

**Adair Standish Corporation and Flint Local 282-C,
Graphic Communications International Union,
AFL-CIO. Case 7-CA-27716(2)**

July 12, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On March 16, 1989, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions 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 No exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally instituting a uniform practice of requesting employees to submit doctors' certifications when they are absent from work because of illness.

Ellen Rosenthal, Esq., for the General Counsel.
Francis T. Coleman, Esq. (Keck, Mahin & Cate), of Washington, D.C., for the Respondent.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, Adair Standish Corporation, is in the printing business. Respondent has several plants. But the only one of its plants we are concerned with here is its facility in Standish, Michigan.

According to the General Counsel: (1) in February and March 1988 Respondent unilaterally laid off some of the employees it employs in its Standish plant without giving the employees' certified bargaining representative notice or an opportunity to bargain, thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act (the Act); (2) Respondent unilaterally changed its policy about asking for doctors' notes from employees who had been absent because of illness, again violating Section 8(a)(5) and (1); and (3) Respondent's unilateral layoff and other unfair labor practices caused and prolonged a strike that began in March 1988.

Respondent admits that it is an employer engaged in commerce, but it denies that it has committed any unfair labor practices. As for the General Counsel's allegations about the strike, Respondent contends that for several

different reasons the question of whether the strike is an unfair labor practice strike is not properly before me.

A. Background

In a Board-conducted election in August 1985, the production and maintenance workers at the Standish plant voted to be represented by Flint Local 282-C, Graphic Communications International Union, AFL-CIO (the Union). In May 1986, the Board issued a Decision and Certification of Representative.¹

Respondent, however, contending that the Board erred in certifying the Union, has at all times refused to recognize or bargain with the Union. That course of action has spawned considerable litigation:

7-CA-25973—283 NLRB 668 (1987), finding violations of Section 8(a)(5) and (1). (An enforcement proceeding is pending in the United States Court of Appeals for the Sixth Circuit.)

7-CA-25059—290 NLRB 317 (1988), finding violations of Section 8(a)(3), (5), and (1).

7-CA-26685—292 NLRB 890 (1989) (*Adair III*) finding violations of Section 8(a)(5) and (1).

B. The Layoffs

1. The facts

Respondent employs about 16 bargaining unit employees at its Standish plant. On February 23, 1988, Respondent laid off nine of those employees.² (Unless specified otherwise, all the events I refer to in this decision occurred in 1988.) Respondent recalled the nine employees on February 24. But on that day and the next they worked short days. Then, on February 29, Respondent laid off the nine until mid-March.

The reason Respondent laid off employees was that it had insufficient work to keep all of its employees working. Respondent selected which employees to lay off the same way it has always selected employees for layoff: Respondent's management determined, based solely on its judgment, which employees were best suited to perform the work that remained.

Respondent did not notify the Union that it was going to lay off employees, the Union did not learn of the layoffs until the employees were laid off, and Respondent did not bargain with the Union about the layoffs.

¹ Case 7-RC-17730. It was the Union that, on March 14, 1988, filed the unfair labor practice charge that began this proceeding. The complaint issued on April 28, 1988. Respondent admits the complaint's allegation that the Union is a labor organization for purposes of the Act and that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by Respondent at its Standish facility, excluding office clerical employees, guards and supervisors as defined in the Act

² The laid-off employees: Carol L. Barber, Ordene Carson, Evelyn Hawks, Kevin Jeffs, Jessie L. Johnson, Greg Kohn, Marie Pashak, Donald L. Smith, and Ralph Stelter

Conclusion

One of the issues in *Adair III* was whether Respondent's layoff of employees without bargaining with the Union violated Section 8(a)(5) and (1) of the Act. The Board concluded that Respondent did violate those provisions (at fn. 1 and p. 891). Since the facts there are comparable in all pertinent respects to those here, I conclude that when Respondent laid off employees without notifying and bargaining with the Union, it violated Sections 8(a)(5) and (1).³

2. Doctors' notes

Dennis Adair was manager of Respondent's Standish facility until June 1987. His assistant plant manager was Joseph Krozleski. Then, June Krozleski took over as plant manager.⁴

The General Counsel claims that when Krozleski became plant manager, he instituted a new policy regarding doctors' notes, and that Krozleski did so without bargaining with the Union.

a. *The Adair period*

Respondent has never had a stated policy, either written or oral, about doctors' notes. But at all times Respondent's employees have on their own initiative often brought in notes from their physicians. The employees bring in the notes either: (1) prior to missing work, in which case the notes relate to upcoming appointments; or (2) after having missed work, in which case the notes relate to the illnesses or injuries that sidelined the employee.

