

Resco Products, Inc. and Vessel Mineral Products Corporation and United Steelworkers of America, AFL-CIO, CLC. Cases 14-CA-24512-1 and 14-CA-24512-2

August 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 23, 1998, Administrative Law Judge Michael O. Miller issued the attached decision. Respondent Resco Products, Inc. (Resco) filed exceptions. Respondent Vessel Mineral Products Corporation (VMPC) filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief. VMPC filed an answering brief and a reply 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 only to the extent consistent with this Decision and Order.

The complaint alleges that Resco and its successor, VMPC, violated Section 8(a)(5) of the Act by failing to make contractually required payments of accrued vacation pay to employees. The complaint also alleges that VMPC violated Section 8(a)(1) by conditioning offers of employment to Resco employees on their waiving contractually accrued vacation pay, and later by threatening employees with termination if they accepted checks in payment for accrued vacation pay. The General Counsel also contends that VMPC is a *Golden State*¹ successor to Resco and that it should be found to be jointly and severally liable to remedy Resco's unfair labor practices.

The judge found the alleged violations, and the Respondents have excepted. The General Counsel has excepted to the judge's finding that VMPC is not a *Golden State* successor. For the reasons discussed below, we affirm the judge's findings that Resco violated Section 8(a)(5), that VMPC violated Section 8(a)(1), and that the case should not be deferred to arbitration. However, we disagree with his finding that VMPC violated Section 8(a)(5). We also find, contrary to the judge, that VMPC is a *Golden State* successor to Resco.

For many years, the Union represented a unit of Resco's production and maintenance employees at its dolomite lime production plant at Bonne Terre, Missouri. The most recent collective-bargaining agreement provided for a pension plan. Article XIII, section 4 of the contract provided, in relevant part, that "[a]ny employee quitting or discharged shall be paid the pro rata part of his earned vacation." Consistent with the latter provision, six employees who were permanently laid off in

early December 1996² because of a loss of business were paid their accrued vacation pay by Resco.

Royce Vessel was Resco's vice president for operations. In October, Vessel began negotiating to buy the Bonne Terre facility. On December 18, Vessel and Resco signed an agreement for the purchase and sale of the plant, to be effective January 1. On executing the agreement, Vessel relinquished his position as vice president of operations, but remained in a supervisory capacity with Resco until VMPC took over the plant on December 31. Vessel became president of VMPC.

Under the terms of the purchase and sale agreement, VMPC agreed to take over the employee pension plan. VMPC also assumed Resco's liabilities to the employees for accrued vacation pay. Specifically, the agreement stated that VMPC would assume and agree to pay

obligations and liabilities of [Resco] with respect to vacation rights due to hourly employees resulting from termination of the Union Agreement with the United Steelworkers of America. The cost to [VMPC] will be . . . deducted from . . . [the] purchase price of the pension plan . . . and [VMPC] indemnifies and holds [Resco] harmless from any loss, costs and expenses . . . in the event that the hourly workers are not paid by [VMPC] or do not accept payment from [VMPC].

Consistent with that provision, the purchase price paid by VMPC for the pension plan was reduced by more than \$80,000, which was the amount of the employees' total accrued vacation benefits.

On December 20, after the purchase and sale agreement had been executed, Royce Vessel met with the unit employees to discuss VMPC's acquisition of the plant and the employees' future employment status there. Also present were Flora Denton, who was Resco's human relations manager and who would occupy that same position under VMPC, and Brad Hiles, VMPC's attorney. Vessel told the employees that he was "on the hook" for their accrued vacation pay. He offered employment with VMPC, effective January 1, to all employees on Resco's payroll as of December 20, on terms and conditions set forth in a two-page document. This offer stated that the same pension plan would be maintained, with an increased benefit of \$1.50 per month per year of service. It also provided that

Note: By accepting this offer, an employee agrees to waive and release any claims against Resco [] and [VMPC] pertaining to accrued vacation pay or vacation time, whether or not such claims exist at the time this offer is accepted.

The acceptance clause at the end of the document repeated the statement concerning waiver of claims for accrued vacation pay. The employees were informed that the increase in

¹ *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

² All dates refer to the period between October 1996 and June 1997.

pension benefits was being given in exchange for the loss of accrued vacation benefits. Vessell told them that they had to sign the offer to be employed by VMPC, but that if they wanted the vacation pay rather than the job, they could have it.

All but 3 of the 34 unit employees signed the offers and were employed by VMPC when their employment with Resco terminated on December 31. They were not paid their accrued vacation pay. The other three employees declined VMPC's offer, and they were terminated December 31. Those individuals were paid their accrued vacation pay.

The Union was not notified in advance or given an opportunity to bargain concerning the proposed waiver of accrued vacation pay or the substitution of increased pension benefits in its place. On February 10 the Union filed a grievance against Resco seeking accrued vacation pay on behalf of the individuals who had accepted employment with VMPC. Their vacation pay has never been paid. The grievance is apparently still pending.

The parties have stipulated that VMPC continued to operate the business in the same form and with a work force of whom a majority had been previously employed by Resco, and that VMPC is a successor to Resco.³ When it took over operations of the Bonne Terre plant, VMPC recognized and bargained with the Union as the representative of the unit employees, but the parties did not reach a contract.

At a bargaining session on March 18, VMPC Attorney Hiles stated that the Company wanted to get to the bottom of the vacation pay issue, and asked for a copy of the Union's grievance. He also told the union negotiators that VMPC was willing to pay the accrued vacation pay to any employee who wanted it, but that any employee who accepted the payment would be terminated. After a caucus, during which time the union negotiators conferred by telephone with their attorney, Hiles repeated the offer, but this time said that the employees could pick up their checks that Friday. He reiterated that if they accepted the checks, they would be terminated. The Union did not agree to that proposal, but informed the employees at a March 20 union meeting that it had been made. When the employees went to pick up their paychecks that Friday, they were given a choice between accepting their vacation pay and being terminated, or signing a waiver stating, "I decline receipt of a check for \$____, representing my accrued vacation pay under the collective bargaining agreement between Resco, Inc. and Steelworkers Local 8734."

