Acrylic Optics Corporation *and* United Optical Workers, Local #932, International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC

United Optical Workers, Local #932, International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC *and* Acrylic Optics Corporation. Cases 7–CA–11514, 7–CB–3194, and 7–CB–3194(3)

February 26, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On October 16, 1975, Administrative Law Judge Milton Janus issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The sole issue in this proceeding is whether Respondent's discharge of employee Jeanne Green in the course of an economic strike was for cause, or whether it was in reprisal for her union or other protected concerted activities. A subsidiary issue is whether Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate Green upon the termination of the economic strike. For the reasons discussed below, we find, contrary to the Administrative Law Judge, that Respondent did not violate the Act either by discharging Green and/or by failing and refusing to reinstate her at the conclusion of the strike.

The underlying facts, as found by the Administrative Law Judge, are as follows: Respondent is engaged in the manufacture, sale, and distribution of eyeglasses, contact lenses, and related products to the public. One of its divisions, known as Detroit Optometric Center, operates a laboratory and 18 retail installations in the Detroit metropolitan area for the sale of eyeglasses and related products. Respondent also maintains places of business in Wisconsin, Missouri, and New York.

The Union is the bargaining representative for three separate units of Respondent's employees: the receptionist-dispensers at the retail outlets; the laboratory employees; and employees at a different installation. Only office clerical employees at Respondent's headquarters in Southfield, Michigan, are unrepresented. The contract or contracts covering the three units were to expire in October 1974.[1] Negotiations leading to a new agreement had been underway for some time, but were unsuccessful. On October 9, the Union struck. The strike lasted until February 13, 1975, when the Union made an unconditional request for reinstatement of all strikers. All employees except Jeanne Green, the alleged discriminatee, were eventually recalled. Respondent contends that Green was discharged on October 16 because of two acts of misconduct which occurred on September 22 and October 14, respectively.

On September 22, during the period contract negotiations were in progress, Respondent held a picnic for employees and their families. According to credited testimony, Green, the Union's financial secretary, was sitting with employees, some of whom were unrepresented office clericals, when the conversation turned to the possibility of a strike. The office clerical employees, including Nancy Potts and Beth D'Haene, expressed concern about their jobs if a strike should occur. Potts then asked Green what would happen to employees who chose to work during a strike. Green replied, "We'll know where you are and where your children are." Potts was stunned by the remark and reported it the next day to Dr. Golden, Respondent's president.

D'Haene and other office employees also asked Green what would happen if there were a strike and the office employees crossed the picket line. Green's response was, "We'll break both your legs." D'Haene asked Green if she was serious and if they would really hurt those who might cross the picket line. Green replied, "We know who you are and . . . where you live." D'Haene reported this conversation later that day to Company Official Breger, stating that she was scared and upset by Green's threat.

By letter to the Union dated October 2, Respondent filed a grievance, requesting that the Union make a public apology for Green's conduct on September 22 and take unspecified disciplinary action against her. The letter also requested a meeting on the matter within 7 days. Before a meeting could be held on the grievance, the Union went out on strike and the matter was never formally resolved.

On October 14, employees Green, Chrabaski, and Hijazi, striking receptionist-dispensers, were picketing at Respondent's Oakland Mall shop. At closing time, 9 p.m., the nonstrikers at the shop, including

[1] All dates are in 1974 unless otherwise indicated.

Debby Adler, left the premises and went to the parking areas for their cars. Green and Hijazi followed Adler, and the latter, aware she was being followed, hurried to her car. When Adler reached her car and was about to unlock its door, Green pushed her with one hand against the car and then walked away to write down the license number of her car. Adler reported the incident to her parents when she got home and her father telephoned Dr. Golden the next day to report the matter. A few days later, Adler, accompanied by Dr. Golden and his son, also an official of the Company, went to the local police and filed a complaint against Green.[2]

By letter dated October 16, Dr. Golden discharged Green for "threatening your fellow employees and their families . . . [and for] assaulting a fellow employee on October 14. . . ."

The complaint in the instant case alleged that Respondent discharged Green on October 16 because she engaged in the protected concerted activity of striking in support of the Union's bargaining demands. Respondent admitted that it fired Green, but denied that it did so for unlawful reasons.

The Administrative Law Judge, while finding the facts as described above, concluded that "Green's conduct was not so flagrant or reprehensible as to justify the Company in discharging her or in its later refusal to reinstate her. . . ." He further concluded that the refusal to reinstate Green "seems excessively severe, considering the nature of her offense."

