

Laidlaw Waste Systems, Inc. and Excavating, Grading, Asphalt, Private Scavengers and Automobile Salesroom Garage Attendants, Local 731, International Brotherhood of Teamsters, AFL-CIO.¹ Case 13-CA-29877

April 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 30, 1991, Administrative Law Judge Stephen J. Gross issued the attached decision.² The General Counsel filed exceptions, the Respondent filed a brief in opposition to the General Counsel's exceptions, and the General Counsel filed a reply to the Respondent's opposition.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ conclusions and to adopt the remedy as modified⁴ and the recommended Order.

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² The judge issued errata to his decision on October 15 and 16, 1991.

³ In the table in the remedy section of the judge's decision showing the Respondent's wage rates and dates of wage increases for the years 1984 through 1989, we correct the entry for 1987, as requested by the General Counsel, to indicate that the effective date of the Respondent's pay action that year was October 5.

⁴ The General Counsel excepts to the judge's failure to order the Respondent to pay annual wage increases after 1990 and make whole employees for losses, if any, resulting from the Respondent's failure to pay such increases. We deny this exception because the Respondent's failure to pay annual wage increases after 1990 was neither alleged in the complaint nor established on the record.

We note, however, that the judge's decision, which we adopt with minor modification, addresses, in part, the General Counsel's concern regarding subsequent wage increases. The judge found that the terms of employment of certain of the Respondent's drivers and helpers included an annual wage increase every October, and the judge ordered the Respondent to cease and desist from unilaterally making changes in its employees' terms and conditions of employment. Accordingly, in the absence of the parties' reaching agreement or bargaining to impasse over this matter, any change in the term of employment under which the drivers and helpers received annual wage increases would be prohibited by this provision of the Order.

We shall, therefore, amend the judge's remedy to state the Respondent's make-whole obligation solely in terms of the amount of the employees' October 1990 hourly increase rather than prescribing a particular hourly rate. We do so in order to avoid any implication concerning future increases, because such increases, if required, would raise the hourly rate that the Respondent is obligated to pay.

Finally, in agreement with the General Counsel, we decline to adopt the judge's remedy insofar as it requires the parties to bargain over the date in October 1990 from which the wage increase should be made effective. Rather, we leave to the compliance stage of this

AMENDED REMEDY

The two paragraphs in the judge's decision immediately preceding the recommended Order shall be deleted and the following shall be inserted in their place:

The Respondent shall pay such employees the 40-cent-per-hour wage increase retroactively from October 1990 until such time as the Respondent bargains in good faith with the Union to agreement or impasse over the wage increase.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laidlaw Waste Systems, Inc., Rolling Meadows, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

proceeding the matter of the specific date in October 1990 from which the make-whole remedy should run.

Scott Gore, Esq., for the General Counsel.

Glenn H. Schlabs, Esq. (Sherman & Howard), of Colorado Springs, Colorado, for the Respondent.

Robert E. Bloch, Esq. (Dowd & Resnick), of Chicago, Illinois, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. We are concerned here with Laidlaw Waste Systems' facility in Rolling Meadows, Illinois. Laidlaw operates a refuse hauling business from that facility. In April 1990 the Board certified Teamsters Local 731 (the Union) as the representative of a unit consisting of the drivers, helpers and certain other employees that Laidlaw employs at its Rolling Meadows and Elgin, Illinois facilities.¹

For a number of years prior to 1990 Laidlaw granted annual wage increases to many of the members of that unit. But in 1990 (after the Union had been certified) Laidlaw decided not to grant any wage increase. Laidlaw did not bargain with Union about that decision. The General Counsel contends that Laidlaw thereby violated Section 8(a)(5) and (1) of the Act.

The General Counsel also contends that statements that Laidlaw supervisors made to unit employees about that decision violated Section 8(a)(1) of the Act.

¹ The General Counsel alleges, Laidlaw admits, and I find that Laidlaw is an employer engaged in commerce within the meaning of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of the Act. The unit represented by the Union at Rolling Meadows: All full-time and regular part-time commercial, residential, roll-off, and municipal recycler drivers and helpers, container repairmen and deliverymen, and recycling processor employees employed at the Employer's facility located at 3651 Blackhawk Drive, Rolling Meadows, Illinois; 3631 Berdnick, Rolling Meadows, Illinois; and 307 Ramona, Elgin, Illinois; but excluding all mechanics, servicemen, truck washers, tiremen, clerical employees, professional and sales employees, guards and supervisors as defined in the Act.

