Selecto-Flash, Inc. ***and*** **Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America.** Cases 29-CA-1477 and 29-CA-1538

May 27, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On March 3, 1969, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that 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, Respondent filed exceptions to the Trial Examiner's Decision, together with 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, brief, and entire record in the proceeding, 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 hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Selecto-Flash, Inc., New York, New York, 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

FREDERICK U. REEL, Trial Examiner: These cases, consolidated by order of the Regional Director and heard at Brooklyn, New York, on January 13 and 14, 1969, pursuant to charges filed the preceding October 2 and December 5 and a consolidated complaint issued December 23, present questions arising out of the efforts of the Charging Party, herein called the Union, to represent employees at one of the locations operated by Respondent, herein called the Company, including an allegation that the Company violated Section 8(a)(1), (3), and (5) of the Act by discontinuing the employment of employee Paul Erwig as a reprisal for his union activity and in an effort to reduce the bargaining unit to a single employee. Upon the entire record, including my observation of the witnesses, and after due consideration of the brief filed by General Counsel, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY AND THE LABOR ORGANIZATION INVOLVED

The Company, a New Jersey corporation, operates a plant at West Orange, New Jersey, where it manufactures highway safety equipment, such as barricades and flashing lights, and from which it annually ships over $50,000 worth of products to points outside the State. The Company also maintains several locations in various northeastern states, where it assembles, and from which it rents, services, and repairs, such equipment. This proceeding concerns the employees in the New York city locations, situated in the Borough of Queens. The foregoing facts, established by the pleadings and by stipulation, support the finding here made that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The pleadings further establish, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background — The Nature of the Queens Operations and the Employment History There Preceding the Hiring of Erwig*

As noted above, the Queens location was devoted to the assembling of barricades and light shipped to it from the New Jersey plant, and to the rental, servicing, and repair of such equipment. Only minor repairs were done at Queens, such as replacing legs on a barricade, or replacing lenses or brackets. Even painting was considered a "major" repair and was done in New Jersey. The Queens facility contained only rather elementary tools — a soldering iron, a hammer, a wrench, two screwdrivers, a crowbar, and a sledge hammer. No particular experience was needed to perform the repair work satisfactorily.

The employee complement at Queens underwent considerable fluctuation. At all times a branch manager, a salesman, and an office clerical were employed there — all outside the bargaining unit. The identity of the men engaged in on-the-job servicing and of those engaged in shop repair work varied. Thus, in 1967, James Gagnon worked there the entire year, except for 3 weeks in December, and Donald Cutter worked the last 10 months of the year. Robert Wells also worked there most, if not all, of that year. Wells and Gagnon were full-time employees engaged in on-the-road servicing; Cutter, who was in high school, worked part time, some of which time was spent in repair work in the shop and some on the road.[1] Another part-time employee, William Siangiola, worked at least some part of every month in that year. Two other men, Marsenison and Dluhos, saw brief service in 1967, the former only in December, and the latter for the last 2 weeks of January and the month of February.

In 1968, up to the time of the union organizing drive in September, the record shows that Gagnon worked full time, that Wells worked only a brief period in January

[1] Cutter normally worked from 24 to 28 hours a week during the school year (although sometimes as little as 16) and longer hours in the summer.

and February, and that Cutter worked part of each month until his graduation from high school in June, when he became a full-time, permanent employee. Siangiola worked some part of each of the first 6 months, Joe Kammer worked 2 weeks in March, April, and a few hours in May, Tom Rogers worked in May, June, and July, and Conrad Eggert worked in July and the first 3 weeks of August.

In summary, at this point in time — the end of August 1967 when the Company hired Paul Erwig — it had regularly employed for a period of about 18 months at least one and often two full-time employees (Gagnon plus Wells or Cutter), and one or two "temporary" employees (Cutter, Siangiola, Kammer, Rogers, or Eggert in 1968, and Cutter, Siangiola, Marsenison, and Dluhos in 1967).

Gagnon, Wells, and later Cutter were primarily engaged in on-the-job servicing of equipment, but would do some work in the shop in the mornings. Siangiola, Eggert, and later Erwig were primarily engaged the shop, doing assembly and repair. The Company's business suffers from some seasonal fluctuation, as road repair work, and hence the need for barricades and lights, is curtailed in the late fall and winter when the ground is frozen.

