International Brotherhood of Electrical Workers, Local 2326, AFL–CIO *and* Vermont Telephone Company. Case 1–CB–10497

December 18, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On July 24, 2006, Administrative Law Judge Martin J. Linsky issued the attached decision. The Charging Party filed exceptions, a supporting brief, a reply brief, and a motion to reopen the record. The Respondent filed an answering brief. The Charging Party and the Respondent jointly filed a motion for expedited review.

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,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Thomas J. Morrison, Esq., for the General Counsel.
Alfred Gordon, Esq. (Pyle, Rowe, Lichten, Ehrenberg & Liss-Riordan, P.C.), of Boston, Massachusetts, for the Respondent.
Pamela J. Coyne and *Peter B. Robb, Esqs. (Downs, Rachlin, Martin PLLC),* of Brattleboro, Vermont, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On August 3, 2005, the charge in Case 1–CB–10497 was filed against the International Brotherhood of Electrical Workers, Local 2326, AFL–CIO, Respondent or Union herein, by the Vermont Telephone Company, Charging Party, or Employer herein.

On December 13, 2005, the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint alleging that the Respondent Union violated Section 8(b)(3) of the National Labor Relations Act, herein the Act, when it failed and refused to honor the Employer's request to execute a written contract embodying the complete agreement it had reached with the Employer on the terms and conditions of employment.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me on March 28, 2006, in Boston, Massachusetts.

Upon the entire record in this case, to include post hearing briefs submitted by counsel for the General Counsel, counsel for Respondent, and counsel for the Charging Party and giving due regard to the testimony of the witnesses and their demeanor, I make the following

I. FINDINGS OF FACT

At all material times, the Employer, a corporation, was a public utility incorporated in the state of Delaware, providing telephone and related services to retail and commercial customers in Vermont.

Respondent Union admits, and I find, that at all material times, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Union admits, and I find, that at all material times the Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Overview

The Union has represented for many years a unit of employees who work for the Employer.

The bargaining unit which the Union represents and which has approximately 50 employees in it is as follows:

> All bargaining unit employees of the Company excluding all supervisory personnel, professional employees, including engineers, departmental secretaries and clerks performing confidential duties for the Employer, and guards.

The Union and the Employer had entered into a number of collective-bargaining agreements, the most recent of which was effective from October 18, 2001 to October 18, 2004.

The unfair labor practice in this case centers on the negotiations for a successor collective-bargaining agreement to the 2001–2004 agreement.

The two major issues during negotiations were employee health insurance and wages, and employee health insurance was, according to the Union and not contradicted by the Employer, the most significant issue in the negotiations. The negotiations on employee health insurance focused on the plans to be offered and the employee contribution to the cost of the insurance.

Two witnesses testified before me. Patricia M. Sabalis, an attorney, who was the chief negotiator for the Employer, testified in the General Counsel's case. Harold Lichten, an attorney, who was the chief negotiator for the Union, testified in the Union's case.

I found both Sabalis and Lichten to be intelligent and honest witnesses and am convinced that both told the truth. They were

[1] The Charging Party has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to pass on the Charging Party's motion to reopen the record to admit a letter sent by the Respondent to the Charging Party on November 8, 2006, because consideration of the letter would not change the result in this case.

both credible witnesses with a great deal of experience in negotiating collective-bargaining agreements.

The disagreement between the Employer and the Union centers on some language that had been in the 2001–2004 collective-bargaining agreement but had not been in prior collective-bargaining agreements between the parties. Suffice it to say two health plans were offered to employees in the 2001–2004 collective-bargaining agreement as well as in the successor collective-bargaining agreement i.e., the NTCA AAA Plan[1] and the MVP Health Plan.

The language that was in the 2001–2004 agreement but not in prior agreements was as follows:

> . . . as outlined in the summary plan description for those plans as modified from time to time by the plan provider.

The intent of that language is that if the provider changes or modifies its plan during the terms of the contract then the plan, as modified, will apply to unit employees.

It is the position of the General Counsel and the Employer that the above language was agreed to by the parties and was to be included in the agreement reached on October 27, 2004.

It is the position of the Union that the Employer and the Union reached an agreement on health insurance that did not include the above language.

The parties had four negotiating sessions and negotiated on health insurance for many hours. The parties discussed the 3 plans offered by NTCA, i.e., the single A plan, the double AA plan, and the triple AAA plan. The NTCA AAA plan was the best plan.

