

O. E. Butterfield, Inc. and Mark Baumgartner, Petitioner, and International Union of Operating Engineers, Local No. 139, AFL-CIO. Case 30-RD-1102

December 18, 1995

DECISION AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, COHEN, AND TRUESDALE

It is well established that permanent replacements for economic strikers, unlike temporary replacements, are generally eligible to vote in a Board election. E.g., *Akron Engraving Co.*, 170 NLRB 232, 233 (1968). In our decision today, we must address an inconsistency in Board law concerning the allocation of the burden of proving whether a strike replacement is temporary or permanent. In representation cases, the Board “will presume that replacements for economic strikers are permanent employees,” and the Board places the burden on “the party challenging the eligibility of a replacement . . . to rebut the presumption.” *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1360 (1962). In unfair labor practice cases, however, the Board will presume that replacements for economic strikers are temporary employees, and the Board places the burden on the employer to “show a mutual understanding between itself and the replacements that they are permanent.” *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987). For the reasons set forth below, we have decided to end this anomaly in our case law, overrule the representation case precedent, and presume that replacements for strikers are temporary employees in all Board cases, consistent with our precedent developed originally in the unfair labor practice setting.

I. BACKGROUND

The following facts are undisputed. The Employer, with a facility located in Waukesha, Wisconsin, has a fleet of trucks that it uses to transport construction materials to and from construction sites. Since November 20, 1992, the Union has been the certified bargaining representative for the Employer’s employees. The employees commenced an economic strike on September 6, 1993,¹ and the Employer began hiring replacement drivers. On December 2, employee Mark Baumgartner filed a decertification petition which resulted in an election on May 26, 1994 pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 5 against the Union, with 10 determinative challenged ballots. Thereafter, the Union filed two objections to the election.

¹ All dates are in 1993 unless otherwise noted.

II. THE HEARING OFFICER’S REPORT

After a hearing, the hearing officer issued her report in which she recommended that the Union’s objections be overruled, that the challenges to four ballots be sustained, and that the challenges to six ballots be overruled.

Thereafter, the parties filed exceptions limited to the hearing officer’s recommendations with respect to the following seven challenged ballots:

A. *Richard Anderson and James Kawatski*

The hearing officer rejected the Union’s contention that these two employees were temporary replacements for striking employees. The hearing officer found that Anderson was hired to replace a driver who had quit his employment, not to replace a striker. Similarly, the hearing officer found that Kawatski was hired for the newly created position of mechanic/driver, not to replace a striker. Accordingly, the hearing officer recommended that the challenges to the ballots of these two employees be overruled.

B. *Stan Walter*

The Union claimed that Walter was hired as a temporary strike replacement. The hearing officer found, however, that there was no record evidence controverting Walter’s testimony that he received assurances from the Employer at the time of hire or immediately thereafter that his job was permanent. Accordingly, the hearing officer recommended that the challenge to Walter’s ballot be overruled.

C. *Alan Gaspervich, Terry Hass, Robert Hirtz, and Ron Van Hammers*

The hearing officer found merit in the Union’s claim that these four employees were temporary replacements for striking employees. The hearing officer reasoned as follows:

[W]hat I find dispositive is the understanding between the employer and the workers at the time of their hire. . . . It is the employer who has the burden of proof in establishing that the replacement employees and the employer had a “mutual understanding” and commitment regarding the permanent nature of their employment. *Hansen Brothers Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987); *Associated Grocers*, 253 NLRB 31 (1980), enfd. mem. sub nom. *Teamsters Local 104 v. NLRB*, 672 F.2d 897 (D.C. Cir. 1981). An employer has a greater obligation to make clear its intent with regard to permanence when it is hiring employees during a strike than at any other time. *Gibson Greetings, Inc.*, 310 NLRB 1286, fn. 23 (1993). The Employer has failed to meet its burden of

proof that replacement employees Gaspervich, Hirtz, Hass, and Van Hammers were hired as permanent employees. Gaspervich, Hirtz, Hass, and Van Hammers admitted the Employer did not use the word “permanent” when hired. Rather, they were told they were hired for “full-time” jobs which I find is not synonymous with permanent. Rather, it is merely the opposite of part-time. *Gibson Greetings*, supra, fn. 20. The Employer presented no testimony on the issue of the striker replacements, and thus, the testimony of Gaspervich, Hirtz, Hass, and Van Hammers stands uncontradicted.

Accordingly, the hearing officer recommended that the challenges to the ballots cast by these employees be sustained.

