UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

ADVANCED TECHNOLOGY CORPORATION[1]	
Employer	
and	
BERNARD M. BARANOWSKI, AN INDIVIDUAL	
Petitioner	**Case No. 8-RD-2076**
and	
UNITED STEEL, PAPER AND FORESTRY, RUBBER,	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL	
AND SERVICE WORKERS INTERNATIONAL UNION	
AND ITS LOCAL UNION # 905-L[2]	
Union	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[3]

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[1] The Employer's name appears as amended at hearing.
[2] The Union's name appears as amended at hearing.
[3] The Employer and the Union have filed post-hearing briefs which have been duly considered. The Union, at the conclusion of its brief indicates that it "incorporates as if fully rewritten herein its Request for Review Submitted" to the Board in Radix Wire Company, Case No. 8-RD-2025. References to exhibits of the Board, Employer, Union and Petitioner shall be noted BX-__ EX-__, UX-__ and PX-__respectively. References to the transcript shall be noted Tr. __. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer with the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, tool and die employees, machinists, and truck drivers employed by the Employer at its facility located at 107 North Eagle Street, Geneva, Ohio, excluding all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

The record indicates that there are approximately 34 employees in the unit found appropriate.

Three witnesses were called by the Employer and testified at the hearing: The Employer's Corporate Director of Operations, Kevin Kirby, Attorney Stephen Sferra, the Employer's labor counsel and chief negotiator and Petitioner Bernard Baranowski.

I. ISSUES[4]

A. Whether current employees are permanent replacements for strikers who commenced an economic strike on April 23, 2006?[5]

B. Whether Robin Summers, Sam Wood and Walt Wood, bargaining unit employees who crossed the economic picket line are eligible to vote in the election.[6]

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II. DECISION SUMMARY

[4] The Union initially argued that the Petitioner was a supervisory employee as defined in Section 2(11) of the Act. Thereafter, at the conclusion of the hearing the Union withdrew this argument. (Tr. 123).

[5] The status of economic strikers as eligible voters was dealt with in the 1959 amendments to the Act by adding the following provision to Section 9(c)(3):

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

The parties stipulated that a strike commenced April 23, 2006 and that as of May 8, 2007, the date of the hearing, "the strike is an economic strike". Further, the parties stipulated that the "Union made an unconditional offer to return to work on April 23, 2007." BX-2, paragraph 6.

[6] At the commencement of the hearing, Counsel for the Union indicated that depending on the evidence and testimony, the Union may contest that the crossovers were eligible to vote in an election. (Tr. 9). At the conclusion of the hearing, the Union reiterated its position that crossovers were ineligible. (Tr. 151). In its brief however, the Union argued in the alternative that if the decertification petition was not dismissed, the Regional Director should find that the striking employees represented by the Union and three crossover employees were the only employees eligible to vote. At all times, the Employer argued that crossover employees were eligible to vote. The Petitioner did not appear to take any position with respect to crossover employees. The parties stipulated that Robin Summers, Sam Wood and Walt Wood are currently working in bargaining unit positions. (Tr. 122).

I find that the current employees hired after the commencement of the strike are permanent replacements for the economic strikers and are eligible to vote in the decertification election. I also find that the three crossover employees currently working in bargaining unit positions, Robin Summers, Sam Wood and Walt Wood are also eligible to vote. Finally, I find that the economic strikers are ineligible to vote in the directed election.

III. BACKGROUND

Advanced Technology Corporation is engaged in metal stamping of automotive parts at its Geneva, Ohio facility. The Employer and the Union have a long standing bargaining relationship. The most recent collective bargaining agreement was initially effective between March 31, 2002 and March 31, 2005. Thereafter the parties extended the agreement on three occasions. The parties' third and final extension continued the most recent collective bargaining agreement until April 23, 2006.

