

Special Mine Services, Inc. and Southern Illinois Laborers' District Council, Laborers' International Union of North America, AFL-CIO

Special Mine Services, Inc. and Smith's Machine and Tool Shop, Joint Employers and Southern Illinois Laborers' District Council, Laborers' International Union of North America, AFL-CIO. Cases 14-CA-21389 and 14-CA-21458

December 16, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On August 31, 1992, the National Labor Relations Board issued its Decision and Order¹ finding that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by subcontracting out its connector-manufacturing operations and discharging 10 employees because of their union activities. The Board ordered that the employees be reinstated with backpay and that the Respondent cease and desist subcontracting and restore the operations.

The Board sought enforcement of its Order with the United States Court of Appeals for the Seventh Circuit. On December 6, 1993, the court issued its decision.² The court enforced all of the Board's Order except the restoration remedy. The court has remanded the restoration issue to the Board for further consideration.

In April 1994 the Board advised the parties that it had accepted the remand and invited statements of position. The General Counsel filed a position statement.³

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

For the reasons discussed below, the Board has decided to remand this case to the Regional Director for issuance of a compliance specification and further proceedings consistent with the court's remand and the Board's Decision and Order in this case.

Background

On April 19, 1991, a representation election was held among the Respondent's battery repair department employees. The election resulted in a tie, with three challenged ballots. The Union filed objections. Soon thereafter the Respondent laid off two known union supporters, allegedly because of lack of work. In May 1991, the Respondent reached an agreement to subcontract the manufacture of its electrical connector parts. In late May or early June 1991, the subcontract took effect. The Respondent transferred the machinery necessary to make its connector parts to the subcontractor and discharged eight employees.

The administrative law judge in the underlying Board decision found that the Respondent violated Section 8(a)(3) and (1) by subcontracting the work and laying off the employees. The judge directed the Respondent to cease and desist from subcontracting the unit work and to reinstate the discharged employees.

The General Counsel filed exceptions to the judge's failure to include a restoration remedy for the subcontracted work. The Respondent filed no response.

The Board adopted the judge's findings and granted the General Counsel's unopposed restoration request, stating at footnote 2:

The General Council excepts to the judge's failure to order the Respondent to reestablish and resume the connector work that it subcontracted for unlawful reasons. We find merit to this exception and shall require restoration of the status quo ante in this respect. The Respondent may introduce at compliance any evidence not available prior to the hearing bearing on the appropriateness of this portion of the remedy. See *Lear Siegler, Inc.*, 295 NLRB 857, 860-862 (1989).

The Board then sought enforcement of its Order before the United States Court of Appeals for the Seventh Circuit.

Court of Appeals Decision

The court agreed with the Board's finding that the Respondent's subcontracting was unlawful. It noted that, "The Board's decision that the employer acted for forbidden reasons is supported by substantial evidence; we need not discuss the details."⁴ The court, however, found the order to restore the operations to be more "problematic." The court went on to note:

"It is the Board's usual practice in cases involving discriminatory relocation of operations to require the employer to restore the operations in question . . . unless the [employer] can demonstrate that restoration of the status quo is inappropriate." *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989). . . . Special Mine Services does not contest the rule but seeks shelter in the "unless" clause—a portion of the doctrine to which courts have devoted more attention, and which they have insisted the Board respect. . . . Special Mine Services documented the financial burden by establishing that its subcontractor supplied the connectors for less than the cost Special Mine Services had incurred to make them, and it contended that other costs of running the oven at its main plant (particularly the need to install heavy-duty electrical circuits, without which the oven had operated poorly) not only supported the original de-

¹ 308 NLRB 711 (1992).

² *NLRB v. Special Mine Services*, 11 F.3d 88 (7th Cir. 1993).

³ The Respondent did not file a statement of position.

⁴ *NLRB v. Special Mine Services*, supra at 89.

cision to subcontract the work but also established that taking the work in house would be unusually expensive.⁵

The court further stated:

The administrative law judge did not recommend the restoration of the work, but neither did he give reasons for not doing so. He stepped lightly over the employer's argument about its electrical problem: he concluded that it is soluble, but [at] what cost in time and money he did not say. He discussed other cost savings, a subject to which we return. In response to the General Counsel's exception on this subject, Special Mine Services reiterated its contentions that resuming the connector operations would impose heavy capital and operating costs. If the union adherents are rehired with backpay, Special Mine Services contended, they will have a full remedy. To this the Board replied (and this footnote is its whole treatment of the subject):

The General Counsel excepts to the judge's failure to order the Respondent to reestablish and resume the connector work that it subcontracted for unlawful reasons. We find merit to this exception and shall require restoration of the status quo ante in this respect. The Respondent may introduce at compliance any evidence not available prior to the hearing bearing on the appropriateness of this portion of the remedy. See *Lear Siegler, Inc.*, 295 NLRB 857, 860-862 (1989).⁶

The court then posited these questions:

Each party had arguments; why did the Board choose one side rather than the other? . . .

