

Albar Industries, Inc. and Local 614, International Brotherhood of Teamsters, AFL-CIO. Case 7-CA-36027

September 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On May 9, 1996, Administrative Law Judge Marion C. Ladwig 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 reviewed the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

¹ The 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent has excepted to the judge's recommended remedy that the unit employees be made whole by reinstating all vacation days that they were required to take over the agreed-upon 1 week, contending that such a remedy is punitive and represents an economic windfall to the employees which is beyond the Board's authority. We reject the Respondent's argument.

In fashioning remedies the Board is authorized by Sec. 10(c) of the Act "to take such affirmative action . . . as will effectuate the policies of the Act." It effectuates the purposes of the Act, and is not punitive, to use the most practicable means available to put employees back into the position they would have enjoyed in the absence of a respondent employer's unfair labor practices. We adopt the judge's recommended remedy of making whole bargaining unit employees for any vacation days in excess of 1 week which they took during the July 1994 and July 1995 shutdowns, because they took those vacation days at those times under orders from the Respondent that unlawfully disregarded the agreement that employees could only be required to use 1 week of their vacation during shutdown periods. It is obviously not possible now to permit the employees to take their vacations during the times in 1994 and 1995 they would have preferred if not subjected to the Respondent's unlawful requirements, so making them whole for the days of forced scheduling is the only practicable means of providing recompense for the unfair labor practice. See *Keystone Steel & Wire*, 248 NLRB 283 (1980), *enfd.* 653 F.2d 304, 306-308 (7th Cir. 1981). In addition, the employees might have been eligible for unemployment compensation if they had been laid off instead of being forced to use their vacation for the extra week of the shutdown, so the remedy compensates them for the loss of that potential benefit.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

modified and orders that the Respondent, Albar Industries, Inc., Lapeer, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(c) and (d).

"(c) Within 14 days after service by the Region, post at its facility in Lapeer, Michigan copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 1994.

"(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Amy J. Roemer, Esq., for the General Counsel.

A. David Mikesell, Esq., of Detroit, Michigan, for the Respondent.

Wayne A. Rudell, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 26, 1995. The charge was filed June 6, 1994¹ (amended July 8), and the complaint was issued July 29 and amended at the trial.

In the 1993 negotiations, the Union proposed that employees be laid off and not be required to take their vacations during the annual shutdown, enabling them to take their vacations at times they choose under the collective-bargaining agreement. The Company wanted to continue requiring the employees to take their vacations during the shutdown to prevent the employees from drawing unemployment compensation.

Finally, as union committee member Judy Holliday credibly recalled, Plant Manager Christopher May told the union committee that there would be mandatory vacations for "One week, and if anybody had a problem with it, that's how it was going to be." The parties agreed to this compromise of a 1-week limit on mandatory vacations and to all

¹ All dates are November 1993 to July 1994 unless otherwise indicated.

the other terms of a contract to replace the expired 1990-1993 agreement.

The Company and Union signed documents containing the agreed changes in the expired agreement. The employees ratified the changes and the Company drafted an agreement to incorporate them. After doing so, however, the Company announced 2 weeks of mandatory vacations during the upcoming July shutdown and refused to sign its own draft.

The primary issues are whether the Company, the Respondent (a) unlawfully refused to execute the collective-bargaining agreement, and (b) unilaterally modified the agreement by requiring employees to use over 1 week of vacation time during the July 1994 and July 1995 shutdowns, violating Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, paints plastic parts used in the auto industry by General Motors, Ford, and Chrysler at its facility in Lapeer, Michigan, where it annually ships goods valued over \$50,000 directly outside the State. The Company 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The 1990-1993 union agreement provided (G.C. Exh. 2, art. 31, Vacations, sec. 4, p. 20):

Every effort will be made to allow vacation off at the time the employee wants his/her vacation but preference will be given to the highest plant seniority employee within a classification. . . . Employees that apply for vacation during the *signup period* from January 1st to January 31st, will be notified in writing within ten (10) working days of January 31st if their vacation has been approved or denied. *Once an employee's vacation is approved in writing by the Company, that approved vacation time will be reserved for that employee.* [Emphasis added.]

