

**Getlan Iron Works, Inc. and Shopmen's Local Union
No. 455 of the International Association of Bridge,
Structural and Ornamental Iron Workers,
AFL-CIO.**¹ Case 29-CA-72

May 5, 1969

**SUPPLEMENTAL DECISION AND
ORDER**

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING AND JENKINS

On November 18, 1965, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,² adopting the Trial Examiner's Decision wherein it was held that Respondent had engaged in and was engaging in the following unfair labor practices:

1. Respondent violated Section 8(a)(5) and (1) of the Act by its solicitation and promise of benefits, between July 23 and August 7, 1964, to striking employees Willy Schaller and Zoltan Gally to abandon the strike of Local 455 and return to work and by stating to them it would not agree upon a contract with that Union.

2. Respondent violated Section 8(a)(5) and (1) of the Act by its solicitation and promises of benefit, on August 21³ and September 1, 1964, to employee James McClenic to abandon the strike and return to work.

3. Respondent violated Section 8(a)(3), (5), and (1) of the Act by its failure, on and after July 28, 1964, to confer in good faith with Local 455 with respect to wages, hours, and other conditions of employment, and by its execution on September 4, 1964, of a collective-bargaining agreement with Industrial Production Employees Union, Local 42, herein called Local 42, including a maintenance of membership provision.

4. By reason of the foregoing unfair labor practices, the strike was converted into an unfair labor practice strike on July 28, 1964, and the strikers continued to be its employees.

5. Respondent early in September 1964, assisted Local 42 in violation of Section 8(a)(2), (3), and (1) of the Act by requesting employees to meet with the Local 42 representative who was soliciting authorization cards of Local 42 and, despite Local 42's lack of majority status, by entering into a collective-bargaining contract with that organization and maintaining the union security and checkoff provisions therein.

On the Board's petition for the enforcement of its Order involving the foregoing findings, the United States Court of Appeals for the Second Circuit on May 23 and June 28, 1967, respectively, entered an

opinion and decree enforcing all portions of the Board's Order except the requirement that Respondent bargain with Local 455 and, upon application, reinstate certain employees.⁴ The court found that there was a lack of substantial evidence that by July 28, 1964, Respondent had a fixed determination not to bargain with Local 455. The court noted, however, that "the evidence . . . might be sufficient to support a finding of [R]espondent's determination not to bargain *sometime after July 28.*" [Emphasis supplied.] The court stated it was therefore necessary to fix the exact date of the unlawful refusal to bargain in order to determine the conversion date of the economic strike and the propriety of the bargaining order. Accordingly, the court remanded to the Board for reconsideration "those portions of the Board's Order requiring Respondent to bargain with Local 455 and dealing with the reinstatement rights of the strikers . . ."

Pursuant to the remand, the Board on October 4, 1967, sent to the parties a notice of opportunity to submit statements of positions concerning the following questions:

1. When, if at all, was the economic strike, which was called on July 22, 1964, converted into an unfair labor practice strike?

2. Did Local 455 represent a majority of the employees in the appropriate unit on the date of Respondent's alleged refusal to bargain?

3. When, if at all, did Respondent refuse to bargain in good faith with Local 455?

Thereafter, such statements and briefs were submitted by all parties except Local 42.

The Board⁵ has considered its original Decision and Order, the opinion and decree of the court, the statements of position and briefs, and the entire record in the case, and hereby makes the following findings of fact with respect to the issues raised by the court's remand order.

Respondent is one of a number of "independent" companies that did not join Allied Building Metal Industries,⁶ an association of about one hundred employers who have been negotiating a series of general collective-bargaining contracts with Local 455. In 1959 and 1961, Respondent, without bargaining separately with Local 455, adopted the two general contracts negotiated by Allied and Local 455 for periods ending December 1961 and June 1964. However, on April 17, 1964, Local 455, which notified the independent employers that they would no longer be permitted as in the past to await the outcome of negotiations with Allied, sent to all such employers, including Respondent, letters expressing its desire to negotiate new agreements

³377 F 2d 894 (C A 2).

We have been administratively advised that, pursuant to the court's decree, a notice was posted by Respondent and there has been full compliance therewith.

⁴Pursuant to the provisions of Sec. 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

⁵Herein called Allied

¹Herein called Local 455

²155 NLRB 1053

³As a result of the Trial Examiner's inadvertence, the date in his fifth conclusion of law incorrectly appears as August 27

with an effective date of July 1, 1964.

