

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMURFIT-STONE CONTAINER
ENTERPRISES, INC.

and

DISTRICT COUNCIL NO. 2,
LOCAL NO. 388-M, affiliated with
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Cases 32-CA-24480
32-CA-24725

DATE OF MAILING: April 30, 2010

AFFIDAVIT OF SERVICE OF THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by email upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 30th day of April 2010.

DESIGNATED AGENT

/s/ Frances Hayden

NATIONAL LABOR RELATIONS BOARD



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

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THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

1. Preliminary Statement

On April 5, 2010, Administrative Law Judge Jay R. Pollack, herein called the Judge, issued his Decision and Order in this matter dismissing the complaint in its entirety. At issue in this case is whether Respondent violated Sections 8(a)(5) and (1) of the Act by unlawfully insisting on the inclusion in the parties' severance agreement of Respondent's permissive proposal that the parties' collective-bargaining agreement terminate when the bargaining unit reduced to a certain number of employees and by terminating the remaining four bargaining unit employees at the time Respondent closed its Fresno facility without first fulfilling its obligation to bargain in good faith with the Union. Counsel for the General Counsel has taken exceptions to the Judge's Decision and Order, and this brief is submitted in support of the General Counsel's exceptions.

2. The Judge's Findings of Fact

For many years prior to September 1, 2009, Respondent was engaged in the manufacture and non-retail distribution of corrugated boxes at its facility located in Fresno, California, where it had a long-term collective-bargaining relationship with the Union. The most recent collective-bargaining agreement between the parties, herein called the Agreement, was effective by its terms from March 1, 2005, to February 28, 2011. As of late September 2008, Respondent employed 92 bargaining unit employees at its Fresno facility. (ALJD 2:19-23)¹

On September 25, 2008, Respondent notified the Union that it intended to cease production and lay off all bargaining unit employees commencing on or after November 28, 2008. (ALJD 2:25-29) Between September 26, 2008 and May 4, 2009, the Union and Respondent engaged in bargaining over the effects of Respondent's decision to permanently close its facility and lay off bargaining unit employees. The parties met on six occasions: September 26, November 21, December 10, 2008, and January 6, March 24 and April 1, 2009. (ALJD 2:35-36) Throughout these bargaining sessions, Respondent continually proposed that the Agreement terminate when the unit was reduced to a certain number of employees. (ALJD 3:5-7) The number decreased during the course of the bargaining from five to three and then, in its last or final offer "to one (1) or fewer." However, as the Judge found, "Respondent . . . indicated that there would be no severance agreement without early termination of the contract" (ALJD 3: 12-13),

¹ References to the Judge's decision are listed as "ALJD _:_."

whereas the Union maintained throughout the bargaining that it would not agree to terminate the Agreement while any employees were still employed at the facility.

During bargaining on March 24, 2009, after informing the Union that the four remaining unit employees would continue to work indefinitely, Respondent proposed that the Agreement terminate when the number of unit employees reached three or fewer. While indicating at this meeting that it was “flexible about the number of employees involved,” Respondent “insisted that the current labor agreement must terminate while there were still some employees working.” The Union rejected this proposal. (ALJD 3:40-47)

On April 1, 2009, Respondent presented its last, best and final offer, which included a proposal that the Agreement terminate when the number of bargaining unit employees was reduced to one or fewer. On April 17, 2009, the Union sent Respondent a counter proposal, which included a rejection of Respondent’s early termination proposal. On April 23, 2009, Respondent rejected the Union’s counter proposal and again offered its final proposal. On May 5, 2009, Respondent withdrew its last, best and final offer, and no further bargaining has taken place. On September 1, 2009, Respondent permanently closed its Fresno facility and laid off the remaining four unit employees. (ALJD 3:48-52; 4:1-4)

3. Argument

A. The Judge Wrongly Found that Respondent's Early Termination Proposal Took on the Characteristics of a Mandatory Subject of Bargaining

A proposal to modify the expiration of an existing collective bargaining agreement is normally a permissive topic of bargaining over which a party may not insist to impasse.² Although a party may “make a proposal on a permissive subject and link it to a mandatory subject as part of an overall package, that linkage does not privilege an employer to continue to insist upon acceptance of the proposal to the point of impasse, in the face of a clear and express refusal by the union to bargain about the non-mandatory subject.”³

Here, Respondent insisted on terminating the collective-bargaining agreement early -- a permissive subject of bargaining. That the proposal was linked to mandatory effects bargaining does not render the proposal mandatory, in the face of the Union's clear refusal to bargain about the topic. Moreover, contrary to the Judge's finding, Respondent's proposal was not so “inextricably intertwined” with the mandatory effects bargaining so as to become a mandatory topic. In that regard, the situation here is similar to that in *Borden, Inc.*, 279 NLRB 396, 399 (1986), where the Board held that the employer's proposal for a broadly-worded, general release of all future claims by employees was not “inextricably intertwined” with the mandatory subject of severance compensation, with the Board relying in part on the fact that the employer's proposal

² See *New Seasons*, 346 NLRB 610, 622 (2006) (party may not insist to impasse on bargaining topic covered by collective-bargaining agreement that was not included in reopener).

