

The A. S. Abell Company and Baltimore Newspaper Web Pressmen's Union No. 31, International Printing and Graphic Communication Union, AFL-CIO

Baltimore News American Division, The Hearst Corporation and Baltimore Newspaper Web Pressmen's Union No. 31, International Printing and Graphic Communication Union, AFL-CIO. Cases 5-CA-7667 and 5-CA-7668

February 8, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On September 22, 1977, Administrative Law Judge Jennie M. Sarrica issued the attached Decision in this proceeding. Thereafter, both Respondents filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs¹ and has decided to affirm the rulings, findings, and conclusions² of the Administrative Law Judge, to modify her remedy,³ and to adopt her recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, The A. S. Abell Company and Baltimore News American Division, The Hearst Corporation, Baltimore, Maryland, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Preserve and, upon request, make available to

¹ The Respondent, The A. S. Abell Company, has requested oral argument. As the record, including the briefs of the parties, adequately presents the issues and the positions of the parties, the request is hereby denied.

² See *The Newark Morning Ledger Co., d/b/a Newark Star Ledger*, 232 NLRB 581 (1977).

³ The Administrative Law Judge inadvertently specified interest to be paid at 7 percent; however, interest will be calculated according to the "adjusted prime rate" used by the U.S. Internal Revenue Service for interest on tax payments.

234 NLRB No. 131

the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

WE WILL NOT discourage membership in, or activities on behalf of, Washington Graphic Communications Union No. 6, International Printing and Graphic Communication Union, AFL-CIO, or any other union, by refusing to hire or, in any other manner, discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to form, join, or assist, or be represented by any labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer to Kenneth M. Swiggart and William Candito immediate employment at the same or substantially equivalent positions at which each would have been employed had he not been discriminated against, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination, together with interest.

THE A. S. ABELL
COMPANY

BALTIMORE NEWS
AMERICAN DIVISION, THE
HEARST CORPORATION

DECISION

STATEMENT OF THE CASE

JENNIE M. SARRICA, Administrative Law Judge: This is a proceeding under Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*),

hereinafter referred to as the Act. Based on separate charges filed on December 8, 1975,¹ and an amended charge filed on June 8, 1976, separate complaints were issued on June 11 and 14, 1976, and consolidated on June 14, 1976, presenting allegations that The A. S. Abell Company and Baltimore News American Division, The Hearst Corporation, herein referred to as Respondent Abell or Sun and Respondent Hearst or News, respectively, and collectively as Respondents, committed unfair labor practices within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act. The Respondents each filed an answer denying that it committed the violations of the Act alleged. Upon due notice, the case was heard before me at Baltimore, Maryland, on July 29 and 30, 1976. Representatives of all parties entered appearances and had an opportunity to participate in the proceeding.

Based on the entire record, including my observation of the witnesses, and after due consideration of briefs and arguments, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, The A. S. Abell Company, a Maryland corporation, is engaged in the publication of daily and Sunday newspapers known as The Sun, The Evening Sun, and The Sunday Sun, at its Baltimore, Maryland, location. Respondent, Baltimore News American Division, The Hearst Corporation, a Delaware corporation, with principal offices in New York, New York, is engaged in the publication of daily and Sunday newspapers called The Baltimore News American and The Sunday News American, at its Baltimore, Maryland, location. During the year preceding issuance of the complaints, a representative period, each of the Respondents, in the course and conduct of their business operations, had gross revenues in excess of \$200,000 and regularly printed advertising of products which are nationally advertised and sold, purchased nationally syndicated and news stories, and shipped newspapers to points outside the State of Maryland.

Respondents admit and I find that each is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The Charging Party, Baltimore Newspaper Web Pressmen's Union No. 31, International Printing and Graphic Communication Union, AFL-CIO, hereinafter referred to as Local 31 or the Union, and Washington Graphic Communication Union No. 6, International Printing and Graphic Communication Union, hereinafter referred to as Local 6, are now, and each has been during all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

Whether fear of possible violence and property damage is a defense to a charge of unlawful refusal to hire referred employees who were members of a striking local union because unidentified members of said local purportedly engaged in reported violence and property damage at another employer.

B. *Background*

The newspaper pressrooms involved herein are staffed with a normal job complement designated as regular employees which is supplemented by additional pressmen as required by the size of the press run. This generally occurs on weekends. The procedure for engaging additional workers for the presses is, under contractual manning requirements, by referral from Local 31. In this, the chapel chairman at the location, 12 to 18 hours in advance, and based on his knowledge of pressroom needs derived from experience and conferences with the pressroom superintendent, indicates the number of additional employees required for a given shift on a specific date, receives the names of the individuals being referred by the Local Union, inserts such names on the "markup,"² and posts these at established locations on bulletin boards in the lunchrooms, in the locker rooms and in the office of the pressroom superintendent. Normally, sometime during his work shift, the temporary employee fills out a payroll form which gives vital employment information.

