

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

THE ARDIT COMPANY

and

Cases 9-CA-089159
9-CA-107434

INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS,
OHIO-KENTUCKY ADMINISTRATIVE
DISTRICT COUNCIL, LOCAL UNION NO. 18

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE BOARD

I. INTRODUCTION:

This matter is before the National Labor Relations Board (Board) upon then Acting General Counsel's Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on July 8, 2013 ^{1/} in Cases 9-CA-089159 and 9-CA-107434 on charges filed by the International Union of Bricklayers and Allied Craftworkers, Ohio-Kentucky Administrative District Council, Local Union No. 18, herein called the Union. The consolidated complaint alleges that The Ardit Company, herein called Respondent, violated Section 8(a)(1) and (5) of the Act when it: (1) unilaterally changed employees' wages and health insurance, (2) ceased contributing to the Union's pension plan and implemented flexible spending accounts, profit sharing and a 401(k) plan, and (3) made further unilateral changes by laying off 9 employees, all without providing the Union notice and an opportunity to bargain over the above-referenced

^{1/} Unless otherwise noted, all dates referenced herein occurred in 2013.

changes. Additionally, the consolidated complaint alleges that Respondent has failed and refused to provide the Union with requested information that is relevant and necessary to its duties as the exclusive-bargaining representative of certain employees employed by Respondent in violation of Section 8(a)(5) of the Act.

On August 14, Counsel for the General Counsel, Respondent, and the Union submitted a Joint Motion and Stipulation of Facts to the Board. Counsel for the General Counsel asserts that the record evidence and case law persuasively supports the argument that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged.

II. FACTS:

Respondent was a member of the Tile, Marble and Terrazzo Contractors Association of Greater Cincinnati (Association) whereby the Association negotiated and administered collective-bargaining agreements on Respondent's behalf. (Jt. M. p. 4)^{2/} Through its membership in the Association, Respondent was subject to an 8(f) Agreement (Agreement) with the Union whose terms were effective through August 31, 2012. (Jt. M. p. 4; Jt. Ex. L) The Agreement contained a traveling contractor's clause requiring Respondent to follow the terms and conditions of any local agreement in effect at the location where Respondent was working. *Id.* Respondent, on May 31, 2011, notified the Union, in writing, that it was withdrawing from the Association and terminating the Agreement. (Jt. Ex. K) However, Respondent was required to comply with the Agreement until it expired on August 31, 2012. (Jt. M. pp. 4, 6; Jt. Ex. L)

On November 17, 2011, and while the terms of the Agreement were still effective, Respondent advised its employees that it was going to implement new terms and conditions of employment upon the expiration of the Agreement on August 31, 2012. (Jt. M. p. 6)

^{2/} References to the Joint Motion and Stipulation of Facts will be designated as (Jt. M. p. ___) and references to Joint Exhibits will be designated as (Jt. Ex. ___).

Specifically, Respondent told employees that it intended to change employee wage rates, health insurance, cease contributing to the Union's pension plan, implement flexible spending accounts, profit sharing, and a 401(k) plan. *Id.*

The Union subsequently filed a representation petition on June 26, 2012. (Jt. M. p. 6; Jt. Ex. S) Following Region 9's issuance of a Decision and Direction of Election, Respondent's request for review and motion to stay, and the Board's Order denying Respondent's above noted request, the representation election was held on August 10, 2012. (Jt. M. pp. 6 -7; Jt. Exs. T – W) Eight determinative challenged ballots were cast at the election. (Jt. M. p. 7; Jt. Ex. X) Respondent's challenge to the ballots were subsequently overruled, and all eight ballots were opened and counted. (Jt. M. pp. 7 – 10; Jt. Exs. Y – BB, DD, FF – NN) The Union received a majority of the votes counted, and as a result, the Union was certified as the Section 9(a) representative of Respondent's employees on May 13, 2013. ^{3/} (Jt. M. pp. 10 – 11; Jt. Exs. OO, PP)

