Ferguson Enterprises, Inc. *and* General Teamsters Local Union No. 162, International Brotherhood of Teamsters. Cases 36–CA–9878, 36–CA–9894, 36–CA–9935, 36–CA–9952, and 36–CA–9992

March 26, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

The main issues in this case are whether the judge correctly found that the Respondent, Ferguson Enterprises, Inc., violated Section 8(a)(5) and (1) of the Act by unilaterally implementing policies prohibiting employees from taking home their truck keys and company-issued cell phones, and by disciplining an employee for violating the truck key policy. For the reasons set forth below, we affirm the judge's findings as to the truck key policy and the employee discipline, but reverse as to the cell phone policy.[1]

I.

The Respondent is engaged in the wholesale distribution of plumbing fixtures, waterworks products, and heating and air-conditioning systems throughout the United States. On March 28, 2005, the Board conducted a representation election among the Respondent's drivers at its facility in Portland, Oregon. The Union won the election, and the parties began bargaining for an initial contract about a month later. Negotiations continued through December 9, 2005, at which time the Respondent proposed its best and final offer.

The drivers engaged in a 2-day strike on January 17 and 18, 2006.[2] When the drivers returned to work, the Respondent's general manager met with them and instructed them not to discuss the strike with customers. On January 30, the Union requested further bargaining dates, and the parties later resumed negotiations.

Before the strike, the drivers had been permanently assigned to specific trucks and had been permitted to take home their truck keys and their company-issued cell phones. Shortly after the strike the Respondent announced that drivers would no longer be permanently assigned a truck and that they would receive their truck assignments on a daily basis. The Respondent also told drivers that they would have to turn in their keys and cell phones each evening. The Respondent instituted these changes without giving the Union notice or an opportunity to bargain over the policies.[3] On January 24, employee Scott Minard was issued a written warning for failing to comply with the truck key policy.

II.

The judge found that the policies regarding truck assignments, truck keys, and cell phones constituted a material change in terms and conditions of employment, and that the Respondent's unilateral implementation of the policies violated Section 8(a)(5) and (1) of the Act. The judge also found that the Respondent violated Section 8(a)(5) and (1) by disciplining employee Scott Minard for violating the truck key policy. Finally, the judge found that the Respondent violated Section 8(a)(1) by prohibiting drivers from discussing the strike with the Respondent's customers.[4]

The Respondent has excepted to the judge's findings that it unlawfully implemented the truck key and cell phone policies, and that it unlawfully disciplined Minard for violating the truck key policy.[5] The Respondent argues that the policies did not constitute a material change in the working conditions of the drivers, and thus it was not required to bargain with the Union prior to their implementation. The Respondent further argues that because the truck key policy was lawfully implemented, it did not violate the Act by disciplining Minard for his failure to follow the policy. As discussed below, we find merit in the Respondent's arguments only with regard to the cell phone policy.

[1] On October 23, 2006, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply 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 and set forth in full below.

We will modify the judge's recommended Order to conform to the violations found. Among other modifications, we will substitute a limited bargaining order for the judge's recommended affirmative bargaining order, which is not necessary to remedy the Respondent's unlawful unilateral changes in terms and conditions of employment. See, e.g., *Mimbres Memorial Hospital*, 337 NLRB 998 fn. 2 (2002). In addition, as the judge found and as we discuss below, the Respondent unlawfully implemented a new truck assignment policy, but it rescinded that policy a few days later. Thus, we will omit as superfluous the judge's remedy of requiring the Respondent to rescind that policy.

[2] All dates are in 2006, unless otherwise noted.

[3] The Respondent rescinded the new truck assignment policy after a few days and returned to its previous practice of permanently assigning trucks to drivers.

[4] The judge dismissed allegations that the Respondent violated the Act by telling employees they were not eligible for profitability bonuses, by rescinding pay raises, and by refusing to bargain with the Union in good faith. The General Counsel has not excepted to the judge's dismissal of these allegations.

[5] The Respondent has not excepted to the judge's finding that it violated the Act by prohibiting employees from talking about the strike and by unilaterally implementing the truck assignment policy.

III.

To establish that the Respondent's unilateral implementation of the cell phone and truck key policies was unlawful, the General Counsel must first demonstrate that the policies constituted a substantial and material change in terms and conditions of employment. Once the General Counsel has done so, the Respondent bears the burden of then showing that the changes were in some way privileged. See, e.g., *Fresno Bee,* 339 NLRB 1214 (2003) (and cases cited therein).

Unlike the judge, we find that the General Counsel has failed to establish that the implementation of the cell phone policy resulted in a substantial and material change in the drivers' working conditions. The judge found that the policy was a material change because it affected the drivers' ability to set up deliveries outside of work hours. The record, however, does not support the judge's finding.

The only evidence proffered by the General Counsel regarding the drivers' use of cell phones was the testimony of employee Cary Balogh. In response to the General Counsel's question about how the policy affected the way he did his job, Balogh testified that the cell phones were useful because they allowed drivers to communicate with the office, with customers, and with the other drivers at any time. He also testified that drivers used their phones to call customers in advance of deliveries. When specifically asked whether he ever used his cell phone after hours, Balogh stated that he "would get calls from our customers after hours if they thought I had a particular route I was doing, if they had a question about it."

