

Butterworth-Manning-Ashmore Mortuary and Public, Professional and Office-Clerical Employees and Drivers Local Union No. 763, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 19-CA-13765

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN, HUNTER, AND DENNIS

On 5 November 1982 Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in reply to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate sympathy striker Autumn Fisher on her unconditional offer to return to work 15 July 1981.¹ We find merit in the Respondent's exceptions, and we shall dismiss the complaint in its entirety.

The Respondent provides mortuary, funeral, and cremation services, and for over 20 years the Union has represented a unit of the Respondent's office clericals and a unit of the Respondent's embalmers.² During that time the Union negotiated separate collective-bargaining agreements for the two units, and the applicable agreements were effective from 1 April 1978 until 31 March 1981. As stipulated by the parties, article VIII of the office clerical contract has remained unchanged for over 20 years and provides as follows:

PICKET LINES

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line at the place of business of any employer party to this Agreement.

The judge found that historically the parties completed negotiations on the embalmers contract before commencing negotiations on the office clerical contract. On 15 January the Union notified the Respondent of its desire to begin negotiations. The

parties were unable to agree on the embalmers contract by the 1 April expiration date, and the embalmers went on strike. On 15 April they established a picket line at the Respondent's facility.³

The four office clerical employees, including bookkeeper Autumn Fisher, refused to cross the picket line until the strike ended 14 July. During the strike the Respondent hired several temporary bookkeepers, but ultimately determined that it needed to hire a permanent bookkeeper in order to maintain efficient business operations. On 4 June the Respondent asked Fisher to return to work and told her that if she did not do so the Respondent would hire a permanent replacement. When Fisher declined to return, the Respondent hired an experienced bookkeeper as a permanent replacement. The judge found that the replacement employee would not have accepted employment on a temporary basis.

The strike ended 14 July when the Respondent and the Union reached agreement on a new embalmers contract. On 15 July Fisher offered to return to her position as a bookkeeper, but the Respondent informed her that she had been permanently replaced. The Respondent had not rehired Fisher as of the day of the hearing, and its position is that Fisher retains preferential hiring rights.

The Board has long recognized that an employee who participates in a sympathy strike engages in conduct which is protected by the Act.⁴ Sympathy strikers are "akin to economic strikers" and may not be discharged because of their protected activity, but an employer is entitled to replace a sympathy striker permanently in order to continue the efficient operation of its business.⁵ The judge found that Fisher assumed the status of a sympathy striker by refusing to cross the embalmers' picket line, and he recognized that ordinarily the Respondent could have hired another employee as a permanent replacement. However, finding that he was bound by the Board's decision in *Torrington Construction Co.*, supra, the judge found that article VIII of the office clerical contract operated as a waiver of the Respondent's right permanently to replace sympathy strikers. He therefore concluded that the Respondent's refusal to reinstate Fisher on her unconditional request violated Section 8(a)(3) and (1).

³ The judge found that the parties were bound by their stipulation that the embalmers contract expired 31 March. He therefore found that the contract's no-strike clause was no longer in effect, and that the embalmers' strike was a lawful primary economic strike. The judge further found that during the strike the Respondent was obligated to continue to apply art. VIII of the office clerical contract, even assuming that the contract expired 31 March.

⁴ *Torrington Construction Co.*, 235 NLRB 1540, 1541 (1978). *Redwing Carriers*, 137 NLRB 1545 (1962).

⁵ *Torrington Construction Co.*, supra at 1541.

¹ Unless otherwise specified, all dates herein refer to 1981.

² The Respondent employed two embalmers, four office clericals, and four unrepresented salaried employees.

Contrary to the judge, we find that article VIII does not constitute such a waiver.⁶

In *Torrington*, supra at 1540, the employer had a contract to supply concrete to a construction site, and it discharged two employees who refused to cross a picket line to deliver the concrete. The Board found that the employer acted unlawfully because it discharged the employees and did not simply replace them. The Board further found that the employer had waived its right to *replace* the sympathy strikers by agreeing to the following contractual provision, which is virtually identical, with respect to the issue before us here, to article VIII of the clerical agreement:

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to work behind any primary picket line, including the primary picket line of Unions [sic] party to this Agreement, and including primary picket lines at the Employer's place of business.

