

Pennsylvania Gas and Water Company and Local 2244, International Brotherhood of Electrical Workers, AFL-CIO. Case 3-CA-17574

August 18, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The question presented here is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by denying a wage increase to a unit of employees who were scheduled to vote in a representation election.¹ The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions 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, Pennsylvania Gas and Water Company, Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹On May 2, 1994, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Robert L. Ellison, Esq., for the General Counsel.
David E. Koff, Esq. and *Cynthia Vullo, Esq. (Koff, Wendolowski, Ferguson & Mangan, P.C.)*, of Wilkes-Barre, Pennsylvania, for the Respondent.
Robert D. Mariani, Esq., of Scranton, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Scranton, Pennsylvania, on March 1, 1994, based on a charge filed by Local 2244, International Brotherhood of Electrical Workers, AFL-CIO (the Union or Local 2244) on January 8, 1993, as amended, and a complaint issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on March 23, 1993, as amended. The complaint alleges that Pennsylvania Gas and Water Company (Respondent or the Employer) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily denying a wage increase to certain of its employees because of their union activity.¹ Respond-

¹Certain other allegations of the complaint were disposed of at hearing.

ent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

The Respondent, a Pennsylvania corporation with an office in Wilkes-Barre, Pennsylvania, and places of business at other locations within the Commonwealth of Pennsylvania, including Edwardsville, Pennsylvania, is a public utility engaged in the sale and distribution of natural gas and water. During the past 12 months, Respondent, in the course and conduct of its business operations, received gross revenues in excess of \$250,000 and purchased and received in excess of \$5000 in products, goods, and materials directly from points located outside the Commonwealth of Pennsylvania. The complaint alleges, the Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICE

A. *Background*

Respondent is a public utility, serving a quarter of a million customers with natural gas and water in the northeast and north central portions of Pennsylvania. It is regulated as to its rates, operating practices, and all matters relating to its service to the public by the Pennsylvania Public Utilities Commission (PUC).

Local 2244 has a collective-bargaining relationship with Respondent, representing about 210 of its approximately 970 employees in two units of distribution, service, and maintenance employees in Respondent's northern division. A different union represents a third unit of undisclosed size.

B. *Union Activity*

In the fall of 1992,² Local 2244 organized among a group of about 18 electricians, equipment maintenance technicians, utility persons, and auto systems specialists at the water treatment facility in Respondent's central division. A petition, Case 4-RC-17927, seeking a representation election in this unit, was filed on September 2, 1992. On September 16, the Union and the Employer entered into a consent election agreement, scheduling the election for October 2. The election was held as scheduled, the Union received a majority of the valid votes counted and the Certification of Representative issued on October 14.

C. *The September Wage Increase*

Periodically, the PUC conducts management audits of the utilities it regulates. An extensive audit of Respondent's operations began in April and continued into the fall. Among

²All dates hereinafter are 1992 unless otherwise specified.

the issues considered were the wages and salaries paid to its exempt, nonexempt, and union employees. Respondent was not required, but was strongly encouraged, to accept the recommendations of the auditors.

On September 2, Harry Dowling, Respondent's vice president for human resources, met with the individual responsible for auditing the wages paid to the nonbargaining unit employees. She reviewed her findings and recommendations, suggesting that the compensation paid these employees was in the range of 20 percent below the market rates paid to comparable employees. Following this meeting, Dowling met with Dean Casaday, Respondent's president and CEO, to discuss the auditor's conclusions, with Casaday voicing concern about the wage discrepancies.

On September 18, Casaday and Pollock, chairman of the Employer's compensation committee, met with the individual responsible for the entire audit. Later that same day or in the following week, they asked Dowling for his views on the wages. He opined that the rates were between 5 and 10 percent below those of the market but not as far off as the auditor had concluded. He recommended a raise of 3.5 percent to be paid to the 520 nonbargaining unit employees, at a cost of between \$450,000 and \$500,000.

In this meeting, they discussed whether the raise should be paid to those employees who were involved in the pending representation matter. Dowling discussed this with Respondent's counsel and was advised that counsel "felt that it would probably be unlawful if we were to give the increase to those individuals." On Dowling's recommendation, they decided to grant a 3.5-percent increase to all nonbargaining unit employees "who are not officers and not involved in the IBEW organizing effort." The matter was discussed with the compensation committee on September 22 and the raise was announced, effective retroactively to September 13, the beginning of the pay period. That decision was ratified by the board of directors on October 28, 1992.

