

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Dallas Airmotive, Inc.

Respondent,

V.

International Association of Machinists and
Aerospace Workers, AFL-CIO, District 776

Charging Party.

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Case 16-CA-192780

**RESPONDENT’S ANSWERING BRIEF TO COUNSEL FOR
GENERAL COUNSEL’S CROSS EXCEPTIONS AND BRIEF
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

Counsel for General Counsel addresses two issues in its Cross Exceptions and Brief to the Administrative Law Judge’s Decision:

1. That the Administrative Law Judge should have disregarded the parties’ 2015 Closure Agreement and applied the terms of the collective bargaining agreement from the closed Forest Park facility.
2. That Respondent should have continued to remit union dues to Charging Party further to the application of collective bargaining agreement that, pursuant to the Administrative Law Judge, had been superseded by the 2015 Closure Agreement.

Both arguments fail to give credence and legitimacy to an agreement properly bargained by the parties – the 2015 Closure Agreement. With that conclusion, the two issues put forth by Counsel for General Counsel should not be reached by this tribunal.

I.

**Two Bargained for Agreements: The 2015 Closure Agreement
And the Collective Bargaining Agreement**

Counsel for General Counsel (CGC) skips a step in its argument that the parties' 2015 Closure Agreement does not supersede the terms of the collective bargaining agreement. Rather, CGC jumps to the specific provisions of the collective bargaining agreement and pleads that they are sacrosanct and, therefore, subject to an extremely high standard to show waiver of their terms. Because those terms were negotiated away by the 2015 Closure Agreement, that argument must fail.

A. CGC's Request to Ignore the 2015 Closure Agreement Must be Rejected.

Asserting that a litany of collective bargaining agreement provisions must remain in place and be applied to the former employees of Forest Park, CGC makes quick work of the 2015 Closure Agreement bargained by the Parties; it ignores it. CGC asserts that various provisions survived the Closure of Forest Park and somehow overcame the terms of the 2015 Closure Agreement. It points to such CBA clauses as discipline and discharge procedures, job security, hours of work, shift schedules, reporting and call-back pay, transfers and promotions and, dues check off, to name but a few. In citing only to the collective bargaining agreement, applicable to the production employees employed explicitly at the Forest Park facility "located at 6114 Forest Park Road, Dallas, Texas" (Joint Exhibit 28), the 2015 Closure Agreement is cast off without apparent import or affect. That Closure Agreement, however, specifically addressed the applicable terms and conditions of the employment of Forest Park employees upon their

transfer to another facility within the DFW Metroplex. It simply cannot be ignored as urged by CGC.

B. The Administrative Law Judge's Finding

In her Decision, Judge Steckler found:

...I agree that Respondent was within its rights to apply its terms and conditions of employment, already established at DFW Center, when the Forest Park bargaining unit relocated. The 2015 Closure Agreement was drafted with Lodge 776's consent and input. The documents reflect that the parties knew a number of contingencies, known and unknown, existed in 2015. The plain language of this agreement waives Lodge's 776's rights to apply the terms and conditions of the collective bargaining agreement. I therefore recommend dismissal of the unilateral changes allegation. ...

ALJ Decision, p. 29.

The Administrative Law Judge properly gave credence and meaning to the Parties' 2015 Closure Agreement. It should not be swept aside, without meaning. Doing so would nullify the effects of the bargaining reached by Charging Party and Respondent and apply the terms of a collective bargaining agreement that went away, coincident with the closing of the Forest Park facility; exactly as bargained for and anticipated by the parties.

C. Even Applying a Stringent Standard, CGC's Argument Must Fail

The most recent appellate court decisions on the waiver issue have been met with great scrutiny, particularly when there is contractual language bearing on the issue presented to the Courts. The contract coverage standard is apropos in this instance, where a bargained for agreement squarely addresses the issue in dispute. However,

even using the more stringent waiver standard, Counsel for General Counsel strains to point to precedent that is arguably akin or helpful in in this instant matter.