We note at the outset that *Torrington* is factually distinguishable, since the employer in that case discharged the sympathy strikers while the Respondent merely hired a permanent replacement for Fisher. In any event, we have reconsidered our decision in *Torrington* and we have decided to overrule it to the extent that it holds that the above contractual language constitutes a waiver of an employer's right permanently to replace sympathy strikers.⁷

The Supreme Court recently affirmed the principle that a waiver of a statutory right must be clear and unmistakable.⁸ The specific circumstances of each case will determine whether a statutory right has been waived.⁹ In both this case and in *Torrington* we have carefully considered, inter alia, whether a finding of waiver is warranted from express contractual language or from extrinsic evidence bearing on any contractual language which may be ambiguous. We conclude that a finding of waiver is

⁶ Because we are overruling *Torrington Construction Co.*, supra, and because we are finding that the language contained in art. VIII of the office clericals contract did not operate as a waiver of the Respondent's right to permanently replace sympathy strikers, we find that it is unnecessary to consider whether the clerical contract had expired and, if that contract had expired, whether the Respondent was obligated to continue to adhere to the provision of art. VIII.

⁷ We leave undisturbed the remaining principles enunciated in *Torrington*, as well as the Board's finding that the sympathy strikers were unlawfully discharged.

⁸ See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Member Dennis finds it unnecessary to consider whether an employer's right to replace strikers is a "statutory" right. She finds that it is a judicially recognized right that is not waived here by the language in art. VIII.

⁹ *Ibid.*

not warranted. We note that article VIII and the contractual provision in *Torrington* expressly prohibit only the discharge and discipline of sympathy strikers, and that neither provision specifically refers to "permanent replacement." The provisions therefore contain no ambiguity and do not specifically waive an employer's right to hire permanent replacements. Even assuming that the provisions contain some ambiguity, there was no extrinsic evidence in *Torrington*, and there is none here, to shed light on what the parties intended when the provisions were agreed upon.¹⁰ Consequently, there is no reason to infer that the phrase "discharge or disciplinary action," as it appears in the *Torrington* provision and in article VIII, means anything other than what it expressly states. On the contrary, we view the language in both contractual provisions as merely an affirmation of the statutory right of employees to engage in sympathy strikes.

In view of the foregoing, we find that the Respondent did not waive its right permanently to replace sympathy strikers, and we find that the Respondent did not act unlawfully in refusing to reinstate Fisher on her unconditional offer to return to work. Accordingly, we shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not contractually waive its right permanently to replace sympathy strikers, and it did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate Autumn Fisher on her unconditional offer to return to work.

ORDER

The complaint is dismissed.

¹⁰ As the judge noted, the parties stipulated that they were unaware of the application of this language in the past to any "analogous situation to that raised in the complaint."

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. This case was tried before me in Seattle, Washington, on September 10, 1982, pursuant to a complaint and notice of hearing issued by the Acting Regional Director for Region 19 of the National Labor Relations Board on April 29, 1982, based on a charge filed by Public, Professional and Office-Clerical Employees and Drivers Local

Union No. 763, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Charging Party or the Union) against Butterworth-Manning-Ashmore Mortuary (Respondent) on July 27, 1981.

The complaint as amended at the hearing alleges that Respondent has failed and refused to reinstate employee Autumn Fisher on her unconditional offer to return to her former position of employment on July 15, 1981, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent admits it has failed and refused to rehire employee Fisher but asserts it has done so because she had been permanently replaced before her offer to return to work and no vacancy has occurred since her replacement. Respondent therefore contends, *inter alia*, that its conduct has not violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence and stipulations, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs. On the entire record herein, including briefs of all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Washington state corporation with a business location in Seattle, Washington, where it is engaged in the business of providing mortuary, funeral, and cremation services. Respondent, during the past 12 months, a representative period, in the course of its business operations, had gross sales of goods and services of a value in excess of \$500,000. During that same period it purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials of a value in excess of \$45,000 directly from sources outside the State or from suppliers within the State who in turn obtained such goods and materials directly from sources outside the State.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

Respondent has recognized and bargained with the Union for over 20 years as the collective-bargaining representative of employees in two units: an office clerical unit and an embalmers unit. Over the years a series of separate contracts for each unit have been negotiated. Each office clerical agreement, again for over 20 years, has contained the following language, including the 1978-1981 agreement where it appears as article VIII:

PICKET LINES

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary

action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line at the place or places of business of any employer party to this Agreement.

The parties stipulated that they were unaware of the application of this language in the past to any "analogous situation to that raised in the complaint."