B. *The Critical Events*

1. The hiring of Erwig

Late in August 1968[2] Paul Erwig learned that a job might be available at the Queens location and applied for it. Branch Manager Trinca told him that, if another person who had been promised the job did not want it, Erwig would be hired. The other person was Eggert, who had spent 3 weeks in that month working for the Company, but Eggert did not return and Erwig was hired. There is some conflict between the testimony of Trinca and Erwig as to their conversation at that time. According to Erwig, nothing was said about the job's being "temporary." Trinca testified that he told Erwig at the time "it would probably be temporary work." Trinca also testified, however, that Cutter worked for 16 months as a "temporary" employee (achieving "permanent" status only upon graduation from high school in the early summer of 1968), and that Erwig was a "temporary" employee in the same sense as Cutter and "could have expected to work there for a year also, perhaps." I credit Erwig's testimony that the question whether the job was permanent was not raised at the time he was hired.

Erwig commenced work at a rate of $1.75 per hour, and in a few days was raised to $1.80. He did not receive the "fringe benefits" given Gagnon and Cutter such as paid holidays and insurance. This disparity of treatment reflected the Company's view that he was a "temporary" employee. Cutter had been similarly disadvantaged during the year or more in which he had worked for the Company while still attending school.

As noted above, Erwig was employed in the shop doing assembly and repair work. He had been employed there about 2 weeks, working full time (40 hours a week except for the week in which Labor Day occurred, when he worked 32 hours), when he and the other employees signed union cards, setting in motion the events which led to this litigation.

[2]All dates hereinafter mentioned refer to the year 1968 unless otherwise specifically indicated.

2. The Union organizes and requests bargaining but the Company refuses

Early in September each of the three employees at the Queens location — Gagnon, Cutter, and Erwig — signed a card authorizing the Union to act as his bargaining representative. The three men comprised the entire complement at that location except for the office clerical employee, a salesman, and the location manager, Jack Trinca; the latter three are not within the bargaining unit claimed by the General Counsel to be appropriate. The Union received the cards on September 9, and on September 17 it addressed a written request for recognition and bargaining to the Company at its Queens address. Trinca, the Queens manager, received this letter in due course, and on Friday, September 20, read it over the telephone to Company President Peepas, who was at the West Orange headquarters. Peepas directed Trinca to mail the letter to West Orange, where Peepas received it on Monday, September 23. On that same date, Trinca advised Peepas by telephone that Cutter, one of the three employees, was leaving his job to accept a better position with National Cash Register. Cutter did in fact quit voluntarily that week for that reason.

Following the Union's bargaining request of September 17, its business agent, Anthony Bai, made several futile attempts to obtain an answer from the Company. On September 20 Bai telephoned Queens, but was told the matter had been referred to West Orange. On September 25 Bai called West Orange, but Peepas told him the matter had been referred to Company Counsel Schwartz. Bai finally sent the Company a telegram on September 26, stating that, unless the Company extended recognition and commenced negotiations by 10 the next morning, he would "be forced to proceed in this matter to protect the rights of those employees we represent." On October 1 Schwartz telephoned Bai, stating that as Cutter had left and Erwig was only a temporary employee, the Company regarded the unit as consisting of only one man, Gagnon, and that it was not going to recognize or bargain with the Union. The Union filed an unfair labor practice charge the next day.

3. Alleged promises and interrogation

According to the testimony of James Gagnon, shortly after Cutter quit his job, Plant Manager Trinca told Gagnon that Trinca had obtained an increase in Gagnon's pay, and could also get Cutter a week's paid vacation. Trinca in his testimony placed this conversation as occurring during the summer, before Cutter left and before union activity commenced. I credit Trinca as it seems highly unlikely that he would have made any such comment to Gagnon concerning a paid vacation for a former employee. Erwig testified, and Trinca denied, that during September Trinca asked Erwig if the employees had sought out the Union, or if the initiative had come from the latter. According to Erwig, he replied simply that he had obtained his card from Gagnon. I credit Erwig, but find that this isolated interrogation does not constitute an unfair labor practice.

