regarding the consequences of failing to comply with the signup instruction, that uncertainty was removed when the Respondent added the names of all nonsigning former strikers. In doing so, it ensured that every former striker covered by the Union's unconditional offer was included on the rehire list as of November 6 and that no one would lose the opportunity for reinstatement through his or her own inaction. This conduct demonstrates the letter was not, nor could it reasonably have been construed to be, a veiled threat to undermine former strikers' reinstatement rights.

Our dissenting colleague's reliance on *The Grosvenor Resort*, 336 NLRB 613 (2001), is misplaced. There, the employer sent a clear message to its employees that it was discharging them. The employer required strikers to return all company property and instructed them to receive their "final" paychecks. In addition, the employer reimbursed strikers for their outstanding vacation pay, which was ordinarily only due to employees upon the termination of their employment. Thus, the employer affirmatively informed strikers that it would treat them as terminated employees.[24] Here, however, the Respondent did not make any statements consistent with an intent to treat unreinstated strikers as terminated employees. Accordingly, we reverse the judge and dismiss the Section 8(a)(1) allegation.[25]

lated under all three prongs of the controlling test, discussed above. The alleged 8(a)(1) threat related to the possibility that former strikers would lose their job reinstatement rights because of conditions within the Respondent's recall policy. The original and amended 8(a)(3) charges underlying the complaint also alleged that the Respondent's recall policy interfered with former strikers' reinstatement rights. Thus, both allegations spring from essentially the same factual basis and present substantially similar legal theories of violation, i.e., interference with former strikers' protected rights, thereby satisfying the first two prongs of the closely related standard. While the Respondent's defenses against these allegations necessarily differed somewhat, in view of the strong factual and legal connections, we find there was sufficient evidentiary overlap regarding the operation of the recall procedure and the impact on employees' reinstatement opportunities to satisfy the third prong.

[23] The fact that the Respondent wrote to the Union, rather than to the employees, is not dispositive. The Respondent was replying to a union letter, and the Union was acting as the exclusive representative of the employees.

[24] Contrary to our dissenting colleague, we do not read *Grosvenor Resort* as reaching the question of what responsibility an employer bears for creating an uncertain message. As discussed, the message sent by the employer there was quite certain.

[25] In finding that the October 23 letter was not unlawful, Member Schaumber has taken into consideration that the signup procedure announced in the letter was itself unlawful in that it created an obstacle to reinstatement and disadvantaged former strikers who failed to sign the recall list in favor of former strikers who did sign the list. However, the

CONCLUSIONS OF LAW

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

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

3. By initially requiring former strikers to come to its facility and sign a recall list, thereby failing and refusing to reinstate or offer to reinstate them to their former or substantially equivalent positions of employment, or appropriately to place them on a nondiscriminatory preferential recall list, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By implementing and maintaining a recall system whereby it granted preference in terms and conditions of employment to (a) employees who abandoned the strike prior to the Union's October 2, 1998 unconditional offer to return by placing them on a recall list ahead of all other employees, and (b) employees who physically came to the Respondent's facility and signed the preferential recall list after the Union's unconditional offer to return by placing them on the recall list in the order in which they signed the list, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The Respondent has not violated the Act in any other manner.

These unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(3) and (1), we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to (1) rescind the recall procedure implemented following the Union's October 2, 1998 unconditional offer to return made on behalf of the striking employees, (2) offer reinstatement to all former strikers who have been denied recall because of the Respondent's discrimination, (3) make whole former strikers for any loss of pay or benefits they may have suffered by reason of the Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and (4) post the remedial notice described below at its facility.

ORDER

The Respondent, Sterling Fluid Systems (USA), Inc., d/b/a Peerless Pump Company, Indianapolis, Indiana, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to reinstate or offer to reinstate to their former or substantially equivalent positions of employment where such positions have become available, or appropriately to place on a preferential recall list the former striking employees on whose behalf the Union made an unconditional offer to return.

(b) Implementing and maintaining a recall system that grants preference in terms and conditions of employment to (a) employees who abandoned the strike prior to the Union's unconditional offer to return by placing them on a recall list ahead of all other employees, and (b) employees who physically came to the Respondent's facility and signed the preferential recall list after the October 2, 1998 unconditional offer to return by placing them on the recall list in the order in which they signed the list ahead of those who did not personally sign the list.

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

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

(a) Rescind the recall procedure implemented following the Union's October 2, 1998 unconditional offer to return.

(b) Offer reinstatement to all former strikers who have been denied recall because of the Respondent's discrimination against them.

(c) Make whole former strikers for any loss of pay or benefits they suffered by reason of the Respondent's discrimination against them in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana copies of the attached notice marked "Appendix."[26] Copies of the notice, on

issue here is not whether the signup procedure *announced* in the letter was unlawful, but the separate and discrete issue of whether the October 23 letter *threatened* former strikers with loss of their reinstatement rights altogether if they failed to come to the plant and sign the recall list. For the reasons set out above, Member Schaumber finds that the October 23 letter contained no such threat.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

forms provided by the Regional Director for region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 1998.

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

CHAIRMAN BATTISTA, dissenting in part.

My colleagues find that the Respondent violated the *Laidlaw* rights of strikers. I disagree.[1]

1. Placement of strikers on the recall list

The Union ended its strike in October 1998, and sought reinstatement for all employees who had remained on strike until that time. My colleagues find that the Respondent acted unlawfully by implementing a recall list which placed these employees beneath those who had sought reinstatement earlier. I disagree. An employer who is faced with more *Laidlaw* strikers than *Laidlaw* positions must perforce establish an order of recall. Under the Act, an employer can choose any order of recall that is nondiscriminatory. In the instant case, there is no evidence that the Respondent acted with the *intention* of punishing those who stayed with the strike until its end. Concededly, the Respondents' system drew a distinction between those who abandoned the strike before its end and those who held out until the end. However, under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), "discrimination" alone does not establish the violation. Absent evidence of motive (see supra), the violation turns on whether the "slight" impact on Section 7 rights is outweighed by legitimate business reasons.[2] The system here provided a rational method for determining the order of recall. It was a first-come, first-served system, under which those who sought work earlier were placed on the list ahead of those who sought work later. Such a system is lawful under *NLRB v. American Orlean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), granting review, 265 NLRB 1625 (1982).

I would adhere to the teaching of that court. Indeed, the system is not essentially different from the system used by the Respondent to distinguish among those who left the strike before its end. Those employees were placed on a list in the chronological order in which they left the strike. Like the strikers involved herein there was "discrimination" based upon when they left the strike. And yet, my colleagues do not find a violation in this respect. Indeed, the General Counsel does not even attack it.[3]

Based on the above, I would find no violation.

2. Request that employees sign recall list

The Respondent requested that unreinstated strikes indicate, by signing a list before November 6, that they in fact desired reinstatement. Although the Union had made a blanket request on behalf of all the strikers, there could obviously be some individual strikers who, for one reason or another, did not wish to come back to work for the Respondent. The Respondent's request was simply a reasonable way to ascertain that fact. Further, those who did not sign the list by November 6 were not excluded from reinstatement. They were simply placed on the list below those who signed up on time. In short, this was simply another rational way to distinguish among the strikers.

Further, the fact that the list was posted inside the plant does not itself warrant a finding of illegality. My colleagues do not assert that the signup requirement imposed a hardship on employees or that the requirement imposed a *significant* obstacle to reinstatement. They

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Under *Laidlaw*, a striker has a right to return to his prestrike job, or the substantial equivalent, if and when such job is available. My dissent deals with these *Laidlaw* rights, and finds no violation. I agree with Member Schaumber that there is no violation as to non-*Laidlaw* positions, i.e., jobs that are not the same as the prestrike job or substantial equivalent. Thus, my dissent does not deal with that matter.

[2] The Respondent's conduct is not "inherently destructive" of employee rights. The employees who remained on strike until the end retained their *Laidlaw* rights, and they were not tainted with a permanent disadvantage (compare *NLRB v. Erie Resistor*, 373 U.S. 251 (1963)), where the award of superseniority to nonstrikers left the strikers with a permanent disadvantage.

[3] My colleagues say that I have turned the "vice of the system into a virtue." They are wrong on two counts. First, as discussed, there is no vice in the Respondent's system. Second, I do not say that the Respondent's choice of system was virtuous. I simply say that the Respondent, faced with more offers to return than available jobs, had a legitimate business reason for devising some rational basis for prioritizing offers. It chose a rational basis. As explained in *Great Dane Trailers*, the fact that there is "discrimination" does not establish the violation. The employer can come forward, as here, to show that there was a business justification for the conduct.

simply conjecture that the requirement posed "an obstacle." I would not engage in such speculation. The General Counsel has not met his burden of proof.

Finally, *Pirelli Cable Corp.*, 331 NLRB 1538 (2000), does not require a contrary result. In that case, the employer offered no justification at all for the requirement. See *Pirelli Cable Corp.*, 331 NLRB at 1539 fn.10. In addition, in that case, unlike here, a failure to sign the list cut off all recall rights.

MEMBER LIEBMAN, dissenting in part.

