

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

# Advice Memorandum

DATE: June 30, 2011

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

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

SUBJECT: Operating Engineers Local 542  
(Beacon Sales Acquisition, Inc. d/b/a 530-6033-1400  
Quality Roofing Supply Company) 530-6033-4240  
Case 4-CB-10623 530-6033-1484

This case was submitted for advice as to whether the Union violated Section 8(b)(1)(B) or 8(b)(3) of the Act by insisting that the parties move a scheduled bargaining session from the Union's hall to another location, after learning that one of the Employer's bargainers was an employee of a law firm that the Union had barred from its property.

We conclude that the Union did not violate Section 8(b)(3) by insisting that the parties meet at a location other than the union hall, nor did its conduct violate Section 8(b)(1)(B) because it did not constitute a refusal to meet with the Employer's designated representative.

### FACTS

The Union represents four bargaining units at facilities owned by the Employer in eastern and central Pennsylvania, southern New Jersey and Delaware. The parties have been in bargaining for a first contract for more than three years.<sup>1</sup> The contentious negotiations have resulted in numerous unfair labor practice charges and three Consolidated Complaints issued against the Employer.<sup>2</sup>

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<sup>1</sup> In January of 2011, the Union was certified as the bargaining representative of a fifth unit, located in New Jersey.

<sup>2</sup> The first Consolidated Complaint was resolved by a formal settlement stipulation. The Board's order in that case was enforced by the Third Circuit, and the Board recently authorized civil contempt proceedings based on violations of that order. In the second case, the Administrative Law Judge concluded that the Employer's actions violated Section 8(a)(5). That case is pending before the Board on the Employer's exceptions. The third case is being litigated

The instant case concerns the Union's conduct at a February 7, 2011 bargaining session. On that date, the parties appeared for a scheduled bargaining session at the Union's hall in Fort Washington, Pennsylvania. The Union was represented by two of its organizers. The Employer was represented by its staff counsel, and by a paralegal from the law firm of Reed Smith. Although the Employer's staff counsel had participated in bargaining before, this was the first time that any representative from Reed Smith attended bargaining. The Union was not notified in advance that the paralegal would be in attendance. Previously, the Employer had provided advance notice to the Union of the identity of its bargainers.

The Employer's representatives arrived at the union hall and proceeded to the conference room. When the Union representatives entered the conference room, they asked the paralegal to identify herself. When the paralegal responded that she worked for the law firm of Reed Smith, one Union representative told her that they would have to bargain somewhere else because Reed Smith was not a union-friendly company, and that his boss (the Union president) would not want the law firm's paralegal to be on the Union's property.<sup>3</sup>

The Employer's staff counsel objected to a change in bargaining location. The Union representative insisted that bargaining could not take place at the union hall with the paralegal present, and offered to meet at the Employer's facility in Yeadon, which is twenty-five miles away from the union hall. The Union also offered to bargain at a hotel, at the Employer's expense. The parties continued to discuss the bargaining location and neither altered its position.<sup>4</sup> The Employer's counsel made no inquiries to determine whether space at its Yeadon facility was available that day. After this discussion, the parties confirmed that their next meeting (regarding another unit), scheduled for February 18, 2011, would be held at the Employer's facility. The parties discussed, but did not

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administratively, and the Region recently filed a complaint in district court seeking Section 10(j) injunctive relief.

<sup>3</sup> The Union has been attempting to reach a first contract for five years with another employer, also represented by Reed Smith.

<sup>4</sup> The Employer's insistence that bargaining take place at the union hall on that day was a reversal of its prior position that it would "never agree to meet at [the Union's] terrorist lair," referring to the union hall.

agree to, future bargaining dates or locations for the subject units.

On February 18, the parties met as planned at the Employer's facility to bargain over the other bargaining unit, and the Reed Smith paralegal was present for the meeting. In addition, the parties exchanged numerous correspondence after the February 7<sup>th</sup> incident, ultimately agreeing to bargain at a neutral location in Center City, where the parties had previously bargained. However, while the parties appear to have reached agreement on a location, they have not reached agreement on the dates and times of further bargaining.

### ACTION

The Union did not violate Section 8(b)(3) by insisting that bargaining take place at a location other than the union hall, nor did it violate Section 8(b)(1)(B) because its conduct did not constitute a refusal to meet with the Employer's designated representative.

When determining whether a party's insistence on a bargaining location is unlawful, the Board does not take a per se approach but instead considers all the relevant circumstances.<sup>5</sup> The determining factors in cases of this kind are whether the proposed bargaining location is unreasonable, burdensome, or designed to frustrate bargaining and whether the proponent has been intransigent and acted in bad faith.<sup>6</sup> In *Somerville Mills*, the Board held that the employer did not violate Section 8(a)(5) when it sought to change the bargaining location that had been mutually agreed upon to one that would be more convenient for its vice president, who attended bargaining. In applying the factors listed above, the Board relied on the fact that the employer's proposal was "reasonable and accommodated its expressed legitimate interests," and that the proposal did not involve distances which greatly inconvenienced the union or place an undue burden on the union.<sup>7</sup>

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<sup>5</sup> *Somerville Mills*, 308 NLRB 425, 426 (1992), enfd. 19 F.3d 1433 (6<sup>th</sup> Cir. 1994).