4. The reduction of Erwig's hours and his later discharge

Erwig had been working a full workweek for each of the first 4 weeks of his employment, but, beginning with the week of September 22-28, his hours for the next 4

weeks ranged from 24 to 32. On or about October 25 Trinca laid Erwig off, telling him that work was getting very slow.

According to Erwig, Cutter's departure left him with more work than before, as both Cutter and Gagnon had done some shopwork in the mornings, and with Cutter gone Gagnon spent practically all his time on the road. Also, after Cutter left, Erwig would occasionally go out with Manager Trinca to cover some of the on-the-road servicing Cutter had done, thus leaving Erwig less time for his shopwork. Gagnon testified that in October 1968 the Queens location had from 1,600 to 1,800 rental units in use, as contrasted with only 1,200 in October 1967. Apparently the source of Gagnon's information was the office secretary, but the Company made no motion to strike this testimony after its hearsay aspect was uncovered, and offered no evidence to the contrary.

5. Events following Erwig's dismissal

During the week before Erwig was laid off, the Company employed Siangiola for a few days. This was the first time Siangiola had worked there since the preceding June. After Erwig's departure the Company occasionally employed Siangiola, who worked some of each week in December 1968 and January 1969 (up through the second week of January, when the hearing took place), and who also worked briefly in November. He worked approximately 16 to 17 hours a week for the Company, usually on Wednesdays and Thursdays, as he also worked 40 hours a week for a neighboring apartment house.

The Company took certain steps to reduce the workload at Queens after Erwig left. About this time, the servicing of Staten Island jobs was transferred from Queens to the West Orange facility. Also, some deliveries formerly made through Queens are now made directly from the New Jersey plant, notably those to the Brooklyn Union Gas Company. The latter change occurred in November, after Erwig left, and the Staten Island change, apparently under contemplation early in October, was effectuated either late that month or early in November. Also, the Company in October began operating in a new building in West Orange in which it contemplated doing more of the repair work than it had previously done in New Jersey. The Company intended, however, that minor repairs would still be done in the branch offices, such as that in Queens. At the time of the hearing, the new repair center was still "in the process of going into operation."

Financial records introduced by the Company establish that rentals from the Queens location in 1968 exceeded $12,000 in value in each of 3 months (July, August, and September), dropping slightly below that figure in May and October, and into the $10,000 class in April, June, and November, the only other months mirrored in the exhibit. Direct sales credited to the Queens branch in that period fluctuated widely from month to month, August (the month Erwig was hired) showing a low dollar value, but October showing the second highest of the year. Finally, the data for the preceding year appears to bear out the testimony that the winter months are the least busy.

In December, after a complaint had issued alleging discrimination against Erwig, the Company offered him the opportunity to return for 2 days' employment, but he declined.

6. Contentions and conclusions regarding the alleged violations of Section 8(a)(1), (3), and (5)

General Counsel contends that the Company reduced Erwig's hours and then discharged him to lend credence to its position that at the time it refused the Union's request for recognition, Erwig was a temporary employee so that the unit consisted of only one man, Gagnon, and was therefore not one in which the Board would compel bargaining. See *Owens-Corning Fiberglass Corporation*, 140 NLRB 1323. The Company contends that Erwig was treated in normal fashion and was let go when economic factors so dictated.

In considering whether Erwig was in fact discriminated against the question whether his status was that of a temporary or a permanent employee is not controlling. Even a temporary employee not within the bargaining unit enjoys statutory protection against discharge for unlawful reasons. For example, under the Company's reasoning, Cutter was a "temporary" employee for well over a year, but, if during this period his "temporary" employment had been prematurely terminated because of union activity, the violation of Section 8(a)(3) and (1) would be patent. To use another example, if Erwig had been a union member in August and had been refused employment for that reason, the "temporary" character of the job for which he was being considered would be immaterial in establishing the violation.

The question in Erwig's case, therefore, is whether the Company curtailed his hours and later discharged him for legitimate business reasons, or whether it did so in an effort to "nail down" the proof that he was a temporary employee outside the bargaining unit. The answer to the question basically depends upon what inferences should be drawn from the circumstantial evidence, bearing in mind that General Counsel bears the burden of proof. I believe, for the reasons set forth below, that the inference of unlawful discrimination is warranted and that the burden of proof has been met.