Respondent's president, Marvin Getlan, and its general manager, Walter Loechel, met with representatives of Local 455 on July 2 and discussed a 1-year contract which was proposed by Local 455 and was in part agreed to by Respondent. When Local 455 requested Getlan to sign a stipulation extending the expired contract to July 10, he refused to do so because he wished to consult counsel. About July 15, Local 455 distributed to the independents a new document entitled "Stipulation of Settlement," which provided that a modified version of the proposed July 2 agreement should become the new contract.

At a meeting on July 22, Local 455, the representative of all shop employees, voted to strike those independent employers who had not agreed to extend the expired contract.⁷ When Getlan arrived the next morning and found his shop employees outside the plant, he asked what had happened and Schaller, the shop steward of Local 455, replied, "We are on strike. No contract, no work." That same day, Getlan, who testified that he was annoyed that some of the other independents had not been struck by Local 455, said to the picketing employees, "Why don't you come back to work? All the other shops [are] working."

While Schaller was picketing during the first or second week of the strike, Getlan said to him, "I'm not going to sign with [Local] 455 any more. If you want to keep working for me you have to drop out of the Union, and I will give you more money."⁸ When Schaller refused to quit Local 455, Getlan responded, "It's been nice knowing you for five years."

On one occasion during the 2-week period after the commencement of the strike, Respondent Manager Loechel approached Schaller and Kunz and said to them, "Why walk with the pickets? You can make yourself a couple of dollars. Here is the key. I will open the door and you can go in."

About a week after the strike began, Getlan came up to Gally, who was picketing, and asked, "Why don't you fellows come back to work?" Gally replied that the return to work would take place as soon as Getlan signed the contract. Getlan then said he was "never going to sign it," that he was "going to get out (sic) the Union [Local 455] from the shop," that he "had so much trouble with the Union," that he "just paid off seven hundred dollars," and didn't "like it." When Gally asked about his vacation pay, Getlan answered that Gally was "on vacation now," that if Gally came back to

work Getlan would give him vacation money with the other union,⁹ and that Getlan would give Gally more raises than Local 455 had obtained for him.

On July 28, Getlan and Loechel negotiated on the basis of the Stipulation with Local 455, including its business agent Frank Candelora and its attorney Belle Harper. Getlan tentatively agreed to some provisions of the Stipulation but expressed doubt as to the legality of the union-security clause. In accordance with her promise, Mrs. Harper on July 31 sent Getlan a copy of the Act and called his attention to the relevant portions of Section 8(a)(3).

On August 4, Candelora visited Respondent's plant where he asked Getlan to sign the Stipulation and put the men back to work. Getlan replied that he did not need any men because he was having his work done out of town and that he would have to see his attorney. According to Getlan, he told Candelora that he had not yet received the contract from Mrs. Harper and Candelora responded, "Well its not acceptable, you will just have to sign the regular contract." Getlan refused to do so and stated that he would sign the contract reached with Allied. However, Candelora refused to guarantee that Allied's contract would be available to Respondent.

On August 21, Getlan asked James McClenic, who was picketing, why he did not come back to work and received the answer that the employees were on strike. Getlan then ridiculed several of Local 455's contract proposals. Getlan stated he would not "sign anything like that" and again asked the strikers to come back to work.¹⁰

About 2:30 p.m. on August 27, Candelora again asked Getlan to sign the contract and the latter unequivocally replied that he was not going to sign any more contract[s] with Local 455, that he was "through with Local 455," and that he was "going to go out of business."¹¹

According to the credited testimony of Respondent manager Loechel, Getlan introduced him to Gerald Lasky, president of Local 42, about August 31, and told him that Getlan and Lasky were "bargaining for a contract."¹² When the employees quit work on September 2, Lasky was on the street outside Respondent's plant¹³ soliciting

⁷Gally testified further that Getlan mentioned "some other union" but didn't state the number of the union, and that while Getlan did not say that he already had another union, he did say he was going to have one.

⁸James McClenic returned to his job and worked full days on August 24, 25, 26, but only the first two hours on August 27 when he was persuaded to resume picketing by Candelora.

⁹The record shows that as of the afternoon of August 27, six unit employees were on strike, namely, Gally, Schaller, Casaine, Kunz, James McClenic and Graham. At work at that time were two old employees, John McClenic and Johnson, and two new employees, Vincent Iacono who had been working for Respondent since August 17, and William Kauderer who started with Respondent on the morning of August 27.

¹⁰Iacono testified that about this time Loechel told him that the place "was going to go union" and that a person was coming down to talk to the employees. Iacono also testified that when he met Lasky on the street the latter said that he was bargaining with Getlan for a contract.

