

Dynatron/Bondo Corporation and Union of Needletrades, Industrial and Textile Employees, AFL-CIO. Case 10-CA-29735

September 30, 1998

ORDER REMANDING PROCEEDING TO
ADMINISTRATIVE LAW JUDGE

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On February 25, 1998, Administrative Law Judge Keltner W. Locke delivered a bench decision and certification in this proceeding. The General Counsel, the Charging Party, and the Respondent each filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the bench decision and the record in light of the exceptions and briefs and has decided to remand this proceeding to the judge for further consideration as set forth below.

The complaint alleges that the Respondent unilaterally implemented the wage and group health insurance proposals that had been contained in its final bargaining proposal to the Union, at a time when prior unfair labor practices committed by the Respondent remained unremedied.¹ The judge, finding that the Respondent had not yet complied with the Board's Orders in those cases, concluded that there could be no lawful impasse in the presence of unremedied unfair labor practices, and therefore that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its contract proposals without notice to or bargaining with the Union.

In its exceptions, the Respondent contends that it was improper for the judge to issue a bench decision because the issues involved herein require a thorough analysis which the judge did not provide. The Respondent claims that the judge failed to consider evidence of the parties' bargaining history in finding that no impasse existed, and failed to determine if there was a causal connection between the prior unfair labor practices and the deadlock in negotiations. We find merit in the Respondent's arguments, and we shall remand this proceeding to the judge for a full analysis of the issues involved herein.

In *Taft Broadcasting Co.*,² the Board set forth the following guidelines for determining the existence of an impasse:

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the

parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

It is well established, however, that an employer may not declare impasse "if the impasse is reached in the context of serious unremedied unfair labor practices *that affect the negotiations*."³ In other words, for the judge to conclude that the unremedied unfair labor practices prevented the parties from reaching lawful impasse, he must first find that there was a causal connection between the previous unfair labor practices and the failure to reach an agreement.

The record contains evidence of the parties' extensive bargaining, which the judge failed to discuss. Further, the judge's brief discussion contains no explanation for why he believed the bargaining was adversely affected by the Respondent's prior unfair labor practices.

In sum, we find that the bench decision lacks sufficient rationale. Therefore, we shall remand this proceeding to the judge for a written analysis of the facts and legal precedent relevant to all the issues presented in this case.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Keltner W. Locke for the purposes described above.⁴

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Katherine Chahrouri, Esq., for the General Counsel.
Douglas Duerr, Esq., *Walter O. Lambeth Jr., Esq. (Elarbee, Thompson & Trapnell)*, of Atlanta, Georgia, for the Respondent.

David M. Prouty, Esq., for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case in Atlanta, Georgia, on January 20, 1998.¹ At the conclusion of the hearing and after all parties had received the opportunity to present oral argument,² I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the

³ *Noel Corp.*, 315 NLRB 905, 911 (1994) (emphasis added), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996).

⁴ In remanding this case, we are not passing on any of the other issues raised by the parties' exceptions at this time.

¹ Certain errors in the transcript are noted and corrected.

² The General Counsel and the Charging Party made oral arguments at the hearing. The Respondent declined.

¹ See *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), and *Dynatron/Bondo Corp.*, 324 NLRB 593 (1997).

² 163 NLRB 475, 478 (1967), petition for review denied sub nom. *Television Artists AFTRA v. NLRB*, 305 F.2d 622 (D.C. Cir. 1968).

transcript containing this decision. The remedy, Order, and notice to employees are set forth below³

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, described below in the recommended Order, including posting the notice to employees attached hereto as Appendix B.

I hereby issue the following recommended⁴

ORDER

The Respondent, Dynatron/Bondo Corporation, of Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in its employees' wages and group health insurance without providing the Charging Party adequate notice of the proposed changes and adequate opportunity to bargain about them.

(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) At the Charging Party's request, rescind the changes it made on or about October 25, 1996, by implementing its wage and group health insurance proposals unilaterally, and restore the terms and conditions of employment pertaining to wages and group health insurance which were in effect before it unlawfully changed them.

(b) To the extent that any employee was affected adversely because of the changes in wages and group health insurance which the Respondent made unilaterally on about October 25, 1996, the Respondent shall make each such employee whole, with interest, for all losses the employee suffered because of the unlawful changes.

