

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

DATE: April 3, 2014

TO: Peter S. Ohr, Regional Director
Region 13

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

SUBJECT: Herman Seekamp, Inc. d/b/a Clyde's Delicious 530-6067-2040-8029
Donuts 530-6033-7000-0000
Cases 13-CA-112595 and 13-CA-107615 530-6033-7084-0000

The Region submitted this case for advice as to: (1) whether the Employer engaged in direct dealing by meeting with employees to discuss its last, best, and final offer less than 24 hours after emailing it to the Union, and (2) whether the parties were at lawful impasse when the Employer unilaterally attempted to withdraw from the multi-employer pension fund. This case also presents the issue of whether a finding of impasse is precluded by a provision in the Employer's last, best, and final offer that allegedly violates Federal tax law.

We conclude, in agreement with the Region, that the Employer did not unlawfully deal directly with employees and that the parties were therefore at lawful impasse when the Employer attempted to unilaterally withdraw from the pension fund. Moreover, even assuming that the Employer had engaged in unlawful direct dealing and/or included a provision in its last, best, and final offer that violates Federal tax law, we conclude that such conduct had no causal connection to, and therefore did not invalidate, the otherwise lawful impasse.¹

FACTS

I. Background

Clyde's Delicious Donuts (the "Employer") has operated a family-owned donut company in Illinois since 1920. The Employer manufactures partially and fully-finished donuts designed for in-store bakeries and food service operators throughout the country, with some international distribution. The Bakery, Confectionery, Tobacco Workers, and Grain Millers Union Local 1 (the "Union") represents approximately 60 of the Employer's employees. The parties have had a collective

¹ Given this conclusion, it is not necessary to decide whether a provision in the Employer's last, best, and final offer violated Federal tax law.

bargaining relationship since 1976. Their most recent collective-bargaining agreement was dated March 1, 2010 through February 28, 2013, and included participation in the multiemployer Bakery & Confectionery Union & Industry International Pension Fund (the “Pension Fund”).

In December 2011, the Pension Fund decided to terminate one of its largest constituent employers, Hostess Brands, Inc., for failing to make required contributions. That termination left Hostess liable to the Pension Fund for nearly \$1 billion in withdrawal liability. Hostess filed for Chapter 11 bankruptcy on January 11, 2012, leaving the Pension Fund in “critical status.”² As a result, the Pension Fund adopted a “Rehabilitation Plan” on November 7, 2012, containing significant reductions in benefits and accruals and increases in employer contributions. Even with those modifications, the Rehabilitation Plan provides that the Pension Fund is not projected to emerge from critical status for more than 30 years.

Under the Rehabilitation Plan’s “Default Schedule,” an employer must withdraw from the Pension Fund within 180 days after the expiration of its last collective-bargaining agreement to avoid being subject to 10% contribution rate increases, compounded every year for 25 years. On the 26th year and thereafter, the increases would be 7.5% per year, compounded. The Default Schedule’s benefit reductions apply to all employees who do not retire before the earlier of the employer’s withdrawal from the Pension Fund or 180 days after the expiration of the collective-bargaining agreement. The reductions most significantly impact senior employees who qualify for the “Golden 80” pension benefit under the old pension plan.³ According to the Union, the Employer’s “Golden 80” employees would lose approximately \$300 per month in retirement benefits under the Default Schedule.

II. Contract negotiations and Employer communications with employees regarding bargaining

The Union and Employer began negotiations for a successor agreement in January 2013.⁴ Between January and August, they held at least seven bargaining sessions and one mediation session through FMCS.

² *In re Hostess*, No. 12-22052, Doc. 1, *11 (Jan. 11, 2012).

³ The Golden 80 Plan was established to provide a full retirement benefit when the participant’s age and service total 80. If a plan participant commenced participation in the Pension Fund after December 3, 1998, the participant must also have a minimum of 10 years of service to be eligible for a Golden 80 pension.

⁴ All dates are in 2013 unless otherwise indicated.

On March 27, the Employer submitted its first written proposal seeking to withdraw from the Pension Fund and implement a 401(k) plan.⁵ This was also its first proposal regarding economic issues. Over the next four sessions, the Employer altered its wage proposal, but the parties showed no movement on the issues of withdrawal from the Pension Fund, use of temporary employees, and midterm flexibility to switch health insurance carriers.

