ABC Outdoor Advertising, Inc. *and* Sign & Pictorial Painters' Union, Local No. 770, affiliated with the Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO. Case 30–CA–588

January 11, 1968

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On October 4, 1967, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged 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 Respondent filed exceptions and a supporting brief.

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

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 Trial Examiner's Decision, the exceptions and supporting brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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 Trial Examiner as modified below and hereby orders that the Respondent, ABC Outdoor Advertising, Inc., Waukesha, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Add the following as paragraph 2(b), the present paragraph 2(b) and those subsequent thereto being consecutively relettered:

"(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces."

2. Delete the words "in the manner described in the Trial Examiner's Decision" from the last line of the second paragraph of the Notice to All Employees attached to the Trial Examiner's Decision.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Trial Examiner: A hearing in the above-entitled proceeding was held before me on July 27, 1967, at Milwaukee, Wisconsin, on complaint of the General Counsel against ABC Outdoor Advertising, Inc., herein called the Respondent or the Company. The sole issue is whether the Respondent discharged its employee Louis Liburdi in violation of Section 8(a)(3) of the Act. The charge was filed on May 9, 1967, and the complaint issued on June 15. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

ABC Outdoor Advertising, Inc., is engaged in the manufacture, production, and servicing of outdoor advertising billboards, with its principal office and place of business in Waukesha, Wisconsin. During the last calendar year, a representative period, it purchased and received goods and materials valued in excess of $50,000 from firms and individuals located outside the State of Wisconsin, and during the same period made sales of materials and services valued in excess of $50,000 to customers located in the State but which in turn sold goods and materials in excess of $50,000 to firms and individuals located outside the State. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Sign & Pictorial Painters' Union, Local No. 770, affiliated with the Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

Louis Liburdi, a pictorial sign painter, worked 8 years for this Company. On Monday, April 24, 1967, the Union, bargaining with an employer association of which the Respondent is a member, called a strike; it picketed this shop as well as others. Liburdi honored the picket line and did not work Monday or Tuesday. Late the second afternoon the Company sent him notice of discharge. He returned to work the next morning but was refused employment and has not been used since. The complaint alleges Liburdi was discharged because he chose to support his Union's strike, and that the Responent thereby violated Section 8(a)(3) of the Act. Donald Koepp, president of the Company, admitted at the hearing without equivocation that had Liburdi not refused to cross the picket line, he, Koepp, would not have removed the man from the payroll.

> Q. If he had been at work on April 24 and 25 would you have terminated his employment with ABC on the afternoon of April 25?
>
> A. [Donald Koepp] No, I don't believe so.

Despite this literal admission of retaliatory discharge, the Respondent advances a number of elusive and contradictory defenses to the complaint. The formal answer states both that Liburdi was "terminated" and that he was "replaced." As a witness Koepp gave a different explanation. He said there was not enough work for Liburdi, and that because two men were doing the same kind of work, it was decided to retain only one. Under this theory Liburdi was simply reduced in force, a matter standing apart from any strike action. This view, of course, conflicts with the idea of replacement, which means someone else is hired to do the work temporarily abandoned by a striker. A further defense, completely at odds with all of the foregoing, is that if in fact the Company did punish Liburdi for having struck, the man deserved it because the picket line he honored was illegal in that the Union was seeking to force the Employer to accept a hot cargo contract.

I find that the Respondent discharged Liburdi on April 25, 1967, and that by such conduct it committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

He was not replaced, and the use of the word is a semantic ploy here. The first thing Liburdi heard from his employer, after refusing to cross the picket line, was a telegram reading:

> You are hereby advised that the position which you formerly held at ABC Outdoor Advertising has been filled by another employee and there is no further work available for you here.
>
> Don Koepp

No one was hired in his place. Indeed, Koepp, before advising Liburdi he was through via the telegram, had not even spoken to any other workmen about doing Liburdi's work. For several years there had been four employees working in this shop: Liburdi, Holtzman, Roe, and Green. From an artist's sketch approved by customers for advertising purposes, these four do what is called pictorial and bulletin work. From a sketch they make a very large perforated pattern, perhaps 44 feet across, then use for drawing and painting an enlargement which becomes the billboard ad. Part of the work is reproducing the picture, "getting a true resemblance," or design conception, and this is called pictorial painting. The rest is referred to as bulletin work, and this includes background painting, lettering, large and small, and lines. The pictorial work requires by far the greater skill, and was always done by Liburdi and Holtzman, each of whom also did a certain amount of lettering and background. Except for rare occasions Roe and Green did only the bulletin work.

