Phelps Dodge Specialty Copper Products Co. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 441, AFL–CIO. Case 22–CA–24104

April 22, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On July 10, 2001, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

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

The National Labor Relations Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Robert Gonzalez, Esq., for the General Counsel.
Nathan R. Niemuth, Esq., and *Frederick C. Miner, Esq.,* for the Respondent.
Ed Pryor, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on May 22 and 23, 2001. The charge and amended charges were filed on July 17, August 11, and 31, 2000. The complaint was issued on January 31, 2001. As amended after the parties had settled most of the allegations, the remainder of the complaint alleged that since July 19, 2000, the Respondent has refused to bargain in good faith about the subjects of union-security and dues-checkoff provisions.

It should be noted that the General Counsel does not allege that the Company engaged in overall bad-faith bargaining or that it violated its duty to bargain in any other manner.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the company 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. ALLEGED UNFAIR LABOR PRACTICES

Phelps Dodge Specialty Copper Products Co., is a subsidiary of Phelps Dodge Corp. It operates a facility in Elizabeth, New Jersey, on Bayway Street (the Bayway plant). For at least 50 years, the Union has been recognized by the Company as the collective-bargaining representative in a unit consisting of all hourly-rated production and maintenance employees of the Employer at its Elizabeth facility including mill or production clerks and inspectors. The most recent collective-bargaining agreement ran for a term of August 1, 1997, to July 31, 2000.

The collective-bargaining agreement covered about 60 employees including a small group of about 6 employees who were transferred from another plant to the Bayway plant in early 2000. The contract, among other things, contained a union-security clause requiring union membership after 90 days of employment or the effective date of the contract, whichever comes last. Additionally, that contract contained a dues-checkoff provision pursuant to which the Employer agreed to deduct and remit union dues upon receipt of an executed dues-checkoff authorization form from an employee.

Notice having been given to terminate the old contract, bargaining for a new agreement began on July 11, 2000. On that date, the Employer tendered a complete contract proposal. This proposed contract, among other things, eliminated the old union-security clause and the dues-checkoff provision and provided that any check-off authorization signed by an employee would be revocable at will.

Following meetings held on July 12 and 13, the Union, at a negotiation session held on July 18, tendered its contract proposal to the Company. This proposal contained a 90-day union security clause and a dues-checkoff provision. As part of the union-security clause, the Union's proposed language made it clear that employees would not have to become union members as such; that membership in good standing simply meant payment of a percentage of union dues permitted by Federal law. The dues-checkoff provision continued the prior contract's requirement that such authorization be irrevocable until a date 1 year from its effective date or until the date that any new contact expires, whichever is earlier.

On the morning of July 19, 2000, the parties discussed at length their respective positions on the dues-checkoff provision. The Company's spokesman, Webster, stated that the Company believed that employees should have the right to choose to be members or nonmembers. He also stated that the Company did not want to be in a position where it would be forced to discharge any employee who either chose to, or for some reason, could not afford to pay union dues. There was some talk about the definition of the union membership requirement. This was clarified, in accordance with the proposal made by the Union on the preceding day, to the effect that no

[1] In support of his finding that the Respondent had not engaged in bad-faith bargaining with regard to union security and checkoff, the judge noted that the Respondent made numerous concessions during negotiations on wages and other matters; that the Respondent explained its position regarding union-security and dues-checkoff provisions; and that some bargaining unit members informed management that they objected to joining the Union. We note, as further evidence that the Respondent bargained in good faith, that on July 13, 2000, the Respondent proposed that the parties adopt the expired contract, which contained the union-security clause. The Union rejected this proposal.

person would be required to be a member. The Union's position was that the membership requirement would be satisfied if such person paid 85 percent of the normal dues required of members. It appears that the parties spent about 2 to 3 hours on this subject without reaching any agreement. At the end, Webster stated that they had a philosophical disagreement.

The Union's witnesses testified that at the meeting on July 19, a company representative made a comment that likened a union-security clause to living under socialism or communism.

Further negotiations were held on July 20 and 26, 2000. At the meeting held on July 26, the Company made another contract proposal which was rejected by the Union. Thereafter, on July 27, 2000, the Company made a "final offer" which, among other things, raised its previous wage offer to 3 percent per year and offered other concessions. However, neither the July 26 or July 27 company proposals contained a union-security clause and the proffered dues-checkoff provision was one which allowed employees to revoke their dues-checkoff authorizations at any time.