During Dennis Adair's tenure as plant manager, he sometimes did ask employees for doctors' notes, and sometimes he did not. Adair seems to have had three criteria for asking for doctors' notes. The first was that the employee did not bring in the note on his or her own initiative. The second was that Adair happened to have heard that the employee was going to be seeing a physician or that an employee's recent absence was the result of illness or sickness. And the third was that Adair happened to think of asking for a note when he saw the employee in question.

b. *The Krozleski period*

Respondent still does not have any stated policy about doctors' notes. And employees still frequently bring in doctors' notes on their own initiative. The difference between the Adair period and the Krozleski period is that Krozleski always, or almost always, asked for doctors' notes from employees who have missed work because of illness or injury and who have not brought in notes explaining their absence.

³ In its answer to the complaint Respondent denies that it was required to bargain with the Union since the Union "was not selected by an uncoerced majority of the Respondent's employees eligible to vote in the . . . representation election." In view of the Board's certification of the Union, however, and, in addition, the Board's subsequent rulings that Respondent's failure to bargain with the Union violated Sec. 8(a)(5), that defense is inappropriate for consideration here.

⁴ Respondent admits that both Adair and Krozleski are supervisors and agents of Respondent within the meaning of the Act.

Respondent does not contend that it bargained with the Union about this change.

c. *The impact of the change on employees*

Respondent's employees are not paid for days they miss work, whether the absence is caused by illness or something else. Moreover employees are not punished (apart from not being paid) if they miss work for reasons that have nothing to do with their health, unless they miss "an excess amount of work."

As for those instances in which Krozleski has asked for doctors' notes, no employee has ever been disciplined in any way for failing to provide the requested note. Moreover, the record suggests that the employees do not treat the requests as carrying any threat of discipline. Thus on one occasion when Krozleski told an employee that he wanted a doctors' note, the employee responded, "if I can get the doctor in, I'll bring one in." Finally it is clear that at least some of the time Krozleski frames his requests for notes in precatory terms, such as, "bring in a slip if you can," or "bring in a slip if you have one."

Doctors' Notes—Conclusion

The 10(b) Issue. There is only one unfair labor practice charge covering the increased frequency with which Respondent asked for doctors' notes. It was filed by the Union in March 1988. That is more than 6 months after the General Counsel alleges that this change occurred. And Respondent did raise the 10(b) issue by pleading it in the answer to the complaint.

But the 10(b) period did not begin to run until the Union learned, or should have learned, of the change. And it is Respondent who has the burden of showing that such actual or constructive knowledge was gained more than 6 months prior to the filing of the charge. *Clark Equipment Co.*, 278 NLRB 498, 529 (1986). Moreover the fact that members of the bargaining unit knew of the change does not necessarily mean that the Union did, particularly where, as here, the the Employer has refused to recognize the Union. *Id.*

Since the record does not show that the Union did learn of the change more than 6 months prior to its filing of the unfair labor practice charge, I find that the allegations of the complaint regarding the doctors' note issue are not time-barred.

Was the change a material, substantial, and significant one? Assuming for present purposes that the increased frequency with which Respondent asks for doctors' notes amounts to a change in terms and conditions of employment, there remains the question of whether the change is a "material, substantial and . . . significant one." Adair III at 891, quoting Peerless Food Products, 236 NLRB 161 (1978). In view of the minimal impact of the change on employees, I conclude that the increased frequency with which management asks for doctors' notes from employees does not amount to a material, substantial, or significant change in terms or conditions of employment and that the allegations of the complaint addressed to this matter accordingly should be dismissed.

3. The strike

On January 26, 1988, the members of Respondent's bargaining unit voted to authorize a strike. They did so for two reasons. First, management's "harassment" of them. And second, Respondent's continuing refusal to recognize and bargain with the Union.⁵

The employees did not immediately go out on strike. They wanted to avoid having to mount a picket line in midwinter. (Standish is in central Michigan, on the coast of Lake Huron; its weather that part of the year is not benign.) And, as one employee credibly put it, "we kept hoping things would improve; maybe the company would bargain with us." But Respondent continued to refuse to recognize the Union and, on top of that, laid off employees without bargaining (as discussed earlier in this decision). That led to a decision made jointly by union officials and a few leaders among the employees to call a strike when Respondent recalled the laid-off employees.

The resulting strike began on March 17. The strike was still underway when the hearing closed.

a. Procedural considerations

Respondent points out that the Union's unfair labor practice charge does not claim that the strike is an unfair labor practice strike. Respondent also points to the facts that no strikers have made unconditional offers to return to work, and that there is no evidence that Respondent would refuse such offers if any were made. These considerations, argues Respondent, preclude the Board from determining in this proceeding whether the strike is an unfair labor practice strike.

