

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

Advice Memorandum

DATE: January 31, 2011

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

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

SUBJECT: Reedman-Toll L.P.
Case 4-CA-37606

530-6033-7000
530-6033-7056-8400
530-6033-7084
530-6033-2025
530-6067-4033-9500

This case was submitted for advice as to whether the Employer's prior unfair labor practices stood in the way of good faith bargaining over changes to its health insurance plan, and if not, whether the Employer otherwise fulfilled its bargaining obligation.

We conclude that the Employer's unfair labor practices did not taint bargaining because the Employer substantially remedied them prior to bargaining. We also conclude that the Employer fulfilled its bargaining obligation pursuant to Stone Container and St. Mary's Hospital.¹ Accordingly, the Section 8(a)(5) charge should be dismissed, absent withdrawal.

ACTION

The first issue is whether the Employer's prior unfair labor practices precluded it from satisfying its bargaining obligation regarding healthcare. Unfair labor practices committed before or during collective-bargaining negotiations may taint a declaration of impasse.² Not all unfair labor practices will preclude a valid impasse, however; taint only flows from serious unfair labor practices that "detrimentally affected the negotiations . . . and contributed to the deadlock."³ In unilateral change cases, unremedied unfair labor practices typically contribute to deadlock by moving the

¹ 313 NLRB 336 (1993), 346 NLRB 776 (2006).

² Dynatron/Bondo Corp., 333 NLRB 750, 752 (2001).

³ Id. at 752-53; see Washoe Medical Center, 348 NLRB 361, 362 (2006) (unfair labor practice did not taint bargaining when unilateral wage increase was not an issue in 30 subsequent bargaining sessions over a period of nearly a year and a half).

baseline for negotiations.⁴ For example, in Lafayette Grinding, the employer's unfair labor practice tainted impasse when the employer unilaterally ceased contributing to its employees' health insurance premiums while the parties were bargaining over healthcare because the employer's action altered the baseline and forced the union to focus on restoring the status quo.⁵

We agree with the Region that the Employer's prior unfair labor practices did not taint bargaining because the Employer substantially remedied them before it began bargaining in earnest. On March 31, 2010,⁶ the Region approved a unilateral settlement agreement to remedy unfair labor practices related to the Employer's July 2009 decision to unilaterally increase employees' health insurance costs.⁷ Under the Settlement Agreement, the Employer committed to (1) restore the employees' co-premiums to June 2009 rates; (2) reimburse employees for 80% of their premium payments and usage costs paid in excess of the June 2009 rates; and (3) post a notice.

When the parties began, in May 2010, to bargain over health insurance for 2011, the Employer's first action was to pledge to implement its commitments as contemplated in the settlement agreement.⁸ The Employer then proceeded to enact its promises: in their June 4 paychecks, it reimbursed employees for premium overpayments. It also began the more-complicated process of reimbursing employees' usage costs. The Employer asked Trion, its health care provider, to waive HIPPA regulations so that it could calculate employees' usage costs, and when Trion refused, the Employer created and implemented its own reimbursement system. In sum, the Employer's 2009 unfair labor practices did not detrimentally affect the 2010 negotiations because the settlement entered into before bargaining began provided an adequate remedy for the prior violations and the Employer's actions toward voluntarily implementing the settlement sufficiently restored the Union to the 2009 baseline before bargaining began.

⁴ Lafayette Grinding, 337 NLRB 832, 833 (2002); Dynatron/Bondo Corp., 333 NLRB at 752 (citing Alwin Mfg. Co. v. NLRB, 192 F.3d 133, 139 (D.C. Cir. 1999)).

⁵ 337 NLRB 832, 833 (2002).

⁶ All dates are in 2010, unless otherwise noted.

⁷ The Office of Appeals denied the Union's appeal of the settlement on July 15.

⁸ The Region held the settlement agreement in abeyance pending an investigation of later-filed related charges from the Union and an investigation of the Union's request for a further extension of the Union's certification year.

The second issue is whether the Employer fulfilled its bargaining obligation prior to effectuating the 2011 health insurance plan changes. We agree with the Region that Stone Container and St. Mary's Hospital provide the applicable legal standards,⁹ which the Employer has satisfied.

In Stone Container, the Board recognized an exception to the general prohibition against unilateral changes during contract negotiations when the parties have not reached overall impasse.¹⁰ This exception permits an employer to lawfully implement a change during contract negotiations if the change concerns a discrete recurring event that just happens to occur during bargaining, and the employer provides the union with reasonable advance notice and an opportunity to bargain.¹¹ The Board has applied this exception to changes to health insurance plans similar to the changes implemented here.¹²

In St. Mary's Hospital, the Board applied the Stone Container exception and found that the employer had complied with its bargaining obligation regarding changes in a health insurance plan even though the parties had not reached an overall impasse in contract negotiations.¹³ There, the employer provided the union with six weeks to bargain, and the parties met for five bargaining sessions. During negotiations, the employer adopted a proposal from the union that permitted the union to raise health insurance issues at any time during the future course of negotiations. It presented the union with two proposals: (1) to stay on the same health insurance plan as non-unit employees; or (2) to separate from the employer health insurance plan and purchase alternate health insurance for unit employees with a lump sum payment provided by the employer. The union consistently demanded that the employer maintain its old health care plan.

