

The Erler Corporation and its alter ego American Tooling Technology, Inc. and Local Lodge PM 2846, Region 1 and 5 of the International Association of Machinists and Aerospace Workers AFL-CIO, CLC. Case 8-CA-24791

May 13, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge filed by the Union August 6, 1992, the General Counsel of the National Labor Relations Board issued a complaint against the Erler Corporation (Respondent Erler) and its alter ego, American Tooling Technology, Inc. (Respondent American), the Respondents, alleging that they have violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On October 1, 1992, the Respondents filed an answer neither admitting nor denying the allegations in the complaint. In the answer, John Erler, president of both Respondents, asserted, on behalf of Respondent American, that all of its manufacturing operations had ceased, although he still operated the business from his home. John Erler made no specific mention of Respondent Erler, and neither he nor anyone else separately filed an answer on behalf of Respondent Erler.

On December 18, 1992, the General Counsel wrote to Erler, advising him that the answer he had filed did not meet the requirements of the Board's Rules and Regulations governing the filing of an answer to a complaint. The letter encouraged John Erler to consult the Rules and to submit an amended answer on or before January 5, 1993. The Respondents did not file an amended answer.

On January 11, 1993, the General Counsel filed a Motion for Summary Judgment. On January 13, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

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

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service "all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board."

The answer did not specifically deny or explain the allegations in the complaint, but stated explicitly that Respondent American neither admitted nor denied the allegations in the complaint. The answer also referred to financial difficulties Respondent American was experiencing. Claims of financial difficulty, however, are insufficient to refute the violations alleged. See generally *Adirondack Foundries*, 286 NLRB 263 (1987); *Goldstein Co.*, 274 NLRB 682 (1985).¹ The answer did not respond to the complaint on behalf of Respondent Erler. Accordingly, the answer raises no material issues of fact or law warranting a hearing or rendering summary judgment inappropriate. *Auburn Die Co.*, 282 NLRB 1044 (1987).

Further, the undisputed allegations in the Motion for Summary Judgment disclose that the General Counsel, by a letter dated December 18, 1992, notified the Respondents that unless an answer was received by January 5, 1993,² a Motion for Summary Judgment would be filed.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Erler, an Ohio corporation, at its facility in Toledo, Ohio, has been engaged in the manufacture and nonretail sale of industrial die models, duplicating plastics, prototypes, and pattern equipment. During the 12-month period ending September 18, 1992, Respondent Erler annually purchased and received goods at its Toledo, Ohio facility valued in excess of \$50,000 directly from points outside the State of Ohio. During the 12-month period ending September 18, 1992, Respondent American annually performed services at its Toledo, Ohio facility valued in excess of \$50,000 outside the State of Ohio. We find that the Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On about June 23, 1992, Respondent American was established by Respondent Erler as a subordinate instrument to, and a disguised continuance of, Respondent Erler. Since about June 23, 1992, Respondent Erler and Respondent American have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared

¹ Also see Member Oviatt's position set forth in *Adirondack Construction Corp.*, 306 NLRB 704 fn. 2 (1992).

² Both the General Counsel's letter and the brief in support of the Motion for Summary Judgment state incorrectly that the answer must be received before "January 5, 1992." We find this inadvertent error to be harmless error.

common premises and facilities; have provided services for and made sales to each other; and have interchanged personnel with each other. We find that Respondent American and Respondent Erler constitute a single-integrated business enterprise and are alter egos and a single employer within the meaning of the Act.

A. The 8(a)(3) and (1) Violations

On about June 23, 1992, Respondent Erler terminated employees Larry Bolander, Jeff Daley, Norm Kwiatkowski, Fred B. Nelson, Walt Papke, Jim Perry, Mike Ruskinoff, Robert Strait, Gerald Xaver, and other employees whose identities are unknown because they were members of the Union and to discourage its employees' membership in the Union. We find that the Respondent has thereby interfered with, restrained, and coerced these employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

We also find that the Respondent has discriminated in regard to the hire or tenure or conditions of employment of these employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

B. The 8(a)(5) and (1) Violations

Since about 1953, the Union has been designated as the exclusive collective-bargaining representative of, and until June 23, 1992, was recognized by Respondent Erler as, the exclusive collective-bargaining representative of employees in the following appropriate unit:

All journeymen wood and metal pattern and modelmakers, plastic and plaster patternmakers and their apprentices, but excluding any other employees of the Respondent who do not work on patterns.

This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective June 1, 1989, to May 31, 1992, and by agreement of the parties was extended until May 31, 1993.

By virtue of Section 9(a) of the Act, the Union has been since 1953, and is now, the exclusive representative of unit employees employed by Respondent Erler and, from about June 23, 1992, has been the exclusive bargaining representative of employees employed by Respondent American.

About December 1991, Respondent Erler unilaterally discontinued payment of insurance premiums, payment to the pension fund, and payments to the health and welfare fund for unit employees.

