

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

# Advice Memorandum

DATE: October 14, 2005

TO : Helen Marsh, Regional Director  
Region 3

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

SUBJECT: Paper, Allied-Industrial, Chemical  
and Energy Workers International Union,  
Local Union 2-109 (Durez Corporation)  
Case 3-CB-8394

554-8425

This Section 8(b)(3) case was submitted for advice on whether the Union was relieved of its obligation to resume negotiations for a new collective-bargaining agreement by the Employer's failure to implement scheduled wage and pension increases that are the subject of an outstanding unfair labor practice complaint.

We conclude that the Union's refusal to bargain violates Section 8(b)(3) because the evidence shows that the Employer's alleged misconduct occurred after the breakdown in the parties' negotiations, and therefore the Union cannot claim that the Employer's actions undermined the collective bargaining process to the extent that subsequent bargaining would be futile.

### **FACTS**

Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 1-209 (the Union) represents a unit of hourly workers employed by Durez Corporation (the Employer) at its Niagara Falls, New York, resin manufacturing facility. As set forth in greater detail in an Advice memorandum in a related case,<sup>1</sup> the Employer and Union bargained to impasse after the expiration of the extension of their collective-bargaining agreement and, on January 9, 2004, the Employer lawfully implemented its final offer to the Union.

The parties continued to meet between January and June, 2004, when the parties exchanged another round of contract proposals. In early September, the Employer contacted the Union to resume bargaining, and asked for another contract proposal from the Union. The Union never

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<sup>1</sup> Durez Corporation, Case 3-CA-25193, Advice Memorandum dated July 18, 2005.

provided a new, marked-up proposal, and made no attempt to resume negotiations.

In October 2004, the Employer informed the Union that it would not be granting the one-percent wage increase and pension increases scheduled for the second through fifth year of the implemented offer. On December 20, 2004, the Union filed a charge in Case 3-CA-25193, protesting the Employer's refusal to adhere to the implemented offer. In March 2005,<sup>2</sup> the Region submitted that case for Advice.

While Case 3-CA-25193 was pending in Advice, the Employer's attorney sent a letter on May 26 to the Union requesting that the parties resume negotiations. The attorney stated that the Employer's financial situation was worsening, and that it had new proposals reflecting its declining condition. The Union did not respond to this letter, nor to subsequent letters sent on June 1 and 7. The Employer filed this charge on June 10, alleging that the Union's refusal to bargain is unlawful.

On July 11, the Union wrote to the Employer's attorney stating that it would not enter negotiations for a new agreement until the alleged unfair labor practices in Case 3-CA-25193 were remedied. On July 18, Advice authorized complaint in Case 3-CA-25193 regarding the refusal to grant the scheduled wage and benefit increases. After settlement efforts failed, the Region issued a complaint in that case on September 2.

### **ACTION**

We conclude that the Region should issue complaint, absent settlement, alleging that the Union's refusal to bargain violates Section 8(b)(3) of the Act. The evidence reflects that the Union had already avoided further bargaining sessions even before it became aware of the Employer's intent to act unilaterally, and therefore the unremedied unfair labor practices do not privilege the Union's continued refusal to bargain.

Section 8(b)(3) of the Act requires a union that is the exclusive representative of employees to bargain collectively with their employer. We found no Section 8(b)(3) cases addressing whether a union is privileged to refuse to bargain in the face of unremedied unfair labor practices. However, the Board has addressed a union's right to refuse to bargain in Section 8(a)(5) cases where an employer raises a union's refusal to bargain as a

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<sup>2</sup> All dates hereafter are 2005 unless otherwise indicated.

defense to, or in mitigation of, its own conduct. These cases arise in two broad sets of circumstances.

In one type of case, the Board will excuse a union from bargaining when an employer committed serious violations of the Act which demonstrated a clear rejection of its responsibility to recognize and bargain with a union. For instance, in Bay Area Sealers,<sup>3</sup> the Board found that an employer's prolonged repudiation of the collective-bargaining agreement justified the union's claim of futility in ignoring the employer's later offer to bargain.<sup>4</sup>

In another situation, the Board has found a union justified in refusing to bargain when the employer had committed less serious unfair labor practices, but then persisted in its unlawful conduct once the parties attempted to resume bargaining. For example, in The Little Rock Downtowner, Inc.,<sup>5</sup> the employer granted an unlawful unilateral wage increase to several employees. When the parties next met to bargain, the union asked the employer to rescind the change and pledge not to make further unlawful unilateral changes. The employer refused both requests. In those circumstances, where it appeared that any attempts at good faith bargaining would have been futile, the Board found that the union's subsequent refusal to meet with the employer was justified.<sup>6</sup>

These cases do not apply here to privilege the Union's refusal to bargain because there is no evidence here that

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<sup>3</sup> 251 NLRB 89 (1980), enfd. in rel. part sub nom. Rayner v. NLRB, 665 F.2d 970 (9th Cir. 1982).

<sup>4</sup> Id., 251 NLRB at 90, n.5. See also Marchese Metal Industries, 313 NLRB 1022, 1024 (1994) (employer's unlawful refusal to execute collective-bargaining agreement during its entire term excused union from failing to respond to employer's invitation to bargain because bargaining would have been futile).

<sup>5</sup> 168 NLRB 107 (1967), enf'd 414 F.2d 1084 (8th Cir. 1969).

<sup>6</sup> Id. at 108. See also Wayne's Dairy, 223 NLRB 260, 265 (1976) (employer's discontinuance of payments to pension, health, and welfare plans upon contract expiration and refusal to reinstate payments during bargaining justified union's cessation of bargaining efforts); M.A. Harrison Mfg. Co., 253 NLRB 675, 684 (1980) (employer's unilateral and repeated granting of raises and additional holidays during the course of bargaining justified the union's refusal to bargain), enfd. 682 F.2d 580 (6th Cir. 1982).

the Employer's refusal to implement certain agreed-upon contract terms has so poisoned the collective-bargaining process or undermined the Union's status as to render further bargaining attempts futile. In fact, the evidence affirmatively shows that the cessation of negotiations was not connected to the alleged unfair labor practices. In this regard, the parties had continued negotiating through June 2004, but then the Union did not respond to the Employer's September efforts to resume negotiations. Thus, the Union's reluctance to come to the table in September 2004, cannot in any way be attributed to the Employer's announcement in October that it would not be granting the January wage increase. In these circumstances, where the evidence demonstrates that the cessation in bargaining was not connected in any way to the alleged unlawful unilateral changes, the Union is not privileged to rely upon those changes to justify its continued refusal to bargain.

For the foregoing reasons, the Union's current refusal to bargain is not excused by the Employer's unremedied unfair labor practices and the Region should issue a Section 8(b)(3) complaint, absent settlement.

B.J.K.