Butera Finer Foods, Inc. *and* UFCW Unions and Employers Midwest Pension Fund. Case 13–CA–40246–1

September 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On April 9, 2003, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each 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 conclusions as modified below and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) of the Act by ceasing pension fund payments after the expiration of its collective-bargaining agreement with the Union. Contrary to the judge, however, we find that the Respondent acted unlawfully only with respect to the payment that was due January 10, 2002.

As the judge observed, Paul Butera, the Respondent's chairman, admitted in his testimony that he had decided at the end of December 2001 to discontinue the pension fund contributions, because he "found out that they were going for decertification."

On January 15, 2002, a decertification petition was filed with the Board on behalf of the Respondent's grocery clerk employees. On January 16, Paul Butera was told of this filing and shown the supporting petitions, which had been signed by about 85 percent of the unit employees. The next pension fund payment was due February 10, 2002.

The Charging Party argues that *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), applies to the Respondent's cessation of pension fund payments. In *Levitz*, the Board held that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. The Respondent contends that *Levitz* does not apply here and that the relevant standard is the one articulated in *Cauthorne Trucking*, 256 NLRB 721 (1981), enf. granted in part and denied in part 691 F.2d 1023 (D.C. Cir. 1982) (the employer may unilaterally alter payments to health and welfare and pension funds which are part of an expired contract if employer demonstrates that, when changes were made, union did not represent majority of unit employees or that employer had a good-faith doubt, based on objective considerations, of union's continuing majority status).

We need not resolve this issue. Even applying a good-faith doubt standard, the Respondent has failed to carry its evidentiary burden with respect to the payment due on January 10. See, e.g., *Cauthorne Trucking*, 256 NLRB at 722 fn. 3 (employer has burden of rebutting presumption of majority support). The Respondent has not demonstrated that it had a good-faith doubt of the Union's majority status *in late December,* when Butera made the decision not to make the January 10 payment. We affirm the judge's finding that, at this point, the Respondent was merely relying on rumors. Butera's hearing testimony—which referred to "word on the street" about "almost a hundred percent" employee support for decertification and his ultimate knowledge that "almost everybody signed the petition"—does not clearly establish the state of his knowledge at the critical time. Butera was not shown the petitions until January 16, some time *after* the decision with respect to the January 10 payment was made. Although the rumors eventually proved correct, his later knowledge cannot retroactively justify his earlier decision.[1]

With respect to the later payments at issue, however, we find that once Butera had been shown the petitions on January 16, even the *Levitz* standard was satisfied. Thus, the Respondent knew that a large majority of unit employees had signed decertification petitions, indicating that the union had actually lost majority support. Accordingly, the Respondent's failure to make the later payments was lawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative Law judge as modified below and orders that the Respondent, Butera Finer Foods, Elgin, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Make its employees whole by paying the pension fund contribution, as provided in the expired collective-bargaining agreement, which has not been paid, and which would have been paid by January 10, 2002, in the absence of the Respondent's unlawful unilateral discontinuance of such payments."

[1] Member Schaumber notes that Butera did not have sufficient knowledge to support a good-faith doubt of the Union's continued majority status in either late December, when he made the decision not to make the next pension fund payment, or on January 10, when the payment was due but not made.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change terms and conditions of employment, including the Pension Fund Contributions for our employees in the bargaining unit represented by the Union.

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 make our employees whole by paying the pension fund contribution, as provided in the expired collective-bargaining agreement, which has not been paid, and which would have been paid by January 10, 2002, in the absence of our unlawful unilateral discontinuance of such payments.

BUTERA FINER FOODS, INC.

Kevin McCormick, Esq., for the General Counsel.
John S. Schauer, Esq. (Seyfarth Shaw), of Chicago, Illinois, for the Respondent.
Mindy Kallus, Esq. (Karmel & Gilden), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on November 8, 2002, in Chicago, Illinois, upon a complaint, dated August 30, 2002, alleging that the Respondent, Butera Finer Foods, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by ceasing to make pension contributions to the Pension Fund without prior notice to the Union and without affording the Union an opportunity to bargain. The charge was filed by United Food and Commercial Workers Union and Employers Midwest Pension Fund (Pension Fund).

