

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

Advice Memorandum

DATE: April 3, 2019

TO: Ronald K. Hooks, Regional Director
Region 19

Jill H. Coffman, Regional Director
Region 20

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

SUBJECT: Inlandboatman's Union	554-1450-1660
Cases 19-CB-228483, 19-CB-230579,	554-1450-7700
19-CB-230580	554-1467-0180
	554-1467-3033
Inlandboatmen's Union of the Pacific, Marine	554-1483-0125
Division (ILWU)	
Case 20-CB-231003	

These cases were submitted for advice regarding whether the Union's counterproposals to the Employers' proposed pension contribution rate increases—made in response to the Pension Plan Trust's rehabilitation plan during the terms of the parties' contracts—violated Section 8(b)(3). We conclude that the Union did not violate Section 8(b)(3) because none of the contracts contained reopener provisions regarding pension contribution rates and, therefore, the Union had no obligation to bargain over the Employers' proposals while the contracts were in effect. Moreover, even assuming that one of the contracts contained a reopener provision and the Union was therefore required to bargain in good faith in response to an employer proposal, we conclude that the Union's counterproposals were made in good faith and did not violate the Act.

FACTS

Sause Bros., Inc. ("Sause") and Crowley Marine Services ("Crowley") are marine transportation and logistics companies whose employees are represented by the Inlandboatmen's Union of the Pacific ("Union" or "IBU"). Sause's employees in Hawaii and Oregon are covered by separate collective-bargaining agreements with the Union: the Hawaii Contract, effective August 1, 2016-July 31, 2020, and the Columbia River Contract, effective July 1, 2017-December 31, 2020. Crowley's employees are covered by the Puget Sound Contract with the Union, effective October

15, 2017-October 15, 2020. All three contracts contain pension provisions requiring the Employers to contribute to the Inland Boatmen’s Union of the Pacific National Pension Plan, a multiemployer plan. The pension-plan section of the Puget Sound Contract also contains a provision that states: “The Company [Crowley] and Union agree to meet prior to November 1, 2018 to discuss options for increasing future Pension Plan Contribution Rates as discussed in 2017-2020 CBA negotiations.” The Columbia River and Hawaii Contracts do not contain this provision in their pension-plan sections; elsewhere, they contain general severability provisions stating that the parties will meet and renegotiate any contract provision that is held invalid or inoperative by legislation or court action, while the rest of the contract remains in effect.

In September 2017, the Pension Plan went into “critical status.” Accordingly, in May 2018, the Pension Plan Trust developed a rehabilitation plan to restore adequate funding to the Plan over a defined time period, as required by the Pension Protection Act of 2006.¹ The rehabilitation plan required all involved parties to mutually agree to one of two supplemental rate schedules—the “Preferred Schedule” or the “Default Schedule”—but if no agreement could be reached, the Trust would impose the contribution rates from the Default Schedule as an extra-contractual surcharge on the employer. The Default Schedule has higher contribution rates than the Preferred Schedule, but both schedules require higher contribution rates than those set forth in the parties’ contracts and provide decreased benefits to employees. Any agreed-upon final schedule (either Preferred or Default) would be incorporated into the parties’ collective-bargaining agreement.

In the Summer of 2018, after the effective dates of all three contracts, Sause and Crowley each sought the Union’s agreement to an MOU (modeled on a form provided by the Trust) adopting the less expensive Preferred Schedule. The Union did not accept those proposals, but rather responded with counterproposals that would adopt the Preferred Schedule but with the following additional language in the MOU: “Any [subsequent] change in these contributions shall be mutually agreed to by the parties.” That language would require the Union’s consent for the Employer to return to lower rates during the term of the extant contracts even if the Pension Plan were to emerge from “critical status” and the Trust were to end the requirement of supplemental payments. The Union states that it sought this language to enable it to recoup some of the lost employee accruals, which were also suspended under the rehabilitation plan. According to the Trust, this additional language would be unenforceable because it would constrain future Trust rate hikes. The Union asserts that it subsequently modified the language of its proposal to Crowley to specify that the “parties shall not *lower* the contribution rates absent mutual agreement.”

¹ See Additional Funding Rules for Multiemployer Plans in Critical or Endangered Status, 29 U.S.C. § 1085(b)(2).

Neither Employer accepted the Union's counterproposal. Because the parties did not agree to a supplemental rate schedule, the Trust is charging the Employers the higher Default Schedule rate.

ACTION

We conclude that the Union's counterproposals did not violate Section 8(b)(3) because none of the contracts contained reopener provisions regarding pension contribution rates and, therefore, the Union had no obligation to bargain over this subject while the contracts were in effect. Moreover, even assuming *arguendo* that the Puget Sound Contract's provision stating that the parties "will discuss options for increasing future Pension Plan contribution rates" is a reopener provision, and the Union was therefore required to bargain in good faith in response to Crowley's proposal, we conclude that the Union's counterproposals did not constitute bad-faith bargaining.

