United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 9, 1998

TO : Sandra Dunbar, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Carrier Corporation
Case 3-CA-21287

530-6067-2070-6700
530-6067-2070-6770
530-6067-4011-7700
530-6050-0800
530-8054-0133

This Section 8(a)(5) and (1) case was submitted for advice regarding whether the Employer unlawfully bargained over a decision involving relocation of one of the Employer's plants, and whether, if the Employer did commit any violations, Section 10(j) injunctive relief is appropriate in the circumstances.[1]

FACTS

On May 1, 1998, Sheet Metal Workers Local 527 (herein called the Union) filed the instant charge alleging that Carrier Corporation (herein called Carrier or the Employer) failed to bargain in good faith by not advising the Union, during negotiations for a successor collective-bargaining agreement, that it was reviewing the operations in building TR-1 and considering subcontracting, as well as new approaches to production.[2] The Union also alleged that, since on or about April 1, 1998, the Employer failed and refused to bargain in good faith over its decision to contract out certain bargaining unit work[3] and to relocate certain other bargaining unit work from TR-1.

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[1] The Section 10(j) issue will be addressed in a subsequent memorandum.

[2] The Region has concluded that dismissal is warranted, absent withdrawal, with respect to these allegations. Accordingly, those issues have not been submitted to Advice.

The Union and the Employer have had a collective-bargaining relationship dating back to at least 1962. The current collective-bargaining agreement is effective from November 3, 1997 until November 5, 2000. The Employer has four separate manufacturing buildings that produce four separate product lines, all related to air conditioning, on property located near Syracuse, New York. Under the bargaining agreement, the employees in all four buildings comprise a single bargaining unit. One of the buildings, referred to as "TR-1," produces large rotary chillers for commercial air conditioning applications, and is the only plant involved in the instant case.

The Employer asserts that TR-1 has not performed well, noting that it lost $112 million between 1995 and 1997, including $38 million in 1997 alone. Because of this, Carrier initiated an analysis of its operations in about April 1997; the analysis was concluded in about January 1998.[4] The complete analysis was presented to senior management for Carrier and its parent corporation, United Technologies Corporation (UTC), which decided that Carrier should dramatically alter the direction of its business and the method used to manufacture products at TR-1. Thus, according to the Employer, it made a three-part entrepreneurial decision to (1) change the scope and direction of business in TR-1 and entirely discontinue production of uncompetitive products;[5] (2) outsource the

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[3] The Region has concluded that based on a clear and unmistakable contractual waiver, dismissal is warranted with respect to the allegation regarding the Employer's decision to subcontract certain bargaining unit work from the TR-1 facility. It further noted that the Employer's failure to provide certain information requested by the Union (in conjunction with Carrier's decisions regarding the remaining unit work) is not alleged in the charge. Accordingly, none of these issues are being submitted to Advice.

[4] All dates hereinafter are in 1998, unless otherwise indicated.

[5] The decision to discontinue certain production is not at issue in this case.

production of certain component parts currently made in TR-1 for use in products that Carrier will continue to manufacture in its commercial chiller line of business;[6] and (3) invest in a modern "focused factory" with a single, mixed model assembly line based on lean manufacturing principles. According to the Employer, on March 30, these decisions were approved by senior management for Carrier and UTC. Left open was the decision regarding whether to retrofit the existing TR-1 facility in Syracuse at an estimated cost of $25 million, or to build a brand new plant somewhere in the southeastern United States.

On March 31, Carrier management officials met with Union representatives and advised them that there was going to be some "restructuring"; that there would need to be concessions in order to save jobs in Syracuse; and that there would be some "reorganization." The Union was told that a decision had been made to invest in a "focused factory" or "single mixed model" line, establishing one line to assemble all products, and that the main question remaining was where Carrier would invest in this line. The Employer told the Union representatives that an "Addendum" to the existing collective-bargaining agreement was needed in order to avoid relocation of the TR-1 unit work not affected by the outsourcing decision. When the Union asked what would happen if the parties could not reach an agreement on an "Addendum," the Employer's response was: "We will invest somewhere else."

