

VERMONT LABOR RELATIONS BOARD

CHITTENDEN SOUTH EDUCATION )  
ASSOCIATION, HINESBURG UNIT )

v. )

DOCKET NO. 85-15

HINESBURG SCHOOL DISTRICT AND )  
HINESBURG SCHOOL BOARD )

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is whether various Hinesburg Elementary School teachers, who were on strike and have now been reinstated to their positions, should be denied back pay and other damages either because of strike misconduct, acceptance of teaching positions at other schools or because of having a special non-renewable contract. On August 30, 1985, the Vermont Labor Relations Board ("Board") issued its Findings of Fact, Opinion and Order in this case, finding the Hinesburg School District and Hinesburg School Board ("School Board") had committed unfair labor practices in violation of 21 VSA §1726(a)(1) and (a)(5). 8 VLRB 219. To remedy these unfair labor practices, the Board ordered the School Board to offer the striking teachers, upon their unconditional application to return to work, "reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, discharging, if necessary, any replacements hired after the commencement of the April 3 strike". 8 VLRB 252. The Board also ordered that if there were any individual teachers whom the School Board contended were not entitled to reinstatement, the School Board would be required to

notify the Board within 20 days of a request for reinstatement and request a compliance proceeding to determine the teachers' eligibility for reinstatement.

By September 16, 1986, 22 of the striking teachers submitted letters requesting reinstatement to their former positions at the Hinesburg School and a twenty-third teacher submitted a request on October 7, 1986. Initially, the School Board denied reinstatement to all of the strikers and filed a request for a compliance hearing with respect to several of the strikers. The School Board contended the strikers forfeited their right to reinstatement either because of strike misconduct, acceptance of teaching positions at other schools or substantially equivalent employment or because of having a special non-renewable contract.

The Board appointed Timothy Noonan, Board Executive Director, as hearing officer to conduct the compliance hearings and to issue recommended findings of fact, opinion and order. Hearings were held on March 10 and 11, 1986. The School Board was represented by Attorney Nicholas DiGiovanni, Jr. The Chittenden South Education Association, Hinesburg Unit ("Association"), the striking teachers' representative, was represented by attorneys Robert Chanin and Bruce Lerner; and James Suskin, General Counsel, Vermont-NEA. Subsequent to the hearings, the School Board and the Association filed briefs. Noonan issued Recommended Findings of Fact, Opinion and Order on June 11, 1986.

On July 25, 1986, the Vermont Supreme Court affirmed in all respects the August 30, 1985, decision of the Board. Subsequently,

the School Board offered reinstatement to those striking teachers who made unconditional offers to return to Hinesburg. Other accommodations were also reached by the School Board and Association. As a result, the issues which were before the hearing officer have been narrowed. The Board addresses only those remaining issues, which are as follows:

1. Whether teacher Timothy Bourne should be denied back pay and other damages because of his picketing at the home of Lauren Smith, one of the replacement teachers;
2. Whether teacher Myrtle Kimball should be denied back pay and other damages because of a handwritten note she left for her replacement teacher and because of a letter she wrote to a woman she knew who was a substitute aide in a neighboring school;
3. Whether four teachers (i.e., Michael Bonavita, Thomas Carlson, Deborah Pyle and Sally Robertson) should be denied back pay and other damages because they accepted employment for the 1985-86 school year in other school districts; and
4. Whether Andrea Amai should be denied back pay and other damages because of her employment as a music teacher during the 1984-85 school year pursuant to a one-year, non-renewable contract.

The Board Chairman appointed the following members as a panel to resolve these remaining issues: William G. Kemsley, Sr., Catherine Frank and Charles McHugh.

The School Board and Association have filed briefs on the recommended decision of the hearing officer. The Board has reviewed those briefs, the briefs filed subsequent to the compliance hearings and the recommended decision of the hearing officer. Upon review of those materials, the Board has adopted the findings of fact made by the hearing officer on the remaining issues, and such findings are contained herein. We further agree with the result recommended by the hearing officer based on those facts. Our Findings of Fact, Opinion and Order follow.

### FINDINGS OF FACT

1. The School Board makes the following general allegations of strike misconduct against striking teacher Timothy Bourne:

On or about April 27, 1985, Mr. Bourne harassed Lauren Smith, one of the replacement teachers, at her home. During late April and early May, Bourne directly picketed the home of replacement teacher Lauren Smith. Such activity which includes invasion of privacy of the replacement teacher constitutes serious misconduct which warrants a denial of reinstatement.

