

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ERIE BRUSH & MANUFACTURING
CORP.

Case 13-CA-43530-1

And

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1

Jessica Willis Muth, Esq., for the General Counsel.
Irving M. Geslewitz and Lorne T. Saeks, Esqs.
(Much Shelist Freed Denenberg Ament & Rubenstein, P.C.)
of Chicago, Illinois, for Respondent.
Alexia M. Kulweic, Esq., Chicago, Illinois, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on November 29, 2006. The Union, Service Employees International Union, Local 1, filed the charge in this matter on July 28, 2006 and the General Counsel filed his Complaint on October 24, 2006.

The General Counsel alleges that Respondent, Erie Brush and Manufacturing Corp., violated Section 8(a)(5) and (1) of the Act in failing and refusing to bargain with the Union. More specifically, he alleges that beginning about May 10, 2006, Respondent demonstrated a fixed intent to delay bargaining by insisting that the parties agree to all non-economic issues before it would bargain over economic issues. Additionally, the General Counsel alleges that as a result of the conduct above, Respondent violated the Act by withdrawing recognition from the Union and refusing to bargain with it after July 6, 2006.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact¹

I. Jurisdiction

Respondent manufactures car wash and polishing brushes at its facility in Chicago, Illinois. It 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ The General Counsel's December 15, 2006 and Respondent's January 15, 2007 motions to correct the transcript are hereby granted.

II. Alleged Unfair Labor Practices

The certification of the Union and prior litigation.

5 On January 14, 2003, the NLRB conducted a representation election at Respondent's facility in an appropriate bargaining unit consisting of all full time and regular part time production and maintenance employees. Twenty five out of twenty seven eligible voters participated in the election. Eighteen voted in favor of representation by the Union; five voted against such representation and there were two challenged ballots.

10 Respondent filed three objections to conduct allegedly affecting the results of the election. The Board conducted a hearing on these objections on February 13, and 14, 2003. The hearing officer recommended that all three objections be overruled. Respondent filed exceptions to the hearing officer's report. The Board also overruled the objections, although modifying the hearing officer's rationale with respect to two of the three. As a result, the Board certified the Union as the exclusive bargaining representative of unit employees on July 18, 2003. The Union requested bargaining on August 18, 2003, but Respondent refused to do so. The Union thereafter filed an unfair labor practice charge and the General Counsel issued a Complaint alleging a Section 8(a)(5) and (1) violation, which the Board found in a decision issued on December 31, 2003, (340 NLRB 1386).

20 The Board sought enforcement of its order in the United States Court of Appeals for the Seventh Circuit. The Court issued its opinion on May 2, 2005, *NLRB v. Erie Brush and Mfg. Corp.*, 406 F.3d 795 (7th Cir. 2005), enforcing the Board's order requiring Respondent to bargain with the Union.

25 *The instant litigation*

Following the Court of Appeals decision, the Union renewed its bargaining demand to Respondent on May 18, 2005. Bargaining commenced on June 28, 2005. Union Vice-President Charles Bridgemon was the principal spokesman for the SEIU and Respondent's attorney, Irving Geslewitz, was the principal spokesman for Erie Brush. Oscar Sandoval, a union business representative, also participated in the negotiations. No bargaining unit employee attended any of the meetings.

30 The parties met on eight occasions between June 28, 2005 and March 31, 2006. They agreed to discuss non-economic issues first.² Respondent and the Union reached tentative agreement on all these issues, except whether the contract would include a union security clause and whether unresolved grievances should go to arbitration, or conversely through the court system. On March 31, 2006, Bridgemon observed that the parties were at impasse with respect to these two issues.

40 At the March 31 meeting, Bridgemon suggested the parties go to mediation. On April 5, 2006, Geslewitz informed Bridgemon by email that Respondent would not agree to a union security clause and that it saw no point in going to mediation since the Union did not have flexibility on this issue.