In addition Liburdi also did, at the time of his discharge, a small amount of sketch work. When he was hired, back in 1959, it was intended he would do much of this—really a form of creative art—but in the next several years it became apparent his skill in this area was not very high, and the Company progressively gave this work out to be done by private freelance artists. By the last year or 2 of his employment, from 1965 to 1967, Liburdi was devoting no more than perhaps 10 to 15 percent of his time on sketches and the rest on pictorial and bulletin painting work. All other sketch work is performed outside the shop. At pictorial work, it was admitted at the hearing, he was "mostly excellent." Liburdi said that Holtzman spent more time on bulletin work than on pictorial painting, but Koepp testified both men divided their time about equally between the two types of work. Holtzman did not testify. In any event, it is clear that Holtzman was unable to do, and never did perform any sketch work. He has been on this job for 5 years.

The Respondent contends that Liburdi was replaced by Holtzman. Nobody was hired. If the record showed no more than the foregoing, the defense of replacement would appear as patently false. On Tuesday, while Liburdi was striking, Holtzman was doing the same work he always did. And on Wednesday, with Liburdi in Koepp's office ready for work and demanding his job back, nothing had changed: Holtzman was still on his old duties. Under these clear facts, any contention that Holtzman had been removed from his own job to that of Liburdi, and thereby replaced an economic striker, merits no discussion. It is perhaps for this reason that the Respondent was forced to the further claim that there was not enough pictorial work for two men, but only sufficient for one. With this it could then be said, with partial plausibility, Holtzman was hired permanently into Liburdi's job.

The difficulty with this position is that for some time both men had worked regular schedules without a word from management about lack of work. Koepp even conceded that on April 15 he told the four men "in the event a strike occurred . . . business would be open and operating and that we wanted them to come to work." As Liburdi quoted him, Koepp said he wanted "Every man to come to work." Although Koepp denied it, I credit Liburdi's addition that when the expected strike was postponed 1 week, the owner again voiced the same request the following week, by saying "I expect you to be on the job." I must credit Liburdi's further uncontradicted testimony that when he protested the discharge telegram, Koepp told him: "I told you what would happen if you didn't come to work." Clearly, therefore, before anyone chose to disregard Koepp's admonition about not striking, he knew there was enough work for everyone. Moreover, what evidence there is of declining work is couched in general terms by Koepp as a condition that had been developing for some time. There is no contention that anything of particular significance affected the quantity of work between the time he told everyone to report promptly, and on April 25. He said "we were a little overstaffed" with pictorial artists, and then:

> Q. Isn't it correct this particular condition had existed for a period of about two years before April 21, 1967?
>
> A. That's correct.

However the facts be viewed, the same answer is compelled: a discharge for engaging in strike activity. Had Liburdi that day been carrying on some other form of concerted or union activity, and out of a clear blue sky been released on the asserted ground of insufficient work, the fact that the claimed economic condition had not changed for 2 years would rob the affirmative defense of all credibility. Further, Koepp's admission that but for the concerted activity of the moment he would not have taken the action proves without question that at least one purpose, if not the sole motivation of the discharge, was unlawful. It follows there was a violation of the statute.

There is more to weaken the claim Holtzman replaced Liburdi. Although Liburdi was then performing very little sketch work, Holtzman had never done any at all. Koepp said he anticipated the new man might learn. As a witness he detailed how before sending the discharge telegram he conferred at length with Holtzman, after discussing the matter with Herbst, the group supervisor, asking Holtzman did he think he could manage the job and would he take it. He said Holtzman accepted before the telegram

was sent. Koepp's affidavit, dated May 17, 1967, reads in part: "After I sent the telegram to Liburdi on April 25, I spoke to Holtzman and advised him that he would be doing the pictorial work and the sketch work and I spoke to him again about his new duties on April 26, and April 27." Herbst was not present at the hearing to corroborate the president; I think it clear Koepp was not telling the truth as a witness. The affidavit must be believed, for the statement was given to a Board investigator in the office of the Respondent's lawyer, and was signed by Koepp only after it had first been returned to the lawyer for approval. The truth of the matter is that Koepp simply decided to discharge Liburdi, and only later sought what he now calls a "replacement." And finally, Koepp also admitted there was no problem of insufficient work before Liburdi came back to his job. "We worked that day, we worked both of those days. We were short a man, the prime man." "I was more concerned with the future than with immediate events of that day." What Koepp was saying at this point is that he wants no one to work for him who might ever exercise the right to strike.

Supervisor Herbst also testified for the Respondent concerning the post-discharge conversation. He said that when Koepp was explaining the discharge telegram to Liburdi "we had no idea of how long the strike would last and we felt that we would put our company in jeopardy. . . ." But Liburdi was above all desirous only of working at that very moment. An employer is not free under this statute to discharge a man today because tomorrow he might join a strike.

