

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. 87-4 (CE)
	)	
UNITED FOOD & COMMERCIAL	)	DECISION NO. 277
WORKERS UNION, LOCAL 480,	)	
	)	FINDINGS OF FACT, CONCLU-
Complainant,	)	SIONS OF LAW AND ORDER
	)	
and	)	
	)	
HAWAIIAN MILLING CORPORATION,	)	
	)	
Respondent.	)	

---

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On March 13, 1987, the UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 480 [hereinafter referred to as Complainant], filed an Unfair Labor Practice Complaint with the Hawaii Labor Relations Board [hereinafter referred to as the Board], in Case No. 87-4(CE). Complainant alleged that Respondent HAWAIIAN MILLING CORPORATION [hereinafter referred to as Respondent or Employer] had engaged in or was engaging in unfair labor practices in violation of Sections 377-6(1) and (3), Hawaii Revised Statutes [hereinafter referred to as HRS]. Complainant alleged that the Employer had interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 377-4, HRS. Also, Complainant alleged that Respondent discouraged membership in the Complainant's union by discrimination in regards to hiring, tenure or other terms or conditions of employment as per a letter, dated March 9, 1987.

The letter attached to the Complaint states:

March 09, 1987

Ronald Joseph  
86-309 Puuhulu Street  
Waianae, Hawaii 96792

Dear Ronald:

We would like to have you return to work at Hawaiian Milling Corporation by Friday, March 13, 1987. If your normal days off are Friday and Saturday then you need not return until Sunday, March 15, 1987.

If you do not wish to return to work at that time and under the conditions offered in our contract proposal, we will be hiring replacements to do the work.

Hope to see you at work by Friday or Sunday.

Sincerely,

HAWAIIAN MILLING  
CORPORATION

/s/ Corky  
Michael C. Bryan  
Manager

On March 23, 1987, the Employer filed an Answer of Respondent. Respondent alleged the following: that the complaint failed to state a claim upon which relief could be granted; the attached letter, dated March 9, 1987, was a statement protected under Section 377-16, HRS, as an exercise of Respondent's right to freedom of speech; the complaint failed to make out a prima facie case of discrimination because the letter merely states that all returning strikers and replacements will work under the same terms and conditions of employment; the Board

lacked jurisdiction to issue a make-whole order; and the letter was an accurate statement of Respondent's rights under the law. Hence, Respondent prayed that the instant complaint be dismissed.

At the hearing held on April 10, 1987, the Complainant offered one exhibit, the letter dated March 9, 1987 previously referred to, and indicated that, as a matter of law, the language of the letter itself violated the statute. Counsel for Respondent indicated that the parties had agreed to submit this case to the Board on a stipulated record with briefs to follow.

On March 16, 1988, the Board issued Proposed Findings of Fact, Conclusions of Law and Order in this case. On April 4, 1988, Complainant filed exceptions to the Board's proposed decision. In addition, Complainant filed a Motion to Reopen Record and/or to Have the Board Take Judicial Notice of the Testimony in Case Nos. 86-6(CE) and 87-7(CE). The affidavit of an associate of Complainant's counsel filed in support of the motion indicates that such testimony directly relates to acts and conduct by Employer's agents regarding certain employees prior to March 2, 1987 and is "critical" in determining whether or not the strike that exists is an unfair labor practice strike or an economic strike.

On April 13, 1988, Respondent's counsel filed a memorandum in opposition to the foregoing motion. Respondent's memorandum indicates that both Case Nos. 86-6(CE) and 87-7(CE) involve only one employee, Raymond Cardus. In Case No. 86-6(CE), Cardus claims that he was discriminated against because Respondent would not allow him to continue working until his hand



completely healed from a non-industrial accident. This occurred in July 1986, prior to the commencement of the March 1987 strike. Case No. 87-7(CE) involves the discharge of Cardus. Respondent alleges that there is no testimony in either case which is connected in any way to the 1987 strike. Further, Respondent alleges there is nothing in this case which would tie in with the evidence adduced in those cases.

On May 3, 1988, Respondent's counsel filed a memorandum in opposition to Complainant's exceptions. A hearing was held on May 11, 1988.

