

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

Advice Memorandum

DATE: February 13, 2004

TO : Helen Marsh, Regional Director
Region 3

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

SUBJECT: UnionTools, Inc. 530-8090-4000
Case 3-CA-24416 530-6067-4011-7700
530-6067-2070-6700
530-6050-0120

This case was submitted for advice as to whether, in the circumstances of this case, the Employer's insistence on a contract extension during bargaining over a relocation decision violates Section 8(a)(5). Although the Employer actually demanded an extension of the entire contract, the evidence strongly suggests that it was concerned with extending only the labor cost-related provisions of the contract and that the limited nature of its concerns was repeatedly made clear to the Union. In these circumstances, the evidence fails to show that the Employer insisted on extending non-economic terms of the contract such that its actions would arguably violate Section 8(a)(5), and the charge should be dismissed, absent withdrawal.

FACTS

UnionTools, Inc. (the Employer) manufactures manual lawn and garden tools. Since the 1950's, the Boilermakers Local No. 1916, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Union) has represented a unit of production, maintenance and warehouse employees at the Employer's Frankfort, New York facility. There are presently approximately 155 employees in the unit. The current contract extends from July 1, 2001 to June 30, 2004.

On May 8, 2003,¹ the Employer informed the Union that it was seriously considering relocating its assembly operations from Frankfort to its newer Sheppardsville, Kentucky facility. The Kentucky facility is non-union. The Employer told the Union that it intended to change its manufacturing method from an assembly line operation to a "cellular assembly" system. This conversion would require a \$1 million investment in new and refurbished equipment. The Employer contends that the Kentucky facility offered a number of advantages, including considerably lower labor

¹ All subsequent dates are 2003.

costs. The Kentucky facility is the Company's distribution center, so relocating to that facility would minimize the costs associated with moving the Company's products from New York to Kentucky for distribution. Also, the Kentucky facility was newer and would thus require fewer capital expenditures or structural improvements to accommodate the equipment necessary for the new assembly system. Because the decision as to the location of the new operation would turn partly on labor costs, the Employer offered to bargain over both the decision and its effects.

Between May 16 and September 17, the parties met nine times to discuss the decision. The discussions, based on the Employer's analyses of annualized labor and non-labor costs, focused on the difference in total operating costs between the two locations.² At the first meeting (May 16), the Employer announced that no matter where the assembly work would be performed, 40 to 45 fewer employees would be needed. As of that date, 80 to 85 unit employees were involved in assembly operations.

On June 3, the Employer submitted a written proposal, with the wage rates left blank. The proposal included a provision extending the current contract through June 30, 2007. The Employer explained several times during the negotiations that the reason for its proposed contract extension was to ensure that the Company would be able to realize the savings promised by such economic concessions as the Union might offer. It explained that it needed to be able to rely on the Union's concessions for a few years. On August 18, the Employer provided its rationale in writing, stating:

² The cost analysis the Employer provided to the Union on May 23 estimated that the annual assembly labor costs in New York, based on the rates set forth in the collective bargaining agreement, would be \$1,870,335, and that the estimated annual labor costs in Kentucky would be \$1,200,930. The cost analysis estimated annual operating costs (building maintenance and lease costs) at New York and Kentucky at \$383,000 and \$177,500, respectively. The remaining cost items, including capital expenditures for floor and roof repair and mechanical systems necessary for the conversion to a cellular assembly system, were estimated to be \$184,728 for New York and \$125,000 for Kentucky. The total cost summary estimated a savings of \$934,633 if the new assembly operation were installed in Kentucky. On June 23, the Employer submitted a revised cost analysis, projecting an overall cost saving of \$1,055,165.

[L]abor costs and operating practice certainty and stability are critical to any decision regarding such a large capital investment as that involved with the cellular assembly initiative. Thus, if the company decides to locate the new cellular assembly process in [New York], it does not want to negotiate a new agreement next summer, less than one year from now. The company simply expects longer term labor peace without the risk of strike or losing the very cost and operational advantages it needs. While cost savings cannot be quantified, the contract extension is an integral component of these negotiations and the decision-making process regarding the location of cellular assembly.

On August 25, the Union presented a proposal to keep the assembly operation in New York that included a reduction in the average hourly assembly rate from \$13.46 to \$10.74, a 12% wage reduction for all bargaining unit employees, and accepting Employer-proposed modifications pertaining to overtime, employee work groups, and vacation. The Employer said that there would be no agreement to keep the assembly operation in New York without the contract extension. The Union refused to discuss the proposed contract extension, stating that it viewed it as a permissive subject upon which the Employer could not insist to impasse.