The Respondent violated the Act in more ways than the Board recognizes today. First, in addition to imposing an unlawful requirement on former strikers who were entitled to reinstatement, the Respondent, in communicating that requirement, violated Section 8(a)(1) by unlawfully threatening former strikers with loss of their reinstatement rights. The majority's failure to find that violation is puzzling. Second, the Respondent violated Section 8(a)(3) and (1) by filling other job vacancies through its job posting procedures in a manner which foreclosed consideration of the former strikers. Contrary to the majority's view, this violation implicates both the right of former strikers to equal, nondiscriminatory treatment in applying for new jobs, as well as the Respondent's separate obligation to reinstate them to their old jobs or substantially equivalent ones.[1]

1. The judge correctly held that the Respondent's October 23, 1998 letter to former strikers implicitly threatened that they would lose their recall rights if they failed to comply with the letter's (unlawful) signup instructions. A reasonable employee certainly could read the letter this way, and the steps that the Respondent took some time *after* sending the letter neither altered the likelihood that employees were coerced, nor amounted to a repudiation and cure of the Respondent's unlawful conduct.

The letter's critical paragraph states:

> If you are interested in reinstatement, it is important that you come to the plant as soon as possible, but no later than November 6, 1998, and sign the preferential rehire list because we plan to fill any available positions, not filled through the normal bid procedure, in the order that employees' names appear on the preferential rehire list as long as the employee has previously held the open job classification.

These words clearly imply that all former strikers covered by the Union's unconditional offer to return must take certain affirmative steps or lose their right to return to work. Why else would compliance with the instructions be "important" for those employees "interested in reinstatement"? Nothing in the letter suggests that a former striker could disregard these directions without losing the right to reinstatement. That the letter did not explicitly spell out the consequences of a failure to comply—as did the letter in *Charleston Nursing Center*, 257 NLRB 554 (1984), relied on by the judge and distinguished by the majority—does not mean that an employee could not reasonably infer those consequences.

The effect of the letter is comparable to cases in which an employer has communicated to an employee that he is being terminated, using language that is less than precise. In those cases, a finding of a discharge does not depend on the use of formal words of firing, but rather it is sufficient if the employer's words or actions would reasonably lead a person to believe he is being discharged. See e.g., *Grosvenor Resort*, 336 NLRB 613, 617–618 (2001), citing *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001). Whether the Respondent's message contained a threat is appropriately construed from the perspective of the former strikers to whom it was sent, and the unlawful message is established if the communication may reasonably be viewed as such. Id.[2]

My colleagues' reliance on the Respondent's post hoc conduct in order to avoid finding a violation is mistaken. At best, it was too little, too late. The only assurance the Respondent offered that no former strikers would forfeit their recall rights was directed not to employees, but rather to the Union—and then nearly 2 weeks after the letter was sent and on the same date as the letter's signup deadline. The Respondent never notified former strikers that their failure to comply with the letter's instructions would not jeopardize their recall rights. In fact, there is no evidence that the Respondent ever notified nonsigning former strikers that their names had been placed on the list. Thus, for at least the period between the time

[1] I agree with the findings of 8(a)(3) and (1) violations, outlined in the majority opinion, regarding the Respondent's denial of reinstatement to former strikers to their previous positions or to positions that are substantially equivalent and its discriminatory formulation of the recall list. As indicated in the majority opinion, I find it unnecessary to pass on the 8(a)(5) allegations, because the remedy would not be substantially affected by these additional findings.

[2] The majority asserts that my reliance on *Grosvenor Resorts*, supra, is misplaced, describing the letter in that case as containing a "clear message" of discharge. Regardless of the characterization of the words used in *Grosvenor Resorts*, the majority misses the fundamental principle for which that case stands; that is, an employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees. In this case, the Respondent's communication was ambiguous, susceptible to a coercive interpretation, and, from the perspective of its audience of former strikers hoping to return to work, created the type of uncertainty which is appropriately deemed unlawful.

the letter was received and the Respondent's communication to the Union—and, in any case, for so long as former strikers were not made aware that these names were added to the list—former strikers could reasonably have believed that failure to comply with the instructions would terminate their recall rights. The majority's emphasis on the "instructive" nature of the letter—addressing an unlawfully discriminatory recall procedure—overlooks the reinforcing coercive effect of the related 8(a)(3) and (1) violation.

Moreover, to the extent that the Respondent's later actions are at all material, they actually support finding a violation. The Respondent placed employees who did not sign the list at the end of the list, which materially diminished their job opportunities in a manner that was discriminatory. How this actual discrimination excuses the Respondent's earlier implied threat of discrimination is a mystery. Under these circumstances, it should be indisputable that the Respondent violated Section 8(a)(1).

2. The judge also correctly held that the Respondent's internal job posting procedures unlawfully discriminated against the former strikers with respect to new jobs, apart from their right to reinstatement. It is well established that:

> [S]trikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service. They are therefore entitled to return to those jobs or substantial equivalents if such positions become vacant, *and they are entitled to non-discriminatory treatment in their applications for other jobs*.

Rose Printing Co., 304 NLRB 1076, 1078 (1991) (emphasis added). The Board has applied this principle to find violations where unreinstated strikers have been effectively excluded from a job-bidding process because of their strike participation. See *Caterpillar, Inc.*, 321 NLRB 1130, 1131, 1142 (1996), vacated but precedential value affd. 332 NLRB 1116 (2000); *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1147–1148 (1994), enfd. 72 F.3d 780 (10th Cir. 1995).

This is such a case. The fact that vacancies were posted only inside the Respondent's facility meant that only those employees who were already working (i.e., replacements and crossovers) had the first—and, effectively, the only—notice that such specific openings existed. This resulted in replacements and crossovers having the unchallenged first opportunity to get the job, irrespective of whether there was an unrecalled former striker who was equally or better qualified. Only if no one successfully bid for a vacant position did the Respondent then resort to the preferential rehire list.

The majority decision correctly recognizes that this procedure violated the principles of *Laidlaw Corp.*, 171 NLRB 1366 (1968), insofar as the former strikers' old or substantially equivalent jobs were involved. As a practical matter, by using the posting procedure to fill all job openings at the facility after the strike ended, the Respondent discriminatorily divested former strikers of their *Laidlaw* rights. It is anomalous, therefore, for the majority to find that this posting procedure was legitimate.[3] In any event, as *Rose Printing* and subsequent cases make clear, entirely apart from *Laidlaw* requirements, the Respondent's job posting system also discriminatorily denied unreinstated former strikers the opportunity to apply for *other positions* for which they were entitled to be fairly considered. They are, simply, to be treated the same as they would have been had they not withheld their services.

In *Medite*, for example, following the conclusion of a strike, the employer filled job vacancies through postings. However, only full-time, active employees were permitted to bid on the jobs; former strikers who had offered unconditionally to return were not informed of the vacancies and ultimately were denied entry to the facility. Holding that the employer unlawfully prevented unreinstated former strikers from bidding on the posted vacancies, the Board held that the former strikers were "entitled to be free from discrimination when applying for other positions and, thus were entitled *to notice of job postings* and to an opportunity to bid on, and be fairly considered for, those posted jobs." 314 NLRB at 1148 (emphasis added). The Board went on to observe that

> [b]y effectively prohibiting the former strikers from bidding on the posted vacancies through failing to notify them of job postings and denying them access to the plant, the [employer] discriminated against them on the basis of their former-striker status. This is discriminatory treatment that violates the Act quite apart from any *Laidlaw* obligation.

Id. Under the circumstances here, the Respondent "effectively prohibited the former strikers from bidding" on posted jobs. While it did not bar them from the plant, it

[3] Not only did the posting procedure interfere with strikers' proper reinstatement to their former jobs, it also clearly limited their reinstatement opportunities to the lowest-level, nonposted, nonbid positions. By opening promotional opportunities to competitive bidding rather than referring to the recall list as a first source, only those job classifications that did not qualify for bidding, i.e., the lowest level positions, were offered first to former strikers still on the recall list. Thus, the Respondent's use of its posting procedure was but another means of effectively thwarting former strikers' *Laidlaw* rights.

never informed them that they were free to enter the plant, much less inform them (or even the Union) of specific postings.[4]

In turn, the judge correctly rejected the Respondent's defenses: (1) that it was simply adhering to the expired collective-bargaining agreement's posting procedure in not notifying nonworking employees of the job postings,[5] and (2) that it had been the Respondent's practice not to provide notice of postings to employees who were on vacation, sick leave, or on other types of absence. First, the expired bargaining agreement is silent on the issue of notice,[6] and the only arguably relevant article in the contract is contrary to the Respondent's poststrike practice concerning available positions.[7] More important, Board precedent makes clear that unreinstated former strikers may not be treated as if they are absent from the workplace for some reason other than their participation in the strike. *Caterpillar, Inc*., supra, 321 NLRB at 1131–1132. Thus, the employer must ensure that they are not disadvantaged as a direct result of their strike participation—here, by providing notice of job postings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to reinstate or offer to reinstate to their former or substantially equivalent positions of employment where such positions have become available or appropriately place on a preferential recall list the former striking employees on whose behalf the Union, District No. 90, International Association of Machinists & Aerospace Workers, AFL–CIO, a/w International Association of Machinists & Aerospace Workers, AFL–CIO, made an unconditional offer to return.

WE WILL NOT implement and maintain a recall system whereby we grant preference in terms and conditions of employment to (a) employees who abandoned the strike prior to the unconditional offer of the Union to return by placing these employees on a recall list ahead of all other employees, and (b) employees who physically came to the facility and signed the preferential recall list after the October 2, 1998 unconditional offer to return by placing them on the recall list ahead of employees who did not sign the list.

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

WE WILL within 14 days from the date of this Order, offer reinstatement to all former strikers who have been denied recall because of our unlawful discrimination.

WE WILL make whole former strikers for any loss of pay or benefits they suffered by reason of our unlawful discrimination against them, less any net interim earnings, plus interest.

