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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Gerald Kobell
Regional Director, Region 6

DATE: January 22, 1996

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

SUBJECT : Westinghouse Electric Corporation,
Energy Systems, Nuclear Services Division
Case 6-CA-27261

530-6083-0125
530-8054-2000
530-8054-2050
530-8054-5000

The Region submitted this case for advice as to (1) whether the Employer violated Section 8(a)(5) and 8(d) by unilaterally subcontracting the entire work of the bargaining unit and terminating all bargaining unit employees in light of a contractual zipper clause; and (2) whether the Employer engaged in bad faith bargaining by pursuing subcontracting within one month of negotiating a contract. The Region's sua sponte request for injunctive relief will be addressed in a separate memorandum.

FACTS

Background

The Union, which represents guards, and the Employer had a long established bargaining relationship. The bargaining unit involved in this case was located at the Employer's Waltz Mill facility. Waltz Mill is one of eight facilities within the Employer's Nuclear Services Division. At the other facilities in the Employer's Nuclear Services Division, security services were provided by Burns International Security or sophisticated electronic equipment. At Waltz Mill, the bargaining unit consisted of nine employees. In addition, the Employer had traditionally utilized one casual guard, a position which had always been excluded from the bargaining unit.

Since about August 1994,[1] prior to the negotiations of the 1994 contract, the Employer had been trying to reduce its costs. Approximately 200 of the 700 non-bargaining unit employees at the facility had retired or had been permanently laid off by the end of 1994.

[1] All subsequent dates are in 1994 unless otherwise indicated.

Negotiations for 1994 Contract

The previous contract expired on November 11, 1994. Prior to its expiration, the parties conducted negotiations for a new contract in about late October and early November. Fred Geradine, Manager of Outage Management Services with overall responsibility for the Waltz Mill facility during the period of negotiations and for some time prior to 1994, designated Human Resource Manager Sally Maybray to act as chief spokesperson for the Employer. Russ Cline, Manager of Plant Protection, also represented the Employer in negotiations. The evidence proffered by the Employer indicates although Geradine did not attend any negotiation sessions, he discussed the negotiations with Maybray. Geradine opposed the use of an outside guard agency on a permanent basis at Waltz Mill and did not seek any major concessions in the Union contract.

The Employer's officials came to the first meeting seeking to amend the unit description to exclude employees provided by a "temporary" service and to add language to the contract permitting the use of a temporary workforce "due to absence of guard or guards or coverage for special events," to have only a one-year contract term, and to gain some minor reductions in wages and economic benefits.

With regard to the use of a temporary workforce, the Union claims that the Employer repeatedly commented that the Employer wanted to have "unlimited access" to an outside security agency in the absence of guards for any reason. According to the testimony of all Union officials, when they reviewed the Employer's initial proposals, they expressed concern that the Employer intended to have them train outside guards, who might some day take their jobs. The Union maintains that their concern was magnified because the Employer sought a one-year contract and because other cuts and layoffs were occurring at the facility around the same time as negotiations, as a result of the Employer's well-publicized cost-savings plan. Contrary to the Employer, the Union insists that in negotiations it clearly and repeatedly voiced its concerns that subcontracting could lead to the elimination of their jobs. The hand written notes of Union representative Steve Larkin support the Union's claim that it raised the issue of its fear that the Employer would train guards from an outside agency and then eliminate the bargaining unit.

According to the Union, after it expressed such concerns, the Employer officials informed the Union that it was not the intent of the Employer to eliminate unit jobs, and that the Employer intended to keep eight guards working

within the bargaining unit as employees of the Employer.[2] The Union officials maintain that once they expressed their concerns over possible loss of jobs as a result of utilizing a temporary agency, the Employer maintained throughout the negotiation process that the reason it proposed the language permitting the use of temporary employees in the first place was to eliminate expenses, mainly in the area of overtime costs, during special events outside the normal work schedule.

Contrary to the Union, the Employer maintains that at no time did the Union raise any fears concerning permanent subcontracting, and that neither party brought up the subject of permanent subcontracting during the 1994 negotiations. The Employer's bargaining notes, however, indicate that Employer representatives informed the Union that it would not lay off unit employees. There is no dispute that at one point during the negotiations, the Union made a verbal counteroffer to the effect that the Employer could hire one more casual, non-bargaining unit guard to add to the one nonunit guard employed at the time. The parties still were unable to come to an agreement on the use of a temporary workforce, with the Union adamantly rejecting the concept of utilizing temporary employees obtained through a security agency.