The 1978-1981 office clerical agreement contained the following language as article X:

Duration

This agreement shall be effective April 1, 1978 and shall remain in effect until March 31, 1981 and thereafter until terminated by either party serving written notice on the other party at least sixty (60) days in advance of the intended termination date. This Agreement may be amended at any time by mutual desire of the parties executed in writing.

The 1978-1981 office clerical agreement contained neither a no-strike clause nor a grievance and arbitration clause.

The 1978-1981 embalmers agreement contained the following language as article XXIV:

Term of Agreement

24.1—This Agreement shall become effective the 1st day of April, 1978 and shall continue in full force and effect until and including March 31, 1981.

24.2—This Agreement shall thereafter continue in full force and effect from year to year thereafter unless either party notifies the other in writing not less than sixty (60) days prior to the date of expiration of a desire to amend or cancel the Agreement.

B. Events in 1981

On January 15, 1981, the Union sent Respondent essentially identical letters separately addressing the office clerical and embalmers contracts. Each letter contained the following language:

In accordance with the current collective-bargaining agreement . . . (which expires March 31, 1981) and the requirements of the Labor Management Relations Act, as amended, you are hereby notified that we wish to amend the present Agreement.

Copies of this letter are being forwarded to the United States Federal Mediation and Conciliation Service and [a state agency] so that they may be advised of our intention to amend the existing Agreement.

We are ready to meet with you at our earliest convenience for the purpose of negotiating an amended Agreement. Please advise us of the earliest date that a meeting can be held.

Consistent with the letters, the Union simultaneously filed appropriate forms with the Federal Mediation and Conciliation Service with respect to each contract.

Historically, the parties have negotiated the embalmers' contract first and then the office clerical agreement. When the agreement covering the embalmers expired on April 1, 1981, the Union took strike action in support of its embalmers' contract demands against certain employers in the metropolitan Seattle funeral home industry and on April 15, 1981, extended its strike action to Respondent by establishing an embalmers' picket line at the facility.

At the commencement of the strike, Respondent employed 10 employees: 2 embalmers in the embalmers unit, 4 office clerical employees in the office clerical unit, and 4 salaried employees in neither unit. On April 15, 1981, the two embalmers struck. The four office clerical employees, i.e., a secretary, a receptionist, an interpreter, and a bookkeeper, Autumn Fisher, refused to cross the embalmers' picket line throughout the strike.¹ The strike extended until about July 14, 1981.

During the strike Respondent hired several temporary office clerical employees including three temporary bookkeepers. Each temporary bookkeeper voluntarily left his or her employment after a short period of time and Respondent ultimately determined it was necessary to hire a permanent bookkeeper to efficiently run its business. About June 4, 1981, an admitted agent of Respondent contacted Fisher by telephone and (1) asked her to return to work in her bookkeeper capacity and (2) told her if she did not it would be necessary to hire a permanent replacement to fill her position. Fisher declined to return to work behind the embalmers' picket line. On June 11, 1981, Respondent hired an experienced bookkeeper as a permanent replacement for Fisher. The replacement employee would not have accepted employment on a temporary basis.

On July 14, 1981, the Union and certain of the metropolitan Seattle funeral home industry employers, including Respondent, reached agreement on the terms of a new embalmers' contract. The agreement was signed the following day and the strike ended. About July 15, 1981, Autumn Fisher contacted Respondent and offered to return to her position as a bookkeeper. Respondent's admitted agent informed her that she had been permanently replaced. Respondent had not reemployed Fisher as of the day of the hearing. Respondent's position is that Fisher retains preferential hiring rights but that as of the time of its posthearing brief no bookkeeper position had become available.

C. Positions of the Parties

The General Counsel asserts his theory of a violation on brief in spare terms. The General Counsel contends that during the strike Fisher was a sympathy striker and concedes that a sympathy striker may be permanently replaced in normal circumstances. The General Counsel

¹ The assertions in the Union's brief that four out of approximately five employees in the office clerical unit worked behind the picket line and that only one employee honored the line is rejected as inconsistent with the stipulation of fact in which union counsel joined.

argues however that Respondent contractually waived any right to replace Fisher by adopting article VIII of the 1978-1981 office clerical agreement.

