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

Advice Memorandum

DATE: January 19, 2005

TO : Helen Marsh, Regional Director
Region 3

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

SUBJECT: Paper Allied-Industrial Chemical & Energy
Workers International Union, Local 1-0620
(Arkema, Inc.)
Case 3-CB-8302 530-8045-8300

This Section 8(b)(3) case, involving the Union's refusal to negotiate a new bargaining agreement on the ground that the current agreement had automatically renewed for one year, was submitted for advice on whether the Employer had provided sufficient notice of its intent to revise or modify the current agreement to prevent its automatic renewal.

We conclude that the Union unlawfully refused to bargain for a new agreement because the Employer's email notice was sufficient to convey the Employer's intention to revise or modify the current agreement. The Employer's email sought early bargaining dates, was sent after both repeated oral requests for early bargaining and two oral references to specific bargaining issues, and the Union also clearly understood that the Employer wanted to revise or modify the existing agreement.

FACTS

The parties' most recent bargaining agreement, covering around 100 production and maintenance employees, provided that it would automatically renew for one year unless either party served "written notice" that it desired "cancellation, revision or modification of any provision or provisions", at least 60 days prior expiration. The agreement had a nominal expiration date of November 21, 2004; the 60-day notice thus was due no later than September 23. Prior bargaining agreements had contained the same written notice provision. Under those agreements, the Union had always sent the Employer a formal letter explicitly announcing the Union's intent to cancel or modify the agreement.

Sometime between the end of February and mid-July, Employer plant manager Foess asked Local Union president

McConnell whether the Union was interested in early negotiations. McConnell ignored the inquiry. Thereafter in July, the Employer notified the Union in various forums that the Employer wanted to change the employees' workday from eight hours to twelve hours. The Union replied that employees preferred the status quo.

On July 13, Foess orally told McConnell that the Employer had a number of issues it wanted to address in future bargaining, including work schedules and overtime, so that it made sense to begin negotiations early. McConnell did not respond. In late July, when Foess again asked McConnell about early bargaining, McConnell replied that the Union was not interested in early negotiations. On August 19, Foess sent McConnell the following email:

> Kevin, you may recall I suggested to you in late July that we reserve time in October to start negotiations. I still have not heard from you.
> As a reminder, we were talking about 2 days the first week we meet and follow up meetings of 2 more days during another week in October. We would schedule additional meetings after that as needed.
> Weeks 3 and 4 were originally open but now only weeks one and look good. Please let us know.

McConnell did not respond to this email.

On September 13, McConnell sent Foess an email seeking permission for the Union's negotiating committee to take two days of leaves of absence, on September 23 and 24, to prepare, coordinate and discuss proposals for upcoming negotiations. The Employer granted that permission. The Union's negotiating committee took the approved leave on September 23.

On September 24, at a previously scheduled grievance meeting, Foess again asked about scheduling negotiations. International Union representative Briggs replied that neither party had furnished written notice of termination. Foess replied that the Employer had not sent a letter notice because "the Union always sends the letter." Briggs stated that the Union had elected to not send notice and therefore was not going to agree to open the contract. Foess replied that in that case, the employees would get to wage increase the following year. Briggs indicated that the Union understood the consequences of its decision.

Later in the evening of September 24, Foess hand delivered a letter to McConnell. The letter noted the November 21 agreement expiration date, recited the circumstances surrounding the August 19 and September 13

emails, and suggested an October negotiations date. By letter dated September 28, Briggs responded that neither party had provided sufficient notice to prevent automatic renewal, but that the Union would be willing to engage in mid-term bargaining. Briggs' letter also asserted that the Union had only requested time off for its negotiating committee because it anticipated that the Employer would send a timely notice.

ACTION

We conclude that complaint should issue, absent settlement, because the Employer's email notice seeking early bargaining dates was sufficient to convey the Employer's intention to revise or modify the expiring agreement. The Employer's email not only sought early bargaining dates, it was sent after repeated oral requests for early bargaining and two references to specific bargaining issues. The Union also clearly understood that the Employer wanted to revise or modify the existing agreement because the Union subsequently requested, obtained, and used a leave of absence for the Union's negotiating committee to prepare for upcoming negotiations.

The Board strictly construes the requirements of contract termination clauses.[1] On the other hand, the Board does not require that a notice to terminate or modify be technically precise; the Board only requires that the notice convey that essential message.[2] In Oakland Press, a union letter to the employer letter did not explicitly state that the union wanted to terminate or modify the agreement. However, the letter did seek to negotiate changes or revisions to the bargaining agreement, to take effect the day after the agreement expired. The Board adopted the judge's decision finding that the letter sufficiently conveyed an intent to terminate or modify the agreement.

