

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

## Advice Memorandum

DATE: October 6, 2017

TO: Paul J. Murphy, Regional Director  
Region 3

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: Anheuser-Busch, LLC  
Case 03-CA-193759

530-6067-2010  
530-6067-2025  
530-8076-3300  
530-8081-0100

The Region submitted this case for advice as to whether Anheuser-Busch, LLC (hereinafter “the Employer”) violated Section 8(a)(5) of the Act by offering to bargain with Teamsters Local 1149 (hereinafter “the Union”) over a single issue while simultaneously testing the Union’s certification before the Board and a court of appeals. We conclude that the Employer violated Section 8(a)(5) because it sought to force bargaining over a single issue of its own choosing while simultaneously refusing to recognize the Union, thus creating a context where good faith bargaining could not occur. The Region should therefore issue complaint, absent settlement.

### FACTS

The Employer operates a brewery in Baldwinsville, New York where it employs workers in a variety of departments and job classifications, including the “People Department.” The People Department consists of three supervisory employees and three clericals, including two labor schedulers and one office administrator. On November 1, 2016, the Region conducted a representation election in Case 03-RC-185455 for the unit of clericals, which the Union won by a 2-1 vote.<sup>1</sup> The Employer filed an objection with the Regional Director, arguing that the office administrator is a confidential employee and should be excluded from the unit. On November 15, 2016, the Regional Director rejected the objection and issued a certification of representation. The next day, the Union requested that the Employer bargain and

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<sup>1</sup> The Union has represented a unit of production and maintenance employees at the Baldwinsville brewery for decades. It also represents other employees in a separate unit at the facility.

provide information for the clerical unit.<sup>2</sup> On November 23, 2016, the Employer replied that the Union's requests were premature because the representation case was still open. The Employer then filed a timely request for review of the Regional Director's decision with the Board.

The controversy in the current case centers on the Employer's subsequent proposal to eliminate one of the labor scheduler positions at the Baldwinsville facility. The Employer maintains that, months prior to the November 1, 2016 election, it had been exploring ways to centralize the scheduling process that would involve creating a regional scheduler and eliminating labor scheduler positions at individual breweries.

On February 22, 2017,<sup>3</sup> the Employer notified (b) (6), (b) (7)(C) at Baldwinsville that it would be eliminating (b) (6), (b) (7)(C) position effective June 30. This employee had (b) (6), (b) (7)(C) years more seniority than (b) (6), (b) (7)(C). On February 27, the Union filed the initial charge in the current case, alleging that the Employer violated Section 8(a)(1) and (5) by failing and refusing to bargain over the decision to eliminate a unit position.

On May 11, the Board denied the Employer's request for review of the Regional Director's decision certifying the Union in the representation case.<sup>4</sup> The Board agreed that the office administrator was not a confidential employee. Subsequently, the Employer informed the Union that it would be testing the Union's certification before the Board and, if necessary, a court of appeals. On May 16, the Region issued complaint in the test-of-certification case (Case 03-CA-196263) alleging that the Employer had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union and provide requested information following the Union's certification. On June 2, the Region filed a motion for summary judgment in that case.

In mid-June, after having been informed by the Region that it had found merit to the charge concerning the decision to eliminate the (b) (6), (b) (7)(C) job, the Employer rescinded its decision and offered to bargain with the Union.<sup>5</sup> It offered to

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<sup>2</sup> The Board already has determined that the information the Union requested about the unit employees' terms and condition of employment is presumptively relevant. *See Anheuser-Busch, LLC*, 365 NLRB No. 123, slip op. at 2 (Aug. 16, 2017).

<sup>3</sup> All dates hereinafter are 2017, unless otherwise noted.

<sup>4</sup> *Anheuser-Busch, LLC*, 365 NLRB No. 70 (May 11, 2017).

<sup>5</sup> As part of the current charge (Case 03-CA-193759), the Region also found merit to the allegation that the Employer had violated Section 8(a)(5) by making unilateral

bargain over the decision to eliminate the position, which job would be eliminated, and the effects thereof. The Employer stated that its offer to bargain “shall not affect the Employer’s continued pursuit of testing the Union’s certification before the National Labor Relations Board or an appellate court of proper jurisdiction.”

At a meeting on June 22, the Employer stated that the parties were there to discuss the job elimination. The Union clarified that the parties were there to negotiate over the decision to eliminate a unit position, the criteria to be used for selecting the employee to be terminated, and the effects of the decision. The Union further asserted that it was not waiving its position that it was the unit employees’ certified representative or that it had the right to bargain for a full collective-bargaining agreement. The Union added that it would be submitting an information request regarding the job elimination issue and that it would not bargain over that issue until it received the requested information. The parties ended the meeting without bargaining, but agreed to meet again on July 6. On June 23, the Union submitted an information request.

