Howard Industries, Inc. *and* International Brotherhood of Electrical Workers, Local 1317. Case 15–CA–164449

December 21, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On September 2, 2016, Administrative Law Judge Geoffrey Carter issued the attached decision. The Union filed exceptions and a supporting brief and the Respondent filed an answering brief. The General Counsel filed an "Answer in Support of Union's Exceptions."

The National Labor Relations Board has considered the decision and the stipulated record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 21, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

The Board's decision can be found at www.nlrb.gov/case/15-CA-164449 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Matthew Dougherty, Esq., for the General Counsel.
Roger Doolittle, Esq., for the Charging Party.
Elmer E. White, III, Esq., for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserted in this case that Howard Industries, Inc. (Respondent) ran afoul of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally changing its policy regarding gifts to employees (including hams during the Christmas season) without first notifying the International Brotherhood of Electrical Workers, Local 1317 (the Union) and giving the Union an opportunity to bargain about the policy change. As explained below, I find that Respondent did not violate the Act because Respondent implemented the policy change after following the procedure set forth in the collective-bargaining agreement regarding proposing, negotiating and implementing new or modified policies. Accordingly, I recommend that the complaint be dismissed.

STATEMENT OF THE CASE

This case was submitted to me via joint motion, dated July 5, 2016, to have the case decided based on an agreed stipulation of facts and exhibits. I granted the parties' joint motion, and I also granted the General Counsel's unopposed July 6, 2016 motion to supplement the record with formal papers (including, but not limited to, the complaint, answer, and various unfair labor practice charges).

The Union filed the charge in this case on November 18, 2015, and amended that charge through filings on January 5, February 25, March 1 and 29, and July 1, 2016. In a complaint that the General Counsel issued on March 30, 2016, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about November 19, 2015, unilaterally changing its policy regarding which employees would receive hams from Respondent during the Christmas season, without first notifying the Union and giving the Union an opportunity to bargain about the policy change.[1] Respondent filed a timely answer denying the alleged violations in the complaint.

On the entire record, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] The General Counsel also alleged that Respondent violated Sec. 8(a)(5) and (1) of the Act by unreasonably delaying in responding to an information request that the Union submitted on December 3, 2015. The General Counsel withdrew that complaint allegation on or about July 1, 2016.

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Laurel, Mississippi, engages in the manufacture and nonretail sale of electrical transformers. On an annual basis, Respondent sells and ships from its Laurel, Mississippi facility goods that are valued in excess of $50,000 and go directly to locations outside the State of Mississippi. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Collective-Bargaining History

Since about 1970, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following appropriate bargaining unit:

> All full time and regular part-time production and maintenance employees (excluding all other employees, guards, and supervisors as defined by the Act).

That recognition has been embodied in a number of successive collective-bargaining agreements, the most recent of which is effective from October 5, 2015, to October 4, 2018. (GC Exhs. 1(k) (par. 7), 1(m) (par. 7).)

B. Collective-Bargaining Agreement Language Concerning Creating or Changing Workplace Policies and/or Job Performance Standards

Section 1 of article XXI of the collective-bargaining agreement sets forth a procedure that applies when Respondent wishes to change an existing policy, create a new policy, or modify job performance standards. Section 1 of article XXI states, in pertinent part, as follows:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining. Except as provided below, they therefore each voluntarily and unqualifiedly waive the right for the life of this Agreement to bargain collectively with respect to any matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered by this Agreement.
>
> However, if the Company wishes to change an existing policy, create a new policy, or modify job performance standards that affect the bargaining unit, advance written notice will be provided to the Union via email. If the Union wishes to negotiate over the changes, it will notify the Company in writing within **ten (10)** calendar days of receipt of the notification. 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.
>
> If timely notification of a desire to bargain is provided by the Union, negotiations shall commence within (10) calendar days and be completed no later than seven (7) calendar days after the first negotiating session unless both parties agree to extend the deadline for negotiations. If the parties fail to reach agreement by the end of the time period set above, the Company may implement the new policy or policy change. If the Company exercises its right to implement the new policy or policy change, the Union will have the right to grieve the reasonableness of the policy under the grievance procedure.

