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Columbia College Chicago and Part-Time Faculty Association at Columbia College Chicago—IEA/NEA. Cases 13–CA–073486, 13–CA–073487, 13–CA–076794, 13–CA–078080, 13–CA–081162, and 13–CA–084369

September 30, 2019

SUPPLEMENTAL DECISION

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

This case, on remand from the United States Court of Appeals for the Seventh Circuit, requires us to reconsider whether a component of our initial remedy—that the Respondent pay the Union’s negotiation expenses—is still appropriate after the court denied enforcement of our finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the Union over the effects of a lawful managerial decision to reduce the number of credit hours for certain courses.¹ In light of the court’s decision, which we accept as the law of the case, we now answer that question in the negative.²

On March 24, 2016, the National Labor Relations Board issued a Decision and Order in this proceeding.³ The Board adopted the judge’s findings that the Respondent violated Section 8(a)(5) and (1) by engaging in bad-faith bargaining for a successor collective-bargaining agreement with the Union (the collective-bargaining representative of the Respondent’s part-time faculty members) and by delaying in providing and failing to provide the Union with certain requested information, Section 8(a)(3) and (1) by discriminating against the Union’s president for engaging in union activity, and Section 8(a)(1) by maintaining an overbroad “Network and Computer Use Policy.” In addition, the Board found that the Respondent

violated Section 8(a)(5) and (1) by failing to bargain over the effects of a lawful reduction in the number of credit hours attributed to certain courses, and by setting unlawful preconditions to bargaining in response to the Union’s February 13, 2012 request for bargaining and its request to bargain over the effects of the course credit-hour reductions.⁴ The Board ordered the Respondent, inter alia, to bargain with the Union, on request, for a successor collective-bargaining agreement and concerning the effects of the course credit-hour reductions. In addition, based on a finding that the Respondent had engaged in unusually aggravated misconduct, the Board ordered the Respondent to reimburse the Union for its negotiating expenses incurred while bargaining for a successor collective-bargaining agreement from March 31, 2011, to June 13, 2012, and while trying to initiate effects bargaining over the course credit-hour reductions from February 21 to May 4, 2012.⁵

Upon an application for enforcement and cross-petition for review of the Board’s Order, the United States Court of Appeals for the Seventh Circuit upheld the Board’s unfair labor practice findings in all respects except the finding that the Respondent had violated the Act by failing to engage in effects bargaining. *Columbia College Chicago v. NLRB*, supra at 555. In addition, because the Board had relied in part on the effects-bargaining violation finding to justify the negotiation-expense award, the court also vacated that component of the remedy. *Id.* After setting forth the Board’s standard for awarding negotiation expenses,⁶ the court remanded the case for the Board “to decide whether such a remedy is still warranted in this case without considering the effects-bargaining behavior.” *Id.*

On May 25, 2017, the Board advised the parties that it had accepted the court’s remand and invited them to file statements of position with respect to the remanded issue. The Respondent filed a position statement.

The Board has delegated its authority in this proceeding to a three-member panel.⁷

¹ *Columbia College Chicago v. NLRB*, 847 F.3d 547 (7th Cir. 2017).

² Inasmuch as the court has already enforced the provisions of our original Order reported at 363 NLRB No. 154 (2016)—minus the effects-bargaining violation—we shall not repeat them here. See, e.g., *Fluor Daniel, Inc.*, 350 NLRB 702, 702 fn. 5 (2007); *Bryan Adair Construction Co.*, 341 NLRB 247, 247 fn. 4 (2004).

³ *Columbia College Chicago*, supra.

⁴ Member Miscimarra relevantly dissented from the finding that the Respondent unlawfully failed to bargain over the effects of course credit-hour reductions and unlawfully set preconditions on bargaining. He also dissented from the imposition of a “bargaining-costs remedy.” *Id.*, slip op. at 7–14.

⁵ *Id.*, slip op. at 5–7.

⁶ See *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), *enfd.* in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

⁷ In finding that the Respondent unlawfully failed to bargain over the effects of its lawful decision to reduce course credit hours, the Board applied the “clear and unmistakable waiver” standard. *Columbia College Chicago*, 363 NLRB No. 154, slip op. at 3. The Seventh Circuit applies the “contract coverage” standard. See, e.g., *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). In addition, the Seventh and D.C. Circuits take the position that where an employer has no decision-bargaining obligation pursuant to the contract coverage doctrine, it also has no duty to bargain over the effects of that decision unless “the governing agreement or the parties’ bargaining history indicates an intent to treat effects bargaining separately from bargaining over the decision

After carefully considering the remaining violations found, the record, and the Respondent's position statement, we find that a negotiation-expense remedy is not warranted.

