

Vermont Foundry Co., a Division of Mahoney Foundries, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Case 33-CA-9050

February 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On May 30, 1990, the General Counsel of the National Labor Relations Board issued a complaint against the Vermont Foundry Co., a Division of Mahoney Foundries, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. On June 13, 1990, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint.

On August 8, 1990, the General Counsel filed a Motion for Summary Judgment. On August 14, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

On August 28, 1990, the Respondent filed a response to the Notice to Show Cause admitting all factual allegations of the complaint,¹ but denying that it violated Section 8(a)(5) and (1) of the Act. On August 31, 1990, the General Counsel filed a response in opposition to Respondent's "showing of cause."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In his Motion for Summary Judgment, the General Counsel contends that the Board should find true the factual allegations admitted by the Respondent and should issue an order based on those findings. We agree.

The Respondent admits the factual allegations of the complaint but denies that it is a successor employer to MCC Clayton Mark Foundry, a unit of Mark Controls Corporation, and that the unit involved here constitutes a unit appropriate for bargaining. In a prior decision involving the same Respondent and Union, *Vermont Foundry Co.*, 292 NLRB 1003 (1989), the Board found that the Respondent is a successor employer to MCC Clayton Mark Foundry and that the unit is an appropriate unit. The Board ordered the Respondent to bargain with the Union as the exclusive bargaining

¹ The Respondent asserts that the General Counsel's complaint is flawed by its failure to allege specifically both the Respondent's bad faith in changing its employees' wages, hours, and working conditions and that its employees were restrained and coerced in the exercise of their Sec. 7 rights. These assertions are frivolous. The complaint expressly alleges that the Respondent's failure to bargain in good faith violated Sec. 8(a)(5) and (1) of the Act.

representative of employees in the unit. The Respondent acknowledges in its answer that, by stipulation dated June 30, 1989, it accepted the Board's findings of fact and conclusions of law in that decision. In that stipulation the Respondent explicitly waived its right to contest either the propriety of the Board's Order or the underlying findings of fact and conclusions of law. Thus, neither the Respondent's status as a successor employer nor the appropriateness of the unit are in issue here.

The Respondent admits, and we find, that without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's unit employees, it changed wages, hours, and terms and conditions of employment by laying off employees, transferring employees to different shifts, changing times for mealbreaks, and changing starting and finishing times of employees.

The Respondent asserts generally that circumstances exist showing a necessity for the unilateral changes and, thus, that its admissions are insufficient to warrant summary judgment. In support of its position, the Respondent relies on *NLRB v. Katz*, 369 U.S. 736 (1962), in which the Court recognized "the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action" *Id.* at 748.

If by "necessity" the Respondent means economic necessity, that is not a valid defense to the allegations. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614 (1973), and 207 NLRB 1063, 1064 (1973), *enfd. mem.* 505 F.2d 1302 (5th Cir. 1974), *cert. denied* 423 U.S. 826 (1975); *International Distribution Centers*, 281 NLRB 742 (1986); *Raymond Prats Sheet Metal Co.*, 285 NLRB 194 (1987). If the Respondent means some other kind of necessity, it has not alleged facts or circumstances in support of its assertion either in its answer to the complaint or in its response to the Notice to Show Cause. Section 102.20 of the Board's Rules and Regulations provides that "any allegation in the complaint not specifically denied or explained . . . shall be deemed to be admitted to be true" Further, the Respondent's attempt to raise a defense for the first time in its response to the Notice to Show Cause is untimely. *Daywork Fire Protection*, 299 NLRB 328 (1990); *Middle Eastern Bakery*, 243 NLRB 503, 504 *fn.* 1 (1979).

The Respondent having admitted the factual allegations of the complaint and having, in effect, failed to advance more than a bare assertion that its actions were legally justified and thus do not constitute unfair labor practices, we find no material issues of fact exist regarding the Respondent's unilateral changes in employee terms and conditions of employment. Accord-

ingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Indiana corporation with an office and place of business located at Vermont, Illinois, is engaged in the business of manufacturing brass and aluminum castings. During the 12-month period ending May 30, 1990, a representative period, the Respondent, in the course and conduct of its operations sold and shipped from its Vermont, Illinois facility products valued in excess of \$50,000 directly to points outside the State of Illinois, and purchased and caused to be transferred and delivered from States other than the State of Illinois to its facility goods and materials valued in excess of \$50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

At all material times the Union has been the exclusive collective-bargaining representative for the employees of the Respondent in the following appropriate unit:

All production and maintenance employees at the Employer's plant at Vermont, Illinois including plant clericals and truck drivers, excluding all office clerical employees, confidential employees, professional employees, guards, working foremen and all supervisors as defined in the Act.

