

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 07

J.G. KERN ENTERPRISES, INC

Respondent,

and

LOCAL 288, INTERNATIONAL UNION,  
UNITED AUTOMOBILE, AEROSPACE  
AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW),  
AFL-CIO

Charging Party

Cases No. 07-CA-231802  
07-CA-245744  
07-CA-252759

**COUNSEL FOR THE RESPONDENT'S**  
**BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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## **I. STATEMENT OF THE CASE**

This case is before the Administrative Law Judge upon a Consolidated Complaint alleging that J.G. Kern Enterprises, Inc. (Respondent) violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act) by delaying collective bargaining with Local 288 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Charging Party), refusing to furnish information requested by the Charging Party and withdrawing recognition of the Charging Party as the bargaining representative of the bargaining unit.

The issue of whether the Respondent unreasonably delayed bargaining with the Charging Party involves a question of fact which was raised at the Hearing. The issue of whether Respondent refused to furnish information to the Charging Party that was relevant to and necessary for the Charging Party's effective performance of its statutory duties as the exclusive bargaining representative of the bargaining unit involves a question of law, as does whether the Respondent withdrew recognition of the Charging Party while Unfair Labor Practice (ULP) charges were pending and whether the pending ULP's were the basis of the Respondent's withdrawal of recognition.

### **A. UNREASONABLE DELAY IN BARGAINING**

It is undisputed that the Charging Party was certified as the exclusive bargaining agent for the bargaining unit on October 4, 2018. The Parties scheduled a bargaining session on November 5, 2018, which the Respondent's bargaining representative had to cancel. There is a question of fact as to whether any other bargaining sessions were actually scheduled or canceled during the month of November 2018. There was no bargaining session in December due to the holidays and other factors, none of which

are alleged to have resulted in bad faith delays. On January 9, 2019, the Parties met for the initial bargaining session. It was undisputed that several bargaining sessions were held in February 2019, March 2019 and April 2019. It was also undisputed that a bargaining session was scheduled for May 2019, however despite both parties being present prior to the start time of the May 2019 session, the Charging Party refused to bargain and canceled the May 2019 session on the spot. Finally, there was no dispute that at the next bargaining session held in June 2019, the Charging Party ended the second day of bargaining before it was halfway complete so that the members of the Charging Party's bargaining team could attend a party on a lake.

The issue in dispute is whether the Respondent caused unreasonable delays in bargaining by canceling one (1) bargaining session, while the Charging Party also canceled one (1) bargaining session and end a second session early for a party on the lake. The obvious answer is no.

#### **B. REFUSAL TO FURNISH INFORMATION**

The undisputed facts established that the only information that the Respondent refused to furnish to the Charging Party was the cost the employer paid for medical benefits. The Charging Party was provided by the Respondent, the summary plan booklet, the options of coverage for bargaining unit members, the amount of deductibles that applied to each option of coverage, the premium cost to the employee and any other out of pocket cost, the Respondent even provide a full census of what option of coverage each employee selected.

The question of law is whether the cost to the employer was necessary for the Charging Party to put forth a reasonable proposal for health insurance to the

Respondent. Simply put the answer is no, the Union had all of the information necessary to prepare a proposal but that the Charging Party was clearly seeking an unfair advantage to provide an insurance bid.

### **C. WITHDRAWAL OF RECOGNITION**

On November 22, 2019, the Respondent was presented with a petition (the Petition) by the bargaining unit members that stated that the employees no longer wished to be represented by the Charging Party. The Parties enter a Stipulation Agreement prior to the Hearing noting that the employees were not coerced to sign the Petition nor did the Respondent interfere with the Petition. The facts were undisputed that at the time the Petition was given to the Respondent there were two (2) pending ULP's. However, there was no evidence put forth by the General Counsel or the Charging Party, that ULP's played any role in the employees' decision to start or sign the Petition. The Respondent on the other hand presented unchallenged testimony for the reasons behind the Petition and none of those reasons involved the allegation of the ULP's.

