

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

DATE: April 27, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Oregon Education Association
Case 19-CA-141023

530-6067-4001-3700
530-6067-4055-4000
530-6067-2030-1200
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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by permitting employees to work from home when their assigned field offices were closed, without providing the Union notice and an opportunity to bargain. We conclude that the Employer acted lawfully because it offered to bargain on several occasions over the impact of its decision to close the field offices and the Union either ignored the requests or explicitly refused to bargain.

FACTS

The Oregon Education Association (the Employer) is a labor organization that represents teachers and other professionals in Oregon public schools and community colleges. The Employer's professional employees, referred to as consultants, serve as business representatives for the Employer's members and are represented by the Oregon Education Association Professional Staff Organization (the Union). The parties' most recent collective bargaining agreement (CBA) was in effect from July 1, 2011 to June 30, 2014.

The consultants' job duties require them to travel regularly in order to meet with local members near their homes and schools, and the consultants maintain their own individual work schedules. Since at least 2007, the Employer has had a policy explicitly permitting professional staff to work from home "to the extent required for prompt responses to members outside the normal work day or on days when the employee is not scheduled to be in the office." The policy also allows for work at home "when the employee needs to be away from office interruptions in order to complete a

specific project or task.” In practice, consultants generally work from home as much as they deem necessary to perform their jobs.

The Employer’s bylaws require that the Employer adopt a balanced budget. Each May, the Employer’s members vote on the budget that will govern the Employer’s fiscal year, which starts in September. In 2012, facing a \$2.6 million deficit, the Employer eliminated support staff positions in five rural offices, leaving the consultant at each office as the lone employee in those offices. The Union filed a grievance alleging that the Employer had failed to comply with a contractual provision requiring a 1:1 ratio of professional employees to support staff. On January 9, 2014,¹ an arbitrator issued an award finding that the Employer was not in compliance with the parties’ agreement.

Over the next several weeks, the Employer proposed several ideas for complying with the arbitrator’s award, including closing the five rural offices and reassigning the consultants to larger offices with more support staff. The Employer shared the options under consideration with the Union and asked for the Union’s input; the Union declined other than to state that the Employer should fully implement the award. On February 26, following a meeting of its Board of Directors, the Employer informed the Union that it had decided to consolidate the five rural offices with other existing offices, permanently closing the five offices. The Employer sent an email to the Union communicating the details of its plan, which included the offices that the five consultants would be assigned to, and a statement that the Employer “will bargain the impacts of this office consolidation for the [affected] [c]onsultants.” The Employer closed the email by asking that the Union review the plan and “please call with any questions or suggestions you may have.” After receiving no response from the Union, the Employer sent another email to the Union on March 11, stating that it had begun the initial planning for closing and consolidating the offices, and that it was “anxious to begin impact bargaining at your earliest convenience.”

On March 27, Union leaders met with the Employer and discussed a proposal by the Union to retain all existing office space, hire part-time support staff for the rest of the fiscal year, and increase the support staff to full-time beginning September 1. The Employer and the Union debated over the budget, particularly whether the Employer had the funds to implement the arbitrator’s award, and whether the Employer was in compliance with the award by having a plan to comply in the future. The Union’s vice president pointed out that the office closures would result in the consultants having to travel hundreds of miles to do their jobs. The Employer inquired whether the Union wanted to begin bargaining over the impact of the office

¹ All dates *infra* are 2014 unless otherwise noted.

consolidations, and the Union responded that it was not prepared to bargain because the proposed changes had not yet been implemented.

On April 4, the Employer responded to the Union's proposal to keep the offices open and hire part-time support staff by stating that it was moving forward with its earlier decision to consolidate and close the rural offices. However, the Employer also stated that it would assign support staff to one of the five offices and not close that particular office. The Employer also reiterated that it was prepared to bargain the impacts of the remaining four office closures and, in particular, that "there are a number of issues relating to rural, mobile office support that we are prepared to bargain." The Employer offered dates in late April when it was available to bargain.

The Union did not respond to the Employer's April 4th memorandum. However, on April 21, the Union sent a letter to the Employer proposing to begin negotiations for a new collective-bargaining agreement to succeed the CBA that was to expire on June 30. The Union proposed dates to open negotiations in late April.

