United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

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TO : Gerald Kobell, Regional Director
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Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Johnstown America Corp. 530-6001-5025
Case 6-CA-33127 530-6067-4001-1700
530-6067-4033-2500

This case was submitted for advice regarding whether the Employer violated Section 8(a)(5) and (1) of the Act when, after it had unlawfully unilaterally implemented its last contractual proposal, and while continuing to bargain for a successor contract, it announced it would refuse to pay a promised annual wage increase included in its implemented proposal. We conclude that the Employer violated the Act. Its promise to pay specified annual increases made those increases part of the employees' existing employment conditions, and the Employer could not change those existing terms without bargaining to impasse with the Union.

FACTS

Background

Johnstown America Corp. ("the Employer") manufactures railroad cars at its Johnstown, Pennsylvania facility. United Steelworkers of America ("the Union") represents the production and maintenance employees, who in 2002, numbered about 300. The parties began bargaining for a successor contract to their most recent contract, which expired on October 31, 2001, in September 2001. To date, the parties have met about 43 times over 20 months. An administrative law judge, in an April 4, 2003 decision and recommended order, found that the Employer's conduct during bargaining through May 2002 violated Section 8(a)(5).[1]

Conduct underlying the administrative law judge's decision

[1] Johnstown America Corp., JD-40-03, Case 6-CA-32504, et al. (April 4, 2003).

The parties first bargained over 19 sessions from September to December 18, 2001. On December 18, the Employer distributed what it termed its "Fifth Draft and Final Employer Proposal for Agreement;" the draft included ten "must-have" items, as well as proposals not previously presented. The Employer stated at the end of the session that bargaining was at impasse. The Union disagreed.

On January 3, 2002, the Employer gave employees a summary of its proposal, which included automatic annual wage increases for each of five years. At a January 10, 2002 ratification meeting, the employees rejected the Employer's proposal. Thereafter, the Union restated to the Employer that it did not believe they were at impasse. At that point, the Employer modified its proposal on retirement benefits, which was different from that presented to the employees for ratification.

By letter dated January 15, the Employer notified the Union that it was clear to the Employer that the parties were at impasse and that the Employer intended to implement its December 18 final proposal. And by letter dated January 16, the Employer notified the employees that it intended to "implement the terms of the Company's final contract proposal on Monday, January 21, 2002." The letter stated, "the implemented five-year proposal contains an immediate average hourly wage increase of fifty-five cents and hourly wage increases of forty cents in the second, third and fourth year and forty-five cents in the final year." An attachment to the letter contained the terms that the Employer planned to implement that included a summary setting forth the annual wage increase schedule, with the specific amounts to be paid for each of the five years of the proposed agreement. On January 16, the Union filed the first of three Section 8(a)(5) charges.[2] On January 21, the Employer implemented the proposal.

On April 16, 2002, the parties resumed bargaining. In May 2002, the Employer made further unilateral changes, in health insurance, life insurance, and supplemental benefits. In response, on June 18, the Union filed a second Section 8(a)(5) charge.[3]

As to the bargaining through May 2002, the judge found that the Employer had violated Section 8(a)(5) and (1) of the Act by:

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[2] Case 6-CA-32504.

[3] Case 6-CA-32801.

(1) delaying the onset of bargaining with the Union without explanation when the Employer knew that the proposal it intended to make would require extensive bargaining that could not be completed before the existing contract's October 31 expiration (JD at 36-37);

(2) taking a take-it-or-leave-it stance by insisting to impasse that the Union agree to ten of the Employer's contract proposals before negotiations on unresolved issues could be conducted, including insisting to impasse on nonmandatory subjects, such as elimination of accrued pension, healthcare, and supplemental unemployment benefits (JD at 38-42);

(3) insisting that the parties were at impasse when the Employer knew that the parties had a material misunderstanding over the proposal's terms (JD at 42-44);

(4) unilaterally implementing the Employer's final contract proposal on January 21 at a time when the parties had not reached good faith impasse; [4]

