

Aelco Corporation and United Automobile, Aerospace and Agricultural Implement Workers, Local 509. Cases 31-CA-21181 and 31-CA-21301

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 1, 1996, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an opposition brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended order as set out in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Aelco Corporation, Van Nuys, California, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Threatening employees with the loss of employment or other reprisals for engaging in a lawful economic strike or other union or protected concerted activities.

(b) Impliedly promising employees benefits to induce employees to abandon union activities.

(c) Unlawfully suggesting that employees withdraw their support or membership from the Union.

(d) Refusing to reinstate employees upon their unconditional offer to return to work from a strike without legitimate and substantial business reasons.

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

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

(a) Offer reinstatement to any strikers who, at the compliance stage of this proceeding, are determined to

¹ The General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In so doing, we note that although the administrative law judge was not overly precise in his credibility determinations regarding James Dooling's statements to the maintenance employees, we, nevertheless, find that the record supports his credibility findings and determinations.

² We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

have been denied reinstatement as a consequence of Respondent's failure to return striking employees to work after the strike.

(b) Make whole the employees described in subparagraph (a) above for any and all losses incurred as a result of Respondent's unlawful discrimination against them, with interest, as provided in the remedy section of this Decision.

(c) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Van Nuys, California facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

³ If 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."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of employment or other reprisals for engaging in a lawful economic strike or other union or protected concerted activities.

WE WILL NOT expressly or impliedly promise employee benefits to induce employees to abandon union activities.

WE WILL NOT refuse to reinstate employees upon their unconditional offer to return to work from a strike in the absence of legitimate and substantial business reasons.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer reinstatement to any strikers who were unlawfully denied reinstatement as a result of our refusal to recall eight bargaining unit employees at the conclusion of the strike which ended March 6, 1995.

WE WILL make whole the strikers mentioned in the preceding paragraph for any and all losses incurred as a result of our discrimination against them, with interest.

AELCO CORPORATION

Bernard Hopkins, Esq., for the General Counsel.
Christopher W. Carlton, Esq. (Faustman, Carlton, DiSante & Freudenberger), of Irvine, California, for the Respondent.
Stuart Libicki, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on February 12, 1996. On April 5, 1995, United Automobile, Aerospace and Agricultural Implement Workers, Local 509 (the Union) filed the charge in Case 31-CA-21181 alleging that Aelco Corporation (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On May 22, the Union filed the charge in Case 31-CA-21301 alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. The amended charge in Case 31-CA-21301 was filed on September 18 and alleged only violations of Section 8(a)(3) and (1). On September 29, the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate certain striking employees after the employees made an unconditional offer to return to work. Additionally, the complaint alleged that Respondent violated Section 8(a)(1) by promising an employee a wage increase as an inducement to refrain from striking, threatened an employee with reprisals for engaging in union activities, and threatened an employee with discharge for engaging in the strike. Respondent filed timely answers to the complaint, denying all wrongdoing. Further,

Respondent alleged that it had legitimate and substantial business justification for failing to reinstate the strikers.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posttrial briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Van Nuys, California, where it is engaged in the business of manufacturing and selling collapsible tubes. During the 12 months prior to the issuance of the complaint, Respondent purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits 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 and Issues

Respondent manufactures collapsible tubes at its facility in Van Nuys, California. It has had a collective-bargaining relationship with the Union for approximately 16 years. The most recent collective-bargaining agreement expired in 1994. The collective-bargaining agreement covered the approximately 50 employees in a production and maintenance unit.

In the latter part of 1994, the parties began meeting in an unsuccessful attempt to negotiate a new contract to succeed the recently expired agreement. An impasse occurred and 33 of the approximately 50 bargaining unit employees went on strike on December 15, 1994. Beginning in January 1995, Respondent hired 15 replacement workers. On March 6, 1995, the Union ended the strike and made an unconditional offer to return to work on behalf of the striking employees. Respondent did not reinstate strikers at that time claiming that no vacancies existed. Thereafter, when vacancies arose, Respondent recalled certain of the strikers.

Within this factual framework, the General Counsel contends Respondent violated Section 8(a)(3) by rejecting the unconditional offers of the strikers to return to work. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees with adverse action for engaging in a strike, threatening an employee with adverse action for engaging in union activities, and promising an employee an inducement not to engage in the strike. In support of his contentions, the General Counsel argues that the replacements hired during the strike were not shown to be permanent replacements.

