

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

Advice Memorandum

DATE: June 18, 2018

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Jayme Sophir, Associate General Counsel
Division of Advice

SUBJECT: Primestar Construction Corporation
Case 28-CA-211009

512-5036-6731

512-5062

530-6050-4133-3700

This case was submitted for advice as to whether the Employer violated Sections 8(a)(5) and (1) by failing to respond to the Union's six grievances. We conclude that complaint should issue, absent settlement, alleging that the Employer's failure to meet and confer in good faith with respect to the Union's six grievances—a mandatory subject of bargaining—violated Sections 8(a)(5) and (1) of the Act.

FACTS

Primestar Construction Corporation (the "Employer"), provides maintenance services to various clients out of its facility in El Paso, Texas. Sometime in 2016, Local 351, International Union of Operating Engineers, AFL-CIO (the "Union") became the exclusive bargaining representative of employees at the Employer's El Paso facility. In November 2016, the Employer and the Union executed a collective bargaining agreement effective from January 1, 2017 through December 31, 2018.

Article 14 of the CBA set forth the parties' grievance and arbitration procedures: Step I. Within five (5) working days of an incident or event giving rise to a grievance, the Shop Steward must provide a written grievance to the Project Manager in order to initiate the grievance. The employee may accompany his Steward, if he so desires. The Company shall render a written decision within five (5) working days hours after the conclusion of the Step I hearing.

Appeal. If the Union wishes to appeal, it must appeal a denied grievance to Step II within forty-eight (48) hours after the receipt or non-receipt of the Company's decision. Such appeal shall be in writing to the Project Manager or department head of the Company's operation at the facility.

Step II. The Shop Steward or Union Representative shall represent the employee. The Project Manager or department head shall meet with the Steward or Union Representative as expeditiously as possible. A decision by the Company shall be rendered within ten (10) working days.

Appeal. The Union may appeal a denied Step II grievance to Step III within ten (10) working days of the receipt or non-receipt of the Step II decision. The Union must provide written notice of appeal.

Step III. The Union Business Representative shall meet to discuss the grievance with the Project Manager and the Company's Corporate Representative as expeditiously as possible. A written decision by the Company shall be rendered within ten (10) working days.

Appeal. The Union may appeal a denied Step III grievance to Arbitration within twenty (20) working days of the receipt or non-receipt of the Company's decision. The Union must provide written notice of appeal and the Company will render a written decision within ten (10) working days.

Step IV Arbitration: In the event that the Union or the Company elects to arbitrate the grievance, it shall be heard by an arbitrator to be designated by mutual agreement of the Company and the Union.

In the event the parties fail to mutually agree upon an arbitrator, either party may move to arbitration through the rules of arbitration as provided by the Federal Mediation and Conciliation Service.

The arbitrator's decision shall be final and binding on all parties concerned. Any compensation required to be paid to the arbitrator shall be borne equally by the parties.

The arbitrator shall have jurisdiction and authority to apply, interpret and determine compliance with the terms of this Agreement but in no case add to, deviate from, detract from or alter in any way the provisions of this Agreement. The decision of the arbitrator shall be confined to the matter submitted to him for arbitration.

From June 2017 through November 2017,¹ the Union filed six grievances alleging that the Employer violated Article 8, Schedule B, “Health & Welfare, Long Term Disability and Pension” and Article 11, “Vacation.” More specifically, the Union filed:

- Grievance 1, on (b) (6), (b) (7)(C) regarding the Employer’s failure to issue payment for Employee A’s health and welfare benefit;
- Grievance 2, on (b) (6), (b) (7)(C) regarding the Employer’s failure to issue payment for Employee B’s health and welfare benefit;
- Grievance 3, on (b) (6), (b) (7)(C), regarding the Employer’s failure to issue payment to the central pension fund on behalf of all affected employees;
- Grievance 4, on (b) (6), (b) (7)(C) regarding the Employer’s failure to pay Employee C’s health and welfare benefit while (b) (6) was on vacation;
- Grievance 5, on (b) (6), (b) (7)(C) regarding the Employer’s failure to contribute the appropriate amount of unused health and welfare benefits to Employee D’s 401K account; and
- Grievance 6, on (b) (6), (b) (7)(C) regarding the Employer’s failure to fully compensate Employee D’s use of vacation time.

The Union attempted to utilize every step of Article 14’s grievance and arbitration procedures to resolve Grievances 1-3. The Employer was largely unresponsive, with few exceptions. The parties discussed Grievance 1 during at least one phone call in July, but the grievance was not resolved and the Employer never formally responded. Likewise, sometime in approximately July, the Employer’s (b) (6), (b) (7)(C) requested the Union’s availability for a meeting regarding Grievance 2. The Union responded with its availability but the Employer never replied and the meeting never occurred. Also in July, the Employer sent the Union an email stating that it would review documents the Union had submitted relating to Grievance 3. However, the Employer never responded to the grievance. In all three instances, the Union notified the Employer each time it advanced the grievance to the next step and requested arbitration after the Employer’s contractual response time had lapsed without an answer. The Union informed the Employer that it would contact FMCS for a panel of arbitrators and requested that the Employer meet to select one for each of the three unresolved grievances. The Employer did not respond to any of the Union’s requests to meet and select an arbitrator.

The Union did not process Grievances 4, 5, and 6 in the same manner because, by that time, it had concluded that the Employer was simply not responding to grievances. Thus, when the Union filed Grievances 4, 5, and 6 on (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b), and (b) (6), (b) (7)(C), respectively, and the Employer never replied to any of the three, the Union did not advance the grievances through the steps outlined in Article 14.

