

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

## Advice Memorandum

DATE: May 26, 2016

TO: Peter S. Ohr, Regional Director  
Region 13

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

SUBJECT: C.R. England, Inc.  
Case 13-CA-169493

Remedies Chron  
625-8883-8400

The Region submitted this case to Advice pursuant to General Counsel Memorandum 11-06 on the issue of whether the additional remedy of bargaining expenses is appropriate where the only indicia of the Employer's unlawful surface bargaining are the contents of its proposals.<sup>1</sup> We agree with the Region that reimbursement of bargaining expenses is an appropriate remedy under the circumstances of this case.

### FACTS

C.R. England (the "Employer") is a corporation headquartered in Utah that provides nationwide trucking services and operates transport facilities in multiple states. On July 11, 2013, the International Brotherhood of Teamsters, Local 705 ("Union") was certified as the collective-bargaining representative for a unit of drivers at the Employer's Chicago, Illinois facility.

The Employer and Union met about 40 times between September 3, 2014, and February 11, 2016, the date on which this charge was filed.<sup>2</sup> The Region has concluded that, during negotiations, the Employer advanced and continued to insist on several proposals that were unacceptable to the Union and that would give employees fewer rights and less protection than they would have under the Act without a contract. The Employer proposed a broad management rights clause that

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<sup>1</sup> The Region also submitted this case for consideration of Section 10(j) injunctive relief. The Injunction Litigation Branch will address the need for injunctive relief in a separate memorandum.

<sup>2</sup> On February 12, 2016, a decertification petition was filed but is currently blocked pending resolution of this matter.

contained a zipper clause permitting it to make changes unilaterally during the life of the contract. It provided only that the Union could “consult” regarding any such changes but that agreement was not a necessary precursor to implementation. From the outset of negotiations, the Employer opposed union security and dues check-off due to its philosophical objection, eventually agreeing only to deduct dues from the paychecks of those unit employees who authorized the Employer to do so.

The Employer’s proposal for grievances provided two alternative avenues for dispute resolution based on the nature of the dispute. For grievances concerning suspensions and discharges, the Employer proposed the formation of a Peer Review Board that precluded the Union from initiating grievances, striking, or seeking arbitration, except in limited circumstances. For grievances concerning contract disputes, the Employer proposed the formation of a Chicago Grievance Committee that provided for strike or lockout as the only recourse if deadlocked. Under the Employer’s proposal, the Union would be required to provide 15 to 17 days notice of its intent to strike. In contrast, the Employer’s proposal reserved for itself the right to immediately lock out employees.

The parties did succeed on reaching tentative agreements on some proposals but remained deadlocked on the aforementioned proposals. On about April 9, 2015, the Union changed its lead negotiator, who introduced a new set of proposals in response to the Employer’s posture at the bargaining table. Those new proposals changed the format that the Union had previously adhered to and introduced new items that previously would have been covered under the Employer’s broad management rights clause. Although the Union’s proposals effectively revoked certain tentative agreements, they did not significantly affect major proposals or set back the parties’ position in bargaining.

The Region found that the Employer’s proposals on management rights, grievance procedures, and union security/dues check-off would leave employees worse off than if they had no contract at all, and determined to issue complaint on an allegation that the Employer had thereby engaged in surface bargaining by insisting on those proposals while only going through the motions of bargaining with no intent to reach an agreement. The complaint will contain no other allegations of misconduct either at or away from the bargaining table.

### ACTION

We conclude that the Region should seek reimbursement of the Union’s bargaining costs for the Section 10(b) period, because the Employer’s surface bargaining infected the core of the bargaining process.

The Board has ordered reimbursement of bargaining costs in bad-faith bargaining cases to restore the status quo ante “where it may fairly be said that a

respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies."<sup>3</sup> In *Frontier Hotel & Casino*, the Board held that such a remedy was necessary both to make the charging party whole for the resources that were wasted due to the respondent's unlawful conduct, and to "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table."<sup>4</sup> Thus, the Board emphasized that reimbursement of bargaining expenses "reflects the *direct causal relationship*" between a respondent's unlawful conduct and the costs a charging party incurs while bargaining.<sup>5</sup>

In determining whether an award of negotiation expenses is warranted, the Board has not set a precise bar in terms of the nature or amount of violations necessary to award expenses but instead examines each case "on its own merits, evaluating the effects of the violation on the wronged party and the injury to the collective-bargaining process."<sup>6</sup> Merely reaching tentative agreements on some subjects during bargaining will not preclude reimbursing a union's bargaining expenses where the respondent had no intent to ultimately enter into a collective-bargaining agreement.<sup>7</sup>