My conclusion is that Laidlaw has violated the Act as alleged by the General Counsel.²

I. LAIDLAW'S VIOLATION OF SECTION 8(A)(5)

A. *The General Counsel's Prima Facie Case*

The evidence that makes up the General Counsel's prima facie case is largely undisputed.

Effective each October, in the years 1986, 1987, 1988, and 1989, all of Laidlaw's residential drivers and helpers (except "recycling" drivers and new employees who were still in their 4-month probation periods) received pay increases, as follows:

Year	Wage Increases	New Wage Rate
1985	—	\$12.86
1986	\$.20	13.06
1987	.20	13.26
1988	.50	13.76
1989	.40	14.16

That pattern goes further back than 1986. Laidlaw did not grant its residential drivers any pay increases in 1985. But in the years 1980 through 1984 Laidlaw (or its predecessor company) granted wage increases at least annually, although in some years Laidlaw treated some of its residential drivers as independent contractors and did not grant pay increases to those drivers.

On March 23, 1990, the members of Laidlaw's Rolling Meadows unit voted to be represented by Teamsters Local 731. On April 13, 1990, the Board certified the Union as the exclusive bargaining representative of the unit. In 1990 Laidlaw granted no wage increase to its residential drivers and helpers.

The General Counsel does not contend that Laidlaw withheld the increase because of the arrival of the Union. That is, no violation of Section 8(a)(3) is alleged. But the General Counsel does claim, and the evidence shows, that Laidlaw did not advise the Union that the company intended to refrain from granting a wage increase. Additionally, in late October the Union wrote to Laidlaw, demanding that the company bargain over "this change in terms and conditions of employment." Laidlaw refused, claiming that the continuation of existing wage rates constituted a maintaining of the status quo during the pendency of litigation concerning the Union's representation of the Laidlaw unit. (Laidlaw had appealed the Board's decision to the Seventh Circuit Court of Appeals. That appeal was decided in the Board's favor subsequent to the hearing in this proceeding: *Laidlaw Waste Systems v. NLRB*, 934 F.2d 898 (1991), enf. 299 NLRB No. 124 (Sept. 24, 1990) (not reported in Board volumes).³

²This proceeding began on November 20, 1990, with the filing of a charge by the Union. A complaint issued on December 28, 1990, and then was amended on April 25, 1991. I heard the matter in Chicago on May 9, 1991. The General Counsel, the Respondent, and the Charging Party have filed briefs.

³The fact that, as of October 1990, Laidlaw was in the midst of appealing the Board's certification of the Union is irrelevant to the issues here. See, e.g., *Mike O'Connor Chevrolet-Buick-GMC*, 209

On the facts stated above, the General Counsel has made out a prima facie showing that Laidlaw violated Section 8(a)(5). See *Central Maine Morning Sentinel*, 295 NLRB 376 (1989); *Venture Packaging*, 294 NLRB 544 (1989); *Medical Center at Princeton*, 269 NLRB 248 (1984).⁴

B. *Laidlaw's Defense*

Before considering Laidlaw's response to the General Counsel's case, a brief discussion of the rather unusual evidentiary setting of this case is unavoidable. The hearing opened with a discussion about a subpoena issue. The General Counsel and the Union, anticipating that Laidlaw was going to put on evidence about the lack of profits at the Rolling Meadow facility in 1990, demanded, inter alia, numerous documents that might show whether Laidlaw suffered comparable losses in earlier years (when Laidlaw had granted wage increases). Laidlaw petitioned to revoke the subpoenas. After hearing from Laidlaw's counsel about why Laidlaw wanted to prove that the Rolling Meadows facility suffered losses in 1990, I ruled that evidence about those losses was irrelevant to the issues at hand. That ruling, in turn, eliminated the need for the documents that the General Counsel and the Union sought. As a result of that ruling and other comparable rulings I made throughout the hearing, Laidlaw presented almost all of its defense to the 8(a)(5) allegation by way of offers of proof rather than by testimony or documentary evidence.

