Airo Die Casting, Inc., a subsidiary of Leggett & Platt, Incorporated *and* Factory Workers Laborers' Local Union #1357 a/w International Laborers Union of North America.[1] Case 6–CA–34769

July 31, 2006

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On April 4, 2006, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply 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,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Airo Die Casting, Inc., Loyalhanna, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at each of its facilities in the Commonwealth of Pennsylvania copies of the attached notice marked 'Appendix.'[3] Copies of the notice, on forms provided by the Regional Director for Region 6, 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 June 28, 2005."

JoAnn Dempler, Esq., for the General Counsel.
Timothy G. Hewitt, Esq., of Latrobe, Pennsylvania, for the Respondent.
George H. Love Jr., Esq. (The Love Law Firm, LLC), of Youngstown, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on February 2, 2006. The charge was filed July 15, 2005,[1] and the complaint was issued on November 29, 2005, alleging that the Respondent, Airo Die Casting, Inc., violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging its employee Ronald W. Lawson III (Lawson) because of his union activities, including participating in a lawful strike.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Airo Die Casting, Inc., a corporation, with an office and place of business in Loyalhanna, Pennsylvania, is engaged in the manufacture of aluminum die castings. With sales and shipments of goods in excess of $50,000 from its facility to points outside the Commonwealth of Pennsylvania, the Company 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent employs about 290 to 300 employees in the manufacture of aluminum die castings for customers such as Harley Davidson. The production and maintenance employees are represented by the Laborers Union, Local 1357, and were operating pursuant to a collective-bargaining agreement which expired on January 31, 2005. The employees

[1] We have amended the caption to reflect the disaffiliation of the Laborers' International Union of North America from the AFL–CIO effective June 1, 2006.

[2] The Respondent has 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Member Schaumber and Member Kirsanow agree with the judge's conclusion, which comports with Board precedent, that the Respondent's discharge of employee Lawson violated Sec. 8(a)(3). In their view, however, there may well be circumstances, absent here, in which a picketing employee's use of the word "nigger" might cause the employee to lose the Act's protection, even in the absence of violence or explicit threats of violence. That is, under the right (or wrong) circumstances, the word itself may be so incendiary as to constitute an implied threat or an incitement to violence. Member Liebman finds it unnecessary to pass on this hypothetical case here.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language in *Excel Container*, 325 NLRB 17 (1997).

[1] All dates are 2005 unless otherwise indicated.

commenced an economic strike on June 13, 2005, after the parties failed to negotiate a successor agreement. On August 29, 2005, the employees returned to work. During that time, the Respondent operated under the terms of the expired contract.

Shortly after the strike had begun, the Respondent hired replacement workers, many of whom were obtained through MADI Corporation, which specializes in providing replacement workers. That company also provided security guards during the strike, because of the hostility between replaced employees and their replacements. The replacements had to cross the picket lines which were formed at the Company's entrances, particularly the main gate. As the caravan of vehicles transporting the replacements to the facility crossed the picket line at the beginning of each shift, the pickets frequently shouted obscenities and made obscene gestures at the replacements, including hand gestures with the middle finger extended. The replacements responded by calling pickets names and also making obscene gestures, often behind closed car windows. The record shows in greater detail the extent of the name calling and the graphic depictions of obscene gesturing. None of this type of misconduct resulted in any discipline.

That changed when on June 22, 2005, at about 6 p.m., at shift-changing time. As usual, employees were picketing as replacement workers were arriving for the night shift and replacements on the earlier shift were leaving the facility. Security guards with video cameras monitored the shift change with orders to tape any unusual events. After the replacement workers had reported for their night shift and most of the replacements had left, the last of the vehicles leaving the facility was a car driven by Robert Galt, security-site commander. Sitting next to him was a black security guard, by the name of Luis Manzanares who held a video camera pointed at a car ahead. Behind him in the car was another security guard, John Kochel. At a point where the car was approaching the picket line, Ronald Lawson, one of the picketing employees, came towards the car. With both hands raised and extending his middle fingers, Lawson yelled, "fuck you nigger" at Manzanares.

Manzanares did not testify, but he filed an incident report with the Company on June 22, 2005, which states inter alia as follows (R. Exh. 1): "I was in the passenger seat when a caucasian male on the picket line directed his attention towards me, he proceeded by flipping me with both of his middle fingers and derogatorily calling out 'fuck you nigger.'" An incident report was submitted by Galt on about the same date, which similarly described the incident, stating: "As we slowly approached the picket line, (1) picket/supporter approached Manzaranes' window, giving the finger with both hands & shouted at the window from approx. 2' feet away, etc." (R. Exh. 3). Mary Lukas, human resource manager, filed a similar incident report after observing the video tape, recorded by Manzanares with his video camera (GC Exh. 5).