Historically, whenever pressmen from another newspaper are not working because of a strike at their publisher, whether that strike is by the pressmen's union or some other union, Local 31, as well as sister locals throughout the country, in cooperation with the respective publishers whose employees they represent, have made these extra jobs available to such idle pressmen. Thus, for example, when there were newspaper strikes in Detroit, Michigan, Washington, D.C., and Cleveland, Ohio, pressmen from those locations have worked by referral through Local 31 at the Respondents' presses.

Respondents and Local 31 had been in negotiations for a new contract and had reached agreement for a temporary extension of their old contract until December 31 prior to the events herein. Negotiations were scheduled to resume on November 17. Although the old contract included a no-strike clause, a prior strike vote by Local 31 members remained viable. However, it was understood among the parties that there was a mutual desire to avoid such an occurrence. At the same time, negotiations between The Washington Post Company, publisher of The Washington Post newspaper, herein referred to as the Post, were in process. The parties involved herein were very much aware of difficulties being encountered in the Post negotiations as they were in frequent, if not daily, contact with their respective counterparts in the Post negotiations. Thus, as the Post strike deadline approached, Local 31's president,

applicant for employment referred by the Union. However, there shall be no discrimination in hiring or promotion because of sex, race, creed, color or national origin."

¹ All dates are in 1975 unless otherwise indicated.

² Local 31 has a joint contract with Respondents Sun and News. Their contract provided that "the Publisher shall have the right to reject any

Robert Stallings, was not only briefed on the situation by Local 6's president, James Dugan, but was also solicited with respect to intentions of Local 31 in accommodating prospective Local 6 strikers by providing interim referral for employment in the extra jobs available.

The collective-bargaining agreement between the Post and Local 6 expired at midnight on September 30, and negotiations were scheduled to continue on October 1. In the early morning of October 1, Local 6 conducted a chapel meeting in the Post pressroom during which time over 100 employees, or approximately 45 to 50 percent of the Post pressmen employed, were scheduled to work. However, the meeting was open to all pressmen and an estimated 8 to 12 nonscheduled pressroom employees were also present. At approximately 4 a.m., Local 6 went on strike at which time a riot broke out in the Post pressroom in the process of which, reportedly, the foreman was beaten, the presses were set afire, equipment was extensively damaged, and picketing outside the Post building began, allegedly accompanied and followed by mass picketing and sporadic outbreaks of property damage and violence.³

Television news reports of the riot incident, press damage, and mass picketing were disseminated by three Washington, D.C., television stations; pictures and news stories were placed on United Press and Associated Press news wires, and headlines, stories, and pictures of this event were displayed in The Washington Post newspaper. Pictures and reports were supplied by the Post management to a convention of newspaper publishers then convened in Dallas, Texas, attended by newspaper officials from across the country, including management representatives of the Respondents, and were published in that organization's bulletin which was disseminated by its research division. Additionally, Laurence A. Wallace, the Post's vice president for labor relations, who was in charge of negotiations for the Post and the subsequent investigation, gave a closed circuit report with a telephonic question-and-answer session to persons in attendance at the convention.

By November 15, officials or responsible agents of the Post, through that company's investigations and those of the grand jury, had been able to identify some, but not all, of the individuals involved in the destruction and violence, and various legal actions were being pursued, including injunctive relief from mass picketing and some individual indictments. Up to November 15, the Post had not absolved any of its pressroom employees. However, admittedly, approximately 50 percent of the pressmen were not present during the early morning riot and damage of October 1, and they would have been cleared of culpability in such conduct had that been the thrust of the effort. Neither the Sun nor the News sought to obtain such information from the Post. The Post official in charge of the investigation of the October 1 events had a folder with the names of pressmen concerning whom investigators had reason to inquire further concerning culpability. The names of William Candito and Kenneth Swiggart were not

contained in that folder or on the list of suspects subsequently prepared by the Post investigators.

