Hormigonera Del Toa, Inc. ***and*** **Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters.** Case 24–CA–6406

May 28, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 24, 1992, Administrative Law Judge Donald R. Holley 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, and conclusions and to adopt the recommended Order as modified.

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging employees Ramon L. Santiago, Joel Fernandez, Guzman Santiago, and Efrain Resto because they had engaged in protected concerted activity. Specifically, the judge found that these employees had concertedly refused to work on Friday, September 20, 1991, to influence the Respondent to raise their hourly wage, to grant them an annual 25-cent raise, and to provide them with a health plan. The judge further found that the Respondent tendered letters to the striking employees on Monday, September 23, informing them that they were deemed to have resigned from their jobs the previous Friday and that these letters constituted discharge notices.

Of significance to the relief he recommended, the judge found that the discharges occurred on September 20 because the discharge letters referred specifically to the employees' protected activity on that date, and that their economic strike thereafter converted to an unfair labor practice strike. Accordingly, the judge ordered reinstatement and backpay for the strikers and required the Respondent to terminate any replacement workers hired after September 20.

The Respondent has excepted to the finding that the employees had been discharged and argues that, rather, they had quit their employment. Alternatively, the Respondent argues that the employees' economic strike did not convert to an unfair labor practice strike until September 23, the day the strikers received the ''resignation'' letters, that the Respondent was therefore privileged to fill their jobs with permanent replacement workers before September 23, and that the strikers had in fact been permanently replaced before they received the Respondent's September 23 letters. Accordingly, the Respondent argues, the strikers are not entitled to reinstatement and backpay. Although we agree with the judge that the Respondent discharged the strikers for their protected concerted activity in violation of Section 8(a)(1), we find merit in the Respondent's contentions that the strike had not yet converted to an unfair labor practice strike at the time of the discharges, September 23, and that the Respondent had at that point hired permanent replacements for three of the striking employees.

Seven of the Respondent's eleven concrete truck drivers met at various times during the week of September 16, 1991, to discuss wages, the need for a medical plan, and selection of a union. After meeting with the Union, employees Fernandez, Resto, and Ramon and Guzman Santiago signed union authorization cards. Employee Ramon Santiago authored a letter, which the seven employees presented to the Respondent's plant manager, Jose Fonseca, about 7:10 a.m. on Friday, September 20. The letter stated, in part:

> Today, all the employees wish to express a silent strike in pursuance of the right that our salaries be increased to $5.75 per hour.
>
> We will not work *today* . . . until an accord is reached.

Later that morning, Company President Antonio Joglar met with the employees and told them that the plant was in no position to give them a wage increase, but that steps had already been taken to establish a medical plan by the end of the year. The employees caucused outside the plant. Employee Ramon Santiago then told Joglar that the Company's position was unacceptable. Joglar replied that the board of directors would meet on Saturday and that he would give the employees the board's decision in writing on Monday, September 23. The employees continued their walkout for the rest of Friday.

The following morning, September 21, the board of directors met, calculated the cost of the employees' wage demands at $108,000 annually, and decided that they would replace the drivers rather than agree to the demands. Joglar conveyed the directors' decision to Plant Manager Fonseca that morning. Later that day, Fonseca offered driver positions to three individuals who had job applications on file, and all three accepted. There is no issue as to the replacements' qualifications. One reported to work on September 23, the others later in the week.

On Monday, September 23, the employees who had struck on Friday reported to the plant shortly before their 7 a.m. starting time but remained outside. President Joglar called the plant at 7:30 a.m., learned from Fonseca that the employees who had struck on Friday had again failed to report to work, and drew up letters,

which he brought to the plant and handed to each of these employees about 9:30 in the morning. Referring to the previous Friday's work stoppage, the letters stated, in part:

> The circumstance of having abandoned your work without first holding a dialogue, then bringing later on some demands which we cannot face economically at this time, in addition to your refusal to work if your conditions are not met exactly the way we [sic] stated them, we have to interpret it as a resignation from your job, leaving us without alternatives and unfortunately we have to accept your decision effective today Monday, September 23, 1991.

The letters also stated that the Friday work stoppage had ''forced [the Respondent] necessarily to cover partially some vacancies and reduce [its] operations to be able to recover in part from the losses'' it had suffered.

After receiving the letters, the employees left the plant and went to the Union to discuss the situation. At some point thereafter, three of the employees who had received the letters requested reinstatement and returned to work. The Union filed the instant charge alleging that the remaining four employees—R. Santiago, Fernandez, Guzman Santiago, and Resto—had been unlawfully discharged.

