STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL NO. 1406 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Complainant, vs. EVCO PLASTICS, Respondent.	Case VIII No. 23471 Ce-1794 Decision No. 16548-A

Appearances

Kelly & Haus, Attorneys at Law, by Mr. William Haus, on behalf of the Complainant.

Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. Paul A. Hahn, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: Local No. 1406 of the International Association of Machinists and Aerospace Workers, AFL-CIO, herein the Union, filed the instant complaint on September 5, 1978, with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that Evco Plastics, herein the Company, has committed certain unfair labor practices under the Wisconsin Employment Peace Act (WEPA). The Commission on September 8, 1978, thereafter appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Hearing on said matter was held in Madison, Wisconsin on October 3, 1978. The parties thereafter filed briefs.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

(1) Local 1406 is a labor organization which represents certain production and maintenance employes employed by the Company.

(2) The Company operates a production facility at DeForest, Wisconsin. Dean Bartelt is the General Manager of the Company and at all times herein has acted as its agent. The Company is engaged in interstate commerce as that term has been defined by the National Labor Relations Board.

The Company operates three shifts which start and end at different times. The first shift starts at either 6:00 a.m., 6:30 a.m., 7:00 a.m. and 8:00 a.m. and lasts for eight hours, plus one-half hour unpaid lunch. The second shift commences at either 2:00 p.m., 2:30 p.m., 3:00 p.m., 3:30 p.m., or 4:00 p.m. and lasts for eight hours, with a half-hour unpaid lunch. The third shift commences at either 10:00 p.m., 10:30 p.m., 11:00 p.m., 11:30 p.m. and 12:00 a.m. and it lasts for eight hours, with a half-hour unpaid lunch.

(3) In October or November, 1973, the Company laid off certain employes. Thereafter, the Company recalled the employes, albeit in some cases to different shifts which they had previously worked on. The employes who returned to work took whatever shift was offered to them. It is unclear as to whether the Union was on the scene at the time of the recall.

(4) In 1974, the Union was certified by the National Labor Relations Board to represent the Company's production and maintenance employes. Thereafter, the parties agreed to several one-year contracts. On or about June 4, 1977, the Union commenced an economic strike against the Company. At the time, approximately fifty employes walked off the job, ten of whom subsequently voluntarily returned to work.

(5) On or about December 14, 1977, the Union proposed a strike settlement agreement which was rejected by the Company. On the same day, the Company proposed a strike settlement agreement to the Union. The Union then proposed some changes. The Company thereafter mailed the following strike settlement agreement, which was received by the Union on December 27, 1977:

STRIKE SETTLEMENT AGREEMENT

1. The Company will furnish the Union a list of employees who were terminated by the company during the course of the strike and employees who notified the Company they were terminating their employment. The Company will make reasonable attempts by letter to notify all employees who did not return to work during the strike notifying them of the settlement of the strike and advising these employees of the establishment of a preferential hiring list. A copy of the letter is attached.

2. Employees who notify the Company of their desire to return to work will be recalled and receive any accrued benefits pursuant to the labor agreement and NLRA.

3. The Company and the Union agree to withdraw any current legal actions, including any charges before the National Labor Relations Board. Neither the Company nor the Union will bring charges or suit against the other for occurrences or activities arising during the strike and known to the parties as of the date of execution of this strike settlement.

The aforementioned three paragraphs, inclusive, compromise the total strike settlement agreement between the parties.

Dated this 7th day of January, 1975.

EVCO PLASTICS
By

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
LODGE 1406
By

(6) Said agreement was signed by Vernon Zitlow, the Union's business representative, on January 7, 1978. On or about January 8, 1978, Zitlow advised Paul Hahn, the Company's attorney, by telephone that the Union had accepted the Company's proposed strike settlement agreement. Zitlow mailed the agreement to Hahn on or about January 9 or 10, 1978. Hahn received the agreement at his office on January 17, 1978, signed it, and on the same day advised Bartelt that the Union had signed the agreement.

(7) On January 17, 1978, Hahn sent the following letter to Bartelt:

> Re: Evco Plastics
>
> Enclosed is an executed Strike Settlement Agreement. Although dated by the Union on January 7, 1978, I did not receive the Strike Settlement Agreement until January 17, 1978, at which time I signed it. I have also enclosed the letter to be forwarded to all employees who did not return to work during the strike. I believe the letter should be dated, insofar as the date of the Strike Settlement Agreement, on the 17th day of January, 1978. Please do not deviate at all from the letter. I believe the letter should be sent out as soon as is reasonably possible.
>
> I would also appreciate it if you would begin to develop the list of employees who were terminated by the Company during the course of the strike, etc., pursuant to paragraph 1 of the Strike Settlement Agreement. If you have any questions, please call me.
>
> The Union has also signed the labor agreement, and I will be forwarding copies to Don for his signature.

(8) On January 23, 1978, the Company sent the following letters to striking employes:

> January 23, 1978
>
> Dear_____:
>
> Re: Strike Settlement - Evco Plastics
> DeForest, Wisconsin
>
> On the 17th. day of January, 1978, Evco Plastics and Lodge 1406 of the International Association of Machinists signed a document settling the strike at Evco, based on the Company's final offer.
>
> If you desire to return to work you must notify the Company within seven (7) days from the date of this letter in writing whether you wish to return to work. You must inform the Company of when you will be available to work, your shift and job preference. You will then be recalled as needed. You should be aware that there are currently only a possible six vacancies that may become available. If you cannot return to work when called because of illness, the Company may fill that vacancy, but you will remain on the hiring list. Also, if the Company does not have available your first choice job or shift, you will be asked if you wish to remain on the hiring list.

You will receive only those accrued benefits due you under the labor agreement. For example, anyone who did not receive their personal holiday before the strike will not receive a personal holiday for calendar year 1977. Any vacation pay due you will depend on whether you worked 1600 hours in your current anniversary year.

Any questions you may have should be directed only to Dean Bartelt. Mr. Bartelt has the only authority to speak on this particular matter for Evco Plastics.

(9) A number of striking employes thereafter failed to respond to said letter. However, approximately eleven (11) employes did respond in writing.

(10) Striker Wilma Mayr, a machine operator, advised Bartelt by letter dated January 27, 1978, that:

Dear Mr. Bartelt:

I am available for work now. Since I worked days the first shift is my preference.