On April 1, the Employer and the Union met to discuss the "Addendum" for the first time. The Employer told the Union that its plan was to invest capital to develop a "focused factory" approach either in the existing TR-1 plant or at a new location, depending on whether negotiations with the Union were successful by May 3. The Employer then presented the Union with a copy of the proposed "Addendum" and stated that there "would not be much movement" on the Employer's part.

The proposed "Addendum," which is designed to be applicable to the TR-1 plant only, contains a broad

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[6] The Region concluded that the collective-bargaining agreement gives the Employer the right to outsource this work. See note 3, supra.

management rights clause that, among other things, specifically gives the Employer the right to relocate.[7] The proposed "Addendum" also includes the following changes in contract terms to be applicable to the TR-1 plant employees: it (1) gives the Employer the right to extend the employee probationary period an additional 30 days; (2) removes contractual language restricting supervisors from doing unit work; (3) recognizes current plant rules, but gives the Employer the prerogative, after first notifying the Union, "to make and revise such reasonable rules and regulations not in conflict with this Addendum, ...;" (4) immediately eliminates the current wage enhancement program, and provides no alternative or new incentive program for TR-1 employees for 15 months; (5) provides for a revised grievance procedure; (6) provides that the terms and conditions of work for the TR-1 employees are effective from May 4, 1998 until December 5, 2004; (7) provides that TR-1 employees would receive the wage increases and benefit changes negotiated in subsequent collective-bargaining agreements as long as such changes would not conflict with the "Addendum"; (8) provides for a no strike/no lockout clause for the six year term of the "Addendum"; (9) limits employees to a one time right to bump, whereas the current bargaining agreement provides for unit-wide bumping; (10) eliminates provisions regarding training for skilled trades; (11) changes the entire vacation selection system, including shutdowns and peak periods for selection; (12) eliminates the right for skilled trades training and building on skilled trades experience; and (13) indicates that in the event of a conflict between the "Addendum" and the collective-bargaining agreement, the "Addendum" would be controlling.

The overall cumulative effect of all these provisions is to clearly carve out separate terms and conditions for the employees of TR-1. Indeed, the "Addendum" itself states, at page 1, third paragraph, "...the basic concepts of this Addendum (separate seniority rights, separate management rights, separate issue resolution, etc.) shall be continued in a separate Addendum relating to TR-1 as a distinct manufacturing facility..."

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[7] The existing collective-bargaining agreement is silent about the right to relocate--saying only that management can determine the number of plants and their locations.

On April 7, the Union submitted a detailed information request to the Employer; on April 13, the Employer responded, asserting, inter alia, that its decisions, including the decision as to where to locate the new focused factory, were not bargainable. Then, in a letter dated April 21, the Union rejected Carrier's proposed "Addendum," stating that it was "not willing to agree to an 'Addendum' that changes major terms of the Agreement and carves TR-1 out of the existing Agreement." The Union expressed its willingness to address the Employer's production concerns within the framework of the existing agreement. By letter dated April 23, Carrier offered to bargain over the location of the new focused factory and stated that it was willing to invest in the focused factory in Syracuse, if the Union would agree to the proposed "Addendum."

Subsequently, representatives of the Employer and the Union met for a final time on April 27 at which time they simply reiterated their respective entrenched positions. According to the Union, a Carrier representative stated unequivocally that the relocation decision would retain the TR-1 work at Syracuse only if the Employer was granted the six-year "Addendum" covering only the TR-1 group. The Union asserted that it was willing to bargain within the framework of the existing collective-bargaining agreement. The Employer stated that with respect to TR-1, "management in the 'chiller' business feels we need to start over...per management we need flexibility and the present contract does not give us that." When the Union asked if the Employer's position was that if the Union would not negotiate about the "Addendum," then nothing further could be done, the Employer's representative responded that "the remainder of the [TR-1 unit] work won't be here and TR-1 will be a vacant building...the only way [TR-1 will] stay is with the '[A]ddendum,' we won't be able to change our mind." With that, the negotiations apparently ended.

In a letter dated May 11, the Employer informed the Union that it had decided to relocate the remaining TR-1 unit work. According to the Union the Employer later publicly announced that the location to which the TR-1 unit work is to be relocated will be Huntersville, North Carolina.

