NLRB v. Whitesell Corp.
638 F.3d 883 (8th Cir. 2011)

OPINION BY CIRCUIT JUDGE SHEPHERD:

The National Labor Relations Board ("NLRB" or "the Board") petitions for enforcement of its order finding that Whitesell Corporation ("Whitesell") violated various provisions of the National Labor Relations Act ("NLRA") while negotiating a new collective-bargaining agreement ("CBA") with the Glass, Molders, Pottery, Plastics, and Allied Workers International Union, AFL-CIO ("Union"). * * * Whitesell challenges, for lack of substantial evidence, the NLRB's determinations that Whitesell failed to (1) bargain in good faith to impasse; (2) give the required timely notice to the Federal Mediation and Conciliation Service ("FMCS"); and (3) bargain in good faith by failing to provide information requested by the Union while negotiating the new CBA.

In January 2005, Whitesell purchased Fansteel Washington Manufacturing, Inc., a wire manufacturer in Washington, Iowa. Pursuant to the purchase, Whitesell recognized the Union that had represented the plant's production and maintenance employees for more than 40 years and adopted the existing CBA, which was set to expire on June 12, 2006. The employees at Whitesell's other facilities do not have union representation. * * *

On March 2, 2006, Whitesell's human resources manager, Cris Libera, sent the Union a letter, declaring Whitesell's "intent to terminate" the CBA upon its expiration on June 12, 2006. Attached to this letter was a copy of the F-7 form that a party seeking to modify or terminate a CBA must file with the FMCS within 30 days of notifying the other party of the dispute. However, the FMCS never contacted the parties, a fact that both sides noted was odd during the subsequent negotiations. When Union negotiator Dale Jeter contacted the FMCS to request a mediator on July 10, almost a month after Whitesell declared impasse and ended the negotiations over the new CBA, the FMCS replied that it had no knowledge of the dispute. Although Whitesell claims it mailed the F-7 form on March 2, the same day it sent the letter to the Union, the FMCS did not receive an F-7 form from Whitesell until August 11.

On May 1, 2006, Whitesell negotiator Robert Janowitz provided Jeter with the company's initial proposal for a new CBA. Janowitz also informed Jeter that Whitesell would not negotiate beyond the existing CBA's expiration on June 12, 2006. Whitesell's stated intention was "to negotiate a new agreement from start to finish" and "to equalize labor costs with that of other [non-union] locations and facilities." Accordingly, Whitesell proposed a number of significant changes, including: elimination of the dues check-off provision; elimination of the provision prohibiting the company from discriminating against union members when making employment decisions; replacement of the "just cause" provision with a requirement that the Union demonstrate that Whitesell acted arbitrarily; elimination of Union representation at disciplinary meetings other than those regarding termination or suspension; imposition of Whitesell's unilateral right to change any policy or procedure affecting overtime pay, holidays, vacations, and sick pay, in accordance with the company's practice at its other facilities; extension of the probationary period for new employees to 90 days; and consideration of factors in addition to seniority for layoffs and recalls.

Beginning on May 26, the parties held eight bargaining sessions. The first and last sessions did not involve substantive bargaining. The Union presented its initial proposals to Whitesell on May 26, which included a yearly wage increase of $1 per hour, two additional holidays, and increases in the company's defined pension contributions, sickness, and accident benefits. * * * At the second meeting on June 6, Whitesell provided Jeter with the specifics of the company-wide policies that it proposed to implement. These included the replacement of the Union-defined contribution pension plan with the company's 401(k) plan, a four- or five-fold increase in the insurance premiums for employees with less than ten years of service, an increase in the number of years of service required for certain vacation benefits, and a decrease in the number of paid holidays from ten to eight days. * * * Whitesell's proposal also eliminated overtime pay for weekend work.

