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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Bernard Gottfried, Director
Region 7

DATE: July 24, 1979

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: General Motors Corporation
Case No. 7-CA-16316

This case was submitted for advice as to whether the Employer violated Sections 8(a)(1), (2) and (3) by its practice, agreed to by the Union, of fully compensating employee-Union representatives for regular and overtime hours spent in the plant, even when those Union representatives are performing no work at all, i.e., neither contract administration nor production work.

FACTS

The Union is the exclusive bargaining representative of a unit of the Employer's employees at the Warren, Michigan plant involved herein. The unit employees are represented for contract administration purposes by a Shop Committee and district committeemen, all of whom are elected. They also are represented by individuals appointed by the Union to represent unit employees at the local level concerning specific areas covered by the national contract between the Employer and the United Auto Workers International Union, e.g., supplemental unemployment benefits and pensions. In order to be an elected or appointed Union representative, an employee must be a Union member.

The National Agreement sets out, for the most part, when each of the Union representatives is permitted to engage in contract administration functions during regular and overtime hours, instead of doing production work. The Employer, by contract, has agreed to fully compensate these Union representatives for most, if not all, of the regular and overtime hours during which they are engaged in contract administration duties. For example, district committeemen, who are not members of the Shop Committee, are required by the contract to perform production work in their job classifications during the first hour of their shifts and are to perform production work during the rest of their regular work hours except when carrying out their representational functions. On overtime hours, these district committeemen are to engage in production work except when handling current grievances arising during those overtime hours. Moreover, the contract allows these district committeemen to spend a



maximum of 30 hours on Monday through Friday and 6 hours each on Saturday and Sunday engaged in representational functions. As another example, the supplemental unemployment benefit representative and the pension representative are, according to the contract, to work at their job classifications during both regularly scheduled hours and overtime except when approached concerning a representational problem by a unit employee.

In fact, however, the Union and the Employer have a long-standing practice of not having any of the Union representatives perform any production work during either regular hours or overtime. 1/ The committeemen and other employee witnesses indicate that not all of the time which committeemen spend on the clock being paid by the Employer is needed for them to handle representational matters, and the remainder of the time is idled away by the committeemen with no repercussions from the Employer. 2/ For example, FOIA Exs. 6 & 7(C) has never been assigned a job nor worked since he has been a committeeman and, when not busy on Union related business, he can do anything he wants to. Committeemen stay in the Union Work Center in the plant, where they sleep, play cards, read non-Union related magazines, etc. while being paid by the Employer. The same is true for the appointed Union representatives, even though there may be little or no need for their representational services. 3/ Thus, for example, the supplemental unemployment benefit representative has little or no need to function since there has been no employee laid off in the plant since May, 1978. Regarding the pension representative, there are only a few employees who retire each month. There is no evidence that Union representatives who stay in the Union Work Center sleeping, playing cards, etc. do not write grievances or perform other representational functions when needed that would otherwise be done if they were working on production.

Employees who are not Union representatives can be disciplined, up to and including discharge, for not performing work during working time. On March 23, 1979, three employees who were not Union representatives were "written up" for playing cards at a time when, according to the employees, they had finished a job and had no other work to do.

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- 1/ Although there is some evidence that certain Union representatives may do some production work at certain times, it appears to be sporadic and also not required by the Employer or Union.
- 2/ Committeemen "work" 7 days a week, 9 to 12 hours per day.
- 3/ There is some evidence that certain appointed Union representatives do production work during overtime hours.

The evidence demonstrates that the Employer has knowledge of the fact that Union representatives do not have to do any production work and has acquiesced in this practice. Such evidence includes the incident involving [FOIA Exs. 6 & 7(C)] as set forth below. It also includes an incident involving the Charging Party. In this latter regard, on May 16, 1979, the Charging Party took a part that needed welding to a foreman who told the Charging Party that there was no one available to do it. The Charging Party, who pointed out to the foreman that the district committeeman was sleeping in the department, was told by the foreman that district committeemen could not be put to work.

There is some evidence that the Employer misuses the "payment-for no-work" system for its own illegitimate ends. The evidence concerns the Union's health and safety representative [FOIA Exs. 6 & 7(C)] who filed several Michigan OSHA (MIOSHA) safety complaints against the Employer. On the day after the pre-hearing meeting with MIOSHA representatives, the Employer informed [FOIA Exs. 6 & 7(C)] that on the week-ends he would have to start working as an electrician. That next Sunday, [FOIA Exs. 6 & 7(C)] was made to work in his job classification although no other Union representatives were made to do so. [FOIA Exs. 6 & 7(C)] had not been required to work in his job classification for nearly 3 years, although there were times that, according to the contract, he was supposed to be doing production work.