2. During the 1984-85 school year, Timothy Bourne was a full-time fourth grade teacher at Hinesburg School with six years of seniority.

3. The decision to picket the homes of replacement teachers was made collectively by the 28 striking teachers on April 25 and 26, 1985; four or five days after the Hinesburg School had reopened with replacement teachers. The decision was based on a recommendation from Joseph Blanchette, Vermont-NEA UniServ Director; Laurie Huse, strike coordinator for the Vermont-NEA; Emily Tyl, Association President, and Margaret McNeil, one of the striking teachers. The purpose of picketing was two-fold. One reason was to foster a sense of unity among the striking teachers. The other, more important reason was so the striking teachers could get their message to the replacements about the reasons for the strike and communicate their views as to what replacements were doing to the students, the school and the striking teachers. This communication could not take place at the Hinesburg School because the replacements were brought there on buses and walked from the buses to the school building through barricades. When replacements began driving their own cars to the school, the strikers were not permitted to enter the school parking lot to communicate with them. The striking teachers believed that, as a

result, the replacements were hearing only the School Board's side of the story. The teachers could have communicated by mail but thought it important to "personalize their message".

4. On Saturday, April 27, 1985, five to eight teachers gathered at strike headquarters in Hinesburg prior to picketing the homes of replacements. The teachers prepared several signs bearing phrases such as, "We're the real Hinesburg teachers", "We're the Hinesburg 28", and "[name of replacement] is stealing my job".

5. The teachers, with the assistance of Blanchette, also prepared packets of information to distribute to the replacements. These packets included handouts that had been distributed to the community; a detailed chronology of the dispute; excerpts from the official fact-finding report that was issued prior to the strike; two or three personal, handwritten notes explaining the teachers' reasons for striking; a letter from one of the striking teachers who had crossed a picket line four or five years earlier; and a handwritten invitation to a Sunday brunch at which the strikers and the replacements could discuss the issues surrounding the strike.

6. Prior to the picketing, Blanchette and Huse gave instructions to the teachers regarding the procedure to be followed during picketing. The picketers were instructed not to trespass on private property, but to remain within 30 to 35 feet of the center of the roadway on public property, as had been recommended by the police. In addition, picketers were instructed not to block access to or from private property, and not to engage in shouting, yelling, arguing or obscene gestures.

7. The teachers also planned to send one or two volunteers to deliver personally the information packet when they arrived at a replacement's home. The volunteers would knock on the door and inquire whether the replacement was willing to discuss the dispute and the teachers' reasons for striking. The rest of the group would picket on the road or sidewalk in front of the replacement's house.

8. One of the homes picketed on April 27 was the home of replacement Lauren Smith. Bourne was among those at Smith's home. Smith's home is on Marble Island Road in Colchester. Two volunteers, one of whom was Bourne, approached the house to deliver a packet of information while the rest of the group waited on the public roadway. Bourne and the other teacher introduced themselves and spoke with Smith for approximately 20 to 25 minutes concerning the strike. They also invited Smith to brunch the following day. The conversation was restrained and civil. Smith did not ask the teachers to leave, and she did not appear angry or upset. While Bourne and another teacher spoke with Smith, the rest of the group engaged in picketing on the public roadway. Blanchette and one other teacher started down the dirt road to Smith's house, but turned back when they realized it might be private property. The conversation between the two teachers and Smith ended when a television cameraman, who had arrived independently of the strikers, approached Smith. At that point, she reentered the house.

9. A group of striking teachers, including Bourne, picketed Smith's house on a second occasion within the following two weeks. As they were driving to the house on the public roadway, they saw Smith jogging on the side of the road. From his car, Bourne engaged Smith in

a conversation about the strike that lasted approximately one minute. The teachers then picketed on the public roadway near Smith's house for approximately 20 to 40 minutes. There was no trespassing on private property, and the picketing was peaceful and quiet.

10. Leaflets were left at the homes of neighbors of Smith. The leaflets referred to Smith by name and referred to her actions as a replacement teacher as "unethical and unprofessional" (School Board Exhibit 4). These leaflets were prepared and distributed by members of the Burlington Education Association, a separate entity from the Association, without the approval or foreknowledge of the striking teachers or their representatives.

