Ace Beverage Company; Astro Beverage Corporation; Banner Distributing Co.; Cimino Distributing Co.; Willie Davis Distributing Co.; Harbor Distributing Co.; Markstein Distributing Co.; Metro Distributing Co.; Mission Trucking Company; Southland Beverage Dist., Inc.; Towne Distributing Co.; Triangle Distributing Co.; Westside Distributing Co. *and* Teamsters Local Union No. 896, Brewery, Soda and Mineral Water Bottlers of California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 21-CA-15861

December 24, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On July 11, 1978, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The Administrative Law Judge found, and we agree, that Respondents did not violate the Act by denying certain reinstated economic strikers *pro rata* vacation benefits for time worked prior to the strike, since these employees were not entitled to such benefits under the terms of the collective-bargaining agreement. Under the vacation benefit provisions of the contract, employees are required to work a full 45 weeks in a calendar year before earning any vacation benefits. As the reinstated strikers were absent, by reason of the strike, for more than 7 weeks in 1976, the Administrative Law Judge properly found that they had not worked the 45 weeks necessary for accruing benefits and that Respondents could not be held in violation of the Act for denying benefits which had not yet accrued.[1] Furthermore, while a provision in the contract (sec. 26.10) does provide *pro rata* benefits for less than 45 weeks of work, such benefits are expressly limited to employees who quit, retire, or surrender their seniority. Thus, the reinstated strikers were ineligible for benefits under this latter provision as well.

Although we agree with the Administrative Law Judge's ultimate conclusion and generally with his rationale, the argument advanced by the General Counsel first at the hearing and later in his exceptions to the Decision warrants some further comment by us.

The General Counsel asserts that the contract does not expressly deny *pro rata* benefits to employees on strike; hence Respondents could not lawfully deny *pro rata* benefits to the reinstated strikers while granting such benefits to other employees eligible under section 26.10 because such conduct, in effect, penalizes employees who exercise the right to strike. We disagree.

Section 26.02 of the contract establishes a general rule requiring employees to work for an employer for 45 weeks in a calendar year in order to qualify for any vacation benefits. The reinstated strikers failed to satisfy this provision because of their strike absences. *Pro rata* benefits for employees who work less than 45 weeks are *only* provided in section 26.10, which states:

> 26.10 In the event an employee who has received his first vacation from an Employer is terminated (other than layoff) by that Employer, or who surrenders his seniority with that Employer, he shall be paid *pro rata* vacation pay as follows: for every one hundred sixty (160) hours worked toward a vacation for that Employer since his last vacation eligibility date, but within the period of two (2) calendar years immediately preceding such termination or surrender, he shall receive an amount equal to one-twelfth (1/12th) of the vacation pay he would have received if he not been terminated or surrendered his seniority and had worked the required forty-five (45) weeks to qualify for a vacation with such Employer.
>
> *Pro rata* vacation pay shall be paid to the employee (1) when terminated (other than layoff), and (2) if he surrenders his seniority at the time he surrenders seniority, and (3) if not recalled from layoff before June 30 following, then on such June 30th

Given the language of section 26.10, particularly when read in connection with section 26.02, it is apparent that striking employees who neither quit, retire, nor surrender their seniority are not entitled to *pro rata* vacation benefits, and to find a violation against Respondents for not treating the reinstated strikers in the same manner as employees who prematurely quit or retire ignores the fact that the contract endorses, and the Union has acquiesced in,

[1] See, e.g., *Glomac Plastics, Inc.*, 194 NLRB 406 (1971), where the Board reached the same result even where the employer's vacation benefit policy—which required employees to work a full 12 months before accruing any vacation benefits—was not part of a collective-bargaining agreement.

this result. Indeed, a study of the negotiations which ensued shortly before the instant strike bolsters this conclusion. Thus, in April 1976, the Union sought to amend the vacation benefit provisions set forth above so as to provide *pro rata* benefits for all employees. The Union clearly recognized that without such an amendment *pro rata* benefits were limited to only those employees who could qualify under section 26.10. The proposed amendment was negotiated at length throughout the spring and early summer of 1976, but the Union did not prevail in its demand. In December 1976, Respondents and the Union signed the current contract which made no changes in any of the vacation benefit provisions.

