Alpha Cellulose Corporation *and* United Paperworkers International Union, AFL-CIO-CLC. Cases 11-CA-8761 and 11-RC-4770

October 21, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

An election by secret ballot was conducted in Case 11-RC-4770 on November 7, 1979, under the direction and supervision of the Regional Director for Region 11. At the conclusion of the election, a tally of ballots showed that 53 ballots were cast, of which 24 were for, and 29 were against, United Paperworkers International Union, AFL-CIO-CLC, herein the Union. The Union thereafter filed timely objections to the election.

Upon a charge duly filed on November 20, 1979, by the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 11, on January 4, 1980, issued a complaint and notice of hearing against Respondent. The complaint alleged that Respondent had engaged in, and was engaging in, certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and of the complaint and notice of hearing were duly served on the parties.

Thereafter, on January 8, 1980, the Regional Director issued a Report on Objections, Direction, and Order Consolidating Cases in which he recommended that certain of the objections in Case 11-RC-4770 be overruled and that others be set for hearing. As the evidence in support of the objections warranting a hearing was similar to that offered in support of the unfair labor practices, he further consolidated Case 11-RC-4770 with Case 11-CA-8761 for the purpose of hearing, ruling, and decision by an administrative law judge. The Board adopted that report on February 1, 1980.

Subsequently, on March 4, 1981, the parties and the General Counsel entered into a stipulation in Cases 11-CA-8761 and 11-RC-4770 and agreed that the stipulation and exhibits attached thereto would constitute the entire record in this proceeding. The parties waived a hearing before, and the making of findings of fact and conclusions of law by, an administrative law judge and indicated their desire to submit the case directly to the Board for decision. On April 22, 1981, the Board issued its order approving the stipulation, transferring the proceeding to the Board, and setting a date for filing briefs. Thereafter, Respondent and the General Counsel filed briefs.

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 stipulation, including exhibits, briefs, and the entire record in this proceeding and hereby makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Alpha Cellulose Corporation is an Ohio corporation with a plant located in Lumberton, North Carolina, where it is engaged in the production of cotton linter paper pulp. During the preceding 12-month period ending February 19, 1981, Respondent in the course and conduct of its business received at its Lumberton, North Carolina, plant goods and raw materials directly from points outside the State of North Carolina valued in excess of $50,000 and, during the same period of time, Respondent shipped directly to points outside the State of North Carolina products valued in excess of $50,000.

The complaint alleges, Respondent admits, and we find that Alpha Cellulose Corporation is, and has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We find that it would effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and we find that United Paperworkers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On October 11, 1979, the Union mailed a letter to all employees in the bargaining unit which discussed the procedure for calling a strike, dues, assessments, and the benefits of unionism. On October 16, October 23, and October 30, 1979, allegedly in response to the Union's letter, Respondent mailed letters to its employees. Certain of the statements in those letters are alleged as objectionable, and as unfair labor practices.

1. The October 16 letter from Respondent outlined the collective-bargaining process, and stated, *inter alia*, that "[n]egotiation is a long, drawn-out process that can take *many months*, and in the meantime *all wages and benefits are frozen*. There can be *no wage increase* or *any benefits improved* by

the Company during this period of negotiation." (Emphasis in original.)

Respondent argues that the letter merely recited the realities of collective bargaining in response to the Union's earlier letter which "misrepresented" that unionization necessarily meant better wages and benefits for the employees. Respondent asserts that there is no indication in the letter that employees would lose wages and benefits during negotiations or that it would not bargain in good faith. And Respondent claims that, in fact, during negotiations an employer cannot unilaterally implement a benefit without bargaining with the union and the letter apprises the employees of the fact.

We agree with the General Counsel, however, that Respondent violated Section 8(a)(1) of the Act by declaring that wages and benefits would be frozen during the period of contract negotiations. The letter, in fact, not only misinformed the employees as to the law by stating that the negotiations prevented employee wage increases,[1] it also implied that a rejection of the Union would free the Company to grant raises and other benefits. The employees were thereby led to conclude that a penalty was attached to the exercise of their rights in choosing a bargaining representative.[2] We thus find that the portions of the letter discussed above violated Section 8(a)(1) of the Act and were objectionable statements.

2. In the October 23 and October 30 letters, Respondent discussed the possibility of a strike and what it could mean to the employees. In the October 23 letter, it stated, *inter alia*:

> Strikers can *lose their jobs*! . . . Could you afford to *lose your job* if you were *permanently replaced* during a *strike*? Could you afford to let your seniority at *Alpha*, your *steady pay*, and your benefits package go *down* the *drain*? If you were a *replaced striker* do you think you could find *another job* in the Lumberton area?