While at the bargaining table on May 13, the Employer presented a written proposal containing the following new provision designed to mitigate the harm of its proposed Pension Fund withdrawal on highly senior employees (the “Golden 80 Proposal”):

As an alternative to the above [401(k)] contributions employees who desire to protect their Golden 80 pension benefit must elect to retire prior to the Company’s withdrawal from the pension. Those employees who retire prior to any such withdrawal do not receive reduced pension benefits in that their retirement occurred prior to the Company’s withdrawal. Further, employees who so elect to retire and then collect at least one pension check may notify the Company thereafter of a desire to suspend their pension benefit and return to work. The Company promises to offer such individuals the opportunity to be rehired with no loss of pay or seniority. Such individuals interested in pursuing said option are encouraged to contact the Pension Fund representatives in that the Company cannot render any opinion as [to] the Fund’s acceptance or non-acceptance of the above option.

In response to the Employer’s continued proposal to withdraw from the Pension Fund and substitute a 401(k) plan, the Union’s lead negotiator called the Employer “fucking greedy.” According to the Union’s lead negotiator, the Employer’s lead negotiator offered to give the Union a revised proposal at the table, and the Union’s lead negotiator responded “we’re not going to wait.” Instead, the Union’s representatives walked out of the bargaining session. As they were leaving, the Union’s lead negotiator instructed the Employer to email its “final proposal” to him.

On May 14 at 8:17 pm, the Employer’s lead negotiator emailed the Employer’s last, best, and final offer to the Union. It was the same proposal that the Employer had presented at the bargaining table the day before, including the Golden 80

⁵ From March 22 through April 30, the Employer’s attorney initiated a series of emails with the Pension Fund’s attorney seeking to understand the impact of the Default Schedule on employees’ benefits and mitigate the harm to employees.

Proposal, except that it changed the proposed wage increase from 5% to 6.5% and included, for the first time, a \$500 ratification bonus.⁶

Sometime after lunch the next day, the Plant Manager and Vice President presented the Employer's last, best, and final offer in meetings with small groups of 10-18 employees and answered questions. They began the meetings by reading from the following prepared script:

As you may have heard, negotiations with your Union officials and committee members is not going well. Our last meeting on Monday ended with [the Union's lead negotiator] calling us greedy and then walking out of negotiations before 12:00 p.m. As a result, we have submitted our final offer yesterday (Tuesday) to them via e-mail which is what they asked us to do. In past meetings, we have tried to communicate with you on the status of your pension and explained how a 401(k) works. As we have said in those past meetings we never negotiate directly with you but the purpose of our meetings today is to make sure that you have all the facts when you are presented the opportunity to vote. We believe *now* is the best time to give you an explanation of final offer because this decision may well be one of the most important in your lives. We are concerned that the Union's presentation of our offer may not accurately reflect the reasoning behind it. Again the decision on how you vote is yours alone and should not be influenced by the Company or the Union but should only be made after a full review of all the facts. [Emphasis in original.]

After reading the script, they led a PowerPoint presentation discussing each of the Employer's proposals, highlighting the proposed wage increase and the new ratification bonus.

Immediately after those meetings, the Plant Manager and Vice President met privately with the employees in each group who would qualify for the "Golden 80" pension. The managers read the Golden 80 Proposal aloud, encouraged employees to contact the Pension Fund directly to discuss the proposal, and answered questions.

On May 18, the Union members voted to reject the Employer's last, best, and final offer and authorize a strike. Ultimately, however, the employees never went on strike.

⁶ The last, best, and final offer also contained other minor changes: moving the date for seniority-based 401(k) contributions from April 1 to May 14 and deleting explanatory language from the health insurance proposal.

On July 3, the parties met with a FMCS mediator for 90 minutes. No proposals were exchanged, and no future bargaining sessions were scheduled. According to the Employer, the mediation session was the first and only time the Union asserted that the Golden 80 Proposal was illegal under Federal tax law. The Employer also claims that the Union's lead negotiator stated at the mediation that the pension was the big issue and, absent the Employer staying in the Pension Fund, further discussion was pointless. The Union's lead negotiator states, however, that he never shut the door on discussions but that he made clear in the mediation session that the Union's position was that the Employer needed to stay in the Pension Fund.