11. The School Board makes the following general allegations of strike misconduct against Myrtle Kimball:

On or about April 23, 1985, Kathleen Lane, one of the replacement teachers, was left a note by Myrtle Kimball, one of the striking teachers, threatening her that she would be "paid back" for "stealing" her job. Such threatening action constitutes serious misconduct which warrants denial of reinstatement.

Further, on or about May 5, 1985, Joan Lyman, an individual who has substituted at the Champlain Valley Union High School on many occasions, received a letter from Ms. Kimball. In said letter Ms. Lyman was threatened with loss of future employment at CVU High School because she publicly supported the School Board in the current labor dispute. On at least one occasion, Ms. Lyman was denied the opportunity to substitute at CVU by the CVU librarian who is also a member of the Vermont-NEA and Chittenden South Education Association.

Such threatening and coercive activity constitutes serious misconduct which warrants denial of reinstatement.

12. During the 1984-85 school year, Myrtle Kimball was a full-time junior high school social studies teacher at the Hinesburg School with 18 years seniority.

13. Shortly after the beginning of the teachers' strike, but before the replacements began teaching at the Hinesburg School, Kimball returned to her classroom to remove her personal belongings. At that time, she left a handwritten note for her replacement in the desk drawer. The note stated in full:

Hi,

You are stealing my job! Because I believe in justice and equality, someday you will be repayed!! I pray so!!!

I urge you to be professional enough not to take someone else's job.

Sincerely,  
Myrtle K.

(School Board Exhibit 1)

14. Kimball took no follow-up action with respect to the note. She never talked to or called her replacement.

15. On May 4, 1985, Kimball sent a handwritten letter to Joan Lyman, a Hinesburg resident who served as a substitute aide at the Champlain Valley Union High School ("CVU") library. Kimball had known Lyman for over 20 years, and they had been neighbors and friends for much of that time. After noticing that Lyman often was in front of the Hinesburg School during the strike to show her support for the School Board, Kimball sent a note to Lyman which provided in pertinent part as follows:

Dear Joan,

Of all the people applauding the new teachers, I think we all were most shocked by you. I know I was!



I would like to explain that to 90% (or higher) of professional educators in Vermont, it is unprofessional and immoral to cross a picket line manned by your fellow educators. They are scabs (people who cross a picket line and take someone else's job). Many of these people admit they couldn't get a job elsewhere and seized the golden opportunity. They are opportunists and hopefully, if justice is done, will be ousted by the Vt. Labor Relations Board's decision.

This is a Civil Rights issue supported by other teachers in the state and many influential non-teachers as well.

Because I really do care about you, I feel I should warn you that there is a chance you could lose your opportunities to substitute at the CVU library. These teachers are professional educators and will lose their respect for you if you are supporting scabs. That's my feeling -- time will tell!

Sincerely,  
Myrtle

I will always care about you but I don't understand what you are doing. Why not let the courts decide.

(School Board Exhibit 2)

16. Kimball sent the letter only to Lyman, and did not send copies to anyone else. Upon receiving the letter, Lyman was, in her own words, "a little bit upset but not overly concerned". Kimball took no action to follow-up her letter. In particular, she never wrote or talked to anyone at the CVU library about Lyman. Lyman was not denied subsequent opportunities to substitute at CVU as a result of this letter or any actions of Kimball.

17. The School Board contends it has no obligation to honor the request of Andrea Amao for reinstatement because she worked at Hinesburg during the 1984-85 school year, at 60 percent time, under a special one-year nonrenewable contract and the School Board was under no obligation to rehire her for the 1985-86 school year.

18. During the 1983-84 school year, Andrea Amai taught music at the Hinesburg School approximately one day per week, substituting for and assisting Pam Miller, the regular music teacher. Toward the end of the 1983-84 school year, Miller requested and was granted a 60 percent reduction in her teaching load for the next school year, such that she would be teaching music only 40 percent of the time during the 1984-85 school year.

19. Soon after the School Board granted Miller's request for this part-time position, Amai was approached by Sam Morse, the Principal of the Hinesburg School. Morse informed Amai she could have a 60 percent position during the 1984-85 school year as a replacement for Miller. After Amai stated she would accept the position, Morse said she only would have to go through the formality of an interview with James Rice, Personnel Director for the Chittenden South Supervisory District. There was a four-month delay between Morse's conversation with Amai and when she actually was interviewed by Rice. During that time, Amai relied upon Morse's assurance that she would be employed as a part-time music teacher at the Hinesburg School during the 1984-85 school year.

