Seyforth Roofing Company of Alabama, Inc. *and* **John Rolley.** Case 10-CA-16647

August 13, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 14, 1982, Administrative Law Judge Robert A. Gritta issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and the General Counsel filed a reply memorandum to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Charlie Appling, one of the nine unlawfully discharged striking employees in this case, testified without contradiction that he did not receive Respondent's February 9, 1981, letter offering him reinstatement to his prior position. The letter was sent to Appling in care of one of the other unlawfully discharged striking employees, Clarence Quarles (misspelled in the internal address of the letter as "Quarter"), at Quarles' address, which Respondent contends was the only address it had for Appling.[3]

Appling also testified that he had no secondary knowledge of Respondent's offers of reinstatement to him or the other striking employees. While this testimony was also uncontradicted, the Administrative Law Judge found it to be implausible under the circumstances, and did not credit it.

In light of the method employed by Respondent to notify Appling of its offer to reinstate him, and Appling's uncontroverted testimony that he never received such notification, we find, under the circumstances of this case, that Respondent has not communicated an adequate offer of reinstatement to Appling.[4] Accordingly, we shall modify the Administrative Law Judge's recommended remedy and Order to require Respondent to offer Appling immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of Respondent's failure to do so, computed in the manner set forth in the remedy section of the Administrative Law Judge's Decision. However, nothing in our Order is to be construed as precluding Respondent from presenting affirmative evidence in compliance proceedings to establish that the method it employed to notify Appling of its offer of reinstatement, while tenuous, was nevertheless reasonable under the circumstances, and thus sufficient to toll its backpay obligation to Appling.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Seyforth Roofing Company of Alabama, Inc., Birmingham, Alabama, its officers, agents, successors,

[1] In light of our affirmation of the Administrative Law Judge's conclusions that Respondent unlawfully discharged its striking employees on January 28, 1981, we find it unnecessary to pass on the Administrative Law Judge's comment that, were it not for his conclusion that the employees had already been discharged, he would have found Respondent's failure to accept the striking employees' February 5, 1981, unconditional offer to return to work to have been unlawful. However, we do note, contrary to the Administrative Law Judge, that there is evidence in the record that Respondent might have replaced certain of the striking employees. Indeed, the Administrative Law Judge's subsequent discussion in this regard makes reference to some of that evidence.

[2] In his remedy, the Administrative Law Judge recommended that Respondent be ordered to pay each discriminatee backpay from January 28, 1981, the date of their unlawful discharges, to February 12, 1981, which the Administrative Law Judge incorrectly stated to be the date of Respondent's offer of reinstatement. The incorrect reference to February 12 appears to be inadvertent, since the record clearly establishes (and the Administrative Law Judge correctly found elsewhere in his Decision) that the date of Respondent's letter offering reinstatement was February 9, 1981.

Additionally, we find that Respondent's backpay obligation was tolled not on February 9, the date of Respondent's letter, but 5 days later, on February 14, 1981, which was the last day on which the employees could reply to the offer of reinstatement, pursuant to the terms of the letter itself. *Bay State Lobster Co., Inc.*, 235 NLRB 458, fn. 2 (1978); *Southern Household Products Company, Inc.*, 203 NLRB 881, 882 (1973).

Also, the Administrative Law Judge stated in his remedy that "Each discriminatee, having declined Respondent's offer of reinstatement, shall not have any restoration of his employment rights." More precisely, however (and consistent with the express terms of Respondent's offer of reinstatement), the striking employees, having been unlawfully discharged on January 28, 1981, and (except for Charlie Appling, discussed *infra*) having subsequently declined Respondent's February 9, 1981, offer of reinstatement, retained their status as economic strikers, with the rights attendant to that status. *Abilities and Goodwill, Inc.*, 241 NLRB 27, fn. 5 (1979); see, generally, *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

[3] The General Counsel and Respondent stipulated that Quarles and the other seven unlawfully discharged striking employees did receive their February 9, 1981, letters from Respondent, identical to that sent to Appling, offering them reinstatement to their prior positions.