The Union asserts that the parties met again on July 6, although the Employer had not provided all of the information the Union had requested. The Union avers that although it asked the Employer to base its job elimination selection on seniority, which the Employer applies pursuant to contracts with Teamsters locals nationwide, the Employer insisted the selection be based on performance appraisals. The (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) had a negligibly higher score on (b) (6), (b) (7)(C) performance appraisal than the (b) (6), (b) (7)(C).<sup>6</sup>

Around August 14, the Employer notified the Union that they had reached impasse over the job elimination issue and suggested that it would implement its last bargaining proposal, which was to eliminate the (b) (6), (b) (7)(C). The Employer has apparently not yet implemented its decision.

On August 16, the Board granted the Region’s motion for summary judgment in the test-of-certification case.<sup>7</sup> Thus, the Board held that the Employer had violated

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changes to its vacation policy. The Region is currently holding that aspect of the case in abeyance.

<sup>6</sup> The Union claims that because of the small size of the bargaining unit and their testimony in the representation case, the Employer knows how each employee voted in the election, and that is why it wanted to eliminate the (b) (6), (b) (7)(C).

<sup>7</sup> *Anheuser-Busch, LLC*, 365 NLRB No. 123, slip op. at 3 (Aug. 16, 2017).

Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the clerical unit, and by failing and refusing to provide the Union with requested information relevant to collective bargaining. On August 24, the Employer filed its petition for review of the Board's order in the test-of-certification case with the Second Circuit.<sup>8</sup>

### ACTION

We conclude that the Employer violated Section 8(a)(5) because it sought to force bargaining over a single issue of its own choosing while simultaneously refusing to recognize the Union, thus creating a context where good faith bargaining could not occur. Accordingly, the Region should issue complaint, absent settlement.<sup>9</sup>

After a union is certified as the exclusive bargaining representative for a unit of employees, the Act gives the employer two mutually exclusive choices, i.e., it can either recognize the union and bargain over all mandatory subjects in good faith or refuse to recognize the union, refrain from bargaining, and test the union's certification before the Board and/or court of appeals.<sup>10</sup> However, the employer must choose between these two options; it cannot do both.<sup>11</sup> That is because "[t]he Board has consistently found that where an employer continues to challenge the validity of a union's certification, it is effectively refusing to bargain with the union, even where it has stated that it is willing to engage in negotiations."<sup>12</sup>

In *Specialized Living Center*, for example, the Board held that an employer violated Section 8(a)(5) by unilaterally changing its employees' work schedule despite the newly certified union having rejected its offer to "meet and confer" over work

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<sup>8</sup> See *Anheuser-Busch Commercial Strategy, LLC v. NLRB*, petition for review docketed No. 17-2646 (2d Cir. Aug. 24, 2017).

<sup>9</sup> Although the Union initially expressed interest in engaging in this limited bargaining, it was privileged to change course when the Employer's conduct demonstrated that such bargaining would not be fruitful.

<sup>10</sup> See, e.g., *Specialized Living Center*, 286 NLRB 511, 511 (1987); *Fred's, Inc.*, 343 NLRB 138, 138 (2004); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225, 226 (D.C. Cir. 1996), enforcing 315 NLRB 749 (1994).

<sup>11</sup> See *Fred's, Inc.*, 343 NLRB at 138 (quoting *Terrace Gardens Plaza*, 91 F.3d at 225).

<sup>12</sup> *Id.* at 138.

schedule changes.<sup>13</sup> The Board held that because the employer maintained that it had no legal obligation to recognize or bargain with the union, the offer to meet and confer over schedule changes was conditional and, thus, not a good faith offer to bargain.<sup>14</sup>

Similarly, in *Fred's, Inc.*, the Board held that an employer that continued to question the validity of a union's certification violated Section 8(a)(5) despite offering to meet with the union "to see if we can resolve any differences between the parties and reach an agreement satisfactory to both sides."<sup>15</sup> The employer argued that it could not have violated Section 8(a)(5) because it had met and bargained with the union. The Board concluded that because the employer never disavowed its intention to test the certification, it never unconditionally recognized the union or engaged in good faith bargaining.<sup>16</sup>

The Board in *Fred's, Inc.* relied on *Terrace Gardens Plaza, Inc. v. NLRB*, where the D.C. Circuit affirmed that an employer had violated Section 8(a)(5) by offering to negotiate with a newly certified union while simultaneously challenging the union's certification.<sup>17</sup> In that case, the employer refused to recognize the new union because it seemingly preferred to deal with a prior union that had disclaimed interest in the unit because of the "no-raid" provision in the AFL-CIO constitution. The employer agreed to bargain with the new union, but continued to state that the union had been erroneously certified. The court held that this was not an offer to bargain in good faith.<sup>18</sup> Importantly, the court rejected the employer's argument that it was being punished for exercising its legal right to challenge certification. The court found that the employer's position was based on a "fundamental misunderstanding of the statutory scheme."<sup>19</sup> According to the court, the Act allows an employer to either recognize the union and bargain unconditionally or refuse to bargain, be charged with

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<sup>13</sup> *Specialized Living Center*, 286 NLRB at 511.

