

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

DATE: November 25, 2013

TO: Robert W. Chester, Regional Director
Region 6

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

SUBJECT: General Electric Company
Case 06-CA-104777

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This case was submitted for advice as to whether the Employer unlawfully transferred work from one of its facilities to another without notice to, and bargaining with, the Union. We conclude that the Employer did not violate the Act within the Section 10(b) period, as there was no transfer of work that required notice and bargaining under the parties' collective-bargaining agreement.

FACTS

For many years, United Electrical, Radio and Machine Workers of America, Local 506 (the Union) has represented production and maintenance employees employed at the Erie, Pennsylvania, facility of General Electric Company (the Employer). This facility produces railroad locomotives and large, medium, and small off-highway vehicle (OHV) propulsion wheels and related parts.

The parties are bound to a national collective-bargaining agreement that provides:

ARTICLE XXIII: Job and Income Security

1. Definitions

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(c) The terms "transfer of work," "to transfer work," and "work transfer" mean the discontinuance of ongoing work at one location coupled with the assignment of the same work to a different location, including subcontracting the same work to another employer, if such assignment of work would directly cause a decrease in the number of represented employees performing such work at the first location.

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5. Notice, Bargaining and Information Requirements

This Section sets forth the full obligations of the Company with regard to notice, bargaining with and information to the Union concerning plant closing, work transfer, subcontracting and the installation of robots or automated manufacturing or office machines.

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(b) Transfer of Ongoing Production Work

(1) Notice

The Company will give notice of its intent to transfer ongoing production work a minimum of six (6) months in advance of the effective date of the work transfer to the Local involved. Such notice will include identification of the work to be transferred, the expected decrease in the number of represented employees as a direct consequence of the transfer of work and the anticipated date of the transfer of work.

(2) Bargaining

If the Local requests decision bargaining within ten (10) working days following a Company notice of intent to transfer ongoing production work, the Company will be available to meet with the Local within five (5) working days of such request and the bargaining period shall continue for up to sixty (60) calendar days from the date of the Company notice of intent to transfer the work unless the period is extended by mutual agreement. The Company will make a decision whether or not to transfer such work after this bargaining period.

(3) Information

If information is requested by the Local for bargaining provided for in Section 5(b)(2) of this Article, the Company will promptly make the following information available to the Local for such bargaining. The information will specifically include the express reason(s) for intending to transfer the work. Where cost is a significant factor in the Company's intent to transfer the work, the Company will provide the Local with a cost comparison between the production cost of the work to be transferred and the projected cost to the Company of having the work performed elsewhere. Likewise, the Company will also provide the related wages, payroll allowances and employee benefits expenses of represented employees for the work intended to be transferred and

of their counterparts who would be assigned the work. This information will be treated as confidential by the Local.

In May 2011, the Employer announced that it would be opening a new locomotive production facility in Ft. Worth, Texas. The Employer told the Union in March 2011 that it intended to start off producing three locomotives per week when its new facility began operations. In October 2011, the Employer announced that it would also open a new OHV facility adjacent to the Ft. Worth locomotive facility. The Employer told the Union at that time that the Ft. Worth OHV facility was scheduled to start producing OHV wheels by the third quarter of 2012.

From June through August 2012, the Employer hired a significant number of OHV production employees in Ft. Worth. In August 2012, it began to produce large OHV wheels there. It reached a stable level of production of large OHV wheels in Ft. Worth by October 2012; this level has not substantially increased since that time.

On October 1 or 2, 2012, the Union's building 12 divisional chief steward in Erie asked a management official why the Employer had not hired a replacement employee to operate a particular machine used in OHV production in Erie. The divisional chief steward claims that the management official responded that the Employer wouldn't need as many employees in this department because Erie wouldn't be making the particular part at issue after the Ft. Worth facility was up and running.¹ On October 2, 2012, the divisional chief steward filed a grievance over the Employer's "violating our National Agreement by not giving notice of transfer" of this work, as well as three other grievances regarding the Employer's "subcontracting" of large OHV wheel work to the Ft. Worth facility.

