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Nabors Alaska Drilling, Inc. and Alaska District Council of Laborers, AFL-CIO. Case 19-CA-28370

April 21, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On August 29, 2003, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel 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 decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

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

Dated, Washington, D.C. April 21, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David Lee Schaff and Daniel R. Sanders, for the General Counsel.

William F. Mede (Owens & Turner), of Anchorage, Alaska, and Donald J. Horton (Andrews & Kurth), of Houston, Texas, the for Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Anchorage, Alaska, on June 11, 2003. On December

¹ In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(5), Chairman Battista notes that, in the circumstances here, the Union did not timely demand bargaining regarding the proposed increase in employee contributions.

23, 2002, Alaska District Council of Laborers, AFL-CIO (the Union) filed the charge in Case 19-CA-28370 alleging that Nabors Alaska Drilling, Inc. (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On February 28, 2003, the Acting Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The 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 following¹

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is an Alaska corporation with an office and place of business in Anchorage, Alaska, where it is engaged in the business of operating an oilfield drilling service that provides rigs and labor to oil companies operating throughout the State of Alaska. During the 12 months prior to issuance of the complaint, Respondent sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of Alaska. Respondent admits and I find that Respondent 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

On October 18, 2000, the Board certified the Union as the exclusive collective-bargaining agent of the employees employed by Respondent in the State of Alaska.² The parties began negotiations for a collective-bargaining agreement in December 2000.

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

² The appropriate bargaining unit certified by the Board is:

Employees working as derrickmen, motormen, floorhands, forklift operators, roustabouts, solids control, crane operators, electricians, mechanics, welders, pit watchers, sewer plant operators, safety equipment managers, ball mill operators, on the job trainers, roustabout pushers, camp maintenance or truckdrivers working for the company in the State of Alaska; excluding all managers, professional engineers, supervisors as defined in the Act (including without limitation, drillers, toolpushers, casing crews, catering managers), satellite camp cooks, HSE employees, clerical employees, guards and all other employees not included in the Unit.

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by implementing changes in healthcare coverage for the bargaining unit employees without affording the Union a reasonable opportunity to bargain about those healthcare changes. The answer denied the commission of any unfair labor practices. Further, Respondent alleges that it offered to bargain with the Union and that the Union waived its right to bargain.

B. Facts

Nabors International Drilling, the parent corporation of Respondent, provides the health insurance benefits for Respondent's employees. The employees covered by this health plan include the bargaining unit and nonunit employees of Respondent and, also nonunit employees of Nabors International Drilling at various locations worldwide. Nabors International's plan is self-funded and operates on a January 1 to December 31 plan year. At the end of each calendar year, the healthcare plan is reviewed to determine if adjustments need to be made. This regular annual review and adjustment of the healthcare plan had been conducted for many years before the Union became the certified bargaining agent and continued after the Union became the bargaining agent. However, since December 2000, the Union and Respondent have successfully negotiated a change of administrator for the program and inclusion of a vision benefit. Further, for calendar year 2002, the healthcare plans' costs to the bargaining unit employees, in terms of copayments were unchanged, although copayment costs were increased for all other employees of Nabors International Drilling in the United States.

On November 1, 2002, the Union, during negotiations asked Respondent to offer its "best" proposed collective-bargaining agreement in order that the Union could submit such a proposal to the bargaining unit employees for a ratification vote. The parties agreed that a collective-bargaining agreement would not be effective until the bargaining unit ratified it. The parties tentatively agreed, as part of the agreement to be submitted for ratification, that bargaining unit employees would participate in Respondent's healthcare plan and that Respondent could terminate or modify any of the provisions of the plan at any time without bargaining with the Union.