III. DISCUSSION

Having reviewed the record in light of the exceptions² and briefs,³ we have decided to adopt the hearing officer’s findings and recommendations as modified below for the reasons set forth in her report and the additional reasons set forth below.

A. *Anderson and Kawatski*

The Union excepted to the hearing officer’s conclusion that these two employees are eligible voters. The record however, clearly supports the hearing officer’s finding that they were not hired as strike replacements. Accordingly, we adopt the hearing officer’s recommendation that the challenges to these ballots be overruled.

B. *Walter*

We also adopt the hearing officer’s recommendation that the challenge to Walter’s ballot be overruled. The hearing officer credited Walter’s testimony that the Employer assured him at approximately the time of hire that he was a permanent strike replacement, and there is no evidence to the contrary. Therefore, regardless of whether one applies a presumption that strike replacements are temporary or a presumption that strike replacements are permanent, where, as here, the record affirmatively establishes that an employee was hired on a permanent basis, a finding of eligibility to vote is warranted.

²In the absence of exceptions, we adopt pro forma the hearing officer’s recommendations that the Union’s objections to the election be overruled and that the challenges to the ballots of Anton Wentz, Jim McGrath, and Harvey Salentine be overruled.

³The Employer filed a motion for reconsideration of the Board’s November 17, 1994 decision to grant the Union’s request for an extension of time to file an answering brief, contending that the Board acted so quickly that the Employer did not have sufficient time to file a response before the Board granted the request. We find no merit in the motion. The motion is denied.

C. *Gaspervich, Hass, Hirtz, and Van Hammers*

A more difficult issue is presented by the Employer’s exceptions to the hearing officer’s conclusion that these four employees are ineligible to vote, although not for the reason the Employer asserts.

The Employer has no quarrel with the test the hearing officer used. Indeed, the Employer refers to it as “the controlling standard.” (We shall refer to it as “the unfair labor practice case standard.”) The Employer claims that, under the unfair labor practice case standard, it satisfied its burden of establishing the permanency of the replacements. Thus, we must determine whether the standard the hearing officer used is the controlling one and, if so, whether the Employer satisfied its burden of establishing the permanency of the replacements. We first turn to the question of the appropriate standard.

Although not cited by the hearing officer or the parties, there is a separate line of Board precedent holding that strike replacements are presumed to be permanent employees (“the representation case standard”). The leading case is *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1360 (1962), in which the Board stated as follows:

[T]he Board will presume that replacements for economic strikers are permanent employees and eligible to vote. . . . [T]he party challenging the eligibility of a replacement shall be required, in order to rebut the presumption, to establish by affirmative, objective evidence that the replacement was not employed on the struck job on a permanent basis. . . . [T]he nature of the evidence which may rebut the presumption will be determined on a case-by-case basis.

The main reason the Board gave for adopting this presumption is that it would expedite the processing of representation cases. 137 NLRB at 1359–1360.

Subsequent to *Pacific Tile*, the representation case standard has been applied in numerous cases. E.g., *Lake Development Management Co.*, 259 NLRB 791, 798 (1981); *Kable Printing Co.*, 238 NLRB 1092, 1096 (1978); *Akron Engraving Co.*, 170 NLRB 232, 233 (1968); *Bowman Transportation*, 142 NLRB 1093, 1097–1098 (1963); *Dinuba Sentinel*, 137 NLRB 1610, 1612 (1962). In none of these representation cases did the Board address the diametrically opposite allocation of the burden of proof in unfair labor practice cases.

The unfair labor practice case standard is typically applied in a proceeding in which the General Counsel is alleging that the employer failed to reinstate economic strikers in accordance with their rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf. 414 F.2d 99 (7th Cir. 1969). The employer often defends on the grounds that it need not reinstate the strikers because it exercised its right under *NLRB v. Mackay*

Radio & Telegraph Co., 304 U.S. 333 (1938), and hired permanent replacements during the strike to continue operations. In these circumstances, as summarized in the hearing officer's report quoted above, the Board places the burden on the employer to show that it had a "mutual understanding between itself and the replacements that they are permanent." *Hansen Bros. Enterprises*, supra.

We believe that the time has come to put an end to this inconsistency in our case law and to adopt a single standard to be applied uniformly in all Board proceedings in which the question arises whether a replacement for an economic striker is temporary or permanent. Of the two standards, we find that the unfair labor practice case standard better effectuates the purposes of the Act. Because an employer is the party with superior access to the relevant information, the burden should logically be placed on it to show that it had a mutual understanding with the replacements that they are permanent. In addition, this allocation of the burden of proof has been upheld by the courts. See *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467 (7th Cir. 1992), and the cases cited therein.