Also in October 2012, the Employer began hiring a significant number of locomotive production employees in Ft. Worth. By late February 2013, the Employer was producing an average of three locomotives per week. The Employer had told the Union in March 2011 that this was its plan. The locomotive production level in Ft. Worth has remained essentially constant since that time.

In mid- to late-October 2012, the Union's building 5 divisional chief steward in Erie asked a management official about some large shipping containers used to ship locomotive platforms outside the facility. The management official said they were for shipping locomotive platforms to Texas, and gave the divisional chief steward documentary evidence of the shipments, including platform building schedules showing that the Erie facility would be producing locomotive platforms for use in Ft. Worth.

¹ As this discussion took place prior to the beginning of the Section 10(b) period, it is unnecessary to determine if it indicates an earlier transfer of work under the parties' collective-bargaining agreement.

On November 2, 2012, the parties met to discuss the October 2 grievances. At this meeting, the Employer denied that there had been a transfer of work from Erie to Ft. Worth as defined by the parties' collective bargaining agreement. Nonetheless, the Employer told the Union that if the Union believed that there had been a transfer of work from Erie to Ft. Worth, the parties could initiate their contractual transfer of work bargaining process. The Union decided not to ask for a transfer of work notice because it did not want to trigger a decision to have the work permanently transferred to Ft. Worth.² At the November 2 meeting, the Employer also raised the possibility that it would discontinue the third shift of OHV production in Erie in the near future.

On November 30, the Union's international business representative changed the claims of the October 2 grievances from "subcontracting" to "transfer of work." Beginning in December 2012 and January 2013, the Employer began a series of temporary transfers of Erie OHV employees to other departments in Erie, as well as some temporary layoffs. In January 2013, the Union's building 12 divisional chief steward filed transfer of work grievances alleging that the Employer transferred or subcontracted large OHV wheel work to Ft. Worth, directly causing a decrease in the number of represented employees performing such work in Erie.

Also in December 2012, the Union's building 5 divisional chief steward received the projected locomotive platform building schedule for January 2013 through November 2013. Based on the document, Erie would no longer be scheduled to produce the platforms needed in Ft. Worth., and projected production numbers in Erie were decreased. In February 2013, the Union's building 5 divisional chief steward filed a grievance over the Employer's continuing to build platforms in Ft. Worth without giving the Union proper notice and bargaining.

In January 2013, the Employer eliminated the third shift of OHV production in Erie. The Employer attributes this change solely to the decline in the market for the medium OHV wheels produced in Erie, which were not being produced in Ft. Worth at all. Some of the third shift employees were temporarily transferred to other departments, some were offered and accepted temporary layoffs, and others bid into open jobs elsewhere. All impacted employees were transferred to other areas of the facility within the employees' pay grade and classification. In addition, overtime opportunities were reduced at this time.

² The Employer claims that it also offered to initiate the transfer of work bargaining process in a conversation with the Union's president about the grievances on October 12, 2012, and that the Union's president did not ask for a notice then as well. The Union's president denies having had this conversation.

On April 9, 2013, the Employer provided the Union with written notice under the parties' collective-bargaining agreement that it planned to transfer substantially all OHV wheel production to Ft. Worth, as well as one type of locomotive production, making Ft. Worth the Employer's primary facility for this type of locomotive production. In addition, the notice informed the Union of the Employer's intent to transfer production of "certain locomotive components" to other GE plants and third party suppliers. The notice stated that the transfer would occur no sooner than October 10, 2013 and that layoffs at the Erie plant were estimated at 950 over the next 12 to 24 months. The Employer asserts that the work which was the subject of the April 9 transfer-of-work notice was wholly distinct from the work already being performed in Ft. Worth, since it involved more than the three locomotives a week which were already being built in Ft. Worth, as well as more OHV wheel products than the particular large OHV wheel that had been produced in Ft. Worth since August 2012. According to the Employer, it decided to issue this notice because the assignment of work in Ft. Worth would directly result in layoffs in Erie for the first time.

