

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

HOWARD INDUSTRIES, INC.,)	
Respondent,)	
)	
and)	Case: 15-CA-164449
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 1317,)	
Union.)	

**RESPONDENT’S ANSWERING BRIEF TO THE
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

COMES NOW Respondent, Howard Industries, Inc. (“Respondent”), through undersigned counsel and pursuant to Section 102.46(d)(1) of the Board’s Rules and Regulations, and files this its Answering Brief to the Exceptions to the Administrative Law Judge’s Decision (“ALJD”) filed by IBEW Local 1317 (“Union”) on October 19, 2016.

INTRODUCTION

The Union has raised five (5) exceptions to the findings of the Administrative Law Judge (“ALJ”). Specifically, the Union’s exceptions are as follows:

EXCEPTION No. 1

The ALJ was wrong for failing to definitively rule on the issue as to whether the Christmas hams are part of the remuneration that employees receive for their work, and thus are subject to the mandatory duty to bargain.

EXCEPTION No. 2

The ALJ erred by concluding that Respondent did not violate the Act because it implemented the policy change after following the procedures set forth in the collective

bargaining agreement regarding proposing, negotiating, and implementing new or modified policies.

EXCEPTION No. 3

The ALJ erred by concluding that Respondent's November 6, 2015 email alone put the Union on notice that Respondent was proposing a new or revised policy.

EXCEPTION No. 4

The ALJ erred by failing to conclude that because Respondent inadvertently misidentified the effective date of the policy that was being rescinded, it failed to give the Union clear and unequivocal notice of its intent to implement a new policy.

EXCEPTION No. 5

The ALJ erred by concluding that Respondent's failure to specifically cite Christmas hams in its notification to the Union did not invalidate the notification.

For the reasons contained in the Decision of the ALJ and those discussed below, the ALJ correctly found that Respondent did not violate Sections 8(a)(5) and (1) of the Act. Accordingly, the Union's Exceptions should be denied.

LEGAL ANALYSIS AND ARGUMENT

A. The Union's argument that the issuance of certificates for hams to employees constituted a term and condition of employment is uncontested.

The Union devoted twenty-five percent (25%) of its Legal Analysis to an issue that is uncontested. At no time has Respondent argued that providing Christmas gifts to employees in the form of certificates for hams had not become so ingrained as to constitute a term and condition of employment. It is undisputed that the only gifts that Respondent provided to employees on an annual basis were the certificates for turkeys and hams. Recognizing that these gifts had likely become terms and conditions of employment, Respondent implemented its

contractual obligation to notify the Union of its desire to change its policy on gifts. It is precisely this contractual language that is at issue, not whether the certificates were a term and condition of employment.

B. Respondent's adherence to the contractual terms negotiated between the parties satisfied its obligations under Sections 8(a)(5) and (1) of the Act.

During the negotiations that resulted in the collective bargaining agreement that is at issue in this case, the parties agreed to a procedure that would be applied whenever Respondent wanted to change an existing policy, create a new policy, or modify job performance standards. In relevant part, whenever that occurred the following rules applied:

- (1) Respondent must provide advance written notice to the Union via email;
- (2) If the Union wishes to negotiate over the changes, it must notify Respondent of this fact in writing within ten (10) calendar days of receipt of notification; and
- (3) If the Union does not serve written notification of a desire to negotiate over the policy or policy change, the Company may implement the change and the Union waives any arbitration or other legal remedies concerning the creation or modification of the policy.

Stip. 9, Ex. D.

At issue is whether Respondent violated Sections 8(a)(5) and (1) of the Act by making a unilateral change in a term or condition of employment involving a mandatory subject without first bargaining to impasse. *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991)). The duty to bargain under the Act does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment. *Id.* Thus, the parties may negotiate “a provision in a collective bargaining contract that fixes the parties’ rights and

forecloses further mandatory bargaining as to that subject.” *Id.* (quoting *Local Union No. 47, International Brotherhood of Electrical Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991)).

To the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining. *Id.* (quoting *Connors v. Link Coil Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992)). When an employer and a union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (quoting *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)).

The relevant language contained in the collective bargaining agreement is unequivocal and was negotiated at arm’s length. There is simply no reason to exempt the Union from its obligation to timely request bargaining. Further, even in non-contractual cases, the Board has held that when an employer gives notice of a proposed change in terms and conditions of employment, the Union must act with due diligence in requesting bargaining. Notice of 4-8 days has been found sufficient to provide a meaningful opportunity to bargain. *Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988).

C. Respondent was not required to give “clear and unequivocal notice” of the proposed policy change.

The ALJ correctly concluded that the traditional analysis of whether a Union clearly and unmistakably waived its right to bargain is inapplicable to this case. ALJD, p.7, lines 16-40. Rather, it is the language contained in the parties’ collective bargaining agreement that controls. And, while it is true that under the traditional analysis the Union must receive clear and unequivocal notification of a proposed change, that requirement is not a part of the parties’ agreement.

