

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

Advice Memorandum

DATE: August 28, 2015

TO: George P. Velastegui, Regional Director
Region 32

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

SUBJECT: Save Mart Supermarkets
Case 32-CA-143846

347-4040-5060-0000
347-4040-8314-0000
530-6033-7000-0000
530-6033-7001-5000
530-6033-7008-0000
530-6033-7056-8700
530-6033-7056-9500
530-6067-6001-0000

The Region submitted this case for advice as to whether the Employer: (1) violated Section 8(a)(5) by prematurely declaring impasse and unilaterally implementing its last-best-final offer where it had failed to provide Local 5 with requested financial information; and (2) violated Section 8(a)(5) by unilaterally implementing its last-best-final offer where it had failed to provide Local 5 with 72-hours' written notice of termination as required by the parties' extension agreement.

We conclude that, although the Employer unlawfully had failed to provide Local 5 with the requested financial information, the Employer's declaration of impasse was not tainted by that alleged violation because even if the information had been provided, it would not have altered Local 5's bargaining position regarding certain economic terms that the Employer continued to insist on as part of a new contract. We further conclude that, although the Employer did not provide Local 5 with 72-hours' written notice of its intent to terminate the prior agreement, the Employer was entitled to unilaterally implement its last-best-final offer where the parties' ongoing contract negotiations in effect had provided the requisite notice of termination, and the parties had reached a bona fide impasse.

FACTS

Save Mart Supermarkets ("the Employer") owns and operates Save Mart and Lucky grocery stores throughout Northern California. United Food and Commercial Workers Locals 5, 8, and 648 represent approximately 8,000 employees working for the Employer in three separate units. Local 5, the Charging Party, represents approximately 3,500 of the Employer's workers in a unit of traditional grocery store

employees that spans the Northern California Coastal Region. Local 8 represents the Employer's employees working in California's Central Valley Region, and Local 648 represents the Employer's employees working in San Francisco, California. Historically, the Locals have engaged in coordinated bargaining with the Employer. Each of the Locals and the Employer were parties to a collective-bargaining agreement with a term of October 9, 2011 through October 12, 2013.

In August 2012, during the term of the 2011-13 contract, the Employer and Locals agreed to a two-year stabilization agreement that granted the Employer significant financial concessions to help it survive the recession. Among other things, the stabilization agreement b(4)

The stabilization agreement had an expiration date of August 10, 2014.

By letter dated July 22, 2013, Local 5 notified the Employer that it wished to open the collective-bargaining agreement and negotiate a successor agreement. Several days before the existing contract expired on October 12, 2013, the three Locals and the Employer signed an extension agreement that extended the 2011-13 contract indefinitely, subject to 72-hours' written notice of termination by either party. The parties agreed to this extension despite the fact that the unit employees were then working under the terms of the stabilization agreement.

On November 13, 2013, the Locals and the Employer began bargaining for a successor contract. Local 5 was represented throughout bargaining by its current president.¹ The other two Locals also were represented by their own officials, but the three Locals had an attorney who served as their chief negotiator. On November 13 and 21, 2013, and January 17 and 31, 2014,² the parties held bargaining sessions during which the Employer made numerous presentations about it being at a competitive disadvantage with nonunion grocers. The parties also discussed the Employer's savings from the stabilization agreement, the effects the stabilization

¹ In late summer or early fall 2014, Local 5's then-director of collective bargaining was elected its new president, pending a Department of Labor investigation of the election procedure. On November 7, 2014, the Department of Labor certified the election results, and this individual officially became the new president of Local 5. Although he served as Local 5's director of collective bargaining prior to being elected its president, for clarity, he will be referred to as "Local 5's President" throughout this memorandum.

² Hereafter, all dates are in 2014 unless otherwise noted.

agreement had on unit employees, and the cost of health and welfare benefits. They also exchanged numerous proposals.

Between March 31 and July 14, the parties held five more bargaining sessions. During these sessions, the Employer gave numerous presentations on the impact of nonunion competition, the changing consumer, and the lingering effects of the recession. The Locals asked the Employer for financial information verifying its statements. The Employer provided the Locals with information showing the profitability of its stores and noted that b(4)

The parties exchanged numerous proposals and entered a number of tentative agreements. The Locals proposed restoring the wage rate of all senior clerks to their pre-stabilization rate of b(4), thereby undoing the b(4) pay cut.

During the parties' August 5 bargaining session, they discussed the service specialist position. This position had been created under the stabilization agreement, and it basically allowed the Employer to use lower paid workers to perform unit work.³ The Employer proposed retaining the position as part of the new contract. The Locals made it clear that they had no interest in including this provision as part of the new contract because the Employer had abused the use of the position under the stabilization agreement.