C. *The Operative Events*

The essential facts are uncontroverted. There was some inconclusive discussion among management officials at the Sun concerning what policy that publisher would adopt if striking Post pressmen were referred for employment. Thereafter, Sun Pressroom Superintendent John Hall discussed the subject with Local 31's secretary, Andrew Tragerser, at which time Hall expressed the view that Post pressmen would not be accepted for employment. Shortly after Hall made this statement, it became the policy adopted by Sun's higher management. Around October 20, upon the conclusion of a grievance meeting, Hall informed Local 31's president, Stallings, of Sun's management's awareness of rumors that Post pressmen would be coming to Baltimore for work and of the Sun's adoption of a policy not to employ any Post pressmen. No attempt was made by Sun officials to ascertain the identity of the perpetrators of the damage and participants in the violence at the Post, and no such information was received at any time prior to the events of November 15.

About a week after his conversation with Hall, Stallings, who was a journeyman-pressman at the News, asked his supervisor, Pressroom Superintendent Bill Tamulonis, what position the News would take concerning referrals of Post pressmen. Tamulonis promised to obtain such information for Stallings. This inquiry precipitated attempts by News' management to ascertain from Post officials the identity of the offending pressmen. A list of the employees who worked in the pressroom of the Post was supplied, but News officials were advised that no identities of participants had been established. Subsequent conferences among News' management and a review of wire service photos of damage and reports of the events at the Post took place, in the course of which Publisher Mark Collins stated that he did not know how the News could hire "people from that area" inasmuch as they did not know the identity of the persons who participated in the destructive conduct. No policy decision was reached at this time. Early in November, News officials met with Stallings and other Local 31 representatives who requested a policy statement on the subject of referrals of Post pressmen. The News officials indicated they were concerned that violence and damage might result if they employed Post pressmen and asked Local 31 not to test the News on this matter. Stallings advised that if any Post pressmen were sent by Local 6, he would have them marked up and offered to guarantee that there would be no trouble, assuring News officials that whatever situation developed they would be able to publish the paper. After this meeting, News officials heard rumors that Post pressmen would be referred on the weekend of November 7, whereupon at another News' management conference it was definitely decided that the News would refuse to employ any Post pressmen, a "ban one—ban them all" approach, without regard to the list

and the extensive testimony that as a matter of fact such reports, in much more detail, were common among the principals of Local 31 and the managements of the Sun and the News.

³ No finding is required or intended as to the accuracy of the report on these events which were the subject of extensive court litigation, it being sufficient to accept as background the reports received by the parties hereto.

and to rely upon the employer's right to reject referrals reserved in their contract.

On President Dugan's inquiry around November 13, Stallings advised that work would be available for Local 6 member referrals for Saturday, November 15. He verified with the chapel chairmen at both the Sun and the News that three positions would be made available at each paper for "markup" of Post pressmen and Local 6 was so advised. Thereafter, on the basis of rumor, Hall called Stallings to remind him of the Sun's policy not to allow Post pressmen to work. Stallings maintained the position that Local 6 pressmen would be marked up.

Late Friday evening, some 6 weeks after the Post incident, Stallings received the names of six Local 6 men and relayed these to the respective chapel chairmen at the Sun and the News for markup. The chapel chairman at the Sun, Victor Reifel, recalling an earlier statement by the pressroom foreman, Fred Weigand, that Post pressmen would not be accepted for employment, after marking up the names supplied by Stallings, advised Weigand of this fact. Weigand called Hall who then told Reifel that Post pressmen would not be employed, nor would they be permitted inside the Sun building. Other officials were brought into conversations with Reifel who advised that this markup was a reflection of the official union position and that if the Post pressmen were denied employment no "job action" would result. At the News, word of the markup brought forth instructions by Pressroom Superintendent Tamulonis to Pressroom Foreman Jim Shuhart and Chapel Chairman Keefer Zeller that when the three Post pressmen arrived they were to be brought to his office to complete payroll information slips and fill out "start" orders, and that each would have to be evaluated for employment. The names of the three Local 6 pressmen were then relayed to higher officials who thereupon instructed Tamulonis to reject the three men when they appeared on the basis of contract privilege, but to have them complete the start orders so as to verify that they were actually Post pressmen.

On November 15, at or about 9 p.m., the three Post pressmen who had been marked up, including William Candito, were met by Chapel Chairman Zeller and taken into Tamulonis' office at the News in accordance with prior instructions. Zeller introduced the three men as the union members from the Post who had been marked up. Tamulonis told the men they would not be allowed to work, using the contract clause as the basis for his actions. He told them that, although they were to complete the start orders, these would not be approved. Candito asked to see and was shown the contract clause relied upon. Candito pressed for a statement of the reason he and the others were not being hired.