In late April and early May, the Employer spoke to three of the affected consultants about working from home on a regular basis once their offices closed. Consultant 1 and Consultant 2 told their supervisor that they were uncomfortable talking about this topic without the Union and immediately told the Union about these conversations. The Employer's executive director asked Consultant 3 whether he would be interested in working from home once his office closed. Consultant 3 responded to the idea enthusiastically because he had a long commute to his current office and spent a good deal of time on the road already.

On May 1, the Union filed a charge² with the Region alleging that the Employer retaliated against the Union by deciding to close the rural offices, in violation of Sections 8(a)(3) and 8(a)(5). Around May 5, the Employer's members approved the budget for the new fiscal year beginning September 1, which included the consolidated field offices. During the month of May, the parties did not engage in effects bargaining or begin bargaining for a successor agreement.

In late May, Consultant 3 contacted his supervisor and asked whether it would be possible for him to begin working at home in June. The Employer obtained a printer and other office supplies for Consultant 3 to use at home. Sometime in June, Consultant 3's office was closed and he began working from home.

In June, the parties traded correspondence about the office consolidation plan. The Union protested the Employer's discussions with the employees about working from home once their offices closed. The Employer responded that it was trying to

² 19-CA-127830.

implement the arbitral award, over which it had repeatedly asked the Union to bargain, and that it still remained willing to bargain over the effects. On June 27, the Union stated that the Employer's earlier requests for effects bargaining were premature until the budget was finalized and that "since the parties are currently in negotiations for a successor agreement, it is the expectation of the [Union] that any proposed changes to the status quo on this topic will be made in that venue."

In late June or early July, the parties met to begin bargaining for a successor agreement. Over the course of the next few months, the parties had approximately 12 bargaining sessions. At none of these sessions did either party make proposals about or otherwise discuss the effects of the four office closures. During two sidebars, however, the Union proposed keeping the four offices open or at least delaying their closure. The Employer did not agree to keep the offices open or delay its plans to close them.

In July, the Union filed a grievance alleging, in part, that the Employer was not in compliance with the required support staff ratio at the three rural offices that were still open. The Union also filed a complaint in the U.S. District Court for the District of Oregon, seeking enforcement of the arbitration award. In late July, the Union withdrew the pending unfair labor practice charge over the Employer's decision to close the offices.

Over the course of the next several months, the Employer sent instructions to Consultants 1, 2, and 4 regarding the plans to close their offices and move equipment or files to their homes as needed. On September 4, a supervisor wrote a memo to the three consultants, copying the Union, stating that each consultant was being assigned to an existing Employer office as part of the consolidation, but that they were not expected to be there on a regular basis and that each consultant "ha[s] approval and support to work from home...when you're not on the road."

On September 22, the Union wrote to the Employer and stated that it was objecting to recent Employer communications with Consultant 4 regarding delivering office equipment to Consultant 4's home. The Union reminded the Employer that they were presently engaged in litigation in federal court regarding the Employer's compliance with the arbitration award and that there was an active grievance over the staffing levels at the remaining offices. The Union stated that "issues relating to those raised in the court action and the grievance are being addressed in [] bargain[ing]" but that the Employer was engaging in "a provocative act intended to change the status quo." The Union asked that the Employer delay the transfer of equipment to Consultant 4's home and to "please respect the bargaining process and allow the representatives of the parties to work out these issues." On September 26, Consultant 4's office was closed and he began working from home.

On November 14, the District Court issued a decision finding that the Employer had not complied with the arbitrator's award at the two offices that remained open, but also concluded that the Employer was not obligated to keep any offices open. By late November, the two remaining rural offices were closed and Consultants 1 and 2 began working from home. In November and December, the parties held additional contract bargaining sessions but did not discuss the effects of the office closures. The Employer states that it remains willing to bargain over the impacts of the closure and consolidation of the four offices.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) by unilaterally establishing a work-at-home option for Consultants 1-4, because the Union waived its right to bargain over this issue by inaction. Following its decision to close the offices, the Employer made several requests to bargain with the Union over the effects of the closures, but the Union declined to engage in bargaining over this issue, either ignoring the requests, claiming that effects bargaining would be premature, or protesting the decision in lieu of pursuing effects bargaining. When the parties began bargaining for a successor contract several months later, the Union again made no effort to bargain over the effects and instead continued to focus only on the Employer's decision to close the offices. Therefore, the Region should dismiss the charge, absent withdrawal.³

Before an employer can implement a change that implicates a mandatory subject of bargaining, the employer must provide the union with clear notice, sufficiently in advance of actual implementation, in order to allow a meaningful opportunity to bargain.⁴ Once such notice is received, the union must act with "due diligence" to request bargaining or risk a finding that it has waived its bargaining rights by inaction.⁵ A union's request to bargain need not be in any particular form so long as

³ The charge also alleges that the Employer engaged in direct dealing in violation of Section 8(a)(5) by speaking directly to employees about establishing permanent home offices; this issue was not submitted for advice.

