JD–135–03
Johnstown, PA

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

JOHNSTOWN AMERICA CORPORATION

and Case 6–CA–33127

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

Clifford E. Spungen, Esq.,
of Pittsburgh, PA, for the General Counsel.
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of Pittsburgh, PA, for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on September 23, 2003 in Johnstown, Pennsylvania, pursuant to a Complaint and Notice of hearing (complaint) issued on June 26, 2003, by the Regional Director for Region 6 of the National Labor Relations Board (the Board). The charge was filed on December 16, 2002[1] by United Steelworkers of America, AFL-CIO, CLC, (the Charging Party or Union) alleging that Johnstown America Corporation (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent unilaterally implemented the terms of its last collective-bargaining contract proposal, which included provisions for automatic annual wage increases for bargaining unit employees. Thereafter, on November 11, Respondent unilaterally cancelled the annual wage increases scheduled for bargaining unit employees. Based on Respondent's refusal to continue in effect bargaining unit employees' existing terms and conditions of employment without the Union's consent and without affording the Union an opportunity to bargain, the General Counsel contends that Respondent engaged in violative conduct within the meaning of Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and

[1] All dates are in 2002 unless otherwise indicated.

after considering the briefs filed by the General Counsel, the Charging Party and the Respondent,[2] I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a corporation engaged in the manufacture of railroad cars and equipment at its facility in Johnstown, Pennsylvania, where it annually sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

On April 4, 2003, Administrative Law Judge David L. Evans issued a decision (JD-40-03) involving the same parties as in the subject case. Respondent filed timely exceptions to Judge Evans decision and they are presently pending before the Board.

Since in or about 1991, the Union has been the exclusive collective-bargaining representative of the bargaining unit, and has been recognized as such by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from November 1, 1997, through October 31, 2001. At various times during the months of September 2001 through January 2002, the parties met to bargain with respect to wages, hours and other terms and conditions of employment of the bargaining unit. Judge Evans comprehensively reviewed and discussed19 bargaining sessions held by the parties during that period and each of those meetings will not be reviewed herein. Rather, I will detail portions of specific meetings that have relevance to the underlying issues presented for decision in this case.[3] At all times material herein, Ray Jastrzab served as the Union's chief spokesperson while Joseph McDermott served in the same capacity for Respondent.

During bargaining session 19, that was held on December 18, 2001, Respondent distributed a "Fifth Draft and Final Proposal for Agreement" to the Union. McDermott stated, "that there were 10 must-have items that Respondent had to have and if we can't reach agreement on the ten items, then perhaps implementation is a viable option." McDermott testified that, as he and Jastrzab left the meeting, he told Jastrzab that he believed that the parties were at impasse. McDermott acknowledged that Jastrzab denied that the parties were at impasse.

In addition to Respondent's ten must-have items, the final offer contained proposals in

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[2] The General Counsel's unopposed motion to correct the transcript, dated November 12, 2003, is granted and received in evidence as GC Exh. 38.

[3] The parties also held 19 additional bargaining sessions between April and September 2002. In two of those bargaining sessions the issue of wages was discussed but do not impact this decision. Likewise, the parties held two bargaining sessions in March and two in April, 2003, but those meetings are not relevant to the issues presented in the subject case.

other areas including wages. The Respondent proposed a matrix with the same combined job classifications in the same departments as those that had been proposed previously in an earlier bargaining session. The December 18, 2001, proposal also included a second matrix in which the Respondent proposed wage-rate increases for each of its proposed job classifications for each succeeding year of its proposed 5-year contract. McDermott told the Union that the Respondent's committee had calculated that its proposed matrix represented increases of $.55 per hour during the first year of a successor contract for each (combined) classification that the Respondent was proposing. McDermott further told the Union that the Respondent's committee had further calculated that its new proposals for succeeding years represented wage increases of $.40, $.40, $.40 and $.45 per hour, respectively, for each classification during each succeeding year of its proposed 5-year contract (GC Exh. 19, Appendix I).