When the Union learned of the planned raises, its president, Daniel Hanley, wrote Paul Henderson, Respondent's vice president for operations, requesting that the raise be applied to the unit employees as well as others. In a meeting held in response to that letter, Henderson rejected Hanley's request, noting that the unit employees received their raises pursuant to contract. No mention was made of the employees subject to the petition.

On September 30, 2 days before the election, Casaday issued a letter to each of the employees in the unit scheduled to vote. That letter "present[ed] some information for [their] consideration so that they can make an informed decision." It discussed some changes in the work activities which had been implemented and continued:

Another change in the Company, since I returned about a year ago, is the renewed commitment to our Company's employees. As evidence of this, I recently announced that a 3.5% salary increase was extended to all non-bargaining employees. Additionally, the Company's salary structure will be reviewed to ensure that we attract and retain good employees. As you know, these salary changes cannot be promised to you because the law forbids such promises during elections.

My philosophy has always been that the greatest asset of our Company is you, our employee. The

changes described are indicative of my commitment to that philosophy. That is why I do not think you need a union and I urge you to vote NO! Working together, I am confident that we can continue the positive changes within PG&W.

Paul Henderson, Respondent's vice president of operations, conceded that the wording of this letter indicated that it was intended to influence the employees in the election.

Respondent's practice, prior to this wage increase, had been to give annual wage increases with one group of nonbargaining unit employees getting theirs in January and the remainder in June. The employees involved in the petition were among those in the June group and they had received raises at that time. Under their collective-bargaining agreement, the bargaining unit employees received their raises in August.

Since the Union's certification in October, the employees in the new unit have received no raises; Respondent and the Union have been unable to agree on wages for them.

D. Analysis

The Board law respecting the granting or withholding of wage increases during a representation campaign is straightforward:

An employer is generally required to grant wage increases while a representation petition remains pending as if the petition had never been filed. Where, however, the employer's past practice is haphazard, the employer may lack objective evidence to substantiate its claim that the increases it gave are the same as they would have been in the absence of the petition. Accordingly, the Board has fashioned a limited exception to the employer's general duty to act as if the petition had not been filed: The employer may withhold the increases provided it truthfully tells its employees that it has merely postponed or deferred the increases and that it has done so only to avoid the appearance that it interfered with the election. The purpose of these precautions is to avoid placing the onus for the employer's decision on the union.

H.S.M. Machine Works, 284 NLRB 1482, 1484 (1987) (citations omitted). See also *Borman's, Inc.*, 296 NLRB 245 (1989), and *Martin Industries*, 290 NLRB 857, 859 (1988).

Respondent, however, contends that, under *Veteran's Thrift Stores*, 272 NLRB 572 (1984), *American Mirror Co.*, 269 NLRB 1091 (1984), and *Great Atlantic & Pacific Tea Co.*, 192 NLRB 645 (1971), it was precluded from granting, and privileged to withhold, wage increases which were unprecedented and unplanned from a unit in which there was a pending organizational campaign.

Respondent's reliance on the foregoing cases is misplaced as the September wage increase could not be properly characterized as unprecedented and unplanned. The controlling authority here is *Associated Milk Producers*, 255 NLRB 750 (1981), cited with approval in *Martin Industries*, supra. In that case, the employer had a practice, very similar to Respondent's, of granting a single annual across-the-board wage increase in about June of every year. It did so in June 1979. In September of that year, however, it learned that changes

in applicable Federal wage guidelines permitted it to grant its employees an additional 8-percent increase. That increase was granted to all of its employees except those who were involved in an organizational campaign and for whom a representation petition was pending, effective in October. As here, the raise was withheld on the advice of counsel.³

The administrative law judge noted that “[w]here the increase withheld from employees is a normal one so that a normal course of action is altered because of employees’ union activities, the employer violates Section 8(a)(1) and (3) of the Act,” citing *Russell Stover Candies*, 221 NLRB 441 (1975), and *Gates Rubber Co.*, 182 NLRB 95 (1970). He stated that the October raise “had aspects of both regularity and irregularity” and that a raise in October was unprecedented and unexpected. However, further observing that “the increase had been decided upon by higher officials free from any consideration of the union campaign,” that it was given to all of that employer’s employees save those involved in the petition, and that those employees traditionally received increases at the same time as other divisional employees, he found the withholding of that raise to be discriminatory. He stated:

Where, as here, a systemwide increase is put in effect in a manner free from union considerations, the withholding of that increase at a . . . unit undergoing union organization is not necessary to avoid risking unlawful interference This is so because the systemwide application does what a regular pattern of wage increases does in other circumstances—provides the evidence necessary to demonstrate that the increase was given free from union . . . considerations.

