

While the request for review was pending before the Board, the parties engaged in negotiations for a successor agreement.¹ During the negotiations, the Employer again attempted to obtain the Union's agreement to divide the bargaining unit into two separate units. The Union would not agree based on the Regional Director's decision in the UC case. The parties then negotiated the terms of an agreement for a single bargaining unit covering both divisions. Employer director of human resources Faut forwarded two copies of the agreement between the parties with a letter dated February 23, 1998, to Union representative Almeida. Faut's letter stated:

Both Division Vice Presidents requested that, in my role as coordinator of the process of putting the Agreement together, I assure you that they do not intend and will not regard the Agreement, your signatures and/or their own signatures as waiving any of the parties' rights that my[sic] arise out of or in connection with the forthcoming decision in the pending unit clarification case.

The parties then executed a new four-year agreement, effective October 1, 1997 through September 30, 2001, covering the two divisions at the separate locations.²

On June 13, 2000,³ the Board issued its decision⁴ reversing the Regional Director's decision and clarifying the unit of Roller Chain and Automotive Division employees into two separate bargaining units relying on Gitano Distribution Center.⁵ On August 29, the parties met, at the Employer's request, to bargain over the effects of the Board's decision. Employer attorney Marta stated that the Employer interpreted the Board's decision to mean that the existing agreement was no longer applicable to the employees

¹ The parties' then existing collective-bargaining agreement expired on September 30, 1997.

² The preamble to the contract states the agreement covers both the Roller Chain and Automotive Divisions. However, the recognition clause refers only to employees at the Holyoke location.

³ All remaining dates are in 2000 unless otherwise noted.

⁴ U.S. Tsubaki, Inc., 331 NLRB No. 47 (June 13, 2000).

⁵ 308 NLRB 1172 (1992).

in the Automotive Division. The Employer requested that the parties establish dates to negotiate a new contract for the Automotive Division and made a formal demand to bargain. Union attorney Pyle stated that the current agreement was binding on both divisions, but the Union would voluntarily agree to bargain early for a successor contract for both units at one set of negotiations. Marta rejected the Union's proposal because the Employer had already tried unsuccessfully to negotiate separate agreements and was now seeking the benefit of the Board's decision, which it claimed required the Union to bargain.

In response to Pyle's inquiry as to what the Employer was willing to offer to induce the Union to come to the bargaining table, Marta stated the Employer would agree to maintain the status quo during bargaining for a fixed period of time, perhaps 60 days. Marta also stated the Automotive Division would seriously consider a new contract that would maintain the wages and benefits provided for in the 1997-2001 agreement through the expiration date of that contract. Pyle rejected the offer to bargain and said that the Union was looking for concessions in the way of greater wages and benefits than in the old agreement if it were to engage in bargaining. Marta stated he would have to file a ULP charge if the Union would not bargain and again made a formal demand to bargain for a new agreement for the Automotive Division. Pyle again stated that the Union would not bargain.

On August 31, the Employer filed the instant charge against the Union alleging that, since August 29, it has refused to bargain for a new contract in violation of Section 8(b)(3). On October 12, the Union filed the instant charge against the Employer alleging it has abrogated its 1997-2001 collective-bargaining agreement with the Union as to its Automotive Division in violation of Section 8(a)(5).⁶

ACTION

We conclude that complaint should issue, absent settlement, alleging the Union violated Section 8(b)(3) by refusing to bargain with the Employer as to the Automotive Division because the Union was obligated to bargain for a new contract covering such employees, in light of the Board's determination that the Automotive Division is a separate unit. [FOIA Exemptions 2 and 5

⁶ The Employer has not, to date, changed any of the terms and conditions of employment set forth in the 1997-2001 agreement as to either division.

