

Exxel-Atmos, Inc. and United Steelworkers of America, AFL-CIO. Case 22-CA-20475

June 5, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

Upon a charge filed by the United Steelworkers of America, AFL-CIO, on February 21, 1995, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on April 27, 1995, against Exxel-Atmos, Inc., alleging that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The Respondent filed an answer to the complaint on May 9, 1995, admitting in part and denying in part the complaint allegations and asserting affirmative defenses.

On August 10, 1995, the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached. On August 14, 1995, the Board issued an Order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On September 6, 1995, the Respondent filed a reply to the General Counsel's Motion for Summary Judgment and a Cross-Motion for Summary Judgment requesting that the complaint be dismissed.

Ruling on Motion for Summary Judgment

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a New Jersey corporation with an office and place of business in Somerset, New Jersey, has been engaged in the manufacture, sale, and shipment of nongas aerosol delivery systems. During the 12-month period ending April 27, 1995, the Respondent, in the course and conduct of its business operations has sold and shipped from its Somerset, New Jersey facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (5) by withdrawing recognition and refusing to bargain with the Union as the exclusive collective-bargaining representatives of the unit, consisting of production and maintenance workers, by soliciting and instigating the decertification of

the Union and by giving a Christmas bonus to its unit employees without giving notice or the opportunity to bargain to the Union.

A. Facts

The Respondent, Exxel-Atmos, Inc., is a small manufacturer of nonaerosol dispensing systems in Somerset, New Jersey. The Respondent voluntarily recognized the Union as the collective-bargaining representative of its production and maintenance employees, without an election, on September 7, 1990.¹

In May 1991, the Respondent unlawfully refused the Union's request for bargaining. In August 1991, the Respondent withdrew recognition from the Union and subsequently refused to bargain. The Board found that the Respondent violated Section 8(a)(1) and (5) of the Act by this conduct. The Court of Appeals for the District of Columbia issued its judgment dated July 15, 1994. *Exxel-Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994), enfg. in part and denying in part 309 NLRB 1024 (1992); petition for rehearing denied 37 F.3d 1538 (D.C. Cir. 1994). That decision upheld the finding of the Board that the Respondent unlawfully refused to bargain with the Union in May 1991, and thereafter unlawfully withdrew recognition from the Union in September 1991. As to the remedy, the court enforced the Board's cease-and-desist order against the Respondent, but declined to enforce the Board's affirmative bargaining order. The court remanded the case to the Board for an explanation why such a bargaining order was the appropriate remedy. The Board subsequently reaffirmed its affirmative bargaining order.²

The undisputed facts in the instant case arose after the court's decision.³ On about December 7, 1994, the Respondent's president, Ronald Lemke, held a meeting for all production and maintenance employees. At the meeting, Lemke read from a prepared speech that gave the unit employees instructions on how to decertify the Union. The text of the speech also informed the employees that the

federal appeals court has now decided that the Company *will be required* to bargain with the Steelworkers union unless our employees *clearly indicate* that you [sic] do not want to have the union represent you. So, unless a sufficient number of you indicate that you do not want the union, if the union requests that we bargain with it, we will have to do so. [Emphasis marks handwritten on original prepared text.]

¹ *Exxel-Atmos, Inc.*, 309 NLRB 1024 (1992).

² *Exxel-Atmos, Inc.*, 323 NLRB 888 (1997).

³ The court of appeals issued its decision denying the Board's motion for rehearing en banc on November 4, 1994.

Lemke's invitation for questions from the employees drew no response. At the conclusion of the speech, Lemke left copies of the text of the speech, along with the address and telephone number of the Regional Office, on a table in the lunchroom for employees to take with them. Within days of the speech, form letters indicating dissatisfaction with the Union were circulated and signed by unit employees. In January 1995, employee Jay Soni presented Lemke with approximately 13 signed form letters. These letters later became the showing of interest for the decertification petition.

Further, the Respondent, without bargaining with the Union, decided to give all unit employees a first-time cash bonus of \$100, referred to as a "Christmas Bonus." This bonus was paid sometime during the week of December 23, 1994. Lemke states in his affidavit that he and the Respondent's director of operations, Tom Sedita, made the decision to give the first-time bonus to show the Respondent's appreciation for the increased sales generated by the employees during 1994.

Based on the form letters from employees expressing dissatisfaction with the Union, the Respondent canceled all bargaining sessions scheduled for early 1995 and has since consistently refused to bargain with the Union.

On January 26, 1995, employee Soni, filed a decertification petition in Case 22-RD-1136. This petition is currently pending in the Regional Office for Region 22.

B. The Parties' Contentions

The General Counsel argues that despite the issuance of the court's judgment enforcing the Board's Order that the Respondent cease from refusing to bargain with the Union, the Respondent continues to refuse to bargain in violation of Section 8(a)(5) and (1). The General Counsel asserts that the Respondent met with the unit employees and provided them with unsolicited instruction on how to decertify the Union in violation of Section 8(a)(1), and, thereafter, decided to grant unilaterally all the unit employees a first-time cash bonus of \$100, referred to by the Respondent as a "Christmas bonus" in violation of Section 8(a)(5) and (1).

