SPE Utility Contractors, LLC *and* Local 339, International Brotherhood of Teamsters. Cases 7–CA–49691, 7–CA–49889, and 7–CA–50103

June 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 2, 2007, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel also filed cross-exceptions and a supporting brief.

The National Labor Relations 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] and set forth in full below.[3]

The judge dismissed the General Counsel's allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by directly dealing with unit employee Linda Leuch regarding a severance package. The judge found, however, that the Respondent violated Section 8(a)(5) and (1) by: (1) laying off Leuch during negotiations for an initial contract with the Union, prior to reaching overall impasse on bargaining for the agreement as a whole; and (2) dealing directly with unit employees by offering employees a bonus to work on the FPL Challenge and by agreeing with employees to recall employee Cheri Seaman to perform bargaining unit work.

We agree with the judge, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) by its direct dealing with unit employees regarding the FPL Challenge and the recall of Cheri Seaman.[4] However, we reverse, on due process grounds, the judge's finding that the Respondent violated the Act by unilaterally laying off unit employee Linda Leuch before the parties had reached overall impasse.

The complaint alleged that the layoff of Leuch violated Section 8(a)(5) because it breached an agreement between the Respondent and the Union to select employees for layoff by reverse seniority.[5] The judge determined that the parties never entered into such an agreement, but he nevertheless found that the layoff violated Section 8(a)(5) because the parties had not yet bargained to overall impasse. Excepting, the Respondent argues that the judge erred in so finding, as the General Counsel neither alleged this theory in the complaint nor moved to amend the complaint to reflect this theory of violation.

We find merit in the Respondent's exception. "[T]he Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Here, the threshold "closely connected" requirement is not met. The violation alleged and the violation found involve different sets of facts and different ultimate issues. The violation alleged put in issue whether the Respondent and the Union had reached an agreement to select employees for layoff by reverse seniority. In contrast, the violation found turned on whether the Respondent and the Union had reached overall impasse in bargaining for an agreement as a whole. These two theories of violation are not closely

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to the violation found. We shall also modify the Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). Further, we shall strike the portion of the judge's recommended Order that requires that unit employees be paid for their work under the Respondent's "FPL Challenge"—an incentive program to reconcile the Respondent's accounts with Florida Light & Power Co.—in a manner consistent with the Fair Labor Standards Act (FLSA). The Department of Labor's Wage and Hour Division, and not the Board, is charged with the primary administration of the FLSA. See *Jacksonville Processing Corp.*, 93 NLRB 943, 945–946 (1951). We shall also substitute a new notice to conform to the modified Order.

[3] 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.

[4] In making this finding, we rely on the fact that the Respondent failed to notify the Union of the FPL Challenge even after it received notice, on January 17, 2007, from Local 339 Business Representative Dale Taylor that the Respondent was to communicate with him, and not simply with union steward Tonya Bland, regarding matters affecting the bargaining unit. Although the Respondent had orally offered unit employees the FPL Challenge a few days before the January 17 notice, it reduced its offer to writing on January 20 without notifying the Union.

Having found that the Respondent engaged in unlawful direct dealing concerning the FPL Challenge, we find it unnecessary to pass on the General Counsel's exception to the judge's dismissal of the allegation that the Respondent also dealt directly with employee Leuch in October 2006, as any such additional violation would be cumulative and would not affect the remedy.

[5] The Respondent's unilateral decision to effect layoffs was not alleged to violate the Act.

connected within the meaning of *Pergament*. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(5) by selecting Leuch for layoff.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, SPE Utility Contractors, LLC, Port Huron, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing Local 339, International Brotherhood of Teamsters, and dealing directly with its unit employees regarding wages, hours, or other terms and conditions of their employment.

(b) 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 from the Union, bargain collectively and in good faith with regard to compensating unit employees for any and all work performed with respect to the FPL Challenge.

(b) Within 14 days after service by the Region, post at its facilities in Port Huron, Michigan, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 17, 2007.