There had been a threat of strike 2 years earlier, in 1965. At that time, when he also told the group the shop would be open in the event and he wanted everyone to come to work, Koepp had also said: "I don't want any union telling me what the hell to do in this place." And when answering Liburdi's charge, on Wednesday afternoon, April 26, that the Respondent had hurt him for having supported the Union, Koepp told him "he had shown a to hell with Koepp attitude." He also told Liburdi "He had no reason to be surprised" at the dismissal. But the only danger to which Liburdi had ever been alerted was the possible displeasure of the Respondent should anyone dare to refuse to cross a possible picket line. Nothing had ever been said about insufficient work. From Koepp's testimony: "I told him these were matters in which you have to choose whose concern you are going to respond to, that of the Company, or that of the Union."

Liburdi, Roe, and Green had paid union fines for crossing the picket line in 1965. Koepp knew, when he "replaced" Liburdi with Holtzman, that of the four employees only Holtzman was no longer a union member. And there were again four men working in July, at the time of the hearing, although Koepp called one a part timer.

I also find no merit in the alternative and inconsistent defense that the Respondent was free to discriminate against Liburdi because the Union was striking illegally. Assuming, for the sake of argument, that an employer who discharges a man solely to give vent to his resentment against strike activity, may, as an afterthought, search for such a defense, the evidence in this case falls short of proving the Union was in fact committing an unfair labor practice in its picketing. The employer association of which the Respondent is a member filed a charge against the Union but it has been withdrawn. Liburdi was not told at the time this was the reason for his dismissal.

For the last several weeks before April 24, while several bargaining sessions took place, four major issues remained in dispute between the parties. These were wages, pension benefits, health and welfare payments, and a no-strike provision. None of these was resolved until a contract settlement was reached sometime after the strike. The Respondent's contention that this was an unlawful strike rests upon the fact that among the many items listed in the Union's initial proposals in February had been a clause permitting its members to refuse to work under certain conditions which counsel for the Respondent at the hearing called illegal hot cargo situations.[1] The clause was similar to one found in the 1965 contract due to expire on March 31, 1967. The Employers demanded a regular no-strike clause in the new contract, although there had been none in the expiring one.

With the discharge shown clearly to have been punishment for strike action, the *prima facie* case in support of the complaint is complete. What is to be considered now is therefore an affirmative defense, the burden of going forward with the proof resting upon the Respondent. The test of evidence required, whether or not sufficiently probative and persuasive, is not unlike that needed were the General Counsel attempting to prove an unfair labor practice by the Union in the strike action.

In the inconclusive bartering which followed the exchange of demands in February, there was much discussion about all of the issues, money matters as well as possible arrangement respecting the right of employees to strike or honor picket lines of other unions. Alexander Adams, business representative of Local 770, who participated in the negotiations, said the no-strike question was argued back and forth perhaps a dozen times. He made clear that with time the Union's demand became a *quid pro quo* which it wanted in return for the Employer's no-strike clause demand. It also appears that what language might be used to satisfy the Union's need was discussed many times. As Adams recalled, "we did take the position that as far as the language, as far as the no-strike clause was concerned we would grant them the no-strike clause but we wanted language that would protect our union member sign painters to honor a picket line on the premises of their employment if a strike occurred. . . . we always had the difference of language, that we were of the opinion we would at all times give them a no-strike clause but we did want some insertion in there that our union members could respect a picket line if a strike would occur on the premises of the employer where they're employed."

The record as a whole does not prove, as the Respondent contends in its brief, that throughout the entire period, clear through April 25, the Union insisted upon contract language precluding the Employer "from discharging any employee or employees who refused to

[1] The then proposed clause reads as follows. "General and miscellaneous provisions. Section 1. A lawful sympathetic strike, when voted by the Executive Board of the union shall be no violation of the agreement on the part of the union Section 2. It shall not be a violation of this agreement and it shall not be cause for discharge, if any employee refuses to go through a lawful primary and sanctioned picket line of a union, nor shall it be a violation of this agreement and it shall not be cause for discharge if any employee or employees refuse to work on any job on which all persons who perform work with said employees or employee on the site of such a job are not members of a union."

work on any job on which all persons who performed work with said employee or employees on the site of such job were not members of a union." Every reference by witnesses at the hearing concerning the impasse matters which precipitated the strike, were to the "no-strike clause" as one of the remaining unresolved issues. And when on April 21, immediately preceding the strike, the employers reported to the employees in writing how matters stood, they stressed the wage and health and welfare disputes, but said nothing about any illegal union demand as an impediment to settlement. Indeed, the leaflet distributed that day by the employer association strongly indicates that all the Union wanted was a not illegal right to refuse to cross picket lines. "We also pointed out to the union that if they would accept our wage proposal here and now, we would agree to continue the health and welfare fund and contribute to it the full cost of the insurance premiums for the increased benefits as well as adjust our position on the no-strike clause so as to allow our employees the right to respect lawful primary picket lines of other employers."