Under these circumstances, to find a violation here would give the Union through an unfair labor practice what it sought—but could not achieve—through good-faith negotiations at the bargaining table.[2] As Respondents urged at the hearing, "The contract falls where it falls and in effect, contrary to the agreement of the parties, what the General Counsel is attempting to do is re-write the agreement."[3]

Accordingly, as there is no contention that Respondents were improperly motivated, or that treatment of the strikers differed from that of certain nonstrikers who failed to work a full 45 weeks, or that the narrow *pro rata* exceptions in section 26.10 were, in reality, a ruse by Respondents to single out strike absences and penalize employees for striking, we adopt the Administrative Law Judge's decision to dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[2] In *Roegelein Provision Company*, 181 NLRB 578 (1970), the Board similarly rejected the union's attempt to recover vacation benefits for striking employees as the employer there had a contractual right to deny all vacation benefits to striking employees who, by striking, had exceeded the maximum allowable absences.

[3] The General Counsel's reliance on cases such as *Frick Company*, 161 NLRB 1089, 1108 (1966), enfd. in part 397 F.2d 956 (3d Cir. 1968), and *Elmac Corporation*, 225 NLRB 1188 (1976), is misplaced for two significant reasons. First, strikers in those cases had already worked the requisite accrual periods prior to the strike and were impermissibly forced to forfeit their accrued benefits because they were absent, by striking, on a particular "eligibility" date. By contrast, the employees here had not yet worked the requisite period prior to the strike and therefore had not accrued any vacation benefits. See also *N.L.R.B. v. Knuth Brothers, Inc.*, 584 F.2d 813, fn. 6 (7th Cir. 1978). Second, unlike here, the employers in *Frick* and *Elmac* were implementing employer-created policies which were not the product of negotiations with a union.

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge: The original unfair labor practice charge in this case was filed on July 15, 1977, by Teamsters Local Union No. 896, Brewery, Soda and Mineral Water Bottlers of California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union. The first amended unfair labor practice charge in this case was filed on July 25, 1977, by the Union.

The Regional Director for Region 21 of the National Labor Relations Board, herein called the Board, who was acting on behalf of the General Counsel of the Board, issued on December 9, 1977, a complaint and notice of hearing in this case against Ace Beverage Company; Astro Beverage Corporation; Banner Distributing Co.; Cimino Distributing Co.; Willie Davis Distributing Co.; Harbor Distributing Co.; Markstein Distributing Co.; Metro Distributing Co.; Mission Trucking Company; Southland Beverage Dist., Inc.; Towne Distributing Co.; Triangle Distributing Co.; and Westside Distributing Co., herein called Respondents.

The General Counsel's complaint alleges that Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. Respondents filed an answer to the complaint, which denied the commission of the alleged unfair labor practices and raised certain affirmative defenses.

The hearing was held before me on March 7, 1978, in Los Angeles, California. Counsel for the General Counsel and the attorney for Respondents each filed very persuasive briefs by the due date of April 11, 1978. Those briefs have been read and considered.

Upon the entire record in this proceeding and based upon my observation of the demeanor of the witness who testified, I make the following:

FINDINGS OF FACT

I. JURISDICTION

With the exception of Respondent Mission Trucking Company, the other 12 Respondents in this case have been, at all times material herein, corporations engaged in the wholesale distribution of beverages within the State of California. Mission Trucking Company has been, at all times material herein, a corporation engaged in the transportation by truck of beverages within the State of California.