On about June 23, 1992, Respondent Erler closed its facility, terminated all but three unit employees, and reopened its facility under the name American Tooling

Technology, Inc. Since June 23, 1992, the Respondent has ceased to apply the collective-bargaining agreement and/or the negotiated terms and conditions of employment. All the unilateral action described above relate to wages, hours, and other terms and conditions of employment of unit employees, and are therefore mandatory subjects for purposes of collective bargaining. The Respondent engaged in each of these unilateral actions without prior notice to the Union and without affording it an opportunity to bargain with respect to these actions and their effects.

On about June 23, 1992, Respondent Erler withdrew recognition from the Union as the exclusive collective-bargaining representative of the unit employees.

On about June 23, 1992, President John Erler, a supervisor and agent for Respondent Erler, bypassed the Union and dealt directly with unit employees by soliciting certain employees to enter into individual employment agreements regarding wages, hours, and other terms and conditions of employment.

On about June 23, the Union requested bargaining, and Respondent Erler refused to bargain with the Union concerning its decision to close the plant and its effects, mandatory subjects of bargaining.

On about June 29, 1992, the Union filed a grievance with Respondent Erler concerning the closing of Erler's facility, its termination of all but three employees, and its reopening under the name American Tooling Technology, Inc., and since that date the Union has requested and Respondent Erler has refused to process the grievance, a mandatory subject of bargaining, and Respondent Erler has thereby since that date refused to bargain collectively about the grievance.

Since about July 27, 1992, the Union has requested, and Respondent Erler has refused, the following information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees:

Various documents relating to the circumstances of the closure by Respondent Erler and commencement of operation by Respondent American.

Financial information pertaining to the closure by Respondent Erler and commencement of operations by Respondent American.

The identity of current employees and information pertaining to their wages, hours of work, employment status, fringe benefits, and other terms and conditions of employment.

Since about June 23, 1992, the Respondents have operated Respondent American as an alter ego and/or a disguised continuance of Respondent Erler in such a manner, or in order, to avoid bargaining with the Union and have thereby failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

We find that, by each of the acts described above, the Respondents have interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

We also find that, by each of the acts described above, the Respondents have failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By terminating employees Larry Bolander, Jeff Daley, Norm Kwiatkowski, Fred B. Nelson, Walt Papke, Jim Perry, Mike Ruskinoff, Robert Strait, Gerald Xaver, and other employees whose identities are unknown, the Respondents have 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 Act.

2. By unilaterally discontinuing payment of insurance premiums, payments to the pension fund, and payments to the health and welfare fund for unit employees; by closing a facility and/or plant, terminating all but three employees, and reopening the facility under another name without affording the Union an opportunity to bargain with respect to this conduct and its effects; by ceasing to apply the collective-bargaining agreement and/or negotiated terms and conditions of employment; by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit employees; by bypassing the Union and dealing directly with unit employees by soliciting certain of the employees to enter into individual employment agreements regarding wages, hours, and other terms and conditions of employment; by refusing the Union's request to process a grievance over the failure to bargain concerning the decision to close the plant and the effects of that decision; and by refusing the Union's request to furnish it with information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reopen the Erler facility and/or plant and to make whole the unit employees for any losses of earnings and other benefits they have suffered

as a result of the discriminatory and unilateral terminations and to make whole the employees for any losses of earnings or other benefits suffered as a result of those terminations. Interest on the backpay shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to offer the employees who have been terminated immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and to make them whole for any losses of earnings and other benefits they may have suffered as a result of the discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, supra. We shall order the Respondents to remove references to the discriminatory terminations from the affected employees' files and to notify the employees in writing that this has been done and that the terminations will not be used against them in any way.

We shall order the Respondents to rescind the individual employment agreements that were solicited by Respondent Erler.

We shall order the Respondents to make the employees and employee benefit funds whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), for any losses suffered as a result of the Respondents' failure to make required contributions to the Union's health and welfare and pension funds,³ with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴

We shall order the Respondent to recognize the Union, to give full force and effect to the existing collective-bargaining agreement, and, on request, to bargain with the Union concerning any decisions to close its facility and/or plant, termination of employees through the facility's closing, and reopening of the facility under a different name, about effects of those decisions, and about the grievance filed over those matters. We shall also order the Respondents to process the grievance.

We shall order the Respondents to furnish the information requested by the Union on July 27, 1992, that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining

³This shall include reimbursing employees for any contributions they may have made, with interest, for the maintenance of the funds after the Respondent ceased making required benefit fund payments. *Concord Metal*, 295 NLRB 912, 914 (1989).

⁴Any additional amounts necessary to make whole any funds established in the agreement will be determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

representative of the unit employees. Because of the closure of the Erler facility, we shall require that the Respondents both post and mail to employees the attached notice.

Nothing in our Order shall authorize or require the Respondents to rescind wages and benefit increases that have been conferred.