In addition to a procedural complaint concerning the delay of the General Counsel in issuing the complaint herein, Respondent contests virtually each proposition necessary to the General Counsel's theory of the case. First, Respondent disputes the notion that Fisher was a sympathy striker rather than an economic striker. Second, Respondent contends the 1978-1981 office clerical contract is irrelevant to the instant case because it was terminated before the strike by action of the Union. The Union contests this claim of Respondent arguing rather that the office clerical contract was in force and effect at relevant times. Third, Respondent argues, even if the contract was in effect at relevant times, article VIII did not increase Fisher's rights under the Act or reduce Respondent's right to permanently replace her because: (1) she was not discharged or disciplined and thus did not fall under the specific terms of the article, and (2) article VIII does not as a matter of law reduce Respondent's rights under the Act to permanently replace a sympathy striker for business reasons.

D. Analysis and Conclusions

1. Respondent's claim that the General Counsel is guilty of laches

Respondent's ninth affirmative defense in its answer to the complaint alleges that the General Counsel is guilty of laches by issuing the complaint more than 9 months after the filing of the charge in the case. The charge was filed on July 27, 1981, the complaint issued on April 29, 1982—over 9 months after the charge was filed. The General Counsel offered no evidence or argument on the issue of delay in the complaint's issuance. The parties do not address the issue on brief.

In *Ventura Coastal Corp.*, 264 NLRB 291 (1982), the Board approved the decision of an administrative law judge who was presented with a defense similar to that asserted here. There the delay between charge and complaint exceeded 18 months, a period the judge found "truly extraordinary." Despite this delay, the judge declined to dismiss the complaint or otherwise adversely affect the General Counsel's case on grounds of delay or laches noting there was no affirmative showing by respondent that it had been substantially prejudiced by the delay, citing *NLRB v. J. H. Rutter-Rex Co.*, 396 U.S. 258 (1969). I view that case as controlling. Accordingly, I shall not dismiss the complaint or otherwise limit the General Counsel's case because of the unexplained delay in issuing the complaint.

2. Fisher's status as an economic or sympathetic striker

An employee who withholds her services from her employer in order to obtain better terms and conditions of employment for herself and others in her bargaining unit is an economic striker under Board law. An employee who withholds her services from her employer in whole or in part, not in her own immediate economic in-

terest but rather out of sympathy with or in order to assist or give mutual aid and support to another group of employees who are engaged in an economic strike, is a sympathy striker under Board law. This distinction is maintained even if a single employer employs both one group of employees engaged in an economic strike and a second group engaged in a sympathy strike in support of the first group. So, too, the distinction is maintained even if the sympathy strikers, by giving their aid and support to the economic strikers, may directly or indirectly be furthering their own economic interests.²

There is no dispute that the April 15, 1981 strike against Respondent was undertaken by the embalmers in furtherance of their contract demands. There is no argument or evidence that bargaining had commenced regarding the office clerical contract. Rather, to the contrary, there was a tradition, apparently not varied in 1981, that office clerical unit contract bargaining did not commence until after the embalmer contract had been negotiated. Given these circumstances, I find that the office clerical unit employees, including Fisher, who honored the embalmers' picket line were acting as sympathy strikers within the meaning of both the Act and the office clerical contract's picket line language in article VIII. They were not economic strikers.

Respondent argues that, because the office clerical agreements have, at least since 1972, reflected the identical wage percentage increases, pension contributions, vacation benefits, and holidays of the earlier negotiated embalmer agreements, the office clerical employees have a historical and immediate stake in the outcome of the embalmers' strike and therefore should be considered in the "shoes" of an economic rather than a sympathy striker. As noted supra, it is not the existence of the possibility or likelihood of eventual personal benefit which determines whether a striker is engaged in sympathetic or economic action. Rather, the strikers' status turns entirely on the strikers' inclusion in the bargaining unit on strike. The dispute here was solely between the embalmers and the employers, including Respondent. Irrespective of their arguable common cause and the likelihood of gains resulting from a successful strike, Respondent's office clerical employees, including Fisher, were no more than sympathy strikers during the 1981 embalmers' strike who apparently did no more than honor the embalmers' picket line at Respondent's facility.

3. The application of the 1978-1981 office clerical contract to the events in issue

Respondent argues virgorously that the Union's letters of January 15, 1981, acted to terminate both the embalmer and the office clerical contracts on March 31, 1981.