Ace Beverage Company has a facility located at 550 South Mission Road in Los Angeles, California. Astro Beverage Corporation has a facility located at 8000 Deering Street in Canoga Park, California. Banner Distributing Co. has a facility located at 13951 South Main Street in Los Angeles, California. Cimino Distributing Co. has a facility located at 455 South Arroyo Parkway in Pasadena, California. Willie Davis Distributing Co. has a facility located at 1710 East 111th Street in Los Angeles, California. Harbor Distributing Co. has a facility located at 19722 South Alameda Street in Compton,

California. Markstein Distributing Co. has a facility located at 2055 East 223d Street in Carson, California. Metro Distributing Co. has a facility located at 539 South Mission Road in Los Angeles, California. Mission Trucking Company has a facility located at 550 South Mission Road in Los Angeles, California. Southland Beverage Dist., Inc., has a facility located at 13099 Temple Avenue in the City of Industry, California. Towne Distributing Co. has a facility located at 3616 Noakes Street in Los Angeles, California. Triangle Distributing Co. has a facility located at 17720 Studebaker Road in Cerritos, California. Westside Distributing Co. has a facility located at 6722 South Crenshaw Boulevard in Los Angeles, California.

With the exception of Mission Trucking Company, each one of the other 12 Respondents named above, during the 12-month period preceding the issuance of the complaint in this case, purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

Mission Trucking Company has annually provided services valued in excess of $50,000 to customers located within the State of California, each of which, in turn, has annually purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

Upon the foregoing facts, which were not disputed in the pleadings, I find that each one of the 13 Respondents has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was not disputed in the pleadings that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. In addition, it was not disputed that Beer Drivers, Salesmen and Helpers, Local 203, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America was, until on or about December 1, 1976, also a labor organization within the meaning of Section 2(5) of the Act. On or about December 1, 1976, the Union and Local 203 merged, with the Union becoming the lawful successor to Local 203.

I find these undisputed facts to be so. However, simply for convenience in this Decision, the term "Union" will encompass both Local No. 896 and Local No. 203, since Local 203 was merged into Local 896.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Applicable Contract Provisions*

The Union and each one of Respondents were parties to a collective-bargaining agreement covering the wages, hours, and other terms and conditions of employment of the employees of Respondents. The effective term of that contract was from June 1, 1973, through June 1, 1976. Among the provisions in that agreement was a section 26 entitled "Vacations."

A copy of the current collective-bargaining agreement between the Union and each one of Respondents was introduced into evidence as General Counsel's Exhibit 3. The effective dates of that contract are from December 6, 1976, to October 1, 1979. That contract contains the same provisions with regard to vacations as did the 1973–76 collective-bargaining agreement. The only difference is that in the current agreement the vacations provisions are set forth in section 24, whereas in the earlier contract the vacations provisions were set forth in section 26. Otherwise, the provisions on that particular subject are identical.

The vacations provisions are:

> Section 26—Vacations
>
> 26.01 There shall be a common anniversary date period, which shall be from January 1 through December 31 of each year. The common anniversary date for qualifying for vacation shall be January 1 of each year.
>
> 26.02 In order to qualify for a vacation, an employee must be employed by the same Employer for forty-five (45) weeks within a calendar year. Any employee who has not qualified for a vacation within one (1) calendar year may qualify for a vacation within a period of two (2) successive calendar years.
>
> 26.03 An employee who has been continuously employed by an Individual Employer in more than one (1) calendar year, but who does not qualify for a vacation in the first calendar year that he is employed by that Individual Employer by reason of the fact that he did not work forty-five (45) weeks in that calendar year for that Individual Employer, shall receive one-twelfth (1/12th) of that year's vacation pay, but no time off, for every month in which he worked at least one hundred twenty (120) hours in excess of twelve (12) such months in the first two (2) calendar years in which he was employed by that Individual Employer.
>
> 26.04 After having qualified for his first vacation period, the number of weeks of paid vacation which an employee is entitled to depends upon the number of vacations which an employee has earned with an Employer, while continuing to have unbroken seniority with such Employer. Such vacation periods shall be as follows: [For 1 earned vacation with an Employer 1 week of paid vacation; for 2 to 4 earned vacations 2 weeks of paid vacation; for 5 to 7 earned vacations 3 weeks of paid vacation; for 8 to 19 earned vacations 4 weeks of paid vacation, and for 20 or more earned vacations 5 weeks of paid vacation.]
>
> 26.05 No employee shall be entitled to a vacation in a period short of a calendar year. No time worked in excess of forty-five (45) weeks in a calendar year can be carried over as a credit to the next vacation.
>
> 26.06 Employees shall be allowed a maximum of sixty (60) calendar days on account of illness or accident and all time actually taken as a vacation period during said calendar year period, and the same shall constitute time worked for the purpose

of computing eligibility for vacation under the provisions of this Section 26.