Appropriately, CGC begins with the U.S. Supreme Court's approval of the Board's administrative standard for waiver as being "clear and unmistakable." In *Metropolitan Edison Co.*, 460 U.S. 693 (1983), the Court approved of this standard in a case where the Company had two favorable arbitration decisions upholding the imposition of greater discipline on union officials versus rank and file members, when the union -- via the collective bargaining agreement's non-strike clause - was obligated to prevent the underlying illegal work stoppages. Those arbitration decisions, however, were followed yet again by the employer's third application of greater, discriminatory discipline against union officers. The underlying arbitration decisions and subsequent renewal CBA bargaining where the issue was never addressed, did not establish the grounds to show the employer had the unfettered right to mete out such unbalanced discipline. It did not show a clear and unmistakable waiver. Although the high Court upheld the Board's standard for waiver and easily agreed with the Board's rejection of waiver given the facts, the case simply provides no guidance to the facts presented in this case.¹ Here, there is a bargained for agreement whose terms address the topics

¹ In its second argument on deduction of dues, CGC's cited authority appropriately points out that the approval of the announced standard by the Supreme Court is reached under the umbrella of the broad discretion given to the Board in determining standards and policy under the ACT. The contract coverage analysis may equally be given the same approval given the Court's deference to the Board on such issues. See, *Lincoln Lutheran*, 362 NLRB 1655, 1656 (2015) ("the Supreme Court has made clear that "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy" as long as it is "rational and consistent with the Act." *NLRB v. Curtin Matheson Scientific, Inc.* 494 U.S. 775, 787 (1990).

upon which the alleged violation rests. That facts and the terms of the 2015 Closure Agreement clearly reflects a waiver of the past collective bargaining agreement.

In yet another distinguishable case the CGC cites to *Georgia Power Co.*, 325 NLRB 420 (1998). There, the employer was faced with an 8(a)(5) allegation for making changes to the current employees' retirement benefits. Short of addressing the substance of the changes, the Board noted, "It is undisputed that the Respondent took this action unilaterally and without affording the union an opportunity to bargain over the announced changes." *Id.* And the Board went on to point out, "Here, however, there is no relevant contract language." *Id.* at 421. Hence, the *Georgia Power* case is of no relevance to the instant matter where Respondent bargained with Charging Party, agreed to an abundance of relevant language and then followed those terms in the transfer of employees out of Forest Park.

In *Provena Hospitals*, 350 NLRB 808 (2007), the split three member panel argued over the proper standard to be applied – the traditional standard which is clear and unmistakable waiver or, contract-coverage standard enunciated by 7th and D.C. Circuit Court of Appeals. See, *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir 1993). *Provena* involved a case where the employer implemented bonuses unilaterally and without notice to the union, relying instead upon the general provisions in the management's rights clause. The Board's majority framed its decision as an opportunity to explain and reaffirm the traditional waiver standard in "determining whether an employer has the right to make

unilateral changes in unit employees' terms and conditions of employment during the life of a collective bargaining agreement." *Id.* at 810.

Provena is simply not applicable to the instant case, where the parties met on multiple occasions and bargained over the Closure of the Forest Park facility, the transfer of employees out of Forest Park and the effects of that Closure, including the applicable terms and conditions of employment wherever the employees were moved. See Respondent's Exceptions and Brief, Brief at pp. 4-5. The 2015 Closure Agreement is not some vague provision or generic reservation of management's rights clause. Rather, it specifically addresses what terms and conditions would be applicable to employees who transferred from Forest Park to other facilities in the DFW Metroplex. Joint Exhibit 25. CGC's brushing the 2015 Closure Agreement aside and seeking application of an extraordinary standard to resurrect the terms of the collective bargaining agreement is spurious at best. Application of the terms of the 2015 Closure Agreement requires a conclusion that the parties' collective bargaining agreement went away upon the closure of Forest Park. It has no bearing on the outcome of this matter and the unilateral change allegation must be dismissed.

Finally, CGC also sites to *Allison Corp.*, 330 NLRB 1363 (2000), where the Board rejected an 8(a)(5) allegation and found a management rights clause specifically gave Respondent authority to subcontract unit work. As such, the clause was clear and unmistakable in its meaning and the union's waiver of work preservation. Hence, where the language in the contract "specifically, precisely, and plainly grants the Respondent the right[s]" it has exercised, there is no violation. *Id.* at 1365. In the instant case,

Respondent Dallas Airmotive, following the 2015 Closure Agreement, applied the 2015 Closure Agreement's terms. The terms of the collective bargaining agreement do not somehow continue on at another facility where, pursuant to the 2015 Closure Agreement, the terms and conditions applicable at the new facility are mandated to be applied to employees. That very conclusion is clear and unmistakable.