ACTION

We conclude that: (1) the Employer's decision to relocate what remained of the TR-1 work to North Carolina was a mandatory subject of bargaining; and (2) the Employer failed to bargain to a bona fide impasse because it effectively conditioned agreement upon the removal of TR-1 employees from the bargaining unit.

In Fibreboard Paper Products v. NLRB,[8] the Court held that an employer's subcontracting of its maintenance work in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment constituted a mandatory subject of bargaining. The Court stated that since the decision to subcontract involved no capital investment and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge the company's freedom to manage the business."[9] Moreover, since the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective-bargaining framework...."[10]

In First National Maintenance Corp. v. NLRB,[11] the Supreme Court held that an employer's decision to close down part of its business was not a mandatory subject of bargaining, because it was a decision "akin to the decision whether to be in business at all" and, in that situation, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision...."[12] The

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[8] 379 U.S. 203 (1964).

[9] Id. at 213.

[10] Id. at 214.

[11] 452 U.S. 666 (1981).

[12] 452 U.S. at 677, 686.

Court left Fibreboard intact, and stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its particular facts to determine whether "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[13]

More recently, in its Dubuque Packing[14] decision, the Board enunciated the following test for determining whether a work relocation decision is a mandatory subject of bargaining: the General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The Employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses.[15] Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision.[16] The Employer also may avoid bargaining if it demonstrates that (1) labor costs were not a factor in the decision or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.[17]

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[13] 452 U.S. at 679, 686, n. 22.

[14] Dubuque Packing Co., 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24, 31-33, 143 LRRM 3002 (D.C. Cir. 1993), cert. denied 146 LRRM 2896 (1994). See also "Guideline Memorandum Concerning Dubuque Packing Co., Inc., 303 NLRB No. 66," Memorandum GC 91-9, dated August 9, 1991 at p. 4 (hereinafter GC Guideline).

[15] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-5.

[16] See Noblit Brothers, 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360, 148 LRRM 2705 (4th Cir. 1995), affd. 517 U.S. 392, 152 LRRM 2001 (1996).

[17] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-6.

Applying the Dubuque test, the Region can establish a prima facie obligation to bargain for which the Employer clearly has no defense. First, the Employer's relocation of the TR-1 work to North Carolina did not significantly change the nature and direction of its business. Regardless of where Carrier invested in its new "focused factory," and whether or not the assembly process may be more efficient, the bottom line is that the Employer is still in the business of making large rotary chillers. Regarding a possible Employer defense, it is abundantly clear that labor costs were a major factor in the decision of whether to stay in Syracuse or move to North Carolina. The Employer has virtually admitted, by its actions, that the relocation decision turned on direct and indirect labor costs because it was willing to keep the TR-1 work in Syracuse if the Union would agree to the terms and conditions in the "Addendum." Accordingly, we conclude that under Dubuque, Carrier's decision to relocate the TR-1 work to North Carolina was a mandatory subject of bargaining.[18]

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[18] The Employer argues that, assuming arguendo that the location of the new factory is a mandatory subject of bargaining under Dubuque, it did not violate the Act because Carrier has, pursuant to its contract with the Union, the right to determine the locations of its plants. Thus the Employer points to Article V of the collective bargaining agreement which provides, inter alia, that it shall be "the responsibility of management alone without interference, restriction, or recourse to [the grievance article]…to determine the number of plants and their locations." The Employer's argument in this regard is without merit. The facts clearly show that what is at issue is not the location of a brand new facility, but rather the relocation of an existing facility. Article V does not mention relocation of unit work at all, and apparently no other contractual provision authorizes the Employer to relocate unit work. Indeed, the "Addendum" sought clear language giving Carrier the right to relocate. We accordingly find no waiver from the language in the current bargaining agreement.

We further conclude that the Employer did not bargain in good faith, because it insisted upon what amounted to a non-mandatory subject of bargaining, i.e. carving out the TR-1 employees from the historical collective bargaining unit.[19] In Reichhold, the Board adopted the ALJ's conclusion that the employer bargained to impasse over a change in the scope of the parties' historic multiplant bargaining unit, a nonmandatory subject of bargaining. The Board noted that while parties may voluntarily consent to bargaining on a basis other than the established appropriate unit, neither party may be forced to continue such negotiations and a party may not be forced to bargain on other than a unit basis. The Board went on to note that these principles are applicable where an employer seeks "to require components of a multiplant unit to bargain about certain issues on an individual plant-basis." 301 NLRB at 1228.

