

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

DATE: April 13, 2018

TO: Allen Binstock, Regional Director
Region 8

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

SUBJECT: Lipton Distributing Company of Youngstown
Cases 08-CA-204229; 08-CA-205989

530-6033-7008

This case was submitted for advice as to whether Lipton Distributing Company of Youngstown (“the Employer”) violated Section 8(a)(5) and (1) by prematurely declaring impasse and implementing its final offer. We conclude that the Employer did not violate Section 8(a)(5) because the parties had reached an impasse in bargaining. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

A. Initial negotiations

The International Brotherhood of Teamsters Local 377 (“the Union”) has represented a bargaining unit of delivery drivers and warehouse employees at the Employer’s beer-and-wine distribution facility for more than 30 years.¹ The parties’ most recent collective-bargaining agreement expired on July 7, 2016. They began negotiations for a new agreement on June 14, and met nine times between that date and early November. During those bargaining sessions, the Union and the Employer reached a tentative agreement on health-and-welfare terms and made significant progress on other issues, including wages. Differences remained, however, on several non-economic issues, including union security, management rights, the transfer of company or interest, work schedules, and the length of the probationary period for new employees.

¹ The Union also represents a unit of sales employees. The collective-bargaining agreement for the sales unit expired around the same time as that of the drivers’ unit and the parties negotiated new agreements for both units simultaneously. Although the Employer maintains the parties were at impasse for both units, it only implemented its final offer to the drivers’ unit, which is the subject of the request for advice.

From the start of bargaining, the Employer proposed deletion of the union-security clause contained in the expired agreement, claiming that the clause made hiring more difficult. The Union maintained that the union-security clause should remain in the agreement. In an effort to compromise on the issue, the Union suggested keeping the provision but including language that allowed for deletion of the clause effective immediately upon the passage of any right-to-work legislation in the state. The Union also proposed adding explicit language concerning employees' right to pay only fair-share fees, rather than pay full membership dues. The Employer, however, consistently maintained its position that the clause should be deleted.

B. November 10 session: Union makes concessions, Employer responds with “final proposal”

On November 10, the Union submitted a proposal to the Employer that made significant movement towards the Employer's positions, using the Employer's most recent proposal as a template and proposing additional language in certain provisions. Specifically, the Union agreed to the Employer's addition of a four-day, ten-hour schedule, with no overtime until the employee exceeded ten hours per day, but conditioned its agreement on the parties' resolution of resulting issues. The Union also modified its position on the time drivers had to return to the facility at the end of the day and moved its driver-commission proposal closer to the Employer's. Finally, the Union withdrew several of its earlier proposals, including one that granted senior employees additional vacation time, one that allowed more employees to take vacations during the summer, and one that increased the Employer's 401(k) contributions.

After taking time to review the Union's proposals, the Employer's representatives presented a “final proposal,” which set wages slightly lower than in the Union's proposal, rejected the Union's overtime proposal, rejected the Union's probationary-period proposal, and further changed the management-rights clause, accepting some of the Union's most recent proposed language and rejecting some. The Employer's final proposal did not address several issues that the Union had identified as stemming from the proposed new work schedules that the Union had tentatively accepted. The proposal also had no union-security clause, consistent with the Employer's unwavering position on that issue. The bargaining session ended soon after the Employer presented its final proposal. The Union did not submit the Employer's final proposal to the unit employees for ratification.

C. January 11 session: Union makes counter-proposal, Employer does not accept it

After various communications to set a date for their next bargaining sessions, the parties met on January 11, 2017.² At that meeting, the Employer maintained all of the positions contained in its November 10 final proposal. The Union, however, presented a counter-proposal that made minor concessions concerning the drivers' commissions, and proposed to accept the Employer's 1-year probationary period contingent upon the Employer's agreement to count certain types of work towards that year. Unlike the Employer's final proposal, the Union's counter-proposal included solutions to the various issues stemming from the proposed new work schedules. The Employer did not respond to the Union's counter-proposal. Rather, after that session, there was a six-month hiatus in bargaining.

