

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

# Advice Memorandum

DATE: July 20, 2007

TO : Irving E. Gottschalk, Regional Director  
Region 30

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

SUBJECT: Sunrise Care Center  
Cases 30-CA-17628  
30-CA-17688  
30-CA-17708

530-6033-7000-0000  
530-6033-7056-0000  
530-6033-7056-8700  
530-6050-0140-0000  
530-6050-4100-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) and (5) and Section 8(d) by insisting to impasse on its proposal to change the apportionment of arbitration expenses, including expenses for grievances arising under the parties' expired contract, and by unilaterally implementing that proposal. The Region also sought advice as to whether the parties had lawfully reached a good-faith impasse, given the Employer's insistence on the arbitration cost proposal and its unlawful efforts to decertify the Union.<sup>1</sup>

We agree with the Region that the Employer's retroactive arbitration cost proposal was a non-mandatory subject of bargaining, and that the Employer violated Section 8(a)(1) and (5) and Section 8(d) by insisting to impasse regarding that proposal, and by unilaterally implementing its terms. We further conclude that the parties reached a good-faith impasse in bargaining, notwithstanding the Employer's insistence on the non-mandatory proposal and its unlawful efforts to decertify the Union.

### **FACTS**

Sunrise Care Center (the Employer) is a nursing home in Milwaukee, Wisconsin. SEIU District 1199 (the Union) represents the 60 CNAs, housekeeping, laundry, aides, cooks, activity assistants, and maintenance employees working for the Employer.

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<sup>1</sup> The Region also sought advice as to whether Section 10(j) relief is appropriate. That issue will be addressed in a separate memorandum. The Region itself determined that the Employer's decertification efforts violated Section 8(a)(1) of the Act; it has not submitted the merits of that allegation for advice.

The contract between the Employer and the Union expired on June 30, 2006.<sup>2</sup> Section 11.10 of the contract provided that each party "shall pay for its own expenses and costs" when submitting a dispute to arbitration. The parties extended the contract through August 31.

Negotiations for a successor contract began in June, with the parties having met approximately 10 times by the end of August. During negotiations, the Employer expressed its belief that the Union had overused the arbitration procedure under the prior contract. Hoping to reduce the number of arbitrations, the Employer proposed that the losing party in arbitration pay all fees and costs, including the prevailing parties' reasonable attorney fees and witness fees. The Employer initially proposed that the change would apply to arbitrations held on or after July 1, 2006, but as part of an August 24 comprehensive proposal, the Employer proposed that the change would apply to arbitration hearings held on or after September 1, 2006. On August 31, the Union membership rejected the Employer's August 24 contract offer.

On September 19, supervisor June Zalenski approached employees Doris Bates and Charmaine Rucker. Zalenski told Bates and Rucker to have employees sign papers to get rid of the Union. Later that day, Zalenski gave Bates a document entitled "Some Questions and Answers Regarding Decertification." The paper described the decertification process and contained a sample petition. Zalenski again told Bates to have employees sign to get rid of the Union. Zalenski said the paper came from the Employer's administrator Catherine Hackney, who was a key member of the Employer's negotiating team.

On September 22, the parties met for negotiations for the first time since August 24. The Employer proposed that the arbitration cost-shifting change now apply to arbitration hearings held on or after October 1, 2006. In response, the Union asked if the Employer was re-bargaining the expired contract, because the proposal included grievances and arbitrations arising under that agreement. The Employer denied that it was re-bargaining the parties' agreement,<sup>3</sup> but said it wanted all arbitrations held after

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<sup>2</sup> All dates hereinafter are in 2006, unless otherwise noted.

<sup>3</sup> The Employer concedes that there are a number of grievances arising out of the expired contract that are set for arbitration under its proposed and unilaterally implemented arbitration cost proposal. The Employer claims, however, that the procedures to be used in any

October 1 to be governed by the new language. By the end of the session, the parties had reached impasse regarding several major issues, including wages, health insurance, and the definition of just cause. The parties also were at impasse regarding how arbitration costs would be apportioned. The Employer immediately implemented its final offer, including the portion requiring the loser to pay the winner's arbitration fees and costs, even for grievances filed under the expired contract.

