

Peterson Builders, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Petitioner. Case 30-RC-2273

November 27, 1974

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on April 18, 1974, under the direction and supervision of the Regional Director for Region 30 of the National Labor Relations Board among the employees in the stipulated unit. Following the election, a tally of ballots was furnished the parties. The tally shows that of approximately 332 eligible votes 308 cast votes in the election, of which 122 were for the Petitioner, 166 were against the Petitioner, and 20 were challenged. The challenged ballots are not sufficient in number to affect the election results. On April 23, 1974, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director investigated the objections and found merit in Objections 1 and 2. He therefore recommended that they be sustained, that the election conducted be set aside, and that a new election be conducted. Thereafter, the Employer filed timely exceptions and a supporting brief to the Regional Director's report and recommendation.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. We find, in accord with the stipulation of the parties, that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its Sturgeon Bay, Wisconsin, location including in-plant inspection employees; excluding all office clerical employees, administrative employees, managerial employees, allowance specialists, cleaning ladies, technical employees, professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Petitioner's objections,¹ the Regional Director's report, and the Employer's exceptions and brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations, for the reasons stated below.

In Objections 1 and 2, the Petitioner alleges:

1. The Employer threatened, coerced and intimidated its employees through letters and captive audience meetings; all calculated to interfere with its employees rights to engage in Union activity, and to exercise a free choice in the election.
2. The Employer threatened employees with economic reprisals if the Union won the election.

The Regional Director found that these two objections related to essentially the same conduct, two letters of the Employer sent to the employees during the critical period, and a speech delivered by the Employer's president from prepared text on April 17, the day before the election. The objectionable material in the letters and prepared text of the speech is excerpted and quoted below. On page 3 of the March 29 letter, the Employer stated:

If the majority votes yes, collective bargaining begins from "scratch", with *NO benefits now enjoyed automatically becoming part of any contract*. Any requests must be bargained and approved by the PBI and the Union at the bargaining table. This procedure may take a long time. Lets keep the team that has been successful, *together*.

On page 2 of the April 15 letter, the Employer asked and answered the following question:

EMPLOYEE QUESTION 6: If the Union wins the right to represent us, will the usual May 1 considerations be given as in the past?

ANSWER: NO, if the Union wins the NLRB certifies the Union, *collective bargaining begins and there would be no adjustments of any kind until a master contract was agreed upon by PBI. First contracts sometimes take months to work out.*

In his prepared speech to the employees on April 17, the day before the election, the Employer's President Peterson with regard to the matter of wages stated as follows:

For the last 15 consecutive years PBI has granted an annual wage increase to each employee. Each of you must know that we are trying to provide good stable employment and good wages for each of our employees. As per our employee manual considera-

¹ Petitioner withdrew Objection 3 on May 22, 1974

tions and changes have gone into effect the Monday nearest the first of May. If you vote the union in, that adjustment would become a bargainable item—it would not be automatic. We could not give any member of the bargaining unit any adjustment until bargaining was completed.

There has been a lot of discussion by the company and union about this year's May first adjustment. If the union wins, the company will sit down and bargain with the union and attempt to reach an agreement on the first contract. It's the law and we intend to be lawful. Any adjustment must be bargained. It is common knowledge that first contracts often require many months of bargaining before agreement is reached. As an example both Bay Ship and Marinette Marine bargained for months before their seven month and seven week strike. [Emphasis supplied.]

At page 11 of the same speech, Peterson said:

If the Boilermakers receive a majority of votes tomorrow, they will have the right to represent you for collective bargaining and my hands will be tied from dealing directly with you and *from making our usual voluntary adjustments as we have done for the last 15 years each May 1.* [Emphasis supplied.]

Peterson did not specifically refer to the "bargaining from scratch" matter in his speech.

The Regional Director found that the Employer has had in effect for the past 15 consecutive years an annual wage and benefit "consideration" program, through which it evaluates area wage data, its own workload and financial situation, and then grants annual upward adjustments in wages and/or benefits. The results are announced to the employees and the increases then become effective the Monday closest to May 1 each year. While the amount and nature of the increases have varied, there has been some increment each year.

The Regional Director further found that the Employer's remarks on the May 1 considerations, as interlaced with the reference to "bargaining from scratch," could reasonably have been interpreted by employees to mean that they would not receive their historically established increases, and possibly would even lose existing benefits, in the event they chose to be represented by the Union. He further found that the references to the possibility of lengthy negotiations and a lengthy strike reinforced this conclusion; that the inference to be drawn by the employees was that the Employer would, by its own conduct, delay resolution of the bargaining process, thereby delaying the employees' receipt of increases, if any. According to the Regional Director, the employees were confronted with the fol-

lowing dilemma: elect the Union and then forgo their normal wage and benefit considerations pending lengthy negotiations; or, in the alternative, vote against the Union and receive the increases as usual. He therefore concluded that under all the circumstances, including the obvious importance to employees of wage and benefit increases during a period of considerable price inflation, the Employer's statement constituted an implied threat of economic reprisal and interfered with the exercise of free choice.² He therefore recommended that Objections 1 and 2 be sustained, the election be set aside, and new election be held.

