Adair Standish Corporation *and* Flint Local 282-C, Graphic Communications International Union, AFL-CIO. Case 7-CA-26685

February 8, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On September 23, 1988, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Adair Standish Corporation, Standish, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent argues that because of its past practice of instituting economic layoffs due to lack of work, it had no obligation to bargain with the Union over such layoffs. However, because of the intervention of the bargaining representative, the Respondent could no longer continue unilaterally to exercise its discretion with respect to layoffs. See, e.g., *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986). Instead, the Respondent was obligated to bargain with the Union over the layoffs, which are mandatory subjects of bargaining. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to bargain with the Union over the layoffs.

Alternatively, the Respondent argues that even if an 8(a)(5) violation is found, a make-whole remedy is not warranted, citing *Hanes Corp.*, 260 NLRB 557 (1982). Under *Lapeer*, however, the appropriate remedy for such a violation is reinstatement with backpay. See also *Adair Standish Corp.*, 290 NLRB 317 (1988). We overrule *Hanes* to the extent it is inconsistent with *Lapeer*, *Adair Standish*, and *Flex Products*, 278 NLRB 417 (1986), cited by the judge, and our decision today.

Ellen Rosenthal, Esq., for the General Counsel.
Francis T. Coleman and *Thomas Murphy, Esqs.*, Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on February 24, 1987, by Flint Local 282-C, Graphic Communications International Union, AFL-CIO (the Union), against Adair Standish Corporation (Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint dated March 27, 1987, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Midland, Michigan, on January 14, 1988, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Michigan corporation, has an office and place of business in Standish, Michigan (the Standish plant), where it is engaged in the manufacture, nonretail sale, and distribution of printed products. Annually, Respondent, in the course and conduct of its business operations, manufactures, sells and distributes, at its Standish, Michigan plant, products valued in excess of $100,000, of which products valued in excess of $50,000 are shipped from the plant directly to points located outside the State of Michigan. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Pursuant to a petition filed by the Union on July 15, 1985, and a stipulation for certification on consent election approved by the Regional Director for Region 7 on August 9, 1985, an election was held among Respondent's production and maintenance employees working at the Standish, plant, on September 11, 1985. The Union won the election and, on May 27, 1986, the Board issued a Decision and Certification of Representative.[1]

To test the certification, Respondent refused to recognize and bargain with the Union and, on June 26, 1986, the Union filed "refusal to bargain" charges with the Board. On April 17, 1987, the Board found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing, since June 6, 1986, to recognize and bargain with the Union and to supply it with requested information.[2]

On July 29, 1988, the Board issued its decision[3] in another postelection unfair labor practice case brought

[1] Case 7-RC-17730.
[2] 283 NLRB 668.
[3] 290 NLRB 317.

against Respondent by the Regional Director for Region 7 In that case, the Board found that Respondent en gaged in violations of Section 8(a)(1), (3), and (5) of the Act Among the violations of Section 8(a)(5), the Board concluded that Respondent had unlawfully failed to bar gain about economic layoffs and, to remedy that viola tion, it issued a make whole order

In the instant case, the General Counsel contends, and Respondent denies that Respondent, beginning in August 1986 and thereafter, violated Section 8(a)(5) of the Act when it, unilaterally, and without giving the Charging Party notice and an opportunity to bargain, in stituted formalized break periods, consolidated the morn ing and afternoon shifts, changed from five 8 hour shifts to four 10 hour shifts and back again, granted employees a new paid holiday on Christmas Eve and laid off unit employees for economic reasons It is undisputed that Respondent has continuously refused to accede to the Union s repeated requests for recognition and bargaining

B *Facts*[4]

Prior to the middle of September 1986, the employees in Respondent s bindery department generally took their breaks, as a group, on request Thus, when one or more employees asked for a break, the machinery would be shut down and the employees took break periods of 5 to 7 minutes' duration Although breaks were not always taken at the same time of day, and work requirements af fected both the number and the timing of daily breaks, the bindery department employees usually received one morning and one afternoon break In addition, an em ployee needing to use the bathroom was free to do so at any time, after first notifying a supervisor who would then find a person temporarily to relieve the absent em ployee

In mid September 1986, Respondent s plant manager, Dennis Adair announced to the bindery department em ployees that thereafter, they would receive two 10 minute breaks each day, one in the morning and one in the afternoon Since that time the bindery department employees have enjoyed 10 minute breaks each day, at 9 30 a m and 2 p m The employees have retained the right to visit the bathroom at other times, after informing their supervisor

Respondent s operations are normally carried on with a single day shift However, during periods of heavy workload, it adds a second shift or night shift and expe rienced employees, selected by Adair are transferred from the first shift to the second shift When necessary temporary employees also are hired to help staff the second shift Second shifts, generally involving the press department only, last for periods of days or months When such shifts are ended employees who had been transferred are returned to the day shift

Prior to the beginning of October 1986, Respondent had operated a night shift in the press department for some 9 weeks At that time, it ended the night shift and the employees who worked on that shift were returned to the day shift

Press department employees normally have worked 8 hours per day, 5 days per week Early in October 1986, Respondent instituted a new 10 hour day, 4 day week schedule, for those employees That schedule remained in effect for some 3 months, at which time Respondent returned the press department employees to their former schedule Plant Manager Adair testified that he instituted the schedule change, in October 1986, after certain em ployees requested it The new schedule was abandoned, 3 months later, when, Adair testified the employees had tired of it

