

**VM Industries, Inc and Local 6, International Federation of Health Professionals Case 22-CA-14791**

September 27 1988

**DECISION AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND CRACRAFT**

On October 28, 1987 Administrative Law Judge Harold B Lawrence issued the attached decision. The Charging Party filed exceptions and a supporting brief and the Respondent filed exceptions.

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 brief and has decided to affirm the judge's rulings, findings<sup>1</sup> 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 VM Industries Inc Newark New Jersey its officers, agents, successors and assigns shall take the action set forth in the Order.

<sup>1</sup> The judge declined to dismiss the representation petition in Case 22-RC-9713 because that case was not before him (and there was no motion to consolidate that case with this case) and because there was insufficient evidence in the record to determine whether laboratory conditions for an election have been affected. In adopting the judge's decision and rationale we find it unnecessary to rely on the judge's characterization of Union President Perry's testimony that the Respondent thought it could get a better deal from Local 11 as only an expression of Perry's opinion. Although Perry's testimony is unclear he ultimately attributed such a statement to representatives of the Respondent. The judge expressed doubt that the Respondent could have held the underlying belief but viewing the testimony as Perry's opinion he did not credit it.

In establishing a remedy the judge failed to state that it should be determined in accordance with *Ogle Protection Service* 183 NLRB 682 (1970) and *Merryweather Optical Co* 240 NLRB 1213 1216 fn 7 (1979). We correct that error.

*Marguerite R Greenfield Esq* for the General Counsel  
*Stephen A Bender* of Newark New Jersey for the Respondent  
*Jonathan Walters Esq (Kirschner Walters & Willig)* of Philadelphia Pennsylvania for the Union

**DECISION**

**STATEMENT OF THE CASE**

**HAROLD B LAWRENCE** Administrative Law Judge  
This case was heard by me at Newark New Jersey on 12 August 1987. The complaint issued on 17 June 1987 is based on a charge filed on 22 December 1986 by Local 6 International Federation of Health Professionals (the Union). In essence it alleges that VM Industries

Inc the Respondent repudiated a collective bargaining agreement that it had entered into with the Union and thereby violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act). The Respondent's president Stephen A Bender interposed an answer on its behalf and represented it at the hearing. The answer denied that Respondent had refused to abide by the contract or that it had committed acts violative of the Act that affected commerce within the meaning of Section 2(6) and (7) of the Act. The answer alleged affirmatively that Respondent's refusal to comply with the contract was the result of the General Counsel's refusal to recognize the decision of an arbitrator.

The parties were afforded full opportunity to be heard to call examine and cross examine witnesses and to introduce relevant evidence. Posthearing briefs were filed on behalf of the General Counsel and the Charging Party.

On the entire record including my observation of the demeanor of the witnesses and after consideration of the briefs filed herein I make the following:

**FINDINGS OF FACT**

**I JURISDICTION**

There is no jurisdictional issue. The Respondent having in its answer admitted all allegations pertaining thereto. Accordingly I find that at all pertinent times herein Respondent was and is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act and the Union was and is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent is engaged in the manufacture and nonretail sale of electronic components and related products and is located in Newark New Jersey. During the calendar year 1986 it purchased and received at its facilities products from outside the State of New Jersey valued in excess of \$50,000.

**II THE ALLEGED UNFAIR LABOR PRACTICES**

**A The Facts<sup>1</sup>**

Since 1981 the Union has represented a unit within the meaning of Section 9(b) of the Act described as follows:

All production and maintenance employees excluding all office clerical employees professional employees engineers shipping clerks guards and supervisors.

The Respondent and the Union throughout this period were parties to collective bargaining agreements. In January 1986 while a 3 year collective bargaining agreement was in effect which was due to expire on 31

<sup>1</sup> The matters narrated in this decision without evidentiary comment are those facts found by me on the basis of admissions in the answer, data contained in the exhibits, stipulations between or concessions by counsel, undisputed or uncontradicted testimony and in instances where conflicts in the testimony did not warrant discussion, the testimony that I have credited.

