

Swift Adhesives, Division of Reichhold Chemicals, Inc. and Ralph Nordstrom. Case 17-CA-17502

December 19, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On June 9, 1995, Administrative Law Judge Martin J. Linsky 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 Respondent's exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by denying vacation pay to 15 permanently replaced economic strikers. We agree for the following reasons.

The relevant facts are undisputed. Under the terms of the expiring collective-bargaining agreement between the Respondent and the Union representing the employees in question, employees who had been employed 196 calendar days¹ during the calendar year were eligible for vacation benefits.² The relevant collective-bargaining agreement, which expired on September 30, 1993,³ also provided that employees who became eligible for vacation days during a calendar year were to take them the ensuing calendar year according to a schedule promulgated by the Respondent. Under section 11 of that agreement, however, employees who were terminated for any reason were to be paid for the vacation days for which they had become eligible. Prior to the expiration of the collective-bargaining agreement, all 22 employees had worked more than 196 calendar days and thus under the terms of the agreement were eligible for vacations the following calendar year.

The employees struck on October 1 after the parties had reached impasse in negotiations for a new collective-bargaining agreement. At the beginning of November, the Respondent notified the striking employees that it had hired 9 permanent replacements and would hire 15 more permanent replacements unless 15 of them returned to work before November 8. None of

the strikers returned. On January 4, 1994, the Union requested, citing section 11 of the expired contract, that the Respondent pay the striking employees for the vacation days they had earned. The Respondent, in response, contended that the strikers had not been terminated but nevertheless agreed to award vacation pay to the seven strikers who had worked at least 196 days during the previous year. The Respondent asserted it was entitled to limit vacation pay to those seven strikers because it had implemented its final offer. That offer changed the eligibility requirements for vacation benefits from 196 calendar days to 196 working days.⁴ It is not in dispute that the remaining 15 strikers had not worked 196 working days.⁵

In *Texaco, Inc.*, 285 NLRB 241 (1987), the Board articulated the principles for the application of the test for finding unlawful discrimination under Section 8(a)(3) set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).⁶ In the case of denial of benefits to strikers, this test requires that the General Counsel make a prima facie showing of some adverse effect of the denial of benefits 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, the burden, under *Great Dane*, shifts to the employer to come forward with proof of legitimate and substantial business justification for its denial of benefits. If the employer proves such a business justification, the Board will dismiss the complaint if the adverse effect of the discriminatory conduct was merely "comparatively slight" but may nevertheless find a violation if the employer's conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.

Applying these principles here, we find that the General Counsel established a prima facie case. All 22 of the striking employees had accrued vacation benefits under the eligibility requirements of the collective-bargaining agreement prior to the agreement's expiration and prior to the commencement of the strike.⁷

⁴ Working days, according to the Respondent's testimony, covered only days actually worked, and excluded days spent on vacation and paid holidays, as well as time on disability. Thus to accrue vacation benefits under its final offer, an employee would have to be on the Respondent's payroll more than 39 weeks in a calendar year.

⁵ The Respondent in its exceptions asserts that the judge erred in finding that 15 strikers had worked 195 working days. On the basis of the record before us, we have no basis for finding that this number of strikers had worked that amount of time. The judge's error, however, is harmless because all the strikers had accrued vacation benefits under existing calendar day criteria before the expiration of the collective-bargaining agreement and the ensuing strike.

⁶ See also *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989).

⁷ We find this case distinguishable from *Nuclear Fuel Services*, 290 NLRB 309 (1988), cited by the judge. In that case, the Board majority found that the vacation benefits that the employer denied

Continued

¹ The parties agree that calendar days include time not working, e.g., paid holidays, days off, vacation days, and time on disability. Thus, an employee accrued vacation benefits if he had been on the Respondent's payroll for 28 weeks during a calendar year.

² The length of the vacation benefit varied according to the employee's total length of service with the Respondent.

³ All dates are in 1993 unless otherwise indicated.

Further, the Respondent's denial of these accrued benefits to 15 strikers was a direct result of the strike since, but for their participation in the strike, the Respondent would have deemed these strikers eligible to receive these benefits.⁸

We further find that the Respondent has failed to meet its burden of showing that it denied the benefits based on a legitimate and substantial business justification. Contrary to its contention, the Respondent is not entitled to rely on the impasse in negotiations for a successor collective-bargaining agreement as justification for its denial of accrued vacation benefits to 15 strikers.

In *R. E. Dietz Co.*, 311 NLRB 1259, 1266 (1993), the Board found that the term "wages, hours, and terms and conditions of employment" as used in Section 8(d) of the Act refers only to *future* wages and conditions, not to past wages and benefits that have already been accrued and that are owed. The Board further reasoned that the employer's proposal in negotiations for a successor collective-bargaining agreement to extinguish its liability for accrued wages and benefits under the previous agreement was therefore a non-mandatory subject of bargaining; and that the employer could not lawfully insist to impasse on a final offer which included this proposal. See also *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984), enf. denied on other grounds 785 F.2d 570 (7th Cir. 1986).

