BOND INFORMATION MEMO

Labor and Employment Law

January 2014

Union's Rejection of Company's "Final" Proposal Does Not Always Signify Impasse

In collective bargaining, a "final" proposal is often a term of art, used to signal the end of a party's willingness to move. However, negotiators frequently will continue to move even after a purportedly final offer. In the view of the National Labor Relations Board ("NLRB"), "final" does not always really mean final. Recently, the Fifth Circuit Court of Appeals agreed with the NLRB's view. In *Carey Salt Co. v. NLRB*, the Fifth Circuit Court of Appeals affirmed the NLRB's holding that labor negotiations had not reached impasse, even though the union had asked for the company's "final" proposal, the company had provided it, the union had rejected it, and the parties had thereafter confirmed that they were far apart.

These facts, on their face, would seem to suggest that the parties had reached impasse, and that the company was therefore entitled at that point to suspend negotiations and implement its final offer. However, the NLRB looked behind these facts, and concluded that the union, when it requested the company's final offer, had not intended to bring negotiations to a halt. The NLRB credited the union's testimony that the union had wished only to poll its membership on the company's position and continue bargaining. The union's negotiator testified – without significant rebuttal – that his request for a "final" offer had included the caveat that the parties negotiate further after receiving it. Under these circumstances, the NLRB held, and the Fifth Circuit affirmed, that the company had prematurely seized on the final offer phraseology to declare impasse and to decline to meaningfully negotiate thereafter.

This strategy had disastrous consequences for the company, not the least of which was that it was ultimately responsible for wages lost during an ensuing strike, which – as a result of the company's premature cessation of negotiations and implementation of its final offer – was held to constitute an "unfair labor practice strike." Although the Fifth Circuit does not have jurisdiction over employers in New York, the Court's decision illustrates the treacherous waters that employers in any state must navigate when assessing whether impasse – always an evasive concept – has truly been reached. The Fifth Circuit's decision includes a particularly scholarly recitation on the subject of impasse in collective bargaining, recounting and discussing precedent on this difficult issue.

A second issue addressed in the case is whether, and under what circumstances, purportedly "regressive" proposals – *i.e.*, company proposals that reduce previous terms or concessions – can be a factor in assessing "bad faith" bargaining on the part of the company. The NLRB held that the company had bargained in bad faith by introducing so-called regressive proposals. However, the Fifth Circuit rejected the NLRB's position, clarifying that regressive proposals are lawful as long as they are not designed or intended to avoid or frustrate bargaining. The Fifth Circuit found no evidence that the regressive proposals had been deployed in a bad faith manner in this instance. Therefore, the Court rejected the NLRB's sweeping conclusion of bad faith based on these proposals alone.

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