

**Westinghouse Electric Corporation and Jason P. Morrow.** Case 25-CA-9055

August 25, 1978

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND PENELLO

On June 14, 1978, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed an exception and a brief supporting both it and the major portion of the Administrative Law Judge's Decision.

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 briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>2</sup>

We note, as did the Administrative Law Judge, that the later post-June grant of a week's paid vacation to the strikers did not leave the strikers without loss. The denial of vacation pay to them in June, when the plant was shut down, meant that nonstrikers, or those who abandoned the strike before then, were paid a week's vacation when they otherwise would not have worked. The strikers, however, were given a week's time off with pay at a later date, at a time they would ordinarily have worked, so that in effect they were denied a week of work by Respondent because they refused to abandon the strike prior to the June shutdown. As the Administrative Law Judge held, this is inherently discriminatory, and the appropriate remedy, which he granted, is to make the strikers whole for the loss of work and pay which Respondent's action caused them.

## 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, as modified below, and hereby orders that the Respondent, Westinghouse Electric Corporation, Bloomington, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> The General Counsel has excepted to the Administrative Law Judge's use, in par. 1(b) of his recommended Order, of the narrow cease-and-desist language, "in any like or related manner," rather than the broad injunctive language, "in any other manner." We grant the exception and modify the recommended Order accordingly because we find the 8(a)(3) violation to be "inherently destructive" of important employee rights. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

## APPENDIX

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

WE WILL NOT discourage membership in Local Union No. 2031, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization by discriminating with respect to the payment of vacation pay to employees because of their participation in a strike.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees because they engaged in concerted activities protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL make whole all strikers for any loss of wages they may have suffered by reason of the discrimination against them, with interest.

WESTINGHOUSE ELECTRIC CORPORATION

## DECISION

### STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This case, heard at Bloomington, Indiana, on January 19, 1978, pursuant to a complaint and notice of hearing dated October 31, 1977<sup>1</sup> (based upon an original charge filed June 27), presents the question whether Westinghouse Electric Corporation (herein the Respondent or Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein the Act), when, in June, it failed

<sup>1</sup> All dates hereinafter refer to the calendar year 1977, unless otherwise indicated.

to pay striking employees vacation benefits. The answer of the Respondent, while generally admitting the jurisdictional allegations of the complaint, denied the commission of any unfair labor practices.

Subsequent to the hearing, and within the time allowed, helpful, post-hearing briefs were filed by counsel for the General Counsel and by counsel for the Respondent, which have been duly considered.<sup>2</sup>

Upon the entire record in the case, including my observation of the demeanor of the witnesses, and a consideration of the arguments of counsel, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a Pennsylvania corporation, is engaged in the manufacture, sale, and distribution of electrical apparatus and related products. Its Bloomington, Indiana, facility is the only plant directly involved in this proceeding. It is admitted that during an annual period the Respondent receives at its Bloomington plant, goods and materials valued in excess of \$50,000 directly from States other than the State of Indiana. During the same period of time, the Respondent ships finished products valued in excess of \$50,000 directly to points outside the State of Indiana.

I find that the Respondent's operations affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that at all times material Local Union No. 2031, International Brotherhood of Electrical Workers, AFL-CIO (herein called the Union), is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Facts*

The facts in the instant proceeding are largely undisputed. Since 1958, Respondent has recognized and has had contractual relations with the Union as representative of its production and maintenance employees employed at the Bloomington facility. Incorporated in the current collective-bargaining agreement is a provision providing for paid vacations for the employees under certain qualifying circumstances (sec. XIII). The provision, in essence, provides that the Company may schedule a vacation shutdown(s) during a calendar year and that the time of such shutdown(s) will be a matter for negotiations with the Union; that the scheduled period for the vacation shutdown will be agreed upon before January 1 of the year in which the vacation shutdown occurs; that employees will be entitled

to vacation with pay based upon accumulated length of service (1 year minimum), as set forth in the agreement; and that a qualified employee has the right to vacation with pay only if he is "on the active role" and [has] completed at least thirty (30) days' continuous employment at the close of business on his last worked day immediately preceding the time of starting his vacations.<sup>3</sup>

