

Everlock Fastening Systems, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 174. Case 7-CA-31675

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On April 10, 1992, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

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, and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Everlock Detroit Division of Everlock Fastening Systems, Inc., Troy, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In adopting the judge's findings and conclusions, we rely on the reasoning set forth in *Everlock Fastening Systems*, 308 NLRB 1018 (1992).

In adopting the judge's findings and conclusions, Member Oviatt does not rely on *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991), a case in which he dissented. He finds the facts in this case to be distinguishable.

Dennis Boren, Esq., for the General Counsel.
Michael Alaimo, Esq. (Dickinson, Wright, Moon, Van Dusen & Freeman), of Detroit, Michigan, for the Respondent.
Laura Campbell, Esq., of Detroit, Michigan, on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on June 25, 1991, in Detroit, Michigan. The charge in Case 7-CA-31675 was filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 174 (the Union) on March 18, 1991, and the complaint issued on April 22, 1991, charging Everlock Detroit Division of Everlock Fastening Systems, Inc. (the Respondent) with violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by failing and refusing to provide hospital/medical insurance to unit employees in accordance

with the collective-bargaining agreement and by failing and refusing to pay vacation payments to employees in accordance with the provisions of the collective-bargaining agreement. The Respondent filed an answer on May 3, 1991, in which it admitted the jurisdictional elements of the complaint and averred that its conduct complied with the U.S. Bankruptcy Code.

FINDINGS OF FACT

I. JURISDICTION

The Company, Everlock Detroit Division of Everlock Fastening Systems, Inc., is a Delaware corporation with its principal office at 431 Stephenson Highway, Troy, Michigan, and, until March 25, 1991, with a place of business at 6567 South Sterling Drive, Sterling Heights, Michigan, where it engaged in the manufacture and distribution of automobile parts.¹ On October 19, 1990, the Respondent filed a bankruptcy petition pursuant to Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. § 101 et seq., and has been designated as a debtor in possession by the U.S. Bankruptcy Court of the Eastern District of Michigan, Southern Division of Detroit.² With gross revenues exceeding \$1 million during 1990 and with purchases in excess of \$50,000 from suppliers from outside the State of Michigan, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 174, is a labor organization engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS

The Company and the Union had a successful bargaining relationship for the employees in the following unit:

All full-time and regular part-time employees of Respondent employed at its Sterling Heights Plant; but excluding foremen, assistant foremen, watchmen, office and clerical employees, salaried employees and supervisors as defined in the Act, time study men and confidential employees.

The latest collective-bargaining agreement, dated August 20, 1988, and effective until August 1991, contains certain provision relevant to the instant controversy. Article VII under the heading "Vacation Plan" provides for the accrual of vacation days based on an employee's seniority (G.C. Exh. 2). Another proviso entitled "Insurance and Drug Program" and a "Supplemental Agreement" obligate the Company to provide a current health insurance and drug program without cost to the employee. (G.C. Exh. 2, art. X.) The record shows pursuant to a stipulation between the parties (Tr. 13): Certain employees who had earned vacation pay prior to October 19, 1990, did not receive their vacation pay because for the period after February 12, 1991, until March 25, 1991. Persons who sought to have their vacation paid,

¹ The Sterling Heights, Michigan place of business is the only facility involved in this proceeding.

² See Stipulations (Tr. 7-10).

had that vacation prorated to prepetition and postpetition periods (Tr. 13, G.C. Exh. 3). In a posted notice, dated February 12, 1991, the Respondent informed the bargaining unit employees that the Company had filed for Chapter 11 protection and how the Company would process accrued vacation payments (G.C. Exh. 3, Tr. 144). The employees were informed, inter alia, that payments for vacation time accrued after October 19, 1990, the date of filing for Chapter 11 protection, were postpetition obligations which would be paid to the employees because the money was considered "administrative expenses." However, accrued payments for vacation time prior to that date were considered prepetition obligations for which claims could be made to the U.S. Bankruptcy Court and which, according to the Company, it was not permitted to pay. The Company also sent a memorandum dated March 22, 1991, to the employees which states as follows (G.C. Exh. 15):