III. The Employer declares impasse and attempts to withdraw from the Pension Fund

On August 2, the Employer sent the Union a letter declaring impasse and notifying the Union that it would implement its last, best, and final offer if a contract was not ratified by August 18. The Union responded by letter on August 14, denying that the parties were at impasse and accepting two minor provisions of the offer, an increased health insurance contribution to take effect on March 1, 2014, and a \$2,000 life insurance policy increase to take effect in 2017.

On August 23, shortly before the 180-day deadline for avoiding the Default Schedule's contribution increases, the Employer notified the Pension Fund that it was withdrawing. The same day, the Employer also sent the Union a letter reiterating its views on impasse and enclosing a copy of its Pension Fund withdrawal letter. The Employer explained to the Union that it was withdrawing from the Pension Fund because otherwise it would be forced into a Default Schedule as of August 27. Specifically, the Employer's letter stated: "It has long been the Company's stated reason for withdrawal from the pension that continued participation will be at escalating costs that cannot be controlled by the Company" and that this was with "no guarantee that the Plan will survive its undeniable critical status of underfunding and ever be able to pay out promised benefits." The Employer's letter also reiterated that its position on the retirees has been clear that "each was an individual decision made by the employee to protect their pension benefit," and that the Plant Manager has "repeatedly communicated to [the Union representative] that any retiree desiring to return is welcome to do so. In fact, such an intention was included in our final offer."

On August 27, the Employer sent letters to seven former employees who had retired at some point after the May 15 meetings. The letters suggested that former employees who wished to return to work contact the Pension Fund beforehand to "determine the appropriate steps that must be taken to protect your benefits," and that after that was done, they could contact the Plant Manager to discuss a return date. The letters stated that "[i]f you have an interest in returning to work for the Company, you may notify us of a desire to suspend your pension benefit and return to

work as stated in our final offer.” Only one of these former employees decided to return to work, and he was rehired. The Union states that the Pension Fund suspended that employee’s pension and informed him that he will receive a reduced pension benefit pursuant to the Default Schedule when he retires from his current position.

On October 23, the Pension Fund informed the Employer that it “is not able to make a determination at this time that the [E]mployer has permanently withdrawn from the Pension Fund. . . .” The Pension Fund wrote that it received a report that the Employer had encouraged employees to apply for retirement benefits to avoid being subject to reductions after the Employer withdrew from the Pension Fund, and that, “[i]f that report is true, you should know that the Pension Fund is prohibited by federal law from treating such a transaction as a legitimate retirement.”

ACTION

We conclude, in agreement with the Region, that the Employer did not unlawfully deal directly with employees and that the parties were therefore at lawful impasse when the Employer attempted to unilaterally withdraw from the Pension Fund. Moreover, even assuming that the Employer had engaged in unlawful direct dealing and/or that the Golden 80 Proposal violates Federal tax law, we conclude that such conduct had no causal connection to, and therefore did not invalidate, the otherwise lawful impasse.

I. The Employer did not engage in direct dealing when it met with small groups of employees to explain its last, best, and final offer

The Act requires an employer to meet and bargain exclusively with its employees’ bargaining representative, and “an employer who bypasses the bargaining representative to make offers regarding the terms and conditions of employment directly to employees violates Section 8(a)(5) and (1) of the Act.”⁷ The Board therefore finds direct dealing where the employer has decided “to deal with the [u]nion through the employees, rather than with the employees through the [u]nion.”⁸ Moreover, the Board will find a direct dealing violation even where the employer has not engaged in actual bargaining with employees, if the employer’s conduct is likely to “erode[] the

⁷ *Central Management Co.*, 314 NLRB 763, 767 (1994) (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944)).

⁸ *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003) (quoting *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 759 (2d Cir. 1969)).

[u]nion’s position as exclusive bargaining representative.”⁹ Thus, although the Board has long recognized an employer’s Section 8(c) right to inform employees in non-coercive terms of its bargaining proposals, including the reasons for its actions and even its bargaining objective,¹⁰ the Board will still find direct dealing if the circumstances are such that the employer’s communication with the employees undermined the union’s status or authority.

