

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

Advice Memorandum

DATE: September 18, 2015

TO: Kelly Selvidge, Acting Regional Director
Region 27

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

SUBJECT: Colorado Symphony Association
Case 27-CA-140724

American Federation of Musicians
Case 27-CB-142595

530-6067-6067-5200
530-6067-6067-3100
554-1433-6700-0000
544-1433-6701-0000
554-1433-6767-0000
554-1450-0180-0000
554-1467-2400-0000
554-8425
530-5791
530-6033-7056-8700
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These cases arise out of an ongoing bargaining dispute between the Colorado Symphony Association (the “Employer”) and the American Federation of Musicians (the “National Union”), dating back to the expiration of the parties’ collective-bargaining agreement in September 2013. Each party has alleged that the other has failed to bargain in good faith in multiple respects.

We conclude that the Employer violated Section 8(a)(5) and (1) by refusing to provide requested information relevant to the core issues separating the parties in bargaining except on the condition that the National Union agree to a confidentiality agreement that contains a damages provision, and by unlawfully implementing its opening proposal in the absence of a lawful good-faith impasse. We further conclude that the National Union violated Section 8(b)(3) by refusing to bargain for nine months, while taking the position that it would not come to the table until its negotiations with the multi-employer association had concluded. However, after the parties met in the summer of 2014, the subsequent breakdown in negotiations was due to the Employer’s unlawful refusal to provide relevant information and not any further bad faith on the part of the National Union. Finally, with respect to an isolated unilateral change involving the Employer’s production of a videogame soundtrack, we conclude that the Employer’s notice to the Denver Musicians Association (the “Local Union”) cannot be imputed to the National Union for Section

10(b) purposes. Absent settlement, the Region should issue Section 8(a)(5) and Section 8(b)(3) complaints consistent with these conclusions and the analysis below.

FACTS

The National Union represents the musicians employed by the Employer with respect to electronic media production. The Local Union has subject matter bargaining authority over limited local matters, including live performances and very limited local media issues. Pursuant to Article 15, Section 6(b) of the National Union by-laws, local unions cannot enter into any contract regarding electronic media production without the prior written approval of the National Union President.

The most recent collective-bargaining agreement between the National Union and Employer, the Integrated Media Agreement (“IMA”), was negotiated with a multi-employer association and effective from May 31, 2010 to September 30, 2013. Article VIA of the IMA provides that the Employer:

may not use audio or audio-visual recordings produced pursuant to this Agreement . . . for any purpose not expressly set forth in this agreement (such as, e.g., . . . videogames) unless the Employer receives advance written permission from the [National Union] and pays to or on behalf of all Musicians who rendered services . . . 100% of all amounts that would be required under the appropriate National Union agreement. . . .

I. Bargaining for a Successor Agreement

On October 4, 2013, the Employer notified the National Union that it had opted out of the multi-employer association and demanded to negotiate a successor agreement on its own behalf. The Employer reiterated this demand to bargain in letters on October 22, 2013, October 27, 2013, December 13, 2013, February 18, 2014,¹ April 23, and June 23. During this nine-month period, the National Union’s position was that it would not bargain with the Employer until after a multi-employer agreement had been reached. For instance, on October 24, 2013, the National Union President emailed, “In the event you wish to engage in direct discussions with AFM toward an agreement unique to your organization, we will be available for such purposes after we have finalized the successor agreement with the joint employers.” On February 7, he wrote that he would provide possible bargaining dates “as expeditiously as possible after the conclusion of the [multi-employer] negotiations,”

¹ All dates hereinafter are in 2014 unless otherwise noted.

and on April 28, he explained his unwillingness to meet before the multi-employer bargaining concluded, stating that “it is a reflection of the practical reality that bargaining with Colorado Symphony will be more meaningful at that time.”

