

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

TRIUMPH AEROSTRUCTURES, LLC

and

Cases 16-CA-197912

LAWRENCE HAMM, an Individual

and

16-CA-198055

RODNEY HORN, an Individual

and

16-CA-198410

THOMAS SMITH, an Individual

and

16-CA-198417

**THE INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, LOCAL 848**

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S
ANSWERING BRIEF TO EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Counsel for the General Counsel files this Reply Brief to Respondent's Answering Brief to the General Counsel's Exceptions to the Decision of the Administrative Law Judge and Brief in Support. This case was tried before the Honorable Administrative Law Judge Robert Ringler (ALJ) on April 22 and 23, 2019. During the hearing, the General Counsel put forth evidence to establish that Respondent violated the Act when it 1) on November 17, 2016 and April 3, 2017, respectively, terminated employee Thomas Smith and suspended employee Rodney Horn, and 2) laid off 12 bond shop employees on April 21, 2017. The ALJ issued his decision (ALJD) on September 30, 2019, dismissing the Complaint in its entirety. The General Counsel filed Exceptions to the ALJD on December 27, 2019, and Respondent filed its Answering Brief on January 27, 2020.¹ In its attacks on the General Counsel's Exceptions and arguments supporting that no impasse was reached in layoff bargaining, Respondent suggests that the Board's analysis of a party's conduct at and away from the bargaining table is a novel concept that would "substantially intrude" on negotiations, rather than a necessary exercise in determining whether an employer engaged in good faith bargaining. The General Counsel responds to Respondent's arguments below and urges the Board to consider the totality of the circumstances, which show that Respondent implemented the layoff at a time when the parties were not at a good faith impasse.

II. ANALYSIS

The ALJ ignored or failed to give proper weight to important events during layoff bargaining that, taken together, preclude an impasse finding. The Board is required to analyze the totality of an employer's conduct in the bargaining context, including the content of its proposals,

¹ Respondent also filed Cross Exceptions to the ALJD and a Brief in Support. The General Counsel will file an Answering Brief to Respondent's Cross Exceptions and will address, inter alia, Respondent's arguments regarding the ALJ's failure to address its equitable estoppel argument as related to the discipline allegations and Respondent's arguments for alternate grounds for dismissing the layoff allegation.

to determine whether it bargained in good faith. See *Regency Service Carts*, 345 NLRB 671 (2005) (the Board examines the totality of an employer’s conduct at and away from the bargaining table in assessing whether it bargained in good faith); *Lapeer Foundry & Mach.*, 289 NLRB 952, 954 (1988) (to ensure meaningful negotiations regarding economically motivated layoff, the Board scrutinizes the “totality of the [parties’] conduct throughout the course of bargaining...” and requires that negotiations occur quickly upon notification); *Chevron Chemical Co.*, 261 NLRB 44, 46 (1982). Proper analysis of the meetings, proposals, and conduct in this case is required, and adequate consideration of all factors relating to impasse is hardly “unprecedented.”

First, Respondent undervalues the importance of Respondent’s April 6 withdrawal of its loan agreement proposal, and its account of the series of events leading to its removal from the bargaining table defies logic. Respondent would have the Board believe its April 6 proposal was simply “one alternative proposal out of the numerous proposals exchanged”; but this characterization oversimplifies the event’s significance. Respondent withdrew not only a single proposal, but backtracked on a loan agreement solution entirely, marking a significant direction change for bargaining that left the Union scrambling for an alternate solution after focusing all bargaining up to that point on the loan. As addressed in detail in the General Counsel’s Exceptions, the parties had bargained a loan agreement proposal for two of the four total layoff bargaining sessions, moving towards an agreement that would allow impacted bond shop employees to remain employed with Respondent at their same rates of pay. Respondent withdrew its loan proposal entirely after the second session and informed the Union it would lay off bond shop employees.

Respondent’s explanation as to why the parties moved away from a loan agreement on April 7 does not make sense given the timeframes involved, the Union’s clear interest in continued employment for bond shop employees, and evidence indicating both parties had believed they were