Deferral to Arbitration

The judge rejected VMPC's contention that the case should be deferred to arbitration, noting that VMPC has no collective-bargaining agreement with the Union and that it did not assume the grievance/arbitration provisions

of the Union's contract with Resco.⁴ VMPC has excepted to this finding.⁵ We find no merit in the exception.

To begin with, VMPC did not make its request for deferral either in its answer to the complaint or at the hearing, but for the first time in its posthearing brief to the judge. The request therefore was untimely raised.⁶

In any event, we would reject VMPC's deferral request even if timely raised. As the judge found, VMPC has no contract with the Union and did not adopt the grievance/arbitration provisions of the contract between the Union and Resco.⁷ Moreover, the Union's grievance was directed only at Resco, not at VMPC. Thus, there is no applicable grievance, or grievance/arbitration mechanism, through which the complaint allegations against VMPC could be adjudicated. Clearly, then, there is no basis for deferring the allegations against VMPC. Moreover, even if the allegations against Resco otherwise would be properly deferrable, those claims are inextricably related to the nondeferrable allegations against VMPC. Under these circumstances, the allegations against Resco also will not be deferred.⁸

The 8(a)(5) Allegation Against Resco

We agree with the judge that Resco violated Section 8(a)(5) by failing to pay accrued vacation pay to the employees who accepted employment with VMPC. As the judge noted, Resco could not avoid its obligations under the collective-bargaining agreement, without the Union's assent, simply by contracting with VMPC to assume them. Resco's failure to make the payments, especially after the Union explicitly demanded payment by filing a grievance, amounts to a complete abrogation of its contractual obligations in this regard.⁹ And, as the judge also found, the waivers signed by the employees do not constitute a defense for Resco. The employees who signed waivers on December 20 did so without the Union's knowledge or consent; consequently, even if Vessell was acting as Resco's agent on that occasion, he was

⁴ See *Collyer Insulated Wire*, 192 NLRB 837 (1971).

⁵ Resco has not excepted to the judge's refusal to defer the case to arbitration. In support of its exceptions, however, Resco argues that the issue of the parties' obligations regarding vacation pay is a contractual one, and should be determined by the arbitrator.

⁶ *Cutten Supermarket*, 220 NLRB 507, 509 fn. 19 (1975).

⁷ In its brief in support of exceptions, VMPC states, without citation to the record, that it *did* adopt the grievance/arbitration mechanism of the predecessor agreement. We find no support in the record for this assertion, which the General Counsel disputes in his answering brief. Although VMPC's reply brief again argues for deferral, it does not contain any support for, or even reiterate, VMPC's earlier claim to have adopted the grievance/arbitration provisions of Resco's contract with the Union.

⁸ *Clarkson Industries*, 312 NLRB 349, 352 (1993).

⁹ The Respondents argue that Resco did not deny liability for the accrued vacation pay or abrogate its contractual obligations. We perceive no merit in that argument. Whether or not Resco formally denied liability or explicitly refused to pay the employees, its failure to make those payments, in the face of a grievance over the issue, is sufficient to support the judge's findings.

³ *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

engaged in direct dealing with the employees over terms and conditions of employment. As for the waivers signed in March, the judge correctly found that the employees were declining payment by VMPC, not necessarily relinquishing their rights against Resco. Thus, even though the March waivers were signed with the Union's knowledge, they did not clearly and unmistakably waive the employees' Section 7 rights to enforce the contract against Resco.¹⁰

VMPC contends that the judge erred in finding that the individuals who accepted employment with it had a contractual right to receive accrued vacation pay. It argues that it is not clear under the collective-bargaining agreement that discharged employees had the right to receive accrued vacation pay in a successorship situation. We find no merit in this argument.

It is well settled that the Board may interpret the terms of a collective-bargaining agreement in order to determine whether an unfair labor practice has been committed.¹¹ In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. To determine the parties' intent, the Board looks to both the contract language and to relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of relevant contract terms as applied to the facts of the case.¹²

Applying the foregoing principles, we agree with the judge that the contractual term affording accrued vacation pay to discharged employees applies in a successorship situation like this.¹³ In the first place, the plain language of article XIII, section 4, states that "[a]ny employee quitting or discharged shall be paid the pro rata part of his earned vacation[.]" (Emphasis added.) Contrary to VMPC's contention, we find nothing in the contract to indicate that that provision does not apply to some discharged employees. Indeed, the very first word in section 4—any—negates any such suggestion.¹⁴ The parties have stipulated that Resco's employees were all

terminated on December 31. "Discharged" and "terminated" are widely used synonymously.¹⁵ We therefore find that the ordinary meaning of article XIII, section 4, supports the judge's finding.

Turning to extrinsic evidence, we find no record evidence that the meaning of "discharged" in article XIII, section 4, was ever the subject of collective bargaining. Nor is there any showing of any previous instance in which the applicability of that provision in a successorship situation has been tested or interpreted. Thus, there is no bargaining history or explicit past practice to shed light on the parties' intentions underlying the contract language. However, as the judge found, the actions of both Resco and VMPC clearly indicate that they understood that the employees would be entitled to receive accrued vacation pay when they were terminated by Resco. In their purchase and sale agreement, Resco and VMPC agreed that, in return for VMPC's assuming liability for paying the employees their accrued vacation pay, the purchase price VMPC paid for the pension plan would be reduced by an amount equal to the total liability for those payments for all employees, not merely those who turned down VMPC's employment offers. There would be no reason for Resco to have entered into such a quid pro quo had Resco not believed that the employees were entitled under the collective-bargaining agreement to receive accrued vacation pay regardless of whether they went to work for VMPC. Moreover, according to the un rebutted testimony of James Peek, a staff representative for the Union, Resco's attorney, John Dugan, told him that he believed the employees were owed vacation pay. A letter from Dugan to Resco states substantially that position. Thus, such extrinsic evidence as exists further supports the judge's finding that the employees who accepted VMPC's employment offers were contractually entitled to receive accrued vacation pay.¹⁶

The Allegations Against VMPC

The judge found that VMPC violated Section 8(a)(1) by conditioning employment offers on the employees' waiving their contractual rights to accrued vacation pay and, later, by conditioning continued employment on their abandonment of those rights. He also found that VMPC consented to adopt the pension plan and the pro-

¹⁰ A waiver of a statutory right will not be found unless it is clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

¹¹ *Mining Specialists, Inc.*, 314 NLRB 268 fn. 5 (1994).