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We conclude the existing contract no longer applies to the Automotive Division, in light of the Board's determination that it is a separate appropriate unit. Thus, the Employer may lawfully rescind the contract as to the Automotive Division and demand that the Union bargain for a new contract covering those employees. In Gitano, above, the Board specifically addressed the issue of whether an existing contract applies to unit employees transferred to a new location. The Board first announced a new rule to apply when an employer transfers a portion of its represented unit employees from one location to a new location. In such circumstances, the Board stated that it will first apply the long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. Assuming the presumption is not rebutted, the Board will then apply a simple fact-based majority test to determine whether the employer is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, the Board will presume that those employees support the union and the employer will be obligated to recognize and bargain with the union. Absent this majority showing, no such presumption arises and no bargaining obligation exists.⁷ Furthermore, the Board stated that although the issue of whether an existing contract would be applicable to the new facility was not presented in that case, "if the new facility is a separate unit, it would appear that the contract would not apply without an agreement that it would apply."⁸

The instant case presents the same issue contemplated by the Board in Gitano. Indeed, the Board has already concluded that the Automotive Division is a separate appropriate unit under the principles set forth in Gitano.⁹ Moreover, the Board indicated in Gitano that it would conclude, absent an agreement otherwise, an existing contract in these circumstances no longer applies to the new unit. Accordingly, a determination that the existing contract no longer applies to the Automotive Division,

⁷ 308 NLRB at 1175.

⁸ Id., n.21, citing Houston Div. of Kroger Co., 219 NLRB 388 (1975).

⁹ 331 NLRB No. 47, slip op. at 1.

absent an agreement that it applies, and thus allowing the Employer to rescind the contract as to those employees, is consistent with Gitano.¹⁰

Furthermore, a determination that the Employer may lawfully rescind the existing contract as to the Automotive Division is consistent with the Board's principle of requiring employer adherence to agreements voluntarily made. As a general rule, an employer is not privileged to rescind an agreement as to certain employees it claims are excluded from the covered unit where the employer voluntarily executed the agreement covering such employees.¹¹ In this regard, we note that in determining whether to apply this rule in a particular case, the Board often considers whether it would entertain a unit clarification petition under similar circumstances.¹² However, the instant case is

¹⁰ We reject the Union's argument that the contract itself is the "agreement" by the Employer to apply the existing contract to the Automotive Division. First, the Employer was obligated to bargain for a contract covering both divisions based on the Regional Director's unit clarification decision. Second, the contract itself is not the type of "agreement" contemplated by the Board in Gitano. Indeed, in referring to an agreement to apply the old contract to the new unit, the Board cited Houston Div. of Kroger Co., above. In this regard, we note that the "agreement" in Kroger to apply the existing contract to a new unit consisted of a specific "after-acquired" clause in the contract that stated the union represented employees "at all stores" operated by the employer's Houston Division. 219 NLRB at 388. No such clause is present in the instant case. Although the preamble of the contract refers to the Automotive Division, the recognition clause only refers to employees at the Holyoke location.

¹¹ See, e.g., Arizona Electric Power, 250 NLRB 1132, 1133 (1982) (Board concluded employer was not privileged to alter unilaterally the scope of the unit during the term of the contract as to certain contractual unit employees it claimed were managers or supervisors. The Board noted that the employer executed the contract with full knowledge of the disputed employees' duties and had never before raised the issue of the continued inclusion of the employees in the overall unit).

¹² Indeed, in Arizona Electric Power, the Board noted that in similar circumstances, it would have refused to entertain a mid-term unit clarification petition to exclude alleged supervisors. The Board reasoned that since it has dismissed

distinguishable from those cases in which the Board has enforced employer adherence to agreements it voluntarily executed, or dismissed a unit clarification petition filed after the execution of a contract.

