

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

DATE: May 31, 2018

TO: Garey E. Lindsay, Regional Director
Region 9

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

SUBJECT: LLFlex, LLC d/b/a Oracle Packaging 530-6033-8400-0000
Case 09-CA-209777 530-6067-2050-7000
530-6067-2060-9400

This case was submitted for advice as to whether the Employer violated Sections 8(a)(1), (3), and (5) of the Act by refusing to execute a tentative bargaining agreement and then, due to changed circumstances, withdrawing part of the tentative agreement, substituting a new sympathy-strike proposal, and locking out employees in support of its proposal. We conclude that the parties had not yet finished their negotiations on all substantive issues and the Employer had good cause to withdraw the parties' tentative agreement regarding sympathy strikes and substitute a proposal for a 60-day suspension of the sympathy-strike language. Thus, the Employer lawfully locked out employees based on its legitimate bargaining position. Accordingly, absent withdrawal, the Region should dismiss the charge.

FACTS

LLFlex, LLC, d/b/a Oracle Packaging ("Employer") operates a plant in Louisville, Kentucky that produces, among other items, cigarette inner bundling material and custom printed laminations for cigar, pipe, and smokeless tobacco products. The Employer's Louisville workforce is represented by three unions: (1) 67 employees represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union"); (2) six employees represented by the International Association of Machinists ("IAM"); and (3) three employees represented by the International Brotherhood of Electrical Workers ("IBEW").

The Union and the Employer began negotiations for a successor collective-bargaining agreement on August 15, 2017.¹ The parties held 19 negotiating sessions

¹ All dates hereinafter are in 2017 unless otherwise stated.

between August 15 and September 27. On September 29, the Union's bargaining unit employees voted to strike over their dissatisfaction with the Employer's proposals. The IAM and IBEW bargaining unit employees engaged in a sympathy strike and honored the Union's picket line, which their respective contracts expressly allow. The Employer then hired temporary employees. On October 10, while the strike continued, the Union and the Employer resumed contract negotiations.

On November 8, the parties met at the Federal Mediation and Conciliation Service's office in Louisville. By mid-afternoon, the Employer gave the Union a "Last, Best, and Final" contract offer, which included all the tentatively agreed upon provisions. Although the document was labeled as final, the Union understood it to be a work in progress.² The Employer also notified the Union that it had reached a contract with the IBEW the day before and that it was hoping to finalize the IAM contract in the next few days so that everyone could go back to work and avoid another work stoppage. The parties took a break around 2:11 p.m. for the Union to review the Employer's offer.

Around 4:30 p.m., the parties reconvened and discussed various contractual provisions, including 401(k) benefits, work schedules, wage rates, and vacation time. The parties also discussed striking employees and whether time out on strike would count as time worked for probationary employees. Around 5:00 p.m., the parties took another break.

At approximately 6:15 p.m., during the break, the Employer's attorney asked to speak with the Union's representative and informed (b)(6), (b)(7) that there was a possible problem because the Employer did not yet have an agreement with the IAM. The Union representative responded that the IAM contract was not (b)(6), (b)(7) concern and that the Union and Employer had reached a tentative agreement. The Employer requested that the Union postpone its ratification vote for a week to give it the necessary time to conclude negotiations with the IAM, but the Union refused.

At approximately 6:35 p.m., the parties reconvened and the Employer presented the Union with a revised copy of all of the parties' tentatively agreed upon proposals, which was now labeled "tentative agreement" rather than "Last, Best, and Final" offer. The Union informed the Employer that it would be presenting the tentative agreement to its membership the next day and that a ratification vote was scheduled for November 10. The Employer informed the Union that its bargaining goal was to

² The Union's bargaining notes characterize the Employer's Last Best and Final offer as a "living breathing document."

have all three bargaining units' employees returned to work on November 12. The parties then ended negotiations for the night.

