

Effect of Strikes Upon Vacations

Ned H. Bassen

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Ned H. Bassen, *Effect of Strikes Upon Vacations*, 57 Cornell L. Rev. 633 (1972)
Available at: <http://scholarship.law.cornell.edu/clr/vol57/iss4/6>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTES

THE EFFECT OF STRIKES UPON VACATIONS

Paid vacations are not a legal requirement in the United States but rather contractual rights established through collective bargaining.¹ Although vacations constitute a mandatory subject of bargaining,² vacation rights are rarely absolute or unconditional. Almost all plans, however structured, require a minimum amount of work for vacation eligibility.³ The minimum service requirement is usually expressed either in terms of continuous service or as a specified amount of time worked during the qualifying year,⁴ and additional units of paid vacation are commonly granted to workers with longer periods of service.⁵ Eligibility clauses often stipulate that certain absences, such as those owing to layoffs, injuries, and illnesses, will be counted as days worked⁶ and not as breaks in continuous service.⁷ Employee strike absences are analogous to absences owing to layoffs and illnesses—although strikers are not actively working during the strike period, they retain their status as employees.⁸ Nevertheless, labor and management rarely con-

¹ Evening News Ass'n, 185 N.L.R.B. No. 70, at 3, 76 L.R.R.M. 1330 (Sept. 4, 1970) (trial examiner's decision).

² See, e.g., Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360, 369 (1952).

³ CCH UNION CONTRACT CLAUSES ¶ 51,202, at 200 (1954). A common form of vacation eligibility clause provides that after an employee has worked one year, he earns the right to a paid vacation of specified length. See, e.g., Brynmore Press, Inc., 8 Lab. Arb. 511, 514 (1947) (Rains, Arbitrator). For example, the eligibility requirement may be expressed as "(1) continuity in the service of the employer during the qualifying year; and (2) at least 1900 hours of working time during the year." Hess-Dubois Cleaners, 19 Lab. Arb. 200, 202 (1952) (Allen, Arbitrator). Other vacation plans grant credits as a percentage of wages and thus have a built-in work requirement. If the employee does not work he receives no credits. E.g., Tex Tan Welhausen Co., 172 N.L.R.B. No. 93, 70 L.R.R.M. 1206 (July 4, 1968), enforced, 419 F.2d 1265 (5th Cir. 1969), vacated and remanded on other grounds per curiam, 397 U.S. 819, modified on other grounds, 434 F.2d 405 (5th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

⁴ E.g., Hess-Dubois Cleaners, 19 Lab. Arb. 200, 202 (1952).

⁵ CCH UNION CONTRACT CLAUSES ¶ 51,201, at 195 (1954). For example, an employee with one or more years of service receives two weeks vacation; with five or more years of service, three weeks vacation; and with 20 or more years of service, four weeks vacation. Great Atl. & Pac. Tea Co., 43 Lab. Arb. 1 (1964) (Turkus, Arbitrator).

⁶ Typically, such clauses specify a maximum amount of absences beyond which deductions are made. See, e.g., Richland Shale Brick Co., 49 Lab. Arb. 113, 114 (1966) (Seinshaimer, Arbitrator).

⁷ See, e.g., Barrett Transp., Inc., 52 Lab. Arb. 169, 171 (1969) (Koven, Arbitrator).

⁸ Section 2(3) of the National Labor Relations Act provides: "The term, employee, . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and

sider strike absences when setting forth vacation eligibility requirements.⁹

Vacation eligibility problems that arise after strikes concern (1) whether vacation credits¹⁰ can be denied for the period of the strike, (2) whether the strike will affect the computation of an employee's overall length of service, and (3) whether an eligibility date falling within the strike period will affect an employee's vacation benefits. Although vacation eligibility is determined by the intentions of the contracting parties, these problems are not solely within the domain of the arbitrator. The National Labor Relations Board is empowered to remedy employer conduct that discriminates against employees for engaging in concerted activity protected by the National Labor Relations Act (NLRA).¹¹ When the employer relies on contract language to justify a denial or proration of strikers' vacation benefits, the Board, much like the arbitrator, is presented in part with an issue of vacation eligibility. When the employer does not rely on contract language to justify denial of vacation benefits, however, the Board may still examine his conduct in terms of possible unfair labor practices.

I

DENIAL OF ACCRUED VACATION BENEFITS TO STRIKERS

In the landmark case of *NLRB v. Great Dane Trailers, Inc.*,¹² the employer admitted that the strikers had fulfilled vacation eligibility

who has not obtained any other regular and substantially equivalent employment" 29 U.S.C. § 152(3) (1970).

⁹ Evening News Ass'n, 53 Lab. Arb. 170, 176 (1969) (Casselman, Arbitrator); Daykin, *Vacation Rights Under Collective Bargaining Agreements*, 17 ARB. J. (n.s.) 34, 35 (1962).

¹⁰ The term "vacation credits" is used to describe a worker's credits earned towards satisfying current eligibility requirements. See note 6 and accompanying text *supra*.

¹¹ The right to strike is protected by sections 7 and 13 of the NLRA, 29 U.S.C. §§ 157, 163 (1970). Section 7 provides: "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection" *Id.* § 157. Section 13 provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.* § 163.

The Board's jurisdiction under sections 10(a) and (b) of the Act (29 U.S.C. §§ 160(a), (b) (1970)) is not based on the contractual rights of the parties but on the filing of unfair labor practice charges under sections 8(a)(3) and (1) (29 U.S.C. §§ 158(a)(3), (1) (1970)), alleging (1) employer discrimination in regard to a term or condition of employment to discourage union membership and (2) interference with, restraint, or coercion of employees in the exercise of their right to strike. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31 n.7 (1967); *Star Expansion Indus. Corp.*, 164 N.L.R.B. 563, 567 n.12 (1967), *petition for review denied sub nom. United Elec., Radio & Mach. Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969).

