

Stauffer Chemical Company and Delores Anderson.
Case 32-CA-272 (formerly Case 20-CA-13142)

May 9, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On May 16, 1978, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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 briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

The Administrative Law Judge found that Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to reinstate economic striker Delores Anderson because of her failure to comply with the terms of a strike settlement agreement which, *inter alia*, had conditioned reinstatement upon a striker's return to work by June 10, 1977. While we agree with the Administrative Law Judge's finding of a violation in this case, we disagree with his rationale for doing so, and rely instead on the reasons set forth below.

The facts here are not complicated. Delores Anderson was first employed by Respondent in March 1977. During that month, Anderson changed her address and telephone number, but neglected to so inform Respondent. She did, however, give her new telephone number to an official of the Union who presumably was engaged in preparing for an impending strike.

As a result of a breakdown in contract negotiations, the Union called an economic strike on April 1, 1977. On June 6, the parties entered into a strike settlement agreement which provided, *inter alia*, that "Employees failing to report to work by June 10, 1977, without just cause, will be considered as having quit their job and will be permanently terminated

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1955), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

from employment." The Union requested that Respondent notify the employees of the strike's termination and also notify them that the agreed-to recall period would run from June 8 to June 10. Respondent refused, claiming that it was the Union who had precipitated the economic action and therefore that it was the Union's responsibility to notify the striking employees of the procedure governing their return to work. Apparently acquiescing in Respondent's position, the Union agreed to notify the employees involved. This last fact is undisputed.

Anderson testified that she first learned from her mother on June 13 that the strike was over. Anderson reported for work the following day at her normal starting time and was informed by two coworkers of the June 10 deadline for reporting. Pursuant to the employees' suggestions, Anderson went directly to the office of Personnel Manager Mike Rice, who, after a series of conversations, informed her that, because of her failure to comply with the June 10 deadline, she was ineligible for reinstatement.²

In reaching his conclusion that Respondent's refusal to reinstate Anderson violated the Act, the Administrative Law Judge stated that "the obligation to notify and reinstate striking employees rests solely with the Respondent, and cannot be transferred to the Union. By making the Union its agent for this purpose, the Respondent here must also assume responsibility for any failure on the part of the Union to successfully communicate terms of the settlement agreement to all of the striking employees. Cf. *Ernst Construction*, 217 NLRB 1069 (1975)." While we do not quarrel with the Administrative Law Judge's finding that the responsibility for reinstating strikers is exclusively an employer's, we disagree with his further conclusion that the obligation to notify striking employees of the recall terms of a bargained-for strike settlement agreement, at least under circumstances as here, is also vested immutably in an employer. The Administrative Law Judge had referred to no Board precedent to support his conclusion, aside from a comparison citation to *Ernst Construction, supra*, a case which is factually inapposite. There, the respondent was obligated under a Board order to offer reinstatement to a discriminatee. The respondent elected to utilize the union as its conduit to make the offer. The union failed to make a timely offer, thus resulting in the discriminatee's being denied an opportunity for reinstatement. The Board there found that the respondent, who by its prior conduct had violated the Act and had been ordered to offer the discriminatee

² During an early stage in these conversations, Rice indicated that Anderson might be rehired, but only as a new employee without any of the seniority rights she might have accrued earlier. Anderson agreed to this arrangement, but it was ultimately rejected by Respondent.

reinstatement, could not shield itself from that Order by virtue of the union's failure to act in a timely fashion. That is not the situation here as there was no outstanding Board order directing Respondent to reinstate Anderson.

Rather, here, Respondent and the Union engaged in bargaining that resulted in the termination of the strike and in an agreement on the terms governing the recall of all striking employees. The question of notification arose and, after discussion, the Union accepted the responsibility of notifying unit employees of the termination of the strike and the agreed-to recall procedure. In the absence of any unlawful coercion exerted by Respondent upon the Union, the Union's agreement to accept the responsibility for notification appears to have been a natural outgrowth of the collective-bargaining process. Obviously, it was incumbent upon one of the parties to inform the strikers of the details of the settlement agreement in order to accord them the opportunity to comply therewith. In the ordinary case, the employer, anxious to resume operations, may prefer to take the lead in recalling employees. Here, however, Respondent rejected that role and the Union agreed to accept that responsibility. As we recognize the intrinsic authority of a union to extend an offer to return to work on behalf of all striking employees, we likewise recognize that a union may also be the proper party: (1) to receive an employer's acceptance of its offer of the employee's return; and (2) by agreement, to communicate the terms of that acceptance to its principals, the striking employees. In the latter circumstances, which exist here, we would not find that an employer, like Respondent, thereby had also made the union its agent for purposes of notifying the employees and had assumed responsibility for the union's failure to notify a striker, like Anderson, of the terms of the recall. Accordingly, we reject the Administrative Law Judge's finding of a violation here on such grounds.