On August 10, the parties' stabilization agreement expired. As a result, the unit employees' terms and conditions of employment reverted back to those in the 2011-13 contract. Subsequently, the Employer explained to the Locals that it b(4) in 2012, but had b(4) after the stabilization agreement was put in place. The Employer stated that because the stabilization agreement had expired, it was now b(4).

At the August 20 session, the Employer and Locals were at odds over the length of time it would take for a unit employee to reach the top wage rate. The Locals calculated that it would take from 10 to 15 years under the Employer's proposed plan, which was not acceptable. The parties also discussed the wage rate for the senior clerks who had endured a two-year pay cut under the stabilization agreement, but there was no agreement on the issue.

³ Service specialists bag and help customers with groceries. The Employer has the ability to "step-up" these workers to food clerks, which is a higher paying classification, but without paying the higher wage. Under the stabilization agreement, the Employer was permitted to flexibly use service specialists during periods of high volume without having to call employees in to work.

By the end of August, the parties had reached a number of tentative agreements, including “holds”⁴ on the following issues: overtime, night premium pay, deletion of separate employer language, paid holidays, method of pay, clerk ratio, ADR letter of understanding (modifying the current language to jointly select an outside independent provider to implement ADR and commence drafting required documents), retirement incentive, senior clerk voluntary resignation incentive, technology, job classification definitions, part-time employees’ scheduling, progression to full-time, workday/week, head night stocker, all-purpose clerk, health and welfare items, pension, and pharmacy technicians. During the August 26 session, the use of service specialists again was on the table, but neither party was willing to change its position.⁵

At this stage in negotiations, the members of Local 5 elected the director of collective bargaining, who had been the Local’s representative since negotiations began, as its new president.⁶

On September 5, the Employer’s Co-President sent a letter to the president of UFCW International asking for assistance with bargaining because of the parties’ lack of progress. The letter urged the International’s president to take a close look at what was occurring at the bargaining table, stated that the Employer’s current offer was its best effort, and stated that representatives for the Locals were unwilling to accept the fact that their demands were financially unfeasible for the Employer. The letter closed by stating that the Locals’ demands would lead to the Employer’s demise and that thousands of high-paying Union jobs would be lost.

Between September 12 and October 3, the Locals and the Employer met six times. During the bargaining session on September 12, the Employer proposed

⁴ A “hold” is when both sides agree on a term, but wait to see how other issues conclude before they enter a tentative agreement on the term.

⁵ In wage discussions on August 26, the Employer proposed a **b(4)** if it reached certain profit margins and a **b(4)**. According to Local 5’s President, at this point in negotiations, the Locals’ opinions diverged and coordinated bargaining started to fall apart. While Local 5’s President did not oppose the **b(4)** or **b(4)** in front of the Employer’s representatives, he told Local 8’s representative, who allegedly had pushed for these items, that the Locals should focus on opposing the concessions that had been in the stabilization agreement. In the opinion of Local 5’s President, the **b(4)** would never come to fruition and the **b(4)** was money that could be applied to wages and benefits.

⁶ See footnote 1, *supra*.

extending the stabilization agreement, which the Locals rejected. The Employer continued to propose a more liberal use of the service specialists, which became a point of contention since Local 5's President had stated that he would not agree to include the use of service specialists as part of a successor contract.

During the September 19 bargaining session, the Employer continued to propose cost saving measures and did not back off its pursuit of economic concessions. Specifically, the Employer continued to propose the elimination of (b)(4) and (b)(4), which the Locals rejected. The parties also went back and forth trading proposals over wage rates and the use of service specialists. Regarding wages, the Locals were not willing to accept the Employer's proposal that unit employees could not progress to the highest wage rate until top wage earners left the Employer. The Employer presented a revised proposal for the service specialists, but maintained the underlying objective of being able to use them flexibly as unit clerks. The Employer also revised its proposal regarding senior clerks, allowing them to retain their pre-stabilization rate of (b)(4) but only if the Locals agreed to the other concessions from the stabilization agreement. The Locals rejected these proposals, and the parties remained far apart on an economic package.

On September 30, the parties again met for a full bargaining session.⁷ For the first time since the parties began bargaining, UFCW International's bargaining director attended, and he continued to be present for each of the following sessions. The Employer stated that it did not have any more money to give and that any other proposals had to be financially neutral. While the parties discussed some aspects of the stabilization agreement that the Employer wanted to roll over, they did not reach any agreements. Local 8 proposed (b)(4) between the Locals and the Employer, but Local 5's President said that Local 5 was not interested in that if it meant keeping any concessions from the stabilization agreement on the table. He stated that Local 5 wanted the concessions removed and could not agree to anything that kept the concessions.

