

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

DATE: December 7, 2018

TO: Paul J. Murphy, Acting Regional Director  
Region 1

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

SUBJECT: UNITE HERE Local 26 (Boston Management 530-6033-0150  
LLC d/b/a Battery Wharf Hotel), 530-6033-1400  
Case 01-CB-219943 530-6033-1450  
530-6033-1467  
530-6033-4280  
530-6050-0120  
530-6067-2030-8100  
530-6067-2070  
530-6067-2070-3300  
554-1433-1700  
554-1467-2400  
554-1467-3500

This case was submitted for advice as to whether the Union violated Section 8(b)(3) by including a large number of unit employees on its bargaining committee and/or failing to meet at reasonable times where the Union insists that contract negotiations be held during evenings and weekends to accommodate its committee. We conclude that, on the current record, there is insufficient evidence to conclude that the Union's conduct was unlawful.

**FACTS**

**Background**

UNITE HERE Local 26 (the Union) represents a unit of approximately 80 housekeepers, kitchen and banquet workers, bartenders, and others employed by Boston Management LLC d/b/a Battery Wharf Hotel (the Employer). For some time, the Union has negotiated a master agreement with a large hotel chain in the Boston area, and other Boston-area hotels, including Battery Wharf Hotel, sign a "me-too" agreement to adopt the terms of the master agreement. In 2016, the Employer

purchased the Battery Wharf Hotel and adopted the existing “me-too” agreement, which was scheduled to expire on February 28, 2018.<sup>1</sup>

### The Parties Commence Bargaining for a Successor Agreement

On January 22, the Union’s (b) (6), (b) and its Hotel Division (b) (6), (b) met with the Employer’s representatives and presented a proposal that the Employer agree to be bound, as a me-too signatory, by the eventual collective-bargaining agreement resulting from ongoing negotiations between the Union and other Boston-area hotels. The Employer expressed that the hotel was amenable to this “me-too” agreement. Following this initial meeting, the parties agreed to extend the current agreement until March 31.

On March 16, the parties held a second negotiation session. The Employer, represented by a new attorney, proposed that the parties directly negotiate a stand-alone agreement for Battery Wharf employees and presented an outline of terms and conditions that differed sharply from the current agreement. The Employer proposed, *inter alia*, to freeze wages for three years, substitute an Employer-provided benefit plan for the Union’s health and welfare plan, eliminate various types of premium pay, and permit supervisors to perform unit work. Upon reviewing the outline, the Union stated that the Employer’s proposal would “gut the contract,” characterized it as a “fairy tale list,” and added that it would be sending the Employer an information request. At the close of the meeting, the Employer asked to schedule another meeting and the Union stated that it would get back to the Employer concerning meeting dates after the Union received a response to its information request. Neither party wished to extend the current agreement beyond March 31.

On March 20, the Union sent the Employer an information request and the Employer provided the requested information shortly thereafter. On April 10, the Employer emailed the Union (b) (6), (b) (7)(C) requesting that (b) (6) propose dates and times for the next meeting. On April 17, the Union proposed that the parties meet on May 8 at 3:00 p.m. The Employer agreed to meet on May 8, but stated that the parties “cannot be meeting [only] once every two months,” and asked the Union to propose additional dates before and after May 8. On April 23, the Union (b) (6), (b) (7)(C) wrote that (b) (6) would get back to the Employer with more dates and noted that the Union was scheduling negotiations with over 30 hotels with expiring agreements. The Union also stated that it would have a “sizable worker committee” at the next meeting. Based on this email and a flyer circulated in the hotel picturing members of the Union’s “organizing committee,” the Employer expected a committee of 12 employees.

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<sup>1</sup> All dates *infra* are 2018.

