Buck Creek Coal, Inc. *and* United Mine Workers of America. Case 25–CA–21903

May 6, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 15, 1992, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Buck Creek Coal, Inc., Sullivan, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Refusing to bargain with the United Mine Workers of America as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees employed at its Sullivan, Indiana coal mine, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, concerning implementation of a shift rotation plan.''

2. Substitute the following for paragraph 2(b).

''(b) On request, bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the above-described bargaining unit concerning implementation of a shift rotation plan.''

3. Substitute the attached notice for that of the administrative law judge.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally impose on bargaining unit employees a shift rotation plan or any other term or condition of employment.

WE WILL NOT refuse to bargain with the United Mine Workers of America as the exclusive collective-bargaining representative of the production and maintenance employees employed at our Sullivan, Indiana coal mine, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, concerning the implementation of a shift rotation plan.

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

WE WILL discontinue our shift rotation plan, restore our former straight shift practice, and maintain the straight shift practice formerly in effect until the Union has consented to a change or we have bargained in good faith with the Union to impasse.

WE WILL, on request, bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the above-described bargaining unit concerning implementation of a shift rotation plan.

BUCK CREEK COAL, INC.

John Petrison, Esq., for the General Counsel.
Terry M. Brooks, Esq., of Nashville, Tennessee, for the Respondent.
Kevin Fagan, Esq., of St. Louis, Missouri, for the Charging Party.

[1] On February 23, 1992, the Respondent's employees voted against ratification of a tentative agreement negotiated by the Respondent and the Union. In describing the terms of the rejected agreement, the judge erroneously found that the ''final written proposal'' made no mention of shift rotation. In fact, the rejected tentative agreement's management-rights provision provides for the Respondent's right to rotate work shifts. Nevertheless, as the tentative agreement was rejected and, as the judge found, the parties did not bargain to impasse, neither the terms of a final agreement nor the course of bargaining privileged the Respondent's unilateral imposition of a shift rotation plan on about March 30, 1992. Moreover, we note that a waiver of bargaining rights contained in a contractual management-rights provision normally is limited to the time during which the contract that contains it is in effect. *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

[2] In fashioning a remedy for the Respondent's unilateral implementation of a shift rotation plan in violation of Sec. 8(a)(5) and (1), the judge ordered an extension of the Union's certification year under *Mar-Jac Poultry Co*, 136 NLRB 785 (1962). Because there is no evidence that this single unilateral change had any meaningful impact on the course of contract negotiations at the bargaining table, we find that a *Mar-Jac* remedy is not warranted. *American Rubber & Plastics Corp.*, 200 NLRB 867, 876–877 (1972). See also generally *Litton Systems*, 300 NLRB 324, 330 (1990), enfd. 949 F.2d 249 (8th Cir. 1991) (unlawful unilateral changes insufficient to establish overall bad-faith or surface bargaining in absence of evidence that changes linked to ongoing negotiations so as to frustrate reaching of an agreement).

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Sullivan, Indiana, on an unfair labor practice complaint,[1] issued by the Board's Regional Director for Region 25, which alleges that Respondent Buck Creek Coal, Inc.[2] (sometimes referred to as Coal) violated Section 8(a)(1) and (5) of the Act. More particularly, the complaint alleges that the Respondent unilaterally changed the shift assignment of its production employees from straight shifts to rotating shifts in derogation of its duty to bargain with the Union the certified representative of its production and maintenance employees. The Respondent, although admitting that the change was made unilaterally, asserts that it was privileged to do so because the parties were at a bargaining impasse and because of its past practice. On these contentions the issues here were joined.[3]

FINDINGS OF FACT

A. *The Unfair Labor Practices Alleged*

In 1989, a new coal mine, known as the Buck Creek Mine, began operations in Sullivan County, Indiana. It is an underground mine, having a 300-foot shaft, where both high sulphur and low sulphur coal can be mined. Many of the employees who built the mining facility and who began its operations had previously been employed by the Laswell Coal Company (Laswell) at the Red Bird Mine, some 25 miles away in Green County, Indiana. As the Red Bird location became mined out, the Buck Creek Mine became phased in. Originally, Laswell owned the mining rights to the Buck Creek Mine, as well as the physical assets of the mine, but it assigned the rights to mine the coal, well as the physical assets, to Buck Creek Mining, Inc. (Mining); however, it stayed on as the contract operator of the facility, and hence the employer of the miners, under an agreement with ''Mining.'' ''Mining'' is owned by Walter J. Pieper, who is also a president of the Respondent in this case.