Contrary to the judge, we find that Balogh's testimony does not establish that the implementation of the cell phone policy affected the drivers' ability to set up deliveries during their off hours. Although Balogh's testimony indicates that drivers used the phones in setting up deliveries, there is no specific evidence that drivers used their company-issued cell phones to do so outside of regular business hours. Further, there is no evidence that would indicate that the drivers' jobs were significantly affected because customers could not reach them after hours on their company-issued cell phone. Given this lack of evidence, we find that the General Counsel has failed to establish that the cell phone policy resulted in a substantial and material change in the drivers' working conditions, and accordingly, we reverse the judge.[6]

[6] Because the cell phone policy essentially limited the drivers' ability to communicate with their customers, Member Liebman would find that the policy resulted in a substantial and material change in working conditions and would affirm the violation.

IV.

We agree with the judge that the implementation of the truck key policy constituted a substantial and material change in terms and conditions of employment, and that the Respondent violated the Act by implementing the policy without bargaining with the Union. In affirming the violation, we find it unnecessary to rely on the judge's conclusion that the policy had a significant effect on employee parking. Instead, we rely on the undisputed evidence that an employee was disciplined for failing to comply with the policy.

The truck key policy was instituted on January 20. On January 24, driver Scott Minard was issued a written warning for retaining a duplicate truck key and taking it home between January 20 and 24. The warning stated that Minard was subject to discharge if he continued his behavior. There is no evidence that any employee had been disciplined for taking keys home prior to the issuance of the policy.

The Board has held that a threat of discipline for a breach of a unilaterally implemented policy is sufficient to establish that the policy constitutes a material change in working conditions. See *Postal Service,* 341 NLRB 684, 687 (2004) (employer's contention that unilaterally implemented policy was not material was "belied by the threat of discipline" for violating that policy); *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (threat to impose discipline on employees who failed to follow new sick leave policy was sufficient to show that employer considered the policy to be significant). Here, Minard was not merely threatened, but was actually disciplined for violating the truck key policy. Consequently, we find that the truck key policy constituted a substantial and material change in working conditions, and that the unilateral implementation of the policy was therefore unlawful.[7]

Because we find that the truck key policy was unlawfully implemented, we find that Minard's discipline, which was issued pursuant to that policy, was also unlawful. See *Great Western Produce*, 299 NLRB 1004,

[7] Chairman Battista agrees that, under extant law, the Respondent's institution of the truck key policy constituted a material and substantial change in the employees' working conditions because it was enforced with discipline. The Chairman has serious doubts about this precedent, however. The precedent confuses a change in a working rule with the discipline meted out for noncompliance with the new rule. Applying that precedent, if there had been no discipline, the change itself would not have been substantial. But, when one adds the relatively minor discipline that was imposed (a warning), the change itself becomes substantial. Chairman Battista would be inclined to evaluate separately whether the change itself was substantial. However, as no party has asked the Board to reconsider this line of cases, the Chairman joins his colleagues in finding the violation.

1005 (1990) (employer violates Sec. 8(a)(5) and (1) by disciplining employees pursuant to unlawfully implemented work rule). Accordingly, we affirm the judge's finding of the violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Ferguson Enterprises, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing existing terms and conditions of employment for bargaining unit employees by implementing policies regarding truck assignments, and by implementing policies prohibiting employees from taking truck keys home.

(b) Disciplining employees for violating the truck key policy.

(c) Prohibiting employees from discussing protected activity with customers during business hours.

(d) 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) Rescind, at the request of the Union, the unilateral change made by the Respondent regarding truck keys.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time drivers employed by the Respondent at its 2121 N. Columbia Blvd., Portland, Oregon location; but excluding warehouse employees, temporary employees, guards and supervisors as defined in the Act.

(c) Within 14 days from the date of this Order, rescind the discipline issued to Scott Minard on January 24, 2006.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Scott Minard, and within 3 days thereafter notify him in writing that this has been done and the discipline will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its facility in Portland, Oregon, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 January 20, 2006.

(f) 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.

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 existing terms and conditions of employment of our employees in a bargaining unit by implementing policies regarding truck assignments, and by implementing policies prohibiting employees from taking truck keys home.

WE WILL NOT discipline employees for violating the truck key policy.

WE WILL NOT prohibit employees from discussing protected activity with customers during business hours.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

[8] 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."

WE WILL rescind, at the request of the Union, the unilateral change we have made.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time drivers employed by us at our 2121 N. Columbia Blvd., Portland, Oregon location; but excluding warehouse employees, temporary employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the discipline issued to Scott Minard on January 24, 2006.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Scott Minard, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and the discipline will not be used against him in any way.

FERGUSON ENTERPRISES, INC.

Adam D. Morrison, Esq. and *Lisa Dunn, Esq.,* for the General Counsel.

Victor J. Kisch, Esq. (Stoel Rives, LLP), of Portland, Oregon, for the Respondent.