¹² 388 U.S. 26 (1967).

requirements, but withheld vacation pay from them while granting it to both non-strikers and those strikers who had abandoned the work stoppage.¹³ The Board held that denial of vacation pay to those employees who had not abandoned the strike constituted unlawful discrimination in violation of sections 8(a)(3) and (1) of the NLRA.¹⁴ The Fifth Circuit denied enforcement on the ground that there was insufficient evidence to support the Board's finding of unlawful motivation.¹⁵

Upholding the Board's order, the Supreme Court distinguished discriminatory employer conduct which is "inherently destructive" of employee rights from that which has only a "comparatively slight" effect on employee rights.¹⁶ If the challenged employer conduct falls into either category—if it is discriminatory conduct that has some adverse effect on employee rights—the employer must establish that he was prompted by substantial and legitimate business justifications.¹⁷ If the employer fails to meet this burden of explanation, he has violated section 8(a)(3) regardless of the category into which his conduct falls.¹⁸ Moreover, even if an employer comes forward with substantial and legitimate business justifications for conduct which is inherently destructive of employee rights, the Board, in an effort to strike a balance between the asserted business justifications and the invasion of employee rights, may find an 8(a)(3) violation by drawing an inference of improper motive.¹⁹ But if the employer advances substantial and legitimate business reasons for conduct with a comparatively slight effect

¹³ It was the contention of the employer that its obligation to pay vacation benefits terminated with the expiration of the contract and that its paying of vacation benefits to non-strikers was based on the adoption of a unilateral policy to pay vacation benefits to all employees who were at work on July 1, 1963, a date which coincided with the vacation eligibility date of the expired contract. 150 N.L.R.B. 438, 443 (1964), *enforcement denied*, 363 F.2d 130 (5th Cir. 1966), *rev'd*, 388 U.S. 26 (1967).

¹⁴ *Id.* at 438. Section 8(a)(3) states: "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1970). Discouraging membership in a labor organization has often been held to include discouraging participation in a strike. *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221, 233 (1963). Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . ." 29 U.S.C. § 158(a)(1) (1970). *See also* note 11 *supra*.

¹⁵ *Great Dane Trailers, Inc. v. NLRB*, 363 F.2d 130, 134-35 (5th Cir. 1966).

¹⁶ *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967).

¹⁷ *Id.* at 34.

¹⁸ *Id.*

¹⁹ *Id.* at 33-34.

on employee rights, anti-union motivation must be proved to sustain an 8(a)(3) charge.²⁰

In reinstating the Board's finding of an 8(a)(3) violation, the Court did not decide whether the withholding of accrued vacation pay from strikers constituted discriminatory conduct inherently destructive of employee rights or conduct with a comparatively slight effect on employee rights.²¹ The employer's discriminatory conduct was held to be violative of section 8(a)(3) because it had at least some adverse effect on employee rights and the employer did not meet his burden of proof by presenting substantial and legitimate business justifications for his conduct.²² Thus neither the Board nor the courts have decided into which category of discriminatory conduct the withholding of strikers' accrued vacation benefits falls.²³ However, the Board has consistently held in cases similar to *Great Dane* that where the employer fails to give sufficient business justifications for his conduct, the denial to strikers of vacation benefits earned before the strike is violative of sections 8(a)(3) and (1).²⁴ It would seem difficult, if not impossible, for an employer to advance substantial and legitimate business justification for withholding accrued vacation pay from strikers.²⁵

²⁰ *Id.* at 34.

²¹ *Id.*

²² *Id.* at 34-35.

²³ Under the *Great Dane* rationale it is not necessary to decide which category discriminatory conduct with an adverse effect on employee rights fits into until after the employer has advanced substantial and legitimate business justifications for his conduct. 388 U.S. at 34-35. Although the Seventh Circuit in dictum has stated that denial of accrued vacation benefits to strikers constitutes inherently destructive conduct, the cases cited do not support this conclusion. *System Council T-4 v. NLRB*, 446 F.2d 815, 819 (7th Cir. 1971).

²⁴ *Cavalier Div.*, 192 N.L.R.B. No. 37, 77 L.R.R.M. 1889 (Aug. 4, 1971); *McCann Steel Co.*, 191 N.L.R.B. No. 64, 77 L.R.R.M. 1783 (June 23, 1971); *Star Expansion Indus. Corp.*, 164 N.L.R.B. 563 (1967), *petition for review denied sub nom.* *United Elec., Radio & Mach. Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969); *Hoffman Beverage Co.*, 163 N.L.R.B. 981 (1967); *Jaycox Sanitary Serv., Inc.*, 161 N.L.R.B. 544 (1966); *MacMillan Ring-Free Oil Co.*, 160 N.L.R.B. 877 (1966), *enforcement granted in part on other grounds*, 394 F.2d 26 (9th Cir. 1968), *cert. denied*, 394 U.S. 914 (1969). The Board has also held, however, that an employer did not commit an unfair labor practice by granting vacations to non-strikers who did not qualify under the collective bargaining agreement while also granting vacation benefits to strikers, including one who did not qualify. *Sinclair Glass Co.*, 188 N.L.R.B. No. 33, 76 L.R.R.M. 1289 (Feb. 10, 1971).

²⁵ *See, e.g., Star Expansion Indus. Corp.*, 164 N.L.R.B. 563 (1967), *petition for review denied sub nom.* *United Elec., Radio & Mach. Workers v. NLRB*, 409 F.2d 150 (D.C. Cir. 1969).

II

ELIGIBILITY REQUIREMENTS

A. *Denial of Vacation Credit for the Period of the Strike*

Prior to *Great Dane*, the Board had held in *General Electric Co.*²⁶ that an employer's denial of vacation credits²⁷ to economic strikers for the period of the strike did not constitute a violation of sections 8(a)(3) and (1) even if the employer granted the credits to non-strikers who performed no actual work during the strike period.²⁸ The Board reasoned that deferred benefits such as paid vacations are actually a form of wages and stated, "It is axiomatic that the Respondent is not required under the Act to finance an economic strike against [Respondent] by remunerating the strikers for work not performed."²⁹ Therefore, no discriminatory conduct resulted from granting vacation credit to the non-working non-strikers. The Board found that non-strikers could be legally compensated for their employment in a standby capacity because they made their services available during the strike and were subject to the employer's call.³⁰ The same result was reached by the Board in *Mooney Aircraft, Inc.*,³¹ a pre-*Great Dane* case involving an unfair labor practice strike. In *Mooney Aircraft* nine unfair labor

²⁶ 80 N.L.R.B. 510 (1948).

