

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ABB Inc.,)	
)	
Respondent,)	
)	
and)	Case No. 14-CA-29219
)	
LOCAL 2379, UNITED AUTOMOBILE,)	
AEROSPACE & AGRICULTURAL)	
IMPLEMENT WORKERS OF AMERICA,)	
)	
Charging Party.)	

**ANSWERING BRIEF OF CHARGING PARTY
UAW LOCAL 2379 TO EXCEPTIONS FILED BY
RESPONDENT ABB INC.**

INTRODUCTION:

Respondent ABB, Inc. (“respondent” or “the company”) appeals the decision of Administrative Law Judge William N. Cates (“the ALJ” or “ALJ Cates”) that it violated Sections 8(a)(5) and (1) of the National Labor Relations Act (“the Act”) by unilaterally changing the job description for the bargaining unit position of Code 18 Electronic Electrician on or about July 17, 2007, and thereafter, on July 26 and August 10, 2007, by refusing to bargain over the job description changes with charging party, Local 2379, United Automobile, Aerospace & Agricultural Implement Workers of America (“charging party” or “the union”).

Respondent’s appeal raises three basic issues. First, whether its acknowledged unilateral changes to the job description violated Sections 8(a)(5) and (1) of the Act. Second, if so, did the union fail to file timely charge protesting that unilateral action. Third, did the ALJ err in allowing General Counsel to file amendment to the amended complaint alleging the company’s unlawful refusal to bargain respecting the job description changes. In resolving those three issues it was necessary for ALJ Cates to weigh the credibility of the witnesses who testified for the

government and respondent. In each instance where material facts were in dispute, ALJ Cates found the government witnesses to be more believable and thereby credited their accounts of the events giving rise to this proceeding.

RESPONDENT’S UNILATERAL CHANGES:

It is undisputed that respondent unilaterally changed the Code 18 Electronic Electrician job description. Respondent claims it did so back in April, 1999, following completion of negotiations of the parties’ first collective bargaining agreement, and that immediately thereafter so notified the union. Respondent further argues that the management rights clause of the parties’ first contract (G.C. Exh. 2, ps.4-5; Co. Exh. 2, ps. 6-7) authorized such unilateral action. In other words, by agreeing to the management rights language, the union waived its right to bargain about employer changes to bargaining unit job descriptions.

It is well settled that a union’s waiver of its right to bargain respecting mandatory subjects of bargaining¹ must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12; *Crittendon Hospital*, 342 NLRB 686 (2004). The union submits that the general language of a contractual management rights provision does not suffice to meet that standard. Initially, while there is language authorizing the company “to prescribe duties,” there is no language which deals expressly with job descriptions. Further, and of greater significance, the parties’ bargaining history discloses that job descriptions were to remain a bargainable item. Reference is made to the testimony of former human resources manager Steve Buckley who served as the company’s chief negotiator during negotiations for the parties’ 1999-2002

¹ Respondent does not question that bargaining unit job descriptions are a mandatory subject of bargaining nor that the changes it made to the Code 18 Electronic Electrician job description were material, substantial and significant.

agreement. Buckley testified that during those negotiations he agreed with the union that bargaining unit job descriptions were negotiable and further represented that the company would be willing to bargain about them in the future:

Q. BY MR. KRETMAR: Yes, Mr. Buckley, in connection with the negotiations for the first collective bargaining agreement between the parties, the one that ran from 1999 to 2002, during negotiations for that contract, you agreed, you as the Company chief spokesman agreed with the Union bargaining committee people that job descriptions were negotiable; is that correct?

A. That's correct.

Q. And you did inform the Union that you would be willing to negotiate job descriptions at a later time?

A. Yes, I did. (Tr.153-154).

In that there was no bargaining respecting job descriptions during negotiations for the 1999-2002 contract because of the Local's blanket acceptance of those then in place (Tr.63-66), Buckley's comments could only mean that the company was agreeable to bargaining about job descriptions thereafter; *i.e.* during the term of the resulting contract.

Moreover, the management rights clause in the 1999-2002 collective bargaining agreement cannot serve to waive the Local's right to bargain as of July, 2007, when based on the credited testimony of the government's witnesses, ALJ Cates found that the union first learned of the job description changes. The 1999-2002 agreement expired on January 31, 2002 (G.C. Exh. 2; Co. Exh. 2). Thereafter, the parties were unable to reach a successor agreement until 2008. In *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 634 (2001), the Board ruled that the management rights clause at issue amounted to a waiver by

the union of its right to bargain over the employer's unilateral changes only during the term of the contract and not thereafter.

