

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

April 10, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND COHEN

On October 19, 1993, Administrative Law Judge Hubert E. Lott issued an initial decision in this proceeding. On August 24, 1994, the Board remanded this proceeding to the judge for a credibility determination concerning what, if any, reasons the Respondent's negotiator, David Koff, gave for announcing that, if employees struck, the Respondent would permanently replace them in reverse order of seniority.¹

On September 23, 1994, Judge Lott issued the attached supplemental decision. The Respondent filed exceptions.

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

The Board has considered the decision, supplemental decision, and the record in light of the exceptions and briefs, and for the reasons set forth below, has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

1. We adopt the judge's credibility determination on remand. Thus, near the end of the final, prestrike bargaining session, the Respondent's attorney, David Koff, announced that strikers would be replaced in reverse order of seniority, i.e., oldest would be replaced first. Respondent gave no reasons for this position. Koff's announcement of the Respondent's plan was directed to employee members of the Union's negotiating committee. The employee members were among the most senior employees in the Respondent's work force. These more senior employees were in a unique position to persuade fellow employees to accept the Respondent's final offer. In this context, we find that Koff's statement was a threat to retaliate against the employees on the Union's negotiating committee in order to coerce them to accept the offer.³

¹The judge's initial decision is attached to our Order Remanding proceeding. See 314 NLRB 845.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³In the absence of any legitimate and substantial business justification for Koff's statement, we find it unnecessary to adopt the

2. Contrary to the judge, we find that Koff's unlawful threat to replace strikers in reverse order of seniority was a contributing cause of the July 1, 1991 strike and made it an unfair labor practice strike from its inception. It is well established that a causal connection between the Respondent's unlawful conduct and the strike may be inferred from the record as a whole.⁴ Thus, if the strike was caused in part by Koff's threat to target the Union's negotiating committee, the strike is an unfair labor practice strike.⁵ Based on the following evidence, we infer a causal connection between Koff's threat to the negotiating committee and the employees' decision to strike shortly thereafter.

Initially, as noted, Koff's threat was directed towards senior employees on the Union's negotiating committee near the conclusion of the last bargaining session held just 3 days prior to the July 1, 1991 strike. Second, although not mentioned by the judge, Union Representative Ed Harry testified that members of the negotiating committee reacted to Koff's threat by expressing concern at a union caucus called immediately after Koff made the threat. Third, Harry specifically discussed Koff's June 27 threat with employees at a strike vote meeting held that same evening. In fact, employee negotiators who had first hand knowledge of the threat participated in the strike vote. Harry testified that after discussing Koff's threat, the employees became upset because the Union's negotiators would be the first employees to be replaced when the strike commenced. Similarly, Ella Davenport, the most senior employee on the negotiating committee, testified that there was discussion among the membership at the June 27 meeting concerning the significance of the Respondent's announcement that, if the employees struck, replacements would be hired and the most senior employees would be replaced first. Davenport testified that the membership was "very upset" by the threat. She also testified that she personally was very upset

judge's finding that Koff's announcement was "inherently destructive" of employee rights.

⁴*Larand Leisurelies*, 213 NLRB 198 fn. 4 (1974), enfd. 523 F.2d 814 (6th Cir. 1975) (when it is reasonable to infer from the record as a whole that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor practice strike); *Brooks, Inc.*, 228 NLRB 1365, 1367 fn. 12 (1977), enfd. in relevant part 593 F.2d 936 (10th Cir. 1979); *Tarlas Meat Co.*, 239 NLRB 1400 fn. 4 (1979). See also *C-Line Express*, 292 NLRB 638 (1989).

⁵*Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989); *NLRB v. Cast Optics Corp.* 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 419 U.S. 850 (1972) (as long as an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike); *Struthers Wells Corp. v. NLRB*, 721 F.2d 465 (3d Cir. 1983); *Larand Leisurelies*, supra at 820-821; *National Fresh Fruit & Vegetable Co.*, 227 NLRB 2014, 2017 fn. 8 (1977), enfd. 565 F.2d 1331 (5th Cir. 1978).

about the Respondent's announcement.⁶ After the discussion, the membership held a ratification vote on the Respondent's final contract offer and overwhelmingly rejected it. The membership then held a separate strike vote after the Respondent's final offer was rejected. The employees overwhelmingly voted to strike.