(c) Preserve and, upon request, make available to the Board or its agents for examination a copy of all payroll records, social security records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay which may be due under this order.

(d) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 10, 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 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

³ For clarity, I have revised the wording of the Order, as read at the hearing.

⁴ If 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.

expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1996.

(e) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

APPENDIX A

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(Time Noted: 4:23 p.m.)

JUDGE LOCKE: On the record.

This is a bench decision in the case of Dynatron/Bondo Corporation and Union of Needle Trades, Industrial and Textile Workers, AFL-CIO. The case number is 10-CA-29735, a decision, pursuant to Section 102.35, subparagraph 10, and Section 8 102.45(a) of the Rules and Regulations of the National Labor Relations Board.

The General Counsel, by the Regional Director of Region 10 of the Board, issued a complaint and notice of hearing in this matter on May 30, 1997. Respondent filed an answer dated June 13, 1997.

In its answer, the Respondent admitted the following complaint allegations, which I find to be true. Respondent admitted that the charge in this proceeding was filed by the union on November 8, 1996 and a copy was served by first class mail on Respondent on November 8, 1996.

Respondent admitted that at all times material, Respondent, a Georgia corporation, with an office and place of business in Atlanta, Georgia, herein called Respondent's facility, has been engaged in manufacturing automobile filler and other automotive parts.

Respondent admitted that during the 12-month period preceding issuance of the complaint, the Respondent, in

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conducting its business operations, sold and shipped from its Atlanta, Georgia facility goods valued in excess of \$50,000 directly to points outside the State of Georgia.

I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 226 and 7 of the Act.

Respondent also admitted that at all material times, the union has been a labor organization within the meaning of Section 2.5 of the Act. Respondent admitted that all production and maintenance employees employed by Respondent at its Atlanta, Georgia facility, including all quality control technicians, but excluding all-office clerical employees, technical employees, laboratory and professional employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. I so find.

Respondent also admitted that on September 8, 1989, in an election by secret ballot, conducted under the supervision of, the Regional Director of the 10th Region of the National Labor Relations Board, a majority of employees in this unit designated the union as their representative for the purpose of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment and other terms and conditions of employment. I so find.

Respondent further admitted that on June 5, 1991, the

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Respondent certified the union—I'm sorry—that the Board certified the union as the exclusive collective bargaining representative of all the employees in the unit I have just described, and, find that to be the case.

Respondent, as I mentioned, has admitted all of these allegations and find them to be true.

Paragraph 10 of the complaint alleges that on or about October 25, 1996, Respondent implemented wage and group health insurance proposals that had been contained in its final bargaining proposal to the union regarding the terms and conditions of employment of the employees in the unit.

Respondent's answer admits that it has implemented the wage and group health insurance proposals contained in its final bargaining proposal. I find that it has and that it did so on or about October 25, 1996.

Respondent's answer does contend that this implementation led to lawful impasse to the union regarding the terms and conditions of employment of the employees in the unit.

In view of these admissions in Respondent's answer, I find that the Respondent, on or about October 25, 1996, implemented a wage and group health insurance proposals that have been contained in its final bargaining proposal to the union, as alleged in the complaint.

Paragraph 11 of the complaint, as amended at the hearing to correct a typographical error in the case citation, alleges that

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Respondent engaged in misconduct; that is, that it implemented the wage and group health insurance proposals that had been contained in its final bargaining proposal to the union unilaterally and without the consent of the union and at a time when its unfair labor practices in Cases 10-CA-25736, et al, and 6 10-CA-29014 remained unremedied. Respondent denies these allegations.

However, it is undisputed that the Board's July 16, 1997 decision in *Dynatron/Bondo Corporation*, reported at 323 NLRB No. 217, a copy of which is in evidence as General Counsel's Exhibit 2, involves Case 10-CA-25736, referred to in the complaint, as amended. It is also undisputed that the Board's September 30, 1997 decision in *Dynatron/Bondo Corporation*, reported at 324 NLRB No. 98, a copy of which is in evidence as General Counsel's Exhibit 3, involves Case 10-CA-29014, referred to in the complaint.