(5) on or after January 21, unilaterally implementing changes in other terms and conditions of unit employment that the Employer had not proposed in bargaining, such as changes relating to pensions, supplemental unemployment benefits, supplemental insurance plan benefits, health care benefits, and seniority accruals for those on layoff status, and in May 2002, making further unilateral changes in health insurance, life insurance, and supplemental benefits (JD 46-49); and

(6) engaging in a course of overall bad faith bargaining with the Union (JD at 49).[5]

Current allegation

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[4] The judge also found that even assuming that a good faith impasse had been reached in the bargaining that ended on December 18, the Employer broke that impasse before making any unilateral changes by proposing changes in its proposal on and after January 11 (JD at 45-46).

[5] The judge dismissed two other Section 8(a)(5) allegations. Those alleged that the Employer unlawfully delayed in submitting initial economic proposals until October 25 and that the Employer refused to furnish information. The judge further found that the Employer did not violate Section 8(a)(3) and (1) when in May 2002, it issued a warning notice to an employee. JD at 52-53.

The parties continued to bargain after the Employer's unlawful May unilateral changes. During the Spring and Summer 2002 bargaining sessions, the parties discussed such issues as management rights, contracting out, supplemental unemployment benefits, shutdown pensions, seniority for recall purposes, benefits for laid off employees, successorship provisions, retiree health insurance, and a $400 pension supplement. In addition, on June 19, the Union presented a revised wage proposal. On July 24, the Employer presented its wage proposal, which was identical to that which it had implemented in January 2002. The Employer did not indicate that it planned to freeze wages or modify that which it had already promised employees.

On September 4, 2002, after bargaining for 18 sessions, the parties broke off discussions to prepare for the impending unfair labor practice hearing. Between October 7 and 11, an administrative law judge held the hearing.

In early November, a local newspaper reported that the Union had reminded unit employees about their upcoming annual wage increase of 40-cents due under the terms that the Employer had implemented. The Employer responded to that report by notifying the Union, on November 11, that it would not give the wage increase because the parties had not reached agreement and it could not unilaterally implement higher wages. The Employer further stated that it was willing to negotiate over further wages increases "in the context of the overall Agreement, and only if such negotiations would be meaningful." The Union did not make a specific request to bargain over the wage increase. On December 16, 2002, the Union filed the instant charge.

Thereafter, the parties resumed bargaining, meeting on March 11 and 13, and April 3 and 25.

ACTION

We conclude that the Employer violated Section 8(a)(5) and (1) when it unilaterally refused to grant the increase it had previously promised for the second year, thus freezing the wages at the level granted for the first year of its proposal. By having promised to grant the schedule of increases included in years two through five of its proposal, the Employer made that schedule part of the employees' existing terms and conditions of employment. The Employer could not thereafter lawfully change the schedule absent the Union's consent or an impasse on an overall agreement.

An employer may not make unilateral changes in its union-represented employees' existing terms and conditions of employment.[6] And, "once promised, future nondiscretionary wage increases are such existing terms and conditions of employment."[7] Thus, to withdraw a promised wage increase is to change a condition of employment.[8]

When the Employer announced to employees in January 2002 that it would pay them specific wage increases each year for the next five years, those increases became a "reasonable expectancy of the employment relationship."[9] Those wage increases thereby became part of the employees' existing terms and conditions of employment, and could not be changed without bargaining to impasse.

The Employer asserts that it should be permitted to unilaterally change the 2003 scheduled wage increase because it was not lawfully implemented in the first place. However, even unlawfully implemented terms may become established terms and conditions of employment which cannot be changed absent bargaining to impasse.[10] Indeed, in

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[6] See Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 198, 206-207 (1991)(the Act, independent of a contract, requires preservation of certain existing terms and conditions); NLRB v. Katz, 369 U.S. 736, 747 (1962).

[7] More Truck Lines, 336 NLRB No. 69, slip op. at 1 (2001)(citing Liberty Telephone & Communications, 204 NLRB 317, 318 (1973)), enf'd 324 F.3d 735, 739 (D.C. Cir. 2003). See NLRB v. Dothan Eagle, 434 F.2d 93, 98 (5th Cir. 1970)(holding that an employer who makes a particular benefit part of established compensation is not thereafter free to unilaterally change it).