Thus, under these principles, the Respondent's proposal to change the eligibility requirement for vacation benefits which had already accrued under the expired collective-bargaining agreement and which were owed the strikers was a nonmandatory subject of bargaining. The Respondent was not privileged to assert that the parties were at a lawful impasse and to unilaterally implement the proposal. Accordingly, we find that the Respondent has not presented a legitimate and substantial business justification for its conduct, and we therefore find that the Respondent's denial of vacation pay to 15 strikers violated Section 8(a)(3) and (1) of the Act.⁹

were not accrued benefits since the contract did not provide for payment for vacation pay in lieu of vacation. Here, however, the Respondent did not make such a contention. To the contrary, by paying vacation pay to seven of the strikers, the Respondent concedes that strikers could qualify for vacation pay in lieu of vacation.

⁸The 15 strikers who were denied their vacation benefits had worked, according to an exhibit introduced by the Respondent, between 156 and 195 days prior to the commencement of the strike on October 1. Thus, even under the Respondent's unilaterally implemented new rule, which required that employees have actually worked 196 days in a calendar year to be eligible for vacation benefits, it is apparent that the 15 strikers would have satisfied the new requirement if they had refrained from exercising their right to strike and had continued to report to work between October 1 and December 31.

⁹In light of this finding, we find it unnecessary to decide whether the Respondent's conduct was inherently destructive of employee rights.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Swift Adhesives, Division of Reichhold Chemicals, Inc., St. Joseph, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lyn R. Buckley, Esq., for the General Counsel.
Michael J. Bobroff, Esq., of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. A charge and first amended charge were filed by Ralph Nordstrom, an individual, in Case 17-CA-17502 on July 11 and August 31, 1994, respectively, against Swift Adhesives, Division of Reichhold Chemicals, Inc. (Respondent).

On August 25, 1994, the National Labor Relations Board by the Regional Director for Region 17 issued a complaint, which was amended on December 13, 1994, which complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the Act when on January 14, 1994, it denied 15 permanently replaced economic strikers vacation pay for 1993.

Respondent filed an answer in which it denied that it violated the Act in any way and, in any event, with respect to 14 of the 15 alleged aggrieved individuals the charge was time barred by Section 10(b) of the Act.

A hearing was held before me in Overland Park, Kansas, on January 12, 1995.

On the entire record in the case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Swift Adhesives (Respondent) is a corporation with an office and place of business in St. Joseph, Missouri, where it is engaged in the manufacture of glues.

Respondent admits, and I find, that Respondent meets the jurisdictional standards of the Act and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the United Food and Commercial Workers Union, Local 576 (the Union) is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

For a number of years the Union or its predecessor represented a unit of employees of Respondent.

The most recent collective-bargaining agreement between the parties was effective from October 1, 1990, through September 30, 1993.

Prior to the expiration of the most recent collective-bargaining agreement the parties entered into negotiations for a successor agreement. The parties had not reached agreement by the expiration date of the 1990–1993 agreement and were at impasse.

On October 1, 1993, the entire complement of employees in the unit represented by the Union, i.e., 22 employees, went on strike. It was an economic strike. All 22 economic strikers were later permanently replaced. It is conceded by the parties that an employee who loses his job would be eligible to receive vacation pay for the vacation time he was otherwise entitled to.

Prior to the strike and under the terms of the 1990–1993 collective-bargaining agreement all 22 employees in the unit had qualified for vacation pay that ranged from 2 to 4 weeks' pay depending on the length of time the employees had worked for Respondent. This was so because all 22 employees had met the criteria of having worked at least 196 *calendar* days in 1993.

Prior to the expiration date of the 1990–1993 agreement, Respondent had proposed changing the rule on eligibility for vacation from 196 *calendar* days to 196 *working* days. That is, under Respondent's proposal, an employee to be eligible for vacation in 1993 would have to have actually worked 196 days in 1993. Working days did not include vacation days, sick days, holidays, etc. For example, under the old rule an employee would receive for vacation eligibility purposes 31 days for the month of January 1993 but under the *proposed* rule the employee would only receive for vacation eligibility purposes those number of days the employee actually worked and since employees worked a 5-day workweek (either Monday through Friday or Tuesday through Saturday) the employee would, in the absence of overtime, receive credit for only 20 days. There would be no credit for vacation eligibility purposes for January 1, which was a holiday, or the 2 days per week the employees had off, which would be either Saturday and Sunday or Sunday and Monday. No business justification was offered for this proposed change other than Respondent's desire to have it. At the hearing it was suggested that Respondent wanted employees to work 75 percent of the year to qualify for vacation but this was an afterthought and never mentioned during negotiations.

