

No. 1-12-2432

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS, LOCAL	)	Petition for Review of an Order of
399,	)	the Illinois Educational Labor
	)	Relations Board
Petitioner-Appellant,	)	
v.	)	Case No. 2011-CA-0106-C
	)	
ILLINOIS EDUCATIONAL LABOR	)	
RELATIONS BOARD and WESTERN	)	
ILLINOIS UNIVERSITY,	)	
	)	
Respondents-Appellees.	)	

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JUSTICE HYMAN delivered the judgment of the court.  
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Board's dismissal of an unfair labor practices complaint was not clearly erroneous where grounds for dismissal were that the terms of a preexisting collective bargaining agreement did not apply automatically to employees who had successfully requested a job classification removing them from the bargaining unit and then later were added back.

¶ 2 In July 2012, the Illinois Educational Labor Relations Board, with one member dissenting, dismissed an unfair labor practices claim filed by petitioner, International Union of Operating Engineers, Local 399 against co-defendant, Western Illinois University. The Union contends the University improperly refused to apply the terms and conditions of a preexisting collective bargaining agreement between the Union and the University to six employees who successfully sought a job reclassification that took them out of the bargaining unit but who were

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later added back in. The Union appeals, arguing the Board erred by dismissing their unfair labor practices claim. We affirm.

¶ 3

### BACKGROUND

¶ 4 Western Illinois University, through a series of collective bargaining agreements, has employed a bargaining unit represented by the Union since 1984. The "maintenance workers" job classification was added to the bargaining unit in April 1991 and was part of the collective bargaining unit when the Union and University negotiated a new CBA in July 2010, covering August 1, 2009 through July 31, 2014. Maintenance workers were responsible for removing asbestos and installing heat/frost insulation, however, by 2009, their duties had evolved so that their work involved more asbestos installation than abatement. As a result, in January 2010, the six maintenance workers asked the University to audit their job duties for possible reclassification as building heat/frost insulators. The building heat/frost insulator position is a prevailing rate classification, which would require the University to pay those employees the prevailing rate of wages and benefits under the Illinois Prevailing Wage Act (820 ILCS 130/1 *et seq.* (2010)), but would take them out of the collective bargaining unit.

¶ 5 In October 2010, following an audit, the University reclassified the six maintenance workers to building heat/frost insulators. The University applied the same terms of employment to the building heat/frost insulators that applied to other unrepresented prevailing rate employees, including a \$3 increase in their hourly rate of pay, a 15-minute paid morning break, and an increased shift differential from \$.70 to \$1. Also consistent with other prevailing rate employees, the University eliminated the thirty-minute paid lunch break for those six employees, which

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reduced their weekly hours from 40 to 37 ½.

¶ 6 On November 8, 2010, the Union filed a self-determination majority interest petition with the Board to add the building heat/frost insulators classification to the existing bargaining unit. On December 15, 2010, the Board issued an order of certification adding the building heat/frost insulators to the bargaining unit. In February 2011, the Union asked the University to apply the terms of the existing CBA to the building heat/frost insulators, including the paid half hour lunch break. The University denied the request, stating that it was not required to apply the terms of the CBA to the newly classified employees but was only obligated to maintain the status quo with regard to the building heat/frost insulators as prevailing rate employees until the parties could negotiate the terms of their employment. The University offered to bargain with the Union but no negotiations were held.

¶ 7 On May 16, 2011, the Union filed an unfair labor practice charge alleging that the University violated the Illinois Educational Labor Relations Act (Act) by failing to apply automatically the terms of the CBA to the newly added building heat/frost insulator classification. The parties filed a joint motion to submit the case on a stipulated record, asking the Board to decide whether the University violated sections 14(a)(1) and (5) of the Act by refusing to apply certain terms and conditions contained in the parties' existing collective bargaining agreement to former bargaining unit employees who were reclassified as building heat/frost insulators. Section 14 of the Act states, in relevant part: "Educational employers, their agents or representatives are prohibited from:

(1) interfering, restraining or coercing employees in the exercise of the rights guaranteed

under this Act.

\* \* \*

(5) refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative; provided, however, that if an alleged unfair labor practice involves interpretation or application of the terms of a collective bargaining agreement and said agreement contains a grievance and arbitration procedure, the Board may defer the resolution of such dispute to the grievance and arbitration procedure contained in said agreement." 115 ILCS 5/14(a)(1), (5) (West 2010).

¶ 8 On July 20, 2012, the Board issued a decision dismissing the Union's complaint. All but one Board member agreed with the University that the parties were obligated to bargain regarding the newly-added employees' terms and condition of employment but that the CBA did not apply automatically to the building heat/frost insulators. In reaching its decision, the majority relied primarily on *Federal Mogul Corp.*, 209 NLRB (1974) and rejected the Union's assertion that the Board's earlier decision in *Rockford School District No. 205*, 6 PERI ¶ 1093 was controlling precedent. The dissenting board member contended that the Union made a bargaining proposal to apply the terms of the preexisting CBA to the building heat/frost insulators and the University committed an unfair labor practice by refusing to respond with a counterproposal. On August 23, 2012, the Union filed a timely petition for direct administrative review of the Board's decision under Illinois Supreme Court Rule 335 (eff. Feb. 1, 1994).