(c) 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.

[6] 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."

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 bypass Local 339, International Brotherhood of Teamsters, and WE WILL NOT deal directly with our bargaining unit office clerical employees with regard to wages, hours, or other terms and conditions of their employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, set out above.

WE WILL, on request, bargain with the Union with regard to compensation for unit employees who performed work on the "FPL Challenge."

SPE UTILITY CONTRACTORS, LLC

Dynn Nick, Esq., for the General Counsel.
William A. Moore, Esq. (Clark Hill PLC), of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on August 8 and 9, 2007. Respondent, which has its main office in Port Huron, Michigan, installs and repairs electrical power lines. It specializes in restoring power lines which have been knocked down in storms.

The Union, Local 339, International Brotherhood of Teamsters, was certified as the exclusive bargaining representative of Respondent's office clerical employees on August 14, 2006. It filed the charges and amended charges giving rise to this case between August 7, 2006, and April 27, 2007. The General Counsel issued the second consolidated complaint, which is before this judge, on May 17, 2007. Most of the allegations in the second consolidated complaint were settled prior to hearing.

The remaining paragraphs of the consolidated complaint allege that Respondent violated Section 8(a)(5) and (1) of the Act, by the following conduct:

1. Respondent, on October 31, 2006, dealt directly with its represented employee, Linda Leuch, by inquiring how much money it would take for her to resign.

2. On November 1, 2006, Respondent offered Linda Leuch a cash payment and other financial incentives in exchange for her resignation and assistance in terminating the Union's status as collective-bargaining representative of Respondent's office clerical employees.

3. Respondent laid off Linda Leuch on December 20, 2006, and did so in violation of an agreement with the Union. Further, the General Counsel argues that even in the absence of an agreement, Respondent violated Section 8(a)(5) in laying off Leuch because the parties had not bargained to impasse regarding her layoff.

4. Respondent unilaterally offered its office clerical employees a cash bonus if these employees reconciled Respondent's accounts with Florida Power and Light Company (FPL).

5. Respondent unilaterally allowed unit employee Cheri Seaman, who it had laid off, to return to its facility to assist other unit employees in reconciling the Florida Power and Light accounts. It also unilaterally required these unit employees to divide their bonus in order to compensate Seaman.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, SPE Utility Contractors, installs and repairs electrical power lines. Its principal office is in Port Huron, Michigan. Respondent received well over $500,000 for work performed outside the State of Michigan in 2006. It 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, Local 339 of the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTUAL CIRCUMSTANCES PERTAINING TO THE ALLEGED UNFAIR LABOR PRACTICES

Complaint Paragraphs 26 and 27: Linda Leuch's Conversations with Respondent's Management on or about October 31 and November 1, 2006

The Union was certified as the exclusive collective-bargaining representative of Respondent's clerical employees on August 14, 2006. Respondent bargained with the Union at about 15 sessions between October 2006 and March 2007. The parties were unable to reach agreement on a collective-bargaining agreement.

By late 2006, Respondent's workload was declining significantly due in part to the end of its contractual work in Florida repairing hurricane damage to the overhead power lines in that State. The number of employees working for Respondent on power lines had declined from about 300 to about 50. At various times there were five to six office clerical employees who were members of the bargaining unit. Tonya Bland[1] was appointed union steward; Linda Leuch, who was the unit employee with the longest tenure at SPE, was appointed alternate steward.

On or about October 31, 2006, Leuch went to lunch with Michael Moriarity, then vice president of Respondent's Michigan operations, and Kurt Satryb, vice president of Respondent's Florida operations. Leuch apparently was personally friendly with Moriarity prior to her employment at SPE. According to Leuch, the two managers asked her what it would take for Respondent to get rid of her. Leuch testified that she responded that Respondent's president, David Postill, had cheated her over the years.