At the third meeting on June 7, Whitesell proposed for the first time replacing annual wage increases with a merit-based system based on annual performance reviews. At the fourth meeting on June 8, Whitesell provided Jeter with cost estimates for employees participating in its various benefit programs and asked the Union to propose a final offer. At the fifth meeting on June 9, Whitesell offered a modified wage proposal, whereby it would increase wages by $0.25 per hour for the first year of the CBA and increase the shift differentials for those working second and third shifts. Whitesell also conceded that the Union could represent employees during performance evaluations. Although the parties agreed on several of Whitesell's proposals, the Union requested that the existing CBA be extended until July 16 to provide the Union with time to understand some of Whitesell's more substantial changes. In particular, Jeter requested information regarding the impact of the company's proposed vacation plan. The company refused to delay the expiration date of the existing CBA. At the sixth meeting on June 10, the Union lowered some of its wage demands and indicated that it would be willing to accept a modified merit-pay system. However, the Union reiterated its objection to some of Whitesell's proposals. With regard to the company's proposal to replace the "just cause" standard for employee discipline with a prohibition on "arbitrary action" by the company, Jeter told Whitesell's negotiator that the Union would never accept such a standard and that this was the Union's "final position."

The last substantive bargaining between the parties took place at the seventh meeting on June 11. At this meeting, the parties agreed on a number of important issues. In exchange for Whitesell's acceptance of the Union's dues-checkoff proposal, the Union accepted Whitesell's proposals on holiday, vacation, and funeral leave. Whitesell also made a counterproposal on seniority. On June 12, the expiration date of the existing CBA, Whitesell presented its final offer after the Union agreed to adopt the company's proposed health insurance plan. Jeter was dissatisfied with the offer and refused to present it to Union membership for a vote. Later that evening, Jeter requested further negotiations. Whitesell refused, declaring that the negotiations were at an impasse. At this time, the parties had reached tentative agreements on approximately 30 issues.

Whitesell then implemented selected portions of its final offer. However, despite Whitesell's inclusion of the Union's dues-checkoff provision in its final offer, Whitesell stopped collecting Union dues after June 12. Whitesell also canceled a voluntary accident program and refunded the money to employees who had contributed, even though cancelling the program had not been one of the terms presented in the company's final offer. In addition, Whitesell prohibited Union members from using their break and unpaid time to post notices about Union meetings on the company's bulletin boards. * * *

[T]he NLRB found that Whitesell had violated the NLRA by prohibiting Union members from posting notices about Union meetings on company bulletin boards during their break and unpaid time; . . . terminating the existing CBA and implementing portions of its final offer without providing notice to the FMCS; . . . failing to provide relevant information requested by the Union; . . . and unilaterally implementing certain provisions of its final offer without first bargaining to a valid impasse. Based upon these findings, the NLRB ordered Whitesell to cease and desist from its termination of the previous CBA and to restore the previous CBA until the parties sign a new agreement or, in good faith, reach a valid impasse. * * * The NLRB now petitions this court for enforcement of its order. * * *

First, we address the issue of whether substantial evidence supports the NLRB's findings that Whitesell failed to negotiate to a valid impasse. * * * [T]he Supreme Court [has] held that an employer violates . . . the NLRA when the employer makes a unilateral change in a term or condition of employment without first bargaining to an impasse on that term. An impasse occurs when "good faith negotiations have exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope." "Whether the parties have reached this point is a case-specific inquiry; there is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." "Among the factors that the [NLRB] considers in evaluating the existence of an impasse are the bargaining history, the good faith of the parties in negotiation, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations."

