

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

DOUGLAS AUTOTECH CORPORATION

Respondent

and

CASE 07-CA-51428

INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS  
LOCAL 822

Charging Union

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## STATEMENT OF THE CASE

On February 25, 2009, the Regional Director of the Seventh Region issued a Complaint and Notice of Hearing alleging that Douglas Autotech Corporation (herein Respondent) violated Sections 8(a)(1) and (3) of the Act by discharging the entire bargaining unit employed at its Bronson, Michigan facility on or about August 4, 2008 [GC 1(e)]. The Complaint further alleges that on or about August 14, 2008, Respondent unlawfully withdrew recognition from International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 822 (herein the Union), and since that date has failed and refused to meet and bargain collectively with the Union in violation of Sections 8(a)(1) and (5) [GC 1(e)].

Respondent filed its Answer to the Complaint about March 17, 2009, admitting the nature of Respondent's operation and the Board's jurisdiction in this matter [GC 1(n)]. Respondent denied, in whole or in part, every other allegation in the Complaint. Respondent also pleaded numerous "affirmative defenses" premised on the assertion that it had license to discharge the bargaining unit en masse because the employees were unprotected by the Act when the Union engaged in a strike without complying with Section 8(d)(3) of the Act.

A hearing was held in Grand Rapids, Michigan on June 24 and 25, and August 17, 18 and 19, 2009, before Administrative Law Judge Paul Buxbaum. At the hearing, Respondent amended its Answer to admit the Complaint allegations regarding the filing and service of the charge and amended charge [Tr at 9]. Respondent further amended its Answer to admit the Union's status as a labor organization within the meaning of Section 2(5), and the supervisory and agency status of R. Paul Viar, Jr., within the meanings of Sections 2(11) and (13) of the Act [Tr at 10-11].

unlawfully and discriminatorily discharged and refused to further employ the members of the bargaining unit, and unlawfully failed and refused to bargain with the Union [ALJD at 2]. ALJ Buxbaum recommended that the Board order Respondent to reinstate the unlawfully discharged employees and make them whole for any loss of earnings and benefits, and that it bargain with the Union upon request. ALJ Buxbaum further recommended a broad cease and desist order citing the “egregious nature and sweeping extent of Respondent’s unfair labor practices, the likely persistence of ingrained opposition to the purposes of the Act due to the continuing tenure of the key management officials, and the depraved state of mind manifested by those officials in their conduct at trial.” [ALJD at 44].

### **STATEMENT OF FACTS**

Respondent is a corporation with offices and a place of business in Bronson, Michigan, where it manufactures steering columns, assemblies, and related products for the automotive industry [ALJD at 6; GC 1(e); Tr at 598]. Respondent and the Union have had a collective-bargaining relationship since 1941 [ALJD at 7; Tr at 77, 724]. The parties' most recent collective bargaining agreement was effective May 1, 2005 through April 30, 2008, and covered a unit of production and maintenance employees at the Bronson plant [ALJD at 7; GC 2; Tr at 77-78].

On January 24, 2008<sup>1</sup>, the parties began negotiations for a successor agreement [ALJD at 8; Tr at 81]. On February 19, the Union provided Respondent with timely notice of its intent to terminate the parties’ contract [ALJD at 8; Tr at 81-83; GC 5]. By April 30, when the contract expired, the parties had held several bargaining sessions but were still far apart on an agreement

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<sup>1</sup> All dates hereafter are in 2008 unless otherwise indicated.

[ALJD at 8; Tr at 83]. On May 1, the Union began an economic strike [ALJD at 9; Tr at 84-87; GC 6].

On the afternoon of Friday, May 2, the Union realized that as the result of a clerical error it had not filed the notice required by Section 8(d)(3) [ALJD at 9; Tr at 87-90]. The Union took immediate action to correct its mistake. After advising the Local leadership of the situation, the Union held a membership meeting and decided to call an immediate end to the strike [ALJD at 10; Tr at 93]. In the early morning hours of Monday, May 5, the Union presented Respondent with an unconditional offer to return to work [ALJD at 10; Tr at 94-97; GC 7]. The Union had the entire complement of first shift employees at the Bronson facility ready to report for work [ALJD at 10; Tr at 97]. Also on the morning of May 5, the Union filed the required F-7 form with FMCS [ALJD at 10; Tr at 90; GC 3].