26.07 Compensation for said vacation, when taken, shall be paid at the rate provided for on the shift on which an employee worked. In the event that an employee is laid off prior to the commencement of his scheduled vacation and has qualified for vacation, if such employee requests that he be paid his vacation pay while on layoff, such vacation pay shall be paid to him. Such vacation pay shall be forty (40) times the first shift hourly rate of his classification, and such vacation pay shall be in lieu of a vacation period.

26.08 It is the intention of the Employer that vacations will be taken from May to September, if possible. However, in the event that an employee has earned more than two (2) weeks' vacation, the employee will not be entitled to take more than two (2) weeks' vacation between May 1 and September 30. Seniority shall prevail relative to choice of vacation time.

26.09 No employee discharged for cause shall receive *pro rata* vacation. This provision shall not serve to deny vacation pay to an employee discharged after he has qualified for a vacation.

26.10 In the event an employee who has received his first vacation from an Employer is terminated (other than layoff) by that Employer, or who surrenders his seniority with that Employer, he shall be paid *pro rata* vacation pay as follows: For every one hundred sixty (160) hours worked toward a vacation for that Employer since his last vacation eligibility date, but within the period of two (2) calendar years immediately preceding such termination or surrender, he shall receive an amount equal to one-twelfth (1/12th) of the vacation pay he would have received if he had not been terminated or surrendered his seniority and had worked the required forty-five (45) weeks to qualify for a vacation with such Employer.

Pro rata vacation pay shall be paid to the employee (1) when terminated (other than layoff), and (2) if he surrenders his seniority at the time he surrenders seniority, and (3) if not recalled from layoff before June 30 following, then on such June 30th.

Time paid for hereunder may never be counted for the purpose of any other vacation credit.

The findings of fact set forth above are based upon a stipulation by the parties, matters not disputed in the pleadings, and documentary evidence.

B. *The Negotiation Meetings*

Martin H. Schinnerer has been chairman of the board of Southland Beverage since April 1977. Prior to that time, Schinnerer had been president of that company since 1968.

Schinnerer participated in contract negotiations between the Employers and the Union in 1976. He said that he attended all of the negotiation meetings, which he estimated were 10 to 12 in number.

At the first meeting concerning contract negotiations on April 5, 1976, the Union presented its original contract proposals. A copy of those proposals made by the Union was introduced into evidence as Respondents' Exhibit 1. The document is nine pages long and contains many proposals. One of those proposals which was discussed at the meeting was item 17 which pertained to proposed contract provisions regarding vacations. Among the Union's proposals was one listed as item 17(h) which proposed with regard to section 26.05 in the contract existing at that time, "Delete and provide *pro rata* for *all* employees." The Union's spokesman at the meeting told the Employers that this was one of the items which they insisted on being put into the contract. Attorney Erwin Lerten, who was representing the Employers, denied the Union's request.

At the next negotiation meeting, which was held on May 10, 1976, the Union again requested that the *pro rata* provision regarding vacations be put into the contract, and Attorney Lerten again stated that it would not be an issue which the Employers would consider. According to Schinnerer, the parties went over all of the items in the Union's initial proposal item by item.

At the May 15, 1976, negotiating session between the Employers and the Union, the subject of *pro rata* vacation pay was again brought up by the Union. The Union's spokesman said at that meeting that it was an issue that the Union was requesting to be included in the new contract. Attorney Lerten made a counterproposal that the 60-day credit for illness be substituted for the *pro rata* vacation for all employees. The Union's response was that they would not buy that proposal.

The Union's revised written proposals, which are dated May 22, 1976, were introduced into evidence as Respondents' Exhibit 2. That document contains an item 12 with regard to the vacation proposals. It proposes, with regard to section 26.05 of the contract existing at that time, the following: "Provide *pro rata* vacations for *all* employees."