⁹ 313 NLRB 336 (1993), 346 NLRB 776 (2006).

¹⁰ 313 NLRB at 336.

¹¹ See, e.g., Neighborhood House Assn., 347 NLRB 553 (2006) (citing TXU Electric Co., 343 NLRB 1404 (2004)). See also Stone Container, 313 NLRB at 336 (employer lawfully implemented its position regarding annual wage increase after good-faith negotiations with the union that were apart from bargaining for an overall agreement).

¹² St. Mary's Hospital of Blue Springs, 346 NLRB at 776; Saint-Gobain Abrasives, 343 NLRB 542 (2004); Nabors Alaska Drilling, Inc., 341 NLRB 610 (2004); Brannan Sand and Gravel Co., 314 NLRB 282 (1994).

¹³ St. Mary's Hospital of Blue Springs, 346 NLRB at 776.

The ALJ concluded that the employer satisfied its duty to bargain because it acknowledged its bargaining obligation, gave timely notice to the union, was not inflexible during bargaining (as evidenced by its adoption of the union's proposal to continue bargaining), and remained willing to bargain over the changes after implementation.¹⁴ The Board affirmed the ALJ, concluding that the parties, who had agreed that time was of the essence, had "exhausted all possibilities of reaching agreement over the healthcare issue before the deadline." In light of its conclusion, the Board stated that it was unnecessary to decide whether the employer was "required to negotiate to impasse [on that issue] before implementation."¹⁵

We conclude that, regardless of whether the Employer's obligation was to reach impasse or to exhaust all possibilities of reaching agreement by the deadline, the Employer here has satisfied its bargaining obligation.¹⁶ The Employer provided the Union with almost three months to bargain, and the parties met for seven bargaining sessions. During negotiations, the Employer adopted two proposals from the Union: one to lessen employee usage costs and the other to make the HMO, POS, and Personal Choice plans available to all employees. It also presented the Union with two proposals: (1) a plan that increased usage costs and premiums; and, in response to the Union, (2) a plan that decreased usage costs, offered employees more health care plan options, and substantially increased premium costs. The Union consistently demanded that the Employer maintain the June 2009 premium rates.

As the facts demonstrate, this case strongly resembles St. Mary's Hospital. The Employer here acknowledged its bargaining obligation, gave timely notice to the Union, was not inflexible during bargaining (as evidenced by its adoption of two Union proposals), and remained willing to bargain after implementation.¹⁷ Additional factors also militate towards concluding that the Employer exhausted all possibilities of reaching agreement before the deadline: throughout bargaining, the Union refused to move on the issue most important to the

¹⁴ Id. at 776, 781.

¹⁵ Id. at 776, fn. 4; see also Saint-Gobain Abrasives, 343 NLRB at 542.

¹⁶ It is not clear that any difference exists between impasse and "exhausting all possibilities of reaching agreement before the deadline." St. Mary's Hospital of Blue Springs, 346 NLRB at 776, fn. 4. We leave that clarification for a later case because the facts here satisfy either standard.

¹⁷ Id. at 776, 781.

Employer: employee contributions to cover rising health insurance premiums. The Union failed to offer any proposals after the Employer rejected its third proposal on July 28. Moreover, the Union declined multiple bargaining opportunities, including the Employer's offer to bargain on July 30, the day before implementation, and on August 5, four days post-implementation. Lastly, on July 29, the Union posted a notice to employees asserting that it procured substantial concessions from the Employer on healthcare, suggesting that the Union did not intend to continue to bargain on the issue. Thus, like the situation in St. Mary's Hospital, the Employer did all that it could to reach an agreement prior to the deadline.

We also conclude that the Employer and Union reached impasse regarding healthcare. The ultimate inquiry in impasse is whether there is any "realistic possibility that continuation of discussion at that time would have been fruitful."¹⁸ In time-sensitive circumstances, bargaining need not be protracted.¹⁹ The Board has recognized that the amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation.²⁰ Here, as discussed above, additional negotiation would not have led to a mutual agreement. And, the Employer was under a deadline to renew its health insurance contract, and it had already obtained and exhausted an extension of that deadline from the carrier.

In sum, we conclude that the Employer's unfair labor practices did not taint bargaining because the Employer substantially remedied them prior to bargaining, and that the Employer did not violate Section 8(a)(5) when it unilaterally changed its health insurance plan because it satisfied its bargaining obligation prior to implementation. Accordingly, the complaint should be dismissed, absent withdrawal.

B.J.K.

¹⁸ Cotter & Co., 331 NLRB 787, 787 (2000) (quoting Television Artist AFTRA v. NLRB, 395 F.2d 622, 628 (D.C. Cir. 1968)).

¹⁹ RBE Electronics of S.D., Inc., 320 NLRB 80, 82 (1995).

²⁰ Saint-Gobain Abrasives, 343 NLRB at 556.