

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

## Advice Memorandum

DATE: March 1, 2013

TO: Peter S. Ohr, Regional Director  
Region 13

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

SUBJECT: Arlington Metals Corporation  
Case 13-CA-090888

347-2083-0150  
530-6033-7070-5000

The Region submitted this case for advice as to whether the union's victory in a decertification election broke an impasse in collective-bargaining negotiations. We conclude that the union's success in that election, along with its post-impasse movement on several bargaining issues and the passage of more than nine months, constituted changed circumstances sufficient to break the impasse.

### FACTS

Arlington Metals Corporation (the Employer) operates a business that processes coiled steel. United Steelworkers (the Union) represents production, maintenance, and shipping and receiving employees at the company's Franklin Park Division. The Union was first certified as the employees' representative in October 2007, but the parties have had an unstable bargaining history and have yet to reach a first contract. The Employer declared impasse in August 2009 and implemented its last, best, and final offer. Sporadic negotiations continued through 2010 and early 2011.

On April 7, 2011, the Employer made new, regressive proposals, and ten bargaining sessions followed. During that bargaining, the Employer rejected the Union's proposed wage increases and its overtime and profit-sharing proposals, citing operating losses caused by a decline in production and falling prices. On November 11, an employee filed a decertification petition, which was blocked by unfair labor practice charges until early June 2012. The Employer lawfully declared impasse on December 7, 2011 and implemented its final offer, which altered various employment terms, on January 1, 2012.<sup>1</sup> For example, the Employer changed from its policy of

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<sup>1</sup> In another case, the Region concluded that there was a valid impasse, and the Office of Appeals upheld that determination.

paying employees overtime compensation for working more than eight hours a day to providing overtime compensation only when they worked more than forty hours a week, and it began a year-long transition to a health savings account (HSA) program, which would become the employees' only health insurance option at the start of 2013. For 2012 only, the Employer allowed employees to retain their PPO plans or to select a new HMO option, provided they paid the entire difference in premiums between those plans and the HSA program.

Despite the impasse, the parties met twice in early 2012. At the first meeting, held on February 15, the Union withdrew its overtime proposal, requested a shorter-term contract or profit-sharing plan, and reduced its demand for a general wage increase. The Union also proposed that if the Employer continued to provide an HMO option, it would drop its demand that the Employer contribute \$1,000 to employees' health savings accounts, and employees who selected the HMO would pay the difference in costs between that plan and the HSA program. The Employer rejected these offers. The parties met for a second time on March 6. The Union further reduced its proposed general wage increase, requested that the starting wage be set above the state minimum, and modified its proposed method of determining the amount of steel processing that would trigger a restoration of wages to their 2009 levels. The Union reiterated its HMO proposal and also submitted that if the Employer agreed to maintain the PPO plan, employees who selected that plan would continue to pay any costs above those of the HSA program. The Employer rejected these proposals. On June 4, the Union sought to schedule another bargaining session, but the Employer refused the request, claiming that it had no obligation to meet because the parties were at impasse. The Employer invited the Union to detail any changed circumstances, but the Union did not respond.

Once the pending unfair labor practice charges were closed in early June, the Region resumed processing the decertification petition. The election was held on July 18. The Union won and was certified on July 31.

On September 19, the Union reiterated its request to bargain, stating that it was prepared to present further proposals and counterproposals in order to reach an agreement on outstanding issues. The Employer again refused to meet, citing the December 2011 impasse and insisting that the Union specify changes in its bargaining position or any other circumstances that would suggest the possibility of fruitful discussions. While the Union objected to the Employer conditioning further meetings on the submission of specific proposals, it referred to the two post-impasse negotiation sessions and its proposals on matters such as health insurance, stating that it was prepared to make additional substantive counterproposals on all those issues in order to arrive at a collective-bargaining agreement. The Union made a similar request to meet on September 24, which the Employer again rejected.