For the reasons set forth by the judge, we find that the September 23 letters were discharges and that termination of the employees for engaging in a protected strike violated Section 8(a)(1) and converted the strike to an unfair labor practice strike. We disagree, however, with the judge's finding that the strikers were discharged on Friday, September 20. The uncontroverted testimony of the Respondent's witnesses plainly establishes that the discharge letters were composed and delivered on Monday, September 23, and the General Counsel has not shown the discharge decision was made the previous Friday and delayed until after it had hired replacement workers.[1] Thus, we do not find support in the record for the judge's holding that the discharges occurred on September 20. We find instead that the strike that had begun on Friday, September 20, continued on Monday, September 23, and that the discharges occurred on the date that they were effectuated, Monday, September 23.

Because the discharges violate the Act, the strike converted to an unfair labor practice strike on September 23. On Saturday, September 21, however, when the permanent replacements were hired, the employees' stoppage remained an economic strike. An employer need not discharge permanent replacements it has hired for economic strikers, even though the strike and strikers thereafter convert to unfair labor practice status. See *Wilder Construction*, 276 NLRB 977, 982 (1985), enfd. 804 F.2d 1122 (9th Cir. 1986); *SKS Die Casting & Machining*, 307 NLRB 207 (1992). Nor is it necessary for the unlawfully discharged unfair labor practice strikers, whether or not replaced, to make unconditional requests for reinstatement in order to qualify for reinstatement and backpay.[2] Accordingly, we shall modify the judge's recommended remedy to require it to offer reinstatement and backpay only to any employee who had not been permanently replaced on or before September 23, 1991.[3]

REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1), we shall order it to cease and desist and to take certain affirmative action designated to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged four employees, we shall order it to reinstate to his former position the one employee of the four who had not been permanently replaced on or before September 23, 1991, if necessary terminating any employee hired to replace that employee after September 23, 1991, and to make him whole for any loss of earnings or other benefit computed on a quarterly basis from the date of discharge to the date of a 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*

[1] Although the General Counsel adduced evidence that the employees had no timecards to punch on Friday and Monday mornings, the judge credited the testimony of the Respondent's plant manager that, at 6 a.m. Friday morning—and consistent with past practice— timecards for all employees were removed from the rack and forwarded to personnel for payroll purposes; that, at the same time, new timecards were placed on top of the timeclock for employees to punch on arrival at the plant; and that the striking employees' cards remained on top of the timeclock until the following Thursday, when they were removed.

[2] See *Abilities & Goodwill*, 241 NLRB 27 (1979).

Member Raudabaugh agrees that the strikers were unlawfully discharged on September 23. He disagrees with his colleagues, however, that this discharge converted the strikers into unfair labor practice strikers. For that reason, a request for reinstatement is not a necessary act to trigger reinstatement and backpay liability. See *Abilities & Goodwill*, supra.

[3] The record shows that the Respondent had hired only three permanent replacements by that date and that the replacement of the fourth discharged employee by Guillermo Rodriguez did not occur until October 1992. As the record does not indicate which of the strikers Rodriguez replaced, we leave to compliance which of the four strikers is entitled to the offer of reinstatement and backpay as not having been replaced as of September 23, 1991. Of course, the Respondent is also obligated to reinstate any of the remaining three to their former, prestrike positions if those positions become vacant by virtue of the departure of replacements, whether permanent or temporary, with backpay running from the date of the replacements' departure.

the Retarded, 283 NLRB 1173 (1987). We shall further order that the Respondent place those employees for whom no employment is available by virtue of their having been permanently replaced on or before September 23, 1991, on a preferential hiring list based upon seniority, or some other nondiscriminatory basis, for employment as jobs become available.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hormigonera Del Toa, Inc., Toa Alta, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer to the unreplaced employee among Ramon L. Santiago, Joel Fernandez, Guzman Santiago, and Efrain Resto immediate and full reinstatement to his former position, or, if that job no longer exists, to a substantially equivalent position, with full seniority and all other rights and privileges restored, and make him whole for any loss of earnings or other benefits he may have suffered by virtue of his discharge in the manner set forth in the Amended Remedy section of the Board's Decision and Order. Those employees for whom no employment is available by virtue of their having been permanently replaced on or before September 23, 1991, shall be placed on a preferential hiring list based upon seniority, or some other nondiscriminatory test, for employment as jobs become available.''

2. Substitute the attached notice for that of the administrative law judge.

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 discharge our employees for engaging in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

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

WE WILL offer to the unreplaced employee among Ramon L. Santiago, Joel Fernandez, Guzman Santiago, and Efrain Resto immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, with full seniority and all other rights and privileges restored, and make him whole for any loss of earnings or other benefits he may have suffered by virtue of his discharge and WE WILL place those employees for whom no employment is available by virtue of their having been permanently replaced on or before September 23, 1991, on a preferential hiring list based on seniority, or some other nondiscriminatory basis, for employment as jobs become available.