The next negotiating meeting was held on May 24, 1976. At that meeting Attorney Lerten proposed once again that the Employers would consider the *pro rata* vacation for all employees if the item in the then current contract regarding 60-day credit for illness be deleted. The Union's spokesman said that the Union would not give that proposal any consideration.

At the May 28, 1976, negotiating session, the Union's proposal and the Employers' counterproposal came up once again. Schinnerer testified on direct examination by the attorney for Respondents as follows:

> Q. Now, directing your attention to May 28, 1976, did you attend a negotiation meeting on that date?
>
> A. Yes, I did.
>
> Q. Who represented the Union at that meeting?
>
> A. Mr. Sperling represented the Union.
>
> Q. Anyone else?
>
> A. And I think that Fahy was there and again one of the members of 896, and Mr. Lerten represented the employers.

Q. Was there anyone from the Federal Mediation?

A. On the 28th?

Q. Yes, sir.

A. Yes.

I think that was the first meeting that we had, and Mr. Allen, Frank Allen, from the Federal Mediation Board was there at that meeting, that we met at the Federal office.

Q. Was there any discussion of *pro rata* vacation pay at that meeting?

A. It again was in their proposal, the Union's proposal.

Q. Who said it?

A. And Mr. Sperling presented that proposal.

Q. What did he say about it?

A. He said this is an item that must be placed in the 1976 contract, the ratification for all employees.

Q. Was there any reply given by any company representative?

A. I think again we through Mr. Lerten made the offer of if they would withdraw the 60-day credit for illness we would consider that *pro rata* vacation for all employees.

Q. All right. What was the Union's response to that?

A. They gave no response except that they said they would stand on the same basis that they have in the past, that they need this item in the contract.

The Union's next written contract proposals dated June 4, 1976, were introduced into evidence as Respondents' Exhibit 3. Among the various proposals made by the Union was item 8 which provided: "*Vacations*—Provide for *pro rata* vacation for all employees after qualifying for a first vacation."

The next negotiation meeting was held on June 14, 1976. At that meeting the Federal Mediation and Conciliation Service commissioner, Frank Allen, verbally presented to the Employers "some final proposals" from the Union. Attorney Lerten asked Commissioner Allen whether the *pro rata* vacation item was dropped from the Union's proposals, and Commissioner Allen replied, "Yes," and that it would remain the same as in the 1973-76 contract. According to Schinnerer, the Union never subsequently reinstated its demand for *pro rata* vacations.

A copy of a letter dated October 28, 1976, from the Union to Attorney Lerten was introduced into evidence as Respondents' Exhibit 4. The letter is seven pages long and is typewritten single-spaced. The letter does not contain any proposal with regard to *pro rata* vacation pay.

A letter dated November 9, 1976, from Attorney Lerten to the Union was introduced into evidence as Respondents' Exhibit 5. It is in reply to the Union's letter, and it is also seven pages long and is typewritten single-spaced. It also does not contain any provision with regard to *pro rata* vacation pay.

The foregoing findings of fact in this section are based upon the uncontradicted and credited testimony of Schinnerer, who was the only witness to testify in this proceeding, and the findings are also based upon the documentary evidence referred to above.

C. *The Strike and Subsequent Events*

On June 1, 1976, the employees of Southland Beverage went on strike and remained on strike through December 6, 1976.

On June 30, 1976, the employees of Metro Distributing went on strike and remained on strike through December 6, 1976.

On October 6, 1976, the employees of the other 11 Respondents in this proceeding went on strike, and they too remained on strike through December 6, 1976.

In each instance, the employees of each one of Respondents were on strike for a period of time in excess of 7 weeks. Between December 1 and December 6, 1976, each of Respondents reinstated all of the striking employees. As noted earlier, the Union and each one of Respondents entered into a new collective-bargaining agreement with effective dates from December 6, 1976, through October 1, 1979.

Compilations from each one of the payroll records of Respondents herein were introduced into evidence as General Counsel's Exhibits 2(a) through 2(m). Those exhibits show for the employees the following: Date of hire; job classification; termination date, if any; dates worked; dates of paid vacation; dates of other paid absences and the nature of the absences; dates of other unpaid absences and the nature of such; and wages in lieu of vacations and when, the amount, and for what period. The compilations cover each of the years of 1976, 1977, and 1978. The compilations from the records of Towne Distributing are different from the records of the other Employers in that Towne Distributing operates on a calendar year basis and, therefore, pays at the end of the calendar year for vacation earned in that year. (See G.C. Exh. 2(k).)

