

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

Advice Memorandum

DATE: March 22, 2016

TO: Paula S. Sawyer, Regional Director
Region 27

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

SUBJECT: Enterprise Electric, Inc. 530-0100
Case 27-CA-157012 530-5791
530-6033-8400

The Region submitted this Section 8(a)(5) case for advice on: 1) whether the Employer committed a *Heinz* violation by refusing to become a signatory to a new multiemployer collective-bargaining agreement,¹ and 2) whether the Union acquiesced to the Employer's refusal to sign by continuing to bargain. We conclude that the Employer and the Union reached a meeting of the minds on all substantive issues and material terms, and thus the Employer's oral agreement obligated it to become a signatory to the new multiemployer agreement. Additionally, we conclude that the Union did not acquiesce to the Employer's refusal to sign the agreement by subsequently continuing bargaining, and thus did not release the Employer from its obligation to sign. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5).

FACTS

Enterprise Electric, Inc. ("the Employer") is an Idaho corporation that provides services as an electrical contractor. In April 2007, the Employer's current president and sole owner purchased the corporation. Shortly thereafter, the Employer assumed its predecessor's Section 9(a) bargaining relationship with the International Brotherhood of Electrical Workers, Local 291 ("the Union"). The Employer also assumed the existing multiemployer collective-bargaining agreement to which the predecessor had been a party and joined the corresponding multiemployer association, the Idaho Chapter of the National Electrical Contractors Association ("NECA"). The Employer designated NECA as its bargaining representative in negotiations with the Union. Thereafter, the Employer's owner took part in negotiations for several

¹ *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941) (affirming that an employer violates Section 8(a)(5) by refusing to sign an agreed-upon contract).

successor contracts between NECA and the Union and later served as an officer in NECA. The Employer currently employs roughly thirty employees.

In 2013, the Employer and several other electrical contractors left NECA to bargain with the Union individually. In late 2014, however, the Union was able to convince the Employer to come back into the fold. In November 2014, the Union had the Employer sign a Letter of Assent (“LOA”) that reauthorized NECA as the Employer’s collective-bargaining representative, provided for recognition of the Union as the Section 9(a) representative of its employees performing electrical construction work within the Union’s jurisdiction, and bound the Employer to the current collective-bargaining agreement between NECA and the Union that was set to expire on May 31, 2015.

By letter dated December 31, 2014, less than two months after rejoining NECA, the Employer served timely notice on the Union and NECA, in accordance with the LOA, of its intent to terminate the multiemployer agreement and bargain individually.² In this letter, the Employer expressed its desire to “modernize” the language of the multiemployer agreement, which had remained virtually unchanged for several years. On February 23, 2015,³ the Union sent an opening bargaining letter to the Employer requesting to open the multiemployer agreement in its entirety.

On April 22, the parties held their first negotiation session. The Employer provided the Union with a package of documents including an hourly cost data sheet, data on electrical contracting work in southern Idaho, and a listing of all sections of the still current multiemployer agreement. The Employer proposed creating a modernized, revamped agreement by changing several clauses in the multiemployer agreement. On its part, the Union gave the Employer a proposal for a three-year agreement containing the same language as the multiemployer agreement, yearly wage increases, and maintenance of health benefits. On May 11, the parties met again but neither party made any proposals at this time.

On May 29, during the parties’ third bargaining session, the Union asked the Employer to prepare an estimate of how many additional hours of unit work the Employer could offer if the Union agreed to change some of the language in the multiemployer agreement. On May 31, the multiemployer agreement to which the Employer had become a me-too signatory the prior November expired.

² The Employer’s owner remained an officer of NECA after this date.

³ All subsequent dates are in 2015 unless otherwise indicated.

On June 1, the Employer prepared the requested proposal and delivered it to the Union at some point soon afterwards. The proposal listed several clauses from the expired multiemployer agreement that the Employer wanted removed, indicating that the Employer was non-compliant with most of these clauses. For example, the Employer's owner contested the clause prohibiting employers from requiring that employees use personal vehicles for work-related purposes, arguing that the Employer needed more flexibility. Similarly, the Employer disputed the clause providing premium pay for work performed outside certain "home" area counties to compensate for employee travel, stating that some employees actually lived in the counties where they worked and thus unfairly received premium pay. The Employer also contested the clause requiring it to have a surety bond, stating that it could not satisfy the requirement and was currently non-complaint with it. Although the parties discussed these proposed changes in detail, the Union ultimately rejected the Employer's proposal.