By the completion of the November 3 bargaining session, the parties reached agreement on all language with the exception of the duration of the contract and the proposal by the Employer concerning the use of a temporary work force provided by a security agency in certain situations. With respect to the term of contract, the Employer initially proposed a one-year contract, while the Union sought a three or four-year agreement.

On November 11, via a telephone conversation, the parties agreed to a four-year contract term and the Employer accepted a Union counterproposal with respect to the use of temporary employees.

Thus, the final contract included Section IX, 8 Casual and Temporary Help, which stated, "Two Casual Guards will be used to reduce the amount of overtime caused by vacation, illness, training or 'knock-out' day. A Security Agency could be employed to cover construction projects, facility emergency or special events."

The 1994 contract also contained the following management rights and zipper clauses, which remained unchanged from prior contracts:

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[2] One of the nine bargaining unit guards had retired.

Section V, Rights of Company

> The Union recognizes that it is the responsibility of the Company and the plant Management to maintain the efficiency of the operation and agrees that the Company shall have the freedom of action necessary to discharge its responsibility for the successful operation of the Company. This responsibility includes, among other rights, the initiation of procedures by which its operations are to be conducted; the right to hire, maintain discipline including suspensions and discharge as required; promotion, transfer or layoff of employees; the selection of those with whom it will do business; the units of personnel required in its operation; determination of work schedules and shifts; assignment and direction of the work force; enforcement of rules and regulations; determination of protection and security measures required for the Waltz Mill Site.

Section IX (page 48) Modification

> This Agreement expresses the complete understanding of the parties in respect to all matters deemed by them to be applicable to the specified bargaining unit. Therefore, except as herein specifically provided, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the rights, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subjects or matters not specifically referred to or covered by this Agreement **which were discussed** during the negotiation of this Agreement. (emphasis added)

Neither this contract nor prior contracts contain reopener language. The final collective-bargaining agreement is effective from November 11, 1994 to November 11, 1998.

On November 29, the Employer issued a memorandum to its employees notifying them of changes in the facility's organization. Jack Bastin replaced Geradine, who retired on November 30, and became Manager of Division Support Operations at this facility effective December 1. Bastin reports directly to General Services Manager Thomas Christopher, who was also Geradine's immediate supervisor prior to his retirement. Christopher ordered Bastin to continue with the 1995 cost savings plans in order that a $3 million savings could be realized by the end of 1995. Bastin gave Cline the responsibility of investigating

possible reductions. Cline reported to Bastin that the Company could realize a savings of about $200,000 a year if the Employer retained Burns employees to do the security work. As noted above, Burns supplies the guards at some of the Employer's other facilities.

On or about December 19, Cline reported his findings to Christopher and Bastin. Christopher instructed Bastin to reduce the costs of the security department by $200,000 and that if this was not possible by retaining the bargaining unit employees, then the Employer would plan to retain Burns to perform this work, or do whatever else was necessary to realize that reduced savings. The Employer maintains that Christopher had the ultimate authority to determine whether or not the guard work would be subcontracted--both at the time of the 1994 contract negotiations and at the time when the final decision was reached in 1995 to subcontract the work. The Employer claims that Christopher accepted the recommendation of Geradine in 1994 not to subcontract the work or cause the bargaining unit employees to suffer any substantial economic concessions, and that he similarly accepted the recommendation of Bastin, about one month after the 1994 negotiations, to subcontract the work, if the Union would not accept concessions to be competitive with Burns.

Mid-term Bargaining in 1995

Commencing January 16, 1995, at the request of the Company, the Employer and the Union held a series of meetings to discuss concessions under the collective-bargaining agreement. Throughout these 1995 negotiations, the Employer sought major economic concessions from the Union. The Employer proposed to reduce wages by more than half--to $6 per hour. The Employer informed the Union during these sessions that if the Union could not propose a $200,000 savings under the contract to be competitive with Burns, the work would be subcontracted.

The Union claims that it repeatedly voiced objections to reopening the contract after just having concluded negotiations on a new agreement, which contained no reopening language.