In its answer to the complaint, the Respondent does not dispute any of the factual allegations. It, however, denies that the Union is the exclusive bargaining representative for its employees. It further denies that Lemke's December 7, 1994 speech to the employees served to solicit and/or instigate a decertification of the Union because the speech did not contain threats or a promise of benefits to the employees. The Respondent admits that it gave its employees a \$100 cash Christmas bonus, but denies that the Company had a duty to provide notice to or the opportunity to bargain with

the Union prior to giving the bonus to the unit employees. The Respondent admits that the Union requested it to bargain collectively on January 11, 1995, but denies that the Company unlawfully failed to bargain, asserting that it had a good-faith doubt as to the Union's majority status as of January 10, 1995, and that doubt was confirmed when the bargaining unit employees filed the decertification petition on January 26, 1995. Further, it acknowledges that the copy of the speech attached to the General Counsel's motion actually reflects the text of the speech given by Lemke to its employees on December 7, 1994. It asserts, as an affirmative defense, that the speech is protected by Section 8(c) of the Act; that it could not have instigated or solicited a decertification petition in view of its employees' past expressions of antiunion sentiment; that the granting of the Christmas bonus was a gift to its employees and was no more than an appropriate seasonal act by a responsible employer; and that the act was de minimis and cannot provide the basis for a violation of the Act.

C. Analysis

In *Exxel-Atmos, Inc.*, 323 NLRB 888 (1997), we affirmed our original findings that the proper remedy for the Respondent's earlier withdrawal of recognition and refusal to bargain with the Union is an affirmative bargaining order requiring the Respondent, upon request, to bargain with the Union for a "reasonable period of time." The Respondent, however, has never acceded to any union demands for bargaining since its August 1991 unlawful withdrawal of recognition. In these circumstances, it is clear that a reasonable time for bargaining has not elapsed and that the Respondent's refusal to bargain violated Section 8(a)(5) and (1) of the Act.

In his unsolicited speech, the Respondent's president, Lemke, provided the unit employees with instructions on how to decertify the Union. In doing so, the Respondent unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act.⁴

The Respondent admits that it gave its employees a \$100 cash bonus on about December 23, 1994. This bonus was a clear deviation from past practice.

It is well-settled Board law that a bonus paid to employees, at Christmas or otherwise, is a condition of employment and the proper subject of collective bargaining.⁵ In *Niles-Bement-Pond Co.*, 97 NLRB 165 (1951), *enfd.* 199 F.2d 713 (2d Cir. 1952), the Board held that although a year end bonus "may be paid at

⁴*Weisser Optical Co.*, 274 NLRB 961 (1985), and cases cited therein.

⁵*Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 613 (1990); *Singer Mfg. Co.*, 24 NLRB 444, 470 (1940), *enfd.* in relevant part 119 F.2d 131 (7th Cir. 1941), *cert. denied* 313 U.S. 595 (1941).

Christmas and therefore carry with it the Christmas spirit of gift giving, [such a bonus] amounts fundamentally to deferred compensation for services performed during the preceding year." *Id.* at 167.

The Respondent further concedes that the "Christmas bonus" was related to the increased sales performance of its employees in 1994. As we have stated, "the policy of the Act to encourage collective bargaining in the interest of industrial peace is best served by requiring an employer to negotiate on the subject matter of such a bonus." *Id.* at 167.

We conclude, therefore, that the \$100 cash "Christmas bonus" constitutes wages, and as such, is a proper subject for collective bargaining. The Respondent's unilateral action on granting the bonus violated Section 8(a)(5) and (1) of the Act.

Finally, even had we not determined in the underlying *Exxel-Atmos* case that the Respondent was precluded from withdrawing recognition as a result of the affirmative bargaining order, we would find that the Respondent could not lawfully withdraw recognition based on the January 1995 decertification petition. Thus, that petition is tainted because it was unlawfully instigated by the Respondent in violation of Section 8(a)(1) and was circulated in the context of the Respondent's unilateral grant of the \$100 "Christmas bonus" which violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By withdrawing recognition and refusing on and after January 11, 1995, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By making a speech on about December 7, 1994, and providing unsolicited information on how to decertify the Union, the Respondent has violated Section 8(a)(1) of the Act.

3. By conferring on its employees a \$100 cash "Christmas bonus," the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for its employees.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, *Exxel-Atmos, Inc.*, Somerset, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by the Respondent at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

(b) Soliciting and/or instigating a decertification petition among its employees.

(c) Refusing to bargain in good faith by making unilateral changes without providing notice to the Union and an opportunity to bargain.

(d) 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) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

(b) On request, bargain with the Union regarding the granting of a "Christmas bonus" to unit employees.

(c) Within 14 days after service by the Region, post at its facility in Somerset, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 1994.

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

⁶ 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.

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 with United Steelworkers of America, AFL-CIO as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

WE WILL NOT solicit and/or instigate a decertification petition among our employees.

WE WILL NOT refuse to bargain in good faith by making unilateral changes without providing notice to the Union and an opportunity to bargain.

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, on request, recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

WE WILL, on request, bargain with the Union regarding the granting of a "Christmas bonus" to unit employees.

EXXEL-ATMOS, INC.