(Jt. Exh. D (emphasis in original; paragraph spacing added); see also Jt. Stipulation of Facts (par. 9).)

C. The December 13, 2006 Christmas Gifts Policy

From December 2006, to November 2015, Respondent maintained and followed a "Christmas Gifts" policy that was issued on December 13, 2006, and stated as follows:

Policy:	Issuance of Christmas gifts by the company to employees and retired employees of [Respondent]
Purpose:	To [ensure] uniform treatment to all full-time employees of [Respondent]
Procedure:	A committee handles Christmas gifts of hams or [whatever] their choice might be at Christmas time. They may also contribute cash gifts to employees who have experienced catastrophic occurrences, as the committee deems necessary.
	Retired employees with 10 or more years of service who voluntarily retire from [Respondent] may be eligible for a Christmas gift of a ham if the [C]ompany deems so on a year to year basis. This is a gift from the Company and does not imply any obligation by the Company to be continued.

(Jt. Exh. A; see also Jt. Stipulation of Facts (par. 1) (noting that the December 13, 2006, Christmas Gifts policy updated an earlier policy from July 1, 2003, which is included in the record as Jt. Exh. F).)

Up to November 2015, all of Respondent's employees, including employees who were out on medical leave or workers' compensation, were eligible to receive certificates from Respondent for turkeys at Thanksgiving and hams at Christmas.[3] The president of the Union was also eligible to receive certifi-

[2] Although I have included several citations in this decision to highlight particular portions of the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

[3] Some of the money that Respondent used to purchase the certificates came from payments that Respondent received from vendors who placed vending machines at Respondent's facility that employees used to buy snacks and sodas. (Jt. Stipulation of Facts (pars. 2–3).)

cates from Respondent for a Thanksgiving turkey and a Christmas ham, even though the president of the Union was not eligible for the benefits that Respondent provided to employees. The Thanksgiving turkeys and Christmas hams were the only gifts that Respondent provided to employees on an annual basis. (Jt. Stipulation of Facts (pars. 3–5).)

D. Respondent's November 6, 2015 email to the Union

On November 6, 2015, Respondent's human resources manager Loren Koski sent an email to Union president Clarence Larkin. The November 6 email stated as follows:

> Subject: 2015-11-2 Company Gifts to Employees
>
> [Message]: This redrafted policy is being provided to you pursuant to Article XXI Section 1 of the CBA.

(Jt. Exh. B1; see also Jt. Stipulation of Facts (par. 6).)

Koski's November 6 email included an attached copy of the "Company Gifts to Employees" policy that was dated November 2, 2015, and erroneously stated that it superseded a policy dated December 17, 2014 (the parties stipulate that Respondent did not have a policy that was issued on December 17, 2014). (Jt. Stipulation of Facts (par. 6.); see also Jt. Exh. C.) Respondent's proposed Company Gifts to Employees policy stated as follows:

> Policy: Issuance of gifts by the Company to active employees and certain retired employees of [Respondent]
>
> Procedure: A Company committee may determine to give gifts to active employees at certain times of the year.
>
> Each year the committee will determine the tenure required to receive a gift from the Company if a gift is given.
>
> The Company will distribute the gift of its choice to all active employees that have performed work within the month of the gift distribution that also meet the tenure requirement.
>
> Employees away from work on Military Assignments are eligible for the gift even if they have been away from the company for the month of the gift distribution, but it is their responsibility to have their family contact the [C]ompany during the gift giving period.
>
> Retired employees with 10 or more years of service who voluntarily retire from [Respondent] may be eligible for a gift if the [C]ompany chooses to provide gifts.
>
> The committee may also contribute cash gifts to active employees who have experienced catastrophic occurrences on a case by case basis, as the committee deems necessary.
>
> This is a gift from the Company and does not imply any obligation by the Company to be continued.

(Jt. Exh. C.)

On November 6, the Union received Respondent's November 6 email and the attached, proposed Company Gifts to Employees policy. The Union did not respond to the November 6 email or request to bargain over the proposed Company Gifts to Employees policy within ten calendar days of receiving the email and policy. The Union also did not seek clarification of what Respondent considered to be "gifts to employees" until after November 16, 2015. (Jt. Stipulation of Facts (pars. 6–7).)

