



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

October 31, 2018

[REDACTED]
FAULKNER, HOFFMAN & PHILLIPS, LLP
20445 EMERALD PKWY STE 210
CLEVELAND, OH 44135-6029

Re: R.L. Lipton Distributing Company of
Youngstown
Cases 08-CA-204229 & 08-CA-205989

Dear [REDACTED]

We have carefully considered your appeal from the Regional Director's refusal to issue complaint. You raise no issue that the Regional Director had not considered previously that warrants reversal of his decision. We agree with the Regional Director's decision and deny your appeal.

On appeal, you allege that the Employer bargained in bad faith for a successor collective-bargaining agreement by the conduct that follows. The Employer engaged in conduct inherently destructive of employees' Section 7 rights by its insistence on the removal of the union security clause without a legitimate business justification and refusal to consider other concessions and alternatives that would allow for its inclusion in some form. The Employer engaged in conduct inherently destructive of employees' Section 7 rights by its demand for its broad management rights provision that included a waiver of bargaining and deference to its interpretation of the contract for matters not covered by the contract. By communications on June 16 and August 10, 2017, the Employer refused to bargain further. Concerning the drivers' unit, the Employer implemented its pre-impasse proposal without the parties having reached a genuine impasse. Regarding the sales unit, the Employer offered and withdrew proposals including tentative agreements without any business reason. By email on August 17, 2017, the Employer refused further bargaining. By letter to employees on August 23, 2017, the Employer misrepresented the status of bargaining and dealt directly with employees. You argue that the facts of the appeal are analogous to those in *Universal Fuel, Inc.*, 358 NLRB 1504 (2012) which requires a finding that under a totality of the circumstances, the Employer here also bargained in bad faith. Contrary to your assertions on appeal, under the totality of the circumstances of this appeal, the evidence is insufficient to support a finding that the Employer bargained in bad faith.

The Employer did not bargain in bad faith or engage in conduct inherently destructive of employees' Section 7 rights by insisting on the removal of the union security clause. Throughout bargaining, the Employer maintained a fixed position that the union security clause be removed in its entirety. But, from the outset of bargaining, it explained its business reasons for its exclusion from the successor contracts. The Employer's business reasons appeared legitimate, and we cannot find here that it opposed the inclusion of the union security clause for philosophical reasons. *KFMB Stations*, 349 NLRB 373, 373-374 (2007). Similarly, the Employer did not bargain in bad faith or engage in conduct inherently destructive of employees' Section 7 rights by its insistence on the broad management rights provision based on the business reasons that it asserted in bargaining. It is well established that it is not illegal, in and of itself, for an employer to propose and bargain concerning a broad management rights provision. *NLRB v. American National Insurance Company*, 343 U.S. 395 (1952). In addition, the parties bargained over this provision. On November 10, 2016, the Employer adopted many of the Union's suggestions to its proposal. However, on January 11, 2017, the Union reasserted its August 18, 2016 proposal without responding to the Employer's acceptance of many of the Union's changes.

Notwithstanding the Employer's belief that the parties were at impasse and its request that the Union identify changed circumstances that warranted bargaining, in the Employer's June 16, 2017 email, it proposed one of two dates, July 10 or July 13, 2017, for bargaining. In the Employer's August 10, 2017 letter, the Employer lawfully refused further bargaining because the parties had reached a genuine impasse.

We agree that by August 10, 2017 the parties reached a genuine impasse. The parties have a successful thirty-year collective-bargaining history. In approximately ten meetings before the Employer's declaration of impasse, the parties made significant progress that resulted in actual compromise on key terms in negotiations. Despite this progress, the parties deadlocked over the issue of the union security clause. The Employer insisted on its deletion for the business reasons that it asserted, and the Union countered that some form was necessary to maintain its funds so as not to jeopardize its ability to continue to represent its members sufficiently. After a six-month bargaining hiatus, the parties resumed bargaining and even utilized the services of a mediator to try and reach agreement. At the August 7, 2017 mediated bargaining session, both parties raised the importance of the union security clause and remained entrenched in their respective positions. Neither party presented new proposals on any issue. This was the parties' final bargaining session and there was no movement. On or about August 8, 2017, the Union requested additional bargaining, but the Employer refused. The Employer relied on the absence of movement and change in circumstances. It advised the Union of its intent to implement the terms of its pre-impasse final offer for the drivers' unit which it did on August 14, 2017. At this time at least, the Employer's early 2017 acquisition of another business entity whose drivers and salesman are also represented by the Union do not constitute changed circumstances that breaks the impasse.

Further, the Employer has not unlawfully withdrawn proposals and/or refused to bargain further over terms for the sales unit. By the Employer's August 17, 2017 email to the Union, the Employer clarified that on March 16, 2017, it had not withdrawn the contents of its final offer, only that its proposal was its last, best, final offer. The Employer explained that its proposal was its last position on the terms for the sales unit on the open issues and reiterated its belief that the parties were at impasse. At the time of this appeal, the Employer had not implemented any terms for the sales unit. On August 17, 2017, the Employer and the Union agreed to a raise for the sales unit.

Lastly, the Employer's August 23, 2017 letter to employees does not rise to the level of direct dealing. It neither sought nor invited bargaining with employees over their terms of employment. The Employer's letter advises employees of the status of the parties' bargaining albeit from the Employer's perspective. In this way, while it may have sought to portray itself as the protagonist, it does not go so far as to undermine the Union, misrepresent the status of negotiations, or exceed the limits of the Employer's free speech under Section 8(c) of the Act.

For these reasons, we find that the facts of this appeal are distinct from those in *Universal Fuel, Inc.*, 358 NLRB 1504 (2012). Whether viewed piecemeal or in totality, the Employer's conduct did not mandate a finding that the Employer bargained in bad faith. However, considering the parties' successful thirty-year collective-bargaining history, the parties may wish to reconsider their respective positions, break the impasse, and resume bargaining for the benefit of their employees and members. Because the evidence is insufficient to find that the Employer violated the Act as alleged, we have no basis to issue complaint. Accordingly, we deny your appeal.

Sincerely,

Peter Barr Robb
General Counsel



By: _____

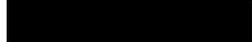
Mark E. Arbesfeld, Director
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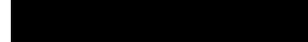
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Youngstown
Case 08-CA-205989

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cc: ALLEN BINSTOCK
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