

Hilton Hotels Corporation, d/b/a The Denver Hilton Hotel and Local Union No. 1823, of the International Brotherhood of Electrical Workers, AFL-CIO and Thomas R. Harberson. Cases 27-CA-7956 and 27-CA-8139

16 December 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 28 September 1984 the Board issued a Decision and Order in this proceeding reversing the findings of the administrative law judge and dismissing the complaint that had alleged that the Respondent had violated Section 8(a)(3) and (1) by refusing to reinstate employees Harberson and Talley on their unconditional offers to return to work following a sympathy strike.¹ On petition to review the Board's Order, the United States Court of Appeals for the Tenth Circuit set aside the Board's decision and remanded the case to the Board for further consideration.² The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board on remand. The General Counsel and Charging Party Harberson filed statements of position.³

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

In its original decision, contrary to the judge, the Board found it appropriate to defer to a board of arbitration award that had denied grievances pertinent to the alleged unfair labor practice. In this regard, the Board found that the contractual issue considered by the arbitrators was factually parallel to the unfair labor practice allegation and that the arbitrators had been presented generally with the facts relevant to resolving the unfair labor practice issue.⁴ Additionally, the Board concluded that the General Counsel had failed to meet the burden established in *Olin Corp.*, 268 NLRB 573 (1984), of showing either that the arbitrator's award was re-

pugnant to the Act or that the arbitral process was defective. Accordingly, as noted, the Board deferred to the award of the board of arbitration and dismissed the complaint in its entirety.⁵ Thereafter, Charging Party Harberson filed a petition for review of the Board's decision with the court.

In remanding this case to the Board for further consideration, the court noted that the Board had reasoned that the resolution of both the contractual and the statutory claims depended on a finding of whether the employees had been permanently replaced during the strike. Although the Board found that the arbitrators had been presented generally with the relevant facts to resolve this issue, the Board, in the court's view: "did not address the factual question that the ALJ considered dispositive: whether Hilton acted to replace Harberson and Talley before or after they reported for work." The court noted that the administrative law judge had made extensive factual findings and had "concluded that the permanent replacement of Harberson and Talley occurred *after* they reported for work. Because this factual question was crucial to the unfair labor practice claim and had not been resolved by the arbitrators, the ALJ found that deferral was not appropriate under *Olin*." The court concluded that the judge's interpretation and application of the *Olin* standard was "reasonable" and concluded that: "the finding of the ALJ that the facts were not generally presented to the arbitrator on the unfair labor practice question is particularly well supported. In view of this finding by the ALJ, we cannot say that the Board's decision is supported by substantial evidence on the record as a whole." *Harberson v. NLRB*, supra at 983, 984. The court did not decide, however, what result we should reach in the case but remanded it for an explanation, taking full account of all the evidence, of how *Olin* properly applies here.

In compliance with the court's remand, we have reconsidered the application of *Olin* to the deferral issue here and, in particular, whether the arbitrators had adequately considered the unfair labor practice issues that were presented to us in this case.⁶ For the following reasons we now conclude that the arbitrators had not and that, therefore, deferral to the arbitration award is inappropriate.

¹ 272 NLRB 488

² *Harberson v. NLRB*, 810 F.2d 977 (10th Cir. 1987)

³ Bill Talley, an alleged discriminatee, has attempted to join the Charging Party in his statement of position. In this regard, Talley has filed a motion requesting that he be granted leave to intervene and that he be granted, at this juncture, the status of a party in this case. The motion is denied. We note that, in any event, Talley is found, *infra*, to have been unlawfully discriminated against, as alleged in the complaint and, accordingly, is covered by the remedial order given to redress the Respondent's unlawful conduct.

⁴ The issue before the arbitrators was whether Harberson and Talley had been "disciplined or discharged" in violation of their contractual right to refuse to cross a lawful picket line without being "disciplined or discharged" for doing so.

⁵ A majority of the three-member board of arbitration found that the Respondent did not violate the agreement when it permanently replaced employees Harberson and Talley. Although their grievances were denied, the award provided that Harberson and Talley were entitled to remain on a "preferential reinstatement list" entitling them to the first available positions for which they are qualified.

⁶ We note that in light of our conclusion that deferral of the unfair labor practice allegations is inappropriate under *Olin*, the issue of the allocation of burdens under *Olin* is not presented here.

Olin states two tests for determining if there has been adequate arbitral consideration of the unfair labor practice issue: whether "(1) the contractual issue is factually parallel to the unfair labor practice issue" and whether "(2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." Here the arbitration award itself and other evidence in the present case make it clear that the Union did not litigate in arbitration, the question of whether Harberson and Talley actually had been permanently replaced before they made their offers to return, i.e., whether, before 13 July 1982, the ostensible replacements had been given permanent offers of employment to perform the work of Harberson and Talley. Rather, the Union argued in arbitration that under the no-strike/no-lockout clause of the contract, Harberson and Talley had an absolute right, even assuming they were permanently replaced, to engage in a sympathy strike and to return to their jobs as soon as they made an unconditional offer to return from their strike. The arbitrators rejected that interpretation of the contract and concluded, as the Respondent contended, that the contract barred the Respondent from discharging but not from permanently replacing Harberson and Talley. Because the Respondent had kept the two employees on the payroll, had continued certain of their benefits, and had placed them on a preferential hiring list, the arbitrators concluded they had not been discharged within the meaning of the contract. The question presented to the arbitrators, therefore, is not the question that is before us, that is, whether Harberson and Talley had been permanently replaced, or whether they were temporarily replaced by Bozic and Jude. Although some evidence was presented to the arbitrators bearing on the issue of the employees' replacements, the arbitrators referred to the discriminatees as permanently replaced merely in the context of distinguishing their status from that of discharged employees. Indeed, the arbitrators had no need to actually decide the precise question of if, or when, permanent replacements were hired because it was essentially conceded for purposes of determining the broader contractual question that the parties were disputing. Accordingly, on further examination we conclude, contrary to our earlier decision in this proceeding, that the contractual and unfair labor practice issues, though related, are not factually parallel.

It is essential to the unfair labor practice issue presented to us, however, to decide whether Bozic and Jude, the ostensible replacements, had been hired as permanent employees to perform the work of Harberson and Talley before the latter made their unconditional offers to return. We agree with the judge's findings⁷ that the Respondent did not establish that Harberson's and Talley's positions were occupied with permanent replacements when they made their offer to return and that the Respondent established no other legitimate or substantial business justification for failing to reinstate them, in accordance with their rights under the *Laidlaw/Fleetwood* doctrine.⁸ We accordingly affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act, and we adopt his recommended Order.⁹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge issued in 272 NLRB 488 (1984), and orders that the Respondent, Hilton Hotels Corporation, d/b/a The Denver Hilton Hotel, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

CHAIRMAN DOTSON, concurring.

I do not agree with my colleagues' characterization of the court's decision nor their reasoning leading to their adoption of the judge's recommended Order. However, based on the court's interpretation of the facts from its review of the record,¹ I agree with my colleagues that deferral to the arbitration award is not appropriate.

⁷ The Respondent has previously 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.

⁸ *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

⁹ In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

¹ I note that this case is not controlled by my acquiescence policy set forth in my dissenting opinion in *Arvin Industries*, 285 NLRB 753 (1987). The present case involves a disagreement between the court and the Board on a factual issue based on the court's review of the record rather than, as in *Arvin*, a disagreement on a proposition of law.