

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

Advice Memorandum

DATE: November 23, 2015

TO: Rhonda P. Ley, Regional Director
Region 3

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

SUBJECT: Nathan Littauer Hospital Association
Case 03-CA-151867

530-6033-7070

530-6033-7084

This case was submitted for advice as to whether a hospital and the union representing its registered nurses were at overall impasse on April 27, 2015, when the hospital announced its intention to unilaterally implement its paid-time off proposal, and if so, whether the union broke that impasse before the hospital implemented that proposal on May 17, 2015. We conclude that the parties were at overall impasse when the hospital announced its intention to unilaterally implement its paid-time off proposal, and that the union's concessions before May 17, 2015 did not break that impasse. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

Nathan Littauer Hospital Association ("Employer") operates a community hospital and nursing home in Gloversville, New York. The New York State Nurses Association ("Union" or "NYSNA") has represented the Employer's registered nurses for years. The parties' most recent collective-bargaining agreement expired on December 31, 2013. In the last twenty months, the parties have met twenty-five times.

Since bargaining began in November 2013, the Employer has sought substantial changes to the status quo in three areas: 1) healthcare premiums, 2) the retirement plan, and 3) paid time off.

In regard to healthcare, under the expired contract, bargaining unit employees participated in the Employer's healthcare plan, but paid less of the premium costs than non-unit employees. Initially, the Employer proposed that unit employees pay the same premiums as non-unit employees, and further added that the Employer would retain unlimited discretion to change any feature of the plan so long as it applied to all employees. The Union initially demanded the status quo, but then in March 2014 vastly expanded its proposal by demanding that unit employees be moved

to the Union's in-house healthcare plan (the "NYSNA Health Plan"), with the Employer paying the *entire* premium for all full-time employees and 80% of the premium for all part-timers. The Employer modified its proposal slightly in July 2014 to ease unit employees into the higher premiums other employees paid by paying a higher percentage of premiums during the first two years of the contract,¹ but otherwise both parties' proposals have remained unchanged since July 2014.

As for the retirement plan, under the expired contract all unit employees hired after January 1, 2007 participated in the Employer's defined contribution plan, to which the Employer contributed four percent of the employee's pay. Some senior nurses, however, were grandfathered into the Employer's defined benefit plan that at one time had covered everyone. At the time the last contract expired, a majority of employees were covered by the defined contribution plan. The Employer's initial proposal was to eliminate what was left of its defined benefit plan and move the grandfathered senior employees to the defined contribution plan. The Union's initial demand was again to maintain the status quo, but on March 2014 the Union upped its demand drastically by proposing that all unit employees be moved to the Union's in-house defined benefit retirement plan (the "NYSNA Defined Benefit Plan"). The parties' proposals on retirement remained unchanged from March 2014 to May 14, 2015.

Finally, under the expired contract, paid-time off was provided for by separate vacation, personal, holiday, and sick-time-off clauses, each with its own accrual formula and procedure for using. The Employer's initial proposal was to collapse vacation, personal, and holiday time off into a single paid-time-off bank, with accrual rates that would leave many employees with less paid time off than they had previously enjoyed. Sick leave would become an extended sick-time bank that employees could use only after being absent for seven days. The Union expressed willingness to move to a single time-off bank provided no employees lost any leave benefits.

On July 29, 2014, the Employer gave the Union its last, best, and final offer, and informed the Union that it believed the parties were at impasse. The Employer repeatedly emphasized that it would not accept a defined benefit plan or a health insurance plan that did not require employees to share some of the premium costs. In response, the Union slightly modified its wage proposal and stated that it was not wed to a defined benefit plan, but no further movement occurred in 2014. After arguing for most of the rest of 2014 about whether they were at impasse, on March 9,

¹ Specifically, the Employer offered to pay 90% of individual premiums and 60% of family premiums for all full-time workers during the first two years of the contract before moving to equality with non-unit employees.