The curtailment in Erwig's hours occurred immediately after the Union's demand for recognition and bargaining. This of itself might give rise to a suspicion that there was "more than a coincidental connection" between the two events. *N.L.R.B.* v. *Condenser Corporation of America*, 128 F.2d 67, 75 (C.A. 3). In addition, at this same time Cutter left, thereby increasing rather than decreasing the amount of work for Erwig to do, not only because Cutter had been doing some shopwork, but because Gagnon, now had to devote full time to on-the-road servicing and Erwig himself now had to do some such work. The records introduced by the Company show no appreciable elimination of work, certainly nothing to account for reducing the work force from three men to one. Indeed, the week before Erwig was let go, the Company needed not only his services but those of Siangiola as well. Gagnon's testimony that there were substantially more units rented at that time than had been the case a year before stands unrefuted. Yet at all times the Queens branch had furnished steady employment to three men, and now it was suddenly reduced to one. Even in the slack months of the winter of 1967-68 the Company had employed Gagnon, Wells, and Cutter as well as Siangiola and, for a short time, Marsenison. In short, the claim of economic motivation for the treatment of Erwig does not withstand scrutiny, and the inference that the true motive was unlawful is reasonable. See *N.L.R.B.* v. *Terry Industries of Virginia, Inc.*, 403 F.2d 633 (C.A. 4), enfg. 164 NLRB No. 117; *Shattuck Denn Mining Corporation*

v. *N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9).

The fact that the Company has not replaced Erwig does not require a contary conclusion. In the first place, the Company has found it necessary to employ Siangiola for part-time work. Moreover, the pendency of this litigation would of itself cause the Company to avoid so far as possible the employment of a replacement for Erwig. Indeed General Counsel suggests that other changes in the Company's operations, such as the transfer of Staten Island jobs to the "jurisdiction" of another shop and the direct shipments to Brooklyn Union Gas, were part of a plan to reduce the work at Queens so as to keep the "unit" to one man and avoid dealing with the Union. In any event, the question as to Erwig is not whether he would have been let go in the winter months but whether the Company was unlawfully motivated in reducing his hours in September and laying him off in October.[3]

The finding that the Company was motivated in its treatment of Erwig by its desire to demonstrate that the unit consisted of only one employee is not controllling on the question whether he was in fact a temporary employee. As already noted, even a temporary employee can be the victim of unlawful discrimination. Conversely, even if I am in error as to the finding of discrimination and Erwig was let go for economic reasons, this would not settle the question whether at the time of the refusal to bargain he was a temporary employee.

The Company relies on the fact that Erwig did not share in certain benefits available to "permanent" employees as establishing the "temporary" character of his employment. This is not conclusive. See *S. G. Tilden, Incorporated*, 129 NLRB 1096, 1097-98. Cutter worked for the Company regularly for well over a year without enjoying those benefits, and in my view was within the bargaining unit during that time even though the Company insists he was "temporary." Trinca, the manager at Queens, testified that when Erwig was hired he "could have expected to work there for a year also, perhaps." Indeed, even accepting Trinca's version the most he told Erwig was that the work would "probably be temporary," and as found above I credit Erwig's denial that the probable duration of the job was mentioned at all. Moreover, the fact that the Company raised Erwig's pay suggests that his tenure was not considered "temporary."

On the Company's side of the ledger it must be noted that Erwig's immediate predecessor, Eggert, had worked only a few weeks, and that the Queens branch had frequently employed men for only a few weeks or months. But rapid turnover of employees does not establish that a particular employee is a "temporary" employee and as such is excluded from the bargaining unit. "Temporary" in the sense we here use the term cannot be established by hindsight into tenure, but goes to the condition prevailing at the time the recognition issue is determined. If the work is such that there is reasonable expectancy of its continuing indefinitely, the fact that turnover in the job is high does not make it "temporary" in the sense here involved.