(11) Striker Neil McLaughlin, a set up man, by a letter which was received by the Company on January 31, 1978, advised Bartelt that:

I understand that Evco Plastics has no certified apprentice in the tool room. If you decide to have an apprentice study in the tool room, I would like to be him. Any shift would be o.k. If you have any questions, please feel free to call at the number above.

(12) Striker Mary Jo Bambrough, a machine operator, in a letter received by the Company on January 31, 1978, advised Bartelt that:

On behalf of the strike settlement, yes, I will return to work, and available as soon as I am notified. As stated in your letter of choice of 1st shift and as a machine operator. If there are no openings would you please keep me remained on the hiring list.

(13) Striker Greg Larson, a material handler, in a letter received by the Company on January 30, 1978, stated:

I would like first or second shift hopper filler job. If neither of these shifts are open I will take third shift hopper filler position.

(14) Striker Pat Leverentz, by letter dated January 27, 1978, advised the Company that she did not wish to return to work.

(15) Striker Barbara Nellen, a machine operator, by a letter received by the Company in late January, 1978, advised Bartelt:

In regard to your letter, yes I will be available to return to work as soon as am notified. As stated in your letter asking of any choice of shift, as machine operator on first shift. If there are no openings on first shift yes I will remain on the hiring list.

(16) Striker Marilyn Tyrer, a machine operator, by letter dated January 26, 1978, advised Bartelt:

> In response to your letter, yes I would be interested in returning to Evco as a machine operator. I would prefer any time on first shift. I would be able to start immediately.

(17) Striker Paul Kozlowski, who was classified as a machinist at the time, by letter dated January 28, 1978, advised Bartelt that:

> I received your letter of Jan. 23, 1978. I would like to return to work. I would be available now, any shift. Job preference as mold maker.

(18) Striker Catharine Maher, a machine operator, by letter dated January 24, 1978, advised the Company that:

> In response to your letter regarding my returning to work I have listed below my shift preference and I am available immediately as a production worker.
>
> (1) second shift ..... 3 p.m. - 11 p.m.
> (2) first shift ..... 8 a.m. - 4:30 p.m.
> (3) third shift ..... 10:30 p.m. - 6:30 a.m.
>
> If nothing is available at this time I wish to remain on the hiring list.

(19) Striker Steven Maher, a material handler, in a letter received by the Company in late January, 1978, advised the Company:

> I am available as of January 30, 1978. My job and shift preferences are as follows:
>
> 1. Hopper filler
> 2. Assembly production
> 3. Machine operator
> 4. third shift
> 5. second shift
> 3. first shift

(20) Striker Sadie Butzen, a machine operator, by letter dated January 24, 1978, advised Bartelt that:

> I would like to return to work and will be available whenever I am called. My job preference is production machine operator. My shift preference is first shift. I also like second shift 2 p.m. to 10:30 p.m. If nothing is available for me, at this time, I would like to remain on the hiring list.

(21) Striker Cindy Quamme, a machine operator, by letter dated January 25, 1977 (sic), advised the Company:

> Dear Sir(s)
>
> I can return to work with a three to five-day notice. Job preference:
>
> 1st choice: 1st shift assembly.
> 2nd choice: 1st shift production machine operator.

(22) The starting seniority dates for these employes are as follows: 1/

Wilma Mayr	7/27/71
Neil McLaughlin	11/15/72
Paul Kozlowski	4/3/73
Catharine Maher	2/25/74
Cindy Quamme	8/6/74
Sadie Butzen	9/4/74
Marilyn Tyrer	9/4/74
Steven Maher	3/11/76
Greg Larson	4/19/76
Mary Jo Bambrough	7/12/76
Barbara Nellen	7/15/76

(23) The Company thereafter failed to immediately rehire any of the above-named employes.

(24) By letter dated February 10, 1978, Union Representative Zitlow advised Hahn that:

> I have been advised by members of the Union - employees of the Company on the Preferential List, that the Company hired and put to work on first and other shifts six new employees right off of the street after the Company's offer was ratified on January 7, 1978, after the Company's offer given the Union at the December 14, 1977 negotiating meeting that there would be up to six jobs to be filled by returning Union member strikers with further vacancies or openings to be filled in accordance with the "Strike Settlement" agreement proffered and agreed to at the December 14, 1977 meeting of the parties.
>
> The Company is in violation of the Strike Settlement agreement and its word and offer given the Union at the December 14, 1977 negotiating meeting which was accepted by the Union when it hired the six new employees instead of bringing back the senior employees of the Preferential List interested in returning to the shifts and jobs the new employees were hired onto.
>
> I did not receive copies of the letters sent to strikers, nor copies of any responses to those letters, etc., that I was supposed to get in order to be able to determine if the Strike Settlement and/or Labor Agreement is being lived up to.
>
> I request the names of all bargaining unit employees, their addresses, the job employed on, the shift employed on, the dates of hire for each as of the dates of your response in order that I can make an intelligent determination whether or not the Company's December 14, 1977 offer, the Strike Settlement, and/or the Labor Agreement is being adhered to.

1/ Pursuant to the request of the Hearing Examiner, Mr. Hahn advised the Examiner and the Union of said seniority dates by letter dated September 10, 1979. Said information is made part of the record.

Anticipating your early response and compliance, I am.

Vernon E. Zitlow
Dir. Business Representative

(25) By letter dated April 10, 1978, Hahn advised Zitlow that:

In reference to your letter of February 10, 1978, regarding the establishment of a preferential hiring list and other matters, I must first of all express disagreement with several of the points in your letter.

At no time during the negotiation session on December 14, 1977, did the Company offer or guarantee that any striking employees would be offered positions at any time. Company counsel made this point clear, both to Mediator Calloway and to the Union. All Company counsel stated was that the Company thought in January possibly there would be six positions that would need to be filled. Further, at no time did the Company state that it would stop hiring employees to fill any vacancies, which was and is its legal right.

You are also mistaken as to your point that the parties agreed at the December 14, 1977, meeting to a strike settlement agreement. Midway through the meeting on December 14 the Union offered a strike settlement proposal. This proposal was rejected by the Company and this rejection was clearly stated to Mediator Calloway. Both Mediator Calloway and Company counsel expressed to the Union that the Company would not agree to the Union proposal for a strike settlement. At the conclusion of the meeting, the Company stated that it would submit a strike settlement counter-proposal to the Union, which the Company subsequently forwarded to your office. Our records show that the strike settlement agreement was not signed by the Union until January 7, 1978, was not received by Company counsel until January 17, 1978, at which time it was executed by counsel for the Company. It is the position of the Company that an agreement is not binding on either party until it is entered into, and this did not transpire until January 17, 1978.

