Bartlett-Collins Company *and* American Flint Glass Workers of North America, AFL–CIO. Case 16–CA–7333

August 23, 1978

DECISION AND ORDER

Upon a charge duly filed on July 15, 1977, by American Flint Glass Workers of North America, AFL–CIO,[1] herein called the Charging Party or the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 16, on August 17, 1977, issued and served on the parties a complaint and notice of hearing. The complaint alleged that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union as the exclusive bargaining representative of all the employees in an appropriate unit by insisting to impasse on a stenographic record of negotiations as a precondition for any further bargaining sessions. On August 29, 1977, Respondent filed an answer denying the commission of unfair labor practices.

Thereafter, on November 10, 14, and 15, 1977, Respondent, the Union, and the General Counsel, respectively, entered into a stipulation of facts in which they jointly moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and an Order. The parties waived a hearing before, and the making of findings of fact, conclusions of law, and the issuance of a decision by, an Administrative Law Judge, and stipulated that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the charge, complaint, answer, and the stipulation of facts and exhibits attached thereto constituted the entire record in this proceeding.[2]

On January 12, 1978, the Board approved the stipulation of the parties and ordered the case transferred to the Board, granting permission for the filing of briefs. Thereafter, the General Counsel, Respondent, and the Charging Party filed briefs.

The Board has considered the stipulation, including the exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a Delaware corporation, licensed to do business in the State of Oklahoma, with its office and principal place of business in Sapulpa, Oklahoma, where it is engaged in the manufacture and sale of glass tableware and other glass items. During the past 12 months, a representative period, Respondent manufactured, sold, and distributed goods valued in excess of $50,000 directly to customers located outside the State of Oklahoma.

Respondent admits, and we find, that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We also find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

In an election conducted by the Board in Case 16–RC–6545 on May 31, 1974, a majority of Respondent's employees in an appropriate unit designated the Union as their exclusive collective-bargaining representative.[3] On June 10, 1974, the Regional Director for Region 16 of the National Labor Relations Board certified the Union in that unit. On July 18,

[1] We note that while the charge filed herein denotes the Charging Party as "American Flint Glass Workers Union of North America, AFL-CIO," the caption appearing on the other formal papers in this proceeding refers to the Charging Party as "American Flint Glass Workers of North America, AFL-CIO." We shall use the latter designation when we refer to the Charging Party by its formal name.

[2] The parties also agreed that the Board's Decision and Order reported at 230 NLRB 144 (1977), involving Respondent and the Charging Party, together with the Administrative Law Judge's Decision, the transcript, the record, and all exhibits, and Respondent's statement of exceptions and objections to the Administrative Law Judge's Decision in that proceeding, were also to be made part of this proceeding, by reference, for all relevant purposes, but that Respondent did not thereby waive application of the provisions of Sec. 10(b) of the National Labor Relations Act, as amended, or its right to object to the admissibility of any such transcript and record. It was also agreed that the incorporation of the transcript and record in the prior proceeding did not constitute acceptance or admission of validity by Respondent of the findings of fact or the conclusions of law of either the Administrative Law Judge or the Board in the prior proceeding.

[3] That unit was:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at Respondent's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals and other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees, as defined in the Act, as amended.

1974, contract negotiations commenced between the Union and Respondent and continued on seven specific dates during the ensuing months. No agreement was reached and, on October 21, 1974, the Union filed a charge in Case 16–CA–5809 alleging, *inter alia*, that Respondent had violated Section 8(a)(5) and (1) of the Act by engaging in bad-faith negotiations in an attempt to undermine the Union's status as the employees' certified representative. Upon complaint and hearing, Administrative Law Judge Morton D. Friedman, on June 30, 1976, issued his Decision in Case 16–CA–5809, finding, *inter alia*, that Respondent had violated Section 8(a)(5) and (1) of the Act, as alleged, by failing and refusing to bargain in good faith with the Union. The Administrative Law Judge found that throughout the course of negotiations Respondent had repeatedly made proposals which it knew could not be accepted by the Union, thereby creating a situation which fell short of the requirements of good-faith collective bargaining demanded by Section 8(a)(5) and (d) of the Act. In reaching his conclusion, the Administrative Law Judge relied primarly on the testimony of union witness Alvarez, whose testimony, he stated, was not materially controverted by any of Respondent's witnesses.