<sup>14</sup> *Id.*

<sup>15</sup> *Fred's*, 343 NLRB at 138 & n.2.

<sup>16</sup> *Id.* at 139.

<sup>17</sup> *Terrace Gardens*, 91 F.3d at 225.

<sup>18</sup> *Id.* at 229.

<sup>19</sup> *Id.* at 225.

an unfair labor practice, and use the invalid certification as an affirmative defense to the charge.<sup>20</sup> The court stated that:

[w]hen, as happened here, the employer reserves the right (i.e., implicitly threatens) to challenge the union’s certification in the court of appeals, it is trying to avoid the necessity to choose between the alternatives it has under the statute. As we explained above, the employer must either bargain unconditionally or, if it wants to contest the union’s right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding.<sup>21</sup>

The foregoing precedent establishes that the Board, with court approval, has determined that good faith bargaining cannot occur in the context of an employer contesting a union’s certification and fulfilling only a portion of its mandatory bargaining obligations. Indeed, the Board recently explained in *T-Mobile USA*, albeit in a slightly different context, why the process of collective bargaining does not countenance an employer “unilaterally [choosing] which parts of the bargaining relationship it would honor, thereby refusing to fulfill all of its normal bargaining obligations.”<sup>22</sup> In *T-Mobile*, the Board held that the employer violated Section 8(a)(5) by refusing to bargain over a successor contract while a decertification petition was being processed.<sup>23</sup> The employer continued to recognize the incumbent union but announced that it was suspending negotiations over a successor contract while the representation issue was being resolved.<sup>24</sup> During this period, the employer offered to bargain over changes to terms and conditions of employment that came up and, indeed, did negotiate with the union over specific issues while refusing to bargain over a new contract.<sup>25</sup> The Board held that the employer’s refusal to bargain over a successor contract violated Section 8(a)(5), reasoning that, because the employer had not withdrawn recognition and assumed the risk of doing so, it had a duty to fulfill all

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 226.

<sup>22</sup> 365 NLRB No. 23, slip op. at 2 (Feb. 2, 2017).

<sup>23</sup> *Id.*, slip op. at 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

of its mandatory bargaining obligations.<sup>26</sup> The Board held that an employer failing to honor all of its bargaining obligations “destabilizes the bargaining process in two important aspects[:]”<sup>27</sup>

[f]irst, an employer that unilaterally removes certain bargaining subjects from negotiation can gain an advantage by excluding those subjects on which it may be more likely to give concessions to the union, reducing the likelihood that the parties will find common ground. Similarly, permitting an employer to unilaterally choose which parts of the collective-bargaining relationship to honor would allow the employer to continue to recognize and bargain with the incumbent union only in those areas where the employer holds an advantage, whether legal or economic, thus reducing the possibility of compromise and the ability of the relationship to function effectively. . . . Second, and relatedly, allowing an employer to unilaterally dictate which subjects the parties can bargain undermines the union, making it appear ineffective and weak to the employees. Thus, permitting bargaining only in those areas that the employer chooses would deny the union a fair opportunity to demonstrate its continued effectiveness. . . .<sup>28</sup>

Applying these principles here, we conclude that the Employer’s conduct violated Section 8(a)(5). The Employer, as it had informed the Union in mid-May, challenged the Union’s certification before the Board and continues to do so before the Second Circuit. At the same time, it has refused to provide the Union with relevant, requested information needed to bargain an initial contract. The one exception to its stance is that the Employer has expressed a willingness to bargain over its decision to eliminate a (b) (6), (b) (7)(C) position from the certified unit. However, as the Board repeatedly has held, good faith negotiations cannot occur in this context.<sup>29</sup>

As in *T-Mobile*, the Employer’s legal position here would significantly destabilize the parties’ collective-bargaining process. First, by removing all other subjects from the bargaining table, the Employer is giving itself an unfair advantage by excluding

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<sup>26</sup> *Id.*, slip op. at 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978) (acknowledging that “. . . ‘horsetrading’ or ‘give-and-take’ . . . characterizes good-faith bargaining”).

<sup>29</sup> See *Fred’s, Inc.*, 343 NLRB at 138-39; *Specialized Living Center*, 286 NLRB at 511.

from negotiations those subjects on which it may be more willing to yield in exchange for agreement on the job elimination issue. By eliminating the potential for horse-trading and give-and-take that is necessary for good faith bargaining, the Employer is “reducing the possibility of compromise and the ability of the [bargaining] relationship to function effectively.”<sup>30</sup> Indeed, after one bargaining session, the Employer already is claiming that the parties are at impasse over the job elimination issue and that it is ready to implement its last bargaining proposal.