STERLING FLUID SYSTEMS (USA), INC. D/B/A PEERLESS PUMP COMPANY

Joann C. Mages, Esq. for the General Counsel.
William E. Hester, Esq. (The Kulman Firm, P.C.), of New Orleans, Louisiana, for the Respondent.
Mr. Joe Cooper, of Westchester, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed March 1, 1999 by District No. 90 International Association of Machinists & Aerospace Workers, AFL–CIO, a/w International Association of Machinists & Aerospace Workers, AFL–CIO (Union), as amended on July 28 and August 6, 1999,

[4] The majority relies on an immaterial factual distinction in *Medite*: that the employer affirmatively denied strikers' access to the plant, as opposed to the Respondent here, who failed to provide former strikers the information they needed to effectively pursue job postings. In this case, there is no evidence that nonworking, former strikers knew or reasonably should have known that they were permitted to enter the Respondent's premises to check for job postings. And even with that knowledge, they still would have had no way to know when a vacancy was posted—short of going to the plant and checking the boards every 3 days, the limited time period for which the job postings remained open. Thus, in practical effect, the Respondent's withholding information about job vacancies from unreinstated strikers was the equivalent of denying them access.

[5] The Respondent's labor relations manager, Dagon, testified that vacancies were posted for a period of 3 days on three bulletin boards: one in the cafeteria, and one at each of the two time clocks.

[6] The expired bargaining agreement's in-plant posting procedure seems not to have contemplated the special considerations existing in a poststrike environment.

[7] Specifically, sec. 6.2 of the collective-bargaining agreement states, "open jobs will not be posted as vacancies so long as any employees have been laid off or transferred from such classification because of or during a layoff." This language would seem to undercut the Respondent's methods of dealing with vacancies in positions that had previously been filled by strikers awaiting recall.

a complaint was issued on August 31, 1999, alleging that Sterling Fluid Systems (USA), Inc. d/b/a Peerless Pump Company (Respondent) (A) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act), (1) by failing and refusing to reinstate or offer to reinstate to their former or substantially equivalent positions of employment or appropriately placed on a preferential recall list the employees for whom the Union made an unconditional offer on October 2, 1998, to return from a strike to work, (2) by granting preference in terms and conditions of employment to its employees who abandoned the strike prior to October 2, 1998 by placing them on the recall list ahead of all other employees, (3) by granting preference in terms and conditions of employment to its employees who physically came in and signed the preferential recall list after the October 2, 1998 unconditional offer to return by placing them on the recall list in the order in which they signed said list, (4) by posting jobs for bids since October 2, 1998 and filling such jobs without granting employees, who had engaged in the strike and who had not been recalled, the opportunity to bid on such job vacancies, and (B) violated Section 8(a)(1) and (5) of the Act (1) about October 2, 1998, by implementing the recall procedure described above without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct and (2) since about October 2, 1998, by letters to unit employees, bypassed the Union and dealt directly with its employees in the unit by requiring its employees who had engaged in the aforementioned strike to sign a recall list to indicate their interest in returning to work. At the hearing herein Counsel for General Counsel's motion to amend the complaint was granted over the objection of the Respondent. The amendment alleges that the Respondent violated Section 8(a)(1) of the Act about October 23, 1998 by letter to its employees threatening them with termination of their reinstatement rights if they did not come in and sign the recall list to indicate their interest in returning to work. The Respondent denies violating the Act.

A hearing was held in Indianapolis, Indiana on November 1 and 2, 1999. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and the Respondent,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Indianapolis, Indiana, has been engaged in the manufacture and distribution of industrial pumps. The complaint alleges, the Respondent admits and I find that at all times material herein, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

The Respondent and Counsel for General Counsel stipulated that on June 6, 1997 the Union called a strike; that unit employees initially participated in the strike; that during the course of the strike individual employees made unconditional offers to return to work and were reinstated by the Respondent; and that on September 23, 1997 the Respondent informed the Union that it had reached a full complement of employees who had been hired on a permanent basis.

By letter dated December 10, 1997, Joint Exhibit 1, the Respondent's attorney, William Hester III, advised Donald Stella, a representative of the Union, as here pertinent, as follows:

> In an earlier conversation, I mentioned to you that Peerless Pump would like to work out some type of agreement with the IAM on how employees, who have indicated a desire to return to work and who have signed the preferential hiring or recall list, will be returned to work. With that in mind, enclosed is a proposed agreement which we request that you execute on behalf of the IAM.

The enclosed proposed agreement reads as follows:

> PEERLESS PUMP COMPANY
>
> PROCEDURE FOR REINSTATING EMPLOYEES FROM PREFERENTIAL HIRING LIST
>
> When a position in the bargaining unit becomes available, and there are persons who have indicated an interest in returning to work, and who have signed the Preferential Hiring List, Peerless Pump Company (Company) will fill the available position as follows:
>
> 1. Company will follow the procedures set forth in Article VI of the collective bargaining agreement between the Company and the IAM dated February 20, 1993.
>
> 2. If no currently-working employee is selected for the position, the Company will consult the Preferential Hiring List. The Company will then contact the first employee on the list who has previously held the position and notify the employee of the available position. (1st employee means the employee who has signed the list on the earliest date.) If the 1st employee (or subsequent employees) indicates that he or she does not want the position or if the employee fails to report for work within seven (7) calendar days from the date of notice the employee will be disqualified and stricken from the list and will not be eligible for employment with the Company except as a new hire.
>
> 3. If the employee (or subsequent employees) is disqualified, Company will go down the list and contact each person who has previously held the position in the order the person signed the list until the position is filled.
>
> 4. If no person on the list had previously held the position or if all persons who previously held the position are

[1] The Respondent has filed a motion for leave to file reply memorandum in response to issues raised by Counsel for General Counsel's summarization of cases and the law in her brief. Counsel for General Counsel opposes indicating that Section 102.42 of the rules and Regulations of the National labor Relations Board clearly do not provide for the submission of reply memorandum to administrative law judges and the Respondent's motion does not set forth good cause for the filing of such a reply memorandum. The Board's Rules do not provide for reply briefs at this stage of the proceeding and Respondent has not shown any real need to depart from the customary practice. Accordingly, the Respondent's motion is denied.

disqualified, the Company may hire an employee from outside who is trained on the position or whose experience indicates that he or she could become productive on the position with minimal training.

Agreed to this _____ day of December, 1997.

For the Company,	For the Union,
Sterling Fluid Systems, USA, Inc. d/b/a Peerless Pump Company	International Association of Machinists and Aerospace Workers, Local 1917

By letter dated December 17, 1997, Joint Exhibit 2, Stella advised Hester as follows:

> The Union is unable at this time to respond to your proposal regarding the preferential hiring list. We are confused by your proposal, you have consistently told us that the language in the expired agreement was totally unacceptable, yet your proposal says the company will follow the procedures set forth in Article VI of the expired agreement.
>
> If this means that you are now willing to enter into good faith negotiations, then the union is willing to meet and negotiate.

By letter dated September 17, 1998, Joint Exhibit 3(b), Stella advised Thomas Dagon, who is Respondent's Labor Relations Manager, as follows:

> On behalf of the striking employees represented by [the Union] effective at 12:01 AM Monday, September 21, 1998, I am hereby making an unconditional offer to return to work. Therefore, based upon your position (that there is no work available for any of the striking employees) taken on September 23, 1997 and reaffirmed at the December 1997 unemployment hearing, all striking employees will be placed on a preferential list to be recalled as soon as openings are available. I have notified the striking employees that they will be contacted by the Company and notified when to return to work.
>
> The Union remains willing to meet for further negotiations and I would suggest that you contact me to set up dates to meet.

By letter dated October 1, 1998, joint Exhibit 3(a), Stella advised Dagon, as here pertinent, as follows:

> Enclosed you will find a copy of the letter I sent to you on September 17, 1998. As per our telephone conversation today, it is my understanding that you did not receive this letter in the mail.

By letter dated October 23, 1998, Joint Exhibit 4, Dagon advised the Respondent's employee Judith Aldridge as follows:

> We have been informed by the IAM that it has made an unconditional offer to return to work on behalf of all employees who went on strike in June of last year and who have not already signed our preferential rehire list.
>
> If you are interested in being reinstated at the earliest possible date, we need for you to come to the plant and sign the preferential rehire list. We also need for you to provide us with your most current home or mailing address and telephone number. We need you to sign the list and we need the requested information so that we can contact you have job openings in the future.
>
> If you are interested in reinstatement, it is important that you come to the plant as soon as possible, but no later than November 6, 1998, and sign the preferential rehire list because we plan to fill any available positions, not filled through the normal bid procedure, in the order that employees' names appear on the preferential rehire list as long as the employee has previously held the open job classification.
>
> In order to accommodate those employees who desire reinstatement, the preferential rehire list is available for signing in the Human Resources Department between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday.

The Respondent and Counsel for General Counsel stipulated that this same letter, with a different employee's name and address, went to all the former striking employees who were covered by the October 2, 1998 unconditional offer to return.

By letter dated October 23, 1998, Joint Exhibit 4, Dagon advised the Respondent's employee Judith Aldridge as follows:

> We have been informed by the IAM that it has made an unconditional offer to return to work on behalf of all employees who went on strike in June of last year and who have not already signed our preferential rehire list. If you are interested in being reinstated at the earliest possible date, we need for you to come to the plant and sign the preferential rehire list. We also need for you to provide us with your most current home or mailing address and telephone number. We need you to sign the list and we need the requested information so that we can contact you when we have job openings in the future.
>
> If you are interested in reinstatement, it is important that you come to the plant as soon as possible, but no later than November 6, 1998, and sign the preferential rehire list because we plan to fill any available positions, not filled through the normal bid procedure, in the order that employees' names appear on the preferential rehire list as long as the employee has previously held the open job classification.
>
> In order to accommodate those employees who desire reinstatement, the preferential rehire list is available for signing in the Human Resources Department between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday.