² Thus, for example, a group of craftsmen employed by one employer may honor a picket line of their own union against another employer put up in furtherance of a strike in support of increases in wages of the other employer's employees. Even if the sympathy strikers who honor the picket line against the other employer are likely or indeed certain to obtain ultimately the benefits the other employer's employees receive as a consequence of their successful strike, such as might result from a collective-bargaining agreement which adopts the wage rates of the other employer or as a result of a prevailing wage statute, the first employer's employees are sympathetic and not economic strikers.

Thus, argues Respondent, the office clerical contract was without force and effect to limit Respondent's rights to permanently replace and refuse to reinstate Fisher in July 1981. The Union argues that its January letters did not act to trigger the termination language of the contracts, but rather merely served as notification to Respondent of the Union's wish to amend, not terminate, the contract. Thus, argues the Union, both contracts continued in force and, therefore, the office clerical contract was valid and applicable to the Fisher situation herein.³

Both the Union and Respondent argue their position on this issue at length, although the General Counsel does not address the question. The Board has resolved similar issues of contract life in other contexts. See, e.g., *KCW Furniture Co.*, 257 NLRB 541 (1980). I am of the view however that a technical analysis and determination of whether or not the 1978-1981 office clerical contract had expired or remained in effect during May, June, and July 1981 is unnecessary to resolve to reach the main issue of this case.⁴ I reach this conclusion for the following reasons.

There is no dispute that at least until March 31, 1982, the office clerical contract was in effect. There is also no dispute that both the Union and Respondent deferred bargaining on new terms and conditions for Respondent's office clerical employees, consistent with their past practice, until after the embalmers' contract was agreed upon. Thus no office clerical unit bargaining took place until after Fisher sought to return to work in July 1981. Accordingly, all operative events regarding Fisher's replacement occurred before any office clerical unit bargaining occurred. Board decisions make it clear that an employer must continue to apply those contract terms and conditions of employment which set employee wage and benefit levels, even after the contract's expiration, until a new agreement or a bargaining impasse is reached. The mere passage of time without bargaining after the contract's expiration, even after notification of the other party of an intention to modify the agreement, does not create an exception to this rule. *Stone Boat Yard*, 264 NLRB 981 (1982). Like wages and fringe benefits, the rights and benefits of employees set forth in article VIII of the office clerical agreement could not be changed unilaterally by Respondent during the period in question. Thus, whether the contract had expired or was still in effect during May, June, and July 1981, Respond-

³ The Union addresses the joint stipulation of fact submitted by the parties which states that the embalmers' contract "expired on April 1, 1981," by asserting that it is "inaccurate." Respondent argues that, if the embalmers' contract was in effect during the strike, then the embalmers' strike was in violation of that contract's no-strike clause. Thus, argues Respondent, Fisher would obtain no protection under the Act for honoring the illegal picket line of the embalmers. The parties' arguments are novel but fly in the face of the stipulation which the parties cannot now modify. I find that the parties are bound by their stipulation. Thus, I find that the embalmers' contract expired on April 1, 1981. The embalmers' strike was a legal primary economic strike and its picket line was not illegal on this record.

⁴ Even given this determination, I would normally make alternative findings so as to obviate any need for a remand should reviewing authority differ with my finding. However, since there are no facts in dispute regarding this issue, the Board may resolve the issue on its own without a remand.

ent could not modify or reduce the rights employees enjoyed under article VIII in the circumstances then pertaining. Office clerical employees were entitled to the whatever benefits they received under article VIII both during its unchallenged life and after any argued expiration. Accordingly, since the contract's technical currency or expiration did not increase or decrease the rights office clerical employees enjoyed under article VIII during the relevant period, it is unnecessary to reason further on the issue or decide whether the contract had expired or been renewed. For purposes of this case, irrespective of the contract's currency, Fisher derived the same benefit, if any, from article VIII of the office clerical contract during the embalmers' strike that she would have derived had the events in question all occurred before March 31, 1982, i.e., during the undisputed life of the office clerical contract.⁵

4. The effect, if any, of article VIII on Respondent's rights to permanently replace Fisher

While there has been some evolution in the wording used to describe the rights and privileges of employers with respect to sympathy strikers in Board cases, there is no dispute, indeed the General Counsel specifically concedes on brief, that, were Fisher an economic striker during the period in which she withheld her services from Respondent, she would have been properly replaced by Respondent and her offer to return to work would have been properly refused. This is true because under this assumption she would have been, after June 11, 1981, a permanently replaced employee entitled only to retain her place on a preferential hire list. Nor is there a dispute that, as a sympathy striker, Fisher would have no greater rights than an economic striker unless she obtains greater rights from the language of article VIII of the office clerical contract. Thus, unless article VIII is held to remove or limit Respondent's normal right to permanently replace sympathy strikers, Respondent has not acted improperly in this matter and the General Counsel's case fails in its entirety. It is therefore appropriate to turn to article VIII and the parties' arguments with respect thereto.