## **II. STATEMENT OF FACTS**

On October 3, 2018, the Charging Party was certified as the exclusive representative of the employees of Respondent. (GC Exh.2). Following some communication between the Charging Party and the Respondent, a bargaining session was scheduled for November 5-7, 2018. (GC Exh.3). The Respondent's attorney canceled the November 5-7, 2018, as the attorney was not in the United States. (GC

Exh.4). The next round of bargaining was scheduled for January 10, 2019, and the Parties met on that day. (Tr. 22:23-24; Tr. 23:11-13).

During the January 10, 2019 bargaining session, the Charging Party requested information with regard to health insurance. (Tr. 23:14 – 24:8). In addition, the Charging Party presented the Respondent with four or five articles that it was proposing but nothing further at this bargaining session. (Tr. 66:22 – 67:2).

The next round of bargaining was scheduled for February 2019, and again the Charging Party presented only a few articles to discuss. (Tr. 67:3-13). At this bargaining session the Respondent provided the Charging Party with the Employee Benefit Plan which contained a summary of the benefits available to the bargaining unit members. (R. Exh.1; Tr. 31:5-10; Tr. 68:5-19; Tr. 83:25 – 84:9). The Employee Benefit Plan was dated 2018, however the employer did not change the benefits in 2019, so the 2018 Employee Benefit Plan was still applicable in 2019. This information was explained to the Charging Party. (Tr. 84:10-22).

The next round of bargaining was scheduled for March 2019, at which time the Charging Party presented a number of articles for negotiation that represented the Charging Party's full proposal and negotiations were held. (Tr. 69:9-20). Also at this session the Respondent provided the Charging Party with a breakdown of the cost to each employee based on the employee's choice of insurance coverage to include premium cost and out-of-pocket cost. (R. Exh.2; Tr. 56:19 – 57:7; Tr. 70:3-11; Tr. 85:4-17).

Once bargaining was underway the Charging Party only made two (2) requests for information pertaining to the health benefits, once in April 2019 and once in June 2019.

(Tr. 10:9-11). In those requests for information the Charging Party was seeking the cost of the health benefit to the employer. (Tr. 30:17 – 31:2). The next bargaining session were held in April 2019 during which the Parties commenced negotiations. (Tr. 70:22 – 71:6). The Respondent did not ignore this request for information but explained to the Charging Party that it would not be provided and why it would not be provided.

A bargaining session was scheduled for May 2019 and both parties were present prior to the start of bargaining, however before bargaining began the Charging Party refused to bargaining and left the facility. The May 2019 session was scheduled for two (2) days but a bargaining session was not held on either day because of the Charging Party's refusal to bargaining. (Tr. 71:7 – 73:13; Tr. 81:12 – 82:11).

The next bargaining session was set for June 2019 and was scheduled for two (2), Thursday and Friday. At the beginning of the second day it was announced by the Charging Party that the session would terminate early and as a result the Charging Party ended the day's session sometime before lunch, less than halfway through the session. (Tr. 82:12 – 83:24). Additional bargaining sessions were held between June 2019 and October 2019.

A bargaining session was scheduled for November 25, 2019. Upon arrival at the bargaining session the Respondent presented to the Charging Party a letter notifying the Charging Party that the Respondent had a good faith belief that the Charging Party was no longer supported by the majority of the bargaining unit and that the Respondent would no longer bargain with the Charging Party. (GC Exh.15; Tr. 32:1 - 33:10; 52:14 – 53:2). Following the brief discussion on November 25, 2019, no further bargaining was held between the Respondent and the Charging Party. As of November 25, 2019 topics

of bargaining that had not been agreed upon were health benefits, wages, profit sharing and a signing bonus. (Tr.34:24 – 35:4).

