

Lourdes Health Systems, Inc. and International Association of Machinists & Aerospace Workers, AFL-CIO, CLC. Case 26-CA-15520

February 13, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On March 11, 1994, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) by denying terminal benefits, including accrued vacation and sick leave pay, to economic strikers who had made unconditional offers to return but wanted to resign from employment prior to being recalled. The benefits in question were accrued, and pursuant to *Texaco, Inc.*, 285 NLRB 241 (1987), the Respondent could deny them to the strikers only if it showed a legitimate and substantial justification for doing so. When an employer proffers an ostensibly neutral benefits policy as a justification and it becomes apparent that the employer has applied the policy so as to penalize strikers as compared with similarly situated nonstrikers, then the policy fails as a substantial and legitimate justification. Here, the Respondent proffered a policy that supposedly required employees to work for 2 weeks after giving notice of resignation, in order to receive accrued terminal benefits. Permanently replaced strikers obviously would not be able to comply with this policy until their former jobs opened up, so they were denied the benefits for an in-

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²We find merit in the Respondent's contention that the judge's make-whole remedy is overly broad because it provides for the payment of terminal benefits, normally payable only to employees who end their employment with the Hospital, to strikers who have not yet resigned and remain eligible for recall. We shall therefore amend the judge's remedy, proposed Order, and notice to limit the provision of terminal benefits to strikers who have resigned from employment and have accrued terminal benefits. In this regard, we note that the Union made an unconditional offer to return on behalf of all of the striking employees.

definite period. Yet other employees who were absent for reasons other than being replaced strikers at the time they sought to resign were granted the benefits without being required to work 2 weeks after giving notice.

The Respondent asserts in support of its defense that it denied terminal benefits to "literally hundreds" of nonstriking employees. We find, however, that employees on active work status are not similarly situated to unrecalled economic strikers because only the former are able to work during the notice period. Therefore, the Respondent's reliance on its failure to give nonstriking employees terminal benefits does not establish the absence of a discriminatory past practice.³ Rather, the appropriate group for purposes of comparison consists of other employees who, like the unrecalled strikers, were not on active work status when their employment terminated. As the judge found, the Respondent discriminated against strikers by withholding terminal benefits from them but giving the benefits to such other employees.

In these circumstances, the Respondent's denial of the benefits discriminated against the class of strikers described in the amended Order, in violation of Section 8(a)(3) and (1).

AMENDED REMEDY

Substitute the following for the last three sentences of the remedy section of the judge's decision.

“. . . and any other striking employee who resigns from employment and who has accrued terminal benefits, by paying the accrued sick leave and vacation benefits due them, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lourdes Health Systems, Inc., Paducah, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(a) Make whole employees Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, and any other striking employee who has resigned his/her position, submitted a written letter

³Cf. *Circuit-Wise, Inc.*, 309 NLRB 905 fn. 2 (1992) (in finding that the respondent did not establish a legitimate and substantial business justification for denying strikers longevity bonuses and vacation payments, the Board found that because unfair labor practice strikers retain their employee status, the respondent erred by relying on its asserted policy of denying benefits to employees who had been on leaves of absence for more than 6 months and who were automatically terminated, finding that the respondent failed to demonstrate the denial of benefits to employees who were on leave for more than 6 months but were *not* terminated).

of resignation, and has accrued terminal benefits, by paying the accrued sick leave and vacation benefits due them, plus interest as set forth in the amended remedy.”

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

MEMBER TRUESDALE, concurring.

I agree with my colleagues’ finding that the Respondent violated Section 8(a)(3) and (1) by denying terminal benefits, including accrued vacation and sick leave pay, to economic strikers who had made unconditional offers to return but wanted to resign from employment prior to being recalled.¹ I also agree with their modification of the judge’s remedy. I have written separately, however, to provide a complete and reasoned analysis within the framework of *Texaco, Inc.*, 285 NLRB 241 (1987), that clarifies the judge’s rationale and is responsive to the arguments raised in the Respondent’s exceptions. In this regard, I note that the Board’s responsibility is not only to develop coherent and correct legal standards governing labor relations, but also to explain their application to the relevant facts. To that end, my analysis follows.

Pursuant to *Texaco*, in order to determine whether the denial of employment benefits to striking employees violates the Act, the General Counsel must make a prima facie showing of an adverse effect of the denial of benefits on employee rights by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. The burden then shifts to the employer to prove a legitimate and substantial business justification for the denial of benefits by demonstrating, inter alia, reliance on a nondiscriminatory contract or handbook interpretation that is reasonable and arguably correct. If the employer proves a business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the General Counsel demonstrates that the denial of benefits is “inherently destructive” of employee rights or motivated by antiunion intent.²

Applying *Texaco* here, I find, in agreement with the judge, that the General Counsel established a prima facie showing that the Respondent violated Section 8(a)(3) and (1) by denying terminal benefits to striking employees. Whether sick leave and vacation benefits were due and payable to striking employees based on past performance, and had therefore accrued when the Respondent withheld them, depends on an interpretation of the parties’ collective-bargaining agreement.³

¹ Although the Respondent’s terminal benefits also consist of holiday benefits, I note that the complaint alleges only that the Respondent “has denied accrued vacation and sick pay to striking employees who have offered unconditionally to return to work.”