January 1987 50 employees signed a petition that read as follows

We the Employees of VM Industries and Members of Local 6 petition the Union and the Employer to immediately sit down with a committee of Employees to renegotiate a new contract which will guarantee an increase in pay better working conditions and holidays

We further urge both parties to take immediate steps not to delay this meeting

The first signature on the petition was that of the union shop steward As a result of this pressure from the employees the Union commenced negotiations though it felt the time was not ripe Respondent and the Union negotiated through the spring and summer of 1986 and finally agreed to arbitrate their differences

On 16 October 1986 the arbitrator held a hearing at the offices of the Respondent at which Bender appeared for the Company along with its treasurer and William Perry the union president appeared for the Union along with its business representative the shop steward and several employees

The following stipulation was entered into

We agree that the term of the successor Agreement to the current contract shall run from October 16 1986 until January 31 1990 All existing terms shall remain the same and be incorporated into the successor Agreement except for those changes that are specifically mandated by an arbitration award to be issued by Arbitrator Marc J Weisenfeld within thirty days of this date (October 16 1986)

The issues in dispute were stipulated to be as follows

What shall be the wages provided for in the October 16 1986 through January 31 1990 collective bargaining agreement? How many holidays shall be provided for in that agreement? What if any changes in Employer payments to the Health and Welfare Fund shall that Agreement provide for?

On 14 November 1986 the arbitrator issued an award denying any increase in the number of paid holidays but granting an increase in wages to all employees in the amount of 20 cents an hour effective retroactively to 16 October 20 cents an hour effective 16 October 1987 and 20 cents an hour effective 1 February 1989 In addition the Company was directed to contribute an additional \$10 a month for each employee to the Local 6 health and welfare fund and the Union was directed to incorporate in the health and welfare fund certain provisions that were set out in full in the award

Thereafter Respondent received notice of a petition filed on 17 November 1986 by Teamsters Local 11 seeking recognition as the employees exclusive bargaining agent (Case 22-RC-9713) On 19 December 1986 the Regional Director for Region 22 issued a Decision and Direction of Election that defined the appropriate unit as follows

All production and maintenance employees employed by the Employer at its Newark New Jersey location but excluding all office clerical employees professional employees engineers shipping clerks guards and supervisors as defined in the Act

Since the filing of the Teamsters petition the Respondent has refused to pay the wages retroactive wages and fund contributions required by the award though it has continued to recognize Local 6 as the employees representative

### B Analysis

Respondent's conduct raises the question of when a breach of a collective bargaining agreement amounts to a violation of the Act Respondent justifies its failure to make the payments required by the arbitrator's award on the basis of the Regional Director's determination that the contract with Local 6 did not bar the Teamsters petition and also on advice it received from the General Counsel that the contract was subject to modification if the Teamsters became the employees bargaining representative At the hearing Bender interpreted Respondent's affirmative defense that the General Counsel refused to recognize the arbitrator's decision as meaning that the General Counsel had told him that the 3 year award might or might not be a reality and might become ineffective unless the incumbent union won the election He testified Since the whole award can't be implemented we did not think it proper to implement a part of it Accordingly Respondent did not implement the parts of it that awarded retroactive wage increases and required Respondent to augment its contributions to the Union's health and welfare fund despite written and oral demands by the Union for compliance

Nothing in the General Counsel's position warranted Bender's interpretation of it as stated in Respondent's answer The position of the General Counsel as set out in the complaint and as elucidated by counsel for the General Counsel at the hearing is in accord with well settled and frequently enunciated principles

