

**Aluminum Welding & Machine Works, Inc. and  
Alan James Plamowski, Case 25-CA-17624**

9 December 1986

**DECISION AND ORDER**

**BY MEMBERS JOHANSEN, BABSON, AND  
STEPHENS**

On 17 June 1986 Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering 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<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Aluminum Welding & Machine Works, Inc., Burns Harbor, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> 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. We also find totally without merit the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the decision, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

<sup>3</sup> The Respondent in its brief to the Board argues that the Charging Party was not an employee because he accepted regular and substantially equivalent employment with another employer. The Respondent seeks to have the hearing reopened and a hearing *de novo* to explore this possible defense. The request is denied. The record reflects that the Respondent at no time sought to ascertain the intentions of the Charging Party concerning recall with the Respondent. In any event, the Charging Party's intentions are objectively shown by his unconditional offer to return to work and his appearance at the Respondent's facility when solicited by the Respondent regarding a position in the welding department. The intention of the economic striker with regard to returning to work with an employer is one of the criteria in establishing whether the striker acquired regular and substantially equivalent employment. See *Salinas Valley Ford Sales*, 279 NLRB 679 (1986), and *Little Rock Airmotive*, 182 NLRB 666 (1970), *enfd.* 455 F.2d 163 (8th Cir. 1972). Accordingly, the Respondent's argument is without merit.

*John N. Petrison, Esq.*, for the General Counsel.  
*J. Charles Sheerin, Esq.*, of Michigan City, Indiana, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

DAVID L. EVANS, Administrative Law Judge. This matter was tried before me on 27-28 February 1986 in Portage, Indiana. The complaint alleges that Aluminum Welding & Machine Works, Inc. (Respondent) has committed a violation of the National Labor Relations Act (the Act). The complaint is based on a charge filed by Alan James Plamowski, an individual, on 12 November 1985.<sup>1</sup> The complaint, which issued on 11 December, alleges that Respondent refused to reinstate Plamowski after an economic strike in violation of Section 8(a)(3) and (1) of the Act. Respondent filed an answer admitting jurisdiction but denying the commission of any unfair labor practices.

On the entire record<sup>2</sup> and my observation of the demeanor of the witnesses, and after careful consideration of the briefs filed by Respondent and the General Counsel, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent is an Illinois corporation located at Burns Harbor, Indiana, where it is engaged in the manufacture, sale, and service of equipment for steel mills. During the 12 months preceding issuance of the complaint Respondent, in the course and conduct of its business operations, purchased and received at its Burns Harbor facility products, goods, and materials valued in excess of \$50,000 directly from suppliers located at points outside Indiana. Therefore, Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

Local Union No. 142, General Drivers, Warehousemen and Helpers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICE**

Respondent and the Union engaged in negotiations for an initial collective-bargaining agreement from about 1 March to 15 August. On 15 July Respondent's 13 production and maintenance employees, including Plamowski, began an economic strike. On 15 August a labor agreement was reached, and an unconditional offer to return to work was made by the Union on behalf of all the striking employees.

<sup>1</sup> All dates are 1985 unless otherwise specified.

<sup>2</sup> The transcript is easily the poorest I have ever seen, but most of the errors are obvious, and neither party has filed a motion to correct the record. Nevertheless, I am constrained to point out that at p. 153, LL. 24 and 25, I asked counsel for the General Counsel, "[W]hy in your case you don't have objections." I did not ask, "[W]hy in your case you don't have suspenders on."

On 17 August Respondent began reinstating strikers. It denied reinstatement to Plamowski, a machinist, on the ground that there was insufficient work for him at that time, a fact that is not disputed. In September, however, when work picked up, rather than reinstate Plamowski, Respondent hired a new machinist, one Walter Doherty. Respondent's president and owner, Darrell T. Boothe, testified that he employed Doherty rather than reinstate Plamowski because Doherty was a much faster machinist.

It is clear, even by the testimony of the General Counsel's own witnesses, that there exist faster machinists than Plamowski. However, an economic striker's reinstatement rights are not dependent on an employer's ability to find a faster, or otherwise "better," worker after an unconditional offer to return work is made. As stated by the Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 at 381 (1967):

If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications." [*NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).]

That is, when work for which Plamowski was qualified became available, his right to reinstatement matured, and that right could be defeated only by Respondent's showing a legitimate and substantial business justification for not reinstating him.