To avoid a finding of unlawful direct dealing, the employer’s communication to employees about its bargaining proposals must not denigrate or urge employees to abandon their union.¹¹ The employer must also “afford[] the [u]nion either an opportunity to consider the proposal or to bargain” before presenting it to the employees.¹² With respect to the opportunity-to-consider-or-bargain consideration,

⁹ *Aggregate Industries*, 359 NLRB No. 156, slip op. at 6 (July 8, 2013); *Armored Transport, Inc.*, 339 NLRB at 376.

¹⁰ See, e.g., *Proctor & Gamble Mfg. Co.*, 160 NLRB 334, 340 (1966) (“[A]s a matter of settled law, Section 8(a)(5) does not, on a *per se* basis, preclude an employer from communicating, in non-coercive terms, with employees during collective bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the [u]nion, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith.”); *United Technologies Corp.*, 274 NLRB 609, 610 (1985) (“*United Technologies I*”) (finding no direct dealing violation for apprising employees of bargaining position and observing that allowing the “fullest freedom of expression” offers the best hope of nurturing a healthy and stable bargaining climate, as “[i]deas which are tested in the marketplace of free debate provide the foundation of a sound labor relations framework”), *enforced*, 789 F.2d 121 (2d Cir. 1986).

¹¹ Compare *United Technologies, Corp.*, 274 NLRB 1069, 1074 (1985), *enforced*, 789 F.2d 121 (2d Cir. 1986) (“*United Technologies II*”) (no direct dealing where the employer “acknowledged the [u]nion’s rightful role as the statutory representative”); *United Technologies I*, 274 NLRB at 610 (no direct dealing where the employer “fully acknowledged the [u]nion’s rightful role as the employees’ statutory bargaining representative”) with *Armored Transport, Inc.*, 339 NLRB at 377 (finding direct dealing regarding employer’s presentation of its proposal to employees where, *inter alia*, employer sought to induce its employees to decertify the union); *Facet Enterprises*, 290 NLRB 152, 153, 173 (1988) (finding direct dealing where the employer sent its proposal to employees at only one of its plants, seeking to pit employees in that plant against employees at two other plants, and denigrated the union), *enforced in relevant part*, 907 F.2d 963, 969 (10th Cir. 1990).

¹² *Armored Transport, Inc.*, 339 NLRB at 376.

the Board has declined to find a direct dealing violation where the employer presented its proposal to the union at the bargaining table before discussing it with employees, even where the employer presented the proposal to the employees later that day.¹³ In contrast, the Board has found unlawful direct dealing where the only advance notice to the union occurred outside the context of the bargaining table, at least under circumstances that made it difficult for the union to consider or bargain over the proposal before it was presented to employees, even where the proposal was communicated to the union more than a day before it was explained to employees.¹⁴ Thus, the circumstances under which the union receives the employer's proposal aids the Board's determination of whether the union had an adequate opportunity to consider or bargain about the proposal before the employer communicated it to employees.

¹³ See *Putnam Buick*, 280 NLRB 868, 868, 869 (1986) (finding no direct dealing where the employer made proposals at the bargaining table in the morning and explained those proposals to employees later the same day), *enforced*, 827 F.2d 557 (9th Cir. 1987); *United Technologies II*, 274 NLRB at 1074 (finding no direct dealing where the employer made an oral proposal at the bargaining table and issued a press release that afternoon describing the proposal); *United Technologies I*, 274 NLRB at 610 (finding no direct dealing where the employer presented its proposal to the union at a bargaining session where, later that day, the employer's foremen spoke to employees about the employer's proposal and the employer distributed leaflets to employees regarding the proposal).

