

Child Development Council of Northeastern Pennsylvania, Inc. and American Federation of State, County and Municipal Employees, District Council 87, Local 2562 (AFSCME). Case 4-CA-20011

August 24, 1994

ORDER REMANDING PROCEEDING

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On October 19, 1993, Administrative Law Judge Hubert E. Lott issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and both filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and finds it necessary to remand the proceeding to the judge for additional factual findings.

The amended complaint alleges, inter alia, that the Respondent's attorney, David Koff, violated Section 8(a)(1) by telling employees during a June 27, 1991 bargaining session that if the employees went on strike, the most senior employees would be the first to be permanently replaced. The judge found this statement to be an unlawful threat that violated Section 8(a)(1), but he found it was not a contributing cause of the July 1, 1991 strike.

The Respondent excepts to the judge's finding of a violation. The Respondent argues that the statement was not punitive, destructive, or motivated by union animus, and was motivated by legitimate economic considerations. The General Counsel excepts, inter alia, to the finding that Koff's statement was not a cause of the strike. For the reasons set forth below, we find that the disposition of these issues requires that the judge make further factual findings.¹

In his factual narration, the judge found:

Koff stated that if the employees went on strike the company would have to permanently replace strikers in order to keep the childcare centers operating and that employees would be replaced in reverse order of seniority (most senior employees replaced first) *since they are the most costly*. Koff testified that [Executive Director] Gurbst had done and [sic] analysis of sick-leave and vacations and concluded that \$40,000 could be saved by replacing senior employees first. None of this was explained to the Union nor was Gurbst's analysis offered into evidence. [Emphasis added.]

¹ We defer deciding the remaining issues until the judge issues his supplemental decision.

At the hearing, Union Negotiator Edward Harry testified that Koff did not say that there was an economic reason for his statement:

Q. When Mr. Koff indicated that Child Development Council would continue to operate and hire permanent replacements by inverse seniority—that is, replacing the most senior first—did he articulate an economic reason for that position?

A. No.

Q. Did he state that the most senior had the most benefits, and replacing them first would be an economic gain to the Child Development Council?

A. No.

Q. When that statement was made, you were at a bargaining session, were you not?

A. Yes.

Ellen Davenport, a negotiating committee member who ranked first on the employee seniority list, testified as follows concerning Koff's statement:

Q. Mr. Koff made a statement that replacement workers would be hired, and that the most senior would be replaced first on down. Is that correct?

A. On what?

Q. On down to the least senior?

A. Right.

Q. Did he explain why CDC was going to take that action?

A. I don't remember. I really, I don't remember. I don't think so.

Q. It's possible that he did?

A. I don't recall any of that discussion about why.

JUDGE LOTT: Well, you wrote it down in the minutes. It must have been pretty important.

THE WITNESS: You mean about—

JUDGE LOTT: Yes, inverse order. Okay.

THE WITNESS: Oh.

JUDGE LOTT: Replacement in inverse order. You wrote it down, right?

THE WITNESS: Oh, yes, because those were the five things.

JUDGE LOTT: That was important, wasn't it?

THE WITNESS: Yes.

JUDGE LOTT: Okay. And you don't remember—

THE WITNESS: But he didn't—if he said because it would be cheaper? He didn't say that, because it would be cheaper.

JUDGE LOTT: Then what's your testimony? He said nothing other than the bare statement?

THE WITNESS: Right. That's my testimony. He looked at me and said they'll replace, and I'd be the first replaced. So, I mean, he didn't say—that

the most senior person would be replaced first, is what he said.

Q. (Respondent’s Counsel): Now you just testified that he looked at you and said you would be the first one replaced?

A. No, I’m sorry. I’m correcting that. He looked at me and he said, “The most senior person would be replaced.” That’s me.

. . . .
Q. Dave Koff was looking straight ahead when he said this?

A. Looking right at me.

Q. But straight ahead?

A. I was right in front of him. He was looking at me.

. . . .

Q. But I want to make clear, you weren’t sitting down at the end of the table. He didn’t look down at the end of the table and say, “And the first one to go is going to be the most senior?” You were right across from him; is that correct?

A. Right.

Attorney Koff also testified about what he told the employee negotiating committee concerning a strike:

I then said to them that considering the nature of this business, the agency has to stay open, because if it closes, the subsidy is gone. The agency would attempt to stay open. But if did, it would probably be necessary to hire permanent replacements. And if that occurred, that the intent of the agency was to replace employees with the most senior first and going down the list. And I specifically gave the reason, which was that it was a matter of cost, and I mentioned two items: vacations and sick leave. Those were the two areas that we thought there would be a substantial savings going that way.