E. November 17, 2015—Respondent Implements its Company Gifts to Employees Policy

On November 17, 2015, Respondent implemented the Company Gifts to Employees policy. The policy was identical to the proposed policy that Respondent emailed to the Union on November 6, except that the heading to the policy: stated that the policy was issued on November 17, 2015; and clarified that the policy superseded the policy dated December 13, 2006 (i.e., the Christmas Gifts policy).[4] (Jt. Stipulation of Facts (par. 8); Jt. Exhs. E, H.)

On November 19, 2015, the Union learned from employees who were out on workers' compensation that Respondent had implemented its Company Gifts to Employees policy and that, as a result, certain employees were no longer eligible for certificates for Thanksgiving turkeys and Christmas hams. That same day, Larkin emailed Koski to request that Respondent bargain over the policy change. (Jt. Stipulation of Facts (pars. 10, 12); Jt. Exh. B2; see also Jt. Exh. H (describing some of the eligibility rules for Thanksgiving turkeys and Christmas hams under the new policy).)

On or about December 1, 2015, Koski asserted that Respondent implemented the Company Gifts to Employees policy after the Union did not request bargaining within ten days of receiving the proposed policy on November 6. (Jt. Stipulation of Facts (par. 15); Jt. Exh. B6.)

Applicable Legal Standards

"Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011). Notably, an employer's regular and longstanding practices that are

[4] Respondent sent a copy of the November 17, 2015 Company Gifts to Employees policy to the Union on November 30, 2015. (Jt. Stipulation of Facts (par. 14); Jt. Exh. B5.)

neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. Id; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

Although an employer and the representative of its employees have a mandatory duty to bargain with each other in good faith about wages, hours, and other terms and conditions of employment, the Board has explained that employers do not have to bargain about gifts that they give to their employees. *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). Items "given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors" are properly characterized as gifts. *Benchmark Industries*, 270 NLRB 22, 22 (1984). Conversely, items that are "so tied to the remuneration which employees receive for their work that [the items] are in fact a part of the remuneration" are properly characterized as wages and are subject to the mandatory duty to bargain. A sufficient relationship to remuneration may exist if the payment (i.e., the alleged gift) is tied to various employment-related factors such as work performance, wages, regularity of the payment, hours worked, seniority and production. *North American Pipe Corp.*, 347 NLRB at 837.

Under the clear and unmistakable waiver standard, bargaining partners may "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007).

Discussion and Analysis

Did Respondent Violate Section 8(a)(5) and (1) of the Act when it Implemented its Company Gifts to Employees policy on November 17, 2015?

1. Complaint allegation

The General Counsel's sole remaining allegation in the complaint is that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about November 19, 2015, unilaterally changing its policy regarding which employees would receive hams from Respondent during the Christmas season, without first notifying the Union and giving the Union an opportunity to bargain about the policy change.

2. Analysis

In a case where the General Counsel alleges that an employer has made unlawful unilateral changes to the terms and conditions of employment, Board precedent would normally require an analysis of issues such as whether the employer made a unilateral change regarding a mandatory subject of bargaining, and if so, whether the union clearly and unmistakably waived its right to bargain.

This case is different, primarily because in Section 1 of article XXI of the collective-bargaining agreement, the parties created and agreed to a specific procedure that applies when Respondent wishes to change an existing policy, create a new policy, or modify job performance standards. Specifically, when Respondent wishes to take such action, Respondent must give the Union advance written notice (by email) of the changes. Upon receipt of such notice, the Union has ten calendar days to notify Respondent in writing that it (the Union) wishes to negotiate over the proposed changes. If the Union does not provide such notice of its wish to negotiate, then Respondent may implement the changes and the Union waives any arbitration or other legal remedies concerning the creation or modification of the policy. (Findings of Fact (FOF), Section II(B).) Notably, the General Counsel does not contend that this portion of the collective-bargaining agreement, or the waiver contained therein (when applicable), is invalid. Cf. *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 (2003) (finding that the employer was entitled to unilaterally implement a change in scheduling holiday shift work because the plain language of the contract privileged the change that the employer made, and because the union clearly and unmistakably waived bargaining over the issue).

