

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

UPS Supply Chain Solutions, Inc.

And

UNION DE TRONQUISTAS DE PR,
LOCAL 901, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

CASES 12-CA-159257 AND
12-CA-168819

EMPLOYER'S BRIEF

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW UPS Supply Chain Solutions, Inc. (hereinafter "Respondent", the "Company" or the "Employer"), and through its undersigned attorneys, very respectfully files its Brief requesting that this case be dismissed.

I. PROCEDURAL BACKGROUND

On September 2, 2015, the Unión de Tronquistas de Puerto Rico, Local 901 (hereinafter "the Union"), filed an unfair labor practice charge before the National Labor Relations Board alleging that the Company, UPS Supply Chain Solutions, Inc. (hereinafter the "Company" or the "Employer"), had engaged in an unfair labor practice within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act since about June of 2015 by bargaining in bad faith with the Union by insisting and conditioning the continuation of the negotiations of the initial contract by requiring that the Union translate its first proposal into the English language. The Company filed a position statement on October 21, 2015 denying that it had bargained in bad faith with the Union.

Complaint was issued on December 30, 2015 and the Company filed an Answer to Complaint on January 13, 2016.

On February 1, 2016, the Union filed another unfair labor practice charge before the Board alleging that the Company had engaged and was engaging in an unfair labor practice within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act since about January, 2016 by failing to bargain collectively and in good faith with the Union by refusing to meet and bargain with the Union because of a pending case before the NLRB, where the Region issued complaint.

An amended complaint was filed on February 19, 2016 alleging that the Company had engaged in an unfair labor practice since about August 1, 2015 by refusing to meet and bargain with the Union for the purpose of negotiating the first collective bargaining agreement.¹ The Company filed a position statement on February 22, 2016. Complaint was issued on February 23, 2016.

On March 2, 2016, the Board issued an Order consolidating the cases. A hearing was held on March 8, 2016.

The Company now files the present Brief requesting that this case be dismissed since the Company has not violated the Act by refusing to bargain or bargaining in bad faith with the Union.

¹ The Company contends that the amended complaint is partially time barred since it alleges that the Company has failed to bargain collectively since about August 1, 2015, which is over six months prior to the date the Amended Complaint was filed on February 19, 2016. The National Labor Relations Act establishes a six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U.S.C. § 160(b).

II. FACTUAL BACKGROUND

UPS and the Union have a long-standing bargaining relationship of many years. The Union represent two units in UPS in Puerto Rico.

On July 28, 2014 the Union was certified as the bargaining representative of the UPS Supply Chain Solutions' employees in the bargaining unit at issue. The Union represents a unit composed of all warehouse employees who work at the Company's facility in Caguas. (Hearing transcript, hereinafter "Tr.", page 14)

Almost five months later, on December 16, 2014, in a letter from Lucas Alturet to Ms. Ilka Ramon, Human Resources Manager of the Company, the Union requested dates for beginning the collective bargaining negotiations. The letter also stated that the Union would be forwarding its proposals "promptly". (Joint Exhibit 1)

The Company responded through its legal representative, Attorney Silva-Cofresi, that the Company would schedule such bargaining meetings as soon as the Union had provided the proposals mentioned in its letter and the Company had been able to review them. (Joint Exhibit 2).

On February 18, 2015, through a letter from Union Representative Argenis Carrillo, the Union sent the Company its bargaining proposal. (Joint Exhibit 3).

On February 20, 2015, Attorney Silva-Cofresi talked by phone with Carrillo and asked the Union to submit its proposals in English.

On March 25, 2015, Attorney Silva-Cofresi notified Carrillo that due to the loss of an important client, the Company would have to perform lay-offs. The Company invited the Union to meet to bargain about the layoffs and its effects on the bargaining unit. The

meeting was scheduled by mutual agreement for March 26, 2015 at the Union's offices. (Joint Exhibit 4).