Section 8(d) expressly states that the duty to bargain in good faith does not require either party "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period . . ." Accordingly, a union generally does not violate Section 8(b)(3) by failing to bargain in good faith in response to a request for a mid-term contract modification.² Although parties may expressly agree that they will bargain during the term of the contract, by including "reopener" language in the agreement, the Board has strictly construed purported reopener provisions, holding that "[o]nly an *express agreement to reopen* the terms of a collective-bargaining agreement suffices as a waiver of th[e] right" not to bargain over proposed midterm contract modifications.³ The Board has also held that parties'

² *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 773 (1989) (finding that there is generally "no obligation either to bargain or to accede to" an employer's request for a mid-term contract modification), *enforced in relevant part*, 905 F.2d 417 (D.C. Cir. 1990); *Boeing Co.*, 337 NLRB 758, 762-63 (2002) (no Section 8(a)(5) violation because "no party to a collective-bargaining agreement may be compelled either to discuss contract changes or to agree to them"); *Connecticut Power Co.*, 271 NLRB 766, 766-67 (1984) (employer did not violate Section 8(a)(5) by refusing to bargain over its own proposal for a mid-term wage increase).

³ *Kellogg Co.*, 362 NLRB 736, 741 n.14 (2015) (emphasis added), *enforcement denied*, 840 F.3d 322 (6th Cir. 2016).

agreement to meet and discuss proposals during the term of the contract is insufficient to create a contract reopener.⁴

Here, Sause’s proposals for the Union to adopt the Preferred Schedule were requests to modify the Hawaii and Columbia River contracts, because those contracts clearly lack express reopener language. We reject Sause’s argument that the severability provisions in those contracts, which require further bargaining if a contract provision is held invalid or inoperative by legislation or court action, are tantamount to reopener provisions. The rehabilitation plan does not render the contractual pension provisions invalid or inoperative; it imposes extra-contractual surcharges on the contractually-required contributions if the parties do not agree to adopt either the Preferred or Default schedule.

The Puget Sound Contract also lacks an express reopener provision. Although it contains language stating that the Union and Crowley will “meet . . . to discuss options for increasing future Pension Plan Contribution Rates,” as noted above, the Board has found that agreements to merely “meet and discuss” contract provisions are not express agreements to reopen the contract. Further, although the Union asserts that the parties agreed to this language in recognition of the Plan’s “critical status” and the likelihood that the forthcoming rehabilitation plan would call for contribution-rate changes, there is no evidence of that in the record, nor any evidence indicating that the parties intended the provision to require reopening the contract.

Absent reopener provisions, the Union had no duty to bargain with Sause or Crowley regarding their proposals and therefore did not violate the Act by making the counterproposals, even if the Trust is correct that the language in the counterproposals, if adopted, would be unenforceable.⁵ Given the terms of the Trust’s rehabilitation plan, it was incumbent upon the Union to consider and discuss the Employers’ proposed MOUs, which it did. But requiring full-fledged bargaining to a good faith impasse would be inconsistent with well-established legal principles regarding parties’ obligations during the term of a contract.

⁴ *Herman Bros., Inc.*, 273 NLRB 124, 124 n.1 (1984) (union did not “tacitly agree” to reopen contract, thereby incurring a bargaining obligation, “simply by agreeing to discuss” employer’s proposed midterm wage modifications and offering its own counterproposals), *enforced mem.*, 780 F.2d 1015 (3d Cir. 1985); *Mack Trucks*, 294 NLRB 864, 865 (1989) (same).

⁵ *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB at 773 (dismissing allegation that union violated Sec. 8(b)(3) by insisting upon an unlawful 8(e) clause as a condition for granting employer mid-term economic relief).

We further conclude that, even if the language contained in the Puget Sound Contract was sufficient to require the Union to reopen the contract with regard to pension contribution rates, the Union’s counterproposal was not bad faith bargaining. The Union’s use of economic leverage created by the rehabilitation plan—under which the parties’ failure to agree to the Preferred Schedule results in a contribution-rate increase equivalent to the more expensive Default Schedule—to extract an additional concession from the Employer is fully consistent with the Act’s good-faith bargaining requirement. Indeed, as noted by the Supreme Court, “[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”⁶ Nor does the fact that the Union’s proposed language may have been unenforceable (if adopted) support a finding of bad faith bargaining.⁷ Moreover, the Union did not even insist on the counterproposal as written; after the Trust communicated its view that the counterproposal was unenforceable, the Union presented a modified counterproposal in order to allay the Trust’s concerns regarding enforceability. The Union at no time demonstrated a “take it or leave it” attitude regarding its counterproposal. Finally, the Union’s counterproposal was not merely an exercise of its leverage but had a reasonable objective—to enable it to recoup employee accruals suspended under the rehabilitation plan. For all these reasons, we would not find bad faith bargaining here even if there were an obligation to bargain during the term of the contract.

Accordingly, the Section 8(b)(3) charges should be dismissed, absent withdrawal.

/s/
J.L.S

ADV.19-CB-228483.Response.Inland2. (b) (6), (b) (7)

⁶ *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970).

⁷ Indeed, even proposing an unlawful provision is not necessarily unlawful absent insistence to impasse. *Compare Register Guard*, 351 NLRB 1110, 1120 (2007) (merely proposing or bargaining over unlawful subject does not necessarily violate the Act; employer did not insist to impasse on arguably illegal proposal where there was no direct evidence the union asked that the proposal be removed from the table), *enforced in relevant part*, 571 F.3d 53 (D.C. Cir. 2009), *with Sheet Metal Workers Local 20 (George Koch Sons)*, 306 NLRB 834, 834, 838-39 & n.12 (1992) (union violated Section 8(b)(3) by conditioning agreement to new contract upon inclusion of unlawful 8(e) clause).