[4] Offers of reinstatement sent through third parties are normally not sufficient. See *King Trucking Company*, 259 NLRB 725, 730 (1981); *Carter of California, Inc., d/b/a Carter's Rental*, 250 NLRB 344, 350 (1980); *Michael M. Schaefer, an Individual Proprietor*, 246 NLRB 181 (1979); *Bromine Division, Drug Research, Inc.*, 233 NLRB 253, 260 (1977).

[5] See, generally, *Marline Industries Corporation, et al.*, 234 NLRB 285, 287-289 (1978).

and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Offer Charlie Appling immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they have engaged in protected concerted activities for their mutual aid or protection.

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

WE WILL offer Charlie Appling immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Charlie Appling, Anthony Boddie, Charlie Burrell, Joe Hill, Andrew Long, Clarence Quarles, John Rolley, Carl Stewart, and Reginald Townes whole with interest for any loss they incurred as a result of our discrimination on January 28, 1981.

SEYFORTH ROOFING COMPANY OF ALABAMA, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge: This case was heard on December 1, 1981, in Birmingham, Alabama, based on a charge filed by John Rolley, an individual (herein the Charging Party), on February 4, 1981, and a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on March 5, 1981.[1] The complaint alleges that Seyforth Roofing Company of Alabama, Inc. (herein Respondent), violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) by discharging nine employees for engaging in concerted activities. Respondent's timely answer denies the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent. Both briefs were duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Seyforth Roofing Company of Alabama, Inc., is an Alabama corporation engaged in the commercial roofing business in Birmingham, Alabama. Jurisdiction is not in issue. Respondent, in the past 12 months, in the course and conduct of its business operations, purchased and received at its Birmingham, Alabama, facility goods and materials valued in excess of $50,000 directly from points located outside the State of Alabama. I conclude and find that Seyforth Roofing Company of Alabama, Inc., is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The sole issue in this case is whether the nine employees making up a roofing crew were discharged for engaging in a concerted work stoppage.[2] If so, a violation of Section 8(a)(1) has occurred. If not, the complaint must be dismissed in its entirety.

B. *Concluding Findings*

Respondent's roofing operation utilizes basically three classifications of employees. Two, the roofer and kettleman, are skilled, or in the least experienced, whereas the third, laborer, is unskilled. Roofer wages vary from $5.75 to $8 an hour while a kettleman earns $4.50 to $6 an hour. Laborers receive $3.50 to $4.50 an hour, and new hires with little or no experience get minimum wage ($3.35).

During January a dispute developed between the nine named employees and management concerning the difference in wages paid long tenure employees and those

[1] All dates herein are in 1981 unless otherwise specified.

[2] The parties stipulated that the nine employees engaged in a strike over wages on January 28. The strike is therefore protected by the Act.

employees newly hired.[3] The dispute came to a head on January 28 when the nine employees confronted management, Dan Hand, president, and Hal Lee, general manager. (Hand and Lee are stipulated to be supervisors within the meaning of the Act.) Hand and Lee suggested to the group that they select a representative to speak for them. The group selected Joe Hill. Hill told Hand and Lee that the group of nine employees were not going to work that day and would not come back to work until they got more money. Hand and Lee explained to Hill that recent raises in the last 45 days were all the employees could expect at present. Hand told Hill specifically that there would not be any pay increases at this time, but they could have their jobs at the same rate of pay. Whether the group made their intentions, with regard to returning to work, clear or not, Lee and Hand told them, "If we don't hear from you, if you don't report to work in the morning, we have to assume that you've quit." The group then left the premises.

Later that day Lee informed the group's foreman, Musgrove, of the situation. Lee testified, "I told him the people were not coming back to work and that we had told them they could have their jobs back, and to go ahead and hire some people if they [the group of nine] didn't come back to work on the morning of January 29." Several laborers and a roofer were hired in the next few days prior to any further contact with the nine employees.