After consideration of the arguments raised for and against reopening the record in this case and/or taking judicial notice of the testimony in Case Nos. 86-6(CE) and 87-7(CE), the Board hereby denies Complainant's motion. Notwithstanding the fact that Complainant has not delineated what testimony and other evidence it believes is "critical" or relevant, we believe it is inappropriate at this stage of the proceeding to now reopen the record. It appears that Complainant's motion was prompted by the Board's issuance of the Proposed Findings of Fact, Conclusions of Law and Order which underscored the scant evidence produced in this proceeding. We believe it is inappropriate at this stage to attempt to cure the record which has been established in this case by a generic reference to two pending cases before the Board. In any event we do not believe such evidence to be dispositive of this case.

Based upon a review of the record in this case, the Board makes the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

Complainant is the UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 480, AFL-CIO.

Respondent is the HAWAIIAN MILLING CORPORATION.

At the hearing on this matter, the parties stipulated that this case be submitted to the Board based upon a March 9, 1987 letter sent to employees by Respondent's manager, Michael Bryan. The parties further stipulated that the letter was sent on March 9, 1987, one week after the employees commenced a strike against Respondent, and that the letter was not accompanied by any further statements. Reply Brief on Behalf of Respondent, p. 2. No other live testimonies were presented by either party and the only exhibit in evidence is a letter, dated March 9, 1987, identical to the letter attached to the Unfair Labor Practice Complaint, except that it is addressed to Maximo Faller, instead of Ronald Joseph.

#### CONCLUSIONS OF LAW

Complainant alleges that Respondent violated Subsections 377-6(1) and (3), HRS. These provisions state as follows:

377-6 Unfair labor practices of employers. It shall be an unfair labor practice for an employer individually or in concert with others:

- (1) To interfere with, restrain, or coerce the employer's employees in the exercise of the rights guaranteed in section 377-4;

\* \* \*

- (3) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. An employer, however, may enter into an all-union agreement with the bargaining representative of the employer's employees in a collective bargaining unit, unless the board has certified that at least a majority of the employees have voted to rescind the authority of their bargaining representative to negotiate such all-union agreement within one year preceding the date of the agreement. No employer shall justify any discrimination against any employee for nonmembership in a labor organization if the employer has reasonable grounds for believing that:

- (A) Such membership was not available to the employee on the same terms and conditions generally applicable to other members;
- (B) Or that membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and the initiation fees uniformly required as a condition for acquiring or retaining membership;

\* \* \*

Section 377-4, HRS, defines the rights of employees as follows:

377-4 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection,



and such employees shall also have the right to refrain from any and all such activities, provided that employees may be required to join a union under an all-union agreement as provided in section 377-6(3).

Complainant alleges that the foregoing provisions were violated because the subject letter does not explain to the employees whether the replacements hired were temporary or permanent. Complainant contends that this letter was "intentionally calculated, by its vagueness, to break the strike and force the employees to give up the strike and accept the Employer's final offer by returning to work or else they would lose their jobs." Complainant argues that the significance of the language of the letter is important because if the employees are properly engaged in an unfair labor practice strike, then the Employer cannot permanently replace them but can only hire temporary replacements. Complainant further argues that Respondent had full opportunity to and should have explained the difference in the nature of replacements depending on the nature of the strike, and failing to do so results in the letter being coercive.

Complainant posits that statements made by the Employer to the striking employees regarding replacement or reinstatement may constitute the unfair labor practice which is determinative as to whether the employees are economic or unfair labor practice strikers and controls the nature of their reinstatement. Complainant relies on NLRB v. International Van Lines, 409 U.S. 48, 81 LRRM 2595 (1972).

In that case, the United States Supreme Court upheld a National Labor Relations Board [hereinafter referred to as NLRB]

order requiring the employer to unconditionally reinstate striking employees whom it discharged before permanent replacements were hired, since the discharges constituted an unfair labor practice. Four employees refused to cross the picket line during a lawful economic strike. Thereupon, three of the four received identical telegrams which read: "For failure to report to work as directed at 7 a.m. on Wednesday morning October 4, 1967, you are being permanently replaced. (Signed) International Van Lines." At the time of the discharges, the employer had not in fact hired permanent replacements. The employees thereafter sought reinstatement and made unconditional offers to return to work. The employer refused reinstatement, claiming that it had hired permanent replacements. The union filed unfair labor practices against the employer with the NLRB.