It is well established that an employer may discharge an employee for good reason, for bad reason, or for no reason, provided that it is not for a reason proscribed by the statute. This is so whether the discharge occurs during a strike period or in more normal times. It is equally well settled that the Board may not substitute its judgment for that of the employer in determining what is a justifiable reason for discharge. The Board may, however, conclude, on the basis of all the record evidence before it, that the reason given for the discharge was not the real motivating reason but was advanced only as a pretext to conceal the employer's unlawful motivation.

Our reading of the record provides us no basis for finding that Respondent's asserted reason for discharging Green was not its true reason. Nor can we find, as urged by General Counsel, that Respondent's real reason for discharging Green was because of her union or other protected concerted activities. Indeed, there is no evidence that Respondent harbored animus against the employees' union activities generally or against Green's protected concerted activities specifically. To be sure, Respondent was unwilling to condone Green's serious threats of physical violence against her fellow employees and their families. To that end, Respondent promptly filed a grievance with the Union, whose agent Green was, requesting that the Union seek to control her behavior in pursuit of its legitimate interests. Since it promptly grieved Green's conduct directly to the Union, Respondent cannot be found to have either condoned the incidents of September 22 or displayed animus against the Union or Green's protected concerted activities.

In light of the foregoing, we are also unable to conclude that Respondent seized upon the October 14 pushing incident as a convenient pretext for getting rid of a leading union supporter. While a discharge or refusal to reinstate a striker upon that incident alone might well have cast serious doubt upon Respondent's true motivation, the October 14 incident does not in fact stand alone. Rather, it must be coupled with Green's earlier threats of extreme physical harm, which threats Respondent had clearly not condoned. Thus, Respondent could reasonably have construed the October 14 incident as being, in effect, a first step by Green toward implementing her earlier threats of force. We cannot fault Respondent for attempting, as it were, to "nip in the bud" such potential violence by a person who has expressed and shown an inclination towards it. Nor can we substitute our judgment for that of the Employer, as the Administrative Law Judge apparently did, and find that its discharge of Green for the two incidents was too severe a punishment. All we are empowered to do is to determine, upon the record as a whole, whether Respondent discharged Green because of her protected concerted activities. We have carefully examined the record and find no basis for so concluding.[3]

Having found that Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged Green in the course of an economic strike, it follows, and we find, that Respondent also did not violate that section of the Act by its refusal to reinstate Green at the conclusion of the strike. The principles governing the reinstatement rights of economic strikers, as enunciated in *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), are not applicable where, as here, the striker was discharged for cause before the strike ended. Following Respondent's lawful nondiscriminatory discharge, Green lost her status as an "employee" of the Respondent.[4] The fact that she thereafter continued to participate in the strike could not, and did not, serve to restore her

[2] The record does not disclose what happened to that complaint.

[3] *Tennessee Plastics, Inc.*, 203 NLRB 1 (1973); *Star-News Newspapers, Inc*, 183 NLRB 1003 (1970).

[4] Cf *The Colonial Press, Inc.*, 207 NLRB 673 (1973); *Typoservice Corporation*, 203 NLRB 1180 (1973).

"employee" status for purposes of asserting the right, as a striker, to reinstatement.

Based on the foregoing, we conclude that Respondent has not violated the Act in any of the particulars alleged in the complaint. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

MILTON JANUS, Administrative Law Judge: On March 6, 1975, the Regional Director for Region 7 issued an order consolidating cases and an amended complaint in this proceeding. The charges on which the complaint was based were filed by the Union, in Case 7–CA–11514, on October 21, 1974, and by the Employer, in Cases 7–CB–3194 and 7–CB–3194(3), on October 31, 1974, and January 15, 1975, respectively. The complaint alleged the commission by the Employer of certain acts in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, during a strike called by the Union, and the commission by the Union of certain acts in violation of Section 8(b)(1)(A) before and during its strike. The General Counsel concedes that the strike, over the failure to reach agreement on a new bargaining contract, was an economic strike during its entire duration, October 9, 1974, to February 13, 1975. The strike was terminated when the Union unconditionally offered to return all the strikers, and the Employer did in fact reinstate all but two of them, Jeanne Green and A. Gregory Stevens.

After several postponements, the hearing in this matter was then set for July 14, 1975. In the meantime, the Employer and the Union continued to bargain over the terms of a new agreement, and to try to settle the pending unfair labor practice proceeding, with a view to withdrawing their respective charges and having the entire consolidated complaint dismissed.

