Winn-Dixie Stores, Inc. *and* United Food and Commercial Workers International Union, AFL-CIO.[1]
Case 12 CA 6434

August 2, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

Upon a charge filed by United Food and Commercial Workers International Union, AFL-CIO (herein called the Charging Party or the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on May 17, 1978, against Winn-Dixie Stores, Inc. (herein called Respondent). Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on Respondent and the Charging Party. In substance the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in an appropriate unit by, on or about July 7, 1974, at which time no impasse in bargaining existed, unilaterally and over the Union's protest granting a wage increase of from 56 to 81 cents per hour to the unit employees.

The amended answer duly filed by Respondent substantially admits the jurisdictional and factual allegations of the complaint, but denies the commission of any unfair labor practices.

On September 2, 1978, the Charging Party, the General Counsel, and Respondent entered into a stipulation in which they agreed that certain documents shall constitute the entire record herein[2] and that no oral testimony is necessary or desired by any of the parties. Thus, the parties expressly waived all intermediate proceedings before an administrative law judge and petitioned that this case be transferred to the Board for the purpose of making findings of fact and conclusions of law and issuing an appropriate Order, reserving to themselves only the right to exercise any post-Board Order rights to which they may be entitled.

By order dated November 16, 1978, the Board approved the stipulation, transferred the proceeding to itself, and set a date for the filing of briefs. Thereafter, Respondent filed a brief which has been duly considered by the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record herein as stipulated, by the parties, as well as the brief filed by Respondent, and makes the following findings and conclusions:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Winn-Dixie Stores, Inc., is a Florida corporation engaged in the business of operating a multistate chain of retail grocery stores with its home office in Jacksonville, Florida. Respondent, in the course and conduct of its business, annually receives gross revenue in excess of $500,000 and annually ships goods and materials valued in excess of $50,000 from its Florida warehouse directly to points outside the State of Florida. The complaint alleges, the answer admits, and we find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The question presented is whether Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting a wage increase to employees represented by the Union.

B. *The Facts*

On April 8, 1974, Respondent submitted a wage proposal to the Union as part of a proposed compromise in an attempt to settle an earlier case[3] concerning the same parties and bargaining unit involved herein. The parties were unable to settle the earlier case and thus the wage proposal was not implemented at that time.

[1] The name of the Charging Party, formerly Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Association and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

[2] The stipulated record consists of the charge, complaint, answer, and the stipulation and attached exhibits.

[3] *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976).

By letters sent to Respondent and dated April 17 and 25, 1974, respectively, the Union requested a date for the purpose of collective bargaining. By letter dated May 3, 1974, Respondent proposed a meeting in early June. Respondent further proposed that the wage increase proposed on April 8, 1974, "be put into effect immediately without prejudice to further bargaining on the subject." The Union responded to this request by a letter dated May 6, 1974, in which it rejected the offer to institute the wage increase, requested resumption of bargaining, and stated its desire to bargain with Respondent not only for "wage increases but increases in pensions, vacations, hospitalization, and other fringe benefits as well as terms and conditions of employment."

Respondent and the Union met on June 24, 1974, for the purpose of collective bargaining. At this meeting the Union requested several different items of information, such as names of unit employees with more than 20 years of service, the current benefits offered by Respondent under its health insurance program, a copy of crew averages, copies of all written reprimands, an update of a previously submitted list of new hires and terminations, a copy of the turnover report, and the hours worked for each shift by department for the month of June 1974. During this meeting the parties discussed the current collective-bargaining contract[4] item by item and there was agreement on certain contract items but no major change in position by either party. Each side essentially restated its previous position on all major open items of the contract. Further, the parties discussed Respondent's wage proposal which Respondent sought to implement immediately with the understanding that such implementation would not foreclose further bargaining on wages of any other subject matter of collective bargaining. Respondent stated that it was anxious to implement the wage proposal immediately because the unit employees had not received a wage increase in 18 months and such an increase would keep Respondent's wage rates competitive with other employers in the area. The Union would not agree to the implementation of the wage increase and instead wanted to reach agreement on the following items before giving any pay raise: night premium pay, holiday, vacations, pension plan, health and welfare, an arbitration.

The parties met again on July 1 and 2, 1974, essentially covering the same ground and reaching the same results as they did at the June 24, 1974, meeting. At the July 2 meeting Respondent advised the Union that it was implementing the proposed wage increase effective July 7, 1974, and suggested that the parties post a joint notice of the wage increase advising the employees that this was an interim wage increase and that wages and all items in the contract were still subject to current negotiations. The Union rejected this proposal and advised Respondent that if the wage increase was implemented the Union would file an unfair labor practice charge. Thereafter, further discussion ensued and again there was agreement and counterproposals by both parties on items in the contract. The meeting adjourned with the parties mutually agreeing to set the date for the next meeting by correspondence; however, no further negotiations were held in 1974.