But Respondent is incorrect. As for the unfair labor practice charge argument, that was settled, in the General Counsel's favor, by *Fant Milling*.⁶ As for the fact that the employees have not offered to return to work, as early as 1956, the Board held that that precluded neither a finding that a strike was an unfair labor practice strike nor the issuance of an order requiring reinstatement of striking employees upon their application. *J. H. Rutter-Rex Mfg. Co.*, 115 NLRB 388, 414 (1956), enfd. 245 F.2d 594, 597-598 (5th Cir. 1957). *Rutter-Rex* remains good law. E.g., *North American Coal Corp.*, 289 NLRB 788 fn. 18 (1988).

b. The strike is an unfair labor practice strike

One of the reasons that the employees went out on strike, and then stayed out on strike, was Respondent's unlawful refusal to recognize and bargain with the Union. The strike, therefore, is an unfair labor practice strike. E.g., *Citizens National Bank of Willmar*, 245 NLRB 389, 391 (1979).

⁵ Respondent tried unsuccessfully to show that the reason the employees went out on strike was because, for at least some of them, their strike pay (from the Union) exceeded their pay from Respondent.

⁶ *NLRB v. Fant Milling Co.*, 360 US 301 (1959) *Fant Milling* concerned a complaint that dealt with incidents that arose subsequent to the filing of the charge. That is also true here. The Union filed its charge on March 14. The strike began on March 17.

THE REMEDY

The accompanying recommended Order requires Respondent to make whole the employees whom Respondent unilaterally laid off in the period February 23 through March 17, 1988, for any loss of earnings and other benefits the employees suffered as a result of the unilateral layoffs. See *Adair III* at fn. 1. The recommended Order also requires Respondent to: (1) reinstate striking members of the bargaining unit in the event any such strikers unconditionally ask for reinstatement, dismissing, if necessary, employees hired on or after March 17 as replacements; and (2) pay backpay commencing 5 days after any such striker makes an unconditional offer to return to work. Such backpay, and the backpay due the laid off employees, shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

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

1. Cease and desist from

(a) Laying off bargaining unit employees without first giving adequate and timely notice to Flint Local 282-C, Graphic Communications International Union, AFL-CIO, and affording it an opportunity to engage in collective bargaining with respect thereto.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make whole, in the manner set forth in the remedy section of the decision, the following employees whom Respondent unilaterally laid off on various days between February 23 and March 17 for any loss of earnings and other benefits they may have suffered:

- | | |
|-------------------|-----------------|
| Carol L. Barber | Greg Kohn |
| Ordene Carson | Marie Pashak |
| Evelyn Hawks | Donald L. Smith |
| Kevin Jeffs | Ralph Stelter |
| Jessie L. Johnson | |

(b) Expunge from its files any reference to the layoffs and notify, in writing, the employees named in paragraph 2(a), above, that this has been done.

(c) On the unconditional offer to return to work of any unfair labor practice strikers: (i) offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions,

⁷ 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.

without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any persons hired by Respondent on or after March 17, 1988; and (ii) make them whole, in the manner set forth in the remedy section of this decision, for any loss of earnings they may have suffered as a result of Respondent's refusal, if any, to reinstate them.

(d) 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.

(e) Post at its facility in Standish, Michigan, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁸ 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.

I. REGARDING OUR REFUSAL TO BARGAIN ABOUT LAYOFFS

WE WILL NOT lay off employees in the bargaining unit described below without first giving adequate and timely

notice to your Union, Flint Local 282-C, Graphic Communications International Union, AFL-CIO, and affording the Union an opportunity to engage in collective bargaining about the proposed layoffs.

All full-time and regular part-time production and maintenance employees employed by Adair Standish Corporation at its Standish, Michigan, facility, but excluding office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole the following employees, whom we unilaterally laid off on various days between February 23 and March 17, for any loss of earnings and other benefits they may have suffered as a result of the layoffs, less any interim earnings, plus interest.

Carol L. Barber
Ordene Carson
Evelyn Hawks
Kevin Jeffs
Jessie L. Johnson

Greg Kohn
Marie Pashak
Donald L. Smith
Ralph Stelter

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

II. REGARDING REINSTATEMENT AND OTHER RIGHTS OF STRIKING EMPLOYEES

Upon the unconditional offer to work of any employees in the bargaining unit described above who are on strike against us:

WE WILL offer to reinstate them to their former jobs, without prejudice to their seniority or other rights and privileges. If those jobs no longer exist when the employees unconditionally offer to return to work, we will reinstate the employees in substantially equivalent positions.

WE WILL, if necessary in order to reinstate those employees, dismiss any person we hired on or after March 17, 1988.

WE WILL make whole those employees for any loss of earnings and other benefits they may have suffered as a result of our refusal, if any, to reinstate them, less interim earnings, plus interest.

ADAIR STANDISH CORPORATION