Louis Piersant, assistant production manager, who was also in the office, advised that it was because they worked for the Post, had come from Local 6, and had been associated with violence and destruction of property. The pressmen all left and shortly returned with Stallings. Upon the latter's pressure for a reason for their action, the News

officials advised that it was because the three men were from the Post and Post pressmen were not to be hired.

Around 9 p.m., November 15, Reifel and two other Sun pressmen, all union officials, went to the building lobby to await the arrival of Post pressmen. Stallings arrived about 15 minutes later and informed the Sun pressmen of what had occurred at the News. Three Local 6 members arrived and asked the guard for directions to the pressroom. The guard requested identification and, upon compliance using Post picture identification, the three were denied entry. Reifel and Stallings approached, identified themselves, and obtained the names⁴ of the three. The guard placed a phone call. Hall and Assistant Pressman Superintendent Don McCloud appeared on the scene. Stallings introduced the three as The Washington Post men who were there to go to work. Hall announced the three men could not work, reiterating the policy that men from Washington would not be permitted to work. In a conversation which followed between Hall and Stallings, Hall asserted his contract right of refusal of a referral, and asked all to leave. When the Local 6 members pressed for the reason, Hall stated they were not being employed because they were from Washington.

Succinctly summarized, Respondents received reports of violence and property damage occurring at the Post in the context of a strike by pressmen members of Local 6 and, without knowledge as to individual culpability, each Respondent adopted a policy of rejecting for employment all referrals of Post pressmen for employment, because of their association with Local 6 and their possible participation in such violence and property damage. Referrals of Local 6 Post pressmen were made and all were denied employment by Respondents' using a right-of-refusal clause in the existing Local 31 contract as the means of implementing this policy. Some attempt was made by officials of the News before this policy was adopted to establish the identity of the individuals involved in the Post incidents but, this proving impossible at the time, no effort was made to ascertain the culpability of the individuals actually referred before they were refused employment. The General Counsel presented testimony, which I credit, establishing that neither Swiggart nor Candito were present or involved in the riot and damage activity in the pressroom at the Post on October 1, nor did they engage in any but orderly picket line activity thereafter.

Analysis and Conclusions

The General Counsel contends that, although Swiggart and Candito were never employees of Respondents Sun and News, because the Act's protection extends beyond the immediate employment relationship, the rule of law in *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), involving discharge for alleged acts of misconduct in the course of protected activity, is applicable to the refusals to employ involved in these cases. Since the reason for each refusal to employ was the Respondent's discovery that the applicant was a member of Local 6, on strike at the Post (a

⁴ One of the names, that of Kenneth M. Swiggart, differed from that (Davis) previously supplied and originally shown on the markup. After the events herein the chapel chairman went to the office and corrected the copy

of the markup to reflect the name of Swiggart and entered the notation by the names of the three, "not allowed in building."

protected union activity), since the applicants cannot be held accountable for acts of others,⁵ and since neither Respondent has met its burden under *Burnup & Sims* of establishing a good-faith belief that either Swiggart or Candito, in any manner, participated in, authorized, or ratified any acts of violence or misconduct associated with the strike,⁶ Respondents discriminated "in regard to hire" within the meaning of Section 8(a)(3) and (1) of the Act by refusing them employment. The General Counsel, relying on *Radio Officers*⁷ and *Erie Resistor*,⁸ points out that along with an employer's right to conduct its business goes a responsibility for the unavoidable consequences. Assertedly, the natural consequence of Respondents' policies, which culminated in the refusal to hire, is to discourage employee membership in a labor organization; therefore, the implementation of such policies violated Section 8(a)(3) of the Act. In any event, the General Counsel contends fear that sabotage and violence could spread to Respondents' publishing facilities, which assertedly occasioned adoption of the policy to ban Post strikers from employment, does not serve as a valid defense since, under *Burnup & Sims*, Respondents' motives are not determinative in establishing a violation.

Acknowledging the long-established and basic principle that applicants are employees within the meaning of the Act and, as such, are accorded its full protection, but quoting the Supreme Court's observation in *Phelps Dodge*⁹ that:

The statute does not touch "the normal exercise of the right of the employer to select its employees or to discharge them." It is directed solely against the abuse of that right

⁵ *Wichita Television Corporation, Inc., d/b/a KARD-TV*, 122 NLRB 222 (1959), enf'd. 277 F.2d 579 (C.A. 10, 1960), cert. denied 364 U.S. 871; *Coronet Casuals, Inc.*, 207 NLRB 304 (1973); *Moore Business Forms*, 224 NLRB 393 (1976), and cases cited therein.

