

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

DATE: October 22, 2013

TO: Mori P. Rubin, Regional Director
Region 31

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Phillips 66 524-0183-3333
Case 31-CA-096709 524-0183-3375
524-5029-5050
524-6708-6200
524-6793-2533
524-8307-1200

The Region submitted this Section 8(a)(3) and (5) case requesting advice as to whether: (1) the Employer unlawfully discriminated against its employees by carrying out its pre-election threats to change their duties and shift schedules if they voted to join the Union, and (2) the Employer unlawfully implemented its final offer because the parties could not reach a valid impasse in negotiations due to the unremedied threats and its insistence on bargaining proposals consistent with those threats.

We conclude that the Employer violated Section 8(a)(3) by implementing employment terms that were consistent with its unlawful pre-election threats and in retaliation for the employees' protected concerted activity in voting to join the Union. Additionally, we conclude that the Employer violated Section 8(a)(5) because this same conduct constituted bad-faith bargaining that precluded both a lawful impasse and the Employer from unilaterally implementing its final offer. Accordingly, the Region should issue complaint, absent settlement.

FACTS

Phillips 66 ("Employer") is in the business of refining crude oil, and has a standing collective-bargaining relationship with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC ("Union"). The parties' most recent collective-bargaining agreement ("CBA") is effective from February 1, 2012 to January 31, 2015. The CBA covers approximately 665 operating, maintenance, and laboratory employees at the Employer's refineries in Los Angeles, Rodeo, and Santa Maria, California.

On November 2, 2011, the Union filed an RC petition to include the five Health and Safety Specialists ("HSS employees") working at the Employer's Santa Maria

refinery in the existing multi-facility bargaining unit. In response, the Employer asserted that the five HSS employees were supervisors and, therefore, ineligible to be in the bargaining unit.

The Employer contended that the “Incident Command” and “Incident Owner” duties that HSS employees performed made them supervisors. The Employer claimed that the Incident Command duty is supervisory because, when invoked during an emergency, the HSS employee in that role outranks even the plant manager. However, the Employer’s “Santa Maria Facility Procedures Manual” states in the “Facility Emergency Procedures” section that at the “Advanced Response” stage, when an “incident cannot be controlled and eliminated by the initial responders,” the “Advanced Response Incident Commander” (a non-unit managerial position) takes over from the HSS employee and assumes “overall management” of the emergency situation. Similarly, under the Employer’s “Incident Reporting & Investigation” written procedure, an HSS employee investigating and acting as the Incident Owner is responsible for determining the cause of a safety incident and establishing the investigation team under the supervision a “Responsible Supervisor.”¹ One HSS employee’s 2011 performance appraisal states that he “work[ed] closely with the [R]esponsible [S]upervisors” when performing Incident Owner duties. Although the Employer noted other alleged intermittent supervisory duties, its assertion of supervisory status was anchored primarily on the Incident Command and Owner duties.

On December 12, 2011, the Regional Director issued a Decision and Direction of Election concluding that the HSS employees were not supervisors under Section 2(11) of the Act. The Regional Director determined, among other things, that the HSS employees spent only a small percentage of their time in the Incident Command and Incident Owner roles and found them to be an insufficient basis to confer supervisory status.

In mid-January 2012,² prior to the representation election, the Employer threatened the HSS employees on two different occasions that if they elected the Union, the Employer would take away their current job duties that it felt were supervisory. Additionally, the Employer stated that, because of the removal of duties, it would not need all five HSS employees on 24-hour rotating shifts, and thus it would reduce the total number of HSS employees and their shift hours. The Employer also asserted that it would hire third-party contractors to perform some of the current

¹ A “Responsible Supervisor” may either be the immediate supervisor of the First Responder who initially responded to an incident, or the supervisor responsible for the area where the incident occurred.

² All subsequent dates are in 2012 unless otherwise stated.