Moriarity also testified that he and Satryb[2] went to lunch with Leuch. However, he testified that it was Leuch that broached the subject of compensation in return for her departure from SPE. According to Moriarity, Leuch claimed that SPE owed her $9000 in annuities and that she would be willing to resign from the Company if she received that amount. Moriarity stated that his response was to offer to talk to Respondent's president, David Postill, about this issue. He then stated that Leuch asked him to do so. Moriarity also testified that he told Leuch that under certain circumstances the Union might have to agree to such a payment.

The next day Leuch met with Postill and Moriarity. According to Leuch, Postill told her that he would pay up her annuity and another $10,000, and not contest her claim for unemployment insurance benefits, if Leuch would make the Union go away. Postill denies this. He testified that he told Leuch that SPE would consider a cash payment to her but that she would have to get the approval of the Union.

I dismiss this complaint allegation in so far as it alleges that Respondent was soliciting Leuch's assistance in getting rid of the Union. I find no basis for crediting Leuch's testimony over that of Moriarity and Postill. For one thing, I don't understand how Leuch was supposed to make the Union disappear. There is, for example, nothing in the record that suggests that Respondent was asking Leuch to initiate a decertification petition.[3]

I also dismiss these allegations in so far as they allege direct dealing by Respondent in attempting to purchase Leuch's departure without contacting the Union. As discussed later in this decision, Respondent, with regard to the so-called "FPL challenge" demonstrated no compunction in ignoring the Union. However, I find I am unable to credit Leuch's testimony that the initiative for the payoff came from Respondent in light of her incredible testimony that Respondent conditioned the payment on her getting rid of the Union. Moreover, I am unable to discredit the testimony of Respondent's witnesses that they informed Leuch that she must obtain the blessing of the Union before they could agree to a severance package for her.

---

[1] Bland's given name is Mary Tonya Bland.

[2] Satryb no longer worked for Respondent at the time of the hearing.

[3] I also note that the Union had about 9 months left in its certification year. Thus, Respondent could not have refused to bargain with the Union on the basis of a decertification petition. On the other hand, Postill may not have been aware of this rule.

Complaint Paragraph 28: Alleged Breach of Agreement in Laying Off Linda Leuch

On December 20, 2006, Respondent's president summoned all its office clericals to his office and informed them that he was laying off three of the five bargaining unit members. Two of those laid off were the lowest employees in terms of seniority, Yvonne Sweet and Cheri Seaman. However, Respondent also laid off Linda Leuch, who had the most seniority with Respondent[4] and retained Tonya Bland and Lisa Thomson, who had less seniority than Leuch.[5]

The General Counsel alleges that Respondent agreed with the Union to layoff according to reverse seniority and breached its agreement. On December 14, Respondent's lead negotiator, Thomas D'Luge, informed Union Business Representative Dale Taylor, that it was very likely that Respondent would lay off some bargaining unit members. On or about December 17, Taylor told D'Luge that any layoff must be done by reverse seniority. He apparently did not object or request bargaining about the layoff itself, or the number of employees who would be laid off.

Sometime between December 17 and 19, Taylor and D'Luge discussed Linda Leuch's ability to handle Respondent's payroll. D'Luge told Taylor that Respondent didn't believe that Leuch could perform the payroll tasks. Taylor disagreed. D'Luge also said that if Leuch were assigned to Respondent's payroll, her wages would be reduced to those paid Cheri Seaman, the employee who was performing the payroll function at the time.[6]

Taylor testified that in a telephone conversation on December 19 D'Luge agreed that Respondent would lay off strictly by reverse seniority. D'Luge testified that Respondent never agreed to any union demands regarding the layoff, except that it would lay off part-time employees before full-time employees.[7] I credit D'Luge since I see no reason for Respondent to raise the issue of the relative capabilities of the unit employees, and then for some unexplained reason agree to layoff by strict reverse seniority. Both Taylor and D'Luge testified that they argued as to Leuch's capability with regard to Respondent's payroll. Since it is clear that Respondent never agreed that Leuch was competent to perform the payroll tasks, it is highly unlikely that it would have agreed to retain her.