⁶ *B.V.D. Company, Inc.*, 117 NLRB 1455 (1957), on remand in *International Ladies' Garment Workers Union, AFL v. N.L.R.B.*, 237 F.2d 545 (C.A.D.C., 1956), reversing *B.V.D. Company, Inc.*, 110 NLRB 1412 (1954). Also see *N.L.R.B. v. Sea-Land Service, Inc.*, 356 F.2d 955, 967 (C.A. 1, 1966), cert. denied 385 U.S. 900.

⁷ *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 44-45 (1954):

. . . [S]pecific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of Section 8(a)(3). . . . proof of certain types of discrimination satisfies the intent requirement. . . . specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership.

⁸ *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963):

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face [T]he employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it is discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries within unavoidable consequences which the employer not only foresaw but which he must have intended. . . .

the Respondents assert that the *Burnup & Sims* rule governing motive in the reinstatement of discharged employees is not apposite, as the Supreme Court, in that decision,¹⁰ "specifically exempted cases involving the 'realm of managerial prerogatives.'" Respondents argue "this illustrates that the Court would react differently where an initial employment relationship was claimed by one who failed to meet the sound business hiring policies of the employer."¹¹ From this premise, Respondents further argue that case precedents, governing reinstatement of individual strikers requiring identification of the particular employee as a participant in substantial strike violence, are similarly inapplicable¹² because Respondents here merely exercised the rights of an employer to establish appropriate hiring practices. Instead, it is contended, cases confirming an employer's managerial right to exercise reasonable discretion in hiring policies establish the applicable legal principle. The rule advanced as controlling here is:

Where "management can point to sound business reasons for its failure to hire an individual, the Board must prove that these reasons were not the motivating basis for rejection of an application for employment or they were, even if sufficient, pretextual."¹³

In such situation the issue is not the individual culpability of the applicant but, rather, the employer's good-faith and reasonable belief that the applicant was undesirable for employment.¹⁴

Under this rule, Respondents assert, motive is crucial, and discrimination which, under Section 8(a)(3), encourages or discourages protected activity depends on a finding that the discriminatory conduct was motivated by an antiunion purpose,¹⁵ especially where the adverse effect is "comparatively slight" and where the employer advances

⁹ *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 187 (1941).

¹⁰ *Burnup & Sims*, *supra* at 24.

¹¹ The quote is from Respondent News' response to the General Counsel's reply brief to the Administrative Law Judge. Because of the identical legal issues involved and the consistency of the Respondents' respective positions, I have treated the arguments advanced by each as presented on behalf of both without regard to the origin.

¹² Even if such cases are deemed relevant, it is asserted, with citation to *N.L.R.B. v. Ohio Calcium Company*, 133 F.2d 721 (C.A. 6, 1943), that such requirement for disqualification is tempered by situations where actual identification as part of a particularly violent group is established, because to hold otherwise would not be conducive to promotion of industrial peace, would be punitive action rather than remedial action contemplated by the Act, and would encourage violence in labor disputes. I find that subsequent case law has rendered this precedent obsolete. Further, it is suggested that, since a union cannot escape responsibility for mass concerted conduct of its members (*Vulcan Materials Company v. United Steelworkers of America, AFL-CIO*, 430 F.2d 446 (C.A. 5, 1970)), some parity of reasoning permits Respondents, in the absence of some means of fixing responsibility for the damage in the Post pressroom, to conclude that all Post pressmen were subject to hiring restrictions provoked by the destruction. The Board and courts have held to the contrary. See fn. 5, *supra*.

¹³ Citing *Reliance Insurance Companies v. N.L.R.B.*, 415 F.2d 1 (C.A. 8, 1969), and *Northern Petrochemical Company v. N.L.R.B.*, 469 F.2d 352, 355 (C.A. 8, 1972), reversing 173 NLRB 1063 (1968), and 194 NLRB 311 (1971), respectively, both on the question of substantial evidence.

¹⁴ *Loffland Brothers Company*, 166 NLRB 195 (1967), involving pending criminal charges not related to union activity, in which the applicant was subsequently acquitted.

