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

Advice Memorandum

DATE: September 29, 2006

TO: Dorthy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Pre Finish Metals Incorporated
Case 4-CA-34588
530-6033-7000
530-6033-7008
530-6033-7056
530-6033-7028
530-6033-7070-5000

This case was submitted for advice as to whether the employer unlawfully declared impasse and implemented its last offer.

We conclude that the parties were not at impasse because the parties had engaged in only a few negotiations over economic issues, and the Union continued to make material economic concessions, as late as one day prior to the Employer's implementation of its last offer and also sought future dates for negotiations, indicating that the Union remained flexible and that further bargaining would not be futile. The Employer argues that continued bargaining would have been futile because the Union's concessions were small and still left a wide gap between the parties. However, the Board has found no impasse, despite a current wide gap between the parties, where one party's material concessions show flexibility and a willingness to continue bargaining, indicating that continued bargaining may produce further movement.

FACTS

The Union has represented the production and maintenance employees at the Employer's Morrisville, Pennsylvania plant since 1983. The parties' most recent bargaining agreement expired on November 18, 2005, but was extended to February 18, 2006 to give the Employer time to complete a potential sale of the plant. The negotiations for the sale of the plant failed in December 2005 and the parties set dates for negotiations for a successor agreement.

During these negotiations, the Employer noted that it had lost considerable business to low wage foreign competition

and would be seeking major economic concessions from the Union to reduce labor costs.[1] The parties engaged in 17 face-to-face negotiation meetings between January 16 and March 27.[2] At the first bargaining session, the Employer announced that it wanted to bargain over noneconomic issues first. Although the Union's chief negotiator objected, the Employer did not make a proposal on wages until February 8, the tenth of the parties' seventeen meetings.

During the initial bargaining on noneconomic items, the parties came to agreement on many issues.[3] The Employer finally presented a full economic package on February 8. This initial offer called for a 35% wage reduction for Tier 1 production employees who comprised most of the unit, and an 8% wage reduction for Tier 1 maintenance employees. The Employer also proposed bringing the Morrisville employees under the umbrella of its corporate wide healthcare policy with United HealthCare, which would require employee premium contributions of 20%, and an increase in employee co-pay for services and prescriptions. The current health care policy under Aetna required no employee premium contributions. The Employer also called for a freeze of the defined benefit pension plan. In substitution, the

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[1] Specifically, the Employer noted that its volume of business had declined by 54% since 2000; it anticipated the loss of two additional customers, accounting for 15 to 20 % of its total sales; it had closed two of its other facilities; it had eliminated the second and third shifts at the Morrisville plant, and the first shift was working less than 40 hours per week; and at the time bargaining began in early January, 21 of 40 bargaining unit employees had been on layoff for more than 4 months. According to the Union, the Employer's financial records indicated that it had made a profit of $8 million over the last six years, though the employer stated that it anticipated a loss in the fourth quarter of 2005.

[2] All dates from this point are in 2006 unless otherwise indicated.

[3] For example, the parties agreed on super seniority, the number of paid grievance committee persons, jury service and required appearances at legal proceedings and the shoe allowance. The Union agreed to the Employer's request for the reduction of 20 year recall rights to one year and withdrew its proposal for improved holiday and vacation benefits. The Employer withdrew proposals for a stronger management rights provision, the exclusion of janitorial employees from the unit, modifications to both the grievance and arbitration provisions and the no strike/lock out provision, and discipline.

Employer proposed a lump sum contribution of 1.75% of the employee's annual compensation to the employees' existing 401(K) plan, in addition to the existing annual Employer matching contributions of up to 3%. The Union requested information regarding the anticipated savings of the employee's proposed pension freeze, and the parties continued to discuss noneconomic issues.

At the thirteenth session, the Union presented its economic position. It called for a 4% wage increase across the board in a one year agreement, a $2 increase in the multiplier in the existing pension agreement, retention of the existing Employer-financed Aetna healthcare policy, improved holiday and vacation benefits, and a severance benefit. On February 17th, the parties agreed to another extension of the existing agreement to March 3 in order to give the Employer time to discuss and work out a severance package.