² 285 NLRB at 245–246; *Advertisers Mfg. Co.*, 294 NLRB 740, 743 (1989).

³ *Texaco*, above at 246 (and fn. 22 cited therein).

Articles XXIV and XXVI of the parties’ expired bargaining agreement, set forth in pertinent part in the judge’s decision, provide that unit employees accumulate paid sick leave and paid vacation time based on hours worked, with no further work required for continuing receipt of the benefits. I therefore find that at all relevant times, the striking employees had accrued sick leave and vacation benefits.⁴

Regarding the payment of sick leave pay and vacation pay as terminal benefits, the contract provisions described above provide that upon cessation of employment, employees shall receive pay for 25 percent of their accumulated sick days provided that the employee has accumulated at least 30 sick days, and shall receive pay for all unused vacation provided that the employee has 1 year or more of continuous service. The Respondent does not contend that the striking employees who were denied terminal benefits failed to meet these eligibility requirements. The contract also states that employees who quit without notice or are discharged for cause forfeit all accrued benefits. The Respondent’s employee handbooks provide that employees who terminate in good standing, submit the required notice, and remain available to work during the notice period are entitled to terminal benefits.⁵

In denying unreplaced resigning strikers accrued benefits, the Respondent stated that, to comply with the notice and availability-to-work policy and receive terminal benefits, strikers would have to return to work, provide notice of resignation, and work during the notice period. As found by the judge, the Respondent’s application of its notice and availability-to-work policy to unrecalled, permanently replaced economic strikers who resigned their employment resulted in the loss of their terminal benefits.⁶ The Respondent’s withholding of accrued benefits on the apparent basis of protected strike activity warrants the inference of unlawful discriminatory conduct; consequently, the burden shifts to the Respondent to prove a legitimate and substantial business justification for the denial.

Simmons, the Respondent’s vice president of human resources, testified that the notice and work policy enables the Hospital to find and train replacements for resigning employees. The judge found, however, that this policy rationale does not apply to replaced strikers, who are not on the payroll. Finding that the Respond-

⁴ See *Domsey Trading Corp.*, 310 NLRB 777, 794 (1993), enf. 16 F.3d 517 (2d Cir. 1994); *Bil-Mar Foods*, 286 NLRB 786, 788 (1987).

⁵ The judge examined the handbooks that were in effect both before and after the Union’s certification. I note that although certain provisions in the bargaining agreement and handbooks refer only to proper notice of termination, the resignation and terminal benefits handbook provisions specify that “resignation in good standing” includes both proper notice and availability to work during the notice period.

⁶ During the relevant period, the Union had made an unconditional offer to return on behalf of each of the striking employees.

ent presented no further business reason for applying the notice and work policy to unrecalled strikers who wanted to resign, he concluded that the Respondent failed to prove a legitimate and substantial business justification under *Texaco*. I agree with the Respondent's contention that the judge erred in focusing solely on the applicability of the notice and work policy to unrecalled strikers to determine whether the Respondent presented a meritorious defense. For example, in *Nuclear Fuel Services*, 290 NLRB 309 (1988), the Board found that the respondent did not violate the Act by denying vacation benefits to strikers because, even assuming *arguendo* that the General Counsel established a *prima facie* case, the respondent demonstrated reliance on a reasonable and arguably correct contract interpretation which required employees to work on the scheduled workdays immediately before and after vacation.⁷ I note that the Board concluded that the respondent in *Nuclear Fuel* rebutted the *prima facie* case even though the probable rationale behind its policy—preventing employees from extending their scheduled vacation period by taking a sick day or leave without pay—was not, like the Respondent's justification here of needing time to find and train replacements, directly applicable to unrecalled, replaced strikers.⁸ Here, as in *Nuclear Fuel*, there is no suggestion that the Respondent implemented its policy in order to discriminate against striking employees.

I find, however, that the Respondent's defense is insufficient to rebut the General Counsel's *prima facie* case because, even assuming the Respondent demonstrated its reliance on a reasonable and arguably correct interpretation of the relevant collective-bargaining agreement and employee handbooks, the Respondent applied the notice and availability-to-work requirement in a discriminatory manner.⁹ The Respondent contends

⁷ The Board in *Nuclear Fuel Services*, *supra*, found that vacation benefits were not accrued benefits because, unlike here, the contract did not provide for vacation pay apart from the taking of a vacation.

⁸ Simmons provided additional reasons for the notice and availability-to-work policy, including the Respondent's desire to prevent scheduling problems and to minimize the cost of overtime that results when employees fail to give appropriate notice of their resignations.

⁹ The handbook and contract provisions on which the Respondent based its denial of accrued benefits to resigning strikers, read literally, do not mandate that unreplaced strikers are ineligible to receive such benefits. The Respondent's employee handbook provides that "[t]o resign in good standing it is important that you both give proper notice and are available to work your scheduled days after your resignation has been submitted and accepted. The Hospital reserves the right to determine whether any benefits may be used as part of the period of notice or will be paid after this period has been worked. If this would cause staffing problems, you would be expected to work through your termination date."