The Parties Meet on May 8 and Correspond Regarding Future Bargaining Sessions

On May 8, the parties were scheduled to meet in a conference room at the hotel. The Union's (b) (6), (b) (7)(C) and its Hotel Division (b) (6), (b) (7)(C) were accompanied by 40 to 50 unit employees. Only a few chairs were available at the table. The Union representatives and employees stood around the table and spilled out into the hallway, and the Union stated that they needed to find a larger room. The Employer stated that, "we are asking for a professional meeting with a proper negotiating team," and asked if the Union had any proposals. The Union responded that its "proposal was the 'me-too' agreement," to which the Employer responded that the hotel had already rejected that proposal. The parties argued over who was on the Union's bargaining committee and whether the meeting could continue in another room; at one point, a unit employee offered to move chairs to set up a larger room. According to the Employer, the Union (b) (6), (b) (7)(C) stated, "we need a larger room as every member of the bargaining unit is on the negotiating team." After several minutes of arguing, with no agreement on relocating the meeting, the Union (b) (6), (b) (7)(C) stated, "we are done with this meeting," and led the employees out, chanting and clapping, with one employee using a bullhorn. The meeting lasted approximately 10 minutes.

On May 9, the Employer filed a charge alleging that the Union had failed to bargain in good faith in violation of Section 8(b)(3).

On May 10, the Employer emailed the Union stating that the parties needed to begin to meet regularly and engage in serious discussions and requested that the Union propose dates and times for the coming weeks. On May 25, the Union proposed meeting on June 14, stating that it would need "a room large enough to accommodate all of our committee members who attend, which we expect to number 35 people." The Employer responded that its representatives were unavailable to meet on June 14, asked the Union to propose other dates, and stated that the next meeting could be held at the Union hall, which would "allow you to decide if we have a serious business meeting or mere theater." The Union offered to meet on June 19 or 21, either at 4:00 p.m. if the parties met at the hotel, or at 5:00 p.m. if they met at the Union hall. The Employer agreed to meet on June 19 at 5:00 p.m. at the Union hall and also stated that, "we do not consider starting a meeting at 5pm (or 4pm) a reasonable time. Nonetheless, because it has been so difficult to get any dates from you, we are accepting what has been offered to us."

On June 19, several hours before the parties were scheduled to meet, the Employer sent the Union an email stating that the Union's "scheduling tactics have precluded any serious bargaining," but nonetheless offered a list of dates for further meetings. The Employer proposed scheduling a minimum of two meetings a week, during regular business hours, and continuing those meetings after regular business hours "where we are engaged in serious and productive dialogue." The Employer

requested that the Union provide any final agreements executed with Boston hotels in 2018 and any proposals in ongoing negotiations with those hotels. The Employer also asked the Union to state “whether the [U]nion has any flexibility in its proposed me-too agreement” when the parties met later that day, and attached an annotated version of its March 22 outline, which included proposed language to edit articles of the parties’ expired agreement.

The Parties Meet on June 19 But Thereafter Do Not Agree on Dates or Arrangements for Further Bargaining Sessions

The June 19 meeting began at around 5:30 p.m. and the Union had approximately 30 unit employees in attendance. After initial remarks, the parties began to review the Employer’s annotated outline. The Employer asked why the Union did not have responses to the Employer’s proposals. The Union responded that it had only received the Employer’s actual proposals (as opposed to a general wish list) that day shortly before the meeting. As the Union (b) (6), (b) (7)(C) read the proposals and posed questions or expressed disagreement, the Employer’s attorney urged, “you don’t have to read...you have seen this before,” and accused the Union (b) (6), (b) (7)(C) of “posturing” and “grandstanding.” At 7:15 p.m., the Union requested a caucus and the Employer asked how long it needed. The Union (b) (6), (b) (7)(C) suggested that they conclude the meeting and stated that (b) (6), (b) (7)(C) would send dates for more bargaining sessions by the end of the week.

On June 22, the Union sent an email stating that it could meet on July 11 and 18 at 5:00 p.m. The Employer responded that “starting at 5 p.m. is unreasonable and indicative of the [U]nion’s continued bad faith. The hotel reiterates its expectation that we meet during business hours.” On July 9, the Union emailed asking if the parties were going to meet on July 11 and 18, and stated that the Union could either meet at 5:00 p.m. at the Union hall or slightly earlier if they met at the hotel. The Employer responded that “the Union’s excuse for offering only those times (that its ‘committee’ is unavailable at other times) [is not] reasonable because...it is not an actual committee in any real sense of the term.”