(2) *Vacation Pay.* You will receive a check for accrued but unused vacation pay as of the date of your termination. Inasmuch as the company is under the jurisdiction of the U.S. Bankruptcy Court, the company is permitted presently to pay out only that portion of severance pay calculable under the company's plan which is attributable to the post-bankruptcy period, i.e. since October 19, 1990. Any amount attributable to the pre-bankruptcy period is subject to the claims procedures of the U.S. Bankruptcy Court.

As a result, the record shows that a certain number of employees did not receive their vacation pay which they had earned prior to October 19, 1990, the date of the filing for bankruptcy. The Company did not notify the Union of the failure to pay vacation benefits to these employees until after the decision was made and the payment plan was implemented. A grievance was filed on March 26, 1991, which sought to challenge Respondent's failure to make the vacation payments (G.C. Exh. 14, Tr. 147). The Respondent denied the grievance on the basis of timeliness and the bankruptcy petition (R. Exh. 11).

The Company offered its employees three medical plans, the Health Alliance plan, the Wellness plan, and a traditional medical plan, the CIGNA plan (R. Exh. 2, Tr. 17). The parties stipulated that the Respondent did not pay the insurance premium for the CIGNA insurance plan from October 15, 1990, to March 25, 1991 (Tr. 15). Several unit employees who were insured by CIGNA thereby lost their coverage for a certain time. Although the policy provides for an automatic cancellation if the premium is not paid, it also contains a "Grace Period" provision which extends the policy by 31 days beyond the payment of the premium (R. Exh. 1). By letter of August 30, 1990, the Respondent had informed CIGNA that it would reduce its accrued premiums of over \$421,000 by making monthly installments for August, September, October, and November 1990 (G.C. Exh. 5; R. Exh. 7). The record shows that \$100,000 was paid in August and \$107,176 on September 15, 1990 (R. Exh. 7). But the Respondent failed to pay the October 1990 installment and any subsequent payments through March 25, 1991 (Tr. 15, 19, 33, 161). The Respondent attempted to shift the responsibility for the cancellation of the CIGNA policy on the insurance carrier. However, the record shows that Respondent's failure

to pay the monthly installment resulted in the cancellation of the policy (Tr. 161, 171, R. Exh. 1). During this period, several employees were no longer insured under the CIGNA plan. Several employees who lost their coverage joined the Health Alliance plan, a health maintenance organization (HMO), as of November 1, 1990, and others joined the Health Alliance Preferred Provider Organization. Nevertheless, as of the end of the grace period, October 15 to November 1, 1990, several CIGNA insured employees were uninsured and other CIGNA-insured employees who opted to join the Health Alliance Preferred Provider Organization remained uninsured until December 1, 1990. The employees who joined either of the two insurance plans had less choice in the selection of their health providers than they would have had with CIGNA (Tr. 22, 163). Accordingly, Donald Larkins, director of industrial relations, contacted an insurance broker in January 1991 to explore an insurance coverage similar to that of CIGNA. However, the Respondent never contracted with an insurance carrier which offered benefits similar to CIGNA. Larkins conceded that the health care plans in existence after October 15, 1990, were not equal in coverage to the CIGNA plan provided for in the collective-bargaining agreement (Tr. 165-168, G.C. Exh. 4).

