

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

DATE: March 19, 2014

TO: M. Kathleen McKinney, Regional Director
Region 15

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

SUBJECT: Kellogg Company
Case 15-CA-115259

524-5065-0175
524-5065-2200
524-5065-5800
530-6050-0140
530-6067-2050-7000
530-6083-0125

This case was submitted for advice as to whether the Employer, during bargaining with Bakery, Confectionery, Tobacco Workers and Grain Millers (“BCTGM”), Local 252-G (“the Union”) over a supplemental local agreement at one of four facilities, violated Section 8(a)(5) by insisting on bargaining proposals that were contrary to the terms of the parties’ current national agreement (“Master Agreement”) that was in effect. The Region also seeks advice concerning whether the Employer violated Section 8(a)(5) and (3) by locking out unit employees in furtherance of its unlawful proposals and/or while it refused to provide the Union with relevant information that affected the Union’s ability to bargain. Finally, the Region seeks advice on the propriety and warrant of Section 10(j) relief.¹

We conclude that the Employer violated Section 8(a)(5) by insisting to impasse on proposals that would constitute midterm modifications of the parties’ Master Agreement and that were thus nonmandatory subjects of bargaining.² We further conclude that the Employer violated Section 8(a)(5) and (3) by locking out the unit

¹ The Union’s request for Section 10(j) relief will be addressed in a separate memorandum.

² Because we conclude that the Employer violated Section 8(a)(5) by insisting on proposals that would modify the Master Agreement during its term, and therefore constituted a nonmandatory subject of bargaining, we need not decide whether the Employer’s proposals were inherently destructive of employee rights or whether the Employer also attempted to bargain over a change of the scope of the Memphis bargaining unit, as alleged in Case 15-CA-122106.

employees in furtherance of its bad-faith bargaining position.³ The Region should therefore issue complaint, absent settlement.

FACTS

I. Parties' collective-bargaining agreement

The Employer, based in Battle Creek, Michigan, operates four Ready-To-Eat Cereal (“RTEC”) food processing and packaging facilities in Battle Creek and Omaha, Nebraska, Lancaster, Pennsylvania, and Memphis, Tennessee. The employees at each facility are represented by different BTCGM locals. The Employer and the International Union are parties to a Master Agreement that governs employees’ wages, benefits, and other terms and conditions such as overtime and premium pay for unit employees at the four RTEC facilities.⁴ Section 5.01 of the Master Agreement (“Wages”) explicitly states that, “[a]ll matters pertaining to hourly wages for Locals ... 252G ... are included as part of this Agreement and are contained in the Wage Appendix, which is contained in this Master Agreement.” The Wage Appendix contains a Cost-of-Living (“COLA”) provision and adjustment table, seasonal rates, and a “New-Hire Progression Schedule” that computes new employees’ pay based on a formula combining job rates, COLA, and percentages based on the employees’ years of service. The Master Agreement also carves out a wage exception for “non-regular employees,” such as casual or temporary employees, who are paid a minimum rate of \$6 per hour less than regular employees.

Additionally, Section 5.04 of the Master Agreement provides employees with double-time for Sunday work and overtime pay for excess hours on Saturdays or their equivalent, in recognition of the fact that some RTEC facilities are seven-day operations and thus use different definitions of “workweek.”⁵

The Master Agreement also provides employees with health insurance and other benefit coverage. Thus, Section 6.01 of the Master Agreement notes that, “[a] schedule

³ We agree with the Region (see note 13, below) that the Employer refused to provide the Union with relevant information in violation of Section 8(a)(5); however, we do not conclude that this violation independently tainted the lockout (see note 27, below).

⁴ The Master Agreement defines “employees” as “all those employees included in each bargaining unit as defined in each Supplemental [local] Agreement.”