On the morning of November 9, the Union emailed the Employer asking to confirm the percentage match for the employees' 401(k) plan, which the Employer confirmed. The Union then met with its membership to present and discuss the tentative agreement. Later in the evening, the Union again emailed the Employer claiming that questions had come up and renewed its request from the previous day's bargaining that the Employer consider probationary employees' time out on strike as time served and counted towards their probationary status. The Union further sought assurances that employees' health care plans would be reinstated once employees ratified the contract. The Employer responded that it did not agree with the Union's request regarding probationary employees' time out on strike and that it would review the health care question.

Also on November 9, the Employer learned that the IAM representative would not be able to meet in the near future because (b)(6), (b)(7)(C) and had been placed on (b)(6), (b)(7)(C). Accordingly, the Employer and IAM would not be able to conclude their contract negotiations before striking employees returned to work. Although the IAM discussed appointing a new bargaining representative, the Employer was concerned that this development would mean it would not reach an agreement with IAM before their contract expired on November 30, which could result in an IAM strike and sympathy strikes by the Union and IBEW. The Employer contacted the Union with this information and stated its need for concrete assurances that the Union would not engage in a sympathy strike before IAM's contract was finalized.³

The Union scheduled a vote for its membership to ratify the tentative agreement on November 10 at 10:30 a.m. A few hours prior to the vote, the Employer contacted the Union with its concern that a new contract with IAM would not be completed before the current IAM contract expired, that it feared IAM members would then strike, and that the Union-represented employees would engage in a sympathy strike, thus shutting down the Employer's operations mere weeks after employees returned to work. Given this fear, the Employer proposed that the Union agree to a 60-day suspension of the sympathy-strike language to give the Employer sufficient time to conclude a contract with IAM. The Employer stated that the proposed sympathy-strike language was now part of the Employer's overall contract proposal and, further, if the Union did not agree to the Employer's sympathy-strike suspension, then there

³ There are no emails or other evidence corroborating that this contact was made. The Union makes no mention of this contact.

was no agreement for a new contract. The Employer further stated that without the suspension language, it would lock out the bargaining unit if the Union proceeded to the scheduled ratification vote.

The Union responded that the parties had a tentative agreement and were not bargaining, but counteroffered a 30-day suspension of the sympathy-strike language if the Employer agreed to consider employees' time out on strike as a credit towards time worked for probationary employees. The Employer refused, saying 30 days was not sufficient time to conclude a contract with IAM and that there is no overall agreement without a sufficient suspension of the sympathy-strike language. The Union then proceeded to the scheduled vote.

At approximately noon, the Union informed the Employer that the tentative agreement had been ratified by the membership and that employees were prepared to return to work on November 12.

On November 11, the Employer notified the Union and Union-represented employees that it was locking out bargaining-unit employees. In its memo announcing the lockout, the Employer stated that the contract the employees voted for on November 10 "did not include all of the [Employer's] proposals," that there is no agreement in place, and that "[t]he lockout is in support of the [Employer's] legitimate bargaining objectives . . . on one significant issue: Temporary Waiver of Sympathy Strike" (emphasis in original). The Employer then locked out Union-represented employees and retained the temporary employees it had hired during the Union's strike.

The Union responded by letter on November 15, claiming that the parties had "reached a complete tentative agreement" on November 8, that the Employer's lockout was therefore unlawful, and that unit employees were ready to return to work. The Employer did not answer, and the unit employees remained locked out.

By November 27, the Employer and IAM reached agreement on a successor contract. The next day, the Employer contacted the Union and stated that it was withdrawing its sympathy-strike proposal. The parties then negotiated a settlement for employees to return to work and reached a final agreement on a successor contract. By December 6, all bargaining unit employees returned to work. The Employer's Louisville plant has been in continuous operation since.

ACTION

We conclude that there was no meeting of the minds on a complete agreement because the parties had not finished their negotiations on all substantive issues. Further, the Employer's withdrawal of the tentatively agreed-upon provision regarding sympathy strikes, and substitution of a new sympathy strike proposal, was not bad-faith bargaining because the Employer had good cause for making this late substitution. Thus, the Employer's subsequent lockout was lawful because it was in support of the lawful sympathy-strike proposal.