The Respondent filed an answer on October 1, 2002, admitting the jurisdictional aspects of the complaint and denying that it had violated the Act.

On consideration of the entire record, including briefs filed by the General Counsel, the Respondent, and the Pension Fund, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation, with an office located in Elgin, Illinois, and with stores located in Elgin, Des Plaines, Norridge, and Harwood Heights, Illinois, is engaged in the grocery store business. With gross revenues in excess of $500,000 and with purchases and receipts at its facilities of goods valued in excess of $50,000 directly from points located outside the State of Illinois, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company is headquartered at Clock Tower Plaza, Elgin, Illinois.

The United Food and Commercial Workers Union, Locals 881 and 1540 (Local 1540 which merged with Local 546 in 2002 is now Local 1546, collectively the Union) are labor organizations within the meaning of Section 2(5) of the Act.

Paul Butera, as chairman of the Company since 1968, is a supervisor of the Respondent within the meaning of Section 2(11) of the Act.

II. BACKGROUND

The Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which expired on November 21, 2001 (Jt. Exh. 1). According to the agreement and Section 9(a) of the Act, the Union was the exclusive bargaining representative of the following collective-bargaining unit:

> All employees employed by Respondent at its stores currently located in 4761 North Nagle Avenue, Harwood Heights, Illinois, 727 North Golf Road, Des Plaines, Illinois, 3 Clock Tower Plaza, Elgin, Illinois and 4411 North Cumberland, Norridge, Illinois, including employees working in leased and/or licensed departments and all concession departments within the stores; but excluding meat department employees, store managers, guards, professional employees and supervisors as defined in the Act.

The parties, represented by Terry DeVito and Elliott Miler for the Union and Paul Butera for the Respondent, negotiated on October 30 and November 12, 2001, for a renewal of the bargaining agreement, but they failed to reach a new agreement on behalf of the grocery clerks.

The expired agreement required the Respondent to make monthly contributions to two trust funds, one the Health Fund (United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund) and the Pension Fund (United Food and Commercial Workers Unions and Employers Midwest Pension Fund) (GC Exh. 32). The documents governing these funds were left unsigned by the respective parties; however, the collective-bargaining agreement specifically refers to these funds, requiring contributions to both the Pension Funds and the Health and Welfare Fund by the 10th day of each month (Jt. Exh. 1).

In the past, the Respondent has made required payments to both trust funds. The Company also made the contributions to the Health and Welfare Fund for the period following the expiration of the bargaining agreement on November 21, 2001, covering the period of December 2001 to March 2002 (GC Exh. 12).

In December 2001, Paul Butera, Respondent's chairman and chief executive, decided to discontinue the contributions to the Pension Fund. The decision was implemented in January 2002, when the contributions for the prior month, December 2001 were due (GC Exh. 9, p. 5). Significantly, the Respondent stopped its Pension Fund contributions effective December 2001, and thereafter without notifying the Union or giving the Union an opportunity to bargain.

The Union was ultimately decertified on April 2, 2002, pursuant to a decertification petition and an election held on February 21 and 22, 2002 (Tr. 16).

III. ANALYSIS

The issue in this case is whether the Respondent lawfully discontinued its contributions to the Pension Funds without notice to the Union and without affording the Union an opportunity to bargain. The General Counsel argues that the Respondent unilaterally changed the terms and conditions of employment for the unit employees after the expiration of the contract at a time when the Respondent continued to have an obligation to bargain with the Union, and that the Company's unilateral change violated the Act. The Respondent argues that the Company did not violate the Act, because it was required or obliged to maintain the status quo of making contributions to the Fund only during the effectiveness of the contract or its extension and not thereafter, that the Union waived the Company's obligation by its failure to negotiate the matter for the period after the expiration of the contact, and that the Union lost its majority status among the employees.

Relevant to a resolution of the issues are the following *undisputed* facts: The collective-bargaining agreement which expired on November 21, 2001, provided for the Company's obligation to make contributions to the Pension Fund. The respective parties met on two occasions, October 30 and November 12, 2001, to negotiate an extension to the contract, but the parties never discussed the subject of the pension fund contributions. Another meeting, which had been scheduled, failed to take place, but the parties did not reach an impasse in their negotiations. Butera admitted in his testimony that he decided at the end of December 2001 to discontinue the pension fund contribution, because he "found out that they were going for decertification." Pursuant to a petition filed on January 15 2002, and a Stipulated Election Agreement approved on January 29, 2002, an election was held on February 21 and 22, 2002. The Union lost and was decertified on April 2, 2002.