¹⁵ Citing *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 309

legitimate and substantial business justification for the conduct,¹⁶ even though it has the effect of rendering striking employees unemployable.¹⁷ Thus, once the employer comes forward with evidence of a sound business justification for alleged discriminatory conduct, the burden of proving otherwise shifts to the General Counsel who must adduce proof that the alleged discriminatory conduct is pretextual or otherwise discriminatorily motivated.¹⁸ In the circumstances of this case, where all applicants are referred by the Union, it is asserted by Respondents that specific union animus with respect to each rejected applicant must be established.¹⁹ Further, Respondents contend that, although motive is less crucial in cases involving allegations of 8(a)(1) violations,²⁰ the existence of some union animus becomes controlling where an employer advances valid business reasons for its actions.²¹

With respect to the particulars, Respondents point out that they had a valid contract with Local 31, had no strike at their respective premises, and had no obligation toward Local 6 or its members. To establish that the hiring policies applied in each of these instances were based on sound business reasons, Respondents point to record testimony that these policies grew out of the reports of destruction in the Post pressroom, violence in the Local 6 pressmen's strike at the Post, and reported rumors that striking Post pressmen might be, or were about to be, referred by Local 31 for employment. In the context of their own temporary contract with Local 31, under which negotiations with an outstanding strike vote were about to resume, Respondents claim that they feared the employment of participants in the Post incidents would invite similar violence and destruction at their facilities; that the formulation of such policies related solely to the unprotected and unlawful activities of an undetermined number of unidentified Post pressmen; and that it was impossible to identify the individual pressmen who were responsible for the property destruction and violence at the Post. As proof that its decision was based on a desire to protect its property and employees, assertedly a reasonable and justifiable economic and business consideration, and not upon any intent to discriminate against²² individuals because of their membership in Local 6, Respondents point to its history of agreements with Local 31 and its past practice of accepting, without question, Local 31's referrals of striking pressmen from other newspapers. Respondents urge that this was

(1965), holding the temporary bargaining lockout "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation," and *N.L.R.B. v. John Brown, et al., d/b/a Brown Food Stores*, 380 U.S. 278 (1965), similarly dealing with the lockout as an economic weapon in a bargaining context.

¹⁶ Reliance is placed on *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), wherein the Supreme Court "distilled" its previous holdings with respect to the requirement for proof of motivation in discrimination cases involving inherently destructive conduct.

¹⁷ Here, citing *The Timken Roller Bearing Company*, 187 NLRB 273 (1970), where invoking an established economic policy not to hire temporary employees because of the cost involved effectively excluded from employment applicants on strike from another employer who were viewed by the employer as seeking temporary employment.

¹⁸ Citing *Ohio Power Company*, 215 NLRB 862 (1974); *Sumter Plywood Corporation*, 208 NLRB 563 (1974); and *Morrison-Knudsen-Sirabag*, 204 NLRB 312 (1973). Cf. *N.L.R.B. v. Great Dane Trailers, Inc.*, *supra*.

¹⁹ No specific authority is advanced to support this argument.

²⁰ As indicated in *Burnup & Sims*, *supra*.

²¹ Reliance is on *Kendrick Cartage Co.*, 188 NLRB 534 (1971), and

reasonable action taken to protect their own property²³ and the personal safety of their employees and, absent proof of an unlawful motive governing the application of these policies, the cases must be dismissed.²⁴

In my evaluation of the case precedent, I am convinced that Respondents have misread the Supreme Court's decision in *Burnup & Sims*, and, therefore, misapplied other case precedent cited. I do not see, in the phrase—"We are not in the realm of managerial prerogatives"—used by the Court, a shield from the application of the principles established in that decision whenever a managerial function is involved. The meaning and impact of that statement must be derived from its context, and the thought in the paragraph in which it is contained is completed with the observation: "Had the alleged dynamiting threats been wholly disassociated from § 7 activities quite different considerations might apply." Read in this context, it is clear that the Court was not setting forth an exception but, rather, was defining the area of concern and differentiating all conduct taking place in the course of Section 7 activity from conduct wholly dissociated from Section 7 activity.²⁵ Clearly, the reported destructive conduct at the Post, occurring in the course of strike activity, was associated with the exercise of such Section 7 rights, and Respondents so viewed it, as indicated by their attempts to isolate it through the ban on the hire of all applicants associated with that strike.

Nor can I find justification in that decision for applying legal concepts and rules to management decisions with respect to hire different from those applicable to management decisions on discharge or reinstatement whenever such decisions impinge upon the realm of Section 7 rights. Clearly, the establishment of a hiring policy is a managerial function. The implementation of that policy is also a managerial decision. The same may be said with respect to decisions to discharge or reinstate employees which are repeatedly scrutinized by the Board. Admittedly, the Act accords full protection to all qualifying as "employee" thereunder, including applicants for employment, thus encompassing applicant-prospective employer relationships as well as employer-employee relationships. And, obviously, varying circumstances and factual considerations give rise to different inferences and shifting burdens of proof. Similarly, alleged violations of the different sections of the Act call forth varying considerations.

Exchange Parts Company, 375 U.S. 405 (1964). I view both cases as distinguishable in facts and context, and of little value in determining the issue herein.