Laidlaw's position is that: (1) the decisional process by which management determined not to increase wage rates in 1990 (after the Union's arrival) was precisely the same as the process by which management determined to grant wage increases in October 1989 (which was prior to the Union's arrival); and (2) the financial circumstances of the facility in the years prior to 1990, when pay increases were granted, were different from the facility's financial circumstances in 1990.

A new manager, David Pinter, came to the Rolling Meadows facility relatively late in 1988—too late, Laidlaw claims, to have been able to change the budget for that year, which budget included an October wage rate increase. According to Laidlaw, Pinter (and his superiors) determined that in no event would a pay increase be granted in any subsequent year in which the facility's budget forecast a loss. Because the facility's 1989 budget showed a break-even outcome, even with a pay increase, Pinter authorized a pay increase that year.⁵ Laidlaw contends that the situation was very different in 1990. The budget for that year showed that the facility's operations would produce a serious loss. Pinter responded, says Laidlaw, by effectuating the policy that he had

NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

⁴The record shows that the wage increases that Laidlaw paid its employees at the Rolling Meadows facility, and the lack of a pay increase in 1985, matched the pay rates specified in area Teamsters agreements. While I do not consider that significant in respect to the General Counsel's prima facie case, I do as regards the remedy to be ordered. That is discussed below, in the remedy section.

⁵Laidlaw's fiscal year runs from September 1 through August 31. For ease of discussion I am treating the September 1989–August 1990 budget as though it covered the year 1989, and the September 1990–August 1991 budget as though it covered 1990.

established when he arrived at Rolling Meadows: he ordered that no wage increase be granted in 1990.

Additionally, claims Laidlaw, in the years prior to Pinter's arrival at Rolling Meadows, in every year in which a pay increase was granted, the facility's budget forecast a profit.

Those contentions might be very much in point were the General Counsel claiming that Laidlaw withheld the 1990 increase because of antiunion animus, that Laidlaw violated Section 8(a)(3). Then Laidlaw's arguments, if supported by the facts, might indeed lead to the conclusion that it was not animus that caused Laidlaw to withhold the pay increase.

But the General Counsel makes no 8(a)(3) claim. Rather the General Counsel contends only that Laidlaw failed to bargain with the Union in circumstances in which Section 8(a)(5) requires the company to have done so. Because of that, I consider Laidlaw's contentions entirely beside the point. The thrust of Section 8(a)(5) (and Section 8(d)), after all, is precisely to limit the scope of the actions that management is entitled to take unilaterally. The fact that a loss was projected in 1990 surely could reasonably have been a talking point in bargaining between Laidlaw and the Union about whether a wage increase ought to be granted. Just as surely management was not entitled unilaterally to bring to an end a pattern of annual wage increases based on a policy Laidlaw's managers had earlier agreed among themselves to adopt.

I note, in that respect, that the strength of Laidlaw's position here arguably might be different had Laidlaw's management, in 1989, or earlier, announced to the Rolling Meadows employees that henceforth wage increases would be dependent on the facility's profitability. But Laidlaw has not even hinted that any such announcement was ever made.⁶

C. Conclusion, Section 8(a)(5)

The record shows that: (1) Laidlaw is an employer engaged in commerce and that the Union is a labor organization; (2) effective every October, in the 4 years 1986 through 1989, Laidlaw, at its Rolling Meadows facility, granted wage increases to certain drivers and helpers; (3) because of those wage increases, and because no circumstances obtained that counterbalanced the import of those wage increases, as of 1990 the terms of employment of such drivers and helpers included annual wage increases effective in October; (4) in

⁶In the course of making an evidentiary ruling at the hearing, I suggested that the relationship between profitability and wage increases in 1989 and 1990 might be relevant to Laidlaw's defense of the General Counsel's 8(a)(5) allegations if Laidlaw had historically linked wage increases to profitability. However: (1) at no time did Laidlaw ever offer to prove any such historical relationship; for example, Laidlaw did not propose to prove that in 1985, when no wage increase was granted, the facility suffered a loss; and (2) on further reflection I conclude that my suggestion was wrong unless, in the very least, Laidlaw had taken steps to ensure that the employees were made aware of that policy. (As noted above, Laidlaw did not propose to prove that any such policy was ever communicated to the employees.)

1990 the Board certified the Union as the exclusive bargaining representative of a unit of employees that included such drivers and helpers; and (5) in 1990 Laidlaw did not grant any such increase and failed and refused to bargain with the Union about not granting the increase.