The Board has considered systemwide changes in wages and benefits as “normal” or free from improper considerations without inquiry as to their historical patterns and has found the withholding of such an increase at a single facility during preelection campaigning to be violative of Section 8(a)(1) and (3) of the Act. *Russell Stover Candies*, supra.

Associated Milk Producers, supra at 755.⁴ The Board expressly affirmed the judge’s rationale.

The systemwide raise given by Respondent, based on the suggestion and at the urging of its regulatory authority, is the equivalent of the raise granted in *Associated Milk Producers* and of raises which follow historical patterns. Respondent was not privileged to withhold it, notwithstanding the advice of its counsel. Withholding that raise violated Section 8(a)(3) and (1) of the Act.

I would further note, moreover, that the timing of the raise to all except the employees subject to the petition, taken together with the timing and wording of Respondent’s September 30 letter to those unit employees, indicates an intent

³Unlike the instant case, however, that employer granted the raise to the employees after the election, albeit prospectively only rather than retroactively as it had for its other employees.

⁴The judge also pointed out that neither an employer’s good-faith belief that a pending organizational campaign or election precluded the grant of such a wage increase nor the possibility of being charged with unsustainable allegations of wrongdoing justified withholding of an increase which normally would have been paid to the affected employees.

to manipulate those benefits so as to influence the election. Thus, there appeared to be no urgent requirement that the raise be granted in September, before the election, or be paid retroactively. Neither was there a need to emphasize that raise in the September 30 letter or to imply further salary reviews for nonbargaining unit employees. Where, as here, an employer manipulates the granting or withholding of benefits to gain an advantage in an election, its actions are deemed discriminatory. *Times Wire & Cable Co.*, 280 NLRB 19, 29 (1986).⁵

Citing *Great Atlantic & Pacific Tea*, supra, and *H.S.M. Machine*, supra, Respondent asserts that an employer may postpone the granting of an irregular or haphazard raise “if it truthfully tells its employees that it has merely postponed or deferred the increases [so as to] avoid the appearance that it has interfered with the election.” *H.S.M. Machine*, supra at 1484. Suffice it to note that Respondent satisfied neither of these conditions. The raise was not deferred, it was denied to the affected employees, and Respondent did not advise the employees, except in the broadest of terms, as to the purported reason for its action.

CONCLUSION OF LAW

By discriminatorily withholding a wage increase from the employees in the collective-bargaining unit which was the subject of the petition and election in Case 4-RC-17927 the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily withheld a wage increase from certain specified employees in violation of Section 8(a)(3) and (1) of the Act, I shall order Respondent to grant them the wage increase which was denied them and make them whole. Respondent shall do so in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Pennsylvania Gas and Water Company, Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall

- I. Cease and desist from

⁵The Union urges an additional 8(a)(1) finding based on the Employer’s actions in placing the onus for the withholding of the raise on the Union. This was not alleged in the complaint by the General Counsel and I am precluded from making such a finding.

⁶If 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.

(a) Withholding wage increases from its employees because of their union activities.

(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) Grant the employees who are in the bargaining unit which was the subject of the petition and election in Case 3-RC-17927 the 3.5-percent wage increase which was denied to them because of their union activities.

(b) Make its employees whole for the wage increase it unlawfully withheld in the manner set forth in the remedy section of this decision.

(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 Edwardsville, Pennsylvania, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, 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

⁷If 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."

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.

(e) 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 wage increases from our employees because of their union activities.

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

WE WILL grant the employees who are in the bargaining unit which was the subject of the petition and election in Case 3-RC-17927 the 3.5-percent wage increase which was denied to them because of their union activities.

WE WILL make our employees whole for the wage increase unlawfully withheld, with interest.

PENNSYLVANIA GAS AND WATER COMPANY