On November 21, 2002, the parties met again in an attempt to finalize the agreement that would be submitted for employee-ratification. The parties agreed to the outstanding provisions of the proposed tentative collective-bargaining agreement. Further, the parties discussed the process for conducting the ratification vote. The Union made it clear that it would neither recommend acceptance nor rejection of the proposed agreement. The ratification vote would take place by mail ballot and the Union requested a current list of bargaining employees with their home addresses. Through no fault of either party, the mailing list was not provided to the Union until January 23, 2003.³

Further, at the November 21 bargaining session, Respondent notified the Union that due to rising healthcare costs, Respondent

³ The League of Women Voters, the neutral party chosen by the Union and Respondent, mailed the ratification ballots to the eligible employee-voters. Because the bargaining unit employees were located around the United States, the ballots were not due until February 26, 2003. Ultimately, the employees rejected the proposed agreement.

was intending to make certain changes to the healthcare program. Respondent stated that the changes would be effective January 1, 2003. Respondent further notified the Union that it was intending to increase the employee's monthly copay contributions but Respondent had not yet made an initial determination as to the specific amount that employees would pay. The Union requested that information and Respondent answered that it expected to make a proposal as to the specific amount of the increased employee copayments within a week. Further, Respondent indicated that it would furnish the Union with the specific copayment information, as soon as the amounts were determined. While the Union requested the specific information regarding the changes in employee copayments, it made no objection to the Respondent's proposed changes. Neither party raised a question regarding the effect these changes might have on the agreement to be submitted for ratification.

As part of its annual review and adjustment of the healthcare plan, each year Respondent sends annual healthcare election packages to employees. This is done in mid-December. During the November 21 bargaining session, Respondent notified the Union that it would be mailing out its annual healthcare election forms to employees in mid-December 2002. On December 6 Respondent sent the Union a letter with 10 pages of attachments by facsimile describing the proposed changes to the healthcare plan, including the specific new proposed copayment rates for employees. In this facsimile, Respondent reminded the Union that time was of the essence because the annual enrollment forms had to be completed by employees by December 23. The only new information contained in the December 6 notification was the specific changes to the employee copayment rates. However, these increases were significant and unexpected by the Union.

As of December 12⁴ Respondent had not received any communication from the Union regarding its fax of December 6. Therefore, on December 12 Respondent's attorney left a voice mail with the Union's attorney, reminding the Union that Respondent needed to transmit enrollment forms to the employees. The message further stated that if the Union had any questions or wished to bargain, the Union should promptly contact Respondent. Most important, Respondent notified the Union that if Respondent did not hear back from the Union by noon the next day, December 13, Respondent would mail out the annual enrollment forms to the employees.⁵

The Union sent Respondent a letter by facsimile on December 13, more than 3 hours after the healthcare enrollment forms were sent, advising that the Union did not agree with the proposed health insurance changes. The facsimile further stated, "Following the Ratification process we look forward to discussing this further, if needed." That same day, Respondent's attorney faxed the Union's attorney a letter stating that the Union had not re-

⁴ General Counsel and the Union contend that a communication took place between Respondent and the Union on December 9 regarding arrangements for bargaining regarding health insurance. The credible evidence and documentary evidence leads me to conclude that such communication actually took place on December 16.

⁵ Nabors International in Houston, Texas, conducted the mailing of the enrollment forms. The noontime limit was based on the fact that noon in Alaska would be 3 p.m. in Houston. Nabors International would then have 2 hours to mail the enrollment forms.

requested bargaining regarding healthcare changes and that Respondent was proceeding with the changes announced in its December 6 facsimile. It further stated that the Union should notify Respondent “if the Union desires further bargaining regarding the proposed changes. Should any requested bargaining lead to a mutually acceptable agreement, the parties can discuss how to implement such an agreement prospectively.”

On December 16 the Respondent’s attorney and the Union’s attorney discussed proposed bargaining dates to discuss the health insurance benefits. On December 18 the Union’s attorney wrote Respondent’s attorney, proposing bargaining dates in January 2003. The Union stated that it believed that Respondent could not lawfully unilaterally implement any changes in the bargaining unit employees’ health insurance benefits or copayments. That same date, Respondent’s attorney sent a facsimile agreeing to meet and bargain with the Union on January 10, 2003. Respondent reiterated its position that time was of the essence and that the Union had delayed in responding to the notice of the proposed changes. Respondent restated that it was proceeding with the proposed changes but was “willing to meet and bargain further with the Union regarding health insurance issues.”