20. Following her interview with Rice, Amai entered into a written contract with the School Board to serve as a part-time music teacher during the 1984-85 school year. The contract was not actually signed by Amai and the School Board until August or September 1985. This was a one-year non-renewable contract (Association's Exhibit 1).

21. The School Board formally approved the hiring of all employees. In such situations, the School Board normally follows the recommendation of the Superintendent. In making a recommendation, the Superintendent consults with the Principal and Personnel Director.

22. During the 1984-85 school year, Amao also worked as a part-time music teacher at 40 percent time at the Starksboro Elementary School.

23. In February or March 1985, Miller asked for and received from the School Board approval for a full leave of absence for 1985-86. At the time the School Board voted on approving her leave, it made no decision regarding her replacement.

24. Around the time Miller's request for a leave of absence was granted, Amao had a discussion with Morse concerning her employment at the Hinesburg School during the 1985-86 school year as a replacement for Miller. Morse informed Amao she could have the position, with the only question being whether she was going to continue at 60 percent time and continue her job at Starksboro or whether the School Board was going to want her to work 100 percent time as a full-time teacher. Amao told Morse that if the School Board wanted her to work full-time, she would do so and give up her job at Starksboro. Morse suggested Amao approach Rita Villa, School Board Chairperson, about the position.

25. Prior to the strike which began on April 3, 1985, Amao had not talked to Villa about the position and the School Board had hired no one for the position and had not decided whether the position would be 100 percent time.

26. Amao's job performance during the 1984-85 school year was excellent.

27. During the strike, the School Board treated Amao the same as it treated the other striking teachers. As it did for all striking teachers, the School Board sent its unilaterally adopted Teacher Employment

Policy to Amao, along with a cover letter informing her she would be subject to replacement if she did not sign the enclosed contract and return to work at the Hinesburg School.

28. At no time before filing its Request for Compliance Hearing on September 24, 1985, did the School Board indicate to Amao she was being treated differently than the other teachers who had been replaced at the Hinesburg School.

29. During the 1985-86 school year, the Hinesburg School has employed someone other than Amao as a full-time music teacher.

30. Michael Bonavita, Thomas Carlson, Deborah Pyle and Sally Robertson were among the striking teachers who requested reinstatement at the Hinesburg School and accepted employment for the 1985-86 school year in other school districts.

31. In accordance with the August 30, 1985, order of the Labor Relations Board in Docket No. 85-15, 23 of the striking teachers, including all of the above four teachers, submitted letters requesting reinstatement at the Hinesburg School for the 1985-86 school year.

32. The above four teachers requested reinstatement by individual letters dated August 30, 1985, which letters were forwarded to the School Board under a cover letter from the Association dated September 16, 1985. The individual letters of reinstatement, each signed by the individual teacher provided:

Dear Hinesburg School Board:

I am writing to inform you of my desire to return to active employment with the Hinesburg School District effective immediately. Specifically, I request reinstatement to the position I held prior to the strike on April 3, 1985, with all statutory, contractual and/or

other rights to which I am entitled pursuant to the Vermont Labor Relations Board Order in Docket No. 85-15, dated August 30, 1985.

(Stipulated Exhibit A)

33. The cover letter accompanying these letters, signed by Vermont-NEA General Counsel James Suskin and addressed to Villa, provided:

Pursuant to the August 30, 1985, Findings of Fact, Opinion and Order of the Vermont Labor Relations Board in the above matter (Order), I have enclosed 10 additional letters of teachers who struck on April 3, 1985, in which they unconditionally request reinstatement to their former positions with the Hinesburg School District.

(Stipulated Exhibit B)

34. At an official School Board meeting held on September 9, 1985, the School Board voted to appeal the August 30, 1985, decision of the Labor Relations Board in Docket No. 85-15. Based on that official vote of the School Board, and also partially for the reasons listed in the Statement of Case above, all of the requests for reinstatement listed above were denied by the School Board.

35. At the time their respective requests for reinstatement were denied by the School Board, Bonavita, Carlson, Pyle and Robertson already had secured other teaching positions for the 1985-86 school year.

36. Each of the four teachers entered into and was subject to an individual employment contract which did not expire until the end of the 1985-86 school year.