On September 5, the Employer reduced the proposed length of the contract extension from three to two years and added a 2% yearly wage increase over and above negotiated reduced wages. On September 17, the Union proposed a 17% wage reduction for all bargaining unit employees. The Employer replied that, although the Union's proposal closed the cost savings gap between the two locations, there would be no agreement unless the Union agreed to the two-year contract extension. The Union again asserted that contract extension was a permissive subject of bargaining, and stated that the Employer's proposal on this was "fundamentally unacceptable." On September 23, the Employer announced its decision to relocate the assembly operation to Kentucky.

The Union filed the instant charge on August 29, alleging that the Employer violated Section 8(a)(1), (3) and (5) of the Act by failing and refusing to bargain in good faith concerning its relocation decision, in that it has engaged in regressive and surface bargaining and insisted to impasse on the Union's assent to certain permissive subjects of bargaining. The charge also alleges that the Employer engaged in bargaining tactics that are inherently destructive of union rights, and that it decided to relocate in order to avoid the Union. The Region submitted for

advice the issue of whether the Employer's insistence on a contract extension was unlawful, and concluded that all remaining allegations lack merit.

The Union alleges that it was unlawful for the Employer to insist on a change in the duration of the contract because, as a term set forth in the collective bargaining agreement, it is a permissive subject of bargaining. The Union also claims that contract duration is not a direct or indirect labor cost that, under Dubuque Packing Co.,³ would make an employer's decision to relocate a mandatory bargaining subject.

The Employer asserts that in order to realize the savings promised by any economic concessions the Union might offer, it needed to be able to rely on those concessions for a few years, and that there was too little time remaining under the current contract to realize the necessary savings. At the time the Employer announced its decision to relocate, there were only nine months remaining under the contract. The Employer further argues that, in contrast to the Union's adamant refusal to even consider any contract extension, the Employer demonstrated its good faith by reducing its proposed extension from three to two years and offering annual wage increases. The Employer contends that contract duration is a mandatory subject of bargaining and that it is lawful to insist to impasse on a mandatory subject in mid-term bargaining.

ACTION

We conclude that the evidence in this case strongly suggests that the Employer, in demanding an extension of the duration of the contract, was concerned with extending only those provisions dealing with labor costs, and that the limited nature of its concern was repeatedly made clear to the Union. Thus its insistence on the contract extension should not be alleged as unlawful.

As discussed below, our analysis rests upon two principles of Board law. First, the Board's decision in Milwaukee Spring II⁴ shows that an employer may lawfully insist on changes to contract provisions involving labor costs associated with a decision to relocate. Second,

³ 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), cert. dismissed 511 U.S. 1138 (1994).

⁴ Milwaukee Spring Division, 268 NLRB 601, 602 (1984) (Milwaukee Spring II), affd. sub nom. Auto Workers Local 547 v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

although it has been alleged that the Employer illegally insisted to impasse on a non-mandatory subject of bargaining, Regal Cinemas⁵ demonstrates that a party may lawfully insist upon any matter intertwined with and essential to the meaningful resolution of the mandatory subject being negotiated.

The evidence demonstrates that this Employer was primarily or exclusively concerned with labor costs affecting its decision to relocate. It repeatedly emphasized (both orally and in writing) that its concern in these negotiations was to ensure that the wage and other economic concessions the Union was offering would last long enough for the Employer to realize the labor cost savings necessary for it to decide not to relocate. Its August 8 letter to the Union explained that "labor costs and operating practice certainty and stability" were critical to the Company's decision about where to make the large capital investment involved in its conversion to a system involving "cellular assembly" of its product. The letter also said that "[w]hile cost savings cannot be quantified, the contract extension is an integral component of these negotiations...", thereby clearly linking the value or amount of cost savings with the Company's reason for insisting on a contract extension.⁶ In this situation, the duration clause of the contract is in effect one of the economic terms of the contract because, together with the wages and other economic concessions being offered by the Union, it determines the overall value of the concessions being offered.

The Employer contends that the nine months remaining in the current contract was an insufficient period to allow it to realize the necessary cost savings. If this is true, some extension of the duration of the provisions relating to labor costs had to be negotiated if there was to be any hope

⁵ 334 NLRB 304 (2001).