Company counsel takes strong exception to the Union's allegation that the Company, as represented by counsel, is in violation of the strike agreement and its word and alleged offer given to the Union on December 14, 1977. Certainly, after a strike of seven months, it might be worthwhile recognizing that such charges will do nothing to improve the relationship between the Company and the Union. Furthermore, the evidently wild allegations being made by employees or former employees might very well be the frustrations of people who realize they made a mistake. However, we would remind them that going out on strike was the employees' choice and not the Employer's.

We have enclosed a list dated March 3, 1978, setting forth the names of the individuals hired since January 1, 1978, their dates of hire and hours of work. You will note these employees were all hired prior to the establishment of a preferential hiring list. We have also enclosed a list of terminated employees and those employees who quit their employment. We are enclosing a copy of a letter that was sent on January 23, 1978, to the striking employees. The Company sent this letter out within five days after the strike settlement was received from the Union by counsel for the Company. As you also requested, we are enclosing a list of people who did not respond to the Company's letter of January 23, 1978, and, therefore, pursuant to the strike settlement letter of January 23, 1978, will not be placed on a preferential hiring list. Lastly, we are enclosing the list of employees who responded to the Company's January 23, 1978, letter establishing them as members of a preferential hiring list. We think you will note that the employees have set themselves, with one or two exceptions, rather limited opportunities for return to employment unless a vacancy becomes available on the first shift.

It is the position of the Company that it is and has been in compliance with the strike settlement agreement, the labor agreement and the discussions between the parties before Mediator Calloway.

We believe this letter responds in essence to the requests of your letter of February 10, 1978.

(26) By letter dated September 11, 1978, the Company advised most of the above-noted striking employes that:

Dear _____:

This letter is to advise you of the current shift openings at EVCO Plastics. We presently have the following openings for production:

1st shift (3) three openings

2nd shift (3) three openings

3rd shift (3) three openings

If you desire to return to work you must notify the company within (7) seven days from the date of this letter in writing whether you wish to return to work.

You must inform the company of when you will be available to work and your shift preferences. If you cannot return to work when called because of illness, the company may fill that vacancy, but you will remain on the hiring list.

If you do not wish to accept any of these job openings, please advise us if you wish to remain on the preferential hiring list.

Very truly yours,

EVCO PLASTICS

Dean Bartelt
General Manager

(27) Thereafter, Catharine Maher, Sadie Butzen, and Wilma Mayr advised the Company that they would like to return to work. Maher, Butzen and Mayr returned to work respectively on September 20, September 20, and September 25, 1978.

(28) Steve Maher did not respond to said letter and did not return Bartelt's telephone call. Cindy Quamme advised Bartelt that she had found employment elsewhere and that she had quit. Barbara Nellen advised Bartelt that she was quitting her employment. Marilyn Tyrer advised Bartelt that she was attending Madison Area Technical College and that she was quitting. Greg Larson told Bartelt that he could not return because he had joined the Air Force on May 29, 1978.

(29) Earlier, by letter dated March 24, 1978, Mary Jo Bambrough advised the Company that she was quitting. Neil McLaughlin was recalled to work on April 10, 1978 as an apprentice foreman. McLaughlin quit on or about August 13, 1978. During his employment, McLaughlin turned down Bartelt's offer to become a maintenance mechanic.

(30) On May 7, 1978 the Company placed a newspaper advertisement for a mold maker. The Company never offered said position to Kozlowski, even though Kozlowski started work with the Company on April 3, 1973 as a mold maker. 2/ He was laid off on December 13, 1974. Kozlowski was recalled and classified as a machinist on February 24, 1975. Kozlowski remained in his machinist classification until he went on strike on June 4, 1978. During the times material herein, the Company did not have any machinist openings.

(31) From January 23, 1978 to September 11, 1978, the Company hired approximately fourty-four (44) employes in the "production/assembly" classification for either the second or third shifts. Of that group, approximately twenty-four (24) either quit or were discharged by the time of the instant hearing. The Company during that time also hired one employe in the maintenance department and two material handlers.

The starting seniority dates for the above-noted "production/assembly" openings are as follows: January 23, 23, 23, 23, March 13, 20, 20, 29, April 3, 3, 3, 3, 24, May 2, 8, 30, 30, 30, 30, 30, 30, June 1, 1, 2, 6, 6, 7, 14, 19, 26, 26, 30, July 5, 5, 10, 10, 10, 17, 31 August 3, 7, 28, 28, September 5, 11, 1978.

(32) From January 23, 1978 to September 11, 1978, the Company did not hire any full time "production/assembly" employes on the first

they wished to be transferred. Said requests were based on seniority. The transferred employes, their seniority dates, and the dates of the transfers are as follows:

Name	Seniority Date	Transfer Date
Joan Hilgendorf	7/25/77	1/23/78
Jane Hilgendorf	10/31/77	1/23/78
Harriet Ripp	11/7/77	2/6/78
Lois Burdick	9/22/76	3/25/78
Michael Schott	11/21/78	6/26/78

(33) The parties are privy to a June 3, 1977 to June 2, 1980 collective bargaining agreement which does not provide for final and binding arbitration. Article XXI of said agreement, entitled "Seniority", provides in part in Section 3 therein:

> Recall from layoff shall be based upon bargaining unit seniority provided the senior employee is qualified to perform the available work. Employees will be placed in available job openings for which they are qualified and will remain in such opening until there is an opening in their regular position for which they are qualified and have bargaining unit seniority.

(34) On October 3, 1978, the Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) wherein it alleged that the Company had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The Union on October 19, 1978 thereafter requested to withdraw said charge because the issues raised in said charge had been fully litigated in the instant proceeding. On October 24, 1978, the Regional Director of the NLRB advised the parties that said charge had been withdrawn. As a result, there is no unfair labor practice charge now pending before the NLRB. 3/

(35) The strikers herein were qualified to perform jobs which arose after their requests for reinstatement.