Respondent and the Union clearly negotiated over the form and content of the procedural notifications. Initially, Respondent must notify the Union in writing by email of its desire to change a policy. The Union, in turn, must respond in writing if it wishes to negotiate over the proposed changes. The parties could have agreed that the initial notification, or the Union's response, or both, had to be in clear and unequivocal terms. But, they did not do so.

D. Although not required to do so, Respondent did provide clear and unequivocal notice of its proposed new policy.

It is undisputed that on November 6, 2015, Respondent emailed a copy of its proposed policy to the Union. That email read as follows: "The redrafted policy is being provided to you pursuant to Article XXI, Section 1 of the CBA." Attached to this email was a copy of a proposed policy titled "Company Gifts to Employees." Stip. 6, Exs. B-1 and C.

Respondent could have satisfied its notification requirement by simply informing the Union of its intention to implement the proposed policy, in which case the Union would have to invoke the Article XXI, Section 1 requirements. Instead, Respondent specifically referenced the requirements of the collective bargaining agreement, thus putting the Union on notice that Respondent intended to change the policy and intended to follow the procedures set forth in the collective bargaining agreement.

The Union argues that because neither Respondent's email nor the proposed policy specifically mentioned Christmas hams, the Union did not receive adequate notification that the certificates for hams were covered by the proposed policy. It is uncontested that the only gifts provided to employees on an annual basis are certificates for Thanksgiving turkeys and Christmas hams. Stip. 4. It is inconceivable that the Union would not have understood that a policy titled "Company Gifts to Employees" included the only gifts that employees regularly received from Respondent.

Furthermore, the Union's President, who received Respondent's email, was not entitled to receive the benefits that Respondent provided to bargaining unit employees. Stip. 5. Yet, up until the time that the new policy was in place, that individual received certificates for turkeys and hams every year. Stip. 3. If the certificates could not be benefits, they had to be gifts.

If the Union did not understand the definition of "gifts," it could have asked for clarification, which it did not do until after the contractual period to request negotiations had expired. Finally, and perhaps more importantly, the Union does not even claim that it misunderstood the meaning of the term "gifts." *See generally*, all stipulations and exhibits.

The Union also argues that because the proposed policy mistakenly referenced a previous policy that did not exist, the notification was invalid. Once again, the Union has not claimed that it was misled by the erroneous date contained in the policy that was sent to it on November 6, 2015. In fact, apparently the Union never looked at that policy during the ten (10) day notification period because it claims that it first learned of the new policy on November 19, 2015. Stip. 10. Had the Union reviewed the policy sent to it on November 6, 2015, it could have requested a copy of the predecessor policy, just as it did on November 24, 2015. Ex. B-5.

The ALJ also correctly concluded that even if Respondent's proposed "Company Gifts to Employees" policy contained new, broader, or different language from the December 2006 policy concerning Christmas gifts/hams, Respondent's proposal was still covered and protected by the procedure that the parties agreed to for creating or changing Company policies. ALJD, fn. 6.

Respondent's email submitting the proposed policy to the Union on November 6, 2015 made specific reference to Article XXI, Section 1. This should have put the Union on notice that it needed to pay attention to the email, particularly since this was only a month after the new

language had been ratified. After contractually agreeing to provide the Company with its intent to negotiate within ten (10) calendar days of receipt of a notice of a change, the Union cannot simply ignore the notification requirement and expect to negotiate over the proposed policy at a later date of its choosing.

CONCLUSION

The ALJ correctly found that Respondent did not violate Sections 8(a)(5) and (1) of the Act. Accordingly, the Union's exceptions should be rejected.

Respectfully submitted this the 26th day of October, 2016.

/s/ Elmer E. White III
Elmer E. White III
THE KULLMAN FIRM
600 University Park Place, Suite 340
Birmingham, AL 35209
P: 205-871-5858 | F: 205-871-5874
ew@kullmanlaw.com

COUNSEL FOR RESPONDENT,
Howard Industries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of October, 2016, caused a copy of the above pleading to be E-filed via www.nlr.gov and served upon the following:

VIA EMAIL

Matthew J. Dougherty, Esq.
Field Attorney
NLRB, Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70130
matthew.dougherty@nlrb.gov

VIA EMAIL

Roger K. Doolittle, Esq.
Doolittle and Doolittle
460 Briarwood Drive, Suite 500
Jackson, MS 39206
rogerkdoolittle@aol.com

VIA EMAIL

Clarence Larkin
President/Business Manager
IBEW, Local 1317
P.O. Box 2296
Laurel, MS 39442-2296
ibewlocal1317@bellsouth.net

/s/ Elmer E. White III
Counsel for Respondent