2015, the Union abandoned its proposal for a paid-time-off bank with no negative impact on any employee's benefits. Instead, the Union proposed to retain the expired contract's status quo on paid time off. The parties dispute whether the Union's abandonment of its willingness to consider a leave bank was regressive, since the Employer had argued that the Union's leave bank proposal was actually more expensive than the status quo.

On April 21, 2015, the Employer again informed the Union that it had conveyed its last, best, and final offer and that the parties were at impasse. On April 27, having received no response, the Employer again advised the Union that they were at impasse and further informed it that the Employer would implement its paid-time-off proposal effective May 17. The Employer also stated that it was still willing to meet as scheduled on May 19 for the purpose of answering any remaining questions about its final offer.

On May 5, 2015, the Union wrote to the Employer disputing its claim of impasse and noting the Union's recent movements on some minor non-economic issues.² On May 14, the Union sent another letter to the Employer indicating that it was changing its position on all three major topics. The Union dropped its demand to move all unit employees to the NYSNA health plan, instead agreeing to leave unit employees on the Employer's health plan, but only if the Employer paid *all* premiums. In regard to retirement, the Union dropped its demand to move unit employees to the NYSNA defined benefit plan, and instead demanded that all unit employees be moved to the defined benefit plan run by the Employer for its grandfathered senior employees. As for paid time off, the Union reversed its March 9 position, and stated that it was again prepared to accept the Employer's proposal to create a single paid-time-off bank but, as before March 9, insisted that the accrual formulas remain the same to maintain existing benefits. Finally, the Union dropped a demand that the Employer provide a Medicare bridge for retirees aged 60-64.

The parties' positions on healthcare premiums, the retirement plan, and paid time off—from the outset of negotiations through mid-May—are summarized below.

- **Status Quo:** Were the parties to maintain the status quo, the Employer estimates it would pay about \$546,000 for employees' healthcare, and contribute about \$229,000 to employees' defined contribution plan accounts.
- **Employer's Position:** Though the Employer has not shared its calculations of the cost savings of its proposals, the Employer's last best offer was that

² The Union had made some changes to its proposals on staff committees, a subject to which the Employer was deeply indifferent.

employees would pay a larger share of their health premiums, the Employer would reserve the right to make changes to the health plan, the grandfathered employees on its defined benefit retirement plan would be moved to the defined contribution plan, and paid time off would be simplified and reduced. All of these proposals represented significant reductions in cost from the status quo.

- Union's Initial Position: The parties would maintain the status quo on healthcare, retirement, and paid time off, as set forth in the expired collective-bargaining agreement.
- Union's Position as of April 27, 2015: The Employer would participate in the NYSNA Health Fund Plan B during the first year of the contract, which the Employer estimates would cost about \$1.2 million (\$654,000 above status quo), and then move to the NYSNA Health Fund Plan A for the second year at a cost of about \$1.47 million (\$924,000 above status quo). The Employer would also move all unit employees to the NYSNA Defined Benefit Plan at a total cost of \$1.1 million. The parties would maintain the status quo on paid time off.
- Union's May 14, 2015 Position: The Employer would maintain its current health plan for employees, but fully pay premiums, potentially costing about \$1,142,932 (\$596,932 above status quo and about \$50,000 less than previous Union proposal's first year). The Employer would move all unit employees to the Employer's grandfathered defined benefit plan at a cost of \$624,500 (\$480,000 less than previous Union proposal). The Union would accept paid-time-off banks, but only if employees were ensured to not lose any benefits (\$164,000 more than status quo). Finally, the Union dropped a demand for a Medicaid bridge, which would have cost about \$65,000. The Employer did not calculate the cost difference between this proposal and the Union's previous one, but afterward put it at roughly \$500,000. The Union calculates the cost difference as almost \$1 million.