²² Citing *N.L.R.B. v. United Parcel Service, Inc.*, 317 F.2d 912, 914 (C.A. 1, 1963), allowing unfettered right to act for "a good reason, a bad reason or indeed for no reason at all" except when "the discharge is motivated . . . by anti-union animus."

²³ "[I]t is well settled that the employer is not to be held guilty of an unfair labor practice because of action reasonably taken to protect his property or preserve discipline against unlawful conduct of employees." *Maryland Drydock Company v. N.L.R.B.*, 183 F.2d 538, 539 (C.A. 4, 1950).

²⁴ The General Counsel also advances the Respondents' use of the contract right-to-reject-referrals clause as a pretext advanced to cover the unlawful motive encompassed in the policy to ban hiring of Post pressmen. I have not treated with the Respondents' responses to this contention as, in my view, there is no pretext involved. Respondents merely asserted their contract privilege as the vehicle for implementation of the newly established hiring policy, but did not advance a reason for the refusals to hire as being anything but application of that policy.

²⁵ Cf. *Loffland Brothers Company*, *supra*.

However, the basic principle and objective remains constant. Therefore, I cannot find merit in the suggestion that managerial functions enjoy exemption from the proscriptions of the Act, or persuasive value in Respondents' speculation as to how the Supreme Court might have reacted in *Burnup & Sims* if a refusal to employ rather than a discharge and refusal to reinstate had been involved. Nor can I see, in the variations in considerations occasioned by the differing employee status and section of the Act involved, a basis for finding *Burnup & Sims* inapposite here, even though that decision found only an 8(a)(1) violation and is not, contrary to the General Counsel, wholly dispositive of the issues herein.

As summarized by the Supreme Court in *Great Dane*,²⁶ when implementation of a management policy impinges upon Section 7 rights and a violation of Section 8(a)(3) is alleged, it becomes necessary to scrutinize that policy and/or its implementation. If the action is discriminatory in character, the element of motivation becomes significant. If the action is inherently destructive of important employee rights, it bears its own indicia of intent and no proof by the General Counsel of antiunion motivation is needed, for the employer is charged with the unavoidable consequences of such acts even though its conduct was motivated by business considerations. However, if the adverse effect of the discriminatory conduct on employee rights is comparatively slight, and the employer comes forward with evidence of "legitimate and substantial business justification for the conduct," antiunion motivation must be proved to sustain the charge.

Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.²⁷

Applying these rules in *Great Dane*, the Supreme Court found it unnecessary to decide the degree to which the challenged conduct might have affected employee rights because the employer there had not come forward with evidence of a legitimate business reason for the discriminatory conduct. Here, the Respondents have proffered claimed legitimate business reasons which become relevant only if the conduct complained of is deemed discriminatory, and then only if the adverse effect of that discriminatory conduct is comparatively slight.

The Board and courts have held repeatedly, in a broad spectrum of cases too numerous to mention, that depriving employees of employment because of protected activity goes to the very heart and purpose of the Act. It would be difficult to identify conduct more destructive of Section 7 rights to join and assist labor organizations than that affecting employment status or tenure. It would seem axiomatic that such discrimination constitutes a type which is inherently destructive of important employee rights. But it is also noted that such a conclusion is consistent with the

Supreme Court holding in *Burnup & Sims* imposing accountability upon the employer for taking discharge action for conduct associated with protected activity, even where it is shown to have been taken in good faith. There the Supreme Court found it unnecessary to reach the motive issue under Section 8(a)(3) because Section 8(a)(1) was plainly violated, as can be said here. However, the ban here establishes its own motive, i.e., nonemployment of strikers—clearly a discrimination for protected union activity. It would seem superfluous to inquire further into the purpose of containing the impact of union activity upon Respondents' businesses for a motive. The Respondents assert that their target was the unlawful conduct, not the union activity, but this was not the thrust of their policy or its implementation.

This brings us to a consideration of whether in the course of engaging in protected concerted activity the individuals participating lost their Section 7 protection because of associated unlawful conduct. Here, I find, contrary to Respondents, that the principles established for reinstatement of strikers adequately represented in cases referred to above²⁸ are applicable. The misconduct must be that of the individual employee discriminated against and the burden of proving a good-faith belief in such guilt is upon the employer; whereupon the General Counsel assumes the burden of establishing that the affected individual did not engage in the misconduct alleged.²⁹ In the instant case, the Respondents not only made no effort to ascertain the individual culpability of the applicants, they also affirmatively assert an inability to do so as the reason for their broadside ban on employment of any referral identified with the Post strike. Although in the circumstances he was not required to do so, the General Counsel has come forward with sufficient evidence to establish that neither Swiggart nor Candito was present when the violence and misconduct allegedly occurred. As the discriminatory ban against employment of strikers is inherently destructive of important employee rights and bears its own indicia of intent for which the employer must bear the unavoidable consequences, I find, in reliance upon *Erie Resistor* and *Great Dane, supra*, that Respondents Sun and News each violated Section 8(a)(3) and (1) of the Act by refusing employment upon referral to Kenneth M. Swiggart and William Candito, respectively.

