Medco Health Solutions of Spokane, Inc. *and* United Steelworkers Local 12-369, affiliated with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO. Case 19–CA–30143

May 30, 2008

DECISION AND ORDER REMANDING

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with requested information and by unilaterally implementing new performance standards and related disciplinary measures. The judge[1] concluded that these allegations were appropriate for deferral to arbitration, in accordance with *Collyer Insulated Wire*, 192 NLRB 837 (1971). For the reasons set forth below, we find, contrary to the judge, that the allegations are not appropriate for deferral to arbitration. We therefore reverse the judge and remand the case for determination on the merits of the alleged violations.

I. BACKGROUND[2]

The Respondent operates a pharmacy. Since 1991, its employees have been represented by the Union in two units, the pharmacist unit and the pharmacy unit.[3] The units are covered by separate collective-bargaining agreements, the most recent of which are effective from April 20, 2003, to October 1, 2006.

This case arose in 2005[4] when the Respondent instituted and announced new performance standards and attendant discipline structures for employees in both units.

A. Pharmacist Unit

On September 1, the Respondent showed pharmacists a presentation about new performance and disciplinary standards. The Union orally requested a copy of the presentation on September 1 and 7 and subsequently made several written requests for information about the new standards. On or about October 10, the Respondent presented the pharmacist performance standards to the Union's chief steward, Mark Johnson. On October 26, the Union, by letter, requested a copy of the performance rankings of pharmacists, an opportunity to consult with the pharmacists about the new standards, and an opportunity to bargain. The same day, however, the Respondent implemented the new standards and disciplinary structure. On October 31, the Union, by letter, requested more information about employee rankings and the newly-implemented performance standards. On November 22, the Union requested copies of all notes and documents presented to specified pharmacists during performance counseling sessions, and stated that it was requesting this information to determine whether to file grievances or other charges.

B. Pharmacy Unit

On November 14, the Respondent presented new performance standards to employees in the pharmacy unit. The Respondent also showed pharmacy unit employees their matrix rankings and counseled some employees before implementing the standards in late November. On November 28, to assist in the investigation of a possible grievance, the Union requested data the Respondent used to create performance management criteria for two unit classifications. On November 30, the Union requested performance-related spreadsheets for those classifications. On December 6, the Union requested performance management meeting notes for all customer service employees who were counseled on performance, again for the purpose of investigating possible grievances.

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[1] On September 12, 2006, Administrative Law Judge William G. Kocol issued the attached bench decision. The General Counsel and the Charging Party filed exceptions and briefs. The Respondent filed an answering brief, and the General Counsel and the Charging Party filed reply briefs.

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, and conclusions only to the extent consistent herewith, and to remand the proceeding for an unfair labor practice hearing on all of the allegations.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The recitations set forth in this section are based on the complaint, the opening statements made at the hearing, the briefs to the Board, and documents submitted into evidence, without objection, by the General Counsel. In light of our determination not to defer the allegations to arbitration, and to remand this proceeding to the administrative law judge for a determination on the merits, we find it unnecessary to address substantive issues regarding the complaint allegations.

[3] The pharmacist unit is limited to pharmacists, and the pharmacy unit includes pharmacy technicians, customer service representatives, data entry operators, and pharmacy support employees. A decertification election was conducted in the pharmacist unit in 2006, after the events alleged here occurred. The results of that election remain pending.

[4] All dates are in 2005, unless otherwise indicated.

II. POSITIONS OF THE PARTIES AND JUDGE'S RULING

The complaint alleges that the Respondent refused to provide information to the Union on various dates in September, October, November, and December, and unilaterally implemented the performance standards in violation of Section 8(a)(5) and (1). The Respondent acknowledges that the Union made the information requests, but asserts that it provided most of the information, though not necessarily in the form the Union wanted, and that other requested information (e.g., the counseling reports) was confidential but was available from the employees themselves. The Respondent further asserts that implementation of the new standards was permitted by the collective-bargaining agreements.

Prior to the taking of any testimony at the hearing, the Respondent moved to defer the allegations to arbitration. The judge found that the implementation of the new performance standards was arbitrable, and he thus granted the motion.[5]

He reasoned that, although the Board customarily does not defer information request allegations to arbitration, deferral was appropriate here because the Respondent agreed to concede in arbitration that the contractual recognition clause of each agreement[6] allows the arbitrator to resolve the information request allegations, and it further agreed to waive any timeliness issues that relate to grieving the complaint allegations.

