Radioear Corporation *and* International Union of Electrical, Radio and Machine Workers, Local 633, AFL–CIO–CLC. Case 6–CA–5376

October 29, 1974

SUPPLEMENTAL DECISION AND ORDER

On October 30, 1972, the Board, Members Fanning and Jenkins dissenting, issued a Decision and Order in the instant case, deferring to the parties' contractual settlement procedures, and dismissing the complaint.[1] Provision was made for the retention of jurisdiction, however, and for further consideration, upon timely motion, should it be shown that (a) the dispute had not, with reasonable promptness, been resolved by amicable settlement or submitted promptly to arbitration, or (b) the grievance or arbitration procedures utilized were not fair and regular or reached a result repugnant to the Act.

Thereafter, the "turkey money" dispute in issue, more fully described in our earlier Decision, was submitted to arbitration. On October 8, 1973, the arbitrator issued his award, denying the Union's grievance. The Charging Party, by motion for further consideration filed October 26, 1973, requests the Board to reinstate the complaint, on grounds the arbitrator's award was contrary to law, disregarded statutory rights, and did not resolve the issues in a manner compatible with the purposes of the National Labor Relations Act. Respondent filed a brief in opposition.

We grant the Charging Party's motion for further consideration for reasons set forth below.

The facts are fully set forth in the Administrative Law Judge's original Decision, and in the subsequent Board Decision, *supra.* For a number of years prior to 1970, Respondent had paid its employees a $30 "turkey money" bonus at Thanksgiving and Christmas. In 1970, Respondent signed its first contract with the Union, effective March 16, 1970. The contract did not mention the bonus, and when the Union demanded its payment at Thanksgiving, Respondent refused and advised the Union that "turkey money" would not be paid then or in the future.

At the negotiations which preceded the 1970 contract, no specific mention was made of the "turkey money" bonus. Nor does the contract anywhere refer to this benefit. There was, however, an attempt by the Union, during negotiations, to convince Respondent to include in the contract a clause preserving all existing benefits; Respondent would not agree to such a clause. The parties did agree to a "zipper" or wrap-up clause, which read:

> It is acknowledged that during negotiations which resulted in this agreement, the Union had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining. Therefore, for the life of this agreement, the Union agrees that the Company shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement.

In our prior Decision, we deferred the parties' dispute over the "turkey money" bonus to their contractual grievance and arbitration procedure. We expressed an unwillingness to agree with the Administrative Law Judge that, since no waiver expressly and unequivocally referring to the "turkey money" bonus was included in the contract, Respondent had a continuing obligation to maintain the "turkey money" bonus unless it bargained first with the Union. We found it inappropriate to apply so rigid a formula to the circumstances of the case. As we stated in our prior Decision, "where the parties, as here, have engaged in the collective-bargaining process, as contemplated by the statute, and have executed a collective-bargaining agreement, setting forth the terms of their bargain, we are unwilling to ignore what has taken place at the bargaining table and decide the parties' dispute on the basis of a simplistic formula arrived at by this Board." Since we found "the collective-bargaining agreement, and the events surrounding its execution . . . [to be] at the heart of the disagreement," we deferred our decision to the parties' contractual settlement procedures, in accordance with our *Collyer* policy.[2]

As contemplated by our prior Decision, upon the Union's request we have examined the award issued by the arbitrator. After determining that the dispute was arbitral, the arbitrator emphasized that his authority was to decide the dispute solely within the bounds of the contract. He noted that the Union had submitted a proposal for maintenance of past benefits which was refused by the Company and not negotiated into the agreement, even though specific benefits, such as health insurance and vacations, were included. The arbitrator also noted that the subject of the Christmas bonus was used by the Union as a leverage and a "buy out for higher wages." The arbitrator questioned "why did they not do the same on turkey money?" The arbitrator found that "by refusal of a maintenance of past benefits and no ne-

[1] *Radioear Corporation*, 199 NLRB 1161

[2] *Collyer Insulated Wire, A Gulf and Western Systems Co*, 192 NLRB 837 (1971)

gotiations on turkey money but specific negotiations on other benefits, it is clear the company never intended turkey money as a benefit of wages but as gift." The arbitrator concluded that it was not within his authority to add on another benefit never discussed until negotiations had been closed and agreement signed. The arbitrator denied the grievance.