The NLRB determined that the labor picketing which commenced was protected activity under the National Labor Relations Act and concluded that the subsequent discharges of striking employees discriminated against lawful union activities and constituted unfair labor practices under Section 8(a)(1)(3) of the Act. The Court held that the discharge of the economic strikers prior to the time their places were filled constituted an unfair labor practice. The Court stated at p. 2596:

It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements. NLRB v. Mackay Radio & Telegraph Company, 304 U.S. 333, 345-346, 2 LRRM 610. It is equally settled that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or statutory provision to the contrary, to unconditional reinstatement with



back pay, "even if replacements for them have been made." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278, 37 LRRM 2587, 2590. Since the strike in the instant case continued after the unfair labor practices had been committed by the employer, the Board reasoned that the original economic strike became an unfair labor practice strike on October 5, when the three telegrams were sent. The Board held the four employees to be unfair labor practice strikers and accordingly, ordered their unconditional reinstatement with back pay.

Based upon the evidence submitted and the foregoing case, Complainant alleges that the letter sent by Respondent violated Sections 377-6(1) and (3), HRS.

Generally, it is stated:

An employer may continue to operate his business during a lawful economic strike, may hire permanent replacements for economic strikers at any time before they unconditionally request reinstatement, may announce that those who accept employment during the strike will have permanent jobs if they want them, and may refuse to reinstate replaced striking employees on their election to return to work. In other words, he is not guilty of an unfair labor practice in refusing to discharge persons hired to fill the places of economic strikers. [Footnotes omitted.]

48 Am. Jur. 2d, § 941, Labor and Labor Relations, p. 768.

It is also well settled that:

A strike which is economic at its inception may be converted into an unfair labor practice strike by the commission of unfair labor practices during its course. A refusal to reinstate economic strikers on their offers to return to work converts the strike into an unfair labor practice strike if the offers to return were unconditional, and leaves the strike an economic one if the offers to return were conditional. But if a strike begins as an economic strike, it is not converted into an unfair labor practice strike by the employer's subsequent unfair

labor practice unless there is proof of a causal relationship between the unfair labor practice and the prolongation of the strike. An economic strike is converted into an unfair labor practice strike if the unfair labor practice "prolongs" the strike and not merely "aggravates" it. And if an economic strike is thus converted into an unfair labor practice strike, strikers who are permanently replaced before the unfair labor practice occurred are not entitled to reinstatement.

Following conversion of an economic strike into an unfair labor practice strike, strikers are entitled to unconditional reinstatement to any other former jobs for which no replacements were held before the date of conversion. [Footnotes omitted.]

Id., Section 950, Labor and Labor Relations, p. 774.

In Mississippi Extended Care Center, 202 NLRB 1065, 82 LRRM 1738 (1973), the NLRB held that the employer did not violate the LMRA in pre-election speeches when it told employees that they could be permanently replaced if they went on strike, even though it did not tell them about their poststrike reinstatement rights and about the special status of unfair labor practice strikers.

In Industrial Waste Service, Inc., 268 NLRB 1180, 115 LRRM 1265 (1984), the NLRB held that the employer did not violate the Labor Management Relations Act [hereinafter referred to as LMRA] when it sent economic strikers a letter stating that it "has the right to hire new employees to do your jobs" and that when the strike ended "we are not required to discharge the new employees in order to take striking employees back." This language was deemed to be an accurate statement of the employer's rights and not a threat in violation of the Act.



In Eagle Comtronics, Inc., 263 NLRB 515, 111 LRRM 1005 (1982), the NLRB held that the employer did not violate the LMRA by its statements describing its legal position which is entirely consistent with the law and held that the employer was not required to delineate more specific rights of economic strikers. During pre-election meetings with employees, an employer spokesperson told the employees that, in case of an economic strike, strikers "could be replaced with applications on file." The Administrative Law Judge determined on this evidence that the employer's failure to inform the employees of their rights to reinstatement might lead employees to erroneously believe that their jobs would be permanently forfeited. The Administrative Law Judge therefore concluded that the failure to advise the employees fully of their rights as economic strikers violated the Act. The NLRB however overturned the Administrative Law Judge's ruling. The Board stated, at pp. 1005-1006:

