

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

DATE: December 8, 2016

TO: Margaret Diaz, Regional Director
Region 12

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

SUBJECT: Southeastern Line Constructors 530-6083-0150-5000
Chapter (NECA) 530-8045-3700
Case 12-CA-171622 530-8045-5000
530-6001-5000
725-6733-1000
725-6733-9000

This case was submitted for advice as to whether the Region should defer to an arbitration award that upheld the Employer Association's interpretation of the parties' collective-bargaining agreement, which permitted it to unilaterally change contractual wage rates to split the cost of increased contributions to the employee health insurance fund. The Region also requested advice regarding whether to solicit a modification of the charge to include a Section 8(d) allegation. We conclude that the Region should defer to the arbitration award because it was not clearly repugnant to the purposes of the Act where the facts here could support a finding that the Employer Association did not unilaterally change employee wages.¹ Thus, the Region should defer to the arbitration award and dismiss the charge, absent withdrawal.

FACTS

International Brotherhood of Electrical Workers Local 222 ("the Union") and Southeastern Line Constructors Chapter (NECA) ("the Employer Association") have a longstanding bargaining relationship. Their most recent collective-bargaining agreement is effective September 1, 2014 through August 31, 2017. Employee wage rates in the collective-bargaining agreement are based on a percentage of the journeyman lineman wage rate. For example, a general foreman earns 115 percent of the journeyman lineman rate and a first period apprentice earns 60 percent. The collective-bargaining agreement also contains an "Additional Benefits" section that

¹ In light of that conclusion, it is unnecessary to analyze whether the Employer Association's action was an unlawful midterm modification of the parties' existing agreement under Section 8(d).

sets forth the fringe benefits paid by the Employer Association on behalf of employees. Because most of these benefits are paid as a percentage of employees' hourly wage rates, their levels are also dependent on the journeyman lineman rate. However, payments made to the employee health insurance fund ("LINECO") are set at \$5.00 per hour per employee.

Periodically, there are increases to the LINECO fund benefit contribution rate. The collective-bargaining agreement states, "Any additional increases shall be split equally between the employer and employee hereon." Historically, regardless of the collective-bargaining agreement language, the Employer Association absorbed the entire increase.

As previously noted, on September 1, 2014, the parties' current collective-bargaining agreement became effective. In December 2014, LINECO notified the Employer Association and the Union that the hourly benefit contribution rate would increase by \$0.25 per hour the following year. In mid-2015, the Union requested that the Employer Association absorb the entire cost as it had in the past, but the Association declined. On December 21, 2015, the Employer Association emailed the Union its solution to dividing up the 25 cent increase – it would reduce the journeyman lineman wage rate by \$0.12 per hour and adjust the other wage rates based on a percentage of the new journeyman rate. On December 22, the Union objected to the proposed adjusted wage rates, saying that the Employer Association should leave hourly wages intact and separately deduct \$0.125 per hour from employees' paychecks. The Employer Association refused and implemented the new wages on January 1, 2016.²

On February 1, the Union filed a grievance asserting that the Employer Association arbitrarily had changed working conditions without the Union's consent. On March 11, the Union also filed the current charge, alleging the Employer Association had violated Section 8(a)(5) and (1) by making unilateral changes to terms and conditions of employment and by failing to bargain in good faith. The Region deferred the charge to the parties' grievance procedure.³ When the grievance was unable to be resolved at the first two steps of the grievance process, it was scheduled to be heard by an arbitration panel.

Before the arbitration panel, the Union presented evidence and argued that the Employer Association unilaterally cut employee wage rates and that, as a result, the cost of the LINECO increase was not being shared equally. The Union's evidence

² All subsequent dates are in 2016.

³ *Collyer Insulated Wire*, 192 NLRB 837 (1971).

highlighted that because the collective-bargaining agreement required other benefits to be paid as a percentage of employee wages, the total compensation for the journeyman linemen actually decreased by \$0.16 per hour. It also represented that the total compensation for the general foreman classification, the highest-paid classification in the contract, decreased by \$0.18 per hour. At the same time, the Union's evidence represented that total compensation for first period apprentice linemen, who earn only 60% of the journeyman lineman rate, was reduced by only \$0.09 per hour.⁴ Without taking into account these various reductions or the actual numbers of employees working in each classification, the Union took the \$0.18 per hour decrease in total compensation suffered by the general foreman, multiplied it by 500 employees allegedly covered by the contract, and concluded that the unit employees as a group were contributing an extra \$172,500 per year to the LINECO fund as a result of the Employer Association's modification.⁵ Based on those figures, the Union asked that the panel find the Employer Association had violated the terms of the collective-bargaining agreement and requested as a remedy that the Employer Association be required to reimburse the employees and cover the entire cost of the increase.