On August 1, 2000, the Union commenced a strike. At a meeting held on that date, the Company asked the Union to define the strike issues and the Union listed about 20 items including the issues of union security and dues checkoff. Another meeting was held on August 3, 2000.

On August 11, 2000, the Union made, on behalf of the employees, an unconditional offer to return to work. On August 14, the employees returned and the strike ended. Further negotiations were held on August 28, October, 23, November 13, 14, 20, and March 20, 2001.

At the meeting held on November 13, 2000, there was more discussion about the union-security and dues-checkoff provisions. At this meeting, Webster referred to his experience at another facility where he had to discharge a group of employees who had failed to pay union dues. He reiterated that the Company did not want to be put in the position of having to discharge employees who either refused or could not afford to pay union dues.[2] Webster also made reference to a situation at another plant where despite the Union's claim that an employee had not paid dues, it later turned out that the employee had a receipt for his dues and that this had led to an unfair labor practice charge. Webster stated that if the Company was required to discharge such an employee, the Company would incur the costs of recruiting and training a new employee, in addition to having lost the skills of the person discharged.[3]

The final meeting was held on March 20, 2001, but this had nothing to do with the union-security issue. The delay between November 20, 2000, and March 20, 2001, was the result of the Company and the Union agreeing that the Union would attempt to find a better and/or less costly health insurance plan.

III. ANALYSIS

The Respondent concedes that the subjects of union-security provisions and dues-checkoff provisions are mandatory subjects of bargaining. This means that both sides have a legally defined duty to bargain about these subjects in good faith. By the same token, if these are mandatory subjects of bargaining (as opposed to permissive subjects), neither side is required by the Act to concede its position and either may insist, as a condition of reaching an agreement, that its position prevail. See Section 8(d) of the Act, which states, inter alia, that the duty to bargain, "does not compel either party to agree to a proposal or require the making of a concession." See also, *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970).

There have been a number of Board decisions where either an administrative law judge or the Board has opined that a "philosophical opposition" to dues-checkoff provisions may constitute evidence of bad-faith bargaining. *Langston Cos.*, 304 NLRB 1022, 1050 (1991), citing *Tiffany & Co.*, 268 NLRB 647, 650 (1984).

Nevertheless, those cases typically involved other unlawful conduct in which the opposition to a union-security or dues-checkoff provision was a significantly smaller part of the whole. For example, in *Langston Cos.*, supra, the Board also concluded that the Respondent refused to bargain by refusing to negotiate at all until certain unfair labor practice allegations were resolved; that it violated the Act by bypassing the Union and dealing directly with employees; that it unlawfully implemented changes to its insurance plan in the absence of an impasse; that it engaged in surface bargaining with no intent of reaching an agreement; and that it discriminated against employees because of their union activities.

In *CJC Holdings*, 320 NBLRB 1041, 1046–1047 (1996), the administrative law judge found that the company illegally implemented its last offer in the absence of a valid impasse. He also concluded that the company violated the Act by implementing unilateral changes during contract negotiations. Finally, the judge concluded that the company engaged in surface bargaining by, among other things, asserting that it had "philosophical" objections to a dues-checkoff provision and objected to being in the dues collection business. The judge opined that these were not legitimate reasons for refusing to agree to such a provision and constituted evidence of bad faith.[4] At footnote 2 of the Board decision, Member Cohen, although agreeing with the judge's conclusion that the company's "primary goal was to avoid agreement and reach impasse," stated that he "does not rely on the judge's finding that a company's fundamental opposition to dues checkoff, on policy grounds, is not a legitimate reason for opposing such a contract provision."

In *Preterm, Inc.*, 240 NLRN 654, 673 (1979), the Respondent refused to consider any union-security provision, asserting that it believed its employees should have the right to choose whether or not to join the union. Finding that the Employer

[2] At this time, the Union's dues were $24 per month.