Before 1986 Respondent gave its employees a paid hol iday on Christmas day, and it also gave each employee a turkey Employees worked at least one half day on Christmas Eve and then were permitted, either to attend a party held at the plant, or to go home They were paid for a full day In 1986, Respondent ceased giving turkeys to employees, and it did not have a Christmas party In stead, for the first time, Respondent gave the unit em ployees a paid holiday for the entire day before Christ mas

Prior to August 25, 1986 Respondent would, at times, temporarily lay off unit employees for lack of work In selecting employees for layoff Plant Manager Adair con sidered, only, his judgments concerning employees abili ties Seniority was not a factor Beginning August 25, 1986, and at various times, Respondent has temporarily laid off unit employees for economic reasons In deciding who to layoff, Adair has considered ability and not se niority

It is undisputed that Respondent took each of the ac tions without giving prior notice to the Union The Union learned of those actions, after the fact when ad vised by employees

C *Conclusions*

Once a majority of employees in an appropriate bar gaining unit have selected a union to represent them their employer is obligated to bargain with the union and the employer may not, unilaterally alter the terms and conditions of employment of the unit employees How ever, not every unilateral change in work rules consti tutes a breach of the bargaining obligation The Act is violated only if the change unilaterally imposed is ' a ma terial substantial and a significant one [5]

With respect to the allegation that Respondent violat ed the Act by unilaterally instituting formalized break periods, the record evidence shows that the change was not material, substantial or significant Under the new formalized" break system, the bindery department em ployees received, essentially the same number of breaks at the same times and for similar duration as they had and they were permitted to use the break periods for the same purposes I find and conclude that Respondent, by formalizing the times at which breaks were to be taken did not violate Section 8(a)(5) of the Act [6]

[4] The factfindings contained in this section are based on a composite of the documentary and testimonial evidence introduced at trial The record is generally free of significant evidentiary conflict

[5] *Peerless Food Products* 236 NLRB 161 (1978)

[6] See *LaMousse Inc* 259 NLRB 37 (1981)

As shown in the statement of facts beginning in August 1986, and thereafter, Respondent, unilaterally, and without giving the Union notice and an opportunity to bargain, consolidated its morning and afternoon work shifts, changed the work schedule of the press department employees from five 8 hour shifts to four 10 hour shifts and back again, granted employees a new paid holiday and laid off unit employees for economic reasons In so doing, Respondent effected unilateral changes in the wages, hours and working conditions of the unit employees which, assuredly, were material, substantial, and significant Further, I reject Respondent's argument that it was privileged unilaterally to lay off unit employees for economic reasons because, prior to the certification of the Union, it had effected, from time to time, economically motivated layoffs [7] I find and conclude that Respondent violated Section 8(a)(5) of the Act by engaging in the foregoing unilateral actions I further conclude that, as a remedy for the unlawful layoffs, a make whole order is required [8]

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

CONCLUSIONS OF LAW

1 Adair Standish Corporation is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act

2 Flint Local 282–C Graphic Communications International Union AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act

3 All full time and regular part time production and maintenance employees employed by Respondent at its Standish Michigan facility excluding office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

4 At all times material the Union has been and is now, the exclusive representative of all employees in the bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act

5 By changing employee shifts and work hours instituting a new paid holiday and laying off employees, without affording the Union an opportunity to negotiate and bargain concerning those acts and the effects Respondent refused to bargain in good faith with the Union, as exclusive representative of the bargaining unit employees, concerning rates of pay wages hours and other terms and conditions of employment, and engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [9]

ORDER

Respondent, Adair Standish Corporation, Standish, Michigan, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Refusing to bargain in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of its employees in the appropriate unit

(b) Laying off bargaining unit employees, or making changes in their rates of pay, wages, hours, and other terms and conditions of empoyment, without first giving adequate and timely notice to the Union and affording it an opportunity to engage in collective bargaining regarding these changes

(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, bargain in good faith with the Union as the exclusive representative of all employees in the appropriate unit with respect to rates of pay wages hours and other terms and conditions of employment

(b) Offer employees immediate and full reinstatement to their former jobs or if those jobs no longer exist to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision

(c) Make whole the employees unilaterally laid off on and after August 25, 1986, for any loss of earnings and other benefits suffered as a result of the unilateral layoffs Backpay shall be computed as prescribed in *F W Woolworth Co* 90 NLRB 289 (1950), with interest as comput

[7] *Gulf States Mfrs* 261 NLRB 852 (1982)

[8] *Flex Products* 278 NLRB 417 (1986)

[9] 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

ed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10]

(d) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order

(f) Post at its Standish, Michigan facility, copies of the attached notice marked Appendix.[11] 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 on 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

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

[10] Under *New Horizons* interest is computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[11] 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 bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Flint Local 282-C, Graphic Communications International Union, AFL–CIO as the exclusive bargaining representative of our employees in the appropriate bargaining unit.

WE WILL NOT lay off bargaining unit employees, or make changes in their rates of pay, wages, hours, and other terms and conditions of employment, without first giving adequate and timely notice to the Union and affording it an opportunity to engage in collective bargaining with respect thereto.

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 offer employees unilaterally laid off on and after August 25, 1986, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the layoffs and notify the effected employees, in writing, that this has been done.

ADAIR STANDISH CORPORATION