Sara Drescher, Esq., of Beaverton, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Portland, Oregon, on July 25 and 26, 2006, based on the third order consolidating cases, second amended consolidated complaint, and notice of hearing issued on July 10, 2006, by the Regional Director for Region 19. The second amended consolidated complaint alleges that Ferguson Enterprises, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act by promulgating and maintaining a rule prohibiting employees from discussing union activities with customers, by telling employees that they were not eligible for profitability bonuses because they chose to be represented by the General Teamsters Local Union No. 162, International Brotherhood of Teamsters (Union), by rescinding wage increases in retaliation for employees' union activities and without notice to or affording the Union an opportunity to bargain, by promulgating and maintaining a rule prohibiting employees from taking truck keys and cell phones home without notice to or affording the Union an opportunity to bargain, by implementing a new truck assignment policy without notice to or affording the Union an opportunity to bargain, and by failing and refusing to bargain in good faith with the Union.

Respondent filed a timely answer to the second amended consolidated complaint denying any wrongdoing.

On the entire record, including the briefs from the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted it is a Virginia corporation with facilities located in Portland, Oregon, where it is engaged in the operation of wholesale distribution of plumbing and related supplies. During the past 12 months, in the course of its business operations in Portland, Oregon, Respondent purchased and caused to be shipped to its Portland, Oregon facility goods valued in excess of $50,000 directly from firms located outside the State of Oregon.

Based on the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent 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

Respondent is engaged in the wholesale distribution of plumbing fixtures, heating and air-conditioning systems, and waterworks facilities from over 1100 locations throughout the United States where it employs 21,000 employees. Respondent has collective-bargaining agreements with various unions at 45–50 of its facilities. Respondent's deputy general counsel is David Meeker (Meeker). Meeker was Respondent's chief spokesman throughout bargaining with the Union. Respondent's area logistics manager is Peter Condon (Condon) who is responsible for operating 27 of Respondent's warehouses, including the facility in Portland. Douglas Nelson (Nelson) is Respondent's warehouse manager in Portland. Greg Coultas (Coultas) is Respondent's warehouse shipping manager in Portland. Gregory Burback (Burback) is Respondent's general manager, responsible for the operation of 14 facilities in the Portland area. Rob Conner (Conner) was Respondent's operations manager in Portland. Respondent admitted that Meeker, Condon, Nelson, Coultas, Burback, and Conner were agents of Respondent within the meaning of Section 2(13) of the Act.

The Union was certified on April 1, 2005, as the exclusive collective-bargaining representative of Respondent's employees in the following unit:

> All full-time and regular part-time drivers employed by Respondent at its 2121 N. Columbia Blvd., Portland, Oregon location; but excluding warehouse employees, temporary employees, guards and supervisors as defined in the Act.

Philip Muter (Muter) was the Union's business agent and chief spokesman during collective bargaining with Respondent.

A. The Alleged Work Rule Changes

1. The rule prohibiting employees from discussing union activity with customers

a. The facts

After the bargaining unit drivers returned to work following the January 17, 2006 strike, Respondent's Portland general manager, Burback, conducted a meeting on January 20, 2006, for all unit drivers. During the meeting Burback said that he did not

want drivers talking to Respondent's customers about the strike. Before the strike Respondent had no rules prohibiting drivers from talking to its customers about nonbusiness subjects. While Portland Warehouse Manager Nelson denied that Burback prohibited drivers from communicating with customers or the media, Burback's notes prepared for the January 20 driver's meeting reflect that he discussed with drivers:

> What our expectations were when site deliveries were made and what we felt was acceptable to be communicated with our customers as they are sure to inquire about the situation. In a nutshell we discussed that during business hours the only comment should be "no comment" and they should ask customers (or anyone else for that matter, i.e., reporters) to contact me for further clarification.[1]

I find that Burback specifically prohibited bargaining unit drivers from discussing the strike with customers during business hours.

b. The analysis

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading and it must not presume improper interference with employee rights. *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

The work rule in this case prohibited employees from discussing protected activity, the strike, with customers during business hours. Such a rule on its face limited employees from discussing protected activity and was chilling of Section 7 rights. The rule was not properly limited to working time but extended to employee break and lunchtime. *Guardsmark LLC*, 344 NLRB 809 (2005). Moreover, there is evidence that employees were free to discuss other subjects not related to their protected activity with customers during business hours. *Teledyne Advanced Materials*, 332 NLRB 539 (2000). I find that the rule prohibiting employee discussion of the strike violated Section 8(a)(1) of the Act.

2. The rule prohibiting employees from taking home cell phones, truck keys, and the new truck assignment policy

a. The facts

For a number of years before the January 17, 2006 strike, bargaining unit drivers were assigned to a specific truck and were allowed to take their truck keys and company cell phones home with them. Driver Balogh testified without contradiction that the assignment to and knowledge of a specific truck shortened the amount of time necessary to perform required safety inspections of the truck. Also access to the company cell phones after hours allowed drivers to communicate with customers regarding delivery requirements. After the strike on January 20, 2006, Burback testified that he learned for the first time on January 20 that unit drivers were taking cell phones and truck keys home. Burback immediately ordered Nelson to cease this practice. Nelson admitted that he immediately wrote a notice to drivers prohibiting them from taking their cell phones and truck keys home.