During his testimony at the hearing, Carrillo² stated that in March 2015, he received a letter from Attorney Silva-Cofresi inviting him to negotiate the layoffs that the Company had to conduct and the parties met at the Union facilities on March 26, 2015. The Company and the Union reached an agreement regarding the layoffs during the meeting (Tr. Page 45). There was no exchange of written proposals and counterproposals (Tr. Page 46).

The parties have met three times to bargain over the collective bargaining agreement. On April 9, 2015, the parties held the first bargaining meeting. At that meeting the parties discussed the proposed bargaining rules. (Joint Exhibit 5). The parties also met for negotiations on July 15, 2015 and on July 24, 2015.

Carrillo declared that the first negotiation meeting was held on April 9, 2015. In that meeting, the Employer submitted its proposal for ground rules for negotiation and those ground rules were discussed by the parties. The parties did not reach agreement regarding the ground rules. (Tr. Page 47)

While Carrillo initially denied that the parties had bargained about the Union's proposal during the first meeting and claimed that instead what had taken place was that the Union had shared its vision of what it intended to do rather than a discussion of the proposal per se (Tr. Page 48), he later had to admit that on line 5 of page 2 of his sworn affidavit, he stated that at the first meeting the parties discussed every one of the clauses of the Union proposal. (Tr. Page 49)

² Carrillo was the sole witness at the hearing.

Carrillo accepted that after the end of the first meeting on April 9, the Union was clear that it would not translate the first proposal. (Tr. Page 50). **Despite this, the parties agreed to another date for negotiating.**

The second bargaining meeting was held on July 15, 2015. (Tr. Page 50). Carrillo claims that he does not recall being 40 minutes late for the meeting, but that it could be so. (Tr. Page 50). During the second meeting, the parties continued to discuss the remaining articles of the Union's proposals. (Tr. Pages 50-51).

In that second meeting, the Union insisted that it would not accept the Employer's proposal of translating its proposal. (Tr. Page 51) Despite this, the parties agreed for a third negotiation meeting, which was held on July 24, 2015. (Tr. Page 51). During the third meeting the parties bargained in detail regarding the Union's proposal. Carrillo took notes of the articles discussed and of the Company's proposals. For example, the Union stated that it wanted to eliminate the third paragraph of Article 5 and transfer it to the layoff, Article 15. (Tr. Page 52).

In addition, the parties discussed changing "country manager" for "facility manager," in page 10, Section 4, and the Union agreed to that. (Tr. Page 53-55). During the meeting, the Company proposed a longer probationary period than the one proposed by the Union of one month. (Tr. Page 55). In Article 10, Section 1, UPS proposed to add a last sentence to clarify that the Union could have access to the Employer's facilities with previous notification to the Company and approval by the Company. (Tr. Page 57). In Article 12, disciplinary actions, UPS proposed to add insubordination and dishonesty as reasons for termination of employment. (Tr. Page 57). The Union did not agree to the Company's proposal. (Tr. Page 57). In Article 12, Section 1, the Union proposed five

steps for disciplining an employee. The parties discussed this and UPS proposed to have four steps instead, which was rejected by the Union. (Tr. Page 58). Regarding Article 13, page 27, on grievance procedure, UPS proposed that the award issued by the arbitrator be in accordance to law, but the Union rejected this proposal. (Tr. Page 58-59). The parties also discussed article 15, regarding seniority, on page 33 (Tr. Page 59) The parties discussed consolidating articles on pages 46 and 47 into one article titled Licenses. (Tr. Page 61). Other articles discussed were article 29, regarding sick leave, page 56 and article 30, regarding holydays, page 59 (Tr. Pages 61-62). The Company proposed 7 holidays instead of the 13 holidays presented by the Union. (Tr. Page 62).

Carrillo's testimony proves that during the three bargaining meetings, the parties engaged in active and thorough discussions of all elements of the Union's proposed collective bargaining agreement.

