

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

MIKE-SELL'S POTATO CHIP CO.

and

Case 9-CA-094143

GENERAL TRUCK DRIVERS, WAREHOUSEMEN,  
HELPERS, SALES AND SERVICE, AND CASINO  
EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

I. INTRODUCTION:

On June 18, 2013, Administrative Law Judge Geoffrey Carter issued his decision and recommended Order in the above-captioned matter finding that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the terms of its full and final offers for collective-bargaining agreements for its Route Sales and Over-The-Road ("OTR") drivers ("drivers unit") and its Warehouse employees ("warehouse unit") without first bargaining with the Union to a good-faith impasse. On July 15, 2013, Respondent filed exceptions and a supporting brief contesting the Judge's Decision. <sup>1/</sup> Counsel for the Acting General Counsel disputes each of Respondent's exceptions as having no basis in law or fact. Contrary to Respondent's claims, Judge Carter's findings that Respondent violated the Act as set forth in his Conclusions of Law are overwhelmingly supported by both the record evidence and Board precedent. <sup>2/</sup>

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<sup>1/</sup> Herein called Respondent's brief and referenced as (Resp. Brief, p. \_\_).

<sup>2/</sup> The decision of the Administrative Law Judge will be referenced herein as (ALJD p. \_\_ 1. \_\_). The transcript will be referenced as (Tr. \_\_) and exhibits will be referenced as (G.C. Ex. \_\_) or (Resp. Ex. \_\_).

II. ANSWER TO RESPONDENT'S EXCEPTIONS:

A. Contrary to Respondent's Exceptions 1 through 6, the Record Evidence and Board Precedent Fully Support the Administrative Law Judge's Conclusion That No Impasse Existed When Respondent Unilaterally Implemented Its "Final" Offer on November 19:

The critical facts supporting Judge Carter's conclusion that the parties had not reached an impasse prior to Respondent's implementations of its purported full and final offers are fully supported in the record. This includes his finding that, at the time of implementation, the parties had been engaging in good faith negotiations for all three employee groups, (ALJD p. 16, ll. 40-42, p. 17, ll. 37-40), during which time they "hammered out several tentative agreements" through their efforts despite having conflicting goals (ALJD p. 16, ll. 43-46, p. 17, ll. 39-40), including tentative agreements covering the warehouse unit and over-the-road drivers on all issues except pension plan and employee healthcare. (ALJD p. 16, ll. 44-46) (See generally the testimony of Michael Maddy and John Doll and, more specifically, Tr. 120-121, 191-196, 232-235, 248, 342-345, 415-416, 427-429, 452, 463-464; G.C. Exs. 29, 30, 43, 47) Indeed, throughout his decision, Judge Carter cites the record evidence supporting his various findings and conclusion, particularly in his Findings of Fact setting forth the parties' bargaining history prior to implementation.

Judge Carter's reliance on the November 14 bargaining session over the route sales drivers as especially signifying the absence of an impasse between the parties (See, ALJD p. 17, ll. 21-34) is fully supported in the record. As described in more detail by Judge Carter (ALJD pp. 10- 11), the meeting lasted for almost 12 hours, with both parties exchanging proposals that included concessions. (ALJD p. 17, ll. 30-31) For example, Respondent proposed to increase the net sales commission rate on manufactured products from 13 percent to 14.5 percent and dropped its proposal that employees equally split the pension contribution, proposing that they pay only scheduled increases instead. (Tr. 160-161, 332, 449; G.C. Ex. 40, p. 2; Also, Compare