(36) The Company did not establish any legitimate business justification for refusing to offer earlier reinstatement to Mayr, Tyrer, Nellen, Quamme, Butzen, Steven Maher, Catharine Maher, and Larson. The Company offered no legitimate business justification for refusing to recall Kozlowski. The Company did establish a legitimate business justification for failing to reinstate Bambrough and McLaughlin to their former positions.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

(1) The Company violated the terms of the strike settlement agreement in violation of Section 111.06(1)(f) of WEPA by failing to

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3/ The parties advised the Examiner of the foregoing in a joint stipulation which was received on July 20, 1979. Said stipulation is made part of the record.

offer immediate reinstatement to Paul Kozlowski, Wilma Mayr, Marilyn Tyrer, Barbara Nellen, Cindy Quamme, Sadie Butzen, Steven Maher, Catharine Maher and Greg Larson.

(2) The Company did not violate the terms of the strike settlement agreement by failing to offer immediate reinstatement to Mary Jo Bambrough.

(3) The Company complied with the strike settlement agreement by offering Neil McLaughlin the position of apprentice foreman.

(4) The Company did not violate Section 111.06(1)(c) 1 of WEPA by failing to immediately reinstate any of the strikers herein.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

(1) IT IS ordered that that part of the complaint which alleged that the Company violated Section 111.06(1)(c)1 of WEPA is hereby dismissed.

(2) IT IS FURTHER ORDERED that that part of the complaint which alleged that the Company violated the strike settlement agreement by failing to immediately recall Mary Jo Bambrough and Neil McLaughlin to their former positions is hereby dismissed.

(3) IT IS FURTHER ORDERED that the Company, its officers, agents, successors, and assigns shall immediately:

1. Cease and desist from refusing to adhere to the terms of the strike settlement agreement.

2. Take the following affirmative action which will effectuate the policies of WEPA:

   (a) Offer to reinstate Paul Kozlowski to his former or substantially similar position without prejudice to his seniority or other rights or privileges, and make him whole for any loss of pay that he may have suffered by reason of the Company's refusal to recall him as a mold maker, by payment to him of a sum of money, including all benefits, which he would have received from the time of the Company's refusal to recall him as a mold maker in May, 1978 to an unconditional offer of reinstatement, less any amount of money that he earned or received (including unemployment compensation), that he otherwise would not have earned.

   (b) Reimburse Catharine Maher, Sadie Butzen, Wilma Mary, Marilyn Tyrer, Barbara Nellen, Cindy Quamme, Steven Maher, and Greg Larson, and make them whole for any loss of pay, if any, they may have suffered by reason of the Company's refusal to reinstate them earlier, by payment to each of them a sum of money, including all benefits, which they would have received from the time of the Company's earlier refusal to reinstate them to the time

that they would have either accepted or turned down the Company's reinstatement offers, less any amount of money that they earned or received (including unemployment compensation) that they otherwise would not have earned.

(c) Notify all employes by posting in conspicious places in its offices where employes are employed, copies of the notice attached hereto and marked Appendix "A". That notice shall be signed by the Company and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 6th day of November , 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX A
NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. WE WILL immediately offer to reinstate Paul Kozlowksi to his former or substantially equivalent position and we will make him whole for any loss of pay he suffered as a result of our refusal to recall him as a mold maker.

2. WE WILL reimburse Catharine Maher, Sadie Butzen, Wilma Mayr, Marilyn Tyrer, Barbara Nellen, Cindy Quamme, Steven Maher, and Greg Larson for any loss of pay they may have suffered as a result of our refusal to recall them earlier.

3. WE WILL NOT violate the terms of the 1978 strike settlement agreement with the Union.

EVCO PLASTICS

By_____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complaint alleges that the Company: (1) violated the terms of the strike settlement agreement by not recalling strikers to available vacancies, and (2) discriminated against the strikers because of their union activities.

The Company, in turn, asks dismissal of the complaint allegations on the grounds that. (1) the Commission has no jurisdiction over this matter because it has been preempted by the National Labor Relations Act, as amended, and (2) in any event, it did not violate the terms of the strike settlement agreement.

At the hearing, and pursuant to the Company's motion to dismiss, the Examiner dismissed that part of the complaint which asserted that the Company had discriminated against the strikers because of their union activities. Said dismissal was predicated upon the fact that Section 8(a)(3) of the National Labor Relations Act, as amended, vests exclusive jurisdiction in the NLRB for determining whether an employer who is engaged in interstate commerce has discriminated against employes because of their union activities.

At the same time, however, the Examiner at the hearing reserved ruling on whether the complaint allegations bearing on alleged violations of the settlement agreement should also be dismissed.

In its brief, the Company argues that (1) the strike settlement agreement is not a collective bargaining agreement; and (2) said agreement expressly provides that strikers "will be recalled and receive any accrued benefits pursuant to the labor agreements" and NLRA. In light of the above, the Company asserts that this matter must be dealt with exclusively by the NLRB and that the Commission therefor lacks jurisidiction to decide the issue herein.

In this connection, the Wisconsin Supreme Court in Tecumseh Products Co. v. Wisconsin Employment Relations Board 4/ has expressly held that the Commission does have jurisdiction to determine whether a collective bargaining agreement has been violated. In so ruling, the Court there noted.

> The Wisconsin Statutes prescribing the powers and duties of the W.E.R.B. antedated the existence of a federal substantive law of labor management agreements, which remained undefined until the Lincoln Mills Case in 1957. However, we believe that the purpose and the policies expressed by the Wisconsin legislature in creating the W.E.R.B. make it clear that it was intended that the W.E.R.B. have the authority to resolve such disputes in Wisconsin, whether state or federal rules are to be applied. This is consistent with the desire to substitute the "processes of justice for the more primitive methods of trial by combat." Section 111.01(4) Stats.

4/ 23 Wis. 2d 118.

> We conclude that the W.E.R.B. has jurisdiction to apply federal common law of collective bargaining agreements in the resolution of disputes under Section 111.06(1)(f) Stats. . .

While acknowledging this to be so, the Company nonetheless argues that the strike settlement agreement herein is not part of the collective bargaining agreement. The difficulty with this agreement is that it is well established that the term "collective bargaining agreement" can, and does, include more than the narrow confines of a printed agreement.