Respondent contends that the 15 employees hired during the strike were permanent replacements. It further argues that it did not have sufficient work orders to recall more workers to the payroll. Since the strike, Respondent's business has decreased. At the time of the hearing, Respondent employed only six employees and expected to lay off those employees and close the facility within a week.

B. Facts

As mentioned above, the strike began on December 15, 1994. The bargaining unit employees picketed Respondent's facility from December 15, 1994, until March 6, 1995. Thirty-three of the approximately 50 production and maintenance employees went on strike. Respondent's plant normally closed for the last weeks of December. Accordingly, Respondent operated for 1 week using only nonstriking employees and then closed for 2 weeks. Respondent did not begin hiring replacement employees until the first week of January 1995.⁴ One of the striking employees returned to work prior to the hiring of any replacements.

On March 6, 1995, the Union notified Respondent in writing that it was ending the strike and made an unconditional offer to return to work on behalf of the striking employees. On March 15, Respondent notified the Union that it acknowledged that the strike was over but refused to replace the strikers claiming that all the strikers had "been replaced." On March 22, the Union wrote Respondent demanding that the strikers be returned to work.

Catalina Ellis, a production employee, testified that she was called into the office of James Dooling Sr., plant manager, a day or two before the strike. According to Ellis, Dooling showed her the Respondent's last contract offer to the Union. Dooling explained that the offer contained a 5-percent cut in wages but if Ellis stayed at work, he would give the money back. Dooling implied that Ellis would get a better job. Dooling told Ellis to explain Respondent's position to Martha Ramirez, Ellis' sister and a production employee for Respondent. Dooling testified that he called Ellis into his office to explain the bargaining impasse because Ellis had complained that the Union had not been giving the employees any information. Ellis was not a union member and Dooling did not expect her to join the Union's strike. Dooling denied telling Ellis that the payout might be given back. Dooling admitted telling Ellis to explain the impasse to Ramirez and other Spanish-speaking employees.

Ellis also testified that on the day the strike began Dooling asked if she was leaving. Ellis answered that she was leaving because she thought the Company was being unfair. According to Ellis, Dooling said that if she left, she would no longer have a job. Ellis' testimony was corroborated by two witnesses, Martha Ramirez and Sandra Mora. Dooling admitted asking whether Ellis was going on strike but denied saying that she would no longer have a job. Dooling testified that he was surprised because Ellis had resigned from the Union. I credit the testimony of Ellis, corroborated by two witnesses, over that of Dooling.

Ellis was called back to work on April 5, 1995. During the strike, Ellis had joined the Union. Shortly after Ellis returned to work, Molly Gardner, a supervisor, asked Ellis what Ellis knew about the Union. Gardner told Ellis that the employees no longer had union representation. Gardner suggested that Ellis get out of the Union and Ellis responded that she felt the employees needed the Union. Gardner did not testify and I credit Ellis' testimony.

Sandra Mora, a production employee, testified that in November 1994, in an informal grievance meeting, Dooling threatened to fire her or take her job away, if she continued to

make complaints. This meeting was held pursuant to a complaint by Mora that a less senior employee had received overtime work. Dooling explained at the meeting and at the instant hearing that under the collective-bargaining agreement an employee that had not worked 40 hours in a given week would have preference for overtime over an employee who had already worked a full week. The union steward was present at the meeting and apparently accepted Dooling's explanation.⁵ Dooling denied making such a threat. I credit Mora's testimony over Dooling's denial.

C. Respondent's Defense

Darlene Schroeder, Respondent's president, testified that Respondent's board of directors had decided to retain the replacements after the strike. However, the words permanent and temporary were not used in these discussions. Schroeder did not hire any of the replacements and did not discuss employment status with any of the employees. Schroeder testified that Respondent did not discharge the replacements at the end of the strike because Respondent "had no intent of letting any of them go."

James Dooling Sr. testified that he had the ultimate responsibility of hiring all the replacements. Fifteen replacement employees were hired between January 5 and March 6, 1995. Of the 15, 8 were production employees and 7 were in the maintenance department. Dooling hired the mechanics and machinists. Six employees were hired as a result of newspaper advertisements. One employee was referred by the State Employment Development Department. The newspaper advertisements were for "permanent openings." The eight production employees were hired by an employment agency "Interim."