The agreement did not refer specifically to mandatory vacations during a plant shutdown, but provided (secs. 1, 4) that

[t]he Company may schedule vacations for employees entitled to vacations [1 week after 1 year, 2 weeks after 2 years, and 3 weeks after 7 years] under this Article either individually . . . or as a group . . . and vacation pay will be paid to the employee before he/she leaves for vacation.

In July 1993 the Company largely nullified the employees' choices of vacation time under the agreement. It shut down

the plant for 2 weeks (except for employees required to work the second week) and required employees to use their vacation time during both weeks. This prevented most of the employees from taking any vacation at the time of their choice under the union agreement. (Tr. 146, 155-156, 205-206.)

The July shutdowns are necessitated by the summer model changeover in the auto industry. Typically General Motors, Ford, and Chrysler, for whom the Company paints plastic parts, would be shut down for 2 weeks—one of the weeks at the same time. (Tr. 153-154.)

Before 1993, as the Company admits in its brief (at 2), "It was during the common week that [the Company] would traditionally schedule its shutdown." Human Resources Manager Charles LeSage admitted that there "had always been" a 1-week "vacation shutdown," when "everybody has to take their vacation." Employees who were not required to work during a second week of limited production were laid off. (Tr. 152, 160, 184.)

B. Agreed 1-Week Limit on Mandatory Vacations

1. 1993 negotiations

In the 1993 negotiations that began in mid-November, the Union made two vacation proposals. Proposal 33 read: "No mandatory vacations during layoff." Proposal 36 read: "Vacation and pay at our convenience, not Albar's." (Tr. 61.)

Under the first proposal, the Union took the position that the employees should not be required to use any vacation time during a July shutdown. As Business Agent Earl Walker explained, mandatory vacations during the plant shutdown take away the employees' "ability to pick selected times to make arrangements for vacations," as well as causes the employees to lose their unemployment compensation as laid-off employees. "The members wanted a guarantee that [these mandatory vacations] would not happen again." (Tr. 16, 41, 61-62.)

The Company opposed the proposed ban on mandatory vacations during the July shutdowns because of cost savings to the Company. "[B]y scheduling employees to use vacation time, that made them ineligible for unemployment benefits" that would be charged to the company account, raising its tax rate, whereas "if they were laid off . . . and not required to use vacation [time], then they would be eligible for unemployment benefits." (Tr. 159, 168-169, 184, 200.)

Under the second proposal, the employees wanted the option of receiving their vacation pay "after the anniversary date" when it would "become due," instead of having to wait (as previously) until the last payday before they took their vacations (Tr. 62, 162-164; G.C. Exh. 2, art. 31, sec. 4).

At the last negotiating session on December 2, as Walker credibly testified, the parties reached a compromise on both issues. The compromise was that the Company "would be allowed to force one week of mandatory vacation time during plant shutdown" (following its practice before 1993) and that the employees could claim "vacation pay" for that "mandatory shutdown" week "anytime after it has been earned." (Tr. 16-18, 160, 164; G.C. Exh. 3 p. 2, item 17.)

Union committee member, Ruby Holliday, credibly testified that Plant Manager Christopher May told the union committee in the meeting that the mandatory vacation was for "One week, and if anybody had a problem with it, *that's*

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how it was going to be [emphasis added]." Holliday, who had not been on the negotiating committee before, erroneously understood that the contract had specifically allowed 1 week of mandatory vacations—evidently because that had been the practice in the plant before 1993. (Tr. 140, 160.)

Both Walker and Holliday impressed me most favorably by their demeanor on the stand as being candid, truthful witnesses, doing their best to recall what had happened. I discredit the denials of the compromise of a 1-week limit on mandatory vacations during a plant shutdown (Tr. 160, 164, 201-203).