Additionally, at the hearing today, Respondent stipulated that it, quote, "has taken no affirmative steps to remedy the 19 unfair labor practices as set forth in the Board's decision dated July 16, 1997 and September 30, 1997, except that with respect to the orders, there has been no renewed request to bargain since the date of the orders."

Based upon the stipulation and the final representations of Respondent's counsel during the hearing, I find that the Respondent has not complied with the Board's orders in these two

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published decisions and, therefore, I conclude that the unfair labor practices found by the Board in those cases have not been remedied.

Also, based upon the representations of Respondent's counsel at the hearing today, I find that the Respondent has not appealed the Board's decisions and orders in the cases before me at 323 NLRB 1263 and 324 NLRB 572, even though it has the

right to do so under Section 10 of the National Labor Relations Act.

Therefore, I find that the Respondent has not remedied the unfair labor practices found by the Board in those cases.

Additionally, I conclude that the Board's findings in those cases are *res judicata* and binding in this proceeding.

In view of the admissions by Respondent and the stipulations of Respondent and the representations of Respondent's counsel on the record at this hearing and considering the findings of fact made by the Board in the cases published at 323 NLRB No. 217 and 324 NLRB No. 98, I conclude that the only issue in dispute in this proceeding is whether or not the Respondent lawfully could implement wage and group health insurance proposals described in the complaint, paragraph 10, at the time it implemented those proposals on or about October 25, 1996.

Based upon the testimony of the General Counsel's only witness, Mr. Harris L. Raynor, the union's chief negotiator in

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its bargaining with the Respondent, I find that the union did not at any time agree or give permission for the Respondent to implement these proposals.

Respondent called no witnesses to contradict Mr. Raynor and credit his testimony.

Therefore, I conclude that if Respondent's implementation of these proposals was lawful, it was on the basis of a legal principle such as waiver or based upon the existence of a *bona fide* impasse and circumstances untainted by Respondent's unfair labor practices.

These questions appear to be limited in scope and quite appropriate for resolution by bench decision.

One week ago, during a telephone conference call with the parties' attorneys, on January 13, 1998, I advised counsel that I was considering issuing a bench decision in this case. I invited counsel to submit pre-hearing memoranda by facsimile on or before close of business Friday, January 16, 1998, with service by facsimile on opposing counsel at the same time.

Neither the charging party nor the Respondent filed a memorandum. The General Counsel submitted a pre-hearing memorandum on January 16, 1998, with a certificate of service indicating that a copy had been served by facsimile on counsel for Respondent.

In oral argument today, counsel for the General Counsel cited the same cases which she had cited in the pre-hearing

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memorandum. In these circumstances, I do not find that issuance of a bench decision denies the Respondent the right to respond effectively.

Additionally, and as counsel for the Respondent pointed out on the record, the Respondent did submit evidence in the form of joint exhibits, which include the Respondents bargaining notes during its negotiations with the union.

I will assume that Respondent is familiar with its own bargaining notes and had the opportunity to make any arguments it wished to make about that evidence.

In sum, the facts in this case are largely undisputed and have been known for some time. The government has not advanced a novel legal theory. Therefore, I conclude that it will not prejudice the Respondent for me to issue a bench decision.

It has long been settled that during the course of negotiations for a new collective bargaining agreement, an employer ordinarily may not lawfully change terms and conditions of em-

ployment unilaterally, although certain exceptions may apply. The Respondent here does not claim any sort of business emergency or exigent circumstances which might create an exception to the general rule.

However, the Respondent does claim, as stated in paragraphs 10 and 11 of its answer, that it had reached a lawful impasse in bargaining and because of this impasse, could implement the wage and group health insurance proposals unilaterally, without

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violating the Act.

However, if the evidence shows the bargaining process is felt to have been adversely affected by employer's unfair labor practices, the parties cannot reach a valid bargaining impasse; see *Inter Mountain Rural Electric Association*, 305 NLRB 783 at 789.

In the case of *Columbian Chemicals Co.*, 307 NLRB 592, at footnote one, the Board stated that an employer's application of the unilaterally implemented policy to employees would preclude a finding that the employer had bargained in good faith to impasse after implementing that policy.