The General Counsel's entire argument on this issue distills down to the citation of a single case. *Torrington Construction Co.*, 235 NLRB 1540 (1978). In *Torrington*, the employer operated a "redi-mix" concrete plant and employed delivery truckdrivers who were represented by a union. The employer and the union were bound to the following contract language:

Article XI

During the term of this agreement neither party shall permit or order any walkout, strike or lockout.

⁵ My analysis here deals with a contractually set benefit such as a wage rate for employees in an expired contract. Contract terms such as arbitration clauses or hiring hall provisions which regulate the employer's dealings with the union do not necessarily continue past the contract's expiration. There different questions obtain. See, e.g., *Nodle Bros. v. Bakery & Confectionary Workers Union*, 430 U.S. 243 (1973); *American Sink Top & Cabinet Co.*, 242 NLRB 408 (1979); *Digmor Equipment Co.*, 261 NLRB 1175 (1982).

Article XII

Section 1. Picket Lines

It shall not be a violation of this Agreement, and it shall not be a cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's place of business.

Two of the employer's drivers refused to cross a lawful picket line at a client's premises and were discharged. Both drivers were replaced on the same day. The following day the first driver was offered another position at a different location and was rehired. The second driver was never offered reemployment in any position. The Board found that as sympathy strikers honoring a legal picket line the drivers, like economic strikers, could not be discharged.

The Board went further, at 235 NLRB 1541-1542:

Furthermore, we find that Respondent's right under the *Redwing Carriers* [137 NLRB 1545 (1962)] doctrine to replace the sympathy strikers was clearly and unmistakably waived by the earlier quoted provision in the collective-bargaining contract. We are mindful of the fact that article XI of the applicable collective-bargaining agreement, which immediately precedes the article concerned herein, prohibits strikes. Unlike Respondent, however, and in agreement with the Administrative Law Judge, we do not view article XII as only a modification or offset of article XI. As stated by the Administrative Law Judge, article XII represents "in clear and unequivocal language" the recognition by all parties to the collective-bargaining agreement of the right of employees to respect a primary picket line. There exists no evidence to show that the picket line which the employees refused to cross was other than primary, despite the assertion to the contrary in the discharge letters. Accordingly, we find that Respondent could not validly raise the *Redwing Carriers* defense as a result of this waiver. And, as the employees' discharges effectively blunted their attempt to give allegiance to a union's lawful picket line and as the discharges were in derogation of their attempt to enforce their contractual rights, we further find that the discharges were in violation of Section 8(a)(1) and (3) of the Act.

We have found that even if Respondent was motivated in its actions by the desire to continue its business activities, it could not, in the attempt to establish a *Redwing Carriers* defense, lawfully discharge [the two drivers]. Moreover, notwithstanding any rights Respondent in the ordinary course of events may have been able to establish under *Redwing Carriers*, we have found that under the collective-bargaining contract those rights were waived by Respondent. Finally, we have also found that discharges of [the two drivers] effectively negated

their attempts to support a lawful picket line and to enforce their contract rights.

Administrative law judges are bound to follow Board precedent unless and until reversed by the Board or the Supreme Court. *Iowa Beef Packers*, 144 NLRB 615 (1965). The *Torrington* case has not been modified by the Board or the Court. The contract clause it interpreted and applied is essentially identical to the instant language of article VIII. In each case the rights of sympathy strikers are at issue. Thus, at least initially, it appears that the *Torrington* decision must be applied herein and perforce determines the outcome in the instant case. If this is so, the numerous arguments of the parties on brief regarding the strengths and weaknesses of the *Torrington* case are not properly to be considered by me but must be made to the Board. Only the Board or the Supreme Court may reverse or modify *Torrington* insofar as it binds administrative law judges.

Respondent argues strenuously however, and the General Counsel seems to concede on brief,⁶ that *Torrington's* language regarding an employer's contractual waiver of its right to replace, as opposed to discharge, sympathy strikers is obiter dictum and therefore should not be regarded by me as binding.