Lawson was notified of his discharge by letter of June 28, 2005 (GC Exh. 3). The letter signed by Daniel A. Krinock, president, states:

> As a result of your picket line misconduct on 6-22-05 when you screamed "fuck you nigger" to an African American non-striking worker while gesturing with each of your middle fingers, your employment with Airo Die Casting is immediately terminated.

In his testimony, Krinock said that the decision to discharge Lawson was made by him and other members of management, following an investigation. He conceded that obscene gestures and obscene language were common on the picket line, and that no one was discharged for yelling obscenities. He stated that Lawson "was discharged for harassing an African-American which goes against the policies of the Company." According to his testimony, the issue whether or not Lawson's conduct amounted to a hate crime was not considered.

This scenario presents the issue whether Lawson's picket line misconduct justified his discharge under well-established Board precedents.

Analysis

The facts are undisputed that Lawson, by picketing the Respondent, was engaged in protected activity, and that the Respondent discharged Lawson because of his conduct on the picket line. Employees have the right under Section 7 of the Act to engage in concerted activities, including engaging in a peaceful strike and picketing, for their mutual aid and protection. Ordinarily, an employer is required to reinstate striking employees at the end of an economic strike, unless justified by legitimate business reasons. *General Chemical Corp*., 290 NLRB 76 (1988). Unlike the issue involving an employee's conduct during his working environment, picket line misconduct is governed by the standard established in *Clear Pine Moldings,* 268 NLRB 1044, (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1968). According to that test, an employer can lawfully deny reinstatement to a striker if his misconduct is such that under the circumstances, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act. In the case cited by the General Counsel, *Siemens Energy & Automation, Inc.,* 328 NLRB 1175 (1999), the Board reemphasized that standard and clarified that picket line misconduct is not governed by *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), but by a standard requiring a two-part analysis, i.e., whether the strike misconduct tended to coerce or intimidate employees in their Section 7 rights, and whether the General Counsel has shown that the striker was denied reinstatement for conduct related to the strike.

Here, the record is clear and the parties are in agreement that Lawson was discharged because of the picket line incident. Their only disagreement relates to the severity of Lawson's misconduct and whether it resulted in the loss of statutory protection he would otherwise have. In this regard, the record shows that Lawson, while stationed on the picket line outside the Respondent's facility, made an obscene gesture accompanied by an obscene utterance and a racial epithet directed at the security guard in the car who was tape recording the pickets. The accuracy of this finding is reflected in the letter notifying Lawson of his discharge, the incident reports, including that filed by Mazanares, and the video-tape

recording. Indeed, my impression after viewing the incident on the video recording is similar to that described by human resource manager, Lukas, in her incident report. She completed the incident report after examining the video-tape recording and concluded that Lawson raised both middle fingers to one of the vans transporting replacement workers at the same time screaming, "fuck you nigger," and that the security guard Louis (Manzanares) felt that the racial slur was directed at him (R. Exh. 6). Lawson testified that he did not remember the incident, but he conceded that it could have been him on the tape. Manzanares did not appear as a witness, and Kochel, the third passenger in the car and a security guard, did not complete an incident report, presumably because he had not seen the incident.

The Respondent's assertion, describing the incident as "Lawson's aggressive assault on the vehicle," is based on Galt's testimony. I observed his demeanor as a witness, and I find that his narrative embellished the incident, and was clearly designed to describe Lawson's behavior as aggressive. His dramatic description with an emphasis on his subjective impressions is inconsistent with his own incident report and the reports of other individuals, as well as the video recording of the actual occurrence. I also find the testimony of Krinock and Rick Tegue, vice president of human resources of the Respondent's parent company, somewhat exaggerated, as they testified about the Manzanares' reaction after the incident. They described him as visibly shaken and offended. In any case, anyone examining the actual recording of Lawson's activity would be hard pressed to see any threatening or aggressive conduct. It did not differ from the general atmosphere on the picket line with the usual tensions between strikers and replacement workers and the use of obscene gestures and vulgar language. The Respondent argues that the video-taped evidence does not show the entire incident, because the camera was aimed forward. Yet the recording belies from the outset the scenario described by Galt. From his vantage point as a driver, Galt observed (Tr. 124–125), "about five feet out, just to the right of . . . my front bumper . . . he [Lawson] turned and came quickly at our vehicle at Louis window and he drew back his hands . . . into the finger gesture . . . and then he got close to the window . . . within a foot or two," at which point Galt "goosed the gas and got out." Clearly, Galt did not observe Lawson making contact with the vehicle or shouting any threats. Considering all the evidence, I cannot find that the picket line misconduct under consideration was accompanied by any threats or any coercion, or any intimidating conduct.