Effective July 7, 1974, Respondent implemented the aforementioned wage increase.

C. *Contentions of the Parties*

As stated, the complaint alleges that Respondent unlawfully granted a wage increase to unit employees. Neither the General Counsel nor the Union has filed a brief herein. In its brief, Respondent contends that a unilateral change in wages or working conditions by an employer during collective bargaining, in the absence of an impasse, does not *per se* establish a failure of the duty to bargain. Rather, Respondent argues unilateral changes may be proper if the Union is given notice of the changes and an opportunity to discuss them and make counterproposals.

D. *Discussion*

It is well settled that an employer violates Section 8(a)(5) of the Act by, during the course of negotiations with its employees' bargaining representative and at a time when no impasse exists, instituting unilateral changes in terms and conditions of employment.[5]

Respondent concedes that there was no impasse at the time it unilaterally granted the wage increase at issue here, but contends that its implementation of the change was lawful despite the absence of impasse because the Union was afforded notice and an opportunity to bargain. Thus, Respondent argues that by providing the bargaining representative with notice of the proposed wage increase and with an opportunity to make couterproposals it satisfied its statutory bargaining obligation. Respondent relies on, *inter alia*,

[4] Although the collective-bargaining agreement discussed at this meeting expired February 1972, by its terms it was still being applied at all times material herein.

[5] *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962); *Atlas Tack Corporation*, 226 NLRB 222 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977); *Federated Publications, Inc., d/b/a The Enquirer and News*, 221 NLRB 778 (1975), enfd. 555 F.2d 144 (6th Cir. 1977). See also *Dust-Tex Service, Inc.*, 214 NLRB 398, 406 (1974).

Winn-Dixie Stores, Inc. v. *N.L.R.B.*, 567 F.2d 1343 (5th Cir. 1978),[6] to support this contention. In that case, the Company had, prior to instituting a wage increase, notified the Union and met with it in a bargaining session at which the Union made counterproposals but refused to assent to the increase. The Board found that the implementation of the wage increase violated Section 8(a)(5) and (1) of the Act; however, the court denied enforcement of the Board's Order in this regard, citing its decisions in *N.L.R.B.* v. *Tex-tan, Inc.*,[7] and *A. H. Belo Corporation (WFAA TV)* v. *N.L.R.B.*[8] The court stated (567 F.2d at 1349):

> It seems clear that Winn-Dixie has complied with its statutory duty to bargain. Before implementing the change, it gave the union notice of its desire to raise wages and met with the union in a bargaining session at which the union presented counterproposals.

Although we have accepted the court's decision as the law of that case, we respectfully disagree with the court's conclusion limiting the obligation of an employer to bargain with the representative of its employees prior to implementing a unilateral change. Our view that, absent extenuating circumstances, an employer must bargain to impasse prior to implementing unilateral changes in working conditions[9] is supported by the Supreme Court's statement in *N.L.R.B.* v. *Katz*, *supra*, that:

> A refusal to negotiate *in fact* as to any subject which is within §8(d), and about which the union seeks to negotiate, violates §8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal.[10]

We recognize that in *N.L.R.B.* v. *Katz* the unilateral wage increase found to have violated Section 8(a)(5) of the Act was granted without notice to the union and that in the instant case Respondent notified the Union of its desire to grant a wage increase and in fact met with the Union three times prior to implementing the change. We conclude, however, that the requirement that the parties reach impasse before a unilateral change may be lawfully implemented, rather than merely discuss a proposed change, is in accord with the basic tenets established by the Court in *N.L.R.B.* v. *Katz*, as quoted above, and by Congress in enacting Section 8(d) of the Act.

Indeed, under the Fifth Circuit Court of Appeals' interpretation of the bargaining obligation, an employer would be entitled to change unilaterally any term or condition of employment, regardless of the status of negotiations with its employees' collective-bargaining representative, as soon as the representative was notified of the intended change and given an opportunity to discuss it. By utilizing this approach with respect to various employment conditions *seriatim*, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the bargaining representative of its employees and itself.

We do not believe that this method of "bargaining" satisfies the definition of the duty to bargain collectively stated in Section 8(d) of the Act as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Instead, under this approach, form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled. In consequence, meaningful collective bargaining is precluded and the role of the bargaining representative is effectively vitiated. We cannot endorse an approach so clearly in disparagement of the collective-bargaining process.

Bargaining presupposes negotiations—with attendant give and take—between parties carried on in good faith with the intention of reaching agreement through compromise. As Professor Cox noted: "The duty to bargain—to meet and treat—was imposed in the hope that negotiations would lead to the kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement."[11] Clearly this duty requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little

[6] Enfg. in part and denying enforcement in part to *Winn-Dixie Stores, Inc.*, *supra*.

[7] 318 F.2d 472, 479 (1963).

