

show that action was in fact taken by the various employers who maintained the blue sheets and by them probed into their employees' attitude toward the various labor organizations, violation might indeed be found. But while we can reflect on the possibilities of violation which might be found and of greater delay in any expression of employee choice, we are limited by the proof.

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

#### CONCLUSIONS OF LAW

1. Marble Polishers, Machine Operators & Helpers, Local 121, AFL-CIO, and Independent Terrazzo, Tile and Allied Trades Union are severally labor organizations within the meaning of Section 2(5) of the Act.

2. The Respondents have not since January 1964 engaged in unfair labor practices within the meaning of Section 8(a) (1) or (2) of the Act.

3. There is no sufficient basis for setting aside the settlement agreement in Cases Nos. 12-CA-2768-1 and 12-CA-2768-3.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the complaint be dismissed in its entirety.

**J. A. Terteling & Sons, Inc. d/b/a Western Equipment Company  
and International Union of Operating Engineers Local 370,  
AFL-CIO. Case No. 19-CA-2920. May 28, 1965**

#### DECISION AND ORDER

On March 25, 1965, Trial Examiner William E. Spencer issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Respondent filed exceptions to the Trial Examiner's Decision with briefs in support thereof.

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

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 entire record in this case, including the Trial Examiner's Decision, the exceptions, and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.<sup>1</sup>

<sup>1</sup> The General Counsel excepts to the finding in the Trial Examiner's Decision that the Respondent offered striking employees reinstatement immediately upon receipt of Trial Examiner Bennett's Decision in the earlier case, reported at 149 NLRB 248. However, the record is unclear as to when the reinstatement offers were made, and the date to which backpay runs under the Trial Examiner's Order which we are adopting must therefore be left for compliance.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Order recommended by the Trial Examiner, and orders that the Respondent, J. A. Terteling & Sons, Inc., d/b/a Western Equipment Company, Boise, Idaho, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

## TRIAL EXAMINER'S DECISION

## STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Trial Examiner William E. Spencer in Boise, Idaho, on September 22, 1964, and January 6, 1965, upon a complaint of the General Counsel of the National Labor Relations Board, herein called the Board, dated August 14, 1964, and the duly filed answer of the Respondent herein. The complaint, based on a charge filed July 13 and an amended charge filed August 5, 1964, by International Union of Operating Engineers Local 370, AFL-CIO, herein called the Union, alleged in substance that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by refusing the unconditional offer of its striking employees to return to work.

Upon the entire record in the case, and after consideration of the briefs filed with me by the General Counsel and the Respondent, respectively, I make the following:

## FINDINGS OF FACT

## I THE BUSINESS OF THE RESPONDENT

Respondent, an Idaho corporation, is engaged at Boise, Idaho, in the sale and service of heavy construction equipment. During its last fiscal or calendar year, it purchased goods and services directly from outside Idaho of a value exceeding \$50,000.

## II. THE LABOR ORGANIZATION INVOLVED

The Union, at all times material herein the representative of Respondent's employees in an appropriate unit, is a labor organization within the meaning of the Act.

## III. THE UNFAIR LABOR PRACTICES

In a prior case involving the same parties as appear here (Cases Nos. 19-CA-2736-1 and 19-CA-2736-2, of which I take official notice) Trial Examiner Martin S. Bennett found *inter alia*, and the Board affirmed, that Respondent's employees engaged in an unfair labor practice strike but that their application to return to work, made on or about November 23, 1963, was not unconditional because it was linked to the Union's position in contract negotiations.

After the close of the hearing in the prior case, by letter dated February 7, 1964, the Union through its representative, John W. Johnston, addressed Respondent's attorney, Eli A. Weston, in material part as follows:

This is your notification that I am again offering in behalf of all strikers, their desire to be reinstated under the terms and conditions of employment existing at the time the strike began.

It is my position that I have already made this offer once . . . and in repeating this offer, I in no way wish to indicate that the offer was not properly made on 11-23-63.

The Respondent did not respond to this application for reinstatement but upon receipt of Trial Examiner Bennett's Decision on or about June 22, 1964, offered to reinstate all striking employees.

The principal issue here is whether the February 7 letter quoted above was an unconditional request for reinstatement. Except for its references to a prior conditional request there is no question that it was. For some reason not at all clear to

me, apparently the Union felt that it would be prejudiced unless it reaffirmed its position that its November 23 reinstatement request was unconditional. Be that as it may, its choice of language in the February 7 letter, to say the least, was unfortunate. This is not to say that a request for reinstatement has to be couched in terms that require the application of legal art. It is to say that such a request should be unequivocally unconditional. It requires no subtlety or exercise of legal art to say simply "we hereby unconditionally apply for reinstatement to the jobs we held at the time we went on strike." Had the Union used such plain, clear language or its counterpart in its February 7 letter we would have no problem here. Its implied linking of the February 7 with the prior November 23 request was not, however, fatal, for no condition is stated in the February 7 request other than that the strikers be "reinstated under the terms and conditions of employment existing at the time the strike began." Any doubts I initially might have entertained in the matter were nullified when I read the Board's decision in *Hawai Meat Company, Limited*, 139 NLRB 966 (cited in the General Counsel's brief), where, as here, the request for reinstatement which the Board found was an unconditional offer to return to work, made reference to a prior offer which was conditional. In that case the Board found no merit in the employer-respondent's contention that the words "we are again offering" made it an equivalent of prior conditional offers.