Here, the Employer's unlawful conduct has directly caused the Union to unnecessarily incur bargaining costs in a futile effort to reach an agreement that the Employer never intended to reach. The Employer has placed the Union at a financial disadvantage by causing it to waste time and resources for some 40 sessions over a

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<sup>3</sup> *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995) (internal citations and quotation marks omitted), enf. granted in rel. part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). See also *Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 2-3 (2014), enf'd 785 F.3d 729 (D.C. Cir. 2015).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (emphasis in original, internal citations and quotation marks omitted)

<sup>6</sup> *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 5 fn. 13 (2014), remanded sub nom. *Hospital of Barstow, Inc. v. NLRB*, --- F.3d --- (D.C. Cir. April 29, 2016). See also *Columbia College Chicago*, 363 NLRB No. 154, slip op. at 4, fn. 14 (March 24, 2016).

<sup>7</sup> See *HTH Corp.*, 356 NLRB No. 182 (2011) (finding reimbursement of bargaining expenses appropriate even though parties met in 37 bargaining sessions and reached approximately 170 tentative agreements), enf'd 693 F.3d 1051 (9th Cir. 2012); *Whitesell Corporation*, 357 NLRB No. 97 (2011) (same).

year and a half by insisting on proposals that would leave unit employees with fewer rights than they would have without a contract and thereby engaging in surface bargaining. Granted, the Employer's conduct here does not bear the hallmarks of other cases in which the Board has found that the overall course of bad-faith bargaining, including other violative conduct at and/or away from the bargaining table, "infected the core" of the parties' bargaining process:<sup>8</sup> the Region did not find that the Employer engaged in other conduct that would buttress its conclusion that the Employer had engaged in surface bargaining. However, the practical effect of the Employer's unlawful conduct is the same. Indeed, the Board has long recognized that in some cases, there may be no evidence of illegal surface bargaining other than the content of a party's proposals.<sup>9</sup> In such cases, the additional remedy of reimbursement of bargaining expenses is appropriate, because the very nature of a surface bargaining violation "infects the core" of the bargaining process by rendering it "merely a charade."<sup>10</sup> The costs the Union incurred in its futile attempts to reach an initial contract, including travel costs and attorney's fees, were no less caused by the Employer's surface bargaining than in those cases where the employer "showed its hand" by other conduct.

The Union's conduct does not render inappropriate the remedy of bargaining expenses. To the extent that the replacement of its negotiator and revisions to its proposals on April 9, 2015, arguably delayed the bargaining process, it appears that the Union's actions were a good faith effort at compromise in response to the Employer's refusal to move off its expansive management rights proposal and attendant, ironclad zipper clause. Many of the changes proposed by the Union in April

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<sup>8</sup> See, e.g., *Ampersand Publishing, LLC*, 362 NLRB No. 26 (March 17, 2015), affirming and incorporating 358 NLRB 1415 (September 27, 2012), at 1417-18 (Board award of bargaining expenses relied principally on employer insistence on broad management rights clause and "extreme" discipline/discharge and grievance/arbitration proposals; conduct away from table "also demonstrated its calculated strategy to reduce negotiations to a sham"), review pending D.C. Cir.

<sup>9</sup> *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 858 (1982), citing *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979) ("Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to."), enfd 737 F.2d 872 (11th Cir. 1984).

<sup>10</sup> *Frontier Hotel & Casino*, 318 NLRB at 858. Cf. *Visiting Nurse Services of Western Massachusetts*, 325 NLRB 1125, 1133 (1998) (award of bargaining costs inappropriate where, although the respondent committed several Section 8(a)(1) and 8(a)(5) violations while bargaining for a successor agreement, there was no allegation of overall bad-faith bargaining), enfd 177 F.3d 52 (1st Cir. 1999).

2015 were ministerial in nature, while others sought to narrow the scope of those matters that would be covered under the Employer's proposed management rights clause. Thus, the investigative record does not disclose any potential Union conduct that might entitle the Employer to an offset against its liability for bargaining expenses. To the contrary: the fact that the Employer roundly rebuffed the Union's efforts at compromise further supports the Region's determination that the Employer was engaged in surface bargaining and that the Union needlessly wasted its resources in negotiations when the Employer had no intention to reach a contract.

Accordingly, the Region should seek a remedy that includes reimbursement of Union negotiating expenses for the Section 10(b) period, in order to restore the status quo ante.<sup>11</sup>

/s/  
B.J.K.

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cc: Injunction Litigation Branch

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<sup>11</sup> The Region has already determined to seek an extension of the certification year and a notice reading.