⁴ *Bell Atlantic Corporation*, 336 NLRB 1076, 1086 (2001).

⁵ *See id.*, 336 NLRB at 1086-87 (union waived its right to bargain over plant closure and transfer of bargaining unit work when the union failed to demand bargaining for four months after receiving notice); *see also Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991) ("What period of time is found sufficient for a union to request bargaining will depend upon the facts of each case."), *enforced*, 984 F.2d 1562 (10th Cir. 1993)

it clearly indicates a desire to bargain.⁶ A union may be excused from the bargaining request requirement, however, if an employer provides too little time prior to implementation or otherwise presents the union with a “fait accompli.”⁷

Here, the Union waived its right to bargain over the effects of the Employer’s decision to close and consolidate the rural offices.⁸ When the Employer initially proposed its office consolidation plan in January, it stated that it intended to bargain with the Union over the effects. And on February 26, when the Employer decided to close the offices, it immediately notified the Union of its decision. Between late February and late April, the Employer made at least four direct invitations to the Union to engage in effects bargaining. None of these communications, viewed objectively, indicated that the Employer had already decided to implement an expanded work-at-home arrangement as a “fait accompli” that would render effects bargaining futile.⁹ Rather, the Employer made diligent and earnest efforts to engage in effects bargaining. Nonetheless, the Union’s only correspondence with the Employer during this period concerned the Employer’s *decision* to close the offices; the

⁶ See, e.g., *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971); see also *Dubuque Packing Co.*, 303 NLRB 386, 398 & n.36 (1991) (information request found to be request for bargaining), *enforced*, 1 F.3d 24 (D.C. Cir. 1993); *Armour & Co.*, 280 NLRB 824, 828 (1986) (finding union properly alerted the employer that it did not acquiesce to employer proposal when it stated that it wanted to “discuss” the employer’s position, even though the word “bargain” was never used).

⁷ See, e.g., *KGTV*, 355 NLRB 1283, 1284 (2010) (where employer demonstrates that it has made a decision and has no intention to truly bargain before implementation, union not required to request bargaining because to do so would be futile); *Defiance Hospital*, 330 NLRB 492, 492-93 (2000) (finding fait accompli where employer made final decision to increase wages before meeting with union and announced the decision simultaneously to both employees and the union).

⁸ Whether the Employer lawfully decided to close the rural offices is not at issue in this case. As described *supra*, the Union withdrew an earlier charge alleging that the Employer retaliated against the Union and violated Section 8(a)(3) and (5) by deciding to close the offices. The instant charge only alleges that the Employer unilaterally implemented work-at-home for the consultants assigned to the rural offices. Furthermore, a new allegation that the Employer unilaterally implemented the office closure and consolidation plan would likely be time-barred.

⁹ See, e.g., *KGTV*, 355 NLRB at 1284 (“A fait-accomplis finding requires objective evidence; a union’s subjective impression of its bargaining partner’s intention is insufficient.”).

Union expressed no interest in effects bargaining. Indeed, when the parties finally met on March 27, the Union claimed that bargaining over the effects of the office closures would be premature.¹⁰ And when the Employer reiterated in its April 4 memorandum that it would be closing certain offices, the Union once again made no response.¹¹ Finally, when the Employer began asking some of the consultants about their views on a work-at-home option in late April and early May, the Union waited a month after learning of these communications before it protested, and even at that point, failed to demand effects bargaining. The Board has found a “waiver by inaction” in cases where, as here, a union had adequate notice of a proposed change but protested the employer’s decision rather than diligently pursue bargaining.¹²

¹⁰ Under the circumstances, the Union’s claim that effects bargaining would be premature is highly suspect. By March 27, the Employer had already notified the Union that it had decided on a plan to close and consolidate the offices and was implementing that plan, with approval by its Board of Directors. Even if the Employer’s members later decided to reject the proposed budget when they voted on the budget in May, contrary to the recommendations of its executive officers, the Union knew that the Employer had no obligation to wait until the next year’s budget was formally approved before proceeding.