37. The four teachers were also subject to collective bargaining agreements which determined the terms and conditions of employment at the school districts in which they were employed for the 1985-86 school year.

38. School districts in Vermont generally employ teachers on a full-time or regular part-time basis for an entire school year, except for day-to-day substitutes and temporary or replacement situations of limited duration. If a school district were to hire a teacher on a full-time or regular part-time basis after the beginning of a school year, that teacher generally would be employed for the remainder of the school year.

39. As a precondition to hiring any of the above four teachers on a full-time or regular part-time basis for the 1985-86 school year, every school district which hired one or more of the teachers required that teacher to enter into a written contract committing him or her to teach in that school district until the end of the 1985-86 school year. Each of the teachers accepted the new positions unconditionally and without including written provisos in their individual contracts which would allow them to leave their new positions prior to the expiration of those contracts. No evidence was introduced as to whether any of the employing school districts may have released any of the teachers from their contracts to allow them to return to Hinesburg.

40. With certain limited exceptions, full-time or regular part-time positions in teaching or substantially equivalent employment for the 1985-86 school year were filled prior to the start of the 1985-86 school year. Thus, in order to obtain full-time or regular part-time positions in teaching or substantially equivalent employment for the entire 1985-86 school year, Bonavita, Carlson, Pyle and Robertson were required to enter into a written contract with a school district prior to the start of the 1985-86 school year.

## OPINION

### I. STRIKE MISCONDUCT

#### A. General Standards for Strike Misconduct

The School Board contends two teachers, Timothy Bourne and Myrtle Kimball, engaged in strike misconduct sufficiently serious to warrant denial of their request for back pay and other damages.

The Board has not had to deal in the past with strike misconduct. Since Vermont's labor relations statutes concerning teachers and the National Labor Relations Act (NLRA) are parallel in that the right to strike is granted and the Board is granted discretion in determining what "affirmative action" to order as a result of an unfair labor practice, 21 VSA §1727(d), Section 10(c), NLRA; it is appropriate to look to Federal court decisions interpreting the NLRA for guidance in establishing standards for determining what conduct by employees constitutes strike misconduct justifying denial of back pay and other damages. In re Local 1201, AFSCME, 143 Vt. 512, 515 (1983).

While refusal to reinstate is not at issue here since both Bourne and Kimball were reinstated at the beginning of the current school year, we believe the case law concerning refusal to reinstate striking employees is applicable. By denying back pay and other damages, the School Board is essentially claiming Bourne and Kimball were not entitled to reinstatement for the period prior to the current school year because of misconduct.

Under Federal court decisions, serious strike misconduct constitutes a "legitimate and substantial business justification" for refusing to reinstate a striking employee. Newport News Shipbuilding and Dry Dock

Co. v. NLRB, 738 F2d 1404, 1408 (4th Cir., 1984). Midwest Solvents, Inc. v. NLRB, 696 F2d 763, 765 (10th Cir., 1982). Federal courts recognize that some confrontations between strikers and non-strikers are inevitable and that not every impropriety is grounds for refusal to reinstate. NLRB v. W. C. McQuaide, Inc., 552 F2d 519, 527 (3rd Cir., 1977).

The prevailing rationale in the Federal courts, as well as in decisions of the National Labor Relations Board, is to apply an objective test to determine when strike misconduct is serious. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Associated Grocers of New England v. NLRB, 562 F2d 1333, 1336 (1977). McQuaide, supra, at 528. Newport News, supra, at 1408. Clear Pine Moldings, Inc., 268 NLRB 1044 (1984).

This standard necessarily excludes from the definition of serious strike misconduct behavior which may be abusive and uncalled for but which does not reasonably tend to coerce or intimidate. Newport News, supra, at 1408. Minor picketline and other misconduct, even though crude or offensive, will not justify refusal to reinstate, as the right to strike necessarily implies some "leeway for impulsive behavior". Associated Grocers of New England, supra, at 1335.

We turn to applying these standards to the facts of this case.

B. Picketing at Home of Replacement

The School Board contends Bourne is not entitled to backpay and other damages due to his picketing at the home of replacement teacher Lauren Smith.



The picketing at the home of Smith was conducted by a small group, was peaceful and quiet and was conducted on public property. Informational material was provided to Smith and attempts were made in a civil manner to persuade her. These activities did not reasonably tend to coerce or intimidate Smith.