⁵ For instance, the local Battle Creek agreement specifies that, “[f]or purposes of pay computations the work week will begin at 7:00 a.m. on Sunday.... For other purposes the normal work week will begin on Monday.” See Section 703 of the Battle Creek Supplemental Agreement, at p. 34. The Lancaster, Pennsylvania RTEC facility begins its workweek “[f]or purposes of pay computation ... at 11:00 P.M. on Saturday (first shift Sunday)” whereas its “normal workweek will begin at 11:00 P.M. Sunday (first shift Monday).” See Section 602 of Lancaster Supplemental Agreement, at p. 42.

of hospital, medical, surgical, major medical, prescription drug, dental, disability, accidental death and dismemberment, and life insurance coverage for all regular employees covered by this Agreement has been established.”

Finally, the Master Agreement’s zipper clause, Section 1.01(f), states:

Those matters which have been covered by provisions in this Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and any of the respective Local Unions in an effort to secure changes in or to secure a new Supplemental Agreement. Those matters covered by provisions in a Supplemental Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and the International Union in an effort to secure changes in or a new version of this Agreement.

The parties’ current Master Agreement will expire in early October 2015.

As noted above, the parties also negotiate supplemental local agreements for each of the four RTEC facilities. Union Local 252-G represents the Employer’s production employees at the Memphis RTEC. The most recent Memphis supplemental agreement (“Memphis Agreement”) was effective from October 22, 2010 through October 20, 2013⁶ and recognized the Union as the “sole bargaining agency for all regular hourly rate employees of the Company, including production, maintenance, warehouse, boiler house and all other departments of this plant.” Wage rates for new Memphis hires are governed by the Master Agreement, as demonstrated by the fact that the Memphis Agreement’s “New Hire Progression Schedule” is taken from the 2005 Master Agreement.⁷ The Memphis facility does not currently operate on a seven-day per week basis; rather, its workweek begins “with the first shift on Monday” and the three “normal shift schedules” are specified as “7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., [and] 11:00 p.m. to 7:00 a.m.”⁸

Finally, Section 107 of the Memphis Agreement is the “Casual Program” provision that governs and limits the use of casual employees at the facility to 30 percent of the total number of regular employees.⁹ The stated purpose of the Casual Program is to provide “regular employees with relief from extended work schedules through the use of Casual employees,” noting that casual employees “will not be

⁶ All remaining dates are in 2013 unless noted.

⁷ See Section 802 of the Memphis Agreement, at p. 33.

⁸ See Section 501 of the Memphis Agreement, at p. 20.

⁹ See Section 107 of the Memphis Agreement, at pp. 8-9.

utilized when regular employees are on layoff.” The Casual Program provision specifies that “[t]he terms and conditions of the Supplemental and Master Agreements will not apply to Casual employees” whereby casual employees do not receive the wages and employee benefits provided by the Master Agreement.¹⁰ The Casual Program also prohibits the scheduling of casual employees unless overtime work has been first offered to, and refused by, all regular employees.

II. Bargaining history

The Employer has twice sought to expand its use of casual employees at the RTEC facilities. First, during the parties’ 2005 Master Agreement negotiations, the Employer proposed, in writing, that the parties negotiate a Memorandum of Agreement (“MOA”) establishing a permanent, lower-paid “qualified Casual workforce,” to be used regularly throughout the RTEC facilities. The Employer also proposed that the parties negotiate a MOA establishing an “Alternative Work Schedule,” that the Union asserts would enable the Employer to change how workweeks are defined at the various RTEC facilities, thereby reducing the premium pay guarantees for weekend and overtime work as governed by the Master Agreement. The International Union responded during the 2005 negotiations that it would consider the Employer’s proposals concerning casual employees and alternative schedules only if the Employer agreed to recoup some of the work the RTEC plants had previously lost, while also enhancing job security provisions for unit employees. Instead, the Employer withdrew its casual employee and alternative work schedule proposals.

The Union asserts that the Employer again broached the ideas for a permanent casual workforce and an alternative work schedule during preliminary discussions preceding the parties’ 2009 Master Agreement negotiations. The International Union reiterated its response from 2005, i.e., that it would only consider a two-tier wage system including casual employees if the Employer agreed to repatriate lost work back to the RTEC facilities with job security enhancements for unit employees. Based on those preliminary discussions, the Employer declined to submit formal proposals on the issues of casual employees or alternative employee scheduling, and the Master Agreement remained unchanged in those respects.