In *Dynatron/Bondo Corporation*, 323 NLRB 1263, issued July 16, 1997, the Board found that the Respondent herein had made unlawful unilateral changes, including discontinuing its past practice of granting merit raises, increases its unit employees' contributions to their health insurance program, and imposing a total smoking ban.

In *Dynatron/Bondo Corporation*, 324 NLRB 572, issued September 30, 1997, the Board found, among other violations, that the Respondent herein had unlawfully made a number of unlawful changes in working conditions unilaterally, including unilaterally instituting new disciplinary rules, changing its parking policy and creating a new policy for employees' compensation during power outages.

I find that because of these unilateral changes, there

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could be no lawful impasse in this case.

Additionally, in view of all the unfair labor practices found in these prior cases and in view of Respondent's action in this case, the charging party did not waive any rights.

Respondent sent an October 23, 1996 letter to the union stating, in part, quote, "It is clear further meetings are futile and we are at impasse," Joint Exhibit 8. The union's reply included both "I continue to await your availability for future meetings," Joint Exhibit 9.

Therefore, I note that in the Respondent's own words, further meetings were futile. Considering all the circumstances, I conclude that the union waived no rights and to require the union to make repeated demands upon the Respondent for further bargaining would be to expect it to engage in a futility. The law does not require that the union engage in a futility.

I find that the Respondent and employer engaged in commerce is within the meaning of Section 26 and 7 of the Act, failed to bargain in good faith with the charging party, which has been, at all material times, the certified representative of Respondent's employees in the bargaining unit alleged in the complaint.

I find that Respondent violated Section 8(a)(5) and (1) of the Act in the manner alleged in the complaint.

I further find that the Respondent's unlawful—I'm sorry

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—that the Respondent's unfair labor practices alleged in the complaint affect commerce within the meaning of Section 26 and 7 of the Act.

In the certification of this bench decision, I shall recommend that the Respondent shall cease and desist from making unilateral changes in employees wages and group health insurance without providing the charging party adequate notice of the proposed changes and adequate opportunity to bargain about them.

The Respondent shall not, in like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

The Respondent shall also take the following affirmative actions; request to bargain collectively with the Union of Needle Trades, Industrial and Textile Employees, AFL-CIO, as exclusive collective bargaining representative of the employees in the appropriate bargaining unit described in the complaint and if an understanding is reached, embodying their understanding in a signed contract.

It shall also, to the extent that employees were adversely affected by the unlawful unilateral changes it made in the employees' wages and group health insurance, restore the previous terms which were in effect and make employees whole for any losses that they may have suffered because of the unlawful unilateral changes.

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I shall not recommend that the Board require Respondent to rescind any unilateral change which is more favorable to the employees, unless the union shall request it. However, should the charging party request it, Respondent shall restore the wage and group health insurance terms as they existed before the unlawful unilateral changes took place.

The Respondent shall preserve and, upon request, make available to the Board or its agents for examination a copy of all payroll records, social security records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay which may be due under this order.

Respondent shall post at its Atlanta, Georgia facility a notice which shall be specified in my certification of this bench decision to the Board. That certification shall contain the additional provisions regarding notification to employees of this decision and notification to the Regional Director of compliance with its order.

The time period for appeal of my decision does not begin to run until my notice of certification of the bench decision is issued.

So I will try to get that certification just as quickly as I can upon receipt of the written transcript.

The hearing is closed. Thank you very much.
(Whereupon, at 4:40 p.m., the hearing was concluded.)

APPENDIX B

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 make changes in the wages or group health insurance of our employees in the bargaining unit represented by the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, without providing the Union adequate notice of the proposed changes and adequate opportunity to bargain about them.

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, if requested by the Union, rescind the changes we made by implementing our wage and group health insurance proposals unilaterally, without the Union's agreement, and restore the terms and conditions of employment pertaining to wages and group health insurance which were in effect before it unlawfully changed them.

WE WILL, to the extent that any employee was affected adversely because of the changes we made in wages and group health insurance, make each such employee whole, with interest, for all losses the employee suffered because of the unlawful changes.

DYNATRON/BONDO CORPORATION