²⁷ See note 10 *supra*.

²⁸ In his dissent, Board member Murdock stated that the majority's holding could not be reconciled with *Republic Steel Corp. v. NLRB*, 114 F.2d 820 (3d Cir.), *cert. denied*, 309 U.S. 684 (1940). 80 N.L.R.B. at 514 n.13 (dissenting opinion). Enforcing a Board order requiring reinstatement of unfair labor practice strikers "without prejudice to their seniority or other rights or privileges," the Third Circuit in *Republic Steel* held that the intentment of the order was that the continuous service of strikers should be computed as if they had actually worked during the strike period. 114 F.2d at 821. The court, however, did not actually award vacation credit for the period of the strike, because the Board's order required neither back pay of wages nor vacation pay for the strike period. What the court did hold was that the Board's order required that the unfair labor practice strike not be considered to constitute a break in a striker's overall length of service, the criterion determining the length of an employee's vacation. This is quite different from the Board's holding in *General Electric* that an employer does not have to grant vacation credit to economic strikers for the period of the strike. *Republic Steel* is also of limited precedential value since, as the Board noted, the Third Circuit was merely upholding the Board's discretionary power to remedy unfair labor practices. 80 N.L.R.B. at 512 n.5.

²⁹ 80 N.L.R.B. at 511.

³⁰ *Id.* at 512, citing *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946). As a matter of federal labor law policy, the Board stated that "an employer whose operations are strike-bound should be permitted to compensate non-strikers for their involuntary loss of time for the purpose of holding intact that portion of his working force." 80 N.L.R.B. at 512.

³¹ 148 N.L.R.B. 1057 (1964), *enforced*, 366 F.2d 809 (5th Cir. 1966).

practice strikers were denied all vacation benefits for a particular year because deduction of the time spent on strike resulted in their failure to fulfill the vacation eligibility requirement of one year's work.³² Relying upon *General Electric* and noting that unfair labor practice strikers are not awarded back pay for the period of the strike, the Board held that no violation of sections 8(a)(3) and (1) had been committed.³³

Unions have contended that *General Electric* and *Mooney Aircraft* were overruled sub silentio by the Supreme Court's decision in *Great Dane*;³⁴ the Board, however, has disagreed, holding with only a few exceptions that an employer is not required by law to treat strike time as time worked for the purpose of vacation eligibility.³⁵ The Board's *Great Dane* decision, which was adopted and amplified by the

³² *Id.* at 1059.

³³ *Id.*

³⁴ See System Council T-4 v. NLRB, 446 F.2d 815 (7th Cir. 1971), enforcing Illinois Bell Tel. Co., 179 N.L.R.B. 681 (1969); Kimberly-Clark Corp., 171 N.L.R.B. No. 82, 69 L.R.R.M. 1408 (May 24, 1968).

³⁵ Roegelein Provision Co., 181 N.L.R.B. No. 72, 73 L.R.R.M. 1396 (March 11, 1970); Illinois Bell Tel. Co., 179 N.L.R.B. 681 (1969), enforced sub nom. System Council T-4 v. NLRB, 446 F.2d 815 (7th Cir. 1971); Kimberly-Clark Corp., 171 N.L.R.B. No. 82, 69 L.R.R.M. 1408 (May 24, 1968); but see Tex Tan Welhausen Co., 172 N.L.R.B. No. 93, 70 L.R.R.M. 1206 (July 4, 1968), enforced, 419 F.2d 1265 (5th Cir. 1969), vacated and remanded on other grounds per curiam, 397 U.S. 819, modified on other grounds, 434 F.2d 405 (5th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

In *Tex Tan* the contractual vacation plan established vacation pay as a percentage of yearly salary and provided that all vacation pay would be forfeited for absences in excess of 280 hours during the qualifying year. The employer deducted time spent on an unfair labor practice strike in calculating absence. As a result, all of the strikers exceeded the minimum absence allowance and were denied vacation pay. 419 F.2d at 1271. Approving the Board's finding of a violation of sections 8(a)(3) and (1), the Fifth Circuit noted that unfair labor practice strikers deserve special protection and that the vacation plan automatically adjusted for strike time by basing benefits on a percentage of wages. *Id.* at 1271-72. Except for the built-in adjustment for non-working time in the vacation plan, this decision is inconsistent with other cases decided by the Board. In *Mooney Aircraft, Inc.*, 148 N.L.R.B. 1057 (1964), enforced, 366 F.2d 809 (5th Cir. 1966), the unfair labor practice strikers were not placed in an especially protected category. See text accompanying notes 31-33 *supra*. Moreover, the Board has held that an employer does not commit an unfair labor practice when he denies vacation benefits to strikers who have exceeded a contractual minimum absence allowance because of time spent on strike. *Roegelein Provision Co.*, 181 N.L.R.B. No. 72, 73 L.R.R.M. 1396 (March 11, 1970).

In *Hanley Dawson Chevrolet, Inc.*, 168 N.L.R.B. 944 (1967), the employer denied vacation benefits to employees who failed to fulfill the one-year employment eligibility requirement as a result of participating in a two-month strike. Adopting the trial examiner's decision, the Board found a violation of sections 8(a)(3) and (1). *Id.* at 950. This case is squarely in conflict with *Mooney Aircraft* and *Roegelein Provision*. The Board's holding is the result of reliance on *Quality Castings Co.*, 139 N.L.R.B. 928 (1962), enforcement denied, 325 F.2d 36 (6th Cir. 1963), a case reversed in part by the Sixth Circuit and of doubtful validity today. Note 67 *infra*.

