

A & W Foods, Inc. and Local 880, United Food and Commercial Workers International Union, AFL-CIO. Case 8-CA-17860

16 September 1985

DECISION AND ORDER

**BY MEMBERS DENNIS, JOHANSEN, AND
BABSON**

On 18 June 1985 Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, A & W Foods, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has 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.

Steven Wilson, Esq., for the General Counsel.
Lisa Mann, Esq., for the Respondent Company.
Lawrence Oberdank, Esq., for the Charging Party Union.

DECISION

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in this case on October 25, and an amended charge was filed on December 7, 1984. A complaint issued on December 7, 1984, and was amended later at the hearing. The complaint alleges, *inter alia*, that Respondent Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to pay a wage increase provided for in the collective-bargaining agreement of the parties. Respondent Company denies violating the Act as alleged. A hearing was held in Cleveland, Ohio, on March 14, 1985. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs of counsel, I make the following

FINDINGS OF FACT

Respondent Company is engaged in the wholesale distribution of meat and poultry products in Cleveland, Ohio, and is admittedly an employer engaged in commerce as alleged. Charging Party Union is admittedly a labor organization as alleged. The Union, at all times pertinent here, has been and is the exclusive bargaining agent of the Company's employees in the following appropriate unit:

All employees in the plants of the Employer located in the jurisdiction of the Union, excluding all clerical employees, guards and supervisors as defined in the Act.

The Union and the Employer have executed successive collective-bargaining agreements pertaining to the unit employees, the most recent agreement (G.C. Exh. 2) being effective from August 15, 1982, to August 15, 1985.

Ray De Santis, an officer of the Union, testified that the 1982-1985 contract between the parties provides for, *inter alia*, a 55-cent across-the-board wage increase on August 15, 1984. (See G.C. Exh. 2, pp. 9-10.) However, by letter dated July 25, 1984 (G.C. Exh. 3), Company Vice President Robert Snow notified the Union:

Because of compelling financial reasons, we regret to inform you that our Company cannot implement the 55-cent-per-hour increase scheduled in our contract with your Union to be effective August 15, 1984.

During earlier meetings we had made private financial information available to your Union, and you should be informed and understanding of our problem.

We are prepared to meet with the Union to discuss this critical situation at any time.

Subsequently, during August 1984, as De Santis testified, the parties met "to discuss the Company's request for future concessions." The Company's representatives claimed that "competition was cutting into their operations," and "they were in financial desire and needed help in the contract." The Company wanted "to stand pat on the present wages"; "some help in overtime pay"; and "possibly some relief in reducing the holiday benefits and vacations." The Union responded: "it was too severe"; "we negotiated in good faith and it [the agreement] was accepted by the membership"; the "members are looking for some kind of increase"; and "we don't see any chance of that passing." Then, Company Vice President Snow

indicated that, well I [Snow] could live with the vacation and the time and a half . . . and the holidays, but I cannot implement the wage increase. . . .

The Union agreed "to take it [the Company's proposal] to the membership." However, as De Santis explained, at no time during the course of this meeting did the Union "tell Company representatives that [it] considered the

contract to be reopened for negotiations simply because of this meeting

Later on August 19 1984 at a special meeting of the union membership attended by 81 members the Union rejected the Company's proposal by a vote of 77 to 4 De Santis so advised the Company See General Counsel's Exhibit 4 the Union's letter to the Employer pertaining to the special meeting and rejection and concluding

If the Company fails to implement the increase by August 29 the Union will file a class action grievance for all members claiming wages due as well as an unfair labor practice charge with the NLRB for unilaterally changing the conditions of employment under the present collective bargaining agreement

On August 22 the Employer notified the Union *inter alia* that A & W Foods is financially unable to implement the 55 cent per hour increase contractually scheduled for August 15 1984 and consequently the Company cannot and will not implement that increase (See G C Exh 5) And as De Santis further testified this scheduled wage increase was in fact never put into effect (See stipulation Tr 29)¹

Company Vice President Snow generally related the problems Respondent faced with its competitors and their negative impact on the Employer's operation He cited pending anti-trust litigation and generally asserted

in legal fees alone it's over 80 or 90 thousand dollars this does not [count] the losses we took in the sale of merchandise we figure we lost between 350 to 450 thousand dollars starting out in the summer of May June July, August September 1983

The Company according to Snow previously notified the Union of the need for financial relief The Company took other business action to improve [its] operations However the Company's economic condition assertedly has not improved since 1984 On cross examination Snow was asked Can you tell me what the size of your losses were then from April 1983 to April 1984? He generally responded I believe the Company showed a loss I don't have any figures but it was the first time since we went into business that we ever showed a loss²

¹ On cross examination De Santis recalled that the Union previously had conducted an intensive audit of the Company's records and books and it was indicated that the Company was profitable had some management problems had a change in merchandise mix where they were making money in some products and losing money on other products they went into additional lines of foods [and] some were very profitable Their losses were not as great as they indicated