Thus, in 301 type actions where they have been asked to decide whether a collective bargaining agreement has been violated, federal courts have found that a side letter pertaining to bidding, 5/ pension plan agreements, 6/ a document pertaining to working conditions, 7/ a rider concerning casual employes, 8/ a company pamphlet, a bulletin and actual company practices, 9/ were to be considered parts of the collective bargaining agreements in question, even though they were not included in the formalized agreements. The Commission itself reached the same conclusion in Sewerage Commission of the City of Milwaukee 10/ wherein it held that a "letter of intent" was part of the collective bargaining agreement.

In addition, the Commission has squarely ruled that it would assert its jurisdiction to determine whether an employer had violated the terms of a strike settlement agreement. 11/

In such circumstances, it must be concluded that a strike settlement agreement is part of a collective bargaining contract and that, as a result, the Commission has jurisdiction to determine whether that agreement has been violated under Section 111.06(1)(f) of WEPA.

In so finding, the Examiner also rejects the Company's additional assertion that the matters herein should be deferred to the NLRB by virtue of that part of the strike settlement agreement which provides that strikers "will be recalled and receive any accrued benefits pursuant to the labor agreements and NLRA". Thus, no charges on this matter are now pending before the NLRB. As a result, resolution of the issues herein will not result in duplicate litigation. Moreover, it is well established that a waiver of a statutory right must be clear and unequivocal. 12/ Here, for the reasons noted above, the Union has the statutory right to have its strike settlement agreements enforced

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5/ Schneider v. Electric Auto - Lite Co. (1972) 79 LRRM 2825.

6/ Brewery Wirters v. Duke & Co., (1974), 86 LRRM 2057 and Harmony Dairy Co. v. Teamsters Local 205, (1972) 82 LRRM 2772.

7/ Morvay v. Tool & Die Co. (1975) 88 LRRM 3100.

8/ Watson v. Teamsters (1968) 69 LRRM 2099.

9/ Furniture Workers v. Virco Corp. (1962) 50 LRRM 2581.

10/ (11407-A), B, (6/73).

11/ See for example, Memorial Hospital Association (10010-A, 10011 A (8171) and John Oster Manufacturing Co. (6781) 6/64.

12/ The State of Wisconsin (13017-D) 5/77.

before the Commission. In effect, then, the Company argues that the disputed language should be read to provide that strikers will be recalled and receive any accrued benefits pursuant to the labor agreements and NLRA, and that any disputes concerning the application or interpretation of said agreement shall be exclusively resolved by the NLRB.

The difficulty with the Company's position is that the settlement agreement does not provide for the underlined portion. Instead, it is entirely silent regarding the question as to how such disputes shall be resolved. At the same time, there is no record evidence of any kind that the parties ever discussed this issue when they agreed to the settlement agreement. In such circumstances, there is no basis for finding that the Union waived its right to have the issues herein be resolved by the WERC. To the contrary, it appears more plausible to conclude that in entering the strike settlement agreement, the parties only intended that recall should be governed by the contract and those recall rights enunciated by the NLRB, as the parties were apparently familiar as to what those rights provided. In this connection, then, the parties could have just as easily have chosen to provide that strikers would receive more rights than those provided for in either the contract or the NLRB. An example of such a provision would be that all economic strikers would be entitled to immediate reinstatement, even though there were no openings for them. Another example would be for the Company to reinstate a certain number of strikers at given intervals, again, even though there were no openings for them at that time. 13/ The parties here, of course, did not agree to such provisions. Rather, they only agreed that the contract and the NLRB's recall policies would govern recall. That, of course, is a separate question from which tribunal would enforce the settlement agreement. Accordingly, and in the absence of a clear and unmistakeable waiver to the contrary, and because as noted in Tecumseh, supra, the Commission can apply federal substantive law in 301 type actions, it is proper for the Commission to determine whether the terms of that agreement have been violated.

Turning now to the substantive merits of the issue posed, the Examiner rejects the Union's contention that the terms of the strike settlement agreement became effective on January 7, 1978.

In this connection, it is true that Zitlow signed the agreement on January 7, 1978 and that Zitlow on or about January 8, 1978 telephonically advised Hahn of that fact. But, be that as it may, Hahn did not receive the settlement agreement until January 17, 1978, and it was not until that date that Hahn signed it and advised Bartelt that the settlement agreement had been signed. In such circumstances, which show that the agreement had no express effective date, and that Hahn did not sign it until January 17, 1978, the Examiner concludes that said agreement did not become effective until January 17, 1978.

As a result, the strikers were entitled to be recalled to those vacant jobs which arose after January 17, 1978, and for which they were qualified to perform. On this issue, the Union points out that four new hires - Joyce Southworth, Ngot Truong, Kimberly Neander and

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13/ Such proposals would necessitate either an expansion of the work force or the termination of striker replacements.

Brenda Paske joined the Company on January 23, 1978, in the "production/assembly" classification. While that is true, the record also shows that these four individuals were interviewed and hired by the Company on either January 10, 11, or 13, 1978. Since they were hired before January 17, 1978, those four positions were filled by that date. The strikers were therefore not entitled to be recalled to those four positions.

At this time, it is perhaps appropriate to touch on the recall rights which economic strikes have under the NLRA.

On that point, the N.L.R.B. in New Fairview Hall Convalescent Home held:

> It is well settled that economic strikers are entitled upon application, to immediate reinstatement to their former or substantially equivalent positions of employment unless such positions have been permanently filled or are unavailable. (Citing N.L.R.B. v. Mac Kay Radio and Telegraph Co., 304 U.S. 33; N.L.R.B. v. Fleetwood Trailer Co., Inc. 389 U.S. 375)
>
> In addition, an employer is obligated to accord economic strikes preferential status and immediately to reinstate such strikers when their previous or substantially equivalent positions are available. (Citing N.L.R.B. v. Fleetwood Trailers Co., supra; N.L.R.B. v. Great Dane Trailers 366 U.S. 26; Laidlaw Corp., 171 NLRB 1366, enfd. 414 F. 2d 99 (C.A. 7), cert. denied 397 U.S. 920.)