On July 15, 2015, in a letter from Carrillo to Ilka Ramon the Union requested the following information (Joint Exhibit 6):

- 1) Disciplinary rules
- 2) Medical plan benefit books
- 3) Service procedures or any related document
- 4) Employee list with hourly salary.

The Company responded by e-mail from Attorney Silva-Cofresi enclosing the list of employees by classification with their current salaries and the SPD of the health plan. The Company informed the Union that it had no disciplinary rules and that the Company did not understand what the Union meant by service procedures. (Joint Exhibit 7).

After the third meeting, the Union, through Carrillo, wrote to Ramón (Letter of August 6, 2015, Joint Exhibit 8) asking about the status of the negotiations and about dates for meeting. The letter states that should the Company not answer with dates for negotiating he would understand that the employer's position was still to have the Union's proposal translated into English and that he would be filing a case before the appropriate agencies.

The letter was answered by the Employer on August 7, 2015 (Letter of Attorney Silva-Cofresi, Joint Exhibit 9). In his answer, the Company explains that from the beginning of negotiations it has requested that the Union submit its proposal in English due to the fact that the Union proposals have to be checked by Company employees in the US who only speak English. In addition, there was a possibility that US English-speaking employees could take part in the negotiations as part of the Company's bargaining team. That is why the Company insisted on having the proposals and counterproposals in English. The Company had offered to pay 50% of the cost of translating the Union's proposals, which the Union refused. Attorney Silva-Cofresi ended the letter as follows:

"Finally we invite you to continue with the negotiations as soon as possible."

Carrillo admitted that the Union never answered the letter inviting the Union to negotiate. (Tr. Page 63). Instead, on August 17, 2015, the Union filed an Unfair Labor Practice charge against the Company, which it later withdrew. The Union filed a second charge on September 2, 2015 alleging that the Company had engaged in an unfair labor practice by bargaining in bad faith with the Union by insisting and conditioning the continuation of the negotiations of the initial contract on having the Union translate its first

proposal into the English language. Carrillo had to accept that after being invited by Attorney Silva to continue with the negotiations as soon as possible, **the Union never responded and did not communicate with the Company from August through November, 2015** (Tr. Pages 64-65).

Finally, on November 19, 2015, the Company wrote Carrillo referring to the August 7, 2015 letter where the Company invited the Union to continue the collective bargaining negotiations. (Joint Exhibit Number 10). The Company reiterated again its desire to continue the negotiations and exhorted Carrillo to get in touch as soon as possible to coordinate new dates for bargaining. **So it was the Union and not the Company which refused to bargain collectively for over four months.** And it was the Company and not the Union, the party that reached out and tried to restart the negotiations.

Carrillo responded on November 20, 2015 (Joint Exhibit 11) stating that he was available for bargaining but claiming to be confused as to the Company's intentions. He inquired whether the Company had altered its position regarding its request that the Union's proposal be translated into English. Carrillo reminded the Company that the Union had filed a charge with the Board which was under consideration and stated that **this was the only reason that the negotiations had been delayed.** This is a clear admission by the Union that the delays in negotiations were not caused by the Company.

On December 8, 2015, the Union wrote the Company to request dates for bargaining. (Joint Exhibit 12). On December 10, 2015, the Company responded through an e-mail message to Carrillo asking him to call Attorney Silva-Cofresi to coordinate dates for bargaining. (Joint Exhibit 13). **The Union did not respond to this request.**

On January 27, 2017, Carrillo wrote the Company stating his understanding of his last conversation with Attorney Silva-Cofresi (Joint Exhibit 14). Carrillo stated that Attorney Silva had told him to call the Company after Ilka Román had returned from vacation. He said that he had called back later and that Attorney Silva-Cofresi told him he had no available dates and that he would continue with the case pending before the Board. In the letter, Carrillo asked the Company to provide dates for bargaining without conditioning the meetings to the Union presenting its original offer in English.