D. Union requests further bargaining, Employer declares impasse

On June 9, the Union emailed the Employer and requested dates to resume bargaining. In response, the Employer offered two dates in July but also declared that the parties were at impasse. The Employer asserted that, in its view, "there has continued to be an impasse" because the existence of a union-security clause was "the core issue that has deadlocked the parties" and asked the Union to identify any changed condition or circumstance that "would serve to lift the parties[] suspension of the duty to bargain." The Union did not respond to the Employer's email and, on June 22, the Employer renewed its request that the Union identify changed circumstances that would lift impasse. Again, the Union did not respond to the Employer's assertion that the parties were at impasse and no bargaining took place in June or July.

On August 7, at the Employer's request, the parties met with a Federal Mediation and Conciliation Service mediator. Also on August 7, prior to the meeting, the Union emailed its January counter-proposal to the Employer along with a list of issues that the Union believed were still open for negotiation. During the mediated bargaining session, however, the parties did not make progress or exchange new proposals regarding union security or any of the other open issues the Union had identified.

The following day, the Union again sent the Employer a list of issues that it believed were still on the table, including: (1) expanding and defining the new-employee probationary period; (2) refining the management-rights clause; (3) adding a four-day, ten-hour work week, and resolving various issues resulting from that

² Herein, all dates are 2017 unless otherwise noted.

modification; (4) agreeing on the driver-shift finishing time; and (5) resolving the time period for retroactivity of pay raises.³ The Union asserted that so long as those “open issues were on the table, the parties cannot be said to be at impasse,” and once again requested to resume bargaining.

In a response sent on August 10, the Employer maintained its position that the parties were at impasse because of the union-security issue and that only the Union’s identification of changed circumstances (implicitly, affecting that particular issue) would lift the impasse. In regards to the open issues identified by the Union, the Employer responded that the Employer had previously identified the same issues “upon which the parties have been at impasse since November 10, 2016.” The Employer concluded that, “since the Union will not agree to any of the positions taken by Lipton on any of the items listed . . . then, as a matter of law, an impasse exists.” The Employer also informed the Union that it planned to implement its final proposal on August 14, 2017, which it did.⁴

ACTION

We conclude that the Employer did not violate Section 8(a)(5) by implementing its final proposal because at the time of implementation, the parties were at a bona fide impasse. Accordingly, the Region should dismiss the charge, absent withdrawal.

Short of reaching agreement with a union, an employer may implement its final proposal only after reaching a good-faith impasse in bargaining.⁵ As the Board has explained, “impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective

³ While the Employer and the Union had tentatively agreed to a new wage rate and bonus amount, they had not yet settled on the retroactivity date. Both parties agreed that all wage increases were retroactively effective back to the date of the expired contract. But while the Union took the position that bonuses should also be paid retroactively to the date of the expired contract, the Employer’s final proposal did not include any retroactivity date for bonuses.

⁴ In its request for advice, the Region noted that the impact of the implementation on the driver unit had thus far been minimal.

⁵ *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001).

position.”⁶ To determine whether parties have reached good-faith impasse, the Board traditionally looks to the bargaining history, the parties’ good faith, the length of the negotiations, the importance of the issue(s) precluding agreement, and the parties’ contemporaneous understanding.⁷ Applying those principles, we conclude that the parties were at impasse by August 14, when the Employer implemented its final offer.

The parties, who have a 30-year history of successful negotiations, had several productive bargaining sessions regarding their successor contract from mid-June to mid-November, 2016.⁸ Over that period of time, they made significant movement on many important issues, such as wages, benefits, and work hours. For example, the Employer began negotiations offering new hire warehouse employees a base rate of \$12.00 per hour, but when the parties reached a tentative agreement on wages in September, it had increased its base rate offer for these employees to \$13.95 per hour. Moreover, there is no evidence that they negotiated in bad faith, generally or with respect to the union-security issue at the source of their impasse.⁹ Indeed, as the Region noted, the Union’s allegation that the Employer bargained in bad faith is unsubstantiated, particularly given the parties’ extensive and productive negotiations, which resulted in actual compromise on several key terms and conditions of employment.

Despite their significant progress in many areas during the ten meetings they had prior to the Employer’s declaration of impasse, however, the parties were unyielding with regard to union security. The Employer insisted on complete deletion of the clause, explaining that the clause impaired its ability, as the only unionized beverage distributor in northeast Ohio, to hire employees who did not want to pay

⁶ *Eads Motors E. Air Devices, Inc.*, 346 NLRB 1060, 1063 (2006) (quoting *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974)).