The handbook does not state that to resign in good standing employees must actually work between the dates of their resignation and termination of employment, only that they must *be available* to work. Strikers who have made an unconditional offer to return to work, have been permanently replaced, and are on a preferential

that it paid terminal benefits to both striking and non-striking employees who gave proper notice and worked during their notice periods, and that it denied benefits to both striking and nonstriking employees who failed to comply with the policy. As the majority discusses, however, employees on active work status are not similarly situated to unrecalled economic strikers. The Respondent discriminated against strikers by giving terminal benefits to other employees who, like the strikers, were not on active work status when their employment ceased.

Simmons testified that the Respondent terminates and provides terminal benefits to employees whose leaves of absence exceed 2 years, including Wilkins and Prince, who were on extended disability leaves. Additionally, Fisher was on a leave of absence to care for a family member when she resigned and received terminal benefits although she had not returned to active work status. Simmons explained that the Respondent treats employees on leave status differently from strikers because the former are separated from employment through "no fault of their own" and are not able to return to work. The Respondent's proffered reason for the disparity lacks merit because strikers retain their status as employees¹⁰ and are similarly not able to work during a notice of termination period "through no fault of their own."¹¹ To deny strikers benefits that are available to other employees not actively working, such as employees on sick leave, is necessarily to discriminate against them for having engaged in protected activity.¹² Moreover, the Respondent's conduct with respect to Wilkins, Prince, and Fisher violates the handbook's provision that employees who fail to return from leaves of absence forfeit claim to all accrued terminal benefits.

call list are, by definition, employees who are available for work. The employer's failure to recall the strikers to work because it has hired permanent replacements and has no work to offer them does not render the strikers unavailable. Thus, the permanently replaced strikers here had satisfied the handbook's requirement at the time of resignation—they were available to work. Under the handbook's terms, the employee must work during the resignation period only if the Respondent requires them to do so because of scheduling problems. Indeed, the Respondent explicitly reserves the right to use the accrued benefits in lieu of wages for that period. Clearly, in the case of permanently replaced strikers, scheduling problems would not mandate their working through the postresignation period, since, if the Respondent had required their services because of scheduling problems, it would have recalled them to work.

¹⁰ See Sec. 2(3) of the Act.

¹¹ The Respondent's contention regarding the inability of employees on leave to return to work is not applicable to Fisher, who was not on a personal medical disability leave. In any event, the Respondent concedes that the Company gave terminal benefits to Fisher "under circumstances where she did not comply with the terminal benefits policy." I further note that the Respondent did not involuntarily terminate Prince, who resigned.

¹² *Glover Bottled Gas Corp.*, 292 NLRB 873, 881-882 (1989), *enfd.* 905 F.2d 681 (2d Cir. 1990).

As further evidence of the Respondent's discriminatory application of its policy, the judge discussed the Respondent's award of terminal benefits to Carter, who submitted a resignation that was effective "immediately." The Respondent contends that Carter tried to revoke his immediate resignation in order to provide appropriate notice and work during the notice period, but that his supervisor indicated that it was not necessary to do so. The Respondent's assertion does not support its business defense, but in fact strengthens the judge's finding that the Respondent applied its notice and work policy in a disparate manner.

Finally, the judge found that Buchanan, who worked for the Respondent on an as needed basis and last worked in January 1992, resigned the following April after 3 days' notice and received terminal benefits despite his noncompliance with the notice and work policy. Although the Respondent maintains that Buchanan's April resignation letter "could have been" a followup of an earlier oral resignation, such conduct on its face violates the handbook requirement that to be effective, notices of resignation *must* be in writing.

Thus, for the reasons set forth above, I find that the Respondent failed to demonstrate that it relied on a nondiscriminatory contract or handbook interpretation which is reasonable and arguably correct.¹³ Accordingly, I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by denying terminal benefits to unrecalled strikers.¹⁴

¹³ See *Circuit-Wise, Inc.*, above at 914; *Glover Bottled Gas Corp.*, above at 881-882; *Forest Products Corp.*, 286 NLRB 1336, 1338 (1987).

The Respondent's discriminatory application of its notice and work policy distinguishes this case from *Nuclear Fuel Services* and *Bil-Mar Foods*, on which the Respondent relied.

In view of the Respondent's failure to prove a nondiscriminatory business justification for withholding terminal benefits, it is unnecessary to pass on whether the Respondent's conduct was "inherently destructive" of employee rights. See *Texaco, Inc.*, above, 285 NLRB at 247.

¹⁴ For the same reasons, I adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by telling unrecalled strikers that they could not resign and receive accrued sick leave pay or accrued vacation pay unless they returned to work, gave adequate notice, and worked during the notice period.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coerce or discriminate against you in the exercise of your rights to engage in or refrain from engaging in union and other protected activities, in-

cluding the right to strike, by withholding payments of accrued vacation and sick leave benefits.

WE WILL NOT tell employees, who, as former strikers, are on a recall list, that under our policy they can not resign and receive accrued sick leave pay or accrued vacation pay, or other accrued benefits, unless they return to work, give adequate notice, and work out the notice period.

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

WE WILL make whole employees Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, and any other employee who has resigned his/her position, submitted a written letter of resignation, and has accrued terminal benefits, by paying the accrued sick leave and vacation benefits due them, plus interest.

LOURDES HEALTH SYSTEMS, INC.