In June 1991, the Respondent, Buck Creek Coal, Inc., was incorporated and, on or about July 1, 1991, became the operator of the Buck Creek Mine under contract with ''Mining,'' thereby replacing Laswell. The Laswell employees were carried over by the Respondent and became its employees. Another corporate shakeup occurred on or about March 1, 1992. Pieper bought control of the Respondent operating company and sold some, but not all, of his interest in the leasing company. With the advent of Pieper's control of the Respondent, new management was brought into the Respondent operating company. Specifically, David L. Steele was hired as vice president in charge of operations. Previously, Steele had run a coal industry consulting firm and had, in that capacity, made a management survey of the functioning of the Buck Creek Mine.

In 1990, a representation election was conducted among the production and maintenance employees at the Buck Creek Mine. At that time, they were Laswell employees.[4] (Case 25–RC–8962.) The election resulted in a tie vote, with five challenges. After some postelection litigation, an agreement was executed between the Respondent, as Laswell's successor, and the Union, for a rerun election, which occurred on October 31, 1991. The Union won this election and was certified on December 18, 1991.

Following the certification, bargaining occurred at seven different sessions in January and early February 1992. The Union's chief negotiator was Roger T. Myers, the UMWA's International executive board member from Indiana. The principal company negotiator was Terry M. Brooks, its labor counsel. Pieper acknowledged in his testimony that, even though he technically had no connection with the Respondent operating company at that time, he sat in on management strategy sessions and kept abreast of the progress of the negotiations.[5] On February 14, after seven bargaining meetings, the parties arrived at a tentative agreement which had been reduced to writing. It was referred to the membership of the Union for ratification. On February 23, the Company's offer was rejected by a vote of 60 to 13. Myers informed Brooks immediately of the outcome of the election, said he was going to get back to the membership to find out what they found objectionable in the offer, and told Brooks he would contact him for another meeting. He suggested to Brooks that they let things ''cool off'' for a while.

On March 1, new management took control of the Respondent. On or about March 23 at a ''bathhouse meeting'' of employees,[6] the Respondent made several announcements including one which stated:

> (6) This week's plan: We will be running five days this week. Beginning Sunday March 29, 992, with third shift we will begin our shift rotation with crews, as shown on the attached sheet. You will receive a copy of the schedule with your paycheck.

The schedule referred to in the announcement outlined three 4-week shift assignments through June 21. It read:

NORTH: A CREW—PRODUCTION
B CREW—PRODUCTION
C CREW—MAINTENANCE

[1] The principal docket entries in this case are as follows

Charge filed by United Mine Workers of America (the Union or UMWA) against the Respondent on April 13, 1992; complaint issued against the Respondent by the Regional Director for Region 25 on June 19, 1992; Respondent's answer filed on July 1, 1992; hearing held in Sullivan, Indiana, on October 14, 1992; briefs filed with me by the General Counsel, the Charging Party, and the Respondent on or before November 9, 1992.

[2] Respondent admits, and I find, that it is an Indiana corporation which maintains its principal place of business in Sullivan, Indiana, where it is engaged in the mining and sale of coal. During the past 12 months, the Respondent has purchased and received at its Sullivan, Indiana place of business directly from points and places outside the State of Indiana goods and services valued in excess of $50,000. Accordingly, it is an employer engaged in commerce within the meaning Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Certain changes in the transcript have been noted and corrected.

[4] The Laswell operations, both at the Red Bird Mine and the Buck Creek Mine, had been nonunion.

[5] Pieper did not attend any bargaining sessions.

[6] The bathhouse is an area where employees change clothes and shower before and after work. Safety meetings and general employee meetings are normally held each week during shift changes at this location.

SOUTH: A CREW—PRODUCTION
B CREW—MAINTENANCE
C CREW—PRODUCTION

First 4 Weeks: March 30, 1992–April 26, 1992

A Crew	*B Crew*	*C Crew*
6 a.m.–3 p.m.	3 p.m.–12 a.m.	11 p.m.–7 a.m—NORTH
7 a.m.–4 p.m.	3 p.m.–11 p.m.	10 p.m.–7 a.m.—SOUTH

Second 4 Weeks: April 27, 1992–May 24, 1992

B Crew	*C Crew*	*A Crew*
6 a.m.–3 p.m.	2 p.m.–10 p.m.	9 p.m.–6 a.m.—NORTH
7 a.m.–3 p.m.	2 p.m.–11 p.m.	11 p.m.–8 a.m.—SOUTH

Third 4 Weeks: May 25, 1992–June 21, 1992

C Crew	*A Crew*	*B Crew*
6 a.m.–2 p.m.	11 p.m.–10 p.m.	10 p.m.–7 a.m.—NORTH
7 a.m.–4 p.m.	4 p.m.–1 a.m.	12 a.m.–8 a.m.—SOUTH

GENERAL INSIDE, BELT MECHANICS, ROVING MECHANICS AND THE SURFACE PEOPLE WILL ROTATE WITH THEIR CREWS EVERY 4 WEEKS. THESE GROUPS WILL ALL WORK 8-HOUR SHIFTS. THE THREE SHIFTS WILL BE: 7 a.m.–3 p.m. 3 p.m.–11 p.m. 11 p.m.–7 a.m.