Finally, prior to the 2012 Master Agreement negotiations, the Union maintains that the parties engaged in essentially the same discussions that they had in 2009 regarding the Employer’s desires for a two-tiered wage system and flexible scheduling, but that the Employer again declined to submit written proposals concerning those items during the negotiations. Instead, the parties formalized a

¹⁰ The few specified benefits provided to casual employees are the Employer’s uniform and shoe subsidy, lunch and breaks provision, shift differential, and the Master Agreement’s COLA provision.

MOA to discuss “scheduling issues” at a future meeting of the Union Advisory Committee.¹¹

III. 2013 bargaining, including the Union’s information request and the Employer’s lockout

A. The Employer’s proposals

The parties held some 14 bargaining sessions for a successor Memphis Agreement between September 17 and October 21. At the parties’ first bargaining session on September 17, the Employer submitted to the Union its initial proposals that would substantially change the Memphis Casual Program as set forth in Section 107 of the Memphis Agreement. Specifically, the Employer proposed removing the Memphis Agreement’s 30 percent cap on its usage of casual employees, and effectively converting casuals into a permanent employee classification. Thus, the proposal defined them as “any employees hired by Kellogg to perform production or any other bargaining unit work” who would not be “limited in the scope of their work, duties, tasks, hours, or in any other terms or conditions of employment except as expressly agreed to by the parties,” could be “employed on an indefinite basis” and upon whom there would be “no restrictions on Kellogg’s rights to hire, use, manage, or direct ... except as specifically set forth in this Agreement or in any specific provisions of an applicable Master Agreement.” Additionally, the Employer proposed that the Memphis Agreement’s layoff and recall provision allow it the right to hire new casual employees even when regular employees were on layoff. In sum, the Employer’s proposals would give it the virtually unrestricted right to hire and retain an unlimited number of casual employees, on an indefinite basis, to perform any type of bargaining unit work.

At the same time, consistent with the Master Agreement, the Employer proposed the continuation of reduced wages for casual employees (\$6 per hour less than regular employees’ job rate) and their continued exclusion from employee benefits coverage. The Employer explained to the Union that its reason behind the casual employee proposals was that, “[r]egular employees—legacy employees are what we have today. We want to redo the casual employee to make them the employee of the future.”

In addition to increasing the use of casual employees in Memphis, the Employer proposed, as it did in prior Master Agreement negotiations, the right to establish an

¹¹ The Union Advisory Committee (“UAC”), a workgroup provided for by the Master Agreement, consists of representatives from the International Union and each Union Local. The UAC has the right to provide advice and input to the Employer, and local Employer facility representatives agree to meet monthly with Local Union representatives to discuss “outside contracting, outsourcing, effective utilization of the work force, and explore ways to cost effectively perform work with bargaining unit employees.”

“alternative crewing schedule” that would allow it to change the workweek at the Memphis facility from a five-day to a continuous seven-day per week operation. One potential effect of a workweek change would be that, as in Battle Creek and Lancaster, employees would receive premium pay for hours worked on what would be the employee’s first day off, but they would not receive premium pay simply for working on a Saturday.¹² The Employer proposed that regular employees continue to receive double time for Sunday hours (consistent with the Master Agreement), but not casual employees. The Employer proposed that preference be given to casual employees to staff any alternative crew lines. The Union made clear its opposition to bargaining over the Employer’s proposal as it would essentially create a two-tiered wage system and eventually convert its workforce into lower-paid employees. This was clearly the largest issue during negotiations. Given the Employer’s adherence to its proposals that would essentially modify the Master Agreement and the Union’s continuous rejection of bargaining about them, the parties were clearly deadlocked and at impasse over this issue.

B. The Union’s request for information

At the parties’ October 10 bargaining session, the Union requested information relating to the Employer’s prior use of casual employees at the Memphis facility and an Employer proposal to change the Memphis Agreement’s job bidding criteria and procedure. Specifically, the Employer proposed to allow both casual and regular employees job bidding rights, change the criteria used for job bidding, and allow increased Employer discretion in the job bidding process.