In view of these facts, we find it reasonable to infer that Koff's June 27 threat, which was specifically discussed and became a matter of consternation at the employee membership meeting that evening, contributed to the employees' June 27 decision to strike. Accordingly, we find, contrary to the judge, that the July 1, 1991 strike was an unfair labor practice strike.⁷

3. We further conclude that the judge erred in finding that the Union's offer to return to work on July 25 was conditional. On July 25, Union Representative Harry told Koff that the strike was over and that the Union wanted all the replacements discharged and the striking employees returned to work while bargaining continued. When Koff asked Harry how long the Union intended to bargain and what would happen if the parties did not reach agreement, Harry responded that the Union would bargain for 6 months and reserved the right to strike again. The judge concluded that an unconditional offer to return to work was not made by the Union on July 25 because Harry wanted all employees returned en masse and all replacements discharged immediately. We disagree with the judge's analysis.

As noted, this case concerns an unfair labor practice strike. Unfair labor practice strikers ordinarily have the right to reinstatement regardless of any replacements hired after the strike became an unfair labor practice strike.⁸ Thus, assuming arguendo that Harry's July 25 comments can be construed as a demand for the immediate reinstatement of the strikers regardless of any replacements, the Union was merely insisting that the Respondent accord its employees their rights as unfair labor practice strikers. Accordingly, we find that the Union's demand for immediate reinstatement of the unfair labor practice strikers did not make its accompanying offer to return to work conditional.

For similar reasons, we also find that the Union's July 25 offer to return to work was not made conditional simply because Harry reserved the employees' statutory right to strike if 6 additional months of negotiations failed to produce an agreement. The Respondent cannot deny strikers reinstatement simply because

they refuse to waive their statutory right to strike in the future. Thus, the Union's unwillingness to waive the employees' prospective right to strike after 6 months of negotiations does not make its July 25 offer to return to work conditional.

In light of the above, we conclude that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate all striking employees for whom the Union made an unconditional offer to return to work on July 25, 1991.

4. We also find, contrary to the judge, that the Respondent violated Section 8(a)(1) by asking returning strikers to sign a form acknowledging that they had been engaged in an economic strike.⁹ The judge dismissed this allegation because, in his view, no evidence was adduced that the form was ever used, signed, or required as a condition of reinstatement. We find merit in the General Counsel's exceptions.

Respondent admitted in its answer that it asked employees to sign the "Acknowledgment." At the hearing, Respondent's counsel confirmed that returning strikers had been asked to sign the "Acknowledgment," a copy of which was introduced by stipulation. Contrary to the judge, we find that these admissions constitute record evidence sufficient to support the complaint allegation that the Respondent violated Section 8(a)(1) by asking employees to sign a document that declared them to be economic strikers.

The Respondent's request for acknowledgment that the strike was an economic strike is tantamount to asking employees to waive their right to receive the more favorable treatment accorded unfair labor practice strikers. The returning strikers were asked to sign the Respondent's form as part of their effort to secure re-employment following an unsuccessful strike. It is reasonable to infer that they anticipated that signing the form would at least enhance the possibility of their return to work. In these circumstances, we find that the Respondent's request that returning strikers acknowledge that they had engaged in an economic strike reasonably interfered with the free exercise of their rights to return to work as unfair labor practice strikers upon their application.¹⁰

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease

⁶We find that this testimony is relevant to the state of affairs that existed at the time of the strike vote. See *F. L. Thorpe & Co.*, 315 NLRB 147, 150 fn. 8 (1994).

⁷The absence of picket sign language stating that the strike was in protest of an unfair labor practice does not establish that unlawful conduct was not a cause of the strike. *Lifetime Door Co.*, 179 NLRB 518, 522-523 (1969); *AMF-Inc.*, 228 NLRB 1406 (1978), enf. 593 F.2d 972, 979-981 (10th Cir. 1979).