By letter dated January 15, McDermott confirmed with Jastrzab that the Union rejected the Respondent's final contract offer that was presented to the Union on December 18, 2001. McDermott stated that based upon the Union's expressed unwillingness to agree to those 10 must-have items that were identified and discussed on December 18, 2001, coupled with the unanimous rejection of Respondent's final proposal, it is clear that we are at impasse in our negotiations. Consequently, the Respondent intends to implement its final contract proposal on January 21 (GC Exh. 25).

Judge Evans concluded that on December 18, 2001, McDermott presented the Respondent's final offer that included several first-time proposals including annual wage increases for years 2 through 5 of a successor agreement. The Respondent admits that on January 21, it implemented the terms of its final offer of December 18, 2001, in which Judge Evans rejected Respondent's defense that such implementation was lawful because the parties were then at a good faith impasse. Accordingly, Judge Evans concluded that Respondent violated Section 8(a)(1) and (5) of the Act by its unilateral actions. In regard to Respondent's overall conduct Judge Evans found that when the Respondent presented its final proposal to the Union on December 18, 2001, it demanded that the Union agree to its 10 must-have items before it would bargain further and it refused to take any counterproposals on the 10 items or any other part of its final offer even though the final offer included several new items such as new annual wage increases in years 2 through 5 of the proposed agreement. Further, by refusing any Union requests for information and by unilaterally implementing its final offer at a time that the parties had not reached a good faith impasse, Judge Evans concluded that the forgoing conduct, taken as a whole, does not represent the behavior of an employer that intends to bargain with the representative of its employees in accordance with the Act. Therefore, he found, by its overall conduct in responding to the Union's requests that it bargain for a successor agreement, the Respondent violated section 8(a)(1) and (5) of the Act.

After implementation of the final offer on January 21, the Respondent under its matrix job classifications plan gave employees a $.55 per hour increase in base pay. Likewise, the Respondent concedes that for the most part, the parties are continuing to operate under the terms and conditions of the 5-year final Employer proposal that was implemented on January 21, and remains in effect until October 31, 2006 (GC Exh. 19).

B. Analysis and Findings

1. Reliance on Judge Evans Decision

The Board has previously held that a judge may rely on an earlier judge's decision involving the same parties and similar issues that are then pending appeal on timely filed exceptions. *The Grand Rapids Press of Booth Newspapers, Inc.* 327 NLRB 393 (1998). Thus, if

I rely on the findings of Judge Evans as it relates to the January 21 unilateral implementation of Respondent's final offer, and the Board rejects that finding, it would be controlling in any review of this case upon timely filed exceptions.

I have carefully reviewed Judge Evans decision and pertinent transcript pages that have been introduced into this record that have bearing on the issues in this case. I am confident that the reasoning expressed in his decision was based on a total review of the evidence and evaluation of the witnesses that testified in that proceeding. Likewise, my own independent review of the transcript pages lead me to believe that Respondent violated Section 8(a)(1) and (5) of the Act when it implemented its final offer including annual wage increases on January 21, without reaching a lawful impasse.[4]

2. Position of the Parties

The General Counsel argues, as it did before Judge Evans, that the unilateral implementation of Respondent's "final offer" on January 21 including annual wage increases in years 2 through 5 of its proposed five-year agreement violated the Act. Thereafter, on November 11, when Respondent unilaterally cancelled the annual wage increase for bargaining unit employees without the Union's consent and without affording the Union an opportunity to bargain, it once again violated Section 8(a)(1) and (5) of the Act.

The Respondent contends, as it did before Judge Evans and in exceptions pending before the Board, that while it unilaterally implemented its December 18, 2001, "final offer" that included annual wage increases it did so after reaching a lawful impasse in negotiations with the Union. Respondent further argues that the Union has waived any right it may have had to bargain over subsequent wage increases by its failure and refusal to respond to its November 11 letter pointing out that since there is no "agreement" and no effective date of "agreement", the provisions of the Employer's proposal for future wage increases are not effective at this time. Lastly, the Respondent asserts that it cannot be unlawful for it to cancel conduct that has previously been found by Judge Evans to be unlawful. Indeed, they argue that the subject complaint seeks an order requiring the Respondent to engage in conduct that Judge Evans previously found to be violative of the Act.

