

9/25/09

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

AMERICAN BENEFIT CORPORATION ^{1/}

and

Cases 9-CA-44679
9-CA-44701

TEAMSTERS LOCAL UNION NO. 505,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS
TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION:

This case is before the Board on Respondent's exceptions and brief in support of exceptions to the decision of Administrative Law Judge David Goldman that issued on July 2, 2009, in which he correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by: (1) unlawfully subcontracting bargaining unit work and (2) failing to furnish relevant and necessary information requested by the Union. ^{2/} For the reasons set forth more fully below, Respondent's exceptions are without merit. The Judge's factual findings are clearly supported by the record and the conclusions that he drew from the factual findings are fully supported by established Board precedent.

^{1/} The name of Respondent appears as amended at the hearing.

^{2/} References to the Administrative Law Judge's Decision will be designated as (ALJD p.); references to Respondent's exceptions and brief in support thereof will be designated as (Resp. Br. p.); references to the trial transcript will be designated as (Tr. p.); references to the General Counsel's and Respondent's trial exhibits are designated as (G.C. Ex.) and (Resp. Ex.), respectively.

II. THE FACTS:

Respondent is a third-party administrator for health, welfare, pension claims and actuary services, including providing consulting services to various union funds. (Tr. p. 25, G.C. Exs. 1(a)-(g)) Respondent currently employs approximately 35 employees. (Tr. pp. 24, 25) The number of bargaining unit employees has steadily declined over the years due to several layoffs orchestrated by Respondent. (Tr. pp. 24, 26) The Union has been the representative of the bargaining unit employees for about 25 years. Dennis Morgan is the local union president. (Tr. p. 20)

Respondent and the Union have a current collective-bargaining agreement with effective dates of June 9, 2006 through June 8, 2011. (G.C. Ex. 2; Tr. pp. 24, 26) Article 31 (temporary employees provision) states that “the Union recognizes the need for the Company to use outside temporary employees in cases where the workload is of an immediate nature such that it cannot be completed by regular employees during the normal work day or during overtime hours.” (G.C. Ex. 2) However, the parties also have a Memorandum of Agreement (MOA) (G.C. Ex. 2, pp. 25-26) that specifically restricts the subcontracting of bargaining unit work.

In 2004, the Union discovered that Respondent had transferred bargaining unit work out of the Huntington, West Virginia facility to a Maria Beimly, in Vandalia, Ohio. (G.C. Ex. 2; Tr. pp. 52, 53) The Union filed a grievance #3825. (G.C. Exs. 2, 13; Tr. p. 53) Ken Joos, one of Respondent’s owners at the time, impressed upon the Union that it was critical to keep the business by allowing Beimly to keep her job. (Tr. p. 53) Respondent assured the Union that Beimly’s work was temporary, and the work would return to Huntington upon her retirement or at the expiration of the 2001-2006 agreement. (Tr. pp. 54, 66, 67) On April 14, 2004, the parties executed a Memorandum of Agreement (MOA) (G.C. Ex 2, pp. 25-26), regarding the situation.

During contract negotiations in 2006, Beimly was still working for Respondent and the parties reaffirmed that “with regards to the memorandum dated April 14, 2004 regarding the Grievance #3825, that addressed the movement of bargaining unit work as performed by one Ms. Maria Beimly at American Benefit Corporation’s Vandalia, Ohio location the Union agrees to the following:

1. Ms. Beimly may continue to perform such work until such time as her employment relationship with American Benefit is severed or Ms. Beimly is no longer performing said work or the expiration of the current agreement, whichever may occur sooner. At that time, all work will immediately be returned to the Huntington bargaining unit to be performed by Huntington bargaining unit employees. In recognition of the Union’s willingness to favorably address this issue the Employer agrees to the following: (1) arrangement will be made in advance by the Employer so that all work will be returned to the Huntington bargaining unit immediately upon Ms. Beimly’s severance.

2. Ms. Beimly is limited to performing only the work she is currently performing, and in no instance will the Employer move any additional work to Ms. Beimly.