The gravamen of a violation of Section 8(a)(5) of the Act is the repudiation by an employer of the obligations imposed by Section 8(d) of the Act A deliberate refusal to be bound by the terms and conditions of a collective bargaining agreement that an employer has entered into with a union that is the employees recognized bargaining representative may constitute unwarranted involvement in the process by which employees select their collective bargaining representative Examples are failure to pay cost of living adjustments provided for in a collective bargaining agreement *Hiney Printing Co* 262 NLRB 157 (1982) delinquent payments into union fringe benefit funds *Detroit Cabinet & Door Co* 247 NLRB 1415 (1980) and repudiation of a contract's wage provisions *Oak Cliff Golman Baking Co* 202 NLRB 614 616 (1973) and 207 NLRB 1063 1064 (1973) See also *Inland Cities* 241 NLRB 374 379 (1979) enfd 618 F 2d 117 (9th Cir 1980) *American Needle & Novelty Co* 206 NLRB 534 545 (1973) *Light Boat Storage* 153 NLRB 1209 fn 1 (1965) enfd 373 F 2d 762 (5th Cir 1967)

In the view of the General Counsel a full collective bargaining agreement existed by virtue of the arbitration award and consequently Respondent's deliberate refusal to honor its provisions amounted to impairment of the statutory rights of the bargaining representative and implicitly renunciation of the principles of collective bargaining. That is precisely the rationale of the cases cited above.

Of course the fact that remedies exist in civil litigation for such breaches of contract does not limit either the Board's powers or its responsibilities. Section 10(a) of the Act provides:

The Board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement law or otherwise.

See also *Smith v Evening News Assn*, 371 U.S. 195 (1962); *NLRB v Strong Roofing & Insulating Co*, 393 U.S. 357 (1969); *Nassau County Health Facilities Assn*, 227 NLRB 1680 (1977).

The advice to Bender that the contract might have to be renegotiated if the contract with Local 6 was determined not to bar an election and the incumbent Union was supplanted was a correct statement of the law. The fate of the contract depends on the outcome of the election. See *NLRB v Burns Security Services*, 406 U.S. 272 (1972); *NLRB v Hershey Chocolate Corp*, 297 F.2d 286 (3d Cir. 1961); *City Markets*, 273 NLRB 469 (1984); *American Seating Co*, 106 NLRB 250 (1953). That does not however confer on Respondent the prerogative to select which provisions of its collective bargaining agreement it will honor or the option to renegotiate the contract.

Perry testified without contradiction that the Respondent wavered and at one point promised to begin compliance with the arbitration award in the next succeeding payroll period. Confronted in these proceedings with the necessity to defend its failure to do so Respondent argues as though it had been confronted with a situation in which serious doubt existed regarding the incumbent Union's continued majority status. Such arguments amount to resort to a phantom situation. The facts of this case are altogether different.

The present case does not involve questions of an employer's responsibilities in the face of competing claims of rival unions that do not already represent the bargaining unit nor does it involve a situation in which an incumbent union is in the process of negotiating an extension or replacement of an expired collective bargaining agreement. As of 16 October 1986 the date to which the award was retroactive there existed a binding collective bargaining agreement between Respondent and the Union of which the arbitration award formed an integral part. Its validity was not affected by the filing of the Teamsters' petition for an election. Even a decertification petition would have afforded Respondent no basis for repudiating the contract. *Dresser Industries*, 264 NLRB 1088 (1982).

In short an employer may not unilaterally modify or cancel a collective bargaining agreement on the ground that during its pendency the question of future employee representation is about to be decided through the medium of the machinery established by the Act to resolve such questions. Unless and until the incumbent Union is supplanted by a rival union the existing contract governs the employer's relations with its employees.

The foregoing principles are dispositive of the issues of this case. It is worth noting however that the result would not be different even if some concession were made to Respondent's contention that somehow it was placed in a quandary by the competing demands for recognition. It is equally well established that notwithstanding an employer's right protected by the first amendment to the Constitution to express a preference for one union over another it may not in the face of competing demands abandon its neutrality by overt acts that favor one union over another since that would amount to interference in violation of Section 8(a)(5) of the Act with the employees' statutorily protected right to choose their own representative. *Southern Conference of Teamsters v Red Ball Motor Freight*, 374 F.2d 932 (5th Cir. 1967); *Texaco Inc v NLRB*, 722 F.2d 1226 (5th Cir. 1984). Employer neutrality is achieved by continued bargaining with the incumbent union.

