

Laidlaw Transit, Inc. and General Truck Drivers, Warehousemen and Helpers, Local Union No. 315 of Contra Costa County, International Brotherhood of Teamsters, AFL-CIO. Case 32-CA-14782

May 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On January 22, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief 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, Laidlaw Transit, Inc., Concord, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹Chairman Gould has previously expressed the view that interest arbitration is a mandatory subject of bargaining on which a party may insist to impasse. *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923, 926 fn. 12 (1994). Accordingly, he would overrule *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976), and other cases holding that interest arbitration is a nonmandatory subject of bargaining. In the absence of a current Board majority to overrule that precedent, however, Chairman Gould agrees that the judge has correctly applied it here in concluding that the Respondent violated Sec. 8(a)(5).

In Member Fox's view this case is not an appropriate vehicle for reexamining that precedent because the Respondent takes the position not only that it should be permitted to insist to impasse on an interest arbitration clause, but that it may seek to hold the Union to an agreement that interest arbitration clauses would be included in every contract negotiated in the course of their bargaining relationship.

George Velastegui, Esq., for the General Counsel.
Julius M. Steiner, Esq. (Obermayer, Rebmann, Maxwell & Hippel), of Philadelphia, Pennsylvania, for the Respondent.
Kenneth C. Absalom, Esq. (Beeson, Tayer & Bodine), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on October 8, 1996. On June 1, 1995, General Truck Drivers, Warehousemen and Helpers, Local Union No. 315 of Contra Costa County, International Brotherhood of Teamsters, AFL-CIO (the Union) filed the charge alleging that Laidlaw Transit, Inc. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On July 28, 1995, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

ent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On July 28, 1995, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Delaware corporation with an office and principal place of business located in Concord, California, where it is engaged in the operation of a bus service for charter and for the transportation of students. During the 12 months prior to the issuance of the complaint, Respondent derived gross revenues in excess of \$250,000. In the same period, Respondent purchased and received goods and products valued in excess of \$5000 which originated from outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

The Union has represented a bargaining unit of Respondent's employees since at least 1987. The last collective-bargaining agreement between the parties was effective by its terms from September 1, 1990, to August 31, 1993. Commencing in August 1993 and continuing until May 1995, Respondent and the Union met for the purpose of negotiating a successor collective agreement to the 1990 to 1993 agreement.

The complaint alleges and the answer admits that during the negotiations Respondent insisted that any successor collective-bargaining agreement include an interest arbitration clause. Further, the parties agree that on or about November 9, 1994, Respondent and the Union agreed to all the terms of a collective-bargaining agreement, except for an interest arbitration clause. Thereafter, in May 1995, Respondent informed the Union that it would not bargain for, agree to, or sign any collective-bargaining agreement that did not include an interest arbitration clause.

Within this factual framework, the General Counsel and the Union contend that an interest arbitration clause is a nonmandatory subject of bargaining and that Respondent has bargained to impasse over a nonmandatory subject of bargaining. Respondent concedes that under current Board precedent an interest arbitration clause is a nonmandatory subject of bargaining. However, Respondent argues that the Board should overrule such precedent and hold that interest arbitration is a mandatory subject of bargaining. In addition, Respondent contends that in 1989, the Union agreed to inter-

est arbitration to be included in all future collective-bargaining agreements with Respondent. The General Counsel and the Union contend that the 1989 agreement relied on by Respondent meant that the Union would agree to interest arbitration, if necessary to reach an agreement in 1990 and that an interest arbitration clause would be included in the 1990 to 1993 agreement. They deny that there was any agreement to include interest arbitration beyond that. Further, the General Counsel and the Union argue that an agreement for interest arbitration, in perpetuity, is unenforceable under Board precedent.

B. Facts

Since at least 1987, the Union has been the exclusive bargaining representative of Respondent's employees in the following appropriate bargaining unit:

All full-time and regular part-time bus drivers, lead drivers, mechanics and fueler/washers employed by Respondent at its facilities located in Contra Costa County and Marin county, California; excluding all other employees, guards, and supervisors as defined in the Act.

In August 1989, Respondent and the Union entered into a "Memorandum Of Agreement On Proposed Voluntary Recognition" whereby Respondent agreed to voluntarily recognize the Union as the exclusive bargaining representative of its regular part-time bus drivers and van drivers at its Benecia, California facility. The Union had to demonstrate its majority status among the Benecia employees. Through a count of union authorization cards, the Union demonstrated that it represented a majority of the unit employees at the Benecia facility. The Benecia based employees were accreted into the existing bargaining unit.