G.C. Ex. 19, pp. 2 and 15). Notably, after having vehemently opposed Respondent's proposal to change the commission rate structure from gross to net based, the Union made a "big step" and proposed to accept the net based structure (albeit at a higher rate) after Respondent gave a lengthy "pitch" asserting the importance of net based commissions in becoming profitable.<sup>3/</sup> (Tr. 163-164, 169-170, 334-337, 428; G.C. Exs. 39, 40, p. 3)<sup>4/</sup> Thus, Judge Carter correctly relied on Board precedent holding that such movement and flexibility militates against a finding of impasse. See, ALJD p. 18, ll. 13-20, citing *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), *enfd.* 236 F. 3d 187 (4<sup>th</sup> Cir. 2000), *cert. denied* 534 U.S. 818 (2001) and *Royal Motor Sales*, 329 NLRB 760, 772 (1999). Also see, *Duane Reade, Inc.*, 342 NLRB 1016, 1017 (2004) and *Patrick and Co.*, 248 NLRB 390, 393 (1980) (bargaining does not occur in a vacuum – movement on one point may serve as leverage for positions in other areas). Judge Carter's conclusion that the parties looked prospectively toward more bargaining – as opposed to impasse – at the close of the November 14 meeting is reinforced by the record evidence establishing that Respondent never characterized any offer as its "last, best and final," and stated to the Union that the parties had made "good movement" and requested more bargaining dates. (Tr. 189, 284, 342, 344-345, 394, 452, 463-464) In turn, the Union, despite having expressed disappointment at the pace of progress, agreed that it wanted to continue negotiating and would provide dates. (Tr. 191, 342-345) In fact, when Respondent changed its posture two days later and recast its proposals as "full and final offers," the Union stated that it "felt we were still negotiating and we'd get an agreement." (Tr. 197-200, 465)

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<sup>3/</sup> Respondent attempts to diminish the significance of the Union's concessionary action by characterizing an obvious *proposal* as only entertainment. (See, e.g., Resp. Brief p. 11)

<sup>4/</sup> See, ALJD p. 8, fn. 13 for Judge Carter's explanation of gross versus net based sales commission. Also see, Tr. 425-428.

B. Contrary to Respondent's Exceptions 2, 3 and 5, the Administrative Law Judge Correctly Found that Respondent Relied Solely on the Contract Expiration Date as a Basis for Declaring Impasse:

The record strongly supports Judge Carter's finding that "[i]t was Respondent who brought the [bargaining] process to a halt when it decided to use the November 17 expiration date of the drivers' collective-bargaining agreement as the arbitrary deadline for negotiation." (ALJD p. 19, ll. 4-6) The record demonstrates that Respondent made numerous verbal and written statements alluding to the OTR/Route Sales contract expiration as a deadline for negotiations. (Tr. 196, 342, 344, 451-452, 460-461, 463- 465; G.C. Exs. 33, 34) As well, via correspondence delivered away from the bargaining table on November 16, Respondent admittedly relied on the looming November 17 contract expiration date to justify converting its bargaining proposals to "full and final offers," and set such date as the deadline for the Union's acceptance of its offers. (Tr. 197-200, 465; G.C. Ex. 34) This directly contradicts an implicit denial in its brief that it "expressly announced the contract expiration date was the 'deadline' for signing a new contract." (Resp. Brief p. 22) Finally, the timing of Respondent's impasse declaration, the day after the contract expired (on a Sunday) (G.C. Ex. 33), along with its ironic admission in footnote 18 of its Brief that it "believe[d] the parties reached impasse on November 17, 2012, *when the contract expired*" (emphasis added), erases any doubt that the Judge correctly concluded that "Respondent set the November 17 [contract] expiration date as an artificial deadline for working out a new agreement." (ALJD p. 17, 42-43) Thus, the Judge accurately gleaned Respondent's true basis for declaring impasse, i.e. contract expiration, and properly applied Board precedent holding such basis to be invalid. See, *Newcor Bay City Division of Newcor, Inc.*, 345 NLRB 1229, 1239-1240 (2005); *CBC Industries*, 311 NLRB 123, 127 (1993); *Dust-Tex Service*, 214 NLRB 398, 405 (1974), *enfd. mem.* 521 F.2d 1404 (8<sup>th</sup> Cir. 1975).

In attempting to attack Judge Carter's reliance on *Newcor Bay* and *CBC Industries*, Respondent does nothing more than "cherry pick" facts that are immaterial to the instant case and make unsupported factual assertions, e.g. that the Union "instigated a bargaining hiatus." (Resp. Brief p. 22) While the Union was unable to accommodate Respondent's asserted urgent need for "more [bargaining] dates" on the 2 days before the contract expired, it is undisputed in the record that at the end of the parties' November 14 meeting the Union told Respondent that it "wanted to continue negotiating" for route sales and would "set more dates" after checking its schedules. (Tr. 189, 342, 344, 452) Indeed, the parties productively met on November 13, 14 and 15. <sup>5/</sup> Notably, Respondent fails to point to any record evidence connecting the timing of its action to anything other than the contract's expiration. This is simply because none exists. At the conclusion of the parties' lengthy November 14 session, Respondent sought more bargaining dates and its primary spokesperson, Phil Kazer, stated that the parties had made "good movement." <sup>6/</sup> (Tr. 189, 342, 344, 452, 464) When the parties met the next day, on November 15, they signed off on tentative agreements covering the warehouse and OTR drivers and agreed to defer further discussion of pension and healthcare to the route sales negotiations. (Tr. 192, 195-196, 235; G.C. Ex. 43, 44) Significantly, Respondent admits that at neither meeting did it characterize any of its proposals or counteroffers as "last, best and final" or claim that the parties were at impasse. (Tr. 190-191, 284, 345, 394, 451, 463) The only intervening "events" between the November 15 meeting and Respondent's November 18 declaration of

