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United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC and Local Union 193-G and PPG Industries, Inc.
Case 33-CB-4317

March 31, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On November 18, 2009, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and Charging Party PPG Industries each filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel and PPG each filed a reply brief. The General Counsel filed a motion to strike the Respondent's answering brief, and the Respondent filed a statement in opposition to the General Counsel's motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.²

We agree with the judge that the General Counsel failed to establish that the Respondent violated Section 8(b)(3) of the Act, as alleged in the complaint, by failing and refusing "to bargain collectively about the Employer's [PPG's] proposed changes to the Unit's economic terms and conditions of employment." The alleged violation is based on the Respondent's declaration, in reliance on article 34, section 2 of the parties' expiring agreement, that it would only bargain "provisionally" over subjects that PPG failed to present by the first day of bargaining, including economic terms.³ While the

¹ Member Becker is recused and did not participate in the consideration of this case.

² The General Counsel's Motion to Strike the Respondent's answering brief is granted solely as to those portions of the brief that cite to and rely on an arbitrator's opinion and award that is not in evidence. Member Hayes finds it unnecessary to pass on the General Counsel's motion.

³ Art. 34, sec. 2, provided:

Should either party desire to discontinue or modify the existing agreement upon any termination date, at least thirty (30) days prior written notice of such intent must be given to the other party hereto. In the event of notice of cancellation or modification of the agreements, it shall be the duty of the parties to meet in conference not less

than (10) days prior to the expiration date of said agreement for the purpose of negotiating new or modified agreements.

Respondent made its declaration on June 2, 2009,⁴ the second day of negotiations, the Board examines the totality of a party's conduct, both at and away from the bargaining table, to determine whether the party violated its statutory obligation to bargain in good faith.⁵

The totality of the Respondent's conduct may be briefly summarized as follows. The Respondent met and negotiated with PPG and made concessions during the 19 days of negotiations the parties held between June 1 and September 10. In addition, the Respondent timely filed a grievance asserting that PPG violated article 34 of the agreement by making proposals after the first day of negotiations. Finally, the parties agreed to expedited arbitration of that grievance to secure a quick resolution of the Respondent's interpretation of article 34, section 2.

In those circumstances, we agree with the judge that the Respondent's June 2 declaration does not evidence bad-faith bargaining. We rely, as the judge did, on the fact that the Respondent's bargaining conduct—meeting at 19 negotiating sessions, advancing proposals, and making concessions—was entirely consistent with good-faith bargaining. We also rely on the absence of any facts demonstrating that the Respondent's declaration actually affected negotiations. In this regard, Michael Mezo, the Respondent's bargaining representative, testified without contradiction that the Respondent's "economic proposals . . . were no different than they would have been if they were not [made] provisionally because we know we have to deal with these problems . . . the viability of the plant depends on it and our jobs depend on it." Finally, the Respondent's filing a grievance and agreeing to expedited arbitration is persuasive evidence that the Respondent did not take the position it announced on June 2 in order to forestall or indefinitely delay agreement or impasse, as the General Counsel contends.⁶

Rather, we find that the Respondent's declaration meant only that it was preserving its right to arbitrate whether some of PPG's proposed modifications to the existing collective-bargaining agreement were untimely; that is, the Respondent would bargain in good faith over

than (10) days prior to the expiration date of said agreement for the purpose of negotiating new or modified agreements.

It is further agreed that proposed changes or new agreements shall be presented not later than the first day of the conference by the party serving notice.

⁴ All dates hereafter refer to 2009.

⁵ See, e.g., *Regency Service Carts*, 345 NLRB 671, 671 (2005).

⁶ Mezo's statement elsewhere that the Respondent's bargaining position was a "tactic" and not a "strategy" does not indicate otherwise. Mezo testified, again without contradiction, that he had told the Local Committee "that it's a tactic at best, it's not a strategy. We're going to have to deal with these issues."