On April 20, 2006, the Employer presented the Union with two documents dated April 20, 2006, one described as the "Company Final Proposal" and the other the "Last Best and Final Offer".[7] According to witness Stephen Sferra, the Employer's chief spokesperson at the time the Union struck, the "Last, Best and Final Offer", a six page document, effectively represented then open issues between the parties. Sferra testified that the longer document tracked the most recent contract, incorporating tentative agreements reached. He also explained that the Employer's final proposal to the Union on April 20, 2006 included both documents. Sferra testified that the Union's negotiator, Ray Gruber informed him that both documents comprising the Employer's Final Offer were presented for ratification and rejected. The extended collective bargaining agreement expired April 23, 2006 and the Union went on strike the same day.

The instant decertification petition was filed April 19, 2007. The parties stipulated that the Union made an unconditional offer to return to work on April 23, 2007. The parties further stipulated that the Union, by letter dated April 23, 2007, advised the Employer that it would accept the Employer's last, best and final offer.[8]

IV. FACTS

Corporate Operations Director Kevin Kirby testified that after the strike, he determined with input from Production Manager Denise Kahler and customer service representatives, which type of hiring the Employer should undertake. Kirby testified that the process started approximately at the end of April 2006. According to Kirby, the Employer needed "to staff a facility that requires some expertise". Kirby also testified that the Employed concluded it would not be able to "fill those shortfalls with temporary workers." Kirby further testified that he and

[7] EX-4 includes both documents.

[8] BX-2, paragraphs 6 and 8 respectively. These stipulations were further affirmed by the testimony of labor counsel Sferra. He also testified that at some unspecified date in 2006, the Employer notified the Union of its intention to implement the terms of the final offer. Sferra elaborated that the terms set forth in combined Employer Exhibit four were implemented and applicable to both crossover employees and replacement workers.

Dr. Stein,[9] as a result of a concern that the Employer could not satisfy customer requirements with temporary workers, solicited legal counsel concerning the differences between temporary and permanent replacement workers. Kirby testified that he successfully urged Stein to utilize permanent replacement workers in order to maintain the level of quality and skill required to fill customer orders.

The Employer introduced documents reflecting their classified ad requests with the News Herald and Star Beacon commencing April 28, 2006. A portion of the authorized text of each of these classified ads reads "Because of a labor dispute ATC is now accepting applications for PERMANENT REPLACEMENT EMPLOYEES." The Employer provided subsequent classified ad requests with these newspapers in the same format to be run June 30 through July 2, 2006.[10]

Kirby's testimony and a review of a compilation of thirty documents titled "ACKNOWLEDGEMENT OF PERMANENT REPLACEMENT STATUS" (Acknowledgement) reveal that in May 2006, the Employer began to hire replacements for the striking employees.[11] The first sentence of the Acknowledgement signed by each replacement confirms that the applicant has "been offered employment at Advanced Technology Corporation as a permanent replacement for striking employees and will not be terminated by Advanced Technology Corporation solely to make room for a returning striker, unless required by a negotiated settlement agreement or an administrative or court proceeding requiring such action". Further language notes "this status does not guarantee employment for any definite length of time". Moreover, the document also sets forth the at-will nature of the employment relationship. Finally, the document confirms that only the Employer's Corporate Human Resources Manager "…is authorized to make any statements or representations altering these terms of employment, and that any modification of these terms must be in writing…."

Kirby testified that he was involved in the hiring process regarding all post-strike applicants. Specifically he testified that during the initial phase he worked closely with the Human Resources Department, sat in on the interview process, reviewed the applications, conducted a portion of the interviews, read the text of the Acknowlegement to applicants[12] and was involved in establishing the Employer's standard to be utilized throughout the entire process.

The record reveals that each applicant, as a condition of hire, signed the Acknowledgement after having an opportunity to review the document. Kirby and Baranowski

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[9] No first name was provided for Stein. Kirby described him as "the principal of the Company".