Upon Respondent's receipt of the Union's unconditional offer to return to work, the parties set up a meeting for 6:00 that evening [ALJD at 10; Tr at 98]. At the meeting, Respondent gave the Union's bargaining committee a letter, acknowledging that the Union's "offer to return to work was unconditional[,] and advising that "effective immediately" Respondent was locking out the bargaining unit in support of its bargaining position [ALJD at 11; Tr at 99; GC 8]. Attached to the letter was a "synopsis" of Respondent's bargaining position and a proposal for a three-year contract [ALJD at 12; Tr at 99-101; 918-919; 1049-1050; GC 8]. Respondent's letter further stated that, "when an Agreement has been reached ... employees can be expeditiously returned to work." [ALJD at 12; GC 8].

When Respondent met with the Union on May 5, Director of Administration Paul Viar and Director of Finance Glenn Kirk suspected that the Union had not filed an F-7 notice prior to beginning its strike [ALJD at 11; Tr at 637; 842]. Notwithstanding these suspicions,

Respondent's representatives did not indicate to the Union that it would take action against the employees if they had engaged in an illegal strike. Instead, it chose to lock out the employees "effective immediately" and bargain with the Union.[ALJD at 15]<sup>2</sup>

On May 21, the parties held their first of several post-lockout bargaining sessions [ALJD at 16; Tr at 104; J 1]. A mediator from FMCS was present at each session. [J 1]. At the May 21 meeting, the Union presented Respondent with a counterproposal to the Respondent's May 5 proposal [ALJD at 16; Tr at 105-107; 989; GC 37]. Also at this meeting, Respondent's spokesperson, Bruce Lillie, stated that Respondent believed the Union's strike was illegal [ALJD at 16; Tr at 107]. Respondent's witnesses testified that Lillie also said that Respondent was not waiving any of its rights [Tr at 651; 851]. During his testimony, Union representative Philip Winkle denied that Lillie made any statement at this meeting regarding "waiver of rights" [Tr at 159]. In any event, it is undisputed that at the May 21 meeting, Respondent reviewed the Union's counterproposal and the parties continued to bargain toward a new collective bargaining agreement [ALJD at 16; Tr at 105-107; GC 37].

Also at the May 21 meeting, Paul Viar acknowledged that Respondent had made a mistake when it cut off health benefits for Gordon Diamond, an employee on sick leave during the strike [Tr at 117-120; GC 48]. Viar assured the Union that Respondent would correct the matter [Tr at 118]. Shortly thereafter, Respondent reinstated Mr. Diamond's benefits [GC 16].<sup>3</sup>

The parties held 11 post-strike bargaining sessions from May 21 through July 31 during which they exchanged proposals and bargained the terms of a successor agreement [ALJD at 16-

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<sup>2</sup> At the hearing, Respondent's witnesses testified that its attorney, Bruce Lillie made remarks at the May 5 meeting regarding the legality of the strike and reservation of rights. However, as set forth in the ALJD, the record makes clear that this testimony was a fabrication.

<sup>3</sup> It is well established that "an employer may not presume that employees unable to work on and after the commencement of a strike are affirmatively supporting the strike and can therefore have benefits terminated as if they were strikers." *Pan American Grain Co.*, 343 NLRB 318, 335 (2004) citing *Gulf Oil Company*, 290 NLRB 1158, 1160 (1988).

19; J 1; GC 37 through 43].<sup>4</sup> During these sessions, Respondent repeatedly assured the Union and its bargaining committee comprised entirely of former strikers [Compare GC 48 and J 1] that the replacement employees Respondent was utilizing were temporary [ALJD at 17; Tr at 120-124; 128-129; 219-220; 877]. Indeed, in his June 23, 2008 position statement to the NLRB, Bruce Lillie stated: “Importantly, the replacement workers used during the course of the lockout have at all times been temporary replacements.” [Tr at 1035-1036; 1042-1046]. Also during the post-lockout bargaining sessions, Lillie, Viar and Glenn Kirk each reiterated Respondent’s May 5 assurance that the former strikers would be returned to work as soon as the parties reached agreement on a new contract [ALJD at 17; Tr at 120-124; 128-130]. At the July 2 bargaining session, Kirk and Lillie made reference to a transition plan to facilitate the return of the former strikers [Tr at 129-130; 220; 877].

On July 24, there was an “ominous shift in Respondent’s thinking” [ALJD at 18]. In a sidebar conference, Bruce Lillie told the Union’s attorney, John Canzano, that Respondent was consulting new counsel about firing the bargaining unit employees [ALJD at 18; Tr at 227-228; 1006]. Lillie told Canzano that he (Lillie) was “afraid that he might be losing control of his client (Respondent)” [ALJD at 18; Tr at 228].