The Respondent and Counsel for General Counsel stipulated that this same letter, with a different employee's name and address, went to all the former striking employees who were covered by the October 2, 1998 unconditional offer to return.

By letter dated October 23, 1998, Joint Exhibit 5, Dagon advised the Union as follows: "We have sent the enclosed letters to all employees. Please review those letters and let us know if we have overlooked any eligible employee."

By letter dated November 3, 1998, Joint Exhibit 6, Stella advised Dagon, as here pertinent, as follows:

> On September 17, 1998 the undersigned made an unconditional offer to return to work for all striking employees. On October 23, 1998 you sent a letter to striking employees stating that if they were interested in reinstatement that they should come to the plant as soon as possible, but no later than November 6, 1998, to sign a preferential rehire list.
>
> This is to inform you that on behalf of all striking employees I made an unconditional offer to return to work for all striking employees. It is the Union's position that for some reason an employee does not sign your *preferential rehire list*, this does not . . . [relieve] you of your responsibility to *offer striking employees reinstatement as vacancies occur*. To make it very clear, it is your responsibility to *offer* former striking employees reinstatement to positions as those positions become available. [Emphasis added.]

By letter dated November 6, 1998, Joint Exhibit 7, Dagon advised Stella as follows: "This is to acknowledge receipt of your November 3, 1998 letter. We understand your position, and do not disagree with you."

When called by Counsel for General Counsel Dagon testified that there had been a number of collective-bargaining agreements between the Respondent and the Union and the most recent was effective from February 20, 1993 through June 6, 1997, General Counsel's Exhibit 2; that there were approximately 150 unit employees at the time of the strike; that in the past theRespondent has sent the Union seniority lists which are based on the hire date of the involved employees; that in the past the Union has also requested lists that show job classifications; that the lists provided the Union in the past were computer printouts; that General Counsel's Exhibit 3, as modified at the hearing herein, is a list of employees with seniority dates and classifications held just prior to the June 6, 1997 strike; that the Union never agreed to the Respondent's proposed procedure for reinstating employees from preferential hiring list; that General Counsel's Exhibit 5 is the list maintained by the Respondent which is titled "STRIKING EMPLOYEES MAKING AN UNCONDITIONAL OFFERTO RETURN TO WORK"; that the list contains the employees' signatures, their phone number and address and a date which indicates when the employees, including those who made an unconditional offer to return to work while the strike was still in progress, signed the list;[2] that the names of those employees who did not come in to sign the list by November 6, 1998 were written in at the bottom of the list by the Respondent; that he received a telephone call on October 1, 1998 from Stella asking him if he had received the unconditional offer to return to work on behalf of all the employees and he told Stella that he did not receive the letter; that Stella then faxed him a copy of the September letter on October 1, 1998 and he received a hard copy on October 2, 1998; that between 60 and 70 employees were covered by the Union's blanket unconditional offer to return to work; that after the Respondent received the Union's blanket unconditional offer to return to work on behalf of the remaining striking employees, the Respondent continued to use the recall procedure that was attached to its December 10, 1997 letter; that the Respondent did not notify the Union after its unconditional offer to return that this was the procedure that the Respondent would use; that the above-described October 23, 1998 letter was sent to each of the employees covered by the Union's unconditional offer to return; that Respondent wanted the returning employees to sign the Respondent's recall list because the Respondent planned to fill any available positions, not filled through the normal bid procedure, in the order that employees' names appeared on the preferential rehire list, as long as the employee had previously held the open job classification; that the Respondent did not have any discussion with the Union prior to sending the above-described October 23, 1998 letter to employees; that employees were not advised that if they did not come in by November 6, 1998 they would be placed on the list; that individuals who came in and signed the Respondent's list after the Union made its unconditional offer to return to work were placed on the list behind the individuals who crossed the picket line; that the Respondent placed the names of the employees who did not come in by November 6, 1998 to sign the Respondent's list at the bottom of the list; that when vacancies occurred they were filled by the first person who signed the list and had previously worked in the involved classification, and it did not matter whether the employee crossed the picket line or was covered by the Union's unconditional offer to return; that the employee's original hire date was not factored in any way; that after the Union's unconditional offer to return, the Respondent also filled positions through job posting systems; that the job posted is open for bid bargaining unit-wide; that a posted job is awarded to the most senior (based on the date of hire) qualified applicant; that the Respondent did not consult its preferential rehire list until after a job could not be filled through the job posting procedure; that the Respondent did not inform the Union or the employees on the preferential rehire list about job postings; that in the past when the Respondent has a layoff and subsequently had a vacancy the vacancy was not posted before the Respondent went to the layoff list; that General Counsel's Exhibit 5, which the Respondent gave to the Counsel for General Counsel in response to her subpoena, was current at the time of the hearing herein with respect to the returns to work; that General Counsel's Exhibit 6 is a list of recalls and rehires, including three new hires, since October 1, 1998; that General Counsel's Exhibit 7 is a seniority list which was run on October 25, 1999, which list contains the original date of hire and the classification as of the run date; that James Dennis was recalled on November 1, 1998 as an engine lathe operator, first class;[3] that Barry Andrews, who did not sign the Respondent's list but whose name was placed on the list by the Respondent, was an engine lathe operator at the time of the strike;[4] that the reason that Dennis was recalled to the engine lathe position over Andrews was because, even though Andrews has more

[2] The Respondent printed the names in the left margin of the page and in the right margin the Respondent indicated, where appropriate, what action was subsequently taken with respect to the named employee and the date of such action.

[3] Dennis signed the Respondent's recall list on April 6, 1998. His original hire date is October 10, 1994.

[4] According to GC Exh. 7, Andrews hire date is January 10, 1978.

seniority than Dennis, Dennis' name appears on the Respondent's list prior to Andrews' name; that Michael Watkins, who was originally hired October 11, 1993, held the position of engine lathe operator just before the strike but Dennis was chosen over Watkins for recall is because Dennis' name appears on the Respondent's list before Watkins', who signed the Respondent's list on November 4, 1998; that the Respondent placed the names of the people who did not come in to sign its list at the end of its list after the signatures dated November 6, 1998, "in seniority order"; that when the Respondent recalled Dennis on November 1, 1998 it did not even consider Andrews or Watkins as being eligible for the recall since neither one was on the Respondent's list at the time; that Michael Jones, who signed the Respondent's list on September 13, 1998 and who has an original hire date of September 12, 1994, was recalled on October 26, 1998 to the position of vertical chucker, first class; that Willie Pink ton, who has an original hire date of August 16, 1993 but who signed the Respondent's list on November 6, 1998, held the classification of NC vertical chucker first class prior to the strike; that Jones was recalled over Pink ton merely because Jones resigned the Respondent's list prior to Pink ton; that when Jones was recalled on October 26, 1998 Pink ton had not signed the list so that the Respondent would not have even considered him; that prior to the strike Jones worked on the horizontal boring mill but he had previously held the position of NC vertical chucker; that Patrick Kavanaugh held the position of NC vertical chucker first class just prior to the strike, he has an original hire date of October 27, 1993 but his name was placed at the end of the Respondent's list because he did not come in to sign the list; that Jones was recalled over Kavanaugh because Jones signed the list before Kavanaugh;[5] that Jeff Speziale, who signed the Respondent's list on September 15, 1998 and who has an original hire date of November 13, 1989, was recalled on November 9, 1999 as a horizontal turret lathe or boring mill operator first class; that just prior to the strike Speziale held the position of storage utility but previously he held the classification of horizontal boring mill; that just prior to the strike Edward Byrd, who has an original hire date of November 16, 1976 but who signed the Respondent's list on October 26, 1998, held the position of horizontal boring mill operator; that Speziale was recalled over Byrd and Paul Snell, who has an original hire date of November 12, 1973 and who was a horizontal boring operator first class prior to the strike but signed the Respondent's list on October 29, 1998, merely because Speziale had signed the list before Byrd and Snell, both of whom were covered by the Union's unconditional offer to return;[6] that Randy Appleby, who has an original hire date of April 2, 1979 and who signed the Respondent's list on October 26, 1998, was recalled on November 2, 1998 as an engine lathe operator first class over Barry Andrews, who has an original hire date of January 10, 1978 but who did not sign the Respondent's list; that Mary Hurt (formerly Tinnen), who has an original hire date of June 22, 1989, was recalled on December 7, 1998 to a stores utility position over two other employees who also held that position prior to the strike, namely Mary Vatter, who has an original hire date of August 10, 1988 and Ricky Riordan, who has an original hire date of October 30, 1978, merely because Hurt signed the Respondent's list immediately before Vatter and Riordan did not sign the Respondent's list;[7] that vacancies were filled through postings, General Counsel's Exhibit 8, instead of recalling employees who held the positions before the strike and were covered by the Union's unconditional offer to return;[8] that returning strikers waiting to be recalled were not notified of the job postings;[9] that if the Respondent was unable to fill the vacancy by posting the job or with a new hire then a former striker would be notified about the vacancy after the 3-day posting period expired; and that the Respondent does not notify employees on vacation, sick leave, or leave of absence about job postings.

When called by the Respondent, Dagon testified that Section 11.5(a) of the collective-bargaining agreement which expired on June 6, 1997, General Counsel's Exhibit 2, reads as follows:

> When it becomes necessary for employees to be laid off for an indefinite period because of lack of work, senior employees may bump laterally or down in the same job family or bump into any classification which the employee has previously permanently held as indicated in the employee's personnel record. Any senior employee may bump a junior employee in Grades 1, 2, 3, or 4.