On July 8, the Employer and the Union signed a letter of agreement which provided that the Employer would reinstate Green and Stevens with no loss of seniority, but without backpay; would resume bargaining negotiations for a new contract immediately; and would submit withdrawal requests of all unfair labor practice charges to the Regional Director. The next day, Stevens, one of the two unreinstated strikers, notified the Regional Director in writing that he was in accord with the letter of agreement, and would return to work in the Employer's laboratory on July 14, under the conditions specified therein. Jeanne Green, the other unreinstated striker, refused to concur with the conditions set for her reinstatement, and under those circumstances, the Regional Director decided to proceed with the hearing. I therefore held a hearing in this matter on July 14 and 15, 1975, at Detroit, Michigan, at which all parties were represented.

At the opening of the hearing, counsel for the General Counsel moved to dismiss all the substantive allegations of the consolidated complaint except those relating to the Employer's discharge of Green on October 16, 1974, shortly after the inception of the strike. There were no objections to the General Counsel's motion, and I granted it. This left, as the only factual issues to be tried, whether Green had threatened certain unrepresented employees with harm if they should try to cross the Union's picket line in the event of a strike, and whether, on one occasion during the strike, she had assaulted a nonstriking employee. If I find that Green committed either or both of these acts, I must then decide whether they were sufficiently serious to justify the Company's refusal to reinstate her.

After the hearing, the General Counsel and the Company filed briefs with me, which I have duly considered. Upon the entire record in the case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Acrylic Optics Corporation is a Delaware corporation whose principal office and place of business is in Southfield, Michigan. It has other places of business in Wisconsin, Missouri, and New York. It is engaged in the manufacture, sale, and distribution of eyeglasses, contact lenses, and related products to the public. One of its divisions, known as Detroit Optometric Center, operates a laboratory and 18 retail installations in the Detroit metropolitan area, for the fitting and sale of eyeglasses and related products. During 1974, in the course and conduct of its business operations, the Company sold and distributed products whose gross value exceeded $500,000, and purchased and received goods valued in excess of $100,000 which were transported to its places of business in Michigan directly from other States. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Optical Workers, Local 932, International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Union is the bargaining representative for three separate units of the Company's employees, one of receptionist-dispensers who worked at the retail establishments, one of laboratory employees, and one covering employees at a different installation. Only office clerical employees at the Company's general office are unrepresented. The contract or contracts covering these three units were to expire in

October 1974, and negotiations for a new agreement had been going on for some time. These negotiations were not successful, and the Union struck on October 9, 1974. The strike lasted until February 13, 1975, when the Union made an unconditional request for the reinstatement of all the strikers. As I have noted previously, Jeanne Green is the only striker who was not eventually recalled. It is the Company's contention that she was discharged on October 16, 1974, because of two acts of misconduct: one occurring before the inception of the strike, and the second, just before her discharge.

Green was the financial secretary of the Union, and had acted for some months as steward for the unit of receptionist-dispensers. She had worked for most of her employment at the Company's retail shop at Oakland Mall, a large suburban shopping center. During the entire period of the strike she participated actively in picketing and other union activities.

Green's alleged misconduct

1. On September 22, 1974, during the contract negotiations period, the Company held a picnic for employees and their families. The Company contends that at the picnic Green threatened certain of the unrepresented office employees and their children with harm if the employees crossed the Union's picket lines during a strike.

Green was sitting with a number of women employees when the conversation turned to the possibility of a strike if negotiations broke down. Some of the women were office clerical employees who expressed concern about their jobs if a strike should occur. Two of these clerical employees, Nancy Potts and Beth D'Haene, who were in the group discussing the matter with Green, were called as witnesses by the Company to testify about their conversation.

Potts testified that some of the employees said they hoped the general office employees would stay away from work during a strike, and that she then asked what about those people who just want to work. Potts said Green looked at her and said, "We'll know where you are and where your children are." Potts was stunned by the remark and said nothing more. During another part of the conversation, according to Potts, Green had offered to distribute authorization cards to office employees who might want to join the Union. The next day, Potts reported Green's remarks to the secretary of Dr. Golden, president of the Company, and she was later interviewed by Dr. Golden and his son, who is also a company officer.

