

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 28, 2008

TO : Michael Josserand, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SPEEA Local 2001 355-2201-5000
(The Boeing Company) 355-2220
Case 27-CB-5025 554-1467-1200

This case was submitted for advice as to whether the Union refused to bargain in good faith in violation of Section 8(b)(3) with respect to employees in a newly expanded, certified bargaining unit. We conclude that the Union did not unlawfully refuse to bargain in good faith because it had no obligation to accede to the Employer's demand to negotiate a new contract covering all employees in the newly expanded unit during the term of an existing collective-bargaining agreement.

FACTS

Charging Party Boeing Company provides aerospace services in, among other locations, Davis and Weber Counties, Utah. Since 1963 Boeing and the Charged Party Union, Society of Professional Engineering Employees in Aerospace (SPEEA) Local 2001, have been parties to successive nationwide collective-bargaining agreements, the most recent of which expires on December 1, 2008. The Agreement covers five separate bargaining units, including the defense-related Utah-based unit at issue here, as well as approximately 10,000 engineers working on commercial airplane projects in the Puget Sound area of Washington state.

A group of engineers at the Utah facility had been in the bargaining unit and subject to successive contracts for many years, at the same time other engineers in Utah did essentially the same type work for another company (Rockwell International). Boeing became the employer of this latter group of engineers in the 1990s after purchasing a rival aerospace facility owned by Rockwell International. Although Boeing had initially maintained separate operations between the divisions, in 1998 it consolidated the two groups. Nonetheless, the former Rockwell engineers remained unrepresented and outside the coverage of the collective bargaining agreement. In 2002, Boeing began to place all new engineers within this

unrepresented group. Recently, the represented unit comprised approximately 40 engineers, while the unrepresented group comprised approximately 60 individuals.

In 2004, the Union filed a grievance seeking to include the historically unrepresented engineers in the bargaining unit. Boeing responded by filing an RM petition seeking an election in an overall unit of engineering employees at its Utah facilities. On November 7, 2007, the Regional Director directed an election to be held in an overall unit comprised of the historically represented and unrepresented employees.¹ The Director concluded that through its grievance, the Union had made a demand for representation which, if successful, would have swept the unrepresented engineers into the historical unit without an election.² He further concluded that these two groups have been merged and are now indistinguishable, and consequently that the only appropriate unit is one comprising all Utah engineering employees.³ Subsequently, a majority of employees in the overall bargaining unit voted for Union representation. On January 14, 2008,⁴ the Regional Director certified the Union as the bargaining representative of the overall unit.

On January 10, the Union's president sent a letter to Boeing stating that the Union was ready to "transition" the formerly unrepresented employees into the current collective bargaining agreement. Her letter further stated that the "most significant immediate changes will be converting those previously not recognized" into the retirement and medical plans in the current Agreement.

Boeing's Senior Manager of Employee Relations responded in a letter dated January 22 and informed the

¹ The Regional Director declined to direct a self-determination election, in part, because it risked perpetuating the exclusion of the fringe group of engineers not on community of interest factors, but solely on arbitrary, historical processes that have resulted in an inappropriate unit. DDE in Case 27-RM-679, at 13 n.15.

² DDE at 14-15.

³ DDE at 19. The Director further concluded that the contract does not bar the holding of an election under "the unusual facts of this case," including the fact that the merger of the two employee groups rendered an overall unit as the only appropriate unit. DDE at 21-22.

⁴ All dates are in 2008 unless specified otherwise.

Union that while transitioning the employees was one option, "[Boeing] believes the appropriate course is to bargain a new contract because 1) The [NLRB] has recognized this group of employees as a new unit, and 2) working together we have the opportunity to craft a contract tailored to this group of employees." The letter ended by stating that Boeing is "ready, willing and able to begin bargaining the contract for this group of employees." He subsequently responded to a Union official's question as to why the Employer wants a separate contract for the Utah engineers by explaining that Utah consists of an integrated defense and space site, while the much larger unit in Puget Sound comprises mostly commercial airplane work.