Attorney Silva-Cofresi responded that same day (Joint Exhibit 15 dated January 27, 2016) stating that there seemed to be a misunderstanding since the last time they had talked he understood they had agreed to await the results of the Board case to later continue negotiations. He stated that he would be contacting Carrillo shortly. **Carrillo never answered the letter.** (Tr. Page 67)

On February 5, 2016 the Company wrote Carrillo reiterating the Company's offer of August 7, 2015 of its willingness to pay 50% of the costs of translating the Union's bargaining proposal into English, which the Union had previously rejected. The Company invited the Union to continue bargaining negotiations on February 24, 2016. (Joint Exhibit 16).

On February 8, 2016, the Union answered by letter accepting the invitation to bargain and reinstating its opposition to the Company's request that the Union's proposal be translated into English. (Joint Exhibit 17). Due to a misunderstanding, the Company did not respond to this letter. On February 23, 2016, the Company contacted the Union via instant messaging asking whether they would be going to the negotiations. The Union answered yes and the Company replied that because the Union had not answered until

that day, Ilka Ramon would not be able to attend and the Company would not be able to negotiate. The Union responded that they had accepted in writing a long time previously and that it would consult its legal division. (Joint Exhibit 18).

That same day, the Union further responded by e-mail to Attorney Silva-Cofresi stating again that it had confirmed the meeting in advance in writing³ and arguing that the Company was trying to place the blame on the Union for cancelling the scheduled meeting. Attorney Silva-Cofresi responded that he would not get into back and forth bickering and stated that he was inviting the Union to bargain on two days, March 22 and 23, 2016. He also sent a separate e-mail to that effect. (Joint Exhibits 19-20). Carrillo admitted that as of the date of the hearing the Union had not responded to the Company's invitation to bargain on March 22 and 23, 2016.

III. LEGAL BACKGROUND

In the case of First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981), the Supreme Court explained that the establishment and maintenance of industrial peace is a fundamental aim of the National Labor Relations Act and that central to achieve that purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management. Thus, Congress acted to create the Board and granted it power to condemn as unfair labor practices conduct by unions and employers that it considered deleterious to the collective bargaining process.

Sections 8(a)(5) and 8(b)(3) of the Act make it an unfair labor practice for an employer and union representative, respectively, "to refuse to bargain collectively." 29 U.

³ The message also stated that it enclosed the Union's letter accepting the date for bargaining, but it was not included, which added to the confusion.

S. C. §§ 158(a)(5) and 158(b)(3). Section 8(d), added, as was § 8(b)(3), to the Act by the Labor Management Relations Act, 1947, 61 Stat. 136, defines the duty to bargain as:

'to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession'

29 U. S. C. § 158(d).

The duty to negotiate in good faith mandated by Section 8(b)(3) and 8(d) of the Act requires both parties to bargain with a "serious intent to adjust differences and to reach an acceptable common ground". NLRB V. Truitt Mfg, 351 U.S. 149, 155, 100 L. Ed. 1027, 76 S. Ct. 753 (1956). The duty to bargain in good faith requires both parties "to participate actively in the deliberations so as to indicate a present intention to find a basis for an agreement". NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943), Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984) (quoting NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960)). Both parties are thus required to have "an open mind and a sincere desire to reach an agreement". NLRB v. Truitt Mfg. Co., supra. Furthermore, the employer and the Union are required to make "a sincere effort... to reach a common ground." NLRB v. Montgomery Ward & Co., supra.

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines **the totality of the party's conduct**, both at and away from the bargaining table. Public Service Co. of Oklahoma (PSO), 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); Overnite Transportation Co., 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); Atlanta Hilton & Tower, supra, at 1603. From

the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. PSO, supra, 334 NLRB at 487. "The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct." Reichhold Chemicals, 288 NLRB 69, 69 (1988), enf. denied in part on other grounds 906 F.2d 719 (D.C. Cir. 1990); Flying Foods, 345 NLRB No. 10, slip op. at 7 (2005).