William Levy, Esq., for the General Counsel.
D. Patton Pelfrey & James D. Cockrum, Esqs. (Brown, Todd & Heyburn), of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Paducah, Kentucky, on June 7 and 8, and August 10, 1993. The charge was filed on March 15, 1993,¹ and the amended charge was filed on April 1. The complaint, issued on April 1, alleges that the Respondent, Lourdes Health Systems, Inc. (Lourdes), violated Section 8(a)(1) of the National Labor Relations Act (the Act), by telling an employee that she forfeited her benefits when she went on strike, and by telling its striking employees that they could not receive terminal benefits unless they returned to work and gave 2 weeks' notice. The complaint also alleges that Lourdes violated Section 8(a)(3) and (1) of the Act, by refusing to pay accrued terminal benefits including sick pay and vacation pay, to striking employees who have offered unconditionally to return to work, and by refusing to consider an employee for a vacant position unless she renounced her right, as an economic striker, who had been replaced, to reinstatement to her former job. In its timely answer, Lourdes denied these allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Hospital, I make the following

FINDINGS OF FACT

I. JURISDICTION

Lourdes, a corporation, provides health care at its facility in Paducah, Kentucky, where it annually derives gross revenues exceeding \$250,000. In addition, during the 12 months

¹ All dates are in 1993, unless otherwise indicated.

ending March 31, Lourdes, in the course of its business operations, purchased and received at its Paducah, Kentucky facility, goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Kentucky. Lourdes admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Lourdes also admits and I find that International Association of Machinists & Aerospace Workers, AFL-CIO, CLC, referred to below as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

On September 29, 1988, the Board certified the Union as the exclusive collective-bargaining representative of a unit of the Hospital's nonprofessional employees. Thereafter, on July 5, 1989, the Hospital and the Union executed a collective-bargaining agreement, which was effective from June 22, 1989, until November 30, 1991. The Hospital and the Union entered into negotiations for a new contract in 1991, which ended in an impasse.

After giving the Hospital a 10-day strike notice, and after a vote by the Union's membership, approximately 240 of the approximately 850 bargaining unit members began an economic strike, at 12:01 a.m., December 1, 1991. On the following day, the Hospital began hiring permanent replacements for the economic strikers.

On November 12, 1992, the Union lost a Board-held decertification election in the bargaining unit. Eight days later, the Board certified the results of that election. By letter dated November 13, 1992, and received by the Hospital on or about November 16, 1992, the Union made an unconditional offer to return to work on behalf of the striking employees.

The expired collective-bargaining agreement, the Hospital's employee handbook, entitled *Employee Guide*, which was in effect prior to the Union's certification, and a second employee handbook, which has been in effect since the Union's certification, contain the policies regarding payment of accrued terminal benefits, consisting of vacation, holiday, and sick leave benefits, to employees upon the termination of their employment at the Hospital. Article XXIV of the expired collective-bargaining agreement, which covered sick leave, provided, in pertinent part:

1. Sick leave with pay shall be accrued by each regular full-time or regular part-time employee at the rate of 3.7 hours of sick leave for each eighty (80) hours of work. Paid time off shall be counted as time worked for the purpose of this computation. Sick leave may accumulate up to a total of one thousand forty (1,040) hours (130 days). Paid sick leave shall accrue beginning with the date of employment but may not be used until the completion of the employee's probationary period.

3. Upon retirement or termination of employment, employees shall receive pay for twenty-five (25%) of their accumulated sick days provided that the employee has accumulated at least 30 sick days.

8. Employees who quit without notice or who are discharged for cause by the Hospital will forfeit all accrued benefits.

The expired collective-bargaining agreement's article XXV provided for seven holidays, including New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, and employee's birthday. Regular holiday pay consisted of 8 hours' pay "for full-time non-probationary employees at the employees' regular straight-time hourly rate."

The sick leave portion of the *Employee Guide* states in pertinent part: "If you quit without notice or you are dismissed by the Hospital, you will forfeit all accrued benefits." The employee handbook in effect since the Union's certification warns, in a section pertaining to sick leave: "If you quit without notice or are dismissed by the hospital, you will forfeit all accrued benefits."

Article XXVI of the expired collective-bargaining agreement, entitled *Paid Vacations*, states in pertinent part:

1. Regular full-time employees shall accrue paid vacation time based on hours paid in each payroll period according to the following schedule

Completed Service	Annual Vacation Accrual
1 thru 5 years	10 days
6 thru 10 years	15 days
11 years and up	20 days

Part-time employees shall accrue vacation time at the same rate per paid hour as full-time employees with comparable service.

2. Vacations may be accrued to a maximum of two (2) times the annual accrual.

. . . .

9. Any employee with one (1) year or more continuous service who leaves employment at the Hospital shall be entitled to pay for all unused vacation unless the employee fails to give proper notice or is discharged for cause.

The *Employee Guide* also states, in pertinent part: "When you terminate in good standing and give the Hospital the required notice, accrued vacation benefits will be paid." The Hospital's personnel handbook in effect during and since the Union's certification declares: "When employees give the hospital the required notice, accrued vacation benefits will be paid."

The "required notice," is explained in the *Employee Guide*, under the heading "voluntary termination," as follows:

Resignation

Should you find it necessary to resign your employment with the Hospital, you are expected to give your department head at least 2 weeks written notice. If you are a supervisor or manager or licensed employee, a written resignation is required at least 4 weeks preceding your termination date.