During negotiations on March 2, the fifteenth session, the Union lowered its wage increase proposal from 4% to 3.5%, and lowered its pension multiplier increase proposal from $2 to $1. The Employer countered by lowering its proposed wage decrease proposal by $.25 per hour for Tier 1 employees. The Union then lowered its proposed wage increase to 3.3%, prompting the Employer to make its "last, best and final offer" on wages: a 29% decrease for production employees and a 4% decrease for maintenance employees.

On March 3, the Union withdrew its proposed increases to the pension multiplier and proposed no change for 1 year. On wages, the Union reduced its initial increase from 3.3% to 2%. The Employer rejected the Union's proposals noting that it had already presented its last, best and final offer on wages: On health insurance, the Union proposed continuing the current Aetna plan and Employer contributions. The Union agreed to a pension freeze if the Employer would add $65,300 to the economic package in some way. The Employer rejected these proposals stating that the Union had everything the Employer had to give. However, the union continued to work on counter proposals. It offered a wage freeze in the first year, and a $2,500 bonus per employee in the second year.

The Employer rejected the Union's proposal, repeating that the Union had the Employer's last, best and final offer. That final offer was a 2 year agreement consisting of a healthcare policy under United HealthCare with a 20% contribution from the employees and a higher co-pay, a freeze on the benefit pension with a 1.75% contribution to the 401(K) from the Employer, and wage decreases of 29% for

production classifications and 4% for maintenance classifications. On March 5 the employees voted to reject the Employer's last offer. The Employer and Union representatives arranged dates for future bargaining. Due to the unavailability of the Union representative and the schedule of the mediator, the parties were not able to meet again until March 27. The parties agreed to the Union's proposed extension of the existing agreement, which would be open ended but terminable upon 48 hour notice.

Prior to the March 27 meeting, the Employer's representative indicated to the Union that he had no authority to improve the Employer's last offer. The Union therefore concluded that the March 27 negotiation would be a sham. At the March 27 meeting, the Employer indicated that the Employer had no new offer and was resting on its outstanding last offer. The Union representative also had no new proposals, did not even have his bargaining committee with him, and gave the Employer another proposed extension agreement. The Employer indicated that it believed the parties were at an impasse. It would leave its offer open until April 1 to give the Union another chance at ratification and would implement the offer on April 3 if the employees did not ratify it. The Union asserted that the parties were not at impasse, and requested continued bargaining. The Employer declined, but indicated that he would listen if the Union had anything new to propose.

On March 29, the Union e-mailed the Employer a new set of proposals. The Union proposed an actual reduction of wages for the first year of about 3% for most current employees, an increase in the second year, and wage rates $2 below the proposed rates for new hires. The proposals also accepted the Employer's proposed freeze of the defined pension benefit plan. For the existing 401(K) plan, the Union proposed an annual Employer contribution of 6.6% for current employees, and 3% for new hires. The Union continued to propose health insurance through the current Aetna plan. On short term disability insurance, the Union counter proposed 75% of employee base pay to the Employer's 50%. On long term disability insurance, the Union proposed 65% to the Employer's 60%.

On March 31 the Employer rejected the Union's offer in its entirety, noting that the Union's concessions on wages still left the parties $5 to $8 apart for all but the skilled maintenance classifications,[4] that the Union was

[4] The actual disparity was closer to $4 to $7, according to the Employer's position statement.

still proposing health insurance through Aetna, and that the Union's agreement to the pension freeze was undermined by its proposal for a 6.6% Employer contribution to the 401(K) plan, well above the Employer's last offer of a lump sum contribution of 1.75 %. The Employer announced it would leave its last offer open, now until April 2, to allow the Union to hold a ratification vote.

On April 2, the Union e-mailed the Employer another set of proposals. On wages, the Union now proposed a wage reduction of about 6% for the first year, with higher rates for the second year. Regarding the 401K plan, the Union reduced its proposed employer contribution from 6.5 & to 5.6% for current employees, and to 2% for new employees. For health insurance, the Union proposed the existing Aetna, but only for current employees. On April 3, the Union sought another contract extension. However, the Employer gave the Union a letter indicating that the Employer believed that the parties were at impasse and that the Employer was implementing its last offer effective immediately.