### **ACTION**

We agree with the Region that the Employer's retroactive arbitration cost proposal was a non-mandatory subject of bargaining, and that the Employer violated Section 8(a)(1) and (5) and Section 8(d) by insisting to impasse regarding that proposal, and by unilaterally implementing its terms.<sup>4</sup> We further conclude that the parties reached a good-faith impasse in bargaining, notwithstanding the Employer's insistence on the non-mandatory proposal and its unlawful efforts to decertify the Union.

#### **1. The Employer's retroactive arbitration cost proposal was a non-mandatory subject of bargaining**

The Board has consistently held that a right which has already accrued under an expired contract is a non-mandatory subject of bargaining.<sup>5</sup> Thus, the term "wages, hours, and terms and conditions of employment" as used in Section 8(d) of the Act refers only to future wages and conditions, not to past wages and benefits that have already been accrued and that are owed.<sup>6</sup> Hence, a party

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future arbitration are mandatory subjects of bargaining, even if they apply to grievances that arose under the expired agreement.

<sup>4</sup> We view the Employer's implementation of its proposal to be a refusal to abide by the expired agreement's provisions concerning arbitration costs.

<sup>5</sup> See Harvstone Mfg. Corp., 272 NLRB 939, 942 (1984), enf. denied on other grounds 785 F.2d 570 (7th Cir. 1986); Swift Adhesives, 320 NLRB 215, 216 (1995), enfd. 110 F.3d 632 (8th Cir. 1997); R.E. Dietz Co., 311 NLRB 1259, 1266 (1993).

<sup>6</sup> See Swift Adhesives, supra; R.E. Dietz Co., supra.

negotiating a successor agreement violates Section 8(a)(1) and (5) and Section 8(d) by insisting to impasse regarding a proposal to modify the accrued right and by unilaterally implementing its proposal.<sup>7</sup>

In the instant cases, we agree with the Region that the procedure by which grievances arising under the expired contract would be arbitrated was a right which accrued under that contract. In Nolde Brothers,<sup>8</sup> the Supreme Court held that the contractual duty to arbitrate disputes arising out of an agreement extends beyond the date of expiration of that agreement, absent clear evidence of contrary intent. The premise of the Court's opinion was that the parties had agreed to arbitrate grievances arising under the expired contract,<sup>9</sup> and the Court was simply holding the parties to the remains of their agreed upon deal. Indeed, the Court indicated that this also included the extant arbitration procedures, as it ordered "resolution under the arbitration provisions of [the expired] contract."<sup>10</sup>

Here, as in Nolde, there is no evidence of any intent contrary to the duty to arbitrate disputes arising under the contract after the contract expired -- and to do so under the procedures contained therein. Thus, the arbitration procedure, including which party pays the cost, was a right which accrued under the expired contract. Therefore, the Employer's retroactive arbitration cost proposal was a non-mandatory subject of bargaining, and the Employer violated Section 8(a)(1) and (5) and Section 8(d) by insisting to impasse regarding that proposal and unilaterally implementing its terms.

**2. The Employer's insistence on the non-mandatory arbitration costs proposal did not taint the parties' bargaining impasse**

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<sup>7</sup> See R.E. Dietz Co., 311 NLRB at 1264, 1267; ACF Industries LLC, 347 NLRB No.99, slip op. at p.3, n.5 (2006).

<sup>8</sup> Nolde Brothers, Inc. v. Bakery Workers Local 358, 430 U.S. 243 (1977).

<sup>9</sup> Id., 430 US at 252-255.

<sup>10</sup> Id., 430 US at 255.