¹² *Id.* at 268–269.

¹³ VMPC contends that the employees' entitlement to accrued vacation pay must be shown by "clear evidence." We are aware of no precedent that imposes such an evidentiary burden. The cases cited by VMPC (*Milwaukee Spring Division*), 268 NLRB 601 (1984), *enfd.* 765 F.2d 175 (D.C. Cir. 1985); *DeSoto, Inc.*, 278 NLRB 788 (1986)), do not stand for that proposition. But even if this heightened evidentiary standard applied, we find that it was met here.

¹⁴ VMPC suggests that when the contract says "discharged," it means only "discharged for cause." We find no support for this suggestion. The phrase "discharged for proper cause" appears in art. XIV. The inclusion of the modifier "for proper cause" indicates that the parties did not intend for "discharged" to mean only "discharged for cause." Moreover, the employees who were laid off in early December, as well as those who refused VMPC's offer of employment and were terminated on December 31, were paid their accrued vacation pay, even though they were not discharged for cause.

¹⁵ See, e.g., *Webster's Third New International Dictionary, Unabridged* (1966) at 644 ("discharge: to dismiss from employment: terminate the employment of"); 2359 ("terminate: to discontinue the employment of: discharge").

¹⁶ VMPC has cited decisions holding that, when a dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or intent to undermine the union, the Board will not attempt to determine which of two equally plausible contract interpretations is correct, and will not find an 8(a)(5) unilateral change violation if the employer acts in accordance with a contract interpretation that has a sound, arguable basis. See, e.g., *Crest Litho*, 308 NLRB 108, 110–111 (1992). Those decisions are inapposite here, because we find that VMPC's contract interpretation lacks a sound, arguable basis. This, in other words, is not a case in which the Board is faced with two equally plausible contract interpretations.

visions for accrued vacation pay contained in the contract between Resco and the Union, and therefore that VMPC was not free either to change those provisions unilaterally or by dealing directly with the employees. He therefore found that VMPC violated Section 8(a)(5) by changing the employees' pension and vacation benefits, and by repudiating its contractual obligation to pay them accrued vacation pay, without notifying and bargaining with the Union. For the reasons that follow, we agree with the judge that VMPC violated Section 8(a)(1), but we disagree with his finding that VMPC also violated Section 8(a)(5).

In *NLRB v. Burns Security Services*,¹⁷ the Supreme Court held that a successor employer is not required to honor its predecessor's collective-bargaining agreement. The Court also held that a successor normally is free to set initial terms and conditions of employment unilaterally, even if it ultimately is required to bargain with the union that represented the employees of the predecessor.

There is, however, an exception to the latter rule. The Court noted that when it is "perfectly clear" that the successor intends to hire all of the unit employees, it is appropriate for the successor to consult with the union before setting initial terms.¹⁸ Consistent with the Court's statement, the Board holds that, when a successor announces new terms before, or when, it extends employment offers to the predecessor's employees, it is not "perfectly clear" that the successor intends to employ all of the unit employees, since some or even most of them may choose not to work under the new terms.¹⁹

VMPC thus is correct in arguing that it was not *required* to adopt Resco's collective-bargaining agreement with the Union. The judge, however, found that it *did* adopt the vacation pay and pension obligations of that agreement. He based that finding on Vessell's December 20 statements to the assembled employees acknowledging the continuity of pension benefits and his being "on the hook" for the accrued vacation pay benefits. We disagree with that finding.

Consistent with the well-established principle that a successor normally is entitled to refuse to be bound by its predecessor's collective-bargaining agreement, the Board requires clear and convincing evidence of consent, either actual or constructive, before finding an assumption of such a contract.²⁰ We find no such clear and convincing evidence here. Vessell's statement that he was "on the hook" for the employees' accrued vacation pay was ambiguous. Vessell did not state that he would adopt any portion of the collective-bargaining agreement. In the

circumstances, it is reasonable to infer that he was referring to VMPC's agreement with *Resco* that VMPC would be responsible for paying the accrued vacation pay, or for reimbursing Resco if Resco had to pay it. There simply is not enough evidence here to support a finding that VMPC adopted any part of the collective-bargaining agreement.

Concededly, VMPC agreed *with Resco* that VMPC would pay the accrued vacation benefits owed to the employees under the Resco-Union contract. But this is not the same as a VMPC agreement *with the Union* that VMPC would pay those benefits. Thus, there was no VMPC adoption of this portion of the collective-bargaining agreement.

In any event, we would be reluctant to find that a successor had "adopted" part, but not all, of a collective-bargaining agreement. Collective-bargaining contracts are usually the products of compromises, and the Board has often held that a collective-bargaining agreement does not arise until there is a meeting of the minds on all material terms.²¹ We think that it would be inconsistent with both this principle and reality to find that a successor employer had "adopted" one or two provisions of a collective-bargaining agreement—in effect, creating a sort of "mini-contract" embodying only those provisions—unless it had the express consent of the union. Otherwise, a successor employer might choose to "adopt" only those provisions of the contract that it found acceptable, and then refuse to negotiate with the union over those terms on the ground that it was not required to do so under Section 8(d). Here, the Union did not consent to the partial "adoption" of only the vacation pay and pension provisions of the collective-bargaining agreement, and there is no contention or evidence that VMPC adopted the entire contract. We therefore find, contrary to the judge, that VMPC did not assume a contractual obligation to pay the employees their accrued vacation pay, and that it did not violate Section 8(a)(5) by failing to do so.