the contested proposals subject to the outcome of its pending grievance. The Respondent's position was thus akin to a position lawfully staked out by the union in *WWOR-TV*, 330 NLRB 1265, 1266 (2000).⁷ In that case, the union initially maintained that its existing contract had automatically renewed, that it was not obligated to negotiate a successor agreement, and that "it would not negotiate a successor agreement." *Id.* at 1270. In response, the employer threatened to unilaterally implement new terms and conditions of employment, claiming that the union had refused to bargain. The union then changed course and agreed to bargain "unconditionally and unequivocally" while expressly reserving its right to pursue a grievance alleging that the prior contract had automatically renewed. A Board majority found that the union's latter position was consistent with good-faith bargaining, explaining that "a union can bargain in good faith with an employer while taking the legal position in other litigation that it was under no such bargaining obligation." *Id.* at 1266 (citing *International Paper Co.*, 319 NLRB 1253, 1264-1265, 1276 fn. 50 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997)). The Board majority rejected the dissent's argument that the union's reservation of its contractual right to pursue arbitration was an unlawful condition that excused the employer's later refusals to bargain.⁸

Here, as in *WWOR-TV*, the Respondent's declaration merely preserved a contractual litigation position without affecting its willingness and ability to engage in good-faith negotiations, as evidenced by the Respondent's actual conduct at the bargaining table.⁹ Thus, the facts support a finding that the Respondent was engaged in

⁷ In joining his colleagues in finding that the facts in this case do not establish that the Respondent was unlawfully endeavoring to frustrate the possibility of reaching agreement, Member Hayes finds it unnecessary to specifically rely on *WWOR-TV*, *supra*. In that case there was no allegation that the union's declaration that it would bargain unconditionally, but without prejudice to its arbitration position, constituted an unfair labor practice. Moreover, the union in that case initially refused to bargain over any subject, which was not the case here. Most importantly, the parties here actually engaged in what the judge found to be extensive, substantive, and meaningful bargaining, which was not the case in *WWOR-TV*.

⁸ The Board found that the union's initial position was inconsistent with good-faith bargaining and excused the employer's refusals to bargain during the period the union maintained it. *WWOR-TV*, 330 NLRB at 1265. In contrast to the union's initial position in that case, the Respondent here never took the position that it would not bargain for a successor agreement.

⁹ In dismissing the complaint, we find it unnecessary to decide whether the Respondent's position was correct under art. 34, sec. 2 of the contract. In *WWOR-TV*, 330 NLRB at 1265 fn. 4, the Board observed that it was "now undisputed that the Union's position was legally incorrect," but that did not affect the finding that the union did not fail to bargain in good faith.

"lawful bargaining to achieve a contract that it consider[ed] desirable" and was not "unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enf. 318 F.3d 1173 (10th Cir. 2003). For these reasons, as well as those set out by the judge,¹⁰ we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. March 31, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Debra L. Stefanik, Esq., for the General Counsel.

Stephen A. Yokich, Esq. (Cornfield and Feldman), of Chicago, Illinois, for the Respondent Union.

Terrence H. Murphy, Esq. (Buchanan Ingersoll & Rooney), of Pittsburgh, Pennsylvania, for the Charging Party Employer.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Peoria, Illinois, on September 30, 2009. PPG Industries, the Employer, filed the charge on July 10, 2009. The General Counsel issued his complaint on August 31, 2009.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Union and the Charging Party Employer, I make the following

FINDINGS OF FACT

I. JURISDICTION

PPG Industries, a corporation, manufactures glass products at a number of facilities, including the one at issue in this case in Mt. Zion, Illinois. At its Mt. Zion facility, PPG purchases and receives goods valued in excess of \$50,000 directly from points outside of Illinois. PPG is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Respondent Union, the United Steelworkers of

¹⁰ We disavow, however, the judge's statement that "[t]he remedy for PPG in this matter was not to file an unfair labor practice charge, but was instead to bargain to impasse and then, if it so desired, to unilaterally implement its proposed changes."

America and its Local Union 193-G are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that the Respondent Union has since June 2, 2009, failed and refused to bargain collectively and in good faith with the Employer in violation of Section 8(b)(3) of the Act. On that date, the Union announced that it was not required to bargain with the Employer over economic matters because its existing collective-bargaining agreement required that all proposed changes be presented no later than the first day of negotiations, i.e., June 1, 2009. The Union did in fact bargain with the Employer, but said it was doing so “provisionally.”

The Union has represented the production and maintenance employees at PPG’s Mt. Zion, Illinois facility for over 45 years. PPG and the Union have been parties to a series of collective-bargaining agreements during this period. Currently there are about 195 employees in the bargaining unit.