Human Resources Manager LeSage and Business Agent Walker (the chief negotiators for the Company and the Union) signed documents containing all the negotiated contractual changes, which the employees ratified (Tr. 14-15, 19-25, 105, 133-134, 218-225, 56-57, 152-153, 158, 166-168; G.C. Exhs. 3, 4).

2. Altered contract language

Before the Company and Union agreed in the 1993 negotiations to revise the expired 1990-1993 agreement to specifically allow 1 week of mandatory vacations during a plant shutdown, there had been no specific reference in the agreement to mandatory vacations during a shutdown (G.C. Exh. 2, art. 31).

The "Final Offer" document that LeSage and Walker signed on December 8 (G.C. Exh. 3; Tr. 18-21, 70) contained the following item 17—which as Walker credibly testified, contrary to LeSage's denials (Tr. 165, 168), he drafted and read to LeSage in the negotiations and LeSage agreed (Tr. 18-21, 70; G.C. Exh. 3):

ARTICLE 31, SECTION 3. ADD LANGUAGE THAT ALLOWS:

If the Company schedules plant shut down and requires employees to take 1 week of their vacation during that time, the involved employees can claim "vacation pay" for that week any time after it has been earned. It is understood that this applies only to "mandatory shut-down" week of vacation pay. [Emphasis added.]

Thus this provision, which was part of the negotiated contract between the parties, specifically "allows" a single week of mandatory vacations. It specifically refers to requiring employees to take "1 week" of their vacation during a scheduled shutdown, to the employees claiming vacation pay "for that week," and to claiming vacation pay at anytime after it has been earned "only" for a mandatory shutdown "week."

When, however, LeSage incorporated the agreed contract language in the draft of a new collective-bargaining agreement around the second or third week in January, he omitted the last two references to a single week, as follows (G.C. Exh. 5 p. 19; Tr. 25-30, 173):

If the Company schedules a plant shutdown and requires employees to take one week of their vacation during that time the involved employees can receive vacation pay for the mandatory vacation [omitting "that week"] anytime after it has been earned. It is under-

stood that this applies only to mandatory vacations [omitting the word "week"]. [Emphasis added.]

After the Company refused on June 2 to sign the draft that LeSage had prepared with the altered language (the Union was not aware of these changes at that time, as discussed below), the Company offered to sign an agreement that omitted any reference to a 1-week limit on mandatory vacations during a plant shutdown, as follows (G.C. Exh. 9):

If the Company schedules a plant shutdown, and requires employees to use vacation time, the involved employees can receive vacation pay for the mandatory vacation anytime after it has been earned. It is understood that this applies only to mandatory vacations.

When the differences in the contract language and LeSage's altered language in the draft were pointed out at the trial, the company counsel was asked why the Company would change the language. He answered as follows (Tr. 79):

By MR. MIKESSELL: Well, I don't know. Well, we'll have to hear from the person who drafted that.

When called as a defense witness, LeSage claimed (Tr. 178-179):

Q. By MR. MIKESSELL: Was it your intention to change the parties' agreement as you understood it to be with respect to paragraph 17 of [G.C. Exh. 3]?
A. No, it was not.

JUDGE LADWIG: Did you have any other intent other than putting it in better grammar?
THE WITNESS: No.

To the contrary, I infer from the undisputed testimony that President Edward May—who neither attended any of the negotiating sessions (Tr. 15, 34) nor appeared as a witness at the trial—was refusing to abide by the compromise of a 1-week limit on mandatory vacations during a shutdown, as agreed on the Company's behalf in the negotiations. May's statements to the Union, discussed below, reveal his personal participation in the matter.

I infer that LeSage was merely following President May's instructions when altering the contract language to support the Company's belated interpretation that the language "dealt strictly with vacation pay."

3. Notice of 2-week mandatory vacations

Around the second or third week of January, LeSage provided copies of his draft of the new agreement to the union negotiating committee. On January 28, near the end of the January vacation signup period in the agreement—which the Company was following, except for the agreed 1-week limit on mandatory vacations during a shutdown—LeSage posted a notice of 2 weeks of mandatory vacations. (Tr. 25-28, 40, 98, 102-103, 129, 173, 179-182, 188-189; G.C. Exh. 5, art. 31, sec. 4, p. 19.)