On October 3, the parties held their next bargaining session, which was the last coordinated bargaining session. They reached a few more tentative agreements but could not agree on holiday pay, the role of service specialists, the wage rate for senior clerks, the progression for wage increases, or the elimination of (b)(4). The Employer again told the Locals that there would be no new money and that the Employer would trade proposals only if there was no increase in overall cost. Local 5's President left this bargaining session about three hours before it ended

⁷ On September 24 and 25, the Locals and the Employer held off-the-record bargaining sessions.

after receiving word that **b(6) & b(7)(C)**, but it is unclear if that reason was conveyed to the Employer's attorney. After his departure, the Employer's attorney informed the representatives from Local 8 and 648 that he would prepare a last-best-final offer to move negotiations forward.

On October 4, Local 648's accountant sent the Locals' chief negotiator a letter identifying the financial information **b(6) & b(7)(C)** needed to evaluate the Employer's monthly losses and profits before, during, and after the stabilization agreement. On October 7, the Locals' chief negotiator sent a copy of that letter to the Employer. On that same day, the Employer emailed the Locals a complete contract proposal that would be on the table only until October 9, and it requested that the Locals make any counterproposals by that date.

On October 8, the Locals' chief negotiator emailed the Employer stating that the Locals were still waiting for the information requested by Local 648's accountant. On October 9, the Employer replied by email and objected to the information request. The Employer indicated that it was protesting several of the items requested because that information had nothing to do with analyzing the impact that the stabilization agreement had on its operating results. The Employer indicated that it was willing to provide the Locals with financial statements covering 2012, 2013, and the first two quarters of 2014. It also indicated that it would create a document showing the impact over the last two months of losing the stabilization agreement.

The following day, the Locals' chief negotiator emailed the Locals about the Employer's October 7 complete proposal and asked them to suggest future bargaining dates. However, none of the Locals were available on the same dates, and they never responded to the October 7 proposal.

On October 13, Local 648's bargaining representative suggested that the Locals draft a counterproposal for the Employer. However, Local 5's President responded that he was against email bargaining and that he wanted to meet face-to-face with the Employer. That same day, a new attorney that Local 5 hired to assist with bargaining notified the Employer that he would be attending the next session to assist with negotiations, but that the Locals' chief negotiator continued to represent all three Locals at the bargaining table.⁸

On October 19, the Employer emailed the Locals' chief negotiator, UFCW International's bargaining director, and each Local's representative its last-best-final offer, which contained only minor, non-economic changes to its October 7 proposal.

⁸ On or about October 15, Local 5's President, its former president, and the Employer met for another off-the-record bargaining session.

The Employer noted that the Locals had failed to respond to its October 7 offer and that it had received neither counterproposals nor any other indication from the Locals that there would be any movement on their part. The email stated that major open issues expressed by the Locals at the October 3 bargaining session included:

- (1) [REDACTED];
- (2) [REDACTED];
- (3) length of proposed progressions;
- (4) the step up of service specialists;
- and (5) the number of reduced senior clerks who would maintain their pre-reduction pay rate upon ratification.

The email also stated that the Employer's position remained unchanged on these issues. The Employer further stated that based on the extensive exchange of proposals over 21 bargaining sessions, it saw no reason to continue bargaining and that absent agreement by 6 p.m. on October 21, it would unilaterally implement its last-best-final offer on October 27, with the exception of a few specified terms.

On October 20, UFCW International's bargaining director emailed the Locals asking to meet the following day to discuss the Employer's final offer. Local 5's President responded that he could not attend because of other obligations and that he considered this to be an artificial deadline imposed by the Employer. He made arrangements for Local 5's former president and its new attorney to attend the Locals' internal meeting on October 21 via teleconference. However, because they did not have the correct phone number they missed over an hour of the October 21 meeting with the other two Locals. By the time Local 5's former president and new attorney obtained the correct phone number and joined the meeting, Locals 8 and 648 already had exchanged emails with the Employer and had reached tentative agreement on a new contract.

By email dated October 21, the Locals' chief negotiator, on behalf of Locals 8 and 648, confirmed that they had reached a tentative agreement with the Employer to accept its October 19 final offer and would recommend ratification to their respective memberships, conditioned upon their auditor's review of the Employer's financial records.⁹ Also on October 21, after receiving no response from Local 5, the Employer reissued Local 5 a copy of its October 19 email and added a declaration of impasse. The email stated that if Local 5 did not accept the last-best-final offer by October 24, the Employer would unilaterally implement on October 27.