Based on the position that the employees in question had not worked for 45 weeks during calendar year 1976, they were not paid vacation pay in 1977 by Respondents. However, certain striking employees who quit their employment did receive *prorata* vacation pay for the time they actually worked in 1976.

There is one exception to the foregoing, and that involves employee Mervin Doebler. He appears on General Counsel's Exhibit 2(a). Doebler was scheduled to take his vacation prior to the strike, and his vacation period coincided with the strike. While he was on strike, Doebler filed a complaint with the Labor Standards Enforcement Division of the State of California, and thereafter Doebler was given his vacation check during the strike. Subsequently, in 1977, Doebler, pursuant to the terms of the contract, was credited with those weeks in 1976 for which he was paid vacation for the purpose of computing his 45-week eligibility in 1976 for vacation in 1977. Unlike the other strikers, Doebler was paid 2 weeks of vacation in 1977.

The foregoing findings of fact in this section are based upon stipulations by the parties, matters not disputed in the pleadings, and documentary evidence.

D. *Conclusions*

The General Counsel alleges in paragraph 20(a) of his complaint that Respondents have failed since on or about

January 16, 1977, "to grant *pro rata* vacation entitlements accrued during 1976 by their employees, or pay wages in lieu thereof." In paragraph 20(b) of the complaint, the General Counsel further alleges that Respondents' failure to take such action was "because their employees engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection and because they participated in the strike described in paragraph 17(b) above."

Citing *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), counsel for the General Counsel points out that the strikers retained their status as employees during the course of the economic strike. He concedes that, during the time of the strike, Respondents were under no obligation to pay them wages or other compensation, and, therefore, he agrees that none of the reinstated strikers who worked less than 45 weeks in 1976 because of the strike were entitled to full vacation benefits under the terms of the contract. However, he argues that Respondents' failure to pay *pro rata* vacation benefits to the reinstated strikers for the actual time that they worked for an employer during 1976 was violative of Section 8(a)(1) and (3) of the Act.

In the General Counsel's view, since such *pro rata* vacation benefits were given to employees who quit work or were terminated even if the employees did not meet the 45-week work requirement, he argues, "to grant *pro rata* vacation benefits to quitting or terminated employees—some of whom herein were strikers who elected to not return after the strike—and not to grant them to reinstated strikers has the natural and foreseeable consequence of penalizing the strikers for engaging in lawful protected activity."

He distinguishes the Board's Decision in *Knuth Bros., Inc.*, 229 NLRB 1204 (1977), by taking the position that the strikers involved herein had worked at least 160 hours during the calendar year and thus under the terms of the contract, section 26.10, were eligible for *pro rata* vacation benefits if they had quit work or if they had been terminated rather than reinstated at the end of the strike. He finds applicable here the Board's Decision in *Elmac Corporation*, 225 NLRB 1188 (1976), where the Board found that the respondent therein violated Section 8(a)(1) and (3) of the Act by withholding accrued vacation pay from striking employees while granting such benefits to other employees, including employees who were terminated by the respondent therein.

On the other hand, the attorney for Respondents argues that the *Knuth Bros.* Decision is applicable here, "since Respondents applied the same vacation policy to both strikers and non-strikers. Since the contract provision adopted is the same contract provision as was in effect in the 1973-1976 Agreement, there clearly is no evidence of any intent to discriminate against strikers."

Under Respondents' view, the employees in question were not entitled to vacation benefits because they had not worked 45 weeks during the calendar year 1976 as required by the terms of the collective-bargaining agreement. However, the attorney for Respondents points out that certain of the striking employees who quit their employment with their employer did receive *pro rata* vacation pay for the time actually worked by them during the year 1976 in accordance with the provisions of the contract. Respondents urge that the terms of the collective-bargaining agreement do not provide for the payment of such *pro rata* vacation pay unless the employee is terminated or unless the employee surrenders his seniority. Respondents take the position that none of the employees who were denied *pro rata* vacation pay were either terminated or surrendered their seniority.