On February 3, Quarles and Appling telephoned Hand asking if they could have their jobs back. Hand told Quarles and Appling to come in the next day (February 4) and he would talk to them about it. Quarles and Appling did go to the office on February 4. Hand met them and invited them in out of the cold and suggested they wait for Lee to arrive. Lee did arrive and spoke to Quarles and Appling. Lee stated that he told both Quarles and Appling that they had been replaced by new hires, but did not mention any other replacements. Lee did acknowledge, however, that as far as he was concerned neither Quarles nor Appling nor any other of the nine employees had a job at Seyforth at this time. Lee denied that he told any of the nine employees at any time that they were fired. Quarles and Appling confirmed that Lee mentioned hiring some new employees and replacing both Quarles and Appling several days before, but added that Lee told them point blank, "You are fired, so get the whole group together so I can tell them all, face to face." Quarles and Appling left the office and went to Joe Hill's house where the entire group was assembled. Quarles and Appling reported to the group that Lee had said the Company hired new employees to replace them and that the group was fired. Also, the group was told of Lee's request that all report to the office February 5.[4]

On the morning of February 5 the group of nine arrived at the office. Lee was not in yet, so Hand told Rolley to come into the office alone as the group's spokesman. Rolley told Hand that the employees had talked it over and all wanted to return to work. Hand told Rolley that he had to hire some people and did not know who he could put back to work immediately. Hand said he would talk with Lee to ascertain just who had been hired and where they were placed, and then decide about putting some of the nine employees back to work. He told Rolley to tell the group to call back that afternoon at 3:30. Rolley did not dispute the substance of Hand's statement, but he did deny that Hand mentioned newly hired employees. Rolley stated that he told the group what Hand had said; and, while they were assembled, Lee appeared and asked Rolley if he told the men what Hand said about calling in later. When Rolley responded that he had informed the group, Lee queried, "What y'all waiting on?" Rolley recalled that Lee was asked if his previous statement applied to the whole crew. Lee said, "Yes, we're going to hire new men." Of the entire group, only Appling called the Company at 3:30 and spoke to Hand. Hand said Appling was drunk and was told he had been replaced, ending the conversation.

Several of the witnesses recalled different phraseology used by Hand and Lee, but, except for Hand's and Lee's denial that the group were told they were fired, there is little dispute on the facts.

As is frequently the case, I find that I cannot totally credit any witness. I was not unfavorably impressed by any witness' demeanor, but the inability of any witness to recall the events with any degree of certainty left me with doubts I can only resolve with probabilities. Both Hand's and Lee's state of mind and expressed opinions evince intent which in turn helps explain the employees' understanding of certain actions by Hand and Lee.

That the nine employees represented by Joe Hill on January 28 thought they were unemployed is clearly borne out by the record testimony. Lee thought their employment had ceased on January 28, and Quarles and Appling on February 3 telephoned to question whether they were still employed. Each event that transpired thereafter was bottomed upon the entire crew's unemployed status without regard for the effect of hiring several new employees. Hand, on February 5, had told the entire crew to call back to talk about getting their jobs back. Lee's affirmation of Hand's directive clearly left the choice of returning to each individual employee rather than dictating selection on the basis of which employee had been previously replaced. Further, Respondent's offer of reinstatement to the entire crew rather than a selected few tends to negate a striker replacement.[5] Thus, the entire group of nine employees were without an employer as of January 28. Respondent's statement to the assembled employees on January 28 left virtually no room for doubt. A quit separates the employment bond

[3] Charlie Appling, laborer; Anthony Boddie, roofer; Charlie Burrell, laborer; Joe Hill, roofer; Andrew Long, laborer; Clarence Quarles, kettleman; John Rolley, roofer; Carl Stewart, roofer; and Reginald Townes, roofer.

[4] Joe Hill's testimony of the meeting was too confused to be helpful and for the most part was contradictory of the other witnesses. I have, therefore, relied on the testimony of the other witnesses of both parties.

[5] Albeit the offer is not controlling of the discharge issue, it is a factor probative of striker replacement, particularly where the permanency of replacement may be questioned.

as surely as any involuntary termination. An assumed quit, as we have here, does no less.

It is undisputed that the nine employees began a protected concerted work stoppage on January 28. Though disputed as a matter of law, it is not subject to question as fact that the employees' employment status was terminated as a direct result of their work stoppage and that future employment rights were both misstated and misapplied. Striking employees, by law, maintain important employment rights and are insulated from discharge for engaging in a strike. Any misstatement or misapplication of such rights communicated to the striking employees has a coercive impact on employee participation and is an impermissible threat to the right of employees to engage in protected concerted activities. The communication in the instant case unequivocally impressed upon the strikers the loss of their status as employees as a direct result of their strike. I therefore conclude and find that the statement made to the assembled employees on January 28 by Hand and Lee, to wit: "If you don't report to work in the morning, we have to assume that you've quit," is a threat of discharge and an actual discharge, bottomed upon the employees' striking activity and each independently violates Section 8(a)(1) of the Act. Respondent shall be ordered to remedy the violations including backpay. See *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

With regard to the communications of February 4 and 5 wherein Lee was alleged to have stated that the group of nine were fired, I credit Lee's denials that any employee was fired. Lee sincerely made his best attempt to recall the incidents as they happened. His testimony was not guarded nor did it appear designed to support any preconceived positions. On the other hand, the testimony of Hill, Quarles, Rolley, and Appling on this particular point appeared confused and unduly influenced by conclusions and speculations. As my findings show, there is no room for doubt that the nine employees understood that they were terminated as of January 28, a time prior to the alleged statements. The record, as a whole, clearly shows that the conduct of both parties after January 28 was based on a prior separation from employment of the nine employees. The weight of the evidence is contra to alleged statements of Lee which themselves are inconsistent with the undisputed conduct that took place contemporaneously with the alleged statements.

The offer to return made by Rolley on behalf of all nine employees on February 5, were it not for the previous discharge, would be the basis for an additional violation by Respondent's refusal to immediately return the striking employees to work. There is no evidence to support that the striking employees or any number of them were actually replaced. Indeed, Hand's statement to the employees, confirmed by Lee, was simply that he did not know who, if any, had been replaced, so all employees were to call in later. Lee's previous statement of hiring new employees to replace the strikers is no more certain than Hand's. In the final analysis only Appling was told he was replaced upon making application and whether he was is open to question.[6] Cf. *Hilton International Co., d/b/a San Jeronimo Hilton Hotel*, 187 NLRB 947 (1971).

Respondent contends that its offer of reinstatement on February 9 is a litigation tactic and therefore not germane to the issues herein. The General Counsel argues that the substance of the offer is relevant and material to the factual issues to be proved in this proceeding. My conclusions are somewhere between the opposing views. The offer was made and is exhibited in the record for its substance; however, as evidence of Respondent's intent in prior conduct I find it insubstantial. I do consider Respondent's offer relevant to any remedy that may be ordered and in that regard I conclude and find that Appling, contrary to his protestations, did have knowledge of the offer and elected not to act thereon. I find support for this conclusion in the undisputed facts that the group was close-knit, and they discussed the positions of themselves as well as the managers before and after each facet of the case unfolded and with some expertise and guidance from the Regional Office. It is therefore incredible to me that Appling would not be the least aware of the offer by Respondent.

Conclusions of Law

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

2. Respondent violated Section 8(a)(1) of the Act by its discharge of the nine employees engaged in protected concerted activity.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Charlie Appling, Anthony Boddie, Charlie Burrell, Joe Hill, Andrew Long, Clarence Quarles, John Rolley, Carl Stewart, and Reginald Townes, its employees, I find it necessary to order it to pay each discriminatee backpay computed on a quarterly basis and interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[7] from January 28, 1981, the date of discharge, to February 12, 1981, the date of Respondent's offer of reinstatement. Each discriminatee, having declined Respondent's offer of reinstatement, shall not have any restoration of his employment rights.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[6] Add to this the temporary nature of several so-called replacement employees and it is clear that the reinstatement rights of the striking employees would not be qualified.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[8]

The Respondent, Seyforth Roofing Company of Alabama, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activity for their mutual aid or protection.

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

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

(a) Make the following employees whole for their loss of earnings in the manner set forth in the remedy section of this Decision:

Charlie Appling	Clarence Quarles
Anthony Boddie	John Rolley
Charlie Burrell	Carl Stewart
Joe Hill	Reginald Townes
Andrew Long	

(b) Preserve and, upon request, make available to the National Labor Relations 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 effectuate the backpay provisions of this Order.

(c) Post at its facility in Birmingham, Alabama, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that 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."