NOT INCLUDED
IN BOUND VOLUMES

PGB
Milan, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CERTAINTEED CORP.

and

Case 08-CA-073922

UNITED STEELWORKERS INTERNATIONAL
UNION, LOCAL 363, A/W UNITED STEEL,
PAPER AND FORESTRY, RUBBER MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION

DECISION AND ORDER

On May 31, 2012, the Regional Director for Region 8 issued a complaint and notice of hearing in this case. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to bargain with the Union concerning its unilateral decision to make its facility in Milan, Ohio (referred to as the "Avery facility") a tobacco-free workplace.

On June 14, 2012, the Respondent filed with the Board a motion to dismiss the complaint, arguing that the Board should defer the complaint allegation to the parties' contractual grievance-arbitration procedure. On July 3, 2012, the Acting General Counsel filed an opposition to the motion. On August 17, 2012, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Acting General Counsel filed a response. The Respondent filed a reply to the Acting General Counsel's opposition to the motion and response to the notice.

The undisputed statements in the parties' filings show the following. The Respondent and the Union have had a long and productive collective-bargaining relationship. Their most

recent collective-bargaining agreement was effective from November 1, 2009 through October 31, 2012. On July 28, 2011, the Respondent announced that, pursuant to a decision by its parent corporation, the Avery facility would become tobacco free on July 1, 2012. The Union made several requests to bargain over this matter. The Respondent refused those requests. The Union filed an unfair labor practice charge on February 6, 2012, alleging a violation of Section 8(a)(5). No party contends, however, that the Respondent harbors hostility to its employees' exercise of their protected statutory rights.

The parties' collective-bargaining agreement included a management-rights clause, which stated in pertinent part:

> Employees of the Company shall observe the rules and regulations which the Company may post from time to time, and upon failure so to do shall be subject to discipline, suspension, or discharge by the Company . . . . Any of the rights, powers, or authority the Company had prior to the signing of this Agreement are retained by the Company, except those specifically abridged or modified by this Agreement.

The agreement also included a grievance-arbitration procedure providing for final and binding arbitration of "those matters involving interpretation of this Agreement and alleged violations of its terms."

Citing the just-quoted language of the management-rights clause, the Respondent contends that it was contractually authorized to implement the tobacco-free policy unilaterally. Recognizing that the Union disagrees with this contention, the Respondent further argues that this matter involves a dispute over whether the management-rights clause permitted the Respondent to act unilaterally, a matter of contract interpretation subject to arbitration under the terms of the grievance-arbitration procedure. The Respondent thus asserts that the Board should defer this issue for resolution under that procedure. We agree.

The Board has "considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." *Wonder Bread*, 343 NLRB 55, 55 (2004). Deferral is appropriate when the following factors are present: "the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution." Id.

As shown above, all of those factors are present in this case.[1] In such situations, the Board defers.[2] Deferral is further warranted because "'[t]he contract and its meaning in present circumstances lie at the center of this dispute.'" *Servomation Corp.*, 271 NLRB 1112, 1113 (1984) (quoting *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971)). That is, a determination concerning the scope of the Respondent's contractual right to post rules and regulations would "necessarily resolve the merits of the unfair labor practice alleged in the complaint." Id. at 1112 (italics omitted). Indeed, in a case involving an employer's unilateral modification of its disciplinary policies, the Board found that the employer raised an issue of contract interpretation suitable for arbitration where, similar to here, a management-rights clause provided that the "promulgation of [] rules . . . [was] solely the responsibility and function of the company."

---

[1] Contrary to the Acting General Counsel's suggestion, the filing of a grievance by the Union "is not a prerequisite to deferral." *Urban N. Patman, Inc.*, 197 NLRB 1222, 1222 (1972), enfd. sub nom. *Provision House Workers Union Local 274 v. NLRB,* 493 F.2d 1249 (9th Cir. 1974), cert. denied 419 U.S. 828 (1974).

[2] See, e.g., *Wonder Bread*, supra at 56 (deferring where grievance-arbitration procedure encompassed "any difference . . . as to the interpretation" of the parties' contract); *Textron, Inc.*, 310 NLRB 1209, 1210 (1993) (deferring where contract defined arbitrable grievance as "a difference of opinion . . . involving the interpretation" of the parties' contract).

Textron, supra at 1210 fn. 6. Accordingly, this dispute is eminently well suited to resolution through the parties' grievance-arbitration procedure.[3]

Because we find that deferral is appropriate, we shall grant the Respondent's motion to dismiss the complaint.

ORDER

IT IS ORDERED that the complaint is dismissed. The Board retains jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C., February 28, 2013.

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] In his opposition to the motion to dismiss, the Acting General Counsel invites the Board to consider whether the management-rights clause constitutes a clear and unmistakable waiver by the Union of its statutory right to bargain over changes to the Respondent's smoking policy. We decline the invitation. Because the criteria for deferral are met here, "[d]eferral is appropriate regardless of whether the Board would interpret the management-rights clause as justifying the unilateral change at issue." *Wonder Bread*, supra at 56. "The question of the reasonable interpretation of the collective-bargaining agreement is one, at this point, for the arbitrator." Id. We note, however, that we retain jurisdiction of this matter pending issuance of the arbitrator's decision, and our processes may be reinvoked "if the arbitral award is not susceptible to an interpretation consistent with the Act or if it is inconsistent with the standards of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)." Id.