United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 29, 1993

TO : John D. Nelson, Regional Director
Region 19

FROM : Robert E. Allen, Associate General Counsel
Division of Advice 133-0100
133-5000

SUBJECT: ITT Federal Services Corp. 530-6067-2060-3300
Cases 19-CA-22713 and 19-CA-22179

This Section 8(a)(5) case was submitted for advice on whether the Employer's bargaining to impasse and later implementation of its impasse proposal was unlawful in light of the Employer's obligations under the Service Contract Act (SCA), 41 U.S.C. 351 et seq.

The Employer provided maintenance and operation services under a contract with the U.S. Air Force set to expire on September 30, 1992. The Employer's Air Force contract came due for rebidding in early 1992, and the Employer submitted a timely bid to the Air Force. However, on June 5, 1992, the Employer sent the Air Force a side letter promising that it would likely offer a "More Probable Cost Initiative" to its initial bid which would reduce its contract costs from 104.7 milion dollars to around 91 million dollars. The Employer's side letter stated that the savings would come in part from reduced employee benefits and that the savings would be passed on to the Air Force. Several weeks later, on June 26, the Employer won the rebid contract set to begin October 1, 1992.

The Employer's bargaining agreement with the Unions was set to expire in September 1992. The parties met in 10 to 15 negotiations sessions beginning in July 1992. On October 21, the Employer declared an impasse. The Union agreed to present the Employer's impasse proposal for a membership vote. The employees rejected the Employer's proposal. On November 11, the Employer announced that it would implement numerous parts of that proposal effective December 7. The Employer's implementation involved immediate reductions in several employee benefits, but froze contract wages for one year until September 30, 1993. After that point, wages would be substantially reduced. The Union's argued that the Employer's bargaining to impasse and impasse implementation violated both the SCA and Section 8(a)(5) essentially because of the obligations that the SCA places on the Employer.

The overall purpose of the SCA is to maintain existing employee wages and benefits at times when one government contractor succeeds another. [1] In general, the SCA requires a successor contractor to pay the wage rates of the predecessor's bargaining agreement for one year following the contract termination, unless the parties either voluntarily renegotiate the bargaining agreement, or the Employer receives a variance from the Department of Labor. The Unions argue that the Employer violated the SCA because its successful rebid of the Air Force contract was not based upon its initial contract bid, but rather upon its June 5 side letter which unlawfully offered to unilaterally reduce contract costs at least in part by reducing employee benefits. [2] The Unions have filed complaints with the Department of Labor charging the Employer with SCA violations.

The Unions argue that the Employer's bargaining also violated Section 8(a)(5) because of the Employer's obligations under the SCA. The Union's first allege that the Employer's contract proposals unlawfully altered employee terms of employment during the first year of the new bargaining agreement. According to the Union, these first year proposals encompassed illegal subjects of bargaining because the SCA requires that first year terms remain the same. The Unions next argue that the Employer bargained in bad faith because its June 5 side letter locked the Employer into insisting upon unnecessary employee benefit concessions which foreclosed Union compromise. Finally, the Unions argue that the Employer's impasse implementation violated the Act because it followed the above bad faith bargaining.

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[1] Although the Employer successfully rebid on its own prior contract, the Unions argue that the SCA nevertheless applied because the Employer had in effect succeeded itself

[2] The Unions allege that the SCA also invoked the Federal Acquisition Regulations (FAR), 48 C.F.R. 52.222, which allegedly required the Price Adjustment Clause in the Employer's Air Force contract. According to the Unions, the effect of the FAR required Price Adjustment Clause was to require the Air Force to adjust the price of its contract with the Employer to cover any increased costs resulting from SCA requirements such as collective bargaining. Therefore, the Employer's bargaining strategy, as set forth in its June 5 side letter, violated the SCA because, instead of seeking government reimbursement, the Employer offered to give the government any cost savings realized from collective bargaining.

We conclude that the charges should be dismissed because (1) aside from the Employer's obligations under the SCA, the Employer otherwise apparently bargained in good faith to impasse and then lawfully implemented portions of its impasse proposal; and (2) if the Employer violated the SCA, it did not thereby necessarily violate Section 8(a)(5), and any SCA violation will be remedied by the Department of Labor.

The Employer bargained with the Unions to an apparent good faith impasse, and thereafter implemented numerous of its impasse proposals. If the SCA were inapplicable, the Employer's bargaining here was fully lawful under the NLRA. We agree with the Region that the Employer's side letter to the Air Force did not lock the Employer into a predetermined bargaining position in violation of the Act. The Employer's side letter, which concerned a "More Probable" proposal, stated that "if future negotiated rates are lower..." (emphasis added), the savings would be passed on to the government. The Unions contend that this amounted to a unilateral commitment to major cost reductions in violation of the SCA and FAR. In our view, this conditional reference, while perhaps a violation of the SCA, does not evince an intention to bargain with a locked mind in violation of the Act.

Second, the Employer's conduct here was not a sufficiently clear violation of the SCA to warrant the finding of a violation of Section 8(a)(5). The Board has premised a violation of the Act upon a violation of another Federal statute. See Carpenters, Local 22 (William Graziano Constr. Co.), 195 NLRB 1 (1972). However, in refusing to similarly find an NLRA violation based upon other allegedly unlawful activity, the Board has noted that "respondent's conduct in Carpenters Local Union No. 22 constituted a clearly discernible and fundamental violation...while in the instant proceeding the alleged violation hinges upon the interpretation of a complex trust agreement." [3] Here, the alleged SCA violation is not "clearly discernible" and instead turns upon an interpretation of the obligations owed under that statute.

Even assuming that the Employer violated the SCA, its bargaining was not thereby necessarily unlawful under the Act. As noted by the Employer, all of its bargaining occurred outside

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[3] Sheet Metal Workers International (Central Florida Sheet Metal Contractors Association), 234 NLRB 1238, 1241 (1978).

the Section 10(b) period. Moreover, the Board has indicated that:

> although it is our duty to construe the labor laws so as to accommodate the puposes of other Federal laws (see, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-894 (1984); Southern Steamship Co. v. NLRB, 316 U.S. 31,47 (1942)), this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace.

Finally, any SCA violation arising from the Employer's bargaining here will be fully remedied by the Department of Labor. We therefore conclude that the charges should be dismissed, absent withdrawal.

R.E.A.