The October 30 letter declared:

> You should think seriously about whether you would want to risk being *permanently replaced on your job*. What kind of job security does a replaced striker have? Do you want to risk your paycheck, your medical insurance or your bonuses *going down the drain*? If you were a *replaced striker* do you think you could get *another* job in the Lumberton area?

The General Counsel alleges first that in these two letters Respondent mischaracterized the applicable law governing the rights of strikers and that this resulted in a threat of loss of jobs if employees engaged in protected concerted activities. Respondent, however, contends that it has only informed employees of the fact that the Union could call a strike, which could result in the hiring of replacements for the strikers, with the unfavorable economic consequences to replaced strikers which could follow from the Union's action.

It is undisputed that an employer may permanently replace employees who are engaging in an economic strike. However, replaced employees retain their employee status and are entitled to reinstatement to their former or equivalent jobs, when their replacements leave or those jobs become available. *The Laidlaw Corporation*, 171 NLRB 1366, 1369–70, 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). See also *Fire Alert Company*, 207 NLRB 885 (1973). In addition, economic strikers also retain their accumulated seniority while engaged in a strike.[3]

Here in its October 23 letter, Respondent indicated to employees not only that, if they struck, they could be permanently replaced, as *Laidlaw* permits, but that they could lose their job as a result of striking. The Board has long held that such clear threats to sever employment relationships in the event that employees engage in an economic strike amount to threats of job loss in violation of Section 8(a)(1) of the Act.[4] This misstatement was also objectionable conduct affecting the results of the November 7 election and interfered with the rights of employees to choose a collective-bargaining representative. *Edward A. Utlaut Memorial Hospital and Fair Oaks Nursing Home*, 249 NLRB 1153, 1157 (1980).

For similar reasons, we also find the October 30 letter to constitute an 8(a)(1) violation and basis for a valid objection to the election. When read in light of the October 23 letter, the October 30 letter confirmed to employees that an exercise of the right to strike would, as a matter of course, lead to

[1] Under Board law, it is axiomatic that it is an employer's general duty to proceed as it would have in the absence of a union. *Russell Stover Candies Inc.*, 221 NLRB 441 (1975). Thus, even during collective-bargaining negotiations, an employer may lawfully implement benefits which have become conditions of employment by virtue of prior commitment or practice. *Charles Manufacturing Co.*, 245 NLRB 39 (1979); see also *La Marche Manufacturing Company*, 238 NLRB 1470, 1481 (1978).

[2] See *Baker Brush Co., Inc.*, 233 NLRB 561 (1977). Therein, the Board held that an employer violated Sec. 8(a)(1) by suggesting that employees did not need a union in order to obtain wage increases and by conveying the impression that the union stood in the way of the employees' prompt receipt of a higher wage.

[3] See *MCC Pacific Valves, a unit of Mark Controls Corporation*, 244 NLRB 931, 935, fn. 19 (1979), and cases cited therein (1979).

[4] See, e.g., *Leonardo Truck Lines, Inc.*, 237 NLRB 1221, 1229, 1232 (1978); *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815, 818 (1975); *Hicks-Ponder Co., A Division of Blue Bell, Inc.*, 186 NLRB 712, 725 (1970); cf. *Mississippi Extended Care Center, Inc., d/b/a Care Inn, Collierville and d/b/a Care Inn, Memphis*, 202 NLRB 1065 (1973).

a permanent loss of their jobs and accompanying benefits.[5]

3. Finally, the General Counsel contends that in the October 23 and October 30 letters Respondent violated Section 8(a)(1) of the Act by threatening its employees that they would be unable to find employment elsewhere in the Lumberton area if they went on strike. He contends Respondent stated no objective basis for its opinion which was clearly calculated to coerce its employees, give the impression of collusion against strikers on the part of area employers, and restrain the employees from joining the Union.

In this regard, Respondent counters that its statement merely conveyed to employees the difficulties—in a local area with a high unemployment rate—of obtaining another job. Respondent also argues that its statements refer only to possibilities—not absolutes. Accordingly, Respondent contends that its statements regarding out-of-work strikers were not threatening, were based on concrete evidence, and were protected by Sec. 8(c) of the Act.

We agree with the position of the General Counsel. Contrary to Respondent, its statements were not limited to lawful predictions of the consequences of unionization.[6] Rather, Respondent's message contained a not-so-subtle threat that employees who engaged in protected concerted activities would be blacklisted by Respondent and would, for discriminatory reasons, be denied employment by other employers.[7] Respondent's letters made no mention of area unemployment nor did they speak to the general problem of unemployed persons gaining employment. Instead, they suggested that a "replaced striker" (i.e., one who exercised Section 7 rights) would not be hired by other employers.