Although other issues were also in dispute, as of April 3, the parties positions on the critical economic issues were as follows:

a) *Wages* - the Employer sought a reduction of 30% or $4-$7; the Union offered a reduction of approximately 6% in the first year, a 3% increase in the second year, and a $2 reduction in the wage rates for new employees;
b) *Pension and 401K* - the Employer proposed to freeze contributions to the defined benefit pension plan and to substitute a lump sum contribution of 1.75% of annual compensation to the employee's 401K account; the Union accepted the freeze but proposed an offsetting Employer 401K annual contribution of 5.6% for incumbent employees, and 2% for new employees;
c) *Healthcare* - the Employer proposed its corporate health care plan with United HealthCare, which entailed a 20% employee premium contribution and higher co-pays for treatment and prescriptions; the Union proposed the continuation of Aetna with the existing level of health care and employee co-pays;
d) *Life Insurance* - the Union agreed to the Employer's proposed cuts in life insurance benefits;
e) *Short Term Disability* - the Employer proposed a benefit of 50% of the employee's base pay; the Union proposed 75%;
f) *Long Term Disability* - the Employer proposed a benefit of 60% of the employee's base pay up to $1,500; the Union proposed 65% up to $2,000.

ACTION

We conclude that the parties had not reached impasse on April 3 and that the Employer thus violated Section 8 (a) (5) when it unilaterally implemented its last contract offer.

An impasse will only be found where both parties are at the end of their rope and believe that further bargaining would be futile.[5] Flexibility and a willingness to compromise shown by one party on a significant issue will preclude the finding of an impasse even if a wide gap still exists because there is reason to believe there will be future movement.[6] The Board does not lightly infer the existence of an impasse, and places the burden of proof on the party asserting an impasse.[7] The existence of an impasse is determined by examining five factors: the bargaining history of the parties, the length of the negotiations, the importance of the issues to which there is a disagreement, the good faith of the parties, and the contemporaneous understanding of the parties as to the state of negotiations.[8]

A. Bargaining History and Length of the Negotiations

Where the parties have not had a long standing bargaining relationship their bargaining history does not favor a finding of impasse. In Old Man's Home of Philadelphia, the Board noted that the parties were negotiating an initial agreement an thus "the bargaining history does not favor a finding of impasse."[9] The Board noted that its policy is to

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[5] Grinnell Fire Protection Systems Co., 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001).

[6] Newcor Bay City Division, 345 NLRB No. 104, slip op. at 10 (2005); Old Man's Home of Philadelphia, 265 NLRB 1632, 1634 (1982), enfd. sub nom. Saunders House v. NLRB, 719 F.2d 683 (3rd Cir. 1983), cert. denied sub nom. Nat. Union of Hosp. and Health Care Employees v. Saunders House, 466 U.S. 958 (1984).

[7] Naperville Ready Mix Inc., 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir. 2001); Serramonte Oldsmobile, 318 NLRB 80, 97 (1995), enfd. In rel. part 86 F.3d 227 (D.C. Cir. 1996).

[8] Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

encourage the fullest opportunity for parties to effect agreement in initial contract negotiations.[10] In the instant case, the Union has represented the production and maintenance employees at the employer's Morrisville, Pennsylvania plant since 1983. Thus, the parties have a well-established bargaining history which weighs in favor of finding impasse.

Concerning the length of the negotiations, the Board has indicated that the more meetings there have been between the parties, the more likely will an impasse be found.[11] However, the Board has declined to find an impasse despite numerous meetings where only a few have concerned the critical issues of the negotiations.[12] Here, the Employer did not present a full economic proposal including wages until February 8, the tenth of the parties' seventeen meetings. The parties then focused on noncritical noneconomic issues until the Union presented its economic proposal at the thirteenth session on February 16. Thus, at the conclusion of all the face to face meetings on March 27, the parties had met and fully discussed economics only a total of five times out of seventeen meetings. This few number of meetings on the critical issues weighs strongly against a finding of impasse.