Coercion necessarily implies a compulsion by pressure or threat to act or think in a given manner. Intimidation is marked by threatening action, either explicit or implicit. Activities here were not threatening and did not reasonably tend to compel Smith to change her actions as a replacement teacher.

One of the key reasons for the home activities was for striking teachers to get their message to the replacements about the reasons for the strike and communicate their views as to what replacements were doing to the students, the school and the striking teachers. This effort to persuade the replacements to quit obviously is not per se illegal. Such communication could not take place at the school since strikers were prohibited from approaching the replacements. The fact they could have communicated their message by mail does not make the "personalized" approach they adopted improper.

C. Charges Against Myrtle Kimball

The School Board contends two letters written by Kimball justify the denial of back pay and other damages because they are threatening and coercive.

In the first case, she left a note for the replacement teacher in her desk drawer which provided, in pertinent part:

You are stealing my job! Because I believe in justice and equality, someday you will be repayed!! I pray so!

Standing by itself, this note is ambiguous. It could be a threat to carry out some type of harm to the reader, as the School Board alleges, or reflective of Kimball's belief that individuals eventually reap the consequences of their own actions, as the Association alleges. The surrounding circumstances do not clear up the note's ambiguity. Kimball took no follow-up action with respect to the note. Kimball never talked to her replacement and the evidence does not indicate the replacement even saw the note. In the absence of other threatening statements or of some coercive action, this is too ambiguous to be considered a threat which would reasonably tend to coerce or intimidate the replacement. Midwest Solvents, supra, at 766. McQuaide, supra, at 528.

Kimball's letter to Joan Lyman (the full text of which is contained in Finding #15) also was not a threatening letter given the context in which it was written and when considered in its entirety. Kimball and Lyman were friends and had been acquaintances for 20 years. Given those circumstances, Kimball's warning to Lyman, after attempting to persuade Lyman to reconsider her support of the School Board hiring replacements during the strike, that she could lose opportunities to substitute at the CVU library because of her support of the School would reasonably be read by Lyman not as a threat, but as a non-threatening warning from a disappointed friend of the possible consequences of her actions. Such an interpretation is supported by the words preceding the allegedly threatening language in the letter, "because I really do care about you, I should warn you..."

Although not determinative, the effect of this letter on Lyman is indicative of the non-threatening circumstances in which it was written. Lyman was "a little bit upset, but not overly concerned" upon receipt of the letter.

## II ENTITLEMENT OF ANDREA AMAO TO REINSTATEMENT

The School Board contends it has no obligation to honor the request of Andrea Amao for back pay and other damages because, unlike the other striking teachers, she worked at Hinesburg during the 1984-85 school year under a special one-year nonrenewable contract and the School Board was under no obligation to rehire her for the 1985-86 school year.

The School Board's argument is based on the erroneous assumption that a teacher who does not have a contractual right to continued employment may not be reinstated for any reason whatsoever. However, this is not the case for such an employee who is seeking reinstatement after an unfair labor practice strike.

The US Supreme Court has recognized that a refusal to reinstate striking employees is clearly destructive of important employee rights and holds that an employer must show "legitimate and substantial business justification" for refusing to reinstate striking employees upon their unconditional application to return to work. NLRB v. Fleetwood Trailer Co., 389 US 375, 378-380 (1967). Proof of anti-union motivation is unnecessary when the employer's conduct could have adversely affected employee rights to some extent and when the employer does not meet the burden of establishing that he or she was motivated by legitimate objectives. Id., at 380.

The School Board has not met that burden here. In fact, it is reasonable to conclude Amao would have been rehired for the 1985-86 school year as the school music teacher but for the strike. It is undisputed her job performance during the 1984-85 school year was excellent. It is also undisputed the Hinesburg School needed a music teacher for the 1985-86 school year because the music teacher Amao was substituting for during the 1984-85 school year had asked for and received a full-time leave of absence for the 1985-86 school year. The School Board had made no decision regarding her replacement during the strike and Amao had been informed by the school principal she could have the position, with the only question being whether it would be full-time or part-time. Amao informed the principal she was available for either part-time or full-time. While the School Board had not offered her the position prior to the strike, it offered no evidence indicating she would not have been rehired except for the fact she had a one-year nonrenewable contract. However, this fact in and of itself does not indicate Amao would not have been rehired, particularly when the evidence indicates she had a reasonable expectation of continued employment.