[10] See EX-2. Another document including newspaper classified ads was offered by the Petitioner. PX-1 is a one page document consolidating eight cut out classified newspaper advertisements. Six are unrelated and two appear related to the instant Geneva facility. The Petitioner acknowledges that he did not assemble these and that the writing on the document, two dates, were not made by him. The larger ad contains the reference to "PERMANENT REPLACEMENT EMPLOYEES", the shorter ad does not. I also note that the shorter ad is undated and contains no reference to temporary employment.

[11] EX-1 represents acknowledgements signed by all replacement workers currently working at the Geneva facility. A review of the dates on these acknowledgements reveal that the Employer for the most part hired replacements each month between May 2006 and the filing of the instant petition.

[12] Throughout the hearing the Employer referred to the Acknowledgement as the "Belknap Agreement" referring to Belknap, Inc. v. Hale, 463 U.S. 491 (1983).

each testified that during interviews, the Employer explained the meaning of their permanent replacement status and answered any questions raised about by employees. Kirby further testified that he assured employees that if the strike ended that they "would not be replaced for a returning striker". According to Kirby, some applicants raised questions relative to the language in the Acknowledgement referring to "negotiated settlement". Kirby testified, without contradiction that the Employer had no intention of entering into a settlement which would displace the replacement workers. Baranowski testified that at the time of his application[13] he was employed full-time elsewhere. He explains that based on the assurances of Kirby and Human Resources Manager Jim Woods, he felt he could accept the position and safely resign his other employment.

Kirby testified that subsequent to the initial hiring period, he personally addressed the concerns of replacement employees apparently raised in response to comments by striking employees to these replacement employees. Kirby testified that he would refer replacement employees back to the Acknowledgement and assure employees that "we had hired them as permanent replacements workers and would follow the agreement."

The evidence revealed that the Employer also held periodic meetings of the entire workforce during which the topic of the replacement employees' status was discussed. Kirby testified that on approximately a quarterly basis, he addressed the entire workforce and referred back to the Acknowledgement, providing copies as requested. Kirby further testified that during these meetings he reiterated that the Employer "had not changed its current position" and was not going to "negotiate a settlement that would require their termination".

Baranowski provided testimony about two such meetings at the facility in April 2007. According to Baranowski, during the most recent meeting, toward the end of April, Kirby reassured "everybody that we were permanent replacement workers". Baranowski confirms that Kirby "kept referring back" to the Acknowledgement and repeatedly assured employees that they were permanent replacement workers.[14] Finally, Baranowski testified without contradiction that no manager or supervisor has ever described his position as temporary.[15]

At the hearing, Kirby testified that there were no current openings.[16]

The evidence relative to the three crossover employees, Robin Summers, Sam Wood and Walt Wood is limited. A review of the compilation of documents contained in Employer Exhibit One demonstrates that these employees did not execute the Acknowledgement of Permanent Replacement Status.[17] During examination by the Hearing Officer, Kirby testified that crossover

[13] UX-B is Baranowski's May 22, 2006 application.
[14] Baranowski testified that at the earlier meeting in April 2007, Kirby similarly explained that "we were permanent replacement workers".
[15] In response to direct questioning, Baranowski testified that he was aware that his job could be in jeopardy if he did not perform up to the Employer's standards, but noted "That's standard in any job."
[16] When asked on cross about an opening created by the departure of a maintenance employee, Kirby testified that because of a downturn in the truck and automotive market, the Employer had decided not to fill the position.
[17] There is no evidence concerning the date/s these employees abandoned the Union's economic strike.

employees were paid their current rate.[18] Labor Counsel Sferra testified that the terms and conditions set out in the implemented final proposal (EX-4) were applicable to both crossover and replacement employees.

V. ANALYSIS

The Board has held that economic strikers retain voter eligibility even after the 12-month period established by Section 9(c)(3) of the Act, if they have not been permanently replaced. Gulf States Paper Corp., 219 NLRB 806 (1975); Erman Corporation, 330 NLRB 95 (1999). The Board in Gulf States concluded that unreplaced economic strikers were eligible to vote in a decertification election held more than one year after the commencement of a strike. 219 NLRB 806.