<sup>6</sup> *Id.* at 426 (no evidence that employer's proposals were made in bad faith or part of any overall scheme to delay or avoid bargaining). Compare *Calex Corp.*, 322 NLRB 977 (1997), enfd. 144 F.3d 904 (6<sup>th</sup> Cir. 1998) (party's frequent cancellation of bargaining sessions was factor in finding bad-faith).

<sup>7</sup> *Id.*

Further, the fact that a party reneges on an agreement to meet at a particular location does not necessarily indicate bad-faith bargaining.<sup>8</sup> Thus, the Board found no violation of the duty to bargain where a party withdrew a prior agreement to bargain at a particular location but made genuine efforts to find an alternative location.<sup>9</sup> On the other hand, a party's insistence that bargaining take place at a great distance from the work-site is more likely to indicate a bad faith avoidance of the duty to bargain.<sup>10</sup>

Applying the *Somerville Mill* factors to this case, we conclude that the Union's insistence that bargaining take place at a different location than the union hall did not violate Section 8(b)(3). First, the Union had a reason for its demand to move to another location, and the demand was not burdensome, or designed to frustrate bargaining. Thus, the Union immediately offered viable alternatives, including moving bargaining to the Employer's facility twenty-five miles away - a venue that the Board typically considers to be optimal due to its easy access to employees and administrators.<sup>11</sup> The Employer offered no reason why such a move would have caused it undue burden. The alternative that the Union offered here stands in contrast to cases in which the Board found that a party's insistence on meeting at a location far from the workplace created an unlawful burden on the other party.<sup>12</sup>

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<sup>8</sup> *Silver Brothers Co., Inc.*, 312 NLRB 1060, 1069 (1993) (nothing in the Act suggests that there is only one reasonable location, or that having once agreed on a location, one party may not change its mind so long as the motive for the change is not to delay or avoid bargaining).

<sup>9</sup> *Silver Brothers Co., Inc.*, 312 NLRB at 1060, 1069.

<sup>10</sup> See e.g. *Caribe Staple Co.*, 313 NLRB 877, 892 (1994) (employer's demand that negotiations take place at its Chicago headquarters, where plant was located in Puerto Rico, was "indicative of bad faith if not in itself unlawful"). See also *P. Lorillard Co.*, 16 NLRB 684, 699 (1939), enfd. as modified 117 F.2d 921 (6<sup>th</sup> Cir. 1941), reversed and remanded with instructions to enforce in full 314 U.S. 512 (1942) (employer's insistence that negotiations take place in New York, where plant was located in Ohio, was unlawful, as it demonstrated that employer had the "deliberate intent of avoiding collective bargaining").

<sup>11</sup> See *P. Lorillard*, 16 NLRB at 697 (finding that negotiations should be held at the plant because all employee relations are administered at plant, employees are hired there, work there, receive their pay at the plant and are laid off by the plant manager).

Second, the Union's insistence on another location did not evidence intransigence or bad faith. To the contrary, as soon as the Union learned that a Reed Smith representative was present, it agreed to meet at the Employer's facility, or at a hotel; it placed no other restrictions on the location for bargaining; it subsequently met with the Employer and its chosen representative at another location of the Employer; and, ultimately agreed to meet at a neutral location in Center City for further bargaining. There is no evidence that the Union's demand to move the bargaining location was made in bad faith.

We further conclude that the Union did not, by refusing to permit the Reed Smith representative into its premises, refuse to deal with the Employer's chosen representative in violation of Section 8(b)(1)(B). The Board "has long recognized that 'each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party.'"<sup>13</sup> Thus, had the Union refused to meet with the Reed Smith representative, a violation would have been established.<sup>14</sup> Here, however, the Union did not refuse to meet. To the contrary, the Union made clear that it was willing to bargain with this representative so long as bargaining did not take place at the union hall. The Union did, in fact, subsequently meet with the Reed Smith representative at the Employer's facility. Further, the Union placed no other restriction on the presence of the Employer's chosen bargaining representative.

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<sup>12</sup> *Caribe Staple Co.*, 313 NLRB at 892; *P. Lorillard*, 16 NLRB at 699.

<sup>13</sup> *Pan American Grain Co., Inc.*, 343 NLRB 205, 206 (2004) quoting *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), *enfd.* 670 F.2d 663 (6<sup>th</sup> Cir. 1982).

<sup>14</sup> *Id.*, quoting *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976) (union may not refuse to meet with the employer's designated representative absent a showing that "the presence of a particular individual would create ill will and make good-faith bargaining impossible").

Accordingly, the Union did not violate Section 8(b)(1)(B) or 8(b)(3) and the Region should dismiss the charges absent withdrawal.

B.J.K.