

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

Advice Memorandum

DATE: June 13, 2000

TO : B. Allan Benson, Regional Director
Region 27

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

SUBJECT: Oregon Steel Mills and New CF&I
d/b/a CF&I Steel, L.P.
Case 27-CA-16638

530-4875
530-6033-7000
530-6033-7056
530-6033-7056-6700
530-6067-2025
530-6067-4001-3700
530-6067-4001-8700

This case was submitted for advice as to whether the Employer is precluded from implementing a change in its tool policy which had not been raised during the parties' contract negotiations, when the parties are in a bargaining deadlock caused by the Employer's unfair labor practices.

FACTS

In June 1997, the parties commenced bargaining over successor collective-bargaining agreements to replace those set to expire on September 30, 1997. On October 3, the employees commenced a strike. On December 30, the Union made an unconditional offer to return to work on behalf of all the strikers. On January 7, 1998, the Employer refused immediately to reinstate all of the strikers and began recalling employees as vacancies arose. These events led the Union to file a number of meritorious unfair labor practice charges, as described below.

In spite of the Employer's refusal to recall all of the strikers, the parties continued to meet for negotiations throughout much of 1998. They held their last meeting in August. On about October 1, the Employer declared impasse and implemented its last offer.

An Administrative Law Judge recently found that the strike was an unfair labor practice strike and that the Employer's refusal to offer immediate reinstatement to the strikers violated the Act. In addition, the ALJ found that

during the course of bargaining, the Employer made unlawful unilateral changes in terms and conditions of employment, unlawfully revoked bargaining proposals, unlawfully proffered regressive bargaining proposals, unlawfully dealt directly with its employees, engaged in overall bad faith bargaining and unlawfully implemented its final bargaining proposal without having reached a good faith impasse.¹

During the term of the parties' expired agreement, the Employer had provided tools at no cost to two classifications of bargaining unit employees, MMT and MET.² During negotiations for a new agreement, neither party proposed a change in the past practice regarding provision of tools and the issue was not discussed.

On May 18, 1999,³ Employer operations manager Simon issued a memorandum to all department managers announcing a new tool policy. Pursuant to this new policy, the Employer expected MMT's and MET's to provide their own hand tools and to replace all lost or misplaced tools. The Employer never notified the Union about this change in policy.

In August, the Union learned from a returning striker that the Employer had changed its tool policy. On September 7, the parties met to discuss the tool policy. At this meeting, Employer manager of employee resources Kraska informed the Union that the Employer had rescinded the May 18 policy. Kraska explained, however, that the Employer's machinists had been required to purchase their own tools, and the Employer wanted to eliminate this inconsistency by proposing that the MMT's and the MET's purchase their own tools. Union subdistrict director Kins responded that the Employer was discriminating against the returning strikers by changing the past practice and requiring them to purchase their own tools when the Employer had supplied tools to the replacement employees hired during the strike. Kraska replied that the tools supplied to the replacements were the Employer's tools and that thus far, the Employer had supplied tools to all the

¹ New CF&I, Inc. and Oregon Steel Mills, Inc. d/b/a CF&I Steel, L.P., JD(SF)-25-00, Cases 27-CA-15562, 27-CA-15750, 27-CA-16054, 27-CA-16164 (May 17, 2000).

² Mill Mechanical Technician and Mill Electrical Technician. Certain of the Employer's other craft employees, such as the machinists and the mobile equipment mechanics, were required to purchase some of their own tools.

³ All remaining dates are 1999 unless otherwise specified.

recalled MMT's and MET's. He stated that if the Employer had intended to discriminate against the returning strikers, it would have required them to purchase their own tools when it first began recalling employees in January 1998.

Kraska supplied the Union with a list of the minimum tools required for the MMT's and MET's, along with handwritten notations regarding the approximate cost of each tool. The total cost for each MMT was \$275. The total cost for each MET was \$278. The Union asked whether these represented the final lists of tools, and Kraska answered that he would not commit that the lists were final. The Union then requested the complete list of all tools that the MMT's and MET's would be required to purchase and the exact cost of each tool.

On September 14, Kraska sent the Union the lists of required tools for the MMT's and MET's, along with the estimated cost of each tool. In his cover letter, Kraska advised the Union that the Employer "remains willing to further discuss the proposed modification to the tool policy." He also stated that if he did not hear from the Union by September 21, then the Employer intended to implement the new tool policy on October 1.

