

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ELMHURST DAIRY, INC.
Respondent

and

Case No. 29-CA-090017

**MILK WAGON DRIVERS AND DAIRY
EMPLOYEES, LOCAL 584, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**
Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
RESPONSE TO NOTICE TO SHOW CAUSE**

On December 21, 2012, Elmhurst Dairy, Inc., (“Respondent”) filed a Motion for Summary Judgment asking the Board to defer the allegations of the Complaint issued in the above-captioned matter to the parties’ grievance arbitration procedure. On January 4, 2013, Counsel for the Acting General Counsel submitted an Opposition to Respondent’s Motion for Summary Judgment. On January 8, 2013, Respondent filed a Reply to the Acting General Counsel’s Opposition wherein it acknowledged that it was seeking only to have the Complaint allegations deferred to the parties’ grievance/arbitration procedure pursuant to *Collyer Insulated Wire and United Technologies, Corp.* On January 18, 2013, the Board issued a Notice to Show Cause why Respondent’s Motion for Summary Judgment should not be granted.

As shown below, in applying the principles of *Collyer*, it is clear that the instant case is not appropriate for deferral in accordance with well-established Board law because: (1) Respondent’s actions constitute a repudiation of the basic principles of collective bargaining, therefore compel the assertion of the Board’s jurisdiction; (2) the issues in this case do not

involve the interpretation of any terms of the collective-bargaining agreement; and (3) some of Respondent's conduct cannot form the basis for a grievance cognizable under the collective bargaining agreement and an arbitrator would have no authority to consider or remedy Respondent's conduct.

Accordingly, Counsel for the Acting General Counsel respectfully requests that Respondent's Motion for Summary Judgment be denied and the case remanded to the Regional Director to reschedule the unfair labor practice hearing.

Background

Respondent's Business

The Employer is in the business of processing milk, which includes the pasteurization, sale and delivery of milk. It is the sole milk processor in the Metropolitan New York Area. There are five milk "Dealers" that operate out of the Employer's property, where the Dealers' trucks are loaded with milk processed by the Employer's utility workers for delivery to retail and wholesale outlets. These Dealers are signatories to the collective bargaining agreement between the Union and the Milk Industry Labor Association of New York ("MILA"), a multi-employer association.

Collective Bargaining History and Agreements

Prior to 2007, the Employer was a member of Milk Industry Labor Association of New York. As a member of MILA, the Employer was a party to the collective bargaining agreement between the Union and MILA effective from July 1, 2005 through June 30, 2007.

In 2007, the Employer withdrew from and ceased being a member of MILA¹. On July 18, 2007, the Employer and the Union entered into a collective bargaining agreement (“Elmhurst Agreement”) effective July 18, 2007 to August 31, 2010. Under Paragraph 28 of the Elmhurst Agreement, the parties agreed to the following language:

Employees on the ER’s payroll prior to July 18, 2007 (“Existing Employees”), shall ***except as provided in this Agreement*** continue their employment under the terms and conditions provided for by the collective bargaining agreement between ER and the Union which expired July 1, 2007, (the MILA Agreement) (emphasis added).

The most recent contract between the Employer and the Union (the Elmhurst Agreement) is effective from September 1, 2010 through August 31, 2015, and it contains language similar to that stated above regarding employees hired by the Employer before and after July 18, 2007.

The Instant Matter Is Not Appropriate For Deferral Because Respondent's Conduct Constitutes A Rejection Of The Principles Of Collective Bargaining

Respondent contends that the Board and courts demand that parties to a collective bargaining agreement be required to use the grievance arbitration process to settle disputes regarding contract interpretation or application. This contention misstates Board law.

While the Board's policy under *Collyer* and *United Technologies* encourages parties' private resolution of disputes arising over the application of or interpretation of an existing collective bargaining agreement, the Board has never relinquished or abdicated its "...authority to maintain the institutional objectives of collective bargaining. Accordingly, the Board will not relegate a dispute to arbitration where, such as here, the respondent has engaged in conduct tantamount to a rejection of the principles of collective bargaining." *Teamsters Local Union 284*,

¹ After Respondent withdrew from MILA, the Association and the Union entered into successive memoranda of agreements (MOAs), including the contract effective from September 1, 2010 to August 31, 2015.