Under these circumstances, the effect of these statements was to impress upon the employees the folly and futility of electing the union, for if the union was voted in and a strike was called, the employees would not only be permanently replaced by Respondent, but the doors of employment to other plants in the Lumberton area would be shut as well.

Viewed in this overall context and coupled with Respondent's threats of permanent replacement,[8] it seems clear, and we find, that the statements that the employees would not be able to find other employment in the area also restrained and coerced employees in violation of Section 8(a)(1) of the Act.[9]

In light of the above we shall also sustain the Union's objections, set aside the election, and direct a second election.

CONCLUSIONS OF LAW

1. Alpha Cellulose Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[5] Contrary to his colleagues, Member Zimmerman finds that Respondent did not threaten job loss in the October 30 letter as it did in its earlier letter. See *Mississippi Extended Care Center, Inc., supra.* He would not find its comments on this issue in the October 30 letter to constitute a violation of the Act or objectionable conduct.

While the General Counsel also claims that both letters violate Sec. 8(a)(1) because they fail to differentiate the rights to reinstatement of unfair labor practice and economic strikers, we are satisfied that Respondent's letter fairly speaks of a situation involving an economic strike.

[6] As set forth by the Supreme Court in *Gissel Packing Co., Inc.* v. *N.L.R.B.*, 395 U.S. 575, 618 (1969):

> Thus, an employer is free to communicate to his employees any of his general views about . . . a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most probable, the eventuality of closing is capable of proof." [*N.L.R.B.* v. *Sinclair Co.*,] 397 F.2d 157, 160. [1st Cir. 1968]. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

[7] See *Brownsboro Hills Nursing Home, Inc.*, 244 NLRB 269, 272–273 (1979); *Richard Tischler, et al. d/b/a Devon Gables Nursing Home*, 237 NLRB 775, 783–784 (1978), enfd. 615 F.2d 508 (9th Cir. 1980); *The Coca-Cola Bottling Company of San Mateo*, 188 NLRB 590, 596 (1971).

[8] Cases cited by Respondent, such as *Industrial First, Inc.*, 197 NLRB 714 (1972), and *Primadonna Hotel, Inc., d/b/a Primadonna Club*, 165 NLRB 111 (1967), do not require a contrary result. In those cases, the evidence was insufficient to establish that employer remarks about employees finding other employment constituted threats to blacklist. Here, Respondent's statement, considered in context of its strong antiunion message, must be considered an implied threat to blacklist employees on account of their protected activities. See *Devon Gables Nursing Home, supra.*

[9] Member Zimmerman does not join his colleagues in finding that Respondent's comments, in its October 23 and October 30 letters about strikers' ability to secure employment elsewhere in the event they were permanently replaced, constitute either an unfair labor practice or objectionable conduct. He finds the majority to be engaged in pure speculation, unsupported by the record, in concluding that Respondent intended by these comments a threat to blacklist employees, and he finds the cases cited at fn. 8, *supra*, inapposite to the instant case. Rather, Member Zimmerman deems these comments legitimate campaign rhetoric and views it as permissible for an employer to ask its employees to consider their employment possibilities elsewhere in the event they went on strike and were permanently replaced. He reaches this conclusion with regard to the comments in the October 23 letter, although he joins in finding that another portion of that letter contained impermissible comments. That finding does not, in his view, taint the remainder of the letter, or warrant the finding of an additional violation.

2. United Paperworkers International Union, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By announcing to its employees that wages and benefits would be frozen during the collective-bargaining negotiations, Respondent interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

4. By threatening the employment rights of economic strikers and stating that they would be unable to obtain employment with other employers as well if they engaged in a strike, Respondent violated Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Alpha Cellulose Corporation, Lumberton, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Declaring that all wages and benefits would be frozen during the period of contract negotiations.

(b) Threatening employees with permanent loss of employment and reinstatement rights should they engage in an economic strike.

(c) Threatening its employees that they will be unable to find employment elsewhere in the Lumberton area if they go on strike.

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

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

(a) Post at its Lumberton, North Carolina, facilities, in all buildings, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on November 7, 1979, in Case 11–RC–4770 be, and it hereby is, set aside and that the case is hereby remanded to the Regional Director for Region 11 for the purpose of scheduling and conducting another election at such time that he deems circumstances permit a free choice on the issue of representation.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT declare that if the Union wins the election all wages and benefits will be frozen during the period of contract negotiations.

WE WILL NOT threaten employees with permanent loss of employment and reinstatement rights should they engage in an economic strike.

WE WILL NOT threaten employees that they will not be able to find employment elsewhere in the Lumberton area if they go on strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in or to refrain from engaging in any or all the activities specified in Section 7 of the Act. These activities include the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection.

ALPHA CELLULOSE CORPORATION

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."