

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

# Advice Memorandum

DATE: June 24, 2008

TO : Wayne Gold, Regional Director  
Region 5

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

SUBJECT: Association of UnaDyn Field Support           554-8425  
Technicians (Universal Dynamics)  
Cases 5-CB-10283, 10361, 10382

These Section 8(b)(3) cases were submitted for advice on whether the Union is privileged to refuse to bargain with the Employer where the Union president was unlawfully terminated, denied Section 10(j) reinstatement, and claims that he is unavailable for bargaining because of his new job. We conclude that the Union was not privileged in its refusal to bargain because the Employer has remedied its prior Section 8(a)(5) violations and there is no showing that bargaining would have been futile.<sup>1</sup>

### **FACTS**

On September 7, 2006, the Association of UnaDyn Field Support Technicians (the Union) was certified as the bargaining representative of a three-person unit of technicians at Universal Dynamics (the Employer) at its Woodbridge, Virginia facility.

Less than two weeks after certification, the Employer fired Union president Darrin Mantle. The Union filed charges alleging that this discharge was discriminatory and that the Employer committed several other unfair labor practices. The Region issued complaint alleging several Section 8(a)(3) and (5) violations, including the discharge.

In May 2007, an administrative law judge found that the Employer committed several unfair labor practices, including discriminatorily terminating Mantle; requiring two employees to report unnecessarily to a different facility in violation of Section 8(a)(3) and (5); and failing to comply with information requests. The judge granted the Union a three-month extension of the certification year, pursuant to Mar-Jac Poultry Co.,<sup>2</sup>

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<sup>1</sup> The ILB will contact the Region concerning the impact of this case on the outstanding Section 10(j) order.

<sup>2</sup> 136 NLRB 785 (1962).

because the Employer has refused to provide information, undermined the Union by unlawfully discharging the Union president, and engaged in retaliatory acts against virtually every other unit member.<sup>3</sup>

Meanwhile, the Region sought a Section 10(j) injunction which, on July 13, 2007, a federal judge granted in part. The judge ordered the Employer to recognize and bargain with the Union, to provide requested information, and to remedy other unfair labor practices, but denied the request for Mantles' reinstatement. The Employer has complied with the Section 10(j) order.

Throughout the summer of 2007, the parties communicated about dates and locations for bargaining. They ultimately agreed to meet with a mediator in Washington, D.C. and in Kansas City, Missouri, on various dates in September and October 2007.

In September 2007, Mantle obtained employment in Missouri, requiring him to work night shifts. Because of his new job, Mantle canceled the bargaining sessions until further notice.

Beginning in January 2008, the Employer began asking Mantle for bargaining dates and identified pressing issues that the Employer needed to discuss with the Union. The Employer offered to bargain in either D.C. or Missouri and to bargain via video-conference (reversing the Employer's prior opposition to video-conference bargaining). The Union has not responded. The Employer filed these Section 8(b)(3) charges against the Union for refusing to meet and bargain after several Employer requests.

#### **ACTION**

We conclude that, absent settlement, complaint should issue alleging that the Union violated Section 8(b)(3) by refusing to meet and bargain with the Employer because the Employer has remedied the Section 8(a)(5) violations and no evidence indicates that bargaining would be futile.

Section 8(b)(3) requires that a union serving as the exclusive representative of employees bargain collectively with their employer. We found no Section 8(b)(3) cases addressing whether a union is privileged to refuse to

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<sup>3</sup> The Employer filed exceptions and the case is pending before the Board.

bargain in the face of unremedied unfair labor practices.<sup>4</sup> The Board, however, has sanctioned a union's refusal to bargain in Section 8(a)(5) cases, and therefore rejected an employer's defense based on such a refusal, where the evidence indicates that bargaining would be futile. For instance, in Bay Area Sealers, the Board found that an employer's prolonged, unremedied repudiation of a collective-bargaining agreement justified the union ignoring the employer's offer to bargain because bargaining would have been futile.<sup>5</sup> Similarly, in Little Rock Downtowner, the Board found a employer's numerous, unremedied unilateral changes struck at the heart of the union's ability to effectively represent employees and justified the union's refusal to bargain because further attempts to bargain would be futile.<sup>6</sup>

These cases do not privilege the Union's refusal to bargain here because the Employer has remedied the Section 8(a)(5) violations. Further, there is no showing that unremedied bargaining violations have so poisoned the collective-bargaining process or undermined the Union's status as to render further bargaining attempts futile.

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<sup>4</sup> But see Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union, Local 2-109 (Durez Corp.), 3-CB-8394, Advice Memorandum dated October 14, 2005 (finding union violated Section 8(b)(3), despite employer's refusal to implement certain agreed-upon contractual terms, because employer's actions had not undermined union's status or rendered bargaining futile).

<sup>5</sup> Bay Area Sealers, 251 NLRB 89, 90 fn. 5 (1980), enfd. in rel. part sub nom. Rayner v. NLRB, 665 F.2d 970 (9th Cir. 1982). 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>6</sup> Little Rock Downtowner, Inc., 168 NLRB 107, 108 (1967), enfd. 414 F.2d 1084 (8th Cir. 1969). 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).

Thus, Mantle's lack of reinstatement does not render collective bargaining futile, where the Employer is willing to bargain with him and where a district court has ordered the Employer to bargain, while simultaneously denying Mantle reinstatement.

Further, while Mantle's current job may render it difficult for him to attend bargaining sessions, the fact that the negotiator is busy affords no defense to a Section 8(b)(3) charge.<sup>7</sup> Indeed, despite the Employer's willingness to bargain via tele-conference and to travel to Missouri, Mantle maintains that he cannot find any time to bargain indefinitely. Even if it were true, the bargaining unit contains at least two other members who apparently could negotiate. Accordingly, Mantle's lack of reinstatement does not privilege the Union's refusal to bargain.

For the foregoing reasons, the Region should issue a Section 8(b)(3) complaint, absent settlement.

B.J.K.

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<sup>7</sup> See Fruehauf Trailer Services, 335 NLRB 393, 393 (2001) (noting that Board has consistently rejected "busy negotiator" defense).