

**Jackson County Commission on Aging and District 1199, The Health Care and Social Service Union, Service Employees International Union, AFL–CIO–CLC.** Case 9–CA–37292

August 5, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On September 19, 2002, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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 has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jackson County Commission on Aging, Ripley, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Teresa Laite, Esq.* and *Kevin Luken, Esq.*, for the General Counsel.

*Richard W. Walters, Esq.*, of Charleston, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on December 30, 1999, by District 1199, The Health Care and Social Service Union, Service Employees International Union, AFL–CIO–CLC (the Union), the Regional Director for Region 9 of the National Labor Relations Board

<sup>1</sup> In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by failing to reinstate economic striker James Anderson, Chairman Battista finds it unnecessary to pass on the judge's finding that the Union's December 23, 1999 letter to the Respondent constituted a valid unconditional offer to return. Instead, the Chairman finds that the General Counsel established a prima facie case by showing that Anderson made a valid unconditional offer to return by arriving at the Respondent's facility ready to work on December 27, 1999, and that the Respondent did not reinstate him. The Chairman further finds that the Respondent did not meet its burden of showing that its failure to reinstate Anderson was motivated by legitimate objectives. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). In particular, the Chairman notes that the Respondent's reliance on the fact that, in 1998, all employees returned from a strike on the day following their acceptance of a contract proposal is—without more—inadequate to establish a legitimate business justification for the failure to reinstate Anderson.

(the Board) issued a complaint on September 27, 2001, alleging that Jackson County Commission on Aging (the Respondent) had violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by refusing to reinstate employee James Anderson to his former position of employment following an economic strike. The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Ripley, West Virginia, on April 3, 2002, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration.<sup>1</sup>

On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent was a corporation engaged in providing services to the elderly in and around its facility in Ripley, West Virginia. During the 12-month period preceding September 27, 2001, in the conduct of its business the Respondent received gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$5000 at its West Virginia facilities directly from points outside the State of West Virginia. The Respondent admits and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent provides services to the elderly utilizing three facilities including one in Ripley, West Virginia. It employs health care technicians who provide various in-home care services to clients and van drivers who deliver meals to homebound clients, transport others to nutrition centers for meals, and provide clients with transportation to medical appointments, stores, etc., and to meet other personal needs. The Union represents a bargaining unit consisting of the home health technicians and van drivers.

A collective-bargaining agreement in effect between October 1, 1998, and October 1, 2001, contained a provision for reopening negotiations over wages and benefits as of October 1, 1999.<sup>2</sup> During those negotiations, the bargaining unit employees began an economic strike on December 13. On the evening of December 21, the parties reached a tentative agreement on all outstanding issues, pending ratification by the union membership. A meeting of bargaining unit employees was held on December 22 and they voted to accept the tentative agreement.

<sup>1</sup> Good cause having been established, the General Counsel's unopposed motion to correct the hearing transcript is granted.

<sup>2</sup> Hereinafter all dates are in 1999 unless otherwise indicated.

It is undisputed that during the parties' negotiations there was no agreement, or even any discussion, about when the striking employees would return to work. Following the vote to accept the tentative agreement on December 22, Union Representative Margarite Kyer sent a letter, dated December 23, to Douglas Deem, director of the Jackson County Commission on Aging, by electronic facsimile transmission, stating that the striking employees had ratified the contract and "will be reporting to work December 23, 1999, December 24, 1999, and December 27, 1999." The letter indicates that it was faxed to Deem's office at 12:19 p.m. on December 23. Deem credibly testified that his office closed at noon on December 23 and he did not see the letter until the morning of December 27.