ORDER

The National Labor Relations Board orders that the Respondent, the Erler Corporation and its alter ego American Tooling Technology, Inc., Toledo, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees because they are members of the Union, to discourage employee membership in the Union, and without prior notice to and bargaining with the Union.

(b) Withdrawing recognition from and failing and refusing to bargain with Local Lodge PM 2846, Region 1 and 5 of the International Association of Machinists and Aerospace Workers, AFL-CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit by unilaterally discontinuing payment of insurance premiums, payment to the pension fund, and payments to the health and welfare fund for employees; by closing their facility and/or plant, reopening the facility under another name, and terminating employees without bargaining about those unilateral decisions and their effects on unit employees and a grievance over these decisions, and their effects; and by unilaterally ceasing to apply the collective-bargaining agreement and/or negotiated terms and conditions of employment to unit employees. The appropriate unit is:

All journeymen wood and metal pattern and modelmakers, plastic and plaster patternmakers and their apprentices, but excluding any other employees of the Respondent who do not work on patterns.

(c) Dealing directly with unit employees by soliciting them to enter into individual employment agreements.

(d) Refusing to process grievances.

(e) Refusing to furnish the Union with information that is necessary for, and relevant to, the Union's performance of its duties as the collective-bargaining representative of the unit employees.

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

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

(a) Reopen the facility and/or plant that was closed on June 23, 1992.

(b) Offer Larry Bolander, Jeff Daley, Norm Kwiatkowski, Fred B. Nelson, Walt Papke, Jim Perry, Mike Buskinoff, Robert Strait, Gerald Xaver, and other employees whose identities are unknown who were terminated on June 23, 1992, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy.

(c) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees, and give full force and effect to the terms of the current collective-bargaining agreement.

(d) Make all contractually required fund and insurance premium payments that are due and make whole unit employees for any losses they may have suffered because of the Respondent's failure to pay insurance premiums and to make payments to the pension fund and the health and welfare fund, as required under the collective-bargaining agreement, with interest, as set forth in the remedy section of this decision.

(e) Remove from the files of the discriminatorily terminated employees' any reference to the terminations and notify the employees in writing that this has been done and that the terminations will not be used against them in any way.

(f) Rescind the individual employment agreements that the Respondent solicited unit employees to sign.

(g) Process the grievance over the closing of the plant.

(h) Furnish the information requested by the Union that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

(i) 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 money due under the terms of this Order.

(j) Post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."⁵ and mail a copy of this notice to the last known address of the employees employed on June 23, 1992, at the Erler facility in the appropriate bargaining unit represented by Local Lodge PM 2846, Region 1 and 5 of the International Association of Machinists and Aerospace Workers,

⁵If 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."

AFL-CIO, CLC. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and mailed immediately 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.

(k) 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 terminate employees because they are members of the Local Lodge PM 2846, Region 1 and 5 of the International Association of Machinists and Aerospace Workers, AFL-CIO, CLC, or to discourage employees from joining the Union.

WE WILL NOT unilaterally discontinue payments of insurance premiums or making pension and health and welfare fund payments.

WE WILL NOT close our facility and/or plant, terminate employees, and reopen the facility under another name, without bargaining with the Union over these decisions, their effects, and grievances filed over these matters.

WE WILL NOT refuse to process grievances filed on behalf of the unit employees.

WE WILL NOT refuse to recognize or to meet, negotiate, and bargain with the Union as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT cease to apply the collective-bargaining agreement or negotiated terms and conditions of employment to unit employees.

WE WILL NOT deal directly with employees by soliciting them to enter into individual employment contracts.

WE WILL NOT refuse to furnish the Union with information necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the unit.

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

WE WILL reopen the Erler facility and/or plant that we closed on June 23, 1992.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and WE WILL give full force and effect to the current collective-bargaining agreement:

All journeymen wood and metal pattern and modelmakers, plastic and plaster patternmakers and their apprentices, but excluding any other employees of the Respondent who do not work on patterns.

WE WILL offer Larry Bolander, Jeff Daley, Norm Kwiatkowski, Fred B. Nelson, Walt Papke, Jim Perry, Mike Buskinoff, Robert Strait, Gerald Xaver, and other employees whose identities are unknown who were terminated June 23, 1992, immediate and full reinstatement to their former positions without prejudice to their seniority or other rights or privileges; and WE WILL make them whole for any losses they have incurred as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the discriminatory terminations and WE WILL notify the individuals discriminatorily terminated that this has been done and that the terminations will not be used against them in any way.

WE WILL make whole our unit employees by paying all delinquent insurance premiums and payments to pension and health and welfare funds, and by reimbursing our unit employees for any expenses ensuing from the failure to make those payments.

WE WILL process the grievance the Union filed on June 29, 1992.

WE WILL rescind all individual employee contracts that we solicited from unit employees.

WE WILL furnish information requested by the Union that is necessary for and relevant to its duties as the exclusive collective-bargaining representative of the employees in the unit.

THE ERLER CORPORATION AND ITS
ALTER EGO AMERICAN TOOLING TECHNOLOGY, INC.