The memo nullified the employees' choice of all vacation time that year, except for any employee who was entitled to a third week of vacation after 7 years of service under the agreement (art. 31, sec. 1, p. 18).

The memo, dated January 24, subject "July Shutdown," states (G.C. Exh. 6):

Based on the information we currently have, there will be a total plant shutdown for two weeks in the month of July. Those employees not required to work during the shutdown will be *required to use two weeks of vacation* for the shutdown. Such designation may render you ineligible for unemployment benefits during the designated period. [Emphasis added.]

When employees in the shop told Scott, "Hey, they posted two weeks off in July," he read the memo on the bulletin board. He then saw President Edward May and Vice President Lawrence May coming from the crib toward him. He confronted them and asked: "What kind of bullshit is this you guys are trying to pull?" (Tr. 98.)

It is undisputed that President May answered (Tr. 99):

That's *just too bad*. I mean we're going to shut it down. . . . *you're going to take your two weeks vacation time*. . . . We don't really care. [Emphasis added.]

On February 1 Scott filed a grievance, which is still pending (G.C. Exh. 7, Tr. 92, 100, 111-113). The grievance reads:

On 1-28-94 notice was posted for a plant shutdown in July requiring some or all employees to use two weeks vacation time.

We feel that this is wrongful for the company to require us to use our 2 wks vacation when according to the contract it says only one week.

[Relief sought:] Vacation time to be released from posted notice.

Scott credibly testified that this was an important issue for the bargaining unit, "So that we'd have a week's vacation for us, to do what we wanted to do, instead of having to be able to take it when the company said for us to take it" (Tr. 97).

On May 20 LeSage posted a second "July Shutdown" notice (G.C. Exh. 8; Tr. 101), confirming the 2-week shutdown and stating that "[t]hose employees not required to work . . . will be required to use *two weeks of vacation time*. . . . Such designation may render you ineligible for unemployment benefits." (Emphasis added.)

Again in July 1995 the Company required employees to use 2 weeks of vacation time during the plant shutdown. The employees received no unemployment compensation for either week. (Tr. 42, 194.)

4. Refusal to sign agreement

In a meeting on June 2, after Business Agent Walker's heart surgery, the Company refused to sign the agreement that Human Resources Manager LeSage had drafted (Tr. 31-34, 38-39). At that time the Union was not aware that LeSage had made the alterations in the provision for a 1-week limit on mandatory vacations (Tr. 50, 58-59, 106-107, 120, 134-135, 150).

It is undisputed that in the discussion of the Company's May 20 notice of the 2 weeks of mandatory vacations during

the next month's shutdown, as Walker credibly testified (Tr. 33-34):

I said, "This [drafted agreement] says one week [of mandatory vacations during a shutdown]. We agreed to one week, the members voted for one week. . . . you wrote it in your own copy. You wrote one week."

[President] Ed May said . . . that was *by way of example*. *It didn't mean one week literally*, and . . . that they thought about two weeks the year before that, and the year before that. They thought about it several times.

And I said, "Well, then why didn't you say that during negotiations?" . . . No response. [Emphasis added.]

It is further undisputed that nothing was said in the negotiations about 1 week of mandatory vacations being considered only an "example" (Tr. 18, 97, 125-126).

It was the following week, on June 9, when LeSage (with the assistance of counsel) prepared a further proposed change in the contract language, omitting any reference to a 1-week limit on mandatory vacations during a plant shutdown, as quoted above.

5. Company defenses

The Company's primary defense is that there was no "meeting of the minds" on limiting mandatory vacations during a plant shutdown. To the contrary, as found, the parties specifically agreed, as Plant Manager Christopher May—in rejecting the Union's proposed ban on any mandatory vacations during a plant shutdown—adamantly demanded at the last negotiating session that the mandatory vacation was "[o]ne week, and if anybody had a problem with it, that's how it was going to be." This compromise restored the practice that existed before 1993.