close to reaching agreement. During her testimony, Respondent’s negotiator Danielle Garrett did not explain Respondent’s choice to pass the Union a proposal, return to the Union’s caucus area after such a short period, discuss the proposal off-the-record, and ultimately determine to move away from a loan agreement. This series of events is a distinct departure from the parties’ normal practice of caucusing separately after passing proposals, and reconvening with responses (Tr. 338, LL. 23-25; 339, LL. 1-11) and merits an explanation. The Union’s explanation, which is memorialized in its bargaining notes, shows Respondent interrupted its caucus merely to inform the Union that a loan agreement was no longer possible, and it would need to lay off bond shop employees. As Respondent indicates, while Garrett conveniently failed to withdraw the loan agreement *on the record* the following day, the Union referenced the withdrawal on the record several times without any attempt at correction or pushback from Respondent (J. Exh. O (“In response to the Company notifying the Union on April 6, 2017 that it plans to lay off approximately 12 Bond Shop employees...at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following...”); GC Exh. 4 at 11 (Barker: “We started talking yesterday about something yanked out behind us of a short-term, temp (sic) loan – we was working on a lot of things then all of a sudden you’re going to have to lay them off.”)). Respondent’s implication that the Union would voluntarily regress in its bargaining proposals and move forward with a less favorable solution on April 7—transferring employees to other job families indefinitely—also defies logic. Respondent’s motivation behind moving away from a loan agreement proposal is especially apparent in its change of heart regarding employees’ pay; interestingly, while its initial proposals included employees maintaining their current rates of pay, only after its April 6 withdrawal did it begin insisting that impacted employees with little to no experience in other job families should not maintain their current rates of pay.

Contrary to Respondent's suggestion, the General Counsel does not assert that Respondent's withdrawal was unlawful in itself; rather, its actions highlight its conduct surrounding layoff bargaining and intent to frustrate agreement. Respondent's actions are distinct from other cases involving regressive proposals in that most, including those cited by Respondent, address an employer's altering a prior proposal in a less-favorable manner. Respondent's actions here are particularly egregious where it completely rescinded, *without explanation*, a loan agreement solution that Respondent itself had initially suggested, and about which the parties had spent the majority of two bargaining sessions discussing and passing proposals. The withdrawal meant that the Union had to start from scratch on April 7. A parties' withdrawal of a proposal tentatively agreed on will be considered unlawful and designed to frustrate bargaining unless the employer demonstrates that it had good cause for the withdrawal of proposals to which it had previously agreed. *See Valley Cent. Emergency Veterinary Hospital*, 349 NLRB 1126, 1127 (2007) (quoting *Suffield Acad.*, 336 NLRB 659 (2001); see also *Transit Service Corp.*, 312 NLRB 477, 483 (1993). While the parties had not entered any tentative agreement when Respondent withdrew the loan agreement, given their mutual expressed desire to keep impacted employees working, it is clear they had agreed that a loan agreement was appropriate.

The impact of Respondent's withdrawal of the loan agreement proposal is far-reaching. In addition to being indicative of bad faith and intent to frustrate bargaining, the withdrawal also significantly undermines Respondent's argument that the length of negotiations supports an impasse finding. Respondent withdrew the loan agreement proposal outright on April 6, and the Union was left to start over on April 7 with an entirely new proposal. An assessment of this bargaining posture does not require the Board to "compel concessions" or judge the substance of prior or future bargaining proposals. Instead, the General Counsel urges the Board to consider the

conduct of Respondent at the bargaining table, and the subsequent impact upon the length of negotiations which, without such consideration, appears more reasonable. “[T]he Board has been afforded flexibility to determine ...whether a party's conduct at the bargaining table evidences a real desire to come into agreement” and considers the content of bargaining proposals in determining the good faith of parties in negotiations. *Chevron Chemical Co.*, 261 NLRB 44, 46 (1982) (quoting *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 498 (1960)). When taking into consideration that negotiations essentially started over on April 7, the two additional bargaining sessions held prior to Respondent’s April 21 implementation, hardly show lengthy negotiations. Furthermore, when considering that the Union’s April 14 letter went unanswered until April 19, and that Respondent subsequently denied the Union’s request to extend bargaining until April 21, the length of negotiations balances against a finding of impasse.

The General Counsel’s argument that Respondent’s April 21 deadline was arbitrary does not suggest parties might be required to “indefinitely delay” an employer’s business decision. Rather, the General Counsel argues a party cannot, in good faith, insist upon arbitrary dates of termination for bargaining over a contract *or specific proposals* that disallow the other party to digest proposals. *See, e.g., Toyota of San Francisco*, 280 NLRB 784, 801 (1986) (employer’s practice of issuing proposals and setting short deadline for their acceptance indicative of bad faith); *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008) (employer violated Section 8(a)(5) by unilaterally implementing provisions of its final offer after imposing arbitrary deadline for negotiations). Under the relevant economic exigency exception in *RBE Electronics of S.D.*, bargaining need not be protracted. 320 NLRB 80, 82 (1995). However, the ALJ’s recognition and parties’ stipulation that the Respondent’s business needs qualified as an economic exigency does not establish that Respondent’s April 21 deadline for laying off 12 bond shop employees was necessary.

