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“Hard” Bargaining Proposals Placed Into Final Offer Evidence Bad Faith Bargaining, NLRB Concludes

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On May 21, 2020, the NLRB issued a decision in *Altura Communication Solutions, LLC*. The case asked the Board to consider whether a series of broad proposals made by the employer during collective bargaining amounted to bad faith bargaining and 8(a)(1) and 8(a)(5) violations.

The Board noted that while it is not its role to decide whether proposals are acceptable, it will examine proposals to determine whether they are designed to frustrate the parties’ goal of reaching a collective bargaining agreement. The NLRB normally does not evaluate the actual proposals made by the parties. However, this was a rare case in which proposals’ *content* was relevant to determine whether a party was making a sincere effort to reach an agreement. The Board found that the employer did not make the requisite effort to reach an agreement, and therefore violated Sections 8(a)(1) and 8(a)(5) of the NLRA by failing to bargain in good faith.

The Board summarized specific provisions of the employer’s final offer to the Union, including:

- “A sweeping management-rights clause” that provided the employer the unilateral right to implement management decisions, including determining whether employees covered by the CBA or other workers would produce goods or services. This clause also largely excluded the exercise of management’s rights from the grievance procedure.
- A broad “zipper” clause which waived the Union’s right to bargain regarding any subject.
- Work-jurisdiction provisions placing no restrictions on the employer’s use of non-unit employees for work that had been exclusively or regularly performed by the unit.
- A broad no strike clause prohibiting protests for any reason.

- An arbitration clause limiting arbitrators' authority to specific alleged violation decisions.
- Layoff provisions providing the employer with broad discretion to eliminate seniority as a consideration, and conditioning severance benefits on waivers.
- A provision stating that the agreement does not guarantee work hours.
- Healthcare provisions allowing the employer to eliminate coverage at will under certain conditions, and excluding coverage disputes from the grievance procedure.
- Proposals to transfer certain benefits, terms, and conditions not addressed in the agreement to a handbook entirely within the employer's control.
- A two-tier wage proposal giving the employer complete discretion over setting rates above specified minimums and raising individual employees' wages, and substantial discretion to reduce wages.

The Board conceded that bargaining for provisions which grant the employer unilateral control over certain terms and conditions of employment is not a per se unfair labor practice. However, the Board noted it consistently has found that proposals can evidence bad-faith bargaining when they give employers "unilateral control over virtually all significant terms and conditions of employment." A purpose of the Act, the Board noted, is for the parties to reach an agreement regarding working conditions; draft proposals which instead grant employers the ability to make unilateral changes to significant terms and conditions of employment are at odds with this goal. An inference of bad faith is appropriate when the employer's proposals would leave the union and employees with fewer bargaining rights statutorily provided to them without a contract.

Overall, the Board found the employer's proposals evinced a failure to bargain in good faith: the wage proposals would have granted the employer complete discretion to raise individual employees' wages above minimums, and substantial discretion to reduce individual wages. The proposals granted the employer complete discretion over work hours and, accordingly, total compensation. The healthcare and handbook proposals combined to essentially allow the employer to unilaterally alter or eliminate many significant benefits such as life insurance and disability benefits. The proposals would have given the employer the ability to unilaterally alter policies governing paid time off, even if it could not alter the amount of paid time off.

The Board considered how the employer's proposals would combine in their totality: the management-rights clause, no-strike clause, and grievance procedure combined to deprive employees of any avenue to challenge the employer's decisions exercised under the management-rights clause, including a hypothetical decision to eliminate the unit.

Considered in their entirety, the employer's proposals would have impeded the Union's ability to function as the employees' bargaining representative such that the employer could not seriously have expected meaningful bargaining over the proposals. The Board noted that certain of the individual proposals would not be unlawful in other circumstances. Still, it ultimately reasoned that despite being unable to decide whether particular proposals are acceptable, "it must sometimes consider a party's proposals, along with all other relevant evidence, if the duty to bargain is to have any meaning at all." The Board also relied on certain additional indicia of bad faith, such as the employer's unilateral implementation of portions of its proposal and insistence that the Union provide advance proposals to continue bargaining, in finding bad faith.

This is a pretty rare case where the NLRB reviewed the content of the employer's proposals and determined that the totality of proposals constituted evidence the employer violated its obligation to bargain. The outcome of this case most likely hinged on the fact that these very management heavy proposals were included in a final offer. The employer even had declared impasse over the proposals. The Board has long held that employers may not insist to impasse on proposals that give the company discretion.

Most of the time, the NLRB will not delve into the content of a party's proposals. Exceptions are when the content is alleged to be unlawful or when the proposals ask the union to give up broad rights. In the final analysis, the Board sometimes looks to the totality of a party's conduct to determine whether it has bargained in good faith with the goal of reaching an agreement. Even "hard" bargaining is permissible –and a function of leverage– so long as such bargaining does not go too far in eroding the rights of a union to represent its members.

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