In the course of his opinion the arbitrator repeatedly set forth his view that he was unable or without authority to pass on the issue before the National Labor Relations Board. Though the arbitrator observed that the "zipper clause refers . . . to a waiver of collective bargaining on issues not explicit in the agreement," he specifically declined to pass on the issue which he deemed to have been before the Board, i.e., whether the Employer had to bargain before discontinuing the benefit. It was his understanding that the Board's deferral of the issue of the Employer's bargaining obligation was inconsistent with his authority as arbitrator. He deemed himself bound by what he considered to be the four corners of that agreement and not by what he implied was an improper mandate given him by the Board.

Somewhat surprisingly, in passing, the arbitrator volunteered that "the Union effectively bargained away its own past practice which is not now subject to reopening under Section 1.02, for there is a specific, clear and unmistakable waiver to *collective bargaining* with respect to subject matter not referred to or covered in this agreement." Nonetheless, the arbitrator believed that there was a question of possible illegality or repugnance to the Act of the zipper clause, and, as indicated, emphatically declined to rule on the applicability of the zipper clause to the specific question raised before the Board; i.e., the Employer's duty to bargain collectively before discontinuing the "turkey money." As the arbitrator saw the case, "the zipper clause is then irrevelant to this dispute and collective bargaining is not here an issue."

We are less clear than was the arbitrator that it was not within his power to decide the issue of whether the Employer acted improperly in unilaterally discontinuing the "turkey money" payment. Indeed, other arbitrators have decided this issue under somewhat similar circumstances.[3] As stated in our initial Decision, "the answer [to the question of the employer's bargaining obligation] does not, in our view, call for a rigid rule, formulated without regard for the bargaining postures, proposals, and agreements of the parties, but rather, more appropriately, should take into consideration such various factors as (a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining; (c) the completeness of the bargaining agreement as an 'integration'—hence the applicability or inapplicability of the parol evidence rule; and (d) practices by the same parties, or other parties, under other collective-bargaining agreements." As we stated, "these are but a few of the many factors that could and would be considered by an arbitrator." These seemed to us, and still seem, to be matters particularly suited to resolution in the forum of arbitration. Nonetheless, the arbitrator in this case specifically found himself unwilling to determine with finality the issue as to bargaining, and we therefore must consider the question of the Employer's bargaining obligation on its merits.

Although this issue will now be decided by us, rather than by the arbitrator, we see no reason to blind ourselves to the several factors we characterized as relevant in our prior Decision. We continue to be unwilling to apply a rigid formula to the question of the Employer's bargaining obligation after a contract has been reached, but rather will ourselves look at the factors we referred to in our prior Decision.

We note, first, that during the course of negotiations for this first contract, the Union sought a maintenance of standards provision, whereby "all benefits and privileges in effect prior to this agreement will continue in effect unless amended or changed herein." As the Administrative Law Judge found, the Company refused to incorporate this language into the contract and the matter was abandoned. Rather, the parties agreed to the zipper clause hereinbefore described. The zipper clause specifically stated that the Union had had an opportunity to bargain over all proper subjects of collective bargaining. By its terms, it contained an agreement by the Union that the Company was relieved of any obligation to bargain "with respect to any subject or matter not specifically referred or covered in this agreement."