I conclude that Laidlaw thereby violated Section 8(a)(5) of the Act.

II. DID STATEMENTS BY LAIDLAW AGENTS VIOLATE SECTION 8(A)(1)

The complaint alleges that "Respondent . . . at its Rolling Meadows facility, told employees that they would not receive a wage increase because of their union activities."

Again, much of the evidence on the point is undisputed. In or around October 1990 various employees asked members of Laidlaw's management whether the employees would be getting their annual pay increase. In response, management told the employees that "we could not change the compensation because it was in litigation," or that the wage increase "was tied up in court." Explicitly on some occasions, and implicitly on all others, management indicated that the litigation and court battles that it was referring to were between Laidlaw and the Union. (As noted earlier, Laidlaw contended before both the Board and the court of appeals that the Union should not be certified.)

Those statements by management constitute a violation of Section 8(a)(1). As discussed in the previous part of this decision, the law by no means prohibited Laidlaw from granting a pay increase to the employees in October 1990. By erroneously claiming that the law did forbid such an increase, and by linking that circumstance to the Union's presence at the facility, Laidlaw coerced, restrained, and interfered with the employees in the exercise of their Section 7 rights. *Gupta Permold Corp.*, 289 NLRB 1234, 1250 (1988).

I would additionally note that, in this proceeding, management contended that the reason for withholding the pay increase was the facility's lack of profits (as discussed earlier), not Laidlaw's litigation with the Union. Thus Laidlaw's agents were being disingenuous when, in response to employee questions about a pay increase, they referred to such litigation.

THE REMEDY

The issue here is how to remedy Laidlaw's violation of Section 8(a)(5) of the Act—that is, Laidlaw's unilateral decision to change its employees' terms of employment by not granting a wage increase effective October 1, 1990.

The evidence shows that throughout the 1980s, and, indeed, even earlier, it was the policy of Laidlaw and of its predecessor company to pay their employees the same wage rates as paid by unionized refuse hauling companies that operated in the same area as Laidlaw. Employees of such unionized companies were, and are, represented by Teamsters Locals 705 and 731. Persons who managed Laidlaw's Rolling Meadows facility in the years prior to 1989 credibly

testified that it was their intention to match the wage rates of such unionized companies. And the record is clear that Laidlaw's wage rates did indeed match the unionized companies' rates:

Year	Rate and Effective Date Specified in Collective-Bargaining Contracts	Laidlaw's Wage Rate	Effective Date of Laidlaw's Pay Action
1984	\$12.86 —	\$12.86	—
1985	12.86 no change	12.86	no change
1986	13.06 October 1	13.06	October 19
1987	13.26 October 1	13.26	October 7
1988	13.86 October 1	13.76	October 1
1989	14.16 October 1	14.16	October 2

Should Laidlaw be Required to Pay Its Employees the October 1990 Wage Rate Specified in the Collective-Bargaining Contracts of Locals 705 and 731

On October 1, 1990, the wage rates of employees at companies that were parties to collective-bargaining contracts with Locals 705 and 731 again increased, this time by 40 cents per hour (from \$14.16 to \$14.56). But as discussed earlier, the wage rates of Laidlaw's employees did not increase.

The General Counsel contends that "the appropriate remedy in the instant case is to grant an increase consistent with the wage increases granted under the Teamsters Local 731 . . . contract." (Br. at 7.) The Union makes a similar claim.

The other alternative would be to require Laidlaw to bargain with the Union about the amounts due the employees.

It is clear that the remedy sought by the General Counsel and the Union would be appropriate if Laidlaw had withheld the 1990 pay increase for reasons associated with union animus. But as discussed earlier, the General Counsel does not contend that that is the case.

It similarly would be clear that that remedy would be warranted if a term of employment at Laidlaw was that Laidlaw would match the wage rates of the unionized companies. But the evidence that would permit a finding of that kind is shaky. On the one hand, given the pattern shown in the above table it is almost certain, as a matter of common sense, that Laidlaw's employees knew very well that their wage rates matched those of neighboring unionized refuse-hauling companies. And there is some employee testimony to like effect.⁷ On the other hand, the record does not show that Laidlaw's management ever told the employees that it was company policy to match union wages.⁸

All things considered, my conclusion is that Laidlaw should be required to match the unionized companies' 40-cent-per-hour increase, effective some time in October 1990. I reach that conclusion because: (1) Laidlaw's pay rates have historically matched those of the unionized companies; (2) the record indicates that Laidlaw's employees knew that their pay reflected the rates at neighboring unionized companies;

⁷ See, in particular, the testimony of Laidlaw employees Swick and Zyer at, respectively, Tr. 97 and 110.