Dagon further testified that he assumed that this provision had been in collective-bargaining agreements between the Respondent and the Union for many years; that the Respondent researched the method to be used in recalling employees and it "found little or no information out there that could give . . . [it] guidance to do that"; that the Respondent found out that the Union did have the authority to make a blanket offer; that the Respondent has not used any procedure or factor, other than the timing of when a former striker showed interest in being reinstated and signed the list, in recalling those employees; that those employees who did not come in and sign the Respondent's list were placed on the list by the Respondent "*in seniority order*, after the name of the last person who did come in and sign the list" (emphasis added); and that the Respondent has not prohibited any former striking employees from coming into the facility and checking the bulletin boards for postings. On cross-examination Dagon testified that while the Respon-

[5] Cavanaugh's name was not even on the Respondent's list on October 26, 1998 when Jones was recalled.

[6] Counsel for General Counsel indicates that the above is meant to be representative or an example of the situations which have occurred.

[7] Subsequently, on October 11, 1999, Vatter was recalled over Riordan because she signed the list and he did not and was, therefore, placed at the end of the list by the Respondent.

[8] Counsel for General Counsel had the witness review examples of situations where striking employees were affected by job postings and she indicated that the review was not meant to be exhaustive.

[9] According to GC Exh. 8(f) a vacancy for a VTL operator large was posted November 6, 1998 and D. Whitaker was given the position. Dagon testified that Whitaker was hired during the strike; that George Gilbertson held the position of VTL operator large prior to the strike and that Gilbertson was not notified about the opening for VTL large. In response to a question of the Respondent's attorney, Dagon testified that if Gilbertson had come to the plant and signed the involved bid sheet, he would have received the position covered by GC Exh. 8(f).

dent was not tied to the recall procedure it was using and the Respondent was open to discussion about it, the Respondent did not inform the Union of this after the unconditional offer to return until September 1999 after the complaint had issued herein; that the Respondent never notified the former strikers who appeared on the Respondent's list that they could come in and look at the job postings; and that it never notified the Union that former strikers could come in and look at the job postings. On redirect Dagon testified that after the Union's unconditional offer to return the only thing that the Respondent received from the Union indicating displeasure with the manner in which employees were being recalled was when the Respondent received a copy of the charge the Union filed herein in early March 1999; and that the Union never indicated that it wanted to have the names placed on the preferential reinstatement list in terms of seniority.

Stella testified that he was assigned to deal with the Respondent in September 1997 after the strike had been in progress for about 3 months; that he attended two meetings with the Respondent in September 1997 and one in October 1997; that at the second meeting, held on September 23, 1997, Hester indicated that all of the striking employees had been permanently replaced and that if the strike were to end that day there would be no work available for any of the striking employees; that at an unemployment hearing in December 1997 Hester told him that he was going to send him a proposal about recalling some of the employees who crossed the picket line; that he subsequently received Joint Exhibit 1 and he responded with Joint Exhibit 2; that the Union had not made an unconditional offer to return to work in December 1997 and he was not interested in working out any type of procedure for the recalling of "scabs"; that he did not receive a response to his reply; that he had heard that the Respondent indicated that it had not received his unconditional offer to return so he telephoned Dagon and sent him a copy of the offer; that he did not have any knowledge of what recall procedure the Respondent was going to use for those covered by the unconditional offer to return; that the Union did receive copies of the October 23, 1998 letter that the Respondent sent to the employees covered by the Union's unconditional offer to return; that when the Respondent started recalling employees there did not seem to be any order to the way they were doing it; that he wrote to the Respondent indicating that all employees covered by the Union's offer to return should be included on the recall list whether or not they signed the list and the Respondent wrote back in agreement; that after a few people had been recalled and the Union received information which it requested about the employees who were working at the plant, there did not seem to be any consistency to the approach that the Respondent was taking and the Union filed a charge with the National Labor Relations Board (Board); that the Union was never notified about job postings by the Respondent; and that in April or May 1999 he was moved from Indianapolis into another area of responsibility. On cross-examination Stella testified that the Union did not include with its unconditional offer to return a list of the employees who were covered by the offer; that the Union did not communicate to the Respondent a method by which the names of the striking employees who were returning, should be placed on the list; that he had never seen General Counsel's Exhibit 5 before he testified herein; that the Union did not receive copies of postings in 1997 and the expired collective-bargaining agreement did not require that the Union receive notice of postings; that there is nothing in the collective-bargaining agreement that requires the Respondent to do anything with respect to the notices, other than to post them for 3 working days on three boards in the plant; that to the best of his knowledge prior to the strike in 1997 the Respondent did not send notices to employees who were laid off, or on medical leaves of absence, or on vacation; that under the expired collective-bargaining agreement employees are recalled from layoff by seniority and ability in that the employees are laid off by seniority and they are recalled in reverse order; and that he believed that Dagon in January or February 1999, in response to an inquiry of the Union, indicated that the striking employees would be recalled by seniority when he supplied a list of current employees and indicated that the Respondent was operating under the terms and conditions of the expired collective-bargaining agreement. On redirect Stella testified that the Union never saw the order which employees were placed on the preferential rehire list; and that Joint Exhibit 4, the October 23, 1998 letter to employees, would have been the first time that the Union was informed as to how the Respondent was treating the employees covered by the Union's unconditional offer to return.

John Soladine, who has been an employee of the Respondent since 1962 and is the President of the Union Local, testified that his classification at the time of the strike was tool and gauge lab inspector; that he has held other classifications while working for the Respondent, namely, third class assembler, fork lift operator, second class engine lathe, second class inspection, first class inspection, tool and gauge lab inspector, and burr band and impeller filer; that he offered to return from the strike with the Union's unconditional offer to return; that about November 2, 1998 he received a letter from the Respondent with respect to coming into the plant and signing a preferential recall list; that he went to the plant and signed the list; and that he is first on the seniority list and he has not received notification from the Respondent about job vacancies or about job postings. On cross-examination Soladine testified that, as indicated by General Counsel's Exhibit 5, he signed the Respondent's preferential recall list on November 2, 1998.

Analysis

Paragraphs 7 (a), (b), and (c) of the complaint allege that Respondent violated Section 8(a)(1) and (5) of the Act about October 2, 1998, by implementing the recall procedure described above, which relates to wages, hours and other terms and conditions of employment of the involved Unit and is a mandatory subject for the purposes of collective bargaining, without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

On brief Counsel for General Counsel contends that the implementation of a recall procedure affecting the return of unit employees from strike is a mandatory subject of bargaining, *Food Service Co*., 202 NLRB 790, 804; that the Union's first notice of what procedure would be used to recall the former striking employees covered by the Union's unconditional offer

to return occurred on or about October 23, 1998, when the Respondent sent the Union copies of letters the Respondent had sent to the individual employees; that while the Respondent may argue that any violation concerning the use of the recall procedure for the strikers who returned after the Union's unconditional offer to return is time-barred by Section 10(b) of the Act, the Board has found that the 10(b) period will commence when a final and unequivocal adverse employment decision is made by the respondent and communicated to the employee and/or union, *Manitowoc Engineering, Co*., 291 NLRB 915 (1988); that the Respondent's December 10, 1997 proposal affected only those employees who crossed the picket line and made individual offers to return; that any violation of the Act would not be ripe until the Union's unconditional offer to return at the end of the strike and the Respondent's reaction and implementation of a recall procedure for those returning strikers; that while the Respondent may argue that the Union waived its right to bargain over the procedure by not requesting bargaining after the unconditional offer to return, the Board had found that an employer who is going to implement a term or condition of employment must give notice to the union with sufficient time to allow a reasonable opportunity to bargain, and if such notice is not given sufficiently prior to implementation, then it is nothing more than notice of a fait accompli, *Century Wine & Spirits*, 304 NLRB 338, 347 (1991); that Respondent did not inform the Union that the Respondent was open to discuss a reasonable method for recalling the former strikers until September 1999, almost a full year after the Union's unconditional offer to return and following the issuance of complaint in this case; and that by the time the Union found out about the procedure the Respondent had already made and implemented its decision to use the procedure and, therefore, any failure by the Union to request bargaining over the recall procedure used after the unconditional offer to return by the Union is excused as the Union was presented with a fait accompli.

The Respondent on brief argues that it implemented its "rehire" policy in December 1997 only after the Union refused to bargain over the policy and, therefore, the Union waived bargaining on the policy and the Respondent did not violate Section 8(a)(5) of the Act; that after the termination of the strike, the Respondent reviewed its legal duties and options, but it did not implement any new "rehire" policy after the Union made the offer for all remaining strikers to return to work; that the Respondent continued the same policy which the Union had not objected to and which the Union had refused to bargain over in December 1997; that the proposed and implemented policy contained no language designating it as an interim policy which could have led the Union to believe that the Respondent planned to alter the "rehire" policy if and when the Union terminated the strike; that absent antiunion animus, an employer may exercise business judgment in determining the order of "rehiring" former strikers; and that the Respondent has made every effort to bargain and work with the Union and the Respondent has exceeded its statutory duty to "rehire" strikers to substantially-equivalent employment in that it has offered strikers any position for which they were qualified.

