

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 3, 1996

TO: F. Rozier Sharp, Regional Director, Region 17

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

SUBJECT: Belger Cartage Service, Inc., Case 17-CA-18554

524-5056-2200, 530-6067-2060-2700, 530-6067-2080-1200

This Section 8(a)(5) and (3) case was submitted for advice on whether the Employer's unyielding insistence on its first and only bargaining proposal constituted unlawful "take-it-or-leave-it" bad faith bargaining, and whether the Employer's subsequent operation with nonunit casual employees was also unlawful.

The parties bargaining agreement was set to expire on January 31, 1996. When the parties met for their first negotiation session on January 12, the Employer's new manager announced that the facility had lost \$240,000 in 1995, and that he had been given one year to turn that around and make a profit. The Union then submitted its proposal noting that there was room for movement and the Union could even agree to a freeze on wages. The Employer then submitted its proposal which eliminated overtime payment, eliminated premiums for shift differential, weekend work and long runs, eliminated set starting times and guaranteed work, and froze both wages and health and trust fund contribution levels.

When the parties met again on January 17, the Union stated that the employees had rejected the Employer's proposal except for the freeze on wages and contributions and the elimination of the shift premium. The Employer responded that it was withdrawing its proposal because the employees were not willing to work with the Employer for one year to try and make the business profitable. The Employer announced that the business would close on January 31 and that employees should bring in their uniforms on that date. The Union then requested negotiations over the terms of the business closure. The Employer replied that, given the prior business losses, there would be no severance pay. The Employer did not respond when the Union stated that there was room for movement in its proposal.

On January 22, the Employer sent the Union a letter stating that the business would close effective February 1. The Employer actually closed the business on January 26. The Employer's explanation for the earlier closing is that customers had learned of the impending closing and canceled business. On January 24, the Employer sent the Union an ambiguous letter stating it was modifying its January 22 letter and that the contract would expire on January 31.

On January 29, the Union asked the Employer to explain its January 24 letter. The Employer replied that it had changed its mind, that it would not totally close but would perform small jobs with from one to four men. When the Union then insisted on negotiations, the Employer's manager deferred until he could contact the Employer President.

The parties met in their final negotiation session on January 31 in the presence of a federal mediator. The Union presented another contract proposal providing for overtime after 40 hours, for some guaranteed pay for work started, and for a reduction in wages of 17 cents per hour. The Employer rejected the Union's offer, stating that it didn't think the men had a proper attitude and that it wanted its original proposal. The following day, the Union filed a grievance alleging that, since January 29, the Employer had been improperly performing unit work without unit employees. The Employer rejected the Union's grievance but has admitted to performing two jobs without unit employees since January 31. ⁽¹⁾

In response to the Union's charge of bad faith bargaining, the Employer asserts that it did not have to concede any of its proposals because the economic viability of the business would have been seriously compromised. The Employer also asserts that it properly performed later jobs with nonunit employees because the contract had expired and the employees had no interest in employment and had become disenchanted with the Union.

We conclude, in agreement with the Region, that the Employer bargained in bad faith under the principles set forth in *General Electric Co.*,⁽²⁾ and further unlawfully locked out its employees and operated with nonunit employees in support of that unlawful bargaining position in violation of Section 8(a)(3).

Under *General Electric*, a party is required to accept and engage in the give-and-take of the bargaining process itself. Accordingly, bad-faith bargaining may be found where a party opens negotiations with its "bottom line" proposal and refuses to alter its position⁽³⁾ as an obstruction to the bargaining process.

The principles proscribing this type of bargaining have been recently reaffirmed by the Board. In *American Meat Packing*,⁽⁴⁾ the Board found bad-faith bargaining in part because, after the employer made its initial proposal at a single bargaining session, it announced that major provisions of that proposal would be implemented upon the expiration of the existing contract and stated that this implementation would "be preceded by either agreement or impasse."⁽⁵⁾ The employer told the union that it had studied its troubled economic condition and had decided on the proposals it believed it could afford before beginning negotiations. The Employer further said that it was not at negotiations to engage in "give and take", but instead was at negotiations to convince union representatives to persuade employees to accept its proposals. The Board determined that the employer's conduct amounted to the take-it-or-leave-it bargaining proscribed in *General Electric* and that the employer lacked a "serious intent to adjust differences."⁽⁶⁾

In the instant case, the Employer similarly refused to move from its initial proposal because, as the Employer later explained, it believed that conceding any of its proposals would threaten its economic viability. When the Union rejected the Employer's proposal, the Employer summarily withdrew that proposal, demeaned the employees' "attitude", and immediately announced permanent closure. This conduct clearly indicated that the Employer was not interested in the give-and-take of bargaining and instead was bent only upon convincing the employees to accept the Employer's proposal on a "take it or leave it" basis. Particularly in view of the Employer's later renegeing on its closure threat, we conclude that the Employer's had no intent to adjust differences and reach an agreement, and instead had been bargaining in bad faith.