The arbitrator chosen by the parties, though refus-

[3] See, e g , the arbitrator's opinion referred to in *Valley Ford Sales, Inc , d/b/a Friendly Ford,* 211 NLRB 834 (1974) Unlike our dissenting colleagues, we do not perceive what application *Alexander* v *Gardner-Denver Co ,* 415 U S 36 (1974), has to our *Collyer* and *Spielberg* doctrines generally nor to the issue here *Alexander,* of course, did not deal with our *Collyer* or *Spielberg* doctrines, but instead dealt with the interrelationship between arbitral procedures and Title VII of the Civil Rights Act of 1964 But subsequent to resolving the issues in that case the Supreme Court has noted our *Collyer* decision with approval, stating "The Board's position harmonizes with Congress' articulated concern that final adjustment by a method agreed upon by the parties is the desirable method for settlement of grievance disputes " *William E Arnold Co* v *Carpenters District Council of Jacksonville and Vicinity et al ,* 417 U S 12 (1974) As to the issue here, even our colleagues state that the arbitrator had the function and duty "to effectuate the intent of the parties " Here, the arbitrator found that the intent was to waive bargaining over the turkey money, and we would therefore have thought he need not have hesitated to issue an award giving full effect to that intent

ing to make a definite ruling on the legality of the clause under the National Labor Relations Act, recognized that the clause was a clear waiver of any bargaining obligation by the Employer. He stated that the legality of such a clause was within the province of the NLRB to decide. We have found no case in which the Board or any court has ever held that such a clause is illegal, repugnant to the Act, or against public policy. We are therefore inclined to give it such effect as the negotiating history and other surrounding circumstances seem to make appropriate, at least in any case where its application would not be repugnant to the basic policies of our Act. As found by the arbitrator, the parties have fully explored the possible continuation of certain specific existing benefits, and as to at least one, the Christmas bonus, there was a "buy out" for higher wages. The parties expressly acknowledged, in the body of their waiver clause, that during negotiations which resulted in this agreement, the Union had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective-bargaining"; as the negotiations were described by the arbitrator, the preamble language of the waiver clause seems to accord closely with the actual facts.

Furthermore, the parties also consciously explored a clause which would specifically have required the maintenance of *all* existing benefits, whether mentioned specifically in the agreement or not. As both the arbitrator and the Administrative Law Judge have found, that proposal was *not* adopted, but the bargaining waiver clause specifically waiving the obligation of the Respondent to bargain over any subject or matter not specifically referred to or covered in the agreement *was* agreed to.

In the light of these circumstances, we find that there was here a conscious, knowing waiver of any bargaining obligation as to nonspecified benefits, such as the "turkey money" bonus. Nor do we find any repugnancy to the Act's principles in giving effect to such a waiver under these circumstances. We do not have here evidence of unconscionable overreaching by the Respondent in the bargaining process, nor any concealment of existing benefits which might make an application of the clause near fraudulent, or any other circumstances which persuade us that we should interfere with the integrity of what appears, in all respects, to have been an openly arrived at, fairly bargained, agreement.

It is our conclusion, therefore, that the waiver here should be given meaning and effect.[4] That is the intent and agreement of the parties as we construe it from the language of their contract and the circumstances surrounding their bargaining. The question of the breadth of such a clause, its relationship to any maintenance of standards clause that may have been proposed or agreed to, are contract interpretation questions appropriate for consideration by an arbitrator. But where the arbitrator chosen by the parties has expressly declined to render an opinion on this matter, we believe it is our duty to do so, and we have done so here.

We find, therefore, that the Union in this case has waived its rights to bargain about the subject matter in question, and we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and on the basis of the entire record in this case, the National Labor Relations Board hereby reaffirms its Order previously issued on October 30, 1972, and orders that the complaint herein be, and it hereby is, dismissed.

MEMBER KENNEDY, concurring:

I do not believe that the arbitrator's award was repugnant to the purposes and policies of the Act. I would dismiss the complaint herein. Accordingly, I agree with the result reached by Chairman Miller and Member Penello.

