Colony Materials, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 492.
Case No. 28–CA–677 (formerly 33–CA–677). December 19, 1961

DECISION AND ORDER

On July 31, 1961, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and is engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Colony Materials, Inc., Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall:

[1] Subsequent to the close of the hearing, the Respondent filed a motion with the Board to reopen the record. In support of this motion, the Respondent submitted letters and an affidavit attesting to the fact that Griego has failed and refused to accept the valid offer of reinstatement made to him at the hearing herein and that Ortiz has refused to accept the Respondent's unconditional offer of reinstatement made to him on August 9, 1961. It contends that this additional evidence tends to show that Griego and Ortiz never desired reinstatement and casts doubt on their credited testimony to the effect that the Respondent only offered them "extra" work. We find no merit in the motion insofar as it is directed to the Trial Examiner's resolutions of credibility, as a clear preponderance of the record does not demonstrate that such resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544. In view thereof, and as the Respondent's backpay liability for Ortiz is a matter which can be determined on compliance, the motion to reopen is denied.

[2] In adopting the Trial Examiner's conclusion that Respondent discriminated against Ortiz, Griego, Archuleta, and Vigil in violation of Section 8(a)(3) of the Act, we find it unnecessary to consider whether, upon their application for reinstatement, they were unfair labor practice strikers as found by the Trial Examiner. For, when these discriminatees applied for reinstatement, they had not been replaced and, therefore, whether economic or unfair labor practice strikers, they were entitled to the reinstatement which was denied them. Contrary to Member Rodgers, we are adopting the Trial Examiner's finding that the application for reinstatement made by Ortiz, Griego, and Archuleta on October 25, 1960, was an unconditional one. In our opinion, neither the language of the request nor the attendant circumstances establishes that their willingness to return to work was conditioned upon the rehire of anybody else.

1. Cease and desist from:

(a) Discouraging membership in the Union, or in any other labor organization, by failing to accept unconditional offers to return to work by unreplaced strikers or by failing unlawfully to return such applicants to their former or substantially equivalent positions.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, in conformity with Section 8(a)(3) of the Act.

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

(a) Offer immediate and full reinstatement to Dan Ortiz, Mac Vigil, and Casimiro Archuleta each to his former or substantially equivalent position.

(b) Make whole Dan Ortiz, Mac Vigil, Casimiro Archuleta, and Dave Griego for any loss of earnings suffered as a result of the Respondent's refusal to accept their unconditional offers to return to work.

(c) 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 or appropriate to analyze the amounts of backpay due under this Order.

(d) Post at its office in Santa Fe, New Mexico, copies of the notice attached hereto marked "Appendix."[3] Copies of said notice, to be furnished by the Regional Director for the Twenty-eighth Region, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-eighth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER RODGERS, concurring:

On April 1, 1960, the Respondent purchased its business from Ken Pike, retaining on its payroll 6 of Pike's 10 employees. On April 12,

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

four of the six employees retained by the Respondent went on strike. On October 25, 1960, three of the strikers, along with Yeager and Anaya, the latter being former Pike employees who were *not* retained by Respondent, appeared at Respondent's plant.[4] Anaya told Respondent's bookkeeper: "We have come to get our jobs back." The bookkeeper responded that Respondent's president was out of town and that the strikers should come back in a day or two. The strikers then left. They did not again contact the Respondent until November 10.

Because he was not retained on Respondent's payroll when Respondent assumed Pike's operations, Anaya was not an employee of Respondent on October 25. As evidenced by the Regional Director's action in dismissing the 8(a)(3) charge in Case No. 33-CA-635 after investigation, there is no question that Respondent's action in discharging Anaya and others was not discriminatory or otherwise improper. Consequently, he had no valid claim, legal or otherwise, to "our jobs." It follows that as Anaya was the sole spokesman for the group of strikers, his statement cannot be construed as an unconditional offer by the strikers to abandon the strike and to return to work.