The Employer has excepted to these findings, contending, *inter alia*, that the Regional Director's conclusion simply ignores the realities of labor relations; that the employees in the instant case had to know that if they voted for the Union on April 18 that any and all changes subsequent to that date relating to wages and fringe benefits would first have to be bargained with the Union; that in all probability contract negotiations would not be completed by April 29, the date they would have received their annual May adjustment, because it usually takes many months to negotiate a first contract.

We agree with the Regional Director's conclusions and recommendations. It is clear that the Employer told the employees, on the day before the election, that if the Union won the election the next day, the Employer would retaliate by forthwith abolishing its automatic 15-year-old policy of evaluating its existing wage structure and adjusting its wage rates in conformance with the evaluation.

The Employer, however, argues in its brief that its remarks cannot be construed as an implied threat, because from the moment the Union would be elected and certified, the Employer would be under a statutory duty to bargain with the Union. Therefore, its representations were "precisely congruent with its duty" to bargain under the Act. And in this contention the Employer is supported by our dissenting colleagues, who refer us to the Supreme Court decision in *N.L.R.B. v. Benne Katz*, 369 U.S. 736 (1962).

It is true that in the *Katz* case the Supreme Court upheld the Board's position that a discretionary merit wage increase is a subject of mandatory bargaining, and that an employer's unilateral change in this condition

² The Regional Director cited *Gary Aircraft Corporation*, 193 NLRB 108 (1971), wherein the Board adopted the Trial Examiner's Decision to the effect (1) that the employer's speech therein clearly threatened that if the union won the election, the company would discontinue all evaluation increases during contract negotiations, falsely stating that such a wage freeze was required by law, (2) that the impact of the threat was magnified by the statement that contract negotiations would last from 3 months up to 3 years, whereas if the company won the election, the evaluation procedures and pay raises would continue, (3) that the speech therefore contained a threat of reprisal which interfered with the employee's free choice of representation, and (4) that the election should therefore be set aside.

of employment violates Section 8(a)(5). But, in so holding the Supreme Court stated that “the raises here in question were . . . informed by a large measure of discretion. There simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.”³ In other words, contrary to our colleagues’ view, the Supreme Court did not hold that once a collective-bargaining agent is selected, the employer must discontinue preexisting benefits and practices. The Court held that an employer with a past history of a merit increase program may no longer continue to unilaterally exercise his discretion with respect to such increases, once the union is selected. But, on the other hand, as we held in *Southeastern Michigan Gas Company*, 198 NLRB No. 8 (1972), neither does the law sanction an employer’s discontinuance of its past practice of a merit increase program.⁴ As we said in *Oneita Knitting Mills, Inc.*, 205 NLRB 500 (1973):

What is required is a maintenance of preexisting practice, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

In the instant case the Employer did not merely warn its employees that the amount of the increases would have to be submitted to the Union, if it won the election, prior to implementation. Instead, the Employer threatened the employees with the complete abrogation of the increases and of the annual program of evaluation of its competitor’s wages and its own financial condition which provide the basis for its discretionary award of wage increases. It is precisely this unilateral abrogation of a preexisting program which is not required, indeed is forbidden, by the law. *Southeastern Michigan, supra*; *Oneita Knitting Mills, supra*. The Employer’s statement made the day before the election that it intended to unilaterally cancel even the general outline of a 15-year-old program, due in just a few short weeks, if and solely because the Union won the impending election, reasonably could have coerced the employees in their choice in the next day’s election. We therefore find no merit in the Employer’s exceptions and adopt the Regional Director’s findings, conclusions, and recommendations.

³ *N.L.R.B. v. Katz*, 369 U.S. 736 at 746-747

⁴ *The Udylyte Corporation*, 183 NLRB 163 at 170 (1970), *A. H. Belo Corporation (WFAA-TV)*, 170 NLRB 1558 at 1565 (1968)

Accordingly, we shall set aside the election conducted on April 18, 1974, and shall direct the holding of a new election in the unit found appropriate herein.

ORDER

It is hereby ordered that the election conducted herein on April 18, 1974, among certain employees of Peterson Builders, Inc., be, and it hereby is, set aside and this proceeding be, and it hereby is, remanded to the Regional Director for Region 30 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

CHAIRMAN MILLER and MEMBER PENELLO, dissenting:

In our view, our colleagues are setting aside this election because, during the preelection period, the Employer advised employees of his intention to comply with the law, as the Board and the Courts have interpreted it. We cannot agree with this holding.

The election was conducted April 18, 1974. Every year previously, for about 15 years, the Employer had announced to employees in May—at approximately the time this Union, if it won, could expect to be certified—its wage plans for the coming year. The Employer would annually evaluate wage data from other employers in the area, as well as its own workload and financial situation, and arrive at a conclusion with respect to wage and benefit increases. As indicated, the outcome of the Employer’s survey would customarily be communicated to employees about May 1.

