

Alsey Refractories Company and Laborers International Union of North America, AFL-CIO, Local Union No. 253. Case 14-CA-7842

December 16, 1974

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

On July 11, 1974, Administrative Law Judge Benjamin B. Lipton issued the attached Decision in this proceeding. Thereafter the Respondent filed exceptions and a supporting brief.

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 record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Alsey Refractories Company, Alsey, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ We affirm the conclusion reached by the Administrative Law Judge that the Respondent ran afoul of the Act by unilaterally instituting a general wage raise, as the parties herein had not reached an impasse in negotiations at the time the increase was put into effect. However, we do not deem relevant to such a determination, nor do we adopt, the Administrative Law Judge's observation that the "Respondent was not warranted in assuming that the Union had abandoned any desire for continued negotiations

" Rather, we rely on what we believe to be a correct standard in determining deadlock in this case, namely, that the Respondent was not warranted in assuming that further bargaining would have been futile. The Administrative Law Judge so found, and we agree. See *Taft Broadcasting Co., Inc.*, 163 NLRB 475, 478 (1967), *aff'd sub nom American Federation of Television and Radio Artists, AFL-CIO*, 395 F 2d 622 (C A D C., 1968)

DECISION

STATEMENT OF THE CASE

BENJAMIN B. LIPTON, Administrative Law Judge: This proceeding was heard on May 20, 1974,¹ in St. Louis, Missouri, upon a complaint by the General Counsel² alleging certain violations of Section 8(a)(1) and (5) of the Act.

On the entire record, the briefs filed by General Counsel

¹ Dates are sequentially in 1973 and 1974, unless otherwise specified

² The complaint issued on April 26 based on the Union's charge filed on March 11 and amended on April 18

and Respondent, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I JURISDICTION AND LABOR ORGANIZATION

Respondent is engaged in the manufacture, sale, and distribution of fire brick and related products at its plant in Alsey, Illinois. During the calendar year 1973, Respondent had a direct outflow in interstate commerce of products from its Alsey plant valued in excess of \$50,000. Respondent admits, and I find, that it is engaged in commerce, and that the Union is a labor organization, within the meaning of the Act.

II THE UNFAIR LABOR PRACTICES

A. *Issues*

1. Whether a general wage raise, unilaterally instituted by Respondent during initial bargaining negotiations with the certified Union, violated Section 8(a)(5). In particular, the question turns on whether the parties had reached a true impasse on the subject of wages.

2. Whether Respondent threatened striking employees with discharge and with loss of vacation benefits in violation of Section 8(a)(1).

B *The Wage Increase*

On July 10, following an election, the Union was certified as exclusive representative in an appropriate unit of production and maintenance employees at Respondent's Alsey plant. After several telephone conversations between John M. Evans, the Union's international representative, and Ralph Edwards, Respondent's attorney, the first bargaining session was scheduled for September 6. At this meeting, and those subsequently held, Evans was the spokesman for the Union, with a committee of about five employees, and Edwards was spokesman for Respondent, accompanied by President Louis Goltermann, Sr., Vice President Louis Goltermann, Jr., and Plant Manager James Riggs.

On September 6, the Union's contract proposals consisting of 22 articles were discussed in detail. On wages, the Union requested an hourly increase of 30 cents per year for a contract term of 1 or 2 years. Respondent proposed an hourly increase of 5 cents per year effective on January 1, 1974, 1975, and 1976. The parties agreed to seven or eight articles of noneconomic content. The next session was set for September 21.

On September 21, after concessions made on both sides, agreement was extended to all but 10 articles, which were essentially of a money character. Positions on a wage increase were unchanged. A date was designated for the next meeting.

On October 4, the negotiations consumed about 20 minutes. The parties reviewed and maintained their same positions. Time was devoted in discussing Respondent's disclosure that employees would be laid off this winter, as in past years, by reason of a shortage of supply to Respondent of natural gas.³ It was mutually decided to call a Federal

mediator to sit in at the next session, which was scheduled for October 17. Following the formal session, as they had agreed, Evans and Edwards privately met in the coffeeshop. Edwards said he would try to persuade his principals to make some position change regarding the 10 articles in disagreement. Evans stated that if the Union received a substantial wage increase and a union-security clause, it "could move" and work out agreement on the remaining items.