On September 1, 2012, prior to the Union's certification, but subsequent to the August 10, 2012 representation election, Respondent implemented the new terms and conditions of employment pursuant to its November 17, 2011 announcement. (Jt. M. p. 8) Specifically, Respondent changed its employees' wage rates, made revisions to their health insurance, ceased contributing to the Union's pension plan, implemented flexible spending accounts, profit sharing and a 401(k) plan. *Id.* Respondent advised employees of the above-referenced changes through a notice posting at its facility, and explained to employees that it made the changes upon the expiration of the 8(f) agreement. (Jt. M. p. 8, Jt. Ex. CC) Respondent implemented the new terms and conditions of employment without first notifying the Union and/or affording the Union

^{3/} The following employees constitute the Unit within the meaning of Section 9(b) of the Act: All tile, marble, and terrazzo installers and helpers employed by the Employer at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act.

an opportunity to bargain over the changes, even though the changes described herein are mandatory subjects for the purpose of collective bargaining. (Jt. M. p. 8)

Subsequent to learning of Respondent's implemented changes, on September 6, 2012, Union Secretary Treasurer Fred Hubbard sent Michelle Johnson (Respondent's president) a letter challenging Respondent's implementation of the changes, and requested to bargain about these matters. (Jt. M. p. 9; Jt. Ex. EE) Respondent did not, however, respond to Hubbard's letter. (Jt. M. p. 9)

Thereafter, on about February 2, March 4, March 5, and March 6, and prior to the Union's certification as representative, but subsequent to the August 10, 2012 representation election, Respondent laid off 9 bargaining unit employees. (Jt. M. pp. 12–13) Respondent did so without first notifying the Union or providing an opportunity to bargain over the layoffs. (Jt. M. p. 13) Furthermore, about May 3, the Union requested information from Respondent which is relevant and necessary to the Union's role as exclusive collective-bargaining representative of the unit employees. (Jt. M. p. 13; Jt. Ex. RR) The Union subsequently renewed its request for the foregoing information on about May 17. (Jt. M. p. 14) Although Respondent received both requests, Respondent did not respond to or provide the requested information. *Id.*

Respondent additionally tested the Union's certification by refusing to bargain with the Union. In *The Ardit Company*, 360 NLRB No. 15 (2013), the Board granted General Counsel's Motion for Summary Judgment, finding the Union to be the exclusive collective-bargaining representative of the bargaining unit employees described above. ^{4/}

^{4/} Respondent has not sought appellate review of the Board's Order.

III. LEGAL ANALYSIS:

A. Respondent violated Section 8(a)(5) of the Act when it made unilateral changes and laid off bargaining unit employees without first notifying the Union and affording it an opportunity to bargain about these matters.

In *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), the Board held that, unless there are compelling economic circumstances, an employer acts at its peril when it implements changes in terms and conditions of employment while objections are pending to a representation election. Such changes violate Sections 8(a)(5) of the Act if the Union is ultimately certified as the employees' collective-bargaining representative. Similarly, the Board found a violation in *Hargrove Electric Co.*, 358 NLRB No. 147 (2012), when an employer announced a change during the term of an 8(f) agreement with the union and then implemented the change after the union's conversion to a 9(a) representative (the union converted to 9(a) status before the 8(f) collective-bargaining agreement expired). The Board stated:

In affirming the judge's finding that the Respondents acted unlawfully by unilaterally changing employees' terms and conditions of employment upon the expiration of the 2007-2010 contract, we rely particularly on the fact that the Respondents were obligated by the Act to bargain with the Union *at all times* from their announcements in February 2008 of the intended changes to their implementation in December 2010. Thus, at the time the Respondents announced their intended change, they were bound to the terms of the 2007-2010 8(f) agreement until its expiration . . . During the term of that agreement, the Union was certified as the employees' exclusive bargaining representative. From that point forward, the parties' relationship was governed by Sec. 9(a), and the Respondents were precluded from acting unilaterally at the expiration of the agreement. *Hargrove Electric Co.*, 358 NLRB at fn1 (emphasis in original).