HSS employee duties, including EMT duties, to avoid giving them overtime.³ The Employer further stated that it would follow through on these threats to discourage employees at its other facilities from joining the Union.⁴

On January 31, after the HSS employees voted 5-0 to join the Union, the Region certified the Union as the exclusive representative for a multi-facility unit that included the HSS employees at the Employer's Santa Maria refinery.

From May 16 to November 18, the parties engaged in eleven bargaining sessions and exchanged several proposals regarding the terms and conditions of employment for the HSS employees. The Union consistently offered proposals that attempted to keep HSS employee duties as they were prior to the election. The Employer largely rejected the Union's proposals and countered with offers that removed duties, particularly the Incident Command and Incident Owner duties, which it considered supervisory. The Employer also countered with proposals that reduced HSS staffing and shift hours as a result of the loss of "supervisory" duties. The Employer further stated that the EMT functions the HSS employees had performed would be subcontracted to third parties and that their remaining duties could now be completed during an 8-hour per day shift. The parties remained far apart on these key issues throughout bargaining.

During the June 14 bargaining session, the Employer offered "Proposal 3C," which laid out its proposed list of duties for bargaining unit HSS employees. The list did not include Incident Command or Incident Owner duties. The Union told the Employer that it disagreed with the removal of those duties from the list, and continued to seek further discussions on how bargaining unit employees could play some role in the Incident Command system. However, throughout the following bargaining sessions, the Employer typically countered Union proposals by simply referring the Union to the job duties listed in "Proposal 3C."

During the August 6 bargaining session, the Union proposed that the HSS employees' duties remain as they were but that the HSS employees would not assume a leadership role in the Incident Command structure. The Employer's counter-proposal accepted the Union's statement that the HSS employees would not assume a leadership role, but again took the position that their duties would be those outlined

³ The written job description for HSS employees stated, under the section titled "QUALIFICATIONS REQUIRED," that they must have "EMT Certification or the ability to acquire certification within 30 days."

⁴ In Case 31-CA-085243, the Region authorized complaint alleging that the Employer violated Section 8(a)(1) by issuing these pre-election threats of reprisal if the HSS employees voted for the Union. That case was not submitted to Advice.

in Proposal 3C, which did not provide for any participation in the Incident Command system. During the September 16 bargaining session, the Employer also proposed that if the Union “prefers” to have HSS employees assigned to 12-hour per day shifts, in contrast to the 8-hour shifts the Employer had proposed, then the Employer “agrees to meet and confer” within 60 days of signing the contract “to discuss specific terms of the schedule.” The Employer’s proposals never deviated from its core positions on reduced duties and shift times.

On October 26, the Employer sent a letter to the Union setting forth the business justifications for its bargaining proposals. The Employer explained, among other things, that it did not want a bargaining unit employee in a supervisory role as Incident Command, which purportedly outranked the plant manager during an emergency. Additionally, the Incident Owner duties needed to be assigned to a supervisor to avoid potential conflicts of interest where a bargaining unit HSS employee may be required to investigate a fellow bargaining unit employee. The Employer further stated that, with the removal of the supervisory aspects of the HSS employees’ duties, it was no longer necessary to keep all five HSS employees on 24/7 shift rotations. The letter also claimed that EMT duties were never a necessary function of the HSS employees and could be filled by other means. Finally, the letter explained, “now that they [the HSS employees] have made that choice [to join the Union], the Company must make appropriate changes to its operations to ensure supervisory duties are performed by supervisors; this merely reflects the necessary changes which are legitimate and logical consequences of that choice.”

On November 18, the parties held their final bargaining session. The Employer declared that negotiations were at impasse and presented the Union with its final offer. The Employer’s final offer included: (1) reducing the number of HSS employees from five individuals to two under the new title of “Health and Safety Coordinator” (“H&SC”); (2) converting the remaining three HSS employees to production positions in the Operations Department; (3) eliminating Incident Command, Incident Owner, and EMT duties for the H&SC employees; and (4) reducing the previous 24-hour staffing of HSS employees to 8-hour per day shifts for the two H&SC employees.