¹¹Johnson, the employee who did not go out on strike and was not a

⁷The parties stipulated that on this day Respondent had eight shop unit employees, namely, Willy Schaller, Zoltan Gally, Arthur Kunz, James McClenic, Frank Casaine, John McClenic, John W. Johnson, and T. Graham, the first five of whom were members of Local 455. On the following day, all of these employees except Johnson went out on strike.

⁸On subsequent questioning by the Trial Examiner, Schaller testified that Getlan said, "that he will not join, will not sign a contract with Local 455 the way it is."

authorization cards for Local 42 from the employees.¹⁴ As noted above, Respondent on September 4 executed a contract with Local 42 even though the latter at that time had not achieved majority status.

As already indicated, the issues remanded by the court deal with the conversion date of the economic strike, the propriety of the bargaining order, and the reinstatement rights of the strikers.

The General Counsel argued as follows:¹⁵

There is sufficient evidence to support a finding of Respondent's refusal to bargain in good faith with Local 455 on August 4, 1964, when Getlan advised Candelora, business agent for Local 455, that he did not need any men, i.e., the strikers, as he was having his work done out of town and that he would only accept a contract identical to that which might eventually be negotiated with Allied. Alternatively, the General Counsel contended that Respondent violated Section 8(a)(5) of the Act on August 27 at which time, in response to Candelora's question as to when Respondent was going to sign a contract, Getlan stated he was "through" with Local 455. The General Counsel stated that the conclusion that Respondent rejected the principle of collective bargaining is buttressed by Respondent's extension of unlawful assistance to and support of Local 42 in that union's organizational campaign in late August 1964, and by its entrance into an unlawful bargaining relationship with Local 42 on September 4.

The General Counsel further asserted that Respondent not only lacked a good-faith doubt as to Local 455's continued majority but engaged in a campaign to undermine Local 455's majority status. The General Counsel also took the position that, despite this campaign, Local 455 in fact maintained its majority status during the strike. As to August 4, the General Counsel asserted that Local 455's majority remained intact because no new employees were hired until August 15. Regarding August 27, the General Counsel reasoned as follows: New employee Iacono was a truckdriver and as such should not be regarded as a replacement of any unit employee because the bargaining unit did not include truckdrivers. As the record does not reveal which of the 5 striking employees were replaced by Kauderer, the Board should, in the opinion of the General Counsel, find that the bargaining unit on August 27 consisted of the strikers — Schaller, Gally, Kunz, Casaine, and Graham — and the four employees — Johnson, John McClenic, Kauderer, and James McClenic — who were working on August 27.¹⁶ The General Counsel concluded that Local 455 still retained its majority as 5 of the 9

employees in the unit on August 27 were members of Local 455. Finally, the General Counsel would find that the economic strike was converted into an unfair labor practice strike no later than August 27.

Respondent made the following argument:

The economic strike was never converted into an unfair labor practice strike since the original and continuing purpose of the strike was to get Respondent to sign the stipulation agreement. No refusal to bargain in good faith can be found on Respondent's part as Local 455 brought about the impasse by its adamant demands for the same agreement as it signed with other employers. However, assuming that Getlan's remark to Candelora on August 27 that he was "through" with Local 455 constituted a refusal to bargain, the refusal was not an unfair labor practice as Local 455 did not represent the majority of employees on that date.

As the economic strike was never converted into an unfair labor practice strike — so Respondent's argument continues — the unit should therefore include the three old employees who were working on August 27, the two new employees who were serving as replacements, and the four employees who were on strike. The action of James McClenic, one of the five members of Local 455, in crossing the picket line and returning to work on the morning of August 27, rebuts the presumption that Local 455 "could count him as one of theirs." Accordingly, as only four of the nine employees in the unit could be considered adherents of Local 455, that organization, in Respondent's opinion, no longer had a majority on August 27.

On the basis of the following appraisal of the evidence, we find that by the afternoon of August 27 Respondent had fully demonstrated its determination to withdraw its recognition of incumbent Local 455 and to replace it with Local 42, which we have already found with court approval was assisted by Respondent in violation of Section 8(a)(2), (3), and (1) of the Act.