On June 8, the Union and NECA concluded negotiations and signed a new multiemployer agreement that will expire in May 2015. Aside from a wage increase of approximately sixty-five cents per hour, the parties made only minor changes in language from the prior multiemployer agreement. On the same day, the Employer granted its employees the exact same wage increase, allegedly to discourage turnover.⁴

On June 18, the Union and the Employer held their fourth bargaining session. The Union emphasized that, since every other contractor had signed the new multiemployer agreement, and the agreement included a most favored nations clause, it was not likely to grant the Employer any concessions. After some discussion, the Employer's owner stated that (b) (6), (b) (7)(C) would go ahead and sign the new multiemployer agreement that the other contractors had signed.⁵ The Union states that the owner indicated (b) (6), (b) (7)(C) agreement to all parts of the new multiemployer agreement, and stated that (b) (6), (b) (7)(C) would sign an LOA. The Employer's owner asserts that (b) (6), (b) (7)(C) was feeling "beat down" that day and agreed to sign out of defeat, but it is not clear whether (b) (6), (b) (7)(C) conveyed these feelings to the Union. The Union told (b) (6), (b) (7)(C) that they would bring the paperwork by (b) (6), (b) (7)(C) office later that day. Approximately an hour later, the Union arrived with the paperwork, but the Employer's owner was not in (b) (6), (b) (7)(C) office. The

⁴ The Region found merit to the portion of the current charge alleging that the Employer violated Section 8(a)(5) by unilaterally granting a wage increase.

⁵ The Employer disputes the Union's factual narrative regarding what occurred on June 18. However, the Employer's owner does not dispute that, on that day, (b) (6), (b) (7)(C) told the Union (b) (6), (b) (7)(C) would "go ahead and sign the new agreement that the other contractors had signed."

Union left two copies of the LOA that it had signed with one of the Employer's estimators. When a Union representative returned the following day to pick up a copy of the LOA with the Employer's signature, the Employer's owner stated that [REDACTED] had changed [REDACTED] mind and was not ready to sign the LOA yet.

On July 2, the parties met again, and the Employer presented a document detailing the same proposals the Union had rejected in the past, such as requiring that employees use their own personal vehicles to haul company materials. The Union representatives took the document and said they would take a look at it. The Union states that it again asked the Employer to sign the LOA, but the Employer refused. The Union also offered to let the Employer execute the new multiemployer agreement on an individual basis. However, the Employer refused to sign anything.

On July 14, at the parties' sixth and final bargaining session, the Union discussed the benefits of signing the new multiemployer agreement, such as Memorandums of Understanding ("MOUs") carried over from the prior multiemployer agreement to the new one. The Union told the Employer's owner that these MOUs could increase [REDACTED] market share, and that [REDACTED] would not have access to them with an individual agreement. However, the owner indicated that [REDACTED] already knew about the MOUs. The Union states that it again asked the Employer to sign the LOA or, alternatively, to execute its own version of the multiemployer agreement. Again, the Employer rejected either alternative.

On July 30, the Union filed the instant charge alleging that the Employer had violated Section 8(a)(1) and (5) of the Act by unilaterally granting a wage increase while bargaining for a successor agreement and by refusing to execute the LOA. On August 6, the Union contacted the Employer and proposed a bargaining session on August 18. After the Employer requested a time for the meeting, the Union later canceled the bargaining session due to the pending unfair labor practice charge.

ACTION

We conclude that the Employer and the Union reached a meeting of the minds on all substantive issues and material terms, and thus the Employer's oral agreement on June 18 obligated it to become a signatory to the new multiemployer agreement. Additionally, we conclude that the Union did not acquiesce to the Employer's refusal to sign the agreement by subsequently continuing bargaining, and thus did not release the Employer from its obligation to sign.