3. Discussion

It should be noted that as part of the affirmative action ordered by Judge Evans the Respondent was directed on the Union's request to, "cancel and rescind all terms and conditions of employment unilaterally implemented on or after January 21, 2002, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union."

There is no dispute that the Respondent unilaterally implemented on January 21, the terms of its last collective bargaining contract proposal that included annual wage increases in years 2 through 5.[5] Indeed, Article XXIII of the agreement provides that "this agreement may not be released, discharged, abandoned, changed, or modified in any manner, except by an instrument in writing signed on behalf of each of the parties hereto." I note that no such

[4] See GC Exh. 30, 31 and 32 that covers approximately 100 pages of transcript.

[5] In addition to the testimony of McDermott admitting this issue, the Respondent's answer at paragraph 11 also confirms this fact.

instrument was ever signed by the parties that would privilege the modification of the annual wage increases set forth in Appendix I (GC Exh. 19).

Particularly noteworthy is that the Respondent has adhered to a number of monetary requirements contained in the implemented final proposal but now argues that it was privileged to cancel the scheduled annual wage increases on November 11. For example, employee Terry Mock credibly testified that under Article XXII of the final proposal he has routinely been paid "overtime lunch money" in the amount of $4.50 when working overtime hours after January 21, and received his most recent payment on September 10, 2003.[6] Likewise, Bryan Stem who is an active unit 24 employee', credibly testified that in accordance with Article XIV of the final proposal he received on November 1 the sum of $120 to be used for the purchase of metatarsal safety shoes in the plant (GC Exh. 35).

I find that the Respondent can not agree to follow the provisions of the agreement for some monetary matters but then argue that it has no obligation to follow the provisions contained in Appendix I regarding annual wage increases.[7] I further note that the Respondent did provide a wage increase to employees shortly after it implemented its "final offer" on January 21.

Likewise, I reject the Respondent's affirmative defense that the Union waived any right it may have had to bargain over subsequent wage increases by its failure and refusal to respond to the November 11 letter. In this regard, the letter did not inform the Union that the Respondent was contemplating canceling the wage increase due employees under the terms of the implemented final proposal. Rather, the letter informed the Union that since there is no "agreement" and no effective date of "agreement" the provisions of the Employer's proposal for future wage increases are not effective at this time. This is nothing more then a *fait accompli*. The Union was provided nothing to bargain about as the decision had already been made not to adhere to the terms of the implemented final proposal and provide employees with future annual wage increases. Thus, the Union cannot be forced to engage in an act of futility. Under these circumstances, I find that the Union did not waive its right to bargain when it did not request to negotiate upon receiving the November 11 letter (GC Exh. 33). *Gratiot Community Hosp.,* 312 NLRB 1075, 1080 (1993), *enforced in relevant part,* 51 F.3d 1255, 1259-60 (6th Cir. 1995).

Additionally, the Respondent's position that since the parties never reached an "agreement" no wage increase was due and owing to employees is rejected. First, I find this defense to be an afterthought, at least as applied to the decision of not granting wage increases in years 2 through 5 of the implemented agreement. I reach this conclusion based on the testimony of McDermott that he never told the Union during negotiations that there had to be an agreement in order to get employee wage increases in years 2 through 5. Second, this argument is further belied in that the Respondent did give wage increases to employees immediately after it implemented the "final offer" on January 21, and by adhering to certain monetary obligations in the agreement when it reimbursed employees for metatarsal safety shoes and overtime lunch money.

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[6] Contrary to Respondent's argument in its brief, Mock did receive the overtime lunch money in the second year of the implemented contract proposal.

[7] In its letter to all employees dated January 16, Respondent apprised them that the implemented 5-year proposal contains an immediate average hourly wage increase of fifty-five cents and hourly wage increases of forty cents in the second, third, and fourth year and forty-five cents in the final year (GC Exh. 27).