Lillie’s portentous comments to Canzano on July 24, notwithstanding, the parties continued bargaining and met for sessions on July 25, July 28 and July 31 [J 1]. Near the end of the July 31 session, Lillie announced to the Union’s bargaining committee: “We’ve made some progress here today. I’m going on vacation, but we’ve got another date scheduled, and I just have something I have to say, and that is by continuing to bargain, the Company is not waiving its right to fire people” [ALJD at 19; Tr at 241; 1011].

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<sup>4</sup> On July 2, the parties withdrew their pending unfair labor charges pursuant to an agreement to begin a cooling-off period regarding NLRB investigations [Tr at 217-219; GC 18].

This was the parties' last bargaining session. By letters dated August 4, Respondent fired every bargaining unit employee. Each member of Local 822, including the employees on layoff status and sick or disability leave during the strike, was sent a letter stating that their employment was "terminated effective immediately because of your participation in the illegal strike" [ALJD at 20; GC 47; Tr at 133-134; 279-281]. Respondent offered no evidence that it attempted to call back to work any one of the employees on layoff or approved leave during the strike. Paul Viar testified that he simply "presumed" that the employees on layoff or leave had joined the strike [Tr at 721].

On August 14, the parties attended a previously-scheduled bargaining session, but Respondent refused to meet with the Union [ALJD at 21; Tr at 136-137]. The Union's counsel, Samuel McKnight, along with the Union's representatives, and the FMCS mediator, went to Respondent's caucus room in an effort to get Respondent to meet with the Union and bargain [ALJD at 21; Tr at 137; 697; GC 67]. McKnight entered Respondent's caucus room and said: "We would like for you to come bargain a contract with us." Bruce Lillie replied: "We're not going to come and bargain. All of the employees have been terminated." [ALJD at 21; Tr at 138; GC 67]. McKnight told Respondent that the Union wanted to negotiate a responsible collective bargaining agreement, and again asked Respondent to bargain with the Union [Tr at 761]. Lillie refused [Tr at 139; GC 67]. The parties have not met for formal bargaining since that date [ALJD at 21].

## QUESTIONS PRESENTED

1. Did the Administrative Law Judge err in stating: “... *had the Employer discharged the bargaining unit members during the duration of the ongoing strike from May 1 to May 5, there would be no legal basis to challenge that decision*” [emphasis added] to the extent that the judge’s use of the term “bargaining unit members” includes employees who did not participate in the strike; i.e., the employees on layoff or approved leave at the time of the strike? [ALJD at 25].
2. Did the Administrative Law Judge err in not making conclusions of law that those employees on layoff or approved leave at the time of the strike did not engage in a strike within the meaning of Section 8(d); and thus did not lose their protected status between May 1 and May 5, 2008?

## APPLICABLE LAW AND ARGUMENT

Section 8(d) provides that any employee who strikes within the 8(d)(3) notice periods “shall lose his status as an employee of the employer ... for the purposes of sections 8, 9, and 10” of the Act ... but that “such loss of status for such employee shall terminate if and when he is reemployed by such employer.” The ALJ correctly found that Respondent reemployed those bargaining unit members that participated in the Union’s strike from May 1 to May 5.<sup>5</sup>

However, the employees on layoff status or authorized leave during the strike did not engage in the strike and never lost their protected status. Engaging in a strike within the meaning of Section 8(d) requires “a volitional act by the employee (deliberately withholding labor) sufficient to make the employee complicit in the unlawful strike.” *Freeman Decorating Co.*, 336 NLRB 1, 6 (2001), enf. denied sub nom. *IATSE Local 39 v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003).

Thus, an employee legitimately absent from work before the strike cannot be presumed to have joined the strike on the basis of his continued absence. See, e.g., *Park Manor Nursing*

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<sup>5</sup> See General Counsel’s Answering Brief to Respondent’s Exceptions

*Home*, 312 NLRB 763, 766-767 (1993) (employer unlawfully discharged employee on authorized vacation leave during strike); *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676, fn. 2 (1990), enfd. memo 986 F.2d 1422 (6th Cir. 1993) (employer unlawfully discharged employee for being on picket line while on maternity leave); *Trumbull Memorial Hospital*, 288 NLRB 1429, 1430 (1988) (employer unlawfully discharged employees on sick leave or vacation leave during the strike). In *Freeman*, the Board held that the above-cited cases clearly establish “that a presumption of strike participation is unjustified where other, reasonable grounds for an employee’s absence from work exist; and that “this principle is as applicable in the context of Section 8(d) as in the context of a lawful strike.” Id at 8.