We also conclude, in agreement with the Region, that the Employer's lockout of employees after January 31, and operation with nonunit employees thereafter in February, violated Section 8(a)(3).

Since the parties were not at a lawful impasse as of January 31, the Employer's continued lockout and replacement of the employees thereafter can only be lawful if it is still in furtherance of a legitimate purpose, e.g., to support a good-faith bargaining position. In order for a lawful lockout to become an unlawful lockout in violation of Section 8(a)(3), the Board has held that there must be a nexus between an unlawful motivation, e.g. anti-union animus or bad faith bargaining, and the continued lockout.⁽⁷⁾

In *R. E. Dietz*, the Board found that an employer who insisted to impasse on a nonmandatory subject of bargaining violated Section 8(a)(1) and (5) of the Act.⁽⁸⁾

The Board adopted the ALJ's determination that:

This [employer conduct] converted a lawful lockout, then in existence, into an unlawfully motivated one. Since the lockout has continued to date, the employees who have still been deprived of employment became discriminatees as of that date and the refusal of the Respondent to reinstate them became, at that point, another unfair labor practice which violated Section 8(a)(1) and (3) of the Act.⁽⁹⁾

Although the Board majority in *Redway Carriers* found that there was no nexus between the Employer's bad faith "accept-concessions-or-else negotiating stance" and the lockout, it stressed that the case involved an atypical lockout. Thus, unlike the more usual cases where lockouts are instituted to support a particular bargaining position, the Board majority in *Redway Carriers* found that the employer's motivation for initiating and continuing the lockout was based on its fear of impending violence if it did not accede to the union's position, and not its unlawful "accept-concessions-or-else negotiating stance." Since there was no showing that the employer's motivation for continuing the lockout had changed from that original fear of

violence, the Board majority concluded that continuing the lockout was not unlawful. ⁽¹⁰⁾

We conclude that R. E. Dietz controls and Redway Carriers is distinguishable from this case because the Board's requisite nexus between illegal conduct and the continuation of a lockout has been clearly established here. As discussed above, the Employer's "take it or leave it" bargaining posture constituted bad faith bargaining. The Employer's lockout was in clear support of that unlawful bargaining position. Accordingly, after instituting the closure/lockout on January 26, the Employer's continuing the lockout with use of replacements after January 31 violated Section 8(a)(3). ⁽¹¹⁾

B.J.K.

¹ The Employer admitted performing small jobs on February 6 and February 17 using the same three nonunit casual employees.

² 150 NLRB 192 (1964), *enfd.* 418 F. 2d 736 (2d Cir. 1969).

³ *Id.* at 195-196.

⁴ 301 NLRB 835 (1991).

⁵ *Id.*, slip op. at 4.

⁶ *Id.*, slip op. at 5-6.

⁷ *Redway Carriers*, 301 NLRB 1113, 1114 (1991).

⁸ *R. E. Dietz Co.*, 311 NLRB 1259, 1267 (1993).

⁹ *Id.*

¹⁰ *Redway Carriers*, 301 NLRB at 1115. Member Devaney dissented in part and argued that although the employer locked out its employees because of its objectively based fear of violence, its subsequent "accept-concessions-or-else negotiating stance" constituted bad faith bargaining, thereby converting the lockout into an unlawful one, since the lockout was thereafter in support of the bad faith bargaining position. *Id.* at 1118.

¹¹ In that regard, *Romo Paper Products Corp.*, 208 NLRB 644 (1974) is distinguishable since the employer in that case had not engaged in bad faith bargaining as of its closure/lock-out on August 31. The Board nevertheless agreed with the ALJ that the partial lockout violated Section 8(a)(3) because of the clear animus earlier demonstrated by the employer against the union's strike threat. Here, the partial lockout is unlawful as demonstrably in support of an unlawful bargaining position, a factor absent in *Romo Paper Products*.