The Employer attached its opening proposal to its June 23 request to bargain and threatened to take “all appropriate steps with respect to the proposal” if the National Union did not respond. The Employer’s opening proposal called for a compensation structure that was different from that of the rest of the industry and contained in the parties’ expired collective-bargaining agreement. For instance, the Employer’s proposal would disregard the National Union’s trade agreements and privilege production of any kind of material in any format for broadcast or distribution by any means for use by itself or another entity. The Employer would retain the license of any newly-created materials and could license them out to third parties at its own discretion and without payment to the musicians. Additionally, the proposal would lower the upfront payment to musicians to 1% of their weekly pay scale and provide “success sharing” on the back end, meaning that all profits would go to the Employer’s general budget from which musicians and administrative employees would share 50% of the Employer’s net income after expenses. The Employer’s proposal arguably does not actually guarantee any income, however, because the 1% upfront payment is to be deducted from each musician’s existing salary for live concerts under the local trade agreement, and there is no guarantee that there will be profits left in the general budget for success sharing. In fact, the parties have had a similar success-sharing arrangement for twenty-five years, and it has produced income for musicians only three times, and for minimal amounts.

In its cover letter accompanying the proposal, the Employer asserted that the compensation and licensing structure changes were necessary to procure new business opportunities in light of difficult financial circumstances:

The CSA firmly believes that successful media projects simply won’t get off the ground under the terms of the expired IMA. The intent of the CSA is to procure new business opportunities for the benefit of all parties. . . . The CSA continues to operate under very challenging economic circumstances, and this proposal represents the Employer’s carefully considered thinking on how to successfully restructure burdensome provisions of the IMA to the benefit of all concerned. . . .

On July 10, the National Union suggested dates for bargaining, and for the next several weeks, the parties sent letters back and forth counter-proposing dates.

On July 18, the National Union made an information request, seeking several items it thought it needed to make a knowledgeable counteroffer, including

clarification of what the Employer meant by certain items in its opening proposal, and details of any media projects planned for the next two seasons.

On July 21, the Employer's counsel responded to the information request by asserting that information regarding its business plans and prospects were confidential. The Employer stated that it could not release such information without a confidentiality agreement, and attached a draft agreement. Over the course of the next couple days, the parties settled on all of the provisions of the agreement, except for one. The National Union agreed to several restrictions on its use of the information, including limiting the disclosure of the information to only three named National Union officials, and agreeing to return the documents within five days upon the Employer's request. The single provision that the parties could not agree upon was the following:

The AFM agrees that the restrictions contained in this Agreement are fair and reasonable and necessary to protecting the interests of the CSA, and that the CSA shall be entitled to seek injunctive relief and monetary damages, in addition to any and all other remedies permitted by law, in the event of a breach of this Agreement by AFM and/or its agents and representatives.

The National Union objected to the damages provision in this paragraph and struck the language: "and monetary damages, in addition to any and all other remedies permitted by law." It then signed the confidentiality agreement with the stricken language on August 4. The Employer refused to sign the agreement without the inclusion of this damages provision. The Employer has argued that the monetary damages provision is necessary because, on one occasion, the National Union contacted one of the Employer's customers, the Colorado Rockies, to inform the organization of a grievance the Union had filed against the Employer that could impact the Rockies' licensing rights with respect to an orchestra recording it was using.

The parties met for bargaining on August 20. Both parties agree that the negotiations were fruitless. The National Union's position was that it could not make a meaningful response to the Employer's proposal without receiving information about the Employer's planned media projects. The Employer believed it could avoid the confidentiality issue by speaking in generalities about business opportunities it planned to pursue. Although bargaining was scheduled for the next day, the Employer said there was no point to meeting because there was no change on the confidentiality agreement stalemate, and the National Union agreed.

On August 25, the National Union sent the Employer a letter offering to continue negotiations in New York from September 15-18, and urging the Employer

to respond to its information request, emphasizing that the National Union had signed the confidentiality agreement with the exception of one sentence about damages in the event of a breach, was committed to keeping the information confidential, and the Employer had no basis to anticipate a breach.

On August 27, the National Union President met with a member of the Employer's Board of Directors at a conference. The National Union President said that the confidentiality agreement was holding up negotiations and asked for the Board member's help to informally speak to the Employer's CEO to get the parties back to the table.

On August 29, the Employer's attorney responded to the National Union's request to continue bargaining, calling it "unreasonable." She did not suggest other bargaining dates, and stated "[w]hile the CSA remains willing to negotiate, as the AFM representatives themselves suggested on both August 20 and 21, there is no reason to meet until the AFM is willing to come to the table to present counter proposals and address the CSA's proposals proactively."

On October 20, the Employer implemented its opening proposal. On December 14, the National Union reached a new multi-employer agreement. The National Union President and Employer CEO met on March 17, 2015 to discuss the agreement, and the National Union urged the Employer to sign onto it. The Employer declined.

