

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

DATE: March 25, 2015

TO: Margaret J. Diaz, Regional Director
Region 12

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

SUBJECT: Federación Puertorriqueña de Trabajadores 554-1483-2000-0000
(Ashford Presbyterian Community Hospital) 554-1483-2033-4060
Case 12-CB-140092 775-9050

The Region submitted this case for advice on whether the Union has been violating Section 8(b)(3) by refusing to meet and bargain over the auxiliary unit or whether the collective bargaining agreement was automatically renewed. We conclude that the collective bargaining agreement automatically renewed because the parties did not engage in bargaining before the Union withdrew its untimely notice of contract termination.

FACTS

The Employer, Ashford Presbyterian Community Hospital, operates a hospital in Ponce, Puerto Rico. The Union, Federación Puertorriqueña de Trabajadores, represents multiple bargaining units at the hospital, including an auxiliary personnel unit, consisting of service and maintenance employees, and a clerical unit.

The auxiliary unit's collective bargaining agreement was effective by its terms from November 1, 2011 to October 31, 2014. Article 36 of that agreement provides for an automatic one-year extension unless either party provides written notice by certified mail of its desire to terminate or modify the agreement no less than 90 days prior to the contract renewal date, which is August 1, 2014.¹

The Union sent an untimely notice to the Employer dated August 12 requesting negotiations for a successor auxiliary unit contract. The Employer did not send a notice.

¹ All dates herein are in 2014 unless otherwise noted.

After the Union sent its notice, the parties met twice while negotiations for a clerical unit contract were ongoing. On April 18, the parties met in the Union's office without their bargaining committees. The meeting included the Union's designated spokesperson for the clerical unit but there was no designated spokesperson for the auxiliary unit.² The Employer argues that this meeting was the first bargaining session for an auxiliary unit contract because the Employer advised the Union at that meeting that it would implement a reduction in benefits across the board effective October 1. The Union denies that the parties bargained about the auxiliary unit. Instead, the Union claims that the Employer simply discussed, in general terms, the hospital's economic problems and the need to reduce all employees' benefits.

The parties met on September 2 to continue bargaining for a successor clerical unit collective bargaining agreement. The Employer gave the Union a written proposal titled "Economic Proposal for the Clerical Unit." The Employer asserts that it said that its proposal would be the same for all units. The Union claims that the Employer never referenced auxiliary employees.

By letter dated September 11, the Union withdrew its August 12 notice. Thereafter, the Employer proposed several dates to bargain about an auxiliary unit agreement and the Union refused to meet, arguing that the contract had been automatically renewed.

ACTION

We conclude that the auxiliary unit collective bargaining agreement automatically renewed as of August 1 because the parties did not engage in bargaining before the Union withdrew its untimely notice on September 11.

Contract clauses requiring written notice to forestall automatic renewal of a collective bargaining agreement are strictly construed.³ "An untimely notice will . . . be treated merely as a request for modification by mutual assent unless the parties thereafter clearly terminate the contract."⁴

² It is unclear whether the Union had ever constituted an auxiliary bargaining committee and designated an auxiliary spokesperson.

³ See, e.g., *Industrial Workers AIW Local 770 (Hutco Equipment)*, 285 NLRB 651, 652 (1987) (citing *Sawyer Stores Inc.*, 190 NLRB 651, 652 (1971)).

⁴ *Moving Picture Machine Operators, Local 224 (K-B Theatres)*, 238 NLRB 507, 511 (1978) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1002 (1958)).

However, if bargaining begins before the contract expires, the parties waive their right to assert that the contract was automatically renewed due to untimeliness of the notice.⁵ In *Hutco Equipment*, for example, the Board ruled that the employer waived its objection to the union's untimely notice because the employer had given the union information for use in negotiations in response to its requests, agreed to a schedule of negotiating sessions, participated in the first negotiating session, agreed to scheduling and procedural matters, and gave the union its first contract proposal.⁶ In contrast, in *Champagne County Contractors Association*, the Board affirmed the ALJ's determination that the parties' discussions were "clearly preliminary" and "no more than initial sparring" and thus there was no waiver even though the employer asked the union to change the contract expiration date and mentioned that the employer "could legally offer an increase of 5.5 percent in wages" and the union replied that "a 5.5 percent raise was probably all the union would ask."⁷

Further, although a party also cannot effectively withdraw or repudiate its own notice after bargaining commences,⁸ a party that withdraws its notice before bargaining has begun does not forestall automatic renewal. Thus, in *Se-Ma-No Electric Cooperative*, the Board found that the employer did not unlawfully refuse to bargain because it withdrew its timely notice and proposed amendments shortly after

⁵ See *Lou's Produce*, 308 NLRB 1194, 1205, n.4 (1992).

⁶ *Industrial Workers AIW Local 770 (Hutco Equipment)*, *supra*, at 654. See also *Ship Shape Maintenance Co.*, 187 NLRB 289, 289 n.1 (1970) (employer waived its right to object to the union's untimely notice where the employer orally agreed to the contract); *Chemical Workers Local 6-0682 (Checker Motors Corp.)*, 339 NLRB 291, 299 (2003) (union waived its right to object to the untimely notice where it made proposals and responded to counterproposals).

⁷ 210 NLRB 467, 469-70 (1974). See also *Anchorage Laundry & Dry Cleaning*, 216 NLRB 114, 115 (1975) (finding no waiver where the employer received the union's proposal and agreed to meet, but asserted that the union's notice was untimely at that meeting and no further meetings occurred); *Sawyer Stores Inc.*, 190 NLRB at 655 (finding no waiver where the employer sought advice from the NLRB Regional Office regarding its obligation to bargain when the union submitted an untimely notice, said the notice was untimely at the parties' meeting, and refused further meetings after receiving the Region's response).

⁸ See *Air Systems Engineering, Inc.*, Case 19-CA-16790, Advice Memorandum dated September 28, 1984 (rejecting the union's argument that the contract automatically renewed because its own notice was untimely where the parties met several times, exchanged proposals, and the employer implemented its final offer).

sending them and refused to meet with the union on grounds that the contract had been automatically renewed.⁹

Here, as in *Champagne County Contractors Association* and *Se-Me-No Electric Cooperative*, there was no bargaining that would prevent the contract from having been automatically renewed. Specifically, neither party stated that the purpose of the April 18 or September 2 meetings was to negotiate an auxiliary unit agreement and no auxiliary unit proposals were exchanged. The April 18th meeting was merely a general discussion of the Employer's economic situation. Indeed, because the auxiliary contract was effective until October 31, the Employer's statement that it would unilaterally reduce benefits effective October 1 could not lawfully have been referring to the auxiliary unit.¹⁰ The sole purpose of the September 2 meeting was to negotiate for a successor contract for the clerical unit. In this regard, the Employer titled its September 2 proposal narrowly as the "Economic Proposal for the Clerical Unit," and there was a clerical employee spokesperson, but no auxiliary employee spokesperson, at the meeting.

Therefore, the Union lawfully refused to meet and bargain with the Employer after it withdrew its untimely notice and the contract was automatically renewed as of August 1. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

⁹ 284 NLRB 1006 (1987).

¹⁰ *See, e.g., Fort Pierce Jai-Alai*, 310 NLRB 862, 862 (1993) ("It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by the agreement without obtaining the consent of the union").