James Anderson was employed by the Respondent as a van driver from 1993 to 1998 when he quit his employment. He was rehired in September 1999 and worked at the Ripley facility. He went on strike with other bargaining unit employees on December 13 and was present at the picket line during each day of the strike. When Anderson reported for work for the first time after the strike on the morning of December 27, Deem gave him a letter stating that Anderson was discharged. The Union filed a grievance over Anderson's discharge which was taken to arbitration. The arbitrator dismissed the grievance, holding, that "the Union did not appeal the grievance to arbitration in a timely fashion." In its answer to the complaint, the Respondent asserted that the arbitrator's decision effectively resolved the matter in its favor. That argument has not been pursued in its posthearing brief and it has no merit.<sup>3</sup>

The complaint alleges that the Respondent's termination of Anderson violated Section 8(a)(3) and (1) of the Act. The General Counsel contends that the Respondent failed to reinstate Anderson, an economic striker, after the Union made an unconditional offer to return to work on his behalf.

The Respondent asserts that the strike ended on December 22 when the membership ratified the parties' tentative agreement, that Anderson should have reported for duty on December 23, and that his failure to do so resulted in his lawful termination. By the time Deem received the Union's offer to return to work, a number of the striking employees had already returned to work, including two van drivers. The Respondent contends that because no replacement workers were hired during the strike and because some striking employees showed up for work on December 23, all were required to do so.

#### Analysis and Conclusions

It is well settled that following an unconditional offer to return to work economic strikers are entitled to reinstatement. An employer who refuses to reinstate strikers commits an unfair labor practice unless it can establish that it had a legitimate and substantial business justification for its action. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). Because such action is inherently destructive of employee rights, evidence of

<sup>3</sup> The Regional Director originally was willing to defer this matter to arbitration. However, because the arbitrator dismissed the grievance without deciding the merits or considering the unfair labor practice issue, that decision cannot serve as the basis for deferral under the Board's policy. *Pepsi-Cola Co.*, 330 NLRB 474 (2000).

specific antiunion motivation is not needed in order to establish a violation of the Act. *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968).

I find that the General Counsel has established a prima facie case by proving that the Union made an unconditional offer to return to work on behalf of all of the striking employees, including Anderson, and that Anderson was not reinstated.

The Respondent does not contend that Anderson's job was no longer in existence or that it was filled by a permanent replacement. On the contrary, it contends that because neither Anderson nor any other employee was permanently replaced, their jobs were there for them when the strike ended. It further contends that there was no need for Anderson or the other employees to make an unconditional offer to return to work and there was no need for it to make an offer of reinstatement to anyone. Since the strike was over on December 22, Anderson was lawfully discharged when he failed to report for work on December 23.

The Respondent cites no authority in support of its argument and it is clearly incorrect. The employees' vote to accept the tentative wage agreement and to return to work was not self-executing and did not necessarily entitle them to return to work immediately. The strike may have been over when the Union made the unconditional offer to work on behalf of the striking employees, but the Union does not run the Respondent's business and could not place the employees back on the job. Once the unconditional offer to return to work was made, the Respondent was obligated to respond and make a valid offer of reinstatement. *Orit Corp.*, 294 NLRB 695, 699 (1989); *Hedstrom Co.*, 235 NLRB 1198, 1200 (1978). To do so, the Respondent had to indicate its acceptance of the offer and set a reasonable reporting date. *Hotel Roanoke*, 293 NLRB 182, 188-189 (1989). It did neither. The fact that some employees may have returned to work without waiting for an offer of reinstatement does not excuse its failure to provide such offers. It follows that since the Respondent never made a valid offer of reinstatement to Anderson or gave him a reporting date, it could not lawfully discharge him for failing to appear for work on December 23.

I find no merit in the Respondent's alternative argument that, even in the absence of its having set December 23 as the date for the strikers to report back to work, that date was reasonable under the "totality of the circumstances." Obviously, the question of the reasonableness of a reporting date only arises when the employer has set one and notified the employees of it. Here, the Union's offer to return to work notified the Respondent that some employees would not be returning until December 27. The Respondent neither expressed any objection to the terms of the offer nor proposed a different reporting date.

