

**Pinkston-Hollar Construction Services, Inc. d/b/a Construction Services, Inc. and United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 116, AFL-CIO.** Case 23-CA-10838

September 30, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On March 30, 1990, the National Labor Relations Board issued a Decision and Order<sup>1</sup> in this proceeding in which the Board found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally discontinuing payments into the Union's trust funds and pension and fringe benefit funds and by unilaterally implementing its own group health, profit-sharing, and vacation plans. The Board ordered the Respondent to cease and desist, to bargain on request with the United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 116, AFL-CIO (the Union), and to make unit employees whole for any losses or expenses.

On February 27, 1992, the United States Court of Appeals for the Fifth Circuit issued a decision<sup>2</sup> refusing to enforce the Board's Order and remanding the case to the Board for reevaluation consistent with the "notice and opportunity to bargain" standard recently reaffirmed by the court.<sup>3</sup> On May 5, 1992, the Board notified the parties that it had accepted remand. The Respondent and the General Counsel filed statements of position on remand.

The Board has accepted the court's remand as the law of the case.<sup>4</sup> The facts, which are summarized below, are fully set forth in our initial decision and in the court's opinion. On January 13, 1987,<sup>5</sup> the Respondent withdrew from multiemployer bargaining and stated it would bargain individually with the Union. Beginning in March the Respondent and the Union met about 10 times to negotiate a new agreement. By letter dated April 9, the Respondent indicated it was considering changes in the existing benefit plans<sup>6</sup> and requested that the Union furnish certain financial information regarding the funds. By letter dated July 22, the Respondent stated that it intended to cease participa-

tion in the Union's benefit funds on September 1 and to implement its own benefit plans. The Union replied that it wished to meet and bargain about the proposed changes and offered three dates in August for negotiations.

On August 14, the parties had a brief meeting at which the Union proposed extending the agreement for a year with possible wage modifications. The parties did not discuss the proposed changes in benefit funds. The parties agreed to meet on August 20. On August 18, the Union learned that the Respondent for the first time would be negotiating through its attorneys. The Union's business agent came to the August 20 meeting and announced that he did not want to negotiate without the presence of the Union's attorney, who was out of town. The Respondent's representatives stated that the Respondent still intended to implement its own benefit plans on September 1, which the Union's business agent acknowledged.

The Respondent ceased payments to the Union's benefit funds and implemented its own plans on September 1. The parties next met to negotiate on September 23. Thereafter, the parties suspended negotiations until the unfair labor practice charge in this case was resolved.

In the initial decision in this case, the Board found that the Union acted with due diligence in requesting and pursuing bargaining over the proposed changes and did not clearly and unmistakably waive its right to bargain over the matter. The Board held that in the absence of impasse the Respondent was not privileged to act unilaterally. Accordingly, the Board concluded that the Respondent violated Section 8(a)(5) and (1) of the Act.

In its opinion in this case, the court stated that the law in the Fifth Circuit is that "unilateral implementation of changes . . . is not a violation of the duty to bargain collectively, even in the absence of impasse, if the employer notifies the union that it intends to implement the change and gives the union the opportunity to respond to that notice."<sup>7</sup> The court concluded that it was bound to follow its decision in *Nabors Trailers*.<sup>8</sup> That case, as does the court's opinion in this case, relied on the following standard set forth in *NLRB v. Citizens Hotel Co.*:<sup>9</sup>

It is true, of course . . . that an employer may make changes without the approval of the union as the bargaining agent. The union has no absolute veto power under the Act. Nor do negotiations necessarily have to exhaust themselves to the point of the so-called impasse. But there must be discussion prior to the time the change is initiated. An employer must at least inform the union

<sup>1</sup> 298 NLRB 1.

<sup>2</sup> *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306.

<sup>3</sup> *Nabors Trailers v. NLRB*, 910 F.2d 268 (1990), cert. granted 111 S.Ct. 1680 (1991), cert. dismissed pursuant to Rule 46, 112 S.Ct. 8 (1992).

<sup>4</sup> Thus, we apply the court's "notice and opportunity" standard only to this case. Our decision is not to be construed as an adoption of the court's legal standard as Board precedent.

<sup>5</sup> All events at issue occurred in 1987.

<sup>6</sup> The expired multiemployer contract required the Respondent to contribute to certain pension, welfare, and other benefit trust funds administered by the Union.

<sup>7</sup> *Pinkston-Hollar*, supra, 954 F.2d at 311.

<sup>8</sup> 910 F.2d 268.

<sup>9</sup> 326 F.2d 501, 505 (5th Cir. 1964).

of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.

Accordingly, the court remanded this case to the Board for reevaluation consistent with the above principles.