1. Unilateral Changes Implemented by Respondent:

On about November 17, 2011, Respondent, in a meeting with its employees, announced future changes it intended to implement upon the expiration of the 8(f) agreement. (Jt. M. p. 6) Thereafter, on August 10, 2012, a certification election was held to which objections were filed

by Respondent on about August 17, 2012. (Jt. M. pp. 6 - 7; Jt. Ex. Y) Subsequently, on September 1, 2012, upon the expiration of the 8(f) agreement and while objections to the certification election were pending, Respondent implemented the aforementioned terms and conditions of employment pursuant to its November 17, 2011 announcement. (Jt. Mt. p. 8) On May 13, 2013, Regional Director for Region 9 of the Board certified the Union as Respondent's employees' bargaining representative. (Jt. M. p. 10; Jt. Ex. PP) The Board subsequently upheld the certification of the unit, and found Respondent to have violated the Act by failing and refusing to bargain with the Union. *The Ardit Company*, 360 NLRB No. 15 (2013).

Like the employers in *Mike O'Connor Chevrolet* and *Hargrove Electric Co.*, Respondent was not privileged to make unilateral changes without first notifying the Union and affording the Union an opportunity to bargain about such changes. Respondent first announced future changes on November 17, 2011, while it was a party to the 8(f) agreement with the Union. Respondent subsequently implemented new terms and conditions of employment while objections to the representation election were pending. Indeed, any argument that Respondent did not have a bargaining obligation while the 8(f) agreement was effective is belied by the fact that Respondent waited to make unilateral changes until after the expiration of the Agreement.

Here, Respondent was obligated to bargain with the Union before it implemented the changes in September 2012 because Respondent's relationship with the Union was governed by Section 9(a) of the Act. See, *Ramada Plaza Hotel*, 341 NLRB 310, 315-316 (2004).

("Respondent's obligation to bargain before making changes commences not on the date of certification, but on the date of the election").^{5/} Consequently, when Respondent changed its

^{5/} And given the Union's 8(f) status as of November 2011, Respondent had a bargaining obligation when the announcement about the proposed unilateral changes was made at that time.

employees' wage rates, made revisions to their health insurance, ceased contributing to the Union's pension plan, implemented flexible spending accounts, profit sharing and a 401(k) plan, it violated Section 8(a)(1) and (5) of the Act because it failed to first notify the Union and give the Union an opportunity to bargain about the above-referenced matters.

Respondent's contention that it was not obligated to bargain with the Union when the announcement about the unilateral changes was made is without merit. Respondent relies on the Board's decision in *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006), and additional cases which stand for the same proposition as that which was set forth in *Starcraft*. However, Respondent's reliance on *Starcraft* is misplaced. In *Starcraft*, the Board held that the employer did not violate the Act when it announced layoffs prior to a Board-held representation election, and implemented the previously announced layoffs after the involved Union was certified. *Starcraft Aerospace, Inc.*, 346 NLRB at 1232. In so holding, and unlike the instant case, the Board noted that the Employer decided to implement future layoffs before a bargaining obligation existed. As such, the Board concluded that the Employer in the above-referenced case was not obligated to notify and bargain with the Union about the layoff even when such occurred after the Union became the certified collective-bargaining representative. *Id.*

While the employer in *Starcraft* had no bargaining obligation with the union when it made the decision to conduct layoffs, Respondent in the instant case was bound by the 8(f) agreement when it announced the future changes on November 17, 2011, and was thus subject to an 8(f) bargaining obligation when the announcement was made. See, *Hargrove Electric Co.*, 358 NLRB No. 147 (2012) at fn.1. As a result, Respondent was bound by the 8(f) agreement at the time it announced the future changes, and was bound by Section 9(a) of the Act when it implemented said changes. It was thus required to notify the Union and afford the Union an

opportunity to bargain. By failing to do so, Respondent violated Section 8(a)(1) and (5) of the Act.

2. Unilateral Layoffs:

Similar to its conduct in implementing new terms and conditions of employment, Respondent was also obligated to notify the Union and afford the Union an opportunity to bargain about Respondent's decision to layoff bargaining unit employees in February and March 2013. Respondent concedes that the layoffs relate to wages, hours, and other terms and conditions of employment of the bargaining unit and are mandatory subjects for the purposes of collective bargaining. (Jt. M. p. 13) For the same reasons cited above, Respondent violated Section 8(a)(5) of the Act by failing to notify the Union and affording the Union an opportunity to bargain prior to laying off bargaining unit employees.

