Plastonics, Inc. *and* Local 151, International Ladies' Garment Workers Union, AFL–CIO. Case 34–CA–5626

October 12, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues remaining in this case concern the judge's recommended remedy for the Respondent's unilateral layoff of unit employees in violation of Section 8(a)(5) and (1) of the Act.[1] The General Counsel and the Charging Party both contend that the judge erred by failing to recommend backpay for the laid-off employees. The Charging Party further contends that the judge should have recommended an extension of its certification year.

The National Labor Relations 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,[2] and conclusions, to amend the recommended remedy, and to adopt the recommended Order as modified. For the reasons set forth below, we agree with the General Counsel and Charging Party that the remedy for the Respondent's unlawful unilateral action should include a provision for full backpay.[3]

On November 19, 1991, the Board certified the Union as representative of a unit of the Respondent's employees. On November 22, the Union requested bargaining. Prior to the January 1992 commencement of contract negotiations, however, the Respondent unilaterally laid off most unit employees for varying periods up to 2 weeks in length. The Union did not learn about the layoffs until a March 5, 1992 negotiating session. Its attorney then informed the Respondent of the obligation to bargain about layoffs. The Respondent's representative answered that he did not believe that he had to do so.

The judge found, and it is not further contested here, that the Respondent violated Section 8(a)(5) by laying off unit employees without giving the Union notice and an opportunity to bargain about the layoff decision and its effects. The judge ordered the Respondent, inter alia, to notify and bargain with the Union regarding the decision and effects of any future economic layoffs. He declined, however, to order the Respondent to give backpay to those employees whom it unlawfully laid off. The judge reasoned that such a remedy ''would serve no useful purpose and to the contrary, might unduly harm the Respondent's financial health and jeopardize its employees' jobs.'' Furthermore, he stated his belief that bargaining would not have changed anything. The Respondent would still have had to lay off employees for valid economic reasons in December 1991. We disagree with the judge's reasoning.

The traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff. *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988). Contrary to the judge, this remedy does not require an antecedent finding that bargaining would have prevented the layoffs. As stated in *Lapeer*,

> First, requiring [such a] finding . . . requires the Board or a court to engage in a post-hoc determination of the economic situation, instead of letting the parties decide themselves at the time of the layoff. This requirement thus unnecessarily injects the Government into an area in which the collective-bargaining process should be permitted to function. Second, the requirement is contrary to our customary policy to order a respondent to restore the status quo when the respondent has taken unlawful unilateral action to the detriment of its employees. The ''consequences of Respondent's disregard of its statutory obligation should be borne by the Respondent, the wrongdoer herein, rather than by the employees.'' *Hamilton Electronics Co.*, 203 NLRB 206 (1973).

Based on the foregoing rationale, we shall amend the remedy, modify the recommended Order, and substitute a notice providing for full backpay relief to unit employees unlawfully laid off by the Respondent in the period from December 18, 1991, to January 6, 1992.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Plastonics, Inc., Hartford, Connecticut, its officers,

[1] On January 8, 1993, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel and the Charging Party (the Union) filed exceptions and supporting briefs. The Respondent filed an answering brief.

[2] There are no exceptions to the judge's findings that the unilateral layoffs violated Sec. 8(a)(5).

[3] We find no merit in the Union's request for an extension of the certification year. The layoffs were completed in less than 3 weeks, and no employee was laid off for more than 2 weeks. All employees were recalled prior to the first bargaining session. As of the hearing date, the bargaining had lasted 9 months and was continuing. There is no allegation that the bargaining was in bad faith, and no showing that it was tainted by the layoffs. In these circumstances, and noting the backpay remedy that we are granting, we are not persuaded that the further remedy of extending the certification year is warranted.

[4] Interest on backpay shall be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as the Respondent recalled all laid-off employees, there is no need to require reinstatement in the Order.

agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

''(b) Make whole, with interest, those unit employees who were laid off in the period from December 18, 1991, to January 6, 1992, for any loss of pay or other employment benefits suffered as a result of this unlawful unilateral action.

''(c) Preserve and, on 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.''

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

CHAIRMAN STEPHENS, concurring.

For the reasons stated by the judge, I agree that it is clear that even if the Respondent had given the Union notice and an opportunity to bargain, layoffs would not have been averted, albeit bargaining might have affected the timing of individual employees' layoffs and recalls. In such rare cases, I would ordinarily be averse to granting an unlimited full backpay remedy. However, in view of the fact that none of the layoffs exceeded 2 weeks, the employees here would receive backpay for the period of their layoffs even under the more limited remedy given for an unlawful failure to bargain over the effects of layoffs. *Transmarine Navigation Corp*., 170 NLRB 389 (1968).[1] Because the violations found by the judge include a refusal to bargain over the effects of the layoffs and because the full backpay remedy here would not exceed the minimum 2-week backpay award imposed under the *Transmarine* precedent, I do not find the backpay order in any way unreasonable.