⁹ In an email to the Employer dated October 22, the Locals' chief negotiator stated that the purpose of this audit was to confirm that the Employer had [REDACTED]

[REDACTED]

[REDACTED]

By letter dated October 22, Local 5's new attorney acknowledged receipt of the Employer's October 21 last-best-final offer. In his response, he refuted the Employer's declaration of impasse and requested a copy of any agreements that had been reached with Locals 8 and 648. The letter stated that the Employer had refused to make financial records available for an audit as it had promised. Also, Local 5 said that it needed to perform its own audit of the appropriate financial records.

On October 23, Local 5's President notified the Employer that the Locals' chief negotiator no longer represented Local 5 and that it should direct future correspondence to Local 5's attorney. That same day Local 5's attorney emailed the Locals' chief negotiator requesting to be present at any review of the Employer's books. The Locals' chief negotiator responded that same day by email stating that the other Locals' auditors had completed their reviews "today," and he was awaiting letters showing their results. The email stated that the reviews were on behalf of Locals 8 and 648 and in no way bound Local 5.

By letter dated October 24, the Employer responded to Local 5 reiterating its previous impasse position. The Employer emphasized that even during the parties' off-the-record meeting on October 15, the Employer indicated that it would not change its position on the major economic issues. Also, because the other two Locals had accepted the Employer's contract proposal, it had no obligation to make a different deal with Local 5. The letter also advised that Locals 8 and 648 had requested the financial information they received solely for the purpose of allowing them to verify to their members before a ratification vote that certain financial situations existed and that the information was not requested for use in making proposals and counterproposals. The Employer's letter stated that it had provided the requested information and that the auditors for Locals 8 and 648 had no further questions.

By letter dated October 25, Local 5's attorney again rejected the notion that the parties were at impasse. He requested copies of any review conducted by Local 8 of the Employer's financial records and the opportunity to review the same records "as part of our continued effort to reach an agreement." He stated, "[Local 5] will need to have our own financial advisor review those records in order to insure an unbiased and independent review."¹⁰ Local 5's attorney also requested a copy of the tentative agreement reached with Local 8, including any side agreement the parties may have entered. The letter stated that Local 5 was ready to bargain and reach an agreement, that the gap between the parties was not that significant, and that some movement by both sides would result in a contract. The letter closed by stating that the Employer's "posturing" was unproductive.

¹⁰ The Region alleges that the Employer violated Section 8(a)(5) by failing to respond to this information request.

The following day, October 26, the Employer sent Local 5 an email advising that it should contact Locals 8 and 648 to obtain copies of any agreement they had reached with the Employer and of any financial reviews generated by their accountants. The Employer stated that it disagreed with Local 5's assertion that the parties were not far apart. The email pointed out that although Local 5 had said the Employer must make some movement for the parties to reach an agreement, it was not willing to do so.

By letter dated October 31, Local 5's attorney again told the Employer that the parties were not far apart and requested future bargaining dates. He expressed Local 5's position that the Employer's October 19 last-best-final offer contained non-mandatory and illegal subjects. The letter never asserted that Local 5's inability to audit the Employer's financial records had precluded it from responding to the Employer's final offer.

Subsequently, Local 5's attorney contacted an FMCS mediator for assistance and on October 31, the mediator contacted the Employer and asked if it would meet with Local 5 to discuss the situation. The Employer agreed, and the parties scheduled a mediated bargaining session for November 10. Also during this time, Locals 8 and 648 began the process of submitting the Employer's last-best-final offer to their membership for a mail-ballot ratification vote.

On November 3, Local 5 met with the FMCS mediator and reviewed the parties' bargaining history. Following the meeting, Local 5 determined that it was best to postpone its meeting with the Employer until after Locals 8 and 648 had concluded their ratification vote because the results could have changed the dynamic of negotiations. Local 5's attorney then contacted the mediator and canceled the November 10 mediated bargaining session. He also told the mediator that Local 5 would not meet with the Employer until after the Department of Labor certified the results of Local 5's presidential election because it did not want to run into the problem of agreeing to a new contract with a negotiator who was not authorized to do so. On November 7, the Department of Labor certified the results of Local 5's presidential election.

During that same week, in an effort to show that the Employer's October 19 final offer had no employee support, Local 5 scheduled a membership meeting to vote on it. However, UFCW International blocked the vote under Section 23(A) of the International Constitution, which allows the International to review an offer before it goes to a ratification vote. Since the meeting was already scheduled, Local 5's President held the vote on an advisory basis. Of the members who attended, 99% of them, or about 20% of the total membership, voted to reject the offer.