On July 11, the Union proposed that the parties alternate bargaining sessions between regular business hours and evenings, and that the Employer pay up to eight Union committee members’ lost wages for sessions that occurred during regular business hours. The Employer rejected this proposal. On July 13, the Union wrote that the unit employees do not attend bargaining “simply for show” but rather “give [the Union] essential information by which to judge employer proposals, help mold the Union’s proposals, give spokespeople guidance on the positions to take, and...make the decision whether to accept or reject proposals.” The Union concluded that, since the Employer had rejected its proposal, “we will meet when [unit employees] can participate without loss: evenings and weekends... This is the Union’s bottom line.”

On July 18, the Employer proposed that employees swap shifts so that “actual committee members who wish to attend meetings during their regularly scheduled hours can switch days or times off with non-committee members. The hotel is willing to help facilitate such swaps if the [U]nion is interested.” The Union rejected the Employer’s proposal, stating that it was “overly burdensome” to unit employees.

Over the next few weeks, the parties exchanged further correspondence but could not agree on meeting arrangements. The Employer’s attorney requested that the Union email any proposals and the Union declined, stating that it would not bargain over email but planned to present counterproposals at the parties’ next meeting. The Union also wrote that “the fact that anyone in the bargaining unit is eligible to be a member of the bargaining committee does not mean that everyone is a member of the bargaining committee. The Union has never insisted on meeting at times when the entire bargaining unit may be present.”

The parties also argued about the relevance of the Employer’s outstanding information request. The Union claimed that information regarding the Union’s negotiations with other hotels was irrelevant since the Employer had rejected a “me-too” agreement. The Employer responded that the information was relevant because the Union had not made any further proposals. On August 30, the Union wrote to the Employer that the Union has “already made it clear to you that it is withdrawing the March 21 me-too proposal...But so that you don’t continue your charade, the Union withdraws its March 21 me-too proposal.”<sup>2</sup> The Union did not thereafter offer a concrete proposal nor did the Employer request one.

Since August 30, the parties have not exchanged any further correspondence or scheduled any additional negotiation sessions.

### **ACTION**

We conclude that the Union has not violated its duty to bargain in good faith through the composition of its bargaining committee, nor has the Union violated its duty to meet at reasonable times by insisting that contract negotiations be held during evenings and weekends to accommodate its committee. The Region should dismiss the charge, absent withdrawal.

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<sup>2</sup> The Region dismissed the charge regarding the Employer’s information request; the Employer has filed an appeal.

### **I. The Union's Inclusion of a Large Number of Unit Employees on its Bargaining Committee Has Not Violated Section 8(b)(3)**

Under Section 7 of the Act, employees have a fundamental right to “bargain collectively through representatives of their own choosing.”<sup>3</sup> Thus, unions, acting on behalf of employees, have the right to designate individuals to serve on a bargaining committee and employers have a correlative duty to negotiate with the union’s appointed agents.<sup>4</sup> The Board has found exceptions to this right only in extraordinary circumstances: 1) where a union’s choice of representatives demonstrates bad faith or ulterior motive;<sup>5</sup> or 2) where an employer has shown that the union’s representatives would present a “clear and present danger” to the collective-bargaining process or create such ill will that bargaining would be impossible or futile.<sup>6</sup>

Absent evidence of bad faith or interference with the collective-bargaining process, one party may not insist that the other party limit the size of its bargaining committee. For example, in *Caribe Staple Co.*, the employer insisted that the union reduce its bargaining committee from ten to four persons, claiming that “side comments” from employees who were not actively involved in negotiations disrupted the meetings.<sup>7</sup> The union refused to limit its committee, claiming that the employees

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<sup>3</sup> 29 U.S.C. § 157.

<sup>4</sup> See *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969); see also *United Parcel Service*, 330 NLRB 1020, 1020 n.1 (2000) (“It is well-settled that the Act bestows on employees, unions, and employers alike the right to select representatives of their own choice for collective bargaining and grievance adjustment and imposes a concomitant obligation to deal with each other’s chosen representatives absent extraordinary circumstances.”)