The record shows that the Company did not notify the Union and it did not offer to bargain with the Union about its failure to make the premium payment and to discontinue the CIGNA insurance until after the implementation of its decision (Tr. 54, 77). On or about October 23, 1990, the Company notified the employees during an employee meeting where the employees were informed that the Company had filed for Chapter 11 bankruptcy and that the insurance programs were not in effect (Tr. 54-55). During that time, the Company informed the employees that CIGNA had stopped paying claims for employees' medical and dental bills and that the employees had the option of joining the Health Alliance (HAP) plan effective November 1, 1990, or HAP's Preferred Provider Organization (PPO) plan effective December 1, 1991, neither of which offered an adequate replacement coverage comparable to the CIGNA insurance, as stated above. (G.C. Exhs. 4, 8, 10.) For example, under CIGNA, employees could select virtually any health care provider, they paid a lower "co-pay" or deductible under CIGNA than with other plans, and they had an option for chiropractic services (Tr. 167-168).

A grievance challenging the Company's failure to maintain the insurance plan was filed on October 10, 1990, by the union steward (G.C. Exh. 6). By memorandum dated December 21, 1990, the Company informed the grievant that the grievance was denied (G.C. Exh. 7).

In sum, the Company (a) failed to pay certain unit employees their accrued vacation pay in accordance with article VII of the agreement and (b) it failed to pay its premiums for the CIGNA health insurance plan or for a new carrier with comparable benefits as required by article X of the collective-bargaining agreement (G.C. Exhs. 2, 3, 4). Respondent's failure in this regard as well as its failure to notify the Union and to bargain collectively, violated Section 8(a)(1) and (5) of the Act, according to the General Counsel. The Respondent argues that its receivership in a bankruptcy pro-

ceeding justified its conduct and that the matter should have been deferred to the grievance procedure in the contract.³

Analysis

The question whether a debtor in possession may reject a collective-bargaining agreement is now governed by section 1113 of the Bankruptcy Code (11 U.S.C. § 1113) entitled Reorganization. This law was enacted by Congress in response to the decision *NLRB v. Bildisco & Bildisco*, 464 U.S. 513 (1984), where the Court held that a debtor in possession does not commit an unfair labor practice when it unilaterally alters the terms of a bargaining agreement. According to section 1113, a debtor in possession or the trustee “may issue or reject a collective-bargaining agreement only in accordance with the provisions of this section” (11 U.S.C. § 1113 (a)). The statute outlines in several paragraphs the specific steps required before a collective-bargaining agreement can be changed or modified. The effect of the provisions assures that a debtor in possession may not unilaterally change the terms of a collective-bargaining agreement. For example, the Act requires that a debtor in bankruptcy first make a proposal to the union and furnish the union with relevant information, it must meet with the union to confer in a good-faith attempt to reach mutually satisfactory modifications, and the bankruptcy court must examine and approve any modifications according to specific guidelines. The Company failed to comply with any of these requirements. Indeed, the Act specifically states: “No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective-bargaining agreement prior to compliance with the provisions of this section” (11 U.S.C. § 1113(f)).

The court in *In Re Unimet Corp.*, 842 F.2d 879, 884 (6th Cir. 1988), cert. denied 488 U.S. 828 (1988), interpreted section 1113 and stated that “[S]ection 1113 unequivocally prohibits [an] employer from *unilaterally* modifying *any provision* of the collective bargaining agreement.” Another circuit court in its analysis of section 1113 stated “that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of § 1113 are prohibited.” *In Re Ionosphere Clubs*, 922 F.2d 984, 989–990 (2d Cir. 1990).

By stipulation the record shows that the bankruptcy court did not issue an order allowing the Respondent to reject the collective-bargaining agreement, and that the Respondent had not filed a motion pursuant to section 1113 of the Bankruptcy Code (Tr. 14–15).

The record here shows that the Respondent, not only failed to make the contractual payment to the insurance funds and failed to pay to certain employees accrued vacation money, but it also failed to notify the Union prior to the implementation of its actions and it did not offer to bargain with the Union. Respondent’s failure to make certain medical insurance payments required by the contract and the failure to pay certain employees their accrued vacation pay are considered

³The Respondent apparently abandoned its affirmative defense that the issues are barred by Sec. 10(b) of the Act. In any case, the alleged practices occurred within the 6-month period prior to the filing of the charge.

violations of Section 8(a)(5) and (1) of the Act. *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991). I, accordingly, find that the Respondent violated Section 8(a)(1) and (5) as alleged in the complaint.