⁸ Two employees testified that in or about early 1990 Laidlaw's management promised the Rolling Meadows employees that their wages would continue to match those of unionized companies. I do not credit that testimony.

and (3) as between, on the one hand, ordering the 40-cent increase and, on the other, ordering Laidlaw merely to bargain with the Union about an increase, I believe that the former would better effectuate the policies of the Act. See *Central Maine Morning Sentinel*, supra; *Sweetwater Hospital Assn.*, 226 NLRB 321 (1976).

I therefore conclude that Laidlaw should be required to make whole the unit members specified below by paying such employees the losses they sustained as a result of the company's unilateral change in the employees' terms of employment; to wit, Laidlaw's failure to institute a 40-cent-per-hour wage increase in October 1990: all residential drivers and helpers employed at Laidlaw's Rolling Meadows facility except for recycling drivers; provided that such make-whole remedy does not apply to employees hired after May 31, 1990, in respect to that portion of such employees' probationary period that occurred on and/or after October 1, 1990. Interest on such amounts shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁹

I further conclude that Laidlaw should continue to pay such employees the higher of their current wage rate or \$14.56 per hour until such time as Laidlaw reaches agreement with the Union about a lower wage rate, or arrives at an impasse after bargaining in good faith.

The Effective Date of the Increase

As the above table shows, the dates on which Laidlaw instituted the October wage increases varied from year to year—from as early as October 1 to as late as October 19. And the testimony indicates that the Laidlaw employees did not focus on precisely when in October wages would increase. Under these circumstances, my conclusion is that the exact date in October 1990 that the 1990 wage increase should be made effective should be determined by bargaining between Laidlaw and the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Laidlaw Waste Systems, Inc., Rolling Meadows, Illinois, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Unilaterally making changes in its bargaining unit employees' wages, hours, working conditions, or other terms or conditions of employment concerning mandatory subjects of bargaining without bargaining collectively with Excavating, Grading, Asphalt, Private Scavengers and Automobile Sales-room Garage Attendants, Local 731, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The appropriate unit is:

⁹ In accordance with the Board's decision in *New Horizons*, interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time commercial, residential, roll-off, and municipal recycler drivers and helpers, container repairmen and deliverymen, and recycling processor employees employed at the Employer's facility located at 3651 Blackhawk Drive, Rolling Meadows, Illinois; 3631 Berdnick, Rolling Meadows, Illinois; and 307 Ramona, Elgin, Illinois; but excluding all mechanics, servicemen, truck washers, tiremen, clerical employees, professional and sales employees, guards and supervisors as defined in the Act.

(b) Where an annual wage increase is a term of employment, erroneously telling employees that it cannot pay such an increase because of its litigation regarding the Union's certification as the bargaining representative of unit employees.

(c) 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) In the manner set forth in the remedy section of the decision, make whole those members of the unit who are residential drivers or helpers (except for recycling drivers) for any losses they may have sustained as a result of its failure to increase wages in October 1990.

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

(c) Post at its facility in Rolling Meadows, Illinois, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon re-

¹¹ If 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."

ceipt 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.

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

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 withhold a pay increase that is a term of your employment, or otherwise change your wages, hours, working conditions, or other terms or conditions of employment concerning mandatory subjects of bargaining, without bargaining collectively with your Union, Teamsters Local 731.

Because an annual wage increase is a term of employment of all residential drivers and helpers in this facility (except for recycling drivers and certain probationary employees) which we are required to pay unless we bargain about it with the Union, WE WILL NOT tell you that we cannot pay an annual wage increase to those employees because of litigation with the Union.

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

WE WILL make whole, with interest, our residential drivers and helpers (except for recycling drivers) for the losses they sustained as a result of our failure to increase wages in October 1990 without first bargaining with your Union.

LIDLAW WASTE SYSTEMS, INC.