To resign in good standing it is important that you both give proper notice and are available to work your

scheduled days after your resignation has been submitted and accepted. . . .

Under the subheading, *Quitting*, the *Guide* warns: "If you quit without proper notice, you forfeit claim to and payment of all accrued terminal benefit hours."

The Hospital's personnel handbook, which has been in effect since the Union's certification, provides the following policy regarding holiday pay:

If termination occurs within 30 days following a holiday, a resigning employee may be paid holiday accruals if he/she was on the active payroll during the week in which the holiday occurred and worked the scheduled hours immediately preceding and following the holiday.

In a section entitled *Terminal Benefits*, the personnel handbook, embraces the same notice and availability-for-work requirements for terminal benefits as the *Guide* does. The handbook, in a section captioned *Resignation of Employment*, warns that: "An employee who quits without proper notice or who fails to return from a leave of absence forfeits claim to all accrued terminal benefits and is not eligible for re-hire."

The issues presented in this case include whether the Hospital violated Section 8(a)(1) of the Act by:

1. Telling an employee that she forfeited her terminal benefits by engaging in a strike.
2. Telling employees, who had been economic strikers, and who had not been recalled to their former jobs, that they could not resign and receive terminal benefits unless they returned to work and gave 2 weeks' notice.

Further issues presented in this case is whether the Hospital, by the following conduct, violated Section 8(a)(3) and (1) of the Act:

1. Refusing to pay accrued terminal benefits to employees, who had been economic strikers.
2. Refusing to consider employee Barbara L. Hayden for a vacant position unless she gave up her right to reinstatement to her prestrike position.

B. The Hospital's Application of its Policy Regarding Terminal Benefits to the Economic Strikers

1. The facts

When the strike ended on November 13, 1992, there were approximately 206 striking employees. As of August 10, the Hospital had recalled 50 to 60 of the strikers, 106 to 116 had resigned, and about 50 strikers, whose replacements had not departed, remained on the recall list. Of the recalled strikers, only two resigned following recall. The same two received their accrued vacation and sick leave benefits. No other strikers have received terminal benefits from the Hospital.

Employee Mildred Englert participated in the strike. However, on October 1, 1992, while on strike, Englert sent a letter to the Hospital announcing her resignation effective October 4, 1992, and requesting her pension and any other benefits which might be due her.

During the last week of October 1992, Englert telephoned the Hospital and conversed with Steven R. Simmons, the Hospital's vice president of human resources, regarding her pension and terminal benefits, including vacation, sick leave and holiday pay. Simmons explained to Englert "she had

not, in the hospital's view, given proper notice nor worked out that notice, and as such, was not eligible for those terminal benefits." Englert became angry and complained of the injustice being done to her.

Simmons attempted to soothe Englert. He explained "that at the time of the strike that those benefits were frozen into a bank for her and that they would be available for her upon her return and proper notice and working it out." Englert protested that the 10-day strike notice satisfied the Hospital's notice requirement. Englert angrily broke off the conversation, when Simmons rejected her suggestion, and stated that a strike notice is not a notice of resignation.²

Testifying before me, Sharon Largent admitted that in February she told former striker Mildred Englert, who was on the recall list, that she was not eligible for terminal benefits. Largent advised Englert that to qualify for terminal benefits, a resigning employee must give either 2 weeks' notice, or four if they were licensed or professional, and work through the notice period. Largent also admitted having as many as 25 conversations with employees, who had been strikers, about terminal benefits. In each instance, she repeated what she had told Englert.

The Hospital's administration resources coordinator, Sharon Largent, an admitted supervisor and agent of the Hospital, echoed Simmons' statement of Lourdes' policy regarding terminal benefits. In a letter dated December 9, 1992, to employee Barbara Wright, a striker, who had not been recalled, and who was seeking retirement and accrued vacation and sick leave benefits, Largent wrote:

Regarding your vacation and sick time accruals, Lourdes' policy has been for many years that employees must give proper notice of resignation in order to be eligible for terminal benefits. You would have had to return to work and then give two weeks notice in order to be eligible for terminal benefit pay.

On December 11, 1992, employee Patricia Rushing, who had participated in the strike, and had not been recalled, submitted a written resignation to the Hospital. In her resignation, Rushing announced that she was "giving my two week notice of resignation of employment to [the Hospital]." She also requested her pension and whatever benefits she was entitled to.

On February 22, Rushing phoned the Hospital, told Administration Resources Coordinator Largent, that she had received a second pension check, and inquired about sick leave and vacation benefits. Whereupon, Largent put Rushing on

² According to Englert, she became upset after Simmons told her that she had forfeited her benefits when she joined in the strike. She also testified that Simmons told her that she should have given the Hospital a 10-day notice and worked the notice period. Simmons flatly denied ever telling Englert or any striker that they had forfeited their benefits only because they engaged in a strike. However, Simmons frankly admitted that he had instructed his staff and strikers that the Hospital's 2-week notice and work policy applied to strikers who had not been reinstated and who were resigning and seeking their accrued vacation, holiday and sick leave benefits. Of the two, Simmons seemed to be more certain of the details of his remarks. I also note that Englert was upset by what she heard from Simmons and thus was likely to recall the effect of his remarks rather than the exact wording. Accordingly, I have credited Simmons' version of their conversation.