The parties also discussed the MVP plan and whether to add dental coverage.

The cost of the NTCA AAA plan was going up rather dramatically in cost and the cost to the employees was a subject the parties spent a lot of time negotiating.

The parties never discussed the critical 20 words. The Employer thinking that only changes to Article 27.3 were being negotiated and the Union thinking that so much time was spent on Article 27.3 that the "TA," or tentative agreement, reduced to writing and executed by the parties was the parties' complete agreement on health insurance.

Article 27 of the 2001-2004 agreement covered "benefits." Article 27.3 covered health insurance and provided as follows:

> "27.3 All eligible employees, spouses and dependents may participate in either the NTCA AAA Plan, which includes medical and dental coverage, or MVP Health Plan ("MVP"), a health maintenance organization, *as outlined in the summary plan description for those plans as modified from time to time by the plan provider.* Eligible employees, spouses and dependents who elect MVP will also be eligible for NTCA dental coverage. Individual cost of employee contribution to health care insurance premium will be as follows:

Contract Year	Single	Two Person	Family
1	3	4	5
2	4	5	6
3	7	8	9

provided that:

> (a) employees may elect to have contributions deducted without tax, as permitted by law;
>
> (b) employees will not have to make any contributions to the health insurance premium for any period prior to October 18, 2002; and
>
> (c) if the blended increase in cost to the Company of health care premiums for the NTCA AAA and MVP plans, measured annually by calendar year beginning January 1, is greater than nine percent (9%) for any calendar year, the individual cost of employee health care insurance premium shall be increased by one dollar ($1.00) per week."

The language involved in the dispute is underlined, i.e., the language that provides as follows "as outlined in the summary plan description for those plans as modified from time to time by the plan provider."

The parties began negotiations for a successor agreement to the 2001–2004 agreement on September 23, 2004. The parties had a total of four negotiating sessions, i.e., September 23, October 4, 13, and 27, 2004. Sabalis was present at all four sessions. Lichten was present at all sessions except the first.

The parties reached what they thought was final agreement on health insurance on October 27, 2004.

It was agreed by the parties that the chief negotiator for the Employer, Patricia Sabalis, would write out in long hand the parties "TA" or tentative agreement on health insurance.

The tentative agreement handwritten by Sabalis was as follows:

> "3 year agreement
>
> Article 27 shall be amended as follows:
>
> 27.3 All eligible employees, spouses and dependents may participate in either the NTCA AAA Plan, which includes medical and dental coverage, or MVP Health Plan with 223 V Dental Coverage ("MVP"), a health maintenance organization. Individual cost of employee contribution to health care insurance premiums will be as follows:
>
> "*The current HL"* NTCA AAA Plan Weekly Contribution
>
> 1/1/2005 Employee pays 10% of premium
> 1/1/2006 Employee pays 12.5% of premium
> 1/1/2007 Employee pays 15% of premium
>
> MVP Weekly Contribution

	Single	Two Persons	Family
1/1/05	8	9	10
1/1/06	10	11	12
1/1/07	11	13	15

Employees may elect to have contributions deducted without tax, as permitted by law. If NTCA 'declines to

[1] NTCA stands for National Telecommunications Association.

> HL' offer insurance coverage to VTel,[2] VTel is not obligated to provide alternate insurance other than MVP.

Sabalis wrote it out. Lichten looked it over and made a couple of changes which are underlined and in italics, i.e., he added the words "The current" and his initials HL before NTCA AAA Plan and added the words "declines to" and his initials after "If NTCA" and before "offers insurance."

The Employer's negotiating team consisted of Patricia M. Sabalis, General Manager Norm Koch and Supervisor Moe Turco. The union negotiating team consisted of Harold Lichten, Union Business Manager Michael Spillane, and two employees. All members of both negotiating teams read over the written "TA" prepared by Sabalis. No one said that the language in the 2001–2004 agreement was missing or that the "TA" was incorrect or incomplete and Koch and Spillane signed the "TA."

The parties also signed off on agreements on long term disability and wages.

The parties agree that during negotiations neither the Employer nor the Union ever specifically mentioned the above language that was in the 2001–2004 agreement but not in the "TA" signed off on by the parties regarding health plan modifications.

The General Counsel and the Employer argue that the deletion of that language from the written "TA" prepared by Sabalis was a "scriveners' error" and that the language was agreed to by default because the parties concentrated all their efforts on the cost of the health insurance to the employees and the health care plans to be offered.