It is clear that on a number of occasions commencing with the first day of the strike on July 23, 1964, Respondent sought to interfere with the legitimate functions of Local 455 as a labor organization by a number of unlawful acts. The evidence is persuasive that Getlan, who strongly disapproved of Local 455's departure from the policy of allowing independents like Respondent to await the outcome of negotiations with Allied and then to adopt the general contract, had no serious intention of bargaining separately with Local 455. Thus, Getlan during the first or second week of the strike made clear his position when he told Schaller, the shop steward for Local 455, that he was "not going to sign with [Local 455]." That Getlan did not wish to deal with Local 455 is obvious from his

member of Local 455, testified that some time before Lasky appeared Getlan told him that he "would try to get another union in the shop."

¹⁴Earlier that day, Loechel received a message "from the office" that Lasky wanted the men to wait for him and Loechel then relayed this message to each of the men individually.

¹⁵Local 455 took essentially the same position as the General Counsel

¹⁶However, as indicated above, James McClenic resumed striking after working the first 2 hours on August 27

effort to weaken that labor organization by attempting to induce Schaller to quit by threatening him with an unlawful discharge and offering him "more money." During the same period, Respondent's manager, Loechel, also resorted to the unlawful act of soliciting Schaller and Kunz, another member of Local 455, to abandon the strike.

About a week after the strike began, Getlan again took illegal action in his effort to dissipate the strength of Local 455 by asking Gally, another member of Local 455, "Why don't you fellows [the strikers] come back to work?" Getlan in his statements made to Gally at this time spelled out with unmistakable clarity his decision not to sign a contract with Local 455, his resolution to get that "union out of the shop," his plan or desire to replace it with another union, and his promise of better vacation benefits and more raises than could be obtained through Local 455.

Getlan's opposition to dealing separately with Local 455 was underscored on August 4 when he insisted on reverting to the old practice of adopting the general contract after it was negotiated with Allied. On August 21, Getlan went still further in his campaign to undermine Local 455 by coupling his unlawful solicitation of James McClenic to abandon the strike with yet another declaration that he would not sign "anything like" the contract proposals of Local 455. Any doubt as to Respondent's position was completely eliminated on the afternoon of August 27 when Getlan asserted he was "not going to sign any more contract[s] with Local 455", that he was "through" with Local 455, and that he was "going to go out of business." In this connection, we find it significant that Respondent's plan to supplant Local 455 with another union, which Getlan first announced in early August, was repeated to Iacono in late August,¹⁷ and was then coming to fruition as evidenced by Respondent's admission that Getlan and Lasky, Local 42's representative, were at that time already in the midst of negotiating the unlawful contract that was executed just a few days later.

Accordingly, we conclude that Respondent refused to bargain on the afternoon of August 27, 1964, when it announced it would engage in no further negotiations with Local 455. We turn now to the question whether Local 455 at that time retained the majority status which is one of the prerequisites for finding that a refusal to bargain constitutes an 8(a)(5) violation.

The Board recently held in *Pioneer Flour Mills*¹⁸ that Section 9(c)(3), which deals with representation matters, is also pertinent to an 8(a)(5) allegation. The Board therefore decided that replaced strikers¹⁹ as well as their replacements, nonreplaced strikers, and nonstriking employees should be counted as

part of the bargaining unit for the purpose of determining an incumbent union's majority status in unfair labor practice cases.

We find in conformity with the above formula that, for the purpose of determining Local 455's majority status on the afternoon of August 27, the bargaining unit consisted of strikers Schaller, Gally, Kunz, James McClenic, Casaine, and Graham, of Johnson and John McClenic²⁰ who were at work, and of replacements Kauderer and Iacono.²¹ As 6 of the 10 employees in the unit were on strike at the time of Respondent's refusal to bargain, there can be little doubt that they were manifesting their support of the Union by this concerted activity. Contrary to Respondent who contended that James McClenic, a member of Local 455, could no longer be counted as a supporter of the Union because he was working on the morning of August 27, we find that this employee reaffirmed his support of the Union when he resumed picketing that same morning. Although one of the strikers, Graham, does not appear to have been a member of Local 455, we find that his participation in the strike demonstrated that he favored the cause of Local 455 and should therefore be counted as one of its adherents.²² Accordingly, we conclude that on the afternoon of August 27 Local 455 continued to maintain its majority status, and, further, that Respondent did not at that time have any reasonable basis for doubting Local 455's continuing representative status which it had theretofore recognized.²³ The record shows, moreover, that Respondent, which argued that Local 455 "brought about the impasse by its adamant demands," did not predicate its refusal to bargain on August 27 upon a doubt of majority. In addition, even if we were to assume, contrary to fact, that majority doubt was impliedly included as a ground for Respondent's refusal to bargain, its opposition to Local 455 and unlawful support of Local 42 show that this was not urged in good faith. We therefore find that Respondent on the afternoon of August 27 refused to bargain with Local 455, the majority representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.