In my opinion, the Respondent has violated the Act as alleged in paragraphs 7(a), (b), and (c) of the complaint. Section 2(3) of the Act indicates as follows:

> (3) The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

The law requires that an employer reinstate or recall former economic strikers to the positions they held when they went on strike or substantially equivalent positions when such positions are open after the strikers have made an unconditional offer to return. It is noted that the Respondent's December 1997 proposal indicates, in part, as follows:

> 2. If no currently-working employee is selected for the position, the Company will consult the Preferential Hiring List. The Company will then contact the first employee on the list who has previously held the position and notify the employee of the available position. (1st employee' means the employee who has signed the list on the earliest date.) If the 1st employee (or subsequent employees) indicates that he or she does not want the position or if the employee fails to report for work within seven (7) calendar days from the date of notice the employee will be disqualified and stricken from the list and will not be eligible for employment with the Company except as a new hire.

This approach would be unlawful to the extent it speaks to those situations where an employee has been with the Respondent for a while and has worked his or her way up so that while he or she may sometime in the past have "previously held the position" with the Respondent, that position was not the position he or she held when the strike commenced and the previously held position is not substantially equivalent to the position that he or she held when the strike commenced. An employer cannot lawfully extinguish the reinstatement rights of an employee because that employee refuses to accept an offer of the Respondent for a job which is not the job which the employee held when the strike commenced or a substantially equivalent position. As noted above, the December 1997 proposal also reads, in part, as follows: "Company will follow the procedures set forth in Article VI of the collective-bargaining agreement between the Company and the IAM dated February 20, 1993." As can be seen, no specific section in article VI is cited by the Respondent in its proposal. Article, in part, reads as follows:

> ARTICLE VI
> Promotions and Transfers
>
> 6.1 The promotion and transferring of employees is the sole responsibility of the Employer subject to the following provisions.
>
> 6.2 It is further understood and agreed that open jobs will not be posted as vacancies so long as any employees have been laid off or transferred from such classification because of or during a layoff.
>
> 6.3 To effectuate the policy, the following shall apply:

> 6.4 Job classification openings will be offered to the most senior qualified associate within the job family. If filled, the position opened by the transfer will be offered to the most senior qualified associate within the job family and so on until an opening within the job family remains vacant. The vacant job will then be subject to Article [VI.]
>
> 6.5. When eligible employees have the opportunity to bid on a posted job, the job will be awarded to the most senior qualified employee. . . . In the event that the Company is to depart from seniority in awarding the job because of qualifications, prior to doing so it will notify the Chairman of the Grievance Committee or his/her designee, and discuss the reasons and the qualifications of the employee in question.
>
> 6.5 Whenever vacancies occur in labor grade four (4) through twelve (12) the Employer shall post on the job posting bulletin board for a period of three (3) working days a list of the open job classifications.

The Respondent points out that the Union did not sign off on the proposal the Respondent submitted to the Union while the employees were out on strike. With respect to timing, in December 1997 the proposal could at that time only apply to employees who had crossed the picket line. The proposal does nonspecifically indicate that it would apply to those employees who would be covered by the Union's unconditional offer to return when and if such offer was made. The Union did not fail or refuse to bargain in December 1997. Rather, as indicated in its above-described letter of December 17, 1997 to the Respondent, it indicated as follows:

> The Union is unable at this time to respond to your proposal regarding the preferential hiring list. We are confused by your proposal, you have consistently told us that the language in the expired agreement was totally unacceptable, yet your proposal says the company will follow the procedures set forth in Article VI of the expired agreement.
>
> If this means that you are now willing to enter into good faith negotiations, then the union is willing to meet and negotiate.

The Union's letter placed the "ball back on the Respondent's side of the court" and the question is then what did Respondent do with it regarding addressing the expressed concerns of the Union. The answer in a word is nothing. Then by its own admission when the Union made the unconditional offer to return to work on behalf of the involved employees the Respondent analyzed the situation to determine what approach to take with respect to their placed employees, and the Respondent decided to do nothing other than to continue the approach it had been taking. But the Union had never agreed to the Respondent's original proposal, the Respondent did not give the Union clear notice what procedure it implemented regarding employees who crossed the picket line after the Union questioned the Respondent's December 1997 proposal, and there was no indication in the December 1997 proposal that the Respondent was going to require returning employees to come into the plant and sign the Respondent's list by a certain date or lose their reinstatement rights.

As indicated above, the implementation of a recall procedure affecting the return of unit employees is a mandatory subject of bargaining. The Board has held that the imposition of notification and registration requirements on former strikers constitutes a mandatory subject of bargaining. Food Service Company, supra. When it sent the Union the above-described letters on or about October 23, 1998, the Respondent presented the Union with a fait accompli. The Respondent did not even give the Union a chance to request bargaining before mailing the October 23, 1998 letter to the employees covered by the Union's unconditional offer to return. And the Respondent did not indicate to the Union that it was willing to discuss a reasonable method for recalling strikers until after the issuance of the complaint in this case. For the reasons set forth above, there was no waiver regarding the December 1997 proposal. And as pointed out by Counsel for General Counsel, the 10(b) period didn't commence until the Respondent's October 23, 1998 letter to employees for at that time there had been an unconditional offer to return by the Union on behalf of the employees and the Respondent first indicated the approach that it was going to take with respect to reinstating the employees covered by the Union's unconditional offer to return, advising the employees that they would have to come into the plant to sign the Respondent's list and that there would be a cut off date for the signing of the Respondent's list.

Paragraph 5(c) of the complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act since about October 2, 1998, in that it failed and refused to reinstate or offer to reinstate to their former or substantially equivalent positions of employment or appropriately place on a preferential recall list the employees for whom the Union by letter about October 2,1998 made an unconditional offer to return from a strike to their former or substantially equivalent positions of employment; and that Respondent's conduct is inherently destructive of the rights guaranteed employees by Section 7 of the Act. And paragraph 5(d) of the complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act since about October 2, 1998, by implementing and maintaining a recall system whereby: (i) Respondent granted preference in terms and conditions of employment to its employees who abandoned the involved strike prior to October 2, 1998 by placing them on the recall list ahead of all other employees; and (ii) Respondent granted preference in terms and conditions of employment to its employees who physically came in and signed the preferential recall list after the October 2, 1998 unconditional offer to return by placing them on the recall list in the order in which they signed said list; and that the conduct of Respondent is inherently destructive of the rights guaranteed employees by Section 7 of the Act.

On brief Counsel for General Counsel contends that while under *Laidlaw Corp.*, 171 NLRB 1366 (1968), the Respondent is not obligated to use one particular method of recalling former strikers over another method, the method chosen by the Respondent must not be unlawfully motivated or inherently destructive of employee rights; that as pointed out by the United States Supreme Court in NLRB *v. Great Dane Trailers*, 388 U.S. 26 (1967), the Board could find an unfair labor practice absent any proof of an antiunion motivation if the discrimina-

tory conduct was 'inherently destructive' of important employee rights, and if the effects of the Respondent's conduct on employee rights is' comparatively slight,' an antiunion motivation must be shown if the employer demonstrates a legitimate and substantial business justification for the conduct; that Respondent's conduct in implementing and maintaining its recall procedure was inherently destructive of employees' right to strike under Section 7 of the Act; that the Respondent has not demonstrated any substantial or business justification for using such a recall procedure; that the recall procedure used by the Respondent here following the end of the strike and the October 2, 1998 unconditional offer to return clearly grants preferential treatment to crossovers (those employees who crossed the picket line) and discriminates against those former strikers covered by the Union's unconditional offer to return; that while following the October 2, 1998 unconditional offer to return all former strikers were on equal footing and should have been treated accordingly, the Respondent continued to maintain its list in basically 'three categories of people,' namely (1) individuals who crossed the picket line and made individual offers to return, (2) former strikers covered by the October 2, 1998 unconditional offer to return who actually signed the Respondent's list, and (3) former strikers covered by the October 2, 1998 unconditional offer to return who did not go to the Respondent's facility and sign the Respondent's list; that preferential treatment, essentially a reward for abandoning the strike, has been found to violate Section 8(a)(1) and (3) of the Act, *Erie Resistor Corp*, 373 U.S. 221 (1963); that as of the Union's unconditional offer of October 2, 1998 all former strikers should have been placed on a preferential recall list income nondiscriminatory manner; and that based on the Respondent's failure to establish a legitimate and substantial business justification for its implementation and maintenance of its procedure, the procedure should be found to be inherently destructive of the rights guaranteed employees by Section 7 of the Act in violation of Section 8(a)(1) and (3) of the Act.

The Respondent on brief argues that the court in *NLRB v. American Olean Tile Co*., 826 F.2d 1496 (6th Cir. 1987), concluded that a chronological rehire policy, implemented during a strike and continued after a union abandoned the strike, did not violate the Act, nor was it inherently destructive of employee rights;[10] that no evidence of any animosity toward the Union of inherently destructive acts was presented at the hearing; and that to the contrary all evidence showed that the Respondent addressed legitimate business concerns in a lawful manner. In my opinion the Respondent violated the Act as alleged in paragraphs 5(c) and (d) of the complaint. As noted above, the Respondent violated the Act by unilaterally requiring that employees come to the plant and sign the Respondent's list and close by a specified date, without first giving the Union an opportunity to bargain over this matter. Consequently any preference that the Respondent gave to those who complied with an unlawful requirement was not justified. The Respondent claims that the reason it took the approach it did regarding its list was because it wanted to know who was still interested and available and it wanted to get the former strikers' most current home or mailing address and telephone number. Yet apparently the Respondent had information which enabled it to mail its October 23, 1998 letter to the former strikers who were covered by the Union's unconditional offer to return. Administrative convenience is insufficient justification to shift the burden of notification to the employee as a prerequisite for an employee to preserve his or her statutory recall rights. The Respondent's list enabled it to reward those employees who abandoned the ongoing strike and crossed the picket line. The Respondent did not show any legitimate and substantial business justification for giving preference to the strike "crossovers" over the former strikers covered by the Union's unconditional offer to return. As part and parcel of its plan to show that it would reward those who abandoned the Union, the Respondent abided by the terms of the plan and at the same time also gave preference to those of the former strikers who were covered by the Union's unconditional offer to return and who were the first to comply with its unlawful requirement to come to the plant and sign its list by specified date. Such conduct on the part of the Respondent was inherently destructive of the rights guaranteed employees by Section 7 of the Act. By unlawfully requiring initially that the employees covered by the Union's unconditional offer to return come to the plant and sign the Respondent's list by a specified date, the Respondent was, in effect, failing and refusing to reinstate or offer to reinstate them to their former or substantially equivalent positions of employment or appropriately place them on a preferential recall list. This conduct was inherently destructive of the rights guaranteed employees by Section 7 of the Act.[11] The final determination as to the reinstatement of individual employees and possible backpay liability is properly left to compliance.

