

**The Sherwin-Williams Company and Local 1961,
Brotherhood of Painters and Allied Trades.
Case 10-CA-15633**

30 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 25 April 1983 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

We agree with the judge that the General Counsel has failed to prove that the Respondent violated Section 8(a)(5) of the Act by unilaterally ceasing to make contributions for employees' health insurance premiums, or Section 8(a)(3) by instituting this change because its employees engaged in a strike.

The Respondent and the Charging Party Union were parties to a collective-bargaining agreement which expired 24 October 1979. The following day the Union began a strike. The Respondent then informed the Union that health insurance coverage provided for in the collective-bargaining agreement would be terminated at the end of October.

The issues raised in the complaint as framed by the parties turn on the interpretation of the contract language. All rely on article XV of the collective-bargaining agreement which provides that The Respondent would pay health insurance premiums monthly for each employee "in active service" who met certain criteria of seniority and hours worked the previous month. The Respondent argues that an employee on strike renders no "active services" and thus is not entitled to the contractual benefit. The Respondent further relies on language in the insurance policy itself which provides that only when an employee performs his "regular duties" for "a full normal workday" is he considered "actively at work." The Respondent thus argues that its obligation with respect to payment of insurance premiums terminated by operation of the two contracts and not by its independent action. The decision not to pay premiums during the month following the month in which a strike began was in accord with the Respondent's

past practice during six previous work stoppages during the term of the collective-bargaining agreement.

The General Counsel also relies on the article XV "active service" language to support his contention that premium payments by the Respondent were accrued benefits and that the withholding of this benefit was "inherently destructive" of employees' rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), and *Swift Service Stores*, 169 NLRB 359 (1968).

The judge found that the "in active service" requirement in the collective-bargaining agreement foreclosed the accrual of the insurance premium benefit to the employees on strike. The judge further found, assuming for the sake of argument, that the "in active service" language was ambiguous, and that the General Counsel had failed to offer evidence as to prior interpretations by the parties which would support his contentions.

We agree with the judge's finding that the General Counsel has failed to prove the complaint allegations as to either Section 8(a)(3) or Section 8(a)(5). As to the former section of the Act, there is no record evidence of discrimination by the Respondent; i.e., no evidence that strikers have ever been treated differently from other employees not "in active service" during the month in which premium payments are due for work performed the preceding month. To the contrary, the Respondent's director of labor relations, Skinner, affirmatively established without contradiction that in all its bargaining units with a similar contractual provision, the Respondent has applied it uniformly and has excluded from coverage employees on disability or leave of absence who like strikers were not "in active service." As to the 8(a)(5) allegation, we agree with the judge that the operation of the contract itself rather than a unilateral act by the Respondent served to deprive striking employees of their premium payment. The judge correctly relied on *Simplex Wire & Cable Co.*, 245 NLRB 543 (1979), in dismissing all complaint allegations. In this case, as in *Simplex*, we will not require an employer to finance the economic strike of its employees.

Further support for our finding upholding the Respondent's interpretation of the expired collective-bargaining agreement can be found in the results of the collective bargaining engaged in by the parties which led to a strike settlement and a new contract, executed prior to the filing of the charge herein. The record shows that the new contract contained the same "in active service" provision in its article XV and was entered into on 4 January 1980. According to the uncontradicted testimony

of Skinner, the returning strikers who qualified with the requisite number of hours worked in October 1979 were covered by the health insurance plan for the first month of the new contract period.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on October 19, 1982, at Atlanta, Georgia. The hearing was held pursuant to a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on September 17, 1980. The complaint is based on a charge filed by Local 1961, Brotherhood of Painters and Allied Trades (hereinafter referred to as the Charging Party or the Painters Union), on March 21, 1980. The complaint alleges that the Sherwin-Williams Company, a corporation (hereinafter referred to as Respondent), has violated Section 8(a)(5) and (1) of the National Labor Relations Act (hereinafter referred to as the Act) by unilaterally refusing to make contributions for employees' health insurance premiums and by refunding payments to the employees for health insurance coverage for their families for the month of November 1979, and that Respondent has violated Section 8(a)(3) and (1) of the Act by instituting the above-alleged unilateral change in existing benefits because its employees engaged in a strike on October 25, 1979. Respondent by its answer filed September 29, 1980, has denied the commission of violations of the Act.