Dicta are judicial observations concerning a rule, principle, or application of law which are not essential to the resolution of the case at issue and therefore lack the force of an adjudication. Being nonessential they do not resolve the issue of the case and (1) may not involve full consideration of the points involved and (2) may not reflect the deliberate determination of the court. Were *Torrington* factually distinguishable from the instant case its holding would not necessarily be binding on the issue present here. For the reasons stated below, however, I reject the notion that *Torrington's* holdings concerning contractual waiver of an employer's right to replace sympathy strikers are obiter dicta or are in any other manner without binding force.

In *Torrington* the sympathy striking drivers were discharged and then replaced on the same day. The Board found that the employer could not properly discharge the drivers because as sympathy strikers they possessed equivalent rights to economic strikers citing *Newberry Energy Corp.*, 227 NLRB 436 (1976). Were the Board's holding, as the parties seem to argue, limited to consideration of the consequences of the employer's discharge and without consideration of the replacement of the drivers, the Board would have ordered reinstatement of the discharged employees to available positions after they made an unconditional offer to return to work.

⁶ The General Counsel on brief states:

Even though the above language of the Board in *Torrington* was not absolutely necessary for the holding in that case inasmuch as the case dealt with straight discharges . . .

And the General Counsel includes as part of his brief's conclusionary argument:

It is clear that even though the Board has not directly held that a clause in a collective-bargaining agreement such as Article [VIII] in the clerical agreement acts as a waiver of the employer's right to permanently replace sympathy strikers, nonetheless, it appears clear that it is what it would hold if confronted with such a factual situation as obtains here.

Such a remedy acknowledges the employer's right to replace sympathy striking employees even if their discharges were improper. The Board in *Torrington* however specifically held, as cited in full supra, that the contract constituted a waiver by the employer of its normal right to replace the sympathy striking drivers. Rather than give the more limited remedy in *Newberry*, the Board ordered immediate and full reinstatement of the drivers without any requirement that they first unconditionally offer to return to work. The Board issued this broader order even though it was clear that the employees had been replaced on the day of their discharge. This distinction between remedies convinces me that the Board's language in *Torrington* regarding the effect of the contract on the employer's rights to replace sympathy strikers was not mere dictum. Only by regarding the contract as a waiver of the employer's right to replace sympathy striking employees may the Board's order in *Torrington* that the drivers be immediately reinstated be rendered intelligible.⁷

A second basis advanced by Respondent in an attempt to discount the application of *Torrington* to the facts at issue herein is that *Torrington* involved a partial sympathy strike while the instant case involved a full-time withholding of services by the sympathy striker. This distinction in types of sympathy strikers was noted and discussed in another context in *Newberry Energy Corp.*, 227 NLRB 436 (1976). Respondent argues that there is a fundamental difference in holding that an employer has waived its right to replace an employee, such as a truck-driver who refuses to cross a picket line at a particular delivery location and who is refusing to perform only a portion of his assigned duties, and an employee such as Fisher here, who entirely withholds her services because of a picket line located at her place of employment. Respondent argues that *Torrington*, even if conclusive as to the former situation, should not apply to the latter. I find Respondent's argued distinctions to be without difference as to the holding in *Torrington*. Both the instant office clerical contract's article VIII and the contract language discussed in *Torrington* specifically waive the employer's right to replace both types of sympathy strikers, i.e., those who honor picket lines at locations away from their employer's premises and those who honor picket lines at their employer's premises. Thus the contracts in *Torrington* and the instant case apply equally to each situation. Further, the Board in describing the effect of the clause in *Torrington* made no distinction whatsoever between the two types of sympathy strikes, partial or total, or the location of the picket lines honored by the sympathy strikers. Given the Board's omission to make the distinctions noted, I feel bound to follow the *Torrington* decision and therefore reject all Respondent's arguments turning on such distinctions. Respondent's arguments in this regard must be made directly to the Board since they constitute in my view an attempt to obtain a modification or reversal of *Torrington*.

⁷ It should be remembered that the Board did not first order an employer to pay backpay even before the striker had offered unconditionally to return to work as a remedy for discharged strikers until the issuance of its 1979 decision in *Abilities & Goodwill*, 241 NLRB 27 (1979).