The term "active role" is defined in the collective agreement in section VII, paragraph 15, as follows:

The Active Roll consists of employees currently available for work except for excused absences such as Vacation, Holidays, etc., but does not include persons who have quit, been laid off, or discharged, or those on the Inactive Seniority List, leaves of absences of all types, Disability Roll, on disciplinary suspension, or those engaged in a work stoppage.

The record shows that the union and the Respondent agreed in 1976 that the vacation shutdown period for 1977 would be June 27, 28, 29, 30 and July 1. However, the record shows that commencing June 12, all bargaining unit employees initially participated in a lawful strike which lasted until July 5. However, by June 24, the last payday preceding the vacation shutdown period, approximately 40 bargaining unit employees had returned to work.<sup>4</sup> The record reflects that these employees were paid for the vacation shutdown which commenced on June 27, but that all employees who remained on strike as of June 24 were not paid for the vacation shutdown. However, after the strike ended, all employees not paid their vacation pay prior to the shutdown took vacation time off before the end of calendar year 1977, and were paid for this vacation time off.<sup>5</sup>

The record reflects that during the course of the strike, the Respondent maintained a telephone line over which taped messages prepared by the Respondent were played. In one of these messages, dated June 20, it was announced that if the strike were not settled before Friday, June 24, and employees were not back to work on that day, they would not be eligible for vacation pay. In his testimony on cross-examination, Respondent personnel relations manager, James Shannon, acknowledged that the approximately 40 striking employees who did return to work by June 24 did not have 30 days' continuous employment prior thereto, and that the company made an exception to the requirement in the collective-bargaining agreement for those persons.

The record reflects that the union and company representatives met several times during the course of the strike, and that during such negotiations, the union representatives queried whether the strikers would be paid their vacation pay. Shannon testified that he told them that "they would not be paid unless the strike was over and they returned to work by June 24 . . . [that] . . . vacation is time off from work—paid time off from work. If there are employees engaged in a strike, they are not working, so our policy is we do not grant vacation and vacation pay if

<sup>2</sup> Attached to the brief of counsel for the General Counsel, and served upon all parties, is a document entitled "Motion to Correct Record" in certain respects. No objections having been filed, said motion is hereby granted.

<sup>3</sup> Sec. XIII, par. 9B (p. 41 of the collective-bargaining agreement).

<sup>4</sup> There were about 400 employees in the bargaining unit at that time.

<sup>5</sup> However, the General Counsel contends that these employees still suffered a monetary loss since they were not paid for the time they would have ordinarily worked while they were enjoying the vacation pay.

they're not working when they're on strike." Shannon did not recall making a statement attributed to him by a union representative, that the company would not finance a strike by paying strikers vacation pay.<sup>6</sup>

### B. Analysis and Concluding Findings

The controlling legal principles governing the facts of this case are set forth in *N.L.R.B. v. Great Dane Trailers, Inc.*,<sup>7</sup> and its progeny. In that case, a strike occurred on May 16, 1963 which lasted until December 26, 1963. The company continued to operate during the strike, and on July 12, 1963, a number of the strikers demanded their accrued vacation pay from the company. The company rejected the demand but thereafter announced that it would grant vacation pay to all employees who had reported for work on July 1, 1963. The court found the refusal to pay strikers vacation benefits accrued under the terminated bargaining contract while announcing an intention to pay such benefits to nonstrikers a violation of Section 8(a)(3) and (1) of the Act, even though there was an absence of proof of antiunion motivation on the part of the employer. The Court noted that the paying of accrued benefits to one group of employees, while announcing the extinction of the same benefits to another group of employees who are distinguishable only by their participation in protected concerted activity, was "discrimination in its simplest form," and certainly "may have a discouraging effect on either present or future concerted activity." The Court further found that the company in that case came forward with "no evidence of legitimate motives for its discriminatory conduct," and therefore did not meet its burden of proof on this issue.