The Company has shown that it has never refused to meet and bargain with the Union. To the contrary, the Company has always been willing to meet and bargain with the Union. The Company has always acted in good faith towards the Union. It informed the Union about the layoffs it was forced to carry out and met and bargained with the Union regarding those layoffs. The Company also supplied the information requested by the Union. The Union's own witness had to admit that on several occasions when the Company had invited the Union to bargain, the Union had not answered.

The only case involving the language to be used in the bargaining proposals is Call, Burnup, and Sims, Inc. and Union Obreros Cemento Mezclado, 159 NLRB No. 144 (N.L.R.B.), 159 NLRB 1661, 62 L.R.R.M. (BNA) 1386, 1966 NLRB Dec. P 20638, 1966 WL 18461 (June 28, 1966) in which the Board found that the employer had violated its duty to bargain in good faith. Based on the totality of the circumstances the Board found that the employer in that case had engaged in an overall course of conduct evidencing both its rejection of the well-established principles regarding the duty to bargain and the employer's intention to forestall or defeat the collective-bargaining process. The Board also found in the employer a disposition to delay resolution of differences concerning

terms and conditions of employment through the collective-bargaining representative. In this case, the employer had insisted in conducting the negotiations in English while the Union at its own expense had supplied an intelligible English version of its contract proposal and had offered to pay half the cost of an interpreter for contract discussions, which offer was rejected by the employer. The Board concluded by agreeing with the Trial Examiner that the employer should make itself available for negotiating meetings at reasonable times and otherwise attempt to solve language or other problems relating to the commencement of negotiations in a spirit of good faith.

The Call, Burnup, and Sims, Inc. case, *supra*, can be easily distinguished from our case. In that case the language disagreement between the parties and the employer's insistence on conducting negotiations in English was part of a company pattern of avoiding bargaining negotiations. That is not the situation here. In addition, in Call, the Union had provided a translation of its proposal and had offered to pay half the cost of an interpreter, which offer was rejected by the employer. In our case, the Company has bargained in good faith with the Union and offered to pay half the cost of translating the Union's proposals.

IV. ARGUMENT

The General Counsel alleges that the Company has violated the Act by insisting that the Union proposals be translated into English and that the Company has insisted that the Union must submit proposals in English as a precondition for bargaining. The evidence in this case, including the testimony of Union representative Argenis Carrillo, regarding the negotiations conducted by the parties, shows that the Company has bargained in good faith with the Union.

We must note that the Union represents two other Company bargaining units and the Teamsters Union with which the local Union is affiliated represent Company employees at a national level. Therefore, the local Union is perfectly aware that UPS is a national company and that its main offices and officials are located in the US. The Union is also perfectly aware that for the two other bargaining units it represents, the Collective Bargaining is in English and Carrillo testified that the parties split the cost of translating the Agreement into English. (Tr. Page 44). Knowing these facts, the Union still chose to file a representation petition to represent the bargaining unit at hand here. It should not have come as a surprise to the Union that the Company would also seek to have the bargaining proposals and final collective bargaining agreement for this bargaining unit translated into English. Unlike the decision in the case of Call, Burnup, supra, discussed above, the Company has never insisted that the negotiations themselves be conducted in English. However, it has sought to have the proposals and the final Agreement translated into English so that Company executives in the US be able to review and participate in the negotiations. To that effect, the Company offered to pay half the costs of translating the Union's proposals.

The General Counsel has argued that all of the bargaining committee members for both the Company and the Union speak Spanish and that the three bargaining meetings held so far have been conducted in Spanish. (Tr. Page 14). While these facts are true, it does not follow that everyone involved in the negotiations on the Company's side, directly and indirectly, speaks and reads Spanish.