On November 11, the Employer sent Local 5 a letter that included a new last-best-final offer and stated that if Local 5 did not accept by November 14, it would unilaterally implement on November 16.¹¹ The letter asserted that the parties were at impasse, and cited as support a statement on Local 5's website that 99% of its members opposed the contract terms that Locals 8 and 648 had agreed to. The letter further noted that Locals 8 and 648 had bargained and reached agreement with the Employer on October 21, whereas Local 5 had chosen not to attend.¹² The Employer also noted that it had agreed to meet for a mediated session the previous day, but Local 5 had canceled and stated that it refused to meet again until after Locals 8 and 648 finished their contract ratification vote on November 24.

By letter dated November 13, Local 5 responded that the Employer had failed to provide it with requested financial information and the Employer's proposal contained unlawful provisions that prevented impasse. Local 5 also requested future bargaining dates. By email dated November 15, the Employer responded that although it had agreed to meet with a mediator on November 10 and Local 5 had backed out, it nonetheless would meet with Local 5 on November 24. Prior to the parties meeting on November 24, Local 5 again canceled the scheduled mediated bargaining session. On November 25, the Employer began implementing its November 11 final offer. Subsequently, the members of Local 8 ratified the new contract, but Local 648 had to proceed to an executive board meeting to ratify the contract.

By letter dated December 3, Local 5's President requested that UFCW International reinstate Local 5's authority to use strike sanctions against members who crossed a picket line during a Local 5 strike. The International had removed that authority when it blocked Local 5's ratification vote. In the letter, he stated that Local 5 and the Employer were not that far apart on a few issues critical to reaching agreement on a contract that the members would accept. The letter also stated that although there were some good terms in the Employer's final offer, the presence of several concessionary terms made it unacceptable and would prompt a majority strike vote. As support for a strike, the letter sighted the non-binding ratification vote Local 5 held in early November at which its members rejected the Employer's

¹¹ The November 11 final offer removed a non-mandatory neutrality agreement, the b(4) [REDACTED], and the b(4) [REDACTED] if the Employer met certain financial goals.

¹² This was the date on which Local 5's representatives were to attend an internal meeting among the Locals by conference call, but were late for that meeting because they had been given the wrong phone number. Once they had the correct phone number and joined the meeting, Locals 8 and 648 already had reached a tentative agreement on a new contract with the Employer.

October 19 final offer. The letter went on to state that Local 5 believed that strike sanctions and UFCW International's support were necessary for the parties to reach an agreement.

On January 5, 2015, Local 5 filed the charge in the instant case alleging, among other things, that the Employer had violated Section 8(a)(5) by prematurely declaring impasse and implementing its last-best-final offer without providing Local 5 with requested financial information, and by unilaterally changing the unit employees' current terms and condition of employment without first providing Local 5 with 72-hours' notice of termination as required by the parties' October 2013 extension agreement.

ACTION

We conclude that, although the Employer unlawfully had failed to provide Local 5 with requested financial information, the Employer's declaration of impasse was not tainted by that alleged violation because even if the requested information had been provided, Local 5 would not have altered its bargaining position regarding certain economic terms that the Employer continued to insist on as part of a new contract. We further conclude that, although the Employer did not provide Local 5 with 72-hours' written notice of its intent to terminate the parties' 2011-13 contract, the Employer was entitled to unilaterally implement its last-best-final offer where their ongoing contract negotiations in effect had provided the requisite notice of termination, and the parties had reached a bona fide impasse.

A. The Employer's Declaration of Impasse was Valid Because Its Failure to Provide Requested Financial Information Did Not Taint the Impasse.

A bargaining impasse occurs when the parties are warranted in believing that continued bargaining would be futile.¹³ In determining whether a bargaining impasse exists, the Board considers a number of factors, including the bargaining history between the parties, the parties' good faith, the length of time the parties spent in negotiations, the importance of the issues over which the parties continue to disagree, the parties' continued willingness to compromise, and the contemporaneous understanding of the state of negotiations.¹⁴ Thus, a bona fide impasse is only

¹³ *Richmond Elec. Services, Inc.*, 348 NLRB 1001, 1002 (2006).