Given the School Board's failure to show "legitimate and substantial business justification" for not rehiring Amao, it is reasonable to presume she would have been rehired but for the strike.

In its August 30 decision, the Labor Relations Board ordered that striking teachers be reinstated, upon unconditional application. There being no legitimate reason offered to distinguish between Amao and other striking teachers, we conclude she should be reinstated. To accept the School Board's argument under the circumstances would be to deny

reinstatement to Amao because of her participation in the protected conduct of a lawful teachers' strike.

III. UNCONDITIONAL NATURE OF OFFERS TO RETURN

The School Board contends that four of the teachers who made so-called unconditional offers to return to Hinesburg did not in fact do so - Michael Bonavita, Thomas Carlson, Deborah Pyle and Sally Robertson. The School Board alleges the teachers could not have been making unconditional offers of reinstatement because, at the time they sought reinstatement, they already had received teaching positions committing them to teach in other schools for the 1985-86 school year and thus were unable to return to Hinesburg.

The School Board points to the fact that each teacher entered into contracts committing them to teach in the school district until the end of the 1985-86 school year and to 16 VSA §1752(a), which provides:

A teacher under contract to teach in a public school who fails, without just cause, to complete the term for which the teacher contracted to teach, shall be disqualified to teach in any public school for the remainder of the school year.

As a matter of law, an unconditional request for reinstatement is an essential prerequisite to a finding of an unlawful refusal to reinstate. Pecheur Lozenge Co., 98 NLRB 496 (1952). enf'd 209 F2d 393 (2nd Cir. 1953), cert. denied 347 US 953 (1954). The mere use of the word "unconditional" will not suffice, irrespective of the context and attendant circumstances. Id., 209 F2d at 405. The offer to return must be unconditional in fact, as well as form. NLRB v. Independent Association of Steel Fabricators, 582 F2d 135, 152-153 (2nd Cir., 1978).

The School Board's argument assumes the four teachers were unable to accept immediate employment at the Hinesburg School in September 1985. It cannot be assumed they were not free to return to work then. Some of these teachers may have been released from their contracts with the other school districts. Alternatively, the reinstatement order from the Board may be just cause under 16 VSA §1752(a) for a teacher's failure to fulfill the remainder of a teaching contract. Thus, it is uncertain whether the teachers could have returned to Hinesburg immediately. This uncertainty was caused at least partially by the School Board since it was the product of a strike which was prolonged by the School Board's unfair labor practice. Uncertainty created by the wrongdoer should not be used to the wrongdoer's advantage. Under the circumstances, we are inclined to conclude this uncertainty results in the teachers' requests being unconditional.

Regardless, even assuming the four teachers were unable to return to Hinesburg until the expiration of their 1985-86 contracts, this inability to return immediately does not make their reinstatement requests unconditional. Under Federal court decisions, the employer's duty to reinstate unfair labor practice strikers is a continuing one, at least for what appears to be a reasonable reporting period. Trinity Valley Iron and Steel Co. v. NLRB, 410 F2d 1161, 1172 (5th Cir., 1979; on appeal from 158 NLRB 890). An important element to be considered in determining the validity of an offer of reinstatement is whether it affords the offeree a reasonable period of time to consider it. NLRB v. Murray Products, Inc., 584 F2d 934, 940 (9th Cir., 1978). Essentially, however, the validity of the offer depends on the situation

in which the offeree finds himself or herself as a result of the discrimination against him or her. Courts look to the reasons why an employee failed to accept the offer of reinstatement within the time imposed by the employer before inquiring into whether that time condition is unreasonable. Consolidated Freightways v. NLRB, 669 F2d 790, 796 (fn. 11) (D.C. Cir., 1981).

In applying the guidance provided in these decisions to the circumstances of this case, we note no offer of reinstatement was actually made here by the School Board. However, the situation here is analogous to those referenced in the court decisions because the School Board is seeking to reduce its backpay liability by proving its offer would have been rejected.