We agree with the hearing officer that it is particularly important for an employer to establish permanency of employment during a strike, because that is a time of uncertainty for all employees, strikers and replacements alike. It is therefore incumbent on the employer, which has control over employees' status, to communicate clearly with employees as to whether they have been hired on a permanent or temporary basis. We do not think that it is too much to ask that the employer be responsible for providing the evidence and the ultimate proof that employees have been clearly told that they are permanent employees during a strike. Finally, we believe that applying the unfair labor practice case standard in the representation case context will better achieve the goal the Board identified in *Pacific Tile* of processing election cases expeditiously, because a presumption will still be used, but unions will no longer be compelled to resort to the time-consuming subpoena process to obtain information peculiarly within the employer's control.⁴

Accordingly, for the foregoing reasons, we hold that in all cases, representation cases as well as unfair labor practice cases, the burden is on the employer to prove that the strike replacements are permanent employees.

⁴Harmonizing the allocation of the burden of proof in the representation and unfair labor practice settings in this manner is also necessary to avoid situations in which the Board would find a replacement employee eligible to vote on representation issues during a strike, applying the *Pacific Tile* presumption of permanent status, even though that same individual would subsequently be found to be a temporary employee subject to displacement once the strike had ended, consistent with the Board's presumption of temporary status under those circumstances.

We hereby overrule *Pacific Tile* and its progeny to the extent inconsistent with this decision.

Our concurring colleague criticizes us for overruling *Pacific Tile*. He states that he would require the party challenging the eligibility of a replacement (here the Union) to bear the "burden of persuasion." He would, however, require the Employer to bear a "burden of going forward." Our colleague agrees with our conclusion in the instant case that the strike replacements are temporary employees, but he does so only because the Employer has presented no evidence that they are permanent replacements.

We find our concurring colleague's rationale inherently contradictory. If *Pacific Tile* were applied here, the strike replacements would be found to be permanent because the presumption of permanence has not been rebutted. Our colleague, while stating that he is not overruling *Pacific Tile*, endorses a result inconsistent with that which would be reached if he applied *Pacific Tile*. In sum, although our concurring colleague chides us for changing representation case law, his "burden of going forward" requirement appears nowhere in *Pacific Tile* or its progeny and represents a significant alteration of the very Board precedent to which he claims to be adhering.

For the reasons stated above, we believe that a better approach is to frankly acknowledge the shortcomings of *Pacific Tile*, and to explicitly overrule it insofar as it creates a presumption that strike replacements are permanent.

In the instant case, we agree with the hearing officer that the Employer has failed to sustain the burden of proving a mutual understanding with Hass, Hirtz, and Van Hammers that they were hired as permanent replacements. The Employer presented no evidence on this issue. The employees themselves testified that they were told that they were "full-time" rather than that they were "permanent." Under Board law, "full-time" is not the equivalent of "permanent." As the hearing officer observed, "full-time" is merely the opposite of part time, and the employees' testimony that they were hired as "full-time" is not sufficient to establish that they were hired as permanent employees.⁵ We conclude, therefore, that Hass, Hirtz, and Van Hammers are temporary strike replacements and that the challenges to their ballots should be sustained.

We reach a different result as to Gaspervich. Gaspervich testified that sometime after he was hired, probably in November, when people connected with the Union followed him out to the jobs and "kept say-

⁵*Gibson Greetings*, 310 NLRB 1286 fn. 20 (1993), enf. denied on other grounds 53 F.3d 385 (D.C. Cir. 1995). The court in *Gibson*, agreeing with the Board on this point, observed that "the new employees were being hired as 'full time associates' but that suggests only that they were not being hired as part-time employees; it does not speak to the question of their permanence." *Gibson Greetings*, 53 F.2d at 390.

ing these things” to him, he inquired of Company President Oliver Butterfield and was told that he was permanent. Gaspervich’s uncontradicted testimony provides a basis for finding the requisite “mutual understanding” between him and the Employer that he was permanent, at least as of November.⁶ Accordingly, we shall overrule the challenge to Gaspervich’s ballot.⁷

DIRECTION

IT IS DIRECTED that the Regional Director for Region 30 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Richard Anderson, Alan Gaspervich, James Kawatski, Stan Walker, James McGrath, Harvey Salentine, and Anton Wentz, serve on the parties a revised tally of ballots, and issue the appropriate certification.

MEMBER COHEN, concurring.