Citing the court's opinion in *N.L.R.B.* v. *Alamo Express, Inc. and Alamo Cartage Company*, 420 F.2d 1216 (5th Cir. 1969), Respondents find that case to be analogous to the situation here where Respondents urge that the collective-bargaining agreement involved herein does not provide for vacation pay for any period of time less than 45 weeks in a calendar year, and, therefore, the striking employees involved herein were not entitled to any vacation benefits for the calendar year 1976. Respondents also point to the Board's Decision in *Glomac Plastics, Inc.*, 194 NLRB 406 (1971), where the Board dismissed a complaint alleging a violation of Section 8(a)(1) and (3) of the Act with regard to the denial of vacation pay to strikers. As pointed out by the Trial Examiner in *Glomac Plastics* at 412, he found the situation there to be distinguishable from the Supreme Court's opinion in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), since "the rights of the strikers had not accrued at the time, April 20, when they went on strike."

Finally, Respondents urge that, by the actions of the Union during contract negotiations in 1976, and by the Union's agreement to enter into the new 1976–79 collective-bargaining agreement, the Union waived the right of the striking employees to receive *pro rata* vacation pay, and, therefore, the failure of Respondents to pay *pro rata* vacation pay to such striking employees could not have been violative of the Act.

After weighing the opposing positions of the parties, I have reexamined the applicable provisions in the 1973–76 collective-bargaining agreement between Respondents and the Union. First of all, I note that section 26.02 makes it clear that, in order to qualify for a vacation, an employee must have been employed by the same employer for 45 weeks within a calendar year. While the employees who went on strike and who were later reinstated by Respondents remained employees within the meaning of the Act, the reinstated strikers were not "employed" by their employer during the period of the strike. Thus, in my analysis, the employees in question did not meet the initial qualification under the terms of the contract to be entitled to a vacation.

With regard to being entitled to a *pro rata* vacation, I note that the terminology "*pro rata* vacation" appears in two sections of the applicable contract provisions. First is section 26.09, which does not have a direct bearing on the issues here, since it provides in pertinent part that "no employee discharged for cause shall receive *pro rata* vacation." However, the use of that terminology in that section and the section which follows suggests that the contract terms do place strict limitations on when *pro rata* vacation may or may not be paid.

Turning now to section 26.10, which is crucial to the issues in this case, I note that there are two operative

facts which require the employer to pay *pro rata* vacation pay to an employee. Those operative facts happen: (1) when the employee is terminated other than by a layoff; or (2) when the employee surrenders his seniority with his employer. In my reading of that section, one of those two facts would have to occur in order for the employer to be required to pay an employee *pro rata* vacation pay.

From the analysis of the contract provisions agreed to by the parties, I conclude that the striking employees had not accrued vacation entitlements, like the situation in *Glomac Plastics*. Furthermore, I conclude that Respondents' refusal to give *pro rata* vacation pay to the reinstated strikers was not because the employees had participated in a strike, but instead it was because Respondents were following the terms of the contract like the situation in *Knuth Bros.*

The attorney for Respondents persuasively argued at the hearing:

> In other words, it is Respondent's position that, while strikers cannot be treated worse than employees who do not strike, conversely they are not supposed to be treated better than employees who do not strike. The contract falls where it falls and, in effect, contrary to the agreement of the parties, what General Counsel is attempting to do is rewrite the agreement between the parties.

After considering the foregoing and the entire record, I conclude that a preponderance of the evidence does not establish that Respondents have engaged in the unfair labor practices alleged in the complaint.

In view of the foregoing, I also conclude that it is unnecessary to reach the defense of Respondents that the Union waived the right of striking employees to receive *pro rata* vacation benefits.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and the entire record in this proceeding, I make the following:

1. Each one of Respondents is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondents have not engaged in the unfair labor practices alleged in the complaint in this proceeding.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

It is hereby ordered that the complaint in this proceeding be dismissed in its entirety.

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[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes. - 13 -