On May 10, 2013, amended on July 31, 2013, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(5) of the Act by unlawfully transferring locomotive and large OHV wheel production work from its Erie facility to its Ft. Worth facility without notifying the Union or affording it an opportunity to bargain over the decision or its effects, and also that the Employer violated Section 8(d) of the Act by ignoring its contractual notice and bargaining obligations regarding such transfers of work, thus effectively modifying the agreement mid-term.³

ACTION

We conclude that the Employer did not violate the Act within the Section 10(b) period, as there was no "transfer of work" as defined by the parties' collective-bargaining agreement that required notice and bargaining under that agreement.

An employer generally has a statutory bargaining obligation over decisions to relocate or transfer bargaining unit work where the decision involves a change in unit work "unaccompanied by a basic change in the nature of the employer's operation," unless the employer can show that labor costs, direct or indirect, were not a factor in

³ The charge in the instant case does not address additional Union allegations that the Employer has failed to meet its bargaining obligations with regard to the transfer of work scheduled to occur pursuant to the April 9, 2013, notice. These allegations are the subject of separate charges filed by the Union on October 17, 2013, currently under investigation by the Region.

its decision or that, if such costs were a factor, the union could not have offered sufficient concessions to offset the value of the employer's decision.⁴ It is well established, however, that a union may waive its statutory bargaining rights, or agree to a different bargaining scheme, if such a waiver is clear and unmistakable.⁵ Thus, the Board will find such a waiver based on contract language where the parties' collective-bargaining agreement expressly empowers the employer to act unilaterally with regard to the specific type of decision at issue.⁶

In the instant case, the parties' collective-bargaining agreement states that it sets forth the *full obligations* of the Employer with regard to notice, bargaining with, and furnishing the Union with information concerning work transfers by providing that the Employer is *only* obligated to give notice to, and bargain with, the Union when there is a *discontinuance of ongoing work at one location coupled with the assignment of the same work to a different location*, and the assignment of the same work to the second location would directly cause a decrease in the number of represented employees performing such work at the first location. By agreeing to these provisions, the Union clearly and unmistakably waived the statutory bargaining rights set forth in *Dubuque Packing*, and instead expressly agreed to the contractual Employer obligations set forth in the agreement. Under the parties' agreement, notice and bargaining are only required when there is: (1) a discontinuance of ongoing work at one location; (2) any such discontinuance is coupled with the assignment of the same work to a different location; and (3) the assignment would directly cause a decrease in the number of represented employees performing such work at the first location. All three of these conditions must be met in order to trigger an Employer bargaining obligation.

We conclude that the second of these conditions was not met here within the Section 10(b) period, which began on November 10, 2012. During this period, the Employer has not made any assignment to its Ft. Worth facility of any work that was discontinued in Erie. In particular, as to OHV production in Ft. Worth, prior to November 10, 2012, the Employer had already hired a significant number of OHV production employees, had already begun to produce large OHV wheels, and had

⁴ *Dubuque Packing Company, Inc.*, 303 NLRB 386, 391 (1991), *enfd.* in pertinent part 1 F.3d 24 (DC Cir. 1993).

⁵ See, e.g., *Provena St. Joseph Medical Center*, 350 NLRB 808, 812, n.19 (2007) (the Board will find a waiver if the contract either "expressly or by necessary implication" confers on management a right to unilaterally take the action in question).

⁶ See, e.g., *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (employer did not unlawfully fail to bargain over subcontracting decision where the parties' agreement "specifically, precisely, and plainly" granted the employer "the exclusive right . . . to subcontract").

already reached a stable level of production of large OHV wheels that has not substantially increased since.⁷ As to locomotive production in Ft. Worth, prior to November 10, 2012, the Employer had already begun hiring a significant number of locomotive production employees in preparation for its production of a constant average of three locomotives per week, which it has maintained throughout the Section 10(b) period.⁸