Shift rotation, as outlined above, began as scheduled on March 30 and was still in effect on October 14, the date of the hearing in this case. As noted in the schedule, the shifts assigned to production crews were enlarged from 8 hours to 9 hours, thereby reducing Saturday overtime.

Respondent points out that, during the operation of the Red Bird Mine, Laswell engaged in shift rotation for the majority of the duration of that mine. During its first year at the Buck Creek Mine, Laswell continued to engage in shift rotation. However, the type of shift rotation used by Laswell differed in some respects from the shift rotation imposed on March 23, 1992, by the Respondent. Laswell operated on a 7-day-week basis, so its shift assignments reflected this fact. A given crew would work 5 days, be off 1 day, change shifts, work another 5 days, and take a 2-day break and change shifts again so that there would be full-time, around-the-clock operations every Saturday and Sunday.[7]

WEEK	*SHIFT*	*MON.*	*TUES.*	*WED.*	*THUR.*	*FRI.*	*SAT.*	*SUN.*
1st/April 17–23	Grave	4	4	4	4	4	3	3
	Day	2	1	1	1	1	1	4
	Swing	3	3	3	2	2	2	2
2d/April 24–30	Grave	3	3	3	2	2	2	2
	Day	4	4	4	4	3	3	3
	Swing	2	1	1	1	1	1	4
3d/May 1–7	Grave	2	1	1	1	1	1	4
	Day	3	3	2	2	2	2	2
	Swing	4	4	4	4	3	3	3

Laswell engaged in shift rotation at the Buck Creek Mine for only about a year. For the most part, it limited shift rotation to production crews, keeping the maintenance crew permanently on the day shift. The amount of work on rotating shifts varied from month to month and declined to nothing in May 1990. Respondent admits that, when it inaugurated its shift rotation plan on March 29, 1992, its crews had been working straight shifts, at fixed hours, for about 23 months, although individual employees may have been transferred from shift to shift, usually on request. Respondent also admits that it imposed its shift rotation plan unilaterally. At no time did it inform the Union in advance of what it wished to do nor did it offer to bargain with it over this change.

Bargaining sessions resumed between the Union and the Respondent on April 9. To the date of the hearing some 14 sessions have occurred but the parties have not reached an agreement, nor has the Union consented to the new shift rotation plan.

B. *Analysis and Conclusions*

The Supreme Court stated in *NLRB v. Katz*, 369 U.S. 736 at 746 (1962):

> A refusal to negotiate in fact as to any subject which is within Section 8(d), and about which the Union seeks to negotiate, violates Section 8(a)(5) of the Act 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 Section 8(a)(5), for it is circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.

The Respondent admits in its brief that shift changes are a mandatory subject of bargaining within the ambit of Section 8(d) of the Act. *Georgia-Pacific Corp.*, 275 NLRB 67 (1985). Notwithstanding this concession, it argues that it was not obligated to bargain over the shift changes at issue in this

[7] A typical Laswell shift rotation plan read:

Four Rotating Shifts

Grave—11–7
Day—7–3
Swing—3–1

Crew # 1 Henry
Crew # 2 Paul
Crew # 3 Mark
Crew # 4 Bill

case because its shift changes were part of a past practice, as well as part of the general practice of the industry in which it is engaged.

In the seven bargaining sessions which preceded the formulation of the proposed contract that the union membership voted down on February 28, there was no discussion of shift rotation nor was there any mention of shift rotation in the final written proposal itself. Respondent points out that Laswell engaged in shift rotation, both at the Red Bird Mine and at Buck Creek, up to May 1990, and on those facts argues that it too was entitled to switch back and forth from straight shift to rotating shifts because such changes were part of its normal procedure, as the employer did with individual shift assignment of broadcasting personnel in *KDEN Broadcasting Co*., 225 NLRB 25 (1976). Respondent's reliance on that line of cases is wholly misplaced. What the facts of this case indisputably establish is that, from the date of its inception as a corporation and as a mine operator in the summer of 1991, the past practice of this Respondent was to operate on a straight-shift basis. Moreover, the mine it was operating had been on a straight-shift basis for nearly 2 years at the time the new rotation plan was imposed. The change in question was not a routine or nominal revision of its operating procedure but a major alteration in the lives and the working times of its entire work force. The change was ''material, substantial, and significant,'' as the Board used those words in *Angelica Healthcare Services*, 284 NLRB 44 (1997), and it cannot be swept aside to a nonbargainable category because it was somehow trivial in character.