³ *Id.* at 623 (internal quotations omitted).

provided for the release not just of claims related to the severance, but all future claims as well. Like the proposal to release all future claims in *Borden*, Respondent's proposal to extinguish an entire collective-bargaining agreement, including termination of contractual rights for the remaining employees, as well as the Union's right to negotiate a future agreement, is not inextricably linked to the severance claims of the employees whose layoffs were being negotiated.⁴

The Judge, in finding Respondent's early termination proposal to be inextricably intertwined with the mandatory severance-related subjects being negotiated by the parties, did not expound on his reasoning in making that finding other than to state that all of the proposals were "part of a package." (ALJD 5:11) However, in *Pleasantville Nursing Home*, 335 NLRB 961, 962 (2001), the Board specifically rejected the idea that a party could circumvent the general rule that one may not insist to impasse on a permissive subject by merely linking permissive subjects with mandatory ones. Thus, while Respondent was entitled at the outset of negotiations to propose linking its early termination proposal to other mandatory proposals as part of a package, this linkage did not transform the proposal into a mandatory one or entitle Respondent to insist on the early termination proposal. Acceptance of the Judge's analysis would make meaningless

⁴ Moreover, Respondent has no *per se* right under the Act to withdraw recognition from the Union simply because the unit contains one or fewer employees. While an employer has no obligation to bargain with a stable, one-employee bargaining unit (see, e.g., *Foreign Car Center*, 129 NLRB 319, 320 (1960)), stable, one-employee units are only those where the bargaining unit over time has been confined to one or no employees (see, e.g., *Stack Elec.*, 290 NLRB 575, 577-78 (1988)) or those where the unit currently has one or no employees and the employer can show that such will be the condition in the future (see, e.g., *Crescendo Broadcasting*, 217 NLRB at 697). Respondent's proposal here did not require that the one-person unit be stable or permanent. Indeed, Respondent had been seeking to terminate the collective-bargaining agreement when more than one employee remained in the unit.

the general rule that a party cannot insist to impasse on a permissive subject of bargaining.

Moreover, the cases on which the Judge relied do not support his finding that Respondent's early termination proposal was inextricably intertwined with mandatory subjects of severance bargaining. One of those cases, *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980), enfd. 685 F.2d 425 (2nd Cir. 1982), was found by the Board to involve a "unique situation," with the Board concluding that what would have otherwise been a permissive interest arbitration proposal on the union's part became inextricably intertwined with other, mandatory proposals by virtue of the arbitration proposal having been voluntarily agreed to by the employer as part of an overall bargaining agreement reached with the union. The Judge also appears to have relied on *Dependable Storage, Inc.*, 328 NLRB 44 (1999), but that case merely recognizes that there is nothing inherently unlawful about a party proposing a permissive subject in the course of contract bargaining, with the judge having emphasized that the employer there did *not* condition agreement on an *overall* contract as being dependent on the union's agreement to the employer's non-mandatory proposal and with the judge indicating that had the employer done so, he would have found a violation.⁵

⁵ Although the Board in *Regal Cinemas*, 334 NLRB 304, 305, enfd. 317 F.3d 300 (D.C. Cir. 2003), found that the severance pay and release proposals at issue in that case were so "inextricably intertwined" as to make the release a mandatory subject of bargaining, that case is distinguishable, for the Board there relied on the fact that the employer sought a specific release linked only to "claims arising from the termination of the employees - the very same employment transaction that occasioned bargaining over severance pay." That contrasted, as the Board noted, with the situation in *Borden*, where the release at issue was so general as to encompass claims unrelated to the employment transaction that occasioned bargaining.

Here, as well, Respondent's insistence on an early termination of the parties' collective-bargaining agreement potentially encompassed claims that were not confined to the employees whose severance

B. The Judge Erred in Finding that Even If Respondent's Early Termination Proposal Was Not Permissive, Respondent's Bargaining Conduct Had Not Risen to the Level of an Unlawful Insistence on that Proposal

As a fallback position, the Judge found that, even if the Board were to disagree with his findings regarding the permissive subject issue, he would still dismiss the complaint because, as he found, Respondent had not insisted to impasse on its early termination proposal. However, that finding is based on a nearly complete lack of analysis and is at odds with other of the Judge's findings, including his finding that Respondent, throughout negotiations, "indicated that there would be no severance agreement without early termination of the contract" (ALJD 3:12-13) and his finding that Respondent insisted that the current agreement expire while there were still some employees working (ALJD 3:45-46). Moreover, as the Judge found, Respondent included an early termination provision in its last, best, and final offer; resubmitted that same offer after the Union again protested the early termination provision; and, then, after the Union again refused to go along with an early termination provision, completely pulled its bargaining proposals, with there being no further negotiations after that point.