Supreme Court, specifically distinguished *General Electric* by noting that the Board was not awarding vacation pay to strikers for any period of the strike, but was simply requiring that the same eligibility standards be adopted and enforced with regard to strikers and non-strikers.³⁶ Although *General Electric* involved denial, for the period of the strike, of eligibility credit for future vacation benefits, *Great Dane* was concerned with the withholding of accrued benefits in the face of conceded eligibility.

Subsequent to *Great Dane*, Board holdings that an employer is not required to grant vacation eligibility credit for the period of the strike have followed one of two approaches. One rationale holds that *General Electric* established that denial of vacation credit for the strike period is not discriminatory conduct and that the *Great Dane* principles cannot be invoked to impose a burden of explanation on the employer until his conduct has been shown by extrinsic evidence to be discriminatory.³⁷ Unfortunately, the issue is not so easily resolved. Denial of vacation credit for the period of the strike is clearly discriminatory conduct which has some adverse effect on employee rights; employees are discouraged from striking when forfeiture of vacation rights may result from failure to meet the minimum work requirements. The second rationale used by the Board is that although denial of vacation credit for the strike period is discriminatory conduct, it can usually be supported by substantial and legitimate business justifications.³⁸ This rationale conforms to reality and removes any doubt about the continuing validity of *General Electric* by applying the *Great Dane* principles to *General Electric*-type employer conduct.³⁹

³⁶ 150 N.L.R.B. 438, 439 n.2 (1964).

³⁷ See, e.g., *Kimberly-Clark Corp.*, 171 N.L.R.B. No. 82, at 13, 69 L.R.R.M. 1408 (May 24, 1968) (trial examiner's decision). Relying upon *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Third Circuit has specifically rejected the argument that the *Great Dane* principles can be applied only after discriminatory conduct has been proven. *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968), enforcing in part 161 N.L.R.B. 1089 (1966). In *Fleetwood Trailer*, the Supreme Court applied the *Great Dane* principles to an employer's refusal to reinstate strikers without first deciding whether the employer's conduct was discriminatory. The Court reasoned that refusal to reinstate strikers "is clearly no less destructive of important employee rights than a refusal to make vacation payments." 389 U.S. at 380. In the *Frick* case, the Third Circuit held that refusal to pay vacation benefits to strikers constitutes evidence of sufficient discrimination to require proof of substantial and legitimate business justifications. 397 F.2d at 962.

³⁸ E.g., *Illinois Bell Tel. Co.*, 179 N.L.R.B. 681, 685 (1969), enforced *sub nom.* *System Council T-4 v. NLRB*, 446 F.2d 815 (7th Cir. 1971). See text accompanying note 29 *supra*.

³⁹ More accurately, by a priori striking the balance in favor of business justifications, the Board effectively relieves the employer of much of his burden of asserting business justifications under *Great Dane* principles. While one might still contest the propriety

Most arbitrators have ruled that when a collective bargaining agreement contains any kind of minimum work requirement for vacation eligibility, vacation credits do not accrue during the strike period.⁴⁰ Much of the arbitrators' reasoning resembles that of the Board. Thus arbitrators have determined that a paid vacation is in the nature of deferred earnings and, like wages, vacation credits accumulate only when work is performed.⁴¹ Although arbitrators' awards are based on

of the Board's balancing, its authority to do so is unquestionable. *See* text accompanying note 18 *supra*. However, denial of vacation credit for the strike period would violate sections 8(a)(3) and (1) if the union could prove anti-union motivation.

⁴⁰ *Folding Carrier Corp.*, 53 Lab. Arb. 784 (1969) (Gorsuch, Arbitrator) (employer may deny service credit for period of strike); *Evening News Ass'n*, 53 Lab. Arb. 170 (1969) (Casselman, Arbitrator) (employer able to prorate vacations by withholding credit for period of strike when collective bargaining agreement required "regular full time employees" to complete various periods of continuous service to be eligible for vacations of differing lengths); *Northwest Airlines, Inc.*, 49 Lab. Arb. 1182 (1967) (Wolf, Arbitrator) (strikers not entitled to vacation credit for any part of strike under vacation clause allowing credit to accrue during first 30 days of absence even though contract provided that continuous service would not be broken by strike); *Union Carbide Corp.*, 49 Lab. Arb. 1180 (1967) (Cahn, Arbitrator) (strikers not entitled to vacation pay because they did not fulfill time worked requirement of contract even though strike settlement agreement waived loss of seniority and company service credit for strike period); *Motor Car Dealers Ass'n*, 49 Lab. Arb. 55 (1967) (Beatty, Arbitrator) (under contract granting vacation credit for excused absences, strike time does not constitute excused absence); *Richland Shale Brick Co.*, 49 Lab. Arb. 113 (1966) (Seinsheimer, Arbitrator) (employer entitled to deduct 1/52 of vacation pay for each week of strike under contract clause providing that after two-week allowance, 1/52 of vacation pay will be deducted for each week of absence or layoff); *Great Atl. & Pac. Tea Co.*, 43 Lab. Arb. 1 (1964) (Turkus, Arbitrator) (employer entitled to deduct time spent on strike for determining how much vacation, if any, employee entitled to under contract basing vacation eligibility on years of service); *Modcraft Co.*, 38 Lab. Arb. 1236 (1961) (Dall, Arbitrator) (employer able to deduct strike time in determining vacation pay under contract specifically basing vacation eligibility on "time worked"); *San Bruno Sportservice, Inc.*, 33 Lab. Arb. 837 (1959) (Ross, Arbitrator) (strike absences caused strikers not to qualify for vacation pay because they did not fulfill eligibility requirement of being in employ of employer for 75% of racetrack meeting); *Vickers, Inc.*, 27 Lab. Arb. 251 (1956) (Smith, Arbitrator) (under contract providing that vacation pay credits accumulate at stipulated rate per month, employer can deny vacation credits for time spent on strike); *United States Steel Co.*, 18 Lab. Arb. 519 (1952) (Blair, Arbitrator) (failure to fulfill eligibility requirement of receiving earnings in at least 60% of pay periods during qualifying year rendered strikers not qualified for paid vacation); *St. Louis Car Co.*, 5 Lab. Arb. 572 (1946) (Wardlaw, Arbitrator) (although contract provided that time spent on layoff is counted as time worked for vacation eligibility, strike time held not to be time worked).