To evaluate the Employer’s job bidding proposal, the Union orally requested information concerning the history of job bidding at the Memphis facility and how the

¹² In this regard, Section 5.04 of the Master Agreement specifies, in part, that:

- (a) Time and one-half will be paid for all hours worked in excess of the normal workday and for all hours worked on Saturday, except as follows:

An employee in a department which normally operates seven (7) days per week will be paid such rate for hours worked on a regular shift on what would otherwise be their first scheduled day of rest in that workweek. This paragraph recognizes the first scheduled day of rest for such employees as equivalent of Saturday, as agreed to in the [local] Supplemental Agreements.

- (b) Double time will be paid for all hours worked on Sunday. Sunday is defined as the twenty-four (24)-consecutive-hour period beginning at the starting time of the first shift on Sunday as defined in the respective Supplemental Agreements.

Employer would use its discretion to award jobs. After a brief caucus, the Employer withdrew its proposed revisions to the job bidding process except for its proposal that casual employees have job bidding rights. The Union has not withdrawn its information request. The Employer failed to provide the Union with any of the requested information except pursuant to the Union's request concerning the Employer's prior use of casual employees at the Memphis facility.¹³

C. The lockout

Although the parties reached agreement on some minor issues, the Union maintained its steadfast opposition to the Employer's proposed wage and benefit reductions and its proposed alternative crewing scheduling, noting in part that those proposals are already covered by the Master Agreement.

On October 16, the Employer gave the Union its last, best offer containing its proposals concerning casual employees (including that casuals have job bidding rights) and an alternative crewing schedule. On that same date, the Employer posted a message to employees on its internal website informing them that they would be locked out as of October 22, absent their ratification of its last, best offer by that date. The Union rejected the Employer's last, best offer. The Employer locked out over 200 unit employees on October 22. The lockout continues to date.

ACTION

We conclude that the Employer violated Section 8(a)(5) by insisting to impasse on bargaining proposals that would constitute midterm modifications to the wage and benefit provisions of the parties' Master Agreement, and that were thus nonmandatory subjects of bargaining. We further conclude that the zipper clause contained in Section 1.01(f) of the parties' Master Agreement establishes that the parties intended to preclude further bargaining over provisions contained in the Master Agreement during its term. Finally, the Employer violated Section 8(a)(3) and (5) by locking out the Memphis unit employees in furtherance of its unlawful bargaining position. The Region should issue complaint, absent settlement.

¹³ We agree with the Region that the Employer violated Section 8(a)(5) by failing to provide the Union with all of the requested information; thus, the Union's information request concerning the history of job bidding in Memphis and Employer discretion in the job bidding process is presumptively relevant to the Employer's outstanding proposal to allow casuals job bidding rights, as well as to the Union's function as bargaining representative in learning how the bidding system actually worked.

I. The Employer violated Section 8(a)(5) by insisting to impasse on proposals that would constitute midterm modifications of the Master Agreement and that were thus nonmandatory subjects of bargaining

Section 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. Generally, an employer may not unilaterally institute changes regarding mandatory bargaining subjects before reaching a good faith impasse in bargaining. Section 8(d) also requires that when a collective-bargaining agreement is in effect and an employer seeks to modify the terms and conditions contained in the contract, the employer must obtain the union's consent before implementing the change. Indeed, a party's insistence to impasse on a midterm modification is an insistence on a nonmandatory subject of bargaining, about which the other party is under no obligation to bargain.¹⁴

Initially, we reject the Employer's argument that its proposals concerning casual employees were simply revisions to the Memphis Agreement's Casual Program and thus appropriate for local bargaining. The Employer concedes that it intends to effectively convert its Memphis workforce into an all-casual employee complement; indeed, the Employer's negotiator identified casuals as its "employee[s] of the future." The Employer's admission, in light of its proposals to eliminate all restrictions on the hiring and use of casual employees while continuing to apply the \$6 wage differential to them, establish that the Employer effectively proposed that the Master Agreement's wage and benefit provisions not apply to new, permanent Memphis employees.¹⁵