Concerning the 8(a)(1) allegations, VMPC argues that it was not required to bargain with the Union before it hired a majority of its work force from among the former employees of Resco, but instead was privileged to set initial terms unilaterally. Accordingly, it argues, it did not violate Section 8(a)(1) by informing the employees, either before or after they accepted its employment offers, that employment with VMPC was conditioned on their waiving their rights to accrued vacation pay. We agree with the judge that there is no merit in that contention.

VMPC is correct that, in his meeting with the employees on December 20, Vessel made it clear that although he was offering all of them employment with VMPC, he

¹⁷ *Supra*, 406 U.S. 272.

¹⁸ *Id.* at 294–295.

¹⁹ *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd.* 529 F.2d 516 (4th Cir. 1975).

²⁰ *Field Bridge Associates*, 306 NLRB 322, 323 (1992), *enfd.* sub nom. *Service Employees Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993).

²¹ *Executive Cleaning Services*, 315 NLRB 227, 228 (1994), *enf. denied* on other grounds 67 F.3d 446 (2d Cir. 1995).

was doing so only on different terms and conditions from those existing under the collective-bargaining agreement. In particular, he stated that in order to work for VMPC, the employees would have to waive their claims for accrued vacation pay, and in return would have their pension benefits increased. We therefore find that it was not “perfectly clear” that VMPC would hire Resco’s work force and thus that it was entitled to set initial terms of employment without first bargaining with the Union.²²

We agree with the judge, however, that VMPC’s right to set initial terms did not include the right to require the employees to waive their right to insist on payment of accrued vacation pay by *Resco*. As the judge recounted, the employees had accrued rights under the contract to be paid their accrued vacation pay as terminated employees of Resco, and they had a statutory right under the Act to insist on payment by Resco. By March 18, when VMPC conditioned their continued employment on their renouncing those claims, the Union had filed and was processing a grievance on their behalf against Resco, claiming their right to receive payment. Although, as a successor, VMPC arguably was privileged to condition those individuals’ employment on their waiving any claims against *it* for the accrued vacation pay, VMPC went further and demanded that they give up any claims against *Resco*. We do not think that *Spruce Up* and its progeny protect such conduct. It is one thing to say that a successor may set initial terms and conditions of employment to which *it* will be bound, even if they differ from those that prevailed under the predecessor. It would be quite another to say that the successor could require, as an employment condition, that employees give up accrued contractual rights, or other rights protected by the Act, against the predecessor. As the judge noted, such a holding would be fundamentally inconsistent with the principle that an employer may not condition employment, or continued employment, on the waiver of statutory rights or on the abandonment of a grievance. We therefore affirm the judge’s finding that VMPC violated Section 8(a)(1) by conditioning employment opportunities on the employees’ waiver of their rights to accrued vacation pay and by threatening to discharge them if they refused to waive those rights.²³

The *Golden State* Successor Issue

The General Counsel contends that VMPC acquired the Bonne Terre facility with the knowledge that the employees would not be paid their vacation pay, and therefore, under *Golden State*, VMPC should be jointly and

severally liable for Resco’s 8(a)(5) violation.²⁴ The judge rejected that contention on the ground that at the time VMPC acquired the facility, Resco had not committed any unfair labor practices. The General Counsel argues, however, that VMPC knew, or should have known, that Resco was not going to make the payments because it had, in effect, contracted with VMPC to make them. The judge disagreed, noting that if VMPC had paid the vacation pay, as it should have, there would have been no unfair labor practice by Resco. We agree with the General Counsel.

Liability under *Golden State* normally attaches only if the successor acquires the predecessor’s business with the knowledge that the predecessor has committed unfair labor practices. As the judge found, Resco had not committed any unfair labor practices at the time VMPC took over the Bonne Terre facility; therefore, although VMPC clearly was a successor to Resco, VMPC did not purchase the facility knowing that Resco *had violated* Section 8(a)(5). Unlike the judge, however, we do not find that fact dispositive, because VMPC knew perfectly well that Resco was *going to* violate Section 8(a)(5) by failing to make the accrued vacation payments. VMPC knew this because it had contracted to make those payments itself and had decided not to do so. Resco’s violation, in other words, was a direct, proximate, and foreseeable result of VMPC’s own conduct.

Moreover, as the General Counsel correctly points out, the Supreme Court based its holding in *Golden State* in part on the fact that a successor who knows about the predecessor’s unlawful conduct can factor its own potential liability for that conduct into the purchase price.²⁵ That, in effect, is what happened here. By negotiating a reduction in the purchase price for Resco’s pension plan to offset the liabilities it was assuming for accrued vacation pay, VMPC seemingly compensated itself for assuming those liabilities. But since VMPC planned to, and did, renege on its agreement with Resco, the reduction in the purchase price actually constituted compensation for VMPC’s liability for the violation that Resco would commit by failing to make the vacation payments. Indeed, under the purchase and sale agreement, VMPC indemnified Resco for any losses resulting from VMPC’s failure to make the payments.

In sum, then, when VMPC purchased the Bonne Terre facility, it knew in advance that Resco would violate Section 8(a)(5) as a result of VMPC’s own conduct, and it negotiated a reduction in the purchase price commensurate with its potential liability for remedying that violation. Accordingly, we find that VMPC was the *Golden*

²² *Spruce Up Corp.*, 209 NLRB at 195.

²³ In so holding, however, we do not rely on *Borden, Inc.*, 308 NLRB 113 (1992), *enfd.* 19 F.3d 502 (10th Cir. 1994), cited by the judge, or on *Swift Adhesives*, 320 NLRB 215 (1995), *enfd.* 110 F.3d 632 (8th Cir. 1997), and *R.E. Dietz Co.*, 311 NLRB 1259 (1993), cited by the General Counsel. None of those cases addressed whether a successor employer could lawfully condition employment on employees’ waiver of accrued contractual rights against the predecessor employer.

²⁴ The Supreme Court in *Golden State* held that a successor employer that acquires and continues a business with knowledge that the predecessor employer committed unfair labor practices may be held jointly and severally liable, with the predecessor, to remedy the unlawful conduct.

²⁵ 414 U.S. at 185.