On December 23, 2002, the Union filed the instant unfair labor practice charge. On January 1, 2003, Respondent implemented the changes to the healthcare plan. The changes became applicable to all employees of Nabors International. However, because the copayments of bargaining unit employees had not been increased in 2002, the increase of copayments for bargaining unit employees was greater than for other employees.

On January 10 the parties met to discuss the health insurance issues. Respondent expressed surprise that the Union had filed unfair labor practice charges. The Union responded that it was surprised by the size of the increases in employee copayments. Respondent explained that the bargaining unit employees had not had their share of health premiums raised in 2002, so that the increase was in fact for 2 years. The Union proposed that Respondent increase employee wages to offset the increase in insurance copayments. Respondent answered that it had considered such a raise but that market conditions did not make a raise viable. However, Respondent stated it would reevaluate the matter and let the Union know if there was any reasonable prospect of a possible wage increase. Following the January 10 meeting, neither party made any attempt to bargain about the healthcare changes that had gone into effect on January 1. On February 26, 2003, the employees rejected the proposed collective-bargaining agreement.

C. Analysis

It is well settled that unilateral action by an employer without prior discussion with the union amounts to a refusal to negotiate about the effected conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Moreover, a showing of subjective bad faith on the employer’s part is unnecessary to establish a violation. *NLRB v. Katz*, supra. The Board looks to whether a change has been implemented in conditions of employment. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement and condemns the conduct if it has. *Daily News of Los*

Angeles, 315 NLRB 1236 (1994), remanded 979 F.2d 1571 (D.C. Cir. 1992), enfd. 73 F. 3d 406 (1996), cert. denied 519 U.S. 1090 (1997).

In *Register-Guard*, 339 NLRB No. 47 (2003), the administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing new sales’ commissions for employees selling two types of newspaper advertisements during negotiations for a new collective-bargaining agreement in the absence of overall impasse on the entire agreement. The Board held that the new commissions represented a change in employee wages, and therefore were a mandatory subject of bargaining and that the Respondent’s unilateral change was unlawful because it was material, substantial, and significant. It wrote:

Where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer’s obligation to refrain from unilateral changes in terms and conditions of employment “extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse in bargaining for the agreement as a whole.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995), see also *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).

The Board has recognized two limited exceptions to this rule: “when economic exigencies compel prompt action,” and when a union, “in response to an employer’s diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining.” *Bottom Line*, supra at 374 (quoting *M&M Contractors*, 262 NLRB 1472 (1982), review denied 707 F.2d 516 (9th Cir. 1983)); see also *RBE* supra at 81. The Respondent does not argue that economic exigencies required it to implement the new commissions, and the evidence does not show that the Union engaged in delay tactics.

In *Register Guard*, the Board also rejected the Respondent’s defenses that the new commissions were a continuance of past practice and therefore did not change the status quo, that the dispute was solely a matter of contract interpretation, and that the allegations were time-barred by Section 10(b) of the Act.

In the instant case, Respondent and the Union were in negotiations for an initial collective-bargaining agreement. The healthcare changes represented a change in employee wages, hours, and terms and conditions of employment, and therefore were a mandatory subject of bargaining. The parties agreed that impasse had not been reached when Respondent implemented the healthcare changes.

Respondent argues that it was privileged to unilaterally revise the health insurance plan on the ground that it had a past practice of reviewing and adjusting its insurance plan annually, and that it gave the Union adequate notice and an opportunity to bargain. See *Stone Container Corp.*, 313 NLRB 336 (1993).