D. The Appropriate Standard is to Give Meaning to the Parties Negotiated Closure Agreement

Regardless of what standard is applied to the facts of this case, the 2015 Closure Agreement must be given meaning. As found by the Administrative Law Judge, "The 2015 Closure Agreement was drafted with Lodge 776's consent and input." ALJ Decision, p 29. Further, Respondent's good faith in the bargaining of the Closure Agreement is explicit in its warning to Charging Party that the negotiations were premature given the information it had. Respondent went so far as to plead with Charging Party to delay the bargaining until a decision had been made where and when the work would be moved. Without taking heed of that warning, the union demanded that the Closure agreement be finalized. Even then, the parties came to specific and particular terms over several unchallengeable points:

- The agreement encompassed the transition of bargaining unit work out of Forest through the complete facility closure.
- It encompassed the transfer of Forest Park employees to other facilities in the DFW Metroplex; and
- It set forth particular terms and conditions and specifically noted that all other policies, practices, and procedures at the location where the work moved will apply.

The conclusion is unavoidable, the Forest Park collective bargaining agreement came to an end at Forest Park via the application of the 2015 Closure Agreement. It cannot and should not be given a second life through its revival and reapplication to the minority of employees consolidated into the new DFW Center.

II.

Union Dues – There Was No Agreement on Deduction and Remittance of Dues

In the face of a collective bargaining agreement that was destined to be applicable to no one at Forest Park and having several witnesses who testified that they stopped paying union dues when they moved to DFW Center (rightfully so), Counsel for General Counsel now seeks out a new standard on the obligation to remit dues. Its suggested dues remittance obligation suffers from a number of infirmities. First, there was no contractual obligation for employees at DFW Center to pay union dues; the union did not negotiate such a requirement in the 2015 Closure Agreement. Second, the collective bargaining agreement, under which the dues obligation arose was only applicable to production employees working at the Forest Park Facility. And third, an order for Respondent to pay dues (versus remit) on behalf of employees is unsupported by any authority under the ACT.

Unfortunately, most of the case authority relied on by CGC is simply not helpful to the matter at hand. However, the prior section of this immediate brief is helpful. Further to the 2015 Closure Agreement, there was no ongoing duty for Respondent to remit dues to Charging Party. There was nothing to reflect that dues were to be

deducted from employee pay after they left Forest Park. Necessarily there must be clear and unmistakable evidence that dues should be deducted and remitted to Charging Party. That evidence is missing from the 2015 Closure Agreement.

A. The CBA Went Away When Forest Park was Closed.

Respondent applied the terms of the underlying collective bargaining agreement to the employees who remained at Forest Park, through its closing. For those employees and if they had signed a dues authorization form, per the terms of the collective bargaining agreement, their monthly dues were remitted to the Charging Party by Respondent. Employees testified that dues were no longer deducted from their pay when they transferred out of Forest Park. Appropriately so. Indeed, the 2015 Closure Agreement contained nothing regarding union dues or a dues checkoff. The union had not negotiated that term into the 2015 Closure Agreement. Rather, the terms and conditions at the new facility were already set when employees from Forest Park began to transfer to the facility. See ALJ Decision, page 29. Aside from those terms directly negotiated in the 2015 Closure Agreement, those existing DFW Center terms and conditions applied to all employees who transferred into DFW Center. There simply was no agreed obligation for Respondent to deduct and remit dues.

This conclusion is actually consistent with the holding in *Lincoln Lutheran of Racine*, 362 NLRB 1665 (2015) (overturning *Bethlehem Steel*, 136 NLRB 1500 (1962)). In *Lincoln Lutheran* the Board held that “an employer’s obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement.” *Id.* The holding went on to point out that an employer must continue to

withhold dues under an expired agreement unless and until the parties negotiate a new agreement. *Id.* at 1656. This is exactly what has occurred in the instant case. The parties negotiated an agreement applicable to Forest Park employees who were transferred out of that facility. That agreement – the 2015 Closure Agreement – contained nothing about an obligation to withhold dues to be remitted to the union. With no contractual obligation to withhold and remit dues, there is no evidence to support a claim that Respondent unlawfully failed to do so.

B. CGC’s Authority Dictates that the Application of the Clear and Unmistakable Waiver Standard on Dues Check-off and Remittance.

While the CGC rightfully argues to turn away from *Lincoln Lutheran* and for a return to the *Bethlehem Steel* standard, it is important to point out the dissenting opinion in *Lincoln Lutheran* and its persuasive argument that dues check-off implicates important employee section 7 rights that cannot be summarily waived via an implication that dues-checkoff continues beyond the expiration of a contract. Therefore, any waiver of those rights (e.g. the continued deduction of dues post contract expiration) must necessarily be made in a clear and unmistakable manner. *Id.* at 1666-7, fn. 15. Without question there is no clear and unmistakable evidence that the 2015 Closure Agreement somehow implies that unions dues should be deducted by the Respondent. Quite to the contrary, the agreement is silent on the issue. Therefore, deductions of dues from the pay of those who transferred to DFW Center would be illegal. It would be tantamount to an 8(a)(2) violation where a company unlawfully provides economic support to a union

without any underlying contractual obligation to do so. Such result is forbidden by the Act and therefore inappropriate in this matter.