A. There was no meeting of the minds because the parties had not concluded bargaining.

It is axiomatic that "Section 8(d) of the Act requires the parties to a collective-bargaining relationship, once they have reached agreement on the terms of a collective-bargaining contract, to execute that agreement, at the request of either party[,] and a failure to do so constitutes an unfair labor practice.⁴ An obligation to sign an agreement arises when the parties reach a "meeting of the minds" over the substantive issues and material terms of an agreement.⁵ A meeting of the minds requires that parties have actually reached a complete agreement *and* that they attach the same understanding to the material terms of the agreement.⁶

To determine whether parties have indeed concluded bargaining, certain "hallmark" words and actions typically signal that negotiations have finished and the parties have reached an agreement.⁷ For example, in *Ready Mix Concrete*, the ALJ, affirmed by the Board, stated it was "obvious" that the parties had reached an

⁴ *TTS Terminals, Inc.*, 351 NLRB 1098, 1101, 1103 (2007) (citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) (employer violated Section 8(a)(5) by failing to execute contract, because there was a meeting of the minds on all substantive terms when union unconditionally accepted employer's final proposal)).

⁵ *Id.* at 1101.

⁶ See *ABM Parking Services*, 360 NLRB 1191, 1191 n.4, 1204–05 (2014) (although parties reached complete agreement, they did not have an *enforceable* agreement because there was mutual misunderstanding of wage scales traceable to ambiguity in the agreement that was not the fault of either party; thus, there was no meeting of the minds); *Aztec Bus Lines*, 289 NLRB 1021, 1023 (1988) (no complete agreement and no meeting of minds where union only accepted part of employer's offer).

⁷ See *Teamsters Local No. 771 (Ready-Mix Concrete)*, 357 NLRB 2203, 2207 (2011).

agreement when they concluded their meeting “with handshakes and mutual expressions of satisfaction on the successful outcome of their [contract negotiations].”⁸ The ALJ described these actions as the “hallmark indication that a binding agreement has been reached at the end of negotiations.”⁹

In some circumstances, the Board has treated otherwise ancillary issues, such as matters related to resolution of a strike, as substantive issues that the parties needed to agree on before a contract was complete. In *Aztec Bus Lines*, the Board found that there was no meeting of the minds on a complete agreement because the employer in that case wanted strike resolution included as part of the parties’ overall contract.¹⁰ Importantly, the union acknowledged that it knew that the employer meant to include strike resolution as part of the overall contract negotiations; thus, the Board determined that the union could not have held a good faith belief that the parties reached a complete agreement when the union accepted only the employer’s offer as to contract matters and not strike matters.¹¹

Here, the parties did not have a complete agreement and, thus, there was no meeting of the minds. The parties were indeed close to a complete agreement by the end of the day on November 8, but both sides communicated that there were outstanding issues. Specifically, the Employer notified the Union that its goal was to bring all three bargaining units’ employees back to work on November 12, but it had not yet concluded a contract with IAM, implying that without all three unions’ contracts completed, November 12 was only a goal and not a firm date. The Union consistently referred to a “tentative agreement” and then added a new strike-resolution matter to the negotiations when it sought to have probationary employees’ time out on strike credited towards their probationary status. Although the Union claims that the parties reached a complete agreement by the end of the day on November 8, neither side engaged in any of the hallmark activity, such as

⁸ *Id.*

⁹ *Id.* See *ABM Parking Services*, 360 NLRB at 1204 (parties concluded their agreement as shown by mutual congratulations).

¹⁰ 289 NLRB at 1023.