More important, however, is the ALJ's finding, again based on his crediting the testimony of the General Counsel's witnesses (Tr.37-42; 66-68),² that the company never notified the union of the 1999 changes to the Code 18 Electronic Electrician job description prior to implementing same in July, 2007:

. . . it is clearly established and I find, the Company initially changed the Code 18 Electronic Electrician job description in 1999 without prior notice to the Union. Notice was first provided to the Union when the Company implemented its unilaterally changed Code 18 Electronic Electrician job description on July 17, 2007. . . (ALJ decision, p.17).

Here the facts established the Union did not have notice of changes to the Code 18 Electronic Electrician job description until July 17, 2007. There is simply no credible showing the Union had clear and unequivocal notice of the changes prior to that time. (ALJ decision, p.19).

Based on the above, the union did not waive, either by agreement or inaction,³ its right to bargain over the company's unilateral changes to the Code 18 Electronic Electrician job description.

² See also G.C. Exhs. 6(a)-(f) and 7(a)-(b).

³ It is well settled that if a union does not make a timely request to bargain it will be deemed to have waived that right by inaction. *NLRB v. Alva Allen Industries*, 639 F.2d 310, 321 (8th Cir. 1966) (a union cannot charge an employer with refusal to negotiate when it has made no attempt to bring the employer to the bargaining table).

THE UNION FILED TIMELY CHARGE PROTESTING THE COMPANY'S UNILATERAL JOB DESCRIPTION CHANGES:

Again, based on credibility determinations, ALJ Cates found that the union did not become aware of the company's unilateral changes to the Code 18 Electronic Electrician job description until July 17, 2007. Less than six months thereafter, on January 16, 2008, the union filed ULP charge challenging those unilateral changes as violative of Sections 8(a)(5) and (1). Thus, it is only if the Board finds some basis to overturn the ALJ's credibility resolutions and credit the testimony of respondent's witnesses that respondent notified the union of the changes as far back as 1999, that the union's charge can be found untimely as way beyond Section 10(b)'s six-month period of limitation. If, however, the Board upholds the ALJ's credibility determinations, there is no question but that the union's charge is timely.

BASED ON THE ALJ'S CREDIBILITY RESOLUTIONS, THE UNION'S CHARGE PROTESTING THE COMPANY'S UNILATERAL JOB DESCRIPTION CHANGES WAS TIMELY FILED:

It is well established Board policy, dating back prior to the 1950 decision in *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3rd Cir. 1951), to uphold an administrative law judge's credibility resolutions unless a clear preponderance of *all* the relevant evidence convinces the Board that those resolutions are incorrect. *Springs Industries, Inc., Bath Fashions Division*, 332 NLRB 40 (2000); *Manner West, Inc.*, 311 NLRB 655 (1993); *The Hartz Mountain Corporation*, 228 NLRB 492 (1977); *Lizdale Knitting Mills, Inc.*, 211 NLRB 966 (1974). This is especially so where the administrative law judge relied upon the demeanor of the individuals called before him to testify. As noted in *Standard Dry Wall Products*:

. . . in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings.

Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility . . . and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testify, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor.

91 NLRB at 545.

Here, ALJ Cates gave considerable weight to the demeanor of the witnesses in resolving what he characterized as the "sharp" credibility conflicts respecting the key facts in this case:

When necessary to resolve conflicting testimony my findings have rested, to a degree, on witness bias[,] established, admitted or uncontested facts, corroboration of testimony and inherent probabilities. In addition to the above considerations ***I was greatly impacted by impressions I formed while watching the witnesses as they testified. The impressions I gathered were based on a combination of the witnesses' mannerisms, how they spoke and their overall, 'on the witness stand' bearing. I, to use a colloquial expression 'sized up' the witnesses in deciding whether their testimony struck me as fair, candid and believable.*** (ALJ decision, ps.12-13, emphasis supplied).

In addition to his assessment of the witnesses' demeanor, on pages 13 through 17 of his decision, ALJ Cates sets out additional grounds for his rejecting the testimony of company witnesses concerning the material facts in dispute.

In view of the above, there is no basis to disturb ALJ Cates' credibility resolutions which establish not just that the union's charge was timely filed, but that respondent violated Sections 8(a)(5) and (1) by unilaterally changing the Code 18 Electronic Electrician job description without notice to the union and thereafter by refusing to bargain over such changes following timely request by the union.

RESPONDENT SUFFERED NO PREJUDICE BY THE ALJ'S ALLOWING AMENDMENT TO THE AMENDED COMPLAINT. FURTHER, THE AMENDMENT'S REFUSAL TO BARGAIN ALLEGATIONS ARE CLEARLY RELATED TO THE UNILATERAL CHANGE ALLEGATIONS OF THE TIMELY FILED CHARGE:

i. Introductory Remarks.