In his statement of position on remand, the General Counsel contends that the Respondent did not give the Union sufficient notice. He argues that the Respondent merely informed the Union it would make changes but never gave the Union an actual plan to review or provided it with any details or information about the plans. Thus, the General Counsel contends the Union was not afforded “a reasonable opportunity for counter arguments.” The General Counsel further contends, in effect, that the Respondent did not afford the Union a reasonable opportunity to bargain. Specifically, the General Counsel argues that the Respondent, by bringing attorneys into the negotiations for the first time on August 20, effectively forestalled bargaining and that the Respondent never explained why it had to implement its proposals on September 1. Contrary to the General Counsel’s contentions, we find under the principle of the Fifth Circuit’s *Nabors Trailers* and *Citizens Hotel* decisions, that the Respondent gave the Union sufficient notice and opportunity to bargain.

With regard to notice requirement of the court’s notice and opportunity to bargain rule, we believe that the court, if not actually deciding the matter, has given us guidelines that we would be remiss to ignore. Thus, in its opinion,<sup>10</sup> the court stated:

The Board argues that the Company’s failure to provide a specific proposal in its notice to the union prevents assertion of this defense here. There is nothing to indicate that the Union ever requested, or complained of the absence of, such information. To the extent the Board is asserting a deficiency in the Company’s notice, we will not address this contention for the first time on appeal. Neither the ALJ nor the Board below found the Company’s notice in any way deficient for purposes of initiating the bargaining process.

The Board also appears to argue, consistent with the Ninth Circuit’s opinion in [*NLRB v. Auto Fast Freight*, 793 F.2d 1126 (9th Cir. 1986)], that a detailed proposal is a condition precedent to a waiver-by-inaction defense. In support, the Board cites our opinion in *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981), where we recognized that an employer may not satisfy its notice obligation by giving general information from which the Union is to infer that a change has occurred. We find that case to be inapposite. Here, the Company gave explicit notice that it in-

tended to discontinue the Union plans and implement its own plans. (In that regard, the Company requested information on the Union plans, which the Union never supplied; on the other hand, the Union never requested more specific information.) By contrast, in *Crystal Springs* the employer merely provided the union with certain information relating to compensation rates from which the union was to infer a change. Moreover, the Ninth Circuit’s cases do not suggest a different result on these facts. In *Auto Fast Freight*, supra, and its precursor, *Stone Boat Yard v. N.L.R.B.*, 715 F.2d 441, 444 (9th Cir. 1983), cert. denied 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984), the employer gave no indication whatsoever of the content of its desired changes, but, at most, that “substantial changes” were desired.

This footnote, we believe, strongly suggests that the substantive notice requirement of the court’s rule has been met.

Contrary to our dissenting colleague, we believe it is our responsibility to read the court’s opinion as a whole and draw reasonable inferences from the court’s discussion of its own notice and opportunity to bargain rule. In the first paragraph of footnote 4, the court stated that it was not addressing the specific contention, not previously made by the Board, that the Respondent’s notice was deficient under the court’s rule. However, in the final sentence of the paragraph, the court suggested as a general matter that notice sufficient to “initiat[e] the bargaining process” is notice sufficient to satisfy the court’s rule.

In the second paragraph of footnote 4, the court further suggested that the notice the Respondent provided the Union here was indeed sufficient to “initiat[e] the bargaining process.” Thus, the court stated that in *Crystal Springs* it “recognized that an employer may not satisfy its notice obligation by giving general information from which the Union is to infer that a change has occurred. . . . Here, the Company gave explicit notice that it intended to discontinue the Union plans and implement its own plans.” The court parenthetically noted, “In that regard, the Company requested information on the Union plans, which the Union never supplied; on the other hand, the Union never requested more specific information.” The record shows that the Respondent notified the Union about what changes it intended to implement and on what day it intended to do so. Although the Respondent did not give the Union any details or copies of its plans, the Union, as the court noted, “never requested more specific information.” In these circumstances, we believe that the court would find that the Respondent gave the Union sufficiently explicit notice under the notice requirements of *Nabors Trailers* and *Citizens Hotel*.

<sup>10</sup> *Pinkston-Hollar*, supra, 954 F.2d at 311 fn. 4.

The dissent correctly points out that the second paragraph of footnote 4 discussed a waiver-by-inaction defense rather than the notice-and-opportunity defense. Our dissenting colleague, however, fails to fully appreciate that the Fifth Circuit has applied the same notice standard to both defenses. Thus, in *Crystal Springs*, supra, a waiver case cited by our dissenting colleague, the court relied in part on the notice and opportunity rule:

These [piece rate] disclosures, charitably so characterized, do not constitute “circumstances which afford a reasonable opportunity for counter arguments or proposals.” See *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). [637 F.2d at 402.]

