

401 MAIN STREET
SUITE 1600
PEORIA, ILLINOIS 61602-1241
TEL: (309) 673-1681
FAX: (309) 673-1690
www.dcamplaw.com

DAVIS & CAMPBELL L.L.C.

FILE NUMBER:

16127-006

September 7, 2010

National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, N.W., Suite 11600
Washington, D.C. 20570

Re: *NTN-Bower Corporation*, Cases 10-CA-37271, et al.

Gentlepersons:

Enclosed for filing are an original and eight (8) copies of the Reply Brief of the Respondent.

Thank you for your attention to this matter.

~~Very truly yours,~~

~~Roy G. Davis~~

cc w/encs. via Federal Express: Martin M. Arlook, Esq.
John Doyle, Esq.
Gregory Powell, Esq.
George N. Davies, Esq.

RECEIVED

2010 SEP -8 PM 1:35

NLRB
ORDER SECTION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NTN-BOWER CORPORATION,)	
)	
and)	Cases 10-CA-37271
)	10-CA-37484
INTERNATIONAL UNION, UNITED)	10-CA-37545
AUTOMOBILE, AEROSPACE, &)	10-CA-37652
AGRICULTURAL IMPLEMENT)	10-CA-37692
WORKERS OF AMERICA,)	10-CA-37762
AFL-CIO CLC.)	10-CA-37820

REPLY BRIEF OF THE RESPONDENT

The Respondent, NTN-Bower Corporation, through its attorneys, Roy G. Davis and Richard A. Russo of Davis & Campbell L.L.C., files the following points and authorities pursuant to Section 102.46 of the Board's Rules and Regulations in reply to the Answering Briefs filed by the General Counsel and the Union. Given the severe page limitations imposed by Rule 102.46, this Reply is necessarily limited to a few issues. The Respondent's inability to reply to the remaining arguments of the General Counsel and the Union in no way suggests acquiescence in or agreement with them.

Temporary Employees

1. Legitimate and Substantial Business Justification. The General Counsel contends that the Company did not present a legitimate and substantial business justification for its refusal to replace temporary employees with former strikers. To the contrary, the testimony in this case demonstrates that the Company bargained for almost two years over the issue of temporary employees and it consistently represented to the Union that their use was required, among other things, to combat unusually high rates of absenteeism in the bargaining unit, smooth out

workforce fluctuations due to peaks and valleys in production, reduce overtime, and allow more bargaining unit employees time off for vacations and other excused absences. Moreover, the Union agreed with the Company's justification for using temporary employees. (R. 8 at p. 6-7)

2. Waiver. The General Counsel argues that Article 39 is vague:

The Company reserves the right to use temporaries.

There is nothing vague about it. The General Counsel contends:

The language is general and makes no mention of *Laidlaw* reinstatement rights whatsoever.

(Answering Brief at p. 25) This argument is dead on arrival.

The "clear and unmistakable" standard for finding waiver of a statutory right, however, does not "[require] more elaborate evidentiary support than simply placing an objective construction on a contract. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1031 (D.C. Cir. 1986), supplemental decision 291 NLRB 1039 (1988), enfd. 898 F.2d 524 (7th Cir. 1990), relying on *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 79 (1953) (interpretation of no-strike clause involves "no determination of rights or duties respecting picket lines broader than this contract itself prescribes"). In interpreting contract language, words must be given their "ordinary and reasonable meaning"...and enforced "[a]bsent a contractual provision in irreconcilable conflict with federal labor policy [since] neither the courts nor the Board may modify or nullify substantive contractual provisions." [Internal citations omitted]

Silver State Disposal Service, Inc., 326 NLRB 84, 86 (1998).

The Board cases are legion holding that language need not expressly state that a waiver is intended for it to be effective.

While a waiver is not lightly to be inferred, it, by the same token, need not be evidenced by an express statement of waiver, such as, "the union hereby waives its right to advance notice and consultation regarding any changes in established overtime practices."

The Alliance Manufacturing Company, 203 NLRB 437, 439 (1973). See also *Food Employers*

Council, Inc., 293 NLRB 333, 343 (1989) and *Northern Pacific Sealcoating, Inc.*, 309 NLRB 759, 760 (party “knew, or should have known, the nature of the rights it agreed to waive at the time it signed the memorandum agreement.”)