[8] 411 F.2d 959, 970–971 (1969), cert. denied 396 U.S. 1007 (1970).

[9] The possibility that extenuating circumstances could justify unilateral action was explicitly noted by the Supreme Court in *N.L.R.B.* v. *Katz*, *supra* at 748. Although Respondent represented to the Union that the reason for its wage proposal was that it had been 18 months since the employees had received a wage increase and such an increase was necessary to keep its wage rates competitive with other employers in the area, Respondent has predicated its defense on the proposition that it satisfied whatever bargaining obligation it had prior to implementing the change by providing the Union with notice and an opportunity to discuss and make counterproposals. Thus, while Respondent refers to these reasons as a "business emergency," the thrust of its defense is that it bargained. In any event, we find that the record is inadequate to support a compelling business justification defense excusing Respondent's unilateral action.

[10] 369 U.S. at 743.

[11] Cox, "The Duty to Bargain in Good Faith," 71 Harv. L. Rev. 1401, 1433 (1958).

more than a ritual or *pro forma* approach to bargaining and hardly constitute the "kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement."[12]

We find here that Respondent's conduct concerning the wage increase falls within the above description of ritual or *pro forma* bargaining. The facts show that, from the time it announced its wage proposal, Respondent intended to implement the increase regardless of whether the Union agreed or objected to it. Thus, the Respondent stressed that the proposed increase would be "put into effect immediately." When the Union rejected the proposal and suggested bargaining first as to other related "money" matters such as premium pay and benefits, Respondent adhered to its position and at the parties' meeting on July 2 in effect informed the Union that the increase would be implemented with or without the Union's acquiescence. In these circumstances, and in the absence of an impasse, Respondent's offer "to bargain" about the wage increase was really more in the nature of a proposal that the Union accept the increase "or else." In other words, the Union was not so much presented with an opportunity to bargain about the wage increase as it was afforded a chance to give approval to Respondent's decision to grant it.[13] Even under the most permissive or limited view of the bargaining process, such conduct on the part of Respondent did not constitute good-faith bargaining, and we so find.

On the basis of all the foregoing, we find no merit to Respondent's contention that it satisfied its obligation to bargain with the Union prior to granting the wage increase, and conclude that Respondent refused to bargain with the Union as the exclusive representative of the unit employees, at a time when no impasse in bargaining existed, by unilaterally granting a wage increase and that, by so doing, Respondent violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[12] *Ibid.* at 1433.

[13] Consequently, Respondent's assertion to the Union that granting the wage increase would not foreclose future bargaining is immaterial to the determination that Respondent unlawfully implemented it.

CONCLUSIONS OF LAW

1. Winn-Dixie Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees engaged in the receiving, shipping, and processing of all food and sundry products at the Employer's warehouse at Jacksonville, Florida; excluding all employees in the meat and cheese processing and packaging department, all garage and mechanical maintenance employees, carpenters, regular maintenance personnel, truckdrivers and helpers, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. United Food and Commercial Workers International Union, AFL-CIO, has been and is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all its employees in the appropriate unit, by, on or about July 7, 1974, at which time no impasse in bargaining existed, unilaterally granting a wage increase, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that the Respondent, Winn-Dixie Stores, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Making unilateral wage increases, in derogation of its bargaining obligation, to its employees represented by United Food and Commercial Workers International Union, AFL-CIO, in the appropriate bargaining unit described below; provided, however, that nothing herein shall require Respondent to vary such minimum salary schedules as are already established. The appropriate unit is:

> All employees engaged in the receiving, shipping, and processing of all food and sundry products at the Employer's warehouse at Jacksonville, Florida; excluding all employees in the meat and cheese processing and packaging department, all garage and mechanical maintenance employees, carpenters, regular maintenance personnel, truckdrivers, and helpers, office clerical employees, guards, and supervisors as defined in the Act.

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

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

(a) Upon request, bargain collectively and in good faith with the above-named labor organization, as the exclusive representative of all the employees in the unit described above.

(b) Post at its warehouse in Jacksonville, Florida, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unilaterally implement wage increases for employees in the bargaining unit described below without first engaging in collective bargaining with United Food and Commercial Workers International Union, AFL-CIO, although this does not mean we are now required to lower any minimum salary schedules presently established for these employees. The unit is:

> All employees engaged in the receiving, shipping, and processing of all food and sundry products at the Employer's warehouse at Jacksonville, Florida; excluding all employees in the meat and cheese processing and packaging department, all garage and mechanical maintenance employees, carpenters, regular maintenance personnel, truckdrivers and helpers, office clerical employees, guards, and supervisors as defined in the Act.

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

WE WILL, upon request, bargain collectively and in good faith with the above-named labor organization as the exclusive representative of all the employees in the unit described above.

WINN-DIXIE STORES, INC.