In construing a purported notice to terminate or modify an expiring agreement, the Board takes into account not only the language of the purported notice, but also surrounding circumstances including the parties' conduct

[1] See, e.g., Motion Picture Machine Operators, Local 224 (K.B. Theatres), 238 NLRB 507 (1978)(notice untimely where served one day late); Jetline Products, Inc., 229 NLRB 322, 323 (1977)(oral notice sufficient only because clause did not specifically require written notice).

[2] See, e.g., Oakland Press, 229 NLRB 476 (1977).

occurring after the notice was sent. In Burger Pitts,[3] the employer was an ad hoc signatory to a multiemployer association bargaining agreement. Both the employer agreement and the association agreement were set to expire on May 31, 1980 and both agreements contained automatic renewal provisions requiring that notice to change or modify be sent 60 days prior to expiration. As the agreements approached expiration, the employer retained as its bargaining representative the same individual who was representing the association. When the union asked the association representative whom the association was bargaining for, the representative provided a list that mistakenly included the employer. On March 18, more than 60 days before the agreements would expire, the representative sent the union a letter stating that the employer was not part of the association, but was being represented individually. At an association/union negotiation session held a few days before the association agreement was to expire, the representative and the union executed an agreement extending the association agreement for one month. The parties then executed a separate agreement similarly extending the employer's agreement.

The judge, adopted by the Board, held that the representative's March 18 letter to the union, "read literally", was insufficient notice of the employer's intent to modify the agreement. However, the judge noted that the letter had been sent during association negotiations for a new agreement, and that the employer historically had always signed new association agreements. The judge further noted that the representative and the union would not have agreed to extend the employer's agreement if they had believed that it had been automatically renewed. The judge thus found that the representative's March letter, sent in this context, conveyed the requisite intent and prevented automatic renewal.[4]

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[3] Burger Pitts, 273 NLRB 1001 (1984).

[4] See also Paper, Chemical and Energy Workers Local 6-0682 (Checker Motors Corp.), 339 NLRB 291 (2003)(although neither party sent a notice to terminate or modify, employer's sending complete contract proposals while parties discussed early negotiations amounted to sufficient notice).

In Champagne County Contractors,[5] the union historically had sent the employer both an explicit notice of contract termination and also an FMCS Section 8(d) notice form. On one occasion, the union forgot to include the explicit notice of termination and sent only the FMCS form. The FMCS form identified the parties, the number of employees, and the bargaining agreement expiration date. The employer argued that the FMCS form was insufficient notice of termination, particularly because sending only the form differed from past practice. However, the parties also had been discussing upcoming negotiations, i.e., who would be the members of their respective negotiating committees, possible negotiating dates, and whether the union would accept both a limited wage increase and a different contract expiration date. In these circumstances, the Board adopted the judge's decision finding that the FMCS form was sufficient notice to prevent automatic renewal.

In the instant case, the Union argues that the Employer's email was insufficient notice of "cancellation, revision or modification of any provision or provisions" because the email did not explicitly refer to expiration of the bargaining agreement, nor refer to any specific provisions for revision or modification. However, the Board does not require such explicit notice; it only requires that a notice convey that the sending party seeks to terminate or modify the existing agreement.[6] Here, the Employer's email referred to October negotiations and even sought specific bargaining dates.

The Employer also sent this email in a context clearly indicating the Employer's intent to revise or modify the current agreement. The Employer had made repeated prior requests for early negotiations, together with references on two occasions to specific subjects for bargaining. The Union also understood that the Employer wanted to renegotiate the expiring agreement because the Union sought, obtained, and even used leaves of absence for its negotiating committee to prepare for upcoming negotiations.[7]

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[5] Champagne County Contractors, 210 NLRB 467 (1974).

[6] See Champagne County Contractors, supra, where the judge stated, "So long as the essential message was conveyed, it is not reasonable for Respondent to hold [the union] to the standards of a Philadelphia lawyer." Id at 470.

[7] See Burger Pitts supra.

The Union argues that the Employer's September 24 statement, confirming that the Employer had not sent a formal notice letter because the Union always sent the letter, indicates that the Employer did not intend to cancel or modify the agreement. However, this Employer statement does not refer to the August email; it merely explains why the Employer did not sent a formal notice letter. The Employer's statement is thus consistent with an intent to cancel or modify the current agreement via the August email.

We therefore conclude that the Employer's email, sent in all the above circumstances, was sufficient notice of the Employer's intent to cancel or modify the agreement, and the Region should issue complaint, absent settlement.

B.J.K.