It was only *after* the employees went on strike and no earlier than November 1, 1993, that Respondent unilaterally implemented its last offer to the Union which included the change in deciding vacation eligibility. In fact the Union was not formally told of the implementation until January 14, 1994, when it was advised that only 7 of the 22 striking employees were entitled to vacation pay. (G.C. Exh. 7.) The seven were entitled because they worked extra days during 1993 and had *actually* worked 196 days prior to the strike. On November 1, 1993, Respondent had notified all 22 striking employees by letter that it was hiring permanent replacements for the striking employees "under the wages, benefits and employment conditions" it had proposed to the Union during the negotiations. (R. Exh. 4.) Respondent argues that this constituted notice to the Union that Respondent was implementing its last best offer.

It is uncontested that all 22 employees were eligible for vacation when they went on strike, i.e., all 22 had worked at least 196 *calendar* days. *After* they went on strike Respondent implemented the new rule on vacation eligibility and only 7 of the 22 employees qualified under the new rule, i.e., they had actually worked at least 196 days in 1993. Fifteen of the employees, believe it or not, had actually worked 195 days during 1993. These 15 striking employees had just 1 day less than they needed to qualify for vacation pay under the new rule that was implemented *after* they went on strike.

The practical effect of this was that these employees in order to retain their right to vacation that they had earned would have to cease exercising their federally guaranteed right to strike and return to work for at least 1 more day in 1993.

It is my opinion that what Respondent did in denying vacation pay to these 15 employees was inherently destructive of important employee rights within the meaning of the landmark Supreme Court decision in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). In *Great Dane*, the Court found that a company that announces subsequent to July 1, 1963, during a strike which began prior to July 1, 1963, that only employees who reported for work on July 1, 1963, would be entitled to vacation, violated Section 8(a)(1) and (3) of the Act. What the Company did was inherently destructive of important employee rights and I conclude that requiring the 15 striking employees in the instant case to quit the strike and work at least 1 more day in 1993 to qualify for vacation pay was similarly inherently destructive of important employee rights. If what Respondent does is inherently destructive of important employee rights no antiunion motivation need be shown.

But even so, to implement the new rule on vacation eligibility as Respondent did in the instant case discriminates against employees for exercising their right to strike and to continue their strike. See *Texaco, Inc.*, 285 NLRB 241 (1987), and *Nuclear Fuel Services*, 290 NLRB 308 (1988).

It is conceded by Respondent that Charging Party Ralph Nordstrom timely filed his charge claiming that he was unlawfully denied vacation pay. Nordstrom filed the charge on July 11, 1994, which was within 6 months of Respondent advising the Union in its letter of January 14, 1994, that it was denying vacation pay to all employees who had not actually worked 196 days in 1993. On August 31, 1994, Ralph Nordstrom filed an amended charge claiming that 14 other former employees of Respondent had been also unlawfully denied vacation pay.

Respondent alleges that with respect to these 14 additional discriminatees that the charge is untimely under Section 10(b) of the Act. I disagree and find, relying on *Redd-I, Inc.*, 290 NLRB 1115 (1988), and *Davis Electrical Constructors*, 291 NLRB 115 (1988), that the allegation regarding these 14 additional discriminatees is not time barred because it is closely related to the charge timely filed on July 11, 1994. This is so because the allegation regarding the 14 additional discriminatees is precisely the same as the allegation regarding Ralph Nordstrom.

I note that this is an inappropriate case for deferral to the arbitral process since it doesn't involve so much as a contract interpretation but is strictly an unfair labor practice case pursued by former employees and not by their Union.

Respondent violated Section 8(a)(1) and (3) of the Act when it refused to pay vacation pay to the 15 discriminatees.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(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. By refusing to pay vacation pay to 15 permanently replaced economic strikers, Respondent violated Section 8(a)(1) and (3) of the Act.
4. The above unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found Respondent engaged in an unfair labor practice, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Order will require Respondent to pay vacation pay to the 15 permanently replaced economic strikers.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Swift Adhesives, Division of Reichhold Chemicals, Inc., St. Joseph, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to pay vacation pay to permanently replaced economic strikers who are entitled to be paid vacation pay.

(b) 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) Pay 1993 vacation pay to former employees Ralph Nordstrom, Howard Gross, Walter Gay, Charles Carriger, Delmar Wehr, Dave Elliott, Billy Filley, Phillip Martin, Jim Mason, Ted Ellis, Bob Jones, David Shuman, Franklin Wall, Dave Carter, and Mike Gasper with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Post at its facility at St. Joseph, Missouri, copies of the attached notice marked "Appendix."² Copies of the notice,

¹If 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.

²If 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

on forms provided by the Regional Director for Region 17, 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.

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

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."

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to pay vacation pay to 15 permanently replaced economic strikers.

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 pay 1993 vacation pay, with interest, to permanently replaced economic strikers Ralph Nordstrom, Howard Gross, Walter Gay, Charles Carriger, Delmar Wehr, Dave Elliott, Billy Filley, Phillip Martin, Jim Mason, Ted Ellis, Bob Jones, David Shuman, Franklin Wall, Dave Carter, and Mike Gasper.

SWIFT ADHESIVES, DIVISION OF REICHHOLD
CHEMICALS, INC.