The Board in O.E. Butterfield, Inc., 319 NLRB 1004 (1995), addressed the then existing inconsistency in representation and unfair labor practice cases concerning the allocation of the burden of proof concerning whether replacements for economic strikers were permanent or temporary employees. In this case which involved determinative challenges in a decertification election, the Board held it would apply a single standard to all Board proceedings. That standard establishes that the burden is on the employer to prove that strike replacements are permanent employees. 319 NLRB 1004 at 1006. In so doing the Board explained:

> Because an employer is the party with superior access to the relevant information, the burden should logically be placed on it to show that it had a mutual understanding with the replacements that they are permanent. In addition, this allocation of the burden of proof has been upheld by the courts. See NLRB v. Augusta Bakery Corp., 957 F.2d 1467 (7th Cir. 1992).

Applying this rationale to the record, the Board in O.E. Butterfield overruled the challenge to a replacement employee's ballot. In so doing, the Board concluded that the employer had sustained its burden of establishing that it and the replacement employee had a mutual understanding that the employee was a permanent replacement for an economic striker. The Board premised its finding on the uncontradicted testimony of the striker replacement that subsequent to his hire, the employee approached the employer's president who informed him that he was a permanent employee. 319 NLRB 1004 at 1006-1007.

In this case, the Employer provided uncontroverted testimony that it established a consistent procedure relative to its post-strike hiring process. The testimony of Kirby revealed that each replacement employee executed a document entitled Acknowledgement of Permanent Replacement Status. This document was reviewed with each replacement and questions were answered during the interview process. Petitioner Baranowski, the only current or former replacement employee who testified indicated that the Employer explained to him what was

[18] With respect to the testimony that crossovers were paid their current rate, there is an apparent reference to these employees working out of their classification. According to Kirby, while replacement employees were brought in within the proposed wage scale based on their skill level, the Union requested that the few individuals working out of their classification be brought in at their current rate. (Tr. 100-102).

meant by permanent replacement status. Baranowski further explained that based on assurances by Kirby and Human Resources Director Jim Woods, he accepted employment and left his then full-time position. Baranowski further testified that while he understood that his job could be in jeopardy if he did not perform up to the Employer's standards, he concluded this was "standard for any job".

Kirby and Baranowski each testified that the Employer held periodic facility-wide meetings in which Kirby would reiterate the Employer's position that the replacements were permanent, that the Employer had not changed its position that it would not negotiate a settlement requiring their displacement by returning strikers and that replacements should refer back to their Acknowledgement. Finally, Baranowski testified without contradiction that he had never been told by any Employer supervisor or manger that his employment was temporary.

The Union argues that the replacement workers hired post-strike at the Geneva facility are merely temporary replacements and not eligible to vote in any decertification election. The Union contends that the Employer has not met its burden of establishing that it and the replacement employees had a mutual understanding that the replacement employees were permanent employees. O.E. Butterfield, 319 NLRB 1004 at 1006. The Union bases its position on the inclusion of at-will employment language in the employment applications, various clauses contained within the Acknowledgement and a comparison of certain classified ads.

The Union cites Harvey Mfg., 309 NLRB 465 at 468 (1992) for the proposition that ambiguities created by an employer's mixed signals relative to replacement employees' status should be construed against the Employer. The Union argues that despite any verbal assurances by the Employer to the replacement employees that their employment was permanent, the language of the employment applications and certain clauses in the Acknowledgement signed by each replacement plainly evidences that their employment was temporary. Specifically, the Union argues that the at-will language in the applications and the Acknowledgement, as well as the references in the Acknowledgement to reinstatement of returning strikers due to strike settlement or administrative or court proceeding demonstrates that the Employer failed to meet its burden of establishing that it had a mutual understanding with the replacement employees that they were permanent employees.