² See also the testimony of Michael Galassi the Employer's operations manager Galassi was in the unit prior to September 1984 and he asserted that as a Union member [he was not] told by any Union official about the Company's economic status Galassi participated in the 1982 contract negotiations for the Union Galassi claimed that the Union had acknowledged that the Company's books showed a loss Galassi subsequently participated in laying off employees He related *inter alia*, other economy measures which were implemented by the Employer

I credit the testimony of De Santis recited above His testimony is in essential part undisputed He impressed me as a reliable and trustworthy witness On the other hand the testimony of Snow and Galassi was vague in complete general and at times unclear I do not find Snow and Galassi on this record to be reliable witnesses

Discussion

In *Connecticut Light & Power Co* 271 NLRB 766 (1984) the Board concluded

that Section 8(d) of the Act protects a party to a collective bargaining agreement from incurring a bargaining obligation on proposing a midterm contract modification when the contract does not contain any reopener language Thus the Respondents did not violate the Act when they refused the Union's request to bargain over a proposal they made during the contract term

The Board explained

[N]othing in this section suggests a party *making* a midterm proposal should be treated differently from a party *receiving* such a proposal As the recipient of a midterm proposal clearly has no duty to discuss or agree to it the party proposing a midterm modification does not incur a bargaining obligation by tendering its proposal

And later in *Herman Bros* 273 NLRB 124 (1984) the Board held

For the reasons stated in our recent decision in *Connecticut Light & Power* [supra] we adopt the judge's finding that [the union] did not tacitly agree to reopen the contract thereby incurring a bargaining obligation simply by agreeing to discuss the Respondent's proposed midterm wage modifications and offering its own counterproposals

In the instant case the Employer notified the Union that it could not implement the wage increase scheduled in our contract effective August 15 1984 The Employer requested the Union to meet The Union later met with the Employer listened to the Employer's request for future concessions didn't see any chance of that passing and agreed to take back to the membership the Company's proposal that the Union waive or freeze the scheduled wage increase The membership overwhelmingly rejected this request The Union so advised the Employer and made clear that

If the Company fails to implement the increase by August 29 the Union will file a class action grievance as well as an unfair labor practice charge

The scheduled wage increase was not implemented Under the circumstances the Employer's midterm unilateral modification of this scheduled wage increase was in derogation of the bargaining obligation under Section 8(a)(5) and Section 8(d) of the Act Here as in *Herman*

Bros. supra, the Union "did not tacitly agree to reopen the contract, thereby incurring a bargaining obligation, simply by agreeing to discuss the Respondent's proposed midterm wage modifications"³

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce as alleged.
2. The Union is a labor organization as alleged.
3. The Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to pay a wage increase provided for in the collective-bargaining agreement of the parties.
4. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such unlawful conduct or like and related conduct and to post the attached notice. Affirmatively, the Employer will be directed to implement and put into effect the hourly wage increase as provided in the current contract of the parties and to make whole the unit employees for all losses sustained as a result of its failure to comply with this contractual provision, together with interest, as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). The Employer will also preserve and make available to the Board, on request, all payroll records and reports, and all other records, necessary and useful to determine the amounts of backpay due and compliance with this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, A & W Foods, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Failing and refusing to bargain in good faith with the Union, Local 880, United Food And Commercial Workers International Union, AFL-CIO, the exclusive bargaining representative of its employees in the appropriate unit described below, by failing and refusing to pay a wage increase as provided in the collective bargaining agreement of the parties. The appropriate unit is:

All employees in the plants of the Employer located in the jurisdiction of the Union, excluding all clerical

³ Respondent asserts as justification its poor economic situation. The above authorities make it clear that the economic position of a party will not privilege such a midterm modification. In any event, the general, vague, and unsubstantiated testimony of Snow and Galassi falls far short of providing a sufficient basis to privilege this specific midterm modification of a scheduled wage increase.

⁴ 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.

cal employees, professional employees, guards and supervisors as defined in the Act.

(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) Implement and put into effect the hourly wage increase as provided in the current contract of the parties.

(b) Make whole the unit employees for all losses sustained by its failure to comply with this contractual provision, together with interest, as provided in this Decision:

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 8, 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 said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Decision, what steps Respondent has taken to comply.

⁵ 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

WE WILL NOT fail and refuse to bargain in good faith with the Union, Local 880, United Food and Commercial Workers International Union, AFL-CIO, the exclusive bargaining representative of our employees in the following appropriate unit, by failing and refusing to pay a wage increase as provided in the collective-bargaining agreement of the parties. The appropriate unit is:

All employees in the plants of the Employer located in the jurisdiction of the Union, excluding all clerical-employees, guards and supervisors as defined in the Act.

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

WE WILL implement and put into effect the hourly wage increase as provided in our current contract with

the Union and make whole our unit employees for all losses sustained as a result of our failure to comply with this contractual provision together with interest

A & W FOODS INC