This year the Employer told the employees on April 15 that, “if the Union wins . . . collective bargaining begins and there would be no adjustments of any kind until a master contract was agreed upon . . .” The day before the election, the Employer explained:

. . . If you vote the union in, [the] adjustment would become a bargainable item—it would not be automatic. We would not give any member of the bargaining unit any adjustment until bargaining was completed.

There has been a lot of discussion by the company and union about this year’s May first adjustment. If the union wins, the company will sit down and bargain with the union and attempt to reach an agreement on the first contract. Its the law and we intend to be lawful. Any adjustment must be bargained . . .

. . . If the Boilermakers receive a majority of votes tomorrow, they will have the right to represent you for collective bargaining and my hands

will be tied from dealing directly with you and from making our usual voluntary adjustments as we have done for the last 15 years each May 1.

In excepting to the Regional Director's recommendation that the election be set aside, the Employer argues that its representations were "precisely congruent with its duty" to bargain under the Act. We fully agree.

The Supreme Court, in *N.L.R.B. v. Katz*, 369 U.S. 736 (1962), considered, in the context of Section 8(a)(5), various aspects of an employer's duty to bargain. The employer in *Katz* had made certain unilateral changes with respect to existing sick leave benefits, wages, and merit increases. The Supreme Court distinguished between earlier programmed automatic increases and the discretionary-type increases there involved, concluding that:

Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases (at 746-747).

The Court found the Company's actions in unilaterally

⁵ See, e.g., *Armstrong Cork Company v. N.L.R.B.*, 211 F.2d 843 (C.A. 5, 1954), and *N.L.R.B. v. Dealers Engine Builders, Inc.*, 199 F.2d 249 (C.A. 8, 1952), cited by the Supreme Court in *Katz*, *supra*.

⁶ *Gray Line, Inc.*, 209 NLRB No. 17 (1974) (Chairman Miller dissented on grounds of de minimis), *O'Land, Inc. d/b/a Ramada Inn South*, 206 NLRB 210 (1973), *Oneita Knitting Mills, Inc.*, 205 NLRB 500 (1973), *The Hartford Fire Insurance Company*, 191 NLRB 563 (1971), enf'd 456 F.2d 201 (C.A. 8, 1972), *Gladwin Industries, Inc.*, 183 NLRB 280, 296 (1970), *Bierl Supply Company*, 179 NLRB 741 (1969), *The Little Rock Downtowner, Inc.*, 168 NLRB 107 (1962), enf'd 414 F.2d 1084 (C.A. 8, 1969), and scores of other cases too numerous to mention.

⁷ Note, for example, the following findings of an Administrative Law Judge in *J.H. Rutter-Rex Manufacturing Company, Inc.*, 164 NLRB 5, at 12.

Admittedly wage increases of 10 cents to 25 cents were granted to the Columbus warehouse employees between July 28 and August 3

granting wage and benefit increases to be violative of Section 8(2)(5).

The Supreme Court's opinion in *Katz* followed numerous Board opinions to the same effect,⁵ and has in turn been cited by the Board on numerous occasions since.⁶ As these cases show, after a union is certified, discretionary increases not previously announced must be negotiated with the collective-bargaining representative; not only is the employer free to withhold them, but indeed he *must* withhold them. The increases involved in the present case were typical, across-the-board discretionary-type increases, resulting from the employer's evaluation of competitors' wages and its own financial situation. Were the employer to have given them to employees unilaterally, after the union was certified, we have no doubt whatever that, based on the above-cited precedents, the Board would have found the employer guilty of 8(a)(5) conduct.⁷ If our colleagues are now holding that an employer, after a union is certified, may adjust wages unilaterally, they ought clearly to overrule all outstanding precedent which is overwhelmingly to the contrary; if not, we see no basis for setting aside the election. It is absurd to say that employees must be kept in the dark about the requirements of the law with respect to collective bargaining. Yet, that is precisely what the majority is holding.

Accordingly, since the Employer's statement regarding "bargaining from scratch" did not threaten to take away existing benefits, we would not set aside the election based on Objections 1 and 2, but would remand for a hearing on the evidentiary conflicts referred to by the Regional Director.

Respondent had determined in April or May, on the basis of studies previously made, that a general wage increase should be granted to all its factory and warehouse employees. About July 12, this increase was introduced at all Respondent's factories. The increase at the Columbus warehouse was held in abeyance upon receipt of the demand of Local No. 3027 for recognition on July 21. However, it was granted shortly after July 28, because Respondent felt that it would be unfair to withhold it any longer. Respondent's evidence on this issue is credited. Nevertheless, I find this increase in wages constitutes an unlawful refusal to bargain as it is a unilateral change in wages made while the Union represented a majority. This is so regardless of the Employer's good faith in taking such action. *N.L.R.B. v. Benne Katz, etc.*, 369 U.S. 736, and cases cited in footnote 11, *Mid-West Towel & Linen Service, Inc.*, 143 NLRB 744, 754-755, aff'd 339 F.2d 958 (C.A. 7).

The above findings were adopted in their entirety by the Board.