WE WILL expunge from our files any reference to the discharges of the four employees named above and notify them in writing, in both English and Spanish, that this has been done and that evidence relating to their discharges shall not be used against them in any way.

HORMIGONERA DEL TOA, INC.

Stanley A. Orenstein, Esq., for the General Counsel.
Rafael Cuevas Kuinlam, Esq. (Cuevas Kuinlam & Bermudez), of Hato Rey, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed by the Union on September 27, 1991[1] (amended on November 8), the Regional Director for Region 24 of the National Labor Relations Board issued a complaint on November 8 which alleged, in substance, that on or about September 23, Hormigonera Del Toa, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act by discharging employees Ramon L. Santiago, Joel Fernandez, Guzman Santiago, and Efrain Resto because they engaged in protected concerted activities. Respondent filed timely answer to complaint which denied it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in San Juan, Puerto Rico, on March 16, 1992. All parties appeared and were afforded full opportunity to participate. On the entire record, including careful consideration of posthearing briefs filed by the parties and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

[1] All dates herein are 1991 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Puerto Rico, is engaged in the manufacture of ready-mix concrete at a facility located in Toa Alta, Puerto Rico. It annually purchases products valued in excess of $50,000 directly from suppliers located in Puerto Rico which, in turn, purchase such supplies from suppliers located outside the Commonwealth of Puerto Rico. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

FACTS

In mid-September 1991, Respondent employed some 11 concrete truckdrivers at its Toa Alta, Puerto Rico plant. During the workweek which commenced on September 16, driver Ramon Santiago testified that he and the other drivers discussed some problems which included the need for a medical plan, better salaries, and the organization of a union. Thereafter, seven of the drivers (Miguel A. Reyes, Roberto Rivera, McDaniel Mojica, Joel Fernandez, Guzman Santiago, Efrain Resto, and Ramon Santiago) met at Ramon Santiago's home on the morning of September 18 to discuss their work-related concerns. About 10 a.m., Ramon Santiago telephoned the office of the Union and learned he should talk to Juan Negron. Shortly before noon, Guzman Santiago, Efrain Resto, Joel Fernandez, and Ramon Santiago met with Negron at the union hall where they discussed their rights and signed union cards. Thereafter, Ramon Santiago prepared a letter which stated the following (Jt. Exh. 2):[2]

> COMPANIA HORMIGONERA DEL TOA
>
> Subject:
>
> Today, all the employees wish to express a silent strike in pursuance of the right that our salaries be increased to 5.75 per hour.
>
> We will not work *today* . . . until an accord is reached . . . .
>
> But we can reach a written accord:
> Our preoccupations are:
>
> (1) A Health Plan
> (2) We wish that an increase of 25 cents be given to us each year, starting next January 1992.
> (3) We belive that our responsibilities are many with respect to the low salary we receive, so we can pay for your expenses.
>
> We, the employees want your reply.

[2] The original letter was in Spanish.

The seven above-named employees who attended the September 18 meeting all signed the letter.

On Friday, September 20, Ramon Santiago and Joel Fernandez handed the above-quoted letter to Jose Fonseca, Respondent's plant manager, about 7:10 a.m. The employees indicated they wished to discuss the letter with Antonio Joglar, the president of the Company. Joglar was contacted at the San Pablo Hospital and Ramon Santiago spoke with him. Santiago explained the employees were not working and wished to speak with him about salary increases and other working conditions. Joglar urged Santiago to continue to work until he could meet with the employees.

Joglar arrived at the plant around 11 a.m. and the seven employees who had attended the earlier meeting at Santiago's house entered the plant to meet with him. He told the employees the plant was in no position to give them a wage increase to $5.75 per hour, but approaches had already been made to establish a medical plan no later than the end of the year. Santiago suggested that the employees go outside to meet so they could give him a reply. Santiago returned in about half an hour to tell Joglar his position was not acceptable. Joglar indicated the board of directors would meet on Saturday and he would give the employees their decision in writing on Monday.

Respondent's board of directors met about 9 a.m. on Saturday. They calculated that raising all employees by the amount demanded would cost them an additional $108,000 per year and decided they would replace the drivers rather than grant the increases demanded. Joglar testified he informed Plant Manager Fonseca of the board's decision about 11 a.m. on Saturday.