⁴¹ *E.g.*, *Evening News Ass'n*, 53 Lab. Arb. 170, 175 (1969) (Casselman, Arbitrator); *Union Carbide Corp.*, 49 Lab. Arb. 1180, 1181 (1967) (Cahn, Arbitrator); *San Bruno Sportservice, Inc.*, 33 Lab. Arb. 837, 839-40 (1959) (Ross, Arbitrator). The theory that vacations are a gratuity from the employer to provide rest and therefore to improve employee efficiency is no longer popular. *See, e.g.*, *Union Carbide Corp.*, 49 Lab. Arb. 1180, 1181; *San Bruno Sportservice, Inc.*, 33 Lab. Arb. 837, 839-40; *cf. Mallet & Co.*, 34 Lab. Arb. 428 (1960) (Wood, Arbitrator); D. ALLEN, FRINGE BENEFITS: WAGES OR SOCIAL OBLIGATION? (1964).

their interpretation of the contract and the intention of the parties, public policy is sometimes relied upon to interpret ambiguous contract provisions.⁴² Some awards thus reflect a view that, since a strike constitutes the mutual withdrawal of services and compensation,⁴³ an employer required to count strike time as time worked for purposes of vacation eligibility would in effect be required to subsidize a strike against himself.⁴⁴ Therefore, before they will make such an award, most arbitrators have required specific contract language providing that vacation credits accrue for the strike period. One arbitrator even expressed his surprise that such a vacation grievance was filed and stated that "by no stretch of the imagination can I be persuaded that a strike . . . can be considered other than time off from work . . ."⁴⁵

Some arbitrators' imaginations can apparently be stretched since a small number have allowed strike time to be treated as time worked for the purpose of vacation eligibility.⁴⁶ A few of these awards are well reasoned, relying heavily upon the past practice of the parties and the circumstances surrounding the strike, such as a company policy state-

⁴² I must conclude that the agreement did not provide vacation credit during a strike. This conclusion is supported by sound public policy and labor relations practice. The purpose of the strike is to test in the crucible of deprivation whether the positions of either side will be changed. If strikes have any validity in our society, it is that they demonstrate that the members of the union are so convinced that their position is correct that they are willing to forego all the economic benefits of their employment in order to demonstrate their sincerity and the employer is willing to forego all economic benefits it may enjoy from their employment. It would be anomalous indeed if the employees were to retain some of their collective [sic] bargained benefits while they fully deprive the employer of the fruits of operating its business.

Northwest Airlines, Inc., 49 Lab. Arb. 1182, 1185-86 (1967) (Wolf, Arbitrator).

⁴³ Evening News Ass'n, 53 Lab. Arb. 170, 175-76 (1969) (Casselmann, Arbitrator).

⁴⁴ Folding Carrier Corp., 53 Lab. Arb. 784, 791 (1969) (Gorsuch, Arbitrator); Motor Car Dealers Ass'n, 49 Lab. Arb. 55, 56 (1967) (Beatty, Arbitrator); cf. text accompanying note 29 *supra*.

Although strikers retain their status as employees under Section 2(3) of the NLRA (29 U.S.C. § 152(3) (1970)), it has been noted that retention of employee status during a strike connotes a bare employment relationship and vacation credits accumulate only when active work is performed. San Bruno Sportservice, Inc., 33 Lab. Arb. 837, 838-40 (1959) (Ross, Arbitrator). The employment status of strikers has been analogized to that of employees on medical leaves of absence. An employee on medical leave of absence also maintains his employee status but is rarely entitled to vacation pay based on his time away from work. *Id.* at 839-40.

⁴⁵ Richland Shale Brick Co., 49 Lab. Arb. 113, 117 (1966) (Seinsheimer, Arbitrator).

⁴⁶ Detroit Free Press, 52 Lab. Arb. 1134 (1969) (Alexander, Arbitrator); Barrett Transp., Inc., 52 Lab. Arb. 169 (1969) (Koven, Arbitrator); Mobil Oil Co., 42 Lab. Arb. 102 (1963) (Forsythe, Arbitrator), *rev'd sub nom.*, Local 7-644, Oil, Chem. & Atomic Workers Union v. Mobil Oil Co., No. 64-44 (E.D. Ill. Oct. 26, 1964), *rev'd and enforced*, 350 F.2d 708 (7th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); Hydraulic Press Mfg. Co., 40 Lab. Arb. 689 (1963) (Dworkin, Arbitrator); Ford Motor Co., 33 Lab. Arb. 638 (1959) (Platt, Arbitrator); Hess-Dubois Cleaners, 19 Lab. Arb. 200 (1952) (Allen, Arbitrator).

ment to preserve the status quo.⁴⁷ On the other hand, one award was based on the notion that vacation credit must be granted for the period of the strike because the parties did not provide otherwise in their collective bargaining agreement.⁴⁸ Since labor and management rarely deal with strikes when setting forth vacation eligibility provisions,⁴⁹ and because the thrust of other decisions and awards is towards denial of vacation credit, this argument is not persuasive.

In *Hess-Dubois Cleaners*⁵⁰ the arbitrator determined that by waiving a continuous service eligibility requirement the parties intended to waive a time worked requirement as well.⁵¹ Yet, if the parties had intended to have vacation credits accrue for the period of the strike, it would not have been necessary to provide that the strike would not break continuity of service.⁵² At the time of negotiating the contract, the parties were, or should have been, aware that two separate requirements existed for vacation eligibility and that waiving the continuous service requirement would not logically waive the time worked requirement.

