

Advice Memorandum

DATE: March 8, 2013

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: Prime Source
Case 32-CA-088266

530-6033-7000
530-6033-7070-5000
530-6067-4001-8100

This case was submitted for advice on the issue of whether the Employer violated § 8(a)(5) of the Act by withdrawing from participation in a union pension plan. We conclude that while the parties previously had been at impasse, the bargaining impasse was broken when the Employer proposed a wholesale withdrawal from the pension plan in contravention of its implemented final proposal. Accordingly, the Employer's withdrawal from the plan without bargaining with the Union violated the Act.

FACTS

The Employer, PrimeSource Building Products, Inc., is a construction materials supplier with a warehouse in San Leandro, California. The Union, Teamsters Local 853, represents the warehouse and yard workers at the San Leandro facility. There are currently about 15 employees in the bargaining unit. The parties' most-recent collective-bargaining agreement expired May 31, 2011. Under that agreement, the Employer was obligated to contribute on behalf of the employees to the Western Conference of Teamsters Pension Trust Fund.

Negotiations for a successor agreement were held in April and May 2011 and resulted in impasse. The primary issue that led to the impasse was the Union's insistence that the Employer make pension contributions for any employees doing bargaining unit work, including temporary agency employees and employees of subcontractors, whom the Employer considers non-employees and non-bargaining-unit members. The Employer has not previously made pension contributions for temporary agency or subcontractor employees. On October 1, 2011, the Employer implemented the terms of its last and final offer, which contained, *inter alia*, the following provision regarding Pensions:

Section 13 Pensions. The Company agrees to continue to pay its current contribution rate for regular and probationary employees, but will not increase that rate during the term of the Agreement.

Thus, under the implemented offer, the Employer's pension contributions remained the same as they had been under the prior collective-bargaining agreement.¹

By letter dated May 16, 2012,² the Employer raised for the first time the possibility that it would withdraw from the pension plan if the parties could not resolve their dispute over pension issues. Then, on August 8, in a letter responding to an inquiry from the Union business agent (BA) regarding a health and welfare issue, the Employer's negotiator stated in no uncertain terms that the Union's adamant insistence on a permissive subject of bargaining, i.e., contribution to the pension plan for nonemployees, was improper and the primary reason for the impasse in negotiations. He asserted that, as a result:

the Company proposes to withdraw from the Teamster Pension Plan on September 1, 2012, and to offer employees a 401(k) plan established by PrimeSource. The Company is not going to allow you to continue to simply ignore the pension issue as you have been doing. If you wish to discuss our proposal, please contact me within fourteen (14) days from today to set up a meeting. If I do not hear from you by August 22, 2012 at 5:00 p.m. CST, I will assume you do not wish to discuss the Company's withdrawal and PrimeSource will withdraw from the Teamster plan and begin to fund a 401(k) established by PrimeSource.

On August 20, the BA responded to the Company's negotiator by letter stating that the Union did not agree to the Employer's proposal to withdraw from the pension plan and, thus, the Employer was obligated to continue making pension contributions under the terms of its implemented final offer. Additionally, he informed that "the Union reads your letter as asserting that there may be some changed circumstances, such that the impasse might be broken." As a consequence, the BA demanded to resume negotiations for an overall agreement on September 13.

¹ The Region previously determined in Case 32-CA-068634 that the parties reached a valid impasse and the Employer lawfully implemented its final proposal, and Appeals upheld the Region's dismissal of the charge in that case.

² Hereinafter, all dates are in 2012.

On August 22, the Employer negotiator responded that if the Union conceded that the Employer did not have to make pension contributions for non-employees, the Employer would resume negotiations for an overall contract. However, absent a change in the Union's position, the parties were still at impasse. The letter also stated that if the Union did not respond by August 28 at 5:00 CST, the Company would implement its proposal to withdraw from the pension plan and substitute a company 401(k).

The BA responded by letter dated August 27, sent by certified mail on that date and again by e-mail on August 28 at 4:01 p.m. PST (i.e. 6:01 p.m. CST). In that letter, the Union again asserted that the impasse was broken and demanded to resume negotiations for a successor agreement. The Union also specifically demanded that the Employer negotiate over its proposed withdrawal from the pension plan as follows:

You cannot dispute the Company's obligation to bargain with the Union over its decision to leave the Western Conference of Teamsters Pension Trust Fund and any effects of the decision, if effectuated. The Union demands and has a right to such bargaining.

On August 28, the Employer informed the Union by letter that, due to the impasse caused by the Union's continued "insistence on a non-mandatory subject of bargaining," the Employer would withdraw from the pension plan. The Employer then withdrew from the pension plan effective September 1.³

The parties met for four hours on October 3 to discuss the pension. As before, the Union would not agree to the Employer's demand to include contract language in any new CBA specifically excluding pension contributions for non-employees. The Employer affirmed that absent contractual language to clarify that it was not obligated to make pension contributions for non-employees it would not agree to re-join the pension plan.

