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

Advice Memorandum

DATE: January 24, 2005

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

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

SUBJECT: MRC Carpenters (Allied Maintenance Technologies)
Case 4-CB-9267 530-6067-2020-0000
530-6067-2060-2700
554-1467-3500-0000

The Region submitted this case for advice on whether the Union's conduct during negotiations for a successor collective-bargaining agreement amounted to unlawful insistence that the Employer accept the terms of a multi-employer contract.

We conclude the Union failed to bargain in good faith in violation of Section 8(b)(3) of the Act by unlawfully insisting that the Employer accept the terms of a multi-employer contract.

FACTS

Allied Maintenance (the Employer) is a construction contractor that performs new construction, renovation and demolition work in the Bethlehem, Pennsylvania area. The Employer has a collective bargaining history with the Metropolitan Regional Council of Carpenters and Carpenters Local 600 (jointly referred to as the Union).[1] From at least 1999, the Union was the Section 8(f) representative of the Employer's carpenters. The Employer was also a member of the Lehigh Valley Contactors Association (LVCA), a multi-employer group, since at least 1999. In June 1999, the Employer signed a one-page agreement agreeing to be bound by the terms of the then-current collective bargaining agreement between the Union and the LVCA and any successor agreements. The Union and LVCA subsequently negotiated a successor agreement, which was effective from July 1, 2001 through June 30, 2004, and the Employer complied with the terms of that agreement.

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[1] Carpenters Local 600 is affiliated with the Metropolitan Regional Council.

On March 25, 2004,[2] the Employer's Vice President, Jeff Smith, timely sent a letter to the LVCA and the Union terminating its relationships with both entities. Smith stated that the Employer would honor the 2001-2004 agreement until it expired on June 30. In April, the Union filed a representation petition and, after an election was held without the Employer's participation, the Union was certified as the 9(a) representative in June.

Between the Employer's March 25 letter of contract termination and the June 30 expiration, Smith informed the Union's Business Agent, Michael Galio, that there were a number of changes the Employer wanted in a new contract. These included revisions to language about the steward being the last man on the job, election day language, and the addition of management rights and most favored nations clauses. According to the Employer, Galio responded, We'll see, we'll see.[3] In mid-June, Smith asked the Union for a copy of the new LVCA agreement, but the Union did not immediately provide one.

On July 1, the parties met. Galio asked Smith to sign two documents in order to keep the men working. The first document was a two-page memorandum of agreement that would extend the parties' present collective-bargaining agreement through June 30, 2008, with several changes including yearly wage increases. The second document was only one page and would bind the Employer to the Union's newly ratified agreement with the LVCA. The document was similar to a form attached to the printed copies of the 2001-2004 LVCA agreements.

Upon receiving these documents, Smith again requested a copy of the entire LVCA agreement. Galio refused to give Smith a copy, but stressed that the Union needed an agreement from the Employer in a couple of days. Later that same day, Smith faxed Galio advising the Union that the Employer was unable to respond to … the two-page memorandum without the entire underlying agreement, and that it would like to continue working in good faith until it reviewed the agreement and determined the necessary steps … to come to a working agreement for both sides. Smith also advised the Union that he would be on vacation until July 13.

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[2] All dates hereafter are 2004, unless otherwise noted.

[3] [*FOIA Exemptions* 6, 7(C), and 7(D)

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The following day, Union President Edward Coryell left a message for Smith stating that there was going to be a big problem with Agere. Agere is the Employer's largest customer and the Employer had several carpenters working on an Agere jobsite. When Smith returned Coryell's call, Coryell told him, I need you to sign this agreement. Smith responded that he was going on vacation, needed the full LVCA agreement, and would not sign the memorandum of agreement without knowing all the terms in the complete agreement. Coryell said, I need something stronger than what you told Galio, or I will have to pull the men off the job. Coryell told Smith that he had to sign an agreement or write a letter saying he would sign. Smith refused, but agreed to review the LVCA agreement after he returned from vacation. Coryell agreed to wait.

While Smith was on vacation, the Union delivered a complete copy of the LVCA agreement. Shortly after Smith's return from vacation on July 13, Galio called and stated he needed the contract signed. Smith stated that he needed two weeks to examine the LVCA agreement and present a counter proposal. On July 30, the Employer sent the Union a 25-page counter proposal. There were a number of differences in language between the Employer's proposal and the LVCA agreement, and the Employer added a management rights clause, a most favored nations clause, and a no strike clause.

On August 3, the Employer's foreman on the Agere site informed Smith that the carpenters had been told by the Union not to work the following day. On the morning of August 4, Smith learned that Galio was at the Agere job site speaking to the Employer's carpenters, and Smith met him there. After a short conversation regarding the fact that the Employer had not yet signed the memorandum of agreement, Smith and Galio agreed to meet later that day at a local restaurant. No carpenters worked on August 4, but all other trades worked at the site.