MEMBERS FANNING and JENKINS, dissenting:

In dissenting from the initial Decision and Order[5] deferring this matter to arbitration, we pointed out that at bottom this case involves no possible issue of contract interpretation but only the legal question whether a catchall "zipper" clause constitutes a waiver of bargaining over existing terms of employment not otherwise mentioned in the contract. Accordingly, even accepting, *arguendo,* the arguments usually advanced by the *Collyer*[6] majority in support of deferral, we found it difficult to understand how those arguments or similar arguments could be used to support deferral here. We concluded therefore that this case represented a further and a particularly unwise extension of a policy we have consistently disagreed with and disputed.[7]

[4] See, e.g., *N.L.R.B.* v *Southern Materials Co., Inc.,* 447 F 2d 15 (C.A. 4, 1971), where the court of appeals admonished the Board to give effect to a similarly broad waiver-of-bargaining clause. In distinguishing such cases as *General Electric Company* v *N L R.B.,* 414 F.2d 918 (C.A. 4, 1969); *Leeds & Northrup Co.* v. *N L R B.,* 391 F.2d 874 (C.A 3, 1968), and *Timken Roller Bearing Co.* v *N L.R.B.,* 325 F.2d 746 (C.A. 6, 1963), the court noted that the language of the waiver clauses in those cases was narrower, and the circumstances differed. Similarly, the approach we here enunciate focuses both on the language of the clause and the circumstances of the bargaining surrounding its execution.

[5] 199 NLRB 1161, 1162.

[6] *Collyer Insulated Wire,* 192 NLRB 837.

[7] See 192 NLRB 837, 846, 850; *McLean Trucking Company,* 202 NLRB 710 (1973) (Members Fanning and Jenkins dissenting)

We also observed in our dissent that any decision by the arbitrator purporting to interpret a contract clause of the kind at issue here as a waiver of bargaining over an established term of employment would necessarily be repugnant to the Act and of no effect under the *Spielberg*[8] doctrine. This conclusion followed from even a cursory examination of Board precedent, as sanctioned by judicial decision, all of which clearly establishes the legal principle that general and catchall contract clauses, regardless of the breadth of the language employed in their construction, are not sufficient to operate as a waiver of the union's right to bargain with the employer prior to the latter's termination of beneficial conditions of employment.[9] Despite these considerations the majority insisted on deferring this dispute to arbitration.

In response to the Board's mandate the arbitrator rendered an award denying the Union's grievance. In so doing, however, the arbitrator specifically disclaimed authority to pass on an issue properly before the National Labor Relations Board. Consequently, he based his decision solely on his reading of the collective-bargaining agreement and expressly left open the question he understood to have been initially before the Board; i.e., whether this Employer was obligated under law to bargain with the Union before discontinuing payment of the "turkey money" bonus. As we pointed out in our initial dissenting opinion, this question was and is the sole issue raised by the complaint here.

In response to the arbitrator's decision our colleagues now inform us that they are "less clear" than was the arbitrator that he lacked authority to resolve this question. Whatever our colleagues seek to communicate by this cryptic comment, we are satisfied that on this point at least the arbitrator was correct. Our conclusion in this respect is buttressed by the recent opinion of the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). There the Court reversed the Court of Appeals for the Tenth Circuit and held that an employee does not forfeit his right to trial *de novo* under Title VII of the Civil Rights Act of 1964 because of a prior submission to final arbitration of his grievance under the nondiscrimination clause of the collective-bargaining agreement. In reaching its decision the Court took pains to underscore the lack of arbitral authority to vindicate public rights. Thus, the Court pointed out that the arbitrator is bound by the four corners of the contract before him, lacks general authority to invoke public laws that conflict with the contract, and, in fact, has only authority to resolve questions of contractual rights. In short, as the Court suggests and as the arbitrator in the present case apparently concluded, the proper function of an arbitrator is to effectuate the intent of the parties, leaving the duty of upholding the requirements of the public laws to those charged with that responsibility.[10] And in any event, it remains a fact that the arbitrator, as he himself said, did not decide the statutory issues of whether such blanket clauses waive the bargaining obligation.

