Alamo Cement Company *and* United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL-CIO-CLC. Cases 23-CA-9937 and 23-CA-10023

30 September 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

Upon a charge filed by the Union 21 January 1985 and 23 April 1985 the General Counsel of the National Labor Relations Board issued complaints 5 March 1985 and 13 May 1985 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally implementing a wage increase and by refusing to bargain about an increase in the uniform rental fee and Estevan Sanchez' discharge.

On 23 September 1985 all parties filed a stipulation of facts and a motion to transfer the proceeding to the Board for decision without a hearing before an administrative law judge or issuance of a judge's decision. On 14 February 1986 the Board approved the stipulation and granted the motion. The General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

After consideration of the stipulation, the briefs, and the entire record in this case, the Board makes the following findings.

I. JURISDICTION

The Respondent is a Texas corporation with its principal office and place of business in San Antonio, Texas, where it is engaged in processing and manufacturing cement. During the past calendar year, a representative period, the Respondent purchased and received products, goods, and materials valued in excess of $50,000 directly from sources outside the State of Texas. We find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Issue*

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a wage increase and by refusing to bargain about an increase in the uniform rental fee and the discharge of Estevan Sanchez.

B. *Facts*

On 8 September 1978 the Board certified the Union as the exclusive collective-bargaining representative of the Respondent's employees in the following unit:

> All production and maintenance employees, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Electrical Department, Laboratory Department and Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers and mechanics, excluding all other employees, office clericals, order clerks, guards, watchmen and supervisors as defined in the Act, employed at its San Antonio, Texas plant.

On 5 March 1979 the Board found that the Respondent had unlawfully refused to recognize and bargain with the Union since 25 September 1978.[1] The Fifth Circuit Court of Appeals enforced the Board's decision 15 February 1980.[2] Thereafter, the Respondent continued to refuse to recognize and bargain with the Union. In four decisions dated 12 November 1985[3] and one decision dated 9 December 1985,[4] the Board found that the Respondent's continued refusal to recognize and bargain with the Union was unlawful and again ordered it to bargain.

About 19 December 1984 the Respondent announced, and on 1 January 1985 implemented, a wage increase for the employees in the unit.

About 23 December 1984 the Respondent posted a memorandum received from Guess Uniform & Towel Supply Co., a Division of Guess Services, Inc., which announced that the fee charged by Guess for uniform rental service would increase by 25 cents. The Respondent does not require all of its 97 bargaining unit employees to wear uniforms on the job. The Respondent pays the entire uniform fee, including any increases, for the employees that

[1] *San Antonio Portland Cement*, 240 NLRB 1168 (1979).
[2] *NLRB v. San Antonio Portland Cement*, 611 F.2d 1148 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980).
[3] 277 NLRB 309, 320, 333, 338.
[4] 277 NLRB 1031.

the Respondent requires to wear uniforms. Only the 35 employees who elect to wear uniforms even though not required to do so by the Respondent must pay the uniform fee. About 23 February 1985 the 25-cent increase in uniform rental fee was implemented by Guess Uniform & Towel Supply Co.

About 31 October 1984 the Respondent discharged employee Estevan Sanchez. By correspondence dated about 30 November and 17 December 1984 and 2 January 1985 the Union requested that the Respondent contact it in order to arrange suitable times and dates for discussing and negotiating about Sanchez' termination and the announcement and implementation of the alleged unilateral changes. The Respondent did not acknowledge or reply to the Union's requests and has not contacted the Union or had any discussion with it concerning these matters.

C. *Contentions of the Parties*

The General Counsel contends that wages, discharges, and uniform rental fees are mandatory subjects of bargaining; that the Respondent at all times material had a continuing obligation to bargain with the Union; that the Respondent did not afford the Union a reasonable opportunity to bargain concerning these subjects; and that by such conduct the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent denies that it has an obligation to bargain or that it has violated the Act. Concerning the increase in the uniform rental fee, the Respondent contends there is no evidence that the Respondent has control over or subsidizes those fees or contracts with Guess Uniform & Towel Supply Co. to supply uniforms to its employees who are not required to wear uniforms.

D. *Discussion of Law and Conclusions*

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment without first providing the collective-bargaining representative of its employees with a meaningful opportunity to bargain about the changes.[5] Since the Union has been properly certified since 8 September 1978, the Respondent was under a duty to bargain with the Union at all material times. We find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting a wage increase and refusing to bargain about the discharge of Estevan Sanchez.