Based on the entire record in this proceeding, including my observation of the witnesses that testified, and after consideration of the positions, of the parties and briefs filed by the General Counsel and counsel for the Charging Party and counsel for Respondent, I make the following

FINDINGS OF FACT AND ANALYSIS

I. BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find "that Respondent is, and has been at all times material herein, an Ohio corporation, with an office and place of business located at Morrow, Georgia, where it is engaged in the manufacture of paint," that "Respondent, during the past calendar year [prior to the filing of the complaint] which period is representative of all times material herein, sold and shipped products valued in excess of \$50,000 from its Morrow, Georgia, facility directly to customers located outside the State of Georgia." Respondent admits the complaint allegation that it has at all times material herein been engaged in commerce within the meaning of Section 2(6) of the Act, but denies that it is an employer within the meaning of Section 2(7) of the Act. On the basis of the foregoing admissions of Respondent, I find that Respondent is, and was

at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Painters Union and the General Teamsters Local No. 528, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the Teamsters Local Union and hereinafter referred to jointly as the Union), are and have been at all times material herein, each a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent and both Unions were parties to a collective-bargaining agreement which expired by its terms on October 24, 1979 (Jt. Exh. 1).¹ On October 25, 1979, the Charging Party commenced a strike against Respondent. The members of the Teamsters Local Union, in support thereof, also discontinued work for Respondent. On the morning of October 25, 1979, Respondent initiated a meeting with the representatives of the Charging Party and of the Teamsters Local Union, and representatives of an employee committee. Edward E. Skinner, Respondent's director of labor relations, was the chief spokesman for Respondent at the meeting.

Skinner testified that at the meeting, Respondent's representatives informed the Union and employee representatives that the hospital medical coverage would continue through October 31, and that thereafter the employees would be sent a notice in order for them to convert to individual coverage. A letter was sent to employees dated October 31, 1979, and informed them of the termination of their life insurance coverage and coverage under the health care insurance plan as of October 31, 1979, and informed them of their right to convert to individual coverage and attached conversion forms with instructions (G.C. Exh. 3). Skinner testified that there had been six previous work stoppages at the Morrow, Georgia, plant during the term of the labor agreement, and in those instances coverage had "continued through the end of the month in which the work stoppage commenced."

Article XV entitled "Pensions—Life Insurance—Disability Plan—Hospitalization—Dental," of the expired

¹ The complaint alleges, the answer admits, and I find that:

All production, maintenance and raw material warehouse employees, and janitors at Respondent's Morrow, Georgia, plant but excluding office clerical employees and the plant clerical, finished product warehouse employees, laboratory assistants, guards and supervisors as defined in the Act constitute a unit appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

The complaint further alleges, the answer admits, and I find that on October 5, 1967, the Regional Director for the Region 10 of the Board certified the Union as the exclusive collective-bargaining representative of all the employees in the above-described unit, and that at all times since October 5, 1967, the Union has been, and is, the representative of the majority of the employees in the above-described unit, for the purposes of collective bargaining and, by virtue of Sec. 9(a) of the Act, has been and is the exclusive representative of all employees in said unit for the purposes of collective bargaining.

labor agreement contained a provision in paragraph 60(a) thereof, at page 38 of the agreement which stated:

For each employee in active service with at least one year's seniority, who has worked no less than seventy-five (75) hours during the preceding calendar month (including hours for which he drew vacation, idle holiday or Company disability pat, half pay counting as one-half hour of work), the Company will contribute \$60.00 per month effective with the payroll deduction made in the month of November, 1976, \$65.00 per month effective with the payroll deduction made in the month of November, 1977, and \$70.00 per month effective with the payroll deduction made in the month of November, 1978, towards the cost of his hospitalization and surgical insurance (or the cost of the insurance if it is a lesser amount). Such insurance shall be optional with the employee but shall be carried under the present Hospitalization, Surgical and Medical Care Plan or under other comparable coverage as may be selected by the Company. All administrative expenses incurred by the Company to execute this insurance program shall be borne by the Company, and the Company shall determine all administrative procedures which may be required to execute such program. The terms of any insurance plan or policy used in carrying out this program shall be controlling in all matters pertaining to benefits thereunder, and any dispute shall be between the employee and the carrier and shall not be subject to the grievance procedure of this Agreement. [Emphasis added.]

Respondent's Exhibit 1 is the group health insurance policy issued by the insurer referred to in paragraph 60(a) of the labor agreement. The policy provides for health insurance coverage for employees and their dependents. Under the terms of the policy, employees become eligible for insurance on the first day of the calendar month following completion of 60 days of active employment, provided the employee is then in the eligible class. The insurance policy further provides:

If the Employee is not required to contribute toward the cost of the insurance, the Employee will become insured on the date the Employee becomes eligible as provided above provided the Employee is "actively at work" as defined below on that date, otherwise on the first day thereafter on which the Employee becomes "actively at work."