B. Importance of the Issues and Good Faith of the Parties

The Board recognizes the difference between "impasse on a single issue that would not ordinarily suspend the duty to bargain on the other issues and the situation in which impasse on a single or critical issue creates a complete breakdown in the entire negotiations."[13] In the instant

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[9] Cf. Old Man's Home of Philadelphia, 265 NLRB at 1634.

[10] Id.

[11] The Baytown Sun, 255 NLRB 154, 157 (1981).

[12] See Beverly Farm Foundation Inc., 323 NLRB at 793 (no impasse; parties held 19 meetings, but only 3 were spent on economic issues); Sacramento Union, 291 NLRB at 554 (no impasse; parties held 17 meetings, but only 6 were spent on the important issue of guild security); Newcor Bay City Division, 345 NLRB No. 104 slip op. at 11(citations omitted) (parties met for 1 month and had conducted 7 meetings before negotiations were cut short by the employer who declared impasse after the passage of an "artificial, relatively short deadline).

[13] Sacramento Union, 291 NLRB 552, 554 (1988), enfd. 888 F.2d 1394 (9th Cir. 1989).

case, the disagreement occurred over wages, pension and health benefits, all of which were critical issues in the negotiations.

Further, there is no claim that the bargaining was not in good faith.[14] Both these factors thus weigh in favor of finding impasse.

C. Contemporaneous Understanding of the Parties

The Board will not find an impasse unless both parties are at the end of their rope, unwilling to compromise.[15] On April 3, the day the employer implemented its final offer, both parties clearly did not believe that further negotiations would be futile. While the Employer might have been at the end of his rope, the union was still exhibiting signs that continued bargaining would produce more movement.

At the final face to face meeting on March 27, the Union explicitly stated that the parties were not at impasse, offered the Employer another contract extension agreement, and requested continued bargaining. After the Employer's declaration of impasse, the Union sent two proposals on economic issues to the Employer, first on March 29 and then on April 2, the day before the employer implemented its final offer.[16] On April 3, the Union sent another offer of contract extension, further exhibiting the Union's belief that the parties were not at an impasse and its willingness to further compromise.

An employer's impatience and frustration with the union's slow pace of bargaining is insufficient to establish an impasse.[17] The Board has declined to find an impasse

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[14] The Union filed a related surface bargaining charge alleging, among other things, Employer delaying tactics. The Region found no merit to that charge.

[15] Grinnell Fire Protection Systems Co., 328 NLRB at 585.

[16] See Royal Motor Sales, 329 NLRB 760, 762 (1999), enfd. sub nom. Anderson Enterprises v. NLRB, 2 Fed. Appx. 1 (D.C. Cir. 2001) (no valid impasse where union made proposal only two days earlier); Towne Plaza Hotel, 258 NLRB 69, 78 (1981) (employer's declaration of impasse invalid where union significantly reduced its wage proposal two weeks earlier); Beverly Farm Foundation, 323 NLRB 787 (1997), enfd. 144 F.3d 1048 (7th Cir. 1998) (No impasse where union advised employer that it had more proposals to make).

simply because one party is unwilling to settle on the other's unchanged terms.[18] Instead it has held that even where there is a wide gap between the parties, an impasse will not be found if one party exhibits flexibility on a significant issue giving reason to believe that it is not at the end of its rope and there will be future movement.[19]

In Newcor Bay City Division, the Union made significant movement toward the Employer's position at the parties' fifth meeting.[20] The Employer nevertheless declared an impasse at the expiration of its own unilaterally set artificial deadline. The ALJ, adopted by the Board, noted that the "Union's concessions demonstrated a willingness to make sacrifices in the interest of arriving at a new agreement, and were presented only two meetings before…Respondent declared impasse."[21] Given the clear flexibility of the Union on significant issues, the Board agreed that, despite the wide gap that remained, the Employer was required to recognize that further negotiating sessions might produce more movement.[22]

In Old Man's House of Philadelphia, the Board found no impasse because the parties had not long discussed the critical issues, and the union's concessions, especially made prior to the employer's announcement of impasse, indicated that the union did not believe that the parties were at impasse.[23] The Board stated that one party may not declare impasse simply because the other party's concessions "have not been sufficiently generous. The Union's concessions with regard to wages and union security were significant enough to reasonably suggest that further

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[17] See Newcor Bay City Division, 345 NLRB No. 104, slip op. at 11 (2005).