Even if the adverse affect of the discrimination by Respondents were regarded as of comparatively slight degree under *Great Dane*, I would regard the business considerations advanced by Respondents (that of fear that violent or destructive conduct associated with a strike at the Post might spread to their own operations and that the strike action itself might spread to their own employees if they were to hire striking Post employees), inadequate to establish a "legitimate and substantial business justification." There is no escaping the glaring fact that the very base of the justification offered is the prevention of or interference with lawful union activity, the very method was discrimination against employees for engaging in

²⁶ *N.L.R.B. v. Great Dane Trailers, Inc., supra*, involving disparate treatment of strikers vis-a-vis strike replacements with respect to vacation pay found to constitute discrimination in its simplest form which was capable of discouraging membership in a labor organization, including participation in concerted activities such as a legitimate strike.

²⁷ *Id.* at 34.

²⁸ See *fn.* 5, 6, and 18.

²⁹ *Cf. Ohio Power, supra.*

protected union activity, and all in order to forestall possible but not predictable misconduct. No matter how substantial the possible damage to business property and operations loomed in the minds of the Respondents, the purpose of the policy and its implementation were not "legitimate." A comparison of the purpose advanced by Respondents here in contrast with that of the employer in *Timken Roller Bearing*³⁰ points up the principle involved. There, the policy of not employing temporary employees and of hiring only prospectively permanent employees established an underlying purpose which was purely economic and unrelated to the exercise of Section 7 rights. Consequently, its application in the rejection for employment of applicants who were on strike at another employer as seeking only temporary employment was not deemed discriminatory, even though their prospective permanency was evaluated on the basis of their status as strikers.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

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

CONCLUSIONS OF LAW

1. Respondents, The A. S. Abell Company and Baltimore News American Division, The Hearst Corporation, are, and each of them has been at all times material herein, employers within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, and Washington Graphic Communications Union No. 6, International Printing and Graphic Communication Union, AFL-CIO, are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to hire applicants Kenneth M. Swiggart and William Candito, referred for employment by Local 31, because such applicants were members of Local 6 on strike at another employer, Respondents discriminated with respect to hire, tenure, and terms and conditions of employment, and engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that the Respondents have engaged in, and are engaging in, unfair labor practices proscribed by the Act, I shall recommend that they be ordered to cease and desist therefrom, and to take the affirmative action set

forth below in the recommended Order designed and found necessary to effectuate the policies of the Act.

Having concluded that the Respondents, on November 15, 1975, and thereafter, refused to employ Kenneth M. Swiggart and William Candito in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondents be required to offer immediate employment at the same or substantially equivalent position at which each applicant would have been employed had he not been discriminated against, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of earnings suffered as a result of the discrimination, with backpay and interest computed under the established standards of the Board, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), as revised to 7 percent in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Having concluded that such unlawful conduct permeates the very purpose and policy of the Act, I shall recommend that Respondents be required to cease and desist from, in any manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4, 1941); *California Lingerie, Inc.*, 129 NLRB 912 (1960).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³¹

The Respondents, The A. S. Abell Company and Baltimore News American Division, The Hearst Corporation, Baltimore, Maryland, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, Washington Graphic Communication Union No. 6, International Printing and Graphic Communication Union, AFL-CIO, or any other labor organization, by refusing to hire, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to form, join, assist, or be represented by any labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activity for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any and all such activity.

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

(a) Offer to Kenneth M. Swiggart and William Candito immediate employment at the same or substantially equivalent position at which each would have been employed had he not been discriminated against, without prejudice to his seniority or other rights and privileges, and make him

102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³⁰ See fn. 17, *supra*.

³¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec.

whole for any loss of pay suffered, in the manner set forth in the section hereof entitled "The Remedy."

(b) Post at its publishing facilities at Baltimore, Maryland, copies of the attached notice marked "Appendix."³² Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by the representatives of the Respondents involved, shall be posted by each Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days

³² In the event that 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

thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material. No other material relative to this matter shall be posted during this period.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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