The agreement on voluntary recognition provided in relevant part: "Whereas, neither party shall hereinafter engage in any form of economic action against the other and will submit any unresolved bargaining issues to the Impartial Arbitrator as provided in the Master Agreement for final and binding arbitration." Dennis Buster, then Respondent's vice president for human resources, testified that the quid pro quo for voluntary recognition was that the parties would not engage in any economic action against the other, and instead would utilize interest arbitration to resolve disputes. According to Buster, Respondent and the Union agreed to interest arbitration in perpetuity.

Ron Teninty, then the Union's president, testified that Buster sought agreement from the Union that all future agreements would include an interest arbitration clause but that he refused to agree to that proposal. According to Teninty he agreed that the agreement for voluntary recognition would provide for interest arbitration and that the next collective-bargaining agreement (the 1990-1993 agreement) would contain an interest arbitration clause. However, according to Teninty, after 1993 the succeeding agreement would be subject to conventional collective bargaining. Teninty admitted that at the time of the 1989 voluntary recognition agreement he believed that interest arbitration was beneficial to both Respondent and the Union (and, therefore, also the Union's members). However, Teninty denied that he had agreed to interest arbitration in perpetuity.

On February 19, 1991, Respondent presented the Union with a contract proposal providing for interest arbitration. On the following day, the Union presented Respondent with its bargaining demands. The Union made no request to change the no-strike/no-lockout interest arbitration provisions. On March 19, Respondent made its final offer which included the no-strike/no-lockout interest arbitration provisions.

However, the Union received a letter from employees purportedly protesting the "perpetual" no-strike/no-lockout provisions of the proposed collective-bargaining agreement. In July 1992, the Union, for the first time, objected to the inclusion of the interest arbitration and no-strike/no-lockout provisions in future bargaining agreements. In 1992, the Respondent's Benecia facility ceased operations because Respondent lost its contract with the school district. Moreover, the master agreement referred to in the voluntary recognition agreement ceased to exist.

On December 29, 1992, the Union's attorney wrote William Schilling, Respondent's director of human resources, stating, *inter alia*:

Although the Local recognizes its obligation to comply with the new language under [the interest arbitration clause] during the forthcoming negotiations, the Union will not be willing to agree to the continuation of the interest arbitration provision into the next collective bargaining agreement.

However, the Union did, on April 15, 1993, execute the 1990-1993 agreement. The 1990-1993 collective-bargaining agreement contained the following interest arbitration clause:

It is the intent of the parties that a successor Agreement to this one shall be completed prior to the expiration date provided in Section 1 of this Article, and that all the terms of such successor Agreement be agreed upon without any interruption of the Company's business and without either the Company or the Union engaging in economic activity against the other. The Company and the Union therefore agree to commence negotiations on a successor agreement sufficiently in advance of the expiration date provided in Section [sic] of this Article to allow for a settlement to be reached, and to submit any unresolved issues to binding final offer, issue by issue interest arbitration.

While the parties proceeded to bargain for a successor agreement after the 1990-1993 agreement expired in September 1993, the parties continued to operate under the terms of the expired agreement. As stated earlier, by November 1994, the Union and Respondent had agreed on all issues for a successor bargaining agreement except for the inclusion of an interest arbitration clause. The parties agree that Respondent has insisted to impasse on an interest arbitration clause and has refused to execute any bargaining agreement that does not include such a clause.

On November 9, 1994, the parties entered into a written memorandum of understanding which provided:

Notwithstanding the issue of "perpetual no strike/no lockout—interest arbitration" which shall be the subject of an unfair labor practice charge to be brought before the NLRB, Teamsters Local 315 and Laidlaw agree that

subject to ratification all terms and conditions of the parties 1993-1996 collective bargaining agreement have been resolved and are enforceable. Furthermore neither party shall resort to any form of economic action or picketing against the other for the duration of the 1993-1996 agreement.

C. Analysis and Conclusions

Section 8(d) of the Act obligates employers and unions to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. Anything not related to these matters is a nonmandatory subject of bargaining. In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court held that insistence to impasse is available to a party only with respect to a mandatory subject of bargaining. Insistence to impasse on a nonmandatory subject of bargaining violates the statutory duty to bargain in good faith. It is also well established that an interest arbitration clause is a nonmandatory subject of bargaining since it relates to the relationship between the parties rather than to wages, hours, or other terms and conditions of employment. *Sheet Metal Workers Local 359 (Madison Industries)*, 319 NLRB 668 (1995); *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923 (1994); *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976).