Affiliated With The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Columbus Distributing), 296 NLRB 19 (1989), quoting *United Technologies Corp.*, supra at 560; *Rappazzo Electric Co.*, 281 NLRB 471 (1986). In other words, the Board has held steadfast its obligation retain jurisdiction in order to protect the statutory bargaining process and statutory rights against conduct that undermines the principles of collective bargaining. *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461 (1972).

In determining whether deferral is appropriate, one factor that the Board examines is whether the dispute is "eminently well suited to resolution through arbitration." Well-established Board law holds that disputes are *not* well suited to resolution through arbitration and are not appropriate for deferral where an employer's actions undermine the Union, (*O.Voorhees Painting Co.*, 275 NLRB 779, 786 (1984), constitute a rejection of the bargaining relationship, or "amount to a repudiation of the contract or strike at the very heart of the collective-bargaining relationship." *United Cerebral Palsy of New York City*, 347 NLRB 603 (2006), citing *Kenosha Auto Transport Corp.*, 302 NLRB 888 fn. 2. The Board added that:

In those instances, "[i]t is unlikely that an arbitrator, whose function is limited to problems of contractual interpretation, would resolve or remedy, if necessary, allegations of statutory wrongs, or address such issues as the Union's status as a labor organization and authorized collective-bargaining representative in accordance with the Act or Board precedent." *United Cerebral Palsy*, 347 NLRB at 606, quoting *Postal Service*, 302 NLRB 767, 774 (1991); *Rappazzo Electric Co.*, 281 NLRB 471 fn. 1 (1986); *AMF Inc.*, 219NLRB 903, 912 (1975).

In *Teamster Local Union 284*, during negotiations for a successor agreement, the respondent Union initially opposed, and later agreed, to wage reopener language proposed by the employer in the event of a strike by the employer's competitor. The strike occurred, the employer requested to reopen bargaining on wage rates, and the union refused, contending that the reopener was conditioned on evidence that the employer was economically harmed and put at a competitive disadvantage. The Board rejected the respondent union's defense, finding that there was no evidence that the reopener that the parties agreed to was conditioned on proof of economic disadvantage to the employer. The Board found that there was no mutuality or

meeting of the minds regarding the union's "strained" interpretation. Moreover, in denying the union's request that the matter be deferred, the Board found that the union's conduct of renegeing, without even any colorable justification, from its agreement constituted an "act of defiance, so unjustified, as to impel intervention by the Board if public confidence in the process of collective bargaining is to be maintained." *Id.*, at 23.

In *O. Voorhees*, the complaint alleged that Voorhees failed and refused to pay employees' wages and benefits according to the collective bargaining agreement and used another company (found to be a joint employer with Voorhees), to pay for work performed by unit employees at wages less than the wage rates provided for in the contract. In finding that deferral was not appropriate, the Board affirmed the ALJ's finding that the case did not involve the interpretation of any terms of the contract, as there was no contract provision that allowed the respondent to pay less than wages set forth in the contract. In addition, the Board found that the respondent's refusal to pay contractually required wages "...must be regarded as an attempt by Voorhees to undermine the union and repudiate the contract. Clearly...this is not a case which pivots on a question of contract construction." *Id.* at 786.

Respondent argues that this matter is simply a contract dispute, suited for an arbitrator to decide, over the meaning or interpretation of a contract clause regarding layoffs, namely whether Respondent was privileged to lay off senior Existing Employees before laying off less senior New Employees. However, this case is not a matter of contract interpretation.