In its brief, the Respondent has raised the issue of deferral. The Respondent’s answer to the allegations in the complaint did not raise the issue of deferral. The record shows that the separate grievances filed by the employees concerned the CIGNA insurance and the vacation pay issues (G.C. Exhs. 6, 10, 14). The General Counsel submits that deferral on either issue is unwarranted at this stage of the proceeding and, in any case, inappropriate.

The collective-bargaining agreement provides for a grievance procedure involving five steps, including arbitration. The grievance procedure presumes the filing of a grievance by an employee and covers any “trouble” or “difficulty” between the Company and any of its employees as to the meaning or application of the provisions of the agreement (G.C. Exh. 2).

The Respondent has taken the position that it is prohibited from making the required payments to the employees because of the pendency of the bankruptcy proceeding. For example, in its memorandum, dated February 12, 1991, the Company informed the employees, inter alia, as follows (G.C. Exh. 3):

The company is allowed currently to pay post-petition obligations (including payroll obligations to employees) as “administrative expenses,” but is not permitted to pay pre-petition obligations. Instead, claims may be filed in the U.S. Bankruptcy Court for those pre-petition obligations. It should be clearly understood by all employees that the above requirements are dictated by federal law and *are not discretionary*.

Again in its memorandum of March 22, 1991, the Company similarly told the employees (G.C. Exh. 15).

(2) *Vacation Pay*. You will receive a check for accrued but unused vacation pay as of the date of your termination. Inasmuch as the company is under the jurisdiction of the U.S. Bankruptcy Court, the company is permitted presently to pay you only that portion of severance pay calculable under the company’s plan which is attributable to the post-bankruptcy period, i.e. since October 19, 1990. Any amount attributable to the pre-bankruptcy period is subject to the claims procedures of the U.S. Bankruptcy Court.

In short, the Respondent did not really deny its obligation under the collective-bargaining agreement but it left the issue for the bankruptcy court and denied the grievance accordingly. (R. Exh. 11.)

The grievance filed with respect to the expiration of the CIGNA policy was filed on October 24, 1990, and the Respondent denied the charges in the grievance by memorandum of December 21, 1990 (G.C. Exhs. 6, 7). The Respondent’s failure to maintain the insurance coverage was clearly the result of its inability to pay the premium and its position in bankruptcy. Respondent’s president, Aran H. Najjarian, informed the Michigan Insurance Bureau by letter of January 21, 1991, inter alia, as follows (G.C. Exh. 9):

On October 19, 1990, Everlock Fastening Systems, Inc. filed a Chapter 11 bankruptcy petition. That same afternoon our Director of Industrial Relations, Mr. Donald Larkins, had a telephone conversation with Mr. Ken White, CIGNA's Account Manager.

Mr. Larkins informed Mr. White of the bankruptcy petition, our inability to meet the scheduled October 15, 1990, premium payment, and specifically asked if CIGNA was going to cancel the insurance policy.

The Respondent's ability to pay the premium for the CIGNA policy and its argument that the issues are before the bankruptcy court, cannot properly be resolved by the provisions of the collective-bargaining agreement.

It is accordingly clear that deferral to the grievance procedure would be of little assistance. Under these circumstances, it is clear that deferring the issue to arbitration would be inappropriate, *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984). Even if the matter had been taken through the final stage of the grievance process with a finding that the Respondent violated the terms of the collective-bargaining agreement, the Respondent's reaction would probably be the same, that is the bankruptcy proceeding is a bar to its contractual obligation and the dispute should be resolved by the bankruptcy court. Accordingly, I find that the Respondent had failed to assert its willingness to use arbitration to resolve the dispute and that the dispute is not well suited to a resolution by the grievance process.