The circumstances herein indicate a "reasonable reporting period" to be imposed by the School Board for the teachers to return to Hinesburg would be at the expiration of their 1985-86 contracts; that is the commencement of the 1986-87 school year. The 10 teachers found themselves in the midst of a lengthy strike that was unlawfully prolonged by the School Board's unfair labor practices. At the time they accepted other employment, in the summer of 1985, it was uncertain whether the Labor Relations Board would order their reinstatement and, if so, whether the School Board would comply with such an order. Thus, they obviously could not assume they would be employed at Hinesburg during the 1985-86 school year. As a practical matter, employees usually must obtain other sources of income to support themselves and their families during a lengthy strike. The teachers should not be penalized for fulfilling this need. Also, as a legal matter, by securing other employment, they

properly mitigated the potential back pay liability of the School Board. c.f. NLRB v, Miami Coca-Cola Bottling Co., 360 F2d 569, 575 (5th cir., 1966) (employee unlawfully discharged for union activities must at least make reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience").

The School Board contends that, while some of the teachers may have wanted to find work elsewhere, they did not have to find work as teachers during the interim period; that they did not have an obligation to bind themselves contractually to another employer. This argument is not persuasive. A teacher is most useful to society doing just that, teaching, and it likely is the occupation at the time which is most available to them. Also, given the need to support themselves and families, a substitute or temporary position is not likely to be feasible. Thus, they must sign a one-year contract with a school district. The School Board cannot escape the consequences of its wrong because the teachers were practically required to make short-term commitments. Under these circumstances, a reasonable reporting time was the beginning of the 1986-87 school year.

We recognize the strikers did not specifically request delayed reinstatement; on their letters requesting reinstatement they sought "immediate" reinstatement. However, while they may have been unable to return to Hinesburg immediately, which was uncertain as discussed above, this does not make their requests conditional. The position in which they found themselves due to the School Board's improper actions made delayed reinstatement until 1986-87 a reasonable reporting



period for reasons outside their control. They should not be penalized under such circumstances.

The School Board contends the offers to return to work were not only conditional but were not "made in good faith but only as an afterthought effort to possibly collect some back pay". As evidence to support this theory, the School Board points out the four teachers all sent in their requests for reinstatement only after the School Board voted on September 9 to appeal the Labor Relations Board decision in this matter, which resulted in the School Board not accepting offers of striking teachers to return. The School Board claims it can be reasonably inferred that if the teachers truly wanted to return to Hinesburg, they would have immediately sent in their letters seeking reinstatement the first week along with 11 other teachers.

We do not believe it is reasonable to draw such an inference. In its August 30 decision, the Board did not place a time limit on when the striking teachers could request reinstatement. Any conclusion as to why the striking teachers delayed their requests for reinstatement is a matter of speculation since no evidence was introduced as to why such delay occurred.

While the explanation offered by the School Board is possibly a plausible one, it is only one of several plausible explanations. For instance, the teachers may have been unsure whether they wished to return to Hinesburg and were deliberating over that decision. Also, they may have wanted to return to Hinesburg but were reluctant to alienate their new employer by expressing an interest in returning to Hinesburg; that risk of alienation lessened when it became clear the School Board

was not going to grant immediate reinstatement. Given the lack of evidence on the issue, we are unable to conclude whether the delay is evidence of intent not to accept employment at Hinesburg, rather than a function of deliberation or some other reason. The School Board has the burden of showing "legitimate and substantial business justification" for denying reinstatement. NLRB v. Fleetwood Trailer, supra, at 380. It has not met that burden here.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, and pursuant to the Labor Relations Board's August 30, 1985, decision; it is hereby ORDERED the Hinesburg School Board shall:

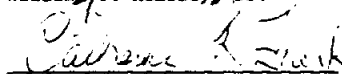
1. Make whole the following teachers for any loss of earnings they may have suffered by payment to each a sum of money equal to that which each normally would have earned as wages from the date commencing five days after the strikers' unconditional request for reinstatement, to the date of their reinstatement, for all hours of their regularly-assigned shift, minus any income (including unemployment compensation received and not paid back) received by employees in the interim: Andrea Amsco, Michael Bonavita, Timothy Bourne, Thomas Carlson, Myrtle Kimball, Deborah Pyle and Sally Robertson. The interest due employees on back pay shall be at the rate of 12 percent per annum and shall run from the date commencing five days after the strikers' unconditional request for reinstatement to the date of their reinstatement;

2) treat all said teachers, and other striking teachers who have been reinstated, without prejudice to their seniority or other rights and privileges.

Dated this 18th day of December, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
William G. Kemsley, Sr.

  
Catherine L. Frank

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Charles H. McHugh