¶ 9

ANALYSIS

¶ 10 The applicable standard of review of an administrative agency's decision depends on whether the question presented is one of fact or of law or of both. An administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct (735 ILCS 5/3-110 (West 2008)) and will be overturned only if the agency's determinations are against the manifest weight of the evidence. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008). A factual determination is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on evidence. *Id.* at 210. An agency's determination of a question of law, however, is entitled to less deference and is reviewed *de novo*. If, however, the question is one purely of law, we give the Board no deference unless it resolved a genuine ambiguity in a statute or regulation it was charged with administering. See *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d 652, 656, 840 N.E.2d 704, 708 (2005). We decide legal questions *de novo*. *City of St. Charles v. Illinois Labor Relations Board*, 395 Ill. App. 3d 507, 509, 916 N.E.2d 881, 883 (2009).

¶ 11 We review mixed questions of fact and law by asking whether the agency's decision is clearly erroneous. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392, 763 N.E.2d 272, 280 (2001). Under the clearly erroneous standard of review, we give some deference to the Board's decision, but not as much deference as if the question were one purely of fact. *AFM*, 198 Ill. 2d at 392, 763 N.E.2d at 280. A finding is clearly erroneous if, despite the existence of some evidence to support the finding, the evidence in its entirety leaves

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the reviewing court with the definite and firm conviction that the finding is a mistake. *AFM*, 198 Ill. 2d at 393, 763 N.E.2d at 280-81.

¶ 12 Here, the parties presented the case to the Board on a stipulated record and the issue is whether those stipulated facts establish an unfair labor practice under sections 14(a)(1) and (a)(5) of the Act. Therefore, the issue is a mixed question of law and fact and the clearly erroneous standard applies.

¶ 13 The Union argues that after the building heat/frost insulators were added to the bargaining unit, the University was obligated to apply the terms of the existing CBA to those employees and violated sections 14(a)(5) and (1) of the Act when it refused to do so. The Union asserts that in dismissing its complaint, the Board failed to follow its own precedent in *Rockford School District No. 205*, 6 PERI ¶ 1093 and instead misapplied a decision issued by the National Labor Relations Board (NLRB) in *Federal Mogul Corp.*, 209 NLRB 343 (1974). The Union acknowledges that because the Illinois Educational Labor Relations Act is modeled on the National Labor Relations Act (NLRA), the federal interpretation of the NLRA is persuasive authority in construing the Illinois IELRA (*East Richland Educational Assn IEA-NEA v. Illinois Educational Labor Relations Bd.*, 173 Ill. App. 3d 878, 902 (1988)), but asserts that under the "unique facts of the case," the Board erred in following the NLRB's holding in *Federal Mogul*.

¶ 14 In *Federal Mogul*, a group of employees known as "setup men" who worked for the respondent corporation elected to join a bargaining unit of production and maintenance workers represented by the United Auto Workers. 209 NLRB 343. The corporation, without bargaining, applied the existing CBA to the setup men, resulting in a loss of some higher-rated benefits. *Id.*

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The UAW filed an unfair labor practice charges with the NLRB, which dismissed the complaint.

*Id.* The NLRB held that the corporation was not permitted to apply the terms of the existing CBA to the newly added employees but that the parties were required to negotiate over the terms and conditions of their employment. *Id.* at 344. The NLRB majority stated that automatically applying the terms of the existing CBA to the setup men without additional bargaining would conflict with the Supreme Court's decision in *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 106-08 (1970), which held that the NLRB may not compel employers or employees to agree to any substantive contractual provisions of a CBA. *Id.*

¶ 15 The NLRB also asserted its decision promoted bargaining stability because if it permitted employers to impose the terms of an existing CBA onto newly added bargaining unit members, both parties would be making agreements for groups of people whose identity and number would be unknown and unpredictable. *Id.* Under that scenario, informed negotiations would be nearly impossible, because the costs of wages and benefits would be unpredictable. *Id.* The NLRB noted that "the same result would of course have to obtain in any case in which a union were to take the same position. That would create the only situation in law known to us in which individuals theretofore not a party to an agreement, could, by their own unilateral action, vote themselves a share of the bargain which the other parties had agreed to between and for themselves." *Id.*

¶ 16 Relying on *Federal Mogul*, the Board found that the terms of the existing CBA did not apply automatically to the building heat/frost insulators but that the parties are obligated to bargain regarding the terms and conditions of employment for those newly added members of the

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bargaining unit. The Union argues *Federal Mogul* is distinguishable because the building heat/frost insulators were parties to the negotiations over the current CBA, though they were classified as maintenance workers at the time. The Union notes that it even made a wage proposal to the University specifically tailored to building heat/frost insulators, but that the parties could not reach an agreement on it. Therefore, the Union asserts, unlike in *Federal Mogul*, where the employer tried to force terms of a CBA onto the setup men, applying the terms of the existing CBA to the building heat/frost insulators will not force on the employees or the University contractual obligations they never had an opportunity to negotiate.