45 On May 10, Bridgemon asked Geslewitz via email to begin negotiations on economic issues.³ Geslewitz responded on May 26, that there was no point to meeting further due to the Union's lack of flexibility on the union security and arbitration issues. Bridgemon replied that he would be willing to

² The Union's initial proposal contained some economic proposals. On June 28, 2005, Geslewitz suggested discussion of these issues be deferred. Bridgemon, who may have initially suggested that the parties discuss non-economic issues first, agreed.

50 ³ There was no contact between Respondent and the Union between April 5, and May 10, 2006.

discuss the two issues with his principals and suggested that the parties bargain about economic issues and revisit the union security and arbitration issues later.

5 On June 1, Geslewitz again reiterated his view that further negotiations were pointless unless the Union authorized Bridgemon to change position with regard to union security and an arbitration clause. The next day, Bridgemon emailed Geslewitz advising that he had some flexibility on the arbitration issue and reiterated his request for a resumption of negotiations.

10 On June 16, 2006, Union Counsel Alexia Kulwicz wrote Geslewitz opining that Respondent's refusal to meet further unless the Union agreed to an open shop was a violation of its duty to bargain in good faith. She advised Geslewitz that the Union might file an unfair labor practice charge if Respondent continued to refuse to negotiate further with the Union. On June 22, Geslewitz called Bridgemon to schedule a bargaining session for July 12, 2006.⁴ The parties subsequently postponed the meeting until sometime after July 24, due to Geslewitz's and Union Representative Sandoval's schedules.

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The decertification petition

20 On or about July 5, 2006, Bargaining Unit Employee Miroslava Onofre handed a petition to Respondent's President, Daniel Pecora. This document, R. Exhibit 8, contains the names of eighteen of the twenty-one unit employees and states in Spanish that the employees no longer wish to be represented by the Union. Pecora called Attorney Geslewitz, who called Bridgemon to inform him that Respondent was withdrawing recognition from the Union. Geslewitz followed up the telephone call with a letter to this effect, GC Exh. 16, which also cancelled the pending resumption of collective bargaining negotiations.

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30 Neither the General Counsel nor the Union has challenged the authenticity or validity of the decertification petition and neither presented the testimony of any bargaining unit employees at this hearing. Indeed, the General Counsel's position is that the circumstances under which the petition was developed is totally irrelevant to this case. Nevertheless, I note that on the face of the document, it appears that one or more employees put more than one name on the document in several instances.

35 It is clear that from the testimony of unit employees Miraslava Onofre and Margarita Salgado that the idea for the decertification petition originated on or about the day on which the Union's certification year expired and not from bargaining unit employees. On the other hand, it appears that the Union had virtually no contact with any bargaining unit employees during the certification year. In light of this and the lack of evidentiary development surrounding the decertification petition, I am compelled to take the petition at face value. The issue before me then is whether Respondent is entitled to withdraw recognition of the Union on the basis of this petition.

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Analysis

45 The General Counsel litigated the instant case solely on the theory that Respondent violated Section 8(a)(5) and (1) in refusing to negotiate on economic issues, unless the Union dropped its demand for a union security clause. Further the General Counsel contends that Respondent was not privileged to withdraw recognition due to this violation. He also argues that since Respondent refused to bargain, it is irrelevant as to whether there is any evidence of a causal relationship between Respondent's unfair labor practice and the Union's loss of majority support.

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⁴ Geslewitz indicated a willingness to resume negotiations in a June 21 email and had left Bridgemon a telephone message sometime before that email.

It is black letter Board law that an employer may not condition bargaining over economic issues upon resolution of all non-economic issues. Thus, an employer may not legally insist that a union agree to an open shop before agreeing to negotiate economic issues, *Vanderbilt Products*, 129 NLRB 1323 (1961) enfd. 297 F.2d 833 (2d Cir. 1961); *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986); *South Shore Hospital*, 245 NLRB 848 (1979) enfd. 630 F.2d 40 (1st Cir. 1980); also see *Eastern Maine Medical Center*, 253 NLRB 224, 245 (1980) enfd. 658 F.2d 1 (1st Cir. 1981); *Northwest Graphics, Inc.*, 342 NLRB 1288 n. 24 (2004). In the instant matter, after refusing to do so for 6-7 weeks, Respondent agreed to negotiate regarding economic issues in late June, a few days before the expiration of the certification year and the gathering of signatures for the decertification petition. However, no bargaining sessions were held between May 10, 2006, when Respondent unlawfully refused to bargain with the Union and its withdrawal of recognition.