¹¹ The April 4 memorandum also stated that the Employer was prepared to bargain about “rural, mobile office support.” Although the Union would have reasonably understood this to be a reference to an expanded work-at-home arrangement for the affected consultants, given the professional employees’ practice of working from home on occasion and the fact that the consultants affected by the closures would have to travel much further distances to work at the Employer’s post-consolidation office locations, it was clearly phrased as an invitation to bargain rather than a fait accompli.

¹² See, e.g., *AT&T Corp.*, 337 NLRB 689, 692-93 (2002) (finding that union waived its right to bargain over facility-closure decision because, despite receiving two-months’ advance notice, it filed a ULP charge but never requested bargaining); *Fraser Shipyards*, 272 NLRB 496, 497, 500 (1984) (finding that union waived its right to effects bargaining after receiving four weeks’ notice of the employer’s intent to close part of its operations, where it failed to demand bargaining and only asked the employer to reconsider its decision); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678-79 (1975) (finding that union waived its right to bargain regarding employer’s implementation of polygraph testing, where union failed to request bargaining and “showed no inclination to do anything but object”); see also *Citizens Natl. Bank of Willmar*, 245 NLRB 389, 390 (1979) (“[a] union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter” rather than bargaining), *enforced mem.*, 644 F.2d 39 (D.C. Cir. 1981).

We further conclude that *Bottom Line Enterprises*¹³ does not support finding a violation here. In *Bottom Line*, the Board held that where parties are in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide the union with notice and an opportunity to bargain.¹⁴ In those circumstances, the duty to bargain encompasses refraining from implementing such changes at all, absent overall impasse on bargaining for an agreement as a whole.¹⁵ Here, the Union waived its right to bargain over the effects of the office consolidation before contract bargaining began.¹⁶ Accordingly, the *Bottom Line* standard is inapplicable.

Further, even under *Bottom Line*, a limited exception to the duty to refrain from implementing changes absent overall impasse exists “[w]hen a union, in response to an employer’s diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining.”¹⁷ In that regard, we note that even after successor contract negotiations began, the Union continued to delay and avoid effects bargaining. Indeed, over the course of seven months and at least twelve bargaining sessions, the Union remained focused on protesting the office consolidation decision and asking the Employer to reconsider closing the offices during sidebars, while making no demands or proposals at or away from the bargaining table in order to actually bargain over the impact of the impending office closures. The Union gave

¹³ 302 NLRB 373, 374 (1991), *enforced sub nom. Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (table).

¹⁴ *Id.*

¹⁵ See, e.g., *Intermountain Rural Electric Assn.*, 305 NLRB at 786; see also *NLRB v. Triple A Fire Protection*, 136 F.3d 727, 739 (11th Cir. 1998) (enforcing Board order finding employer not entitled to implement unilateral changes to employees’ wages and benefits while parties were bargaining for new agreement).

¹⁶ We assume, arguendo, that contract bargaining for purposes of *Bottom Line Enterprises* began as of April 21, the date that the Union sent a letter to the Employer proposing to begin negotiations for a successor collective-bargaining agreement.

¹⁷ 302 NLRB at 374, citing *M&M Contractors*, 262 NLRB 1472 (1982) (citations omitted); see also *AAA Motor Lines, Inc.*, 215 NLRB 793, 794 (1974) (finding union’s intentional delay tactics for two-and-a-half months after receiving the employer’s proposal for a successor agreement sufficient to permit the employer to implement certain changes unilaterally).

no indication that it was interested in bargaining over the impact of the closures as opposed to protesting the decision.¹⁸

Based on the foregoing, we conclude that the Employer was privileged to unilaterally implement an expanded work-at-home arrangement for the consultants who were affected by its decision to close the rural offices. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

¹⁸ *Cf. Double S Mining*, 309 NLRB 1058, 1059-62 (1992) (finding employer justified in unilaterally deciding amount of holiday bonus, where, during contract bargaining, the union mistakenly believed that any change to the bonus was unlawful and refused to negotiate at all on that issue); *Mail Contractors of America, Inc.*, 346 NLRB 164, 164 n.1, 175 (2005) (finding employer did not violate the Act by implementing changes to employee health benefits during first contract negotiations because employer had decided to switch health insurance carriers before union was recognized and gave the union an opportunity to bargain over the proposed benefits but, rather than “seek real negotiations on the issue, [the union] insisted that the changes not be implemented”).