On December 4, the Union rejected the Employer’s final offer and disagreed with its assertion that the parties were at impasse. On December 10, the Employer unilaterally implemented its final offer. As a result, the two newly appointed H&SC employees and the three former HSS employees who were transferred to the Operations Department all saw a significant reduction in salary due to reduced wage rates and shorter shifts.

ACTION

We conclude that the Employer violated Section 8(a)(3) by implementing employment terms that were consistent with its unlawful pre-election threats and in

retaliation for the employees' protected concerted activity in voting to join the Union. Additionally, we conclude that the Employer violated Section 8(a)(5) because this same conduct constituted bad-faith bargaining that precluded both a lawful impasse and the Employer from unilaterally implementing its final offer. Accordingly, the Region should issue complaint, absent settlement.

A. The Employer Violated Section 8(a)(3) by Implementing Discriminatory Employment Terms for the HSS Employees

An employer violates Section 8(a)(3) by implementing adverse terms and conditions of employment in retaliation for its employees exercising their Section 7 right to elect union representation.⁵ In finding that an employer possesses the requisite unlawful anti-union motive, the Board has relied on, among other factors, the presence of prior unfair labor practices committed by the employer,⁶ statements by management officials evincing a discriminatory intent,⁷ and findings that an employer's proffered reasons for the disparate terms are a pretext.⁸ Based on these principles, we conclude that the Employer violated Section 8(a)(3) by implementing discriminatory terms, consistent with its pre-election threats, to retaliate against the

⁵ See, e.g., *Willamette Industries*, 341 NLRB 560, 562-63 (2004) (finding 8(a)(3) violation where employer changed employee shift schedules and reduced overtime in retaliation for employees electing union); *Kurdzeil Iron of Wauseon*, 327 NLRB 155, 155 (1998) (finding 8(a)(3) violation where employer told unit employees they would receive routine wage increase granted to non-union employees if they voted to decertify the union in pending election); *Phelps Dodge Mining Co.*, 308 NLRB 985, 995-96 (1992) (finding 8(a)(3) violation where employer granted special bonuses to its "union-free" employees shortly before unit employees were eligible to petition for decertification), *enforcement denied*, 22 F.3d 1493 (10th Cir. 1994); *Peabody Coal Co.*, 265 NLRB 93, 99-100 (1982) (finding 8(a)(3) violation where employer with history of 8(a)(1) conduct told unit employees that new benefits were withheld because they were "trying to get into the [u]nion"), *enforced in relevant part*, 725 F.2d 357, 366 (6th Cir. 1984).

⁶ See, e.g., *Willamette Industries*, 341 NLRB at 562 (noting employer's unlawful threats of adverse consequences if union prevailed in election and unlawful discipline of union supporters); *Peabody Coal Co.*, 265 NLRB at 100 (noting employer's history of 8(a)(1) violations).

⁷ See, e.g., *Kurdzeil Iron of Wauseon*, 327 NLRB at 155 & n.4; *Phelps Dodge Mining Co.*, 308 NLRB at 998; *Peabody Coal Co.*, 265 NLRB at 100 & n.12.

⁸ See, e.g., *Phelps Dodge Mining Co.*, 308 NLRB at 996-97 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

HSS employees for voting in favor of Union representation.⁹ The evidence strongly demonstrates the Employer's anti-Union motive for this conduct.¹⁰ Specifically, the Employer's anti-Union motive is established by its pre-election threats, the anti-Union statements in its October 26 letter, and the evidence demonstrating that the proffered explanations for its bargaining proposals were a pretext.