We find that the Respondent did not violate Section 8(a)(5) and (1) of the Act regarding the increased uniform rental fee. For the purpose of our analysis, we shall assume arguendo that the matter is a mandatory subject of bargaining. However, in order for a statutory bargaining obligation to arise with respect to a particular change unilaterally implemented by an employer, such change must be a "material, substantial, and a significant" one affecting the terms and conditions of employment of bargaining unit employees.[6] On the basis of the limited facts presented, we find that the increase in the uniform rental fee did not constitute a material, substantial, and significant change in the terms and conditions of employment of bargaining unit employees. We conclude, therefore, that it did not give rise to any bargaining obligation.[7]

CONCLUSIONS OF LAW

1. The Respondent, Alamo Cement Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Company's San Antonio, Texas plant, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department and Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers and mechanics, but excluding all other employees, office clericals, order clerks, guards, watchmen, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

4. The Union is now, and at all times material has been, the unit employees' exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union regarding the discharge of employee Estevan Sanchez,

[5] *NLRB v. Katz*, 369 U.S. 736, 741–743, 747 (1962).

[6] *United Technologies Corp.*, 278 NLRB 306 (1986); *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978); *Peerless Food Products*, 236 NLRB 161 (1978).

[7] Member Johansen has no quarrel with the analysis and reasoning set forth by Member Stephens in his partial dissent. However, contrary to Member Stephens, Member Johansen cannot find that the complaint puts in issue the matter of whether the Respondent violated Sec. 8(a)(5) and (1) by an overall refusal to bargain with the Union about "uniforms." Rather, in Member Johansen's view, the complaint, with respect to the uniform rental fees, alleges only that the Respondent's actions regarding the 25-cent increase in rental fees violated the Act.

Chairman Dotson agrees that the complaint allegations limit the issue in this case to the Respondent's actions regarding the 25-cent increase in uniform rental fees. He therefore does not reach the so-called "second issue" the dissent addresses.

the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally announcing and implementing a wage increase, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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

8. The Respondent has not violated the Act by refusing to bargain about a 25-cent increase in the uniform rental fee.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent, in addition to bargaining with the Union over Sanchez' discharge, to pay Sanchez at the rate he received when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union concerning Sanchez discharge; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; provided, however, that in no event shall this sum be less than Sanchez would have earned for a 2-week period at his normal wage rate when last employed by the Respondent. See *San Antonio Portland Cement*, 277 NLRB 338 (1985).

ORDER

The National Labor Relations Board orders that the Respondent, Alamo Cement Company, San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain about the discharge of Estevan Sanchez.

(b) Unilaterally and without bargaining with the Union granting a wage increase, provided that nothing herein shall require the Respondent to rescind any wage increase that it has previously granted.

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

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

(a) On request, bargain collectively in good faith with the Union as the employees' exclusive collective-bargaining representative concerning the discharge of Estevan Sanchez and wage increases or any other term and condition of employment.

(b) Pay Estevan Sanchez his normal wages for the period set forth in the section of this Decision and Order entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its San Antonio, Texas place of business, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

The complaint is dismissed in all other respects.

MEMBER STEPHENS, dissenting in part.

With respect to the uniform rental fee issue, there are actually two issues presented to us on this sparse stipulated record as I read it in light of the pleadings and the parties' arguments. One is whether the Respondent violated Section 8(a)(5) and (1) of the Act when, without prior notice and bargaining with the Union, it announced a 25-cent increase in rental fees charged by a third-party supplier for uniforms furnished to certain of the Respondent's employees who opted to wear uniforms on the job but were not required to do so. (This is the same supplier that furnishes uniforms to employees who are required by the Respondent to wear uniforms and for whom the Respondent bears the rental ex-

[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."

pense.) The second issue is whether the Respondent violated Section 8(a)(5) and (1) when it refused to respond at all to a written request from the Union to bargain about the "uniforms." For the reasons explained below, I would find that no violation is made out here under the "unilateral change" theory, but that the record does show a violation in the Respondent's flat refusal to bargain after the announcement of the fee increase prompted a request by the Union to bargain about the uniform rental fees.