[3] The Union's proposed contract, offered back on July 18, 2000, states, at article 1, sec. 4: "The Union shall hold the Company harmless for any losses it may suffer by reason of its deduction of dues or initiation fees in accordance with an authorization as provided in subparagraph 3." The Union's representatives testified that although this provision was intended to hold the Company harmless in the event of a successful unfair labor practice brought by an employee, it was not intended to cover such company expenses as recruitment or training of any new employee hired to replace someone who was discharged for failing to pay union dues.

[4] He also relied on the company's failure to comply with an earlier refusal to bargain order in a previous case.

refused to consider any alternative proposal by the union, (such as an agency shop clause), and concluding that the Respondent went into negotiations with a fixed mind on this issue, the administrative law judge concluded that the "Respondent's refusal to discuss union shop or any modified form thereof, based upon its alleged 'philosophical opposition' thereto constitutes evidence of a refusal to 'confer in good faith' within the meaning of the Act." Nevertheless, the administrative law judge concluded, based on other conduct, including Respondent's attempt to exclude certain categories that were in the unit by virtue of the certification of representative, that the Respondent engaged in surface bargaining with a "mere pretense at engaging in negotiation." He held and the Board affirmed, that the Respondent's ultimate goal was not to reach an agreement but to free itself of the need to deal with the union. In addition to his conclusion that the company engaged in surface bargaining, the judge also found that the Respondent violated the Act by illegally threatening employees with job loss.[4]

On the other hand, the Board, in *National Steel & Shipbuilding Co*., 324 NLRB 1031, 1044 (1997), rejected the contention that the company refused to bargain in good faith by its rejection of a union-security provision. In this case, it was alleged that the company bargained in bad faith by presenting and insisting on regressive union-security proposals and that the company bargained to impasse on a permissive subject of bargaining, namely yard security. In relation to the union-security allegation, the judge noted that absent other evidence of bad faith, regressive contract proposals are not violative of the Act. She also noted that there were changed circumstances because there were many new employees hired at the plant, some of whom questioned the "union shop" language and some who raised objections to the payment of initiation fees to the union. Additionally, she noted that the parties, in other respects, engaged in good-faith bargaining which produced agreement on other issues. She stated:

> Based on a totality of the circumstances . . . I find that NAACO's actions . . . with regard to union security do not support a finding of bad faith bargaining. In particular, the changed circumstances of weathering the strike and job actions as well as the new hires questioning traditional union-security requirements permitted modification of prior union-security proposals.

In *Hickinbotham Bros. Ltd*., 254 NLRB 96, 102–103 (1981), the administrative law judge, dealing with the issue of an employer's proposal to eliminate union security, stated in pertinent part:

> It is immaterial whether the Union, the General Counsel, or I find these reasons totally persuasive. What is important, and I so find, is that these reasons are not so illogical as to warrant an inference that by reverting to these proposals Respondent has evinced an intent not to reach agreement and to produce a statement in order to frustrate bargaining.

This case presents the allegation that the Respondent refused to bargain about union-security and dues-checkoff provisions in the absence of any other bargaining misconduct. The General Counsel wants the Board to conclude, not only that the Company's negotiation positions on these two issues may constitute evidence of bad-faith bargaining, but that such positions constitute, by themselves, a violation of the Act. I do not agree.

The evidence here indicates that the Respondent engaged in good-faith bargaining in all other respects and made concessions during negotiations on wages and other matters. The Respondent's position with respect to union-security and dues-checkoff clauses cannot, in my opinion, be considered irrational and it took the time during negotiations to explain its positions. Given the fact that these issues are mandatory subjects of bargaining, neither side can be compelled to agree to the other's position or to even make concessions in its own position. Moreover, there was evidence that some bargaining unit employees, such as those accreted to the unit during the preceding contract term, raised some objections to joining this Union and made their feelings known to management.

In my opinion, the conduct of the Respondent, in this case, and the positions taken by it in relation to union-security and dues-checkoff provisions do not, by themselves, amount to a violation of the Act. Accordingly I shall recommend that the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

[4] Although affirming the general conclusion that the Respondent engaged in bad-faith bargaining by its overall conduct, the Board refused to find that the Respondent's insistence on a broad management-rights clause was evidence of bad faith or that its representative's somewhat bellicose behavior at the negotiating table was evidence of bad faith.

[5] 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.