In *Stone* the Board found that the status quo is not always rigid and may, in fact, be fluid. In *Stone*, the respondent-employer had a past practice of granting annual wage increases in April ranging from 3 to 6 percent to its hourly employees. The Board found no

violation in the respondent-employer's unilateral decision, based on its annual review, not to grant a wage increase. The Board distinguished *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf.d. 15 F.3d 1087 (9th Cir. 1994). Thus, the Board stated,

Bottom Line Enterprises, above, stands for the proposition that when parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilaterally discontinuing an established practice extends beyond the mere duty to give notice and an opportunity to bargain; rather, except for certain circumstances not present here, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. In *Bottom Line Enterprises*, the employer unilaterally discontinued its contributions to the union's health and welfare and pension trust funds; thus, the employer's unilateral implementation concerned a proposal which was one of the subjects that was part of the negotiations for an overall agreement. Such a proposal differs significantly from a proposal concerning a discrete event, such as an annually scheduled wage review like the one in the instant case, that simply happens to occur while contract negotiations are in progress. We note that it is not disputed that the April wage increases here were annually occurring events, and thus bargaining over the amount of such increases could not await an impasse in overall negotiations. Further, the Respondent was not proposing to permanently abandon the April wage increases nor declining to bargain over how much of an increase, if any, it should give in April. Rather, the Respondent expressed its willingness to discuss the subject, conducted its "annual wage and benefit survey," and proposed giving no wage increase because, in its view, financial circumstances did not justify one at that time. Further, while the Respondent made its proposal in time for bargaining over the matter if the Union wished to bargain, the Union made no counterproposal concerning the April wage increase, and did not raise the issue again during negotiations. Thus, we find that the Respondent satisfied its bargaining obligation regarding the April . . . wage increase, and we affirm the judge's dismissal of the complaint.

However, in *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994), the Board distinguished *Stone Container* and found a violation of Section 8(a)(5). The health plan changes at issue in *Brannan Sand & Gravel* were held to be similar to the annual wage increase involved in *Stone Container* because after the inception of the health plan, its costs and benefits had been reviewed and adjusted annually to control the respondent-employer's expenditures. Therefore, the Board held that the respondent-employer was not obligated to refrain from implementing its proposed changes until an impasse was reached on collective-bargaining negotiations as a whole. However, in *Brannan Sand & Gravel*, unlike the situation in *Stone Container*, the respondent-employer did not satisfy its obligation to provide the charging party-union with timely notice and a meaningful opportunity to bargain over the change in employment conditions. Rather, the Board found that the respondent-employer had presented the health plan changes to the charging party-union as

a fait accompli. In this connection, the Board relied on the fact that by the time the charging party-union was apprised of the contemplated changes, the respondent-employer had already announced them to the employees. Further, the respondent-employer had advised the charging party-union that any discussion over the health plan changes would have been "fruitless" because the respondent-employer had no intention of doing anything other than what it planned to do.

In the instant case, it is not disputed that the health insurance review was an annually occurring event, and thus, bargaining over the changes in health insurance could not await an impasse in overall negotiations. Further, the Respondent was not declining to bargain over the health insurance changes, including the changes to copayment contributions. Rather, the Respondent expressed its willingness to discuss the subject, and stated, "if the Union had any questions or wished to bargain, the Union should promptly contact Respondent." Further Respondent stated, "should any requested bargaining lead to a mutually acceptable agreement, the parties can discuss how to implement such an agreement prospectively." Even after the changes were made, Respondent restated that it was "willing to meet and bargain further with the Union regarding health insurance issues." Respondent did, in fact, meet and bargain with the Union over the health insurance issues. The fact that Respondent did not agree to a wage increase does not minimize the fact that Respondent met and bargained with the Union over the health insurance issues. There is no evidence that bargaining or further bargaining with Respondent would have been fruitless. Accordingly, I find this case governed by *Stone Container Corp.*, and shall recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(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. The evidence fails to establish that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint.
4. Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended⁶

ORDER

The complaint shall be dismissed in its entirety.

Dated, at San Francisco, California, this August 29, 2003

⁶ All motions inconsistent with this recommended order are hereby denied. In the event 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.