The most recent collective-bargaining agreement was in effect from June 15, 2008 to June 15, 2009. Article 34, section 2 of that agreement, which been contained in every agreement the parties have had, provides:

Section 2. Should either party desire to discontinue or modify the existing agreement upon any termination date, at least (30) days prior written notice of such intent must be given to the other party hereto. In the event of notice of cancellation or modification of the agreements, it shall be the duty of the parties to meet in conference not less than (10) ten days prior to the expiration of said agreement for the purpose of negotiating new or modified agreements.

It is further agreed that proposed changes or new agreements shall be presented not later than the first day of the conference by the party serving notice. (GC Exh. 3, p. 22.)

Judy Lewkowski, PPG’s director of human resources, notified Local Union President Jeff Wallace on April 22, 2009, that PPG intended to open negotiations and suggested that negotiations for a new agreement begin on June 1, 2009 in Decatur, Illinois. The next day, Thomas Mordowanec, PPG manager of employee and labor relations, called Michael Mezo, a Union International Representative, and proposed a preliminary meeting, which was held at Chicago’s O’Hare Airport on May 14. Mordowanec and Mezo were the chief negotiators for PPG and the Union, respectively, in collective-bargaining negotiations.

On May 14, Mordowanec and other PPG representatives discussed PPG’s economic situation with Mezo. Mordowanec told Mezo that due to the comparative labor costs of its competitors, PPG had to reduce its cost per labor hour from \$37 to \$27 by the third year of the next contract. Further, Mordowanec told Mezo that to get to \$27 PPG would treat laid off employees as new hires when they were recalled and that PPG would need wage concessions from current employees. Mezo asked for specifics regarding wage concessions. Mordowanec declined to give the Union specific figures.

On May 28, Mordowanec sent Mezo an email calculating the cost per labor hour that would result if the parties agreed to a two-tier wage system without wage concessions from current

employees. He reiterated PPG’s desire to achieve a \$27 cost per labor hour by the end of a 3-year agreement and opined that it would be difficult to achieve that figure without significant concessions from current employees, GC Exh. 5.

On June 1, the first day of collective-bargaining negotiations, Mordowanec reiterated PPG’s intention of getting down to \$27 cost per labor hour. He made it clear that there would be a second tier wage scale for new employees and employees returning from layoff that would be lower than the wage scale for current employees who were not laid off. Whether Mordowanec specifically stated it or not, the Union was aware from the May 28 email that PPG would ask for wage concessions from current employees to reach \$27 per hour.

PPG did not present specific wage rates to the Union on June 1. Instead it presented and discussed with the Union proposals that all parties characterize as “non-economic.”

On June 2, the second day of negotiations, Mezo announced, citing article 34 of the then-current collective-bargaining agreement, that the Union was not obligated to bargain over any proposal that had not been submitted to it on June 1. However, Mezo stated that the Union was willing to bargain about employer proposals submitted after June 1 on a provisional basis.

On either June 2 or 3, Mezo sent Mordowanec an email stating that the Union was not obligated to bargain over any proposal made by the Company subsequent to June 1, GC Exh. 8. He also stated that the Union did not have any proposals to submit at that time and that it was the Union’s position that “any provision of the CBA for which you have not submitted a proposed modification shall remain unchanged for the term of the CBA.”

The email continued, “notwithstanding, the Union is willing to provisionally discuss any matter raised by the Company, provided that failure to reach agreement on such matter shall not alter the Union’s position as stated above.” The Union subsequently filed a grievance, contending that PPG violated section 34 of the existing contract by introducing proposals after the first day of negotiations. The grievance is currently pending before an arbitrator.

PPG presented a two-tier wage schedule with specific figures to the Union on June 3. The parties met on 19 days in collective-bargaining negotiations between June 1, and September 10, 2009. The Union made numerous proposals, but continued to maintain throughout negotiations that it was not obligated to bargain over proposals made by PPG after June 1, and that union proposals on such matters as employee wages were made “provisionally.”

Analysis

The General Counsel and Charging Party Employer contend first that PPG complied with article 34 of the existing collective-bargaining agreement. They note that PPG notified the Union prior to June 1 that the Company intended to achieve a \$10 per hour reduction in cost per labor hour in negotiations. Moreover, PPG notified the Union that it would seek to achieve this goal through a two-tier wage structure and that it would likely be seeking wage concessions from current employees.