On September 15, Kins reminded Kraska in writing that at their September 7 meeting, "You said that [the] directive on the MET and MMT tool issue was rescinded." The letter then noted that the Union had requested complete information about the tool requirements for the MET and MMT classifications, but that "someone has failed to include the factual cost including taxes." In addition to requesting that information, the Union also asked "whether it is the [Employer's] position that all the existing MMT and MET classified employees will have to pay for the tools they are using."

By letter of September 17, Kraska responded that the fact that the original policy statement was rescinded "did not negate the fact that the Company had learned it did not have a consistent policy for maintenance employees. One purpose of our meeting was to discuss the revision of our policy." The letter further stated that the Employer would not change the tool policy until October 1, "as I stated in my letter." Kraska then noted that he had faxed the requested cost information, and that "[n]o one presently working or who returns to work prior to October 1, 1999, will be affected by this policy." Finally, the letter stated that the Union's claim that the Employer had illegally refused to return strikers to work had "yet to be decided by the judicial process."

There was no further contact between the parties regarding the tool policy until October 1, when Kraska told Kins that the Employer had re-implemented the tool policy. When Kins asked whether the Employer would have a program to purchase tools for employees who did not have the money to purchase them, Kraska responded, "maybe." Kins then asked whether the Employer would terminate any employee for not having tools. Kraska replied that the Employer required MMT's and MET's to purchase their own tools. Kins told Kraska that he considered this requirement to be an NLRA violation, and asked whether it was the Employer's policy that former strikers be required to purchase their own tools. Kraska answered yes, and that the Employer had reinstated its earlier, May 18 policy. The parties have not discussed the tool policy since October 1.

ACTION

We conclude that the Employer violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a change in tool policy which had not been raised during the parties' contract negotiations, when the parties were in a bargaining deadlock caused by the Employer's unfair labor practices.

When a collective bargaining agreement expires, the employer must maintain the status quo on all mandatory subjects until the parties reach agreement or a good faith impasse.⁴ The Board has "long held that even if the parties have reached deadlock in their negotiation, a finding of impasse is foreclosed if that outcome is reached 'in the context of serious unremedied unfair labor practices that affect the negotiations.'"⁵ Thus, if the parties are

⁴ Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 fn. 6 (1988), citing NLRB v. Katz, 369 U.S. 736, 743 (1962). See also Bottom Line Enterprises, 302 NLRB 373 (1991), where the employer violated Section 8(a)(5) by unilaterally implementing its final proposal on certain benefit contributions when the parties had not reached impasse. The union did not waive its right to complain because it failed to respond to the employer's announcement; where the parties were engaged in negotiations, the employer's obligation includes not just notice but a duty to refrain from implementation until impasse.

⁵ Royal Motor Sales, 329 NLRB No. 71, slip op. at 3 (Nov. 3, 1999), quoting Noel Corp., 315 NLRB 905, 911 fn. 33 (1994),

deadlocked, the employer may not unilaterally change a mandatory subject of bargaining or implement its last contract offer if the employer's unlawful conduct has prevented the parties from reaching a valid impasse.⁶ Nor, absent a valid impasse, may an employer unilaterally change a past practice that is not contained in the contract, if the parties did not bargain about it during negotiations.⁷ Thus, in Royal Motor Sales, the Board found that an employer violated Section 8(a)(5) of the Act by unilaterally changing its past practice regarding employee parking policy without discussing the subject during bargaining or including it in its earlier offers to the union.⁸

An employer also violates Section 8(a)(5) if it makes piecemeal changes in mandatory subjects without bargaining to impasse on an agreement as a whole.⁹ The effect of implementing on certain issues where there is no impasse on

enf. denied on other grounds, 82 F.3d 1113 (D.C. Cir. 1996); Naperville Ready Mix, 329 NLRB No. 19 (Sept. 21, 1999) (even had the parties reached a deadlock, it would not immunize employer's implementation of the change because the impasse was tainted by the employer's prior unfair labor practices).

⁶ Royal Motor Sales, 329 NLRB No. 71, slip op. at 5-6.

⁷ An employer's insistence on bargaining over a non-contract issue during a deadlock caused by the employer's own unlawful conduct thus differs from the situation in which an employer seeks to change employment conditions during the life of a contract. In that case, absent a contractual zipper clause, the employer's obligation with respect to mandatory subjects that are not "contained in" the contract is bargaining in good faith to impasse over the subject before instituting the proposed changes. St. Vincent Hospital, 320 NLRB 42 (1995) (quoting Milwaukee Spring Division, 268 NLRB 601, 602 (1984), enfd. 765 F.2d 175 (D.C. Cir. 1985)). Even then, implementation of the changes prior to a valid impasse violates Section 8(a)(5) of the Act.