On October 13, at a union meeting, a majority of the employees present voted to authorize a strike. In consideration of the gas shortage and the layoff of employees, a strike date was not set. It appears that certain of the layoffs had already commenced.⁴

On October 17, a mediator was present to assist in the negotiations. Respondent raised its wage offer from 5 cents to 10 cents an hour for each of 3 years. It was evidently not acceptable to the Union as a substantial increase. In other respects, there was no change by either party as to the 10 articles in dispute. The mediator then caucused separately with Respondent, following which he conferred with the Union alone. Thereafter, the parties jointly discussed the subject of the gas shortage and the layoffs. Evans testified—"we, more or less, agreed not to meet any more until such time as the employees would get back to work." And it was further requested that the mediator would call all future meetings. The mediator requested that he be called by either Evans or Edwards at any time to set up a meeting.

On January 22, Respondent announced to the employees that they would receive a wage increase of 10 cents effective January 1. The increase was reflected in their pay on January 25. It is established and undisputed that Respondent put into effect the same terms in the wage offer which was made and rejected at the previous bargaining meeting on October 17, and that Respondent acted unilaterally, without notifying or consulting with the Union. Although contended in Respondent's opening remarks at the hearing, it is not evidenced that this general increase was "consistent with the company's practice."

On January 28, at the Union's request, the mediator convened the next bargaining conference.⁵ Evans protested that Respondent's unilateral conduct regarding the wage increase was unfair. Edwards stated that he had no knowledge of it, and that the action was taken by Vice President Goltermann on his own. Edwards indicated that if the Union wanted the wage increase rescinded he would see that it was done. Evans answered that it was entirely up to Respondent, and that, as union representative, he was not going to ask the Company to take away the 10-cent increase given the employees

At the meeting on February 20, as on January 28, no progress was made in the negotiations. On March 7, the employees voted to strike, and on March 11, a strike and picketing commenced.

On April 14, when the parties next met, the Union reduced its wage demand to 20 cents and made "considerable other changes" regarding the 10 articles in issue. At a further and final session on May 17, the Union confined its requests to

a raise of 20 cents, union security, and "six months retention of seniority," and would then delete all other articles unresolved. The strike is still in progress, and the Federal mediator has continued active participation in the dispute.

Conclusions

Respondent argues that the unilateral wage increase announced on January 22 was lawful in view of an existing impasse in the negotiations.⁶ As support for the impasse contention, it relies on the factors that it had not heard from the Union for 3 months since the date of its wage offer made at the previous meeting on October 17; the Union had not changed its original wage demand; and the Union had not exercised its authorization to strike which it had received 3 months earlier.

"Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors. . . ." Here, the parties were engaged in their first experience in bargaining after union certification, and their efforts to achieve a contract should be afforded the fullest opportunity.⁸ When the wage increase was effected, only four meetings, one consuming 20 minutes, had taken place in a 6-month period since the certification. Thus, the length of time devoted to negotiations, on its face, appears less than exhaustive. In the particular circumstances, Respondent unduly placed the onus on the Union for the lapse of 3 months following the previous bargaining session on October 17. The good-faith obligation to initiate meetings and to meet was mutual with both parties. Moreover, Respondent's 5-cent increase in its wage offer on October 17 was not put forward as a final stand on the issue. The reason for delay in resumption of negotiations was generally understood by the parties. Indeed, it had been specifically agreed on October 17 "not to meet any more" until those employees—laid off as a result of the gas shortage—returned to work.⁹ So far as appears, Respondent made no attempt to discuss with the mediator the possible benefit of another meeting with the Union in light of its intention to implement the wage increase. It did not inform or consult on the matter with its own negotiator, Attorney Edwards. On January 28, Edwards' offer to rescind the raise did not detract from the effects of the unilateral action, nor could the Union be faulted for refusing the burden of the rescission. Bargaining did continue on wages in the additional meetings held on February 20, April 14, and May 17—approaching the end of the certification year. In the last

⁶ It is true that—"after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospect of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Co., Inc.*, 163 NLRB 475, 478 (1967), *affd sub nom American Federation of Television and Radio Artists, AFL-CIO*, 395 F.2d 622 (C.A.D.C., 1968).

⁷ *Ibid*.

⁸ *Cf. Ray Brooks v NLRB*, 348 U.S. 96.

⁹ It is merely indicated that one such employee, Neff, was laid off on October 13 and recalled on November 15, no data are shown as to any of the others.

³ Testimony shows that employees were laid off in consequence of a gas shortage occurring in the winter of the preceding years.

⁴ Dale Neff testified he was laid off on October 13.