In Fire Alert Company 15/ the N.L.R.B. amplified upon this issue wh it there noted:

> In Brooks Research & Manufacturing, Inc., 202 NLRB 634, the Board noted that the Supreme Court in Fleetwood Trailer, 389 U.S. 375 at 381 (1967), had held:
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> . . . The status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment" . . . If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.
>
> The right can be defeated only if the Employer can show "legitimate and substantial business justifications." N.L.R.B. v. Great Dane Trailers, 388 U.S. 26.
>
> The Board continued in Brooks, supra, stating from its decision in The Laidlaw Corporation, 171 NLRB 1366, enfd. 414 F. 2d 99 (C.A. 7, 1969), cert. denied 397 U.S. 920 (1970), that:

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144 NLRB 680

> . . . economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon departure of replacements or when jobs for which they become qualified become available, unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer full reinstatment was for legitimate and substantial business reasons. (Emphasis supplied.)
>
> Thus, it is obvious that the Respondent's reinstatement obligation here is not limited to the strikers' old positions, but rather includes reinstatement to substantially equivalent positions which the strikers are qualified to fill.

At the same time, it is also necessary to detail the recall rights which the strikers have under the collective bargaining agreement. As to that, and as noted in Finding No. 33, Article XXI of the contract specifies that laid off employes shall be recalled by seniority, that they may be assigned to jobs for which they are "qualified", and that they may remain in such positions until there is an opening in their regular position. There is no requirement in said provision or in any other part of the contract to the effect that laid off employes can only be recalled to their prior shifts. To the contrary, General Manager Bartelt testified that in 1973 or 1974, following a lay off, some employes were recalled to whatever shift had job openings for them.

With reference to the jobs available herein, the Company asserts that it was only required to recall strikers to the specific shift and jobs for which they had indicated a preference.

There is no merit to this claim. Thus, as noted in Finding No. 8, the Company sent a letter to all strikers on January 23, 1978 which in part advised them that:

> You must inform the Company of when you will be available to work, your shift and job preference.

That letter did not specify that strikers would only be considered for their first preference, and for no other jobs. Said letter goes on to state that if "The Company does not have available your first choice job or shift, you will be asked if you wish to remain on the hiring list." The implication of this was that employes would be considered for positions which were not their first choice. As a result, the strikers had absolutely no way of knowing that in indicating their preferences they were foregoing consideration for any other jobs. Indeed, Bartelt himself expressly acknowledged this fact at the hearing when he was asked:

> On what basis would you expect employes to have understood that their consideration for recall would be limited to those shifts and jobs that they indicated a preference? 16/

16/ Transcript, p. 12.

Bartelt replied:

> I have no reason to believe that they would know that. 17/

In light of Bartelt's own admission, then, there is obviously no way that employes could have known that in indicating their first preference, they thereby were narrowing their right to being considered for other jobs for which they were qualified. Since a waiver of a contractual or statutory right must be "clear and unequivocal", 18/ and as there was no manifestation of that here, there is no basis for finding that the strikers waived their right to be considered for jobs for which they were entitled. 19/

Indeed, the utter speciousness of the Company's assertion is clearly demonstrated by its subsequent September 11, 1978 letter noted in Finding No. 26. There, the Company advised the laid off employes that it had "production" openings on three shifts. Bartelt admitted that "production" jobs included the machine operator, material handler, and assembly/machine operator classifications. 20/ By virtue of said letter, it is absolutely clear that the Company then was not interested in the purported narrow job preferences earlier indicated by the laid off employes. At the hearing, Bartelt attempted to justify this change of position on the grounds that: (1) it had day openings in September, 1978, 21/ and (2) the letter "inadvertently" omitted the word hours. 22/ In fact, since only three of the nine openings then available were on the first shift, and as it is totally implausible to believe that the Company would "inadvertently" fail to specify hours when the Company for approximately nine months adamantly refused to offer available second and third shift openings to the laid off employes, Bartelt's purported explanation simply does not make sense. In this connection, the Union's brief contends that the Company offered jobs to the strikers herein only after it had received the instant Complaint on September 8, 1978 and that the Company at that time "scampered to limit its exposure in the area of back pay." Irrespective of what motivated the Company at that time, it suffices to say for present purposes that the Company was totally unjustified in its earlier refusal to consider the strikers for whatever qualified jobs arose.

On this issue, the contract expressly provides that laid off employes are to be recalled to jobs for which they are "qualified" even though said jobs may be different from those previously performed by the employes. Said contract does not specify that recalled employes

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17/ Transcript, p. 13.

18/ State of Wisconsin, supra.

19/ In its brief, the Company points out that the Union did not immediately question the Company's recall policies after it received Hahn's April 10, 1978 letter. While that is so, the fact remains that the Union never agreed to those policies either at that time or at any time subsequent thereto. As a result, the Union never "clearly and unequivocally" waived the recall rights which the strikers had under both the NLRA and the contract.

20/ Transcript, p. 14.

21/ Transcript, p. 15.

22/ Transcript, p. 16.

can only be recalled to their prior shifts. As a result, and because the Company has recalled laid off employes to different shifts, and because the Company has offered absolutely no business justifications for its refusal to consider strikers for jobs for which they are qualified, it follows that the Company was required to offer strikers openings for whatever jobs they were "qualified" to perform, irrespective of shift.

With reference to some of those qualifications, the record shows that the Company hired approximately twenty-three (23) employes for the "production/assembly" classification from January 23, 1978 to June 7, 1978. Bartelt acknowledged at the hearing that the eleven strikers herein could have performed that job with little or no training, that in some cases a twenty or thirty day training period may have been required, and that none of the strikers herein were refused recall to those jobs because they were unqualified to perform them. 23/

Indeed, as noted above, the Company, on September 11, 1978, advised the employes herein that "production" jobs were available. Bartelt testified that said "production" jobs included the machine operator, material handler, and assembly/machine operators classifications. The Company's September 11, 1978 offer therefore clearly indicated that the employes herein were capable of performing any of the "production" jobs then available. If the employes at that time were admittedly capable of performing said jobs, they were likewise capable of performing them in the earlier nine-month period.

Along this line, it should be noted that approximately twenty-four (24) of the approximately forty-four (44) new hires for the "production/assembly" classification from January to September, 1978 either quit or were discharged at the time of the instant hearing. The Company has offered absolutely no legitimate justification whatsoever as to why, in the face of such massive turnover, it did not attempt to offer those jobs to the experienced employes herein who would have required very little training.

Absent, therefore, any business justification as to why they could not be recalled to the "production/assembly" classification, and since the strikers herein would have been able to perform that job with little training, it must be concluded that the Company was required to offer those jobs to the strikers herein. 24/

At the same time, and as noted in Finding 32, the Company transferred five of its employes to the first shift "production/assembly" classification. Bartelt testified that the Company asked those employes to transfer and it transferred them on the basis of seniority pursuant to Company policy. In its brief, the Union claims that said transfers

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23/ Transcript, pp. 60-61.