Respondent admits that all terms of a collective-bargaining agreement were reached and that it refused to agree to or sign any collective-bargaining agreement that did not contain an interest arbitration clause. Under existing Board law, Respondent could not insist to impasse on the inclusion of an interest arbitration clause. Respondent argues that the Board should overrule existing precedent and decide that interest arbitration should be considered a mandatory subject of bargaining. However, I am bound by current Board law and any policy change must come from the Board or the Supreme Court.

The second question presented is whether the Union waived its right to bargain over interest arbitration. The credible evidence shows that in 1989 Respondent and the Union agreed that in return for voluntary recognition for the Benecia based employees, the Union would agree to no-strike/no-lockout interest arbitration. I credit Buster's testimony over that of Teninty. At the time the agreement was signed, Teninty believed that interest arbitration was in the best interest of both Respondent and the Union. It was not until July 1992, almost 3 years after the recognition agreement, that the Union argued that the interest arbitration clause was not perpetual.

However, having found that the Union agreed to an interest arbitration clause in 1989, without limitation, does not end the inquiry here. In December 1992, the Union's attorney notified Respondent that although the Union recognized its obligation to comply with the no-strike/no-lockout provisions of the 1990-1993 agreement, the Union would not be willing to agree to the continuation of the interest arbitration provision into the next collective-bargaining contract. In that context, in April 1993, Respondent and the Union entered into the 1990-1993 collective-bargaining agreement. In negotiations for the 1993-1996 agreement, Respondent has continually demanded an interest arbitration clause and the Union has steadfastly refused to enter into such a clause.

In *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989), the Board held that if a union has a reasonable basis in fact and law to bind the employer to an interest arbitration clause, the union may lawfully invoke its contract rights, including initiating court action to enforce any resulting contract. However, the Board will not "saddle" the parties with "a perpetual cycle of binding interest arbitration." *Sheet Metal Workers Local 206 (Warrens Industrial)*, 298 NLRB 760, 762 at fn. 4 (1990); *Sheet Metal Workers Local 91 (Neyens Refrigeration)*, 311 NLRB 1140, 1140-1141 (1993). These principles were based on the presumption that a party cannot be compelled to relinquish economic weapons perpetually. Cf. *Parks v. Electrical Workers*, 314 F.2d 886, 910 (4th Cir. 1963); *Mechanical Contractors Assn. of Newburgh*, 202 NLRB 1, 3 (1973).

The Board has consistently precluded a party from using an existing interest arbitration clause to perpetuate that clause; otherwise, "a party, having once agreed to that provision, may find itself locked into that procedure for as long as the bargaining relationship endures." *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1169-1170 (5th Cir. 1976), enfg. *Printing Pressman Local 252 (R.W. Page Corp.)*, 219 NLRB 268 (1975). Thus, an interest arbitration clause is unenforceable insofar as it applies to the inclusion of a similar clause in a new collective-bargaining agreement. *Sheet Metal Workers v. Aldrich Air Conditioning, Inc.*, 717 F.2d 456 (8th Cir. 1983); *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43 (1984). The Board has been unwilling to permit self-perpetuating interest arbitration clauses because they represent an irretrievable surrender of economic weapons in support of their bargaining positions, and the Board has recognized these self-perpetuating clauses as attempts to dictate the composition of a party's negotiating team by substituting an arbitrator's decision in lieu of bargaining by interested parties. Cf. *Mechanical Contractors Assn. of Newburgh*, 202 NLRB 1 (1973).

In the instant case, I find that the Union has not clearly and unmistakably waived its statutory rights. During the negotiations for the 1990-1993 agreement, the Union clearly stated that it was agreeing to an interest arbitration clause for the 1990-1993 agreement only and that it would not include such a clause in a future agreement. The foundation for the first interest arbitration clause had disappeared. The Benecia unit no longer existed and there no longer was a master agreement containing an interest arbitration clause. The strong Board policy against a perpetual interest arbitration clause dictates a finding that the Union was not bound to include an interest arbitration clause in the 1993-1996 agreement nor was the Union required to submit the inclusion of such a clause to interest arbitration. Accordingly, I find that the prior interest arbitration clauses do not provide the Respondent with a defense. I find that Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on a nonmandatory subject of bargaining.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on its proposal for an interest arbitration clause.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Laidlaw Transit, Inc., Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively by insisting to impasse on its proposal for an interest arbitration clause.

(b) In like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Regional Director, post copies of the attached notice marked "Appendix"² at its locations in Marin County and Contra Costa County, California. Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps

¹If 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.

²If 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."

shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 1 1995.

(b) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with General Truck Drivers, Warehousemen and Helpers, Local Union No. 315 of Contra Costa County, International Brotherhood of Teamsters, AFL-CIO, by insisting to impasse on a proposal for an interest arbitration provision.

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

LIDLAW TRANSIT, INC.