¹⁴ *Wayneview Care Ctr.*, 352 NLRB 1089, 1113 (2008), *adopted as modified* by 356 NLRB No. 30 (2010), *enfd.*, 664 F.3d 341 (D.C. Cir. 2011) ; *Wycoff Steel*, 303 NLRB 517, 523 (1991). *See also Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd sub nom.*, *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

reached when further discussion of mandatory issues would be futile and “there is no realistic possibility” that bargaining will be “fruitful.”¹⁵

Applying these principles, we initially conclude that the parties had reached impasse as of November 25, and the Employer was privileged to unilaterally implement its November 11 last-best-final offer as of that date. From November 13, 2013 to October 3, 2014, the parties met over 20 times including their off-the-record meetings, and they each remained unwilling to compromise on certain key economic terms. From the beginning of negotiations, the economic concessions that the Locals had granted to the Employer under the 2012-14 stabilization agreement were a point of contention between the parties, with the Employer wanting to maintain those concessions and the Locals seeking not to include them in a new contract. The first thing the Employer did was provide the Locals with financial information showing

b(4)

■ The Employer took the position that it needed to retain those concessions in the successor agreement to remain profitable, particularly in light of the nonunion competition it faced. However, the Locals took the position that they would not agree to a new contract containing those concessions. Although the parties were able to reach tentative agreement on a numbers of issues, they remained locked in their bargaining positions regarding certain economic terms that previously had been covered by the stabilization agreement. Those terms included:

- b(4);
- b(4);
- the length of time it took a unit employee to progress to the top wage rate;
- the increased use of service specialists to perform unit work; and,
- maintaining the b(4) for senior clerks who had their pay cut during the stabilization agreement.

After the stabilization agreement expired on August 10, the Employer proposed b(4) which had been one of the concessions in the stabilization agreement. The Locals rejected that proposal. When the parties met on September 19, the issue of holiday pay centered on the Employer’s proposal that employees receive b(4), which the Locals rejected. On September 30, the Employer proposed b(4) which the Locals rejected. Despite the Locals’ opposition, the Employer refused to remove these proposals from its final offers.

¹⁵ *Cotter & Co.*, 331 NLRB 787, 787 (2000), *enf. denied in relevant part sub nom.*, *TruServe Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002).

The Employer and Locals were also at loggerheads over the length of time it would take for a unit employee to reach the top wage rate. The Locals calculated that it would take from 10 to 15 years under the Employer's proposed plan, which was not acceptable. The Employer also proposed that an employee had to wait until a top wage earner left the Employer before another employee could earn that top wage rate. When the parties discussed the issue in September, the Locals rejected the Employer's proposals and countered with their own timeline, but the Employer rejected their proposal leaving the parties far apart on the issue.

During the parties' bargaining sessions in August, they discussed the service specialist position, which had been created by the stabilization agreement. The Employer proposed that it have the freedom to continue using them like the higher-paid unit clerks. The Locals made it clear to the Employer that they had no interest in including this provision from the stabilization agreement in the new contract because they believed the Employer had abused the provision during the stabilization agreement to divert work away from unit clerks. Although the parties continued to discuss the issue, neither was willing to compromise.

The parties also were not able to reach agreement on maintaining the b(4) for senior clerks who had their pay cut under the stabilization agreement. When the parties discussed the issue before the last coordinated session on October 3, the Employer revised its proposal to maintain the senior clerks at that wage rate, but in exchange proposed keeping the other concessions from the stabilization agreement.

When the Locals and the Employer met on October 3 for their last coordinated bargaining session, they did reach some tentative agreements. Although the Locals proposed changes to the issues discussed above, the Employer had rejected the Locals counterproposals, leaving the parties far apart on these issues. Thus, by the time the parties reached this last coordinated bargaining session, the Locals had tried to convince the Employer of the importance of compromising on these issues, but the Employer refused and bargaining was at a standstill. Thereafter, on October 7, the Employer put forth a comprehensive contract proposal and then presented it as a last-best-final offer on October 19. Except for minor changes not material to the economic issues above, the Employer never deviated from that final offer. That is the same final offer that Locals 8 and 648 tentatively agreed to on October 21 and later ratified. The Employer's November 11 final offer to Local 5 included largely the same proposals that were in its October 19 final offer.¹⁶

¹⁶ The Employer's November 11 final offer had a few worse terms than its October 19 offer because it eliminated the b(4) and the b(4).