Generally Applicable Legal Principles

When negotiating a collective-bargaining agreement with the authorized representative of its employees, an employer is obliged pursuant to Section 8(a)(5) of the Act to maintain the status quo with regard to mandatory subjects of bargaining, *NLRB v. Katz,* 369 U.S. 736 (1962); *Our Lady of Lourdes Health Center,* 306 NLRB 337 (1992). During negotiations, an employer's obligation to refrain from unilateral changes in the wages, hours, and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole. *Bottom Line Enterprises,* 302 NLRB 373 (1991).

There are exceptions to this general rule. One is the "longstanding practice exception." This exception is based on the recognition that certain unilateral changes do not interfere with collective bargaining because they represent the status quo, *Queen Mary Restaurants Corp. v. NLRB,* 560 F.2d 403, 408 (9th Cir. 1977); *The Courier Journal,* 342 NLRB 1093, 1094 fn. 1 (2004). Employers may also implement unilateral changes when a union engages in tactics designed to delay bargaining. Additionally, when economic exigencies compel prompt action, an employer may be entitled to implement such unilateral changes. However, even when "economic exigencies compelling prompt action" justify unilateral changes, the employer must provide the union adequate notice and an opportunity to bargain. *RBE Electronics of S.D., Inc.,* 320 NLRB 80, 82 (1995).

I conclude that Respondent satisfied its statutory obligations with regard to the layoff by notifying the Union of its intentions to lay off office clericals and offering the Union the opportunity to bargain over the layoffs. As the Union raised no objections either to the layoff itself, or the number of employees to be laid off, the only remaining issue is whether Respondent violated Section 8(a)(5) by laying off Linda Leuch despite her seniority.

Applying the rule in *Bottom Line Enterprises,* supra, I conclude that Respondent violated Section 8(a)(5). Regardless of whether they had reached an impasse as to whether Leuch should be retained or not, the parties had not reached overall impasse on bargaining for the agreement as a whole. There is no evidence of "economic exigencies" to justify the layoff of Leuch absent either an agreement or overall impasse. Even assuming that Respondent established that it could operate better with the two employees it retained, Tonya Bland and Lisa Thomson, it did not establish that it could not have continued operating satisfactorily had it retained Leuch instead of one of these two employees.

Complaint Paragraphs 29 and 30: Respondent's Unilateral Offer of a Bonus to Unit Employees (Direct Dealing)

In early January 2007, David Postill summoned unit employees Tonya Bland and Lisa Thomson into his office, along with nonunit employee Lisa Livingston. He offered the three a $10,000 bonus if they could reconcile SPE's billing disputes

[4] Sweet and Seaman, but not Leuch, were unilaterally recalled to work by SPE in the winter or spring of 2007. There is no allegation before me that Respondent violated the Act in doing so.

[5] Respondent's lead negotiator D'Luge testified that the Union insisted on superseniority for its steward, Tonya Bland. Union Business Representative Dale Taylor testified that superseniority was never discussed. D'Luge testified that he informed Taylor that Respondent would not agree to superseniority, but wanted to retain Bland for other reasons. Bland, at the time of the layoff, was working on the Detroit Edison account, which was the largest of Respondent's accounts at the time. Leuch, in contrast, was working primarily on the Florida Power and Light account. At the time of the layoff, Respondent's storm restoration work for FPL had finished although there were millions of dollars in dispute between SPE and FPL.

[6] Leuch was being paid $17.50 per hour; Seaman was paid $14 per hour.

[7] Respondent's position statement, GC Exh. 6, states that it also agreed to use seniority as a tie breaker if all other considerations were equal.

with FPL by February 15, 2007.[8] This offer is referred to in the transcript and complaint as the "FPL challenge." Respondent did not inform the Union of this offer.