State successor to Resco and that it is jointly and severally liable with Resco for the latter's 8(a)(5) violation.

ORDER

A. The NLRB orders that the Respondent, Resco Products, Inc., Norristown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with the United Steelworkers of America, AFL-CIO, CLC by abrogating the terms of the collective-bargaining agreement between it and the Union.

(b) In any like or related manner interfering with, restraining, or coercing its 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) Jointly and severally with Respondent Vessell Mineral Products Corporation, make whole those employees whom it terminated on December 31, 1996, for any loss of accrued vacation pay in the manner set forth in the remedy section of the judge's decision.

(b) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(c) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix A"²⁶ to all bargaining unit employees in the Bonne Terre, Missouri facility who were employed by Resco and terminated on December 31, 1996. The notice shall be mailed to the last known address of each of the employees after being signed by Respondent Resco's authorized representative.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges a violation of the Act not specifically found.

B. Respondent, Vessell Mineral Products Corporation, Bonne Terre, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Conditioning employment on the waiver of statutory rights or threatening employees with discharge if they refuse to waive statutory and contractual rights.

(b) In any like or related manner, interfering with, restraining, or coercing its 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) Jointly and severally with Respondent Resco Products, Inc., make whole those employees whom Resco terminated on December 31, 1996, for any loss of accrued vacation pay in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days after service by the Region, post at its facility in Bonne Terre, Missouri, copies of the attached notice marked "Appendix B."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 1996.

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

MEMBER HURTGEN, concurring.

I agree that Respondent successor VMPC is liable under *Golden State*¹ for the 8(a)(5) violation of Respondent predecessor Resco. I also agree that Respondent VMPC violated Section 8(a)(1). However, the bases for my conclusions differ somewhat from those of my colleagues.

In the paradigm *Golden State* situation, a predecessor has committed a violation prior to the transfer of the business to a purchaser. The purchaser knows of that violation. Under *Golden State*, the purchaser can be held liable for the predecessor's violation.

In the instant case, predecessor Resco did not commit an 8(a)(5) violation prior to the transfer. At most, it was *obligated* to make accrued vacation payments to discharged employees. Even assuming arguendo that the employees were discharged when Resco ceased operations, there is nothing to suggest that Resco was obligated to make the vacation payments at the moment of discharge. Thus, it cannot be said that Resco committed

²⁶ 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."

²⁷ See fn. 26, above.

¹ *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

a violation of Section 8(a)(5) at that time. I recognize that, at that time, Resco had agreed with VMPC that VMPC would be liable for the payments. But even if this were tantamount to a declaration that Resco would not make the payments, that declaration was not made to the Union or to the employees. In any event, the declaration was not the violation alleged by the General Counsel. The alleged violation was a failure to pay, not a declaration that Resco would not pay.

In sum, the violation, i.e., failure to pay, was not at fruition at the time of the takeover. Although, Resco ultimately did not pay, that occurred subsequently.

Thus, the paradigm *Golden State* situation is not present here. Notwithstanding this, in the unique circumstances of this case, I would grant a *Golden State* remedy. *Golden State* is an equitable doctrine to assure that employees who are victims of unlawful conduct by a predecessor are made whole after a transfer of the business to a new employer. If the new employer knows of the unlawful conduct, and has the opportunity to negotiate a purchase price that takes account of future liability, it is equitable to impose the remedy on the new employer. In the instant case, VMPC knew of Resco's intention not to pay, VMPC agreed to pay, and VMPC negotiated for a concomitant reduction in the purchase price. Thus, it is equitable to impose on VMPC the obligation to rectify Resco's failure to pay.²

I also concur with the conclusion that VMPC violated Section 8(a)(1). I recognize that VMPC had a right to unilaterally set its own terms and conditions of employment.³ However, in the circumstances of the instant case, that right did not include the right to eliminate vacation pay. Where, as here, the employees have a contractual and statutory right to such pay from Resco, and a *Golden State* right to such pay from VMPC, VMPC could not unilaterally take away those rights from the employees. Accordingly, Respondent VMPC could not condition employment on employee waiver of claims against both employers. Thus, VMPC violated Section 8(a)(1) when it conditioned employment on the waiver of employee rights vis-a-vis itself of Resco.

APPENDIX A

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 bargain in bad faith with the United Steelworkers of America, AFL-CIO, CLC, by abrogat-

ing the terms of our collective-bargaining agreement with the Union covering the employees in the following unit:

All hourly production and maintenance employees employed by Resco at our Bonne Terre, Missouri facility, excluding office clerical and professional employees, watchmen, laboratory employees, guards and supervisors as defined in the Act.

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 jointly and severally with Vessell Mineral Products Corporation make whole all our employees whom we terminated on December 31, 1996, by paying them the accrued vacation pay to which they were entitled, plus interest.

RESCO PRODUCTS, INC.

APPENDIX B

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 condition employment on the waiver of statutory rights or threaten employees with discharge if they refuse to waive their statutory or contractual rights.

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

WE WILL jointly and severally with Resco Products, Inc. make whole all employees whom Resco terminated on December 31, 1996, by paying them the accrued vacation pay to which they were entitled, plus interest.

VESSELL MINERAL PRODUCTS
CORPORATION

Christal J. Gulick, Esq., for the General Counsel.

Terry L. Potter, Esq. (Peper, Martin, Jensen, Maichel & Helage), for the Respondent, VMPC.

Karl A. Sauber, Esq. (Diekemper, Hammond, Shinnors, Turcotte & Larrew, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in St. Louis, Missouri, on October 29, 1997, based upon charges and amended charges filed by the United Steelworkers of America, AFL-CIO, CLC (the Union) on April 7 and June 17 and 18, 1997, and a consolidated complaint which issued on June 30, 1997, as thereafter amended. That complaint alleges that Resco Products Co. (RESCO) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally failing and refusing to pay accrued vacation

² My view is tied strictly to the unique facts of this case. It is not to be taken as a willingness to broadly expand *Golden State*.