On February 20, the Union filed a grievance alleging that Boeing violated the recognition clause of the collective bargaining agreement. In the grievance, the Union contended that "the Employer's current obligation is to negotiate transition terms for those employees who have become part of the SPEEA represented unit of employees in Weber and Davis Counties, Utah. Boeing's effort to pull these employees from the parties' current agreement before its December, 2008 expiration violates [the recognition clause]."⁵

On March 13, when Boeing met with Union representatives to discuss the Utah situation, it again asked whether the Union was prepared to sit down and bargain over the Utah bargaining unit. The Union representatives responded that there was no reason to bargain a separate contract and asked why Boeing's concerns could not be addressed under the current contract. They raised further concerns about getting a less favorable contract relative to the Puget Sound unit and accused Boeing of being divisive by taking this strategy. One of the Union representatives indicated that the Union would not agree to meet with Boeing for a separate contract. That same day, Boeing filed the current charge alleging that the Union unlawfully refuses to bargain over the certified bargaining unit.

ACTION

We conclude that the Union did not unlawfully refuse to bargain in good faith because it had no obligation to accede to the Employer's demand to negotiate a new contract

⁵ The Union has not sought to move for arbitration. Consequently, the grievance will remain at Step 3 and be periodically discussed by the parties until the Union either drops it or moves for arbitration.

covering all employees in the newly expanded unit during the term of an existing collective bargaining agreement.

In Federal-Mogul Corp.,⁶ the Board articulated a framework of bargaining obligations after an unrepresented "fringe group" of employees voted to join an existing bargaining unit through a Globe⁷ self-determination election. The employer must maintain any existing collective bargaining agreement covering the historical bargaining unit while the parties negotiate interim contractual terms to be applied to the newly added employees.⁸ No unilateral changes to the fringe group's pay and working conditions are allowed while the parties engage in these interim negotiations.⁹ During this period, the parties are also barred from unilaterally covering the new additions with the existing agreement, since their application would materially alter the bargained-for agreement.¹⁰ Once the historical unit's contract expires, the parties are obligated to bargain over a single agreement covering the newly enlarged unit.¹¹ However, in describing interim bargaining, the Board noted that "[w]e are not suggesting that the Respondent here was precluded from asserting, as a bargaining position, that the existing

⁶ Federal-Mogul Corp., 209 NLRB 343 (1974).

⁷ Globe Machine and Stamping Co., 3 NLRB 294 (1937).

⁸ Federal-Mogul Corp., 209 at 343-44. The Board noted that an agreement during this interim stage of bargaining "in all likelihood [will] be an addendum to the existing ... contract." Id. at 344.

⁹ Id. at 345.

¹⁰ Id. at 344. Application of an existing agreement to employees long excluded from the unit "would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the H.K. Porter doctrine." Id., citing to H.K. Porter v. NLRB, 397 U.S. 99, 102 (1970) ("while the Board does have the power ... to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement").

¹¹ Ibid. Accord: Bay Medical Center, 239 NLRB 731, 732 (1978) ("impediment" to bargaining for contract over single unit comprising pre-existing employees and Globe'd employees removed only after contract in pre-existing unit expired).

contract ought to apply and inviting ... any suggestions as to what specific modifications therein should be made."¹²

Although Federal-Mogul dealt specifically with the expansion of an exiting, appropriate unit through a Globe self-determination election, the Board has applied this framework where historically diverse employee complements have combined to create a new, consolidated bargaining unit. In Borden, Inc.,¹³ the employer merged two discrete employee groups into a single consolidated operation, which effectively created "a new, merged unit, different from either preexisting unit."¹⁴ Despite the effective extinction of the former bargaining units, the Board ordered the employer to maintain the former work groups' separate, existing collective-bargaining agreements pending their expiration and the negotiation of a new contract at the integrated facility. Thus, the Board discerned "no 'legal or practical justification for permitting either party to escape its normal bargaining obligation,' which is to bargain with the employees' previous conditions of employment as the starting point."¹⁵ Rather, the Board's goal was to preserve the preexisting terms of employment of each group of employees until the parties eventually entered into bargaining over the overall unit.¹⁶