Did the Board disbelieve the employer's claim that installing new electrical lines (and making other adjustments) will be costly? Did it accept the evidence but think these costs appropriate in light of the magnitude of the injury inflicted on the employees? Did the Board perhaps believe that the costs will not be incurred at all, because the union will agree to continuation of the subcontracting in exchange for higher wages (so that the order will not produce a waste of resources, but will only transfer wealth from employer to future workers)? Did the Board rely on the ALJ's pooh-poohing of the employer's cost savings claim? . . .⁷

Or did the Board perhaps not consider the subject at all, postponing the "real" decision to a

compliance hearing? The final sentence of the footnote suggests as much, although it implies that only new evidence—and not the sort of arguments made in the briefs on the basis of the record the ALJ assembled—would count. If the Board meant to put off decision, it is not clear why it has asked us to enforce this portion of its order. For *our* order would not just send the parties to a new hearing for the introduction of fresh evidence. Our order would direct Special Mine Services to restore the connector fabrication to its own plant, and the expense of doing so would be no defense. When the Board defers decision, it ought to defer the application for enforcement as well. . . .⁸

The court concluded:

Forced to decide on this record, and with the meager assistance of the Board, whether Special Mine Services must be put in jeopardy of the contempt process if it does not resume connector fabrication at its main plant, we must decline to enforce the order. The Board may supply the missing explanation for its decision and file a new petition for enforcement, or it may conduct the compliance proceedings and issue a fresh decision on the enlarged record. What we will not do is put judicial compulsion behind an order entered for undisclosed reasons on a record the Board itself apparently believes inadequate for decision.⁹

Board Decision on Remand

As a preliminary matter, we respectfully note that the court inadvertently misstated one fact. The court is apparently under the impression that the Respondent filed a response to the General Counsel's exceptions to the judge's failure to order restoration. As a result, the court concludes that "each party" made arguments to the Board and the Board "chose" one over the other. That is incorrect. The Board made its decision to order restoration based on the unopposed exceptions from the General Counsel.¹⁰

That being said, we now respond to other issues of concern raised by the court's decision. The court suggests that by allowing the parties to introduce evidence at a compliance hearing relevant to restoration of the status quo ante, the Board is "postponing" or "deferring" its "real" decision. With all due respect, the Board has not "deferred" decision in this case. In the

⁵Id. at 89.

⁶Id. at 89.

⁷Id. at 89-90.

⁸Id. at 90.

⁹Id. at 90.

¹⁰What the court may have interpreted as the Respondent's response to the General Counsel's exceptions is the Respondent's late-filed motion for reconsideration which the Board denied. At the time the motion was filed, the Board was already seeking enforcement before the Seventh Circuit and thus no longer had jurisdiction.

underlying proceeding the Respondent had an opportunity to argue, and did argue, that its decision to sub-contract was motivated by economic considerations. The Board rejected this argument, and the court has agreed. In addition, Respondent had an opportunity to argue that events occurring after the decision to sub-contract, but before the hearing in this case, made a restoration order inappropriate. As noted, the Board, in the absence of a Respondent argument, ordered the restoration remedy. The only issue left undecided by the Board was whether newly discovered evidence, e.g., evidence not previously available at the time of the hearing, made a restoration order inappropriate. That issue can be addressed in compliance proceedings. As we stated in *We Can, Inc.*, 315 NLRB No. 24 (Sept. 30, 1994),

We recognize, however, that in this case, as in almost any case, evidence may come to light after the close of the record in the unfair labor practice hearing that may, if credited and found sufficiently material, establish that some portion of the remedy imposed by the Board is no longer appropriate.

We have provided for that contingency by allowing the Respondent to introduce such new evidence at the compliance stage of this proceeding.

With reference to the court's concern that enforcement of the restoration order in this case would unequivocally require the Respondent to restore its connector manufacturing operations and that expense would be no defense, we believe the court's concern is addressed by our procedures. The Board discussed this issue in *Lear Siegler, Inc.*, 295 NLRB 857 (1989). The Board noted that several courts had refused to enforce restoration orders. The Board observed that in some of those cases the restoration orders had been unequivocal. The Board considered that the reviewing courts might have thought that if those orders were enforced, the Board at compliance might ignore all evidence of changed circumstances, require restoration of operations even if that remedy was no longer appropriate, and bring contempt proceedings based on the literal terms of the orders. The Board made clear in *Lear Siegler* that its order expressly allowed the employer to introduce evidence at compliance concerning the continued appropriateness of the restoration and reinstatement portions of the remedy, and that the order thus clearly implied that if the employer could demonstrate that the restoration of its facility would be unduly burdensome, restoration would not be required. The Board went on to say, "court enforcement of the [o]rder in this case will enable the Board to require restoration only if the [r]espondent cannot show that

restoration would impose an undue hardship."¹¹ The Board also emphasized that contempt proceedings would not be brought against the employer for failing to comply with its restoration order until the Board, in compliance proceedings, had finally determined that restoration was appropriate; the employer then failed to comply with the restoration order; the Board's order was subsequently enforced; and the employer then refused to comply with the order as enforced.¹²

Thus, here, as in *Lear Siegler*, the Respondent will have the opportunity at the compliance phase of this proceeding to present any evidence that has become available since the earlier hearing that might bear on the appropriateness of the restoration remedy. If it fails to do so, or if the evidence it presents is unconvincing, the restoration order will stand, subject to court review. If, however, the Respondent presents evidence at compliance that convinces the Board that restoration is no longer appropriate, the Respondent will not be required to carry out those portions of the Order, and will be not be in danger of contempt proceedings for failing to do so. See *We Can, Inc.*, supra.

Consistent with the Board's established practice of leaving the details of the remedy to compliance, and mindful of the two "options" given by the court, i.e., "supply the missing explanation for its decision and file a new petition for enforcement" or "conduct [a] compliance proceeding[s] and issue a fresh decision," we shall adopt the latter "option" and remand this proceeding to the Regional Director for Region 14 who shall issue a compliance specification and take any further appropriate action consistent with this decision.¹³

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 14 for issuance of a compliance specification and all further appropriate action in accord with this decision.

¹¹ 295 NLRB at 862.

¹² 295 NLRB at 862 fn. 33.

¹³ If after issuance of a compliance specification, it is determined that a hearing is necessary, the Respondent may introduce at that hearing any evidence not available prior to the unfair labor practice hearing bearing on the appropriateness of the restoration remedy.