**ACTION**

We conclude that, assuming the parties' willingness to engage in the February and March 2012 bargaining sessions does not per se demonstrate an absence of impasse, there were changed circumstances sufficient to break the impasse, including the Union's victory in the decertification election, its post-impasse movement on several bargaining issues, and the passage of over nine months since the impasse was declared in December 2011.

As an initial matter, it appears that the Employer itself acknowledged that the parties were not at impasse in February and March 2012 when it engaged in two significant bargaining sessions with the Union. In this regard, one of the factors in determining whether parties are at impasse is the parties' contemporaneous understanding of the situation.<sup>2</sup> But, even assuming that the February and March discussions did not per se demonstrate an absence of impasse, we conclude that changed circumstances broke the December 2011 impasse and required the Employer to continue contract negotiations.

An impasse occurs when the parties reach a good-faith deadlock in negotiations.<sup>3</sup> However, "[a]n impasse does not destroy the collective-bargaining relationship. Instead, [it] merely suspends the duty to bargain over the subject matter of the

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<sup>2</sup> See *Monmouth Care Center*, 356 NLRB No. 29 (Nov. 17, 2010), *adopting*, 354 NLRB 11, 47-49 (2009) (finding that parties lacked contemporaneous understanding that impasse existed where one respondent-employer did not object to union's request for further negotiation sessions, and another respondent-employer actually met with union and mediators after claimed date of impasse), *enforced*, 672 F.3d 1085 (D.C. Cir. 2012); *Shangri-La Health Care Center*, 288 NLRB 334, 334, 338 (1988) (parties' scheduling of another bargaining session evidenced lack of contemporaneous understanding that impasse existed); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (holding that factors for determining whether bargaining impasse exists include "the contemporaneous understanding of the parties as to the state of negotiations," but finding that parties reached lawful impasse), *petition for review denied sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). See also *Hotel Bel-Air*, 358 NLRB No. 152, slip op. at 1 (Sept. 27, 2012) (post-impasse, "off-the-record" exchanges between parties, even if "something less than negotiations," created possibility of fruitful discussion and broke impasse).

<sup>3</sup> See *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973) (holding that an employer may not unilaterally withdraw from a multiemployer bargaining unit solely because an impasse in negotiations has been reached), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974).

impasse until changes in circumstances indicate that an agreement may be possible.”<sup>4</sup> Thus, an “impasse is only a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken . . . .”<sup>5</sup> Indeed, a party’s post-impasse exertion of economic pressure, such as an employer’s unilateral changes in terms and conditions of employment, usually alters the bargaining atmosphere and breaks the impasse.<sup>6</sup>

Accordingly, in considering whether an impasse has been broken, the Board looks for “anything that creates a new possibility of fruitful discussions,” even if it “does not create a likelihood of agreement.”<sup>7</sup> The Board makes this assessment based on “all the circumstances”<sup>8</sup> and takes various factors into account. For example, a strike may end an impasse.<sup>9</sup> Even when unsuccessful, a strike effects a change in a union’s

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<sup>4</sup> *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996) (finding that passage of time, selection of new union negotiating representative, and union’s reduced demands constituted sufficiently changed circumstances to break impasse).

<sup>5</sup> *Id.* (internal quotation marks omitted) (quoting *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982) (upholding Board’s determination that impasse did not justify employer’s unilateral withdrawal from multiemployer bargaining unit)). See also *Hi-Way Billboards*, 206 NLRB at 23 (“[A] genuine impasse is not the end of collective bargaining.”).

<sup>6</sup> See *Hi-Way Billboards*, 206 NLRB at 23.

<sup>7</sup> *Circuit-Wise, Inc.*, 309 NLRB 905, 921 (1992) (finding lawful impasse precluded by employer’s various unfair labor practices, but explaining that even if impasse had been reached, it was broken by changed circumstances including passage of fourteen months without face-to-face meeting between the parties, thirteen-month-long unfair labor practice strike, employer’s implementation of wage increases exceeding the parties’ last proposals, and union’s substantial modification of its bargaining proposals).