¹⁷*C.H. Guenther & Son, Inc., d/b/a Pioneer Flour Mills*, 174 NLRB No. 174.

¹⁸Involving in strikes of not more than 12-month duration.

¹⁹John McClenic, who, as noted above, went out on strike on July 23, returned to work at an unspecified time before the morning of August 27.

²⁰We do not agree with the General Counsel that Iacono was a truckdriver and as such should not be regarded as a replacement of a striking shop unit employee. Although Iacono testified at the hearing on February 24, 1965, that he was a driver, his authorization card for Local 42, dated September 3, 1964, only about 2 weeks after he was hired, gives his position as "welder & installer," which is a shop classification. In any event, even assuming that Iacono was hired as a truckdriver, we are of the opinion that this was a unit job as the parties stipulated that truckdriver Johnson was among those listed in the unit on the eve of the strike.

²¹*Cf S & M Mfg Co.*, 172 NLRB No. 104.

²²*United Aircraft Corporation (Pratt & Whitney Division)*, 168 NLRB No. 66; *Laystrom Manufacturing Co.*, 151 NLRB 1482; *Celanese Corp. of America*, 95 NLRB 664.

¹⁷As noted above, such a statement was also made to nonstriking employee Johnson sometime before September 2.

There remains the question of remedy. As Respondent violated Section 8(a)(5) and (1) of the Act on the afternoon of August 27, we hold that the strike was converted into an unfair labor practice strike as of that date. As four of the six striking employees were not replaced by that time and therefore became unfair labor practice strikers because of the conversion, we find that they, unlike the two *economic strikers*, who were replaced prior thereto, are entitled to reinstatement. However, as it does not appear from the record which four of the six strikers were replaced prior to the conversion, we shall refer this matter to compliance. We shall therefore require that Respondent, upon application, reinstate the strikers who had not been permanently replaced as of the afternoon of August 27, 1964, to their former or substantially equal positions, without prejudice to their seniority and other rights and privileges discharging, if necessary, persons hired since August 27, 1964, and make them whole for any loss of pay suffered by reason of Respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which they normally would have earned less their net earnings,²⁴ during the period 5 days after the date on which they apply or have applied for reinstatement to the date of Respondent's offer of reinstatement.²⁵

In view of the foregoing, we shall enter the following remedial order and notice.²⁶

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that Respondent, Getlan Iron Works, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

Refusing to bargain with Shopmen's Local Union No. 455 of the International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO, as the exclusive representatives of the employees in a unit composed of all production and maintenance employees of Getlan Iron Works, Inc., employed at its plant, exclusive of clerical employees, superintendents, foremen who do not handle material or work with tools, employees who are represented by any other union with which Respondent has signed a collective-bargaining agreement, employees engaged in erection, installation, or construction work, and all supervisors as defined in Section 2(11) of the Act, with respect to rates of pay, hours, and other terms and conditions of employment.

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

(a) Upon application, reinstate to their former or substantially equal positions, the four of the six strikers — Willy Schaller, Zoltan Gally, Arthur Kunz, Frank Casaine, James McClenic, T. Graham — who were not replaced prior to the afternoon of August 27, 1964, without prejudice to their seniority and other rights and privileges, discharging if necessary, persons hired since August 27, 1964.

(b) Make whole said employees in the manner set forth above.

(c) Preserve and make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to assist in the determination of which strikers were entitled to reinstatement and also to analyze the amount of backpay due under the terms of this Order.

(d) Notify any of the four nonreplaced strikers presently serving in the Armed Forces of the United States of their 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.

(e) Upon request, bargain collectively with Local 455 as the exclusive collective-bargaining representative of the employees in the aforesaid unit, with respect to wages, hours, and other terms of employment, and if an agreement is reached, incorporate the same in a written contract.

(f) Post at its plant in Hempstead, New York, copies of the attached notice marked "Appendix."²⁷ Copies of this notice on forms provided by the Regional Director for Region 29, shall, after being duly signed by a representative of Respondent, be posted by Respondent upon receipt hereof, 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.

(g) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Supplemental 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:

After a trial in which both sides had the opportunity to present their evidence, and after the Court of Appeals

²⁴See *F W Woolworth Corp.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

²⁵*Southern Beverage Company*, 171 NLRB No. 128.

²⁶See fn. 4

²⁷In the event this Order is enforced by a Decree of the United States Court of Appeals, there shall be substituted for the words "Supplemental Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