⁷ *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enforced sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *cf. Calmat Co.*, 331 NLRB 1084, 1097 (2000) (bona fide impasse possible where the deadlock on a single critical issue leads to the breakdown in overall negotiation).

⁸ While the number of negotiating sessions is not controlling, generally, the more meetings, the better the chance of finding an impasse. *PRC Recording Co.*, 280 NLRB 615, 635 (1986) (citing *Fetzer Television v. NLRB*, 317 F.2d 420 (6th Cir. 1963)).

⁹ *Midwest Television*, 349 NLRB 373, 373 (2007) (employer proposed elimination of union-security clause during the course of otherwise fruitful negotiations did not constitute bad-faith bargaining); *see also Challenge-Cook Bros.*, 288 NLRB 387, 388 (1988) (same).

union dues. In particular, the Employer cited its competition with a large corporation for drivers with commercial driver's licenses and professed its belief that it was disadvantaged by the union-security clause. The Union, for its part, insisted on including some version of a union-security clause, asserting the clause was necessary to ensure adequate funding to fulfill its duties as the unit's bargaining representative. Moreover, the Union asserted that it was unlikely the International would approve an agreement without a union-security clause, and noted that such approval is a precondition to holding a ratification vote. Throughout the parties' negotiations, the Employer repeatedly stated that union security was a significant issue and observed that the parties' positions were diametrically opposed.

After the parties' six-month bargaining hiatus, the Employer reiterated the significance, and apparent resoluteness, of the union-security issue when it responded to the Union's June 2017 request to bargain, expressly characterizing union security as the pivotal issue that drove the parties to impasse.¹⁰ After receiving no response from the Union, the Employer again informed the Union of its belief the parties were at impasse because neither party would move from its position on union security. Again, the Union failed to respond.¹¹

Finally, at the Employer's instigation, the parties scheduled a last, mediated bargaining session, which also failed to move their negotiations forward. Hours before the parties met with the mediator, the Union e-mailed the Employer the same counterproposal it had presented in January, and listed issues it considered to be open, including union security. During the session, however, the Employer reiterated its position that any union security clause was unacceptable, and thus rejected the Union's January counterproposal. Neither party presented new proposals on any issue during the session and, as a result, the mediator ended the session without scheduling a follow-up session.¹²

¹⁰ Specifically, the Employer's attorney repeatedly stated that it was his understanding that the Union would not approve an agreement without a union-security clause. While the Union now maintains it only "expressed doubt" that the International would approve such an agreement, there is no evidence that it ever contemporaneously corrected or disputed the Employer's understanding.

¹¹ The Union also failed to respond to the two bargaining-session dates suggested by the Employer and, as a result, the parties did not meet in June or July. *Huck Mfg. Co.*, 254 NLRB 739, 754 (1981) (whether the parties continue to meet and negotiate is of importance in determining the existence of impasse).

¹² *NLRB v. Cambria Clay Prods. Co.*, 215 F.2d 48 (6th Cir. 1954 (the failure to reach agreement after the intervention of a mediator suggests the existence of impasse)).

Despite the fact that the parties made no progress during the mediation, the Union sent the Employer another request to bargain the following day, and again listed issues it considered to be open. The Union's request failed to include a proposal and, two days later, the Employer responded and explained that because the Union failed to identify any changed circumstances that would have lifted impasse, the Employer planned to implement its final offer. Thus, after the Employer declared that the parties were at impasse, the Union had two months to contemplate the Employer's position, which had not changed since November 10, 2016, and to prepare a new proposal, but failed to do so. By the time the Employer implemented its final offer, no evidence suggests that the Union had anything more to offer in regards to the union-security issue, or any other aspect of the contract negotiations.¹³ The parties were "deadlocked."

Accordingly, the Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully implemented its final offer.

/s/
J.L.S.

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¹³ *ACF Industries*, 347 NLRB 1040, 1041 (2006) (Parties at impasse where the employer had nothing "left to offer beyond that which had already been rejected, and the Union similarly had offered no new proposals to demonstrate that further progress was possible."). *See also Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (impasse where "union failed to offer any new proposal" in last meeting "before the company's unilateral implementation of its final offer").