A. The Employer Violated Section 8(a)(5) by Refusing to Execute a Contract to Which it Had Agreed.

As part of the obligation to bargain collectively and in good faith, Section 8(d) of the Act requires "the execution of a written contract incorporating any agreement

reached if requested by either party.” Thus, if parties reach agreement, an employer’s refusal to sign and execute a contract “is a refusal to bargain within the meaning of the Act.”⁶ To determine if an agreement has been reached, the Board looks to see whether the parties had “a ‘meeting of the minds’ on all substantive issues and material terms of the contract.”⁷ Whether the parties had a meeting of the minds is determined “not by parties’ subjective inclinations, but by their intent as objectively manifested in what they said to each other.”⁸ In other words, the Board looks to the “specific language that the parties used in their communications with one another and the context in which these interactions occurred.”⁹ The General Counsel “bears the burden of showing that the parties have reached the requisite ‘meeting of the minds.’”¹⁰

In *Midvalley Steel Fabricators*, the Board held that an employer violated Section 8(a)(5) by refusing to sign a contract, after giving oral assent, that included

⁶ *H.J. Heinz Co. v. NLRB*, 311 U.S. at 523, 525-26.

⁷ See, e.g., *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992).

⁸ See, e.g., *Crittenton Hosp.*, 343 NLRB 717, 718 (2004), citing *MK-Ferguson Co.*, 296 NLRB 776, 776 n.2 (1988); see also *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982) (agreements in the bargaining context between employers and unions require only “conduct manifesting an intention to abide and be bound by the terms of the agreement”), affirming, 252 NLRB 43, 43 n.2, 43-44 (1980) (finding parties reached an enforceable oral agreement when the employer’s owner stated that if its competitors “give anything, he will give the same,” and the union then reached agreement with a competitor).

⁹ *Carpenters Local 33 (Curry Woodworking, Inc.)*, 316 NLRB 367, 368-69 (1995) (finding a meeting of the minds where employer unconditionally accepted union's offer to become a me-too signatory to a multiemployer agreement, because the parties’ past contractual relationship demonstrated that the union's communication to the employer constituted an unconditional offer rather than an invitation to make an offer), *enfd sub nom.*, *NLRB v. Boston Dist. Council of Carpenters*, 80 F.3d 662 (1st Cir. 1996). See also *Windward Teachers Assn.*, 346 NLRB 1148, 1150-51 (2006) (affirming ALJ’s finding that parties believed they had reached complete agreement when they concluded last bargaining session with handshakes and mutual expressions of satisfaction on their successful negotiation of a contract).

¹⁰ See, e.g., *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004), citing *Intermountain Rural Electric Assn.*, 309 NLRB at 1192.

specific terms that were different than the union's standard independent contract ("SIC") but also incorporated by reference the SIC except to the extent modified by the specifications agreed upon.¹¹ In reaching that conclusion, the Board reversed the ALJ's finding that the incorporation of the SIC constituted a "substantial addition" that the employer was entitled to study before agreeing to its adoption.¹² Rather, the fact that the parties' bargaining had focused on modifying the SIC and the employer's adoption of a virtually identical version of it in the past demonstrated that the employer's owner was "fully aware of the contents" of the SIC when [REDACTED] stated that the draft contract was "satisfactory."¹³ Since the SIC was not a "substantial addition" of terms outside the employer's knowledge, and the employer did not raise any objections to incorporating it when it gave its assent, the Board concluded that the parties had "reached agreement upon 'all terms of [the] new contract.'"¹⁴

Here, the parties' specific language and the context in which their interactions occurred demonstrate that the Employer and the Union reached the necessary meeting of the minds to form a binding collective-bargaining agreement. First, the parties' actions on June 18 establish that they had come to terms on a complete agreement at that time. On June 18, the Employer's owner objectively demonstrated [REDACTED] intent to sign the new multiemployer agreement by stating that [REDACTED] agreed to all its terms and would sign the same agreement the other electrical contractors had signed. There is no evidence that the Employer's owner stated at this bargaining session that [REDACTED] could not become a signatory to the new multiemployer agreement because [REDACTED] was unaware of its substantive terms. Moreover, the Union returned to the owner's office an hour after [REDACTED] had agreed to the new multiemployer agreement with two copies of the LOA for [REDACTED] signature. The Union then returned the next day to pick up their signed copy of the LOA. None of this conduct would have occurred absent agreement on a new contract.