⁸See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

⁹The amended complaint alleges that since July 1, 1991, the Respondent, in writing, requested employees who returned to work after having engaged in the strike, to sign a form entitled "Acknowledgment and Recordation of Unconditional Offer to Return to Work." The form characterized the strike as an economic strike.

¹⁰The amended complaint includes an appendix A naming the strikers. We grant the General Counsel's unopposed Motion to add the names of strikers D. Barth, K. Lentz, M. Wabik, and L. Pascucci, who were inadvertently omitted from the appendix.

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

The Respondent shall be ordered to cease and desist from requesting employees to sign documents acknowledging that they have been economic strikers, and from refusing to offer immediate reinstatement to the unfair labor strikers listed in appendix A to the amended complaint. The Respondent shall offer the employees listed in appendix A immediate reinstatement to their former positions, and discharge, if necessary, all replacement employees hired after July 1, 1991. Respondent is ordered to make the employees listed in appendix A whole for any loss of earnings suffered as a result of its failure to reinstate them immediately upon their unconditional offer to return to work on July 25, 1991.

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 employees with permanent replacement by reverse order of seniority if they engage in a strike.

(b) Failing and refusing to reinstate unfair labor practice strikers immediately following the Union's July 25, 1991 unconditional offer to return to work, and to discharge, if necessary, any replacements.

(c) Asking returning strikers to sign documents acknowledging the strike to be an economic strike.

(d) 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) Offer each of the employees listed in appendix A, as amended and attached to the amended complaint, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacement employees hired on or after July 1, 1991, and make these employees whole for any loss of earnings or other benefits resulting from Respondent's failure to reinstate them on about July 25, 1991, with interest.

(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."¹¹ 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.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor 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 our employees with permanent replacement by reverse seniority if they strike.

WE WILL NOT discourage membership in the Union or any other labor organization by failing and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work or otherwise discriminating against employees with regard to their hire, tenure, or other terms and conditions of employment.

WE WILL NOT ask returning strikers to sign documents acknowledging the strike to be an economic strike.

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 offer to each of the employees listed in appendix A to the amended complaint immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging if necessary replacement employees hired on or after July 1, 1991, and make such employees whole for any loss

of earnings or other benefits resulting from our failure to reinstate them, with interest.

CHILD DEVELOPMENT COUNCIL OF
NORTHEASTERN PENNSYLVANIA, INC.

SUPPLEMENTAL DECISION

HUBERT E. LOTT, Administrative Law Judge. On October 19, 1993, I issued my decision in this case. On August 24, 1994, the Board remanded the case ordering that a credibility resolution be made concerning what, if any, reasons Respondent's negotiator Koff gave for announcing at the June 27, 1991 bargaining session that if employees struck, Respondent would permanently replace them by inverse order of seniority.

Having reviewed my decision, the Board's order remanding proceeding, the entire record, and my recollection of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

When I stated in my decision that Koff's testimony wherein he stated that he gave union negotiators economic reasons for replacement by inverse seniority was an afterthought, used as a defense only at time of trial, I was discrediting his

uncorroborated testimony and crediting the denials of Harry and Davenport that any reasons were given to the Union. At the time I also considered Koff's alleged statement that Director Gurbst had calculated a savings of \$40,000 if Respondent replaced in inverse seniority. Neither the calculations nor Gurbst's testimony were offered to support his testimony. The only testimony offered was that of Susan Dinofrio who testified that she made savings calculations in preparation for the instant trial. In fact she was hired long after the strike was over. For these reasons and the demeanor of the witnesses, I find Koff's testimony on this issue unconvincing and I discredit it.

I therefore again find that during the June 27, 1991 bargaining session Koff gave no economic reasons for the planned replacement by inverse seniority. I reaffirm my conclusions that the announcement of this policy violated Section 8(a)(1) of the Act. I further reaffirm all other findings of fact,¹ conclusions of law, remedy, Order, and appendix.²

¹ Certain errors in the transcript have been noted and corrected.

² If 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.