

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AFSCME COUNCIL 5, LOCAL 3558

Respondent

and

ST. LUKE'S HOSPITAL OF DULUTH, INC. D/B/A  
ST. LUKE'S HOME CARE

Charging Party

Case 18-CB-149410

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**BRIEF TO THE NATIONAL LABOR RELATIONS BOARD  
ON BEHALF OF THE GENERAL COUNSEL**

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Submitted by:

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## **I. STATEMENT OF THE CASE**

This is a straightforward case based on well-settled law. AFSCME Council 5, Local 3558 (“Respondent”) has insisted to impasse on bargaining with St. Luke’s Hospital of Duluth d/b/a St. Luke’s Home Care (“the Employer”) over a permissive subject of bargaining. Specifically, since about March 11, 2015, Respondent has insisted on bargaining over the inclusion of an interest arbitration provision in a successor collective-bargaining agreement. In doing so, Respondent has violated Section 8(b)(3) of the National Labor Relations Act (“the Act”), which makes it unlawful for a labor organization or its agents to refuse to bargain collectively with an employer whose employees it represents.

This brief begins with an overview of the stipulated facts supporting the allegations contained in the complaint. I will explain why Respondent’s insistence on bargaining to impasse over the inclusion of an interest arbitration provision is unlawful. Next, I will address Respondent’s misguided contention that it may invoke the interest arbitration in order to allow an arbitrator to decide whether interest arbitration should be included in the successor contract. In sum, these arguments will demonstrate that Respondent has acted in violation of Section 8(b)(3) of the Act.

## **II. FACTS**

The relevant facts in this case are brief and have been stipulated to by all parties to the proceeding. Respondent is labor organization within the meaning of Section 2(5) of the Act, and the Employer is engaged in the operation of an acute care hospital and the provision of home health care services. During the calendar year ending December 31, 2014, the Employer, in conducting its operations, purchased and received at its Duluth, Minnesota facility goods and services valued in excess of \$50,000 directly from points outside the State of Minnesota. As such, the Employer has been an employer within the meaning of Sections 2(2), (6), and (7) of the Act. In addition, Respondent’s field representatives Kenneth Loeffler-Kemp and Amanda Prince have been agents of Respondent within the meaning of Section 2(13) of the Act.

At all material times, the Employer has recognized the Respondent as the exclusive collective-bargaining representative of the employees in the following bargaining unit (“the Unit”), which is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All homemakers and technicians employed with the Employer at or out of its 810 East 4<sup>th</sup> Street, Duluth, Minnesota facility who work on average or are anticipated to work an average of four or more hours per week over a 13 week period; excluding RNs and LPNs, Office and Clerical Employees, Therapists, Therapist Assistants, Guards and Supervisors, as defined in the National Labor Relations Act.

The Employer’s recognition of Respondent as the Unit’s exclusive collective-bargaining representative has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 1, 2012 to December 31, 2014 (“the Agreement”).

The Agreement includes Article 21, regarding the “Arbitration of Contracts.” (Ex. G at 21.)<sup>1</sup> Article 21, Section 21.3 of the Agreement relates to the “Continuation of Interest Arbitration” and provides:

The provisions of this Article (XXI) shall be in full force and effect during the entire term of this agreement and shall apply and be utilized by the parties to reach agreement as to the terms of a succeeding Labor Agreement in the events that the parties are otherwise unable to reach agreement through negotiations. The arbitration panel in rendering its decision shall incorporate there in a provision that this arbitration clause (Article XXI) shall be a part of the succeeding contract, unmodified, except that this arbitration panel may impose an expiration date on the provisions of this Article XXI for any Labor Agreement expiring during or after the calendar year 2005.

In early 2015<sup>2</sup>, Respondent and the Employer met for contract negotiations on four occasions: January 28, February 2, February 25, and March 11. During these negotiations, the parties exchanged written proposals and counterproposals. At the first meeting, on January 28, the Employer’s proposal included Article 21 regarding interest arbitration. At the next bargaining session on February 2, however, the Employer withdrew the proposal to include interest arbitration in the successor contract and then maintained that position through the remaining negotiations. Respondent, on the other hand, consistently proposed that interest arbitration should be included in the successor contract.