But employees' wage rates and benefits are clearly governed by the Master Agreement and cannot be changed without the Union's consent. As to wages, Section 5.01 of the Master Agreement explicitly states that, "[a]ll matters pertaining to hourly wages for Locals ... 252G ... are included as part of this Agreement and are contained in the Wage Appendix, which is contained in this Master Agreement." And concerning

¹⁴ See *Chesapeake Plywood*, 294 NLRB 201, 201, 212 (1989), *enfd. mem.* 917 F.2d 22 (4th Cir. 1990) (employer violated Section 8(a)(5) by insisting to impasse during contract negotiations on union's agreement to employer's modification of court-approved EEO settlement agreement, a nonmandatory subject of bargaining); *R.E.C. Corp.*, 296 NLRB 1293, 1299-1300 (1989) (employer violated Section 8(a)(5) by insisting to impasse on nonmandatory subject of bargaining, i.e., that union negotiate reduction in wages and benefits contained in current contract).

¹⁵ The Employer notes that its proposed changes to the Memphis Agreement are projected to result in cost savings of \$8.4 million during the contract's three-year term, while "hav[ing] no impact on the wages and benefits of existing regular employees." See Employer's Position Statement, dated December 11, 2013, at 3.

employee benefits, Section 6.01 of the Master Agreement explicitly provides that, “[a] schedule of hospital, medical, surgical, major medical, prescription drug, dental, disability, accidental death and dismemberment, and life insurance coverage for all regular employees covered by this Agreement has been established.” In contrast, the Memphis Supplemental Agreement has not set its own employee wages or provision for employee benefits. The Memphis Agreement’s wage progression for new hires is identical to, and specifically taken from, the new-hire wage progression contained in the Wage Appendix of the Master Agreement.

As set forth above, Section 5.04 of the Master Agreement also governs how premium pay is allocated to employees, regardless of how the RTEC facilities define their operational workweeks. Section 5.04 of the Master Agreement states that employees receive premium pay for hours worked on a regular shift “on what would otherwise be their first scheduled day of rest ... as equivalent of Saturday,” thereby recognizing that the RTEC plants define their workweeks differently based on their individual operating needs. In this regard, the Employer’s proposal to establish an “alternative crewing schedule,” and pay employees premium pay “as provided for under Section 5.04(a) of the Master Agreement,” is consistent with the Master Agreement and the parties’ history of bargaining alternative crew schedules on a local level in Battle Creek and Lancaster.¹⁶ But Section 5.04(d) also guarantees employees double time for hours worked on Sunday. Therefore, the Employer’s proposal to specifically deprive new employees working on an alternative crewing schedule from receiving Sunday premium pay, simply by calling those new employees “casuals,” contravenes the Master Agreement.

Rather than consent to such bargaining, however, the Union has maintained its steadfast opposition to local bargaining over employees’ wages and benefits. It recognizes that the Employer’s admission that casual employees are the “employee[s] of the future,” and its proposals giving it the right to permanently hire an unlimited number of casual employees on an indefinite basis, would effectively nullify the Master Agreement’s governance of new Memphis employees’ wages and benefits.¹⁷ The Employer’s repeated attempts since the 2005 Master Agreement negotiations to bargain the conversion of its workforce into a two-tiered wage and benefit system demonstrate that the Employer itself recognized that wages and benefits are national subjects that cannot be bargained at the local level, absent all parties’ consent. Because the Union is under no obligation to bargain modifications to the wage and benefit provisions of the Master Agreement during its term, the Employer’s insistence

¹⁶ See note 5.

