

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

# Advice Memorandum

DATE: May 21, 2004

TO : Frederick Calatrello, Regional Director  
Region 8

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

SUBJECT: Kroger Co.  
Case 8-CA-34610-1

530-6033-8400  
725-6750-0100  
737-8401-6600

This Section 8(a)(5) case was submitted for advice as to whether the parties reached a meeting of the minds in their Memorandum of Agreement (MOA), requiring them to execute and implement a collective-bargaining agreement, and, if not, whether the Employer violated Section 8(a)(5) by implementing only part of an agreed-upon wage proposal. We conclude that the unambiguous language of the MOA demonstrates that the parties reached a meeting of the minds on all subjects, including wage increases for "top rated" baggers and an October 1 implementation date for "maintenance of benefits" increases. However, since the collective-bargaining agreement forwarded to the Employer for execution did not accurately reflect that meeting of the minds, the Employer was not obligated to sign it and was not otherwise obligated to implement the bagger wage increase. Therefore, the charge should be dismissed absent withdrawal.

## **FACTS**

Kroger Co. (the Employer) and UFCW Local 911 (the Union) were parties to a collective-bargaining agreement covering a unit of grocery employees that expired on April 1, 2003.<sup>1</sup> Between February 25 and April 24, the parties met on several occasions to negotiate a successor collective-bargaining agreement. The negotiations for, and post-bargaining conduct regarding, the two disputed contractual items are discussed below.

### **1. Wage Increases for "Top Rated" Baggers.**

The expired contract provided for a progression of semi-annual wage increases for all employees. Employees "topped out," i.e., reached the top of their wage progression, between 30 to 48 months of employment, depending on their job and part-time versus full-time status. Employees who had not "topped out" were considered to be "within the progression." The expired contract had

---

<sup>1</sup> All dates are 2003, unless otherwise indicated.

provided for separate wage scales and increases for clerk/cashiers, deli-bakery, general merchandise clerks, and baggers.

When negotiating the new agreement, the parties made separate wage proposals for "within the progression" employees and "topped out" employees. During the April 12 session, the Employer proposed specified annual wage increases for the groups of "full time top rate" employees, "part time top rate" employees, and "progressions" (referring to employees within a progression), along with various department heads. Unlike the expired contract, the proposal did not refer separately to different types of grocery employees within the three generic groups. Thus, baggers were not specifically referred to in or separated out from the wage proposals. The Employer codified this proposal in a writing dated April 13.

At the April 24 bargaining session, the Union made oral counter-proposals to the Employer's April 13 offer for "top rate" employees and "progression" employees. The Employer responded in writing, proposing slightly lower increases for "top rated" employees. The Employer's written response also provided for a \$100 lump sum payment to "progression" employees, with the exception of baggers. Thus, the Employer now explicitly excluded "progression" baggers from its April 13 written proposal.

During this session, Union and Employer representatives met away from the bargaining table, where the Employer reiterated that it did not want to give the lump sum payment to the "progression" baggers. The Union asserts that there was no suggestion that "top rated" baggers would not receive the Employer's specified wage increase. The Employer asserts that the Union asked the Employer to give "top rated" baggers the wage increase and that it refused.

The parties eventually agreed to a wage proposal almost identical to the Employer's April 24 proposal (with a lump sum payment to employees within the progression of \$125 rather than \$100). The parties incorporated this agreement, along with other agreements, into the MOA that was signed by both parties.

The MOA was not written in complete contract terms. Instead, it adopted the Employer's April 13 "offer for ratification" with changes: "The 4-13-03 'offer for ratification' with the following changes represent the parties unanimous recommendation for new labor agreements . . . between [the Union] and [the Employer]."

The MOA provides for a 30-cent annual increase for "top rates." The MOA does not refer to different types of "top rate" grocery workers. The MOA further provides for a "\$125 lump sum . . . to be paid within two weeks of ratification" for "Employees in progressions (except courtesy clerks)."<sup>2</sup>

## **2. Maintenance of Health & Welfare Benefits.**

The prior contract provides for Health and Welfare "maintenance of benefits" increases effective on August 1 each year.