Just as in *Teamster Local Union 284* and in *O. Voorhees*, it is clear that the instant case is nothing less than Respondent's complete repudiation of the principles of collective bargaining and a blatant attempt to do an end run around the parties' collective bargaining agreement - to obtain unilaterally what it failed to obtain through bargaining - namely a reduction in its labor costs - thereby undermining the Union and rejecting the principles of collective bargaining. Respondent could not simply cut the wages and benefits of the costly Existing Employees, failed to get the relief it wanted in negotiations with the Union, and admittedly unilaterally

decided to achieve its desired goal, lower labor costs, by laying off the very senior employees that it was hoping to get rid of by convincing another employer to hire them or by convincing them to take a buyout.

In its Memorandum of Law in support of its Motion, Respondent states that on August 20, 2012, it notified the Union that it was facing economic distress and asked to meet and bargain with the Union "to discuss a possible solution." (Affirmation pg. 6) In its discussions, Respondent informed that Union that it was seeking to have one of its milk dealers hire some of Respondent's "Existing Employees," (the most senior employees), and that Respondent was willing to offer a buyout to the senior "Existing Employees" in order to cut costs.

Respondent admits that to address its financial circumstances, it decided, unilaterally to reduce its labor costs by laying off 42 (out of 53) of the senior "Existing Employees," who received substantially higher wages and benefits than Respondents employees hired after July 18, 2007 under the Elmhurst agreement. Respondent also paid the 42 laid off employees six months of COBRA health insurance premiums. (Respondent employed approximately 150 unit employees in total).

It is noteworthy that just before laying-off the 42 senior employees, Respondent hired many new employees, whose wage and benefit packages were substantially less than the 42 senior employees. Thus, Respondent cannot claim that the layoff was a genuine layoff in the traditional meaning of a reduction in force necessitated, for example, by a reduction in demand. Instead, Respondent's layoff of the 42 senior employees was a blatant circumvention of the bargaining process. Had Respondent achieved its goal of reducing its labor costs by unilaterally reducing unit employees' wage rates, it would be clear that such conduct would not be appropriate for deferral under well established Board law. Here, knowing that it could not reduce wages during the term of the contract, Respondent accomplished essentially the same thing by hiring new, less expensive employees, and laying-off senior employees.

Thus, Respondent's conduct is no less extreme and no less conduct that repudiates the basic principles of collective bargaining, abrogates the bargaining relationship it had with the Union and strikes at the very heart of the principles of collective bargaining than the cases cited above, which the Board found not appropriate for deferral. Moreover, it cannot be doubted that Respondent's conduct of circumventing the collective bargaining process to achieve the reduction in labor costs that it could not otherwise obtain undermines the Union and weakens bargaining unit members' faith in the collective bargaining process and in the Union's ability to protect their contractual rights.

Analogously, the Board has consistently refused to defer unilateral change allegations where an employer failed to pay contractual wages or benefits. See, *Oak-Cliff-Golman Banking Co.*, 207 NLRB 1063, 1064 (1973), enf'd. nom. 505 F.2d 1302 (5th Cir. 1974), cert. den. 423 US 826 (1975). (Board refused to defer allegation that employer unilaterally reduced employees' wages because wage rate provision was a pivotal contract term, and thus repudiation of that term amounted to a repudiation of the contract). The rationale for refusing to defer these matters is that the contractual breach does not involve questions of contract interpretation that requires the special expertise of an arbitrator. The Board has held steadfast that its authority and obligation requiring it to protect the statutory bargaining process and statutory rights against conduct that is "so disruptive to one of its principal functions – the establishment and maintenance of a viable agreement on wages," requires that the Board not withhold the exercise of its jurisdiction. *New Mexico Symphony Orchestra*, 335 NLRB 896, 898 (2001).

The Board views wages as one of the most important aspects of the employment relationship that Congress remitted to the mandatory process of collective bargaining, *Id.* at 897-889. Wages are the bedrock upon which collective bargaining rests and the Board has found that mid-term alterations and/or refusals to pay contractual wages amounts to contract repudiation. Any such alteration, "[strikes] at the heart of the collective bargaining relationship between parties and amount[s] to a repudiation of the collective bargaining relationship itself."