¹⁷ See, e.g., *Conoco, Inc.*, 318 NLRB 60, 63 (1995), *enf. denied* 91 F.3d 1523 (D.C. Cir. 1996) (employer’s interpretation of contractual provision lacked a sound arguable basis because it would render the provision a nullity and it is “axiomatic that parties to a collective-bargaining agreement do not intend to agree to a nullity”).

to impasse on bargaining over wage and benefit reductions was an insistence on a nonmandatory subject of bargaining.¹⁸

Because we conclude that the Employer seeks to change wages and benefits for new employees at the Memphis facility rather than, as it asserts, to simply modify its use of casual employees, we reject the Employer's argument that Section 1.01(f) privileges its attempt to merely expand its local use of casual employees, while shielding it from having to bargain over casual employees at the national level. Indeed, Section 1.01(f) supports our conclusion that the Union was not obligated to bargain over the Employer's attempt to reduce employee wages and benefits midterm. The Board has long held that the normal function of a zipper clause is to maintain the status quo, not to facilitate unilateral changes.¹⁹ A zipper clause that contains language signifying that the parties intended to preclude further bargaining will prevent either party from forcing the other to bargain over subjects covered by the clause during the duration of the contract.²⁰ In this regard, a zipper clause serves as a "shield" that a party may use against the other party's request for midterm bargaining, but not a "sword" to accomplish unilateral changes in terms and conditions of employment.²¹ A zipper clause thus encourages industrial stability by preserving the status quo during the contract term.²²

Here, Section 1.01(f) of the parties' Master Agreement states in pertinent part:

Those matters which have been covered by provisions in this Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and any of the respective Local Unions in an effort to secure changes in or to secure a new Supplemental Agreement.

¹⁸ See *Chesapeake Plywood*, 294 NLRB at 201, 212 (employer violated 8(a)(5) by insisting on union's agreement to midterm modification of court-approved EEO settlement agreement, a nonmandatory subject of bargaining); *R.E.C. Corp.*, 296 NLRB at 299-1300 (employer violated 8(a)(5) by insisting that union negotiate reduction in wages and benefits contained in current contract).

¹⁹ *Murphy Oil USA*, 286 NLRB 1039, 1039 (1987), citing *Suffolk Child Dev. Ctr.*, 277 NLRB 1345, 1350 (1985); *GTE Automatic Elec.*, 261 NLRB 1491, 1492 (1982).

²⁰ See, e.g., *Success Village Apartments, Inc.*, 348 NLRB 579, 580, 628-29 (2006). See also *GTE Automatic Elec.*, 261 NLRB at 1491-92 (employer was privileged to invoke a zipper clause as a shield against the union's midterm demand for bargaining over new benefit sought by the union).

²¹ *Success Village Apartments*, 348 NLRB at 629; *GTE Automatic Elec.*, 261 NLRB at 1491-92.

²² See *GTE Automatic Elec.*, 261 NLRB at 1491-92.

The operative language of the zipper clause is thus explicit that the parties will not be required to negotiate terms that are covered by the Master Agreement during the parties' efforts to bargain local agreements. The language clearly and unequivocally expresses the parties' intent to waive any further bargaining over covered subject matters. Because new employees' wages and benefits are subjects clearly covered by the Master Agreement, the Agreement's zipper clause protects the Union from the Employer's insistence on bargaining over those subjects during the term of the Master Agreement. For all the above reasons, the Employer's insistence to impasse that the Union bargain locally over terms that would clearly modify the Master Agreement violated Section 8(a)(5).

II. The Employer violated Section 8(a)(5) and (3) by locking employees out in support of its unlawful bargaining position

An employer may initiate a "bargaining lockout" only where the lockout's sole purpose is to bring economic pressure in support of the employer's legitimate bargaining position.²³ Conversely, an employer may not lock out its employees in support of its bad-faith bargaining.²⁴ Thus, an employer may not lock out its employees in support of its demands on a nonmandatory subject of bargaining.²⁵

²³ See *National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 4 (2011), *enfd. sub nom. KLB Indus., Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012). See generally *American Ship Building*, 380 U.S. 300, 318 (1965) (employer does not violate Section 8(a)(3) and (1) by locking out employees after impasse and in support of legitimate bargaining position).