3. No bargaining unit employee may be laid off from Huntington bargaining unit while the work Ms. Beimly is performing remains unreturned to the Huntington bargaining unit... **Further, the Employer agrees that this memorandum will not be interpreted as a waiver by the Union with regards to the subcontracting of bargaining unit work in any fashion and that the Employer also agrees that there will be no subcontracting or transfer of bargaining unit work in the future absent a signed agreement by the parties to that effect.** In the event the Employer subcontracts, transfers, or otherwise diverts bargaining unit work, the Union and the employees are immediately released from any express or implied no-strike obligations and are free to engage in economic activity during which time the Employer may not permanently replace any striking employees Union.” (G.C. Ex. 2, pp. 25-26; Tr. pp. 52, 55, 57) (emphasis added)

About October 21, 2008, Morgan, received a telephone call from employees informing him that bargaining unit work, specifically several claims forms^{3/} were missing from the office

^{3/} Morgan testified that it is his understanding that dental claims and vision claims are mailed or brought to Respondent’s facility on paper and some are sent in electronically. (Tr. p. 29)

cabinets. (Tr. pp. 27, 28, 29) Morgan contacted Respondent's Human Resources Director Patricia Bostic, who told him Respondent had the right under Article 31 (temporary employees clause) of the contract to subcontract work out of the facility. (Tr. p. 33) Morgan told Bostic that the parties' contract gave Respondent the right to use temporary employees in the facility where the work is traditionally performed, as it did in 2000 to move heavy furniture, but did not give Respondent the right to take the work out of the facility. (Tr. pp. 35, 36, 87, 88) Morgan told Bostic that the only time any work was taken out of the Huntington, West Virginia facility was the Maria Beimly situation, which gave rise to the Beimly grievance. (Tr. pp. 34, 51) Morgan also told Bostic that Respondent had never used temporary employees when current employees were on layoff. (Tr. pp. 33, 34, 36, 51)

On November 7, 2008, the Union filed a class action grievance against Respondent alleging that Respondent unilaterally diverted bargaining unit work without bargaining. (G.C. Ex. 5; Tr. pp. 37, 38) On November 19, 2008, the Union requested certain information relevant to the grievance. (G.C. Ex. 6; Tr. pp. 38, 39) On November 25, 2008, Respondent sent a letter to the Union simply stating that the information request was overly broad and sought irrelevant information but offered no explanation for its contention. (G.C. Ex. 7; Tr. p. 39) On December 9, 2008, Morgan sent a letter to Bostic and asked what portion(s) of the Union's information request was overly broad and irrelevant. (G.C. Exs. 6, 9; Tr. pp. 50-51) Bostic never responded until April 24, 2009, 4 days before the hearing and 5 months after the request was made. (Tr. p. 69)

III. ANSWER TO RESPONDENT'S EXCEPTIONS:

A. Respondent's Exception 1: The Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by hiring temporary employees is correct inasmuch as there is no evidence that the Union waived its right to bargain over this issue.

Respondent contends that the Judge erred in his findings because the Union waived its right to bargain over this issue. (Resp. Br. p. 9). Despite Respondent's assertions, the Judge correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by hiring temporary employees without affording the Union notice and the opportunity to bargain. The Board has consistently held that a waiver of statutory rights to bargain must be express, clear, unequivocal and unmistakable. *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, (6th Cir., 1993); *Johnson-Bateman Co.*, 295 NLRB 130, 185 (1989), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983). There is no evidence of any such waiver in the facts presented by the instant case.

Respondent argues that the Judge incorrectly found that the June 8, 2006 Memorandum of Agreement (MOA) regarding subcontracting (the Maria Beimly case), which is contained in the parties' collective-bargaining agreement, supersedes Article 31. (Resp. Br. p. 12) Counsel for the General Counsel is of the opinion that Respondent's interpretation of the trial record and the Judge's decision is factually and legally incorrect. First, the Judge in his decision notes that Respondent's argument that Article 31 is not subordinate to the MOA is true but also finds that Article 31 is not superior to the MOA since both were collectively bargained in the same negotiations and were effective at the same time. (AJD p. 22) Secondly, the Judge states that there is no basis in law, logic or contract interpretation to ignore or devalue the MOA when attempting to assess whether the Union has "clearly and unmistakably" waived its right to bargain over the transfer of bargaining unit work. (ALJD p. 22) Finally, the Judge notes that in the face of the MOA's express prohibition on the practice, and its conditioning of future subcontracting on an agreement between the parties on the subject, it is not credible to conclude that the 2006 Agreement, considered as a whole, "clearly and unmistakably" shows that the

parties intended to waive the Union's bargaining rights on the subject. (ALJD p. 22)