<sup>8</sup> *Transport Company of Texas*, 175 NLRB 763, 763 n.1 (1969) (finding impasse broken “under *all* the circumstances, including the strike which was lost by the [u]nion, the replacement of strikers, the wage changes instituted by the [employer], and the hiatus of 7 months since the last bargaining meeting”). See also *Airflow Research & Mfg.*, 320 NLRB at 862 (“A number of factors must be considered in determining whether circumstances have changed sufficiently to break a lawful impasse and revive an employer’s obligation to bargain over the subjects of the impasse.”).

<sup>9</sup> *E.g.*, *Circuit-Wise*, 309 NLRB at 921 (thirteen-month-long unfair labor practice strike).

bargaining position and renews the possibility of compromise during negotiations.<sup>10</sup> Movement in a party's bargaining position may also break an impasse,<sup>11</sup> even where such movement occurs in "informal discussions that are something less than negotiations"<sup>12</sup> and despite important differences remaining between the parties.<sup>13</sup> Other relevant factors the Board considers as part of the "totality of circumstances" include an employer's post-impasse unilateral changes in terms and conditions of employment,<sup>14</sup> a union's progress in organizing an employer's industry,<sup>15</sup> changes in

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<sup>10</sup> *Transport Company of Texas*, 175 NLRB at 763 n.1, 767–68 (two-day economic strike that resulted in strikers' unconditional offer to return to work). *See also United States Cold Storage Corporation*, 96 NLRB 1108, 1109 (1951) (finding that employer violated Section 8(a)(5) by refusing to meet with union during strike because "even assuming the existence of an impasse before the strike, that impasse was broken by the strike for . . . what seemed a rigidity of bargaining positions before the strike action, afterward might very well have become a model of flexible compromise"), *enforced*, 203 F.2d 924 (5th Cir. 1953).

<sup>11</sup> *E.g.*, *Airflow Research & Mfg.*, 320 NLRB at 861–63 & nn. 8–12 (finding new "proposals indicat[ing] willingness by the [u]nion to reduce some of its demands" a significant factor in breaking of impasse).

<sup>12</sup> *Hotel Bel-Air*, 358 NLRB No. 152, slip op. at 1 (Sept. 27, 2012) (internal quotation marks and citation omitted) (even assuming parties had reached impasse, it was broken by subsequent informal, "off-the-record" discussions in which parties narrowed their differences).

<sup>13</sup> *See Webb Furniture Corporation*, 152 NLRB 1526, 1529 (1965) (impasse broken by union's modification of its holiday and bonus-vacation proposals; union's adherence to original demand for checkoff, which employer claimed would still have precluded a contract, irrelevant since it was possible that further bargaining would lead to resolution of that issue), *enforced*, 366 F.2d 314 (4th Cir. 1966). *Cf. Holiday Inn Downtown-New Haven*, 300 NLRB 773, 773–75 (1990) (impasse not broken where union sought to resume bargaining but explicitly maintained its opposition to employer's subcontracting proposal, which had been the "major stumbling block" leading to impasse, and where no other "intervening event . . . [was] likely to affect the existing impasse or the climate of bargaining").

<sup>14</sup> *Pavilions at Forrestal & Princeton Healthcare*, 353 NLRB 540, 540–41 (2008) (two-member Board) (any impasse that existed was broken when employer unilaterally implemented a new health insurance plan without providing union with notice, opportunity to bargain, or requested information; "[t]he cancellation of the [previous] health insurance plan and the necessity of obtaining alternate coverage changed the

an employer's financial position or the industry's economic outlook,<sup>16</sup> a change in negotiators,<sup>17</sup> and the passage of time.<sup>18</sup> Once an impasse is broken, the statutory duty to bargain requires the parties to meet upon request and prohibits a party from insisting on an exchange of bargaining proposals in advance of such a meeting.<sup>19</sup>

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backdrop of negotiations and created the possibility of productive bargaining”), adopted by 356 NLRB No. 6 (Oct. 22, 2010), enforced *sub nom. Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310 (D.C. Cir. 2012); *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 at 763 n.1, 768 (same).