First, the Employer's proposals throughout bargaining mirror exactly its pre-election threats to discriminatorily provide fewer benefits to the HSS employees if they unionized, specifically by (1) eliminating the job functions of Incident Command and Incident Owner, (2) reducing shift work and overtime, and (3) contracting out their pre-election EMT work.¹¹

Second, the Employer essentially admitted that the HSS employees' protected concerted activities were the sole reason for its discriminatory bargaining proposals. In its October 26 letter to the Union, in which the Employer described its purported legitimate business reasons for its bargaining position, the Employer stated that the changes it sought to the HSS employees' employment terms were the "legitimate and logical consequences" of their choice to join the Union.¹²

⁹ The Region previously dismissed the Union's charge in Case 31-CA-09017, which alleged that the Employer had violated Section 8(a)(5) by bargaining in bad-faith from May to September. The Office of Appeals subsequently affirmed that dismissal. However, the dismissal of that prior charge has no preclusive effect on the instant case because it was never fully adjudicated on the merits. *See Kelly's Private Car Service*, 289 NLRB 30, 39 (1988) ("It is well settled that the dismissal of a prior charge by a Regional Director, even where the identical conduct is involved, does not constitute an adjudication on the merits, and no res judicata effect can be given to th[o]se actions"), *enforced sub nom.*, 919 F.2d 839 (2d Cir. 1990); *Ball Corp.*, 322 NLRB 948, 951 (1997).

¹⁰ Because the Employer's conduct is unlawfully motivated under a *Wright Line* analysis, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 393 (1983), the Region should not allege that the Employer's conduct also violated Section 8(a)(3) because it is "inherently destructive" of the HSS employees' statutory rights, *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967).

¹¹ *See, e.g., Willamette Industries*, 341 NLRB at 562 (relying, in part, on employer's threats of adverse consequences to find anti-union motive); *Peabody Coal Co.*, 265 NLRB at 100 (relying, in part, on employer's history of violating 8(a)(1) to find anti-union motive).

¹² *See, e.g., Kurdzeil Iron of Wauseon*, 327 NLRB at 155 & n.4 (finding unlawful motive where plant superintendent stated represented employees would get 3 percent

Finally, the Employer's unlawful motive is evidenced by the fact that the business reasons it proffered for its proposals were a sham and served only as pretext to provide cover for its retaliatory motive.¹³ Although the Employer asserts that the supervisory aspects of the HSS positions were the reasons for its bargaining proposals, the Regional Director concluded in the December 2011 Decision and Direction of Election that the HSS employees are not supervisors because they spent only a small percentage of time performing Incident Command and Incident Owner duties. Furthermore, the Employer's position that the HSS employees are supervisors because they perform those two functions is undermined by its written policies. While the Employer's procedures manual states that HSS employees assume the role of Incident Command during the *initial* stages of an emergency, an "Advanced Response Incident Commander" takes over once it is determined that the initial emergency cannot be immediately contained. At that point, the HSS employee, in the Incident Command role as written, would not have the authority to exert unfettered control over the plant and its management personnel, which the Employer claims is its major concern. The Employer's procedures manual also states that investigations conducted by HSS employees as Incident Owners are supervised. An individual identified as the "Responsible Supervisor" assigns an HSS employee to be the Incident Owner and works closely with him to document an incident. Indeed, one HSS employee's 2011 performance appraisal states that he "work[ed] closely with the [R]esponsible [S]upervisors" when performing his Incident Owner duties. Thus, the Employer's argument that there may be a conflict of interest concerning HSS employees performing Incident Owner duties is baseless given that they are supervised by a management official when performing those duties.

Furthermore, the Employer's business justification for reducing shift hours and the total number of HSS employees is based on the predicate that their overall duties will be significantly decreased after their Incident Command and Incident Owner duties are taken away because those duties are supervisory in nature. However, this

wage increase granted to unrepresented employees if they decertified union); *Phelps Dodge Mining Co.*, 308 NLRB at 998 (finding unlawful motive, in part, where employer referred to "union-free" employees and special bonuses they received shortly before represented employees were eligible to petition for decertification); *Peabody Coal Co.*, 265 NLRB at 100 & n.12 (employer official stated benefits granted to unrepresented employees did not pertain to represented employees because "you're trying to get into the [u]nion").