¹ All remaining dates are in 2017 unless otherwise indicated.

The Employer never explicitly stated that it refused to process or arbitrate the six grievances, nor did it provide the Union with an explanation or justification for its inaction. There is no indication that the Union filed any other grievances, nor that the Employer processed any previously filed grievances, during this period.

ACTION

We conclude that the Employer violated Sections 8(a)(5) and (1) because the Employer violated its duty to meet and confer in good faith with respect to a mandatory subject of bargaining by failing to respond to the Union's grievances. Accordingly, the Region should issue complaint, absent settlement.

"It is well settled that an employer is obligated under Section 8(d) of the Act to meet with the employees' bargaining representative to discuss its grievances and to do so in a sincere effort to resolve them."² Indeed, "[g]rievances concerning the terms and conditions of employment . . . are mandatory subjects of bargaining,"³ and as such, employers are obligated to "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement."⁴ Thus, it is clear that an

² *Hoffman Air & Filtration Systems*, 316 NLRB 353, 356 (1995); see *Storall Mfg. Co.*, 275 NLRB 220, 221 (1985) ("An employer's obligation under the Act with respect to individual grievances presented by the collective-bargaining representative of its employees is no different from its obligation with respect to contract negotiations."), *enforced* 786 F.2d 1169 (8th Cir. 1986).

³ *Riverside Cement Co.*, 305 NLRB 815, 820 (1991), *enforced* 976 F.2d 731 (1992).

⁴ *Arkansas Rice Growers Cooperative Assn.*, 171 NLRB 75, 76 (1968) (internal citation omitted) (concluding that employer's willingness to discuss but refusing to process grievances was part of employer's conscious effort to undermine union and bargain in bad faith); see *Hoffman*, 316 NLRB at 356 (concluding that the employer violated 8(a)(5) by habitually engaging in bad faith at each stage of the grievance procedure in an attempt to undermine the entire grievance procedure and bankrupt the union via arbitral expenses). Cf. *McDaniel Ford, Inc.*, 322 NLRB 956, 965 (1997) (holding that employer's rejection of experienced labor arbitrators and demand for individuals without labor or arbitration experience constituted an "extreme or unreasonable proposal" that was designed to avoid the employer's obligation to bargain in good faith and select an arbitrator).

employer's failure or refusal to meet with the union or engage in any substantive discussions about a grievance violates Sections 8(a)(5) and (1) of the Act.⁵

The Board's decision in *Paul Mueller Co.*⁶ demonstrates that an employer may not simply ignore the parties' mutually agreed upon grievance procedure. Therein, the employer was once efficient in its processing of grievances and typically scheduled a meeting to discuss the grievance within five days of its filing.⁷ Following the resolution of a strike, however, the employer abandoned its previous approach without explanation and no longer responded to grievances nor scheduled meetings for their resolution.⁸ The Board concluded that the employer's failure to respond to grievances for several months without an explanation for its inaction constituted a refusal to meet and confer in violation of Section 8(a)(5) and (1).⁹

Here, although the Employer initially indicated that it would respond to some of the grievances, it did not follow through and completely failed to provide any substantive response. Thus, similar to the employer in *Paul Mueller*, the Employer regularly shirked its responsibility to actively participate in the resolution of the six

⁵ *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962) (internal citations omitted) ("Clearly, the duty [to meet and confer in good faith] . . . may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—to meet * * * and confer—about any of the mandatory subjects."); see e.g., *Contract Carriers Corp.*, 339 NLRB 851, 852 (2003) (overruling ALJ to conclude that respondents' failure to meet and confer with union regarding the resolution of grievances violated Sections 8(a)(5) and (1); notwithstanding the language in the CBAs that arguably permitted the union to continue processing the grievances and proceed to arbitration without the involvement of the respondents, the Board found that respondents' failure to attend any of the five scheduled hearings as well as its refusal to provide requested information violated the Section 8(d) duty to meet and confer in good faith); *Riverside Cement*, 305 NLRB at 820 (finding that employer's refusal to meet and discuss grievance was part of an unlawful strategy to avoid its obligation to bargain with union).

⁶ 332 NLRB 332 (2000).

⁷ *Id.* at 334.

⁸ *Id.*

⁹ *Id.*

grievances filed by the Union and at no point did it attempt to articulate why it refused to meet and engage in substantive discussions. This was not a matter of a mere missed deadline or two, but rather constituted a “pattern of conduct that frustrate[d] the intended operation of the grievance procedure”¹⁰ In fact, beyond several unproductive telephone calls and emails, the Employer opted for silence and allowed the grievances to languish for over five months without engaging in a good-faith attempt at resolution.¹¹

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Sections 8(a)(5) and (1) by failing to satisfy its Section 8(d) obligation to meet and confer about the six grievances filed by the Union.

J.L.S.

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¹⁰ *Contract Carriers Corp.*, 339 NLRB at 852.

¹¹ The Region should not argue, however, that the Employer’s conduct was tantamount to a refusal to arbitrate grievances, or otherwise was a complete repudiation of the contractual grievance/arbitration process. The parties’ collective-bargaining agreement permitted the Union’s unilateral elevation of disputes to arbitration, and the Union chose not to avail itself of that opportunity. Thus, the Region should not rely on *Exxon Chemical Co.*, 340 NLRB 357 (2003), *3 State Contractors*, 306 NLRB 711 (1992), or other similar cases in arguing a violation here.