The issue in this case, then, is whether Respondent's decision to implement its Company Gifts to Employees policy on November 17, 2015, is protected by the collective-bargaining agreement.[5] I agree with Respondent that it is. There is no dispute that on November 6, the Union received an email from Respondent in which Respondent explicitly stated that it was providing the "redrafted" Company Gifts to Employees policy to the Union pursuant to section 1 of article XXI of the collective-bargaining agreement. That communication alone put the Union on notice that Respondent was proposing a new or revised policy, and that the Union had ten calendar days to notify Respondent in writing that it wished to negotiate about the policy. Moreover, the Union also received (as an attachment to

[5] In their posttrial briefs, the General Counsel and, to a lesser extent, Respondent raised the threshold question of whether Respondent needed to bargain at all over gifts that it provided to employees. (See GC Posttrial Br. at 2–4; R. Posttrial Br. at 8.) As an initial thought on that point, I note that it was Respondent who attempted to initiate bargaining over its Company Gifts to Employees policy by invoking sec. 1 of art. XXI of the collective-bargaining agreement. Thus, to the extent that Respondent now asserts that it did not need to bargain at all about the policy (based on the theory that the policy related to gifts), Respondent asserts a position that is contrary to how it handled the matter in the first instance. In addition, the Company Gifts to Employees policy explicitly states that, apart from a few exceptions, Respondent "will distribute the gift of its choice to all active employees that have performed work within the month of the gift distribution that also meet [a] tenure requirement." (FOF, Sec. II(D).) Those employment-related prerequisites to receiving gifts such as Christmas hams arguably establish that the Christmas hams are a part of the remuneration that employees receive for their work, and thus are subject to the mandatory duty to bargain. Compare *Benchmark Industries*, 270 NLRB at 22 (finding that Christmas hams and dinners that the employer gave to employees were properly characterized as gifts because the employer gave them regardless of employees' work performance, earnings, seniority, production or other employment-related factors). Ultimately, I need not rule definitively on this issue because I find that Respondent prevails in this case on other grounds.

the November 6 email) a copy of Respondent's proposed Company Gifts to Employees policy, and thus had notice of the nature and content of Respondent's proposal.

To be sure, the proposed Company Gifts to Employees policy that Respondent sent to the Union on November 6 incorrectly stated that it superseded a policy dated December 17, 2014 (a date that does not correspond to any existing policies). I disagree, however, with the General Counsel's argument that the incorrect date of the old policy invalidates Respondent's November 6 notice to the Union. Even with the incorrect date of the old policy, the Union was still on notice that Respondent was seeking to change its gift policy under the procedures set forth in the collective-bargaining agreement. To the extent that the incorrect date of the old policy prompted questions, that should have provided the Union with even more reason to notify Respondent that it wished to negotiate. The Union, however, did not do so within the 10-day notification period specified in the collective-bargaining agreement. Thus, once the 10 day notification period passed, the terms of the collective-bargaining agreement permitted Respondent to implement the Company Gifts to Employees policy, and also established that the Union waived arbitration and any other legal remedies concerning the creation or modification of the policy.[6]

In sum, I find that Respondent lawfully implemented its Company Gifts to Employees policy on November 17, 2015, after complying with the notice and bargaining requirements that the parties agreed to in section 1 of article XXI of the collective-bargaining agreement. Accordingly, I do not find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint, and I recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

The General Counsel failed to prove that Respondent violated Section 8(a)(5) and (1) of the Act by, on November 17, 2015, unilaterally changing its policy regarding which employees would receive hams from Respondent during the Christmas season, without first notifying the Union and giving the Union an opportunity to bargain about the policy change.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 2, 2016

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[6] The General Counsel also argued that Respondent did not provide adequate notice of its proposed policy change because Respondent's Company Gifts to Employees policy did not explicitly state that it was related to distributing hams to employees at Christmas. (GC Posttrial Br. at 5.) I find that the lack of explicit language about Christmas hams does not undermine the validity of Respondent's November 6 email to the Union to propose the Company Gifts to Employees policy. To the contrary, sec. 1 of art. XXI of the collective-bargaining agreement allows Respondent to propose modifications to existing policies and also to propose entirely new policies. (FOF, sec. II(B).) Thus, 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.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.