A second contention made here by the Respondent is that the matter of the November 23 offer to return to work having been fully litigated in a prior proceeding, the Respondent was justified in awaiting the Trial Examiner's Decision in that earlier case before acting on the reinstatement of strikers. That it did act as soon as it received the Trial Examiner's Decision in the prior case has already been noted. The Respondent's position on this point lacks merit for the simple reason that the February 7 offer to return to work was not made until after the close of the hearing in the prior case, was not considered by the Trial Examiner in that case, and therefore has not been previously litigated. This distinguishes the present case from *Peyton Packing Company, Inc.*, 129 NLRB 1358, in which the Board found in effect that the General Counsel was not allowed two bites out of the same apple by litigating the same issue twice. Here we have two apples, for the cause of action raised by the February 7 offer is not the same cause of action that was raised by the November 23 offer, unless the Board should find, contrary to its Trial Examiner, that the two offers are substantially identical. The Board did not in the *Peyton* case hold that the employer in that case could, with impunity, engage in new and independent acts amounting to a refusal to bargain while awaiting a decision in the pending case. No more could the employer here with impunity fail and refuse to act on a new and unconditional request for reinstatement merely because an earlier request was pending before a Trial Examiner. It follows that the Respondent, in failing to respond to the February 7 offer until after it had received the Trial Examiner's Decision in a pending case, acted at its peril, and may not now escape its liability for backpay from the date of its receipt of the February 7 request to the date on which it actually offered reinstatement to its unfair labor practice strikers.

It is found that by failing and refusing to reinstate its striking employees within a reasonable time after receipt of their February 7, 1964, request for reinstatement,<sup>1</sup> the Respondent discriminated in regard to their hire and tenure of employment, and conditions of employment, in violation of Section 8(a)(1) and (3) of the Act

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Respondent as described 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 of commerce.

#### V. THE REMEDY

Having found that the Respondent discriminated against its striking employees by failing and refusing to reinstate them upon their February 7, 1964, unconditional offer to return to work, it will be recommended that the Respondent make those employees named in the reinstatement offer whole for any loss of pay suffered by reason of the discrimination against them by payment to them of a sum of money equal to that amount they would have earned in Respondent's employ but for said

<sup>1</sup>The employees named in the February 7, 1964, reinstatement offer are: Jim Storer, Theodore Totorica, Harold Hamilton, Albert Karnowski, Otto Vanderschell, Nathan Wallace, Glenn Newkirk, Hank Bauer, Orville Baldwin, Carl Burgess, Don Stevens, Dave Johnson, and Raulley Fuller

discrimination, from February 10, 1964, to the date when Respondent offered them reinstatement, together with interest thereon (*Isis Plumbing & Heating Co.*, 138 NLRB 716), less their net earnings, if any, during said period. The loss of pay shall be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

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, and has been at all times material, an employer within the meaning of Section 2(2) of the Act, and is engaging in and has engaged in commerce and a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment and the terms and conditions of employment of its striking employees, thereby discouraging membership in the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the aforesaid discrimination the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

#### RECOMMENDED ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby recommended that the Respondent, J. A. Terteling & Sons, Inc., d/b/a Western Equipment Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or any other labor organization of Respondent's employees, by discriminating against any individual in regard to his hire or tenure of employment or any other term or condition of employment, except as authorized by Section 8(a)(3) of the Act.

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

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole its striking employees listed in footnote 1, *supra*, for any loss of pay suffered by them as described in the section of this Decision entitled "The Remedy."

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

(c) Post at its offices in Boise, Idaho, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of this said notice, to be furnished by the Regional Director for Region 19, shall, after being duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply therewith.<sup>3</sup> Unless Respondent so notifies the said Regional Director, it is recommended that the Board issue an Order requiring Respondent to take the aforesaid action

<sup>2</sup> In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

<sup>3</sup> In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 19, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership and activity in International Union of Operating Engineers Local 370, AFL-CIO, or in any other labor organization of our employees, by discriminating in any manner in regard to hire, tenure, or any other term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in any or 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.

WE WILL make whole the employees listed below for any loss of pay suffered as a result of the discrimination against them, from February 10, 1964, following their unconditional offer to return to work, until the date on which we offered them reinstatement:

Jim Storer, Theodore Totorica, Harold Hamilton, Albert Karnowski, Otto Vanderschell, Nathan Wallace, Glenn Newkirk, Hank Bauer, Orville Baldwin, Carl Burgess, Don Stevens, Dave Johnson, Raulley Fuller.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named or any other labor organization.

J. A. TERTELING & SONS, INC. d/b/a WESTERN EQUIPMENT COMPANY,  
*Employer.*

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, Seattle, Washington, Telephone 682-4553, if they have any questions concerning this notice or compliance with its provisions.

**Donald Skillings, d/b/a Yankee Distributors and Truck Drivers, Warehousemen and Helpers Union Local #340 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 1-CA-4617. May 28, 1965**

DECISION AND ORDER

On February 12, 1965, Trial Examiner Benjamin B. Lipton issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint.