

Nolan Systems, Inc. and National Production Workers Union Local 707 of Denver, Case 27-CA-7643

28 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon unfair labor practice charges filed on 3 December 1981 by National Production Workers Union Local 707 of Denver, herein called the Union, the General Counsel of the National Labor Relations Board by the Regional Director for Region 27 issued 15 January 1982 a complaint against Nolan System, Inc., herein called the Respondent, alleging that the Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the complaint and notice of hearing were served on the Respondent. Thereafter, the Respondent filed a timely answer denying the commission of any unfair labor practices and asserting certain affirmative defenses.

On 11 September 1982 the parties jointly moved to transfer the instant proceeding to the Board without benefit of a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On 3 December 1982 the Executive Secretary of the Board, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

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

Upon the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New York corporation engaged in the manufacture and sale of material handling equipment for the newspaper industry at its facility located at 11250 East 40th Avenue, Denver, Colorado. The Respondent, in the course and conduct of its business operations, annually sells and ships goods and material valued in excess of \$50,000 directly to points and places outside the State of Colorado. Accordingly, we find that the Respondent is an employer engaged in commerce

within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The National Production Workers Union Local 707 of Denver is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Issue

The issue presented is whether the Respondent's failure to reinstate former economic striker Michael James after the termination of his permanent strike replacement violated Section 8(a)(3) and (1) of the Act.

B. Facts

In January 1981,¹ Ken Krov, who worked for the Respondent as a metal finisher, was hospitalized. Krov was given a leave of absence and his position was permanently filled 11 May by Michael James. On 27 May Krov submitted to the Respondent a medical release from his doctor which stated that Krov was well enough to return to a job other than metal finisher. Consequently, on 1 June Krov was assigned to the position of assembler "C." Because that job paid less than his former job as metal finisher, Krov obtained written assurance from Plant Superintendent John Rhine that he would be returned to the metal finisher job, health permitting, when that position became open for bid.

Certain of the Respondent's employees, including Michael James and Bill Maes, engaged in an economic strike against the Respondent from 11 to 19 August. During the strike, the Respondent hired Howard Ross as a permanent strike replacement to fill James' metal finisher position. On 19 August, all the strikers made unconditional offers to return to work, and the Respondent and the Union executed a strike settlement agreement establishing a seniority-based preferential hiring list for replaced strikers.

On 6 October, Ross was terminated for "excessive unexcused absences." When Krov heard that Ross was being terminated, he asked to be transferred back to the metal finisher job. After receiving a verbal clearance from Krov's doctor, the Respondent assigned him to the metal finisher job. The Respondent also gave written notice to the employees on the preferential hiring list that the assembler "C" job was open. Maes succeeded to that position on the basis of his seniority.

¹ All dates hereafter refer to 1981, unless otherwise indicated.

On 7 October, James filed a grievance regarding the Respondent's failure to rehire him to the metal finisher position. The Respondent denied the grievance in a letter to the Union dated 12 October which stated, in part that:

Based on the fact that this commitment was made to Ken Krov prior to the existence of the Strike Settlement Agreement and that this is a unique situation, the decision has been made to return Ken to his former job as Metal Finisher.

The Preferred Recall list will be used in all future instances, up to the expiration of such list, where there is an opening in a classification and an individual remains on the Preferred Recall List, who was in that classification at the time of the strike.

The Job Posting procedure will be used for all positions in classifications not represented on the Preferred Recall List. Those individuals on the list will be afforded the opportunity to bid on these jobs by seniority.

Subsequently, on 13 October, Krov started work as a metal finisher. On 1 February 1982, after a complaint had been filed in the instant proceeding, James assumed the metal finisher position and Krov returned to the position of assembler "C."²

C. Contention of the Parties

The General Counsel contends that under the principles set forth in *Laidlaw Corp.*, 171 NLRB 1366 (1968), James was entitled to the metal finisher job when his strike replacement Ross was terminated and that, therefore, the Respondent's prior commitment to Krov was irrelevant. Accordingly, the General Counsel maintains that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate James to the metal finisher position.

The Respondent makes four arguments in its defense. First, it contends that its prior commitment to transfer Krov to the metal finisher job meant there was no vacancy for James to claim when Ross was discharged. Second, assuming that Ross' termination did create a vacancy, the Respondent maintains that Krov was also entitled to the job on the basis of seniority. Third, the Respondent contends that it satisfied the requirements of *Laidlaw* when it assigned former striker Maes to the assembler "C" position after it had discharged striker replacement Ross. Finally, it asserts that its promise to Krov constituted a legitimate and substantial business reason for not recalling James.

² The parties stipulated that no inference adverse to the Respondent should be drawn from this fact.

D. Discussions of Law and Conclusions

It is well established that economic strikers have the right to be treated equally with nonstrikers. The Supreme Court in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967), stated that

. . . the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." . . . 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 justification." [*NLRB v. Great Dane Trailers*, 388 U.S. at 34.]

In *Laidlaw Corp.*, supra, the Board relied on the principles set forth in *Fleetwood Trailer* and held that economic strikers who unconditionally apply for reinstatement when their positions are filled by permanent replacements are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer reinstatement was for legitimate and substantial business reasons.

All parties here agree that James had made an unconditional offer to return to work and was entitled to the reinstatement rights of a former economic striker under *Fleetwood Trailer* and *Laidlaw*. The question presented is whether James had a right superior to Krov's under the Act to succeed Ross in his metal finisher job. We find that James did have such a right.

Initially, we reject the Respondent's contention that no vacancy existed to trigger reinstatement rights of strikers when Krov replaced Ross. The departure of strike replacement Ross did not terminate the existence of his or any other job position. Clearly, a job vacancy had been created in James' former position. Krov's transfer to that position—after a total absence of 9 months, two intervening tenancies (by James and Ross), and his tenure as assembler "C"—is substantially different from those situations in which the Board has found that short-term, nondiscriminatory personnel shifts did not create vacancies which an employer had to offer unreinstated strikers.³

³ See *Randall, Burhart/Randall*, 257 NLRB 1, 5 (1981) (temporary interdepartmental transfers of similarly classified employees and transfers of employees to another classification for 10 days or less); *Bancroft Cap Co.*, 245 NLRB 547 (1979) (recall of employees laid off for 2-7 days due to materials shortages).

Because the departure of strike replacement Ross created a vacancy, the Respondent was required to prefer reinstated striker James for reinstatement to his former job rather than transfer Krov from another job on the payroll, unless the Respondent could show "substantial and legitimate business reasons" for transferring Krov. *Randall, Burhart/Randall*, supra at 5-6; *MCC Pacific Valves*, 244 NLRB 931 (1979). In this regard, the Respondent's reinstatement of former striker Maes to the lower-paying assembler "C" position vacated by Krov does not relieve it of the burden to justify the failure to reinstate James. The Board has held that an employer is generally obligated to offer the initial job vacancy created by the departure of a strike replacement to an unreinstated, qualified striker. *MCC Pacific Valves*, supra at 933-934; *Crossroads Chevrolet*, 233 NLRB 728 (1977). This rule is a necessary corollary of *Laidlaw*. Requiring proof of a legitimate and substantial business justification for any exception to this rule deters employer practices which might inherently discriminate against former economic strikers who seek recall to their jobs in higher pay strata.

The Respondent's brief claims two legitimate and substantial business justifications for transferring Krov rather than reinstating James to the metal finisher vacancy: (1) Krov's seniority; (2) the written commitment made by the Respondent to Krov when he returned to work after his convalescence. Assuming that Krov's seniority would entitle him instead of James to transfer to a metal finisher vacancy if both employees sought transfer in a competitive bidding situation, we find such a fact irrelevant because the Respondent, itself, has effectively admitted the inapplicability of seniority to the situation at issue. As previously indicated, the Respondent's written denial of the Union's grievance about Krov's transfer characterized his situation as "unique," relied exclusively on the written commitment made to him, and clearly expressed the Respondent's understanding that the strikers' preferred recall list took precedence over the seniority-based job posting procedure for all job vacancies in classifications represented on the recall list. Consequently, we find that seniority considerations could not have been a legitimate and substantial justification for Krov's transfer.

We also find that Respondent's written commitment to Krov was not sufficient business justification for its failure to reinstate James to his former job.⁴ The Respondent does not contend that any

overriding business considerations compelled Krov's transfer. Its commitment to Krov appears to have been a purely personal pledge to return Krov to the higher paying job which illness had forced him to relinquish. Acknowledging the legitimacy of the Respondent's written commitment to Krov, we find that it was not so substantial as to outweigh the statutory commitment imposed by *Laidlaw* on the Respondent to reinstate James to the same job which he held more recently than Krov. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate James after his strike replacement, Ross, was discharged.

CONCLUSIONS OF LAW

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

2. The National Production Workers Union Local 707 of Denver is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to reinstate Michael James to his former job after he had unconditionally offered to return to work, and when said job was available, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

The parties agree that a reinstatement order is not necessary here because the Respondent placed James in the metal finisher position and transferred Krov on 1 February 1982. We shall, however, order the Respondent to make James whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment of a sum of money equal to that which he would have earned from 7 October 1981, when the Respondent unlawfully refused to reinstate him, to 1 February 1982, less his net earnings, if any, during such period. Backpay will be computed in the manner prescribed in *F. W. Woolworth Co.*, 90

⁴ In *Overhead Door Corp. (Todco Division)*, 261 NLRB 657, 664 (1982), the Board adopted a judge's decision which correctly stated:

A lawful transfer situation normally arises when there is a business downturn which would allow the company to continue its oper-

ations with a reduced work force. It can also happen when, as here, an entire function, such as policing the plant premises with specially designated employees, has been discontinued.

See also *Randall, Burhart/Randall*, supra at 5-6.

NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁵

ORDER

The National Labor Relations Board orders that the Respondent, Nolan Systems, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate or otherwise discriminating against any employee for having engaged in a lawful strike or other concerted activity protected under the provisions of Section 7 of the National Labor Relations Act, as amended.

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

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

(a) Make Michael James whole for any loss of earnings he may have suffered by reason of its failure to reinstate him to his former job, reimbursing him in the manner set forth in the section of this decision entitled "The Remedy."

(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 Denver, Colorado, place of business copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediate-

ly 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 Respondent 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate or otherwise discriminate against any employee because he engaged in the protected activity of engaging in a strike.

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

WE WILL make Michael James whole for any earnings lost as a result of our unlawful failure to reinstate him to his former job, plus interest.

NOLAN SYSTEMS, INC.

⁵ See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁶ 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."