Equally, lacking in merit is its contention that past practice required the employees to return to work the day after they voted to end their strike because they allegedly did so after a previous strike. Deem testified that, after going on strike for 11 days in 1998, the employees voted to accept a contract proposal on Thursday, October 1, and all returned to work on Friday, October 2. However, his testimony failed to establish whether the return date was a part of the negotiated agreement, whether there had been a written offer to return to work, and whether

the Respondent had responded to such an offer. In the present case, there clearly was a written offer to return to work which specified the dates on which employees would be returning to work, to which the Respondent did not respond.

Finally, the Respondent contends that regardless of the fact that it did not set a reporting date, Anderson knew that he had to report to work on December 23 because he was told by a union representative that he had to do so. I need not speculate as to what effect, if any, such a circumstance might have because I find that the evidence fails to establish that it happened.

The Respondent relies on the testimony of Rose Wallen who was a van driver at the time of the strike but is now a supervisor. Wallen testified that at the ratification meeting on December 22, she asked Union Representative Kyer, "[D]id the van drivers return to work and she said yes." She said there was some discussion between Kyer and some home health technicians about when to return to work but that while she did not pay attention it caused her to ask Kyer if the van drivers were to return to work on December 23. Kyer said, "[A]bsolutely yes," and Anderson that he would not return that day because he had other plans. Kyer then told Wallen she wanted to speak to her about a grievance that Wallen had pending. At that point Wallen again asked if the van drivers were to go back to work the next day and Kyer again said yes. Wallen testified that after the meeting she called Kyer at her hotel to discuss her grievance and again asked if she should go back to work the next morning and Kyer again said yes. Wallen asked Kyer what would happen if Anderson did not show up in the morning and Kyer said the employer had a right to fire him and Kyer could not get his job back.

Another witness called by the Respondent, Deborah Parsons testified that, at the meeting on December 23, Kyer told the employees that the strike was over and they were to go back to work the next day. She heard Anderson and some other employees say that they could not return the next day because they had prior engagements and Kyer told them that they should contact their supervisors. She also saw Anderson speaking with Kyer but she did not know what was said.

Kyer testified that, at the December 22 meeting, that several employees including Wallen asked about when they should return to work as they had temporary jobs during the Christmas season or other holiday plans. She told them that she would notify the employer that the employees would be returning on December 23, 24, or 24. Kyer's testimony was corroborated by the testimony of Anderson and home health technicians, Wilma Barker, Bonnie Sue Wells, and Rosemary Palmer.

I find the evidence establishes that Kyer did not tell the employees that they had to report to work on December 23. Rather, in response to the questions raise by several who had made other plans, she told them that the offer to return to work would indicate that the employees would be returning to work on one of three alternative dates. She in fact did so in the letter she faxed to Deem on December 23. Wallen obviously understood that she could report for work on December 23 and did so. However, based on her demeanor while testifying and the consistent, credible evidence to the contrary I cannot credit her

testimony that Kyer ever said that all van drivers, including Anderson, had to report to work on December 23.<sup>4</sup>

Considering all of the foregoing, I conclude that by failing to reinstate Anderson to his job following the strike, the Respondent violated Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Jackson County Commission on Aging is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate striking employee James Anderson on December 27, 1999, and thereafter.

#### 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 discriminatorily failed to reinstate employee James Anderson, I shall recommend that it be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, Jackson County Commission on Aging, Ripley, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to reinstate striking employees who have made an unconditional offer to return to work.

(b) 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.

<sup>4</sup> In this regard I find no reason to doubt the veracity of Barker or Wells because they have held positions with the Union, as the Respondent suggests. On the contrary, I find that as current employees of the Respondent it is unlikely that their testimony would be false. See *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *K-Mart Corp.*, 268 NLRB 246, 250 (1983).

<sup>5</sup> 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.

(a) Within 14 days from the date of this Order, offer James Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole James Anderson for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of James Anderson and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Ripley, West Virginia, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 27, 1999.

<sup>6</sup> 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."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to reinstate striking employees after they have made unconditional offers to return to work.

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, within 14 days from the date of the Board's Order, offer James Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Anderson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of James Anderson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.