On January 24, 2006, unit driver Scott Minard (Minard) was issued a written warning for taking a duplicate truck key home between January 20 and 24, 2006.[2]

After unit drivers returned to work on January 20, 2006, Respondent's shipping manager, Coultas, told drivers that they would no longer be assigned to a specific truck but that they would be informed of their truck assignment each morning. According to Respondent's warehouse manager, Nelson, the assignment of specific trucks was changed when Respondent heard that driver Meador, who had crossed the picket line, had missing truck keys and paperwork. The daily assignment to a different truck lasted for a few days and Respondent returned to the old policy of assigning drivers a specific truck.

The Union was given no notice of the changes to Respondent's policy regarding cell phones, truck keys, or assignment to trucks.

b. The analysis

The Board has made clear that in order to constitute a unilateral change that violates the Act, the employer's action must be a material, substantial, and significant change that has a real impact on, or causes a significant detriment to, the employees or their working conditions. *Pan American Grain Co.*, 343 NLRB 318 (2004). In *Pan American Grain,* the judge found no violation and the Board affirmed that requiring employees to sign a receipt for an overtime schedule was part of a longstanding past practice of instructing employees to acknowledge receipt of documents by signing either the document itself or a separate acknowledgment form.

In the instant case, the practice of assigning bargaining unit drivers new trucks each day was a material change that substantially affected the time required for employees to inspect the truck. Requiring employees to turn in their cell phones was also a material change since it affected bargaining unit drivers' ability to communicate with customers to set up deliveries before and after working hours. By not allowing drivers to take truck keys home, Respondent made it more time consuming for drivers to park their personal cars in the spot vacated by the truck they were using that day.

Unlike the facts in *Pan American Grain,* supra, Respondent's changes to the practice of allowing drivers to take home cell phones and truck keys and assigning specific trucks was not grounded in a past practice. The new rules affected employees terms and conditions of employment and the failure to bargain over the changes violated Section 8(a)(1) and (5) of the Act. Moreover, the discipline issued to Minard for violating this rule likewise was unlawful under Section 8(a)(1) and (5). *Great Western Produce*, 299 NLRB 1004 (1990).

[1] R. Exh. 57.

[2] GC Exh. 80.

B. The Profitability/Incentive Bonuses

1. The facts

According to unit driver Balogh, during the meeting with unit drivers on January 20, 2006, Burback told drivers that they would not be eligible for profitability bonuses but would continue to participate in safety bonuses. Nelson denied he heard Burback discuss profitability or safety bonuses, however, Burback could not recall if he said drivers could not participate in profitability bonuses and admitted he told drivers they could participate in safety bonuses. I credit Balogh and conclude that Burback told drivers that they could not participate in profitability bonuses.

2. The analysis

The Board has long held that an employer violates Section 8(a)(1) if it advises employees that it will withhold benefits because of union activities. *Invista,* 346 NLRB 1269 (2006). In *Invista*, the judge found that a supervisor informed employees that there would be no more bonuses as long as the Union was trying to get in. While the timing of Burback's statement is suspect as it occurred immediately after employees returned to work after the strike, unlike the facts in *Invista*, there is no connection between the statement and protected activity as Burback did not state that the bonus was eliminated because of the strike or any other protected concerted activity. I find that Respondent did not violate Section 8(a)(1) of the Act by telling employees they were not eligible for profitability bonuses.

C. The Wage Increases

1. The facts

On about September 24, 2005, Respondent gave unit drivers a pay increase.[3] In mid-October 2005, Burback held a meeting with unit drivers and told them that the pay increase was a mistake and that the wage increase would be rescinded. Burback notified Meeker of the pay error and on October 20, 2005 Meeker sent an e-mail[4] to Muter concerning the pay mistake, advising that it would be rescinded over two pay periods. All of the bargaining unit drivers but Ronald Meador, who told Respondent's supervisors in December 2005 that he did not support the Union, had their September 2005 pay increase rescinded by early November 2005. Meador continued to receive the pay increase until May 2006. According to Burback, the error in Meador's pay occurred because the October 2005 list of drivers he created who should have their pay increases rescinded erroneously omitted Meador. The error was compounded when Burback verified his list of bargaining unit drivers with the Union's seniority list[5] which also excluded Meador.

2. The analysis

Counsel for the General Counsel contends Respondent violated Section 8(a)(1) and (3) of the Act in rescinding wage increases for all bargaining unit drivers but the one driver who did not support the Union.

To establish a violation of Section 8(a)(3) of the Act counsel for the General Counsel must establish the existence of protected activity, employer knowledge, and discrimination by the employer motivated by the protected activity. Once the General Counsel has established this prima facie case, the burden shifts to Respondent to establish that it would have taken the action even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980).