We further note that the Union was aware of the Employer's previously determined production plans prior to the Section 10(b) period, not only because of the Employer's statements in 2011 of its future production plans, but also because management officials had already told one of the Union's divisional chief stewards in Erie about the Ft. Worth large OHV wheel production. Managers also advised another divisional chief steward in Erie about the shipment of locomotive platforms to Ft. Worth, and even gave him documentary evidence showing that the Erie facility would be producing locomotive platforms for use in Ft. Worth. Indeed, prior to the Section 10(b) period, one of the divisional chief stewards in Erie had already filed grievances over the large OHV wheel production in Ft. Worth.⁹ Finally, prior to this time, the parties had discussed the possibility of initiating the parties' contractual transfer of work process over the Ft. Worth OHV production, a possibility the Union acknowledges that it declined to request because it did not want to risk the potentially permanent loss of work that might result from notice and bargaining. These discussions and statements to the Union and its officials may not have been legally sufficient to constitute adequate notice and opportunity to bargain, if such notice and bargaining was required, but they nonetheless demonstrate that the Employer had already fully implemented the "assignment" of this work to Ft. Worth before the Section 10(b) period began in the instant case.

Significantly, under the express terms of the parties' agreement, there is no "transfer of work" or bargaining requirement when the Employer merely discontinues production work in a facility that has traditionally performed such work, such as Erie,

⁷ This production schedule for large OHV wheels in Ft. Worth is entirely consistent with the Employer's October 2011 statement to the Union that the Ft. Worth OHV facility was scheduled to start manufacturing and assemble OHV wheels by the third quarter of 2012.

⁸ This production level in Ft. Worth is entirely consistent with the Employer's long-established production plan of three locomotives per week, which the Employer claims it told the Union in March 2011.

⁹ The Union subsequently characterized these grievances as being over transfers of work, apparently solely based on evidence the Union already had prior to the commencement of the Section 10(b) period.

even if similar production work continues to be performed at another facility, such as Ft. Worth, as long as the discontinuance of the work in Erie is not “coupled” with the assignment of work in Ft. Worth. Thus, there is no notice and bargaining obligation under the parties’ agreement when, as here, production was initiated or increased in Ft. Worth during a period of projected high product demand, but was later decreased in Erie (but not in Ft. Worth) in a declining market, unless it can be shown that the work that decreased in Erie was assigned to Ft. Worth. As the Ft. Worth facility already had been assigned all of the OHV and locomotive production work it has done long before any decision was made to decrease the OHV and locomotive production work in Erie, the two decisions are not “coupled.” Therefore, we conclude that there was no “transfer of work” within the Section 10(b) period that required notice and bargaining under the parties’ collective-bargaining agreement.

Given the lack of any new assignment of work to Ft. Worth within the Section 10(b) period, we need not decide whether the re-assignment of previously subcontracted work would constitute the “discontinuance of ongoing work” in Erie,¹⁰ or whether the transfer or reassignment of Erie employees to other departments or the loss of overtime would be “a decrease in the number of represented employees performing such work.” Moreover, we need not determine whether there was any Employer failure to give notice and bargain over transfers of work made prior to November 10, 2012, as any such allegation would be untimely.¹¹ Finally, we do not address whether the Employer has met its bargaining obligations over the transfer of work scheduled to occur pursuant to the April 9, 2013, notice. This conduct is the

¹⁰ In addition, because the OHV and locomotive production work at issue here was assigned to Ft. Worth prior to the Section 10(b) period, we need not determine whether it had previously been performed in Erie or by subcontractors.

¹¹ While it is well established that Section 10(b) does not begin to run until the aggrieved party, using due diligence, “receives clear and unequivocal notice . . . either actual or constructive . . . of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows that his statutory rights have been violated,” *John Morrell*, 304 NLRB 896, 899 (1991), rev denied mem. 998 F.2d 7 (D.C. Cir. 1993), the Board has also made it clear that “there is no requirement that an affected party have knowledge of all the circumstances leading up to, or surrounding, the event in issue,” *R.P.C., Inc.*, 311 NLRB 232, 234 (1993), and that a charging party cannot rely on its own inaction or failure to exercise reasonable diligence to toll a limitations period, *Moeller Bros. Body Shop*, 306 NLRB 191 (1992). Here, as discussed above, prior to the beginning of the Section 10(b) period, the Union was well aware of the Employer’s OHV and locomotive production in Ft. Worth, and had even filed grievances over the OHV production.

subject of later-filed charges currently being investigated, and will be examined separately.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

/s/
B.J.K.