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<sup>1</sup> References to Exhibit G will use the original pagination from the document.

<sup>2</sup> All dates are in 2015 unless otherwise noted.

At the March 11 bargaining session, Respondent and the Employer reached agreement on all open contract issues except for the inclusion of Article 21 regarding interest arbitration. While Respondent again sought to include Article 21 in the collective-bargaining agreement, the Employer reiterated that it did not want to include interest arbitration in the successor contract and would not negotiate further regarding that provision.

After the March 11 bargaining session, Respondent sought to invoke Article 21 of the Agreement to submit the issue of the continuation of the interest arbitration clause to an arbitrator. Respondent's efforts were confirmed in a March 31 email from Respondent's agent, Kenneth Loeffler-Kemp to the Employer's representative, Marla Halvorson. (Ex. H.) In that email exchange, Loeffler-Kemp confirms that the only outstanding issue is that of Article 21 – Arbitration, and reiterates that the Employer has proposed removing the provision, while Respondent has not agreed to the Employers proposal.

### III. ARGUMENT

#### ***A. Respondent Unlawfully Insisted to Impasse on the Inclusion of the Interest Arbitration Provision in the Successor Contract, a Permissive Subject of Bargaining***

Under Section 8(d) of the Act, employers and unions must bargain in good faith with respect to wages, hours, and other terms and conditions of employment, which are mandatory subjects of bargaining. Subjects not related to these matters are nonmandatory, or permissive, subjects of bargaining. See, e.g., *Laidlaw Transit*, 323 NLRB 867, 869 (1997). While a party may lawfully insist on bargaining to impasse with respect to a mandatory subject of bargaining, a party violates the Act when it does so regarding a nonmandatory subject. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1956); *Laidlaw Transit*, 323 NLRB at 869.

According to well-settled Board precedent, interest arbitration is a nonmandatory subject of bargaining, and, therefore, a party may not insist to impasse upon including interest arbitration in a collective-bargaining agreement. See, e.g., *Sheet Metal Workers Local 38 (Elmsford Sheet Metal Works)*, 231 NLRB 699, 700 (1977); *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43, 45 (1984); *Sheet Metal Workers Local 359 (Madison Industries)*, 319 NLRB 668, 670 (1995); *In re*

*Connecticut State Conference Board*, 339 NLRB 760, 767 (2003). In *Columbus Printing Pressman Union No. 252 (R.W. Page Corp.)*, the Board affirmed a judge’s conclusion that, in contrast to grievance arbitration, interest arbitration is a nonmandatory subject of bargaining as such provisions “do not regulate the terms and conditions of employment of the employees in the contract being negotiated, do not vitally affect such terms and conditions of employment, and are not an integral part of such terms of employment.” 219 NLRB 268, 280 (1975). Indeed, interest arbitration’s status as a nonmandatory subject is so well established that, in *Connecticut State Conference Board*, the Board confirmed that “there can no longer be any doubt that interest arbitration is a permissive subject of bargaining and, therefore, a party cannot insist upon it in negotiations to the point of impasse.” 339 NLRB 760, 767 (2003). Even the circuit courts unanimously agree with the Board’s view that an interest arbitration clause is a nonmandatory subject of bargaining. See *Sheet Metal Workers Local 38 (Elmsford Sheet Metal Works)*, 231 NLRB 699, 700 fn.5 (1977) (collecting cases).

In the instant case, Respondent admits that, as of March 11 the parties agreed on all open contract issues except for the interest arbitration provision. Despite this fact, Respondent sought to send the matter to arbitration. By this course of action – and the March 31 email—Respondent confirms that impasse has been reached and that it was continuing to insist on the inclusion of the interest arbitration provision in any collective-bargaining agreement with the Employer. See *Sheet Metal Workers Local 359 (Madison Industries)*, 319 NLRB at 670. Under these circumstances, there can be no doubt that the Respondent Union has insisted to impasse on the inclusion of a nonmandatory subject of bargaining, in violation of Section 8(b)(3) of the Act.