Livingston, however, asked Bland in her capacity as union steward, if it was okay.[9] Bland responded affirmatively, but opined that the employees would never receive the bonus. Neither Respondent nor Bland informed Business Representative Taylor of the bonus offer in January. Taylor became aware of the bonus offer in mid-February. Postill followed up his oral offer with an e-mail on January 20, 2007 (GC Exh. 3). In the e-mail, Postill encouraged the three employees to work at home "or on your own time."

Lisa Livingston suggested that the three invite Cheri Seaman, who had been laid off and not yet recalled, to come to the office to work on this project. The three employees went to David Postill, who approved their plan to get Seaman's assistance. However, Postill told them that Seaman was to work only on the "FPL challenge." The employees advised Postill that they would compensate Seaman for her work on this project. Seaman worked for somewhere between 2 and 5 weeks on the "FPL challenge," possibly 4 to 5 hours a day. The three warned Seaman that she might not be paid the bonus. As it turned out, none of the employees were paid anything for reconciling the FPL account, which was accomplished after the deadline (which was apparently extended beyond February 15).

Although David Postill was in Florida during all or almost all of the period in which Seaman worked while on layoff, Michael Moriarity worked in the same building, on the same floor as the clericals on a regular basis. He was aware that Seaman was at Respondent's office on a regular basis.

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1). Direct dealing need not take the form of actual bargaining. As the Board made clear in *Modern Merchandising*, 284 NLRB 1377, 1379 (1987), the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode "the Union's position as exclusive representative." Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions plainly erodes the position of the designated representative.

Respondent's offer of a bonus to unit employees without giving notice to the Union and offering it the opportunity to bargain with regard to it constitutes "direct dealing" that violates Section 8(a)(5) and (1) of the Act. *Register Guard,* 339 NLRB 353, 359 (2003); *James Heavy Equipment Specialists,* 327 NLRB 910, 915 (1999). Lisa Livingston's communications with Tonya Bland, who was the Union's steward until she resigned the position in March, do not satisfy Respondent's obligation to bargain in good faith with the Union. Livingston, who is David Postill's aunt, was at one time Respondent's office manager. It is not clear whether she held this position in January 2007, and the record does not establish that she was either a supervisor or Respondent's agent.

Moreover, Postill's communication with Bland also failed to satisfy Respondent's statutory obligations. Bland had informed Postill in October 2006 that he must contact the Union about any changes to the terms and conditions of employment of the bargaining unit employees and that discussing such changes with her was not sufficient. The Union's business representative, Dale Taylor, reiterated this message to Respondent's lead negotiator, D'Luge, on January 17, 2007, i.e., that SPE must communicate with Taylor in regard to any decision affecting the bargaining unit, not simply with Bland.

The controlling Board decision on this issue is *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 349 (2003). In that case, the Board held that notice to union stewards did not constitute notice to the Union where the parties' collective-bargaining agreement and a letter to the employer from the union president unambiguously informed the employer of limitations on the stewards' authority. In the instant case, Respondent was on notice from October 2006 onward that it must communicate with Business Representative Taylor regarding any change in the terms and conditions of employment for unit members. Moreover, when Taylor reiterated this message on January 17, Respondent made no effort to inform him of the FPL challenge or the fact that it had approved the performance of unit work by Cheri Seaman. If so informed, Taylor could have, for example, insisted that Respondent bargain with regard to who should be recalled to work on the FPL challenge and how they should be compensated. Thus, Respondent's direct dealing with unit employees violated Section 8(a)(5).

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(5) and (1) by laying off Linda Leuch during negotiations for an initial contract with the Union prior to reaching overall impasse on bargaining for the agreement as a whole, dealing directly with unit employees with regard to the "FPL challenge" and recalling Cheri Seaman to perform bargaining unit work.

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.

The Respondent having illegally laid off an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[8] Respondent's brief asserts that the offer was made initially on January 11, 2007. There is no evidence in the record to support this assertion. However, Tonya Bland testified the offer was made sometime prior to the Postill's January 20, 2007 e-mail.

[9] Bland resigned her position as union steward in March 2007.