[8] Liberty Telephone, 204 NLRB at 317-318 (citing Armstrong Cork Co. v. NLRB, 211 F.2d 843, 847 (5th Cir. 1954)).

[9] Liberty Telephone & Communications, 204 NLRB at 318. See also More Truck Lines, 324 F.3d 735, 739 (D.C. Cir. 2003) (employer unlawfully threatened to cease paying automatic wage increases contained in existing collective-bargaining agreement with incumbent union if employees elected a new union).

[10] See Boise Cascade Corp., 304 NLRB 94, 96 (1991) (employer's unilateral grant of benefits to employees was unlawful, as was its unilateral rescission of the benefits); Accurate Die Casting Co, 292 NLRB 982, 988-989 (1989)(after first implementing its final offer proposal to make employee IRA contributions, the employer unlawfully discontinued contributions).

crafting the remedy in this case, the judge specifically ordered the Employer not to rescind or cancel "any unilateral changes that benefited the unit employees without the Union's request."[11]

The Employer also was not free to cancel the scheduled wage increase simply because the Union did not make a specific request to bargain over that proposed change. When parties are involved in bargaining, a union is not required to make a request to bargain over a specific proposal.[12] In addition, when parties are bargaining for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, the employer must refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole.[13]

Here, the parties had been bargaining since October 2001 for an overall collective-bargaining agreement. After the Employer's unlawful declaration of impasse, they continued to actively bargain, meeting 18 times beginning in April. They broke off in September to prepare for the

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[11] JD at 55. See Taft Broadcasting Co., 264 NLRB 185, 185 n.6 (1982)(to remedy unlawful unilateral changes that may benefit employees, an employer must await the union's request for rescission of those changes).

[12] Bottom Line Enterprises, 302 NLRB 373, 373-374 (1991)), enf'd mem. sub nom. Master Window Cleaning, Inc. v. NLRB, 15 F.3d 1087 (9th Cir. 1994)); Intermountain Rural Electric Ass'n, 305 NLRB 783 (1991), enf'd 984 F.2d 1562 (10th Cir. 1993). See also Burrows Paper Corp., 332 NLRB 82, 83 (2000)(employer, without an overall impasse, unlawfully changed an employment term during contract negotiations, and union's silence did not constitute clear and unmistakable waiver of its right to bargain over change).

[13] Visiting Nurse Services of Western Mass., Inc., 325 NLRB 1125, 1130-1131 (1998)(citing RBE Electronics of S.D., 320 NLRB 80 (1995)), enf'd 177 F.3d 52, 56 (1st Cir. 1999), cert. denied, 528 U.S. 1074 (2000); Bottom Line Enterprises, 302 NLRB at 374. See also Duffy Tool & Stamping, LLC v. NLRB, 233 F.3d 995, 997 (7th Cir. 2000) ("If by deadlocking on a particular issue the employer is free to implement his proposal with regard to that issue, he signals to the workers that the union is a paper tiger").

following month's unfair labor practice hearing, but apparently understood that bargaining would continue after the hearing.[14] It was thus unlawful for the Employer in November, when bargaining was only temporarily suspended and when the parties were not at impasse on the agreement as a whole, to give notice of a unilateral change in the wage schedule, and then to implement that change. There can be no doubt that the Union did not agree to the wage rescission; the Employer does not argue that it had the Union's consent, and the announcement of that change led to the Union's filing a new charge. And, the Employer has raised no claim, and there is no evidence to suggest, that exigency or union delay would privilege a unilateral change.[15]

Accordingly, in addition to the unfair labor practices found by the administrative law judge, the Employer violated Section 8(a)(5) and (1) when it refused to pay the scheduled increase. The Region should issue complaint, absent settlement.

B.J.K.

[14] After the unfair labor practice hearing, the parties met four more times, in March and April 2003, to bargain for an agreement.

[15] See RBE Electronics, 320 NLRB at 81.