The Company submitted information to the Administrative Law Judge regarding Puerto Rico legislation that requires the use of both English and Spanish in different aspects of daily life. Spanish and English are established as official languages of the Government of Puerto Rico, Act Number 1 of January 28, 1993.

Said Act also provides:

§ 59a Translations and interpretations

When necessary, written translations and oral interpretations shall be made from one language to the other so that the interested parties can understand any proceeding or communication in said languages.

Credits— Jan. 28, 1993, No. 1, § 2.

1 LPRA § 59a

The General Counsel has argued that based on Census Data the majority of people in Puerto Rico do not speak English well. While this may or may not be true (we do not know what is meant by speaking English well, nor do we know whether the self-assessment regarding how people in Puerto Rico speak English is accurate), there are other factors that show that English is commonly used in Puerto Rico. We have requested that the Honorable Judge take administrative notice of the representative sample we submitted of some of the Puerto Rico statutes that require the simultaneous use of both English and Spanish, in fields such as education, finances, banking, taxes, voting, housing and professional boards among others. For example, Act No. 149 of July 15, 1999 requires that “the teaching process shall be conducted in Spanish and/r English in the System’s schools”, 3 LPRA § 145i. Therefore, we respectfully suggest that the Honorable Administrative Law Judge should disregard any information regarding the level of usage of English in Puerto Rico in reaching the decision.

The Company has shown that, based on its previous experience with the Union in its other collective bargaining units, it would reasonably expect to be able to obtain agreement by the Union to translate the Union proposals and the final Collective Bargaining Agreement into English. **We must note that the Union made an outright rejection of the Company's offer to pay half the cost of translating its proposal and did not engage in bargaining with the Company regarding this offer.** We must emphasize that the duty to bargain in good faith applies both to the Employer and to the Union. In this case, the Union has not engaged in the required bargaining. Moreover, the totality of the bargaining history between the parties shows that the Company has always been willing to compromise and meet the Union half way and has therefore fulfilled the statutory requirement to bargain in good faith.

With respect to the alleged refusal to bargain, the evidence clearly shows that the Company never refused to meet with the Union or refused to bargain in good faith. The testimony of Union Representative Argenis Carrillo, the sole witness presented by the General Counsel, clearly shows that **most of the delays in bargaining were caused by the Union.** After being certified as bargaining representative, the Union took seven months to send the Company its bargaining proposal. (Tr. Page 45). Furthermore, on several occasions the Union did not respond to Company invitations to bargain. The evidence is clear that on the three occasions when the parties met for negotiations, both parties did engage in bargaining and the negotiations advanced.

Counsel for the General Counsel makes much of the fact that the parties have not reached an agreement despite the time passed since the Union was certified as the employee's bargaining representative. However, the Act does not require that bargaining

parties reach an agreement in a specific period of time. The Act solely requires that the parties bargain good faith and try to reach agreement.

In his letter of November 20, 2015 (Joint Exhibit 11) Carrillo reminded the Company that the Union had filed a charge with the Board which was under consideration and stated **that this was the only reason that the negotiations had been delayed, a clear admission by the Union that any delay was caused by the Union, not the Employer.** The reality is that the Union in this case has not been diligent in pursuing negotiations with the Company and it now wishes to ascribe all delays to the Employer. The facts are clear that the Company has not violated the Act by refusing or delaying negotiations. In fact, the evidence shows that most of the delays in bargaining can and should be ascribed to the Union itself.

V. PLEA

WHEREFORE, Respondent respectfully moves that this case be dismissed on both charges since it has always bargained in good faith with the Union.

In San Juan, Puerto Rico this 1st day of April, 2016.

CERTIFICATION:

We hereby certify that on this same date, a true and exact copy of this document was sent by email to Mr. Argenis Carillo, Union Representative tronquistaslu901@gmail.com and to the Council for the General Counsel Carlos J. Saavedra Gutierrez at carlos.saavedra-gutierrez@nrlb.gov.

RESPECTFULLY SUBMITTED.

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