¹³ See, e.g., *Phelps Dodge Mining Co.*, 308 NLRB at 996-97 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d at 470 (where trier of fact finds employer's stated motive for personnel action is false, trier of fact can infer that employer was attempting to conceal true, discriminatory motive)).

assertion also fails because, as set forth above, the Employer's true motive for seeking to remove the HSS employees' Incident Command and Incident Owner duties was to retaliate against them for electing the Union and not because of legitimate business reasons.

Similarly, the Employer's asserted business reason for contracting out the HSS employees' prior EMT duties also does not withstand scrutiny. The Employer merely asserted that EMT duties were "never . . . a core or necessary function" of HSS employees and, thus, it was free to contract with a third party to provide EMT services. In other words, the Employer did not provide a bona fide business reason, but simply said that it could subcontract the EMT duties because it had the right to. More important, as stated above, the Employer expressly threatened before the representation election to contract out HSS employee duties to prevent them from receiving overtime hours and this proposal was the realization of that threat. Also, the Employer's assertion that EMT duties were "never" a necessary requirement is contradicted by the written job description for HSS employees, which states under the section titled "QUALIFICATIONS REQUIRED" that HSS employees have an "EMT Certification or the ability to acquire certification within 30 days." Thus, the employer's sham reasoning for wanting to subcontract EMT duties further supports a finding that it was making a discriminatory proposal to retaliate against the HSS employees for electing the Union.

B. The Employer Violated Section 8(a)(5) by Bargaining in Bad Faith and Unilaterally Implementing its Final Proposal¹⁴

The Employer also violated Section 8(a)(5) because it could not have bargained in good faith with the Union over the terms and conditions of employment for the HSS employees where, as set forth above, its bargaining proposals were discriminatorily motivated.¹⁵ Therefore, the parties could not have reached a legitimate impasse

¹⁴ As stated in note 9, *supra*, although the Region previously dismissed the Union's bad-faith bargaining charge in Case 31-CA-09017, and the Office of Appeals affirmed, those actions have no preclusive effect on the instant case.

¹⁵ *Cf., e.g., Gold Coast Produce*, 319 NLRB 202, 202 n.1 (where employer's decision to subcontract work is motivated by union animus, it is not exempt from its bargaining obligation under *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 687-88 (1981), because "[d]iscrimination on the basis of union animus cannot constitute a lawful entrepreneurial decision"); *Strawsine Mfg. Co.*, 280 NLRB 553, 553 (1986) (same).

during negotiations.¹⁶ Absent a lawful, good-faith bargaining impasse, the Employer was not privileged to unilaterally implement its final offer.¹⁷ As a result, the Employer further violated Section 8(a)(5) by unilaterally implementing its final offer on December 10.¹⁸

Accordingly, for the reasons stated above, the Region should issue complaint, absent settlement.

/s/
B.J.K.

ROF(s) - NxGen

H: ADV.31-CA-096709.Response.Phillips66. (b) (6), (b) (7)(C)

¹⁶ See, e.g., *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001) (“a lawful impasse cannot be reached in the presence of unremedied unfair labor practices”); *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001) (same).

¹⁷ See, e.g., *Titan Tire Corp.*, 333 NLRB at 1158 (“an employer that has committed unfair labor practices cannot ‘parlay an impasse resulting from its own misconduct into a license to make unilateral changes’”); *Dynatron/Bondo Corp.*, 333 NLRB at 752 (same).

¹⁸ See *Jano Graphics*, 339 NLRB 251, 251 (2003) (employer violated 8(a)(5) by unilaterally implementing final offer when parties had not reached valid impasse; employer unlawfully had refused to bargain unless union first agreed to permissive bargaining subject, i.e., contract ratification vote by unit employees); *Titan Tire Corp.*, 333 NLRB at 1159; *Dynatron/Bondo Corp.*, 333 NLRB at 753.