In Reichhold, which is factually similar to this case, the union represented a unit of all production and maintenance employees at Reichhold's four plants, and the parties' most recent bargaining agreement covering that unit was set to expire. At the first bargaining session for a successor contract, Reichhold proposed the creation of four separate bargaining agreements with four separate expiration dates. The union objected. At the next negotiating session Reichhold admitted that it "knew it could not legally insist on its proposal to separate the bargaining unit...." Reichhold then made a new proposal described as "a master and supplemental agreements."

The ALJ noted that Reichhold's "proposal called for sweeping changes . . . [and] contained new provisions to vary the expiration date of the contracts from plant to plant, so that there would be four separate expiration dates...." 301 NLRB at 1230. The ALJ further noted that many subjects "forming the core of the parties' established master agreement were entirely taken out and moved to separate supplemental agreements, such as wages and rates of pay which included minimum and basic rates of pay, shift differentials, and new job classification pay, holiday designation and pay, vacations, pensions, funeral leave benefits, and jury duty pay." The ALJ also pointed out that in Reichhold's proposal, many "equally long-

[19] See Reichhold Chemicals, 301 NLRB 1228 (1991).

established contract provisions defining the parties' bargaining in the multilocation unit, although not entirely removed, [were] significantly altered...so as to more strongly demarcate each of the four plants from the reach of the historical multiplant bargaining in a single unit."

The ALJ then went on to elaborate regarding certain specific language in Reichhold's proposal which in his view served to place "emphasis on...the local supplements" to be distinguished from the overall master agreement. The ALJ also noted that with respect to language changes concerning dues deductions and PAC employee contributions, Reichhold "asserted the need for greater flexibility in operations as the motive behind its move to separate plant bargaining units yet no such purpose seems to be served by its insistence on such a language change," and that "[r]evealing its drive towards a separation in the overall unit further is [Reichhold's] proposal to restrict strikes and lockouts to the separate plants." The ALJ then concluded: "In sum, the May 11 proposal effectively drained the parties' established multilocation unit bargaining of some 20 terms and conditions of employment redistributing them for bargaining in individual plant units, covered by separate agreements containing different expiration dates." 301 NLRB at 1231.

The union rejected the May 11 proposal because Reichhold was trying to do through the supplements what it initially had tried to do by breaking the agreement into four separate contracts. Reichhold then proposed a common expiration date for each plant agreement and the master, with the earlier proposal otherwise remaining unchanged in major respects. Reichhold then announced that it was moving five subjects from the local supplemental agreements back into its proposed master agreement and that two plants would be included in one supplemental agreement. Finally, Reichhold presented its last proposal with no further retrenchment from its desire for a master with local supplemental agreements.

The ALJ found unlawful Reichhold's bargaining to impasse on a nonmandatory subject of bargaining, viz., changing the bargaining unit. In addition to relying upon the employer's first and May 11 proposals, the ALJ noted: "while Respondent [after May 11] reduced somewhat the number of topics for separate plant bargaining... as well

as withdrawing separate termination dates, it left a substantial number of core employment terms and language changes forcing the divisions of the established unit into separate plant units..." Id. at 1233.

Reichhold provides strong support for finding a violation in the instant case. We note that Carrier, unlike Reichhold, did not acknowledge up front that it was seeking to effectively establish a separate unit and contract for the TR-1 plant. However, Carrier bargained to impasse on the issue of a separate contract expiration date for the TR-1 plant, whereas Reichhold gave up on having separate expiration dates prior to impasse. In most other respects, employer proposals in the two cases are substantially the same. Accordingly, we conclude, in agreement with the Region, that Carrier unlawfully bargained to impasse on the "Addendum," which effectively carved out the TR-1 employees from the rest of the established collective bargaining unit, in violation of Section 8(a)(5).

B.J.K.