Moreover, the Union cannot seriously contend that it did not know what it was agreeing to when it signed the contract. On at least three occasions it published communications to its members acknowledging that Article 39 would result in temporary employees replacing bargaining unit employees. (R. 9, 10 and 11).

We are persuaded by the affirmative evidence appearing in this record that the denial of vacation benefits has been satisfactorily demonstrated to be a lawful implementation of a right understood to have been acquired through the collective-bargaining process, from which conduct no inference of improper motive should be drawn. It is undisputed that the Respondent, in denying vacation benefits, relied solely on section 3 of the vacation article, which disqualified employees from participating in benefits if absent for more than 200 hours, for any reason, during the previous 12 months. That this provision would adversely affect those striking in support of the Union’s position was inescapably in issue during the bargaining which led to its incorporation in the final contract. The negotiating history shows that the meaning and scope of that provision were the subject of repeated discussions.

Roegelien Provision Company, 181 NLRB 578, 580 (1970). “The resulting contract language was plain and unambiguous, and since the Union acceded to it while a strike was in progress, there could be no confusion as to its intended impact upon reinstated strikers.” *Id.*

3. Union failure to arbitrate. Neither the Union nor the General Counsel disputes the fact that the Union filed a grievance over the Company’s failure to replace the temporary employees with former strikers. Similarly, neither disputes the fact that the Union pursued the matter to the third step of the grievance procedure on August 27, 2008. It is further undisputed that the Company continued to use temporary employees through April 2009 which is significantly more

than 90 working days after the third step meeting. Finally, it is undisputed that, under the collective bargaining agreement, a grievance not appealed to arbitration by the Union after the third step is considered settled based on the Company's last answer. It is the Company's position that the Union acquiesced in its interpretation of the contract by not pursuing its grievance to arbitration.

The General Counsel contends that the Company failed to meet its burden of proof since it "did not adduce the third-step answer/alleged settlement into the record". The General Counsel misreads the contract. The contract does not anticipate or require a documented settlement. In fact, it gives the Company the option of denying a grievance by inaction:

If the Company fails to answer a grievance within the applicable time limit, the Union may appeal the unanswered grievance to the next step of the procedure within three (3) regular working days following the expiration of the time limits for the Company's answer.

(J. 1 at p. 9) The consequence of the Union's failure to pursue the grievance is inescapable. Silence or inaction on the part of the Union is acquiescence in the Company's interpretation of the contract.

Reduced Work Schedules

Despite the General Counsel's and Union's best efforts to paint the implementation of the shortened work weeks as a unilateral change to the terms and conditions of employment subject to the "clear and unmistakable waiver" standard, they miss the mark – this is clearly a contract modification dispute under Section 8(d). The focus has always been on the alleged *modification* of Article XV of the Collective Bargaining Agreement, which covers hours of work, including normal work week and shift starting times.

If that agreement had addressed the issue involved here, any unilateral modification of the terms of that agreement would have constituted a violation of Section 8(d). In such circumstances, the Board has explained that the sole question is “whether the employer has altered the terms of a contract without the consent of the other party.”

Knight Protective Service, Inc., 354 NLRB No. 86, 6 (2009).

This case turns on the resolution of two conflicting interpretations of the Collective Bargaining Agreement. It has been clear from the beginning that the Union’s interpretation of Article XV of the Collective Bargaining Agreement is in conflict with the Company’s interpretation, resulting in the complaint that the Company has unlawfully modified Article XV of the Collective Bargaining Agreement via the implementation of shortened work weeks in March and May of 2009.

“[I]t is well settled that an employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act, by modifying a term of a collective bargaining agreement without the consent of the other party while the contract is in effect.”

Hospital San Carlos, Inc., 355 NLRB No. 26, 6 (2010).

The Union’s responses to the announcements regarding the shortened work weeks show that the Union viewed the Company’s actions as a modification of the Collective Bargaining Agreement. On February 10, 2009 and again on May 14, 2009, International Representative Michael Brown sent letters to Gary Franks, the Company’s Human Resources Manager in Hamilton, regarding the decision to implement shortened work weeks. Both of the letters state in relevant part:

[P]lease be advised that the Union’s position regarding this matter is that the **Collective Bargaining Agreement** is very clear.

Article 15 [in part] states: “The normal work week consists of eight (8) hours per

day, five days per week, Monday through Friday, inclusive.”