The Employer implemented its paid-time-off proposal on May 17, and the parties met for previously scheduled bargaining sessions on May 19 and June 9.³ At those meetings, the Union made some changes to its proposal, but the Employer rejected them and stuck to its last best offer. The Union filed various ULP charges, including the one at issue here, and little bargaining occurred while the Region investigated. However, the parties have recently recommenced bargaining, meeting most recently on November 4.

³ The Employer has not implemented any proposals besides its paid-time off proposal.

ACTION

We conclude that the parties were at overall impasse when the Employer announced its intention to unilaterally implement its paid-time off proposal, and that the Union's concessions before May 17, 2015 did not break that impasse. Accordingly, the Region should dismiss the charge, absent withdrawal.⁴

Whether a bargaining impasse exists "is a matter of judgment."⁵ The bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.⁶ In order for genuine impasse to occur, the parties must have "exhausted all avenues for reaching agreement," there must be "no realistic possibility that continuation of discussion at that time would have been fruitful," and both parties must be unwilling to compromise.⁷

Once the parties have reached an impasse, "[a]nything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks [that] impasse."⁸ A substantial concession by a party at the bargaining table often indicates both that that party is willing to compromise and that further discussion may be fruitful.⁹ As the Board noted in *Hayward Dodge*, the "essential

⁴ While we conclude that the parties were at impasse when the Employer implemented its paid-time off proposals, we reach no conclusion as to whether the parties' subsequent interactions may have broken the impasse.

⁵ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *petition for rev. denied*, 395 F.2d 622 (D.C. Cir. 1968).

⁶ *Id.*

⁷ *Hayward Dodge*, 292 NLRB 434, 468 (1989). *See also Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586 (1999) (finding no impasse, in large part because although union said it could not accept employer's wage offer, it did not say it could not lower its own wage offer), *enforced*, 237 F.3d 187 (4th Cir. 2000).

⁸ *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 861-62 (1996).

⁹ *See Old Man's Home of Philadelphia*, 265 NLRB 1632, 1634 (1982) (finding that union concessions were substantial enough to reasonably suggest that further concessions might be forthcoming), *enforcement denied*, 719 F.2d 683, 688 (3d Cir. 1983).

question is whether there has been movement sufficient “to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.”¹⁰ Typically, so long as the concession is “not trivial or meaningless,” it will break an impasse even if the parties are far apart, because normally such a change gives “reason to believe that further bargaining might produce additional movement.”¹¹

However, concessions on significant issues will not break an impasse if the concessions do not reasonably create a possibility of fruitful discussion. Often in cases where a union has indicated that it will never concede to an employer’s demands, other concessions by the union do not necessarily create any “rays of hope,” as the parties are still fundamentally at odds.¹² In *Hayward Dodge*, for instance, the employer claimed it needed substantial relief because it was losing money, while the union claimed that the employer was profitable and so demanded increased benefits. Thus, the Board found the parties were at impasse even though the union dropped a week from its vacation demand at the last bargaining session.¹³ Due to the fundamental difference in the parties’ perspectives, the Board agreed that there was no reason to reasonably believe continued talks would be fruitful.¹⁴

¹⁰ *Hayward Dodge*, 292 NLRB at 468 (quoting *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966)).

¹¹ *Id.* See also *Webb Furniture Corp.*, 152 NLRB 1526, 1529 (1965), *enforced*, *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966).

¹² See *Concrete Pipe & Products Corp.*, 305 NLRB 152, 154 (1991) (finding parties at impasse even though union dropped its demand for a wage increase, because union categorically refused to consider employer’s demand for a wage decrease without the employer opening its books, which employer was unwilling to do), *enforced sub nom. Steelworkers Local 14524 v. NLRB*, 983 F.2d 240 (D.C. Cir. 1993); *H & H Pretzel Co.*, 277 NLRB 1327, 1327, 1333-34 (1985) (finding impasse even though parties only met four times and union had offered concessions at third meeting, where union had no intention of consenting to lower labor costs when that was the sole reason employer had opened bargaining), *enforced*, 831 F.2d 650 (6th Cir. 1987).