⁵ The subsequent meetings, *infra*, were similarly initiated by the Union's call to the mediator.

two sessions, the Union receded considerably from its earlier demands on wages and other terms, without inducing any change in Respondent's position on the 10 articles in disagreement. It could well be inferred that the unilateral wage raise had an impact on the subsequent negotiations. That the Union had not for 3 months exercised its authorization to strike, as argued by Respondent, was scarcely an indication that an impasse had been reached.¹⁰ The existence of the strike begun on March 11, or its purported lack of effectiveness, could not serve to relieve Respondent of its duty to bargain in good faith.¹¹ On this entire record, I find that Respondent was not warranted in assuming, as of January 22, that the Union had abandoned any desire for continued negotiations, or that further good-faith bargaining on wages would have been futile. I conclude that no genuine impasse existed when Respondent unilaterally instituted the general wage raise and that, by such conduct, it violated Section 8(a)(5) as alleged.¹²

C. The Threats by Respondent at the Picket Line

In the early morning on March 11, at the start of the strike, Vice President Goltermann and Plant Manager Riggs talked to the picketing employees, telling them generally that their jobs were available if they wished to come to work.¹³ Walter Scoggins¹⁴ testified that Goltermann alone spoke to him in the following manner: "What are you going to do . . . throw it all away . . . listen to them stupid sons of bitches?" Scoggins replied he would "rather listen to them than him"—upon which Goltermann stated he was fired. In his testimony, Goltermann did not recall such a separate conversation. Scoggins is credited.

Earnest Hart testified Golterman asked him what he thought about losing his 3 weeks vacation that year,¹⁵ what he thought about being fired, and who was paying Hart's bills. Hart responded he had not lost his vacation yet, was not aware he was fired, and "not to worry" about his bills. In Golterman's version, he asked what Hart would do about his vacation this year, and whether he liked his job or not. I credit Hart.

As alleged in the complaint, I find that Respondent threatened striking employees with discharge and with loss of vacation benefits, and thereby violated Section 8(a)(1) of the Act.

III THE REMEDY

Having found that Respondent is engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

¹⁰ See, e.g., *J. H. Bonck Company, Inc.*, 170 NLRB 1471, 1479 (1968), enf'd 424 F 2d 634 (CA 5, 1970)

¹¹ E.g., *N.L.R.B. v J. H. Rutter-Rex Mfg. Co.*, 245 F 2d 594, 596 (CA 5, 1957), *N.L.R.B. v Safeway Steel Scaffolds Company of Georgia*, 383 F 2d 273 (CA 5, 1967).

¹² *N.L.R.B. v Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U S 736, 743 (1962)

¹³ Riggs did not testify

¹⁴ One of the employees on the Union's negotiating committee

¹⁵ Scoggins corroborated this aspect of the conversation, which he overheard

Upon the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including truckdrivers at Respondent's Alsey, Illinois, facility, excluding office clerical employees, professional 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. The Union is the exclusive representative of all employees in the appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By unilaterally granting a general wage raise to the unit employees, without notifying or consulting with the Union, Respondent had engaged in and is engaging in a refusal to bargain within the meaning of Section 8(a)(5) of the Act

6. By the foregoing, and by other specific acts and conduct interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

Upon the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁶

Respondent, Alsey Refractories Company, Alsey, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or loss of vacation benefits, or other reprisals, for engaging in a strike or other protected concerted activities.

(b) Refusing to bargain in good faith with Laborers International Union of North America, AFL-CIO, Local Union No. 53, by unilaterally instituting wage increases, or changing any term or condition of employment, without notifying, consulting, and bargaining with the above-named Union, as exclusive representative of its employees in the appropriate unit.

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

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

¹⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes

(a) Upon request, bargain collectively and in good faith with the above-named Union as the exclusive representative of its employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Notify and consult the above-named Union, and afford it an opportunity to bargain collectively, with respect to any changes in wages or other terms or conditions of employment before effectuating such changes.

(c) Post at its Alsey, Illinois, plant and facility copies of the attached notice marked "Appendix."¹⁷ Copies of said notice, on forms provided by the Regional Director for Region 14, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁷ In the event that the Board's 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 be changed to 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 threaten employees with discharge or loss of vacation benefits, or other reprisal, for engaging

in a strike or other protected concerted activities.

WE WILL NOT refuse to bargain collectively with Laborers International Union of North America, AFL-CIO, Local Union No. 253, by unilaterally instituting wage increases, or changing any term or condition of employment, without notifying, consulting, and bargaining with the above-named labor organization, as the exclusive representative of our employees in the appropriate unit.

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

WE WILL, upon request, bargain collectively and in good faith with the above-named labor organization, as the exclusive representative of our employees in the appropriate unit, and embody in a signed agreement any understanding reached.

WE WILL notify and consult the above-named labor organization, and afford such labor organization an opportunity to bargain collectively with respect to any changes in wages, benefits, or other terms or conditions of employment before effectuating such changes. The bargaining unit is:

All production and maintenance employees including truckdrivers at the Alsey, Illinois, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

ALSEY REFRACTORIES COMPANY