²⁴ See *Bagel Bakers Council*, 174 NLRB 622, 622 (1979), *enfd. in relevant part* 434 F.2d 884, 889 (2d Cir. 1970) (because employer's lockout was "clearly in violation of Section 8(d) and was in support of Respondent's bad-faith bargaining, we find the lockout to be unlawful"); *American Stores Packing Co.*, 158 NLRB 620, 622 (1966) ("[w]e assume for the purposes here that if the Respondent ... were bargaining with the [u]nion in good faith, it could legally lock out its employees. We nevertheless conclude that Respondent's bad-faith bargaining throughout this period requires a different result").

²⁵ See *Movers and Warehousemen's Assn.*, 224 NLRB 356, 357 (1976), *enfd.* 550 F.2d 962 (4th Cir. 1977) (unlawful lockout in support of employer's proposal concerning contract ratification procedure, a nonmandatory subject of bargaining). See also *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022, 1023-24 (1993), *enf. denied* 40 F.3d 669 (3d Cir. 1994) (lockout unlawful where employer insisted on proposal changing unit scope); *Branch Int'l Servs.*, 310 NLRB 1092, 1104-1105 (1993), *enfd. mem.* 12 F.3d 213 (6th Cir. 1993) (same; Board affirmed ALJ's conclusion that lockout was unlawful where employer insisted on unit scope proposal, a nonmandatory subject of bargaining).

Here, we conclude that the Employer violated Section 8(a)(5) by unlawfully locking out its Memphis unit employees in support of its bad-faith bargaining position, i.e., to coerce them and the Union to bargain over its proposals reducing the Master Agreement's wage and benefit guarantees to new hires, which is a nonmandatory subject of bargaining.²⁶ The Union refused to bargain over those proposals, noting that such terms are appropriately bargained only at the national level during negotiations for the Master Agreement. Because the Employer insisted that the Union engage in local bargaining over proposals that would alter the Master Agreement during its term—and thereby violated Section 8(a)(5) by insisting to impasse on a permissive subject—its lockout in support of those bad-faith bargaining proposals is also unlawful.²⁷ Finally, because the Employer's lockout was in support of a bad-faith bargaining position, the lockout also violated Section 8(a)(3).²⁸

Accordingly, the Region should issue complaint, absent settlement.

/s/
B.J.K.

cc: Injunction Litigation Branch

H: ADV.15-CA-115259.Response.kelloggs(3) (b) (6), (b) (7)

²⁶ See *Rangaire Co.*, 309 NLRB 1043, 1043, 1050 (1992), *affd. mem.* 9 F.3d 104 (5th Cir. 1993) (employer unlawfully locked out employees to coerce them and union to agree to midterm modifications of contract). See also *R.E.C. Corp.*, 296 NLRB at 1293, 1299-1300 (employer unlawfully laid off employees because they refused to reopen contact and agree to midterm reductions in wages and benefits). See also generally *American Ship Bldg. Co.*, 380 U.S. at 308 (lockout unlawful where designed to allow employer to avoid its bargaining obligation); *Clemson Bros.*, 290 NLRB 944, 945 (1988) (employer's lockout unlawful where initiated while employer was bargaining in bad faith by refusing to allow union to verify employer's asserted inability to pay).

²⁷ As noted above, although we agree that the Employer's refusal to provide the Union with relevant job bidding information violated Section 8(a)(5), we do not conclude that its refusal tainted the lockout. Thus, even if the Union had received the requested information, it would not have consented to the Employer's insistence to impasse on bargaining a reduction of employees' wages and benefits. As such, the Employer's refusal to provide the Union with the requested information, while unlawful, did not cause or prolong the lockout.

²⁸ See, e.g., *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1237 (1989), *enfd. sub nom. Teamsters Local 639 v. NLRB*, 924 F.2d 1078 (D.C. Cir. 1991) (lockout that violated Section 8(a)(5) in support of false declaration of impasse also discriminated against unit employees in violation of Section 8(a)(3); *Clemson Bros.*, 290 NLRB at 945 (footnotes omitted) ("it is the Respondent's avoidance of its bargaining obligation in instituting the lockout, rather than the absence of a lawful impasse, which renders the lockout violative of Section 8(a)(3) and (1)"); *Bagel Bakers*, 174 NLRB at 622, 631 (lockout in support of employer's bad-faith bargaining also violated 8(a)(3)).