II. The Oh Heck Yeah Unilateral Change

In February, the Employer received \$5,000 for recording the soundtrack for Oh Heck Yeah, an interactive, outdoor, videogame arcade installation, made available for the public to play in Denver in June or July. The Employer paid the musicians less than they would have been entitled under the non-promotional work provisions of the IMA. The Employer maintains that the Local Union had notice of this in February and approved the Oh Heck Yeah project before it was produced. It is undisputed that the National Union did not learn of the Oh Heck Yeah project until August, when the National Union met with Local Union officers during bargaining. The Region has determined that the reduced compensation for the project constituted a unilateral change and has requested advice only as to whether the charge allegation regarding this change, filed on November 10, is time-barred because of the notice to the Local Union outside the 10(b) period.

ACTION

I. The National Union violated Section 8(b)(3) by engaging in dilatory tactics to stall negotiations until a multi-employer agreement could be reached.

We conclude that the National Union violated Section 8(b)(3) by essentially refusing to bargain for nine months in order to stall negotiations until a multi-employer agreement was signed.

Section 8(b)(3) provides that a union violates the Act when it refuses to bargain with the employer of the employees it represents. Section 8(b)(3) is read in conjunction with Section 8(d), which expressly defines the bargaining obligation to include a requirement to meet at reasonable times and confer in good faith.²

It is well established that the statutory duty to bargain “surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring.”³ In *Local Union #612, Teamsters (AAA Motor Lines)*, the Board upheld the ALJ’s finding that the union violated Section 8(b)(3) by putting off for two months negotiating with an employer until the master freight agreement was signed.⁴ The employer had withdrawn from the multi-employer bargaining unit and revoked the multi-employer association’s authority to bargain on its behalf. In response to the employer’s earnest efforts to bargain, the union explained, *inter alia*, that it “would not be able to meet until after the master contract was settled” and at the parties’ in-person meeting, set up in response to the employer’s unfair labor charge, the union told the employer to return to Alabama since the union would negotiate only after the master contract was settled.⁵

² See *Food & Commercial Workers Local 1439 (Layman’s Market)*, 268 NLRB 780, 784 (1984) (“As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes ‘that had been condemned in management’ by the previously enacted Section 8(a)(5)”), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 487 (1960).

³ *Storer Communications*, 294 NLRB 1056, 1095 (1989) (quoting *Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949)) (finding Employer violated Section 8(a)(5) by refusing to meet at reasonable times because it could offer no explanation for being able to meet only three days in more than five months).

⁴ 215 NLRB 789, 791-92 (1974).

⁵ *Id.* at 790-91.

Similarly, here, for months -- from October 4, 2013, when the Employer first demanded to bargain, until July 10, 2014, when it finally proposed dates for bargaining -- the National Union refused the Employer's repeated requests to meet, basing its refusal on wanting to delay until the multi-employer contract was settled. In so doing, the National Union violated Section 8(b)(3).

II. **The Employer violated Section 8(a)(5) by refusing to fully respond to the National Union's information request.**

An employer's duty to bargain in good faith includes a duty to provide, upon request, information relevant to negotiating and administering a collective-bargaining agreement.⁶ The Board uses a broad discovery-type of standard in determining relevance for information requests.⁷ In accordance with this standard, "[p]otential or probable relevance is sufficient to give rise to the employer's obligation to provide information."⁸ The information need not be dispositive of the issues, but must have some bearing on them.⁹ The Board's relevance standard "require[es] only that the information be directly related to the union's function as bargaining representative and that it appear 'reasonably necessary' for the performance of that function."¹⁰

To determine whether an employer violated Section 8(a)(5) by refusing to provide information relevant to negotiations when an information request implicates confidentiality concerns, the Board balances the union's need for the relevant information against the employer's "legitimate and substantial" confidentiality

⁶ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

⁷ *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

⁸ *Disneyland Park*, 350 NLRB 1256, 1258 (2007).

⁹ *Pennsylvania Power & Light*, 301 NLRB 1104, 1105 (1994).