Although the parties met several times in 1995 and discussed ways to cut costs to realize a $200,000 savings, the parties were never close to reaching any agreement on this matter. By letter dated April 24, 1995, the Employer notified the Union that the parties were at "impasse" and that effective April 30, 1995, the Employer would subcontract the guard work to Burns and the bargaining unit employees would be permanently replaced. As of April 30, 1995, all bargaining unit employees were replaced by Burns personnel; however, under the Employer's Employee Security and Protection Plan for Union-represented Employer's

Employees," which requires a 60-day notice in advance of such separation, the guards continued receiving the same wages and benefits during the 60-day notification period. Thus, effective July 1, 1995, all unit employees were permanently separated from the Employer's employ. In addition, the "casual" guards employed by the Employer at this site, who were not covered by the collective-bargaining agreement, were also laid off on April 30, 1995. Burns' employees continue to date to perform security services at Waltz Mill, the exact work previously performed by bargaining unit personnel.

The Union grieved the Employer's actions. However, the Employer is unwilling to arbitrate the dispute and is opposed to the use of the Board's traditional arbitral procedures regarding this dispute.

ACTION

We conclude that a Section 8(a)(1) and (5) and 8(d) complaint should issue, absent settlement, because the zipper clause in the collective-bargaining agreement and Section 8(d) of the Act prevent the Employer from subcontracting the entire work of the bargaining unit during the term of the agreement without the Union's consent.
[FOIA EXEMPTIONS 2 and 5

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Generally, an employer may not unilaterally institute changes regarding mandatory subjects such as wages, hours, and other terms and conditions of employment, such as subcontracting, before reaching a good-faith impasse in bargaining under Section 8(a)(5).[3] Section 8(d) imposes an additional requirement that a party which seeks to modify a term or condition of employment "contained in" a current collective-bargaining agreement must obtain the consent of the other party before implementing the change. Therefore, an impasse in negotiations does not privilege a unilateral change in a contractual subject. If the employment conditions the employer seeks to change are not "contained in" the contract, however, the obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change. Milwaukee

[3] An employer's decision to subcontract unit work is a mandatory subject of bargaining when what is involved is the substitution of one group of workers for another to perform the same work, and not a change in direction or scope of the enterprise. Acme Die Casting, 315 NLRB 202, n. 1 (1994); Torrington Industries, 307 NLRB 809 (1992).

Spring Division, 268 NLRB 601 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985).

The Board has held that a zipper clause in a collective-bargaining agreement may privilege either party to refuse to bargain during the term of the contract about subjects which are covered by the agreement. Suffolk Child Development Center, 277 NLRB 1345, 1350 (1985). The parties may choose to bargain, but they may not be required to do so. If there is bargaining, no changes may be made in the contract without mutual agreement. Mead Corp., 318 NLRB No. 16, slip op. at 2 (1995). Furthermore, neither party may unilaterally modify the contract midterm, even if the parties have bargained to impasse, unless the subject of the bargaining is covered by a reopener clause in the collective-bargaining agreement. Speedrack, Inc., 293 NLRB 1054 (1989); Hydrologics, Inc., 293 NLRB 1060 (1989).[4]

The Board has also held that a zipper clause, by its terms, may prevent changes during the contract period in subjects which are not covered by the collective-bargaining agreement, including those not within the knowledge or contemplation of the parties. GTE Automatic Electric Incorporated, 261 NLRB 1491 (1982). Such a zipper clause serves as a "shield" which a party may use against the other party's request for midterm bargaining but not a "sword" to accomplish unilateral changes in terms and conditions of employment. GTE, supra. The clause thus encourages industrial stability by preserving the status quo during the contract term. GTE, supra at 1491-1492.

In this case, the 1994 contract is silent on the issue of permanent subcontracting. Therefore, the Employer's unilateral subcontracting of the bargaining unit work did not violate Section 8(a)(5) unless the Employer, by agreeing to the zipper clause, waived its right to bargain during the term of the contract over the subjects referred to in the zipper clause. Mead, supra. The test governing waivers contained in zipper clauses is the same as that for waivers contained in other contractual provisions - the waiver must be clear and unmistakable. Michigan Bell Telephone, 306 NLRB 281, 281-282 (1992); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

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[4] In Speedrack, the Board found the employer lawfully implemented a wage modification after bargaining to impasse pursuant to a wage reopener. Id. at 1055. The Board also held in Hydrologics that the union was privileged to strike upon reaching impasse in negotiations pursuant to a wage reopener provision. Id. at 1062-1063.

