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Tri-Clover, Inc. *and* International Federation of Professional & Technical Engineers, Local 92. Cases 30–CA–15004, 30–CA–15036, and 30–CA–15091

November 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 31, 2000, the Regional Director for Region 30 issued an order consolidating cases, a consolidated complaint, and a notice of hearing in this proceeding alleging that the Respondent committed unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act. The Respondent filed an answer admitting in part and denying in part the allegations of the complaint and asserting affirmative defenses.

On November 22, 2000, the Respondent filed with the Board a motion to dismiss the consolidated complaint, arguing that the Board should defer the matter to the contractual grievance-arbitration process. On December 7, 2000, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The General Counsel filed an opposition and brief to the Respondent's motion. The Charging Party also filed an opposition to the Respondent's motion. The Respondent thereafter filed a reply brief, and the General Counsel filed a response.

For the reasons set forth below, we grant the Respondent's motion to dismiss.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by giving verbal disciplinary warnings to, and ultimately laying off, employee Steve Kurta for engaging in protected concerted activities. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring at least two unit positions outside the unit, eliminating at least three unit positions and laying off the employees holding those positions, and subcontracting unit work to a laid-off employee.

The undisputed statements in the pleadings and briefs reveal that the Respondent, a manufacturer of pumps and valves, has had a collective-bargaining relationship with the Charging Party Union since the 1970s. Their most recent collective-bargaining agreement, covering technical employees at its plant in Kenosha, was effective from October 1, 1998, through October 4, 2001. In late 1999, the unit consisted of approximately eight employees.

From December 1999 through April 2000, the Union filed four grievances over the discipline and layoff of Kurta and the unilateral changes mentioned above. All are currently pending at various stages in the grievance process. The Union subsequently filed unfair labor practice charges with the Board for each of the underlying grievances.

The parties' collective-bargaining agreement provides in pertinent part:

> 23(d) The decision of the arbitrator shall be final and binding upon the parties thereto and the arbitrator's fees shall be borne equally by the parties. The arbitrator shall be limited by the terms of the contract and shall have no power to add to the terms or to modify or amend such terms.
>
> 23(e) It shall be the intention of the parties to settle all differences between the employer and the Union through grievance machinery and arbitration in accordance with the provisions of this agreement. Therefore, the employer agrees that it will not lock out its employees and the Union agrees that it will not sanction, authorize or condone a strike, slowdown or work stoppage during the life of this agreement.
>
> 23(f) In the event that the party that the arbitrator rules against does not fully implement the decision of the arbitrator within thirty (30) days of receipt, Paragraph 23(e) will become null and void (lockout, strike, etc.) except when either party litigates such decision of the arbitrator on the basis of violation of Section above.

The Respondent contends that the unfair labor practice allegations should be deferred to the grievance-arbitration procedure of the contract. The General Counsel contends, however, that the matter is not appropriate for deferral under the contract, because the contractual grievance procedure is not final and binding in view of the provisions reserving to the parties the right to strike or lockout if the other party does not implement the arbitral award within 30 days.[1] We agree with the Respondent that the strike and lockout provisions notwithstanding, the arbitration procedure provided under the collective-bargaining agreement is final and binding.

The Board has considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act. See *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). However, the Board will only defer to an arbitration procedure which is final and binding.

Paragraph 23(d) of the parties' collective-bargaining agreement explicitly states that the decision of the arbitrator shall be "final and binding." This clear language is not rendered inoperative, as the General Counsel suggests, by the language in paragraph 23(f) allowing the prevailing party to strike or lockout in the event of the

[1] The General Counsel does not dispute the Respondent's contention that in all other aspects, the case is appropriate for deferral.

other party's noncompliance with the arbitration decision. Paragraph 23(f) merely reinforces the finality of the arbitration procedure by adding another means of enforcing compliance, if necessary. Of course, judicial enforcement of the arbitration award remains a viable and, in fact, the preferred remedy. See *Malrite of Wisconsin, Inc*., 198 NLRB 241, 242 (1972), remanded on other grounds *Electrical Workers Local 715 v. NLRB*, 494 F.2d 1136 (D.C. Cir. 1974). Nothing in the contract suggests that an arbitral award involving these parties would not be enforceable in court.

Further, noncompliance with an arbitral award under the contract would also violate Wisconsin State statutory provisions prohibiting the violation of the terms of a collective-bargaining agreement and the refusal to accept the final determination of a tribunal having jurisdiction over a matter. See Wis. Stat. § 111.06; see also *T & J Komp Electric*, WERC Decision No. 26660–A (March 26, 1991). These provisions add support to our finding that the parties' contractual arbitration procedure is final and binding.

Accordingly, for all these reasons, we find that deferral of the matters alleged in the complaint pursuant to *Collyer* and *United Technologies* is appropriate in this instance.[2] Therefore, we shall grant the Respondent's motion to dismiss the complaint.

[2] We agree with the parties that in all other respects, the matter is appropriate for deferral.

ORDER

IT IS ORDERED that the complaint is dismissed, provided that: the Board retains jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C. November 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD