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

Advice Memorandum

DATE: March 28, 1996

TO : F. Rozier Sharp, Regional Director
Region 17

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

SUBJECT: Baker Supermarkets
Case 17-CA-18398

512-5018-6700
530-4080-5018
530-4080-5084
530-6033-7070-5000
530-6033-6000

This Section 8(a)(1) and (5) case was submitted for advice as to whether the Employer unlawfully (1) assisted employees in trying to decertify the Union by allowing signature solicitation during work time, and (2) withdrew an already implemented final offer to prevent the Union from reaching agreement prior to employees filing an RD petition.

FACTS

The Employer's most recent contract with UFCW Local 271 (Union) covering a meat and deli employee unit at 15 stores was effective through June 9, 1995. The contract permitted Union officials to speak with employees during work time in work areas so long as they did not interfere with business. The Union has exercised that right over the past few years. The Employer has no written rule prohibiting work place solicitation by employees or outside organizations, and has allowed fund raising events in designated store areas. Employees have been permitted to solicit or engage in fund raising during work time in work areas in their home store as well as other stores.

From May 5 to June 14, 1995, the parties met six times to bargain for a new contract.[1] The Employer insisted on bargaining from its proposals and refused to consider Union proposals. On June 13, the Employer gave the Union a list

[1] The Region investigated a June 16 charge filed by the Union and found unlawful Employer interrogations and threats. In September, the Region approved a settlement agreement signed by the Employer.

of 25 proposals,[2] including language reflecting current wages and benefits, a one-year contract term, and a "revocable at will" dues checkoff clause. On June 14, after discussing that offer, the Employer declared its June 13 package to be its "last, best, and final offer" and the parties acknowledged reaching impasse. The Employer informed the Union that if its proposal was not accepted by the membership, it would be unilaterally implemented.

On June 20, the Union informed the Employer that the members had voted to reject the proposal but requested that the Employer "resume bargaining immediately." The Employer responded that it saw no purpose in returning to the table except to discuss questions regarding the final offer and that, since the contract had expired, dues checkoff and grievance/arbitration were no longer effective and, except for dues checkoff and contract term, it was implementing its June 13 proposal.

A strike scheduled for the end of June never commenced due to lack of membership participation, and picketing efforts to protest the alleged ULPs (see footnote 1, above) ended around October for the same reason. By letter dated November 16 to unit employees, the Union stated, in part:

> due to the difficulty in obtaining hired pickets and the lack of participation, we have been unsuccessful in getting [the Employer] to return to the bargaining table.... We cannot accept what [the Employer] has implemented. The duration of [the] implemented offer has seven (7) months remaining. During this time... we will request [the Employer] to negotiate a fair and workable agreement.

Around early October, employee Cheney told the Employer he intended to work behind the picket line and asked who he might speak to on behalf of other employees about the Union situation. The Employer apparently told Cheney that he could not engage in such activities on company time and referred him to the Region, which relayed procedures for filing a decertification petition. Cheney began soliciting signatures in December on his days off.

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[2] About 13 of these had been tentatively agreed upon.

Around mid-December, employee Jones began assisting Cheney and solicited signatures at about 10 - 13 stores, including some employees on duty at their work stations. Jones showed store managers a copy of a blank showing of interest petition and received permission to solicit, but was told that management would provide no assistance. Neither Cheney nor Jones received management offers of assistance or process of benefits in furtherance of their efforts.

By letter dated January 3, the Employer informed the Union that "in view of your letter dated November 16... and recent events, there appears to be serious doubt as to whether you represent a majority." The letter stated that the June 14 final offer is formally withdrawn and that "this notice should not be construed as a withdrawal of recognition; however we will protect the rights of our [employees] and act in accordance with their wishes and the law." On January 8, Cheney filed an RD petition (supported by about 94-100 signatures), but further processing has been blocked by this charge filed on January 9.

ACTION

We conclude that the Employer violated Section 8(a)(5) by withdrawing its "final" proposal because it essentially refused to bargain with the Union thereafter. We further conclude that the Employer did not unlawfully assist employees in their efforts to decertify the Union.

The Board has long held that withdrawal of a contract offer in the face of actual or even imminent acceptance by a union is violative of Section 8(a)(5).[3] However, although either party may withdraw or change proposals prior to acceptance, the Board evaluates the totality of the parties' bargaining and the good faith of a party withdrawing offers prior to acceptance in determining whether a withdrawal is lawful.[4] For example, in Pennex

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[3] See Mead Corp., 256 NLRB 686 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983).