⁶ The letter also stated that the "company simply expects longer term labor peace without the risk of strike or losing the very cost and operational advantages it needs." Although that sentence arguably suggests that the extension might have been motivated in part by a desire to avoid "the risk of strike" in a non-economic sense, we do not believe that would be an appropriate interpretation. It seems reasonable to interpret that language as meaning that the Company feared that the Union might at some early date offer it the Hobson's choice of either enduring a strike or giving up the concessions that it relied on in deciding not to relocate.

of addressing the Employer's substantive concern about the adequacy of the concessions being offered. The Employer showed some flexibility by reducing its proposed contract extension from three to two years and added an annual 2% wage increase beyond the negotiated reduced wages. This proposal demonstrates the Employer's willingness to negotiate the length of the contract extension. Indeed, given the total lack of evidence of Employer concern about contractual issues other than those dealing with labor costs, we believe that if the Union had proposed limiting the contract extension to the terms of its concessionary offer, the Employer would likely have accepted that limitation. For these reasons, we do not view the Employer as having insisted on an extension of any of the non-economic terms of the contract.

Since the Employer essentially insisted on extending only the contract provisions related to labor costs, this case is governed by the Board's decision in Milwaukee Spring II.⁷ There the union refused to bargain about wages and benefits in bargaining over a proposed relocation, whereupon the employer relocated the work. The Board held that when the union refused to bargain over the employer's proposal to modify, mid-term, contract provisions relevant to the economic considerations motivating the employer's proposed relocation, the employer, having complied with its bargaining obligation, became free to relocate without violating Section 8(a)(5).⁸ Applying that holding to the instant case, we find that when the Union refused to bargain about extending the current contract in order to allow the Employer to realize the benefits of the economic concessions being proposed, the Employer was free to decide to relocate without violating Section 8(a)(5).

We also note that the Union relies on a legal theory that was rejected by the Board in Milwaukee Spring II. The union there claimed that the company, by insisting on changes in the wage and benefits provisions in the parties' collective bargaining agreement, had effectively modified those provisions in violation of Section 8(d).⁹ The Board explained that the company did not in fact modify the contract's wage and benefits provisions, but merely proposed that they be modified.¹⁰ Indeed, if the position of the

⁷ 268 NLRB at 601.

⁸ Id. 603-604, and n. 13.

⁹ Id. at 602.

¹⁰ Id.

union in Milwaukee Spring II and the Union in the present case on this point were correct, meaningful bargaining over wage or other economic issues, as contemplated by Dubugue,¹¹ would be impossible in any mid-term context because such issues will virtually always be the subjects of provisions in the parties' contract.

The Union also alleges that the Employer acted unlawfully by insisting on extending the contract on the theory that contract duration is a non-mandatory subject of bargaining. As noted above, the rule prohibiting insistence to impasse on non-mandatory subjects of bargaining is not violated where the matters being insisted upon are limited to issues intertwined with and essential to the meaningful resolution of the issue being negotiated -- in this case, the adequacy of the Union's offered economic concessions. For example, in Regal Cinemas,¹² the Board held that during bargaining over severance, it was lawful for the employer to insist that employees sign certain limited releases as a condition of receiving severance pay because bargaining over the release went "hand in hand" with bargaining over severance.¹³ The Board stated that it would be difficult for the employer to "bargain meaningfully" over severance without being able to fix its costs.¹⁴ Similarly, in the instant case, the length of time that the Union's proposed concessions would last was essential to determining the value of those concessions.¹⁵

¹¹ Supra, 303 NLRB at 391.

¹² 334 NLRB at 304.

¹³ Id. at 305-306. The Board held that the record failed to establish that the employer was insisting to impasse on a general release of all employee claims against it, but rather that it merely proposed that the employees sign "release agreements." The evidence there suggested that the employer was "prepared to bargain over the terms of the release and was thus open to a narrower release." Id. at 305.

¹⁴ Id. at 305-306.

¹⁵ The Board in Regal Cinemas specifically noted support for its conclusion in "cases where the Board has suggested that there must be some flexibility in permitting employers at least to link proposals on permissive subjects with proposals on mandatory subjects." Id. at 306, citation omitted. Thus the Board would likely find no violation in the instant case even if it were stipulated that contract duration in a mid-term bargaining context is a permissive

Accordingly, absent withdrawal, the Region should dismiss the charge alleging that the Employer's insistence on the contract extension was unlawful.

B.J.K.

subject, because here it is clearly intertwined with the value of the concessions offered by the Union.