Second, other conduct by the Employer's owner establishes that [REDACTED] knowingly accepted the terms the Union was offering on June 18. On June 8, the same day that the Union signed the new multiemployer agreement with NECA, the Employer's owner unilaterally granted [REDACTED] employees the same wage increase as that set forth in the new agreement, reasoning that [REDACTED] did not want [REDACTED] employees to leave for higher

¹¹ 243 NLRB 516, 516-17 n.3 (1979), *enfd in relevant part*, 621 F.2d 49 (2d Cir. 1980).

¹² *Id.* at 516 n.3, 521-22.

¹³ *Id.* at 516-17 n.3.

¹⁴ *Id.*

paying jobs.¹⁵ On July 14, when the Union again sought to persuade the Employer to abide by its prior acceptance of the new multiemployer agreement, noting that the MOUs that had carried over from the prior agreement could increase [REDACTED] market share, the Employer's owner acknowledged that [REDACTED] already knew about the MOUs. These facts further demonstrate that the Employer knew what it had agreed to on June 18.

Finally, the context in which the parties' interactions occurred further compels the conclusion that the Employer made a knowing acceptance on June 18. The parties here were not "strangers," but had an established contractual relationship.¹⁶ Since purchasing the business in 2007, the Employer's owner represented NECA in negotiations with the Union for successor multiemployer agreements. After the Employer withdrew from multiemployer bargaining in 2013, the Union convinced it to rejoin NECA, and the Employer signed onto the prior multiemployer agreement via an LOA in November 2014. The LOA by which the Union sought to make the Employer a signatory to the new multiemployer agreement on June 18 was identical to the LOA the Employer had signed only seven months earlier. Having withdrawn from the multiemployer agreement in the past, changed its mind, and then bound itself to a multiemployer agreement by signing an LOA, the Employer knew on June 18 that the LOA would make it a me-too signatory to the new multiemployer agreement.¹⁷

More important, the context here reinforces that the Employer had the requisite knowledge of the terms of the new multiemployer agreement. The reason the Employer wanted to bargain individually with the Union was that prior multiemployer bargaining, in which it had played an active role, had not resulted in material changes to the multiemployer agreement. Thus, the Employer was well-acquainted with the content of that agreement. Indeed, at the parties' first individual

¹⁵ After submitting [REDACTED] timely withdrawal from NECA by letter of December 31, 2014, the Employer's owner remained an officer of that association and in a position to learn about the new multiemployer agreement.

¹⁶ *Curry Woodworking*, 316 NLRB at 368-69.

¹⁷ The Union subsequently offered to allow the Employer to sign the new multiemployer agreement on an individual basis rather than sign the LOA. Because the Employer had agreed to the terms of the new multiemployer agreement, it was required to "sign, and/or signify – by whatever means, methods, or procedure employers privy to collective-bargaining contracts negotiated by [the multiemployer association] customarily follow – its determination to acknowledge, honor, implement, and comply" with the new agreement. *Goodsell & Vocke*, 223 NLRB 60, 68 (1976) (affirmative remedial provision (2)(a)), *enfd.*, 559 F.2d 1141 (9th Cir. 1977).

bargaining session on April 22, one of the documents the Employer provided to the Union listed all the sections of the multiemployer agreement. The Employer subsequently presented the Union with its June 1 proposal listing specific clauses it wanted removed from the multiemployer agreement. The Employer discussed those clauses, such as the one regarding premium pay for work outside the “home” area and the other prohibiting employers from requiring the use of employee-owned vehicles, at length and in great detail. The Employer also raised the agreement’s surety bond requirement and noted that, as with several other clauses, it was currently noncompliant. In short, the Employer had knowledge both of the terms of the prior multiemployer agreement, and of the fact that multiemployer negotiations in 2015 had resulted in adherence to those same terms.