The issue posed in this case is the degree of detail required of an employer who informs employees that they are subject to replacement in the event of an economic strike. It is well established that, when employees engaged in an economic strike, they maybe permanently replaced. Of course, "permanent replacement" does not mean a striking employee is deprived of all rights. Specifically, striking employees retain the right to make unconditional offers of reinstatement, to be reinstated upon such offers if positions are available, and to be placed on a preferential hiring list upon such offers if positions are not available at the time of the offer. However, the Board has long held that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. The Board has held that such comments do not constitute impermissible threats under Section 8(a)(1), or objectionable conduct in



an election. Unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Section 8(c) of the Act. Therefore, we conclude that an employer may address the subject of striker replacement without fully detailing the protection enumerated in Laidlaw<sup>1</sup>, so long as it does not threaten that, as a result of strike, employees will be deprived of their rights in a manner inconsistent with those detailed in Laidlaw. To hold otherwise would place an unwarranted burden on an employer to explicate all the possible consequences of being an economic strikers. This we shall not do. As long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act.

In the instant case, Respondent informed employees only that they could be replaced by applicants on file. Such a statement, simply describing an employer's legal prerogative, does not contravene any Laidlaw rights, but, indeed is entirely consistent with the law. Respondent was not required to delineate more specific rights. Accordingly, we reversed the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) by its statement in this regard.

In this case, Complainant relies entirely on the letter, dated March 9, 1987, to establish its case of an unfair labor practice charge. The letter, which was sent after the instant strike was in progress, purports to indicate when the employees should return to work. The letter specifically states, "If you do not wish to return to work at that time and under the conditions offered in our contract proposals, we will be hiring replacements to do the work."

---

<sup>1</sup>The Laidlaw Corporation, 171 NLRB 1366, 68 LRRM 1252 (1968).

There is, however, nothing in evidence in this case which indicates that the instant strike is anything but an economic strike<sup>2</sup>. There is no evidence that the employees considered themselves discharged; there is no evidence of letters of termination or final checks being issued. There is no evidence of coercive statements. This is not a reinstatement case as in International Van Lines, supra; there is no evidence of any unconditional offers from the strikers to return to work. All there is in evidence before the Board is the letter and a stipulation that all employees received it one week after the strike began. The letter does not indicate that the replacements hired are to be considered "permanent", it only states that replacements will be made. As in the cases cited above, and relied upon by this Board, we find that the Employer in this case, was not required to fully delineate the reinstatement rights of what was known to them at the time to be economic strikers. We do not find the authorities cited by the Complainant to be controlling nor compelling. Hence, the Respondent's mere reference to the

---

<sup>2</sup>In its exceptions to the Board's proposed decision, Complainant stated that this finding is inappropriate since the Board is "well aware of and has knowledge of the incident involving Mr. Cardus that occurred prior to the March 9, 1987 letter sent by the Employer to the striking employees." Complainant argues that the letter in evidence in this case must be considered in light of those matters involved which precipitated the strike. The Board is presented in this case with the sole issue of whether the content of the letter constituted an unfair labor practice. Complainant's attempts to try to tie this in with other pending cases at this late stage we believe, is inappropriate. There has not as yet, been a finding that the present strike is anything but an economic strike. Nothing in this record indicates that the Respondent has denied reinstatement to these employees based on the status of any strike. Hence, the Board denies Complainant's exceptions.

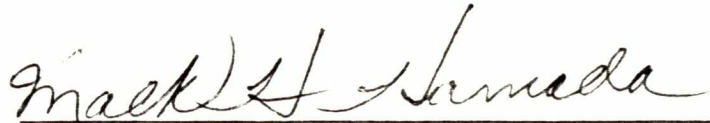
word "replacements", does not violate Sections 377-6(a)(1) and (3), HRS, because it accurately reflects the Employer's position and does not misstate the strikers' reinstatement rights.

ORDER

Accordingly, the instant unfair labor practice charge is dismissed.

DATED: Honolulu, Hawaii, June 28, 1988.

HAWAII LABOR RELATIONS BOARD

  
MACK H. HAMADA, Chairperson

  
JAMES R. CARRAS, Board Member

  
GERALD K. MACHIDA, Board Member

Copies sent to:

Richard M. Rand, Esq.  
Randall N. Harakal, Esq.  
Joyce Najita, IRC  
Robert Hasegawa, CLEAR  
Publications Distribution Center  
State Archives  
University of Hawaii Library  
Richardson School of Law Library  
Library of Congress