Finally, the Respondent's argument that there "is nothing in the record to suggest that the lapse in medical insurance coverage was caused by Respondent" and that, in any case, the Union waived its rights to bargain over this issue is plainly contradicted by the record. Don Larkin, Respondent's director of industrial relations, testified that CIGNA's cancellation was caused by Respondent's failure to pay the October 15 premium (Tr. 30). Furthermore, the payment schedule for four monthly installments was an accommodation by the insurance carrier because prior to that time the Respondent's fixed premium payments were already behind schedule (Tr. 32). The cancellation of the policy as a result of Respondent's failure "to catch up as past due accrued premiums" should not have been a surprise and was in accord with the automatic cancellation provision in the insurance contract. Moreover, the Union did not waive its bargaining rights, particularly where, as here, the Respondent blamed CIGNA and the bankruptcy posture.

CONCLUSIONS OF LAW

1. The Respondent, Everlock Detroit Division of Everlock Fastening Systems, Inc., is a debtor in possession and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 174, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following is an appropriate unit for purposes of collective bargaining:

All full-time and regular part-time employees of Respondent employed at its Sterling Heights Plant; but ex-

cluding foremen, assistant foremen, watchmen, office and clerical employees, salaried employees and supervisors as defined in the Act, time study men and confidential employees.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally, without notice to the Union and without offering to bargain with it, changing the terms of the collective-bargaining agreement, by (1) failing to pay certain unit employees their accrued vacation pay earned prior to October 19, 1990, and (2) failing to pay its health insurance premiums for the CIGNA medical insurance from October 15, 1990, to March 25, 1991, as required by the contractual provisions of the collective-bargaining agreement, dated August 20, 1988.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I recommend that it be ordered 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 failing (1) to pay certain employees accrued vacation pay and (2) to pay insurance premiums, as required in the collective-bargaining agreement, I the Respondent must be ordered to make the payments on behalf of the unit employees subject to the approval of the bankruptcy court with any interest or other sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondent must make the unit employees whole for any losses they may have suffered as a result of its failure to make the contractually required payments. *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent would also be ordered to bargain with the Union as the collective-bargaining representative of the unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Everlock Detroit Division of Everlock Fastening Systems, Inc., Troy, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain collectively with the Union and unilaterally and without notice to the Union changing the terms of the collective-bargaining agreement, by failing to pay em-

⁴If 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.

ployees the accrued vacation pay or failing to make insurance premium payments.

(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) Make all payments to employees for their accrued vacation pay and all insurance premium payments which have been unlawfully withheld, with interest pursuant to the collective-bargaining agreement and make whole the employees in the unit for any losses directly attributable to the withholding of those payments with interest, as set forth in the remedy section of this decision.

(b) Bargain collectively with the Union as the exclusive bargaining representative of the employees in the aforementioned unit.

(c) 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 analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Troy and Sterling Heights, Michigan, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁵ 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."

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 refuse to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, and its Local 174 and unilaterally and, with notice to the Union, change the terms of the collective-bargaining agreement by failing to make insurance premium payments or payments to employees for accrued vacation pay.

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 make the payments to certain employees for their accrued vacation pay and all insurance payments which we have unlawfully withheld, with interest, pursuant to the collective-bargaining agreement between ourselves and the Union.

WE WILL make whole our employees in the unit for any losses directly attributable to our withholding of the payments or contributions, with interest. WE WILL bargain collectively with the Union on behalf of our employees in the following appropriate unit:

All full-time and regular part-time employees of Respondent employed at its Sterling Heights Plant; but excluding foremen, assistant foremen, watchmen, office and clerical employees, salaried employees and supervisors as defined in the Act, time study men and confidential employees.

EVERLOCK DETROIT DIVISION OF EVERLOCK
FASTENING SYSTEMS, INC., EMPLOYER AND
DEBTOR IN POSSESSION IN BANKRUPTCY