Nevertheless, we find, based on the facts before us, that Respondent was not justified in its decision to reject Anderson's application to return to work. Presumably, Respondent's concern in negotiating the strike settlement agreement was to enable it to relieve its supervisory personnel by expediting the filling of those vacancies not occupied by returning strikers by June 10. Respondent, for whatever reason, had elected not to replace Anderson by the time of her application on the morning of June 14, the second business day following the termination of the recall period. Thus, Respondent can hardly claim that Anderson's reinstatement would have frustrated its goal, implicit in the settlement agreement, as it had refrained from hiring anyone to replace her. Accordingly, under the limited circumstances of this case, we find that Anderson's reinstatement rights as an unre-

placed economic striker were not nullified by the strike settlement agreement, and that, in the absence of a compelling business justification, Respondent's refusal to reinstate her violated Section 8(a)(3) and (1) of the Act.¹

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 and hereby orders that the Respondent, Stauffer Chemical Company, San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Moreover, Respondent was, at the very least, obligated to treat Anderson in a nondiscriminatory fashion in considering her application for reinstatement. The record, however, indicates that despite Anderson's willingness to forgo the seniority rights which she had accrued during her tenure with Respondent, thereby relegating herself to the status of a new employee, Respondent declined to accept her application for reemployment because of her prior failure to seek reinstatement in accordance with the terms of the agreement. This it also was not privileged to do.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: The charge in this case was filed on July 12, 1977, by Delores Anderson, an individual (hereinafter called Anderson or the Charging Party) against Stauffer Chemical Company (hereinafter called Respondent). On August 30, 1977, the Regional Director for Region 20 issued a complaint and notice of hearing on behalf of the General Counsel, alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (hereinafter called the Act), 29 U.S.C. §151, *et seq.* Basically, the complaint alleges that Respondent's employees, including the Charging Party, were engaged in an economic strike which terminated on June 6, 1977.¹ Further, that on June 14, the Charging Party made an unconditional offer to return to her former position of employment, and Respondent unlawfully refused to reinstate her. Respondent filed an answer denying certain allegations of the complaint and specifically denying the commission of any unfair labor practices.²

A hearing was held in this matter on January 19, 1978, in San Jose, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses, and to present material and relevant evidence on the issues involved. Briefs were submitted by both counsel and have been duly considered.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor while testifying, I make the following:

¹ Unless otherwise indicated, all dates herein referred to are 1977.

² At the hearing the parties entered into a stipulation on the record regarding certain facts. While the stipulation clarified certain responses contained in Respondent's answer, it in no way affected Respondent's position that it had not committed any unfair labor practices.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Stauffer Chemical Company, is, and has been at all times material herein, a Delaware corporation with a place of business in San Jose, California, where it is engaged in the manufacture and nonretail sale of food ingredients. During the past calendar year, in the course and conduct of its business operations in San Jose, Respondent sold and delivered goods in excess of \$50,000 directly to customers located outside the State of California. The pleadings admit, and I find, that Respondent is, and has been at all times material herein, an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Chemical Workers Union, Local No. 294 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The basic facts of this case are not in serious dispute. Respondent's employees are represented by International Chemical Workers Union, Local No. 294. Commencing sometime in February, the Union and Respondent were engaged in negotiations for a new collective-bargaining agreement. The parties were unable to agree on the terms of a new contract, and the Union called an economic strike on April 1. The strike ended on June 6. While the strike was in progress, Respondent continued to operate its plant with salaried personnel on a 12-hour shift basis, and did not hire strike replacements.

At the termination of the strike on June 6, the parties entered into a strike settlement agreement, the pertinent parts of which are set forth below:

A. *Memorandum of Agreement*

It is agreed by and between Stauffer Chemical Company and the International Chemical Workers Union and its Local Union No. 294 that as a part of cessation of the Union's strike against the Company and final agreement between the Company and the Union, the following conditions will be met:

* * * * *

4. Employees failing to report to work by June 10, 1977, without just cause, will be considered as having quit their job and will be permanently terminated from employment. Other employment commitments will not be considered as just cause.

5. The Union recognizes and accepts the fact that some former employees may be delayed in their return to work or may not return to work following the strike and, therefore, agrees that the Company supervisors or

other salaried employees of the Company may perform normal bargaining unit work duties until their return or until their replacements may be hired. The Company agrees that there will be no unnecessary delay in their (sic) attempt to hire replacements.