Thus, contrary to the dissent, we see no basis for failing to pay heed to the court’s suggestions.

Although the notice and opportunity to bargain rule is the law of the case, we agree with our dissenting colleague that the court did not definitively resolve the issue concerning the meaning of the word “notice” as used in the rule. The court, however, has strongly suggested its own resolution of this issue. That is, if the employer’s notice identifies the subject of the proposed change, and the union has a reasonable opportunity to ask for more specific details, the substantive notice requirement is met. Given the fact that the notice and opportunity rule is the court’s rule, we do not think it prudent to ignore the court’s strong suggestion as to what its own rule means, and having accepted remand, we are constrained by that remand to apply the court’s rule as we think the court would.

With regard to opportunity to bargain, the record shows that the parties met to bargain on August 14 and 20. At the August 14 session, the Union chose to offer to extend the existing agreement, possibly with wage modifications. At the August 20 session, the Union chose not to bargain because its attorney was not present. Even accepting the General Counsel’s contention that the Respondent forestalled meaningful bargaining on August 20, we believe the Respondent has met the Fifth Circuit’s opportunity to bargain standard. In its decision in *Winn-Dixie Stores v. NLRB*,<sup>11</sup> the Fifth Circuit held that the company complied with its statutory duty to bargain. In that case, the company, after notifying the union that it desired to raise wages \$.25 per hour, met with the union at one bargaining session. The company asked the union to agree to the increase in order to halt high employee turnover. The union wanted a wide range of changes in the bargaining agreement and did not agree. The next day, the company informed the union that it was implementing the raise. In this case, the Respondent notified the

Union more than a month before it made its changes and in fact met with the Union to bargain without restriction on August 14. Thus, we find that the Union had as much, if not more, opportunity to bargain than did the union in *Winn-Dixie*.

For the foregoing reasons, we find, as the law of this case, that the Respondent has met the Fifth Circuit’s notice and opportunity to bargain standard and conclude that the Respondent was free to unilaterally implement the changes it did. Accordingly, we shall dismiss the complaint.

#### ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would find that the Respondent did not provide the Union with sufficient notice of its proposed changes in benefits to satisfy its bargaining obligation under the Fifth Circuit’s “notice and opportunity to bargain” standard, applicable here as law of the case pursuant to my colleagues’ decision to accept the Fifth Circuit’s remand.<sup>1</sup> Accordingly I would reaffirm the Board’s previous finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing existing benefit plans and implementing its own benefit plans.

As my colleagues note, the Fifth Circuit has held that, after a collective-bargaining agreement expires, an employer may unilaterally modify terms and conditions of employment if the employer notifies the union that it intends to institute the change and gives the union the opportunity to respond to the notice. However, the court has also noted that, under this approach, “[a]n employer must at least inform the union of proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals.” *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (1964).

In this case, the Respondent’s notice to the Union indicated only that the Respondent intended to cease participating in existing benefit funds and to instead “utilize its own group health plan, profit-sharing plan, and vacation plan for its employees.” The Respondent did not provide the Union with any details or information about the new benefit plans it proposed to implement, and indeed there is no evidence showing that these plans were even in existence at the time the notice was given. Thus, even after receiving the notice, the Union was still completely in the dark as to the substantive terms of the benefit plans the Respondent intended to implement.

<sup>1</sup> *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (1992), remanding case to Board for reconsideration in light of *Nabors Trailers v. NLRB*, 910 F.2d 268 (1990), cert. granted 111 S.Ct. 1680 (1991), cert. dismissed pursuant to Rule 46, 112 S.Ct. 8 (1992).

<sup>11</sup> 567 F.2d 1343, 1349 (1978), a case relying on *Citizens Hotel*.

I would find that this notice was insufficient to satisfy the Respondent's bargaining obligations under the Fifth Circuit's "notice and opportunity to bargain" standard.<sup>2</sup> In prior cases in which the Fifth Circuit has found that the employer satisfied this standard, the respondent had presented detailed proposals to the union before they were implemented. See, e.g., *Nabors Trailers*, supra at 271 (employer provided union with proposed job classification system, wage scale, and specific wage rates it proposed to implement); *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir.), cert. denied 439 U.S. 985 (1978) (employer lawfully implemented wage increase where it notified the union that it intended to raise wages by \$.25 per hour); *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152 (5th Cir. 1976) (employer announced plans to lay off 11 employees in dye house); *A. H. Belo Corp. v. NLRB*, 411 F.2d 959 (5th Cir. 1969), cert. denied 396 U.S. 1007 (1970) (employer announced plans to give employees a \$5-per-week raise and eliminate car allowance). Here, in contrast, the Respondent notified the Union only that it would replace the existing plans with "its own" benefit plans.<sup>3</sup>