For 33 years, the representation case law has been that the burden of proof is on the party who seeks to show that a strike replacement is temporary. This rule is in accord with the principle that the burden is on the party who seeks to prevent an individual from voting. My colleagues now change that law. I would not do so. However, in this case, I agree with their result. I therefore write this separate concurrence.

My colleagues say that they simply wish to harmonize representation case law with unfair labor practice case law. The latter teaches that the burden of proof is on the party who seeks to show that the strike replacement is permanent. However, my colleagues fail to recognize the fundamental difference between the two types of cases. In the context of a representation case, the Board deals with a party who wishes to deny employees the right to vote, even though these employees are performing unit work. In such circumstances, it is clearly appropriate to place the burden of proof on the party who would deny the franchise to employees.

By contrast, in the context of an unfair labor practice case, the General Counsel establishes that employees have exercised the statutory right to strike and now

wish to return. The respondent seeks to deny reinstatement to those strikers. Under established law, the respondent must show a legitimate and substantial justification for doing so.¹ The proffered justification is that the strikers have been permanently replaced. Clearly, the burden is on the respondent to establish that justification.

In sum, there is a good reason for treating the “replacement” issue differently in different types of cases. My colleagues would force an artificial symmetry, and would overrule precedent to do so. I would do neither.

In support of their desire for change, my colleagues argue that the employer possesses the evidence on the “replacement” issue, and thus the employer should bear the burden of going forward. I agree. However, this provides no basis for changing the burden of persuasion.

Similarly, my colleagues contend that, under their rule, unions will no longer be compelled to resort to a time-consuming subpoena process to obtain information peculiarly within the employer’s control. However, in light of my agreement that the employer has the burden of going forward, my colleagues’ point is essentially mooted.

Finally, the majority says that, absent uniformity, there is a danger of inconsistent results. However, after 33 years under *Pacific Tile*, 137 NLRB 1358 (1962), my colleagues cite no case in which inconsistent results were reached. In these circumstances, I do not perceive a danger.

In sum, I would not overrule established precedent. However, I agree that the Employer bears the burden of going forward.

My colleagues contend that I have made “a significant alteration” of *Pacific Tile*. The fact is that I have not done so. I have left in place the fundamental tenet of *Pacific Tile* that the party who challenges the replacement must ultimately prove that the replacement is temporary. Concededly, I have also dealt with an issue that was not resolved in *Pacific Tile*. That case did not deal with the issue of which party must proceed first with the presentation of the evidence. For the reasons set forth above, I would resolve that issue by requiring the employer to proceed first. But, to repeat, the ultimate burden of proof is on the union, as it is under *Pacific Tile*.²

¹ *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *NLRB v. Fleetwood Trailers*, 389 U.S. 375 (1967).

² Thus, I reach the same results as my colleagues. However, in other cases, my approach would yield a result different from that of my colleagues. The difference between my colleagues and myself can be illustrated as follows: If the Employer had presented evidence that replacements were told that they were permanent, and if there were counter-balancing evidence on the other side, I would conclude that the Union’s burden of persuasion (to show temporary status) has

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⁶ See *Associated Grocers*, 253 NLRB 31 (1980), enfd. mem. sub nom. *Teamsters Local 104 v. NLRB*, 672 F.2d 897 (D.C. 1981).

⁷ For the reasons stated in his concurrence, Member Cohen agrees with Chairman Gould and Member Truesdale that Gaspervich was a permanent employee and the challenge to his ballot should be overruled.

Member Browning finds that Gaspervich’s testimony is insufficient to meet the Employer’s burden of proving that Gaspervich was a permanent employee. There was clearly no “mutual understanding” at the time Gaspervich was hired that he was permanent, because he testified, like the other employees, that he was told only that he was “full-time.” Member Browning finds that Gaspervich’s testimony that he was told on one occasion in response to a brief inquiry, several months later, that he was “permanent” is insufficiently concrete to establish a new “mutual understanding” or to otherwise convert his status from temporary to permanent. Accordingly, she would sustain the challenge to Gaspervich’s ballot.

In the instant case, the Employer presented no evidence that Hass, Hirtz, and Van Hammers were told that they were permanent replacements. Thus, I con-

not been met. My colleagues presumably would conclude that the Employer's burden of persuasion (to show permanent status) has not been met.

clude that they were temporary replacements. As to Gaspervich, I note that the Employer presented evidence that it told Gaspervich, prior to the eligibility date, that he was a permanent replacement. The Union did not rebut this evidence. Thus, I conclude that the Union has not met its burden of showing that Gaspervich was only a temporary replacement.