[18] Grinnell Fire Protection Systems Co., supra.

[19] Newcor Bay City Division, 345 NLRB No. 104, slip op. at 10 (2005) Newcor Bay City Division, supra at 5 (The Union initially proposed a wage increase but later proposed a 5% wage cut versus the Employer's 20% cut).

[21] Id. At 10.

[22] Id.

[23] Old Man's House of Philadelphia, supra at 1634 (The Union initially proposed a $40 per week wage increase plus a COLA that it later modified to an 8% wage increase over a three year contract versus the Employer's proposed 6% pay raise and an across the board wage increase of 6% in lieu of a COLA).

concessions might be forthcoming."[24] The Third Circuit court agreed with the Board, stating: "A concession by one party on a significant issue in dispute precludes the finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason be believe that further bargaining might produce additional movement."[25]

Here, as in Newcor Bay City Division and Old Man's House of Philadelphia, the Union continued to offer concessions on the critical issues up to a few days before the Employer implemented its final offer. It e-mailed proposals to the employer on March 29 and April 2 that contained small, yet significant, concessions on wages and pension benefits. Although a large gap remained between the parties, the Union continued to be flexible and offered to compromise, giving no indication that it was "at the end of its rope." Thus this factor weighs strongly against the finding of an impasse.

The Employer argues that continued bargaining would have been futile because, despite the Union's late concessions, the parties still remained very far apart. In support of this argument, the Employer cites Taft Broadcasting,[26] Rochester Telephone Corp.,[27] and Hayward Dodge.[28] However, unlike the case at hand, the late concessions made in those cases were either regressive or showed no progress, leaving no hope for future movement.

In Taft Broadcasting, the Board found that after 23 bargaining sessions progress was imperceptible on the critical issues and that each party believed that they were further apart than when they had begun negotiations.[29] Similarly, in Rochester Telephone Corp. the ALJ determined that the union's proposals at the last bargaining session prior to implementation were regressive, leaving the employer in a worse position relative to the union's previous offer.[30] In Hayward Dodge, the employer indicated

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[24] Id.

[25] Saunders House v. NLRB, 719 F.2d at 688.

[26] 163 NLRB 475 (1967).

[27] 333 NLRB 30 (2001).

[28] 292 NLRB 434 (1989).

[29] Taft Broadcasting, 163 NLRB at 478.

that it believed the parties were at an impasse and asked the union to make a significant concession on the critical issues dividing the parties. The union simply reduced its vacation demand. The critical issues had involved the current level of wages and benefits; vacation was not an issue in much dispute.[31] Thus the ALJ found that this concession did not prevent the finding of an impasse.

In the instant case, the Union's bargaining proposals were not regressive and did not offer meaningless concessions on non-critical issues. To the contrary, the Union's latest offers contained meaningful concessions on the critical issues of wages and pension benefits. The Employer's cited cases thus do not support finding an impasse here where the union has shown flexibility giving reason to believe that there will be further movement.

We conclude that this case falls within the purview of the Board in Newcor Bay City Division, and the Board and the Third Circuit in Old Man's House of Philadelphia. Even though a large gap still remained between the parties in this case, the concessions made by the Union on March 29 and April 2 were significant enough to preclude an impasse because they exhibited the union's flexibility and willingness to compromise, and gave reason to believe that continued bargaining might produce additional movement. Unlike in the cases cited by the Employer, the Union's concessions were not regressive; they did not leave the parties in the same or worse position than before. These concessions show that both parties were not at the end of their ropes when the Employer unilaterally implemented its last offer after having relatively few bargaining sessions on economics and the passage of an arbitrary deadline.

In sum, the employer violated Section 8 (a) (5) when it declared impasse and implemented its final offer.

B.J.K.

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[30] Rochester Telephone Corp., 333 NLRB at 64.

[31] Hayward Dodge, 292 NLRB at 469-70.