### **III. ARGUMENT**

#### **A. Credibility**

Nearly all of the facts of the case are undisputed with two (2) key exceptions. In addition to the bargaining session scheduled for November 5-7, 2018 which the Respondent acknowledged it canceled, the Charging Party alleged that there were two (2) additional sessions scheduled for November 26, 2018 and November 30, 2018 which the Respondent canceled. (Tr. 21:21 – 22:7). When the Charging Party filed the original ULP, it provided the NLRB with copies of emails to establish that the November 5-7, 2018 session was in fact scheduled and was canceled by the Respondent. (GC Exh.3; Tr. 18:12 – 18). The Charging Party asserts that the November 26-27, 2018 session was scheduled by text, but unlike the email scheduling the November 5-7, 2018 session, the Charging Party never provided that evidence to the NLRB during the investigation of the ULP. (Tr. 21:21 – 22:1). Further, the Charging Party was in possession of the text until approximately June 2020, when the text was alleged to have been lost, and never provided such a text to the General Counsel. (Tr. 23:2 – 10; 37:19 – 38:5). It should also be noted that the Charging Party provided the email of the canceled November 5, 2018 session on November 27, 2018, only one day after the supposed November 26, 2018 session which was alleged to have been scheduled and canceled. Respondent on the other hand asserts that no such text ever existed nor were any sessions scheduled for November 26-27, 2018 or November 30, 2018, no less

canceled thereafter. (Tr. 101:24 – 102:8; Tr. 102:23 – 103:4). It stands to reason that if there were text communications between the Charging Party and the Respondent whereby either bargaining sessions were scheduled or canceled, during the year and a half that the Charging Party was in possession of such texts, the Charging Party would have provided them to the NLRB during its investigation, just as it did with the email of the November 5-7, 2018 negotiations, or to the General Counsel during its preparation for the Hearing. The Respondent asserts that no such communications existed which is the reason they were not provided.

The other fact in dispute is whether the Respondent failed or refused to provide financial information to the Charging Party as it relates to employee cost, and whether such refusal is the reason the Parties were not able to reach an acceptable collective bargaining agreement. The General Counsel asserts that several information requests were made by the Charging Party and that the Respondent did not provide the requested information. (GC Exh.1(aa)). The Respondent provided to the Charging Party, the Employee Benefit Plan (Res. Exh. 1), the cost of the benefits to the employees, as well as out of pocket cost (Res. Exh. 2), and the census of which employees elected which insurance (Res. Exh. 3). The facts clearly established that the only information not provided to the Charging Party was the cost of the medical insurance to the Employer. The Respondent explained that the reason it did not provide the information was because it provided the Charging Party with an unfair advantage in competing for the Employer's insurance business. (Tr. 74:20 - 75:17).

## B. Delays in Bargaining

The Charging Party was certified on October 3, 2018 and the Parties agreed to bargain one (1) month later on November 5, 2018. Due to certain circumstances, the Respondent's bargaining representative was out of the country and had to cancel the November 5, 2018 session. There is no evidence to establish that the parties agreed to meet again in November 2018. The Parties agreed to a meeting in January 2019, of which the yearend holidays played a factor not to meet in December 2018. As a result, the Respondent canceled one (1) bargaining session. Likewise, the Parties agreed to meet in May 2019 in order to bargain but on the day of bargaining the Charging Party canceled the bargaining session. The Charging Party further ended the next session in June 2019 early by ending the second day of bargaining before lunch.

Section 8(d) of the Act provides in part that collective bargaining is: ". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. So while the Act requires employers and the bargaining representatives to meet at reasonable times and act in good faith, it is beyond common sense that the General Counsel and the Charging Party would assert that the Respondent was unreasonable and acted in bad faith when canceling one (1) bargaining session, while the Charging Party also canceled one (1) bargaining session but also terminated a bargaining session earlier to attend a party.

## C. Respondent's Duty to Furnish Information

It is well established that "[t]he duty to bargain in good faith requires an employer to furnish information requested and needed by the employees' bargaining

representative for the proper performance of its duties to represent unit employees of that employer.” Coca-Cola Bottling Co. of Chicago, 311 NLRB 424, 425 (1993) (citing NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967)). Despite this duty to furnish information requested and needed by a union, “an employer’s statutory obligation to provide information presupposes that the information is relevant and necessary to a union’s bargaining obligation vis-a-viz its representation of unit employees of that employer.” Id. Whether an employer is required to supply information is “determined on a case-by-case basis,” and “depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it.” Id. Consequently, even if an information request is presumptively relevant, that relevance may be rebutted.