Paragraph 5(e) of the complaint alleges that Respondent violated Section 8(a) (1) and (3) of the Act since about October 2, 1998, by posting jobs for bids since about October 2, 1998 and filling such jobs without granting employees, who had engaged in the strike and who had not been recalled, the opportunity to bid on such job vacancies; and that the conduct of Respondent is inherently destructive of the rights guaranteed employees by Section 7 of the Act.

On brief Counsel for General Counsel contends that Respondent's method of filling vacant positions through the internal job posting system and by not informing unreinstated strikers of the job openings for bid violates the Act in three respects, namely, (1) the evidence presented at the hearing indicates that

[10] As pointed out by the Respondent, the court indicated at 1501–1502, among other things, "[w]hile the list created a preference based on the time when an employee made an unconditional offer to return, it made no distinction between those who offered during the strike and those who did so after it ended." Here there would be a distinction in that a crossover would receive a job over a former striker who remained out until the Union made an unconditional offer to return, and the distinction would be based solely on the fact that the crossover was willing to abandon the strike, cross the picket line, and abandon the Union.

[11] While I do not believe that a finding of antiunion motivation is necessary here, the Respondent's preference given to those who abandoned the strike, crossed the picket line, and abandoned the Union at the expense of those who stayed on strike until the Union made the unconditional offer to return would, in my opinion, be sufficient if motive was material here.

the Respondent hired new employees for at least two positions posted after the Union's unconditional offer to return which had previously been held by former strikers eligible for recall,[12] (2) record evidence establishes that the Respondent has had vacancies arise in positions previously held by strikers awaiting reinstatement and had filled them by first offering them to employees on the existing payroll rather than strikers awaiting recall which results in preferring strike replacements to strikers awaiting recall in violation of the Act, *MCC Pacific Valves*, 244 NLRB 931 (1978),[13] and (3) by denying unreinstated strikers the opportunity to bid on any of the jobs posted internally; that the Board has held that not only are strikers who have made unconditional offers to return entitled to their former or substantially equivalent jobs, but they are also entitled to nondiscriminatory treatment in their applications for other jobs, *Rose Printing Co*., 304 NLRB 1076, 1078 (1991), and they are entitled to notice of job postings and an opportunity to bid on such posting, *Medite of New Mexico*, Inc., 314 NLRB 1145 (1994); that the mere fact that the Respondent did not prevent the individuals access to the plant does not relieve the Respondent of its obligation to see that the former strikers had notice of such job postings or even notice that they could bid on job postings and be given fair consideration; that while Dagon testified that contact was never made with employees on vacation, sick leave or leave of absence regarding such postings, a similar argument was discussed and rejected in *Caterpillar, Inc*., 321 NLRB 1130, at 1132 (1996) where the majority, in discussing the dissent's contention that no discrimination could be found because the former strikers were treated like employee son vacation or sick leave, rejected such contention as faulty since an "absence from the workplace due to vacation or illness does not rise to the level of a lawful strike, participation in which is protected by Section 7 and Section 13 of the Act.

The Respondent on brief argues that it has a continuing legal obligation to comply with the job posting procedures of the expired collective-bargaining agreement; that following any other job posting procedure would be a unilateral change by the Respondent and would undoubtedly place the Respondent in violation of the Act; that *Mediate*, supra, is distinguishable omits facts since there the employees were forbidden access to the plant; that *Rose Printing*, supra, fully supports the Respondent's actions; and that the adoption of the General Counsel's position that the former strikers were entitled to notice, not provided to their off-duty employees, would grant them a special preference not won at the bargaining table and would be a General Counsel-dictated unilateral change in a term and condition of an expired collective-bargaining agreement

In my opinion the Respondent violated the Act as alleged in paragraph 5(e) of the complaint. While, as noted above, the Respondent argues that requiring it to give notice of job postings to former strikers waiting to be reinstated would result in a unilateral modification in the expired collective-bargaining agreement, the article of the expired collective-bargaining agreement dealing with posting jobs for bid does not speak to notice or the lack thereof to former strikers waiting to be recalled or reinstated. And the involved Article does not speak to there being no obligation to give employees on vacation, sick leave or leave of absence notice of job postings. According to Dagon's testimony this is apparently the Respondent's practice and, therefore, the Respondent should not be required to give employees on a preferential recall list notice of job postings. But as the Board indicated in *Caterpillar, Inc*., supra, at 1132

> Finally, contrary to the dissent's apparent position, the "discrimination" prohibited by Section 8(a) (3) is not limited simply to distinctions between strikers and nonstrikers. Section 8(a) (3) 'discrimination' includes the difference between conduct that takes place because of a strike and conduct that would not have taken place in the absence of a strike. See *Industrial Workers A/W Local 289 v. NLRB*, 476 F.2d 868, 877 (D.C. Cir. 1973; *NLRB v. Jemco*, 465 F.2d 1148, 1152 (6th Cir. 1972) cert denied 409 U.S. 1109 (1973). The dissent ignores the fact that had the unreinstated strikers not engaged in a protected concerted activity; they would have been entitled to bid on the posted job. The dissent's contention that there was no "discrimination" because the strikers were treated just like employees on vacation or sick leave (assuming arguendo this to be true) is faulty because an absence from the workplace due to vacation or illness does not rise to the level of a lawful strike, participation in which is protected by Section 7 and Section 13 of the National Labor Relations Act.
>
> In sum we find that by denying the unreinstated strikers the right to bid on jobs posted after their unconditional offer to return to work, the Respondent plainly discouraged "a union activity protected by Section 7 [and] also discouraged and discriminate[d] against membership in a labor organization" in violation of Section 8(a)(3) and (1) of the Act. *Industrial Workers*, supra at 877.

And in *Medite of New Mexico, Inc.,* 314 NLRB 1145, 1148 (1994) the Board indicated as follows:

> Applying these principles to the facts in this case, it is clear that the Respondent's failure to allow the former strikers to bid on the vacancies posted for bid—a right extended to all other of its employees—constituted a form of discrimination against the former strikers. Although the former strikers were not entitled to reinstatement to the jobs they held prior to the strike because there were no vacancies, they were entitled to be free from discrimination when applying for other positions and, thus, were entitled

[12] Counsel for the general counsel contends that while the Respondent may try to argue that these individuals were hired on September 29, 1998 prior to the Union's unconditional offer to return, this argument, however, demonstrates the Respondent's insincerity regarding its use of the posting procedure for (a) if the Respondent had truly hired these two individuals for these two positions it would have no need to post the positions as vacant on October 7, 1998, and (b) Dagon admitted that if anyone had successfully bid for the position posted the new hire would have been let go. Counsel for General Counsel contends that neither of the alleged two new hires could have possibly been hired on September 29, 1998 and, therefore, the Respondent's actions are in clear violation of Sec. 8(a)(1) and (3) of the Act.

[13] Counsel for general counsel contends that as a result of the Respondent waiting for the chain reaction effect of the bidding procedure to run its course, unreinstated strikers were only recalled to the lowest job classifications and less desirable jobs.

to notice of job postings and to an opportunity to bid on, and be fairly considered for, those posted jobs. For these reasons, we find that the Respondent violated Section 8(a)(3) of the Act by preventing the Charging Party from bidding on posted vacancies.

The Respondent contends that by accepting this theory the Board is creating a new duty for employers, separate and distinct from the duty imposed by *Laidlaw*. We agree that the statutory obligation at issue here is different from the *Laidlaw* obligation, but we do not agree that it is new. This is not a matter of automatic reinstatement entitlement; it is a matter of being free from that discrimination in hire or tenure of employment which is expressly prohibited by Section 8(a)(3) and (1) of the Act. The Respondent surely would not argue that it would be proceeding lawfully under the Act if it announced after a strike that it was designating certain jobs as positions to which only those who had not engaged in the strike could aspire. The Respondent has engaged in analogous conduct here. By effectively prohibiting the former strikers from bidding on the posted vacancies through failing to notify them of job postings and denying them access to the plant, the Respondent discriminated against them on the basis of their former strike status. This is discriminatory treatment that violates the Act quite apart from any *Laidlaw* obligation. *Rose Printing*, supra, 304 NLRB at 1078. [Footnote omitted.]