However, as the record discloses that Respondent did not rely upon the conditional nature of the strikers' offer, but subsequently offered employment to some of these individuals and rejected others on grounds separate and apart from Anaya's October 25 request, I concur in the result reached by my colleagues.

[4] It is not entirely clear whether or not the strike was for the purpose of forcing the Respondent to rehire Anaya and other former Pike employees whom the Respondent discharged. However, such a conclusion is strongly suggested by the facts. In this regard, it should be noted that the Trial Examiner erred when he said that in a prior case involving the same parties, *Colony Materials, Inc.*, 130 NLRB 105, the Board found "that the strike was caused by the unfair labor practices committed by the Respondent." The Board made no such finding. In that case the Board found that the Respondent refused to bargain with the employees' duly certified bargaining representative—no allegation was made, nor did the Board consider, whether the strike was or was not in support of the 8(a)(5) charge. However, with respect to the purpose of the strike, it is noteworthy that the original charge was filed on April 11, 1960, 1 day before the strike commenced, and that the charge alleged, in addition to the 8(a)(5) violation, that Respondent violated Section 8(a)(3) of the Act by failing to retain certain of Pike's employees, including Anaya, on the Respondent's payroll. And significantly, the 8(a)(3) charge was dismissed.

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL offer Dan Ortiz, Mac Vigil, and Casimiro Archuleta, immediate and full employment, each in his former or substan-

tially equivalent position, without prejudice to seniority or other rights and privileges previously enjoyed. We have offered such employment to Dave Griego and we will make Griego, Ortiz, Vigil, and Archuleta whole for any loss of pay suffered as a result of the discrimination against them.

WE WILL NOT by unlawfully refusing to accept unconditional offers of unreplaced strikers to return to work or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local 492, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the National Labor Relations Act, as amended.

All of our employees are free to become, or remain, or to refrain from becoming or remaining members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 492, or any other labor organization.

COLONY MATERIALS, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

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

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 492, herein called the Union, the General Counsel of the National Labor Relations Board issued a complaint dated April 18, 1961, alleging that Colony Materials, Inc., Santa Fe, New Mexico, herein called the Respondent, had violated and was violating Section 8(a)(1) and (3) of the National Labor Relations Act.

Pursuant to due notice, a hearing in this matter was held before the duly designated Trial Examiner in Santa Fe, New Mexico, on May 24 and 25, 1961. All parties were represented and participated in the hearing. Briefs received from counsel for the General Counsel and counsel for the Respondent have been considered.

Upon the entire record in the case, and from my observation [1] of the witnesses, I make the following:

[1] The demeanor of the several witnesses constitutes an important, substantial, and sometimes determinative element in the appraisal of credibility. The resolutions of that nature which follow have been made upon consideration of that criterion

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a New Mexico corporation with its principal office and place of business in Santa Fe, New Mexico. There the Respondent manufactures, sells, and distributes ready mixed concrete. For the 12-month period ending April 1, 1961, in the course of its business operations, the Respondent purchased equipment and materials valued in excess of $50,000, from New Mexico suppliers which in turn received such equipment and materials from points outside the State of New Mexico. I find that Respondent's operations are in and affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act, admitting to membership employees of the Respondent

III. THE UNFAIR LABOR PRACTICES

On April 1, 1960, Respondent took over by purchase the business formerly operated by one Ken Pike. On April 12 some of the employees went on strike. Upon a complaint of the General Counsel a hearing was held and a Board decision reached [2] finding that the strike was caused by unfair labor practices committed by the Respondent.

On October 25, 1960, three of the strikers, Dan Ortiz, Casimiro Archuleta, and Dave Griego, with others, came to the plant. President Philip Naumburg being absent from the city, their spokesman told David Allen, the bookkeeper, that the men had come to get their jobs back. Allen said that Naumburg was out of town and the men left. The fact that these strikers had come to the plant for the purpose of going back to work came to Naumburg's attention a day or two later. Naumburg took no action in the matter.