Accordingly, the Judge did not err in his finding that the MOA prohibits Respondent from utilizing outside temporary employees, without bargaining with the Union.

Respondent further argues that the Judge erred by not finding that the Union clearly and unmistakably waived its right under the zipper clause to bargain over the subcontracting of bargaining unit work. (Resp. Br. pp. 13-14; ALJD pp. 19, 23) Contrary, to Respondent's contention, the Judge correctly found that there is nothing specific to the zipper clause (Article 1, Section 2) regarding the diversion of work, the hiring of temporary employees, subcontracting, or any other label that one could reasonably attach to the subject in dispute. (ALJD p. 23) Additionally, the Judge found that nothing in the language of the zipper clause cited by Respondent makes reference to, much less mentions, the right claimed by Respondent to unilaterally institute a diversion of unit work offsite. (ALJD p. 23)

The Board generally has held that zipper clauses will not be construed as waivers of statutory rights. *Pan American Grain Co*, 343 NLRB 205, 217 (2004). Moreover, there is no record evidence that Respondent has a practice of subcontracting bargaining unit work. The only other time that Respondent subcontracted bargaining unit work was in 2004, which resulted in the Maria Beimly grievance. In this regard, Morgan testified that when the Union discovered Respondent had transferred a certain amount of bargaining unit work out of the Huntington, West Virginia facility to Beimly in 2004, the Union promptly filed a grievance. (G.C. Exs. 2, 13; Tr. pp. 52, 53) Morgan testified, without contradiction, that Respondent assured the Union that Beimly's work was temporary and the work would return to its facility upon Beimly's retirement or at the expiration of the 2001-2006 agreement. (Tr. pp. 53, 54, 66, 67) Since Beimly was still working for Respondent at Vandalia, Ohio during the 2006 contract negotiations, the parties

reaffirmed that “the Company agrees there will be no further subcontracting of bargaining unit work currently performed at the American Benefit Office in Huntington, West Virginia.” (Tr. pp. 55, 57) The record makes clear that Respondent had always understood that under the contract, the use of temporary employees merely involved hiring individuals to temporarily assist unit employees, whereas subcontracting was the performance of unit work outside of the office, as in the Beimly case. (G.C. Ex. 2; Tr. pp. 52, 55, 57) The fact that Respondent purposely concealed its actions from the Union undercuts its claim of contractual privilege and refutes any claim that Respondent was exercising a contractual right. (Tr. pp. 87-88) Moreover, Respondent’s CFO, Ryan Jones, also admitted, and the Judge notes in his decision, that Respondent had already made the decision and given the job ^{4/} to offsite employees before communicating that to Union. (Tr. pp. 313, 337, 338, 339; ALJD p. 5) Consistent with Board law, the Judge points out in his decision that an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterargument or proposals. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). The Judge further states that to be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. Thus, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the Union of a *fait accompli*. See, *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982) enfd. 722 F.2d 1120 (3rd Cir. 1983). That is exactly the situation which occurred here.