B. *Effect of a Strike upon Overall Length of Service*

Two periods of time have to be accounted for in most vacation systems: (1) the employee's overall length of service, to determine his basic entitlement to a vacation of specified length, and (2) the working time an employee has accumulated in the qualifying year to determine

⁴⁷ *E.g.*, Ford Motor Co., 33 Lab. Arb. 638 (1959) (Platt, Arbitrator). In Mobil Oil Co., 42 Lab. Arb. 102 (1963) (Forsythe, Arbitrator), the use of the words "active service" in the vacation eligibility provision indicated that vacation credits would accrue only for the actual performance of work; but the arbitrator held that since the employer did not prorate for the part of the strike that occurred during the prior eligibility year, he could not do so for the succeeding year. In Detroit Free Press, 52 Lab. Arb. 1134 (1969) (Alexander, Arbitrator), the arbitrator relied on the employer's past practice of granting vacation credit for a strike period; he also stressed, however, that the contract provided for proration of vacation benefits for leaves of absence but did not mention strikes. See text accompanying note 49 *infra*. The arbitrator in Barrett Transp., Inc., 52 Lab. Arb. 169 (1969) (Koven, Arbitrator), relied on the lack of contractual authorization to deny credit for the strike period; but his award was supported by a strike settlement agreement that provided for retroactivity of the terms of the new agreement to a date prior to the beginning of the strike.

⁴⁸ Hydraulic Press Mfg. Co., 40 Lab. Arb. 689 (1963) (Dworkin, Arbitrator).

⁴⁹ Text accompanying note 9 *supra*.

⁵⁰ 19 Lab. Arb. 200 (1952) (Allen, Arbitrator).

⁵¹ *Id.* at 203.

⁵² In deciding that the collective bargaining agreement did not provide for accrual of vacation credit during the strike period despite the existence of a contractual stipulation that continuous service would not be broken by a strike, the arbitrator in Northwest Airlines, Inc., 49 Lab. Arb. 1182, 1185 (1967) (Wolf, Arbitrator), reached a conclusion contrary to *Hess-Dubois*.

if he is eligible to enjoy his basic entitlement. As with withdrawal of a reinstated striker's job seniority,⁵³ an employer would be hard-pressed to advance substantial and legitimate business reasons for depriving strikers of accrued overall length of service for vacation purposes.⁵⁴

A more difficult question is whether strike time must be added to an employee's overall length of service in computing basic entitlement. In setting forth overall length of service provisions, labor and management variously use words such as "continuous service," "continuous employment," "service," and "seniority."⁵⁵ This terminology is imprecise and can lead to confusion. For example, while the Board decided in *General Electric* that refusal to grant vacation credit for the strike period did not constitute an unfair labor practice, it also held that "tolling the seniority of the strikers during their participation in the strike, and at the same time permitting other employees to accrue seniority" did violate sections 8(a)(3) and (1).⁵⁶ The Board reasoned that, unlike vacation credits which constitute compensation for work performed, relative job seniority affects tenure of employment, and the employment relationship of a reinstated striker cannot be impaired because he engaged in protected concerted activity.⁵⁷

Job seniority, however, is a concept entirely different from length of service for vacation purposes.⁵⁸ An employer should not be required

⁵³ See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. No. 174, 70 L.R.R.M. 1433 (March 18, 1969), enforced, 427 F.2d 983 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *Laidlaw Corp.*, 171 N.L.R.B. No. 175, 68 L.R.R.M. 1252 (June 19, 1968), enforced, 414 F.2d 99 (7th Cir.), cert. denied, 397 U.S. 920 (1969); *California Date Growers Ass'n*, 118 N.L.R.B. 246 (1957), modified and enforced, 259 F.2d 587 (9th Cir. 1958); *Olin Mathieson Chem. Corp.*, 114 N.L.R.B. 486 (1955), enforced, 232 F.2d 158 (4th Cir. 1956), aff'd per curiam, 352 U.S. 1020 (1957). A similar problem was presented in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), when the Supreme Court upheld the Board's finding that granting superseniority to non-strikers and strike replacements is conduct that is inherently destructive of employee rights and thus violative of sections 8(a)(3) and (1).

⁵⁴ Overall length of service earned prior to the work stoppage is as much an earned right as "job seniority" and accrued vacation pay or credits. See text accompanying notes 21-25 *supra*.

⁵⁵ The parties frequently use the same words when setting forth the minimum work requirement, which causes confusion in differentiating the two distinct requirements of minimum work and overall length of service. See note 62 *infra*.

⁵⁶ 80 N.L.R.B. at 512.

⁵⁷ *Id.* at 513.

⁵⁸ As admitted by both the Union and the Respondent . . . , continuous service credit did not itself constitute compensation. Nor was it *per se* a condition of employment. It was simply a basis for the determination of certain real benefits, such as [job] seniority, vacations, and pensions It follows that the legality of the various effects of Respondent's action upon the conditions and tenure of employment of its employees must be considered separately.

Id. at 511 (footnote omitted).

by law to count strike time in determining an employee's basic vacation entitlement—"vacation seniority." The right to a certain vacation length, like vacation credits for minimum work requirements, constitutes deferred earnings for work performed. Although additional entitlement is admittedly based upon greater length of service, at this point similarity ends between "seniority" for vacation purposes and "seniority" as used by the Board in *General Electric*. Job seniority affects the position of one employee vis-à-vis his fellow employees in regard to such matters as relative status for layoffs. When used to determine eligibility for additional units of paid vacation, "seniority" affects the employer-employee relationship rather than the relative status of employees, and therefore does not relate to tenure of employment.⁵⁹

One arbitrator has specifically dealt with the effect of a strike upon vacation "seniority."⁶⁰ As a matter of federal labor law, rather than contract interpretation, the arbitrator decided that the employer could not withdraw the "seniority" that strikers had accrued prior to the work stoppage and therefore could not treat the strike as a break in continuity of employment and the reinstated strikers as new employees.⁶¹ He also held, however, that strike time should not be counted towards vacation "seniority," because to do so would be unfair to those employees who did not strike and would cause the employer to subsidize a strike against himself.⁶²

⁵⁹ If seniority is used to determine employee choice of vacation time, however, it would affect employee interrelationships. The Board has held that a contract clause that gave strike replacements and employees who abandoned the strike superseniority with respect to choice of vacation times violated sections 8(a)(3) and (I). *Great Lakes Carbon Corp.*, 152 N.L.R.B. 988 (1965), *petition to set aside order denied*, 360 F.2d 19 (4th Cir. 1966).