The instant case is governed by the Board's decision in *Lee Lumber & Material Corp.*, 322 NLRB 175 (1996) and thus the absence of evidence of a casual relationship between the loss of majority support and Respondent's unfair labor practice is, as the General Counsel asserts, irrelevant.

In *Lee Lumber*, the employer violated the Act in refusing to bargain on the basis of a decertification petition tainted by its unfair labor practices. Then the lumber company reconsidered and bargained with the Union on five occasions during a two month period. Afterwards, it refused to bargain further on the basis of a second decertification petition. It determining that the second refusal to bargain was unlawful, the Board stated:

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the casual relationship between the unlawful act and subsequent loss of majority support may be presumed.

322 NLRB at 177.

The Board went on to hold that while it was not adopting a *per se* rule, it would allow an employer to rebut this presumption in limited circumstances. The Board's rationale in limiting the ability to rebut the presumption was stated in this quotation from its decision in *Karp Metal Products*, 51 NLRB 621, 624 (1943):

[e]mployees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.

The Board also noted in *Lee Lumber* that lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Thus, delays in bargaining caused by an employer's unlawful refusal to bargain will foreseeably result in loss of employee support whether or not employees know what caused the delay. Thus the Board found that the presumption of unlawful taint caused by a general refusal to bargain can only be rebutted by a showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices, 322 NLRB at 177-78.

Respondent argues that it did not violate the Act because the parties had reached a lawful impasse by March 31, 2006 and that therefore it did not violate the Act by refusing to bargain further. Citing *Richmond Electrical Services*, 348 NLRB No. 62 (October 24, 2006) and *CalMat Co.*, 331 NLRB 1084, 1097 (2000), Respondent argues that the deadlock regarding a union security clause was of “such overriding importance” that it was entitled to refuse further bargaining. However, the Board has never sanctioned the refusal of a party to continue negotiations without ever engaging in bargaining over economic issues. There can be no lawful impasse when a party refuses to engage in negotiations concerning wage rates.⁵

Moreover, the cases cited by Respondent are situations in which the employer had bargained over both economic and non-economic issues, and then implemented its final offer due to a deadlock on a single issue. Respondent’s situation is distinguishable. It could not have implemented a final proposal because it had never made one that covered wages.

Respondent has not rebutted the presumption enunciated in *Lee Lumber*. It has not established that the Union lost support of a majority of employees after it notified the Union of its willingness to resume bargaining. Indeed, unlike the employer in *Lee Lumber*, Respondent never resumed bargaining with the Union and thus had never cured its unfair labor practice.

The Board stated in *Lee Lumber* that one of the reasons for its presumption and rule limiting an employer’s ability to rebut the presumption was to “to remove from the employer the temptation to avoid its bargaining duties in the hope that delay will undermine employees’ support for the union.” While there is no way of knowing whether Respondent’s employees would have sought to decertify the Union had Respondent not violated the Act, its refusal to bargain certainly delayed the consideration of economic issues until the expiration of the certification year.

Although this record suggests a lack of diligence on the part of the Union in staying in touch with unit employees, it is possible that had the employer engaged in good faith bargaining with the Union when it requested negotiations on economics, that the Union could have reaffirmed the support of a majority of unit employees by reporting to them progress on such issues. Moreover, one cannot presume that in the face of overall agreement on economic issues that the Union would not rethink its position regarding a union security clause.