Subsequent to the Administrative Law Judge's Decision, and pursuant to the Union's request, the parties resumed bargaining on July 29, 1976. Present at this meeting, at the request of Respondent's chief negotiator, Harold Mueller, was a certified court reporter who was asked to record and prepare a transcript of that day's negotiations. The Union protested the presence of the reporter and the major part of the meeting thereafter consisted of a heated discussion over the acceptability of a court reporter at future bargaining sessions. Although, pursuant to agreement of the parties, the reporter recorded that day's meeting, the parties failed to resolve the reporter issue as it related to future bargaining sessions and no further meetings between the parties were scheduled or conducted until June 1977.

On June 13, 1977, the Board issued its Decision and Order in Case 16–CA–5809,[4] affirming in full Administrative Law Judge Friedman's finding that Respondent had violated Section 8(a)(5) and (1) of the Act.

Thereafter, On June 17, 1977, counsel for the Union advised counsel for Respondent that the Union desired to resume collective-bargaining sessions. On June 27, 1977, the Union's counsel confirmed the parties' agreement to renew bargaining at meetings to be conducted on July 20, 21, and 22, 1977. Respondent's counsel confirmed this arrangement by letter to the Union's counsel on June 29, 1977. Then, on June 30, 1977, Respondent's counsel wrote the Union's counsel that, in view of the Board's Decision and Order in Case 16-CA-5809 (cited at fn. 4, *supra*), Respondent had concluded that "a record of bargaining under the circumstances is both desirable and necessary to establish without resort to credibility determinations what was said or done by the parties in bargaining." To that end, Respondent indicated that it was making arrangements to secure the services of a court reporter for the forthcoming bargaining sessions. While Respondent's counsel stated that it would be appropriate for the Union to share in the costs of such transcription, it indicated that Respondent was willing to bear the entire expense involved. Respondent contended that, as the Board's recent Decision and Order turned on credibility resolutions, it would protect all parties to have a certified court reporter's transcript of negotiations to eliminate the possibility of potential misunderstanding and/or misquoting of exactly what would transpire during the upcoming bargaining sessions.

By letter dated July 8, 1977, the Union's counsel notified Respondent's counsel of the Union's continued opposition to the presence of a court reporter during contract negotiations. The Union's counsel stressed two considerations: (1) "the presence of a court reporter at the bargaining table tends to interfere with and unduly impede negotiations and frank discussion"; and (2) the members of the Union's bargaining committee were not accustomed to judicial or administrative proceedings where stenographic transcripts were made by a court reporter and, consequently, several members of the committee were reluctant to express their views under such conditions. The Union's counsel expressed the hope that the litigation between the parties had been concluded; that a mutually satisfactory agreement could now be reached; and that Respondent's concern over potential credibility resolutions and further Board proceedings should not present an issue as far as future bargaining sessions were concerned. However, as an alternative, the Union proposed that each party be permitted to record the bargaining session through the use of its own electronic recording equipment. The Union indicated that it did not wish to meet under Respondent's conditions.

Respondent's counsel responded to the Union's position by letter dated July 14, 1977, stating that Respondent did not agree with the reasons advanced by the Union for its reluctance to bargain in the presence of a court reporter; that the alternative proposal suggested by the Union was unacceptable; and that

[4] *Bartlett-Collins Company*, 230 NLRB 144 (1977).

Respondent remained available for bargaining, provided that a record of the negotiations would be prepared by a certified court reporter. Respondent's counsel also noted that the Union's counsel had informed him that because of Respondent's position, there was no point in meeting and therefore Respondent's counsel was releasing the dates earlier agreed upon for resumed negotiations.