In the instant matter, it is undisputed that on and after the commencement of the strike, 33 employees were on layoff or leave status and not scheduled to report to work [ALJD at 7; GC 48; GC 49; Tr at 68-72; 404; 462-465; 721-723]. It is also undisputed that Respondent’s established practice was to contact laid off employees by telephone or letter to advise them that work was available [Tr at 720-721]. There is no evidence of any such efforts by Respondent to contact the 33 employees on layoff or leave during the Union’s strike.

Instead, Paul Viar admittedly “presumed” that these employees joined the strike [Tr at 721-723]. That presumption was unlawful. Without evidence that these individuals actually withheld labor that Respondent could specifically expect to be forthcoming, it cannot be said that any of them engaged in the strike. “[S]imply having been represented by a union that called an unlawful strike will not suffice to trigger the ‘loss of status’ provision.” *Freeman* at 6.

Accordingly, these employees at all times retained their protected status.

Respondent had absolutely no factual basis to believe that the employees on layoff or leave had joined the strike. There is no evidence that Respondent attempted to call any of these

employees back to work during the strike. There is no evidence that Respondent investigated whether any of these employees had joined the strike or supported it in any way. *Freeman*, 336 NLRB at 9 citing *Valmont Industries*, 328 NLRB 309 (1999), *enfd.* in relevant part 244 F.3d 454 (5<sup>th</sup> Cir. 2001).

Indeed, the evidence shows that Respondent knew that the employees on layoff and leave did not engage in the strike. In the May 20, “Notice of the Existence of Labor Dispute” Respondent filed with the Michigan Unemployment Insurance Agency, Paul Viar described the 30 employees on layoff status when the strike began as unemployed for “lack of work not caused by a labor dispute” [Tr at 295-297; GC 44 at pages 7-10]. In other words, as of May 20 – more than two weeks after the strike ended – Viar clearly did not believe that these employees had joined the strike – he considered them to be laid off employees. [See also GC 49]. Yet, on August 4, Viar fired every one of these 30 employees for “participat(ing) in an illegal strike” [GC 47; GC 48].

Similarly, the record shows that prior to August 4, Respondent did not believe that the three employees on sick leave or workers compensation had joined the strike. At the May 21 meeting, Paul Viar acknowledged that Respondent had made a mistake cutting off the benefits of Gordon Diamond, an employee on sick leave during the strike, and Respondent assured the Union that it would correct the matter [Tr at 117-120; GC 48]. Shortly thereafter, Respondent reinstated Mr. Diamond’s benefits [GC 16].

Respondent was obviously well aware that “an employer may not presume that employees unable to work on and after the commencement of a strike are affirmatively supporting the strike and can therefore have benefits terminated as if they were strikers.” *Pan American Grain Co.*, 343 NLRB 318, 335 (2004) citing *Gulf Oil Company*, 290 NLRB 1158,

1160 (1988). Viar's statements at the May 21 meeting regarding Diamond, and Respondent's subsequent reinstatement of his benefits, are clear admissions by Respondent of its knowledge that the employees on sick leave and workers compensation leave were not, and could not have been, strikers.

In sum, Respondent was **at no time** privileged to discharge those employees who were on layoff status or authorized leave during the strike. As set forth above, engaging in a strike within the meaning of Section 8(d) requires a volitional act by the employee (deliberately withholding labor) sufficient to make the employee complicit in the unlawful strike. Respondent's presumption of strike participation by these employees was unlawful. There being no evidence of any of these employees deliberately withholding their labor, thus making them complicit in the unlawful strike, the ALJ should have found that these employees never lost the protection of the Act.

### **CONCLUSION**

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to conclude that the Administrative Law Judge erred by stating: "... had the Employer discharged the bargaining unit members during the duration of the ongoing strike from May 1 to May 5, there would be no legal basis to challenge that decision" to the extent that the judge's use of the term "bargaining unit members" includes employees who did not participate in the strike; i.e., the employees on layoff or approved leave at the time of the strike. The ALJ should have made a conclusion of law that those employees on layoff or approved leave at the time of the strike did not engage in a strike within the meaning of Section 8(d); and thus did not lose their protected status between May 1 and May 5, 2008.

Dated at Grand Rapids, Michigan, this 26<sup>th</sup> day of May, 2010.



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