This statement by the employers about the last ditch situation, makes credible Adams' recollection of one of the bargaining sessions. "Well, at that particular meeting Mr. Brigden [attorney for the Employer Association] brought up an example. He said, for instance, if Miller Brewing Company is on a strike we will give you language to the effect that your people can honor their picket line. I said, well, this is fine, but this doesn't serve our purpose. We want language in there to the effect that our people can respect an employer's picket line in our industry."

I think it clear from all this, which Herbst, an employer negotiator who testified at the hearing did not contradict, that whatever may have been the initial demands of both parties with respect to a strike or no-strike provision, there were many proposals and counterproprosals for altering the original suggested language. To say, as the Respondent now contends, that at the moment of strike the Union was unalterably and adamantly insisting upon the original version of its proposed language, would be to strain the evidence of record.

The eventual contract which settled the strike is also pertinent to the question here. The Union's demand for privilege to cross the picket lines of other unions or at other locations, even as modified by its representatives in the course of the negotiations, was abandoned entirely. It would appear that on this issue the employers prevailed, for the contract as executed contains a direct no-strike clause with only the following qualifications: "employees may strike to enforce the award of an arbitrator after two (2) weeks written notice to the employer involved."

In support of its argument that Local 770 was striking unlawfully on April 24, the Respondent rests primarily upon those Board decisions holding that a union may not strike or picket to force the employer to agree to a written hot cargo contract provision. I cannot find on the record here that this was the purpose of the strike; the true objectives could as well have been the many company demands from which the Union had refused to recede. Comparison of the two contracts in evidence – that which expired on March 31 and its renewal – shows that both journeymen sign painters and their helpers won a 20-cent-per-hour raise the first year of the contract, and a further 15-cent raise the second. This is supporting indication that the real disagreement which provoked the strike was a matter of money. It is not possible to discern clearly from a reading of the health and welfare and the pension clauses of the two contracts, which do appear changed, whether improved benefits in this area were won by the Union. No precedent has been cited for a proposition of law that whenever a union, at any stage of bargaining negotiations, requests an unlawful hot cargo clause, any strike which follows is illegal regardless of how the respective positions of the parties may have changed in the intervening period, and I do not believe this to be the law.[2]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's 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.

V. THE REMEDY

Having found that the Respondent has committed an unfair labor practice, I shall recommend that it be ordered to cease and desist from such conduct and to take certain affirmative action designed to dissipate its effect. The Respondent having illegally discharged Louis Liburdi, it must be ordered to reinstate him to his former or equivalent position, and to make him whole for any loss of earnings he may have suffered in consequence of the illegal discrimination against him. Backpay shall be computed in accordance with the rules prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing and Heating Co.*, 138 NLRB 716. In view of the nature of the unfair labor practice committed, the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondent be ordered to cease and desist from in any manner infringing upon the rights guaranteed to its employees by Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2 of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Louis Liburdi, 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 practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in the case, I recommend that ABC Outdoor Advertising, Inc., Wau-

[2] Cf. *Paul Biazevich d/b/a MV Liberator*, 136 NLRB 13, 20.

kesha, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their exercise of the right to strike, or in any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Sign & Pictorial Painters' Union, Local No. 770, affiliated with the Brotherhood of Painters, Decorators, and Paperhangers of America, AFL–CIO, 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, as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

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

(a) Offer Louis Liburdi immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set out under "The Remedy" section of this Decision.

(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 Recommended Order.

(c) Post at its place of business in Waukesha, Wisconsin, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by the 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 30, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[4]

[3] In the event that this Recommended Order is 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 is 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."

[4] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 30, 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 Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership by any of our employees in Sign & Pictorial Painters' Union, Local No. 770, affiliated with the Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO, or in any other labor organization, by discharging or otherwise discriminating against employees in regard to their hire or tenure of employment, or any other term or condition of employment.

WE WILL offer Louis Liburdi immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of pay he may have suffered as a result of the discrimination against him, in the manner described in the Trial Examiner's Decision.

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

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

ABC OUTDOOR ADVERTISING, INC.
(Employer)

Dated By
(Representative) (Title)

Note: We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 2nd Floor Commerce Building, 744 North 4th Street, Milwaukee, Wisconsin 53203, Telephone 272–3879.