It is clear that the Respondent's driver's engaged in union activities that led to the certification of the Union as their collective-bargaining representative. There is also evidence of antiunion animus in the interrogation of bargaining unit employees during the organizing campaign. However, General Counsel contends that the nature of the alleged discrimination here is not that the drivers received a pay raise but that the raise was rescinded for all those who supported the Union but not for the one individual who opposed the Union. General Counsel's argument must fail because there is no evidence Respondent had knowledge that Meador did not support the Union until after the pay raises had been rescinded. While the pay raises were rescinded in October 2005, Respondent did not have knowledge Meador did not support the Union until December 2005. Moreover, it is apparent that both the general pay raise to all drivers as well as the failure to rescind Meador's raise were the product of clerical errors rather than an intentional effort to discriminate due to union or other protected activity. I will dismiss this portion of the complaint.

D. Bargaining for the Initial Contract

1. The facts

a. The evidence of antiunion animus away from the bargaining table

Prior to the March 28, 2005, Board-conducted election among Respondent's drivers, Peter Condon, Respondent's area logistics manager had a meeting with bargaining unit driver Cary Balogh (Balogh). Condon asked Balogh if he knew who brought the Union into the facility, how many people were involved in bringing the Union into Respondent's facility, if Balogh were one of those who brought the Union into the facility, what Balogh's position was on the Union and how Balogh was going to vote. Condon denied asking employees about their union activities or sympathies. I credit the testimony of Balogh. Condon admitted that one of the purposes of this meeting was to discover if there was union activity at Respondent's Portland facility. Given Condon's purpose in meeting with bargaining unit drivers, Balogh's testimony concerning interrogation would be reasonable.

Also before the Board-conducted election Respondent's district manager, Al Byrd (Byrd), had a one-on-one conversation with unit driver Minard. It is uncontradicted that Byrd asked Mindard if he had signed a union card.

During a meeting of bargaining unit drivers before the election it is undisputed that Condon told drivers that they could end up losing their 401(k) enhancement that the Company put in and that the Union could not force him to pay the drivers $20 an hour.

[3] GC Exh. 2.
[4] R. Exhs. 24, 26; GC Exh. 79.
[5] GC Exh. 4 at p. 3.

b. The bargaining sessions

On March 28, 2005, after the Board-conducted election but before the Union was certified as the bargaining representative of Respondent's Portland, Oregon drivers, Respondent's deputy general counsel, Meeker, contacted Union Business Agent Muter in order to select dates to begin bargaining. After exchanging calls, the initial bargaining session was scheduled for April 26, 2005, in Portland.

At the April 26, 2005 meeting the Union presented its initial proposals.[6] The Union's proposals were based in part on an agreement between Respondent and a teamsters' local union representing Respondent's drivers in the southern California area, Portland driver's demands, and Respondent's Portland policies. Respondent commented on the Union's proposals as the parties went through them. Meeker told Muter that Respondent would be bargaining from scratch in the Portland bargaining unit since it was the first time Respondent was engaging in initial bargaining in a newly certified bargaining unit. In all of Respondent's other facilities where employees were represented by a union, Respondent had acquired a company with an extant bargaining relationship.

Without offering a satisfactory explanation Respondent did not submit its first counterproposal to the Union until the second bargaining session on June 29, 2005.[7] Respondent's June 29, 2005 proposals included a management-rights article that stated:

> ARTICLE 2–MANAGEMENT RIGHTS
>
> Section 1. Functions. Except as limited by a specific written provision of this Agreement, the employer retains exclusively the right to manage its business and to direct its associates including, but not limited to the following: to direct, plan and control operations; to change existing methods and performance standards, materials, equipment, facilities and accounting practices and procedures and/or to introduce new or improved ones; to utilize supplies; to determine what products or services shall be distributed, or performed, and to determine their design, marketing, advertising and pricing; to establish and change the hours of work (including overtime work); to select and hire associates, determine their training, assign them to work as needed (to suspend, discipline and discharge associates for cause); to make and enforce reasonable shop rules not inconsistent with the provisions of this Agreement including the policies of the Employer applicable to all associates as set forth in the Policy Manual, and Safety Manual and other distribution methods; and, to lay off and to relieve associates from duty because of lack of work. The Employer shall [has] the right, during the term of this Agreement, to utilize subcontractors and to select and assign such duties as [it] deems appropriate to supervisory, casual and temporary personnel and other categories of associates to perform the work when needed.[8]

Respondent's June 29, 2005 proposal concerning discharge and discipline stated in pertinent part:

> ARTICLE 15: DISCHARGE AND DISCIPLINARY LAYOFF
>
> Driver associates shall be subject to discipline, suspension or discharge by the Employer pursuant to the policies established by the Employer and applicable to all driver associates, to the extent not inconsistent with this Agreement.[9]

As reflected in the Union's fax of July 18, 2005,[10] at the June 29, 2005 bargaining session, the parties reached tentative agreement (TA) on the following subjects: article 1–union security; article 2–management rights, sections 2 and 3; article 5–leave of absence, sections 2; article 8–hours of work and overtime, sections 7, 10, and 12; article 1–grievance and arbitration-sections 1, 2, and 3; article 13–union representatives: article 14–stewards; article 17–jury duty, sections 1 and 2; article 18–no discrimination; article 20-successors and assigns; exhibit a–substance abuse policy, and; exhibit b–attendance policy.