D'Haene testified that she and other office employees were interested in how they would be affected by a strike, and that she asked Green directly what would really happen if there was a strike and the office employees crossed the picket line to go to work. Green's response was "We'll break both your legs." D'Haene asked her if she was serious and whether they would really hurt those who might cross the picket line, and Green answered by saying, "We know who you are and we know where you live." At the time, D'Haene was holding two of her young children on her lap. D'Haene agreed that some time before the conversation had taken this ominous turn, Green had offered to sign up office employees in the Union, but that she, D'Haene, had not brought up the matter of signing union cards. Later, at work, D'Haene told Breger, a company official, about the conversation with Green, and said that she was very upset and scared by what she took to be a threat.

Green's version is that she was sitting with two friends at the picnic when three women who worked in the general office joined them. Green said she did not know two of these women, but that when they came over there was first some general conversation, and that they then asked her what they could do to join the Union. Green said she told them that, if they wanted to join, she would get them cards to sign. The women then asked Green what would happen if the Union went on strike and they decided to cross the picket line. Green said she told them she didn't know, that she had never been involved in a strike before, but that anything could happen, that you saw it in newspapers and on television. Green said she then got up and left the group.

I find the versions of Potts and D'Haene more credible than Green's. It strikes me as unlikely that they would, in Green's words, ask her how they could get into the Union, even if they knew she was a union officer. Potts and D'Haene, as office clerical employees, were unfamiliar with the Union and were more interested in learning whether they would be able to work during a strike than in joining it. Green even corroborated their testimony that they had asked her what would happen if they crossed the picket line to go to work. Based on their respective demeanor and the probabilities of the situation, I find that Green told Potts and D'Haene, in response to their questions about crossing the Union's picket line, that "they" knew who they were, where they lived, and where their children were. Green's intimation that they and their children might suffer harm if they worked during the strike would reasonably have the effect of intimidating them and other employees in deciding whether to work during a strike.

When Potts and D'Haene reported to management officials what Green had told them at the picnic, the Company filed a grievance on October 2, relating to her conduct as an officer and agent of the Union. It asked the Union for a public apology and disciplinary action against Green. Before a meeting could be held on the grievance, the Union went out on strike. The matter was never formally resolved, but became one of the reasons given for Green's discharge on October 16, together with the incident related below, an alleged physical assault by Green on a nonstriker.

2. On October 14, a few days after the strike began, Green, Chraboski, and Hijazi, all striking receptionist-dispensers, and Nolan, a representative of the International Union, were picketing at the Company's Oakland Mall shop. At closing time, 9 p.m., the nonstrikers at the shop left the premises and went to the outside parking area for their cars. The four pickets followed them, and at the mall exit Nolan and Chraboski proceeded after one of the nonstrikers, while Green and Hijazi followed the other, a young woman named Debby Adler. The ostensible purpose of the pickets in trailing after the nonstrikers was to take down the license number of their cars. Adler was aware that she was being followed onto the parking lot,

and hurried to her car, while Green and Hijazi continued after her. Adler testified that, as she reached her car and was about to unlock its door, Green pushed her with one hand against the car, and then walked away to write down the license number. Green and Hijazi denied that Green had pushed Adler, saying that they had never gotten near enough to touch her, and had only taken down her license number.

When Adler got home that evening, she told her parents about being pushed. The next day her father called Dr. Golden to report the incident. A few days later, Adler went to the police with Michael Golden, Dr. Golden's son, to file a complaint against Green. Eventually the city attorney of Troy wrote a letter, but Adler was not told what, if anything, resulted from it.

Hijazi had to go to the company office the day after the Adler incident to pick up her pay, and Dr. Golden's secretary asked her if she had been with Green the night before, when Green had physically abused a nonstriker. Hijazi said she had been with Green, but that they had neither spoken to Adler nor touched her.

I have decided to credit Adler's version. I do not believe that she would have fabricated a story for her parents. I find that the incident occurred as she described it, that Green pushed her against her car with one hand on the evening of October 14.

3. There was testimony about another incident involving Green which took place on January 4, 1975, more than 2 months after the Company notified her of her discharge. It concerned a retired inspector of the Detroit police force named DeLuca. He had driven up to one of the Company's offices to pick up his eyeglasses, and had encountered some pickets, among them Green. DeLuca, who weighs 250 pounds, testified that Green slapped him after he accused her of banging on his car as he attempted to drive by the pickets. Green and other pickets testified, however, that not only had she not slapped DeLuca but that he first called her an obscene name and then rocked her with a blow which would have knocked her down if she had not been supported. It is just as well that I need not decide who was telling the truth here, because there are credible elements in both versions. However, since the Company had already discharged Green, the DeLuca affair had no impact on that decision, and even if Green had slapped DeLuca I would not consider it sufficiently serious of itself to warrant the Company in refusing to reinstate her for misconduct.