In similar circumstances the Board has held that an employer that has agreed to become a me-too signatory to a multiemployer agreement that it has not read cannot subsequently rely on that fact to avoid its contractual obligations.¹⁸ In *Contek*, although the employer read and signed a short-form agreement that bound it to the long-form multiemployer agreement, it never read the long-form agreement. Contrary to the terms of the multiemployer agreement, the employer asserted that it had agreed only to a site-specific agreement, and that its unilateral mistake regarding what it had agreed to privileged it to rescind acceptance of the multiemployer agreement.¹⁹ Although the Board in *Contek* recognized that “unilateral mistake *may* be grounds for rescission of a contract,” it held that an employer failing to read a contract before giving its assent was “not the kind of obvious error justifying rescission.”²⁰ Thus, the employer in that case remained bound to the multiemployer agreement. Similarly, the Employer here, after having informed the Union that it had agreed to accept its offer, cannot avoid its obligation to sign the agreed-upon contract based on an alleged failure to read the new multiemployer agreement.

¹⁸ See *Contek Int., Inc.*, 344 NLRB 879, 879 (2005).

¹⁹ “Unilateral mistake occurs whenever parties give different meaning to a term or terms of a contract.” *Diversified Bank Installations*, 324 NLRB 457, 461 (1997), *enf’d mem.*, 175 F.3d 1025 (8th Cir. 1999). However, “a party to a contract cannot avoid it on the ground that he made a mistake where the other contractor has no notice of such mistake and acts in perfect good faith.” *North Hills Office Servs.*, 344 NLRB 523, 525 (2005), *citing Health Care Workers Local 250*, 341 NLRB 1034, 1037 (2004).

²⁰ *Contek Int., Inc.*, 344 NLRB at 879 (emphasis in original).

B. The Union Did Not Acquiesce to the Employer's Refusal to Sign the Agreed-Upon Multiemployer Agreement by Continuing to Bargain.

The Board has held that bargaining subsequent to reaching agreement on a complete contract does not release the party contesting the existence of an agreement from its obligation to sign it.²¹ In *Superior Coffee*, the employer and union reached agreement on a new contract but the union later refused to sign the contract post-employee ratification because the trustee overseeing the union objected to the subcontracting language.²² Despite having reached agreement, the parties continued bargaining over the subcontracting clause, but the employer rejected the union's proposals and requested that it sign the agreed-upon contract.²³ The ALJ, whose decision the Board adopted, rejected the union's defense that the employer waived its right to a signed agreement by continuing to bargain, stating that the employer never agreed to release the union from its obligation by "clear and unmistakable waiver."²⁴ Similarly, in *Capitol-Husting*, after concluding that the parties had reached a binding agreement when the employer stated early on in negotiations that it would agree to the same terms the union obtained with either of its competitors, the ALJ held that subsequent meetings during which the employer made proposals did not "revoke or interfere with this understanding, considering the realities of the bargaining process."²⁵

Here, the Union never agreed to release the Employer from its obligation to sign the new multiemployer agreement. Rather, in bargaining sessions after June 18, the Union repeatedly and consistently asked the Employer to sign either the LOA or the new agreement on an individual basis, and the Employer consistently refused. At no point did the Union clearly and unmistakably accept that the Employer would not sign the new multiemployer agreement and that the parties would bargain for a different contract. At this point in the process, when the Employer was refusing to sign the agreed-upon contract, the Union had little choice but to entertain the Employer's proposals and continue its efforts to have the Employer sign the new agreement. Thus, these bargaining sessions consisted of little more than the Union

²¹ See *Teamsters Local 471 (Superior Coffee)*, 308 NLRB 1, 3 (1992); *Capitol-Husting Co.*, 252 NLRB 43, 43 n.2, 44-45 (1980), *enfd.*, 671 F.2d 237 (7th Cir. 1982).

²² *Superior Coffee*, 308 NLRB at 1-2.

²³ *Id.* at 2.

²⁴ *Id.* at 3.

²⁵ 252 NLRB at 45.

trying to convince the Employer to give its already promised signature by showing the benefits of signing the multiemployer agreement. As in *Superior Coffee* and *Capitol-Husting*, the post-June 18 bargaining sessions did not release the Employer from its obligation to sign the prior oral agreement.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to become a signatory to the new multiemployer agreement.

/s/
B.J.K.

ADV.27-CA-157012.Response.Enterprise Electric Inc. (b) (6), (b) (7)