³ *NLRB v. Burns Security Services*, 406 U.S. 272, 294-295 (1972).

pay due its employees under its collective-bargaining agreement with the Union. It further alleges that Vessell Mineral Products Corporation (VMPC), as the successor to RESCO, interfered with, restrained, and coerced its employees in the exercise of their statutory rights, in violation of Section 8(a)(1), by conditioning offers of employment upon their waiver of contractually accrued vacation pay and by threatening employees with termination if they accepted checks to be tendered them in payment of that vacation pay. And, it alleged that VMPC failed to bargain in good faith, in violation of Section 8(a)(1) and (5), with the representative of its employees by failing to continue in effect the terms and conditions of employment which it had assumed by repudiating the obligation to pay employees their accrued vacation pay.

RESCO and VMPC's timely filed answers deny the commission of any unfair labor practices.

Based on my observation of the witnesses and consideration of the entire record, including the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

Until January 1, 1997, RESCO, a Pennsylvania corporation with its principal offices in Norristown, Pennsylvania, and plants located throughout the United States, including the plant located in Bonne Terre, Missouri, was engaged in dolomite lime production. The Bonne Terre facility is the only one involved in these proceedings. The complaint alleges, and RESCO admits that, during the 12-month period preceding January 1, 1997, RESCO sold and shipped from its Bonne Terre facility goods valued in excess of \$50,000 directly to points of the United States outside the State of Missouri. RESCO admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Since January 1, 1997, VMPC, a Missouri corporation, with its office and place of business in Bonne Terre, Missouri, has been engaged in the business of dolomite lime production. The complaint alleges, and VMPC admits that the projection of its operations since January 1, 1997, establishes that it would annually ship from its Bonne Terre facility goods valued in excess of \$50,000 directly to points outside the State of Missouri. VMPC admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

RESCO and VMPC admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

For many years, RESCO owned and operated the Bonne Terre, Missouri dolomite lime production plant. Since about 1967, the Union was recognized as the exclusive collective-bargaining representative of the hourly production and maintenance

employees at that plant.² That recognition was embodied in a series of collective-bargaining agreements, the last of which ran from August 16, 1996, to August 15, 1997.

Included within that collective-bargaining agreement was a provision for annual vacations. For employees who began before August 16, 1987, the vacations ranged from 2 to 5 weeks. For those whose service commenced after that date, the vacations ranged from one to 3 weeks.

Section 4 of the vacation article provided:

Any employee quitting or discharged shall be paid the pro rata part of his earned vacation . . .

The agreement also provided for a pension plan. That plan paid retired employees \$17 per month for each year of service. Normal retirement age was 65 but employees with 35 years of service could retire at age 55. The maximum pension was for 35 years of service (\$595 per month).

B. Sale of the Plant

In October 1996,³ RESCO began negotiating to sell the Bonne Terre facility to Royce Vessell, its vice president for operations. Those negotiations culminated in an agreement for Vessell's newly created corporation, VMPC, to purchase the Bonne Terre assets, executed December 18 and effective January 1. Upon its execution, Royce Vessell ceased to function as RESCO's vice president although he retained a supervisory role. He became VMPC's president. RESCO notified the Union of the sale of the plant.

In that purchase and sale agreement, VMPC expressly acquired, assumed, and paid for the hourly employees pension plan. Thus, VMPC's purchase price included "the sum of . . . being the value of the over funded portion of the Resco Products of Missouri Hourly Employees Pension Plan . . . which the Buyer is assuming. . . ."

VMPC also assumed RESCO's liabilities to the employees for accrued vacation benefits. The cost of that liability, in excess of \$80,000, was deducted from the price it paid to acquire the pension plan. The agreement stated:

2.2.1. Buyer shall assume as of the Closing Date, and pay when due, the following liabilities of the Seller ("Liabilities");
 2.2.2. Effective the Closing Date, Buyer shall assume and agree to pay, perform and discharge, and to indemnify Seller against and hold it harmless from any costs, expenses, losses or liabilities, including attorneys' fees, suffered by Seller by reason of:

(d) obligations and liabilities of Seller with respect to vacation rights due to hourly employees resulting from termination of the Union Agreement with the United Steelworkers of America. The cost to Buyer will be . . . deducted from . . . [the] purchase price of the Pension Plan . . . and Buyer indemnifies and holds Seller harmless from any loss, costs or expenses . . . in the event that the hourly

¹ The facts have, in substantial part, been stipulated by the parties and are not in dispute. Although fully apprised of the hearing, no appearance was made on behalf of RESCO; in lieu of an appearance, RESCO submitted a stipulation of facts, in which the counsel for the General Counsel and the Union joined.

² The unit, stipulated to be appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act, was:

All hourly production and maintenance employees employed by RESCO at its Bonne Terre, Missouri facility, EXCLUDING office clerical and professional employees, watchmen, laboratory employees, guards and supervisors as defined in the Act.

³ All dates are from October 1996 to June 1997 unless otherwise indicated.

workers are not paid by the Buyer or do not accept payment from the Buyer.

In early December, prior to the transfer of the plant, about six employees were permanently laid off due to a loss of business. RESCO paid each of them their accrued vacation pay.

C. Vessell and VMPC Meet with the Employees

On December 20, Royce Vessell, VMPC's (and RESCO's) human relations manager Flora Denton, and VMPC's attorney, Brad Hiles met with virtually all of the unit employees. Royce Vessell told them that he was "on the hook" for their accrued vacation pay. Those "individuals on the hourly payroll of Resco Products Incorporated as of December 20" were given offers which detailed the offered terms and conditions of employment, including wages, health and life insurance, vacations and pensions. It expressly provided:

Note: By accepting this offer, an employee agrees to waive and release any claims against Resco Products Incorporated and [VMPC] pertaining to accrued pay or vacation time, whether or not such claims exist at the time this offer is accepted.

In regard to the pension plan, it was noted that VMPC would maintain the same defined benefit pension plan previously provided by RESCO but would increase the benefit by \$1.50 per month per year of credited service.

The waiver of claims pertaining to accrued vacation pay and time was repeated in the acceptance clause.