¹⁴ See, e.g., *Detroit Edison Co.*, 310 NLRB 564, 564-65 (1993) (finding direct dealing where the employer provided the union representative with a copy of its proposal at his home when he was on vacation and painting his house "a few days" before presenting it to employees, because the "evidence fail[ed] to show that the...proposal was previously offered by the Respondent in negotiations with the [u]nion" and, under the circumstances, it had been given "no meaningful opportunity to consider" the proposal); *Overnite Transportation Co.*, 329 NLRB 990, 995 n.26, 1047 (1999) (finding direct dealing where the employer sent its proposed productivity package to the union by overnight mail two days before it presented the proposal to employees and four days before negotiations were scheduled to resume, because this allowed the union "no adequate opportunity to digest the proposal or to respond or to begin discussion" before it was presented to employees), *enforcement denied in relevant part*, 280 F.3d 417, 432-33 (4th Cir. 2002); see also *American Pine Lodge Nursing*, 325 NLRB 98, 103-104 (1997) (finding direct dealing where the employer sent a copy of its proposal to the union on the same day it provided it to the employees), *enforcement denied in relevant part*, 164 F.3d 867, 875-77 (4th Cir. 1999).

Applying these principles to this case, we conclude that the Employer did not engage in direct dealing by meeting with employees to explain its last, best, and final offer less than 24 hours after the Employer emailed it to the Union. Initially, the Employer was not negotiating directly with employees, and there is no evidence that the Employer denigrated the Union in any way when it explained its proposal. To the contrary, the evidence shows that the Employer affirmed the Union's role as bargaining representative during those meetings, stating that "we never negotiate directly with you but the purpose of our meetings today is to make sure that you have all the facts when you are presented the opportunity to vote."

Moreover, although the Employer emailed its proposal to the Union, rather than presenting it at the bargaining table, we conclude that it gave the Union an adequate "opportunity to consider the proposal or to bargain" about the proposal before presenting the proposal to employees. Thus, the Union acknowledges that, during the May 13 bargaining session, the Employer offered to present its proposal at the bargaining table, and that the Union declined, walked out of the bargaining session, and instructed the Employer to email the proposal to the Union's lead negotiator instead. This case is therefore different than *Detroit Edison Co.*,¹⁵ *supra*, where the employer gave the union its proposal away from the bargaining table under inappropriate circumstances, *i.e.*, "almost literally while [the union representative] was on a step ladder painting his house" during vacation. Moreover, the key provisions in the proposal communicated to the employees (including replacement of the pension plan with a 401(k) plan) were the same as had been communicated to the Union in bargaining. Finally, the employees would not perceive the Employer's action as undercutting the Union's role in bargaining where the Employer explained to the employees that it had offered to provide the proposal at the bargaining table and only emailed it at the Union's behest.

In these circumstances, rather than erode the Union's role as bargaining representative, the Employer affirmed it. Accordingly, we find no evidence of direct dealing in this case.¹⁶

¹⁵ 310 NLRB at 564-65, 576.

¹⁶ For all the reasons discussed above, our conclusion would be the same under the three-part test that the Board sometimes uses to assess whether direct dealing has occurred, *i.e.*, whether (1) the employer has communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *See Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000). In applying this test, the Board finds direct dealing only when all three factors are met, which was not the case here.

II. The parties were at lawful impasse when the Employer attempted to withdraw from the Pension Fund

Absent reaching agreement with a union, an employer may implement its final proposal only after reaching a good-faith impasse in bargaining.¹⁷ The Board traditionally looks to the bargaining history, the parties' good faith, the length of the negotiations, the importance of the issue(s) precluding agreement, and the parties' contemporaneous understanding to determine whether the parties reached a good-faith impasse.¹⁸ Within this framework, the Board has found lawful impasse where the deadlock on a single critical issue led to a breakdown in the overall negotiations.¹⁹

Applying these principles here, we conclude that the parties were at good-faith impasse by August 23, 2013, when the Employer implemented its last, best, and final offer and attempted to withdraw from the Pension Fund. Although the Union accepted two minor provisions on August 14 (an increased health insurance contribution to take effect March 1, 2014, and a \$2,000 life insurance policy increase to take effect in 2017), the parties were at deadlock on the critical issue of the Employer's withdrawal from the Pension Fund.

Both parties were resolute and unyielding with regard to the Employer's continued participation in the Pension Fund, for legitimate reasons. As the Employer explained, it was concerned about escalating costs associated with remaining in the "critical status" Pension Fund with no guarantee that the Pension Fund would survive and pay out benefits. From the Union's perspective, the Employer's withdrawal would further damage the Union's already precarious Pension Fund, and

¹⁷ *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001).

¹⁸ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968).