The uncontroverted testimony reveals that the Union asked Respondent to notify the employees that the strike was terminated and that they were to return to work beginning June 8, and not later than June 10. Respondent refused on the ground that the Union had taken the economic action, and it was the Union's responsibility to notify the employees to return to work. The Union verbally agreed to undertake to discharge this responsibility.³

B. *The Events Relating to Anderson*

Anderson worked the day shift in Respondent's house-keeping department. Sometime in March, she moved to a new residence and her home telephone number was changed in the process. Anderson did not inform Respondent's personnel office of her new address and telephone number. Shortly before the commencement of the strike, however, Anderson gave her new telephone number to one of the union officials, who was getting the names and telephone numbers of the employees—presumably, in preparation for the strike.

Anderson testified that during the course of the strike, she was contacted at home on the telephone by union representatives on two occasions for assignment to picket line duty. She walked the picket line for one one day in response to the Union's first request, but did not show up for picket duty on the second occasion. Anderson further testified that she initially followed the practice of calling the plant office once or twice a week to ascertain if the strike was still in progress. She later limited her calls to once a week. She stated that other than the two calls for picket line duty, she never received any calls from the Union, nor were any messages left with her mother.⁴ Anderson did not engage in any other employment during the time of the strike.

Anderson testified she first learned the strike was over on the evening of June 13, when her mother informed her that it was announced on television. She immediately called the plant in an effort to reach her supervisor. Her attempt in this regard was unsuccessful, however, as the day shift had already ended. The next morning (June 14), Anderson reported to work in time for her shift. As she was changing clothes she was informed by two coworkers that Respondent had given the Union 48 hours to notify the employees to return to work. They advised her to see someone in the personnel office before starting work.

Anderson testified she went directly to the office of Mike Rice, Respondent's personnel manager. According to Anderson, when she told Rice she had only learned of the termination of the strike the evening before, he stated that the Company had given the Union 48 hours to notify the employees to report back to work. Anderson testified that Rice suggested she could probably be reinstated, but would

³ Several weeks prior to the commencement of the strike, management gave the union representatives a list, taken from the personnel records, containing the employees' names, addresses, and telephone numbers.

⁴ Anderson testified that she lived with her mother.

have to lose her seniority and start as a new employee. She agreed to this, and Rice sent her across the hall to wait in the office of one of his assistants until a decision could be made. Anderson stated that approximately 15 minutes later Rice came over and told her he was uncertain whether she could be reinstated. He instructed her to remain there until he could see what he could do about her situation. According to Anderson, she spoke with Rice in his office approximately 20 minutes later. He told her that she could not be reinstated and she left the plant.

Rice testified that there was only one conversation with Anderson. He stated he saw Anderson sitting in his assistant's office, and he went over to ask her why she had not returned to work by June 10. According to Rice, when Anderson stated she had just learned that the strike had ended, he explained about the memorandum of agreement between Respondent and the Union requiring the employees to return to work by June 10. Rice testified that he informed Anderson she could not be reinstated, and he advised her to see her union representative. He denies ever telling Anderson that she could probably be reinstated as a new employee.

Rice further testified that he made the decision not to reinstate Anderson because he was familiar with the memorandum of agreement, and Respondent's actions in this regard could have an effect on future situations following a strike. He admits that he called Gregory Miller, Respondent's regional employee relations representative, and discussed the matter with him. Rice stated, however, that he did so *after* his conversation with Anderson. Rice further acknowledged that Anderson had not been replaced at the time she applied for reinstatement.

Miller's testimony confirms that he received a call from Rice regarding Anderson's request for reinstatement. Miller discussed the matter with his superior as well as with Rice. According to Miller, the decision not to reinstate the employee was a correct one because (1) Respondent had to adhere to the strike settlement agreement, and (2) any deviation would have an adverse impact on future strike settlement situations, not only covering that plant, but other plants of Respondent where the employees were represented by the Union.

On the basis of my observation of the witnesses, I credit the testimony of Anderson regarding her conversation with Rice. Anderson impressed me as being sincere and forthright in her testimony. In addition, I find it improbable that Rice made the decision not to reinstate the employee without first contacting Miller, who was the chief negotiator on behalf of Respondent in working out the strike settlement arrangement. The fact that Rice discussed Anderson's reinstatement with Miller lends credence to her testimony that Rice had her wait until a decision could be made on her request for reinstatement. Accordingly, I find that Anderson and Rice had more than one conversation on the morning of June 14, and I further find that Rice made the statements attributed to him by Anderson during these conversations.

C. Concluding Findings

The General Counsel argues that the memorandum of agreement is an invalid infringement on the rights of em-

ployees to engage in a lawful economic strike, as the period in which the employees were required to return to work was "unreasonably" short. Therefore, the strike settlement agreement violated the criteria set forth in the *United Aircraft, supra*,⁵ and *Laher Spring & Electric Car, supra*,⁶ cases. Respondent, on the other hand, contends that the agreement is a valid result of collective bargaining encouraged by the Act to settle labor disputes, and to impose on the parties something other than agreed upon in the bargaining process violates the ruling of the Supreme Court in *H.K. Porter Company, Inc.*, 397 U.S. 99 (1970).