At the same time, after October 21, and dating back to the final coordinated bargaining session on October 3, Local 5 never changed its position regarding any of the core economic issues. Indeed, even though Local 5 asserted after October 21 that the parties were not far apart and an agreement could be reached if the Employer continued to bargain, it did not make counterproposals on any of the core issues that demonstrated a willingness to compromise and reach agreement. To the contrary, Local 5's President held a meeting in early November to vote on the Employer's October 19 final offer to show that it had no support among the membership. Of the members present at that meeting, 99% of them, or about 20% of the total membership, voted to reject the offer. Then, after the Employer implemented its November 11 final offer, Local 5's President requested that UFCW International restore its authority to impose strike sanctions. In his December 3 letter to UFCW International, Local 5's President stated that strike sanctions and the International's support were what was needed to reach to an agreement. That letter also stated that the Employer's final offer contained several economic concessions that Local 5 could not accept and prompted the need for a strike. The President's letter to UFCW International also referenced the membership vote in early November that overwhelmingly rejected the Employer's October 19 final offer. Thus, it is clear that Local 5 was not willing to accept the core economic concessions that the Employer would not remove from any of its final offers. Therefore, based on the parties' fixed positions on these issues throughout negotiations, and Local 5's documented interest in pursuing a strike rather than compromising, there is no reason to believe that further bargaining would have resulted in an agreement.¹⁷ Therefore, we conclude that the parties were at an impasse on November 25, and as a result, the Employer was entitled to implement its November 11 last-best-final offer as of that date.

In sum, the parties remained far apart on several major issues and neither party indicated that it was willing to compromise. Nevertheless, Local 5 asserts that the impasse was invalid because the Employer had failed to provide it with requested financial information. A party's failure to provide relevant information on significant bargaining issues generally prevents negotiations from reaching a good-faith impasse because the lack of information prevents full exploration of those significant issues.¹⁸

¹⁷ *Cf. Rochester Telephone Corp.*, 333 NLRB 30, 30 n.3 (2001) (Board found impasse where the "Union's counterproposal . . . did not create a 'reason to believe that further bargaining would produce additional movement'" (quoting *Hayward Dodge*, 292 NLRB 434, 468 (1989)).

¹⁸ *E.I. du Pont de Nemours & Co.*, 346 NLRB 553, 558 (2006) ("It is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse."), *enfd*, 489 F.3d 1310 (D.C. Cir. 2007). *See also Decker Coal Co.*, 301 NLRB 729, 740 (1991); *Pertec Computer*, 284 NLRB 810, 812 (1987),

However, Board law recognizes that there are some circumstances where an employer's failure to comply with an information request does not undermine the finding of a valid impasse that privileges unilateral implementation. Thus, when a failure to provide information has no "causal nexus" to a deadlock, that unfair labor practice would not taint a lawful impasse.¹⁹

In an October 25 email to the Employer, Local 5's attorney specifically requested copies of any financial reviews conducted by Local 8 and the opportunity to inspect the same financial records "as part of our continued effort to reach an agreement." He also requested copies of the tentative agreement that the Employer had reached with Local 8, and any other side agreements the parties had entered that would affect bargaining with Local 5. We first agree that the Employer had an obligation to provide Local 5 with the requested information, and that it violated Section 8(a)(5) by failing to do so. However, there is no evidence that the deadlock in negotiations would have been broken if the Employer had satisfied that obligation. To the contrary, Local 5's subsequent actions indicate that it would have continued to insist that the Employer not include the concessions from the stabilization agreement in a successor contract, which the Employer refused to do. Indeed, this is the posture the parties had been in since they started this round of negotiations in November 2013. Local 5 made this request for financial information only after months of extensive bargaining, after its sister Locals had tentatively agreed to accept the Employer's final offer, and after it had rejected that same final offer.

Moreover, Local 5 did not subsequently rely in its correspondence with the Employer on the failure to respond to its October 25 information request as the reason why it had not been able to generate counterproposals to the Employer's final offer.²⁰ It simply continued to assert that the parties were not at impasse and that

supplemented by Triumph-Adler-Royal, 298 NLRB 609 (1990) (eliminating plant restoration remedy), *enfd as modified sub nom., Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir. 1991).

¹⁹ *Sierra Bullets, LLC*, 340 NLRB 242, 243-44 (2003) (impasse not precluded where information requested regarding overtime issue was unrelated to the four "core issues" separating the parties which the union considered necessary to an agreement; employer's failure to provide the requested information was not alleged as unlawful); *Washoe Medical Center*, 348 NLRB 361, 362 (2006) (no causal nexus between unfair labor practice in 1999 and impasse in 2001 absent evidence that the employer's declaration of impasse in April 2001 was "inevitably tainted" by the unilateral change in beginning wage rates for new hires in June 1999).

²⁰ *Community General Hospital*, 303 NLRB 383, 383 n.1, 385 (1991) (no evidence, nor did the union allege, that information sought in outstanding information request

the information was needed for future bargaining. “While bargaining must be conducted in good faith, it need not continue in perpetuity. Nor may one side insist on negotiating for an indefinite period of time simply because it subjectively believes that an agreement at some indeterminate future date is possible.”²¹ Furthermore, the Employer had provided the Locals with financial information from the beginning of negotiations regarding the effect of the stabilization agreement as support for its proposals on the core economic issues that resulted in the deadlock.²² In these circumstances, we conclude that the information requested had no “causal nexus” to the resulting deadlock.²³ Therefore, the impasse remained valid in spite of the fact that the Employer failed to provide Local 5 with the information that it was entitled to receive.