Hiles explained that the employees' accrued vacation pay would be taken away as of January 1 in exchange for which they would receive the increased pension benefit. Royce Vessell made clear that they had to sign the offer as proposed in order to secure continued employment but that, if they wanted the accrued vacation pay rather than the job, they could have it.

Thirty-one of thirty-four employees accepted the employment offers and signed the proffered waivers; they did not get their accrued vacation pay upon their December 31 termination by RESCO. Three employees declined the offer; they received the accrued vacation pay and were terminated effective December 31.⁴

There had been no notice to, or bargaining with, the Union by either RESCO or VMPC concerning the waiver or the substitution of increased pension benefits for the accrued vacation pay.

On February 10, the Union filed a grievance against RESCO on behalf of those employees who accepted employment with VMPC, seeking their accrued vacation pay. It has never been paid and that grievance is, apparently, still pending. An unfair labor practice charge filed on April 7, as amended on August 17, 1997, alleged that RESCO had abrogated its contractual obligation by unilaterally failing to pay its employees their accrued vacation benefits. This grievance came to VMPC's attention in mid-March.

⁴ They were paid their accrued vacation pay by RESCO and RESCO was then reimbursed by VMPC. One employee sought to limit his acceptance with language to the effect that he was reserving his rights under federal labor laws. Denton rejected his language and insisted that, if he wished to be employed by VMPC, he had to sign the offer as it was made to him. He did so.

D. Recognition and Bargaining

As of January 1, VMPC continued to operate the business "in basically an unchanged form and employed as a majority of its employees individuals who were previously employees of . . . Resco." It was further stipulated that "VMPC has continued the employing entity and is a successor to . . . Resco." VMPC recognized the Union as the collective-bargaining representative of the unit employees and entered into negotiations for a new labor agreement.

After receiving notice of the vacation pay grievance filed against RESCO, VMPC met with the Union in a negotiating session on March 18. Present for VMPC were Royce Vessell, Flora Denton and Brad Hiles. The Union was represented by its International Representative, James Peek, its Local Union president and a number of employee members of the negotiating committee. After some introductory matters, Hiles stated that the employer wanted to get to the bottom of the vacation pay issue; he asked for a copy of the Union's grievance. He then told the Union committee that VMPC was willing to pay all of the employees their accrued vacation pay that day. If they accepted those checks however, he stated, they would be terminated.

The parties caucused and, when they got back together, Hiles reiterated VMPC's offer, changing it only to indicate that the checks would be ready on Friday. Once again, the employees were told that they could have those checks if they wanted them, but that, if they accepted payment for accrued vacation pay, they forfeited their employment. The Union never agreed to VMPC's proposal.

The other employees were told of VMPC's latest "offer" at a union meeting held on March 20. When the employees went in to pick up their paychecks on that Friday, they were required to either accept their vacation pay check or, once again, sign the following express waiver:

I decline receipt of a check for \$_____, representing my accrued vacation pay under the collective bargaining agreement between Resco, Inc. and Steelworkers Local 8734.

The vacation paychecks were in various and not insubstantial amounts. Employee Denzele Grimes declined a check in the net amount of \$689.19 (\$1038.69 gross); Jame's Weible's check was for \$3552.20 (\$6404.58 gross).

E. Analysis

1. RESCO's 8(a)(5) violation

When RESCO terminated its employees on December 31, it became liable, under its contract, to pay them their accrued vacation pay. It recognized this when it paid those employees laid off prior to December 31 for the vacation pay they had coming. It also recognized this, in its agreement with the purchaser, when it reduced the sales price by the value of the accrued vacation pay and provided that VMPC would make it whole if RESCO was required to pay that vacation pay to those employees.

It is elemental contract law that a party to a contract cannot escape its obligations by agreeing with a third party to assume them. *Williston on Contracts*, 3d Ed. (1960), Section 411, pp. 18-19. See also *Gulf-Wandes Corp.*, 236 NLRB 810 (1978). In that case, an employer who had recognized an international union was found not to have breached its obligations under the contract's checkoff provisions when it refused to acquiesce in the International's assignment of the dues debt to a local union.

Here, the Union never acquiesced in the transfer of liability and, on behalf of the employees, it demanded that RESCO meet its obligations.

Moreover, it is no defense that the employees may have signed documents purporting to waive their rights to the accrued vacation pay. In the first instance, the documents signed by the employees merely indicated that the signatory was declining a check proffered by VMPC, not necessarily waiving rights as against RESCO. More significant, however, is the principle that, even if Vessell was acting as agent of RESCO in securing these purported [and coerced] waivers, an employer may not change terms and conditions of employment by dealing directly with its employees. *Clemson Bros.*, 290 NLRB 944, 952 (1988).

RESCO has failed to comply with the demand that it pay the terminated RESCO employees their accrued vacation pay and its failure is more than a mere contract breach, it is a total abrogation of all remaining bargaining obligations in violation of Section 8(a)(5). *King Manor Care Center*, 308 NLRB 884, 887 (1992); and *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991). I so find.

2. VMPC's liability and conduct in violation of Section 8(a)(1) and (5)

a. Section 8(a)(1)

VMPC contends that, as a successor employer, it was free to set whatever initial terms and conditions it chose and that the employees were free to accept or reject employment upon those terms. *Marriott Management Services*, 318 NLRB 144 (1995); *Planned Building Services*, 318 NLRB 1049 (1995); *Spruce Up Corp.*, 209 NLRB 194, 195 (1974). Thus, it argues that conditioning employment upon their acceptance of higher pension benefits in lieu of vacation pay which had accrued to them as RESCO employees did not restrain them in the exercise of Section 7 rights.

The General Counsel, however, draws a distinction between the setting of future wages and benefits and the conditioning of employment upon the relinquishment of accrued contractual benefits. The latter, it is argued, presents the employees with a Hobson's choice between continued employment and the abandonment of rights guaranteed under the Act. *Borden, Inc.*, 308 NLRB 113, 115 (1992). In that case, the employer merged two units of employees, both of which had been represented by a single union recognized by the employer. The employer required that the employees in the unit which had the superior benefits accept the lesser benefits of the agreement covering the other unit as a condition of continued employment. Those employees who retired rather than accepting the lesser benefits were found to have been constructively discharged in violation of Section 8(a)(3) and (1).⁵ The employer's statements to the effect that employees would be denied transfers to the new facility unless the union agreed to waive their rights to their contractual benefits were deemed violative of Section 8(a)(1).