Moreover, the Fifth Circuit has held that an employer which implements changes in terms and conditions of employment which differ from those presented to the union has not satisfied the notice and opportunity to bargain standard. In *Winn-Dixie Stores*, above, cited by my colleagues, the employer proposed a 5.5-percent wage increase to the union but subsequently implemented increases ranging from 4.11 to 6.23 percent. The Fifth Circuit found those increases unlawful, stating that

[i]t seems clear to us that implementing changes significantly different from those proposed to and rejected by the collective bargaining representative is tantamount to implementing changes without notifying the union of the proposed changes. We agree that, with respect to the changes actually implemented, the union had neither notice nor opportunity to respond.

<sup>2</sup>The Board did not previously consider this issue. Under the standard which the Board applies in cases of this type, the issue is whether the parties bargained to impasse over a proposed change in terms and conditions of employment, not whether the employer's notice to the union concerning the changes is adequate to allow the union to engage in meaningful bargaining.

<sup>3</sup>I recognize that the Union did not demand more information from the Respondent concerning its proposal at the parties' abortive preimplementation bargaining sessions. However, the Fifth Circuit does not hold that such a demand is relevant to the scope of an employer's obligations under the court's notice and opportunity to bargain standard. Particularly in light of the court's express statement at fn. 4 of its decision remanding this case that it was not addressing the alleged insufficiency of the Respondent's notice, its observation that no such demand was made here would appear to be dicta.

*Id.* at 1350 (citation omitted). See also *J. P. Stevens*, above at 1164 (same). Because the Respondent here did not provide the Union with notice of the specific benefit plans it eventually implemented, I would find that, like those cases where changes were implemented which differed from those presented to the union, the Union here also had "neither notice nor opportunity to respond."<sup>4</sup>

More fundamentally, my colleagues fail to explain how it is that the notice provided in this case gave the Union a "reasonable opportunity for counter arguments or proposals," *Citizens Hotel*, above, given that it was not aware of the identity of the insurance provider the Respondent proposed to use, whether the Respondent intended to self-insure, or whether the proposed benefit plans would be more or less generous than those the Respondent proposed to replace. As the Fifth Circuit recognized in remanding the case, it is the Board's responsibility, in the first instance, to determine whether the notice provided here was adequate. In light of the court's expressly having disavowed reaching any conclusions in this regard, I would not abdicate that responsibility merely on the basis of inferences drawn from the court's discussion of the waiver by inaction defense.<sup>5</sup> Rather, I would find that the Respondent failed to give the Union sufficient no-

<sup>4</sup>My colleagues cite no case in which a generalized notice such as that present here has been found by the Fifth Circuit sufficient to satisfy its notice and opportunity to bargain standard. Rather, my colleagues rely on certain statements made by the court in response to the General Counsel's citation to it of *NLRB v. Auto Fast Freight*, 793 F.2d 1126 (9th Cir. 1986), *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984), and *NLRB v. Crystal Springs Shirt Co.*, 637 F.2d 399 (5th Cir. 1981), in support of the General Counsel's argument to the court that the Respondent's notice in this case was inadequate. The court's comments in this regard must be evaluated in light of its express statement that it was not addressing the adequacy of the Respondent's notice under its notice and opportunity to bargain standard. Indeed, each of the three cases—and the court's response to them—deals with the analytically distinct waiver by inaction defense, which focuses primarily on the union's conduct. Here, in contrast, the question before the Board is whether the Respondent's actions satisfied its bargaining obligations under the Fifth Circuit's notice and opportunity to bargain standard. Under these circumstances, and considering the Fifth Circuit precedent cited above, the dicta on which my colleagues rely is not sufficient grounds on which to decide this case.

Contrary to my colleagues, the Fifth Circuit did not state in *Crystal Springs* that it applies the same standard in cases where a waiver by inaction defense is raised as it does in cases where the adequacy of the notice and opportunity to bargain provided by the employer is at issue. Rather, the court there rejected the employer's argument that, on the facts of that case, the union had waived its bargaining rights because it had notice of the changes at issue and had failed to request bargaining. In this regard, the court found that the notice was insufficient because it was given after the changes had been made, not because it was not sufficiently specific.

<sup>5</sup>In light of my finding that the notice provided to the Union was inadequate, I would find it unnecessary to decide whether the sequence of events following the Union's initial demand for bargaining indicates that the Union was otherwise provided with a sufficient opportunity for bargaining.

tice of the changes it eventually made in its benefit plans and that the implementation of those changes was therefore unlawful under the Fifth Circuit's notice and opportunity to bargain standard.