The NLRB's finding that Whitesell did not negotiate to a valid impasse is supported by substantial evidence. * * * Whitesell's negotiator, Janowitz, informed the Union of Whitesell's intention not to negotiate beyond the expiration of the existing CBA when he sent the company's initial proposals to the Union, and he reiterated this intention at the first bargaining session. * * * While there were eight bargaining sessions, the parties spent much of the time caucusing with their respective sides, and two of these sessions did not involve any substantive bargaining. Whitesell first presented its proposal to replace the Union's system of annual wage increases with a merit-based system at the third meeting. [In another case, the NLRB found] that a party failed to bargain in good faith when that party sought extensive changes to an existing agreement, but imposed "an artificial, relatively short, deadline for concluding a new agreement and then declared impasse when that deadline could not be met." Moreover, despite Whitesell's claims of impasse, the parties came to agreement on 30 issues and were continuing to come to agreement on important issues up until the final meeting on June 12. * * * Whitesell claims that the parties were deadlocked on a number of important issues on the final day, in particular the standard for disciplinary action, retirement plan, wage increases, the company's insurance plan, vacation, seniority, overtime, and the leave of absence and sick leave provisions. However, the disagreements over the standard for disciplinary action and overtime are the only issues over which the parties were clearly deadlocked. Concerning the retirement plan, Jeter testified that he did not understand the parties to be "at the end of their rope" because they had not yet fully discussed the differences between the Union's existing defined contribution pension and Whitesell's 401(k), or how the company's plan would affect the benefits accrued under the existing plan. Nothing in the record contradicts Jeter's belief that the parties were not at an impasse over the retirement plan. Whitesell's claim that the parties were deadlocked over wage increases is belied by the fact . . . that the Union reduced its proposed wage increases for the second and third year of the CBA and agreed to accept a modified version of the company's proposed merit-pay system two days before Whitesell declared impasse. Similarly, although the parties had not reached an agreement on the time frame within which to introduce the increases in employee insurance premiums, at their final meeting the parties came to the more fundamental agreement that the Union would accept Whitesell's group health insurance proposal. Moreover, Whitesell compromised on its proposal to use performance evaluations in addition to seniority to determine layoffs and recall, a fact that undermines Whitesell's contention that the parties were deadlocked concerning seniority. Finally, Whitesell concedes that the provision concerning leaves of absence and sick leave was relatively unimportant to the parties, thereby diminishing the relevance of any disagreement over this provision to the question of whether the entire bargaining process had broken down. * * *

Further, the cases cited by Whitesell do not support its claims of impasse. In *TruServ*, the court reversed the NLRB's finding that the parties had not bargained to a valid impasse. However, unlike the company in *TruServ*, Whitesell has made no demonstration of economic exigencies that justified the haste with which it wanted to conclude the bargaining process. Moreover, the parties in *TruServ* had an extensive bargaining history with one another, whereas the parties here were negotiating for the first time. Similarly, in *AMF Bowling Co.*, the court held that the parties had reached a genuine impasse where the union had twice voted on and rejected the company's final offer without making any counteroffers that would indicate a willingness to compromise. There is no such indication of obstinacy on the part of the Union here.

Whitesell's claim that the parties were at a good-faith impasse is further undermined by the NLRB's finding that Whitesell failed to provide information about the vacation plan . . . . Although the Union ultimately accepted Whitesell's vacation proposal, the parties continued to disagree over whether, and to what extent, the company's plan would deprive employees of the vacation benefits they had earned under the expiring CBA. This disagreement was prolonged by Whitesell's failure to provide the information requested by the Union. * * * Whitesell also cancelled the voluntary supplemental accident fund without bargaining for the issue or including such a provision in its final offer. * * * "It is settled law that where an employer bargains in good faith to impasse, . . . it may implement unilateral changes in working conditions so long as the changes are reasonably comprehended within its pre-impasse proposals to the union."