The Respondent's general defense to both of these allegations is simply that the subject of uniform fee rentals is not within its 8(a)(5) bargaining obligation—i.e., not a mandatory subject of bargaining—because the wearing of the uniforms was voluntary on the employees' part and because the third-party supplier was the one who set the prices. I agree that the fact that the price increase was made by the third-party supplier and that the Respondent merely announced it to the employees is an adequate basis for concluding that the Respondent itself made no unilateral "change," at least where there is no history of collective bargaining on the subject.[1] Thus, in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), in which the Supreme Court upheld the Board's conclusion that in-plant cafeteria and vending machine prices set by a third-party contractor were a mandatory subject of bargaining, the employer was deemed to have violated the Act *not* by unilaterally changing the food prices but rather by refusing to bargain about the prices when the union requested bargaining. By the same token, the remedy was not to require the employer to restore the original prices but rather to bargain about the subject on request by the Union. *Ford Motor Co.*, 230 NLRB 716, 719 (1977).

But the holding in *Ford* refutes the Respondent's contention that the uniform rental fees are not a mandatory subject of bargaining simply because they are supplied by a third party and because the employees in question are not required to wear uniforms. In *Ford* the cafeteria and vending machine operations were run by a third-party contractor, and the employees, who were free to bring their lunches from home, were not required to purchase food from those operations. As the Court pointed out, however, the food prices were still of legitimate interest to the employees and were clearly connected to their working conditions, and the employer could potentially affect their impact on the employees either through its negotiations with the contractor over the terms under which the operations would be run or through subsidizing the prices itself, or both. 441 U.S. at 498, 503. Such a subsidy would be simply a form of benefits that might properly be regarded as part of the economic package constituting the employees' remuneration. I see no reason the foregoing principles would not apply here. Clothing worn on the job in a cement plant is related to working conditions, regardless whether only a portion of the work force is required to wear uniforms, and the parties could plainly bargain over subsidies for the rental fees paid by the employees who opt to wear the uniforms.[2]

With respect to the point on which my colleagues rest their conclusion that no violation is made out—the lack of proof that the rental fee increase constituted a "material, substantial, and significant" change—I note initially that this argument has not been made by the Respondent in its brief filed with the Board. More significantly, the Respondent did not cite this point as the basis for denying the Union's written request for negotiations over "uniforms." Rather, it is apparent on the basis of the record and the Respondent's submission to us that the Respondent is engaging in a blanket refusal to discuss any aspect of the rental of uniforms to employees who are not required to wear them.[3] It simply takes the position that this is not a mandatory subject of bargaining. Even accepting that the Union's request for bargaining was prompted by the announced fee increase and that that increase may or may not be de minimis, the Respondent's blanket, categorical refusal to negotiate constitutes, in my view, a violation of Section 8(a)(5) and (1) of the Act. See *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 362, 363 (D.C. Cir. 1983). Accordingly, I would find a violation and issue an order requiring the Respondent to cease and desist from refusing to bargain on the subject of uniform rental fees for its employees.

[1] Had the parties previously bargained over arrangements for the rental of optional uniforms, the Respondent might well have had a duty at least to give advance notice of the supplier's impending increase.

[2] The Respondent's claim in its brief that there is no evidence that the Respondent has any contractual arrangement with the uniform supplier is belied by the stipulation that it pays this supplier the fees for the uniforms worn by employees required by the Respondent to wear them and by the documentary evidence that the supplier sent its announcement of the rental increase directly to one of the Respondent's officials. It was through the Respondent's posting of this announcement that the employees learned of the rental fee increase.

[3] Member Johansen is correct in his observation that the complaint, with respect to the uniform rental fees, alleges only that the Respondent's actions regarding the 25-cent *increase* in rental fees violated the Act. Given the documentary evidence and the arguments made to the Board by the parties, however, the issue actually litigated was whether the Respondent had an obligation to bargain on the subject of the uniform rental fees at all. Thus, the Respondent's defense is not the argument made by my colleagues but rather the claim that "[b]ecause the wearing of uniforms by employees who are not required to do so is not a term or condition of employment, there is no obligation to bargain with respect to same [citation omitted]."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union, United Cement, Lime, Gypsum and Allied Workers International Union and its Local 560, AFL-CIO-CLC as the representative of the employees in the bargaining unit, by unilaterally implementing a wage increase.

All production and maintenance employees, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, and Oiler Subsection, as well as plant clericals, leadmen, truckdrivers, and mechanics, excluding all other employees, office clericals, order clerks, guards, watchmen, and supervisors as defined in the Act employed at our San Antonio, Texas, plant.

WE WILL NOT refuse to bargain about the discharge of Estevan Sanchez or any other bargaining unit employee.

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

WE WILL, on request, bargain with the Union concerning the discharge of Estevan Sanchez and any wage increase or other change in the employees' terms and conditions of employment.

WE WILL pay Estevan Sanchez his normal wages as required by a Decision and Order of the National Labor Relations Board.

ALAMO CEMENT COMPANY