The General Counsel's argument, I find, is the more persuasive. The employees had accrued contractual rights to their vacation pay as terminated employees of RESCO. They had a

⁵ While a contention that I should find that the three employees who declined VMPC's offer of employment, received their accrued vacation pay and were terminated, to have been constructively and discriminatorily discharged would appear to be warranted herein, no such argument was presented.

statutory right to insist on payment by RESCO. Their Union had filed a grievance on their behalf seeking to enforce those rights. As Vessell had acknowledged to them, VMPC was "on the hook" for the costs of those benefits. It was obligated to make RESCO whole, to the extent that the former RESCO employees insisted upon payment.⁶ To wriggle off that hook, it demanded, as a condition of employment, that the employees waive their statutory rights. In essence, it threatened employee-applicants with the denial of employment on December 20, and current employees with discharge on March 18 and 21, if they did not give up those rights. The conditioning of employment upon the waiver of Section 7 rights or upon the abandonment of a grievance violates Section 8(a)(1). *Retlaw Broadcasting Co.*, 310 NLRB 984, 991 (1993); *Prince Trucking Co.*, 283 NLRB 806, 807 (1987). It also negates the validity of any "waiver" resulting from such coercion. *Clemson Bros.*, supra at 951-952.

b. Section 8(a)(5)

It may be that, by virtue of its liability to RESCO, VMPC's financial responsibilities will be fully satisfied. However, the complaint mandates that I determine whether its conduct independently violated Section 8(a)(5).

Contrary to VMPC's contentions, its agreement with RESCO clearly and expressly provided that it would assume RESCO's vacation pay and pension obligations arising from the collective-bargaining agreement.⁷ Vessell's meeting with the employees on December 20, wherein he acknowledged continuity of the pension benefits and "being on the hook" with respect to the accrued vacation benefits, satisfied the Board's requirement of consent to an adoption of the contract. *Field Bridge Associates*, 306 NLRB 322, 323 (1992); and *E G & G Florida, Inc.*, 279 NLRB 444, 453 (1986).⁸ Having assumed those aspects of the agreement, it was not free to unilaterally change, or to "bargain" directly with the employees for modifications of, them. Its failure to notify and bargain with the Union, which it recognized as the employees' collective-bargaining representative, over changes in the payment of accrued vacation pay (and pension benefits), and its repudiation of its contractual obligation to pay the employees terminated by RESCO their accrued vacation pay, violated Section 8(a)(5). It is, I find, jointly and severally liable, with RESCO, to make these employees whole.

c. Golden State liability

In *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973), the Supreme Court held that a successor employer who acquires

⁶ It is clear to me that Vessell intended, from the get-go, to discourage these employees from asserting their rights to their accrued vacation pay. Thus, the sales agreement, sec. 2.2.2 (3) (d), expressly refers to the possibility that the buyer, VMPC, might not pay the employees their accrued vacation pay, or that the employees might not accept payment of it from VMPC.

⁷ That the price Vessell paid for the over-funded portion of the pension plan was reduced by the exact cost to VMPC of the assumption of RESCO's obligations with respect to the accrued vacation pay (assuming that VMPC were to pay it in full) belies any contention that Vessell presumed that it had no liability for accrued vacation pay.

⁸ Vessell's preemptive strike with respect to accrued vacations and pensions deprived the Union of an opportunity to consent to the adoption of those portions of its contract. However, the union engaged in no conduct inconsistent with consent and, when given the opportunity, timely objected to VMPC's unilateral actions.

and continues a business with knowledge that the predecessor had committed an unfair labor practice may be found jointly and severally liable, with the predecessor, to remedy that unfair labor practice. The General Counsel seeks application of that principle to the facts of this case. While I have found that VMPC independently violated Section 8(a)(5) and is therefore jointly and severally liable, with RESCO, to make the employees whole for the losses they suffered as a result of that violation, I cannot find *Golden State* applicable. At the point in time that VMPC acquired RESCO, RESCO had committed no unfair labor practices. Its violations occurred thereafter, when it abrogated its continuing obligations.⁹

d. Deferral to contractual arbitration procedures

VMPC seeks deferral of this dispute to the contract's grievance/arbitration procedures. However, it has no contract with the Union and did not assume that portion of RESCO's contract which included a grievance procedure. Deferral of the allegations involving VMPC is therefore inappropriate.

CONCLUSIONS OF LAW

1. By abrogating its agreement with the United Steelworkers of America, AFL-CIO, CLC, thereby failing and refusing to bargain in good faith, Resco Products, Inc. has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By conditioning employment on the waiver of statutory rights and threatening employees with discharge unless they waived statutory and contractual rights, Vessell Mineral Products Corporation has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By unilaterally and without notice to the Union abrogating the adopted terms of an agreement with the United Steelworkers of America, AFL-CIO, CLC, thereby failing and refusing to bargain in good faith, Vessell Mineral Products Corporation has violated Section 8(a)(5) and (1).

REMEDY

Having found that RESCO abrogated its collective-bargaining agreement by failing to pay its employees their accrued vacation pay upon termination, which conduct is an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including making those employees whole by payment to them of that accrued vacation pay, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that VMPC has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including making its employees whole for the accrued vacation pay to which they were entitled under the portion of the RESCO-United Steelworkers of America, AFL-CIO, CLC collective-bargaining agreement assumed by it, plus interest as computed in *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]

⁹ The General Counsel also argues that VMPC knew or should have known that RESCO intended to abrogate this portion of its collective-bargaining agreement based upon the terms of the purchase and sale agreement, reducing the purchase price by the exact amount of the accrued vacation pay liability. However, if VMPC had satisfied its obligations with respect to the vacation pay, there would have been no unfair labor practice or unfair labor practice charge.