We further conclude that the Employer's unlawful insistence on the non-mandatory proposal did not invalidate the bargaining impasse. In order to "taint" a bargaining impasse, there must be evidence that the Employer's "insistence on the [non-mandatory] proposal contributed to the impasse in [some] discernible way."<sup>11</sup> In this case, it is clear that the parties would have reached a bargaining impasse even if the Employer had not unlawfully insisted on its retroactive arbitration cost proposal. By the end of the September 22 bargaining session, the parties were deadlocked on several major issues -- including wages, health insurance, the definition of just cause, and the Employer's lawful insistence on changed how arbitration costs would be apportioned for grievances arising under any future contract. Indeed, other than the Union having asked on one occasion if the Employer was re-bargaining the expired contract, there is no evidence that the Employer's insistence on the non-mandatory proposal hindered the negotiations or contributed to the standoff in any way. Thus, the bargaining impasse does not appear to have been "created even in part" by the Employer's insistence on its retroactive arbitration cost proposal, and the Employer's unlawful conduct cannot be said to have tainted the impasse.<sup>12</sup>

**3. The Employer's unlawful decertification efforts also did not taint the bargaining impasse**

Finally, we conclude that the Employer's unlawful efforts to decertify the Union did not invalidate the impasse. A finding of impasse presupposes that the parties have acted in good faith prior to the impasse.<sup>13</sup> While, generally, a lawful impasse may not be reached in the presence of unremedied unfair labor practices, not all unremedied unfair labor practices committed during negotiations will invalidate an otherwise good-faith impasse; only "serious unremedied unfair labor practices that affect the negotiations" will taint the asserted impasse.<sup>14</sup> Thus, the central question is whether the

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<sup>11</sup> ACF Industries LLC, 347 NLRB No.99, slip op. at p.3 (2006).

<sup>12</sup> See, e.g., Quality House of Graphics, 336 NLRB 497, 508-510 (2001).

<sup>13</sup> Circuit-Wise, Inc., 309 NLRB 905, 918 (1992).

<sup>14</sup> Dynatron/Bondo Corp., 333 NLRB 750, 752 (2001).

Employer's unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock.<sup>15</sup>

In this regard, the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table."<sup>16</sup> Instead, such conduct "has been considered for what light it sheds on conduct at the bargaining table."<sup>17</sup> The initiation of a decertification campaign by an employer official who is participating in the negotiations, without evidence of misconduct at the table, will not suffice to establish bad-faith bargaining.<sup>18</sup>

Here, there is insufficient evidence to establish that the impasse was invalid because the Employer was bargaining in bad faith with the Union. The only evidence that the Employer was bargaining in bad faith is Administrator Hackney's initiation of the decertification campaign on September 19 -- there is no evidence of bad faith at the bargaining table. Moreover, Hackney initiated the campaign after the Employer had negotiated in apparent good faith with the Union for several months, and she did so only three days before the conclusion of the bargaining. On these facts, it is difficult to argue that the Employer had been bargaining in bad faith earlier, or that Hackney's September 19 conduct affected the negotiations or tainted the impasse reached on September 22. Therefore, we conclude that the Employer's unlawful efforts to decertify the Union did not invalidate the impasse, and that the Employer lawfully implemented its final offer, with the

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<sup>15</sup> Ibid.

<sup>16</sup> St. George Warehouse, Inc., 349 NLRB No.84, slip op. at p.8 (2007).

<sup>17</sup> Ibid.

<sup>18</sup> Id., 349 NLRB No.84, slip op. at pp.8-9, 25-27 (2007) (employer official's encouraging a decertification effort while simultaneously being involved in contract negotiations did not "show an intent to frustrate agreement" and was not "evidence of overall bad-faith bargaining"); Marriott In-Flite Services, 258 NLRB 755, 766-768 (1981) (employer decertification effort, in combination with its conduct at the bargaining table, established bad faith posture), enfd. 729 F.2d 1441 (2d Cir. 1983) (table).

exception of the non-mandatory retroactive arbitration cost proposal.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) and Section 8(d) by insisting to impasse regarding the non-mandatory retroactive arbitration cost proposal and by unilaterally implementing its terms. The Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully implemented its final offer at a time when the parties were not at a valid impasse in the negotiations.

B.J.K.