^{4/} As the Administrative Law Judge correctly found, the transfer of the dental and medical claims processing work was core bargaining unit work, of exactly the type performed by unit employees, using the same technologies and processes. (ALJD p. 16)

Although asserting that it had no obligation to bargain with the Union, Respondent also claims that it had no choice but to utilize outside temporary employees because bargaining unit employees refused to work overtime. (Resp. Br. p. 11) However, the record evidence makes clear that Respondent laid off employees in September 2008, a month after it supposedly was advised by a customer that its claims processing was 60 days behind target levels. (Tr. p. 289) An employer cannot purposefully create an emergency condition and then rely on that very condition to argue exigency. Thus, in *Eagle Transport Corporation*, 338 NLRB 489 (2002), the Board adopted the administrative law judge's finding that the employer violated Section 8(a)(5) by unilaterally subcontracting bargaining unit work, despite the employer's argument that it was faced with an economic exigency of such a compelling nature that it was relieved from its bargaining obligation. The employer's claimed exigency, a potential loss in customers, was not the type of "extraordinary event" that justified unilateral action without bargaining.

B. Respondent's Exception 2: The Administrative Law Judge did not insert terms into the unambiguous language in the parties' contract to support his conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by hiring temporary employees.

Respondent takes issue with the Judge's finding that "Article 31 does not expressly treat with the issue of whether the temporary employees envisioned by the clause can work at noncompany locations on bargaining unit work sent out of the facility." (ALJD p. 21) Respondent argues that there is nothing in the language of the collective-bargaining agreement that requires that work be performed in Respondent's facilities or near Huntington, West Virginia. (Resp. Br. p. 15) Respondent's contentions are without merit. The Judge merely notes that the language of Article 31 does not specifically permit or prohibit such action. However, the parties' past practice provides clear guidance.

The record evidence shows that the only instance when Respondent brought in temporary employees to work at the Huntington facility was in 2000 when Respondent wanted to move some heavy cabinets across the street for storage and for a mass mailing. (Tr. p. 35) Morgan credibly testified, and the plain language of Article 31 of the current contract makes clear, that Respondent has the right to bring temporary employees into the facility in situations where the work could not be completed by regular employees during the normal work day or during overtime hours. (G.C. Ex. 2)

As noted earlier, the Judge, in his decision, states that Article 31 is not superior to the MOA since both were collectively bargained in the same negotiations and effective at the same time. (ALJD p. 22) The Judge also notes that there is no basis in law, logic or contract interpretation to ignore or devalue the MOA when attempting to assess whether the Union has “clearly and unmistakably” waived its right to bargain over the transfer of bargaining unit work. (ALJD p. 22) Moreover, General Counsel’s witnesses testified credibly that by signing the MOA, Respondent specifically agreed that there would be no subcontracting or transfer of bargaining unit work in the future, absent a specific signed agreement. In fact, Respondent understood its obligations under the parties’ contract/MOA and attempted to deny and hide its actions from the Union and employees. (Tr. pp. 28, 29, 33-36, 60-61)

C. Respondent’s Exception 3: The Administrative Law Judge’s conclusion that Respondent violated Section 8(a)(1) and (5) of the Act in refusing to provide and/or timely provide information requested by the Union is correct as it is fully supported by evidence showing that the requested information was relevant to and necessary for the Union’s role as the collective-bargaining representative.

In its brief in support of Exception 3, Respondent contends that the Judge’s decision does not reference any evidence presented by the General Counsel or the Union regarding how the information requested is relevance to and/or necessary for the Union in its role of representing

unit employees. (Resp. Br. p. 17) Contrary to Respondent's assertion, the record evidence shows that the Judge relied on several factors in finding that the Union demonstrated that the requested information is relevant and necessary to its representational functions. First, the Judge notes in his decision that the information requested by the Union concerned details, i.e., the who, what, where, when and how, regarding Respondent's hire and use of nonunit employees to perform bargaining unit work offsite, including the nature of the unit work performed. (ALJD p. 26) The Judge concluded that under the circumstances, the relevance of the nonunit information should have been apparent to Respondent. (ALJD p. 26) The Judge also noted that the instant case was not a situation where the Union needed to cite additional facts to justify its desire for information since there was no dispute but that the diversion of work was the primary subject and motivation for the information requested. (ALJD p. 26) Secondly, the Judge explained that at the time of the information request, there was no doubt, by either party that the Union believed that Respondent's actions violated the parties' collective-bargaining agreement and that a grievance had been filed alleging just that. (ALJD p. 26) The Union's information request referenced pending grievances and stated that the information request was in support the grievances. (ALJD p. 26) The Judge found that from the beginning, the outlines of the contractual dispute were clear to both parties, both from the grievance and from discussions between Bostic and Morgan. (ALJD p. 26) He also found that Respondent knew that the Union believed that the MOA and other provisions prohibited Respondent's transfer/subcontracting of work to temporary employees working offsite. (ALJD p. 26) The Judge notes that the Union knew that Respondent believed its actions were justified by Article 31, although under Respondent's view, in order for the hiring of temporary employees to be contractually permitted, regular unit employees must be unable to perform the work during regular hours or overtime.