Before the April 12 session, the Employer proposed "maintenance of benefits" increases of up to 4% each year of the contract but did not include an effective date. The Union's counterproposal included a higher percentage and also did not specify an effective date.

At the April 12 session, the Employer countered with a higher percentage annual increase and, for the first time, proposed to change the effective date of the "maintenance of benefits" increases from August 1 to October 1. The Union rejected the Employer's increase and expressed its disagreement with the proposed October 1 implementation date. The Employer's final proposal at this session was to increase the "maintenance of benefits to 7% for each year of the contract with an effective date of October 1."

In the Employer's April 13 "offer for ratification," the Employer included its April 12 proposal on "maintenance of benefits," including the October date of implementation:

**Health and Welfare** - Change to read: Maintenance of benefits of up to seven (7) percent, if needed, 7% in October 2003; 7% in October 2004; 7% in October 2005 and 7% in October 2006.

At the April 24 session, the Union orally proposed a higher "maintenance of benefits" increase and an August 1 effective date. Later in the session, the Employer made a counterproposal on the percentage increase (10%) but did not specify when the "maintenance of benefits" increases would become effective.

The Union asserts that it later met with the Employer and stated that it wanted to clarify that "maintenance of benefits" was now 10% with a roll-over effective August 1. The Employer asserts that it did not agree to that.

---

<sup>2</sup> "Courtesy clerks" is another term used to describe baggers.

The parties eventually agreed on the following MOA provision: "Change MOB (maintenance of benefits) to 10%, 10%, 10%, 10% with roll over." The MOA did not specify an effective date of the "maintenance of benefits." As discussed above, however, the MOA adopted the Employer's April 13 "offer for ratification" with specified changes, and the April 13 offer included the October date of implementation.

### **3. Events After Ratification.**

The employees ratified the MOA on April 30. On May 20, the Union forwarded to the Employer for execution a collective-bargaining agreement that included the bagger wage increase and an August 1 "maintenance of benefits" effective date. The Employer refused to sign the agreement, claiming that it contained some errors, including the language regarding wage increases for the topped out baggers. The Union refused to change any of the language, including the erroneous August 1 date. The Employer implemented the other terms and conditions of the MOA, including all other employee wage increases.

Around August, the Union asked the Employer to effectuate the maintenance of benefits increases as of August 1. The Employer refused and asserted that October 1 was the new effective date.

The parties met two more times in the Fall of 2003 but have not resolved these disagreements.

### **ACTION**

We conclude that the MOA was unambiguous and that the parties reached agreement on all material terms of a collective-bargaining agreement. The terms of that Agreement included providing wage increases for top-rated baggers and providing maintenance of benefit increases effective October 1. The Employer was under no obligation to execute the collective-bargaining agreement forwarded by the Union, because it contained an incorrect August 1 effective date for the "maintenance of benefits" increases. The Employer also did not violate Section 8(a)(5) by implementing wage increases without implementing the bagger increase. Therefore, the charge should be dismissed absent withdrawal.

Parties are obligated to execute a collective bargaining agreement once they have reached a meeting of the

minds on all substantive issues.<sup>3</sup> If parties have executed a Memorandum of Agreement that reflects a meeting of the minds, they are also obligated to execute a full collective-bargaining agreement that incorporates the terms of the MOA and other documents referenced therein.<sup>4</sup>

In determining whether the parties had a meeting of the minds on an issue, the Board prohibits the consideration of parol evidence where the written terms of an agreement are unambiguous.<sup>5</sup> Thus, where contractual provisions are unambiguous, "[p]arol evidence is . . . not only unnecessary but irrelevant."<sup>6</sup>

Here, we conclude that the two disputed provisions are unambiguous, and that it would not be appropriate to consider such parol evidence as the April 24 off-the-record discussions in determining whether there was a meeting of the minds. Regarding the "top rated baggers," the MOA wage increase provision refers generally to all "top rated" grocery employees, which would include baggers.<sup>7</sup> Furthermore, the MOA specifically excludes the "progression" baggers from the lump sum payment given to grocery employees, and does not specifically exclude baggers from

---

<sup>3</sup> Buschman Co., 334 NLRB 441, 442 (2001); Henry Bierce, 307 NLRB 622, 628-29 (1992).