Similarly here, the payment of accrued vacation benefits to returning strikers while refusing to make such payments to striking employees would appear to be the simplest form of discrimination based upon protected concerted activity. This particularly is the case where the Respondent unilaterally breached the requirement prescribed in the collective-bargaining agreement to the effect that employees, in order to be entitled to such payment, must have completed at least 30 days' continuous employment immediately prior to the payment date. Such employer conduct, as in *Great Dane*, would seem to be "inherently destructive" of important employee rights so that proof of an antiunion motivation is not required.<sup>8</sup> Moreover, the Respondent here came forward with little or no evidence of business considerations which motivated the waiver of the 30-day requirement.<sup>9</sup>

Based upon all of the foregoing, I find and conclude that by deferring the payment of vacation benefits to strikers on June 24, Respondent discriminated in order to discourage membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

### CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By deferring the payment of vacation pay of its employees because they were engaged in protected concerted activity described above, Respondent has engaged in discrimination in regard to terms and conditions of employment of its employees to discourage membership in a labor organization within the meaning of Section 8(a)(3) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

Having found that Respondent engaged in, and is engaging in, certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent unlawfully deferred the payment of vacation benefits to strikers, the question remains whether any monetary relief is appropriate in view of the fact that, as previously noted, the strikers were accorded their vacation with pay following the termination of the strike. Counsel for General Counsel contends that the question should be answered affirmatively since the strikers lost a week's pay by taking the vacation during a working period.

The issue is not one of facile resolution since the strike occurred fortuitously during the vacation period, and the strikers were eventually paid the vacation benefits. On the other hand, the strikers did lose a week's pay as a direct consequence of the Respondent's unlawful conduct. Accordingly, in order to restore the *status quo ante*, it is my judgment that a make-whole remedy is required in the circumstances.

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

<sup>6</sup> Shannon did not deny making the statement. Under all circumstances, I credit the testimony of Union President Morrow. However, I do not agree with counsel for the General Counsel that the making of such statement necessarily reveals an unlawful motive on the part of the Respondent.

<sup>7</sup> 388 U.S. 26 (1967).

<sup>8</sup> In view of the foregoing finding of discrimination based upon disparate treatment of returning strikers versus strikers, I do not reach the issue of whether the Respondent may legitimately include employees' participation

in protected concerted activity along with disability, suspension, leaves of absence, etc., as a reason for nonpayment. Cf. *G. C. Murphy Company*, 207 NLRB 579 (1973), with *Knuth Bros., Inc.*, 229 NLRB 1204 (1977). See also *Electro Vector, Inc.*, 220 NLRB 445 (1975), *Texaco, Inc.*, 179 NLRB 989 (1969). I note that this provision in the collective-bargaining agreement was not specifically attacked in the complaint.

<sup>9</sup> In its brief, at fn. 5, the Respondent states that the company was willing to waive the 30-day continuous employment requirement "in an effort to settle the strike and to accommodate the union."

ORDER<sup>10</sup>

Respondent Westinghouse Electric Corporation, its officers, agents, successors, and assigns, shall:

## 1. Cease and desist from:

(a) Discouraging membership in Local Union No. 2031, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization, by discriminating against its employees respecting payment of their vacation pay because they engaged in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Make whole with interest,<sup>11</sup> all striking employees

for any loss of wages they may have suffered as a result of the Respondent's failure to pay to them vacation benefits on June 24.

(b) Post at its plant in Bloomington, Indiana, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon 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 analyze and compute the amount of backpay due under the terms of this recommended Order.

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

<sup>10</sup> In the event that 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.

<sup>11</sup> Backpay and interest thereon to be computed in the manner prescribed

in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>12</sup> In the event that this Order is enforced by a judgment of the 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."