<sup>5</sup> See *Caribe Staple Co.*, 313 NLRB 877, 889 (1994), citing *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963).

<sup>6</sup> See, e.g., *Dilene Answering Service*, 257 NLRB 284, 291 (1981) (despite objections that unit employees “were only observers” rather than representatives and their presence might be embarrassing to company president, employer did not meet its burden to show that the employees should be barred from negotiations); *King Soopers, Inc.*, 338 NLRB 269, 269-70 (2002) (where grocery employee was terminated by employer for violent and threatening behavior, employer was justified in refusing to later deal with individual as union business agent).

<sup>7</sup> 313 NLRB at 889 (concluding that the employer violated Section 8(a)(5) by refusing to schedule bargaining sessions unless the union reduced the size of its committee).

represented various shifts and distinct classifications.<sup>8</sup> The administrative law judge found, with Board approval, that the employer had failed to show how the size of the union's negotiating committee interfered with bargaining, and that the employer's "generalized testimony" about employees' side comments was "undetailed, and lacked [a] basis for evaluating how any such remarks proved disruptive."<sup>9</sup>

Similarly, here, we cannot conclude that the size of the Union's bargaining committee has interfered with bargaining so far as to violate Section 8(b)(3). The Union states that it requires the presence of unit employees during negotiations in order to evaluate Employer proposals, help mold Union proposals, and give Union spokespeople guidance on the positions to take.<sup>10</sup> Although the Union (b) (6), (b) (7)(C) allegedly remarked at the May 8<sup>th</sup> meeting that the "entire unit" was on the committee, at most 40 to 50 employees from the 80-person unit attended that meeting and approximately 30 employees attended the June 19<sup>th</sup> meeting. There is no evidence that the presence of a large number of unit employees at either session interfered with the parties' negotiations. The May 8 meeting ended, after a short discussion, only because the Union's committee could not fit in the hotel conference room and the parties could not agree on moving to another room. Although the Union contingent left the meeting chanting, clapping, and with one employee using a bullhorn, this demonstration occurred after the meeting was adjourned and did not interfere with the negotiations. At the June 19<sup>th</sup> session, the parties' spokespersons discussed the Employer's proposals at length without interruption. And despite the Employer's claims that the Union (b) (6), (b) (7)(C) was "posturing" and "grandstanding," there is no evidence that the Union's conduct that day, including reviewing the Employer's written proposals, asking questions, and offering opinions while the parties met face-to-face, evidenced bad faith or interfered with bargaining. In these circumstances, where the Union's committee has not disrupted bargaining, and there is no showing to date that the Union has insisted on including a large number of unit members in order to avoid bargaining in good faith, the Union's committee size is not a violation of Section 8(b)(3).

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; see also *People Care, Inc.*, 327 NLRB 814, 824-25 (1999) (employer violated Section 8(a)(5) by refusing to meet with union attorney following a negotiation session where several of the 35 employees present physically confronted employer's representatives and blocked them from leaving the meeting; employer did not establish that the union's attorney caused disruption or that his continued presence would make future bargaining impossible or futile).

<sup>10</sup> *Cf. Dilene Answering Service*, 257 NLRB at 291 (employer could not exclude unit employees whom the union claimed were present to observe and assist union spokesperson).

## II. The Union Did Not Violate its Duty to Meet at Reasonable Times by Insisting on Scheduling Negotiation Sessions on Evenings and Weekends

Under Section 8(d), both unions and employers have an explicit duty to “meet at reasonable times and confer in good faith.”<sup>11</sup> It is well established that the statutory duty to bargain “surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring.”<sup>12</sup> Neither the Act nor the Board have defined the frequency with which parties must meet in order to satisfy their bargaining obligations.<sup>13</sup> The Board will look to the “entire context” to determine whether there has been a breach of either party’s obligation to meet and confer.<sup>14</sup> In particular, the Board will consider whether a party has frequently canceled scheduled bargaining sessions; refused to meet more than once or twice a month; refused to respond to a party’s repeated requests for more frequent bargaining; and/or refused to schedule more than one bargaining session at a time.<sup>15</sup> The Board will not tolerate a “busy negotiator” defense if a party is dilatory in scheduling meetings; a party is not relieved of its statutory obligation to furnish a negotiator who can devote adequate time to attend reasonably prompt and continuous

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<sup>11</sup> See *Food & Commercial Workers Local 1439 (Layman’s Market)*, 268 NLRB 780, 784 (1984) (“As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes ‘that had been condemned in management’ by the previously enacted Section 8(a)(5)”), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 487 (1960).

