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Eighth Circuit Upholds NLRB Bad Faith Bargaining Decision and Broad Remedies Order

Labor Relations Update on **April 12, 2024**

On April 8, 2024, the U.S. Court of Appeals for the Eighth Circuit, in *United Food & Com. Workers' Union, Loc. No. 293 v. Noah's Ark Processors, LLC*, No. 23-1895 (8th Cir. 2024), upheld the National Labor Relations Board's ("NLRB") decision that a meat processor ("Noah's Ark") illegally bargained in bad faith with a local chapter of the United Food & Commercial Workers' Union ("Union"), and that the processor must, among other remedies, reimburse the Union for negotiating expenses, representing an extreme example of the types of broad remedies that can be ordered by the NLRB for bad-faith conduct.

Background

In early 2018, Noah's Ark and the Union began negotiations to replace an already expired collective bargaining agreement ("CBA"). The first attempt at negotiations were unsuccessful because the company's appointed representative lacked decision making authority, leading to a CBA offer that excluded agreed upon changes. Based on this conduct, the Union filed unfair labor practices charges with the NLRB.

While considering the charges, the NLRB filed a petition in federal district court seeking injunctive relief to force Noah's Ark back to the negotiating table. The injunction was granted, but Noah's Ark reentered negotiations only long enough to express an unwillingness to negotiate and to present another final offer. The district court held Noah's Ark in contempt, and the NLRB determined that Noah's Ark had failed to "bargain in good faith" and ordered the parties to renew negotiations. The Eighth Circuit upheld this order.

Noah’s Ark returned to the negotiating table and brought proposals that included eliminating binding arbitration for labor grievances, subcontracting “existing operations”, cutting vacation days, and limiting holiday pay—all refused by the Union. The company conceded to allowing an enclosed bulletin board for union announcements, adherence to nondiscrimination laws, and providing rest periods and leaves of absence for its employees—but still no agreement with the Union. Noah’s Ark extended another final offer, which included previously-rejected proposals by the Union; the Union rejected the final offer again. Noah’s Ark declared that parties were at impasse, and to break the impasse, unilaterally implemented the proposals from its last, best, and final offer.

The Union filed another unfair labor practice charge, which proceeded to a complaint and trial before an administrative law judge; the ALJ found that Noah’s Ark bargained in bad faith, and prematurely declared an impasse. The ALJ ordered the negotiations to continue, and for Noah’s Ark to “provide backpay to its employees, reimburse the union for its bargaining expenses, and have its CEO read a remedial notice at an all-employee meeting.”

On review to the NLRB, the Board expanded these remedies by further ordering Noah’s Ark to, “mail a copy of the remedial notice to every employee, post the notice in its plant, and allow ‘The Board or… its duly[] authorized representatives’ to inspect the facility for up to a year.” The Eighth Circuit panel upheld the NLRB’s decision and order.

The Eighth Circuit’s Ruling on Appeal

Bad Faith Negotiation

The court determined that there was “substantial evidence of the company’s unwillingness to approach renewed negotiations with an open mind and sincere intention to reach an agreement”—the longstanding standard for parties’ good-faith bargaining requirements under Section 8(d) of the NLRA.

The court observed that Noah's Ark opened negotiations with a regressive offer and refused to engage on major issues. Its proposals backtracked on key issues, only made progress on minor points, and rejected union proposals without suggesting alternatives. The court reasoned that while an employer does not have to "agree to a proposal or make concessions" they cannot "negotiate as a kind of charade or sham, all the while intending to avoid reaching an agreement." The company's conduct provided enough evidence for the court to uphold the NLRB's conclusion of bad faith bargaining in violation of Section 8(a)(5) of the NLRA.

No-impasse

The court also determined that there was substantial evidence to support the NLRB's finding that an bona fide impasse did not exist at the time the employer unilaterally implemented its last, best and final offer. An employer can only act unilaterally when "good-faith negotiations have exhausted the prospects of concluding an agreement." Noah's Ark ended renewed talks quickly, did not include major issues during the most recent round of negotiations, and "jumped the gun" on declaring an impasse, according to the court—all evidence that the court found to support the NLRB's decision that no impasse existed.

Noah's Ark argued that the declaration of impasse was not premature because the Union was insistent on arbitration of workplace disputes. The court reasoned that while the NLRB could have concluded that "deadlocking on arbitration was fatal to the negotiations, there was another interpretation of the evidence: it gave Noah's Ark an excuse to end them." The Eighth Circuit did not review the NLRB's decision de novo; rather, the standard of review only required the court to determine if there was substantial evidence to support the NLRB's decision, which it did.

Remedies

The court held that it was too late to consider Noah's Ark's objections to the NLRB's broad order of remedies. Under the National Labor Relations Act, the court can only "consider those objections that were urged before the Board" except in cases of "extraordinary circumstances". While Noah's Ark did challenge the ALJ's order, the company did not seek reconsideration of the NLRB's additional remedies. The court refused to recognize any extraordinary circumstances and granted the enforcement of the NLRB order.

Takeaways An appeals court can review NLRB remedies to determine if they fall within the NLRB's "broad discretionary power." However, this objection can only be preserved by first urging it before the NLRB. Failure to initially raise the objection before the NLRB limits an appeals court's review to matters of "extraordinary circumstances." Notably here, the Eighth Circuit recognized that it would ordinarily have reviewed the order had Noah's Ark previously raised the objection concerning the remedies. This case provides a helpful reference point of what parties should do (and avoid) when attempting to ensure a complete NLRB record before appealing to the Circuit Courts—particularly with respect to remedies, as we have seen the current NLRB and General Counsel seek broad remedies against employers for violating the Act.

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