In Holy Cross Hospital, above, the Board affirmed the ALJ's conclusion that the employer was required to apply the terms and conditions of the existing contract to the "house supervisors." Before executing the contract covering such employees, the employer filed a UC petition in order to establish that the house supervisors were statutory supervisors and, therefore, excluded from the nurses' unit. However, the employer also executed an agreement with the union that it would not seek review of an adverse UC decision. The Regional Director subsequently determined that the house supervisors were not statutory supervisors, relying on a line of cases subsequently overruled by the Supreme Court in NLRB v. Health Care & Retirement Corp.¹³ The employer did not seek review as it had agreed, and the parties then executed a successor collective-bargaining agreement in which the house supervisors remained in the nurses unit. The employer then made unilateral changes in the house supervisors' terms and conditions of employment. In defense of its actions, the employer argued that it never voluntarily agreed to the inclusion of the house supervisors in the collective bargaining agreement, and absent the use of the Board's flawed legal test in the UC decision, the house supervisors would have been excluded from the unit as it requested in that proceeding.¹⁴

In rejecting the employer's argument, the ALJ stated that the employer should be held to the bargain that it struck with the union during negotiations. According to the

mid-term petitions to exclude alleged supervisors on the ground that to entertain them would be disruptive of established bargaining relationships, "it would be anomalous were we here to permit [the employer] to engage in the far more disruptive practice of unilaterally modifying the scope of a unit during the life of a contract covering that unit." Id. at 1133. See also Holy Cross Hospital, 319 NLRB 1361, 1365 (1995), discussed below. See Edison Sault Electric Co., 313 NLRB 753 (1994), and cases cited there for discussion of the Board's policy of dismissing unit clarification petitions filed during the term of a contract specifically covering the disputed employees.

¹³ 511 U.S. 571 (1994).

¹⁴ 319 NLRB at 1364.

ALJ, the employer's voluntary inclusion of the house supervisors in the unit was demonstrated by its agreement to limit its prosecution of the UC petition to the initial decisional level. The ALJ reasoned that the employer effectively agreed to treat the Regional Director's decision as final and binding on the house supervisor issue by agreeing beforehand that it would not seek review of the UC decision as it was legally entitled to do.¹⁵ Furthermore, the employer should have known the analytical approach the Regional Director would take in reaching the UC decision because he simply applied the law as it existed at the time. Based on the circumstances, the ALJ concluded that the employer should be held accountable for his agreement "for the same reasons that underlie the Board's policy in not permitting parties to use the unit clarification process to secure the removal of supervisors from a unit after executing a collective-bargaining agreement which includes the supervisors in issue."¹⁶

Conversely, the Employer's conduct in the instant case does not indicate that it "voluntarily" agreed to include the Automotive Division in the unit. Unlike the employer in Holy Cross Hospital, the Employer never agreed to put the issue of separate units to rest by agreeing not to seek review of the Regional Director's decision. Indeed, the Employer did in fact seek Board review of the adverse decision before the parties began negotiations for the current agreement. In addition, the Employer requested that the parties negotiate an agreement to separate the two divisions into separate bargaining units during the term of the previous contract, and again, in negotiations for the current agreement. Moreover, once the parties embodied the negotiated terms into an agreement and before it was executed, the Employer sent the Union a letter stating that it in no way intended the agreement to waive any rights that may arise in connection with the pending UC decision. Based on the circumstances, the Employer adequately met its burden of establishing that it did not voluntarily agree to the inclusion of the Automotive Division in unit. Thus, although the Employer subsequently executed the agreement covering both divisions, it did so only because of the Regional Director's unit determination, which it was contesting, and not because it had voluntarily agreed to the inclusion of the Automotive Division in the unit.

Moreover, the instant case is distinguishable from cases in which the Board has declined to process a UC

¹⁵ Id. at 1365.