¹³ 292 NLRB at 469 (further relying on the fact that the parties had not scheduled any more bargaining sessions and that the union had preconditions before it was willing to consider any more concessions).

¹⁴ *Id.*

In *GATX Logistics, Inc.*, the Board held that the parties were at impasse even though the union continued to reduce the proposed employer contributions to the union health and pension funds throughout bargaining, even up to when the employer declared impasse.¹⁵ In that case, the union “steadfastly refused to consider” moving from those funds to a 401(k) or the employer’s health plan, so the Board determined that further negotiations were “futile” and the union’s concessions were not “substantive.”¹⁶

Initially, we agree with the Region that the parties were at overall impasse on April 27. As of that date, the parties had met twenty-five times over almost eighteen months. The parties were millions of dollars apart on three major issues: healthcare premiums, the retirement plan, and paid time off.¹⁷ The Employer had not modified its proposal in ten months, had repeatedly stated that it did not intend to move anymore, and had been asserting for almost seven months that the parties were deadlocked. The Union disagreed that they were deadlocked, but had not significantly altered its position on any of the key issues for almost six months, and did not react when the Employer asserted on April 21 that the parties were at impasse.

In addition, although the Board, as outlined above, has a very liberal view of what breaks impasse, we conclude that impasse was not broken by the Union’s May 14 letter. As in *Hayward Dodge*, we see no “ray of hope” here. The only *Taft* factor that suggests impasse may have been broken is that the Union believed the parties to not be at impasse. The Employer was clear about its demands since the beginning of bargaining and was steadfast in those demands for over a year. Although the Union cut nearly \$1 million from its earlier proposal (the Employer claims the reduction was roughly \$500,000), it did not create any possibility of fruitful discussion. The Union’s proposal was still much costlier than the status quo, and, under the circumstances outlined below, was not a serious attempt to engage with the Employer’s central problem—cost reduction.

At the outset of the negotiations, the Employer identified certain concrete goals: health premium relief, eliminating the grandfathered defined benefit plan, and creating a simplified paid-leave system with no added costs. Although the Union consistently claimed that it was flexible and did not explicitly rule out a defined contribution plan, which arguably distinguishes this case from *GATX Logistics*, the

¹⁵ 325 NLRB 413, 413, 419 (1998).

¹⁶ *Id.*

¹⁷ The parties’ proposals also differ with respect to other key economic issues such as wages and staffing, but the parties are in general agreement that employees will receive a wage increase of some amount.

Union's proposals did not indicate any willingness to address the Employer's concerns. The Union's May 14 proposals still rested on the idea that the Employer was to pay all health premiums, put all employees in a defined benefit plan, and increase benefits hundreds of thousands of dollars above the status quo. Indeed, the Union's paid-time-off proposal was simply a rehash of its past proposals, and was arguably regressive. In sum, in spite of the Union's stated flexibility, the parties were speaking different languages.

In addition, while the Union's complete departure from its initial bargaining proposal may not have reached the point of unlawful regressive bargaining, it created a wide gulf between the parties. Moderate forward movements in a party's position after such a significant retrogression naturally lose some of their compromising effect. Given how far apart the parties remained both economically and conceptually, and the dispiriting effect of the Union's total abandonment of its initial proposal, we are unconvinced that the mere change in the dollar figure of the Union's May 14 proposal created any chance of a potential breakthrough. Moreover, to find otherwise could create a perverse incentive for unions to inflate their demands and simply lower them a little at a time in order to prevent an employer from ever declaring impasse.¹⁸

Based on the foregoing, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

¹⁸ See *H & H Pretzel Co.*, 277 NLRB at 1334 (affirming ALJ's determination that union had no intention of ever consenting to a reduction in labor costs, but was simply trying to keep bargaining going as long as possible to prevent employer withdrawing fringe benefit).