On July 15, 1977, the Union filed a charge in the instant proceeding, alleging that Respondent had violated Section 8(a)(5) of the Act by insisting to impasse upon the presence of a court reporter during collective-bargaining negotiations between the parties.

B. *The Contentions of the Parties*

General Counsel contends that Respondent's current demand for the presence of a court reporter, viewed in the context of Respondent's prior unlawful conduct, is another attempt to frustrate the Union's endeavors to engage in meaningful negotiations. General Counsel asserts that the request was not made in good faith, but rather was an attempt to avoid Respondent's obligation to bargain. The Union agrees with the General Counsel's contention, and argues further that Respondent's insistence to impasse on the presence of a court reporter, which the Union contends is a nonmandatory subject of bargaining, was *per se* a violation of the Act.

Respondent, on the other hand, contends that, in the absence of bad faith, its demand for the presence of a court reporter was not a violation of the Act. It argues that in the absence of evidence to indicate that its request was made in bad faith the complaint should be dismissed.

Analysis

In *Reed & Prince Manufacturing Company*,[5] the Board held that, in the absence of bad faith, a party does not violate the Act by insisting that a court reporter be present to make verbatim transcript of bargaining sessions. In subsequent decisions, the Board has consistently examined the surrounding circumstances to determine if the insistence either on a court reporter in negotiations or on a device to record those sessions was made in bad faith; i.e., to avoid or frustrate the legal obligation to bargain.[6] Where bad faith has not been shown, the Board has found no violation of the Act in such insistence.[7] In taking this approach, the Board has, in effect, treated the issue of the presence of a court reporter or a recording device at negotiations as a mandatory subject of bargaining. Thus, in *St. Louis Typographical Union No. 8, supra*, the Board reasoned:

> It is wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods of compromise and accommodation as are used in resolving equally difficult differences relating to substantive terms and conditions of employment. [149 NLRB at 752.]

Upon reexamination of this issue under Supreme Court guidelines, however, we now conclude that the demand for the presence of a court reporter during negotiations as a device to record those negotiations is not a mandatory subject of bargaining, and that either party's insistence to impasse on this issue is, accordingly, a violation of the Act, without regard to whether such insistence was in good or bad faith.

Lawful subjects of bargaining have traditionally been divided into two categories: mandatory and nonmandatory or permissive. In *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*[8] the Supreme Court, in light of the statutory language of Section 8(a)(5) and (d) of the Act, restated the definition of both subjects of bargaining, and the rights and obligations respective to each:

> Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . . ." The duty is limited to those subjects and within that area neither party is legally obligated to yield. . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

It is our view that the issue of the presence of a court reporter during negotiations or, in the alternative, the issue of the use of a device to record those negotiations does not fall within "wages, hours, and other terms and conditions of employment." Rather these subjects are properly grouped with those topics defined by the Supreme Court as "other matters" about which the parties may lawfully bargain, if they so

[5] 96 NLRB 850 (1951), enfd. on other grounds 205 F.2d 131 (C.A. 1, 1953), cert. denied 346 U.S. 887 (1953).

[6] See, e.g., *St. Louis Typographical Union No. 8, affiliated with International Typographical Union, AFL CIO (Union Employers' Section of the Graphic Arts Association of St. Louis, Inc.)*, 149 NLRB 750 (1964) (then Member Fanning and Member Brown concurring specially. For the reasons expressed in that concurrence and in this Decision, Chairman Fanning now would overrule that decision); and *Southern Transport, Inc.*, 150 NLRB 305 (1964).

[7] See, e.g., *American Ship Building Company*, 226 NLRB 788, 800–901 (1976), enfd. in an unpublished order, Docket 77-1178 (C.A.D.C., April 5, 1978).

