Wonder Bread, a Division of Interstate Brands Corporation *and* Teamsters Local Union No. 334, Sales & Service Industry. Case 30–CA–16456–1

September 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND MEISBURG

On July 28, 2003, the Regional Director for Region 30 issued a complaint and a notice of hearing in this proceeding alleging that the Respondent committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. The Respondent filed an answer admitting in part and denying in part the allegations of the complaint and asserting affirmative defenses.

On April 2, 2004, the Respondent filed with the Board a motion to dismiss the complaint, arguing that the Board should defer the matter to the parties' contractual grievance-arbitration procedures. The General Counsel filed an opposition to the motion, and the Respondent filed a reply to the General Counsel's opposition. On June 28, 2004, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The General Counsel and the Respondent each filed responses. The Charging Party Union filed no opposition to either the motion to dismiss or the Notice to Show Cause.

For the reasons set forth below, we grant the Respondent's motion to dismiss.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union before unilaterally requiring its route sales representatives (RSRs) to submit to physical examinations, including possible drug testing, pursuant to regulations of the United States Department of Transportation (DOT).

The undisputed statements in the pleadings and briefs reveal that the Respondent, a distributor of baked goods, has had a collective-bargaining relationship with the Charging Party Union since the 1970s. Their most recent collective-bargaining agreement, covering all sales representatives, route riders, special delivery drivers, and transport drivers in the Respondent's employ, is effective from May 12, 2002, through May 14, 2005.

On March 20, 2003, the Respondent notified the unit employees of its intention to require the RSRs to submit to physical examinations pursuant to DOT's regulations. Immediately following the Respondent's implementation of the physical examination requirement on April 14, 2003, the Union requested bargaining. Thereafter, the Union filed a grievance, which is currently awaiting arbitration. The Union filed an unfair labor practice charge with the Board on May 1, 2003.

The parties' collective-bargaining agreement provides that "the Union recognizes that the management of the plant, the methods of operation, and the direction of the workforce is vested in the company except as specifically modified by this Agreement." See art. 6 (management rights). The parties' agreement includes a multistep grievance and arbitration process which provides for final and binding arbitration of "any difference . . . between the Company and the Union as to the interpretation or application of any provision of this Agreement." See art. 21 (grievance procedure).

The Respondent contends that the unfair labor practice allegations should be deferred to the grievance-arbitration procedure of the contract. The General Counsel contends, however, that the matter is not appropriate for deferral because the issue of whether the Respondent's conduct violated its statutory obligation to bargain does not turn on a dispute over the interpretation of the agreement's terms, and therefore the dispute is not cognizable under the parties' grievance-arbitration provisions.[1]

The Board has considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act. See *Dubo Mfg. Corp.*, 142 NLRB 431 (1963); *Collyer Insulated Wire*, 192 NLRB 837 (1971); and *United Technologies Corp.*, 268 NLRB 557 (1984). Deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. *United Technologies*, supra at 558.

Applying these factors, we agree with the Respondent that deferral is appropriate. The parties have had a bargaining relationship dating back several decades, the Respondent has expressed a willingness to utilize the grievance-arbitration process to resolve the instant dispute, and the Union, by filing a grievance, has indicated

[1] We reject the General Counsel's additional contention that the instant motion should be denied as untimely. The hearing, originally scheduled for October 20, 2003, was thereafter rescheduled several times. As of April 2, 2004, the date the motion to dismiss was filed, the hearing had been rescheduled for July 8, 2004. Under the Board's Rules and Regulations, the motion was required to be filed 28 days prior to the hearing date. See Sec. 102.24(b). Under these facts, we conclude that the Respondent's motion was timely.

that the subject of the grievance is amenable to the grievance-arbitration process. See *E. I. du Pont & Co.*, 293 NLRB 896, 897 (1989). Moreover, there is no contention that the Respondent has been hostile to the exercise of its employees' protected statutory rights.

Notwithstanding, the General Counsel opposes deferral on the ground that neither the management-rights clause nor any other contract provision can reasonably be interpreted as authorizing the alleged unilateral action. We reject this argument. The question of the reasonable interpretation of the collective-bargaining agreement is one, at this point, for the arbitrator. The grievance-arbitration clause is extremely broad, in that a grievance can be filed with respect "to any difference . . . between the Company and the Union as to the interpretation" of the agreement and any grievance can be brought to arbitration. So long as an interpretation of the agreement is implicated, there appears to be no restriction on the subject matter of grievances that may be filed and pursued to arbitration. In such situations, the Board defers. See, e.g., *Roy Robinson Chevrolet*, 228 NLRB 828, 830 (1977) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–583 (1960)) (if a matter is otherwise suitable for deferral, deferral should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"). Indeed, the Board has held that *Collyer* prearbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision's meaning is in dispute.[2]

The Respondent's reliance on the management-rights clause has created a dispute as to the interpretation of the agreement. Deferral is appropriate regardless of whether the Board would interpret the management-rights clause as justifying the unilateral change at issue. See generally *Roy Robinson*, supra. In any event, because we retain jurisdiction pending issuance of the arbitrator's decision, which has not yet been rendered, our processes may always be reinvoked if the arbitral award is not susceptible to an interpretation consistent with the Act or if it is inconsistent with the standards of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).[3]

For all these reasons, we find that deferral of the matters alleged in the complaint is appropriate in this instance, and we shall grant the Respondent's motion to dismiss the complaint.

ORDER

IT IS ORDERED that the complaint is dismissed, provided that: the Board retains jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

[2] See, e.g., *Inland Container Corp.*, 298 NLRB 715 (1990) (unilateral imposition of drug-testing program); *E. I. du Pont & Co.*, 275 NLRB 693 (1985) (unilateral changes in certain work schedules); *Standard Oil Co. (Ohio)*, 254 NLRB 32, 34 (1981) (fact that examination is not pinpointed in contracts as a conceded management prerogative is insufficient reason for disregarding proof, if any, that parties intended to permit employer to give such tests when appropriate).

[3] Contrary to the General Counsel's position, the Board has deferred to arbitrators' decisions finding that language in a general management-rights clause authorizes an employer's unilateral changes in terms and conditions of employment. See, e.g., *Hoover Co.*, 307 NLRB 524 (1992); *Dennison National Co.*, 296 NLRB 169 (1989).