¹⁰ *Chapin Hill at Red Bank*, 360 NLRB No 27, slip op. at 5 (Jan. 10, 2014) (citing *Acme Indus. Co.*, 385 U.S. 432, 437 (1967)); see also *E.I. du Pont de Nemours*, 264 NLRB 48, 51 (1982) (once union establishes that requested information "bears a reasonable relation to [its] role as bargaining representative . . . the union need not prove actual relevance, but may simply demonstrate a *probability* that the data is useful for the purposes of bargaining intelligently") (citations omitted), *enforced*, 744 F.2d 536 (6th Cir. 1984).

interests.¹¹ The party asserting confidentiality has both the burden of proof¹² and the duty to seek an accommodation.¹³

In *Caldwell Mfg. Co.*, the Board held that when an employer makes specific factual assertions in support of its bargaining positions, information needed to verify those assertions becomes relevant and must be provided upon request.¹⁴ As the Board explained, the union needs such information not only to verify the employer's claims but also to respond intelligently to them during bargaining.¹⁵ Following *Caldwell*, the Board in *National Extrusion & Mfg. Co.* held that the employer's claim in bargaining that it needed a 12% wage concession to make its facility competitive due to competition from Asia and an increase in production costs made the union's request for, among other items, customer lists, price quotes, and marketing plans, relevant for Section 8(a)(5) purposes.¹⁶

Similarly in this case, the Employer justified its proposal by asserting that the parties needed to restructure the licensing and compensation structures of the IMA because of "challenging economic circumstances" and the need to "procure new business opportunities." The National Union needed specific information about those potential new business opportunities to verify those claims and to formulate a response to the Employer's proposal regarding those projects. Accordingly, the National Union's request is clearly relevant.

¹¹ See *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 3 (Jan. 11, 2011) (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979)).

¹² *Id.*, citing *Jacksonville Area Ass'n for Retarded Citizens*, 316 NLRB 338, 340 (1995).

¹³ See *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) (the employer bears the burden of formulating a reasonable accommodation proposal).

¹⁴ 346 NLRB at 1159-60 (employer's claim that it needed to make facility viable and more competitive required it to provide union with competitor data, labor costs, and other relevant information).

¹⁵ *Id.* at 11.

¹⁶ *National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 2-3 (July 26, 2011), *enfd. sub nom. KLB Indus., Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012). See also *A-1 Door and Building Solutions*, 356 NLRB No. 76, slip op. at 4-5 (union's request for job bidding information made relevant by the employer's justification of its proposals on grounds that it was not competitive with other companies for bidding purposes because of its higher wages and benefits).

Applying the other side of the balancing test, even assuming, *arguendo*, that the Employer in this case could show legitimate and substantial confidentiality concerns, the National Union has agreed to a confidentiality agreement accommodation sufficient to protect the Employer's interests. Thus, the National Union has agreed to protect the Employer's confidentiality by limiting disclosure of the Employer's records to only three named, high-level officials, and upon the Employer's request, limiting the time they can examine the records to five days.

Moreover, the National Union has given the Employer no reason to doubt it will protect the confidential information. In this regard, the Board has determined that an important factor weighing against an employer's defense is that it refuses to test the willingness of the union to treat the information as confidential without proof that the union is unreliable in respecting confidentiality.¹⁷ The Employer's only evidence of the National Union's unreliability is the fact that on one occasion, the National Union contacted the Colorado Rockies in connection with a labor dispute. However, the National Union was attempting to inform the team of a grievance that could impact its licensing rights, rather than trying to discourage the business partnership.¹⁸

Finally, the Employer cannot show that the damages provision is a necessary additional protection above that to which the Union has already agreed. We could find no Board decision dealing with an accommodation in the context of a

¹⁷ See *Reiss Viking*, 312 NLRB 622, 622 n.4, 626 (1993) (affirming ALJ determination that the employer's refusal to turn over the requested information based on confidentiality concerns was "more an afterthought than a real concern" where, *inter alia*, the employer offered no proof that the union had been untrustworthy in confidential matters) (citing *Island Creek Coal Co.*, 289 NLRB 851 (1988)); *Stella D'Oro Biscuit Co.*, 355 NLRB 769, 773-74 (2010) (rejecting the employer's assertion that it needed to keep financial information confidential where, *inter alia*, there was no evidence that the union could not be expected to keep the information confidential), *enforcement denied sub nom.*, *SBC Holdings Inc. v. NLRB*, 711 F.3d 281 (2d Cir. 2013).