The General Counsel and the Charging Party except, contending that all of the complaint allegations should be resolved in a Board proceeding. The General Counsel argues that the judge did not adhere to the Board's policy of not deferring refusal to furnish information allegations and that the unilateral implementation allegations should not be deferred because they are intimately related to the information allegations.[7]

III. ANALYSIS

A. Alleged Refusal to Furnish Information

In cases alleging a refusal to furnish information, in violation of Section 8(a)(5), the Board has maintained a policy against deferral to arbitration because deferral can result in a "two-tiered" process that may cause delay in resolving the underlying dispute and undue expense for the parties involved, and because the bargaining representative has a statutory right to relevant information that is independent of rights accorded under the contract. *Postal Service,* 276 NLRB 1282, 1285 (1985), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). In *Team Clean, Inc.*, 348 NLRB 1231 fn. 1 (2006), the Board recently reaffirmed its policy not to defer information request allegations.[8]

Here, a controversy exists concerning whether or not requested information was provided or withheld from the Union. Deferral of the information allegations would contravene the Board's established policy against deferring such allegations.

Accordingly, we find that deferral of the information request allegations is not appropriate here.

B. The Alleged Unilateral Implementation

Generally, in cases in which "an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied." *American Commercial Lines*, 291 NLRB 1066, 1069 (1988). Accord: *Arvinmeritor, Inc.*, 340 NLRB 1035 fn. 1 (2003) ("closely intertwined" allegations); *Clarkson Industries*, 312 NLRB 349, 352 (1993) ("closely related" allegations); *S.Q.I. Roofing, Inc.*, 271 NLRB 1 (1984) ("close interrelationship").

Here the unilateral change allegations are arguably deferrable, based on the contractual management-rights clauses, which reference discipline standards of production and the adjustment procedure.[9] However, the alleg-

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[5] The 2003–2006 agreements for the two units contain nearly identical language. The grievance and arbitration provision of each agreement encompasses the establishment of a grievance committee, steps and timetables, and arbitration procedures, including a provision that states as follows:

Arbitrable disputes shall include matters affecting the application, interpretation and enforcement of the terms and provisions of this Agreement. In no event shall the arbitrator have authority to modify, add to, disregard or abolish, in any way, any of the terms and provisions of this Agreement.

[6] The recognition clause of each collective-bargaining agreement provides:

The [Respondent] recognizes the Union as the sole and exclusive representative for purposes of collective bargaining of a unit consisting of all regular full-time and part-time [pharmacists/pharmacy employees]. . . .

[7] The Charging Party further argues that there is no contractual provision covering the information request; therefore the issue is beyond the arbitrator's province. Finally, the Charging Party contends that the unilateral change allegations are not deferrable because mandatory subjects of bargaining are at issue, and it did not clearly and unmistakably waive its right to bargain over those subjects.

[8] Chairman Schaumber would defer the information request allegations to arbitration, finding that they are covered by the parties' contractual arbitration clause. See *Team Clean, Inc*., supra. He recognizes, however, that Board precedent is to the contrary. See, e.g., *Shaw's Supermarket*, 339 NLRB 871, 871 (2003). Accordingly, for institutional reasons, he concurs in finding that deferral of the information request allegations is not appropriate here. See also *DaimlerChrysler Corp.*, 344 NLRB 1324 fn. 1 (2005); *SBC California*, 344 NLRB 243 fn. 3 (2005).

The management-rights clause of each agreement states, in pertinent part:

[t]he Company reserves the right to exercise all the duties and responsibilities of management and to determine all matters of management policy and pharmacy operation, and to direct and control the work

edly unlawful unilateral implementation of the standards is closely intertwined with the nondeferrable allegations concerning the refusal to provide information about those standards. This information was relevant not only for the purpose of considering whether to grieve disciplinary decisions resulting from the change in the performance standards, but also for the purpose of facilitating the Union's ability to engage in negotiations regarding any such changes in the standards prior to their implementation. In view of this interrelation, and having found that the information issues are not appropriate for deferral, we conclude that deferral of the unilateral implementation allegations would, under these circumstances, be inappropriate.

