

Paul Mueller Company and Sheet Metal Workers International Association, Local No. 208. Cases 17–CA–18912, 17–CA–19208, and 17–CA–19352

September 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 21, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.

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

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order as modified.

The Respondent has excepted to the judge's finding that it violated Section 8(a)(5) by unilaterally implementing changes in the list of preferred providers under the Med-Pay health care delivery system. In another case involving the same parties, the administrative law judge found that the Respondent violated Section 8(a)(5) by its unilateral implementation of the entire Med-Pay program. The remedy for that violation requires the Respondent, on request of the Union, to restore the health insurance program in existence prior to the implementation of the entire Med-Pay program and to make unit employees whole, with interest, for any losses resulting from the unlawful change. The Respondent did not except to the unfair labor practice finding in that case or to the remedy, and we have today adopted them as part of our Decision and Order in *Paul Mueller Co.*, 332 NLRB No. 29 (Sept. 25, 2000). We find that litigation of the unfair labor practice issue in the cited case obviates the need for an additional unfair labor practice finding and remedy in this case. We shall therefore delete remedial provisions relevant to this issue from the judge's recommended Order and notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Paul Mueller Company, Springfield, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as new paragraph 2(c) and substitute the former paragraph 2(c) for paragraph 2(d).

“(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Steve Slone and, within 3 days thereafter, no-

tify him in writing that this has been done and that the discharge will not be used against him in any way.”

2. Delete paragraphs 1(e) and 2(e) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

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.

The Sheet Metal Workers International Association, Local No. 208, is the exclusive representative of our employees in the following appropriate collective-bargaining unit:

All full-time and regular part-time craftsmen, fabricators, and production workers employed by Paul Mueller Company at its Springfield, Missouri facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas, and other machinist work areas.

WE WILL NOT refuse to promptly reinstate unfair labor practice strikers who unconditionally offer to return to work.

WE WILL NOT deal directly with unit employees concerning proposed changes in their hours and days of work.

WE WILL NOT refuse to meet and confer regarding grievances filed by the Union.

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, within 14 days from the date of the Board's Order, offer Steve Slone full reinstatement to his former

job as the second-shift 24-gun welder without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Steve Slone whole for any loss of earnings and other benefits resulting from our refusal to promptly reinstate him, as a returning unfair labor practice striker, to his former job, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Steve Slone, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL promptly meet and confer with the Union concerning grievances.

PAUL MUELLER COMPANY

Richard C. Auslander, Esq., for the General Counsel.

Stanley E. Craven, Esq., for the Respondent.

Michael Krasovec, for the Charging Party.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Springfield, Missouri, on November 21, 1997. The Sheet Metal Workers International Association, Local 208 (Union) has charged that Paul Mueller Company (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act). On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following¹

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(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. BACKGROUND

The Respondent is a manufacturer of steel tanks and other products and maintains a place of business in Springfield, Missouri. The Union has been the collective-bargaining represen-

¹ Counsel for the General Counsel's unopposed motion to correct page 30, line 18 of the transcript is granted. The line is corrected to read, "Did you walk picket?" His other request to correct the transcript regarding "line 5 of page 31" is denied as the requested correction does not appear at the cited line and page of the transcript.

tative of certain of the Respondent's employees since 1977.² The most recent collective-bargaining contract between the parties had a term of June 12, 1991, to June 11, 1994. On July 25, 1995, the unit employees went on strike. The Union subsequently filed unfair labor practice charges against the Respondent and a hearing was ultimately held before Judge Marion C. Ladwig.³ On May 21, 1997, Judge Ladwig issued his decision relating to those charges.⁴ He found that the Respondent had engaged in various unfair labor practices, including unlawfully refusing to bargain in good faith, and that the July 25, 1995 strike was an unfair labor practice strike. At the time of the instant hearing, Judge Ladwig's decision was on appeal to the Board.

III. REINSTATEMENT OF STEVE SLONE

Employee Steve Slone works for the Respondent as a fabricator. Slone had been working regularly on the second shift 24 gun welder since 1989. He was cross-training on the seam welder at the time he went on strike, but there was no showing that this was a permanent assignment. Slone is an active union member and chief steward for the Union. He remained working until October 2, 1995, when he joined the strike. On November 8, 1996, at the behest of the Union, Slone made an unconditional offer to return to work on November 12. On November 11 the Respondent answered Slone's request, stating that there were "no available openings to which he can return." (G.C. Exh. 6.)

At the time Slone requested reinstatement, Robert Kinder, a nonunit machinist, was working on the third shift operating the 24 gun welding machine. On about November 17 Kinder was replaced on the third shift 24 gun welder by Bill Smith, a non-striking employee. Smith had been in training since October 24 to learn how to operate the 24 gun welder. Smith continued to work the third shift 24 gun welder until December 2 when he was transferred to Slone's prestrike position of 24 gun welder on the second shift. Smith has remained in that job since that date.