Respondent attempted to put in the record some testimony to the effect that it should be excused from bargaining about shift changes because other employers in the same industry ploy a shift rotation policy. The argument is irrelevant, even if true,[8] because in unionized coal mines such policies are necessarily a matter of negotiation and agreement between the employers and unions involved there. If this Employer had negotiated in good faith with this Union over shift rotation at this mine and had obtained union assent, it too could have implemented a shift rotation program, but it did not do so. Its duty to the Union here is defined by the parameters of the bargaining unit at this coal mine and that duty cannot be modified or satisfied by what some other employer and some other union have done in some other bargaining unit.

Belatedly, the Respondent attempted to justify its action because of an asserted impasse in bargaining which would permit it to implement preimpasse offers which had been made in good faith to the bargaining agent of its employees. Belated or not,[9] there is no factual foundation in the cord for this contention. At no time throughout the bargaining which occurred up to the date the membership of the Union rejected the Company's offer had the Respondent ever proposed to adopt a shift rotation program. In light of this history, it is frivolous for the Respondent to contend that the parties were at impasse over an issue which was never on the bargaining table. Moreover, the fact that the union membership rejected the total company proposal does not define an impasse, especially where, as here, the parties have resumed bargaining and have met a total of 14 times since the date of the contract rejection in order to compose their differences. In order for an employer to claim impasse as a justification for taking unilateral action, there must be an impasse over the total contract proposal, not just an impasse on one item. *Firefighters*, 304 NLRB 401 (1991). Nothing remotely approaching that situation has occurred in this case. Accordingly, this defense must be rejected. What occurred here is that new management took over the operating company at the Buck Creek Mine and decided, without consulting or discussing the matter with the Union, to impose a revised shift plan which it felt might improve production at its facility. Although the desirability of such a move might well be justified, either on the basis of increased safety, increased production, or flexibility in moving employees from one part of the mine to another as the dictates of its scheduling require, it is not for the Board to pass on the desirability of such a measure and, finding it to be an appropriate exercise of business judgment, approve its use at the Buck Creek Mine. The change in question was a material, if not a radical, alteration of past practice and as a mandatory subject of collective bargaining, had to be submitted to the give and take of negotiation with the Union before it could lawfully be adopted. Because the Respondent admittedly failed to follow this procedure before adopting shift rotation, it violated Section 8(a)(1) and (5) of the Act in doing it. I so find and conclude.

[8] Record evidence indicates that in Indiana, no unionized underground mines employ shift rotation nor do surface mines. Elsewhere in the region, a majority but not all unionized underground mines utilize shift-rotation policies though surface mines do not.

[9] At no time until the date of the hearing in this case did the Respondent advance a claim of impasse as justification for its action.

CONCLUSIONS OF LAW

1. Buck Creek Coal, Inc. is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Respondent at its Sullivan, Indiana coal mine, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

4. Since on or about October 31, 1991, the Union has been the exclusive collective-bargaining representative of all the Respondent's employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. By unilaterally instituting a practice of shift rotation among its bargaining unit employees, the Respondent violated Section 8(a)(1) and (5) of the Act. The aforesaid unfair labor practice has a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent here has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Among those affirmative actions will be the discontinuance of the shift-rotation plan and the resumption of straight-shift assignments, less and until the Union here consents to a shift-rotation plan or the Respondent has

bargained in good faith to impasse over the proposal. As the bargaining of the Respondent has, to date, been marred by bad faith, I will recommend an extension of the certification which was issued by the Board on December 18, 1991, for a period of 9 months, to begin when the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962). There is no suggestion that the Respondent here did not bargain in good faith during the 3-month period which elapsed between the certification date and the date on which it ordered a unilateral change in its shift assignment procedure. Accordingly, it will be given credit for that period of time. *Colfor, Inc*., 282 NLRB 1173 (1987). I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Buck Creek Coal, Inc., Sullivan, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally imposing on bargaining unit employees a shift rotation plan or any other term or condition of employment.

(b) Refusing to recognize and bargain collectively in good faith with the United Mine Workers of America as the exclusive collective-bargaining representative of the Respondent's production and maintenance employees employed at its Sullivan, Indiana, coal mine, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(c) By any like or related means 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 the Act.

(a) Discontinue its shift-rotation plan, restore its former straight-shift practice, and maintain the straight-shift practice formerly in effect unless and until the Union has consented to a change Respondent has bargained in good faith with the Union to impasse.

(b) Recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above-described bargaining unit. The certification year covering the unit shall extend for a period of 9 months from the date the Respondent begins to bargain collectively in good faith with the Union in the above-described bargaining unit.

(c) Post at the Respondent's Sullivan, Indiana place of business copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

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

[10] 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.

[11] 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.''