Dooling testified that the replacement employees were not to be replaced at the end of the strike. However, Dooling admitted that he was told by Respondent's counsel not to use the word permanent in hiring interviews. Dooling said that the reasoning was that permanent could be taken to mean forever. According to Dooling, he told every replacement that he or she would still have a job after the strike ended. Further, Dooling testified that he continually reassured the production workers that they would keep their jobs after the strike ended.

I do not credit Dooling's testimony that he told the production workers, during the hiring process, that they would keep their jobs after the strike. The credible evidence of two replacements reveals that "Interim," the employment agency, hired the employees and Dooling then put them to work. It does appear that Dooling did tell some of the production workers "not to worry, that they would still have their jobs after the strike ended." No replacement employee testified to being informed that he or she was hired as a permanent employee. One replacement testified that she was told by the employment agency that the job was not permanent but temporary.

The eight production employees hired by Interim were placed on Interim's payroll. These employees punched a timecard. However, the timecards used by the Interim employees bore the marking "temp." The employees were placed on Respondent's payroll on May 1, 1996. When the replacements were transferred to Respondent's payroll they began their 90-day probationary periods. The maintenance employees, on the other hand, were placed on Respondent's payroll at the time of

⁴ On December 20, Respondent sent its employees a letter stating that those workers who did not return to work by January 3, 1995, would be "replaced."

⁵ The union steward was present at the hearing. However, the General Counsel did not call the steward as a witness because the sequestration rule had inadvertently been violated.

their hire, had no “temp” markings on their timecards, and began their 90-day probationary periods from their dates of hire.

Respondent placed advertisements in newspapers for the positions of machinists and mechanics. These ads mentioned that Respondent was seeking to fill permanent positions. The Interim agency was not used to hire these skilled employees. The mechanics and machinists were hired directly by Respondent.

III. ANALYSIS AND CONCLUSIONS

A. Independent 8(a)(1) statements

In November, after Mora raised a question about overtime being assigned to a less senior employee, Dooling threatened that Mora would be fired or lose her job if she did not stop making complaints. I find that by such conduct, Respondent unlawfully threatened Mora in violation of Section 8(a)(1) of the Act. *Buck Brown Contracting Co.*, 283 NLRB 488 (1987); *Interlake, Inc.*, 218 NLRB 1043 (1975), enfd. 529 F.2d 1277 (8th Cir. 1976).

Shortly before the strike, Dooling told Ellis that Respondent’s offer to the Union contained a wage reduction of 5 percent. Dooling then proposed that if Ellis did not strike, she could get the wage reduction back. I find that by such conduct, Respondent unlawfully promised Ellis better benefits in order to discourage union activities. *PBA Inc.*, 270 NLRB 998 (1984); *Trading Port, Inc.*, 219 NLRB 298 (1975). I further find that Dooling unlawfully threatened Ellis and other employees by telling Ellis that she would lose her job by joining in the strike. *Outboard Marine Corp.*, 307 NLRB 1333 (1992), enfd. 9 F.3d 113 (7th Cir. 1993); *Trading Port*, supra.

Finally, I find that Gardner violated Section 8(a)(1) of the Act by telling Ellis that the employees no longer had union representation and by suggesting that Ellis quit the Union. *Jones Plumbing Co.*, 277 NLRB 437, 440 (1985); *Jennie-O Foods*, 301 NLRB 305, 330 (1991).

B. Reinstatement of the strikers

Economic strikers retain their status as employees and are entitled to reinstatement to their former positions at the conclusion of the strike unless the employer can establish legitimate and substantial reasons for the failure to reinstate the strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). During a strike an employer may hire permanent replacements to continue to operate its business, and that proof of such action constitutes legitimate and substantial justification for refusing to reinstate those strikers so replaced. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *NLRB v. Mackay Radio Co.*, 304 U.S. 333, 345–346 (1938). Even if permanent replacements have been hired for the strikers, on the departure of the replacements, the former strikers are entitled to reinstatement to their former jobs unless they have obtained substantially equivalent employment elsewhere or unless their employer is able to sustain his burden of proof that the failure to recall was justified by legitimate and substantial business reasons. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 379 U.S. 920 (1970). Unless an employer sustains his burden of proof, a refusal to reinstate strikers constitutes an unfair labor practice notwithstanding the absence of animus or bad faith; for such conduct “discourages employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act.” *NLRB v. Fleetwood Trailer Co.*, supra at 378.