¹⁹ *See, e.g., Redburn Tire Co.*, 358 NLRB No. 109, slip op. at 7 (Aug. 31, 2012) (determining that good-faith impasse had been reached where the "overriding issue" throughout negotiations was whether to modify the existing contract provision guaranteeing free health insurance coverage to senior employees, and the parties made a good faith attempt to compromise on that issue but could not); *California Pacific Medical Center*, 356 NLRB No. 159, slip op. at 6-7 (May 25, 2011) (finding overall good-faith impasse where bargaining would be "futile regarding the two issues of overriding significance" that were holding up overall compromise, as the employer was inflexible on those issues and the union conditioned its position on the employer's further flexibility).

would result in significant decreases in benefits, particularly to the most senior employees. Prior to the impasse, the Union asserted that the Golden 80 Proposal was illegal, *i.e.*, that it was not a lawful way to mitigate the harm to senior employees from the Employer's withdrawal. Accordingly, the parties each indicated their deadlock on this critical issue—the Employer through its August 2 and August 23 letters, and the Union through its statements. Indeed, even without crediting the Employer's version of the Union's statement at the FMCS mediation session, the Union's version—that it made clear that its position was that the Employer needed to stay in the Pension Fund—nonetheless indicates that the parties were at deadlock on the Pension Fund withdrawal issue. Since the pension issue was critical to reaching an agreement, the impasse on that issue created an impasse in the overall negotiations.

Of course, one party's commission of an unfair labor practice before or during collective bargaining negotiations can taint an otherwise lawful impasse.²⁰ But even if we had determined that the Employer had engaged in unlawful direct dealing with employees in its May 15 meetings, we would not find that this tainted the otherwise lawful impasse. Only serious unfair labor practices that have "a causal connection" to the deadlock will preclude an otherwise valid impasse.²¹ Typically, unremedied unfair labor practices can contribute to deadlock either by increasing friction at the bargaining table or, in the case of a unilateral change, by moving the baseline for negotiations.²² Thus, the Board repeatedly has found that an employer violated Section 8(a)(5) by implementing its final offer where impasse was declared in the wake of serious unfair labor practices that directly contributed to the parties' failure

²⁰ *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001).

²¹ *See, e.g., Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) ("Only those unfair labor practices that contributed to the parties' inability to reach an agreement can preclude a finding of valid impasse."); *Titan Tire Corp.*, 333 NLRB at 1158 (characterizing as "the central question" whether the employer's unlawful conduct detrimentally affected negotiations and contributed to a deadlock); *Dynatron/Bondo Corp.*, 326 NLRB 1170, 1170 (1998) ("[F]or the judge to conclude that the unremedied unfair labor practices prevented the parties from reaching lawful impasse, he must first find that there was a causal connection between the previous unfair labor practices and the failure to reach an agreement."); *Litton Systems*, 300 NLRB 324, 333 (1990) ("[O]n a practical level, the Respondent's unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations so as to prevent a lawful impasse."), *enforced*, 949 F.2d 249 (8th Cir. 1991).

²² *Dynatron/Bondo Corp.*, 333 NLRB at 752 (citing *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 139 (D.C. Cir. 1999)).

to reach an agreement.²³ Conversely, unremedied unfair labor practices that have no causal connection to the deadlock do not taint the impasse.²⁴

Here, the alleged direct dealing had no “causal connection” to the parties’ deadlock on the issue of the Employer’s withdrawal from the Pension Fund. The deadlock on both sides was driven by their calculus of the economic consequences of the decision to withdraw. It is significant that neither party altered its position on the Pension Fund withdrawal issue at any time during the negotiations. Moreover, the alleged direct dealing occurred at the end of the negotiations, after the parties’ positions on the primary issues had become entrenched. Indeed, the Union specifically asked for the Employer’s “final proposal” two days before the alleged direct dealing, and the Union’s members voted down the proposal and authorized a strike three days later. Further, any “friction” at the table occurred two days *before* the alleged direct dealing, when the Union stormed out of the negotiations and called the Employer “fucking greedy.” And the parties returned to the bargaining table through a FMCS mediation session after the alleged direct dealing occurred.