I conclude that at the time of the demand for recognition and the Company's refusal, Erwig was not a "temporary" employee. See *G.P.D., Inc.* v. *N.L.R.B.*, 406 F.2d 26 (C.A. 6). The work which he was doing was a regular, steady part of the operation, and he was the only man doing it. Indeed, the departure of Cutter increased the assurance of continuing need for someone in Erwig's job. The Company as far as this record shows had always needed someone, at least part time, to do the shopwork (part-time employees, of course, are included in a bargaining unit). While the onset of winter (still over 2 months away at the time of the refusal to bargain) might have caused a curtailment of hours, there was no reason to expect that the job would disappear altogether even then. I therefore conclude that Erwig was not a temporary employee, that the unit consisted of two men, and that the refusal to bargain was therefore violative of Section 8(a)(5) and (1) of the Act.[4] In this connection I note that the Company has never challenged the validity or authenticity of the authorization cards, that it based its refusal to bargain solely on its view that the Union consisted of one man, and that the unit alleged in the complaint is manifestly appropriate as it includes all the "warehouse" employees at Queens, and excludes only an office clerical, a salesman, and a supervisor.

CONCLUSIONS OF LAW

1. The Company by reducing the hours of work it gave Paul Erwig and by later discharging him engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the Act.

2. The Company by its refusal to recognize the Union and to bargain collectively engaged in an unfair labor practice affecting commerce within the meaning of Sections 8(a)(1) and (5) and 2(6) and (7) of the Act.

The Remedy

I shall recommend the issuance of an order directing the Company to cease and desist from its unfair labor practices, to bargain collectively with the Union, and to offer Erwig reinstatement[5] and backpay for the period commencing with the discriminatory curtailment of his hours. Backpay should be computed in accordance with the methods prescribed in *F. W. Woolworth Company*, 90 NLRB and *Isis Plumbing & Heating Co.*, 137 NLRB 716; see also footnote 3, *supra*.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Respondent, Selecto-Flash, Inc., its officers, agents, successors, and assigns, shall:

[3] The question whether Erwig might have been laid off in the winter months goes only to computation of backpay, a matter normally reserved for later proceedings. Cf. *N.L.R.B.* v. *Cambria Clay Products Company*, 215 F.2d 48, 56 (C.A. 6), and cases there cited. In this connection it may be observed that Erwig, who was earning $1.80 per hour or $72 per week with the Company, obtained other employment at $107 per week late in November, approximately a month after he left the Company.

[4] I reject, however, the General Counsel's contention that Siangiola, who had not been at work for 4 months at the time of the refusal to bargain, was a regular part-time employee See *Horace Simmons d/b/a Vaca Valley Bus Lines*, 171 NLRB No 179; *Blade-Tribune Publishing Company*, 161 NLRB 1512, 1520, and cases there cited.

[5] The offer made Erwig in December was to return to work for "a couple of days," to quote Trinca. At that time it may be that the Company intended to offer him 2 days per week on a regular basis, but the record falls far short of establishing that the offer was made in terms of more than a single "two days" employment.

1. Cease and desist from:

(a) Discharging or in any other manner discriminating against employees because of their membership in or activity on behalf of a labor organization, or for the purpose of avoiding negotiating with a labor organization.

(b) Refusing to recognize and bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the statutory bargaining representative of all truckdrivers, warehousemen, assemblers and helpers employed by Respondent at its Queens plant, exclusive of all office clerical employees, salesmen, guards, watchmen and all supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Upon request bargain collectively in good faith with the above-named Union as the representative of the employees in the above-described unit.

(b) Offer to reinstate Paul Erwig to his former or substantially equivalent position, and make him whole in the manner set forth in the portion of the Trial Examiner's Decision entitled "The Remedy," for losses suffered as the result of the reduction of his hours in September and October 1968 and his discharge in the latter month.

(c) 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.

(d) 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 hereof.

(e) Post at its location in the Borough of Queens, New York City, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by it 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.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[7]

[6] 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."

[7] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, 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 bargain with Teamsters Local 282 as the representative of the truckdrivers, warehousemen, assemblers and helpers employed at our Queens location in a good-faith effort to arrive at a contract.

WE WILL offer Paul Erwig his former job, and we will pay him for losses he suffered as a result of our having reduced his hours in September and October 1968 and our having discharged him in October 1968.

WE WILL NOT discharge or otherwise discriminate against any employee because of his union activity or in an effort to avoid having to bargain with a labor union.

WE WILL NOT in any like or related manner interfere with our employees' right to join or be represented by a labor union.

SELECTO-FLASH, 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, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 212-596-3535.