¹⁶ Id., citing Edison Sault Electric Co., above.

petition filed after the execution of a contract. Indeed, it falls within the exception to the Board's policy of dismissing UC petitions filed after a contract is executed.¹⁷ In Baltimore Sun Co.,¹⁸ the employer made a proposal in negotiations for a successor agreement to exclude certain employees and stated "that if we are not able to negotiate these exclusions we are going to the Board. . . to file a unit clarification petition."¹⁹ The Board concluded that, in the absence of evidence the employer withdrew its position in exchange for any concession from the union, the employer adequately reserved its right to go to the Board. In the instant case, the Employer did not explicitly reserve its right to go to the Board because it actually went to the Board by filing the UC petition and seeking Board review of the adverse decision, before it executed the contract. Moreover, even if the Employer had not already petitioned the Board, arguably its requests to bargain for separate units on two separate occasions and its letter to the Union dated February 23, 1998, adequately reserved its position.²⁰ Furthermore, there is no evidence indicating it abandoned its position on the unit issue in exchange for any concession from the Union. Accordingly, the instant case falls within the exception to the Board's policy of dismissing unit

¹⁷ See St. Francis Hospital, 282 NLRB 950, 951 (1987), and cases cited there for discussion of the exception to the Board's policy of dismissing UC petitions filed after the execution of the contract. According to the Board, in some circumstances, the interests of stability are better served by entertaining a unit clarification petition filed during the term of a contract. Thus, the Board will entertain a petition at such time where the parties cannot agree on whether a disputed classification should be included in the unit, but do not wish to press this issue at the expense of reaching agreement, and there is no indication that the petitioner abandoned its request in exchange for some concessions in negotiations.

¹⁸ 296 NLRB 1023 (1989).

¹⁹ Id.

²⁰ See Brookdale Hospital Medical Center, 313 NLRB 592, n.3 (1993) (explicit reservation to pursue the issue with the Board is not required; letter requesting inclusion of disputed employees and refusal by other party sufficient to demonstrate that dispute existed during negotiations).

clarification petitions filed after the execution of a contract.²¹

We further conclude the Union violated Section 8(b)(3) for failing to bargain with the Employer for a new contract covering the Automotive Division at the new facility. As previously discussed, the existing contract no longer applies to the Automotive Division. Moreover, the Union remains the bargaining representative of the new unit as a majority of the employees at the new facility were transferred from the old facility, and the Union has not disclaimed its representational interest. Thus, as bargaining representative for the Automotive Division, the Union is obligated upon request to bargain with the Employer for a new collective-bargaining agreement.²²

Accordingly, the Region should issue complaint, absent settlement, alleging the Union violated Section 8(b)(3) for failing to bargain with the Employer for a new contract covering the Automotive Division. [*FOIA Exemptions 2 and 5*]

²¹ We note that although the Employer is not required to apply the existing contract to the Automotive Division, the Employer must continue to maintain the employees' status quo while bargaining for a new contract. Furthermore, the Employer must bargain with the employees' previous conditions of employment as the starting point. See Borden, 308 NLRB 113, 115 (1992), enfd. 19 F.3d 502 (10th Cir. 1994) (Board concluded employer must maintain status quo and bargain from employees' previous conditions of employment in bargaining for a new contract covering new unit of employees, composed of transferees from other plants, at new consolidated operation).

²² See Food & Commercial Workers Local 1439 (Layman's Market), 268 NLRB 780, 784-85 (1984) (union refusal to meet and confer with employer because of "mistaken belief that the Employer had adopted the [competitor's] contracts cannot privilege its failure to meet its obligations under Section 8(d)," and union violated Section 8(b)(3)). In Layman's Market, the ALJ noted that Section 8(b)(3) must be read in conjunction with Section 8(d), which sets out the mutual obligations of the parties to meet regarding, among other things, "the negotiation of an agreement," and quoted NLRB v. Insurance Agents, 361 U.S. 477, 487 (1960), for the proposition that "when enacting Section 8(b)(3) Congress sought to condemn in union agents those bargaining attitudes 'that had been condemned in management' by the previously enacted Section 8(a)(5)."

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B.J.K.

²³ [*FOIA Exemptions 2 and 5*

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