Conclusions

The right to strike, to picket, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection is guaranteed by Sections 7 and 13 of the Act. Employer conduct which interferes with, restrains, or coerces employees in the exercise of these rights violates Section 8(a)(1), and discharge or refusal to reinstate strikers without just cause, to discourage membership in a labor organization, violates Section 8(a)(3).

When the employer has a good-faith belief that an individual striker has engaged in misconduct, he may refuse to reinstate that individual unless it can be shown that the striker had not committed the offense, or that the activity involved was not sufficiently serious to justify the striker's termination.

I have found that Green committed the two acts for which she was discharged—the implied threat made at the picnic, and pushing Adler against her car door in the parking lot on October 14. Neither was incidental to the maintenance of a picket line when impulsive action in the form of threats or scuffles may result as strikers watch nonstrikers moving across their picket line. In fact, the threat at the company picnic occurred even before the strike began. I also note that Green's acts of misconduct were not committed in the context of the employer's own unfair labor practices, since it is conceded that the strike was over economic issues.[1]

Nonetheless, taking all that into account, I believe that Green's conduct was not so flagrant or reprehensible as to justify the Company in discharging her or in its later refusal to reinstate her on the same terms offered the other strikers. The strike ended 4 months after the last of Green's actions, a 4-month period in which Green continued her strike and picketing activities without further misconduct. Green's intimidating remarks at the picnic and the push directed at Adler were outside the bounds of generally acceptable striker conduct, but neither were they grossly violent nor vicious. To punish Green by refusing to reinstate her at the termination of the strike seems excessively severe, considering the nature of her offenses. I therefore find that the Company violated Section 8(a)(1) and (3) by refusing to reinstate Jeanne Green after the Union ended its strike.[2]

Conclusions of Law

1. Acrylic Optics Corporation is engaged in commerce within the meaning of the Act.

2. United Optical Workers, Local 932, International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC is a labor organization within the meaning of the Act.

3. By failing and refusing to reinstate Jeanne Green after the unconditional offer to return all the strikers to work, made on February 13, 1975, Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

I have found that the Respondent unlawfully refused to treat Jeanne Green in the same manner as it did other strikers who were reinstated or placed on a preferential

[1] The Board and the courts balance the severity of an employer's unfair labor practices which provoked a labor dispute against employee action during the strike in deciding whether to reinstate strikers who have misconducted themselves. *Golay & Co, Inc*, 156 NLRB 1252, 1263 (1966), enfd in pertinent part 371 F.2d 259, 262–263 (C A 7, 1966), *Thayer Company*, 99 NLRB 1122 (1952), remanded 213 F.2d 748, 752–757 (C.A. 1, 1954)

[2] *Consolidated Supply Co, Inc*, 192 NLRB 982, 988–989 (1971). Cf. *QIC Corporation*, 212 NLRB 63 (1974) (Aldrich and Culbreath).

hiring list, after the Union's unconditional offer on February 13, 1975, to end the strike. The standard remedial provision would be to order her reinstated to her former job, but in this case some further exposition is necessary. Green had worked as a receptionist-dispenser in the Oakland Mall office, one of the Company's 18 such service and retail establishments in the Detroit metropolitan area. Each office employed a small number of receptionist-dispensers, perhaps three to five altogether, some of whom were permanently assigned there, while others worked at more than one office on a swing basis. All receptionist-dispensers, both permanent and swing, were represented in a single unit covering all the Company sales offices.

Green is entitled to reinstatement to a receptionist-dispenser position, but whether she is entitled to a place at the Oakland Mall office, where she previously worked, is a matter I cannot now determine. It may be that employees were entitled to bid for assignments to particular offices, based on their unitwide seniority or their residence; or, on the other hand, it may be that assignments were unilaterally determined by management, based on its schedule and manning requirements. Since I do not know the basis on which assignments to particular offices or shifts were made, I will leave it to the compliance stage of the proceeding to ensure that Green is reinstated to a position in accordance with the past practices in effect between the Company and the Union.

On the basis of the above qualifications, I recommend that the Respondent offer Jeanne Green immediate reinstatement to her former job or, if such job no longer exists, to an equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered, by payment to her of a sum of money equal to what she would normally have earned as wages from the date on which she would have been reinstated after the Union's unconditional request on February 13, 1975, to the date of an offer of reinstatement, less net earnings in accordance with the formula set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), plus interest at 6 percent per annum.

[Recommended Order omitted from publication.]