Accordingly, we shall remand the entire case to the judge for determination of the complaint allegations on the merits.

ORDER

The National Labor Relations Board remands this proceeding to Administrative Law Judge William G. Kocol, who shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order concerning the allegations, as appropriate on remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Daniel R. Sanders, Esq., for the General Counsel.
John J. Peirano, Esq. (McElroy, Deutsch, Mulvaney & Carpenter, LLP), of Morristown, New Jersey, and *John J. Shea, Esq.,* for the Respondent.
Todd A. Lyon, Esq. (Reid, Pederson, McCarthy & Ballew, LLP), of Seattle, Washington, for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Spokane, Washington, on August 22, 2006. I granted Respondent's motion to defer this case under *Collyer Insulated Wire,* 192 NLRB 837 (1971), and I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations setting forth findings of facts and conclusions of law. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the Bench Decision; it is attached as Appendix A.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed, provided that jurisdiction is retained for the limited purpose of entertaining a timely motion for further consideration upon a showing that either (a) that the dispute has not, with reasonable promptness after the issuance of this Bench Decision, either been settled or promptly submitted to arbitration or (b) the arbitrator reached a result that is repugnant to the Act.

APPENDIX A

BENCH DECISION

JUDGE KOCOL: The following shall constitute my bench decision in this case, pursuant to the Board's Rules and Regulations.

Jurisdiction in this case is admitted by Respondent, right, Mr. Peirano, in the filing and service of the charge?

MR. PEIRANO: Admitted, Your Honor.

JUDGE KOCOL: All right. The parties in this case have had a fairly long—someone mentioned 1990, if I caught the year right—harmonious relationship. I'm not aware of any unfair labor practice findings by the Board involving these units.

The parties have had collective bargaining relationships. There is a contract now in effect. The contract now in effect clearly covers the alleged unlawful implementation allegations here.

Respondent has agreed to arbitrate the allegations concerning the unlawful refusal to provide information and Respondent is also willing to concede and will concede in arbitration that the recognition clause in the respective collective bargaining agreements will allow the arbitrator to resolve the refusals to provide information.

This, in my view, is a major distinguishing factor from some of the prior cases where a Respondent is willing to arbitrate just the underlying alleged unfair labor practices, but not the refusal to provide information, and this will allow all the issues to be presented to the arbitrator.

The employer, the Respondent, here has also agreed to waive any timeliness allegation that they might otherwise have in the Com—I'm sorry—in the respective collective bargaining agreements concerning the filing of grievances covering the allegations in this complaint and another factor I take into account is that, on the face of the Complaint, the pertinent refusal to provide information allegations were not made at a time sufficiently in advance of the alleged unilateral implementation that would have allowed the union an opportunity to meaningfully use that information in deciding whether or not to bargain.

And so, for all those reasons, I am going to grant the motion to defer this case to arbitration.

force . . . . The Employer shall be the exclusive judge of all matters pertaining to the servicing of its client . . . the schedule and standards of production, equipment methods, processes, means and materials to be used. The promulgation and enforcement of rules and regulation not inconsistent with the provisions of this Agreement are vested in the Employer. . . .

[1] 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.

Within a few days after I get the transcript in this hearing, I'll issue a short written decision in accordance with the Board's Rules and Regulations, adopting what I've just said as my bench decision in this case.

Any other matters for the parties?

MR. LYON: Yes, Your Honor.

JUDGE KOCOL: Yes? Okay, Mr. Lyon.

MR. LYON: Yes. Just in terms of a clarification of Your Honor's order, I think it would be helpful for the parties to identify the issues, if we can, for arbitration.

JUDGE KOCOL: All the substantive allegations of the Complaint, including the refusal to—All right. Let's be more specific. You're right, Mr. Lyon. What I'm talking about is the allegations in Paragraph 6 of the Complaint. Those cover the refusal to provide information. 6 and 7, actually, cover that. And 8 and 9 cover the alleged unilateral changes. So thank you for raising that. I'll clarify that by specifically referring to those paragraphs in the Complaint.

MR. LYON: Okay.

JUDGE KOCOL: All right. Thank you all for your courtesy and cooperation.

The hearing is now closed.