<sup>15</sup> *Kit Manufacturing Company, Inc.*, 138 NLRB 1290, 1294–95 (1962) (where nearly six-month-long impasse was precipitated by disagreement over union security and increased wages, “subsequent advances by the [u]nion in its organizing efforts in the industry and improvement of the financial position of the [employer]” constituted sufficient changed circumstances), enforced, 319 F.2d 857 (9th Cir. 1963).

<sup>16</sup> *Id.*; *Raven Services Corp. v. NLRB*, 315 F.3d 499, 505–06 (5th Cir. 2002) (impasse broken by changed circumstances—including a change in government contracts that altered employer's economic circumstances, union's election of new unit head, and passage of two years—and by employer's failure to supply relevant information to union), enforcing *Raven Government Services*, 331 NLRB 651 (2000).

<sup>17</sup> *Airflow Research & Mfg.*, 320 NLRB at 862 & n.7 (change in person representing union in negotiations was one factor that “created the possibility of a new approach toward the subjects of the earlier impasse”).

<sup>18</sup> *Id.* at 862 (passage of more than a year since impasse began, which “was clearly a sufficient period for cooling off and taking a second look at earlier positions,” was one of several factors that broke impasse); *Circuit-Wise*, 309 NLRB at 921 (passage of fourteen months was one factor supporting finding of changed circumstances); *Transport Company of Texas*, 175 NLRB at 763 n.1 (passage of seven months since last bargaining session was a factor in finding impasse broken).

<sup>19</sup> See, e.g., *United States Cold Storage*, 96 NLRB at 1108–09 (employer violated Section 8(a)(5) by refusing to meet with union after strike broke impasse since “collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table”); *NLRB v. United States Cold Storage Corp.*, 203 F.2d at 928 (The statutory obligation to bargain in good faith “is not satisfied by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference.”). See also *Fountain Lodge, Inc.*, 269 NLRB 674, 674 (1984) (employer violated Section 8(a)(5) by refusing to meet

Although the parties here reached an impasse in December 2011, circumstances had sufficiently changed by the time the Union requested to bargain in September 2012 so as to renew the possibility of fruitful discussions and break the impasse. The Employer's unilateral implementation of its final offer in January, an exertion of economic pressure, itself affected the bargaining atmosphere and encouraged a renewed dialogue between the parties.<sup>20</sup> And, in fact, the Union changed its position on several important issues during the two bargaining sessions held in February and March. The Union reduced its wage demands, withdrew its overtime proposal, and made concessions on health insurance—all of which reflected key aspects of the Employer's implemented final offer. Although no accord was reached during these two sessions, this narrowing of differences indicated that an agreement was attainable.

The Union's victory in the July 2012 decertification election further altered the bargaining climate and enhanced the prospects for a productive give-and-take between the parties. By voting to retain the Union as their representative, the employees demonstrated their continued support for its bargaining efforts and thereby strengthened its negotiating position. Moreover, the election and subsequent certification triggered two rules: Section 9(c)(3)'s statutory election bar, which prohibits the holding of another election for twelve months;<sup>21</sup> and the Board's certification year rule, which grants the Union an irrebuttable presumption of majority status for one year.<sup>22</sup> Since "[u]nions are generally at their greatest strength

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with union and insisting instead that bargaining initially take place by mail exchange of proposals).

<sup>20</sup> See *Hi-Way Billboards*, 206 NLRB at 23 (employer's unilateral change in terms and conditions of employment will often break impasse).

<sup>21</sup> See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785, 786–87 (1962) (explaining Section 9(c)(3) and its purpose and extending certification year due to employer's failure to bargain in good faith with union).