<sup>12</sup> *Storer Communications*, 294 NLRB 1056, 1095 (1989) (quoting *Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949)) (finding employer violated Section 8(a)(5) by refusing to meet at reasonable times because it could offer no explanation for being able to meet only three days in more than five months).

<sup>13</sup> See *Exchange Parts Co.*, 139 NLRB 710, 711-12 (1962), *enforced*, 339 F.2d 829 (5th Cir. 1965).

<sup>14</sup> See *id.*; see also *Garden Ridge Management*, 347 NLRB 131, 132 (2006) (Board considers the totality of the circumstances, not simply the number of bargaining sessions held).

<sup>15</sup> See, e.g., *Calex Corp.*, 322 NLRB 977, 977 (1997) (employer violated Section 8(a)(5) because it arbitrarily limited the frequency of bargaining sessions to once per month, canceled sessions, and refused repeated requests to bargain more frequently), *enforced*, 144 F.3d 904 (6th Cir. 1998).

negotiation sessions, regardless of his other time commitments.<sup>16</sup> On the other hand, a union's attempt to schedule meetings when its selected representatives can participate, even if that results in limiting meetings to evenings and weekends, does not evidence bad faith. In *Lancaster Nissan*,<sup>17</sup> for example, the Board held that the employer failed to meet at reasonable times even though the union had insisted on including two members of the eight-person unit, thus requiring that bargaining occur only on evenings and weekends.

Here, both parties bear some responsibility for the fact that they have only met four times over the course of nine months. Although the Employer urged the Union to meet more frequently, it insisted on several occasions that the Union propose dates rather than offer any itself. And, while the Union has not responded to the Employer with the same level of urgency and, on one occasion, effectively offered the "busy negotiator" defense, it has also proposed meeting dates on multiple occasions, accepted one of several dates offered by the Employer, and has never canceled any scheduled meetings.<sup>18</sup> The primary reason for the paucity of meetings has been the Union's insistence on meeting after hours, so that employee members of the bargaining committee can attend without sacrificing wages. The Union has a right to attempt to schedule meetings when its selected representatives can participate. Moreover, the Union has shown some willingness to accommodate the Employer's desire to meet during regular business hours by proposing that the Employer pay the lost wages of up to eight committee members. Although this proposal was rejected by the Employer, the Union remains willing to meet on evenings and weekends and the Employer has not offered a reason why it cannot meet at those times, beyond its

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<sup>16</sup> See, e.g., *People Care, Inc.*, 327 NLRB at 825 (rejecting employer's defense that its negotiator was too busy to bargain at times other than those time to which it agreed).

<sup>17</sup> 344 NLRB 225, 225 n.1 (2005) (Member Schaumber noting agreement that the employer violated Section 8(a)(5)), *enforced*, 233 Fed. App'x. 100 (3d Cir. 2007).

<sup>18</sup> Cf. *Garden Ridge*, 347 NLRB at 131-32 (finding employer violated duty to meet at reasonable times where union requested at least eight times that the parties meet more frequently and the employer refused and gave no explanation other than wanting a break to "contemplate what had happened during negotiations").

objection to the Union's committee size. In sum, the Employer has not established that the Union has engaged in unlawful dilatory tactics.<sup>19</sup>

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/  
J.L.S.

ADV.01-CB-219943.Response.Unite Here (Battery Wharf) (b) (6), (b) (7)

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<sup>19</sup> The Employer claims, without evidentiary support, that the Union is delaying negotiations until the Union reaches an agreement with other hotels. (b) (5)

(b) (5)

(b) (5)

However, although the Union initially sought to have the Employer sign another me-too agreement, it withdrew that proposal when the Employer refused to agree.