Your letter implies that you intend to unilaterally change the work week As you know, **the Agreement may only be modified** by mutual agreement of the parties. We will be glad to discuss this matter with you, should you so choose, however to this point, you made no such request.

(G. 19 & G. 26) (emphasis added)

The Union filed three grievances in March 2009 regarding the shortened work weeks. All three grievances stated:

This grievance represents protest to the managements **violation of Article 15, Section 1**, and any other contract violation pertaining to the current labor agreement in as much as they precluded employees from working in the Hamilton plant

(G. 22) (emphasis added)

Even though it had agreed to work week changes in the past, the Union filed the charge giving rise to the instant complaint on March 12, 2009 alleging that the Company “**modified** and changed the work week **as set forth in the collective bargaining agreement.**” (G. 1(dd)) (emphasis added)

Moreover, the testimony elicited from Union officers by the General Counsel demonstrates that the crux of the claim is that Article XV of the Collective Bargaining Agreement was modified when the Company implemented the shortened work weeks.

International Representative Michael Brown testified at trial in accord with the Union’s position in the aforementioned letters, grievances and charge.

Q Why did you sign Article 15 here?

A Because that is the section that defines the work week.

Q And so the — calling attention to that next paragraph, paragraph three,

will you please read paragraph three?

A Okay.

Q Okay. And why did you include this paragraph in this letter?

A It was an offer to bargain with the Company, in the event that they wanted to modify the work week or discuss modification of the work week.

(Tr. 150-151)

Q Now, calling your attention back to page one of that letter dated May 14th, 2009, could you read paragraph one?

A (Witness complies.) Yes, sir.

Q What was the purpose of writing paragraph one?

A This, like the other letter, was written based on some information provided to me by president Tony Perry, indicating that the company was intending on changing the work week in the month of May.

Q And what was the Union's position?

A Again, that the work week is specifically **defined in the agreement** between the parties, and that if they wish to discuss it, we made an offer to discuss it and bargain about it.

(Tr. 152) (emphasis added)

Q What is the purpose of paragraph three?

A It is to identify the requirements of the **agreement** and outline that it can only be **modified by mutual agreement** of the parties, and an offer to discuss and bargain regarding any potential changes.

(Tr. 153) (emphasis added)

Union Local President Tony Perry's testimony echoed Brown's testimony.

Q Now, given your experience, what impact if any does Mr. Franks' letter of February 5th, have on Section 1, Article 15?

A It is changing the normal work week, which is considered Monday through Friday, without sitting down and negotiating or bargaining with the Union about it.

(Tr. 329)

Q How does Mr. Franks' February the 5th, 2009 letter impact Section 4?

A Once again, they are **making changes to agreed upon contract language** without bargaining or negotiating with the Union.

(Tr. 330) (emphasis added)

Additionally, the Union's Post-Hearing Brief further illustrates that the focus of this case is on conflicting interpretations of the Collective Bargaining Agreement.

Thus, rather than granting the company the broad right to unilaterally change work schedules as it claims, the contract actually limits those rights by other provisions of the Agreement. Article XV, Section 1 of the Agreement is just such a provision. Therefore, even if the general language of Article II could be read to encompass the change in work schedules as made here, it clearly did not authorize unilateral action in the face of Article XV, Section 1. Additionally, Article II states that the rights provided under that section "shall not be used in a manner that will violate any of the terms or provisions of this Agreement." Article XV, section 1 sets forth the work schedule of the employees. Neither that section nor the management rights clause give the company the right to unilaterally and without bargaining with the Union, change employee work schedules from five days to four.

(CP Post-Hearing Brief, p. 18)

Finally, the plain language of the Fifth Amended Complaint, alleges that the Company failed to bargain collectively "within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act." (Fifth Amended Complaint at paragraph 37). This allegation buttresses the point that the reduced work schedule claim is appropriately analyzed using the "sound arguable basis" standard.

Member Schaumber notes that the General Counsel alleged that the Respondent

violated Sec. 8(a)(5) within the meaning of Sec. 8(d) by (1) assigning bargaining unit work to nonbargaining unit employees, (2) requiring operators to call in for overtime assignments on their days off, and (3) failing to follow the bidding process. Under the General Counsel's exclusive theory regarding these allegations, he was required in each instance to identify a contract provision in the contract that addressed the issue, and then show how Respondent's conduct modified the contract provision.