Meeker's bargaining notes[11] reflect that the parties deferred discussions on article 2, section 1–management rights, article 3–vacations, article 4–holidays, seniority, article 6–work protection, article 7–wages and classifications, article 8–hours of work and overtime, other than section 7, 10, and 12, article 9–tailgating, article 10–health and welfare, articles 11 and 12–pension, article 13–strikes and/or picket lines, article 14–grievance and arbitration other than sections 1, 2, and 3, article 17–discharge and disciplinary layoff, article 18–funeral leave, article 2–uniforms, article 22–transfer, and article 23–duration.

There was no agreement concerning the seniority provisions,[12] Respondent's right to subcontract,[13] and discharge and discipline.[14]

The next bargaining session took place on July 19, 2005. The Union made a counterproposal[15] to Respondent's management-rights clause. The essential change in the Union's proposal was to add the following language, "to suspend, discipline, and discharge associates for cause." Respondent rejected this proposal. In addition, the Union proposed that the management-rights clause be modified to eliminate Respondent's unlimited right to subcontract unit work and to have bargaining unit work performed by management. The Union's language states, "The Employer shall have the right, during the term of this Agreement, to utilize subcontractors as long as all bargaining unit members are working or were scheduled to work. Management may perform bargaining unit work in emergencies."[16] This proposal was rejected by Respondent but as reflected in Meeker's bargaining notes there was TA on the following language, "Management may perform bargaining unit work when bargaining unit associates are not immediately available."[17] In addition there were TA's on article 6–sick leave, sections 1 and 2, and article 8–workweek, section 1.

[6] GC Exh. 4.
[7] GC Exh. 5 and R. Exh. 4.
[8] R. Exh. 4 at p. 2.
[9] Id. at 15.
[10] GC Exh. 8.
[11] R. Exh. 4.
[12] GC Exh. 4, p. 3.
[13] GC Exh. 5, p. 2.
[14] Id. at p. 15.
[15] GC Exh. 7.
[16] Id.
[17] R. Exh. 9, p. 2.

The fourth bargaining session took place on August 10, 2005. At this session the Union discussed its counterproposals faxed to Respondent on July 22, 2005, regarding uniforms, management rights, sick leave, physical examinations, and grievance and arbitration.[18] Meeker's notes confirm that the parties agreed on the management-rights language dealing with Respondent performing bargaining unit work.[19] There was a TA on physical examinations. The parties discussed seniority, overtime, and tailgating. Respondent rejected the concept of utilizing seniority and insisted on merit as the determining factor for layoffs, recalls, promotions, filling job vacancies, and other terms and conditions of employment. The Union demanded overtime after 8 hours. Respondent rejected this proposal and insisted on overtime after 40 hours. Tailgating union proposal at article 9, the practice of sending additional employees on delivery trucks to assist in unloading was tentatively agreed on at this session.

On August 18, 2005, Meeker canceled a session scheduled for August 24, 2005, and he suggested meeting the week of September 12 or 19.[20] On September 16, 2005, Meeker proposed meeting on September 29 and October 11–14, 2005.[21] Muter agreed to October 11–14, 2005.[22]

Bargaining session five took place on October 13, 2005. Union Executive Assistant Denny Whitkopp (Whitkopp) attended this session and during the meeting, according to Meeker's bargaining notes,[23] Whitkopp declared impasse on the subjects of vacation, subcontracting, seniority, and discipline. Whitkopp said that without agreement on seniority a joint conference board for resolution of grievances, and the Union's proposals for the management-rights clause there could be no contract. Meeker's notes and testimony reflect that he then agreed to the Union's proposal for a joint conference board and that the subjects left without agreement were leave, strikes, wages, health and welfare, pension, and the Teamster's 401(k).[24] Muter did not recall if there was a TA regarding the joint conference board. Both Balogh, a member of the union bargaining committee and Muter denied that the parties agreed to grievance and arbitration language. I credit Meeker's testimony over that of Muter and Balogh. Both Muter and Balogh's memory of bargaining sessions was characterized by lack of recollection and lack of detail regarding specific topics of bargaining. On the contrary Meeker's testimony concerning bargaining sessions was both explicit and detailed. Moreover, Meeker's bargaining notes are consistent with his testimony concerning subjects of bargaining and specific agreements reached while the Union's bargaining notes are sketchy and lack detail.

On October 21, 2005, Respondent submitted a counterproposal.[25] From Meeker's October 13, 2005 e-mail[26] to Muter, it is clear this counterproposal was not intended to be a final offer. Consistent with Meeker's bargaining notes of October 13, 2005, the Respondent's October 21, 2005 counterproposal dealt with the subjects of sick leave, overtime, uniforms, management rights (subcontracting), seniority, discipline, vacations, tailgate, strikes, wages, health and welfare, pensions, and 401(k) plan.

On November 15, 2005, Muter requested additional dates for bargaining.[27] Again on November 21, 2005, Muter said the Union was available for bargaining on December 6, 8, and 13–15.[28]

A sixth bargaining meeting was held on December 8, 2005. The Union made counterproposals regarding sick leave, hours of work and overtime, uniforms, management rights, seniority, strikes, health and welfare, wages, pension, and 401(k) plan. The Union amended its opening wage proposal of $18, $18.75, and $19.50 per hour in the first, second, and third years of the contract to $18.50, $19, and $19.50 per hour. The Union's proposed management-rights language amended the last sentence of article 2, section 1 to read, "The Employer shall have the right, during the term of this Agreement, to utilize subcontractors to the same extent as permitted prior to the effective date of this agreement and management and other associates of the Employer may perform bargaining unit work when bargaining unit associates are not immediately available."[29] Meeker's bargaining notes reflect that he added to the Union's management-rights proposal language that granted Respondent the "absolute and unlimited" right to subcontract to the same extent permitted before "the commencement of any union activity."[30] There was no agreement on the subcontracting language. However, it is clear from Meeker's bargaining notes that a TA was reached on sick leave, uniforms, vacations, and tailgate delivery.[31]

On December 9, 2005, Respondent proposed its last, best, and final offer.[32] Respondent's final offer reflected all TAs that had been reached to date together with those items where there was no mutual agreement. Respondent's offer regarding wages reflected that CDL drivers would earn from $15 to $17.50 per hour and non-CDL drivers would earn from $12.50 to $15 per hour. At this time Respondent's bargaining unit drivers, with the exception of Meador who made $17.50 an hour, earned from 15.26 to 16.60 per hour.[33]

The Union struck Respondent on January 17 and 18, 2006. All employees returned to work on January 20, 2006.

On January 31, 2006, Muter advised Meeker that the Union requested further dates for bargaining and that he would not be available February 5–10, 2006.[34] On February 15, 2006, Meeker responded that Respondent would not be available for bargaining until the week of March 20, 2006.[35]

The seventh bargaining session took place on March 22, 2006. At this bargaining meeting Muter said that he did not understand the form of Respondent's final offer of December 9,

[18] R. Exh. 12.
[19] Id. at p. 2.
[20] GC Exh. 32.
[21] GC Exh. 33.
[22] Id.
[23] R. Exh. 20.
[24] Id. at p. 2.
[25] GC Exh. 10.
[26] GC Exh. 39.
[27] GC Exh. 44.
[28] GC Exh. 45.
[29] GC Exh. 11.
[30] R. Exh. 42.
[31] Id.
[32] GC Exh. 12.
[33] GC Exh. 2.
[34] GC Exh. 57.
[35] GC Exh. 58.

2005, as it made reference to too many other documents. Accordingly, Respondent redrafted its final offer in contract form.[36]

On March 23, 2006, Muter requested bargaining take place April 3, 4, 7, and 17–21, 2006.[37]

The eighth bargaining meeting took place on April 18, 2006, where the Union made a presentation concerning its pension plans and explained the differences between the Western Conference of Teamsters Pension and the Central States Pension plans. Respondent was concerned about its liability if it agreed to participate in under funded Teamsters Pension Plans. The Union admitted that both Teamsters Pension Plans were underfunded. There was no agreement on pension language.

The parties met for bargaining a ninth time on April 19, 2006. At this session the parties discussed seniority. There were proposals and counterproposals made regarding this subject.[38]

At the 10th bargaining session on May 24, 2006, the parties discussed health and welfare and pension language with no agreement. The next day at the final bargaining session pension was again discussed and according to Muter there were no agreements. However, Meeker's bargaining notes reflect that the parties had TAs on grievance and arbitration, joint conference board, discharge, funeral leave, transfer, and work protection.[39]

As of July 25, 2006, the parties had TAs with respect to numerous provisions of the proposed collective-bargaining agreement.[40] The outstanding issues were subcontracting, seniority, wages, health and welfare, pension, no strike, no lockout, and picket line.

2. The analysis

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract." *NLRB v. Insurance Agent's Union,* 361 U.S. 477, 485 (1960. "The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct." *Reichhold Chemicals*, 288 NLRB 69 (1988); *Flying Foods*, 345 NLRB 101, 118 (2005). "From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of reaching agreement." *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001).

The Board has held that while insisting on a bargaining position is not itself evidence of a refusal to bargain in good faith, other conduct may be indicative of a lack of good faith including delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984).

Counsel for the General Counsel contends that Respondent has engaged in surface bargaining by insisting on a broad management-rights proposal that grants Respondent unlimited right to subcontract unit work, by engaging in regressive bargaining with respect to the subcontracting clause, by insisting on a discharge article with no just cause provision, by requiring a no-strike clause without arbitration, by proposing regressive wage provisions and by failing to meet at reasonable times all supported by Respondent's antiunion animus.

It is not unlawful for an employer to propose and bargain for a broad management-rights clause. *St. George Warehouse, Inc*., 341 NLRB 904 (2004); *Commercial Candy Vending Division*, 294 NLRB 908 (1989). In those cases where the Board found surface bargaining broad management-rights clauses were accompanied by regressive bargaining, no-strike provisions, absence of meaningful arbitration, discharge provisions giving the employer unfettered ability to discipline without regard to just cause, essentially leaving employees less than they would enjoy by simply relying on the certification without a contract. *Public Service Co. of Oklahoma,* 334 NLRB 487 (2001); *Target Rock*, 324 NLRB 373 (1997); *Western Summit Flexible Packaging*, 310 NLRB 45 (1993).