For similar reasons, we need not decide whether the Golden 80 Proposal violates Federal tax law and whether it is therefore an illegal subject of bargaining. In general, an employer that bargains to impasse over an illegal subject violates Section 8(a)(1) and (5), and there can be no good faith impasse in such circumstances.²⁵ In this case, the Union argues that the Golden 80 Proposal is unlawful pursuant to an IRS Private Letter Ruling, Priv. Ltr. Rul. 201147038 (April 20, 2010) (the “PLR”).²⁶

²³ See, e.g., *Noel Corp.*, 315 NLRB 905, 911 (1994) (unlawful discharge of numerous strikers precluded good-faith impasse where “negotiations foundered in part because the [employer] refused the [u]nion’s demand that the strikers be reinstated as a group”), *enforcement denied in relevant part*, 82 F.3d 1113, 1121 (D.C. Cir. 1996); *Lafayette Grinding Corp.*, 337 NLRB at 833 (employer’s unilateral cessation of health and welfare fund payments precluded good-faith impasse where such payments were “a major issue in the negotiations”).

²⁴ See, e.g., *Washoe Medical Center*, 348 NLRB 361, 362 (2006) (unilateral wage increase had “no causal nexus” to impasse where it was not an issue in the parties’ 30 subsequent bargaining sessions over a period of nearly a year and a half); *Sierra Bullets, LLC*, 340 NLRB 242, 243-44 (2003) (refusal to provide requested information regarding overtime issue was “unrelated to the core issues separating the parties in negotiations” and therefore did not preclude impasse).

²⁵ *Eddy Potash, Inc.*, 331 NLRB 552, 552, 560 (2000).

²⁶ In that PLR, an anonymous pension fund had proposed to include in its rehabilitation plan a provision that would give participants prior notice that their

The Employer contends that the PLR is distinguishable and, in any event, can be afforded no weight because IRS private letter rulings are not binding precedent. Without deciding whether the PLR may be considered,²⁷ or making an independent determination of the proposal's legality under the Tax Code and relevant IRS Regulations and Revenue Rulings, we conclude that the Golden 80 Proposal did not preclude impasse because that proposal was tangential to the critical issue of withdrawal from the Pension Fund. The Golden 80 Proposal was merely a provision designed to lessen the impact of that withdrawal on a small group of employees; it was of limited duration (it had no application to retirements after August 23); and in the period between the Employer's transmittal of the proposal and its attempted withdrawal, only seven employees retired, and only one of those employees has returned to work. In these circumstances, we conclude that, even if this proposal was unlawful, it did not taint the otherwise lawful impasse.

early retirement benefit would be eliminated under the default schedule and allow them to retire and then return to work the next day "or perhaps after a week." The pension fund conceded that, in either case, "neither the employee nor the employer will plan on these 'retirees' actually terminating employment and no longer performing services. . . ." The IRS synthesized numerous provisions of the Tax Code, Income Tax Regulations, and IRS Revenue Rulings, and concluded that "if both the employer and the employee know at the time of the 'retirement' that the employee will, with reasonable certainty, continue to perform services for the employer, a termination of employment has not occurred upon 'retirement' and the employee has not legitimately retired." Accordingly, applying that standard, the IRS determined that such retirements are not legitimate and would result in disqualification of the pension plan.

²⁷ The Employer is correct that by Congressional design, private letter rulings "may not be used or cited as precedent." 26 U.S.C. § 6110(k)(3). However, the circuit courts are split as to whether courts nevertheless may consider private letter rulings' substance as persuasive authority. *See Amergen Energy Co., LLC v. U.S.*, 94 Fed. Cl. 413, 418 (Fed. Cl. 2010) (describing the circuit split and collecting cases); *see also Davis v. Comm'r of the Internal Revenue*, 716 F.3d 560, 570 n. 26 (11th Cir. 2013) (joining the list of courts ruling that private letter rulings are entitled to persuasive authority); *Seinfeld v. O'Connor*, 774 F.Supp.2d 660, 668 (D. Del. 2011) (finding "this particular private letter ruling to be informative here, as it sheds light on whether the IRS would view the [executive incentive plan] to be tax deductible").

Accordingly, for the foregoing reasons, we conclude that the charge should be dismissed, absent withdrawal.

/s/

B.J.K.