Since on or about March 26, 1990, the Respondent has announced and effectuated certain changes regarding wages, hours, and working conditions, including shift transfers, and certain layoffs in the grinding and the foundry department. Since on or about April 2, 1990, the Respondent has announced and effectuated changes in times for mealbreaks and in starting and quitting times. Since on or about April 9, 1990, the Respondent has changed the starting time for the second shift. Since on or about December 1, 1989, the Respondent has laid off certain employees.² The Respondent engaged in these acts and conduct without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees with respect to these decisions and their effects.

²The laid-off employees include Billy Smith, Nancy Blakely, Rick Barnes, Troy Rhodes, James McFarland, William Barrett, Jeff L. Smith, Mary Curtis, Eric Martin, Jeff Dutton, Anett Ziesler, James Hickle, Benjamin Cox, Brad Heath, Medesta Pigg, Craig Adkins, Samantha Beans, Rodney Koenig, and Billy Troutman.

We find that these acts constitute an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Vermont Foundry Co., A Division of Mahoney Foundries, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally transferring employees to different shifts, laying off employees, changing times for mealbreaks, and changing starting and quitting times, all without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees with respect to these decisions and their effects, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees, transferring employees to different shifts, changing mealbreak times, and changing starting and quitting times, all without affording the Union notice and an opportunity to negotiate, we shall require the Respondent to rescind the unilateral changes and to reinstitute the wages, hours, and other terms and conditions of employment which were in effect before the Respondent engaged in the unlawful conduct.³ Further, we shall order the Respondent to bargain with the Union concerning these decisions and their effects on the unit employees.

In addition, we shall order the Respondent to make whole those employees who suffered any loss of earnings or other employment benefits as a result of being transferred to a different shift, having mealbreak times changed, or having starting or quitting times changed. The loss of earnings shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent to offer immediate reinstatement to and make whole those employ-

³Nothing in our Order is to be construed as requiring rescission of any increase in wages or other benefits that has been granted the unit employees.

ees who were unlawfully laid off, less any interim earnings. The Respondent's backpay liability shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Finally, we shall require the Respondent to post and abide by a notice to its employees.

ORDER

The National Labor Relations Board orders that the Respondent, Vermont Foundry Co., a Division of Mahoney Foundries, Inc., Vermont, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO over its decisions, and the effects of its decisions, to transfer employees to different shifts, lay off employees, change times for mealbreaks, and change starting and quitting times.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, rescind all unilateral changes and reinstitute the wages, hours, and other terms and conditions of employment that were in effect prior to its unlawful conduct.

(b) Bargain with the Union concerning its decisions, and the effects of its decisions, to transfer employees to different shifts, lay off employees, change of employee mealbreak times, and change starting and quitting times.

(c) Make whole employees for any loss of earnings and other benefits suffered as a result of its unlawful conduct in transferring employees to other shifts, changing times for mealbreaks, and changing starting and quitting times, in the manner set forth in the remedy section of this decision.

(d) Offer to employees laid off about April 2, 1990, and December 1, 1989, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the

unlawful layoffs in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Vermont, Illinois facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this order what steps the Respondent has taken to comply.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally transfer employees to different shifts, lay off employees, change times of employees' mealbreaks, or change employees' starting and quitting times without providing the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL-CIO and its Local 844, with notice and an opportunity to bargain about such decisions and the effects of such decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind all unilateral changes and reinstitute the wages, hours, terms and conditions of employment that were in effect prior to our unlawful conduct.

WE WILL, on request, bargain with the Union concerning the decisions, and the effects of the decisions, to transfer employees to different shifts, lay off em-

ployees, change meal times, and change starting and quitting times.

WE WILL make whole those employees who suffered a loss of earnings or other employment benefits as a result of our unlawful conduct in transferring employees to different shifts, changing times for mealbreaks, and changing starting and quitting times.

WE WILL offer those employees laid off about April 2, 1990, and December 1, 1989, immediate and full reinstatement to their former jobs or, if those jobs no

longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings or other benefits resulting from their layoffs, less any net interim earnings, plus interest.

VERMONT FOUNDRY Co., A DIVISION OF
MAHONEY FOUNDRIES, INC.