Secondly, the General Counsel and Charging Party Employer contend that the Union, in offering to bargain over some

or all of the Employer's proposals "provisionally," violated Section 8(b)(3) of the Act. By doing so, the General Counsel and Charging Party allege that the Union failed to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," as required by Section 8(d) of the Act.

All three parties rely on the Board's decision in *WWOR-TV*, 330 NLRB 1265 (2000), in support of their positions. While *WWOR* is analogous, it is also distinguishable in that it involved an unfair labor practice filed against an employer.

The Union in the *WWOR* case, the National Association of Broadcast Employees and Technicians (NABET) took the position for a month and a half that *WWOR* had failed to properly terminate its 1993–1996 contract and that therefore the contract had been automatically renewed. Thus NABET contended that it was under no obligation to bargain for a new contract.

On October 17, 1996, however, NABET offered to bargain "unequivocally and unconditionally" for a new contract. It did so without prejudice to its position that *WWOR* had failed to terminate the existing contract. NABET filed a grievance in support of this claim. At a negotiation session on November 6, 1996, the Union repeated its offer to bargain unconditionally, without abandoning its position that *WWOR* had failed to terminate the prior agreement. *WWOR* refused to bargain with the Union and within a few weeks implemented new terms and conditions of employment about which it had notified the Union on November 1, 1996.

The Board found that while the Union refused to bargain prior to October 17, it did not do so after October 17. As a consequence the Board found that *WWOR* violated Section 8(a)(5) and (1) by refusing to bargain with the Union after October 17, and by unilaterally implementing new terms and conditions of employment.

The most salient point in the *WWOR* case is contained in footnote 7 of the majority decision. The majority answered the dissent's concern that its decision would require the Employer to withhold action for a prolonged period on its proposed changes. The Board majority stated:

As the judge recognized, the Respondent would have been justified in unilaterally implementing its proposed changes had it first bargained with the Union to a bona fide impasse.

International Paper Co., 319 NLRB 1253, 1264–1265, 1276 fn. 50 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997), cited by the General Counsel and the Union, is also a case involving a refusal to bargain allegation against an Employer.¹ *International Paper* argued that its Union was

¹ The Union also relies on *Lou's Produce*, 308 NLRB 1194, 1195 (1992), in which the Board also rejected an employer's defense to an 8(a)(5) allegation. The Employer contended that it was entitled to make unilateral changes due to bad-faith bargaining on the part of its union. In the context of the Employer's unlawful polling of its employees, the Board found that the Union did not engage in bad-faith bargaining by offering to bargain while at the same time contending that the parties' prior agreement had been automatically renewed.

not entitled to certain documents it requested because the Union had illegally refused to bargain over *International Paper's* proposal to permanently subcontract bargaining unit work. The Union had filed an unfair labor practice charge contending that the company violated the Act in making this proposal 2 months after unilaterally implementing its best and final offer. The Union also stated on several occasions that it would never agree to the permanent subcontracting of unit work.

The Board found that the Union did not refuse to bargain over *International Paper's* subcontracting proposal pending the disposition of its unfair labor practice charge. Noting that the Act does not require a party to agree to a proposal or make a concession, the Board found that since the Union never refused to meet and confer with *International Paper*, it did not violate the Act. As a consequence, the Board held that *International Paper* violated the Act in refusing to provide documents to the Union that pertained to its subcontracting proposal.

I conclude that as in *International Paper*, that Respondent cannot be found to have refused to bargain over PPG's proposals because the Union never refused to meet and confer with the Employer. Rather, like the union in *International Paper*, the Steelworkers regularly met with PPG, negotiated and made concessions. While the Union expressed its adamant opposition to some of the Employer's proposals, it was entitled to do so. The remedy for PPG in this matter was not to file an unfair labor practice charge, but was instead to bargain to impasse and then, if it so desired, to unilaterally implement its proposed changes.

CONCLUSION OF LAW

In the circumstances of this case, in which the Union met regularly with the Employer and in fact bargained with it, it did not violate Section 8(b)(3) of the Act, by maintaining that it was not obligated to bargain over some of the Employer's proposals and by contending that it was only bargaining "provisionally."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 18, 2009

² 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.