Discussion

The Board has awarded negotiation expenses in cases of "unusually aggravated misconduct" where a respondent's "substantial unfair labor practices have infected the core of the bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" *Frontier Hotel & Casino*, supra at 859 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969)). All of the respondent's unfair labor practices are considered in determining whether a negotiation-expense remedy is warranted. See *Fallbrook Hospital Corp. v. NLRB*, 785 F.3d 729, 736 (D.C. Cir. 2015). The Board considers "each case on its own merits, evaluating the effect of the violation on the wronged party and the injury to the collective-bargaining process." *Barstow Community Hospital*, 361 NLRB 352, 356 fn. 13 (2014), enf. denied on other grounds and remanded 820 F.3d 440 (D.C. Cir. 2016), adopted and incorporated by reference in 364 NLRB No. 52 (2016), enf. 897 F.3d 280 (D.C. Cir. 2018); see also *Whitesell Corp.*, 357 NLRB 1119, 1123 (2011).

Removing the effects-bargaining violation and associated conduct from consideration,⁸ we find that the Respondent's remaining misconduct does not warrant an award of negotiation expenses. Considering the totality of the Respondent's remaining misconduct, we find that it does not approach the level and variety of misconduct present in other cases in which the Board has ordered respondents to reimburse unions' negotiation expenses. See, e.g., *Whitesell Corp.*, supra at 1122–1123 (awarding negotiation-expense remedy where the respondent refused to agree to recognition clause, engaged in regressive bargaining with threats of ever-worsening proposals, insisted on retaining unilateral control over mandatory subjects of bargaining, insisted on attendance system penalizing employees involved in negotiations, unreasonably withheld

and delayed information on its proposals, conditioned bargaining on proof of the union's intent to reach agreement, and twice declared impasse prematurely and made unilateral changes); *Frontier Hotel & Casino*, supra at 857–859 (awarding negotiation-expense remedy where the respondent made regressive proposals, reduced wages from \$11.92 per hour to \$6.50 per hour, required 2000 hours of work to qualify for holiday pay, eliminated pension plan, replaced health plan, goaded unions to strike and threatened to replace strikers, stated intent to eliminate all collective-bargaining agreements, scheduled bargaining sessions through a federal mediator and threatened to implement its proposals unless unions contacted the respondent's attorney, insisted on discussing its proposals only, and prematurely declared impasse); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 960, 964–965 (1980) (awarding negotiation-expense remedy where the respondent was frequently extremely late in arriving at bargaining sessions, bargained regressively, assumed a "take it or leave it" negotiating posture, unreasonably withheld information requested by the union, repudiated pre-strike agreements, acted to prolong strike, unlawfully froze unit employees' wages, rejected union's proposal without costing it out, refused to negotiate over bargaining-unit group leaders' pay, made unilateral changes including discontinuation of wage improvement program and bonuses, and dealt directly with employees concerning grievances).

In sum, we find the remaining violations in the present case insufficient to establish that the Respondent "infected the core of the bargaining process." *Barstow Community Hospital*, supra at 355. Pursuant to the court's remand, therefore, we will not order the Respondent to reimburse the Union for negotiation expenses incurred from March 31, 2011, to June 13, 2012, in connection with Case 13–CA–078080, and from February 21, 2012, to May 4, 2012, in connection with Case 13–CA–073487.

Dated, Washington, D.C. September 30, 2019

John F. Ring,

Chairman

itself." *Columbia College Chicago v. NLRB*, 847 F.3d at 553; see *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838–839 (D.C. Cir. 2005).

Recently, the Board adopted the contract coverage standard in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), a case involving decision-bargaining issues. We acknowledge that there is considerable force to the above-stated position of the Seventh and D.C. Circuits regarding effects bargaining, and that position warrants serious consideration in a future appropriate case. It is unnecessary to the disposition of this case to reach that issue here, which in any event was not fully briefed or argued by the parties.

⁸ In determining whether the Respondent's actions constituted "unusually aggravated misconduct" warranting a negotiation-expense remedy, we will consider neither the prior effects-bargaining violation

finding nor behavior that related to effects bargaining even if some of that behavior also related to violations the Respondent did not except to or appeal. We thus interpret the court's description of "effects-bargaining behavior" to include the following: the Respondent's precondition to effects bargaining that required the Union to present a proposal on the effects of the course credit-hour reductions and a list of the affected union members before it would discuss the issue, the Respondent's proposal to expand the language in the management-rights clause to include effects bargaining, and the delay and other detriment to the Union caused by setting preconditions to effects bargaining to the extent that the Board previously concluded that the Respondent deliberately acted to prevent any meaningful progress during bargaining and diminished the Union's bargaining strength.

Marvin E. Kaplan, Member

William J. Emanuel, Member

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