During the week of March 19, 1979, the Employer required all committeemen on all shifts to work, as per contract, the first hour of their shift and all overtime at their job classifications. On March 26, 1979, [FOIA Exs. 6 & 7(C)] filed a discrimination charge against the Employer with MIOSHA alleging that his being made to work, when no other Union representatives were made to do so, was because of his filing the MIOSHA complaints. That week, [FOIA Exs. 6 & 7(C)] told the Employer that if it would refrain from making him and the other committeemen engage in production work, he would withdraw his MIOSHA discrimination charge. The Employer agreed and no Union representatives have been made to thereafter do any production work. [FOIA Exs. 6 & 7(C)] claims that he received no pressure from the Employer to make the agreement, but was greatly pressured by the other Union representatives to make this arrangement. This agreement with the Employer apparently did not include [FOIA Exs. 6 & 7(C)] trading off or withdrawing any of the MIOSHA safety complaints.

ACTION

It was concluded that the Employer's conduct herein was a violation of Sections 8(a)(1), (2) and (3) as to at least certain Union representatives, thereby making issuance of complaint warranted, absent settlement.

The Board has held that where the parties to the collective bargaining process tie job rights and benefits to union activities, they are thereby

establishing a dependent relationship essentially at odds with the policy of the Act, which is to insulate the one from the other. 4/ However, in Dairylea, supra, the Board recognized that even where the parties' practice ties an on-the-job benefit to union status to some extent, the practice can be lawful under the Act if it furthers the effective administration of bargaining agreements on the plant level. 5/

In order to apply the foregoing principles to contractual superseniority clauses, the Board, in Dairylea, established the following test: superseniority clauses granting superseniority for layoff and recall purposes only are presumptively lawful, whereas clauses that grant superseniority for purposes beyond layoff and recall are presumptively unlawful, with the burden of rebutting that presumption (i.e. establishing justification) resting on the shoulders of the party asserting their legality. In order to establish justification, it must be demonstrated that the grant of superseniority furthers the effective representation of unit employees, such as the effective administration of the bargaining agreement.

In Seaway Food Town, Inc., 6/ the Board applied this same test to a situation which did not involve superseniority. If the preference does not involve superseniority, it is presumptively unlawful. In that case, the Board found a contractual clause which provided union stewards premium pay, i.e. 5 cents per hour above the wage rate for their classification, to be presumptively unlawful. Since the respondent union presented no valid justification for the benefit granted exclusively to stewards, the union therein was found to have violated the Act. 7/

It was concluded that the benefit granted exclusively to Union representatives herein of being paid by the Employer while not working either at contract administration or production duties was analogous to the benefit granted union stewards in Seaway Food Town, supra. Thus, in effect, Union representatives in the instant case are being paid a higher wage for their actual time worked. As such, the practice was considered presumptively unlawful. 8/

4/ See Dairylea Cooperative, Inc., 219 NLRB 656, 658, enfd. 531 F. 2d 1162 (C.A. 2, 1976), citing Radio Officers' Union of the Commercial Telegraphers Union, AFL (A.H. Bull Steamship Co.) v. N.L.R.B., 347 U.S. 17 (1954).

5/ Dairylea, supra, at 658.

6/ 235 NLRB No. 214.

7/ See also Great Plains Beef Company, 241 NLRB No. 150, slip op. p. 2, n. 2 and pp. 31 and 67-68 of ALJD, where the union and the employer therein were held to have violated the Act by negotiating and implementing a contract with a premium pay provision for union stewards.

8/ The contractual provisions concerning time permitted for Union representatives to be away from their production work in order to perform contract administrative

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The only justification provided by the Employer for the practice herein was that if it monitored the activities of Union representatives, it could be charged with illegal interrogations and/or surveillance. 9/ This asserted justification was concluded not to be sufficient to rebut the presumption. Thus, the Employer was viewed as having a legitimate interest in policing its collective bargaining agreement. Therefore, the Employer was considered privileged to inquire of employees for this purpose even as to matters involving Section 7 rights of engaging in Union activities without incurring Section 8(a)(1) liability. 10/ In this regard, even if the Board would require the Employer to provide the Johnnie's Poultry safeguards to the Union representatives in the context of such inquiry, the Employer may still monitor the Union representatives for the limited purpose of policing its contract with the Union.