The facts in Harvey Mfg. are distinguishable from the instant case. In Harvey Mfg., the employees received and signed a document entitled "Temporary Agreement" which began with an acknowledgement of their temporary status. In addition, the replacements received a referral slip describing their "temporary position" status from the referring agency and presented this slip to the employer. Finally, after 30-days, the replacement employees received a document addressed to "New Employees Working as Temporaries of Harvey Industrial, Inc." This document began "You will be working for us as a temporary employee." 309 NLRB 465 at 468. While recognizing that oral representations of permanent status were made at various points to replacements, the Board, in Harvey Mfg., concluded that these replacements were temporary strike replacements.

In contrast, in the instant case, there is absolutely no testimony or documentation referring to the employees hired post strike as temporary replacement employees. At-will

employment references contained in the employment application and the "Acknowledgement of Permanent Replacement Status" does not transform an offer of permanent employment into an offer of temporary employment. The language described in Employer Exhibit One acknowledging that the replacements continued employment was potentially subject to any court or agency order or contractual undertaking requiring the reinstatement of the employer's striking employees similarly does not convert the replacements' permanent employment to that of temporary employment.

The Union further argued that a comparison of the Employer's classified ads contained in Petitioner's Exhibit 1 demonstrates the Employer's inconsistent approach when seeking applicants. I conclude that while the larger, longer ad clearly articulates a search for "Permanent Replacement Employees" the smaller, shorter text does not evidence that the Employer was seeking applications for temporary employment.

The Union contends that the Supreme Court's decision in Belknap v. Hale, 463 U.S. 491 (1983) and the Board's decision in Target Rock Corporation, 324 NLRB 373 (1997) support its contention that the replacement employees are temporary employees. I disagree.

In Belknap the Supreme Court held that: "An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike." 463 U.S. 491 at 503.

In Target Rock, the Board concluded that the evidence failed to demonstrate that the employer and the replacement employees shared a mutual understanding that replacements were hired as permanent employees. 324 NLRB 373 at 375. The Board in Target Rock concluded that statements attributed to employer representatives "amply demonstrate the Respondent's own belief that the replacements were no more than temporary employees." Id. at 374. The Board also noted that the text of the advertisement seeking replacements indicated "…all positions could lead to permanent full-time after the strike." (emphasis added) Id. at 373. Finally, the Board noted that the record revealed substantial evidence that the replacements did not understand that they were hired as permanent employees. Id. at 373.

In the instant case, the testimony of Kirby, the Employer's Operations Director and Petitioner Baranowski, the sole current or former replacement employee witness, provide uncontradicted testimony demonstrating a mutual understanding that replacements were hired as permanent employees. Unlike in Target Rock, the record was devoid of statements demonstrating any belief by the Employer that the replacements hired were temporary. Further, in the instant case, unlike in Target Rock, there is no classified ad noting all positions "could lead to permanent full-time employment after the strike." Id. at 373. Finally, as set forth above, the Court in Belknap specifically concluded that the contingencies described in Employer Exhibit One did not automatically convert an economic strike replacement into a temporary employee.

Accordingly, based on the testimony and documentation, as well as the precedent cited, I conclude that the replacements were hired as permanent as opposed to temporary replacements for the economic strikers and are eligible to vote, whereas the economic strikers are ineligible to vote in the directed election to be scheduled in excess of 12 months from the commencement of the strike.

Also, I note that the Union, in its brief changed its position and concluded that crossover employees Robin Summers, Sam Wood and Walt Wood were eligible to vote in any directed election. Further, the parties stipulated that the crossover employees were currently working in bargaining unit positions. Under these circumstances, I conclude these employees are eligible to vote in the directed election.

Finally, based on record testimony, I find that the following named individuals occupy the positions set forth opposite their respective names and are ineligible to vote in the directed election:

Jim Wood	Human Resources Manager
Denise Kahler	Production Manager
John Miller	Supervisor

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented by **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND ITS LOCAL UNION #905-L**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access

to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. If a party wishes to file a request for review electronically, guidance for E-filing can be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed. This request must be received by the Board in Washington by June 8, 2007.

DATED at Cleveland, Ohio this 25th day of May, 2007.

/s/ [Frederick J. Calatrello]

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8