An Employee will be considered actively at work only if the Employee performs for a full normal work day the Employee's regular duties of employment.

The policy also provides under the heading, "Termination of Insurance" that:

The insurance with respect to any individual Employee shall terminate as of the earliest date determined in accordance with the following provisions:

(e) the last day of the calendar month during which the Employee's active employment with the Group Policyholder is terminated.

The General Counsel and the Charging Party contend that Respondent violated Section 8(a)(3) of the Act by discontinuing the payment of the health and surgical policy insurance premiums for its striking employees during the month of November as the premium payments which were withheld by the Employer were accrued benefits to which the employees were entitled as a quid pro quo for services rendered by their active employment and the work of the employees for 75 hours in the month of October and rely on the language of paragraph 60(a) of the labor agreement as set out above. The General Counsel and counsel for the Charging Party contend that the withholding of such benefits is inherently destructive of the employees' rights to engage in concerted activities for striking in this instance and cited in support thereof, *NLRB v. Great Dane Trailers*, 150 NLRB 438 (1964), enfd. 388 U.S. 26 (1967), and *Swift Service Stores*, 169 NLRB 359 (1968). The General Counsel and the Charging Party further contend that Respondent's announcement and refusal to pay the November insurance premiums for its striking employees constituted a violation of Section 8(a)(5) as a unilateral change in benefits without engaging in bargaining, and cite in support thereof, *Marquis Elevator Co.*, 217 NLRB 461 (1975); *Latin Quarter Cafe*, 182 NLRB 997 (1970); *George E. Light Boat Storage*, 153 NLRB 1209 (1965), enfd. 373 F.2d 762 (5th Cir. 1967); *Clear Pine Mouldings*, 238 NLRB 69 (1978), enfd. 632 F.2d 721 (9th Cir. 1980); and *NLRB v. Katz*, 369 U.S. 736 (1962). The Charging Party has also cited in support of its position that withholding benefits by Respondent constituted a violation of Section 8(a)(5), *Laclede Gas Co.*, 173 NLRB 243 (1967); *Bethlehem Steel Co. v. NLRB*, 320 F.2d 615 (3d Cir. 1963); *Sioux City Bottling Works*, 156 NLRB 379, 385 (1965).

Respondent contends in its brief that paragraph 60(a), page 38, of the 1977-1979 labor agreement (Jt. Exh. 1), provided for payment of \$70 per month by Respondent toward the cost of each covered employee's hospitalization and surgical insurance provided the employee "meets the following conditions":

- (i) Is in the active service of the Respondent;
- (ii) Has one year or more seniority with the Respondent;
- (iii) Has worked 75 hours or more for the Respondent during the preceding calendar month.

Respondent contends that the striking employees rendered no service and were thus not in the active service of Respondent within the meaning of the labor agreement and were thus not entitled to the payment of insurance premiums by Respondent under the terms of the expired labor agreement. Respondent further contends that the insurance coverage expired under the terms of the policy (Resp. Exh. 1), which provides in part at page 5 thereof:

Termination of Insurance

The insurance with respect to any individual Employee shall terminate as of the earliest date determined in accordance with the following provisions:

(e) the last day of the calendar month during which the Employee's active employment with the Group Policyholder is terminated.

And which further provides at page 3:

An Employee will be considered actively at work only if the Employee performs for a full normal work day the Employee's regular duties of employment.

Respondent contends that the insurance coverage and its obligation to pay the premiums therefor expired on October 31, 1979, by reason of the operation of each of the two contracts, rather than by reason of any independent action taken by Respondent, and that at the meeting held on the morning of October 25 its representatives merely conveyed this information as it had communicated with employees' representatives in previous strikes with respect to the coverage of group health insurance, and that it additionally communicated by letter to all employees the method and manner in which health insurance could be continued (G.C. Exh. 3) by converting to individual coverage.

Respondent contends that its position is supported by prior decisions of the Board and specifically cites *Laidlaw Corp.*, 171 NLRB 1366 (1968), 414 F.2d 99 (7th Cir. 1969), wherein the Board adopted the trial examiner's finding that the employer had not violated Section 8(a)(3) of the Act when it notified striking employees that their insurance coverage was being terminated because this change occurred "by operation of the express terms of the insurance contract and not by any act of Respondent." Respondent further relies on *Ace Tank & Heater Co.*, 167 NLRB 663 (1967), wherein the Board held:

As we have stated, an employer is not required to finance a strike by paying wages for work not performed, and we have found that wages include such deferred benefits as retirement and vacation benefits and health insurance premiums.