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.

WE WILL NOT, without first giving notice and affording Local 151, International Ladies' Garment Workers Union, AFL–CIO the opportunity to bargain in good faith over our decision and its effects, lay off our employees in the following unit:

> All full-time and regular part-time production and maintenance employees employed by us at our Hartford, Connecticut facility; but excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL give notice to the Union before we implement any future economic layoff and give the Union the opportunity to bargain over that decision and its effects, unless we and the Union agree to a different procedure in a written collective-bargaining agreement.

WE WILL make whole, with interest, those employees whom we unilaterally laid off during the period from December 18, 1991, to January 6, 1992, for any loss of pay or other employment benefits suffered as a result of our unlawful conduct.

PLASTONICS, INC.

John F. S. Gross, Esq., for the General Counsel.
Brian Clemow and *Patrick J. McHale, Esqs*., of Hartford, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on a charge filed March 23, 1992, and amended on May 4, 1992, by Local 151, International Ladies' Garment Workers Union, AFL–CIO (the Union), the Regional Director for Region 34 issued a complaint and notice of hearing against Plastonics, Inc. (Respondent or Company) on May 7, 1992. The complaint alleges that Respondent has engaged in certain conduct in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed a timely answer admitting certain factual complaint allegations, including the jurisdictional allegations, but denying that it committed any unfair labor practices.

A hearing was held in these matters in Hartford, Connecticut, on September 21, 1992. Briefs were filed by the parties on or about October 26, 1992. Based on the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Connecticut corporation with an office and place of business in Hartford, Connecticut, where it engages in the nonretail sale and application of custom plastic coatings. Respondent admits the jurisdictional allegations of the complaint and I find that it is now, and has been at all times material to this proceeding, an employer engaged in

[1] This remedy is intended to compensate for the loss of bargaining leverage that the union might have possessed had bargaining occurred before the action at issue was taken. See, e.g., *Stevens Pontiac-GMC*, 295 NLRB 599, 602–603 (1989).

commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively and in good faith with the Union by laying off its unit employees on or about December 19, 1991, without prior notice to and without affording the Union an opportunity to bargain with Respondent with respect to the layoff.

A. *The Factual Circumstances Giving Rise to the Controversy*

As noted above, Respondent operates a facility in Hartford, Connecticut, and is engaged in the nonretail sale and application of custom plastic coating. Specifically, Respondent coats wire baskets, door hardware, boot laces, and other metal items sent to its facility by various customers. Once coated, these items are sent back to the various customers for sale to the ultimate consumer. Respondent's president and vice president are Robert and William Zimmerli, respectively. Bruce Hallden is Respondent's vice president and treasurer. The Respondent had approximately 30 employees, including about 23 production and maintenance employees, at the time of the events in question.

On November 19, 1991, pursuant to a representation election conducted on November 7, 1991, the Union was certified as the exclusive collective-bargaining representative of the following employees (unit or unit employees):

> All full-time and regular part-time production and maintenance employees employed by [Respondent] at its Hartford, Connecticut facility; but excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

On November 22, 1991, Alice Bethea, manager of the Connecticut District Council, International Ladies' Garment Workers Union and lead negotiator for the Union in negotiations with Respondent, requested in writing that Respondent meet with the Union ''as soon as possible at a mutually agreed upon time and place, for the purpose of negotiating a collective-bargaining agreement.'' The letter also requested that Respondent furnish certain information. Subsequent to this letter, at a date most likely in January 1992, the parties had a phone conversation in which a date and place were selected for the first negotiation session.

Prior to this first meeting between the Respondent and the Union, the Respondent laid off all of the bargaining unit employees, except maintenance employees, for an approximate 2-week period from late December 1991, until early January 1992.

Prior to the certification of the Union, the Respondent had had two layoffs, one in February 1990 and one in September of that year. The February 1990 layoff was caused by a lack of orders from customers which resulted in one department having nothing to do. At that time, Respondent laid off three employees in the affected department for 5 to 10 working days. In September 1990, the Company faced a similar situation and laid off four employees in one of its departments.