I find neither of these arguments, although ably presented in the briefs, meets the fundamental issue in this case. There is no question that the Act protects the right of employees to engage in an economic strike.⁷ It is equally well settled that a refusal to reinstate unreplaced striking employees, upon an unconditional offer to return, is inherently destructive of this protected right. But the right is not an absolute one and can be defeated by a showing of legitimate and substantial business justifications. *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). It is for the Board to strike the proper balance between the asserted business justifications and the invasion of this important employee right in the light of the Act and its policy. *United Aircraft Corporation, supra*, at 387.⁸

However, the facts of the instant case are such I do not find it necessary to determine the validity or invalidity of the strike settlement agreement. Indeed, for purposes of this Decision it is assumed that the agreement is valid and was not discriminatorily applied by Respondent. Nevertheless, I find that the circumstances here require the finding of a violation.

Having entered into a strike settlement agreement through the normal bargaining process, Respondent insisted on delegating to the Union the responsibility for notifying the employees of the terms governing their return to work. But the obligation to notify and reinstate striking employees rests solely with Respondent, and cannot be transferred to the Union. By making the Union its agent for this purpose, Respondent here must also assume responsibility for any failure on the part of the Union to successfully communicate the terms of the settlement to all of the striking employees. Cf. *Ernst Construction, Division of Ernst Steel Corporation* 217 NLRB 1069 (1975).

The record in the instant case does not contain a scintilla of evidence showing that the Union communicated or attempted to communicate the strike settlement terms to Anderson. To the contrary, Anderson's credited testimony that no such communication was ever made stands unrefuted. While it is true that other employees were contacted, this alone is not enough to support an inference that Anderson

⁵ *United Aircraft Corporation, Pratt and Whitney Division*, 192 NLRB 382 (1971).

⁶ *Laher Spring & Electric Car Corp.*, 192 NLRB 464 (1971).

⁷ Sec. 13 of the Act specifically provides:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

⁸ *N.L.R.B. v. Fleetwood Trailer Co., supra* at 378; *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

was similarly contacted, nor is it sufficient to destroy her protected status as a striking employee.

In these circumstances, Respondent's rigid application of the time limitation to Anderson's request for reinstatement must be considered an impermissible violation of the statutory rights of striking employees. The preservation of these important employee rights, in the circumstances presented here, far outweigh any adverse effects that a deviation from the time limitation would have on Respondent's future dealings with the Union in strike situations. This is especially true where, as here, Respondent failed to adequately communicate the time limitation for returning to work to the striking employee; the striking employee reported to work at the first opportunity after gaining knowledge of the termination of the strike—2 working days beyond the time limitation; and the striking employee had not been replaced at the time she reported for work. To hold otherwise, would penalize the striking employee for exercising statutory rights while allowing Respondent to terminate her status as an employee with less than full satisfaction of its reinstatement obligation.

Accordingly, I find that by failing to reinstate Anderson under the circumstances here, Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Stauffer Chemical Company, is an employer 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. International Chemical Workers Union, Local No. 294 is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing, on June 14, 1977, to reinstate striking employee Delores Anderson upon an unconditional offer to return to work, Respondent violated Section 8(a)(3) and (1) of the Act.

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

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, Respondent shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It shall be recommended that Respondent offer Delores Anderson immediate and full reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or her other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the unlawful termination of her employment. Backpay shall be computed with interest thereon, in the manner prescribed in

F. W. Woolworth Company, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁹

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:

ORDER¹⁰

The Respondent, Stauffer Chemical Company, San Jose, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to reinstate unreplaced economic strikers who unconditionally offer to return to work and who were never properly informed of the time limitation contained in the strike settlement agreement governing such return.

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

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

(a) Offer Delores Anderson immediate and full reinstatement to her former position of employment, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole, in the manner set forth above in the section entitled "The Remedy," for any loss of earnings she may have suffered by reason of the unlawful discrimination against her.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its San Jose, California, plant copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps has taken to comply herewith.

⁹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁰ 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. 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.

¹¹ 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 Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board Having Found, After a Hearing in Which All Parties Had an Opportunity to Present Evidence, That We Committed Certain Unfair Labor Practices in Violation of the National Labor Relations Act, as Amended, We Hereby Notify You That:

WE WILL NOT refuse to reinstate unreplaced economic strikers who unconditionally offer to return to work, and who are not properly informed of the time

limitation for returning to work as contained in the strike settlement agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Delores Anderson immediate and full reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of earnings she may have suffered by reason of the unlawful termination of her employment.

STAUFFER CHEMICAL COMPANY