The Company cites in its brief (at 3) the testimony by Christopher May. According to him (Tr. 201):

It was roughly midway through the negotiation process. . . . [I said] I had known that GM had just settled their contract and that in that contract there was some discussion of that they were going to shut down for a two-week period in the summer.

And I looked right at Earl [Walker] and I made the statement that if the UAW and GM plan on shutting down for two weeks, then [the Company] would like to have the right to be able to shut down for at least two weeks.

As LeSage admitted at the trial, General Motors as well as Ford and Chrysler "traditionally had a two week shutdown." Even assuming, however, that May made such a statement earlier in the negotiations, the statement refers to GM and the UAW agreeing to a 2-week shutdown. That fact is clearly irrelevant. There is no evidence of the Union ever opposing a company shutdown for lack of parts. The issue was whether the Company could impose a mandatory use of vacation time during the shutdown.

LeSage claimed at the trial that "My understanding was that [the contract language] dealt strictly with vacation pay" (Tr. 170). In its brief (at 3-4) the Company contends:

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LeSage reviewed the Union's document [the "Final Offer" document that both he and Walker signed on December 8] and concluded the quoted language only incorporated [the Company's] concession to pay employees the mandatory vacation time as it was earned.

LeSage did incorporate the revisions [in the expired 1990-1993 agreement when drafting the new agreement] . . . making *minor grammatical* changes to the "final offer" wording. . . . In making these minor revisions, LeSage had no intention of changing the parties' agreement as he understood it.

To the contrary, as discussed above, the contract language specifically "allows" a single week of mandatory vacations and the so-called "minor grammatical" changes that LeSage made without notice to the Union included omitting two specific references to the single week of mandatory vacations during a plant shutdown.

6. Concluding findings

I find that there was a "meeting of the minds" at the last negotiating session on December 2 when the Company and the Union compromised the mandatory vacation issue and agreed to a specific provision in the new agreement, allowing the Company to require employees "to take 1 week of their vacation" during a scheduled plant shutdown.

I therefore find that the Company unlawfully refused on June 2, 1994, to execute the collective-bargaining agreement to which it had agreed and unilaterally modified the binding agreement when it required employees to take 2 weeks of mandatory vacation during the July 1994 and July 1995 shutdowns, violating Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By refusing on June 2, 1994, to execute the collective-bargaining agreement to which it had agreed, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By unilaterally modifying the binding agreement during its term, the Company further violated Section 8(a)(5) and (1).

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.

I find that the Respondent must, on request, execute and retroactively apply the collective-bargaining agreement to which it and the Union agreed, including the provision for a 1-week limit on mandatory vacations during a plant shutdown as agreed in writing on December 8, 1993.

I also find that the Respondent must make whole the bargaining unit employees who were required to take over 1 week of vacation during the July 1994 and July 1995 shutdowns by reinstating the number of vacation days they were required to take over the 1-week limit on mandatory vacations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Albar Industries, Inc., Lapeer, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute its collective-bargaining agreement with Teamsters Local 614.

(b) Unilaterally modifying the agreement by requiring bargaining unit employees to take over 1 week of their vacation during a plant shutdown.

(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) On request, execute and retroactively apply the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(b) Make whole the bargaining unit employees who were required to take over 1 week of vacation during the July 1994 and July 1995 shutdowns by reinstating the number of vacation days they were required to take over the 1-week limit on mandatory vacations.

(c) Post at its facility in Lapeer, Michigan, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

² 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.

³ If 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."

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 refuse to sign our collective-bargaining agreement with Teamsters Local 614.

WE WILL NOT require you to take over 1 week of your vacation during a plant shutdown.

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, on request, sign and retroactively apply the union agreement.

WE WILL reinstate the number of vacation days you were required in 1994 and 1995 to take over the 1-week limit on mandatory vacations.

ALBAR INDUSTRIES, INC.