Oak-Cliff, id.; *Del-Ral, Inc.*, 315 NLRB 538, 539 (1994); *Williams Pipeline Co.*, 315 NLRB 630 (1994). (The Board found repudiation where the employer did not apply wage terms to *all* of its unit employees.)

Similarly, like employers who unilaterally decrease the wages of employees, Respondent reduced a large portion of its contractual financial obligation by simply bypassing the bargaining process and laying-off one-quarter of its workforce². Just as wages are a fundamental tenet of collective bargaining, so, too is job security and protection against layoffs fundamental to the collective bargaining process.

Respondent's conduct also struck at a second fundamental tenet to the Union, namely seniority. In its Affirmation, Respondent admits that it recently hired employees just before, and in anticipation of, laying-off the forty-two senior employees. It completely disregarded seniority rights when it decided who to layoff, instead focusing on which employees cost it the most money. Respondent then bypassed the contract by laying-off employees out of seniority order. Respondent specifically targeted the more senior employees because they had higher pay. Respondent was concerned only with reducing its contractual financial obligations and so it chose to skip over the newly hired, less expensive employees, and instead layoff more senior employees. Seniority is a pivotal term in the collective bargaining process and is a key right that unions bargain for in representing their unit members and is a fundamental principle of collective bargaining to which many an employees' rights are bound. The Board has consistently held that violating seniority provisions is a basic unfair labor practice, particularly when it is violated during lay-offs. *Johns-Manville Sales Corp.*, 282 NLRB 82 (1986) (Change in policy of laying-off in seniority order violative.); *General Equipment Manufacturing*, 266 NLRB 1285 (1976) (Necessity of plant efficiency not an excuse for violating seniority in layoffs.)

² Although Respondent claims that economic hardship was the driving force behind its conduct, economic hardship is not an excuse for abrogation the collective bargaining relationship. *NLRB v. Topinka's Country House*, 624 F.2d 770 (6th Cir. 1980); *Sun Harbor Manor*, 228 NLRB 945 (1977).

In summary, Respondent did what it wanted to do, reducing labor costs without regard to seniority despite a collective bargaining agreement being in effect. It thus repudiated its collective bargaining relationship by disregarding two major tenets of the collective bargaining process, wages and seniority. As Respondent's layoff of such a high percentage of senior unit employees in order to avoid paying their wages, without notice and bargaining with the Union is a rejection of principles of the collective bargaining agreement, deferral is not appropriate.

**The Contract Language is Clear and Unambiguous and
There Is No Genuine Issue of Contract Interpretation**

Board law is clear that deferral is inappropriate because the contract language is clear and unambiguous and there is no genuine issue of contract interpretation. *Teamsters Local 284*, supra; *O. Voorhees Painting Co.*, 275 NLRB 779, 786 (1984).

Respondent contends that the dispute is whether it had the right to conduct layoffs among only the senior "Existing Employees" "covered by the MILA contract and pursuant to provisions therein," or whether the layoffs had to "take into account" the less senior employees hired after July 2006. Respondent contends that the parties created two groups of unit employees each with its own set of terms and conditions of employment.

In *Westinghouse Electrical Corp.*, 313 NLRB 452 (1993), an employer made a similar argument. There, the employer consistently interpreted a seniority bumping rights clause in a manner the Union disagreed with. The Board agreed with the Administrative Law Judge's determination that the matter should be deferred for an arbitrator to interpret the contract, but relied on the fact that the employer had 1) consistently interpreted the contract in the same manner, 2) the Union had notice over the life of the contract that the employer held a contrary interpretation, and 3) the employer's interpretation was reasonable. In the instant case, in contrast, the Union was *not* aware that Respondent viewed the contract as creating two seniority lists. Further, Respondent's own conduct betrays any notion that it believed in a

bifurcated seniority provision. Respondent's production of a single seniority list which it furnished to the unit employees and to the Union for bidding and vacation confirms that Respondent never conveyed to the Union any bifurcated view of the seniority provision in Agreement. Thus, unlike in *Westinghouse Electrical Corp.*, deferral is not appropriate in the instant case.