Second, allowing the Employer to pick what issues will be subject to collective bargaining would make the Union look weak and ineffective to the unit employees who only recently elected it.<sup>31</sup> The Employer also could cease negotiations at any time over the single issue, as evidenced by its threat to declare impasse and implement, and this too denigrates the Union in the eyes of the employees. If the newly certified Union cannot demonstrate its worth to the unit employees and loses their support, a ruling by the Second Circuit upholding the Union’s certification will be meaningless because the Employer already will have neutralized the Union.<sup>32</sup> Thus, the Employer cannot be permitted to force bargaining over a single issue of its own choosing while refusing to fulfill all of its mandatory bargaining obligations or it will undermine the statutory process of collective bargaining.

The Employer’s primary defense to this charge is that its conduct is permitted under the Board’s decision in *Show Industries*.<sup>33</sup> In that case, the Board determined that an employer did not violate Section 8(a)(5) by bargaining over the effects of a

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<sup>30</sup> *T-Mobile USA*, 365 NLRB No. 23, slip op. at 2. See also *Korn Indus., Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967) (“Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas.”); *Patrick & Co.*, 248 NLRB 390, 393 (1980) (“... the very nature of collective bargaining presumes that, while movement may be slow on some issues, a full discussion of other issues . . . may result in agreement on stalled issues.”), enforced, 644 F.2d 889 (9th Cir. 1981).

<sup>31</sup> See *T-Mobile USA*, 365 NLRB No. 23, slip op. at 2.

<sup>32</sup> See, e.g., *Electrical Workers v. NLRB (Tiidee Products, Inc.)*, 426 F.2d 1243, 1249 (D.C. Cir. 1970) (“Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees.”).

<sup>33</sup> 326 NLRB 910, 912 (1998).

plant closure while simultaneously challenging the union's certification.<sup>34</sup> The Employer construes that case to mean that a company does not violate Section 8(a)(5) by offering to bargain over the size of the unit, which includes position eliminations, while simultaneously challenging a union's certification. But *Show Industries* dealt with a plant closure, and the only remaining issue for the union to bargain over was the effects of the closure, including layoffs; in other words, "given the closure, it may well be that [other] matters are moot or at least less critical."<sup>35</sup> Also, as the Board noted, it was allowing effects bargaining while the employer challenged certification because that was when bargaining over the effects of the closure would be meaningful.<sup>36</sup> Thus, *Show Industries* is distinguishable from the current case because eliminating a unit position is not the sole issue left for the parties to bargain over, and this was not the only meaningful time to bargain that issue.<sup>37</sup>

Finally, there is no merit to the Employer's defense based on the Board's recent decision in *Total Security Management*.<sup>38</sup> In that case, the Board held that discretionary discipline is a mandatory subject of bargaining and, therefore, even before an employer and newly certified union have reached an initial collective-bargaining agreement, employers may not impose certain types of discipline unilaterally.<sup>39</sup> The Employer asserts that finding its conduct unlawful would place it in the odd position of violating Section 8(a)(5) by complying with that decision, simply because it is exercising the statutory right to test the Union's certification. However, in *Total Security Management*, the employer had fully recognized the union and was negotiating with it over an initial collective-bargaining agreement, although the parties had not yet reached agreement on one.<sup>40</sup> As discussed above, the Employer

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<sup>34</sup> *Id.* at 912-13.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Moreover, the Board has implicitly indicated that *Show Industries* is limited to the specific facts of that case in light of its subsequent decision in *Fred's, Inc.*, 343 NLRB at 138-39, where the Board held that an employer who continued to challenge a union's certification violated Section 8(a)(5) despite meeting and bargaining with the union.

<sup>38</sup> 364 NLRB No. 106 (Aug. 26, 2016).

<sup>39</sup> *Id.*, slip op. at 1, 11-12.

<sup>40</sup> *Id.*, slip op. at 2, 42.

has the options under the Act of fulfilling all of its mandatory bargaining obligations or testing certification and relying on that legal challenge as a defense for any Section 8(a)(5) violations it may commit during the process. It may not do both at once because good faith bargaining, even for purposes specified in *Total Security*, cannot occur in that context.<sup>41</sup>

Accordingly, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by unlawfully seeking to force bargaining over a single issue of its own choosing while simultaneously refusing to recognize the Union, thereby creating a context where good faith bargaining cannot occur.

/s/  
J.L.S.

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<sup>41</sup> See *Fred's, Inc.*, 343 NLRB at 138 (quoting *Terrace Gardens Plaza*, 91 F.3d at 225). See also *T-Mobile USA*, 365 NLRB No. 23, slip op. at 2.