¹¹ *Id.* See *Teamsters Local 662 (W.S. Darley & Co.)*, 339 NLRB 893, 900 (2003) (contract negotiations included strike resolution matters that were “the capstone for final agreement on the totality of agreement on terms for a collective-bargaining contract”), *enforced*, 368 F.3d 741 (7th Cir. 2004).

handshakes or mutual congratulations, which would have confirmed parties' completion of a contract.¹²

Critically, the parties continued bargaining on November 9. Specifically, the Union repeated its proposal that the Employer credit probationary employees' time out on strike and asked when striking employees' health insurance would be reinstated. The Union thus communicated that it considered strike-resolution matters to be a necessary part of a complete agreement for an overall contract.¹³ Indeed, the Union again attempted to include strike-time credit for probationary employees in its November 10 counteroffer to the Employer's sympathy-strike proposal. We therefore reject the Union's claim that the parties had a complete agreement on November 8, when one of its significant concerns had not been resolved and the Union continued to refer to a "tentative agreement" through November 15. Accordingly, the parties did not have a complete agreement, there was no meeting of the minds, and either party was free to make additional proposals.

B. The Employer had good cause to withdraw and substitute the tentative agreement's sympathy-strike language, and its lockout was lawful.

Where parties have not reached a complete agreement, one party may rescind a specific tentative agreement and substitute an alternate or even regressive proposal, provided it has "good cause" to do so.¹⁴ Good cause or lack thereof is determined by

¹² *Cf. Ready-Mix Concrete*, 357 NLRB at 2207 ("obvious" that parties had complete agreement when final bargaining session closed with handshakes and mutual expressions of satisfaction).

¹³ *See W.S. Darley & Co.*, 339 NLRB at 900 (strike resolution matters were "capstone" on terms for a collective-bargaining agreement); *Aztec Bus Lines*, 289 NLRB at 1023 (where one party knew other party wished to include strike resolution in negotiations, there could be no meeting of the minds on a complete agreement that did not include strike resolution).

¹⁴ *Suffield Academy*, 336 NLRB 659, 669 (2001) (withdrawal of proposal that was previously agreed upon is unlawful and designed to frustrate bargaining process unless good cause shown), *enforced*, 322 F.3d 196 (2d Cir. 2003); *Merrell M. Williams*, 279 NLRB 82, 83 (1986) ("withdrawal of tentative agreements reached prior to the formation of a legally enforceable contract" without good cause constitutes bad-faith bargaining).

examining whether the withdrawing party has legitimate reasons for the withdrawal or if it was simply to frustrate bargaining.¹⁵

Here, it was not unlawful for the Employer to rescind the sympathy strike provision of the tentative agreement, and substitute a new proposal for a 60-day suspension of the contract's sympathy-strike language, because the Employer had good cause for the substitution and it did not show an intent to frustrate bargaining. Indeed, the Employer was forthcoming about the unforeseen delay in concluding the IAM contract and the very real threat of a sympathy whipsaw strike.¹⁶ Further, the Employer's temporary employees, hired at the onset of the initial strike, were finally fully trained, and returning the unit employees only to lose them again with a likely whipsaw strike would require the Employer to hire new, untrained temporary employees. Thus, the Employer had a legitimate reason to present its new sympathy-strike proposal and insist on the proposal to the point of instituting a lockout.¹⁷

For the foregoing reasons, we conclude that the parties had not reached a complete agreement when the Employer withdrew and substituted its sympathy-strike proposal, the Employer had good cause to substitute the proposal, and the Employer lawfully locked out employees based on its legitimate bargaining position. Accordingly, absent withdrawal, the charge should be dismissed.

/s/
J.L.S.

¹⁵ *Suffield Academy*, 336 NLRB at 669 (“withdrawal of a proposal which had previously been agreed upon will be considered unlawful and designed to frustrate the bargaining process unless good cause is shown for the withdrawal”).

¹⁶ *See Rescar, Inc.*, 274 NLRB 1, 2 (1985) (employer's withdrawal of proposal and substitution with regressive proposal not bad-faith bargaining because it occurred in the context of the economic situation at the time resulting from changes in the employer's industry).

¹⁷ *See Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (a “bargaining lockout” for the sole purpose of bringing economic pressure to bear in support of an employer's legitimate bargaining position does not violate the Act); *Midwest Generation, EME, LLC*, 343 NLRB 69, 71 (2004) (same).

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