The Union argues that the "TA" on health insurance as written out by Sabalis, signed off on by the parties and later ratified by the Union is the agreement on health insurance that the parties reached. In the alternative the Union argues that there was no meeting of the minds regarding Article 27.3 and its wording. In either case the Union did not violate the Act in refusing to sign a contract that contained the aforementioned language.

After ratification by the Employer Norm Koch, who had signed the "TA" on Article 27.3 on behalf of the Employer, told Patricia Sabalis that the language from the 2001–2004 agreement was not in the agreement being prepared for execution by the parties.

Sabalis wrote a letter to Harold Lichten on December 17, 2004, in which she refers to the missing language and writes "Would the Union object if we included that phrase from the previous contract in the current contract? Please advise." This is hardly language that is the same as saying we agreed to include that language.

Lichten wrote back to Sabalis on December 21, 2004, that he has sent her letter to the union for review.

On February 10, 2005, Sabalis, not having heard further, wrote to Lichten again and wrote that Lichten said he was going to check with the client, i.e., the Union, and Sabalis asks "Have you had an opportunity to do so and shall we include the language?" This is not the same as saying we agreed to have this language in the contract.

[2] VTel is Vermont Telephone Company, the Employer in this case.

On March 3, 2005, Sabalis sent to Lichten for execution a copy of contract which contained the language from the 2001–2004 agreement but which was not in the "TA" executed by the parties on October 27, 2004.

The Union since March 3, 2005, has failed and refused to execute the contract with the contested language in Article 27.3 and by letter of July 26, 2005, reiterated that it would not sign the contract with the additional language in Article 27.3 because that was not the agreement of the parties.

B. Analysis

The Employer filed a charge with the National Labor Relations Board, which issued a complaint alleging that the Union violated Section 8(b)(3) of the Act when it failed and refused to sign the agreement agreed to by the parties.

Section 8(b)(3) of the Act provides as follows:

> It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

Section 8(d) of the Act provides, in part, as follows:

> (d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is 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, or the negotiation of an agreement or any question arising there under, and *the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . . [Emphasis added.]

If a party refuses to execute an agreement reached by the parties it violates the Act. *HJ Heinz Co.*, 311 US 514 (1941).

The question that leaps to mind is why would Sabalis in writing up the "TA" or tentative agreement on Article 27.3 leave out the language she left out. Having heard and observed Sabalis I am convinced she thought the language she left out was supposed to be part of the agreement. She left it out by mistake because the negotiations on health insurance had centered on the plans and the cost to the employees and she focused on that and when writing out the "TA" she used as a model a copy of Article 27.3 that did *not* contain the language she left out of the written "TA" on Article 27.3.

Did the Union take unfair advantage of the Employer? I don't think so. Lichten, during the negotiations focused on the plans and the costs of each plan, i.e., NCTA AAA or MVP, to the employees the Union represented. There was considerable back and forth. The "TA" written up by Sabalis, slightly modified by Lichten, signed off on by both the Union and the Employer, and ratified by the Union was the agreement that Lichten thought the parties had reached.

By way of background the NTCA AAA Plan was the gold standard but was going up considerably in cost. The MVP plan was an HMO to which dental coverage was added. The MVP

plan was much cheaper than the NTCA AAA Plan. Under the 2001–2004 agreement the overwhelming majority of employees elected the NTCA AAA Plan and only a few selected the MVP Plan because the NTCA AAA Plan was better than the MVP Plan and the cost to employees was the same. However, with the cost of the NCTA AAA plan going up so much the Union thought more employees would opt to go to the lower cost MVP plan. Accordingly, Lichten credibly testified if he knew the language missing from Article 27.3 would be in the contract he would have adjusted his negotiating approach differently to account for it.

Since I credit both Sabalis and Lichten this is not a case where the parties agreed on the language of the contract but disagreed as to what it meant. See, *Windward Teachers Assn*., 346 NLRB 1148 (2006) and case authority therein. This is a case where the parties did not agree on the language.

Accordingly, I conclude that there was no meeting of the minds and since there was no meeting of the minds the Union did not violate Section 8(b)(3) of the Act when it failed and refused to execute the collective bargaining agreement sent to it by the Employer, which contained the language which was in the 2001–2004 agreement, but not in the tentative agreement signed off on by both parties on October 27, 2004.

CONCLUSIONS OF LAW

1. The Vermont Telephone Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union, International Brotherhood of Electrical Workers, Local 2326, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Union did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed in its entirety.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.