[8] 356 U.S. 342, 349 (1958).

desire, but over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue.[9]

In view of the above, we find that Respondent's demand for the presence of a court reporter during negotiations should be accorded the status and attendant characteristics of a nonmandatory subject of bargaining. Accordingly, we conclude that Respondent, by insisting to impasse on the presence of a court reporter during contract negotiations as a precondition to such negotiations, violated Section 8(a)(5) and (1) of the Act. Having found that the subject matter here involved is not a mandatory subject of bargaining, and that Respondent's insistence on such subject therefore violated Section 8(a)(5), it is irrelevant whether Respondent's insistence was in good or bad faith. Prior Board decisions indicating to the contrary are hereby overruled.[10]

Conclusions of Law

1. Bartlett-Collins Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Flint Glass Workers of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times relevant herein, American Flint Glass Workers of North America, AFL-CIO, has been the exclusive rerpesentative of all the employees in the appropriate unit set forth below for purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at the Employer's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals, other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees as defined in the Act, as amended.

4. Since on or about June 30, 1977, and continuing to date, Respondent, by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions, we will order that Respondent cease and desist from engaging in such conduct and, upon request, bargain collectively in good faith with American Flint Glass Workers of North America, AFL-CIO, and its designated agents at times and places mutually convenient concerning wages, rates of pay, hours of employment, and other terms and conditions of employment, as indicated in our Order below.

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[9] Indeed, we note that many experts in the field of labor relations have expressed their opinion that the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining. In "Techniques of Mediation in Labor Disputes," (Oceana Publications, N.Y., 1971), p. 63, author Walter Maggiolo states that:

> Experience has taught that the presence of a stenographer or tape recorder does inhibit free collective bargaining. Both sides talk for the record and not for the purpose of advancing negotiations toward eventual settlement. Each becomes overconscious of the recording of his remarks. The ease of expression so necessary to proper exposition of problems is hampered. The discussion generally becomes stultified.

And, as noted in "Practice of Collective Bargaining," by Beal, Wickersham and Kienast (Richard D. Irwin, Inc., Ill., 1976), p. 217, the presence of a stenographer tends to formalize proceedings and reduces the spontaneity and flexibility that are often manifiested in successful bargaining.

[10] Respondent contends that the Union was equally responsible for the parties reaching impasse on this issue. We disagree. While the Union expressed the opinion that the presence of a court reporter would unduly inhibit frank discussion, it demonstrated a willingness to compromise on the issue by proposing that both parties be permitted to utilize electronic recording equipment to transcribe the various negotiation sessions. It did not insist on that condition, however, and was willing to proceed without any recording being done. It was Respondent, however, which remained adamant in its refusal to engage in negotiations in the absence of a court reporter, a position which foreclosed the possibility of discussion on any topic, including that of the court reporter. In these circumstances, we find that Respondent's conduct alone was responsible for the bargaining impasse which the parties reached.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bartlett-Collins Company, Sapulpa, Oklahoma, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Intefering with the efforts of the Union to bargain on behalf of the employees in the unit described below, by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at the Employer's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals and other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees as defined in the Act, as amended.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees in the above-described unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the Union and its designated agents at mutually convenient times and places with respect to wages, rates of pay, hours, and other terms and conditions of employment and, if agreement is reached, embody it in a signed contract.

(b) Post at its place of business in Sapulpa, Oklahoma, copies of the attached notice marked "Appendix."[11] Copies of said notice on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[11] In the event that 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."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interfere with the efforts of the Union to bargain on behalf of the unit employees by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions.

WE WILL NOT in any like or related manner interfere with the efforts of the Union to bargain collectively on behalf of our employees so represented.

WE WILL, upon request, meet and bargain collectively in good faith at mutually convenient times and places with American Flint Glass Workers of North America, AFL–CIO, and its designated agents, in the unit described below, with respect to wages, rates of pay, hours, and other terms and conditions of employment and, if agreement is reached, WE WILL embody it in a signed contract. The appropriate unit is:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at the Employer's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals, and other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees as defined in the Act, as amended.

BARTLETT-COLLINS COMPANY