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<sup>5/</sup> Presumably, Respondent would urge the Board to ignore the November 13 and 15 warehouse dates as irrelevant to the Union's good faith based on its desperate assertion that "it was improper [for Judge Carter] to aggregate and collectively rely on events for all three groups because only the route sales negotiations are relevant to this case." (See, Resp. Brief at p. 19) Such argument strains legal logic, given that Respondent declared impasse and subsequently unilaterally implemented terms for all three groups. (See, e.g., G.C. Exs. 1 (the Complaint), 33-36) Indeed, the route sales and OTR drivers are in the same bargaining unit and covered by the same contract.

<sup>6/</sup> Respondent did not bother to call Kazer as a witness and Willie is the only witness to claim that Kazer further stated that the Union had "done nothing." (Tr. 457, 657-658) Judge Carter apparently did not credit Willie's claim. (See, ALJD p. 12, ll. 6-10 & fn. 21) In any event, even Willie's incredible account militates against a finding of impasse because it further corroborates the fact that Respondent was not at the "end of its rope."

impasse were Respondent's conversion of its previously made proposals to a "full and final offer" based on the Union's failure "to meet on the dates that the company provided," i.e. November 16 and/or 17 (Tr. 197-200, 465; G.C. Ex. 34) and the Union's failure to accept such offers by November 17. (Tr. 197-199, 201-202; G.C. Ex. 33)

C. Contrary to Respondent's Exception 4 the Record Evidence Does Not Establish that the Union Engaged in Dilatory Tactics Warranting A Finding of Impasse:

Judge Carter correctly dismissed, as having no basis in the record, Respondent's arguments that the Union's alleged dilatory bargaining tactics warranted Respondent's declaration of impasse. (ALJD p. 18, ll. 25-43) A review of the record citations supporting Respondent's enumeration of the Union's alleged misconduct (See, Resp. Brief pp. 20-21) will reveal that such list is largely overblown, misleading and, in some cases, simply not true. Judge Carter appropriately considered, but did not find compelling, the fact that the Union had cancelled two meetings. He also correctly dismissed any claim that the Union's failure to "jump" at Respondent's request for frequent meetings before contract expiration somehow constituted dilatory conduct warranting a finding of impasse. Even in *M&M Contractors*, 262 NLRB 1472 (1982), cited by Respondent, the Board stated that "before imposing any changes, an employer, as a part of demonstrating its diligence and good faith, must present the union with its detailed contract proposals and permit the union a reasonable time to evaluate the proposals." The Board specifically stated that 5 days would not normally fulfill this requirement, except under the exceptional circumstances of that case where the union had essentially ignored the employer's pleas for bargaining dates for over 6 months. *Id.* at 1472, 1477. By contrast, here the Union did not ignore Respondent's requests for dates – nor did it refuse to meet with Respondent, despite Respondent's repeated and unsupported assertions throughout its brief. Rather, the record demonstrates that the Union was unable to meet on the dates requested and made itself available on other dates. More importantly, Respondent gave the Union only 2 days

(from November 16 to November 18) to consider its purported final offers before it unilaterally implemented the offers, when the Board, consistent with *M&M Contractors*, supra, would not even find 5 days to be sufficient.

III. CONCLUSION:

The Administrative Law Judge's Decision finding that Respondent violated the Act is fully supported by the record and extant Board law. Respondent has failed to demonstrate that its exceptions have merit as a matter of fact or law. For these reasons and based on the foregoing, the Board should reject all of the Respondent's exceptions and issue an Order in due course consistent with Judge Carter's recommendations.

Dated at Cincinnati, Ohio this 27<sup>th</sup> day of August 2013.

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Dated at Cincinnati, Ohio this 26<sup>th</sup> day of August 2013.



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