No such consideration has been shown here. The only business consideration held by Respondent when work became available was Boothe's hope of employing a faster machinist than Plamowski. However, such hope has never been held to be a "legitimate and substantial" business consideration as envisioned by the Court. Nor could it be. It is not "substantial" because all employers, at all times, hope to find faster or otherwise "better" workers. It is not "legitimate" because it would allow employers to pick and choose among returning strikers on the basis its evaluation of its prospects of fulfilling this universal hope of finding "better" employees. Therefore, Respondent's refusal to reinstate Plamowski when work for which he was qualified became available, even if Doherty was better qualified, was a violation of Plamowski's right to reinstate, as was made clear in 1967 by the Supreme Court's decision in *NLRB v. Fleetwood Trailer Co.*, supra.<sup>3</sup>

Accordingly, I find and conclude that, by its refusal to reinstate Plamowski immediately after work for which he was qualified became available, Respondent violated Section 8(a)(3) and (1) of the Act.

<sup>3</sup> See also *Salinas Valley Ford Sales*, 279 NLRB 679 (1986), and *Lehigh Metal Fabricators*, 267 NLRB 568, 575 (1983), enf. mem. 735 F.2d 1350 (3d Cir. 1984). At the hearing, I specifically invited Respondent to cite any case in which reinstatement rights were defeated solely because an employer was able to find a "better" worker than a striker who had unconditionally offered to return to work. Of course, no such citation is contained in Respondent's brief.

## CONCLUSIONS OF LAW

1. Aluminum Welding & Machine Works, Inc. is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 142, General Drivers, Warehousemen and Helpers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to reinstate Charging Party Alan James Plamowski on availability of work for which he was qualified,<sup>4</sup> Respondent has discriminated against an employee in violation of Section 8(a)(3) and (1) of the Act.

## IV. THE REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act, I will recommend that it be ordered to cease and desist from engaging in such conduct, and I will further recommend that Respondent be ordered to offer reinstatement to Plamowski and Pay to him backpay, with interest.<sup>5</sup> Backpay is to be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest as established by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Pursuant to Section 10(c) of the Act, I issue the following recommended<sup>6</sup>

## ORDER

The Respondent, Aluminum Welding & Machine Works, Inc., Burns Harbor, Indiana, its officers, agents, successors, and assigns, shall

(1) Cease and desist from

(a) Discouraging membership in or activities on behalf of Local Union No. 142, General Drivers, Warehousemen and Helpers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen

<sup>4</sup> The exact date when Respondent violated the Act by refusing to reinstate Plamowski is a matter that may properly be left for compliance. It would not necessarily be the date when Doherty began working; if work for which Plamowski was qualified became available before then, the violation began at that point, and the remedy should run from that date.

<sup>5</sup> At the compliance stage, the Board should reject any contention that Plamowski's rate of pay would be at a "C" machinist grade. Although at the hearing Respondent contended that Plamowski was really a "C," rather than "B," machinist, that category includes "trainees and machinist helpers" according to Respondent's own job descriptions. Although Plamowski was slower than other machinists, he could operate all machinery in Respondent's machine shop by himself, and Boothe acknowledged that Plamowski was "very accurate." Moreover, Boothe acknowledged that he never told Plamowski that he was a "trainee or machinist helper." Finally, Union Representatives VonAsch and Sawochka credibly testified that during contract negotiations Respondent classified Plamowski as a class "B" machinist.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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.

and Helpers of America, or any other labor organization, by refusing to reinstate economic strikers who have made an unconditional offer to return to work immediately on availability of work for which they are qualified.

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

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

(a) Offer to Alan James Plamowski immediate reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights and privileges, dismissing, if necessary any person hired as a replacement after 15 August 1985, and make Plamowski whole, with interest, for any loss of earnings and other benefits suffered by reasons of Respondent's unlawful refusal to reinstate him.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Burns Harbor, Indiana place of business copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 Respond-

ent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps 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

WE WILL NOT discourage activities on behalf of Local Union No. 142, General Drivers, Warehousemen and Helpers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization by refusing to reinstate employees who have unconditionally offered to return to work from an economic strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by the National Labor Relations Act.

WE WILL offer Adam James Plamowski immediate reinstatement to the job he held before our unlawful refusal to reinstate him or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any person hired as a replacement after 15 August 1985.

WE WILL make Adam James Plamowski whole, with interest, for any loss of pay he may have suffered as a result of our discrimination against him.

ALUMINUM WELDING & MACHINE  
WORKS, INC.

<sup>7</sup> 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."