¹⁸ The case cited by the Employer on this point, *Allen Storage and Moving*, 342 NLRB 501, 503 (2004), is inapposite. In that case, the employer was found to have lawfully refused to supply the union with customer names because of the union's conduct during a preceding strike, which included contacting several customers and showing up at jobsites. Subsequent events confirmed the legitimacy of the employer's concerns because, despite its promise not to do so, and even without getting the information, the union sent letters to twenty of the employer's customers threatening them with boycott activities if they continued to do business with the employer.

confidentiality clause with a damages provision.¹⁹ However, in a well-reasoned opinion, the ALJ in *PCA Industries, Inc*, determined that the delay resulting from an employer's insistence that a union sign an agreement that would obligate it to pay liquidated damages, costs, and attorney fees in the event of a breach was an unfair labor practice because the union had no motive to breach the agreement and had not been shown to be unreliable with respect to confidentiality.²⁰ The ALJ explained that "the mere threat of suing the Union for breach of an unadorned confidentiality agreement, which the Union was willing to sign, should reasonably have seemed ... to be deterrent enough."²¹ For the same reasons, the National Union's reluctance to sign a damages provision in this case does not insulate the Employer from Section 8(a)(5) liability. The Employer sought monetary damages "in addition to" other remedies permitted by law. In this respect, the provision that the Employer was insisting upon would seemingly allow it to obtain more relief that it would otherwise be entitled to under the law, much like the damages clause that the employer was insisting on in *PCA Industries*.

¹⁹ *Cf. Stella D'Oro Biscuit Co.*, 355 NLRB at 793-94 (disregarding the employer's argument that damages are difficult to obtain for breach of confidentiality agreement cases and finding that the employer unlawfully refused to furnish copies of its financial statements to the union).

²⁰ Case No. 14-CA-23303, JD-147-95, 1995 WL 1918057 (Aug. 18, 1995).

²¹ *Id.*

III. The Employer violated Section 8(a)(5) by unilaterally implementing its proposal in the absence of a valid impasse.

A. The parties were not at impasse when the Employer implemented its opening proposal.

In general, an employer may implement its final proposal only after reaching a good-faith impasse in bargaining.²² The Board traditionally looks to the bargaining history, the parties' good faith, the length of the negotiations, the importance of the issue(s) precluding agreement, and the parties' contemporaneous understanding as to the state of negotiations to determine whether the parties reached a good-faith impasse.²³

Applying these principles here, we conclude, and the Employer does not dispute, that the parties were not at good-faith impasse on October 20, when the Employer implemented its proposal. The parties had only met once for negotiations and had not substantively discussed the Employer's proposal. They were deadlocked on the threshold issue of the Employer responding to the information request, not the substantive contract proposals at issue in bargaining.

B. The parties could not reach a lawful good-faith impasse in the context of the Employer's unremedied unfair labor practice.

Even if the parties were otherwise at impasse in this case, we would conclude that the impasse was rendered invalid by the Employer's unlawful refusal to respond to the information request. The Board is clear that one party's commission of an unfair labor practice before or during collective bargaining negotiations can taint an

²² *E.g., Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001) (employer's unfair labor practices, including its refusal to furnish information about upcoming layoffs, precluded a valid impasse).

²³ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968).

otherwise lawful impasse.²⁴ However, only serious unfair labor practices that have a causal connection to the deadlock will preclude an otherwise valid impasse.²⁵

Thus, a party's unlawful refusal to respond to information requests will not preclude impasse if the requests are unrelated to the key issues dividing the parties.²⁶ Conversely, a party's unlawful refusal to provide information in response to an outstanding information request will preclude impasse when the request relates to the core issues separating the parties.²⁷

²⁴ *Dynatron/ Bondo Corp.*, 333 NLRB 750, 752-53 (2001) (no impasse because union could not formulate bargaining proposals in the environment of the employer's serious unremedied unfair labor practices including discharging union bargaining committee members, and unilaterally increasing employee health insurance contributions).

²⁵ See, e.g., *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) ("Only those unfair labor practices that contributed to the parties' inability to reach an agreement can preclude a finding of valid impasse."); *Titan Tire Corp.*, 333 NLRB at 1158 (characterizing as "the central question" whether the employer's unlawful conduct detrimentally affected negotiations and contributed to a deadlock); *Dynatron/ Bondo Corp.*, 326 NLRB 1170, 1170 (1998) ("[F]or the judge to conclude that the unremedied unfair labor practices prevented the parties from reaching lawful impasse, he must first find that there was a causal connection between the previous unfair labor practices and the failure to reach an agreement."); *Litton Systems*, 300 NLRB 324, 333 (1990) ("[O]n a practical level, the Respondent's unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations so as to prevent a lawful impasse."), *enforced*, 949 F.2d 249 (8th Cir. 1991).