⁶⁰ *Folding Carrier Corp.*, 53 Lab. Arb. 784 (1969) (Gorsuch, Arbitrator).

⁶¹ 53 Lab. Arb. at 790, 792.

⁶² *Id.* at 791. Arbitrators have uniformly determined that strikes do not cause a loss of length of service accrued prior to the work stoppage. *E.g.*, *Folding Carrier Corp.*, 53 Lab. Arb. 784 (1969) (Gorsuch, Arbitrator); *Marathon Rubber Prods. Co.*, 6 Lab. Arb. 238 (1947) (Gilden, Arbitrator); *Greyhound Bus Co.*, 1 Lab. Arb. 596 (1946) (Simkin, Arbitrator). Some cases, however, are misleading. Although the arbitrators state that the strike resulted in a break in continuous service, they actually mean that vacation credits do not accrue for the period of the strike. *Vindicator Printing Co.*, 48 Lab. Arb. 213 (1966) (Smith, Arbitrator); *Denver Upholstered Furniture Mfrs.*, 42 Lab. Arb. 929 (1964) (Seligson, Arbitrator); *Stearns Coal & Lumber Co.*, 1 Lab. Arb. 274 (1946) (Dwyer, Arbitrator). The confusion is attributable to the frequent use of the words "continuous service" by labor and management when setting forth both the overall length of service and minimum working time requirements. *See* note 55 *supra*.

C. *Effect of Vacation Eligibility Date Falling Within the Strike Period*

Many vacation eligibility clauses stipulate a cutoff date for determining overall length of service and amount of working time in the current year.⁶³ It is also common for vacation eligibility dates to be established by provisions requiring employees to be listed on the payroll or in the continuous employ of the employer on a certain date to qualify for vacation benefits.⁶⁴ The Board has consistently rejected employer attempts to deny earned vacation benefits to strikers on the ground that they failed to be at work on the vacation eligibility date. However, of the two approaches the Board has used to reach this result, only one is reconcilable with the prevalent deferred compensation-earned benefit rationale underlying other vacation eligibility decisions.

In 1966 the Board, in *Frick Co.*,⁶⁵ adopted a trial examiner's recommended order holding that an employer's denial of vacation benefits based on strikers' absences on the eligibility date was violative of sections 8(a)(3) and (1) because the employer had equated strike time with unexcused absence.⁶⁶ This rationale clearly conflicts with

⁶³ *E.g.*, Brynmore Press, Inc., 8 Lab. Arb. 511, 514 (1947) (Rains, Arbitrator). This date is commonly referred to as the "vacation eligibility date," "vacation qualifying date," or "vacation anniversary date."

⁶⁴ *E.g.*, Smith v. Kingsport Press, Inc., 366 F.2d 416 (6th Cir. 1966), *rev'g* 233 F. Supp. 643 (E.D. Tenn. 1964); Duncan Foundry & Mach. Works, Inc., 176 N.L.R.B. No. 31, 71 L.R.R.M. 1225 (June 5, 1969), *enforced*, 435 F.2d 612 (7th Cir. 1970).

⁶⁵ 161 N.L.R.B. 1089 (1966), *enforced in part*, 397 F.2d 956 (3d Cir. 1968).

⁶⁶ The trial examiner found a violation of sections 8(a)(3) and (1) on the alternative grounds that the employer had either equated strike time with an unexcused absence or had demonstrated anti-union motivation. *Id.* at 1108. The court enforced the Board's order on the grounds that the employer's conduct presented sufficient evidence of discrimination to invoke the *Great Dane* principles and that the employer failed to advance substantial and legitimate business justifications.

The Board's holding in *Frick* was based on its earlier decision in *Quality Castings Co.*, 139 N.L.R.B. 928 (1962), *enforcement denied*, 325 F.2d 36 (6th Cir. 1963), that although an employer cannot be required to make profit sharing distributions to employees based on strike time, he cannot treat strike time as a normal absence; thus strikers were held not to forfeit all of their profit sharing for the year for failure to fulfill the eligibility requirement of having worked 50% of the scheduled work periods during the qualifying year. Two Board members dissented on the ground that fringe benefits are a form of deferred earnings based upon the performance of work and that employees forfeit their contractual rights to fringe benefits if they fail to meet the contractually established eligibility requirements because of strike time. *Id.* at 935. The dissenters noted that attendance affects profits and an employee who has been absent for more than half of the scheduled work periods is likely to have detracted from rather than contributed to the earning of profits. *Id.*

The Sixth Circuit set aside and denied enforcement of the Board's order in *Quality Castings Co. v. NLRB*, 325 F.2d 36 (6th Cir. 1963). Although the case preceded *Great Dane*, the court's analysis indicates the outcome had the case arisen after 1967. Whether

the Board's holdings and characterization of vacation benefits as deferred earnings in *General Electric* and *Mooney Aircraft*.⁶⁷ The only reasonable explanation for the holdings in *General Electric* and *Mooney Aircraft* is that an employer may equate strike time with unexcused absence.⁶⁸ Subsequent Board decisions equating strike time with unexcused absence have cast further doubt on the *Frick* rationale.⁶⁹

The second approach adopted by the Board in denying employers the use of cutoff dates to withhold vacation benefits is that strikers may fulfill the eligibility date requirement since, even though they are not actively at work, they retain their status as employees during the strike under section 2(3) of the NLRA.⁷⁰ While this rationale clearly solves the problem when the eligibility provision is worded merely as a cutoff

the employer's conduct is inherently destructive of employee rights or only has a comparatively slight effect on employee rights, the 50% attendance forfeiture rule is supported by a substantial and legitimate business justification. If the employer's conduct falls into the latter category, a section 8(a)(3) charge cannot be sustained because anti-union motivation does not exist since the forfeiture rule was applied to strikers and non-strikers alike. Even if the employer's conduct is inherently destructive of employee rights, there is no section 8(a)(3) violation since the balance should be struck in favor of the asserted business justification, because an employer is "entitled to require a minimum amount of work and consequent profit creation before it permit[s] an employee to participate in profit sharing." *Id.* at 43.