In late October or early November, Mac Vigil, a striker, telephoned Naumburg and asked for reemployment. Naumburg answered that there was no job opening.

On November 10, Ortiz and Archuleta came again to the plant seeking work. Naumburg told Archuleta that his job no longer existed and that there was no place for him. Ortiz was told, he testified credibly, that he was offered work as an extra man and warned that if he made any mistakes he would be terminated at once. Ortiz told Naumburg that he had a temporary job which he wished to finish. The meeting ended with Naumburg expecting Ortiz to return on November 21. Ortiz testified that he did not agree to come back; that he was not interested in "extra" work.

On January 7, 1961, the four strikers, Vigil, Archuleta, Ortiz, and Griego, went to the plant and spoke with Naumburg. Naumburg again told Archuleta that his job no longer existed and that there was no place for him. For the first time he told Vigil that at the time the strike began Vigil was then to have been laid off and that he would not be rehired. Naumburg told Ortiz that he had expected him to return to work on November 21 and as he had not done so, there was no job for him. Turning to Griego, Naumburg said that this was the first time Griego had made an attempt to return. On January 8 Naumburg sent and Griego received a telegram offering employment on the following day, a Monday. Before starting time on Monday, January 9, Griego came to Naumburg's office apparently prepared to go to work. It was a cold and snowy morning and no concrete was being hauled. According to Griego's credited testimony, Naumburg said that business was slow and that he would be able to afford Griego about 2 or 3 hours' work a day. Griego stood about for a short time, during which he was noticeably snubbed by other employees, and then left the plant. According to Griego, he had another job in which he was guaranteed 5 hours a day employment and in this circumstance he did not find Naumburg's offer acceptable. During the hearing on May 24 and 25, through Respondent's counsel, Griego was offered unconditional reinstatement to his former employment. I am not informed whether Griego accepted the offer.

It is urged on the part of the Respondent that both Vigil and Archuleta lost their employment upon nondiscriminatory considerations. As to Vigil, Naumburg testified decision was reached to employ him when Naumburg took over on April 1. After observing Vigil on some occasions as a truckdriver, according to Naumburg, he observed him to be somewhat less than expert in handling the truck but considering Vigil's pleasing personality, he believed that he would develop into a good employee.

---

[2] 130 NLRB 105.

On April 9 Vigil damaged a motor on a truck. Jack Sloan, Respondent's mechanic, testified that the nature of the damage was such that in all probability it was due to mishandling by Vigil and that he so reported to Naumburg. Naumburg testified that he accepted Sloan's attribution of fault and that he immediately determined that Vigil must be replaced. Naumburg asked a business acquaintance to learn if the latter could recommend a driver to him and mentioned that one of his drivers had damaged a truck motor. Considering, according to Naumburg, that the prospective employee located through this inquiry was not immediately available and that Vigil's workweek would not end until Wednesday, he delayed bringing about Vigil's discharge and mentioned nothing about the damage to Vigil. On April 12 before the end of the workweek and before a replacement for Vigil was available, the strike began and Vigil, of course, did not report for work.

At the hearing in the earlier unfair labor practice case in July 1960, of which mention has been made, Naumburg testified "Mac Vigil and Casimiro Archuleta were slated to leave the day after they went on strike."

Naumburg voiced no complaint concerning the work attitude or performance on the part of Archuleta. He explained that Archuleta's principal duty as an employee was to transfer sand and gravel by way of a moving belt to the point where it was mixed with water and cement. When not so occupied Archuleta swept up the plant and burned trash. According to Naumburg, before the strike Archuleta was busy on the conveyer belt about a third of the workday. About a week or two after the strike began Naumburg had the operation of the belt changed so that it would move sand and gravel at a faster speed. Ever since, according to Naumburg, the conveyer belt operation has been handled by the batch plant operator, the mechanic, any truckdriver who might be standing around waiting for his truck to be loaded, or even by Naumburg. No individual has been hired to take the place of Archuleta.