²⁶ See *Sierra Bullets, LLC*, 340 NLRB 242, 244 (2003) (information requested regarding overtime issue was unrelated to four issues union considered necessary to an agreement).

²⁷ See *Decker Coal*, 301 NLRB 729, 733 (1991) (finding no valid impasse where the employer failed to fully comply with the information request concerning pensions and job security, the precise issues over which the parties had been bargaining); *Circuit-Wise, Inc.*, 309 NLRB 905, 919 (1992) (finding no valid impasse where the employer failed to furnish information relating to its drug-testing proposal, upon which the parties were deadlocked, and its profit-sharing proposal, a "significant issue separating the parties"); *E.I. du Pont & Co.*, 346 NLRB 553, 558 (2006) (finding impasse precluded where the employer refused to provide information that related directly to the employer's proposed subcontracting milling and finishing work, a "core issue" between the parties), *enforced*, 489 F.3d 1310 (D.C. Cir. 2007); *Genstar Stone Products*, 317 NLRB 1293, 1294 (1995) (employer refusal to provide information on

In this case, the information request clearly related to the core issues separating the parties because it related to the Employer's opening proposal covering the entirety of the bargainable electronic media issues between the parties. Specifically, the Employer's proposal sought to revise the entire licensing and compensation scheme in a way that is foreign to the industry. The proposal sought to obtain for the Employer sweeping licensing rights to the material, to the exclusion of musician protections in existing trade agreements, and to establish a new compensation structure that would give musicians very little guaranteed income. The National Union's request primarily sought information that would enable it to understand the proposal, and what business opportunities the Employer had referenced, in order to determine whether such a sweeping overhaul could be justified, and to respond with its own counterproposal based on the concrete business realities the Employer claimed that it had relied upon. Thus, we conclude that the Employer's refusal to provide information relevant to bargaining precluded the parties from reaching a valid good-faith impasse.

C. The National Union's alleged dilatory tactics did not privilege the unilateral implementation.

In *Bottom Line Enterprises*, 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.²⁸ 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.²⁹ However, the Board has recognized a limited exception to this rule “[w]hen a union, in response to an

health care proposal, which was a “major dividing point in negotiations,” precluded impasse).

²⁸ *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enforced sub nom.*, *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (table).

²⁹ *See, e.g., Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), *enforced*, 984 F.2d 1562 (10th Cir. 1993); *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 contract).

employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining. . . ."³⁰

Pursuant to this exception, the Board in *AAA Motor Lines, Inc.* found that an employer did not violate Section 8(a)(5) when, following the union's two-and-a-half month refusal to meet and bargain because the master agreement was not yet signed, the employer implemented the parts of its proposals which required immediate action to avoid certain employee benefit losses.³¹ Similarly, in *M&M Contractors*, the Board held that the employer was privileged to implement its proposal, since in response to the employer's repeated efforts to bargain, the union "clearly manifested its aversion to bargaining" for seven months preceding the implementation.³²

Unlike in *AAA Motor Lines* and *M&M Contractors*, here the National Union actively engaged in or attempted to engage in bargaining over the Employer's proposal before the Employer implemented it. Despite its earlier dilatory bad faith conduct prior to the date the Employer transmitted its opening proposal, upon receipt

³⁰ *Bottom Line Enterprises*, 302 NLRB at 374 (internal citations omitted) (noting that there is also a second exception to this rule when "economic exigencies compel prompt action").

³¹ 215 NLRB 793, 794 (1974).