Respondent cannot, therefore, be said to have committed a further act of discrimination by failing to pay premiums, for, as we have noted, it was not obligated to pay either wages or premiums for those employees who were on strike. Its failure to pay premiums was no more discriminatory than its failure to pay wages.

Respondent further cites in support of its position *Towne Chevrolet*, 230 NLRB 479 (1977); *Trading Post*, 219 NLRB 298, 299 (1975); and *Illinois Bell Telephone Co.*, 179 NLRB 681 (1969), *enfd.* 446 F.2d 815 (7th Cir. 1971).

The Respondent contends that as the expiration of the health insurance coverage occurred by reason of the operation of the labor agreement and the insurance policy,

there was no unilateral action on its part and no refusal to bargain occurred regarding the insurance. Respondent argues further that assuming *arguendo* there had been an unilateral action on its part, said action was not violative of the Act as an employer is not required to finance employees' economic strikes and cites *Simplex Wire & Cable*, 245 NLRB 543 (1979), in support thereof.

Analysis²

As observed by the United States Court of Appeals for the Third Circuit in *E. L. Wiegand Division v. NLRB*, 650 F.2d 463 (1981), at page 468, concerning an issue wherein the employer terminated payment of sickness and accident benefits to disabled employees during a strike by their bargaining unit:

On one side, as the employer argues, it is not required to finance a strike against itself by paying wages or other similar expenses On the other side, an employer must not withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitimate economic strike.

In this case, the Respondent came forward with evidence of business justification, relying on the terms of the collective-bargaining agreement, the insurance policy, and the un rebutted testimony of Skinner which I credit that the insurance coverage had continued "through" the end of the month (which I find to mean *only* through the end of the month) during six prior work stoppages under the same labor agreement at the Morrow, Georgia, facility. There was no evidence of union animus presented by the General Counsel. See *NLRB v. Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979), *Borden, Inc.*, 248 NLRB 387 (1980), on remand. See also *Vesuvius Crucible Co. v. NLRB*, 688 F.2d 162 (3d Cir. 1981).

The General Counsel has the burden of proof in establishing a violation of the Act. I find that the General Counsel has failed to prove a violation of the Act, as I find the evidence presented by the General Counsel is insufficient to prove that the benefit (of the Employer's obligation to pay a portion of the health insurance premiums on behalf of the employees for the month of November 1979) had accrued. Although, as conceded by Skinner in his testimony, substantial numbers of, if not all, employees for whom the Employer's portion of the insurance premiums were not paid by the Employer, had worked 75 hours or more for Respondent during the month of October, their absence from "active service" of Respondent by reason of their engagement in the strike commencing October 25, 1979, foreclosed the accrual of this benefit to them under the terms of the labor agreement. As strikers, although they remained employees under the Act, they were no longer engaged in the "active service" of Respondent and, accordingly, did not

² R. Exh. 3, which had been received at the hearing subject to documentation thereof to be supplied by Respondent after the close of the hearing, was withdrawn by Respondent, and I have not considered it in arriving at my decision.

qualify under the terms of the labor agreement. Assuming arguendo that the language in the labor agreement was ambiguous, the General Counsel bears the burden of proof in this instance. The General Counsel offered no evidence of prior interpretations placed by the parties on this clause. The General Counsel has failed to prove that the operation of this clause was inherently destructive of employee rights and has not presented any evidence of union animus on the part of the Employer. Moreover, the language of the insurance policy also supports Respondent's position by its provision that for purposes of insurance coverage, an employee is considered "actively at work only if the Employee performs for a full normal workday the Employee's regular duties of employment" and which provides for termination of an employee's insurance on "the last day of the calendar month during which the Employee's active employment with the Group Policyholder is terminated" with limited exceptions.

Under these circumstances, I find that the General Counsel has failed to prove a violation of Section 8(a)(5) of the Act by Respondent when it declined to pay the November insurance premiums for employees who were absent by reason of their strike against the Employer. *General Electric Co.*, 80 NLRB 510 (148); *Trading Post*, supra; *Simplex Wire & Cable Co.*, supra; *Brunswick Hospital Center*, 265 NLRB 803 (1982). I also find that Respondent did not violate Section 8(a)(3) of the Act by refusing to pay a benefit which it had no obligation to pay by reason of the employees' absences because of their en-

gagement in the strike against Respondent. *Simplex Wire & Cable Co.*, supra; *Kimberly Clark Corp.*, 171 NLRB 614 (1968).

On the foregoing findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent, The Sherwin-Williams Company, is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1), (3), or (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

It is ordered that the complaint be, and it hereby is, dismissed in its entirety.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.