At their meeting, Smith and Galio reviewed the LVCA contract vis-à-vis the Employer's counter proposal and discussed where the proposals differed. According to the Employer, Galio made statements such as, It has to be this way, because we can't live with it any other way, or It has to be my way or no way, when discussing the Employer's proposed language changes. The Employer also asserts that when Smith asked Galio why they could not have mutually agreeable language, Galio responded, This is the way it is, we gotta have this language in our contract. When the parties discussed the management rights, most favored nation, and no strike clauses proposed by the Employer,

Galio said the Union had to have its language and could not live with the Employer's proposals. By the end of the meeting, the Employer agreed to include much of the Union's original language it had originally proposed to delete but retained its three new substantive proposals.

Following the August 4 meeting, Galio called Smith approximately three times to ask if the proposal was complete. During these conversations Galio stated that the Union wasn't going to take this much longer, and if the Employer did not get its proposal to the Union quickly, Galio would pull the men.[4] On August 26, the Employer sent the Union a second contract proposal incorporating the language changes to which it had agreed on August 4.

At a brief meeting on September 9 or 10 Galio told Smith that he had read only three pages of the Employer's August 26 proposal, which he referred to as bullshit, and that the Employer had changed everything and rewritten the agreement. Smith responded that he had not rewritten the contract, but simplified it, making it easier to read.[5] Galio then stated that the Union had to have its language in the contract and could not have a separate agreement without its language included. Galio then handed Smith a two-page memorandum of agreement and said, You are not going to rewrite our entire agreement, you are going to sign our agreement, and that is how it's going to be. He said if the agreement was not signed by the end of the day he would pull the men, and they would not return to work until the Employer signed the agreement.[6] Smith signed the agreement later in the day and faxed it to Galio.

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[4] The Employer's carpenters returned to work on August 5 and, in fact, no more work stoppages occurred.

[5] When comparing the language of the Employer's first and second proposals, we noted the reintroduction of the Union's language that the Employer originally proposed to delete but then agreed to retain on August 4. However, we could not discern any changes -- either extreme language revisions alleged by the Union or the simplifications claimed by the Employer.

[6] The two-page memorandum of agreement was essentially the same agreement Galio had given Smith on July 1, except that it was modified to provide that all references to LCVA would be substituted with the Employer's name.

ACTION

We conclude the Union failed to bargain in good faith, in violation of 8(b)(3), by unlawfully insisting that the Employer accept the terms of a multi-employer contract.

Section 8(b)(3) of the Act provides that a Union acts unlawfully when it refuses to collectively bargain with the employer of the employees it represents. Section 8(b)(3) must be read in conjunction with Section 8(d), which expressly defines the bargaining obligation to include a requirement to meet and confer in good faith. "As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes 'that have been condemned in management' by the previously enacted Section 8(a)(5)."[7]

It is well settled that a "union may adopt a uniform wage policy and seek vigorously to implement" it among several employers in an area, and otherwise legitimately can strive "to obtain uniformity of labor standards."[8] In so doing, however, it is not exempted from the obligation to bargain in good faith.[9] The requisite good faith has been defined variously as a "desire to reach ultimate agreement, to enter into a collective-bargaining contract;"[10] "a willingness to negotiate toward the possibility of effecting compromise;"[11] a "willingness among the parties to discuss freely and fully their respective claims and demands and, and when these are opposed, to justify them on reason;"[12] and "the serious intent to adjust

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[7] Food & Commercial Workers Local 1439 (Layman's Market), 268 NLRB 780, 784 (1984), quoting NLRB v. Insurance Agents, 361 U.S. 477, 487 (1960).

[8] United Mine Workers of America v. Pennington, 381 U.S. 657, 665-666 (1965).

[9] See Graphic Arts International Union, Local 280, (Samuel L. Holmes and James H. Barry Co.), 235 NLRB 1084, 1094-96 (1978), enforced 596 F.2d 904 (9th Cir. 1979).

[10] NLRB v. Insurance Agents, 361 U.S. at 485 (1960).

[11] Associated General Contractor of America, Evansville Chapter, Inc. v. NLRB, 465 F.2d 327, 335 (7th Cir. 1972), cert. denied, 409 U.S. 1108 (1973).