“hold.” When she returned to the phone, Largent asked Rushing if she had gone out on strike. Rushing admitted that she had been a striker. To which Largent replied that Rushing could receive those benefits only after giving the Hospital 2 weeks’ notice and working out that notice.³ The Hospital has neither recalled Rushing, nor paid terminal benefits to her.

On February 4 or 5, employee Fairia Carlisle, who had engaged in the strike and had not been recalled, telephoned the Hospital to discuss her concerns about retirement. She spoke first to Vice President Simmons, who transferred the call to Sharon Largent. In the discussion which followed, Carlisle asked about her entitlement to accrued vacation and sick leave benefits upon retirement. Largent answered that Carlisle was not eligible for those benefits, and would not be until she had worked 2 weeks. The Hospital has not recalled Carlisle, who has not retired.⁴

By letter, dated December 21, 1992, striker Rosalee Barger, an LPN, notified the Hospital of her intent to resign, effective 4 weeks from December 23, 1992. She also requested payment of her vacation and sick leave benefits on the effective date of her resignation.

In mid-March, after receiving no response to her letter, Barger phoned the Hospital’s personnel office seeking word on her terminal benefits. A woman, who answered the phone as “Kim, Personnel,” responded to Barger’s inquiry. Kim said that Barger was not eligible for terminal benefits because she had left her employment without giving the necessary notice. Barger did not learn Kim’s last name. When Barger asked about her letter in which she had given 4 weeks notice, Kim repeated the Hospital’s policy, which Barger interpreted to mean that as a striker, who had not been recalled, she was ineligible.⁵

Nurse aide Ella Sue Richie, an 18-year employee of the Hospital, participated in the strike, which began on December 1, 1991. On or about March 9, after deciding to retire from the Hospital, Richie asked Recruit Officer Amarylis Chandler about her vacation and sick leave pay. Chandler, an admitted supervisor and agent of the Hospital, said, that Richie could not get those benefits unless she returned to work. At the same time, Chandler offered to reemploy Richie, “PRN” (on an as-needed basis). Richie rejected the offer, retired on March 12, and did not receive any of her accrued vacation or sick leave benefits.⁶

The Hospital has on occasion relaxed its notice-and-work policy regarding terminal benefits. One instance involved housekeeper Billy Joe Wilkins, who was off from work from July 13 until October 15, 1990, because of an injury, and

³ I have credited Rushing’s uncontradicted testimony regarding her conversation with Largent on February 22.

⁴ I have credited Carlisle’s uncontradicted testimony regarding her conversation with Largent on February 4 or 5.

⁵ At the time Barger phoned the Hospital in mid-March, personnel assistants Kim Lindsey and Kym Lampe would have been available to answer the phone and give the advice which Barger received. Both Lindsey and Lampe admitted that they answered telephoned questions regarding eligibility for terminal benefits, and gave answers similar to the one Barger reported in her testimony regarding the first question she asked Kim. Neither Lindsey nor Lampe recalled a telephone conversation with anyone named “Barger.”

⁶ My findings regarding the circumstance leading up to Richie’s retirement, including her conversation with Chandler, are based upon Richie’s uncontradicted testimony.

placed on leave-of-absence⁷ from the latter date until January 23, when the Hospital terminated his employment. On February 4, the Hospital paid accrued vacation benefits to Wilkins without requiring him to give a 2-week notice and work out a 2-week notice period.

According to Vice President Simmons, the Hospital did not require that Wilkins give, and work out, a 2-week notice period because:

[H]e had been on a leave-of-absence in excess of 2 years and it was the Hospital’s stance that if an individual had not returned within 2 years, that we would sever that relationship.

LPN Earlene Fisher’s last day of work at the Hospital was July 17, 1992. A Hospital employee since 1987, Fisher went on a leave of absence. In October 1992, Fisher notified the Hospital by letter that she would not be returning to work and tendered her resignation. The Hospital made her resignation effective October 30, 1992, and paid \$62.72 in accrued vacation benefits to her. Fisher did not return to work out a 4-week notice period before receiving her accrued vacation money.

The Hospital employed registered nurse William Carter, from March 13, 1989, until March 24, 1992, when he resigned, and indicated he was leaving at once. That same day, the director of Carter’s department issued a memo to her entire staff announcing Carter’s resignation given that day “without notice.” She also remarked in her memo that:

Unfortunately, this leaves no opportunity for timely replacement. We will have a lapse in staffing for a few weeks.

The Hospital paid terminal benefits to Carter. Yet he had not given the 4-week notice required under the Hospital’s policy. Nor did he work the 4-week notice period which that policy imposes upon licensed employees as a condition for receiving terminal benefits.

X-ray technician Patricia Buchanan, a Hospital employee since September 8, 1981, submitted a letter of resignation dated April 7, 1992. In her letter, Buchanan stated that she had been available for the last 7 months on “a PRN basis,” which means “as needed.” The Hospital made her resignation effective April 10, 1992. According to the Hospital’s records, Buchanan had not actually worked since January 1992. The Hospital paid terminal benefits to Buchanan, including the pay period ending April 25, 1992. From the record before me, I find that the Hospital did not require that Buchanan comply with its notice-and-work policy before it paid terminal benefits to her.