Turning to the substance of our colleagues' decision on the merits, at the outset we reiterate our opposition to a result that ignores consistent and longstanding precedent and serves only to undercut a basic statutory right. That this is precisely the effect of our colleagues' position is evident for, as we have noted previously, the Board and the courts have time and again made clear that catchall contract clauses do not constitute a waiver of employees' interest in specific existing terms and conditions of employment so as to privilege the employer's termination or change of such terms and conditions without bargaining. Rather, such a waiver may be accomplished only by "clear and unequivocal" language. Our colleagues, however, seek to avoid the application of this legal principle by characterizing it as "simplistic" and "rigid" and intimating that it is a rule which finds expression only in prior Board decision.

In place of this so-called simplistic rule our colleagues offer no rule at all, only the open-ended invitation to the trier of fact to consider and weigh any or all factors he deems relevant. Judging from the factors our colleagues have indicated they would consider, including for example factors as remote as "practices of other parties to other collective bargaining agreements," the prospect of anything approaching sensible and consistent resolutions of the problems now created by our colleagues' rejection of the Board's historic position is hardly bright.

Our pessimism in this regard is fully warranted by our colleagues' performance in finding the "zipper" clause in the present case a "conscious, knowing waiver of any bargaining as to nonspecified benefits." This conclusion, our colleagues inform us, stems from the finding that the Union sought a "buy out" of Christmas money but not of Thanksgiving "turkey money," and from the fact that the Union unsuccessfully bargained for a maintenance-of-benefits clause and ultimately agreed to a "zipper" clause

The significance the majority attaches to the Christmas money "buy out" escapes us. We see nothing remarkable or inconsistent in a union's decision to bargain away one benefit and its contemporane-

[8] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955)
[9] See *Radioear Corporation*, 199 NLRB at 1162, fn 3

[10] As we have elsewhere observed it is precisely the abrogation of this Board's duties under the Act which is one of the most objectionable aspects of the *Collyer* policy

ous intention to retain another. Likewise, we are puzzled by the proposition that a union's attempt, albeit unsuccessful, to secure *additional* contract protection for existing conditions of employment clearly confirmed as past practice evidences a "conscious" waiver of those conditions simply because the union ultimately agrees to a catchall "zipper" clause. The most that can be said about such a course of bargaining is that it leaves such noncontract terms precisely where they were before bargaining commenced; i.e., within the protection historically afforded by the Act and Board doctrine. To find that a catchall clause, couched in the most general language and intended merely to forestall bargaining about what might be termed "new" subjects, effectively operates as a "conscious knowing waiver" of bargaining over modification or termination of an established condition of employment is, in our view, illogical.

In sum, by their decision here our colleagues demonstrate the basic fault in the approach they now endorse. For in the guise of effectuating the intention of the parties—an intention they tell us they must construe not solely from the language the parties employ but from all the circumstances surrounding bargaining and indeed including intentions of other parties in other bargaining—our colleagues substitute for settled legal principle the vagaries of supposition, hypothesis, and guesswork. In so doing our colleagues promote neither the intent of the parties nor the principles of collective bargaining. Accordingly, and for the reasons expressed above and in our initial dissenting opinion, we would affirm the Administrative Law Judge's Decision and find the violation as alleged in the complaint.

Finally, we would note that, because the arbitrator limited himself to an interpretation of the contract without deciding the statutory issue, which is the limitation inherent in arbitration and properly observed by most arbitrators, it has become necessary for the Board to decide the issue on the merits. We should have done this when the case was initially before us instead of applying the *Collyer* policy of deferral. That policy has put the parties to substantial and futile expenditures of money, effort, and delay, an outcome we predicted when the policy was established.