Upon an unconditional offer to return to work, an unfair labor practice striker is entitled to immediate and full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent position. *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995). I find that Kinder, as a non-unit employee, was a strike replacement and that Slone, as an unfair labor practice striker, was entitled to replace Kinder on the third shift 24 gun welder. *Super Glass Corp.*, 314 NLRB 596 fn. 1 (1994). If Slone had been properly reinstated to take Kinder's job he would then have been transferred to the second shift 24-gun welder commencing December 2. I find that by

² The unit is:

All full-time and regular part-time craftsmen, fabricators, and production employees employed by Respondent at its Springfield, Missouri, facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas and other machinist work areas.

³ The lead case of those charges is 17-CA-17623.

⁴ JD-60-97.

refusing to promptly reinstate Slone, and ultimately assign him to the second-shift job, the Respondent violated Section 8(a)(1) and (3) of the Act.

IV. DIRECT DEALING

Several employees testified that since May 1997 supervisors have told them that the Respondent was considering changing the employees' work hours and days to a 4-day, 10-hour schedule. The employees were polled by the Respondent as to their preferences if the changes were implemented.⁵ The Respondent never consulted the Union about the proposed changes or asked its permission to discuss the matter directly with employees. I find that work schedules are a mandatory subject of bargaining. I further find that the Respondent's direct dealing with employees about the proposed changes is a violation of Section 8(a)(1) and (5) of the Act.

V. PROCESSING OF GRIEVANCES

Prior to the strike, when the Union filed a written grievance, Director of Human Resources Michael Young would set the matter for consideration in a meeting between the Union and management. The meeting was usually held within 5 days of the grievance being filed. Since about March 25, 1997, the Union has filed several grievances. Young has not responded to any of the grievances or scheduled them for meetings. The Respondent offered no reasonable explanation for the change in practice of promptly acknowledging grievances and scheduling them for discussion. I find that the Respondent's conduct of refusing to meet and confer about grievances is a violation of Section 8(a)(1) and (5) of the Act. *Kenton Transfer Co.*, 298 NLRB 487, 488-489 (1990); *Conoco, Inc.*, 287 NLRB 548 (1987).

VI. CHANGES IN HEALTH PLAN PROVIDERS

The employees' medical plan in effect at the time of the present hearing had been the subject of litigation in the earlier unfair labor practice proceeding. Judge Ladwig found that the Respondent had unilaterally instituted a new health care delivery system through Med-Pay, Inc. He concluded that this action was a violation of Section 8(a)(1) and (5) of the Act.

On about August 11, 1997, the Respondent posted a letter from Med-Pay that noted certain changes in the physicians that were part of its plan. The letter states that after October 1, 1997, Med-Pay was no longer contracting with Columbia Hospitals North and South. As a result, care by certain physicians would no longer receive discounted coverage and their services would be subject to lower benefit provisions under the health plan.

The Respondent has previously been found to have unlawfully instituted the Med-Pay plan. I find, therefore, that the Respondent is responsible for the effects resulting from changes in that plan. The Respondent did not offer to bargain

with the Union before notifying the employees of the Med-Pay changes. I find that such conduct is a violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Paul Mueller Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Sheet Metal Workers International Association, Local 208, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

ORDER

The Respondent, Paul Mueller Company, Springfield, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to promptly reinstate unfair labor practice strikers to their former positions of employment upon their unconditional offer to return to work.

(b) Refusing to notify the Union, and affording it an opportunity to bargain about, changes in unit employees' terms and conditions of employment.

(c) Dealing directly with employees concerning proposed changes in their hours and days of work.

(d) Refusing to meet and confer about grievances filed by the Union.

(e) Making unilateral changes in unit employees' health care providers.

(f) 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) Within 14 days from the date of this Order, offer Steve Slone full reinstatement to his former job as the second shift 24 gun welder without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Steve Slone whole for any loss of earnings and other benefits suffered as a result of the failure to promptly reinstate him to his former position of employment, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁵ Employees Glen Smithson and Jim Bishop were assistants to Respondent's supervisors. They each asked employees for their preferences as to the proposed change in work schedules. I find that Smithson and Bishop were thus acting as Respondent's agents within the meaning of Sec. 2(13) of the Act when performing this task. *CDR Mfg.*, 324 NLRB 786 (1997); *Roskin Bros., Inc.*, 274 NLRB 413, 421 (1985).

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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.

(c) Preserve and, within 14 days of a 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) Make whole unit employees for any losses they may have suffered as a result of the Respondent's unilateral change in their health care providers.

(e) Upon request of the Union revoke the changes to the employees' health care providers unilaterally announced by the Respondent on August 11, 1997.

(f) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time craftsmen, fabricators, and production employees employed by Respondent at its Springfield, Missouri, facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas and other machinist work areas.

(g) Promptly meet and confer with the Union concerning grievances.

(h) Within 14 days after service by the Region, post at its facility in Springfield, Missouri, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 17, 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 expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 12, 1996. *Excel Container*, 325 NLRB 17 (1997).

(i) 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.

⁷ 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."