In finding no impasse, the Judge asserted that for impasse to occur, "neither side must be willing to compromise" (ALJD 5:29-30), whereas, in his view, "Respondent was

claims were legitimately at issue in the parties' negotiations. Like the proposal to release all future claims in *Borden*, Respondent's proposal to extinguish an entire collective-bargaining agreement, including the termination of contractual rights for the remaining employees, as well as the Union's right to negotiate a future agreement, is not inextricably linked to Respondent's severance proposal. Thus, Respondent cannot reasonably argue that it needed the early termination of its contract with the Union in order to "fix" its costs associated with laying off unit employees. To the extent that Respondent may have had a legitimate need to determine the costs associated with laying off employees before agreeing to severance pay for them, it could have satisfied that need through proposals specifically linked to the severance claims of the employees being laid off, such as a waiver of recall rights of the laid off employees or an explicit termination date for any continued medical or other benefits on behalf of the laid off employees.

always willing to bargain” (ALJD 5:29). However, as noted, the Judge found that Respondent had always insisted on early termination of the parties’ collective-bargaining agreement as a condition of any severance agreement, i.e., that it was not willing to relinquish that basic point (only on when that early termination was to occur), and that it continued to insist on such a provision even though the Union, in March and April 2009, unequivocally rejected the Employer’s early contract termination proposal.

Such insistence on Respondent’s part runs afoul of *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), where the Court held that, while a party is free to make proposals on non-mandatory subjects, it may not insist upon agreement to a non-mandatory subject as a condition precedent to entering an agreement. The Third Circuit, in applying *Borg-Warner*, noted that, “[a]s *Borg-Warner* makes clear, there can be no adverse consequence from a party’s failure to agree or even his failure to bargain about a non-mandatory subject of bargaining.” *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (1980). The *Latrobe Steel* decision was cited in *Chesapeake Plywood, Inc.*, 294 NLRB 201, 212 (1989), where the Board found that it was unlawful to at least partially cause a deadlock in negotiations on the basis of non-mandatory demands. Similarly, the Board in *Mental Health Services, Northwest, Inc.*, 300 NLRB 926, 928 (1990), found a violation where a non-mandatory proposal was *one of the subjects* preventing agreement on a contract, with the Board observing that adamant insistence on a permissive subject is unlawful.

Here, Respondent’s conduct clearly rose to the level of unlawful insistence on its early termination proposal. Thus, as found by the Judge, Respondent insisted until the

final breakdown in negotiations that there would be no effects agreement without an early termination provision, and that insistence was certainly a contributing cause of the breakdown. Accordingly, the Judge erred by not finding in line with the foregoing authorities that Respondent, in bargaining for an early termination provision, pushed to the point of unlawful insistence on that proposal.

C. The Judge Erred by Failing to Find Both That Respondent Closed Its Fresno Facility Without First Meeting Its Obligation To Bargain in Good Faith Over the Effects of Its Closure and that the Four Employees Employed at the Time of the Closure Were Entitled To a *Transmarine* Remedy

The Judge found that Respondent closed its facility and terminated the last four bargaining unit employees on September 1, 2009. The Judge also found that Respondent had the obligation to bargain in good faith with the Union over the effects of decision to close its Fresno facility. However, and because of his earlier erroneous determinations that Respondent's early termination proposal became a mandatory subject of bargaining and that Respondent in any event did not unlawfully insist to impasse on that provision, the Judge did not reach the issue of whether Respondent had engaged in meaningful effects bargaining before it laid off the final remaining four Fresno bargaining unit employees on September 1, 2009. As shown above, prior to closing the facility, Respondent failed to meet its obligation to bargain in good faith over the effects of the closing because it unlawfully insisted on its early termination proposal as a condition of entering into an effects agreement. Accordingly, because Respondent closed its facility without first meeting its obligation to bargain in good faith with the Union regarding the effects of the closure, the four bargaining unit employees employed at the Fresno facility

at the time of its closure are entitled to be made whole in the manner set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).⁶

4. Conclusion

For the reasons set forth above, it is respectfully requested that the Board find merit to the General Counsel's exceptions and find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged herein and order the appropriate remedies.

DATED AT Oakland, California this 30thth day of April 2010.

Respectfully submitted,



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⁶ *Melody Toyota*, 325 NLRB 846 (1998) (a *Transmarine* remedy is the standard back pay remedy in failure-to-engage-in-effects-bargaining cases).