Whitesell also contests the NLRB's finding that it failed to provide notice to the FMCS as required by . . . the NLRA. * * * [T]he NLRB found that the failure to provide the requisite . . . notice constituted a separate violation of the duty to bargain . . . and that the remedy for this violation was to extend the dues-checkoff provision until 30 days after the FMCS received the proper notice from Whitesell. * * * [T]he obligation is on "the party desiring such termination or modification" to "notif[y] the [FMCS] within thirty days after such notice of the existence of a dispute." Whitesell bears the burden of showing that the FMCS received the notice that a dispute had arisen between Whitesell and the Union. Merely stating that the notice was mailed does not show that notice was received by the FMCS. Further, because Whitesell was the party seeking to modify the CBA, the obligation rested with Whitesell to perfect the notice. Thus, the Union's communication with the FMCS on July 10 to request a mediator does not meet the clear mandate . . . that Whitesell serve as the notifying party. * * * [D]ues-checkoff provisions are not terms or conditions of employment that will continue to be in effect until the parties reach a new agreement or bargain to a genuine impasse. Therefore, Whitesell is only required to reimburse uncollected dues for the period ending 30 days after it gives the notice it is statutorily obligated to provide. If the dues-checkoff provision was a term or condition of employment, Whitesell would be expected to comply with the provision until it reached a bargain or impasse, rather than for the finite period ending 30 days following proper notice. Whitesell, of course, could have avoided this obligation altogether had it insured that the proper notice was timely given to the FMCS.

Finally, we address the claim that Whitesell failed to bargain in good faith by not providing information regarding changes in Whitesell's proposed vacation plan as requested by the Union . . . . "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." "Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." * * * We agree with the NLRB's findings that Whitesell violated [the NLRA] by not providing the requested information concerning how its vacation proposal would impact the employees. Prior to the negotiations, Whitesell provided the Union with a seniority list and indicated the Union would be able to determine, using the list, how the vacation proposal would impact the employees. When the Union stated it calculated that one-third of the employees would be adversely impacted by the vacation proposal, Whitesell responded that the Union's calculation was close but not accurate. This response resulted in the Union's request for a complete list of employees along with an explanation of how the vacation proposal would affect each employee.

Whitesell argues we should not enforce this part of the NLRB's findings because Whitesell provided the Union with a seniority list and the Union "was as fully capable as [Whitesell] of determining who would be affected immediately and in the future by [Whitesell]'s vacation proposal." This argument is belied by Whitesell's response that the Union's calculation was close but not accurate. The Union was entitled to the information upon which Whitesell was basing its individual vacation calculation.* * *.

Accordingly, we enforce the NLRB's order as supported by substantial evidence.

CASE QUESTIONS

1. What were the legal issues in this case? What did the court decide?
2. Why was it concluded that a valid impasse did not exist at the time that the employer ceased to negotiate? As the employer wanted to eliminate the just cause provision in the contract and the union said that it would never agree to that, why wasn't that fact alone enough to show the existence of an impasse?
3. So, what happens now? What if the parties still cannot come to agreement?
4. What specific things should this employer have done differently to avoid the outcome in this case?

Does the duty to bargain extend to every issue that might be raised by one of the parties? For example, a union might be concerned about the firm's business strategy, the excessive pay of top management, the prices charged for a company's products, or any of a host of other issues. The duty to bargain pertains to "wages, hours, terms and conditions of employment." This phrase is given a broad reading under the NLRA, but it does have boundaries. The NLRB distinguishes between "mandatory" and "permissive" (or voluntary) topics of bargaining.[92] Mandatory topics are issues that, if raised by either party, must be negotiated over. Furthermore, disagreement over a **mandatory topic** is a sufficient reason for failing to reach agreement in negotiations. In contrast, if a **permissive topic** is raised, the other party can decline to discuss it. And if a permissive topic is discussed but not agreed on, it cannot be the basis for failing to come to terms. The many mandatory topics of bargaining include wages, bonuses, benefits, work schedules, safety, layoff and recall procedures, and grievance procedures, to cite only a few. Permissive topics are all nonmandatory topics that are not illegal to incorporate into a labor agreement. The firm's business strategy, CEO pay, and pricing policy are examples of permissive topics that an employer is not required to discuss.

[92] *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).