The Employer Association claimed before the arbitration panel that it had distributed the increase in LINECO payments based on industry standard that permitted it to deduct \$0.12 per hour from the journeyman lineman rate and adjust all other wages accordingly. The Employer Association also claimed it was actually paying more than \$0.12 per hour when all employees were taken into account, but it did not provide the Region with any evidence to support that assertion or the evidence that it presented in arbitration.

When calculating contractual wages and subtracting \$0.125 cents per hour per job classification as proposed by the Union, and comparing those wages to the Union's calculations regarding the effect of the Employer Association's reduction of the journeyman lineman rate, journeyman linemen lose only \$0.03 per hour and general foremen lose \$0.05, whereas first period apprentice linemen earn \$0.04 *more* per hour. Thus, based on the Union's figures before the arbitration panel, employees in job

⁴ Based on the evidence the Union presented to the arbitration panel, of the 15 classifications in the collective-bargaining agreement, seven had their total compensation reduced by \$0.12 or less per hour.

⁵ It is not clear what other variables the Union relied on to arrive at the \$172,500 sum. The Union did not present evidence that all of the employees it represents are paid at the general foreman rate. Presumably, not all employees in the unit are paid at or above the journeyman lineman rate. Also, the charge claims that the Union represents only 300 unit employees, not 500 as represented in the Union's calculations.

classifications who earn 85 percent or more of the journeyman lineman wage rate pay slightly more than \$0.125 per hour toward the LINECO increase, while employees who earn 80 percent or less than the journeyman lineman rate pay slightly less than that amount. When averaging out the wage difference among all the job classifications, the Union's preferred method of deducting \$0.125 cents per hour and the method the Employer Association implemented result in approximately the same overall deduction from employees as a group. Although the Union's method distributes the increase in equal shares to each job classification, the Employer Association's calculations do not appear to put a heavier burden on the employees generally.⁶

On May 16, 2016, the arbitration panel, consisting of six representatives each from the Employer Association and the Union, issued a unanimous decision finding that the Employer Association had not violated the collective-bargaining agreement. The panel stated:

In the instant case there is no violation of the agreement by management. Unless otherwise negotiated, any increases or decreases shall be taken from the base wage of the Journeyman Lineman and all other benefits and classifications shall be paid as specified in the collective bargaining agreement.

The Union subsequently requested that the Region revoke its deferral of the charge and issue complaint, absent settlement.

ACTION

We conclude that the Region should defer to the arbitration award as it is not clearly repugnant to the purposes and policies of the Act because there is some basis to conclude that the Employer Association's decision to tie increases to the LINECO benefit payments to the journeyman lineman wage rate was not a unilateral change.

The Board will defer to an arbitration award where the following four conditions are met: (1) the arbitration proceedings were fair and regular, (2) all parties agreed to be bound, (3) the decision of the arbitration panel is not "clearly repugnant" to the purposes and policies of the Act,⁷ and (4) the arbitration panel considered the unfair

⁶ This does not take into consideration how many employees are in each classification. However, assuming that more employees are in classifications less than 100 percent of the journeyman lineman rate than are at the journeyman lineman rate or higher, it is likely that the Employer Association's assertion that it is losing money is correct.

⁷ *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082 (1955).

labor practice issue.⁸ The Board will consider the arbitrator to have adequately considered the unfair labor practice if (a) the contractual issue is factually parallel to the unfair labor practice issue and (b) the arbitrator was presented generally with the relevant facts to resolve the unfair labor practice.⁹ The party asking the Board to decline to defer bears the burden of proof that these conditions have not been met.¹⁰

In this case, neither party disputes that the first two conditions for deferral were met. The arbitration proceeding was fair and regular where both the Union and Employer Association were permitted to present evidence, make oral arguments, and submit written briefs to the arbitration panel. Each party also agreed to be bound. Regarding the fourth factor, the unfair labor practice issue is also factually parallel to the contractual issue presented to the arbitration panel because each turns on whether the collective-bargaining agreement permitted the Employer Association to collect the employees' share of the LINECO increase by reducing the journeyman lineman wage rate by \$0.12 per hour, and then adjusting the wage rates of the remaining job classifications based on that reduction.¹¹ Moreover, it appears that the parties presented the arbitration panel with all of the relevant facts. Thus, the only remaining question is whether the arbitration panel's decision was "clearly repugnant" to the Act.

An arbitration award is "clearly repugnant" to the Act if it is not susceptible to an interpretation consistent with the Act.¹² "Consistent with the Act" does not mean the

⁸ *Olin Corp.*, 268 NLRB 573, 574 (1984).

⁹ *Id.* See also *Bath Iron Works Corp.*, 302 NLRB 898, 890 (1991) (applying the foregoing principles in a Section 8(a)(5) case). Because the current case involves an alleged violation of Section 8(a)(5), the Board's recent modification of the post-arbitration deferral standard in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 1, n.2 (Dec. 15, 2014), is not applicable here.