***B. Interest Arbitration Clauses are Unenforceable as to Any Nonmandatory Subject, Including Interest Arbitration***

Respondent, in its statement of position (Ex. J at 2-3), appears to contend that the interest arbitration clause from the 2012-2014 Agreement requires that this matter be sent to arbitration and essentially serves as a waiver of the Employer’s right to bargain – or refuse to bargain – over the

inclusion of the interest arbitration provision in a successor contract. The Board has directly rejected these arguments.

In general, the Board finds interest arbitration of mandatory subjects of bargaining permissible, but views interest arbitration of nonmandatory subjects as “void as contrary to public policy.” *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43, 45 (1984), quoting *NLRB v. Sheet Metal Workers, Local 38*, 575 F.2d 394 (2d Cir. 10978). Though it is clear that parties may voluntarily agree to arbitrate nonmandatory subjects, “either party may, with impunity, withdraw from the proceeding at any time.” *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB at 45. In the same way that a party may freely withdraw from arbitration on a nonmandatory subject, the Employer in this case has the right to refuse to arbitrate the nonmandatory subject of interest arbitration. Here, the interest arbitration provision invoked by Respondent is not enforceable with respect to any nonmandatory subject, including interest arbitration.

Importantly, the Board has specifically addressed whether a party may invoke an existing interest arbitration provision in order to perpetuate that same clause in a successor contract, and has consistently held that a party may not do so. See, e.g., *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB at 45, citing *Sheet Metal Workers v. Aldrich Air Conditioning, Inc.*, 717 F.2d 456, 459 (8<sup>th</sup> Cir. 1983); *Laidlaw Transit*, 323 NLRB 867, 869 (1997). The rationale for this prohibition rests on a concern for the parties’ ability to bargain, which would be undercut by the fact that “a party, having once agreed to that provision, may find itself locked into that procedure for as long as the bargaining relationship endures.” *Laidlaw Transit*, 323 NLRB at 869, quoting *NLRB v. Columbus Printing Pressman & Assistants’ Union No. 252*, 543 F.2d 1169-1170 (5<sup>th</sup> Cir. 1976), enfg. *Columbus Printing Pressman Local 252 (R.W. Page Corp.)*, 219 NLRB 268 (1975). According to the Board, allowing the perpetual renewal of the interest arbitration results in the parties’ “irretrievable surrender of economic weapons in support of their bargaining positions” and effectively inserts the opinion of an arbitrator for the bargaining by parties. *Laidlaw Transit, Inc.*, 323 NLRB at 869.

The language of Article 21, the interest arbitration clause that Respondent seeks to invoke in this case, is exactly the type of self-perpetuating interest arbitration clause the Board finds so problematic. Article 21 removes all control from the bargaining parties. In fact, it does not even allow the arbitrator any discretion as to whether to include the provision in the successor contract—Article 21 explicitly requires that the interest arbitration clause *must be incorporated* into the next contract. The arbitrator’s only choice is whether or not to impose an expiration date on that clause. Respondent attempts to distinguish the instant case from years of Board precedent prohibiting perpetual interest arbitration clauses because Article 21 allows that an arbitrator *may impose* an expiration date on the interest arbitration clause that *must be incorporated* into the successor contract. Though the arbitrator may impose an expiration date, he also may not. Regardless, the decision is out of the hands of the parties and in the hands of an arbitrator.

#### IV. CONCLUSION

For the reasons discussed above, the Board should find that Respondent violated Section 8(b)(3) of the Act by insisting to impasse on bargaining over a nonmandatory subject of bargaining.

Dated: February 26, 2016

Respectfully submitted,

/s/ Rachael M. Simon-Miller

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the **Brief to the National Labor Relations Board on Behalf of the General Counsel** in case 18-CB-149410 was filed via e-filing and served on February 26, 2016, by email, on the parties whose names and addresses appear below:

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