C. Even If the CBA Somehow Survives, the Applicable Standard Should Not be Penal and Recoupment of any Dues Paid by Respondent Must be Allowed

CGC argues for a change in the standard on dues check-off and its attendance duration in association with the life of the underlying collective bargaining agreement. The argument and suggestion of a changed standard presumes the validity of ordering an employer, as part of a remedial order, to pay a union back dues on behalf of its employees. Even if such remedy is statutorily permitted, jumping to the standard put forth by CGC ignores the issue of whether or not an employer who pays such dues to the union can subsequently recoup those payments from its employees.

These issues were most recently addressed by the Board in *Alamo Rent-A-Car*, 362 NLRB 1091 (2015) aff'd., 831 F.3d 534 (D.C. Cir. 2016) (affirming Board's decision based upon procedural deficiency in the timely raising of dues issue for appeal). In *Alamo*, the Board held in a split decision that based upon underlying unfair labor practices, the employer was properly ordered, vis-à-vis the remedy, to pay the union back dues from its own funds without the subsequent right to recoup those payments from its employees. In dissent, then member Miscimarra laid out the argument for allowing an employer to recoup dues paid to the union to a remedial order and subsequently having the right to recoup those amounts from its employees. *Id.* at 1097-98. The argument, simply stated, is that dues are lawfully payable only by employees.

Therefore, an order for the employer to pay such dues out of its own funds without the right to recoupment is necessarily punitive in nature, not remedial. As such, such remedial order is beyond that allowed under the ACT. *Id.* Fortunately, in this matter the question surrounding the dues issue need not be reached as there was no obligation for Respondent to make dues deductions from employees' pay. But if there was such duty, the right to recoup any such payments made by Respondent on behalf of employees must be granted. See General Counsel Memorandum 18-02, p. 4 (Dec. 1, 2017).

D. Returning to the Old Standard, While Appropriate, Is Beyond the Scope of the Instant Case

CGC is seeking to go beyond the issues presented in this case and argues for a standard that is well past the scope of this matter. In seeking to address the precedent of the survival of dues check-off within the context of an ongoing collective bargaining agreement, sight has been lost of the present facts. Without question, the parties collective bargaining agreement went away, either through natural expiration, because there no longer were employees at the Forest Park facility or because the 2015 Closure Agreement superseded the collective bargaining agreement and all of its terms.

The dues check off clause is of no special import to rise above any of the other contractual provisions that went way in this case. It too was part of an agreement associated with a facility that shutdown. It was negotiated at the same time that the partied agreed to the terms of an applicable Closure Agreement. That agreement expressed nothing on union dues or dues check off. It expressed nothing on the survival of any provision past the closing of the Forest Park facility. What it did express,

with clarity, is the terms and conditions applicable to those Forest Park employees who transferred to another facility in the DFW Metroplex. For those employees, the collective bargaining agreement was no longer applicable. The 2015 Closure Agreement was applicable.

A perusal of the 2015 Closure Agreement reflects that the parties agreed that terms and conditions of employment existing at DFW Center would be applicable to those who transferred in from Forest Park. They did not include any deduction of union dues nor remittance of dues to the union. Even by creative assumptions and standards one cannot conclude that those terms and conditions included the deduction of dues for Charging Party's benefit (nor any of the other provisions in the collective bargaining agreement as urged by CGC). Rather, to get to a legally mandated dues remittitur based upon a CBA that had no employees to call its own, the Board must elevate the dues checkoff to a position beyond even that sought by Counsel for General Counsel. Accordingly, this cross exception must be denied.

III.

Conclusion

The 2015 Closure Agreement dictates that Counsel for General Counsel exceptions be rejected. The collective bargaining agreement went away upon the closure of the Forest Park facility. With it, its terms and conditions and the mandate to deduct and remit dues to Charging Party similarly passed. Accordingly, Counsel for General Counsel's exceptions are without merit and should be dismissed.

Dated this 20th day of May 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served this 20th day of May, 2019, to all counsel of record via electronic filing and via email.

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