¶ 17 The Union further argues that the Board failed to apply its own precedent in *Rockford School District No. 205*, 6 PERI ¶ 1093 (IELRB 1986), which resolves the issue in the Union's favor. In *Rockford*, the union filed a self-determination petition seeking to add a group of employees to an existing bargaining unit. The hearing officer dismissed the petition finding that under the "contract bar doctrine," additional employees could not be added to an existing bargaining agreement midterm. The contract bar doctrine, which is now found in section 7(d) of the Act, prohibits elections in a bargaining unit during the term of a CBA except as directed by the Board in the final year of the CBA. 115 ILCS 5/7(d) (West 2010). The Board reversed the dismissal, stating that the purpose of the contract bar doctrine is to promote stability in a collective relationship with an incumbent that would be hindered by allowing frequent reassessment by employees of their attitude toward representation. 6 PERI ¶ 1093. Because the employees were deciding for the first time whether to join the bargaining unit, the Board found that rationale did not apply. *Id.*

¶ 18 In explaining its decision in *Rockford* the Board noted, "there would be no significant disruption to the parties' existing collective bargaining relationship" if a majority of employees in the petitioned group vote to join the bargaining unit, although additional collective bargaining for that group might be needed. *Id.* The Board further stated, "[t]hat need, however, would only pertain to issues unique to the newly added employees," while the terms of the preexisting CBA would "remain intact for all employees in the unit, including newly added ones." *Id.* The Board noted that applying the terms of a CBA to a group of newly added employees and requiring collective bargaining on certain issues unique to those employees would not cause significant disruption to the parties' existing bargaining relationship. *Id.*

¶ 19 The Union argues that *Rockford* supports its contention that once a group of employees votes in a self-determination election to join an existing bargaining unit, the existing CBA covering that unit must be applied to all employees in that unit, including the newly added employees. The Union acknowledges, as the Board stated in its order, that the language in *Rockford* regarding the extent of bargaining necessary upon adding employees to an existing bargaining unit was dicta and not a precedent for deciding this case. But, the Union asserts that dicta can be persuasive authority (*Board of Trustees of the Police Pension Fund of the City of Urbana*, 141 Ill. App. 3d 447, 456 (1986) (citing *Harms v. Sprague*, 118 Ill. App. 3d 503, 505 (1983)), and that *Rockford* is particularly persuasive here. The Union argues that applying the terms of the CBA to the building heat/frost insulators would cause no disruption to the existing collective bargaining relationship since those employees have been part of the bargaining unit since December 2010, were covered by the existing CBA when it was negotiated, and continued

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after their reclassification to do the same duties they were doing before, under the same supervision. The Union asserts, therefore, there are no issues unique to the building heat/frost insulators that require additional bargaining.

¶ 20 It is true that the job duties of the six employees who were reclassified from "maintenance workers" to "building heat/frost insulators" remained essentially the same, but their employment status did not. On their reclassification, they became prevailing rate employees, a group that had never been represented by the Union and whose terms of employment, including wages and hours, were governed by the Prevailing Wage Act (820 ILCS 130/1 *et seq.* (2010)), not a negotiated CBA. Although the six employees were part of the bargaining unit when the new CBA was negotiated, neither party was negotiating for them from the perspective of prevailing rate employees with all of the attendant terms and conditions of that employment classification. Just as it was unfair in *Federal Mogul* to allow the employer to impose the terms of an existing CBA onto the newly added employees without additional bargaining, it would be unfair to require the University to apply the terms of the CBA to newly classified prevailing rate employees, a group that had not previously been represented by a union, without additional bargaining.

¶ 21 We note that the Union argues, for the first time on appeal, that *Baltimore Sun Co.*, 335 NLRB 163 (2001), supports its argument that the existing CBA should apply to the building heat/frost insulators. In *Baltimore Sun*, the NLRB found that employees who were added to a bargaining unit by a "unit clarification petition" were covered automatically by an existing CBA. *Baltimore Sun Co.*, 335 NLRB at 169. But, in *Baltimore Sun*, the NLRB citing *Federal Mogul*,

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noted there is a distinction between employees added to a bargaining unit by unit clarification, who are automatically covered by an existing CBA and employees added by self-determination elections, who are not. *Id.* Given that distinction, *Baltimore Sun* is not controlling here.

¶ 22 As the Board noted in its decision, after certification, an employer must maintain the status quo regarding wages, hours, and other mandatory terms of employment until the parties bargain and reach agreement on a contract. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). After the Board certification adding the building heat/frost insulators to the bargaining unit on December 15, 2010, the University was required to maintain the status quo until the parties could negotiate the terms of employment for those employees who were now prevailing rate employees, a group that had not previously been represented by the Union. Until the parties engage in collective bargaining and reach an agreement, the University is required to maintain the status quo and is not permitted to apply the terms and conditions of the existing CBA to those employees. Therefore, the Board's decision to dismiss the Union's complaint was not against the manifest weight of the evidence.

¶ 23 CONCLUSION

¶ 24 For the reasons set forth above, the Board's dismissal of plaintiff's complaint is affirmed.

¶ 25 Affirmed.