On May 27, 2009, five days prior to the start of the hearing, the Regional Director filed amendment to the amended complaint adding the allegation that respondent unlawfully refused the union's request to bargain about the unilateral changes to the Code 18 Electronic Electrician job description. Pursuant to Section 102.17 of the NLRB's Rules and Regulations, a complaint may be amended prior to hearing "upon such terms as may be deemed just." Respondent filed motion to strike or, alternatively, to dismiss the amendment to the amended complaint relying on two grounds. First, that allowing the amendment was prejudicial to respondent. Second, that the unfair labor practice allegations of the amendment were not closely related to those of the union's underlying unfair labor practice charge.

ii. Respondent Not Prejudiced By ALJ's Permitting Amendment To Amended Complaint.

The following establishes that respondent suffered no prejudice by the ALJ's allowance of the refusal to bargain amendment to the amended complaint. Initially, the amendment allegations are limited and straightforward - the union timely requested to bargain over respondent's unilateral changes to the Code 18 Electronic Electrician job description upon learning of same and respondent failed and refused to comply with that request. Second, respondent had adequate time both prior to the hearing and following the first day of hearing to prepare its defense to the refusal to bargain allegations. Third, at no time following the ALJ's denial of its motion to strike or alternatively to dismiss the amendment, did the company seek a

continuance of the hearing in order to prepare its defense to the refusal to bargain allegations. Fourth, counsel for respondent had the opportunity to cross-examine both of the General Counsel witnesses who testified about the refusal to bargain allegations (Tr.46-50; 81-83) and prior to questioning those witnesses (Tr.54-59; 84-87) made no request for additional time to prepare for cross-examination. Fifth, on the second day of hearing the company presented evidence in defense of the refusal to bargain allegations. Basically, respondent's human resources manager, to whom the General Counsel's witnesses testified the two requests were directed (Tr.46-50; 81-83), denied having been asked on those two occasions or at any other time to bargain over the job description changes (Tr.238-240). As respondent had adequate time both to prepare for and then fully litigate the refusal to bargain allegations of the amendment to the amended complaint, it cannot demonstrate that it was prejudiced by the ALJ's allowance of the amendment. *Key Coal Company*, 240 NLRB 1013 (1979).

iii. The Amendment To The Amended Complaint Is Closely Related To The Allegations Of The Union's Timely Filed Charge.

In denying respondent's motion to strike the refusal to bargain amendment, ALJ Cates provided that:

Bargaining over the changes to the Code 18 Electronic Electrician job description flows out of and is inextricably intertwined with the unilateral change of the job description itself. Each arose from the same factual circumstances and are part of the continuing sequence of events. The bargaining request issue is sufficiently grounded in the original timely filed charge such as to support the complaint allegations related to the bargaining requests. The mere fact the Government waited until a few days before trial to amend the amended complaint to include the bargaining request in no way warrants a different conclusion. (ALJ decision, p.19).

As noted in *REDD-I, Inc.*, 290 NLRB 1215 (1988), the Board and the courts have traditionally allowed the General Counsel to add complaint allegations outside the six-month 10(b) period if those added allegations comprising the amendment are closely related to the allegations of the timely filed charge. In determining whether complaint amendments are closely related to the charge allegations, the Board looks to three factors set out in *REDD-I, Inc.*, one of which is whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. *The Carney Hospital*, 350 NLRB 56 (2007) (sufficient factual relationship under second prong of “closely related” test in *REDD-I, Inc.* can be established by showing that there is a causal nexus between the two sets of allegations and they are part of a chain or progression of events); *SKC Electric, Inc.*, 350 NLRB 70 (2007) (there must be showing of a chain or progression of events related to the allegations in the timely filed charge).

Clearly, the second prong of the “closely related” test has been met here. One cannot seriously challenge ALJ Cates’ finding of a causal nexus between the company’s unilateral changes to the Code 18 Electronic Electrician job description and its refusal to bargain over same following timely request by the union (Tr.46-50; 81-83). Accordingly, ALJ Cates correctly allowed for the refusal to bargain amendment to the amended complaint and based on his crediting the testimony of the government’s witnesses properly concluded that respondent wrongfully refused to bargain over its unilateral changes to the Code 18 Electronic Electrician job description which it implemented on July 17, 2007.

CONCLUSION:

For the reasons set out above, the rulings, findings and conclusions of the Administrative Law Judge should be affirmed and the Board should adopt his recommended order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above and foregoing Answering Brief of Charging Party UAW Local 2379 were served by facsimile and mailed first-class, postage prepaid, this 21st day of December, 2009, to:

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