Armstrong World Industries, Inc., 254 NLRB 1239, 1245 (1981). The Charging Party could have prepared a health benefit proposal based on the Union’s standard costing structure without knowing what the Employer paid, just as if the Employer did not have an existing medical plan.

Within the first two bargaining sessions, the Respondent, in a timely manner, provided the Charging Party with the Employee Benefit Plan, the employee cost of the medical plan, to include out-of-pocket cost, and a breakdown of which employees selected which medical plan. “In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident.” West Penn Power Co., 339 NLRB 585, 587 (2003). “[T]he duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as

promptly as circumstances allow." *Id.* It is clear that the Respondent made a good faith effort to provide all of the information that was requested and relevant for the Charging Party to offer a proposal for health benefits.

The Parties had several outstanding issues at the time the employees submitted the Petition to the Responded. These issues included health benefits, but also wages, profit sharing and a signing bonus. While negotiating in good faith on mandatory subjects is required, agreement on them is not. "Conversely, both employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims". *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573; 29 U.S.C. § 158(d). On the contrary, "within that area neither party is legally obligated to yield." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958) ("Borg-Warner ").

On mandatory terms, the Act concerns itself only with the process of collective bargaining. The results are largely left to the parties and are a function of their respective economic positions. There is no requirement to accept the other side's offer on mandatory subjects, after a good-faith negotiating. See, e.g., *Colorado-Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1403-05 (10th Cir.1991). So while General Counsel may argue that refusal of the requested information negatively impacted the collective bargaining process, there is clear evidence that even if the requested information was provided, a collective bargaining agreement at the time of the Petition was unlikely as there were other bargaining issues unrelated to health insurance that were unresolved.

D. Respondents Refusal to Recognize the Charging Party as the Bargaining for the Respondent's Employees.

In a July 3, 2019 decision involving *Johnson Control Inc.*, 368 NLRB No. 20 (2019) the Board updated its legal test for the withdrawal of recognition. The Board held that the employer must have a good faith belief that the union no longer enjoys the majority support of the bargaining unit, and that there be no outstanding unfair labor practice charges that were the direct cause of the union losing support. On November 22, 2019, more than 12 months after the Charging Party was certified, the employees of the Respondent present a petition that was signed by more than 80% of the bargaining unit stating that they no longer wished to be represented by the Charging Party. As a result the Respondent notified that Charging Party that it would no longer recognize the Charging Party as the bargaining representative of its employees.

There is no allegation that the Respondent forced or coerced the employees to sign the Petition, therefore it is clear that the Respondent had a good faith belief that the Charging Party no longer had the majority support of the bargaining unit. (Jt. Exh. 1). While there were outstanding ULP's at the time the Petition was presented to the Respondent, there is also no allegation that the ULP's played a roll if the decision of the bargaining unit members and tainted the Petition. (Tr. 95:15 – 19). Therefore the Petition was not the result of coercion by the employer or tainted by the outstanding ULP's. As a result, neither the Charging Party nor the General Counsel are able to establish that the Charging Party maintained or enjoy a majority support from the bargaining unit. In *Conair Corp. N.L.R.B.*, 721 F.2dD 1355 (C.A.D.C., 1983) the Court held that "Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of

majority employee assent to union representation; we therefore decline to enforce the NLRB's bargaining order."

#### **IV. CONCLUSION**

The evidence and law supports that the Respondent did not violate Sections 8(a)(1) and 8(a)(5) of the Act. The Respondent did not cause an unreasonable delay in bargaining, nor did it refuse to provide information to the Charging Party that prevented the Charging Party from carrying out its duties and responsibilities. In addition the General Counsel and Charging Party failed to present any evidence to support a claim that the Petition presented to the Respondent by the bargaining unit members was tainted in anyway as a result of the two (2) pending ULP's. Assuming there is a finding that the Respondent did create an unreasonable delay in bargaining or failed to furnish necessary information, the ruling should still honor the proper wishes and the Section 7 rights of the bargaining unit to no longer be represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, or its Local 288.

Dated: September 8, 2020

Respectfully submitted,

J.G. KERN ENTERPRISES, INC.



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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2020, Respondent's Post Hearing Brief was electronically filed and served upon the following parties:

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Dated: September 8, 2020



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