

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 14, 1989

TO: Rosemary Pye, Regional Director, Region 1

FROM: Harold J. Datz, Associate General Counsel, Division of Advice

SUBJECT: International Paper, 1-CA-26069

This case was submitted to Advice on the issue of whether there existed vacancies to whom strikers should have been reinstated.

The Union began a strike on June 16, 1987. The Employer hired permanent replacements in skilled classifications. In addition, pursuant to past practice, the Employer hired 100 employees into a utility labor pool. The employees in this pool performed outdoor work in the summer and substituted into skilled positions.

On October 6, 1988 (Thursday), the Employer made a decision to transfer the labor pool employees into vacant skilled classifications. About 15 of these employees had bid on the skilled jobs. The effect of the Employer's decision was to accept their bids. About 50 employees were actually working in skilled jobs on a temporary basis. The effect of the Employer's decision was to assign them permanently to these jobs. The Region finds that the Employer's decision was final and non-discriminatory.[1] The Employer also decided that first line supervisors would inform the transferring employees of the decision. The notification was oral and took place over several days. However, because of work schedules, an undetermined number of these employees were not told of the decision until after October 9.

The Union, on behalf of all strikers, offered to return on October 9 (Sunday). The Employer takes the position that the October 6 final decision to fill the skilled positions means that there were no vacancies in these positions on October 9. The Region apparently agrees as to the employees who were told of the decision before October 9. The Region submits for advice the issue of whether there were vacancies as to employees who were not told prior to October 9. We conclude that it is arguable that there were vacancies as to these latter employees.

In *Anderson Clayton*, 120 NLRB 1208, the Board held that a final decision to transfer employees into certain jobs, plus notification to them of that decision, was sufficient to make them occupants of those jobs so as to defeat a subsequent strike offer to return. Although the Board did not have the instant issue before it, the fact that notification was mentioned by the Board suggests that notification was an important factor in the Board's determination.

In addition, where an employer decides to convert a temporary replacement into a permanent one, but has not yet told the replacement, the replacement remains a temporary replacement, and the striker can "bump" him/her from the job. *Associated Grocers*, 253 NLRB 31. In the Board's view, the uncommunicated decision of the employer "established permanency only in the mind of the respondents' president." In order to establish permanency, there must be a mutuality of understanding that permanency is intended.

Similarly, in our case, the labor pool employees occupied the new positions only in the mind of the Employer. The employees themselves did not view the matter that way on October 9. Thus, the mutuality requirement was not met. With particular respect to the 50 employees who were already in the skilled jobs, the change as to them was simply a change from temporary to permanent status. We see no appreciable difference between this situation and the situation where a temporary replacement becomes a permanent one. Since notification and mutuality are required in the latter, they should be required in the former as well.

As to the 15 employees, the Region reports that the Employer has provided no specific evidence that individual employees had been awarded the skilled jobs. In view of this fact and the fact that these employees were not working in the skilled jobs, we

would argue that they were not occupants of the skilled jobs.

Thus, on October 9, there were vacancies in those instances where employees had not been told of the assignment.

Finally, the fact that the vacancy could be filled by transferring existing employees does not require a different result. Where, as here, the striker is qualified to fill that vacancy, the assignment must go to the striker rather than to a transferrina employee. MCC Pacific Valves, 244 NLRB 931.[2]

We recognize that, in MCC, the vacancy occurred after the striker offered to return. In the instant case, the vacancy existed prior to and at the time of the offer to return. However, in our view, this is a distinction without a difference. The important point is that there was a vacancy, which the striker was qualified to fill, and the Employer decided not to give the striker that job.

Accordingly, the Region is authorized to issue complaint, absent settlement.

H.J.D.

[1] In this regard, the Region finds that the Employer did not know on October 6 that the strike would end on October 9.

[2] This case does not involve "fungible" jobs. Rather, the labor pool jobs were quite separate and distinct from the skilled classification jobs.