<sup>4</sup> Teamsters Local 617 (Christian Salvesen), 308 NLRB 601, 602 (1992).

<sup>5</sup> See, e.g., America Piles, Inc., 333 NLRB 1118, 1119 (2001) (refusing to consider companies' evidence that they only intended to agree to project agreements where agreements "clearly and unequivocally" bound the companies to the full term of the collective bargaining agreements); NDK Corp., 278 NLRB 1035, 1035 (1986) (refusing to consider testimony that union assured company that contract would not be enforced where agreement's terms were unambiguous); Made 4 Films, Inc., 337 NLRB 1152, 1158-59 (2002) (refusing to consider company's testimony that, despite collective bargaining agreement referencing addenda on health and welfare contributions, those addenda were not part of agreement).

<sup>6</sup> See NLRB v. Electric Workers Local 11, 772 F.2d 571, 575 (9th Cir. 1985).

<sup>7</sup> Although the prior collective-bargaining agreement listed baggers separately in the wage provision, other provisions in that agreement included baggers in the general category of "grocery workers."

the "top-rated" employee wage provision. Thus, all "top rated" employees, including baggers, should receive the wage increases specified in the MOA.<sup>8</sup>

Regarding the implementation date for the "maintenance of benefits," the Employer's April 13 written offer specifically includes the October implementation date, and the MOA specifically adopts the Employer's April 13 offer except as changed in the MOA. Since the MOA specifies no changes as to the date of implementing the maintenance of benefits, the MOA clearly provides for an October 1, not August 1, date of implementation. Thus, it would not be appropriate to consider parol evidence inconsistent with what appears from the Agreement to be a clear meeting of the minds on this substantive term.

Notwithstanding the parties' meeting of the minds on all substantive issues, the Employer was not obligated to execute the collective-bargaining agreement forwarded by the Union because it did not accurately reflect the parties' agreement.<sup>9</sup> Thus, since the agreement forwarded by the Union incorrectly included an August 1 effective date for

---

<sup>8</sup> We reject the Employer's assertion that there was no agreement because the Employer clearly made a mistake in failing to explicitly exclude the baggers from the written wage increase provision. Any such mistake was not the kind of obvious error which the Union should have realized and should not be permitted to benefit from. See Hospital Employees Local 1199 (Lenox Hill Hospital), 296 NLRB 322, 326 (1989) (unlike situations where there were obviously incorrect transcriptions or typographical errors in codifying parties' agreements, employer and union representatives clearly understood that handymen would be excluded from an agreed-upon wage increase. Although a union representative mistakenly included them in the agreement submitted to the employees for ratification, the Board affirmed ALJ finding that the union's unilateral mistake was not the fault of the employer and did not excuse the union from executing a contract with the agreed-upon exclusion). There is no reason to discredit the Union's testimony that the parties discussed exclusion of the progression baggers from the lump sum payment but had no discussion about the exclusion of top-rated baggers from the top-rated employee wage increase. Therefore, the Union would have no way of knowing that the Employer had mistakenly included the top-rated baggers in its top-rated employee wage increase proposal, and the Employer should be held to the bargain it made.

<sup>9</sup> See Shaws Supermarkets, 337 NLRB 499, n.2, 505 (2002).

maintenance of benefits increases, the Employer was privileged to refuse to execute it.

In this regard, we note that while the parties in fact reached an agreement here, neither has bargained in good faith regarding a written contract that each must execute. Thus, the Union has made clear it will not forward a written document containing the agreed-upon October 1 effective date for "maintenance of benefits," while the Employer has refused to execute any contract containing the agreed-upon wage increase for baggers. In these circumstances, issuing complaint would not be consistent with the principles of good faith collective-bargaining between the parties.<sup>10</sup>

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

---

<sup>10</sup> See generally Continental Nut Co., 195 NLRB 841, 848 (1972) (where union engaged in bad faith conduct precluding a contract during much of negotiations, allegations that employer violated 8(a)(5) by the totality of its conduct could not be tested and, therefore, were not found).