[4] See Loggins Meat Co., 206 NLRB 303 (1972) (although parties had reached agreement by membership ratification prior to notice that employer senior partner had not

Aluminum Corp., 271 NLRB 1205, 1206 (1984), the Board found no 8(a)(5) violation where the employer withdrew those elements of its offer not tentatively agreed-upon after holding the proposal open for over six weeks, and specifically noted a lack of evidence supporting the General Counsel's allegation that the withdrawal was made solely because no strike had occurred during that time. Instead, evidence indicated the employer had reason to believe that the absence of a strike had swung the economic balance in its favor. Even if the asserted connection existed, the Board found that the withdrawal was not made in the context of bad faith bargaining where the offer had not been accepted for six weeks, only parts of rather than the entire offer were withdrawn, and the parties continued to bargain in good faith immediately after withdrawal of the offer.

In American Protective Services, 319 NLRB No. 115, slip op. at 4 (December 11, 1995), the Board found that the employer violated Section 8(a)(5) by repudiating an agreed-upon ratification procedure by which the union would accept or reject the employer's offer, and further violated Section 8(a)(5) by withdrawing the offer in the context of that bad faith bargaining. There, the employer unlawfully advised a mediator not to count ratification ballots which had already been cast and thereby unilaterally precluded a ratification determination, "thus ensuring that the Union would be unable to communicate the possible acceptance of its final offer...." Id. at 3.[5]

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considered, and withdrew, two contract items, withdrawal was lawful since both parties reserved right to alter proposals at any time and senior partner's entire course of conduct did not reveal intent to delay and frustrate bargaining); Olin Corp., 248 NLRB 1137, 1141 (1980) (withdrawal of union security clause proposal one day before scheduled ratification vote not violative of Section 8(a)(5) where striker replacements, some of whom were concerned about having to join the union, were beginning work, and the employer's pre-acceptance withdrawal when it was operating with a new work force was accompanied by a stated willingness to continue bargaining).

[5] See also Glomac Plastics, 234 NLRB 1309, 1318-19 (1978) (withdrawal of maintenance-of-membership clause unlawfully stalled negotiations during certification year in

Initially, we conclude that the Employer was privileged to withdraw its offer. Thus, the Employer had reason to believe it enjoyed increased economic leverage due to changed circumstances, i.e. the Union's admitted lack of employee participation in strike and picketing efforts and the open, notorious decertification drive. See Pennex, above. However, upon withdrawing the offer the Employer was obligated to substitute a new proposal or to respond affirmatively in any other way to the Union's continued requests to resume bargaining.[6] An effort to invoke Board processes for an election, including a decertification petition, does not relieve an employer of its bargaining obligation with the incumbent representative of its employees[7] and, in any event, the decertification petition herein was filed after the withdrawal of the Employer's offer. Any impasse that existed in June was broken by the changed circumstances set forth above and the withdrawal of the offer. However, absent impasse, the Employer was obligated to accept the Union's outstanding request for bargaining and, by failing to do so, it violated Section 8(a)(5).[8]

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anticipation of possible decertification petition; while employer "may reasonably refuse to participate in keeping employees tied to such union if he entertains a reasonable doubt as to its continued majority," when employer "seeks to justify its bargaining positions by asserting such a doubt, presumably his good faith can be tested by the appropriateness of his positions to the asserted end").

[6] In addition to the Union's June 20 request to "resume bargaining immediately" after membership rejection of the Employer's final offer, the Employer was aware of the Union's November 16 notice stating its determination to convince the Employer return to negotiations.

[7] See Dresser Industries, 264 NLRB 1088, 1089 (1982); cf. RCA del Caribe, 262 NLRB 963, 965-66 (1982) (petition filed by rival union does not privilege refusal to bargain).

[8] Although not alleged as unlawful by the Union in June, we further note that the Employer's refusal to bargain from anything but its own proposals is further evidence that its

Finally, we agree with the Region that the Employer did not unlawfully assist the employees' decertification effort. The evidence clearly establishes that the Employer has permitted off-duty employees nearly unfettered access to its premises for Union as well as personal solicitations, and also allows non-employee groups to solicit on its premises. Further, there is no written rule restricting solicitations by employees and they, along with the Union, have discussed matters with on-duty employees in work areas so long as business was not disrupted. Accordingly, there is no basis for finding disparate treatment in permitting solicitation of the decertification petition by off-duty employees. See Parkview Gardens Care Center, 280 NLRB 47, 51 (1986).[9]

B.J.K.

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failure to continue bargaining and present a new proposal was in bad faith.

[9] In a position statement to us dated March 27, 1996 (copy enclosed), the Union contends, *inter alia*, that the Employer's bad faith bargaining since January 3 unlawfully tainted any employee signatures subsequently procured to support the January 8 RD petition. However, the Union never presented this argument to the Region. [*FOIA Exemptions* 2 and 5

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