24/ There is no record evidence that the approximately twenty-three individuals hired for those jobs required less training than the strikers herein. Since it is the Company which has the burden of proving that it had a legitimate business justification for refusing to recall strikers to jobs for which they are qualified, the Company cannot now claim that the strikers were unqualified to perform those jobs. See, for example, International Union, United Automobile Workers (Udylite Corp.) v. N.L.R.B., 455 F. 2d 1357, LRRM 2031, 2039 (C.A.D.C.) (1971) and H. & F. Binch Co. v. N.L.R.B., 456 F. 2d 357 (C.A. 2, 1972).

had the effect of reducing or eliminating the likelihood that there would be first shift openings, thereby preventing recall under the Employer's policy.

That is true. And, in many circumstances, it may very well be that laid off employes are entitled to be recalled to said positions. Here, however, it is unclear as to whether all the employes herein previously worked on the first shift and whether they, in fact, had preferences over those jobs vis-a-vis second and third shift employes. In addition, two of the five - Jane Hilgendorf and Joan Hilgendorf - were transferred on January 23, 1978, on the same day that four new employes were hired for "production/assembly" jobs on the second shift. It is therefore unclear as to whether the Hilgendorfs may have been transferred from their prior second shift jobs because of those legitimate new hires. Moreover, a third transferee, Louis Burdick, was transferred from third shift on March 25, 1978, only a few days after a new employe was hired on the third shift on March 20, 1978. As noted below, said March 20, 1978 opening should have been offered to the laid off employes. Since Burdick's transfer may have been the result of said new hire, it is unclear as to whether two openings then existed. A fourth transferee, Michael Schott, is immaterial as it occurred on June 26, 1978, well past the time that the employe herein should have been offered second and third shift openings.

Accordingly, and because the record is unclear as to whether the five first shift openings were of a permanent nature, the Examiner concludes that there is insufficient evidence to find that the first shift openings should have been offered to the laid off employes.

Turning now to the question of what employes were entitled to what jobs, a matchup of the seniority dates noted in Finding 22 and available job openings noted in Finding 31, reveals the following:

Wilma Mayr, the most senior of the eleven, was a machine operator on the first shift before the strike. Her seniority entitled her to be offered the first production/assembly which opened up after the strike settlement agreement was reached. The record shows that such an opening arose on March 13, 1978. In fact, Mayr was not offered reinstatement until September, 1978, at which time she returned to work as a machine operator on the first shift. The Company's refusal to offer her the March 13, 1978 position was therefore violative of the settlement agreement.

Neil McLaughlin, who requested to return to work as a tool room apprentice, was returned to work on April 10, 1978, as an apprentice foreman, a non-bargaining unit position. McLaughlin thereafter voluntarily terminated his employment. The earliest that McLaughlin could have been recalled for production/assembly was March 20, 1978. Since McLaughlin was recalled at about the time, and as there is no evidence that his position as an apprentice foreman was not substantially similar to those unit positions, there is no basis for finding that the Company's recall of McLaughlin violated the strike settlement agreement. 25/

25/ Since McLaughlin turned down the Company's offer to be a maintenance mechanic, there is no merit to any claim that the Company failed to offer him said position.

The third most senior of the laid off employes was Kozlowski. As noted in Finding No. 17, Kozlowski was classified as a machinist at the time of the strike. He advised Bartelt by letter dated January 28, 1978 that he preferred to return as a mold maker. The record also shows that the Company on May 7, 1978 ran a newspaper advertisement for a mold maker. Since Kozlowski wanted that position, the Union rightfully asks why the Company did not offer that position to Kozlowski.

In its brief, the Company asserts that it is not sure if Kozlowski was initially hired as a mold maker and that in any event, Kozlowski was only entitled to be recalled as a machinist, the classification he held at the time of the strike.

As to point (1), Kozlowski in fact was hired as a mold maker, as reflected in Mr. Hahn's October 10, 1978 letter to the Examiner which is made part of this record. 26/ Also without merit is the Company's assertion that Kozlowski was only entitled to be recalled as a machinist, as the Company offers no case law to support its theory. In addition, it has offered absolutely no business justification whatsoever as to why it would not recall Kozlowski to his former mold maker position. Moreover, the collective bargaining agreement expressly provides that laid off employes shall be recalled for jobs for which they are "qualified" even though such jobs may be different from the employe's regular classification. Since Kozlowski was "qualified" to serve as a mold maker, he was entitled to be recalled under this contractual provision. Indeed, in this connection, the record shows that the Company had once before recalled Kozlowski to a classification which was different from his former one. In light of the above, it must therefore be concluded that the Company breached the settlement agreement when it failed to offer Kozlowski the mold maker position noted in the May 7, 1978 newspaper advertisement. 27/

In so finding, the Examiner is aware of the Company's contention that the N.L.R.B. found that Kozlowski was a machinist and that the N.L.R.B. dismissed an unfair labor practice charge filed by Kozlowski. Since said charge was not introduced into the record, the exact nature of the charge is unclear. Moreover, even though the N.L.R.B. may have found that Kozlowski was a machinist, said determination does not go to the additional question of whether Kozlowski was entitled to the May 7, 1978 mold maker position under Article XXI of the contract. Accordingly, even assuming arguendo that Kozlowski may not have been entitled to recall under the NLRA, he was entitled to be recalled under Article XXI. 28/

26/ Even if said letter were not received, the Examiner credits Zitlow's testimony that Kozlowski was hired as a mold maker.

27/ In light of this finding, it is unnecessary to determine whether Kozlowski was entitled to the March 20, 1978 "production/assembly" opening.

28/ Indeed, since the employes herein were "qualified" for the second and third shift openings under Article XXI, the Company's earlier refusal to recall them to said positions was violative of the contract. That is so irrespective of whether said refusal was also violative of the NLRA. Since the Commission clearly has the right to enforce such contractual recall rights, there should be no question whatsoever but that the Commission has jurisdiction to decide that said rights have been violated.