<sup>22</sup> See *Americare-New Lexington Health Care Center*, 316 NLRB 1226, 1226–27 (1995) (holding that Board's certification year rule applies to an incumbent union's certification following a decertification election and finding that employer violated Section 8(a)(5) by withdrawing recognition from union within that year, as extended by a settlement agreement), *enforced*, 124 F.3d 753 (6th Cir. 1997). See also *Beverly Manor Health Care Center*, 322 NLRB 881, 881–82 (1997) (reaffirming *Americare-New Lexington Health Care Center* and applying certification year rule to union's third certification).

[during] the 1-year period immediately following the[ir] certification,”<sup>23</sup> these rules put the Union in a much stronger bargaining position by insulating it from challenges during that year.<sup>24</sup> Thus, like other factors that create changed circumstances because of a change in the relative strength of the parties’ negotiating positions—such as a strike or an employer’s implementation of new terms and conditions of employment—the decertification election was a catalyst that called for the parties to reassess their stances at the bargaining table and created a new possibility of successful negotiations. In addition, the election resolved the substantial uncertainty created by the decertification petition, which undoubtedly inhibited fully productive negotiations during the parties’ meetings in early 2012. Once the election was over, the parties were assured that they would be dealing with one another for the foreseeable future, and stability returned to the bargaining relationship.<sup>25</sup>

Furthermore, the mere passage of time—nine-and-a-half months between the Employer’s declaration of impasse and the Union’s September requests to bargain, six of those months with no face-to-face meetings between the parties—served as a considerable cooling-off period for the parties to reevaluate their positions.<sup>26</sup> The salutary effect of this hiatus is evident from the Union’s September communications, in which it showed a new desire to reach an agreement by continuing its movement on several key issues.

Taken together, these circumstances broke the impasse because they “create[d] a new possibility of fruitful discussions,” even if they did not necessarily “create a likelihood of agreement.”<sup>27</sup> In addition, the fact that the Union did not specifically cite the decertification election or other changed circumstances when it asked to bargain did not permit the Employer to reject that request or to demand that the Union

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<sup>23</sup> *Mar-Jac*, 136 NLRB at 786–87.

<sup>24</sup> See *Brooks v. NLRB*, 348 U.S. 96, 99–100 (1954) (noting that certification year rule fosters collective bargaining by giving a newly-certified union a reasonable period of time for carrying out its mandate); *Mar-Jac*, 136 NLRB at 786 (Section 9(c)(3) “insure[s] the parties a reasonable time in which to bargain without outside interference or pressure[.]”).

<sup>25</sup> See *Americare-New Lexington Health Care Center*, 316 NLRB at 1126 (noting that decertification elections disrupt collective bargaining).

<sup>26</sup> See *Airflow Research & Mfg.*, 320 NLRB at 862.

<sup>27</sup> *Circuit-Wise, Inc.*, 309 NLRB at 921.

submit new proposals in advance of any meeting.<sup>28</sup> At that point, the impasse was at an end and the Employer had a duty to bargain upon request. And in any event, the Union did indicate that it had various proposals relating to outstanding issues and specifically referred to its post-impasse counterproposals regarding health insurance.

Lastly, requiring the Employer to engage in renewed bargaining with the Union would not impose an undue burden on it.<sup>29</sup> The Employer had already implemented its final offer and could continue to operate under those terms and conditions while the parties resumed negotiations.

Accordingly, we conclude that the Region should issue complaint, absent settlement, alleging that the Employer's refusal to bargain with the Union in September 2012 violated Section 8(a)(1) and (5).

/s/  
B.J.K.

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<sup>28</sup> See *Transport Company of Texas*, 175 NLRB at 763 n.1 (“In light of the [u]nion’s request for a bargaining meeting with the [employer] after these substantial changes had occurred, the failure of the [u]nion to declare publicly that its demands had not [sic] lessened must be discounted and does not relieve the [employer] from its obligation under Sec. 8(d) of the Act to meet at ‘reasonable times’ with the [u]nion.”)

<sup>29</sup> *Webb Furniture*, 152 NLRB at 1529 (“bargaining negotiations in an effort to reach an agreement with the [u]nion [would have] imposed no undue burden on” the employer where union’s modification of its holiday and bonus-vacation proposals broke impasse).