¹⁰ *Olin Corp.*, 268 NLRB at 574.

¹¹ The Union argues that the unfair labor practice and contractual issues are not factually parallel. It asserts that while the arbitration panel ruled that the Employer Association did not breach the existing contract, the panel failed to address whether the Association violated Section 8(a)(5) by acting unilaterally. But as set forth above, the arbitration panel considered the Union's arguments and concluded that there had been no unilateral change.

¹² See *Olin Corp.*, 268 NLRB at 574.

Board would reach the same result.¹³ Rather, the Board will defer to any interpretation of the arbitration award that is within the broad parameters of the Act.¹⁴ Here, the arbitration panel's award upholding the Employer Association's deduction of \$0.12 per hour from the journeyman lineman rate was not clearly repugnant to the Act because there is some basis to conclude that the Employer Association did, in fact, split the fund increase equally between itself and the employees, and thus did not make a unilateral change.¹⁵ As noted above, when examining the effect of the Employer Association's wage changes and comparing those figures to the Union's preferred method of deducting \$0.125 per hour for each employee, journeyman linemen lose only \$0.03 per hour and general foremen lose \$0.05, whereas first period apprentice linemen earn \$0.04 *more* per hour. In other words, employees in job classifications who earn 85 percent or more of the journeyman lineman wage rate pay slightly more than \$0.125 per hour toward the LINECO increase, while employees who earn 80 percent or less than the journeyman lineman rate pay slightly less than that amount. When averaging the wage changes across all the job classifications and comparing them to the Union's preferred method of distributing the LINECO increase, there is essentially no difference between the Employer Association's and Union's methods. Additionally, the arbitration panel heard evidence that the Employer Association had followed industry standard by splitting the cost based on reducing the journeyman lineman rate and the arbitration panel agreed that the parties' contract permitted cost-sharing in that way. Thus, because there is some basis for finding that the Employer Association's method equally split the cost of the LINECO fund increase in a manner consistent with

¹³ *Smurfit-Stone Container Corp.*, 344 NLRB 658, 660 (2005).

¹⁴ *Id.* at 659-60. *See also Dennison National Co.*, 296 NLRB 169, 170-71 (1989) ("The Board's involvement at this postarbitration deferral stage, however, is not in the nature of an appeal by trial de novo.").

¹⁵ *See Smurfit-Stone Container Corp.*, 344 NLRB at 659-60 (arbitration award susceptible to an interpretation consistent with the Act where arbitrator found management rights clause in a collective-bargaining agreement permitted the employer to unilaterally institute an attendance policy). *Compare Dunham-Bush, Inc.*, 264 NLRB 1347, 1348 (1982) (arbitration award clearly repugnant where the Board found the employer's unilateral implementation of production quotas a midterm modification in violation of Section 8(d)); *Alfred M. Lewis, Inc.*, 229 NLRB 757, 757-58 (1977) (arbitration award clearly repugnant where arbitrators ignored clear Board precedent that in the absence of a specific contract right, an employer cannot unilaterally set production quotas without violating Section 8(a)(5)), *enforced in relevant part* 587 F.2d 403, 407-08 (9th Cir. 1973).

industry practice, the arbitration panel's conclusion is within the broad parameters of the Act.¹⁶

In light of the preceding analysis, we conclude that the arbitration award sustaining the Association's conduct is not clearly repugnant to the purposes and policies of the Act and that the Region should defer to the arbitration award.¹⁷ Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

ADV.12-CA-171622.Response.Southeastern Line Constructors Chapter (NECA) (b) (6), (b) (7)

¹⁶ Because we conclude that the Employer Association did not effectuate a unilateral change, we find that a Section 8(d) analysis does not apply. However, even assuming that a Section 8(d) analysis did apply, we conclude that the evidence supports a conclusion that the Employer Association arguably had a sound arguable basis for its interpretation of the collective-bargaining agreement to permit cost-sharing in this way. Because the Board will only find a Section 8(d) violation where the collective-bargaining agreement *forbade* the employer's conduct, and because the collective-bargaining agreement here can be read in a way that permits the Employer Association to tie any benefit changes to the journeyman lineman wage rate, we conclude that there is also some basis to conclude the Employer Association did not violate Section 8(d). See *Bath Iron Works*, 345 NLRB 499, 502 (2005), *enforced sub nom. Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

¹⁷ See the cases cited at note 15, *supra*. We reject the Union's assertion that the Employer Association repudiated the parties' bargaining relationship. In this regard, the Union's reliance on *Oak-Cliff Golman Baking Co.*, 207 NLRB 1063, 1063-64 (1974), *enforced mem.* 505 F.2d 1302 (5th Cir. 1974), is misplaced. In that case, the Board found an unlawful midterm modification that repudiated the parties' bargaining relationship because no conceivable reading of the contract authorized the employer's "clear repudiation of the contract's wage provision." *Id.*, 207 NLRB at 1064.