[12] NLRB v. George P. Pilling & Sons Co., 119 F.2d 32, 37 (3rd Cir. 1941).

differences and to reach an acceptable common ground."[13] Good faith is "inconsistent with a predetermined resolve not to budge from an initial position;"[14] and is not satisfied by the "mere willingness of one party in negotiations to enter into a contract of his own composition."[15]

In Endo Laboratories, Inc., the Board, overruling the ALJ, found that the employer failed to bargain in good faith in violation of 8(a)(5) by engaging in "take it or leave it" negotiations.[16] The Board found that the employer's bad faith was demonstrated not by the substance of its proposal, but by its presentation. In particular, the Board emphasized that the employer indicated that "it was not at liberty to make changes in the package as presented; that the package was [the employer's] package; and that there could be no discussion concerning its contents."[17]

The Union's approach here is strikingly similar to the respondent's in Endo Laboratories. From the outset, the Union presented its proposal as an entire, indivisible package from which it would not depart, even as to nonsubstantive language changes. From the initial presentation of the its proposal on July 1, the Union indicated it had to have the entire agreement signed in order to "keep the [employer's] men working." On August 4, the day of the Union's one-day work stoppage and the parties' first negotiation meeting, the Employer presented its counterproposal, discussed how it differed from the Union's, but ultimately agreed to reinstate much of the language it had originally deleted from the Union's proposal. The Union made no substantive or even cosmetic concessions, and its response to any proposed amendment to its initial proposal was that it had to be the Union's version because it could not live with anything else. The Union, like the respondent in Endo Laboratories, demonstrated a take it or leave it approach in the presentation of its proposal by repeatedly making

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[13] U. S. Gypsum Co., 200 NLRB 1098, 1101 (1972), enf. denied 484 F.2d 108 (8th Cir. 1973).

[14] NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (separate opinion of Frankfurter, J.).

[15] U.S. Gypsum Co., supra, 200 NLRB at 1101.

[16] Endo Laboratories, Inc., 239 NLRB 1074, 1076 (1978).

[17] Id. at 1075.

statements to the effect, "That is the way it is, we gotta have this language in our contract," and "it has to be my way or no way."

Further, as in Endo Laboratories, the Union here clearly was not interested in reaching any agreement other than its own. When the Employer asked if there was room for compromise and mutually agreeable language, the Union stated, "This is the way it is, we gotta have this language in our contract." At the parties' last meeting, with the Union having threatened a second, prolonged strike, the Union stated, "You are going to sign our agreement, and that is how it's going to be." The Union's own words demonstrate that it did not enter into negotiations with an open mind and a willingness to negotiate toward the possibility of effecting compromise.[18] Instead, the Union repeatedly demonstrated that it was willing to take nothing less from the Employer than complete acceptance of the LVCA agreement.

This case is distinguishable from Teamsters Local 705 (Kankakee-Iroquois),[19] where the Board found no bad faith bargaining despite several statements by the union indicating that the employer-association had to agree to the terms of another multi-employer contract or suffer the effects of a strike. The Board found that the union's statements of intransigence should be attributed to reflect "hard but real bargaining …," emphasizing that the Union's behavior, including a mealtime pay concession from the other multi-employer contract, suggested an "open and accessible position." In this respect, the Board relied on the fact that the union and employer met four times in a 2-month period, with each meeting averaging over 2 hours in duration. At each session, the employer was given an opportunity to present its proposals and the union's representatives listened and rationally discussed them, giving reasons for rejecting those proposals and justifying its bargaining posture.[20]

Here, the parties met only twice for negotiations in a period of a little over two months. The first impromptu meeting was on August 4, after the Employer submitted its proposals and the Union held its one-day strike. During

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[18] Associated General Contractor of America, Evansville Chapter, Inc. v. NLRB, 465 F.2d at 335.

[19] 274 NLRB 1176 (1985), review denied 825 F.2d 1091 (7th Cir. 1986).

[20] 274 NLRB at 1176-1177.

this meeting, the Union refused to consider any substantive changes proposed by the Employer and demanded complete acceptance of the LVCA agreement. The second meeting on September 9 or 10 lasted only briefly, with the Union stating that the Employer's proposals were "bullshit" and that the men would be pulled by the end of the day if the proposed LVCA agreement were not signed. Unlike in Kankakee, the Union never listened "rationally" to or engaged in any meaningful discussion of the Employer's proposals, but only insisted that the Employer accept the LVCA agreement in its totality. Even when the Union finally acceded to the Employer's request for a copy of the LVCA agreement and time to present a counterproposal, the Union maintained the position that it would accept nothing other than the prompt acceptance of the LVCA language. There is nothing in the Union's behavior here that suggests an open and accessible position.

Based on the foregoing, we conclude the Union failed to bargain in good faith, in violation of 8(b)(3), by unlawfully insisting that the Employer accept the terms of a multi-employer contract. Accordingly, complaint should issue, absent settlement.[21]

B.J.K.

[21] [*FOIA Exemptions* 2 and 5

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