We conclude that the Employer waived its right to make midterm changes in the staffing of the guards' work. Although the bargaining history behind the zipper clause is unclear, the operative language in the zipper clause is explicit. The clause provides that the parties "for the life of this Agreement, ...voluntarily and unqualifiedly waive the rights, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subjects or matters not specifically referred to or covered by this agreement which were discussed during the negotiation of this Agreement." (Emphasis added.) The Union's expressed fear that the Employer would replace the bargaining unit employees with guards from an outside agency, as a reason for objecting to the Employer's temporary staffing proposal, and the Employer's response that it did not intend to eliminate unit jobs made staffing a subject that was discussed but not specifically referred to in the agreement. Therefore, we conclude that the zipper clause requires the Union's consent for changes in staffing and the use of subcontracts to decrease the unit guard staff.[5]

In reaching this conclusion, we reject the Employer's claim that the subject of permanent subcontracting was never discussed. The Union's negotiating notes are direct evidence that it expressed its fear that the Employer would replace the bargaining unit with workers from an outside agency. Also, the Employer's bargaining notes indicate that it assured the Union that it would not lay off unit employees. Such comments were reflective of the surrounding circumstances, such as the Employer's well publicized cost cutting measures in other areas.

The Employer also contends that it had reached an impasse in negotiations with the Union to justify its unilateral subcontracting. However, this argument is not a

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[5] Cf. Jones Dairy Farm, 295 NLRB 113 (1989), where the zipper clause stated that negotiations on matters not covered by the agreement were to be deferred until the expiration of the agreement, and Michigan Bell Telephone, supra, where the Board upheld the unilateral implementation of a drug testing policy because the existing contract had no provision concerning or referring to drug testing, the zipper clause stated that the agreement was in final settlement of all demands and proposals made by either party during negotiations and that the parties "intended thereby to finally conclude contract bargaining throughout its duration," and the parties stipulated at trial that the drug policy or related subjects were not discussed during prior negotiations.

defense to the charge because parties to a contract need not bargain in midcontract over matters not covered by a reopener clause. Campo Slacks, Inc., 266 NLRB 492, 497 (1983). Thus, impasse is irrelevant in this situation.

The Employer also argues that if the Union was so concerned about the subcontracting of all unit work, it should have never entered into a contract without more restrictive language about subcontracting. The Board rejected a similar argument in Tocco Division of Park-Ohio Industries, 257 NLRB 413, 414 (1981), where the employer argued that the union had waived its right to bargain over the transfer of unit work because it did not submit proposals to restrict the employer's freedom to transfer work. In the Board's view, this argument ignores the union's statutory right and represented the employer's attempt to shift its burden for obtaining contract language dealing with transfer of unit work to the union. The Board stated that it was not, however, incumbent on the union to obtain contract language; instead, it was incumbent on the employer, if it sought to limit or restrict the union's statutory right, to obtain the waiver. Similarly, in the instant case, the Employer's argument that the Union should have sought more restrictive language on subcontracting is without merit.

The Employer also argues that it was privileged to subcontract the unit work under the management rights clause which provides that it has the right to initiate procedures by which its operations are to be conducted efficiently. This argument also fails because the broadly worded management rights clause says nothing about subcontracting. Cf. Kohler Co., 273 NLRB 1580, n. 1 and 1582 (1985).

We conclude, therefore, that the Employer's unilateral subcontracting of the work of the bargaining unit despite a contractual zipper clause requiring the Union's agreement to midterm changes violates Section 8(a)(5) and (1) and 8(d).

In the alternative, the Region should also argue that even if the ALJ were to find that the parties did not discuss permanent subcontracting during negotiations, within the meaning of the zipper clause, they did discuss labor costs, the sine qua non of subcontracting decisions. There is no dispute that during the 1994 negotiations the parties negotiated wages and economic benefits. Thus, labor costs, the essence of the Employer's decision to subcontract here, were discussed and negotiated by the parties and fall within the ambit of the zipper clause. Moreover, the terms of wages and benefits are contained in the contract. Therefore, as an alternate theory, we conclude that the Employer violated Section 8(a)(5) and 8(d) by subcontracting the guard work without obtaining the Union's consent because labor costs, the essence of bargaining over subcontracting, were

discussed and are also terms contained in the contract, and therefore clearly fall within the language of the zipper clause.

[FOIA EXEMPTIONS 2 and 5

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B.J..K.