The Hospital employed Wayne Prince from 1974 through 1988. Prince sustained an injury which resulted in his disability retirement from the Hospital. The Hospital learned of Prince’s decision to retire from his doctor. I find from Prince’s testimony, and his last earning statement from the Hospital, that he received accrued vacation and sick leave benefits in February 1989. The Hospital did not require that

⁷ I find from Vice President Simmons’ testimony that the Hospital places an employee on a leave of absence, when he or she “anticipates being gone greater than five work days without any type of pay, without any type of benefits, i.e., sick leave.”

Prince provide any written 2- or 4-week notice of his intent to retire. Nor did the Hospital ask him to return to work.

2. Analysis and conclusions

In resolving the question of whether the Hospital violated Section 8(a)(3) and (1) of the Act by refusing to pay accrued vacation and sick leave benefits to employees who had engaged in a strike, I have looked to the principles which the Board articulated in *Texaco, Inc.*, 285 NLRB 241 (1987). Looking to the test set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Board expressed it as follows:

Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.

Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be “inherently destructive” of important rights or motivated by antiunion intent. [Citations omitted, 285 NLRB at 245–246.]

The record showed that the Hospital’s notice-and-work policy, as applied to the strikers, provided, in effect, that they would lose their terminal benefits, which they had earned, and which had accrued when the strike began, on December 1, 1991, including accrued holiday, vacation and sick leave pay, if the Hospital replaced them permanently and did not recall them to work. Thus, I find that the Hospital’s application of that policy to strikers posed a clear threat of economic loss to the permanently replaced strikers as a consequence of their participation in a lawful economic strike, which was union activity protected by Section 7 of the Act.

When counsel for the General Counsel asked Vice President of Human Resources Simmons why the Hospital decided to apply the notice-and-work policy to the strikers, his testimony was:

Because that’s the policy and the policy states that you must—you know, for a resignation, you must give proper notice and be available and work out that notice.

When asked about the reason for the notice requirement, Simmons at first said that he did not know the Hospital’s purpose in requiring notice. He was not a Hospital employee when the policy was devised. He then said he could think of two reasons. One was to enable the Hospital to find and train a replacement for the resigning employee. Simmons could not come up with the second reason.

I suggested to Simmons that when an employee goes out on strike and is replaced, his proffered reason for the notice policy disappears. He agreed. The Hospital presented no fur-

ther business reason for applying its notice-and-work policy to the economic strikers.

According to its own records and credited testimony, during the period from early 1989 until February 4, the Hospital paid terminal benefits to five employees, without requiring any of them either to provide any notice or to work out a notice period. Counsel for the General Counsel asked Simmons why the Hospital paid benefits to employees who had been on leave of absence in excess of 2 years and did not return to work. The vice president answered: “The hospital’s stance was that those individuals were being separated from the hospital at no fault of their own, that it was not a discharge, it was simply a severance of the employment relationship.” When I asked Simmons why the Hospital treated employees on leave of absence different from strikers, he offered no explanation. Nor did the Hospital explain why it gave terminal benefits to X-ray technician Patricia Buchanan, who resigned to take a job elsewhere, without working out any notice period.

Registered nurse Carter’s precipitate resignation gave the Hospital no opportunity to obtain a replacement for him. Yet the Hospital paid terminal benefits to Carter. The Hospital did not explain why it abandoned its notice-and-pay policy for Carter.

In sum, I find that the Hospital has not shown any business reason for imposing forfeiture of accrued benefits upon employees because they participated in a protected economic strike called by the Union. Therefore, I further find that the Hospital violated Section 8(a)(3) and (1) of the Act by refusing to pay terminal benefits to striking employee, who have offered unconditionally to return to work, including Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie. *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989); *Texaco, Inc.*, 285 NLRB at 247.

The Hospital urged me to find that its application of its notice-and-work policy to its strikers was lawful, using the Board’s holdings in *Bil-Mar Foods*, 286 NLRB 786 (1987), and *Nuclear Fuel Services*, 290 NLRB 309 (1988), as guidance. However, I find both cases contain material facts which render their holdings inapposite in the instant case.

In *Bil-Mar Foods*, the Board applied its *Texaco* test and found no violation where the employer withheld vacation benefits in reliance on a nondiscriminatory interpretation of a relevant benefit plan, consistently applied to strikers and nonstrikers. In the instant case, unlike *Bil-Mar*, the Hospital’s application of its notice-and-work policy resulted in outright forfeiture of the strikers’ accrued terminal benefits and the record showed inconsistent and discriminatory application of the benefit entitlement policy.

The facts in the instant case also differ materially from those the Board found in *Nuclear Fuel Services*, applying *Texaco*, to the facts in *Nuclear Fuel Services*, the Board held that General Counsel had not made a prima facie case of 8(a)(3) and (1) conduct, where the employer refused to grant vacation benefits to striking employees. There, unlike the instant case, the vacation benefits had not accrued prior to the commencement of the strike. Further, the Board stated that even if the General Counsel had made a prima facie showing, the employer had established a good business reason for denying the requested vacation benefit. The employer had shown that the collective-bargaining agreement covering the striking employees did not provide for the payment of vaca-

tion money to any employee. Accordingly, I find that the Board's holdings in *Bil-Mar* and *Fuel Services* do not apply in this case.

