Commentary

Results without a Negotiated Agreement in Mediation: IUF v PepsiCo, Inc.
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Introduction

The National Contact Point of the United States for the OECD Guidelines for Multinational Enterprises (USNCP) received a complaint from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF), a global federation of trade unions, that between 5 January and 30 April 2013 all but eight of the 170 workers employed at three Bengal warehouses contracted by PepsiCo in a subcontracting relationship were dismissed or compelled to resign for joining a union. IUF stated that PepsiCo in India contracts for warehouse services with Radhakrishna Food Land Pvt. Ltd. (RKFL), which in turn contracts with Weavings Manpower Solutions. IUF claims that PepsiCo—by this double outsourcing—facilitated abuses of basic worker rights. PepsiCo’s contract with RKFL, IUF alleged, included no provisions related to compliance with national and international labor standards. The 162 union members were invited to return to work on the condition that they renounce their union membership.

IUF requested that the USNCP offer mediation to facilitate a resolution that would include the reemployment of twenty-eight workers. PepsiCo argued that it had duly investigated the allegations and had received satisfactory answers to its inquiries. It emphasized that it had neither the ability nor the obligation

1 OECD National Contact Point, United States, Specific Instance between the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) and PepsiCo, Inc., Final Statement, 15 April 2016.
under the Guidelines to require reemployment of workers dismissed by its contractor. Last, it claimed that IUF’s true motivation was PepsiCo’s refusal to enter a formal global relationship with IUF, thus abusing the Specific Instance process. PepsiCo also noted that the IUF had inappropriately publicized the complaint through social media.

The USNCP offered its services for mediation, which PepsiCo declined. On May 19, 2014, the USNCP then issued a Final Statement. In November 2015, both PepsiCo and IUF returned in good faith to the bargaining table. USNCP therefore renewed its offer of mediation, which took place over three days in February 2016. IUF, PepsiCo, and RKFL participated. Ultimately, however, the parties were unable to bridge their differences.

The USNCP commented on three issues raised in this Specific Instance: supply chain responsibilities, the value of mediation, and confidentiality. The OECD Guidelines are clear that enterprises are responsible for their supply chains and that suppliers are responsible for their own actions. As for mediation as a tool, the USNCP states that the submitter should not start the process by putting a “best and final offer” on the table. A successful mediation may result in a solution that neither party had imagined before entering the process and that improves the situation of both parties. Finally, the USNCP emphasized that NCP procedures provide that parties are expected to strictly respect the confidentiality of all communications during the entire process—from submission of the complaint to issuance of the final decision.

The USNCP recommended that PepsiCo updates its Human Rights Workplace Policy, committing itself explicitly to the OECD Guidelines for Multinational Enterprises and incorporating the human rights and labor chapters of the Guidelines as the standard for PepsiCo activities.

Analysis

The OECD Guidelines are divided into two parts: Part I includes the Guidelines, Part II includes implementation procedures. These procedures state that adhering countries shall set up National Contact Points (NCPs) to further the effectiveness of the Guidelines. When problems arise in relation to the observance of the Guidelines, the NCP is to help parties resolve them, but only when they address the NCP “in good faith.” “Good faith” in this context means responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in