As can be seen, the obligation to not discriminate against former strikers on the recall list is a statutory one which places these individuals in a different category than employees on vacation iron sick leave. Requiring that the Respondent here abide by that obligation does not amount to a unilateral modification of unexpired collective-bargaining agreement. Additionally, the Respondent's argument that it did not deny former strikers on the recall list access to the plant and, therefore, *Medite of New Mexico*, supra, is distinguishable on its facts is misplaced in that the Respondent admittedly did not give the former strikers on the recall list notice of the job postings and other than indicating in its above-described October 23, 1998 letter to former strikers that "we need for you to come to the plant and sign . . . no later than November 6, 1998 . . . the preferential rehire list [which] is available for signing in the Human Resources Department. . . .", the Respondent did not notify the former strikers on the recall list that they could have access to the plant to check job postings and could bid on the vacant jobs which were posted. The Respondent's conduct in this regard is inherently destructive of the rights guaranteed employees by Section 7 of the Act in violation of Section 8(a)(1) and (3) of the Act. Under the circumstances extant here, the final determination as to the reinstatement of individual employees and possible backpay liability is properly left to compliance.

Paragraph 8 of the amended complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act since about October 23, 1998, by letters to its employees threatening them with termination of their reinstatement rights if they do not come in and sign the recall list to indicate their interest in returning to work.

On brief counsel for the General Counsel contends that the Respondent's October 23, 1998 letters to the former strikers covered by the Union's unconditional offer to return threatened these employees with the termination of their reinstatement rights in violation of Section 8(a)(1) of the Act; that while an employer can request former economic strikers to provide current information regarding their telephone number, address and interest in reinstatement, an employer cannot require the former strikers to respond to such a request or risk losing their reinstatement rights, *Charleston Nursing Center*, 257 NLRB 554(1981); that Dagon's testimony and the letter itself belies the fact that Respondent also intended to determine who was interested in returning to work by requiring them to physically come to the plant and sign the Respondent's list; that the clear implication of the letter is that those employees interested in reinstatement must respond to the letter and sign the Respondent's list by November 6, 1998 or risk losing their right to reinstatement; that while the Respondent may argue that there is no violation because it ultimately placed those former strikers who did not respond to the letter by November 6, 1998 on the Respondent's list, this fact does not change the threat made to the former strikers in the Respondent's October 23, 1998 letter; that the Respondent placed former strikers who did not come to the plant and sign the Respondent's list on it solely because the Union made this an issue and the Respondent never informed the recipients of its October 23, 1998 letter that they would be eligible for reinstatement whether or not they responded by November 6, 1998; that the Respondent proffered no evidence of any legitimate business reason to justify the deadline of November 6, 1998; that while the Respondent claimed that it did not know who was covered by the Union's unconditional offer to return, it is obvious that Respondent had a way of determining who was covered since it sent the October 23, 1998 letter to those individuals; that if the Respondent intended to place all the former strikers on the preferential recall list there would not have been any need to provide a deadline of November 6, 1998; and that the clear implication of the October 23, 1998 letter to the former strikers was that if they failed to respond by the November 6, 1998 date their reinstatement rights would be terminated.

The Respondent on brief argues that its October 23, 1998 letter to the former strikers never threatened the loss of reinstatement rights for those who failed to respond to the letter or sign the list; that the letter complied with Board precedent, *Giddings & Lewis, Inc*., 264 NLRB 561, 566–567 (1982); that the letter never stated nor implied that employees who failed to respond or sign the preferential "rehire" list would lose any reinstatement rights; that the letter never used the word "termination" as alleged in the complaint; and that if there was any possibility for confusion in the Respondent's first letter, the Respondent clarified its position and communicated this to the employees' representative.

In my opinion the Respondent violated the Act as alleged in paragraph 8 of the complaint. Interestingly, nowhere in its argument on brief on this matter does the Respondent even mention the November 6, 1998 deadline which it gave in its October 23, 1998 letter to the former strikers. In *Charleston*

Nursing Center, 257 NLRB 554, 556–557 (1981), the Board indicated as follows:

> Therefore, we conclude that, although an employer may legally request replaced economic strikers to furnish current information about their interest in reinstatement, an employer may not require replaced economic strikers to respond to such a request or risk losing their reinstatement rights.

Here, as noted above, the Respondent included the following units October 23, 1998 letter to the former strikers:

> If you are interested in reinstatement, it is important that you come to the plant as soon as possible, but no later than November 6, 1998, and sign the preferential rehire list because we plan to fill any available positions, not filled through the normal bid procedure, in the order that employees' names appear on the preferential rehire list as long as the employee has previously held the open job classification.

The Respondent did not disagree with the Union's subsequent expressed concern about the language of this letter. Yet the Respondent did not subsequently forward a modified version of the letter to the former strikers or seek to assure the former strikers that it did not mean what the letter implies, namely, that if they do not come to the plant by November 6, 1998 and sign the preferential "rehire" list their reinstatement rights would be extinguished. It is not necessary to use the word "termination." For the reasons specified by the Counsel for General Counsel as set forth above, the Respondent violated the Act as alleged in this paragraph of the complaint.

Paragraph 7(d) of the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act since about October 2, 1998, by T.M. Dagon, by letters to unit employees, bypassed the Union and dealt directly with its employees in the unit by requiring its employees who had engaged in the aforementioned strike to sign a recall list to indicate their interest in returning to work.

On brief Counsel for General Counsel contends that the Union's first notice of the recall procedure applied by the Respondent to former strikers covered by the Union's unconditional offer to return was on or about October 23, 1998; that the notice came to the Union at virtually the same time as the Respondent was informing the involved unit employees of the mechanism under which they would be recalled; that the Respondent unlawfully implemented the recall procedure as to former strikers covered by the Union's unconditional offer without bargaining with the Union and the Respondent unlawfully communicated this procedure to unit employees without first adequately presenting the proposal to the employees' bargaining representative; that there had been no discussion between the Union and the Respondent regarding this procedure prior to its dissemination to the unit employees; and that this communication to employees, informing them of the mechanics of their reinstatement rights and the requirement that they come into the plant and sign the preferential recall list without dealing with the Union first constitutes direct dealing.

The Respondent on brief argues that the letter to former strikers explaining the preferential "rehire" policy was permissible employer communication to the employees; that the letter did not, in any way, coerce the employees by threatening or encouraging them to abandon their bargaining representative; and that the letter not only acknowledged the role of the Union in making the return to work offer, it plainly showed that the Union received a copy of the letter.

In my opinion the Respondent violated the Act as alleged in paragraph 7(d) of the complaint. The letter was coercive and threatening and it advised its recipients that the employees who abandoned the strike, crossed the picket line and abandoned the Union were going to be rewarded at the expense of those employees who stayed out for the duration of the strike, in that those who abandoned the strike, crossed the picket line and abandoned the Union were going to be given preference with respect to recall over the former strikers who waited until the Union made an unconditional offer to return. As pointed out by Counsel for General Counsel, the Union first learned that the former strikers would be required to come into the plant by a specified date and sign the Respondent's list when the Union received copies of the letters which were sent to the former strikers on October 23, 1998. The Respondent was unlawfully communicating its unlawful requirements directly to the employees without first affording the Union an opportunity to bargain with the Respondent over them and their effects. The Respondent bypassed the Union and dealt directly with its employees in the unit.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

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

3. By failing and refusing to reinstate or offer to reinstate to their former or substantially equivalent positions of employment or appropriately place on a preferential recall list the former striking employees on whose behalf the Union madman unconditional offer to return, which is inherently destructive of the rights guaranteed employees by Section 7 of the Act, the Respondent violated Section 8(a) (1) and (3) of the Act.

4. By implementing and maintaining a recall system whereby it granted preference in terms and conditions of employment to (a) its employees who abandoned the involved strike prior to the Union's unconditional offer to return by placing them on a recall list ahead of all other employees, and (b) its employees who physically came in and signed the preferential recall list after the October 2, 1998 unconditional offer to return by placing them on the recall list in the order in which they signed the list, both of which are inherently destructive of the rights guaranteed employees by Section 7 of the Act, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. By since about October 2, 1998 posting jobs for bid and filling such jobs without granting employees, who engaged in the involved strike and who had not been recalled, the opportunity to bid on such job vacancies, which is inherently destructive of the rights guaranteed employees by Section 7 of the Act, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. By about October 2, 1998 implementing a recall procedure which grants preference in terms and conditions of employment to (a) its employees who abandoned the involved

strike prior to the Union's unconditional offer to return by placing them on a recall list ahead of all other employees, and (b) its employees who physically came in and signed the preferential recall list after the October 2, 1998 unconditional offer to return by placing them on the recall list in the order in which they signed the list, without affording the Union an opportunity to bargain with the Respondent with respect to this conduct or the effects of this conduct, the Respondent violated Section 8(a)(1) and (5) of the Act.

7. By about October 23, 1998 letters to Unit employees, bypassed the Union and dealt directly with its employees in the Unit by requiring its employees who formerly engaged in the involved strike to sign a recall list to indicate their interest in returning to work, the Respondent violated Section 8(a)(1) and (5) of the Act.

8. By about October 23, 1998 letters to its employees threatening them with termination of their reinstatement rights if they did not come in and sign the recall list to indicate their interest in returning to work, the Respondent violated Section 8(a)(1) of the Act.

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

REMEDY

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

The Respondent shall be ordered to (1) rescind the recall procedure implemented following the October 2, 1998 unconditional offer to return, (2) provide prior notice to each former striker of future job postings and provide each former striker an opportunity to submit bids, (3) upon request bargain collectively in good faith with the Union concerning the implementation of recall procedure, (4) offer reinstatement to all strikers who have been denied recall because of the Respondent's discrimination, (5) offer reinstatement to those former strikers who have been denied an opportunity to bid on job vacancies and who would have filled the involved openings but for the Respondent's discrimination, (6) make whole former strikers foray loss of pay or benefits they have suffered by reason of the Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and (7) post the remedial notice described below at its facility.

[Recommended Order omitted from publication.]