And, in fact, when—in the conversations I had with Ms. Gurbst, the calculation was some where in a \$40,000 range.

JUDGE LOTT: What do you mean, \$40,000 savings?

THE WITNESS: Yes.

JUDGE LOTT: Per—

THE WITNESS: If you go down the list as opposed to up the list.

JUDGE LOTT: Per month, per year, per week?

THE WITNESS: Per year.

JUDGE LOTT: Alright.

THE WITNESS: When the reason Your Honor, if you will, you have, I believe, a joint exhibit, which is the collective bargaining agreement. If you look you’ll see that there is a rather unique provision—not unique, but different provisions which provide for vacations and sick leave for

those hired prior to July 1, 1979 and those hired afterwards.

. . . .

Q. You, in conjunction with Ms. Gurbst, formulated the procedure for the formula for recall by inverse seniority or for replacement by inverse seniority?

A. Yes.

Q. Why did you at that meeting of June 27th inform the Union and its negotiating committee that you intended to hire permanent replacements in the event of an economic strike?

A. There were two reasons: Firstly, it was my opinion that the subject of the methodology of the replacement is a mandatory subject of bargaining and the Employer has an obligation to bargain about it. We were in a situation where there would not have been time between the 27th of June and July 1st for another meeting. And if there was a strike, the Employer would have to begin a replacement process immediately.

The judge found that the Respondent’s announcement at the last negotiating session, prior to the strike, that striker replacement would be in reverse order of seniority, was a threat to the negotiating committee calculated to be punitive and was inherently destructive of employee rights because there was no valid reason for making the announcement and because senior employees were on the committee. The judge rejected the Respondent’s contention that it had an economic reason for making the statement. He found that the economic justification for the statement was an after-thought that was only used as a defense at the time of trial.

In arriving at these conclusions, the judge failed to address the above-quoted testimonial discrepancies concerning what, if any, reasons Koff gave at the June 27 negotiating session for the statement that if employees struck the Respondent would permanently replace strikers by inverse seniority. Resolution of these discrepancies in the foregoing testimony may be critical. As noted, in his factual narration, the judge found that Koff said, on June 27, that senior employees would be replaced first because “they are the most costly.” His legal analysis, however, is based on the assertion that any economic reason was a post-hoc “after-thought” used as a defense at trial.

We find the judge’s decision internally inconsistent on this issue because, if Koff gave an economic reason at the time he made the statement, then that economic reason was not an “after-thought” and might constitute a valid business justification.² In addition, resolution of the foregoing conflict in testimony was piv-

² We do not now decide whether the statement, if explained, would be lawful.

otal because the character of the strike may turn on whether the alleged threat is unlawful.

The conflict in testimony should be resolved by the judge, who had the opportunity to observe the demeanor of the witnesses at the hearing, and not by the Board on the basis of a cold record. On remand, therefore, the judge should review the differing versions of the testimony and determine which version or versions should be credited. Accordingly, we remand this proceeding to the judge to make the requisite credibility determination concerning what, if any, reasons Koff gave for announcing at the June 27, 1991 bargaining session that if the employees struck, the Respondent would permanently replace strikers by inverse seniority, and to make any other findings of fact and conclusions of law that follow from the credibility determination or that may be otherwise supported by the record.

ORDER

It is ordered that this proceeding is remanded to the administrative law judge for consideration of the matters discussed above.

IT IS FURTHER ORDERED that the judge shall make the credibility determinations and findings of facts and conclusions of law discussed above, and that he shall prepare and serve on the parties a supplemental decision setting forth his determinations and findings, conclusions of law, and recommended Order based on those determinations, findings, and conclusions. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Margaret McGovern and Linda Carlozzi, Esqs., for the General Counsel.

Richard Ferguson, Esq., for the Respondent.

Timothy Bergen, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard in Scranton, Pennsylvania, on November 18, 1992, upon unfair labor practice charges and amended charges filed on August 20, 1991, and January 21, 1992. A complaint and amended complaint issued on January 22 and September 10, 1992.

Respondent's answers to the complaints, duly filed, denies the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties.