Counsel for the Respondent asserts that from the circumstances that none of the strikers applied for reinstatement until almost 3 months after the cessation of picketing, it should be found that none of them was really interested in returning to work; that the applications made thereafter were inspired or directed by the Union. The strikers may have been reluctant to return to employment after their unsuccessful strike. Loss of face would be involved and, further, they would have as associates on the job those who had not gone out on strike with them and perhaps some who had come to work during the strike. It may be that without prodding from the Union they would have abandoned their jobs. But they didn't. Each applied for reinstatement. I find that they did so in good faith. Upon such applications, leaving special circumstances aside, the Respondent was obliged to take them back, discharging, if necessary, any replacements.

The applications of Ortiz, Griego, and Archuleta on October 25 are not to be fobbed off because Naumburg was not at the plant. They applied at the proper place and to the man in charge, Allen. Assuming that Allen lacked authority to put them back to work he nonetheless quickly told Naumburg about it and the latter did nothing. By doing nothing Naumburg rejected the applications. When Vigil telephoned Naumburg for work he was told that no opening existed for him. Thus his application too was rejected.

I find that Ortiz, Griego, Archuleta, and Vigil offered unconditionally to return to work and that as soon as Naumburg learned of this he was under a duty imposed by decisional law to take them back. The reasons advanced for not putting the men to work on the several occasions when they applied will now be examined.

Taking first the situation of Mac Vigil, it is urged on the part of the Respondent that because of the damage to a truck motor on April 9 decision had been reached to discharge him and that therefore he had no employee status in late October or early November when he asked to be reemployed. Vigil testified that on April 9 he was driving a truck not regularly assigned to him, that the motor was in poor condition, and that the damage occurred without his fault. Respondent's mechanic testified that the motor was in good enough shape before Vigil misused it and that Vigil was to blame in the matter. Naumburg, in his testimony, said that the mechanical condition of the equipment and trucks was poor when he took over on April 1. If Naumburg really felt that Vigil was blameworthy in the matter, it is odd that he did not ask Vigil for an explanation. Just a few days earlier Naumburg considered Vigil to be an employee of some promise. Although he had opportunity to do so, not until January 7, 1961, did Naumburg tell Vigil that he considered him to have been discharged in April because of the truck incident. I credit the testimony of Naumburg that he was seeking another truckdriver a few days before the strike began and that he arranged, through a business acquaintance, to hire a man who reported for work on April 14. I think that it does not follow from this, how-

ever, that the additional driver was hired to replace Vigil. Naumburg's own testimony is that he chose Vigil as an employee on April 1, after observing him at work on occasions over a period of several weeks and in the belief that Vigil would develop into a valuable worker. Against this background, I do not believe Naumburg's testimony that he decided to discharge Vigil upon learning of the motor damage. I think that he would not have done so without first seeking to learn from Vigil just what had happened.

It is obvious that the Respondent did not want to rehire any of the strikers. The testimony of Naumburg in the earlier unfair labor practice hearing that Vigil and Archuleta were slated to leave the day after they went on strike must be viewed against that background. As to Archuleta, Naumburg's own testimony refutes his assertion that Archuleta was slated for discharge on that early date. The arrangement to increase the speed of the sand and gravel belt was not completed until several weeks after the strike began. Thus, Archuleta would have been kept busy for at least that period of time and could not have been by reason or lack of work slated for discharge the day after the strike began.

Naumburg testified that running the sand and gravel belt now requires about 2 hours' work a day.[3] Joe Chavez, an employee called as a witness by Respondent, testified that the belt required the attention of a man for 3 or 4 hours a day. Of course, the amount of time needed to run sand and gravel over the belt would vary widely with the amount of concrete produced. In any event, Archuleta was at least partly replaced. The truckdriver, the batch plant operator, the bookkeeper, and Naumburg, himself, who, on occasion ran the sand and gravel belt, were performing work that had been done by Archuleta. Allen testified, and I credit him, that the Respondent tried to provide more than 30 hours a week of paid time for the employees. To make this possible the men covered sand bins, put heaters on the sand pile, closed the cement silos, and did any kind of work that could be found in slack periods. There is no reason to believe that Archuleta could not have been kept busy in this fashion when he was not occupied with running the sand and gravel belt. I find that the job which Archuleta held before the strike has not been abolished.