(ALJD pp. 26, 27) The Judge also found that the Union, which maintained that a number of unit employees were on layoff, and had pending grievances to that effect, did not accept that Article 31 could be invoked. (ALJD p. 27) The Union's request for detailed information on the hiring and work of the temporary employees was directly related to contractual claims it was advancing under the collective-bargaining agreement, and defenses to the claims advanced by Respondent and each party was aware of the others' position. (ALJD p. 27) Based upon the above facts, the Judge concluded that the facts were more than adequate to demonstrate the relevance of the requested information to the Union's representational duties. (ALJD p. 27) Finally, as noted by the Judge, the Union is entitled to request and receive information that substantiates, undercuts, or in any way informs its good faith efforts at contract administration and the Board need only decide whether the information sought has some bearing on these issues or would be of use to the Union. *Dodger Theatricals Holdings*, 347 NLRB 953, 970 (2006).

Respondent also argues in its brief that the Judge erred in determining that Respondent failed to timely provide the requested information. (Resp. Br. p. 18) Despite Respondent's contention, the record evidence overwhelmingly supports the Judge's conclusion. Thus, the record evidence shows that on November 7, 2008, the Union filed a class action grievance against Respondent alleging that Respondent unilaterally diverted bargaining unit work without bargaining. (G.C. Ex. 5; Tr. pp. 37-38; ALJD p. 24) On November 19, 2008, the Union requested certain information pertaining to the grievance. (G.C. Ex. 6; Tr. pp. 38-39, ALJD p. 24) On November 25, 2008, Respondent sent a letter to the Union stating that the information request was overly broad and sought irrelevant information. (G.C. Ex. 7; Tr. p. 39, ALJD p. 30) On December 9, 2008, Morgan sent a letter to Bostic and asked what portion(s) of the Union's information request was overly broad and irrelevant and the basis for the objections.

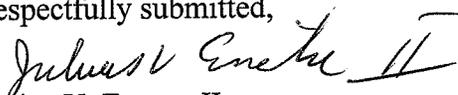
(G.C. Exs. 6, 9; Tr. pp. 50-51; ALJD p. 30) Bostic never responded until April 24, 2009, 4 days before the hearing and 5 months after the request was made. (Tr. p. 69) The Judge notes that Respondent did not provide any excuse or explanation, either through testimony or in counsel's brief, for the 5 months delay in providing this information. (ALJD p. 31) Further, all the information that Respondent eventually provided in April 2009 appears to be information that Respondent would have possessed in November 2008 when the request was made or within few days thereof. (ALJD p. 31) Based upon the above facts, the Judge justifiably concluded that Respondent's unreasonable delay in providing the requested information was also violative of the Act. (ALJD p. 32)

IV. CONCLUSION:

Based on the record as a whole, and for the reasons discussed above, Counsel for the General Counsel submits that Respondent's exceptions should be rejected as the evidence and case law supports the Judge's finding that Respondent violated Section 8(a)(1) and (5) by: (1) subcontracting bargaining unit work without providing the Union with notice and an opportunity to bargain and (2) by failing and refusing to furnish the Union with requested relevant information. Accordingly, the Board should affirm the Judge's decision and adopt his findings of fact, conclusions of law and recommended Order.

Dated at Cincinnati, Ohio this 25th day of September 2009.

Respectfully submitted,



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Attachment

CERTIFICATE OF SERVICE

September 25, 2009

I hereby certify that I served the attached Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision on all parties by e-mail at the e-mail addresses listed below:

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