

Hard Bargaining or Unlawful Bargaining: What A Difference A Board Member Makes

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The National Labor Relations Board (NLRB) recently held that an employer's proposal and adherence to proposals could in itself be deemed to be unlawful bad faith bargaining. *District Hospital Partners*, 375 NLRB No. 55 (5/8/2024).

The case is significant in two regards. First, the exact same case had been before the NLRB in 2021 before a Republican majority board which voted 2-1 to overturn the administrative law judge's (ALJ) decision and found no unlawful practices. Later, that decision was vacated based on a possible conflict of interest by one of the majority members. Upon reopening the matter, a new panel, this time having a majority of Democratic appointees, voted 2-1 to affirm the ALJ's decision and to order significant relief. Second, the NLRB indicated that the employer's maintenance of three proposals in particular was sufficient in itself to justify a finding of bad faith bargaining. This runs counter to a long history in which the board would rarely rely on the content of an employer's non-final proposals in finding bad faith bargaining.

The hospital had a long-term bargaining relationship with the Service Employees International Union. When the then-current agreement came up for renewal, the employer announced that it wanted to engage in wide ranging revisions of the agreement. The board found three of the employer's proposals together would so adversely affect the union's role as bargaining agent that their being put on the table and maintained through several months of bargaining was in itself sufficient to find bad faith bargaining. The specific proposals were: 1) to revise the Management Rights clause to give the employer discretion in using non-unit employees to perform the work, eliminate the requirement of just cause for discipline, change health care benefits and to subcontract; 2) a discipline policy that eliminated the need for just cause for discipline, eliminated progressive discipline requirements and removed discipline short of discharge from the grievance and arbitration process; 3) a no strike provision which waived the right to strike over contract breaches and unlawful acts. Eventually the employer modified its proposal to eliminate arbitration as the last step of the grievance process and replace it with non-binding mediation. The parties bargained for 18 months without reaching agreement. The talks ended when a majority of the employees filed a petition to deauthorize the union, and the employer withdrew recognition.

In 2019, the ALJ held that the employer proposal taken as a whole so undermined the union's role that they constituted surface bargaining designed to avoid rather than reach agreement. He therefore ordered the hospital to recognize and continue bargaining with the union until an agreement or impasse was reached. In 2021, the board issued its first decision, overruling the ALJ. The board characterized the above-described proposals as lawful in themselves, and further suggested that because they were only initial proposals, rather than final offers, no inference of bad faith bargaining could be made. The 2021 NLRB panel also faulted the union for merely rejecting rather than countering the employer's proposals on these issues.

Upon reopening the case, the current board revisited the exact same ALJ decision and record as had been considered by the 2021 board panel. The current board held that the three proposals when considered together effectively required the union to "cede substantially all of its representational functions" such that the employer "could not seriously have expected meaningful bargaining." The current board rejected the 2021 panel's reliance on the non-final nature of the proposals by noting that the employer had maintained basically the same proposals though 14 months of

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bargaining before making any movement. The current board held that such a pattern frustrated the bargaining process.

Employers entering negotiations, particularly those seeking to drive some hard bargains would be well advised to calibrate their positions in light of this decision, and in particular should closely examine proposals that would vest undue discretion in management and thereby undermine the union's role as bargaining agent.

If you would like to discuss the decision of the NLRB or other employment law matters, please contact your Miller Canfield attorney or one of the authors of this alert.