⁶⁷ *Mooney Aircraft, Inc.*, 148 N.L.R.B. 1057 (1964), *enforced*, 366 F.2d 809 (5th Cir. 1966); *General Elec. Co.*, 80 N.L.R.B. 510 (1948); text accompanying notes 28-33 *supra*.

⁶⁸ If a collective bargaining agreement contains a minimum work requirement for vacation eligibility, it in effect requires absence not to exceed a stipulated length.

Relying on *Frick*, the Board has also held that an employer violated sections 8(a)(3) and (1) by refusing to grant vacation pay to strikers who were absent on vacation eligibility dates and "who but for the fact that they were on strike would have received such pay." *Flambeau Plastics Corp.*, 167 N.L.R.B. 735, 745 (1967), *enforced*, 401 F.2d 128 (7th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969). But the strikers in *Mooney Aircraft* would also have received vacation pay but for their strike.

⁶⁹ In *Kimberly-Clark* the Board adopted the trial examiner's decision and agreed with his interpretation of the *General Electric* holding that "an employer need not remunerate strikers for work not performed, means simply that it is no more discriminatory for an employer to deny compensation for absence due to strike than to deny it for any other period of absence." 171 N.L.R.B. No. 82, at 14, 69 L.R.R.M. 1408 (May 24, 1968) (trial examiner's decision). A vacation eligibility clause examined in *Roegelien Provision Co.*, 181 N.L.R.B. No. 72, 73 L.R.R.M. 1396 (March 11, 1970), provided that employees forfeited all vacation pay if absent for more than 200 hours during the vacation qualifying year. Counting strike time as unexcused absences, the employer denied strikers vacation pay for the year because they exceeded the 200-hour limit. *Id.* at 1-2. Although the trial examiner relied on the *Frick* rationale to find a violation of sections 8(a)(3) and (1), the Board reversed his decision, upholding the employer's equation of strike time with unexcused absences on the grounds that the vacation eligibility clause was the product of collective bargaining and that during negotiations it was made clear to the union that strike time would be equated with unexcused absences. *Id.* at 1-2, 5, 6.

⁷⁰ *Duncan Foundry & Mach. Works, Inc.*, 176 N.L.R.B. No. 31, at 4, 71 L.R.R.M. 1225 (June 5, 1969), *enforced*, 435 F.2d 612 (7th Cir. 1970).

date, it is of limited usefulness when the clause requires active employment on the eligibility date. The Sixth Circuit, however, has indicated that literal application of an eligibility clause requiring active work, rather than mere employee status, on the qualifying date would be a violation of sections 8(a)(3) and (1) unless the employer could justify it in terms of substantial and legitimate business interests.⁷¹ An employer would be hard-pressed to advance such business interests because, unlike other eligibility requirements, vacation eligibility dates are established primarily for administrative convenience in determining vacation eligibility and are not related to the performance of work. Strike dates, as opposed to the length of strikes, have little relation to employee contributions for purposes of earned benefits such as vacations.⁷²

In the three arbitration cases considering the effect of a vacation eligibility date falling within the strike period, the arbitrators agreed that the contracts in question only required employment status on the eligibility date rather than actual performance of work.⁷³

CONCLUSION

In *General Electric* and *Mooney Aircraft*, the Board adopted a deferred compensation-earned benefit theory for paid vacations and held that federal labor law does not require an employer to grant vacation credit to strikers for the period of the work stoppage. Most arbitrators have interpreted collective bargaining agreements to reach the same result. *Great Dane* generally delineated a set of principles placing a burden of explanation on employers engaging in discriminatory conduct and specifically held that the withdrawal of accrued vacation benefits from reinstated strikers must be justified by substantial and legitimate business reasons. It follows from this that accrued overall length of service cannot be withdrawn from reinstated strikers without the employer meeting a severe and perhaps impossible burden of

⁷¹ *Smith v. Kingsport Press, Inc.*, 366 F.2d 416, 418 (6th Cir. 1966), *rev'g* 233 F. Supp. 643 (E.D. Tenn. 1964) (vacation eligibility clause required employees to be on payroll on certain date).

⁷² However, an employer should be able to justify an eligibility date requiring the active performance of work on the basis of substantial and legitimate business interests (1) if the nature of his business is seasonal, or (2) if the clause was negotiated into the contract to inhibit strikes at particularly critical times for the employer, such as during periods of heavy customer demand.

⁷³ *H.K. Porter Co.*, 49 Lab. Arb. 147 (1967) (Cahn, Arbitrator); *Brynmore Press, Inc.*, 8 Lab. Arb. 511 (1947) (Rains, Arbitrator); *St. Louis Car Co.*, 5 Lab. Arb. 572 (1946) (Wardlaw, Arbitrator).

explanation. Similarly, the fortuitous circumstance of the vacation eligibility date falling within the strike period does not result in a forfeiture of vacation benefits unless an eligibility clause requiring active work on the qualifying date can be shown to be justified in terms of substantial and legitimate business interests. Yet an employer should not be required by law to count strike time in computing overall length of service to determine eligibility for additional units of paid vacation.

Ned H. Bassen