I have found *Torrington's* holdings, quoted supra, applicable to the instant case and binding on me. Accordingly, for the reasons noted by the Board in *Torrington*, I find the language of article VIII in the 1978-1981 office clerical agreement between the Union and Respondent acted to waive Respondent's right to permanently replace sympathy striking employee Fisher. Therefore, I find that by permanently replacing employee Fisher and failing and refusing to reinstate her to her former position on her unconditional offer to return to work, Respondent has acted in derogation of Fisher's attempts to enforce her contractual right to give allegiance to the Union's lawful picket line and has thereby violated Section 8(a)(1) and (3) of the Act.

5. Summary and conclusion

I have found that the complaint is properly before me for resolution on its merits despite the occurrence of an unexplained 9-month delay between the filing of the charge herein and the issuance of the complaint. I have found that during the period April 15 to July 15, 1981, Respondent's office clerical employee Autumn Fisher engaged in a sympathy strike and not an economic strike against Respondent. I have further found that Respondent for business reasons during Fisher's sympathy strike replaced her with a permanent employee and that, at the time of Fisher's unconditional offer to return to work, there was no position available for her unless a permanently hired replacement was discharged. I have found that Respondent has at all times since July 15, 1981, declined Fisher's offer to return to work and has informed Fisher that she is on a preferential rehire list and will receive the first position which becomes available.

Given these findings, I have determined that, were no issue of contract waiver at issue, Respondent acted permissibly under the Act. I therefore determined that the sole issue remaining for determination was what effect if any the 1978-1981 office clerical contract had on Respondent's right to permanently replace sympathy striker Fisher. Regarding the 1978-1981 office clerical contract, I found, despite any issue regarding whether the contract renewed or terminated, that article VIII retained vitality and currency with respect to Fisher's rights under article VIII in April, May, June, and July 1980. Further, with respect to the contract article VIII's influence and effect on Respondent's rights, I found I am bound by the result and rationale reached by the Board in *Torrington Construction Co.*, 235 NLRB 1540 (1978), a case which may not be effectively distinguished from the instant case. Accordingly, consistent with the holding and analysis in *Torrington*, I found that, by permanently replacing Fisher and by failing and refusing to reinstate her to her former position of employment on her unconditional offer to return to work, Respondent has acted in derogation of Fisher's attempt to enforce her contractual right to give allegiance to a union's lawful picket line, thereby violating Section 8(a)(1) and (3) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order that it cease and

desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found Respondent violated Section 8(a)(1) and (3) of the Act by permanently replacing sympathy striker Autumn Fisher and thereafter failing and refusing to reinstate Fisher on her unconditional offer to return to work, thereby acting in derogation of Fisher's attempt to enforce her contractual right to give allegiance to a union's lawful picket line, I shall order Respondent to offer employee Fisher immediate reinstatement to her former job, discharging if necessary any employee hired to replace her, or, if her former job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges. In addition I shall order Respondent to make Autumn Fisher whole for any loss of earnings she may have suffered as a result of Respondent's discrimination against her by failing and refusing to reinstate her on her unconditional offer to return to work on July 15, 1981. Backpay shall be computed in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in a manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977) (see also *Isis Plumbing Co.*, 138 NLRB 716 (1962)). Respondent shall further expunge from its files any reference to the permanent replacement of and refusal to reinstate employee Autumn Fisher and notify her in writing that this has been done. Cf. *Sterling Sugars*, 261 NLRB 472 (1982); see also *Airport Parking Management*, 264 NLRB 5 (1982).

In ordering the remedy noted supra, I specifically reject Respondent's argument that there is an element of improper retroactivity in such an order. First, the *Torrington* decision issued several weeks before the 1978-1981 office clerical agreement was signed by Respondent. Second, even were this case regarded as a revision or extension of Board policy regarding sympathy strikers, an argument I have specifically rejected, supra, the Board with court approval has held that as to strikers "the complete vindication of employee rights should take precedence over the employer's reliance on prior Board law." *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 107 (7th Cir. 1969), quoting the General Counsel's brief, cert. denied 397 U.S. 920 (1970), enfg. 171 NLRB 1366 (1968).

Based on the foregoing findings of fact and the record as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) and (3) of the Act by derogating office clerical employee Autumn Fisher's attempts to enforce her contractual right to give allegiance to a union's lawful picket line by permanently replacing Fisher and thereafter failing and refusing to reinstate Fisher upon her July 15, 1981 unconditional offer to return to work.
4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act. [Recommended Order omitted from publication.]