With respect to the December 1991 layoff, Respondent's vice president and treasurer, Hallden, testified that the Company was not in good financial shape, having not had a reasonably profitable year in the last 4 or 5 years. In December 1991, the Company experienced difficulty meeting its payroll, and was late in making its tax payments to the city of Hartford. According to Hallden, the December holiday period is traditionally a slow period for the Company and December 1991 was the slowest he had ever experienced in 25 years with the Company. According to Hallden, many of its customers shut down for 3 or 4 days during the holiday period.

Because of the slowdown in incoming orders the Respondent began considering a layoff or an entire shutdown around December 10 to 12, 1991. The Company's salesforce spent 2 or 3 days phoning customers to determine whether they were planning on sending in orders in the coming days and weeks. From these efforts the Company learned that it was going to receive very little business over the holiday period.

In addition to financial factors which caused the layoff, the Respondent mentioned that it could use a layoff to repair a tank which was leaking and needed repair. It is difficult to keep production going while this tank is repaired as it feeds other processes in the facility. Thus, during the December layoff, a subcontractor made extensive repairs to the tank, finishing on Thursday, January 2, 1992. This job involved about 62 hours of labor. Though Respondent argues on brief that this repair was a reason for the timing of the layoff, the facts just do not support such an argument. The tank had been leaking for months, and Hallden testified that the Company decided to repair the tank only after the layoff started because it would be a good time to have the work done.

The decision to lay off was made on December 15. According to company documents, it laid off 21 unit employees for varying periods of time beginning on December 18, and ending on January 6, 1992. Eight employees were laid off on December 18, five on December 19, 7 on December 23, and one on December 24. The lengths of layoffs of individual employees varied from 2 days to 10 days. The variance in layoff time occurred because the Company laid off employees as their departments ran out of work. Some departments had more work than others to finish. This was the same layoff procedure followed in the 1990 layoffs. Two unit maintenance employees were not laid off. One nonunit office employee, Karen Johnson was laid off. This employee is charged with receiving and processing orders for work and entering them into the Company's computer. She was laid off from December 20 through January 6.

The first negotiation session between the parties was held on January 28, 1992. To this point, the Union had received no notice of the December layoff and it was not discussed at this negotiating session. At the second negotiating session, the Union introduced a comprehensive contract proposal. Inter alia, it proposed with respect to seniority the following: ''Employees shall be laid off in inverse order of seniority and recalled in order of seniority, so long as the most senior employee is able to do the available work. Seniority is measured from date of hire.'' This is the only reference to layoffs in the document. At about this time, the Company experienced another slowdown in work which would affect some

of the unit employees, and gave notice to the Union of its intention to lay off such employees temporarily. The Union chose not to bargain over this layoff decision or its effects. This layoff was conducted pursuant to the procedures followed in the earlier layoffs.

At a negotiating session held March 5, 1992, the Union learned from the employees on the negotiating committee that there had been a December layoff. The Union's attorney informed Respondent's representatives that they were obligated by law to negotiate over, inter alia, layoffs. William Zimmerli responded for the Company saying he did not believe that he had to do that. In any event, there is no dispute that no notice of the December layoff was given to the Union prior to this March meeting, and obviously, the Union was not afforded the opportunity to bargain over the decision or its effects.

To date of hearing in this proceeding, about 12 negotiation sessions had taken place and such negotiations were ongoing at that time, though no full agreement had been reached on a contract. According to Hallden, the parties had agreed to seniority language and to a management-rights clause, which in part allows management ''[to] employ or transfer employees, or to layoff, terminate or otherwise relieve employees from duty for a lack of work, or other legitimate reasons'' The seniority language agreed to reads: ''Seniority shall be defined as an employees length of continuous service since his/her most recent date of hire. In the event of layoff for a lack of work or other reduction in force, the least senior employees in the affected departments shall be laid off first, unless otherwise agreed between the company and the Union, provided the remaining employees are fully qualified to perform the remaining work without training. The company reserves the right not to observe the provisions of section two in cases of layoffs of two working days or less.''

B. *The Legal Principles Involved and Conclusion with Respect to the Complaint Allegations*

The Board has consistently held that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining and that an employer must provide notice to and bargain with the union concerning the decision to lay off bargaining unit employees and the effects of that decision. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). I believe that the layoff was motivated by economic reasons, the loss of customer orders to sustain production, and not by any change in the scope and direction of the business. In the instant case, it is clear that the Respondent did not give notice to the Union of its decision to lay off unit employees and afford the Union an opportunity to bargain over that decision and its effects. The Union gained knowledge of the layoff and subsequent recall only months after the event.