Upon the entire record, and based upon my observation of the witnesses and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and principal place of business in Wilkes Barre, Pennsylvania, where it is engaged in the operation of 12 childcare centers at various locations in northeastern, Pennsylvania. During the fiscal year ending June 20, 1991, Respondent, in conducting its business operations, derived gross revenues in excess of \$250,000 and purchased and received at its facilities products, goods, and materials valued in excess of \$5000 directly from points outside the Commonwealth of Pennsylvania.

The company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(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

The parties have had an amicable collective-bargaining relationship for over 15 years. The last collective-bargaining agreement extended from July 1, 1990, to June 30, 1991, and covered two separate units: A professional unit comprised of 4 teachers and a nonprofessional unit of 80 employees. Under this agreement, Respondent paid for all the health insurance benefits.

The parties negotiated from April to June 1991 but could not reach agreement. On June 27, 1991, the parties met. The Company was represented by Attorney David Koff and Executive Director Gurbst. The Union was represented by AFSCME Representative Edward Harry and an employee committee comprised of Ellen Davenport, who had 20 years' service and was 1st on the seniority list, and four other employees whose seniority ranking was 2d, 5th, 9th, and 19th. At this session, Harry presented eight union proposals. They included four noneconomic proposals dealing mostly with seniority and layoffs, shift assignment, and transfers. The economic proposals included \$1500-per-year wage increase, employer payment of health insurance, bereavement pay, and inclusion of parents for employee sick leave. These proposals were rejected by Koff, who made a final offer of no wage increase and cost sharing on health insurance. Finally, Koff stated that if the employees went on strike the Company would have to permanently replace strikers in order to keep the childcare centers operating and that employees would be replaced in reverse order of seniority (most senior employees replaced first) since they are the most costly. Koff testified that Gurbst had done an analysis of sick leave and vacations and concluded that \$40,000 could be saved by replacing senior employees first. None of this was explained to the Union nor was Gurbst's analysis offered into evidence.

Harry and Davenport testified that on the evening on June 27 a membership meeting was held among 50 to 55 employees. Harry set forth the Company's formal offer and discussed the open issues presented by the Union. He told them that if there was a strike, the Company intended to replace them in reverse order of seniority. Both Harry and Davenport testified that employees were upset about the replacement issue because they figured the negotiating committee would be the first to go. Martina Jacobs, a 3-year employee, testified that Harry told the members that the Employer offered no raise, would cut health benefits, and offered nothing on

noneconomic issues. When she heard that the Company considered noneconomic issues insignificant and that most senior employees would be replaced first, she abstained from voting instead of voting against the strike. The members voted, overwhelmingly, to reject the Company's final offer and to strike.

The strike began on July 1 and ended on July 25, 1991. The picket signs did not mention unfair labor practices or the replacement of strikers. Nor were these issues mentioned in any other way during the strike. On July 25, the parties met and Harry told Koff the strike was over, get rid of replacements and bring all the employees back and we will continue to bargain for as long as it takes. Koff testified that he asked Harry what would happen if they did not reach agreement and Harry responded that he reserved the right to strike. Koff asked how long they intended to bargain and Harry said 6 months. Koff stated that the Company had permanently replaced all strikers and he couldn't accept the 6 months' condition because it would place a possible strike in the middle of a semester.

On August 12, 1991, Harry made a written unconditional offer to return to work in a letter to Koff. Fifty-four employees went on strike, twenty-six did not. From August 12, 1991, to January 13, 1992, 34 replacements were hired. On January 13, 1992, Ellen Davenport was offered reinstatement. Thereafter, all committee members were offered reinstatement in order of seniority. Starting January 19, 1992, other strikers were offered reinstatement by seniority.

Ellen Davenport testified that 2 weeks before the strike, admitted Supervisor Connie Stroud told her not to discuss the strike with the children's parents. Stroud said Gurbst told her to convey this message to the employees. Then Stroud said, "Please tell your people because they could be fired." Davenport testified that about the same time, she posted, in the daycare center where parents go, a notice to members of a strike authorization vote. She was never asked to remove it.

Davenport further testified that while on the picket line, admitted Supervisor Karen Bronsberg told her that Harry wasn't telling her everything, that a \$500 bonus was offered. She testified that she called Harry to confirm this and he said he didn't know what she was talking about.

Martina Jacobs testified that on June 18 or 21, Supervisor Ellen Adams told her not to discuss the strike with parents or she could lose her job.

Connie Stroud and Mary Ellen Adams testified that they had no instructions from Gurbst about strike talk and that they never told Davenport or Jacobs not to discuss the strike with parents.