To be sure, Lawson's comment and gestures were clearly repulsive and offensive, in particular the racial epithet, but it did not occur during his working time or in his working place. Picket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment. As argued by the General Counsel, the Board has found that a striker's use of the most vile and vulgar language, including racial epithets, does not deprive him of the protection of the Act, so long as those actions do not constitute a threat. *Detroit Newspapers*, 342 NLRB 223 (2004) ("you fuckin' bitch, nigger lovin' whore"). *Nickel Molding*, 317 NLRB 826 (1995). Lawson's conduct on the picket line, the use of obscene language and gestures and a racial slur, standing alone without any threats or violence, did not rise to the level where he forfeited the protection of the Act. *Clear Pine Moldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985).

The Respondent argues that Lawson violated Company policy requiring his discharge. In support, the Respondent points to a company poster, entitled "Operation Honesty," which generally encourages employees to report drug and alcohol abuse, as well as harassment (R. Exhs. 7, 9). The document, however, does not make any reference to racial harassment or to a form of discipline contemplated by the Employer. The Respondent also cites a company memorandum, dealing with equal employment and affirmative action issues (GC Exh. 4). The memorandum assures the employees of the Company's commitment to diversity in the workplace and deals with the usual issues relating to equal employment opportunity, including verbal or physical harassment on such issues as race, age, and disability. Employees who violate the policy may be disciplined or fired depending on the severity of offense. Clearly, the Respondent has the authority to enforce company policy in the workplace, but these documents make no reference to conduct on the picket line.

To illustrate its even-handed approach, the Respondent cites the disciplinary actions taken against two employees for similar misconduct, one incident involved sexual harassment and the other an ethnic insult. Again, the conduct of these employees occurred in the workplace, not on the picket line outside of the plant. Moreover, the record shows that one of Respondent's higher-up supervisors, Steve Murray, had a conversation on January 20, 2006, with Robert Hillman, an employee. Murray, a facilitator at the facility in charge of the operation on the second shift, used the same racial epithet during a brief colloquy with Hillman, namely the "n"-word, without being disciplined. In short, the Respondent had difficulty in enforcing its harassment policy evenly in the workplace.

As reprehensible as Lawson's use of the racial slur may be, I find that his verbal and gesturing conduct, was unaccompanied by threats, coercion, or intimidation. It did not rise to the level to justify the Employer's refusal to reinstate this employee. He was the only one on the picket line to be discharged.

CONCLUSIONS OF LAW

1. The Respondent, Airo Die Casting, Inc. a subsidiary of Leggett & Platt, Incorporated is an employer engaged in commerce within the meaning of Section 2(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. By discharging its employee Ronald W. Lawson and by refusing to reemploy said individual, because of his union or his protected concerted activities, including his participation in a lawful strike, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

The Respondent having unlawfully and discriminatorily discharged Ronald W. Lawson, it must offer him reinstatement to his former position, or if he was permanently replaced prior to the Union's offer to return to work on about August 29, 2005, to afford him the rights of a permanently replaced economic striker under *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969), and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Airo Die Casting, Inc., a subsidiary of Leggett & Platt, Incorporated, Loyalhanna, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging its employees' activity on behalf of a labor organization by discharging and discriminating against a striking employee because of his participation on a picket line and without an honest belief that he had engaged in serious misconduct.

(b) 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 policies of the Act.

(a) Within 14 days from the date of this Order, offer Ronald W. Lawson full reinstatement to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, if he was not permanently replaced before the Union's August 29, 2005 offer to return to work, dismissing if necessary any replacement hired thereafter. If no employment is available for the discriminate, he shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

(b) Make Ronald W. Lawson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at each of its facilities in the Commonwealth of Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided 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 June 22, 1995.

(f) 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage our employees' activity on behalf of labor organization by discharging and discriminating against a striking employee because of their participation on

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[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."

a picket line and without an honest belief that they had engaged in serious misconduct.

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

WE WILL within 14 days from the date of this Order, offer Ronald W. Lawson full reinstatement to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, if he was not permanently replaced before the Union's August 29, 2005 offer to return to work, dismissing if necessary any replacement hired thereafter. If no employment is available for the discriminate, he shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

WE WILL make Ronald W. Lawson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against them in any way.

AIRO DIE CASTING, INC., A SUBSIDIARY OF LEGGETT & PLATT, INCORPORATED