Respondent contends in its Statement of Position that it laid-off bargaining unit employees as a result of exigent circumstances. (Jt. Ex. WW) Respondent further avers that several of its terrazzo workers and tile finishers were laid off due to one project finishing, and that it was unable to send those workers to another jobsite because a second project was postponed. (Jt. M. pp. 11 – 12) Respondent's defenses are clearly without merit. "[I]t is well settled that a drop in business does not rise to the level of an economic exigency or compelling economic circumstances" that allow an employer to act unilaterally. *Contemporary Cars, Inc.*, 358 NLRB No. 163, slip op. at 40 (2012), quoting *Uniserv*, 351 NLRB 1361, 1369 (2007). "A compelling economic circumstance justifying a refusal to bargain with regard to the decision to lay off employees and the effects thereof must be 'an unforeseen occurrence having a major economic effect . . . that requires the company to take immediate action.'" *Contemporary Cars, Inc.*, 358 NLRB at 40, quoting *Angelica Healthcare Services Group*, 284 NLRB 844, 853

(1987). Importantly, the party asserting such a defense bears a heavy burden. *Our Lady of Lourdes Health Center*, 306 NLRB 337, 341 fn. 6 (1992).

Respondent's compelling economic circumstances argument relative to the alleged necessity of the February and March layoffs is clearly unavailing. First, Respondent is a commercial flooring contractor, specializing in the installation of tile, terrazzo and stone floors. (Jt. M. 3) While delays can happen in most industries, Respondent's line of work has a quantifiably defined ending date; for example, when a floor is completely installed, the project is finished. Moreover, Respondent can gauge the progress being made and estimate a completion date by visually assessing the amount of floor already installed, i.e. when Respondent has completed half of the installation on a particular project, it is in a position to estimate a future completion date based on the time that it took to complete the first half of the project. This point is crucial in that Respondent can predict the length of a project, by tracking progress as such is being made. Because Respondent can straightforwardly forecast a project completion date, the final project ending is not subsequently unforeseen such that Respondent would be compelled to take immediate action. Therefore, while Respondent places particular weight on the winding down of its 120 West Gay project, it cannot justifiably argue that the project completion was an unforeseen occurrence. (Jt. Mt. 11 – 12) Indeed, the record is devoid of any evidence indicating the date Respondent's 120 West Gay project ended. Nor was any evidence presented from which a finding could be made that the foregoing project's completion date was unforeseen.

In further contending that it faced compelling economic circumstances, Respondent avers that it was not awarded a bid project at the Port Columbus International Airport, and maintains that a project at The Ohio State University Medical Center was postponed. As such, Respondent concludes it was unable to send its employees to another jobsite. However, the evidence does

not establish that Respondent had no other projects to which it could have transferred its employees, or that it did not have future projects. The evidence simply reflects that Respondent was not awarded one bid, and that another project was postponed.

Furthermore, the stop-work order which Respondent relies upon was issued to it on February 5. (Jt. Ex. QQ) Notably, Respondent laid off one employee prior to the stop-work order, and laid-off 8 other employees 1 month *after* receiving the stop-work order. One would think, if the stop-work order was, indeed, unforeseen and required Respondent to take immediate action, that Respondent would have immediately laid off all employees upon its receipt of the stop-work order. Thus, Respondent's actions cannot reasonably be viewed as immediate or caused by unforeseen occurrences.

Contrary to Respondent's position, it matters not that they conducted previous layoffs during the term of the 8(f) Agreement without notifying the Union. (Jt. M. 13; Jt. Ex. WW) Importantly, the factual stipulation relied upon by Respondent does not state that Respondent *never* provided notice to the Union when it laid off employees, or that the Union never challenged Respondent's failure to notify the Union prior to laying off employees, it simply states that Respondent laid off employees without notifying the Union. Nevertheless, Board law makes it clear that Respondent acted at its own peril when it laid off employees and failed to give the Union notice of same while objections to the representation election were pending.