In *Len Martin Corp*, 282 NLRB 482 (1986) an employer was held to have violated the Act by refusing to continue bargaining with the incumbent union on a successor contract because another union had filed a representation petition. The Board explicitly reaffirmed its adherence to its reasoning in *RCA Del Caribe*, 262 NLRB 963 (1982) in which the employer had entered into a contract with an incumbent union with knowledge of a pending petition filed by a rival union during the open period. The Board commented (262 NLRB at 965):

While the filing of a valid petition may raise a doubt as to majority status the filing in and of itself should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim.

We have concluded that requiring an employer to withdraw from bargaining after a petition has been filed is not the best means of assuring employer neutrality thereby facilitating employee free choice. Unlike initial organizing situations an employer in an existing collective bargaining relationship cannot observe strict neutrality. In many situations as here the incumbent challenged by an outside union is in the process of—perhaps close to completing—negotiation of a contract when the petition is filed. If an employer continues to bargain employees may perceive a preference for the incumbent union whether or not the employer holds that preference. On the other hand if an employer withdraws from the bargaining particularly when agreement is imminent this withdrawal may more emphatically signal repudiation of the incumbent and

preference for the rival the ebb and flow of economic conditions cannot be expected to subside merely because a representation petition has been filed Under the circumstances we believe preservation of the status quo through an employer's continued bargaining with an incumbent is the better way to approximate employer neutrality

For the foregoing reasons we have determined that the mere filing of a representation petition by an outside challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union

It is to be noted further that failure of an employer to abide by an agreement requiring submission of wage and other issues to arbitration is deemed tantamount to repudiation of collective bargaining and injurious to industrial peace and stability *Sea Bay Manor Home for Adults* 253 NLRB 739 741 (1980) enfd 685 F 2d 425 (2d Cir 1982)

Certainly the same reasoning requires that an employer honor the interest award itself

#### CONCLUSIONS OF LAW

1 Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act

2 The Union is a labor organization within the meaning of Section 2(5) of the Act

3 Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing and refusing to abide by the terms of the contract entered into with the Union on 16 October 1986

4 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

Respondent having refused to abide by the arbitration award that fixed the wage health and welfare and holiday terms of the contract between Respondent and the Union will be directed to make employees whole for any loss of earnings and other benefits of which they have been deprived by reason of Respondent's conduct with interest as computed in *New Horizons for the Retarded* 283 NLRB 1173 (1987) Respondent will also be directed to make appropriate payments with interest to the health and welfare fund of Local 6 to provide to the fund such moneys as it would have received had Respondent complied with the arbitration award

The Charging Party urges that further relief is needed in the present case by way of an order dismissing the petition in the representation case Case 22-RC-9713 It is contended that Respondent's refusal to implement the award signaled the Respondent's preference for the challenging union and that its lack of neutrality prejudiced Local 6

I decline to issue an order granting such relief for several reasons The petition in the representation case is not

before me and no motion has been made to consolidate the representation case with the instant proceedings The question is not automatically resolved by my Order directing compliance with the contract There is insufficient evidence in this record to determine whether the requisite laboratory conditions for an election have been affected

Respondent urges that I take into account the motivation behind Respondent's failure to implement the arbitration award in determining the remedy However evidence of Respondent's motivation is scanty as was to be expected in light of the manner in which the issues of the instant proceeding are framed Perry testified that threats to remove the plant to Tennessee were made repeatedly Stephen Bender denied that such threats were made and testified that statements involving Precision Tubular Heating Corporation an affiliated company owned either by Respondent or by Respondent's principals and located in Franklin Tennessee amounted merely to mention of the company and the acknowledged fact that work can be moved back and forth The ambiguity was apparent in his testimony

And at various times the question has come up of why do we have two plants Why do we manufacture in Newark and why we manufacture in Tennessee and it is a long and complicated answer and we have always said that we have the ability to move any of the operations we are doing between the plants but it is a fact of life We do have the two manufacturing facilities