Naumburg denied that he offered Ortiz work as an "extra man" on November 10 but conceded that he then said that hours would be short during the winter and that if Ortiz did not perform his job properly he would quickly be discharged. No doubt that Naumburg thought, on November 10, that Ortiz would return to work on November 21. Ortiz testified that he did not do so because he wanted a steady job—the kind of a job that he had before the strike. I find that the offer of work to Ortiz was made by Naumburg in such a fashion as to encourage its rejection. In another connection, Naumburg testified that in November the drivers were working about 40 hours a week and that throughout the winter the Respondent, through various devices, tried to provide 30 hours of work a week. This was not told to Ortiz. Rather a gloomy picture of little work opportunity was presented. I find that the offer on November 10 was not an offer to Ortiz of return to his former or substantially equivalent position.

On January 9, according to Griego, Naumburg told him that business was slow and that there would be only 2 or 3 hours' work a day. Naumburg denied saying this and testified that he mentioned only the obvious fact that the cold and snowy weather would lessen deliveries. Between Griego and Naumburg, I credit the former. Here, again, as in the case of Ortiz, reluctant to take back a striker, Naumburg offered a job so unattractive as to make rejection likely. No mention was made to Griego about Respondent's policy of providing 30 hours' work a week. I find that Griego was not, on January 9, offered reinstatement to his former or substantially equivalent position. The offer of reinstatement made to Griego during the hearing on May 24 and 25, I find, was a valid offer. If it has not been accepted the Respondent is under no duty to renew it.

By misrepresenting work opportunities to Ortiz and Griego in order to encourage them not to accept reemployment, the Respondent in effect refused to offer them the employment to which they were entitled and thus rejected their applications. By such misrepresentation and by refusing to accept the unconditional offers to return to work made by Vigil and Archuleta the Respondent has discouraged membership in and activity on behalf of the Union and has thereby violated Section 8(a)(3) and (1) of the Act.

[3] Naumburg testified that before the strike Archuleta spent about a third of his time at this task. If he was speaking of an 8-hour day the increase in speed brought about a saving of only 40 minutes.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

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

As the Respondent has not accepted the unconditional offers of the strikers to return to employment, it will be recommended that it offer to Ortiz, Vigil, and Archuleta immediate and full reinstatement each to his former or substantially equivalent position and that it be required to make Griego, Ortiz, Vigil, and Archuleta whole for any loss of pay suffered by reason of the failure to reinstate them or any of them from the earliest date that each applied for reinstatement to the date when such offer is made. In the case of Griego, a valid offer of reinstatement having been made on May 25, 1961, no further such offer need be held out and loss of earnings for Griego shall be calculated to May 25, 1961. As the unfair labor practices found indicate a propensity on the part of the Respondent to disregard the requirements of the Act, a broad remedy will be recommended.

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

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing to accept the unconditional offers of Griego, Ortiz, Vigil, and Archuleta to return to work and by failing to offer them their former or substantially equivalent positions upon such applications, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of 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.

[Recommendations omitted from publication.]

District No. 9, International Association of Machinists, AFL–CIO *and* Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc. *and* Greater St. Louis Automotive Association, Inc., Party to the Contract. *Case No. 14–CE–5. December 19, 1961*

DECISION AND ORDER

Upon charges duly filed by the Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc., herein called the Trimmers Association, the General Counsel of the National Labor Relations Board, by the Regional Director for the Fourteenth Region, on December 20, 1960, issued a complaint alleging that District No. 9, International Association of Machinists, AFL–CIO, herein called the Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(e) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the