I also find that the Hospital by its supervisors, Steven Simmons, Sharon Largent, and Amarylis Chandler, and by its personnel assistants, restrained and coerced employees in the exercise of their right, under the Act, to engage in a lawful economic strike, by telling strikers, whom the Hospital had not recalled, that they were not eligible to receive accrued terminal benefits, including sick pay and vacation pay unless they returned to work, gave the Hospital proper notice of their resignation and worked out their notice periods. I further find, therefore, that by that conduct, the Hospital violated Section 8(a)(1) of the Act.

C. *The Alleged Discrimination Against Barbara Hayden*

The Hospital has employed nurse aid Barbara Hayden since June 5, 1972. Hayden joined the strike, which began on December 1, 1991. When the strike began, the Hospital employed Hayden as nurse aide in its oncology department, on the 7 a.m. to 3 p.m. shift.

In February, after the strike had ended, Hayden contacted the Hospital and asked for work as a nurse aide. She accepted her prestrike position in the oncology department on a temporary basis pending her replacement's recovery from injuries suffered in an automobile accident. Hayden returned to work on February 15 and was scheduled to work until March 7.

In late February, Hayden realized that as a temporary employee she was not eligible to buy insurance. She approached the director of the oncology department, Sue Derouen and asked about employment in the Hospital's pool of employees, who were called to work as needed. Pool employees were eligible to buy insurance. Derouen consulted Vice President Simmons and told Hayden that he did not see any bar to her getting into the pool and buying insurance.

A few days later, the Hospital's Employee Recruit Officer, Amarylis Chandler, in conversation, told Hayden that if she went into the pool, the Hospital would remove her name from the recall list. Chandler also pointed out that the Hospital considered employment in the pool to be a position, and that if a full-time job opened up, the next person on the recall list would get it.⁸

In late February, after her conversation with Chandler, Hayden went into the pool. However, the Hospital retained Hayden in her prestrike job until June 8, when her permanent replacement returned to work. At the time of the hearing before me, Hayden was in the pool, but was on a full-time job. In mid-March, Hayden learned from Director Derouen that if her prestrike nurse aide job opened up, she would get it.

There was no showing that Hayden's name was removed from the recall list. Nor did her prestrike job or any other job for which she was eligible open up between Chandler's warning in February that Hayden's name would be removed from the recall list if she opted for the employee pool, and Derouen's reassuring message in mid March.

The complaint alleges that the Hospital violated Section 8(a)(3) and (1) of the Act in late February by refusing to consider Hayden "for a vacant position unless she renounced

her *Laidlaw* right to return to her former job." In his brief, the General Counsel has abandoned that allegation. He now contends that the Hospital violated "Section 8(a)(3) and (1) of the Act by terminating the reinstatement rights of striking employee Barbara Hayden." Counsel for the General Counsel urges that the Hospital violated those sections of the Act by removing Hayden's name from the recall list, while assigning her to the pool, which assignment was not substantially equivalent to her prestrike position.

Contrary to the General Counsel's contention, the record does not show that the Hospital terminated her reinstatement rights by removing Hayden's name from the recall list. Nor was there any showing that the Hospital conditioned her temporary assignment to a nurse aide position or any other work assignment upon Hayden's renunciation of her entitlement to reinstatement. Instead, the record shows that the Hospital assured Hayden that her reinstatement rights were intact. Accordingly, I shall recommend dismissal of the allegations of discrimination against Hayden.

CONCLUSIONS OF LAW

1. The Respondent, Lourdes Health Systems, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Association of Machinists & Aerospace Workers, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees, who, as former strikers, were on a recall list, that under Respondent's policy, they could not resign and receive accrued sick leave pay or accrued vacation pay unless they returned to work, gave adequate notice, and worked out the notice period, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to pay accrued sick leave pay or accrued vacation pay to unrecalled employees Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, when they sought to resign their employment, because they supported an economic strike, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated Section 8(a)(3) and (1) of the Act by either refusing to consider employee Barbara L. Hayden for a vacant position unless she renounced her right as a permanently replaced economic striker to return to her former job or by terminating her reinstatement rights.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding payments of accrued benefits due employees, including Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, I shall recommend that the Respondent be required to make whole employees Englert, Wright, Rushing, Barger, Richie, and any other employees who suffered similar discriminatory treatment at the Respondent's hands, by paying the accrued sick leave and vacation benefits due them, plus

⁸I have credited Hayden's uncontradicted testimony regarding her conversations with Derouen and Chandler in February.

interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Lourdes Health Systems, Inc., Paducah, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against and coercing employees in the exercise of their rights to engage in or refrain from engaging in union and other protected activities, including the right to strike, by withholding payments of accrued vacation benefits, accrued sick leave benefits, or any other accrued benefits.

(b) Telling employees, who, as former strikers, are on a recall list, that under Respondent's policy, they can not resign and receive accrued sick leave pay or accrued vacation pay, or other accrued benefits, unless they return to work, give adequate notice, and work out the notice period.

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

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

(a) Make whole employees Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, and any other employee who suffered similar dis-

crimatory treatment at the Respondent's hands, by paying the accrued sick leave and vacation benefits due them, plus interest as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the identity of the employees to whom accrued benefits are due as provided herein, and to analyze the amounts of accrued benefits due each employee under the terms of this Order.

(c) Post at its hospital in Paducah, Kentucky, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

⁹If 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.

¹⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."