Respondent's internal communications related to the staggering of laying off employees on April 7, and the reduction of the number of employees to lay off as late as April 13, cast doubt upon Respondent's insistence that it was economically necessary to lay off 12 employees precisely on April 21. Importantly, Respondent's economic exigency does not explain its refusal to extend bargaining *until* April 21, not beyond April 21, its self-imposed deadline, per the Union's request, which would have been in accordance with Respondent's own RIF policy allowing it to inform employees on the same date on which they are laid off. This is especially problematic given that Respondent did not provide the Union with the requested employee rankings until April 20, because, according to Respondent, they were not yet available. Thus, Respondent implemented its layoff on the basis of rack-and-stack scores, but arbitrarily implemented the layoff prior to providing the Union with a chance to review the rankings which would have assisted it in making further proposals, requesting additional information, or challenging Respondent's decisions.

The General Counsel relies on arguments in its Brief in Support of Exceptions with regard to the clearly relevant information requests the Union made, and Respondent's refusal and delay in responding. As with the withdrawal of the loan agreement, the General Counsel does not allege this as a separate, *per se*, unfair labor practice but urges that the information requests and responses be considered as a factor in an impasse analysis. All the Union's information requests were clearly relevant to the issues at hand. Respondent's position that its explanation about the averred irrelevance of contractor pay privileged its failure to provide a response is unavailing. In fact, Garrett explicitly clarified that the Union was requesting an updated list of any new hires since the last list the Union had received on March 27, and a pay analysis for anyone hired since February into assembly (R. Exh. 6 at 4). At no point after that time did the Union indicate it no longer needed or desired that information, nor did Respondent indicate it could not or would not provide it.

Respondent's failure to provide the Union with notice and an opportunity to bargain over the termination and suspension of its employees had a clear impact on bargaining, and Respondent's attempt at arguing otherwise is unavailing. A lawful impasse cannot be reached "in the presence of unremedied unfair labor practices"—including unilaterally changing employees' terms and conditions of employment—in other words, an employer may not 'parlay an impasse' resulting from its own misconduct. *White Oak Coal Co., Inc.*, 295 NLRB 567, 568 (1989) (quoting *Wayne's Dairy*, 223 NLRB 260, 265 (1976)). Here, Respondent insisted throughout bargaining upon selection criteria that ranks employees based on performance, *including active discipline*. (J. Exh. A). As Respondent acknowledges, the parties held differing views on the method for choosing bond shop employees who would be impacted by its reduction in force. One of the Union's main concerns about Respondent's RIF policy criteria was that it could, and did, include consideration of active disciplines about which the Union had not yet had the opportunity to contest through a grievance/arbitration procedure. This encompassed disciplines, including that of bond shop employee Rodney Horn, that would eventually be considered in its bond shop rankings.² (R. Exh. 7 at 2 (1:00pm)) (Garrett: "Why wouldn't we include active discipline?" Ducker: "we believe that in light of how disciplines have gone at this point there is discretionary open disciplines that could very much be the deciding factors to these layoffs"). The Board does not require the unfair labor practice to impact a parties' 'ability to bargain effectively', as Respondent suggests; rather, if the unlawful conduct contributes to deadlock and impacts negotiations such that it hinders the parties'

² Respondent misunderstands the General Counsel's statement regarding Horn's suspension in its Brief in Support of Exceptions. The General Counsel states that Horn's suspension was factored into the *evaluation and ranking* that eventually led to his layoff from his bond shop position, not that the suspension led to his layoff. This information is based on Respondent's status quo layoff procedure, that includes consideration of active discipline, as well as Respondent's explicit insistence that it consider active disciplines in its layoff rankings. Any suggestion by Respondent that perhaps Horn's suspension was not factored into his score and ranking is unbelievable given its insistence upon including active discipline in the selection procedure, especially during the April 19 bargaining session.

ability to reach agreement, it will preclude impasse. *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001) (Board considers whether conduct detrimentally affected negotiations and “contributed to the deadlock”). Respondent’s insistence upon considering active discipline in ranking employees for reducing bond shop headcount, and the Union’s concern about Respondent’s failure to provide it with the opportunity to challenge those decisions, clearly contributed to the parties’ ability to reach agreement.