³² 262 NLRB 1472, 1472 (1982), *petition for review denied sub nom. Carpenters Local 266 v. NLRB*, 707 F.2d 516 (9th Cir. 1983) (table). *See also Serramonte Oldsmobile*, 318 NLRB 80, 99-101 (1995) (employer was privileged to unilaterally implement its proposal because the union engaged in a strategy of avoiding and delaying bargaining, including refusing to meet for 3-1/2 months based on its "spurious and sham" argument that it did not receive proper service of notice to reopen the contract, procrastinating accepting expedited arbitration of the notice issue, "feign[ing] ignorance of the employer's proposals and refusing to submit their own, and refusing to agree to bargaining dates after the employer had threatened implementation), *enforced in relevant part*, 86 F.3d 227 (D.C. Cir. 1996); *Southwestern Portland Cement Co.*, 289 NLRB 1264, 1273-1276 (1988) (employer was privileged to implement its proposal in light of the union's delay tactics, including failing to inform the union negotiators of the employer's proposal, and insisting that the parties wait to bargain until it could do so in the presence of a federal mediator and until an unfair labor practice charge alleging that the employer failed to provide a meeting place was resolved). *Compare Oak Hill*, 360 NLRB No. 55, slip op. at 46-47 (2014) (union did not engage in dilatory tactics by refusing to meet for a few dates within a 2-month period where the parties met for eight sessions within 3 months, and the parties' failure to meet more often was equally attributable to the employer's conduct).

of that proposal the National Union sought to bargain in good faith with the Employer. The National Union made a request for relevant information so that it could formulate a response to the Employer's proposal, bargained over the confidentiality agreement, participated in face-to-face negotiations, proposed future bargaining dates, and attempted to use backchannels to get the Employer back to the table.

IV. The Union bargained in good faith after it received the Employer's June 23 proposal and its conduct during this time period did not violate Section 8(b)(3).

For the reasons articulated above, we conclude that the breakdown in negotiations in the fall of 2014 was due to the Employer's unfair labor practices and not to any bad-faith conduct by the National Union. The National Union did not delay bargaining after receiving the Employer's proposal. Rather, it made a request for relevant information in order to formulate a response to that proposal, bargained over the confidentiality agreement, and attended successor contract negotiations. It was the Employer who called off the second day of negotiations, and the National Union who proposed further bargaining dates after that. Moreover, the National Union President separately met with a member of the Employer's Board of Directors in an attempt to use backchannels with the Employer's CEO to get the Employer back to the table. After spending nine months disengaged from bargaining, the National Union had changed its position and was willing to work with the Employer.

The Employer's 8(a)(5) violations provide further support for finding that the National Union did not violate Section 8(b)(3) after receiving the Employer's proposal. We found no Section 8(b)(3) cases addressing whether a union is privileged to refuse to bargain in the face of unremedied unfair labor practices. However, in past cases, we have indicated that a union's refusal to bargain would be privileged if the employer's unfair labor practices have "so poisoned the collective-bargaining process or undermined the union's status as to render further bargaining attempts futile."³³

³³ See *Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union, Local 2-109 (Durez Corp.)*, Case 3-CB-8394, Advice Memorandum dated October 14, 2005, at pp. 3-4 (finding union violated Section 8(b)(3), despite employer's refusal to implement certain agreed-upon contractual terms, because employer's action had not undermined union's status or rendered bargaining futile, and cessation of negotiations was not connected to the alleged ULPs); see also *Association of UnaDyn Field Support Technicians (Universal Dynamics)*, Cases 5-CB-10283, 10361, 10382, Advice Memorandum dated June 24, 2008 at pp. 3-4 (finding that the union was not

In this case, the Employer's refusal to provide information regarding its opening proposal made it impossible for bargaining to continue in any meaningful way. The Employer proposed an entirely new compensation structure from the status quo in the industry based on its assertions that its survival as an orchestra depended on tapping the new media streams that were infeasible under the IMA status quo, but refused to provide information that would substantiate why this would be necessary and that would permit the Union to make a meaningful counterproposal. Under the unique circumstances in this case, given the National Union's limited jurisdiction, the only negotiable issue between the parties is electronic media production. Accordingly, it was impossible for the parties to put to the side the unanswered information request and to bargain in substance about other issues. Thus, the Employer's unremedied unfair labor practice rendered bargaining futile, which would have privileged the National Union's refusal to bargain further until its information request was satisfied.

V. The Oh Heck Yeah unilateral change allegation is not barred by Section 10(b).

Section 10(b) provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof”³⁴ However, “the Board has consistently held that the 10(b) period does not commence until the charging party has clear and unequivocal notice of the violation.”³⁵ Such notice may be actual or constructive.³⁶ The burden of showing that the charging party had notice is on the party raising the 10(b) defense.³⁷ An employer's notice to a union steward is not imputed to the union for purposes of Section 10(b) tolling when the steward had no

privileged to refuse to bargain because the employer remedied its prior Section 8(a)(5) violations and there was no showing that bargaining would have been futile).