Catharine Maher, who was a machine operator before the strike, was entitled to be recalled to the March 20, 1978 production/assembly opening. The Company did not recall her until September, 1978, at which time she returned as a machine operator on the second shift. The Company's refusal to offer reinstatement to Maher in March, 1978 thereby violated the settlement agreement. 29/

Cindy Quamme, who was a machine operator before the strike, was entitled to be recalled to the March 20, 1978 production/assembly opening. As to her, Bartelt testified that she advised him on September 30, 1978 that she had quit her employment and that she was working elsewhere. She did not advise Bartelt as to when she had quit. There is no basis in the instant record, therefore, to conclude that Quamme had quit before March 20, 1978. As a result, it is entirely possible that had she been offered the March 20, 1978 opening, Quamme may have taken it until such time that she secured employment elsewhere. The Company's refusal to offer her said position on another date was therefore violative of the settlement agreement.

Sadie Butzen, who was a machine operator on the first shift before the strike, was entitled to be reinstated on March 29, 1978. The Company did not offer reinstatement to Butzen until September 27, 1978, at which time she returned to the first shift. The Company's refusal to offer her earlier reinstatement therefore violated the settlement agreement. 30/

Marilyn Tyrer was a machine operator before the strike. Her seniority entitled her to be recalled to an April 3, 1978 production/assembly opening. The Company did not attempt to recall Tyrer until September, 1978, at which time she advised Bartelt that she was going to Madison Area Technical College and that she had quit. 31/ Since there is no record evidence that Tyrer quit before April 3, 1978, the Company's refusal to offer her earlier reinstatement violated the settlement agreement.

29/ On page 19 of its brief, the Company acknowledges that it "made an error in not attempting to recall Ms. Maher for that position", i.e., one which arose on May 30, 1978. As a result, even if the Company were not required to recall Ms. Maher in March, 1978, it nonetheless clearly violated the settlement agreement when it refused to recall Maher on May 30, 1978.

30/ While Bartelt testified that he spoke to Tyrer on April 25, the totality of the record shows that such conversation took place after the Company advised her of job openings on September 11, 1978.

31/ On p. 18 of its brief, the Company acknowledges that Butzen should have been offered a second shift production/assembly job which arose on July 5, 1978. As a result, even if the Company were not required to recall Butzen on March 29, 1978, its refusal to offer Butzen the July 5, 1978 opening is violative of the settlement agreement. Indeed, the Company concedes on p. 20 of its brief that:

> The Employer believes that with the exception of the case of Catharine Maher and Sadie Butzen, it complied with the Strike Settlement Agreement, and that no reinstatement or back pay ordered would be appropriate except, perhaps as to those two employees.

Steven Maher, who was apparently a material handler on third shift before the strike, was entitled to be recalled to an April 3, 1978 position in production/assembly. The Company did not offer him reinstatement until September, 1978, at which time Maher failed to advise the Company whether he wished to return. The Company therefore violated the strike settlement agreement when it refused to offer him earlier reinstatement.

Greg Larson, a material handler before the strike, was entitled to be recalled to an April 3, 1978 production/assembly opening. The company did not offer reinstatement to Larson until after September, 1978, at which time he advised Bartelt that he had joined the Air Force on May 29, 1978. As a result, it is possible that Larson may have accepted the April 3, 1978 job and worked until May 29, 1978. The Company thereby violated the settlement agreement when it refused to offer him the job.

Mary Jo Bambrough in mid or late March, 1978, advised the Company by letter that she had found employment elsewhere and that she was terminating her employment. Inasmuch as Bambrough would not have been recalled prior to March, 1978, said termination letter relieved the Company from any duty to recall her.

Barbara Nellen, who was a machine operator before the strike, was entitled to be recalled to an April 3, 1978 production/assembly opening. The Company did not offer her reinstatement until September, 1978, at which time she stated that she was quitting. Since there is no evidence that Nellen quit her job before April 3, 1978, the Company's refusal to offer her reinstatement on that date violated the settlement agreement.

Reviewing the above, the record shows that although it did not violate the settlement agreement with respect to Bambrough and McLaughlin, the Company did violate said agreement by failing to earlier recall Mayr, Catharine Maher, Quamme, Butner, Tyrer, Steven Maher, Larson and Nellen, and by refusing to recall Kozlowksi for the mold maker position. This question of whether the Company violated the settlement agreement is, of course, a different question from the additional issue of what remedy should be issued for said violation.

In this connection, the Company first argues in its brief that "The Union's failure to have the individual employees testify must result in dismissal of any claims for back pay." In support of this proposition, the Company cites N.L.R.B. v. Mastro Plastics Corp. 60 LRRM 2578 (1965).

The Company's reliance on Mastro for this broad proposition is misplaced, as Mastro involved an N.L.R.B. supplemental back pay hearing, one which followed an initial N.L.R.B. order which held that the employer there had acted unlawfully when it discriminatorily discharged 77 employes. As a result, Mastro did not address the question of whether the discharged employes had to testify in the initial hearing. Accordingly, and because questions involving back pay are usually resolved in supplemental hearings, the Company's claim is rejected.

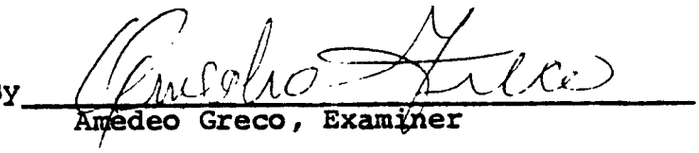
Alternately, the Company contends that the Commission "should have a back pay hearing scheduled in which all of the employes must come and testify in order to be eligible for any back pay award". This point is

well taken as the Company is entitled to have the nine employes herein testify in order to determine: (1) whether they would have returned to work had they been recalled earlier; and (2) to determine the back pay, if any, awarded to each of the strikers.

At the same time, the Company maintains that, but for Kozlowski, its back pay liability should terminate in September, 1978, as it then offered reinstatement to all of the nine, excluding Kozlowski. It is unnecessary to resolve this issue at the present time as the instant proceeding does not center on the amount of the Company's back pay liability, but rather, is limited to the more narrow question of whether the settlement agreement has been breached. The question of the amount of the Company's back pay liability, if any, is therefore more appropriately left to a supplemental hearing.

The Union requests that the Examiner should retain jurisdiction "for purposes of determining the implementation of the award requested herein". Since that is not the standard was in which such matters be handled, this request is denied.

Dated at Madison, Wisconsin this 6th day of November, 1979.

By 
Amedeo Greco, Examiner