Therefore, Respondent must be required to recognize the Union and bargain in good faith with it for a reasonable period of time of not less than six months.⁶ Then, if unit employees still choose to dispense with union representation, they can initiate another decertification petition.⁷

Conclusions of Law

1. Between May 10, 2006 and June 21, 2006, Respondent was in violation of Section 8(a)(5) and (1) by refusing to bargain with the Union unless the Union agreed to an open shop.

⁵ Respondent’s position, as set forth in footnote 9 of its brief, amounts to the proposition that the Union was required to agree to an open shop before Respondent was required to engage in bargaining over economic issues. There is no Board precedent to support such a proposition.

⁶ *Lee Lumber*, 334 NLRB 399 (2001).

⁷ Conversely, there is no adverse consequence to unit employees, in terms of their free choice, in requiring Respondent to bargain with the Union for an additional reasonable period—other than the fact that Respondent may not be able to make unilateral changes in the terms and conditions of their employment during this period.

2. Unit employees' decertification petition of July 3, 2006, was tainted by Respondent's aforesaid violation of the Act.

3. Respondent was therefore not privileged to withdraw recognition of the Union on July 6, 2006 on the basis of the July 3 petition and has been in violation of Section 8(a)(5) and (1) ever since.

Remedy

Having found that the Respondent 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.

Affirmative Bargaining Order

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a) (5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act over-ride the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. A balancing of the three factors warrants an affirmative bargaining order.

First, an affirmative bargaining order vindicates the employees' Section 7 rights by providing the employees, who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition, with the opportunity to negotiate and execute an initial collective bargaining agreement. The May 2005 court of appeals order required Respondent to bargain in good faith for at least one year in order to vindicate the Section 7 rights of employees who chose union representation in the January 2003 representation election. Respondent failed to accord these employees the benefit of their free choice.

At the same time, an affirmative bargaining order does not unduly burden the Section 7 rights of employees who might oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the Respondent's unlawful withdrawal of recognition and unlawful refusal to bargain.

Second, an affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it gives the parties a reasonable period of time to resume negotiations and to execute a collective-bargaining agreement if those negotiations are successful. It also ensures that the Union will not be pressured, by the possibility of another challenge to its majority status, to achieve immediate results at the bargaining table—results that might not serve the best interests of the bargaining unit employees.

Third, a cease-and-desist order without the temporary bar on challenges to the Union's majority status attendant to an affirmative bargaining order would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain violations because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of

recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the Union's need to reestablish its representative status with unit. These circumstances outweigh the temporary impact an affirmative bargaining order will have on the rights of those employees who oppose continued union representation.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

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The Respondent, Erie Brush and Manufacturing Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Failing and refusing to recognize and bargain with the Union as the exclusive representative of a bargaining unit of all full-time and regular part-time production and maintenance employees at its Chicago facility.

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(b) Until a lawful impasse has been reached, failing and/or refusing to bargain with the Union unless the Union agrees to withdraw any specific proposal during collective bargaining negotiations, including, but not limited to, a union security clause.

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

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

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(a) On request, bargain for a reasonable period of time, of not less than six months, with the Union as the exclusive representative of its full-time and regular part-time production employees, and if an understanding is reached, embody the understanding in a signed agreement.

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(b) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix"⁹ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 May 10, 2006.

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⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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⁹ 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."

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(a) 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.

5 Dated, Washington, D.C., January 26, 2007.

Arthur J. Amchan
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT condition bargaining with the Union, the Service Employee International Union, Local 1 (SEIU), on the Union's withdrawal of any specific proposals, including, but not limited to a proposal for a union security clause.

WE WILL NOT fail and refuse to bargain with the Union until either agreement has been reached on a collective bargaining agreement or a lawful impasse has occurred.

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 recognize and, on request, bargain for the Union for a reasonable period of time, of not less than six months, until either an agreement has been reached on a collective bargaining agreement or a lawful impasse has occurred.

ERIE BRUSH & MANUFACTURING CORPORATION

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

209 S. LaSalle St., Suite 900

Chicago, Illinois 60604

Hours: 8:30 a.m. to 5 p.m.

312-353-7570.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170

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