³⁴ 29 U.S.C. § 160(b).

³⁵ *Vallow Floor Coverings*, 335 NLRB 20, 20 (2001).

³⁶ *See, e.g., Art's Way Vessels, Inc.*, 355 NLRB 1142, 1147 (2010).

³⁷ *See, e.g., United Kiser Services, LLC*, 355 NLRB 319, 319 (2010); *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enforced*, 483 F.3d 628 (9th Cir. 2007).

actual authority to act regarding the matter, and was not held out by the union as having such authority.³⁸

The Region has determined that the musicians' compensation under the Oh Heck Yeah videogame project constituted a unilateral change. The issue then is whether, assuming that the Employer could substantiate its assertion that the Local Union had notice of, and actually voted to approve, the Oh Heck Yeah project,³⁹ the charge allegation relating to this unilateral change is time-barred because the National Union had constructive knowledge of the change outside the 10(b) period.

We conclude that this allegation is not barred by Section 10(b). It is undisputed that the National Union did not have actual notice of the unilateral change until it met with Local Union officials in August during negotiations, well within the Section 10(b) period. It is clear from the IMA agreement and National Union by-laws that the National Union has sole bargaining authority over videogames, including Oh Heck Yeah. Therefore, even if the Local Union had actual notice and approved the project in February, such knowledge cannot be imputed to the National Union. Like an employer's notice to a union steward who lacks actual or apparent authority concerning the matter, the Employer's notice to the Local Union

³⁸ See, e.g., *Brimar Corp.*, 334 NLRB 1035, 1035 n.1 (2001) (unilateral change charge not barred by 10(b) where the employer gave notice to the steward who had no role in matters relating to bargaining, and the employer had no reason to believe otherwise); *Catalina Pacific Concrete Co.*, 330 NLRB 144, 144 (1999) (charge not barred by 10(b) despite notice to the steward because the employer "had no reasonable basis for believing that . . . [the steward] had the authority to act as the union's agent with respect to the receipt of the notice of proposed unilateral changes. . . . [T]here was no contractual basis for attributing such authority to [him], nor did the union hold him out as possessing such authority."), *enforced*, 19 F. App'x 683 (9th Cir. 2001); cf. *Philadelphia Bottling Co.*, 340 NLRB 349, 349 (2003) (employer notice of unilateral change to steward not imputed to the union because the collective-bargaining agreement limited the steward's responsibilities and the union told the employer that stewards lacked the authority to sign agreements without authorization), *enforced*, 112 F. App'x 65 (D.C. Cir. 2004); *Kennametal, Inc.*, 358 NLRB No. 68, slip op. at 4 (June 26, 2012) (for purposes of Section 10(b), "knowledge of individual union members is not imputed to the union unless those members had a role in bargaining or other factual circumstances warrant imputing their knowledge").

³⁹ See, e.g., *Broadway Volkswagen*, 342 NLRB at 1246 ("[t]he burden of showing a complaint is time barred is on the party raising Section 10(b) as an affirmative defense").

in this case similarly alerted a union agent who lacked the authority to bargain over the change.⁴⁰

Therefore, absent settlement, the Region should issue Complaint against the National Union alleging that it violated Section 8(b)(3) by delaying bargaining from October 2013 until it received the Employer's June 23, 2014 proposal, and against the Employer, alleging that it violated Section 8(a)(5) by refusing to respond to the National Union's information request, unlawfully implementing its proposal in the absence of a valid impasse, and making unlawful unilateral changes in the Oh Heck Yeah project.

/s/
B.J.K.

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⁴⁰ The cases cited by the Employer are distinguishable and consistent with this conclusion. See *The Baytown Sun*, 255 NLRB 154, 160 (1981) (finding that notice to the union steward of unilateral changes could be imputed to the union for Section 10(b) purposes because she was "more than a union steward" since she attended all of the 25-30 negotiating sessions for the union); *YHA v. NLRB*, 2 F.3d 168 (6th Cir. 1993) (setting aside Board order that notice of non-smoking policy to union steward was not imputed to the union for bargaining waiver purposes on the basis, *inter alia*, that the steward was the designated, duly appointed union representative on the non-smoking task force).