B. The Parties’ Contract Negotiations Provided Local 5 with the Requisite Notice to Terminate the October 2013 Extension Agreement.

The Board does not always require a specific notice in order to terminate an agreement. Indeed, “even when notice is not given, a party, by its actions, may waive notice requirements and agree to bargain.”²⁴ For example, in *Checker Motors Corp.*, the Board affirmed the ALJ’s finding that the parties’ contract did not automatically renew even though the employer did not provide the required 60-days’ written notice of termination.²⁵ Because the union actively had participated in early negotiations with the employer for several months before the contract expired, the employer “clearly conveyed the essential message to the [u]nion that it wished to terminate

about pension plan would have broken deadlock over the Employer re-entering the union’s pension and welfare plan; Board also noted union made request after the parties had reached impasse and the employer was not alleged to have violated Section 8(a)(5) for failing to provide the information).

²¹ *Id.* at 385.

²² Although occurring after the Employer unilaterally implemented for the Local 5 bargaining unit on November 25, Locals 8 and 648 ratified the new contract after their accountants had verified that the Employer had b(4)

²³ See the cases cited at footnote 19, *supra*.

²⁴ *Chemical Workers Local 6-0682 (Checker Motors Corp.)*, 339 NLRB 291, 299 (2003).

²⁵ *Id.* at 291 n.2, 298-99.

their contract and negotiate a replacement collective-bargaining agreement” and “the Union understood that the [employer’s] actions and . . . contract proposals constituted notice to terminate.”²⁶ This is consistent with other cases where the Board has held that a written request to negotiate a successor contract prevented automatic renewal of the current contract despite the lack of specific language in the request conveying the party’s intent to terminate.²⁷

Here, over the course of about a year and 20 or more bargaining sessions, the parties bargained with the intent of reaching an agreement that, if achieved, would have terminated the October 2013 extension agreement and, more important, replaced the parties’ 2011-13 contract. Local 5 actively participated in negotiations during that entire period and clearly understood that the parties were bargaining for a successor agreement to replace the 2011-13 contract. Indeed, it would be disingenuous for Local 5 to now claim that it did not have the requisite notice of termination where, in July 2013, it was the party that originally submitted written notice to the Employer that it wanted to open the 2011-13 contract and bargain a successor agreement. As in *Checker Motors*, because it is “self-evident” here that Local 5 understood the parties’ ongoing negotiations to have terminated the 2011-13 collective-bargaining agreement, it waived any notice requirement imposed by the extension agreement.²⁸

²⁶ *Id.* at 298. The Board’s decision in *Checker Motors Corp.* appears to address the concerns raised by the court in *Long Island Head Start Child Development Services v. NLRB*, 460 F.3d 254, 258-60 (2d Cir. 2006), *on remand to* 354 NLRB 684 (2009). In *Long Island Head Start*, the court stated that in the Board decisions cited there, one of the parties had submitted oral or untimely notice of termination, but negotiations had waived the formal requirements of a writing or timeliness. *See* 460 F.3d at 259. The court noted that the cited cases had not adopted a rule that negotiations alone could waive the required notice of termination. *Id.* That case did not discuss the Board’s decision in *Checker Motors*, where the Board made clear that notice requirements could be waived based solely on the parties’ negotiations before contract expiration. *See* 339 NLRB at 291, n.2.

²⁷ *See, e.g., Bridgestone/Firestone, Inc.*, 331 NLRB 205, 208 (2000) (finding contract had not rolled over and union had provided requisite notice of termination where it sent a letter to the employer requesting to bargain over wages, hours, fringe benefits, and other working conditions); *South Texas Chapter, AGC*, 190 NLRB 383, 386 (1971) (finding that a union’s contract reopener letter seeking to negotiate “all matters pertaining to wages, hours, and all conditions of employment,” effectively terminated, rather than sought to modify, the collective-bargaining agreement).

Accordingly, the Region should dismiss the charge, absent withdrawal, because the Employer did not prematurely declare impasse or fail to terminate the October 2013 extension agreement before it unilaterally implemented its November 11 final offer.

/s/
B.J.K

H://ADV.32-CA-143846.Response.Save Mart (b) (6)

²⁸ 339 NLRB at 298. Also, any failure by the Employer to comply with the requirements of Section 8(d) are irrelevant here because there was neither a strike nor a lockout. See *Jet Line Products*, 229 NLRB 322, 322-23 (1977).