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

Advice Memorandum

DATE: January 12, 2001

TO : Elizabeth Kinney, Regional Director
Region 13

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

SUBJECT: Gardner Asphalt
Case 13-CA-38934

530-6033-0150
530-6067-2070-5000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by refusing to resume face-to-face bargaining for a successor contract unless the Union submitted a written proposal.

FACTS

The most recent collective-bargaining agreement between the Employer and Union was effective from 1994 until October 31, 1998. In August 1998, the parties met to negotiate a successor agreement; the Union submitted a written proposal, to which the Employer later submitted a written counterproposal. By October 11, 1998, the parties believed they had reached a verbal agreement on a new contract. On October 20, the Union submitted a written "memorandum of agreement" which purported to set forth the contractual terms, but which the Union admitted omitted some terms. Two days later, the Employer submitted a revised "memorandum of agreement" which included those omitted terms, but which the Union contends also included terms not agreed to. The Union then prepared a second version of a "memorandum of agreement" which it claims contained only those terms the parties agreed upon. On December 4, 1998, the parties met in an effort to reconcile the differences in the memoranda, but were unable to do so. The Union refused to engage in further negotiations.

On December 7, 1998, the Union filed a charge alleging that the Employer had refused to sign a memorandum of agreement as negotiated between the parties. On April 12, 1999, the Union filed another charge alleging that the Employer had not implemented terms set forth in the memorandum and had made unilateral changes. On September 14, 1999, the Region dismissed the first charge because there was insufficient evidence that the parties had

reached an agreement. The Region also dismissed that portion of the second charge alleging failure to implement the "agreement," but found merit to the unilateral change allegations, finding that there had been no impasse in negotiations nor agreement as to the terms the Employer implemented. On July 21, 2000, the Region issued a complaint on the second charge, alleging violations of Section 8(a)(5) in unilateral changes in Union access and in holiday pay.

No bargaining negotiations took place after the December 4, 1998 meeting. In late August 2000, the Union wrote the Employer requesting a resumption of negotiations for a new contract. The Employer did not respond. In September 2000 the Union called and left two messages to see if the Employer would resume negotiations. By letter dated September 22, the Employer stated that it was willing to sit down to negotiate proposed changes to the expired contract, but that the Union needed to submit a written contract proposal outlining the changes sought before the Employer would meet. On October 11, the Union replied that the only way to begin the bargaining process was to meet "face to face," as opposed to exchanging proposals by mail. The Employer did not respond. On October 25, the Union left a message with the Employer to schedule negotiation dates. The Employer did not respond.

ACTION

We conclude that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unlawfully conditioned meeting and bargaining upon the Union first submitting a written proposal.

The Board has long held that an employer violates Section 8(a)(5) by refusing to meet and bargain unless a union supplies a written proposal, both in the context of initial bargaining negotiations[1] as well as where the parties have already been conducting face-to-face negotiations.[2] The one limited exception is where an employer, after a good-faith impasse in bargaining, was found not to have unlawfully refused to meet and bargain

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[1] See, e.g., Fountain Lodge, Inc., 269 NLRB 674 (1984).

[2] See, e.g., Beverly Farm Foundation, 323 NLRB 787, 793 (1997), enf'd. 144 F.3d 1048 (7th Cir. 1998); Chemung Contracting Corp., 291 NLRB 773, 774 n. 3 (1988); Caribe Staple Co., 313 NLRB 877, 890 (1994)(conditioning further negotiations on submission of written agenda).

when it asked the union to first furnish the employer with its proposals.[3]

In the instant case, the Region specifically found there was no impasse in bargaining in determining that the Employer was not privileged to make unilateral changes. Thus, the facts here do not fall within the limited exception to the general rule that an employer may not lawfully condition meeting and bargaining upon receipt of written proposals. Moreover, while there has been a significant passage of time,[4] it would appear that the union had a "proposal" on the table which was the Union's second version of the "memorandum of agreement." In these circumstances, complaint is warranted.

B.J.K.

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[3] Holiday Inn Downtown-New Haven, 300 NLRB 774, 774-76 (1990)(union's bare assertion of "flexibility" on subcontracting proposal which had caused impasse insufficient to break deadlock).

[4] The significant passage of time arguably equates more with the cases involving initial bargaining rather than impasse.