The Board has consistently held that "pension, health, and welfare plans provided for by the expired contract constituted an aspect of employee wages and a term and condition of employment which survived the expiration of the contract and could not be altered without bargaining." *Peerless Roofing Co*., 247 NLRB 500, 503 (1980); *Harold W. Hinson*, 175 NLRB 596 (1969); *Cauthorne Trucking*, 256 NLRB 721 (1981); see also *KBMS, Inc.,* 278 NLRB 826 (1986); and *Post-Tribune Co.,* 337 NLRB 1279 (2002). An employer is therefore prohibited from discontinuing the pension fund payments, unless, (1) the parties had reached an impasse in their bargaining, (2) the Union had lost its majority status or the employer can demonstrate a good-faith doubt of the Union's majority status, and (3) the Union had waived its right to bargain about the contributions.

Here, the record shows that the Respondent met none of these exceptions. Clearly, the parties did not reach an impasse in their negotiations. They simply failed to meet for their third scheduled meeting. Indeed, the Respondent has not argued that an impasse had occurred.

The Respondent has also failed to demonstrate that it had a good-faith doubt about the Union's majority status at the time Butera made his decision. "Whether a union is certified or voluntarily recognized, it enjoys a rebuttable presumption of majority status on the expiration of a collective-bargaining agreement." *R.J.B. Knits,* 309 NLRB 201 (1992). Butera had merely heard rumors about a decertification petition, but the petition had not yet been filed, and the election had not been held when Butera decided to cease making the contributions. "The filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union." *Dresser Industries,* 264 NLRB 1088 (1982). Clearly, according to the standards discussed in *Levitz Furniture Co*., 333 NLRB 717 (2001), the Respondent has failed to establish its good-faith doubt.

Finally, the Union clearly had not waived its bargaining rights. A union's waiver in this regard "must be clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The Respondent's reliance upon a prior experience with the meat department employees is misplaced. It involved a decertification proceeding with the meat cutters 2 years earlier. The Union's failure to file an unfair labor practice charge in that connection does not amount to a waiver of its rights under the current set of circumstances. Here, as in *Post-Tribune Co*., supra, "there was no evidence even of notification to the Union about the changes let alone that the issue was discussed and consciously explored and/or that the Union consciously yielded or clearly and unmistakably waived its interest in the matter."

In agreement with the positions of the General Counsel and the Union, as well as that of the Midwest Pension Fund, I find that the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Butera Finer Foods, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food and Commercial Workers Union, Locals 881 and 1540, the (Union), have been labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent at its stores currently located at 4761 North Nagle Avenue, Harwood Heights, Illi-

nois, 727 North Golf Road, Des Plaines, Illinois, 3 Clock Tower Plaza, Elgin, Illinois and 4411 North Cumberland, Norridge, Illinois, including employees working in leased and/or licensed departments and all concession departments within the stores; but excluding meat department employees, store managers, guards, professional employees and supervisors as defined in the Act.

4. The Union and the Respondent have been parties to a collective-bargaining agreement, which expired on November 21, 2001.

5. By unilaterally ceasing payments into the United Food and Commercial Workers Unions and Employers Midwest Pension Fund upon the expiration of the collective-bargaining agreement between the Respondent and the Union, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above-described unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in an unfair labor practice, the Respondent must be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent must make the employees whole by paying all pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid and which should have been paid absent Respondent's unlawful unilateral discontinuance of such payments.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Butra Finer Foods, Inc., Elgin, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notice to the Union and without affording the Union an opportunity to bargain, ceasing to make pension contributions to the Pension Fund.

(b) In any like or related manner interfering with, restraining, or coercing his employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make his employees whole by paying all the pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid, and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments, and continue such payments until April 2, 2002, the date of the Union's decertification.

(b) Within 14 days after service by the Region, post at its facility in Elgin, Illinois, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9, 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, 2001.

(c) 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.

[1] 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.

[2] 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."