Respondent’s argument that both parties understood they had reached impasse seizes upon the Union’s decision not to make a final counterproposal on April 19. However, the remainder of that bargaining session, as Respondent acknowledges, consisted of the Union continuing to bring up alternative proposals and Garrett repeatedly rejecting them and pressuring the Union to insist it could not move past the rack-and-stack. In direct contrast to Respondent’s argument, the Union made significant concessions in its April 19 proposal; namely, a provision that would allow Respondent to evaluate employees for layoff under the RAS (excluding active discipline) who had been employed for less than 48 months, or who had transferred from another facility within the past 48 months, which included all bond shop employees (J. Exh. S; R. Exh. 7 at 1-2).³ Even assuming the parties had reached impasse prior to or during the April 19 session, the Union’s proposal, that included significant movement, would have broken that impasse. The Board has held that even if impasse is reached over an issue, it may be broken if one of the parties moves off its previously adamant position. *See Tom Ryan Distributors*, 314 NLRB 600, 604-605 (1994), *enfd. mem.* 70 F.3d 1272 (6th Cir. 1995). In response, Respondent stuck to its previous position, offered no counterproposal, and refused to engage with the Union when it offered further ideas

³ Respondent incorrectly states this proposal included applying the RAS to only less-senior employees. The Union explained during the April 19 session that all bond shop employees had transferred to the Red Oak facility within the past 48 months, so all bonders were included (R. Exh. 7 at 1-2 (1:00pm)). Garrett confirmed this understanding at that bargaining session. *Id.*

and proposals. In its Answering Brief, Respondent ignores the Union's significant movement on the RAS procedures for determining impacted employees, arguing instead that the Union failed to indicate it was willing to make concessions on the issue of selection methods (R. Br. 54).

Respondent also argues there is no evidence the Union "had any genuine proposals left to offer." In fact, both parties' bargaining notes reflect numerous attempts by the Union at proposing new resolutions. In response to Garrett's position on the different aspects of the Union's proposal, the Union provided further ideas to get the parties closer to agreement, including allowing bond shop employees who took assembly positions at lower rates of pay to apply for bond shop positions in the future at their former, higher rate of pay, a years-of-service multiplier for bond shop employees who took assembly positions, and a letter of agreement providing that the evaluation and discipline subjects of the layoff would be open to the grievance procedure with a full remedy option available (R. Exh. 7 at 7-10). Garrett refused to engage the Union on those suggestions in any meaningful way, ultimately telling the Union she did not think they were anywhere close.

Respondent's suggestion that the Union abandoned bargaining after April 21 is contradicted by record evidence. In fact, on April 24 and 28, the Union requested information from Respondent related to the layoff, including the discipline files for the 12 employees impacted by the layoff (GC Exh. 12)⁴, information regarding the attendance records of certain individuals for the purpose of discussing their discipline and layoff, and "a detailed explanation as to why each Bond Shop employee received the rating they did in each layoff evaluation category," along with documentation related to those ratings (GC. Exh 13; 11 at 2). Upon receipt, Garrett inquired about the reference to a layoff, and said the Union was requesting information after the fact, asserting

⁴ The information request includes a discrepancy in dates; indicating that it was sent on April 24, but that the Union received information on Rodney Horn on May 23 (GC Exh. 12). Respondent does not dispute receiving this information request and agrees that it provided Horn's information on May 23 (Tr. 415-416).

she had fulfilled her obligation to give the Union notice and an opportunity to bargain (GC Exh. 11 at 2-3). Garrett said the Union was just ‘exercising her’ and making her work for no reason, the layoff had already been processed, and the Union was given sufficient notice and opportunity to bargain (GC Exh. 11 at 3). Ducker responded that Respondent had rated employees on those items, and the Union had a right to see whether the discipline pertained to the layoff (GC Exh. 11 at 3). Garrett then asserted her belief that the information request is indicative of “James’ [Ducker] inherent need to have discipline that was properly given taken away” and that the Union was arguing that Respondent should not have disciplined employees (GC Exh. 11 at 4). After some exchange regarding the April 28 requests, including clarification by the Union, Respondent ultimately responded half-heartedly with information the Union already possessed about the employee performance rankings (GC. Exh. 14). The Union’s continued interest in bargaining about the layoff as evidenced by its information request, and Respondent’s hostility towards same, undermines Respondent’s argument that the Union failed to request bargaining after April 21.

Based on the above, the General Counsel respectfully reaffirms its Exceptions and arguments in support and urges the Board to find that Respondent violated the Act.

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Date: February 10, 2020

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Reply Brief to Respondent's Answering Brief to Exceptions to the Decision of the Administrative Law Judge has been served this 10th day of February 2020, via electronic mail upon each of the following:

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