The Board has held that the establishment of ''compelling economic circumstances'' may excuse a company's failure to bargain over a layoff decision, but that such an exception shall only apply in ''extraordinary situations.'' *Lapeer Foundry*, supra. I do not consider that Respondent's decision to repair a leaking piece of machinery to be such a compelling circumstance, the decision coming as it did only after the layoffs began. However, there is a question in my mind whether the economic circumstances which existed were sufficiently compelling to justify finding an exception to the bargaining obligation. On December 10, the Company was faced with a serious decline in orders, orders necessary to sustain production as the Company evidently works only on job orders and does not produce or coat products for inventory. A canvass of its customers over the next 2 or 3 days revealed that there would be an insufficient amount of business to continue production and that employees would be idled, at least for a period of time. This situation was combined with an unquestioned, in this record, assertion that the Company's financial health was not good and it was having difficulty making its payroll.

I believe that the circumstances are close to meeting the exception, but are not so compelling as to excuse even giving notice to the Union of the intention to lay off unit employees. As stated by the Board in *Lapeer Foundry*

> In light of the economic circumstances motivating a company's decision to lay off employees, however, we will require that negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation.'' [Id. at 954.]

I believe that the Respondent could have given notice and engaged in timely bargaining over the decision before it found it necessary to lay off its employees. It was protected from inaction or delay on the part of the union as noted in *Lapeer Foundry*, supra. Accordingly, I find that the Respondent's failure to give notice of its intention to lay off unit employees and allow the Union the chance to bargain over the decision and its effects to be in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The 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. By laying off its unit employees without giving notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over that decision and its effects, the Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act.

4. The unfair labor practices found to have been committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effect the policies of the Act.

For reasons set forth below, I do not recommend that Respondent be ordered to pay backpay to the affected unit employees. Based on this record, such a remedy would serve no useful purpose and to the contrary, might unduly harm the Respondent's financial health and jeopardize its employees' jobs. As the Board stated in *Lapeer Foundry*

> Having determined that an employer violates the Act by failing to bargain over its decision to lay off employees, we must formulate a remedy that addresses the wrong committed. As the Supreme Court has observed, our ''task in applying Section 10(c) is to take measures designed to recreate the relationship that would have been had there been no unfair labor practice.'' [Citations omitted. Id. at 955.]

I firmly believe that the affected employees would have been laid off in virtually the same manner as they were without bargaining, even if bargaining had occurred. There is no assertion in this record that Respondent's decision to effect the layoff in question was motivated by anything but genuine economic considerations. It had in the past laid off employees when a particular department ran out of work and it followed this practice in December 1991. The only contact between the recently certified Union and the Company was Bethea's letter of November 22, seeking information and requesting that dates and places be set for bargaining over a collective-bargaining agreement. There was no pattern to bargaining established and Respondent's management mistakenly believed that it was under no obligation to notify the Union of its decision.

Would bargaining have changed the course of events given the existing circumstances? Subsequent events would suggest that it would not. The Company was again faced with reduction in workload in February 1992, and advised the Union, during bargaining sessions, that it contemplated laying off some employees for this reason. The Union made no attempt to bargain over either the decision or its effects. The Company instituted the layoff following the the same procedures it had followed in past layoffs. Subsequently, the parties agreed to contract language that gives the Company the right to effect layoffs for lack of work as a management right.

Moreover, this is not a case where there was a decision to be made as to which employees would be laid off, or whether hours could be cut to stretch out work, or some other concessionary move made by the Union to eliminate the need for the layoff. According to this record, the Company simply did not have any work for any of its production employees.

This record is devoid of any suggestion that the Respondent acted from any antiunion motivation and that there existed any alternative to layoff. The Union's subsequent actions indicate that it recognizes the need for layoffs in the face of lack of work and that it does not desire to bargain over such decisions. Imposing a traditional make-whole remedy would serve only to punish the Respondent and would not serve the policies of the Act in my opinion.

I will recommend that the Respondent be ordered to give notice to the Union before it implements any future economic layoff and give the Union the opportunity to bargain over that decision and its effects, unless the parties agree to a different procedure in a written collective-bargaining agreement.

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

ORDER

The Respondent, Plastonics, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its unit employees without giving notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over that decision and its effects.

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

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

(a) Give notice to the Union before it implements any future economic layoff and give the Union the opportunity to bargain over that decision and its effects, unless the parties agree to a different procedure in a written collective-bargaining agreement.

(b) Post at its Hartford, Connecticut facility copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's 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.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent had taken to comply.

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[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 Section 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.''