Lastly, I reject the Respondent's assertion that it cannot be unlawful for it to cancel conduct that has previously been found by Judge Evans to be unlawful. Indeed, as discussed above, Judge Evans provided for this contingency when he directed the Respondent not to cancel any unilateral changes (including wage increases) that benefited the unit employees without a request from the Union. There is no dispute in this case that the Union ever requested the wage increases to be cancelled. To the contrary, as set forth in the November 11 letter, the Union was anticipating that employees' should be receiving a $.40 per hour raise under the terms of the implemented "final offer." [8]

C. Conclusions

Based on the forgoing I conclude that when the Respondent unilaterally cancelled the annual wage increase for bargaining unit employees it did so without the Union's consent and without affording the Union an opportunity to bargain. Accordingly, since the Respondent has been failing and refusing to bargain in good faith with the Union it has violated Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(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. The following employees of the Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by Respondent at its Johnstown, Pennsylvania, facility, excluding all executives, office and salaried employees foremen, assistant foremen, supervisors, draftsmen, timekeepers, watchmen and guards, and full-time first – aid and safety employees, and any other office clerical employees and guards, professional employees and supervisors as defined in the Act.

4. At all times material herein the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

[8] Even if others ultimately find that the Respondent lawfully implemented its "final offer" after reaching a good faith impasse in negotiations with the Union, I would still find that the Respondent violated the Act when it unilaterally cancelled the annual wage increases in years 2 through 5 of the agreement. First, as found above, the November 11 letter was not couched in the form of contemplating to cancel the wage increases but rather the decision had already been made. Second, the terms of the parties' collective bargaining agreement require that before any modifications or changes may be made to its terms an instrument in writing must be signed by both parties. It is beyond dispute that the Respondent did not adhere to this requirement in the agreement.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally canceling the annual wage increase for its Unit employees without the Union's consent and without affording the Union an opportunity to bargain.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent, in violation of Section 8(a)(1) and (5) of the Act, unilaterally cancelled the annual wage increase for its Unit employees, I shall recommend that the Respondent restore the status quo ante and make whole the employees for any loss of pay or other benefits they may have suffered as a result of the Respondent's unfair labor practices in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Johnstown America Corporation, Johnstown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the unit employees' terms and conditions of employment without affording the Union an opportunity to bargain about the changes and without bargaining with the Union to either an agreement or good faith impasse.

(b) Unilaterally canceling the annual wage increase for its Unit employees by announcing that it would not give the automatic wage increases due under the January 21, 2002 implemented final offer.

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

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

(a) On request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

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[9] 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.

(b) On the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after January 21, 2002, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(c) Make the unit employees whole for any loss of wages or benefits, with interest, that they may have incurred as a result of its refusal to bargain and by reasons of the unilateral change of canceling the scheduled annual wage increase for its Unit employees.

(d) Within 14 days after service by the Region, post at its facility in Johnstown, Pennsylvania, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 6, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 10, 2003

Bruce D. Rosenstein
Administrative Law Judge

[10] If this Order is enforced by a Judgment of the 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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT implement our last offer before the parties have reached an agreement or a lawful impasse during negotiations and WE WILL NOT implement other changes in your terms and conditions of employment including annual wage increases before we have reached an agreement or we have reached an impasse in negotiations with the Union.

WE WILL NOT unilaterally cancel the annual wage increase for Unit employees without the Union's consent and without affording the Union an opportunity to bargain.

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

WE WILL, on request, bargain collectively with the Union as the exclusive representative of all employees in the unit with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make the unit employees whole for any loss of wages or benefits, with interest, that they may have incurred as a result of our refusal to bargain and by reasons of all unilateral changes instituted by us in their terms and conditions of employment, including the cancellation of the annual wage increase for Unit employees.

WE WILL, on the Union's request, cancel and rescind all terms and conditions of employment that we unlawfully implemented on or after January 21, 2002, but nothing in this Order is to be

construed as requiring us to cancel any unilateral changes that benefited the unit employees, without a request from the Union.

JOHNSTOWN AMERICA CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

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

1000 Liberty Avenue, Federal Building, Room 1501, Pittsburgh, PA 15222-4173

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.