ACTION

We conclude that the Employer broke the impasse between the parties on August 8, 2012, by proposing to withdraw from the Teamster Pension Plan on September 1 and implement a new 401(k) plan as an alternative. The Union timely requested

³ It appears, however, that the Employer did not implement a new 401(k) plan for its employees.

bargaining with regard to that proposal, including an August 27 specific request to bargain over withdrawal from the pension plan and its effects. Nonetheless, on September 1, the Employer implemented part of its proposal, i.e., withdrawal from the pension plan, without bargaining with the Union. Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement, based on the Employer's September 1 unilateral withdrawal from the Teamsters Pension Plan.

It is well established that after the parties have bargained to impasse (that is, after negotiating in good faith the parties have exhausted the prospects of concluding an agreement), the employer is free to institute unilaterally changes that were offered or agreed to in the negotiations preceding the impasse.⁴ However, the Board has also held that a change in circumstances which creates a new possibility of fruitful discussion or which may yield the possibility of movement from either bargaining position, even if it does not create a likelihood of agreement, breaks an impasse and revives the duty to bargain.⁵ The Board has also held that post-impasse changes in terms and conditions may break an impasse that had occurred up to that time.⁶

In the instant case, the parties had reached a legitimate impasse when, on October 1, 2011, the Employer implemented its final offer. In that final offer the Employer agreed to pay into the Teamsters Pension Plan at its then current rate of contribution. The Employer's announcement on August 8 of its intention to withdraw from the pension plan and its offer of a new 401(k) program in its place deviated substantially from its final implemented offer and was a sufficient change in the

⁴ *Bi-Rite Foods, Inc.*, 147 NLRB 59, 64-66 (1964); see also *Saunders House v. NLRB*, 719 F.2d 683, 686 (3d Cir. 1983), *cert. denied*, 466 U.S. 958 (1984) (when an impasse occurs, the employer is free to implement changes unilaterally so long as the changes have been previously offered to the union during bargaining.)

⁵ *Circuit-Wise, Inc.*, 309 NLRB 905, 921 (1992); *Airflow Research and Mfg. Corp.*, 320 NLRB 861, 862 (1996).

⁶ See, e.g., *Pavilions At Forrrestal & Princeton Healthcare*, 353 NLRB 540, 540-541 (2008), *adopted by* 356 NLRB No. 6 (October 22, 2010), *enfd. sub nom. Atrium of Princeton LLC v. NLRB*, 684 F.2d 1310 (D.C. Cir. 2012) (employer's unilateral implementation of new health insurance plan without bargaining with Union broke any impasse); *Circuit-Wise*, 309 NLRB at 921 (changed circumstances included employer's implementation of wage increases bringing wages above level previously offered); *Transport Company of Texas*, 175 NLRB 763, 763 n.1, 768 (1969) (same).

backdrop of negotiations to break the impasse and create a new possibility of fruitful negotiations.⁷

The Union responded to that change in circumstances on August 20, demanding that the parties “resume negotiations towards an Agreement,” and on August 27, the Union specifically demanded that the Employer bargain over its decision to withdraw from the pension plan and its effects. While we agree with the Region that the Union demand for negotiations for a new contract on August 20 was sufficient to trigger the Employer’s obligation to bargain before it went forward with the proposed actions, there can be no doubt that the Union’s specific request to bargain over the withdrawal from the pension plan on August 27, less than a month from the announcement, was sufficient to trigger the Employer’s obligation. Putting aside whether the Employer’s arbitrary deadlines for negotiations over such a substantial change would satisfy its obligation to bargain in good faith, and contrary to the Employer’s assertion that the Union’s August 27 response was untimely, we conclude the Union timely requested bargaining over the Employer’s proposed change.⁸

Thus, the Employer’s failure to bargain with the Union before withdrawing from the pension plan violated Section 8(a)(5). While the Employer subsequently held negotiations with the Union on October 3, at that point good faith bargaining could not occur given the Employer’s unremedied unlawful unilateral change.⁹ Accordingly, the Region should issue complaint, absent settlement.

/s/
B.J.K.

⁷ See, e.g., *Pavilions, supra*, 353 NLRB at 541 (“the cancellation of the existing health insurance plan and the necessity of obtaining alternate coverage changed the backdrop of negotiations and created the possibility of productive bargaining.”).

⁸ Since the Employer’s letter was ambiguous as to the what constituted a timely response to its August 28 deadline, we conclude that the Union’s letter mailed by certified mail on August 27, and received by the Employer on the next day was timely, notwithstanding that its receipt by the addressee may have been one hour past the Employer’s arbitrary deadline.

⁹ *Florida-Texas Freight, Inc.*, 203 NLRB 509, 510 (1973), *enforced*, 489 F.2d 1275 (6th Cir. 1974) (good faith bargaining cannot occur so long as employer’s unilateral conduct remains unremedied; otherwise, the employer could use restoration of the unlawfully rescinded term as “bargaining bait” to force acceptance of other proposals.).