Contrary to counsel for the General Counsel's assertion, I find no evidence of regressive bargaining. With respect to the subcontracting language Meeker added that Respondent's right to subcontract would be "absolute and unlimited" this language was only a clarification of what Respondent had already proposed, i.e., subcontracting of bargaining unit work without limitation. Moreover, Respondent's wage offer was not regressive. It represented an increase in pay over extant wages earned by bargaining unit drivers. As noted above, the pay increase granted drivers in September 2005, a unilateral change during the course of bargaining was remedied immediately by restoring the status quo.

Respondent's broad management-rights clause was not without limitation. Respondent's right to discharge and discipline was limited by a just cause provision contained in the management-rights clause. Further, contrary to counsel for the General Counsel's contention, I find that Respondent agreed to neutral arbitration as well as submission of grievances to a joint conference board.

Last while there were only 11 bargaining sessions over a 15-month period, Respondent never refused to meet after the Union proposed dates for bargaining sessions. Over the course of 15 months of bargaining there were cancellations of meetings by both sides, there were delays in bargaining caused by a strike, by an initial delay in submission of Respondent's counterproposals and by the Union's failure to

[36] GC Exhs. 13 and 14.
[37] GC Exh. 62.
[38] GC Exh. 16.
[39] R. Exh. 93.
[40] R. Exh. 96.

respond to Respondent's last, best, and final offer. I find no pattern by Respondent in delaying bargaining or refusing to meet at reasonable times.

While it is clear that Respondent engaged in hard bargaining, there was no evidence that Respondent engaged in a plan to avoid reaching agreement. There was give and take by both parties during the course of negotiations Thus, there were agreements reached by the parties on many items including sick leave, uniforms, vacations, and tailgate delivery, sections 2 and 3 of the management-rights clause, section 2 of the leave of absence provision, sections 7, 10, and 12 regarding hours of work and overtime, grievance and arbitration union representatives, stewards, jury duty, no discrimination, successors and assigns, substance abuse policy, attendance policy, discharge, funeral leave, transfer, and work protection. Significant concessions were made by Respondent with respect to union security and arbitration, including submission of disputes to a joint conference board.

The record reflects that there was give and take on the issue of subcontracting with a TA on management's right to perform bargaining unit work. There were proposals and counterproposals on the issue of subcontracting with the Union proposing that Respondent could subcontract to the same extent it did prior to the certification. While Respondent insisted upon its own pension program, it provided a reasoned basis for refusing to joint the Teamster's Western Conference Pension Plan. It was admitted by the Union that the Western Conference Pension Plan was under funded which could result in unfunded liability for Respondent. Respondent took the position that it did not want to participate in an unfunded pension plan.

With respect to conduct by Respondent away from the bargaining table, I have found above that Respondent interrogated its employees concerning their union activities before the election on March 28, 2005, that Respondent implemented an overly broad no-solicitation rule and that Respondent engaged in unilateral conduct in implementing new work rules regarding truck assignments, truck keys, and cell phones. Conduct away from the bargaining table is a factor the Board considers in determining if there has been a refusal to bargain. In those cases where the Board has found a refusal to bargain, the conduct away from the bargaining table is much more egregious that that found here. Significantly the Board has found surface bargaining where there have been "smoking gun" statements made by managers including statements that the employer had no intent of reaching an agreement. *U.S. Ecology Corp*., 331 NLRB 223 (2000); *Western Summit Flexible Packaging,* 310 NLRB 45 (1993). In this case, Respondent's conduct away from the bargaining table, while unlawful and chilling of employee Section 7 rights, does not evidence intent to engage in surface bargaining. Further, Respondent's statements before the election that the drivers could lose the employer contribution to their 401(k) plan and that the Union could not force Respondent to pay the drivers $20 an hour were only factual statements that did not suggest an intent by Respondent to avoid their obligation to bargain in good faith. *St. George Warehouse, Inc.,* supra.

I find that Respondent did not violate Section 8(a)(5) of the Act by refusing to bargain in good faith with the Union by engaging in surface bargaining. I will recommend that this portion of the complaint be dismissed.

CONCLUSIONS OF LAW

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

2. General Teamsters Local Union No. 162, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act by unilaterally changing work rules that prohibited employees from taking home cell phones, truck keys, and assigning designated trucks, by disciplining employee Scott Minard for taking home truck keys and by promulgating a rule prohibiting employees from discussing protected activities with customers during business hours.

4. Respondent has not violated the Act in any other respect and the remaining complaint allegations are dismissed.

5. The above are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act. I shall order the Respondent to bargain with the Union as the exclusive collective-bargaining representative of its employees in the following described unit and on request by the Union meet and bargain in good faith:

> All full-time and regular part-time drivers employed by Respondent at its 2121 N. Columbia Blvd., Portland, Oregon location; but excluding warehouse employees, temporary employees, guards and supervisors as defined in the Act.

[Recommended Order omitted from publication.]