Plant Manager Fonseca testified that Joglar informed him of the partner's decision and instructed him to start hiring replacements. He testified he offered permanent driving positions to three individuals on Saturday. They were Jaime Rivera, Jose Martinez, and Wilfredo Fines. He indicated Fines told him he could start work on Monday, September 23, but Rivera and Martinez indicated they would start work on Tuesday, September 24. Rivera and Fines corroborated Fonseca's claim that he hired them on Saturday, September 21, and that they started to work on September 23 (Fines) and September 24 (Rivera). Respondent placed in evidence as Respondent's Exhibits 2 and 3 payroll records for the week beginning September 20 and ending on Thursday, September 26. They reveal that Fines and Rivera started to work on the dates they claim they started, and they worked everyday thereafter through Thursday, September 26. With respect to Martinez, the payroll records reveal that he worked 26-1/2 hours straight time and 3 hours overtime during the period Tuesday, September 24, through Thursday, September 26.

Fonseca testified that subsequent to the time Rivera, Fines, and Martinez were hired, one Guillermo Rodriquez was offered a job as a driver at some point in October after he completed truckdriver training for which he was not paid. Rodriquez accepted the offer and went on the payroll the first or second week of October 1991.

On Monday, September 23, Respondent conveyed the board of director's decision to the seven striking employees

by delivering to them, at approximately 9:30 a.m., letters addressed to them individually, which uniformly stated:[3]

> By this means I want to inform you that the directors of this Corporation have met with regard to the situation arisen last Friday, September 20, 1991, in which you and a group of co-workers abandoned your work thus causing damagers to our enterprise and unnecessarily causing us economic losses.
>
> The circumstance of having abandoned your work without first holding a dialogue, then bringing later on some demands which we cannot face economically at this time, in addition to your refusal to work if your conditions are not met exactly the way we stated them, we have to interpret it as a resignation from your job, leaving us without alternatives and unfortunately we have to accept your decision effective today, Monday, September 23, 1991.
>
> We regret that this situation arises at this moment wherein the Corporation has suffered great losses because of breakages in addition to the possible losses of contracts and commitments which has forced us necessarily to cover partially some vacancies and reduce our operations to be able to recover in part from the losses we have had due to your action.
>
> We sincerely regret this decision from you all which has been detrimental to you as well as to us.
>
> Yours truly,
> Hormigonera Del Toa, Inc.
>
> (sgd.)
> Antonio Joglar Moreno
> President

At unspecified times after September 23, 1991, striking employees Miguel Reyes, Rafael Rivera, and McDaniel Mojica abandoned the strike and requested reinstatement. They were returned to work.

Employee Ramon Santiago testified the 7 striking employees viewed the letters given them by Respondent on the morning of September 23 as letters of discharge. He indicated that on receipt of the letters, the striking employees left the plant and went to discuss the situation with the Union. Thereafter, on September 27, 1991, the Union filed the original charge in the instant case naming employees R. Santiago, Fernandez, Guzman Santiago, and Efrain Resto as alleged discriminatees. While the record reveals the alleged discriminatees have not picketed or demonstrated at the Respondent's plant since September 23, 1991, it fails to reveal that the employees or the Union acting on their behalf, have offered unconditionally to return to work at Respondent.

In addition to seeking to establish that the striking employees were discharged on September 23, 1991, by offering in evidence the Joglar letters which were given to them on that

[3] See Jt. Exhs. 3(a) and (b) through 6(a) and (b).

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall recommend it be directed to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Ramon L. Santiago, Joel Fernandez, Guzman Santiago, and Efrain Resto, I recommend it be ordered to reinstate those employees to their former positions, if necessary, terminating the services of any employees hired to replace them, and make them whole for any loss of earnings and benefits they suffered as a result of their unlawful discharges, less any interim earnings, with the sums due and interest thereon calculated in the manner set out in *F. W. Woolworth Co*., 90 NLRB 289 (1950), *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend Respondent be ordered to expunge from its records and files any reference to the discharges of the four employees named above and that they be notified in writing, both in English and Spanish, that this has been done and evidence relating to their unlawful discharges shall not be used against them. I further recommend that the notice attached hereto be prepared and posted both in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Hormigonera Del Toa, Inc., Toa Alta, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

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

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

(a) Offer Ramon L. Santiago, Joel Fernandez, Guzman Santiago, and Efrain Resto immediate and full reinstatement to their former positions, if necessary terminating any employees hired to replace them, with full seniority and all other rights and privileges restored, and make them whole for any loss of earnings or other benefits they may have suffered by virtue of the unlawful discrimination against them in the manner set out in the remedy section of this decision.

(b) Expunge from its records and files any reference to the discharges of the four employees named above and notify them in writing, in both English and Spanish, this has been done and that evidence relating to their unlawful discharges shall not be used against them in the future.

(c) 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 determine the payments which will make whole the four employees named above for the discrimination practiced against them.

(d) Post at its facility at Toa Alta, Puerto Rico, copies of the attached notice, in Spanish and English, marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 24, shall be signed by an authorized representative of Respondent and posted immediately after their 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.

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

[5] 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.

[6] 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.''