Additionally, the Union requested that Respondent cease implementation of unilateral changes during the pendency of the objections, and also requested that Respondent abide by the previous terms and conditions of employment as set forth in the 8(f) Agreement even as the parties bargain in the future. (Jt. Ex. EE) Given that Respondent's exigent circumstances argument is without merit, Respondent was not privileged to unilaterally lay off its employees

without first notifying the Union and giving the Union an opportunity to bargain about the changes. See, *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995) (even if the employer encountered an economic exigency which required the employer to take prompt action, the employer, at a minimum, still is required to notify the union and afford the union an opportunity to bargain). As a result of the Union's ultimate certification, Respondent's failure to notify the Union and afford it an opportunity to bargain about the layoffs constituted a violation of Section 8(a)(1) and (5). See *Mike O'Connor Chevrolet*, supra; *Hargrove Electric Co.*, supra. Consequently Respondent violated Section 8(a)(5) of the Act when it failed to notify the Union and afford the Union an opportunity to bargain.

B. Respondent violated Section 8(a)(5) of the Act by its failure and refusal to produce requested information which was relevant and necessary to the Union's collective-bargaining function.

Respondent admittedly received the Union's request for information on May 3, and subsequent renewal of that request on May 17. (Jt. M. pp. 13 – 14; Jt. Exs. RR, SS) Respondent admits that items 1 through 6 of the request are presumptively relevant as they pertain to bargaining unit employees, and that items 7 through 12 of the request are relevant and necessary as they relate to the unilateral changes made by Respondent, and that such will assist the Union in making collective-bargaining proposals. (Jt. M. pp. 13 – 14) Respondent's sole reason for withholding the requested information is based on its challenge to the certification in this matter, which was recently ruled upon by the Board. Indeed, the Board upheld the Union's certification of representative and found Respondent to have violated the Act by its failure and refusal to bargain with the Union. *The Ardit Company*, 360 NLRB No. 15 (2013).

An employer, on request, must supply a union with information that is necessary and relevant to the fulfillment of its bargaining responsibilities. This includes information which is

relevant to contract administration, the processing of grievances and contract negotiations. *NLRB v. Acme Industrial, Co.*, 385 U.S. 432 (1967); *National Broadcasting Co.*, 352 NLRB 90, 97 (2008); *CEC Corp.*, 337 NLRB 516, 518 (2002). When the request concerns terms of employment within the bargaining unit, the information is presumptively relevant, and the employer then has the burden of proving lack of relevance or providing adequate reasons why it cannot, in good faith, supply such information. *AK Steel Co.*, 324 NLRB 173, 183 (1997). Further, an employer “must respond to an information request in a timely manner.” *Endo Painting Service, Inc.*, 360 NLRB No. 61, slip op. at 1 (2014); see also, *Woodland Clinic*, 331 NLRB 735, 736 (2000).

Here, the Union clearly requested both presumptively relevant information, and other pieces of information which are relevant and necessary to the Union’s collective-bargaining function. It is equally undisputed that Respondent failed to respond or produce information after it received the initial and renewed information request. In failing and refusing to do so, and in the absence of an adequate reason for its refusal to provide the information, Respondent unequivocally violated Section 8(a)(5) of the Act.

IV. REMEDY:

As part of the remedy sought in this matter, Counsel for the General Counsel respectfully requests the Board to order the reinstatement of all laid-off employees to their former positions without prejudice to their seniority or any other rights previously enjoyed, and order Respondent to make those employees whole for any loss of earnings, benefits, and expenses incurred as a result of Respondent’s unlawful layoff. If any discriminatees have already been recalled by Respondent, Respondent should be ordered to reinstate any additional bargaining unit employees who have not yet been recalled. Additionally, Counsel for the General Counsel respectfully

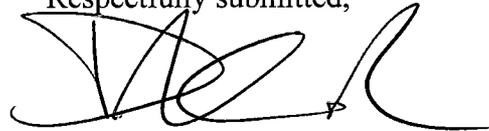
requests that Respondent, upon request by the Union, be required to rescind all unilateral changes it made without first notifying the Union of said changes and affording the Union an opportunity to bargain over the changes. Counsel for the General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

V. CONCLUSION:

Based on the record as a whole and for the reasons discussed above, Counsel for the General Counsel submits that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged, and further that the Board provide an appropriate remedy.

Dated at Cincinnati, Ohio this 17th day of March 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Goode', with a long horizontal flourish extending to the right.

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