Furthermore, the Elmhurst Agreement language is unambiguous. Article 13 of the Elmhurst Agreement provides that "seniority is the period starting from the date on which the employee is last hired by the Employer" and that "layoffs and recalls shall be in accord with the appropriate seniority list, provided, however, that the employees have the skills, ability and qualifications to perform the work."

Even assuming, for argument sake, that the MILA agreement pertains, Article 4(b) (Layoffs, Rehiring) of that agreement provide that "it shall be the responsibility and obligation of the Employer to recall men laid-off through no fault of their own, **in order of their company seniority** in their respective crafts..."

Thus, neither the Elmhurst agreement nor the MILA agreement provides for the operation of two seniority lists, one for Existing Employees and one for New Employees. The plain language of both contracts clearly contradicts Respondent's tortured and self-serving interpretation.

There is No Provision in Collective Bargaining Agreement Regarding COBRA.

When Respondent laid-off the 42 employees, it also offered them extended insurance coverage under COBRA³. The Complaint and Notice of Hearing alleges that Respondent failed to provide the Charging Party an opportunity to bargain about extending COBRA benefits to the laid-off employees. As there is no provision in the Elmhurst collective bargaining agreement

³ Respondent argues that it informed that Union of this offer prior to making it and the Union acquiesced. The Acting General Counsel, however, disagrees and alleges this action as an unfair labor practice.

(nor in the MILA agreement) regarding COBRA, an arbitrator would have no authority to resolve or fashion a remedy regarding this dispute. Indeed, Article 18(f) of the Elmhurst agreement (Grievance and Arbitration) states that, “in no event, shall any arbitrator have any power or authority to alter, modify, amend, add, or subtract from any of the terms or provisions of this Agreement.” Thus, as there is nothing in the Elmhurst agreement that would allow for Respondent to unilaterally provide COBRA benefits to laid off employees, an arbitrator would be precluded from addressing this dispute as it would alter, modify or add to the terms of the contract. Accordingly, this issue is not appropriate for arbitration and cannot be deferred.

In addition, contrary to Respondent’s contention, both the allegation regarding its unilateral granting of COBRA benefits and the allegation that Respondent failed to notify and afford the Union an opportunity to bargain about lay-offs are clearly inextricably linked as they arise out of the same circumstances and conduct. It defies logic for Respondent to claim otherwise, as Respondent offered the COBRA following its layoff of the 42 senior employees. But for its layoff of the 42 employees, Respondent would not have offered those employees COBRA benefits.

It is well-settled that the Board does not find appropriate deferral of unilateral change allegations such as the layoff involved herein, when those allegations are “closely intertwined” or “inextricably related” to nondeferrable issues. As the allegation that Respondent unlawfully unilaterally granted COBRA benefits is not deferrable because there is no basis for a grievance cognizable under the contract, and because an arbitrator would have no authority to consider or remedy the COBRA violation, the unlawful layoff allegation is also not deferrable. See, *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461 (1972); *Medco Health Solutions of Spokane, Inc.*, 352 NLRB No. 78, slip op. at 203 (2008); *Windstream Corp.*, 352 NLRB No. 9, slip op. at 1, n. 1 (2008); *Avery Dennison*, 330 NLRB 389, 290-391 (1999).

Conclusion

For the above reasons, the allegations of the Complaint and Notice of Hearing in the above-captioned matter should not be deferred to arbitration. Instead, the Complaint and Answer raise issues best and appropriately resolved through a hearing before an Administrative Law Judge. Counsel for the Acting General Counsel reiterates its request that Respondent's Motion for Summary Judgment be denied in its entirety and that this matter immediately proceed to hearing before an Administrative Law Judge as set forth in the Complaint and Notice of Hearing.

Dated February 1, 2013, in Brooklyn, New York.

Respectfully submitted,

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