⁸ 329 NLRB No. 71, slip op. at 6, 72-73.

⁹ Visiting Nurse Services of Western Mass. v. NLRB, 177 F.3d 52, 58-59 (1st Cir. 1999), enfg. 325 NLRB 1125, 1130 (1998).

the whole proposed agreement is to permit the employer to remove, one by one, issues from the negotiating table and impair the ability of the parties to reach overall agreement through compromise on particular items. It also undercuts the role of the union as representative by communicating to employees the idea that the union lacked power to keep mandatory issues on the table.¹⁰

Even where the parties are at a lawful impasse, an employer may implement only those changes that were contemplated during negotiations¹¹ and are reasonably encompassed within its pre-impasse proposals.¹² An implemented change may neither be substantially different from what had been proposed earlier nor differ at all from an earlier agreement by the parties on the subject.¹³

In the instant case, the Administrative Law Judge found that during bargaining, the Employer engaged in a course of unlawful conduct and committed unfair labor

¹⁰ Ibid.; Vincent Industrial Plastics v. NLRB, 209 F.3d 727, 735 (D.C. Cir. 2000).

¹¹ Vincent Industrial Plastics v. NLRB, at 734-35 (the union cannot be held to have waived the right to bargain over issues never proposed during bargaining sessions). See also Circuit-Wise, Inc., 309 NLRB 905, 918 (1992) (while "no unfair labor practice is insignificant, in the context of determining whether an impasse is present some have more significance than others in their ability to impact upon the negotiating process and its progress." Unilateral changes in terms and conditions of employment may constitute significant violations "in the context of which misconduct, no lawful impasse can be reached.")

¹² See Royal Motor Sales, slip op. at 73 ("Since [the employer] had never bargained regarding employee parking, its implemented offer did not cover employee parking which was a change not reasonably comprehended within the earlier offers to the [u]nion"); Plainville Ready Mix Concrete Co., 309 NLRB 581 (1992), enfd. 44 F.3d 1320 (6th Cir. 1995).

¹³ Emhart Industries, 297 NLRB 215, 217 (1989) (employer's unilateral implementation of reinstatement procedure was unlawful because it reflected only a relatively small part of the comprehensive recall system proposed by the employer and differed from its later agreement with the union).

practices of the type to "have the effect of weakening the Union's position at the bargaining table."¹⁴ Since the Employer's unfair labor practices were "substantial and antithetical to good faith bargaining," and its "overall bargaining following the strike was in bad faith," the Employer "violated Section 8(a)(1) and (5) of the Act when it declared an impasse and implemented its contract proposal. . . ."¹⁵

In August 1999, during this unlawful deadlock caused by the Employer's unremedied unfair labor practices, the Union first learned that since May, the Employer had unilaterally changed its prior practice of providing tools to the MMT and MET employees. The subject had not been raised or discussed during contract negotiations. When the Union protested the change, the Employer "rescinded" its unilateral change, imposed a deadline for the Union to respond to its plan, and then re-implemented the change.

We conclude that the Employer violated Section 8(a)(5) and (1) by insisting on bargaining piecemeal, and then implementing its tool policy, at a time when the Employer's unlawful conduct has prevented the parties from reaching a good faith impasse in bargaining and has placed the Union in an untenable bargaining position.¹⁶ As discussed above, an employer may not implement piecemeal changes in mandatory subjects without bargaining to impasse on the agreement as a whole. Here, there was no lawful impasse in contract negotiations because of the Employer's unlawful conduct; thus, the Employer was not at liberty to implement a piecemeal change in tool policy.¹⁷ By weakening the Union's bargaining strength through its unlawful course of conduct, and unlawfully removing all other issues from the table by declaring an invalid impasse, the Employer's

¹⁴ JD(SF)-25-00, slip op. at 91.

¹⁵Id., slip op. at 92.

¹⁶ See Korn Industries, Inc. v. NLRB, 389 F.2d 117, 121 (4th Cir. 1967) ("Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas").

¹⁷ In light of our conclusion, it is unnecessary to decide whether the parties were still "engaged in negotiations" within the meaning of Bottom Line Enterprises, 302 NLRB at 374, when the Employer changed its tool policy.

conduct effectively forced the Union to engage in piecemeal bargaining over the tool policy.¹⁸ Accordingly, the Employer's implementation of its new tool policy violated Section 8(a)(5) of the Act.¹⁹

B.J.K.

¹⁸ [FOIA Exemption 5

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¹⁹ [FOIA Exemption 5

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