We conclude that the Federal-Mogul framework best suits the circumstances and equities here. As the Regional Director held, the merger resulted in the creation of a new, expanded bargaining unit comprising both the represented and formerly unrepresented employees. However, after the RM election, a bargaining obligation over this new unit attached during the term of the historical Boeing unit's collective bargaining agreement. Thus, as in Borden, "normal bargaining obligations" should attach, requiring maintenance of the Puget Sound agreement to the historically covered employees until it expires. Maintenance of contractual terms after consolidation into a single appropriate unit "promotes the statutory interest of stability in collective bargaining" by "ensur[ing] that both portions of the merged unit begin from the same

¹² Federal-Mogul, 209 NLRB at 345.

¹³ 308 NLRB 113 (1992), enfd. 19 F.3d 502 (10th Cir. 1994), cert denied 531 U.S. 927 (1994).

¹⁴ Id. at 114.

¹⁵ Id. at 115, quoting Federal-Mogul, 209 NLRB at 344.

¹⁶ Id. at 115 and n.10, citing Bay Medical Center.

relative point."¹⁷ In adopting the Federal-Mogul framework, we decline to adopt an interpretation of the representational procedure that, even where the Union wins an election in a unit containing already represented employees, would put the historical unit's bargained-for contract in jeopardy. The Board's goal of promoting stability during this transitional period is not well served by requiring mid-term negotiations for an overall contract that, upon impasse, could result in the implementation of a final offer and consequent abrogation of the existing agreement. Rather, the parties' relative bargaining positions should be retained until negotiations over a single contract can begin.¹⁸

Consequently, we conclude that the Union did not fail to bargain in good faith by rejecting the Employer's improper demand that it immediately enter into negotiations for a new, overall contract. Nonetheless, the Union's own bargaining position is muddled. On the one hand, the Union sought through its initial January 10 proposal to bargain a way to "transition" the formerly unrepresented employees into the current collective bargaining agreement, particularly as to pension and medical coverage. On the other hand, its grievance appears to call for application of the entire Puget Sound agreement to the new employees. While the Employer has no obligation to apply the historical unit's contract to these employees, Boeing does have the obligation to negotiate interim terms, which could lawfully include the benefits coverage that the Union seeks. The Employer's insistence on immediate negotiations for a single unit-wide agreement deprived it of the ability to test the nature of the Union's bargaining position, i.e.

¹⁷ Borden, 308 NLRB at 115.

¹⁸ The Board's decision in Steelworkers Local 7912 (U.S. Tsubaki), 338 NLRB 29 (2002), does not require a different conclusion. There, the Board clarified a bargaining unit by finding separate units appropriate. In the specific circumstances of that case, the Board held that a union could not subsequently refuse to bargain separate agreements in reliance on an existing collective bargaining agreement covering the former, enlarged unit. The employer had agreed to the contract in the overall unit while specifically preserving its right to request Board review of the propriety of that unit. The Board held that "[u]nder these circumstances," the employer's agreement to the single contract was the "least disruptive to the bargaining process." Id. at 30. The framework articulated herein, under the specific circumstances of this case, is similarly the least disruptive to each party's interests.

whether it was limited to certain terms, was merely an initial proposal for complete contract coverage, or was actual insistence on complete contract coverage as requested in the 2004 grievance. Thus, as the Board indicated in Federal-Mogul, although "neither party appears to have qualified as a model of flexibility," we cannot conclude that the Union's initial proposal, to the extent that it sought to extend the existing agreement to the new employees, constituted unlawful insistence that the Employer agree to its bargaining position.¹⁹

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

¹⁹ Federal-Mogul, 209 NLRB at 345.