It is the employer’s burden to prove its affirmative defense that the alleged discriminatees were permanently replaced. *Augusta Bakery Corp.*, 298 NLRB 65 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992); *Aqua-Chem, Inc.*, 288 NLRB 121 (1988). Such proof must be specific and must show a mutual understanding between the employer and the replacements that they are permanent. *Chicago Tribune Co.*, 304 NLRB 259 (1991); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987). Recently, in *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995), the Board held that in both representation cases and unfair labor practice cases it would presume that replacements for strikers are temporary employees and that the employer must “show a mutual understanding between itself and the replacements that they are permanent.” The Board further affirmed that evidence that a replacement was “full-time” is not sufficient to establish that the employee was hired as a permanent replacement.

Respondent presented very little credible evidence on this point. The replacements in the production department were hired by an employment agency.⁶ There is no evidence that the employment agency ever told the replacements that they were being hired as permanent employees.⁷ One employee testified that she was told nothing and another testified that she was told the position was not permanent but temporary. The employees were not placed on Respondent’s payroll but rather were retained on the payroll of the employment agency. The timecards used by these employees contained a notation “temp,” again indicating that the employment was temporary. The employees were not placed on the payroll of Respondent until approximately 2 months after the strike ended. Only after being placed on Respondent’s payroll, did an employee commence her 90-day probationary period. Thus, while the employees were on the payroll of “Interim,” the employees were “pre-probationary.” Assuming Dooling told employees not to worry about their jobs if the strike ended, I find Respondent’s conduct conflicted with such remarks. See *Harvey Mfg.*, supra. In its December letter to the employees and its March letter to the Union, Respondent used the term replacements without indicating whether the replacements were temporary or permanent. Clearly, Respondent has not established a mutual understanding between itself and the replacement employees that these employees were hired as permanent replacements.

On the other hand, the employees hired in the maintenance department were not hired through the Interim agency. These employees were hired pursuant to advertisements which characterized the positions as permanent. The employees were placed on Respondent’s payroll and immediately began their probationary periods. Their timecards did not indicate that they were temporary. These employees were interviewed and screened by Respondent rather than the Interim agency. Dooling’s testimony that he informed these employees that they would retain their jobs after the strike ended is uncontradicted. None of the machinists or mechanics were called to testify. The Board has not required an employer to have used “the magic word ‘permanent’” in order to establish that it indeed hired replacements as permanent employees. See *Crown Beer Distributors*, 296 NLRB 541, 549 (1989). Accordingly, I find that Respondent

⁶ Even the name of the agency, “Interim,” implies that the employment was temporary or, at least, less than permanent.

⁷ Interim was an agent of Respondent with respect to the hiring and employment of these employees. See, e.g., *Harvey Mfg.*, 309 NLRB 465 fn. 4 (1992).

has established that the machinists and mechanics hired during the strike were permanent replacements.

I find *Gibson Greetings*, 310 NLRB 1286 (1993), cited by the Union to be distinguishable. In that case, the replacements were told that there was a possibility that the company and union could renegotiate an agreement and that the replacements could be placed on layoff subject to manning requirements at that time. Thus, the Board found that the company and replacements did not share an understanding, that the replacements were being hired as permanent employees. Further, the Board found that the statement read to employees indicating that they were “full time” employees was subject to interpretation that the replacements were permanent or temporary. I find here that although Respondent did not use the word “permanent” is assuring the mechanics and machinists that they would retain their jobs after the strike ended, Dooling did convey that message to the employees. Considering the decision of Respondent’s board of directors, the newspaper advertisements, Dooling’s assurances to the employees and the substantial difference in the treatment of the “Interim” employees and the maintenance employees, I find that the maintenance employees were permanent replacements.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate eight strikers in the absence of legitimate and substantial business reasons.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of employment or other reprisals for engaging in a lawful economic strike or other union and protected concerted activities, promising better benefits to induce employees not to engage in a strike or other union activities, and unlawfully soliciting employees to withdraw or resign from the Union.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

I shall recommend that Respondent offer to the strikers full and immediate reinstatement to the positions they held prior to the unlawful refusal to reinstate them.⁸ Further Respondent shall be directed to make the strikers whole for any and all loss of earnings and other rights, benefits, and emoluments of employment they may have suffered by reason of Respondent’s discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

[Recommended Order omitted from publication.]

⁸ At the time of the hearing Respondent was scheduled to close down its business. However, I have issued the usual remedy. If Respondent’s business has not reopened then the remedy may be adjusted accordingly at the compliance stage of the proceedings.

The determination of which employees are entitled to a remedy and the discontinuation of the backpay period will be left to the compliance stage of these proceedings.