The parties also disagreed whether Joseph Bender another principal was present when these allegedly threatening statements were made There appears to me to be insufficient evidence of Respondent's motivation in mentioning the second plant Perry testified that Respondent's conduct was intended to and did assist Local 11 because Respondent thought it could get a better deal from Local 11 That testimony amounted only to an expression of Perry's opinion which Bender did not respond to in his own testimony Since the arbitration award had been issued and was known to the members of the bargaining unit the assertion that a successful challenging union would be expected by Respondent to begin its career as the employees representative by agreeing to reduce the wages and fund contributions set by the arbitrator requires an imaginative leap which I am not prepared to take

There being insufficient evidence to determine that a prejudicial indication of Respondent's union preference was made that affected the election conditions any issues in the representation case should be determined on objections to the election made in that proceeding By that time pursuant to the Order to be made the award will have been in effect for some time Prejudice to Local 6 if any arising from Respondent's failure to pay the wage increases and fund contributions by the time the election is held may be shown to have been offset by the demonstration through these proceedings of the ability of Local 6 to compel compliance with the collective bargaining agreement it negotiated with Respondent

Laboratory conditions for an election are not considered to have been destroyed merely by reason of the filing of a petition during a period in which a new contract is in the process of negotiation by an incumbent union. In *RCA Del Caribe* supra the Board made some observations that are pertinent to the charging party's request for remedial relief.

This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice. It should be clear that our new rule does not have the effect of insulating incumbent unions from a legitimate outside challenge. As before, a timely filed petition will put an incumbent to the test of demonstrating that it still is the majority choice for exclusive bargaining representative. Unlike before, however, even though a valid petition has been filed, an incumbent will retain its earned right to demonstrate its effectiveness as a representative at the bargaining table. An outside union and its employee supporters will now be required to take their incumbent opponent as they find it—as the previously elected majority representative. Consequently, in the ensuing election, employees will no longer be presented with a distorted choice between an incumbent artificially deprived of the attributes of its office and a rival union artificially placed on an equal footing with the incumbent. (262 NLRB at 965-966.)

It would appear to be appropriate therefore for the issues raised by the charging party to be taken under advisement in the representation proceeding if they are properly raised by the charging party.

The General Counsel applied for a visitatorial clause authorizing for compliance purposes discovery from the Respondent under the Federal Rules of Civil Procedure subject to supervision of the United States Court of Appeals enforcing the Order. Under the circumstances of this case, I find it unnecessary to include such a clause.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation<sup>2</sup>

#### ORDER

The Respondent, VM Industries, Inc., Newark, New Jersey, its officers, agents, successors, and assigns shall:

1. Cease and desist from:
  - (a) Refusing to administer, until the date of its expiration or any earlier modification, its collective bargaining agreement with the Union, including the terms of the arbitration award dated 14 November 1986.
  - (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.

<sup>2</sup> 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- (a) Make its employees whole for any loss of earnings and other benefits of which they have been deprived by reason of failure of the Respondent to honor its contractual obligations under the collective bargaining agreement between Respondent and the Union entered into on 16 October 1986.

- (b) Pay into the union health and welfare fund the difference between any payments made by Respondent and amounts required to be paid in accordance with the collective bargaining agreement entered into on 16 October 1986 and the arbitration award that forms a part thereof.

- (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 and conditions due under the terms of this Order.

- (d) Post at its facility at Newark, New Jersey, copies of the attached notice marked Appendix <sup>3</sup>. Copies of the notice on forms provided by the Regional Director for Region 22, 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 the 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 Order what steps the Respondent has taken to comply.

<sup>3</sup> 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities

WE WILL NOT refuse to abide by the terms of our collective bargaining agreement with Local 6 International Federation of Health Professionals including all the terms of the arbitration award dated November 14 1986

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

WE WILL make payment into the union health and welfare fund of all payments required by the arbitration award

WE WILL pay to our employees all retroactive wages required by the arbitration award and WE WILL henceforth pay wages to all employees at the rates prescribed in the award

VM INDUSTRIES INC