ATC, LLC, 348 NLRB 796, n. 1 (2006).

Simply put, the reduced work schedule claim turns solely on the interpretation of the Collective Bargaining Agreement, and therefore, under *Bath Iron Works*, 345 NLRB 499 (2005) this is clearly a "contract modification" issue governed by the "sound arguable basis" standard.

Even when the Board determines that a §8(a)(5) unfair labor practice charge turns solely on the interpretation of the contract, it applies the sound arguable basis standard to the exclusion of the clear and unmistakable waiver standard.

Bath Marine Draftsmen's Assoc. v. NLRB, 475 F.3d 14, 26 (1st Cir. 2007)

Furthermore, even if this matter were deemed to be a "unilateral change" case, the appropriate standard to apply is the "contract coverage" standard.

Under this test where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties *have bargained* about the subject and have reached some accord. Thus, there has been no refusal to bargain. In sum, the issue is not whether the union has *waived* its right to bargain. The issue is whether the union and the employer *have bargained* concerning the relevant subject matter. If so, the Board and the courts should honor the fruit of the bargaining.

Provena Hospitals, 350 NLRB 808, 817 (2007) (Chairman Battista, dissenting) (emphasis in the original); *See Bath Marine Draftsmen's Assoc.*, 475 F.3d 14; *Chicago Tribune Company v. NLRB*, 974 F.2d 933 (7th Cir. 1992); and *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

The Administrative Law Judge clearly erred in not applying the "sound arguable basis"

standard as mandated by *Bath Iron Works Corp.*¹

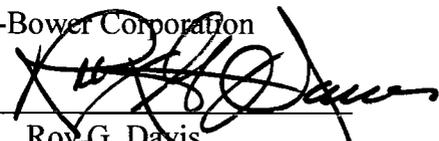
Having distinguished unilateral change cases and their “waiver” defense, we now turn to the issue of whether the contract has been modified. In the instant case, that issue turns on the resolution of two conflicting interpretations of the respective CBAs and the Plan documents. Where an employer has a “sound arguable basis” for its interpretation of a contract and is not “motivated by union animus or ... acting in bad faith,” the Board ordinarily will not find a violation.

Bath Iron Works Corp., 345 NLRB at 502.

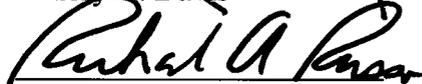
Conclusion

For the foregoing reasons, the Respondent’s exceptions should be granted.

NTN-Bower Corporation

By: 

Roy G. Davis



Richard A. Russo

September 7, 2010

Roy G. Davis
Richard A. Russo
Roy G. Davis
Davis & Campbell L.L.C.
401 Main Street, Suite 1600
Peoria, Illinois 61602
(309) 673-1681
(309) 673-1690 facsimile
rgdavis@dcamplaw.com
rarusso@dcamplaw.com

¹ The same analysis applies to the Union access claim, because the focus is on the Company’s interpretation of Article III, Section 9 to restrict inactive employee Union officers’ access at the Hamilton facility (consistent with the Company’s treatment of all individuals who are not active employees under its visitor policy) and to relocate the Union’s office to a non-production area of the facility.

Certificate of Service

Counsel of record for the Respondent certifies that he caused a true and correct copy of the foregoing Reply Brief of the Respondent to be served upon each counsel of record on by placing the same with Federal Express on September 7, 2010 for overnight delivery in an envelope addressed as follows:

Gregory Powell, Esq.
John Doyle, Esq.
National Labor Relations Board
1130 22nd Street, Suite 3400
Ridge Park Place
Birmingham, Alabama 35205

George N. Davies, Esq.
Nakamura, Quinn, Walls, Weaver & Davies, LLP
2700 Highway 280 East, Suite 380
Birmingham, Alabama 35209

Martin M. Arlook, Esq.
Regional Director
Region 10
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303-1513

A handwritten signature in black ink, appearing to read "Roy G. Davis", is written over a horizontal line.

Roy G. Davis
Davis & Campbell L.L.C.
401 Main Street, Suite 1600
Peoria, Illinois 61602
(309) 673-1681
(309) 673-1690 facsimile
rgdavis@dcamplaw.com

RECEIVED
2010 SEP - 8 PM 1: 35
MLRB
ORDER SECTION