Karen Bronsberg testified she never mentioned a \$500 bonus to Davenport.

The final allegation concerns Respondent's request that strikers, upon returning to work sign an "Acknowledgement and Recordation of Unconditional Offer to Return to Work." The form, among other things, acknowledges that the employee was engaged in an economic strike and that the employee unconditionally offers to return to work. No evidence was taken as to whether this form was ever used, signed, or required as a condition of reinstatement.

Analysis and Conclusions

I find the Respondent's announcement at the last negotiating session, prior to the strike, that striker replacement would be in reverse order of seniority to be a threat to the negotiating committee calculated to be punitive and was inherently destructive of employee rights because there is no other valid reason for making such an announcement and because senior employees were on the committee. Respondent contends that it had an economic reason for doing this. However, the evidence supports a conclusion that this was an afterthought which was used as a defense at time of trial. I also find that the statement is merely a violation of Section 8(a)(1) and did not inhibit bargaining because there was no 8(a)(5) allegation.

The issue then is whether or not the threat to the negotiating committee was a contributing cause of the strike. I find that it was not for the following reasons.

Although the striker replacement issue was discussed at the employee meeting, so was Respondent's unattractive final offer. General Counsel did not carry her burden of proof that striker replacement was a factor influencing any employees' vote. She only called two witnesses who attended the meeting. Davenport didn't testify as to how she voted or why. Jacobs testified that when she heard the company offer and the proposal on replacements, she abstained.

General Counsel should have called some witnesses to testify that striker replacement was considered in their decision to strike. Since she did not, I will presume that striker replacement was not an issue. Moreover, it should be noted that at no time during the 25-day strike was there any mention of unfair labor practice or striker replacement by reverse seniority, either on picket signs or verbally. Finally, I conclude that the threat had no impact on the bargaining relationship. Accordingly, I find that Respondent's final offer, which would reduce employee wages, was the sole cause of the economic strike.

I further find that an unconditional offer to return to work on July 1 was not made by the Union because it wanted all employees returned en masse and all replacements discharged immediately. However, I do not find this condition obtaining in the August 12, 1991 written unconditional offer. Therefore, I find that Respondent violated Section 8(a)(3) of the Act when it hired permanent replacements after August 12, 1991.

I do not credit the uncorroborated testimony of Davenport and Jacobs over the flat denials of Stroud and Adams that they threatened them with discharge if they discussed the strike with parents.

I do not credit the uncorroborated testimony of Davenport over the flat denial of Bronsberg that she mentioned a \$500 bonus. Even Harry did not confirm any telephone call from Davenport.

I can not consider the form acknowledging an economic strike and an unconditional offer to return to work as a violation because there is no evidence in the record to support this allegation.

CONCLUSIONS OF LAW

1. Respondent Child Development Council of Northeastern Pennsylvania, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. American Federation of State, County and Municipal Employees, District Council 87, Local 2562 (AFSCME) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Child Development Council of Northeastern Pennsylvania, Inc. violated Section 8(a)(1) of the Act by threatening the bargaining committee with replacement by reverse seniority if a strike occurred.

4. Respondent Child Development Council of Northeastern Pennsylvania, Inc. violated Section 8(a)(3) of the Act by hiring striker replacements after strikers made an unconditional offer to return to work.

5. All other allegations are dismissed.

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

REMEDY

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

The Respondent, having hired striker replacements after an unconditional offer was tendered, must discharge all replacements hired after August 12, 1991, and offer reinstatement to all strikers where vacancies exist and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date when a new permanent replacement was hired (after August 12, 1991) until such time as the striker is given a proper offer of reinstatement. Backpay to be computed in accordance with current Board law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Child Development Council of Northeastern Pennsylvania, Inc., Wilkes Barre, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening the Union's negotiating committee.

(b) Refusing to offer reinstatement to strikers.

(c) 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.

¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer reinstatement to strikers in accordance with the affirmative action set forth in the remedy section of this decision.

(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 facility in Wilkes Barre, Pennsylvania, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

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

²If 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."

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.

WE WILL NOT threaten the negotiating committee with permanent replacement by reverse seniority.

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 discharge all striker replacements hired after an unconditional offer to return to work was made by our strikers and offer reinstatement to the strikers where vacancies exist without prejudice to their seniority or any other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits they may have suffered, where appropriate.

CHILD DEVELOPMENT COUNCIL OF NORTH-
EASTERN PENNSYLVANIA, INC.