A potential justification which was not raised by the Employer is that, depending on the contract administration duties and production job performed by a particular Union representative, it may substantially disrupt the Employer's production to require that employee to engage in his/her production job when not engaged in contract administration. For example, requiring Union representatives who spend a substantial amount of time on contract administration functions to intermittently engage in production work may substantially disrupt the Employer's production. Thus, it is possible that such a Union representative would, in such circumstances, be going on and off production work constantly, making it difficult for the Employer to accomplish its production objectives. Therefore, where requiring a Union representative to do production work when not engaged in contract administration functions would cause a substantial disruption of the Employer's business, the Employer was concluded to have a substantial business justification for permitting that Union representative to not do any work when not engaged in contract administration. 11/

8/ Continued:

functions, and the Employer's payment for such time, were considered to be lawful. Thus, under the contract, Union representatives are required to engage in production work during regular and overtime hours when not performing contract administration duties. They are not paid for doing nothing. Hence they do not enjoy a job-related preference and no Dairylea problem is presented. It is the parties' practice at variance with the contractual provisions, that was viewed as presumptively unlawful.

9/ The Employer also contended that it makes Union representatives work according to the terms of the national agreement. However, the facts clearly belie this assertion.

10/ Cf. Johnnie's Poultry Company, 146 NLRB 770, 774-775.

11/ This conclusion was not considered inconsistent with the Board decision in Great Plains Beef Company, supra, at slip op. p. 2, n. 2, where the Board was viewed as holding that an employer's assurance of uninterrupted work on its production line was not sufficient business justification

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Less than a substantial disruption of production, however, was not considered to privilege the Employer's practice. In this regard, the Employer has the burden of persuasion on any claim of substantial disruption and such claim should be strictly scrutinized, with an objective standard being applied. 12/ This is especially appropriate in the instant case, where the parties' contract would appear to reflect the parties' objective judgment as to the appropriate balance to be struck between production needs and representational needs. As noted supra, the contract contemplates that Union representatives should be doing production work when not engaged in contract administration duties. However, if the Employer meets this stringent standard of showing substantial disruption with respect to any of the Union representatives, as to those representatives, if any, the Employer's conduct would be lawful. 13/ To illustrate, there are certain representatives as to whom it is clear that there is an inadequate justification for the practice. These illustrations are set forth immediately below.

As to the supplemental unemployment benefit representative, and most probably the pension representative, there would be no substantial disruption of production if they were made to do production work when not engaged in contract administration duties. Their representational work is so minimal and infrequent that it would appear that the Employer could assign them production work without fear of substantial interruption and consequent disruption. Accordingly, there would seem to be no justification for paying them for not working. In such cases, where it would not create substantial disruption of production to require a Union representative to engage in production work when not performing representational functions, the Employer was viewed as violating the Act by permitting them to remain idle while being paid by the Employer as if they were working. Thus, it is conduct which discriminates against unit employees who are not Union representatives, thereby encouraging Union membership, with no consequent representational benefit to unit employees. Such conduct violates Section 8(a)(1) and (3)

11/ Continued:

to override the discrimination which encouraged union membership by reason of the premium pay provision for union stewards. Herein what we have considered substantial business justification is not uninterrupted production but, instead, the interest in avoiding constant interruption thereby substantially disrupting production.

12/ See Preston Trucking Company, Inc., 236 NLRB No. 56, slip op. p. 6.

13/ The Region should inquire of the Employer whether there are any Union representatives who fit into this category. The Region should also inquire of the Union as to whether it wants to put forth justification for the practice in question in this case.

of the Act 14/ and complaint should issue alleging the practice to be unlawful with respect to all Union representatives improperly receiving the benefit. On the other hand, there may be representatives who perform substantial representation work and who otherwise would be assigned to production work which requires uninterrupted attention. In such circumstances, there may be a substantial justification for permitting such representatives to remain off-production even during their "down time" concerning representation work.

Finally, since the Employer's conduct encourages Union membership, the Employer was viewed as unlawfully assisting the Union in violation of Section 8(a)(2). 15/ It was concluded that a cease and desist and notice posting order would adequately remedy the Employer's violation of Section 8(a)(2) herein and that a "cease recognizing the union" remedy for the Section 8(a)(2) violations is inappropriate in this case.


H. J. D.

14/ See Great Plains Beef Company, supra; Cf. Seaway Food Town, Inc., supra; Dairylea Cooperative, Inc., supra.

15/ See Great Plains Beef Company, supra, slip op. p. 2, n. 2 and p. 68 of ALJD. Even assuming, arguendo, that the Employer's practice involved herein was lawful, if it could be shown that the Employer engaged in a consistent pattern of using the practice, as in the Eichbauer incident, to interfere with Union activity, the practice itself would be concluded to be conduct violative of Section 8(a)(2). The FOIA Exs. 6 & 7(C) incident, standing alone, would not establish such a practice. However, if the Charging Party alleges other similar incidents, the Region should investigate them to ascertain whether the Employer has used the practice in a similar fashion on other occasions. If a pattern emerges, the Region should allege that by such conduct the Employer rendered the practice unlawful, even if the practice were otherwise lawful.