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You Shall Not Impasse: Eleventh Circuit Affirms the NLRB's High Bar for When Further Bargaining is Futile

Labor Relations Update on **March 2, 2026**

On February 19, 2026, the Eleventh Circuit upheld a 2024 National Labor Relations Board (the "NLRB" or "the Board") decision finding the now-defunct Southwest Florida Symphony Orchestra and Chorus Association prematurely declared an impasse in bargaining and unlawfully implemented its last, best, and final offer. A three-judge panel issued an unpublished decision in *Southwest Florida Symphony Orchestra and Chorus Association Inc. v. NLRB* reaffirming the Board's high bar for lawfully declaring a bargaining impasse.

In September 2020, after approximately one year of negotiations for a successor collective bargaining agreement with a local chapter of the American Federation of Musicians, the Symphony submitted to the Union what it deemed its last, best, and final offer. The Union's membership failed to ratify the offer, prompting the Symphony to declare impasse and hire musicians for its upcoming performances under the terms of its rejected offer. In September 2021, the NLRB issued a complaint alleging that the Symphony violated the National Labor Relations Act ("NLRA" or the "Act"). Notably, an administrative law judge from the NLRB's Division of Judges initially sided with the Symphony, finding there was no "room for movement" on the parties' respective proposals, however, the Board reversed and held that the Symphony failed to demonstrate that further negotiations would have been futile. As a remedy, the Board issued a bargaining order instructing the Symphony to return to the bargaining table, instructed the Symphony to reinstate the pre-impasse terms and conditions of employment, and ordered make-whole relief for affected employees including the enhanced make-whole remedies for any direct or foreseeable pecuniary harms authorized by the Board's 2022 *Thryv, Inc.* decision (as we reported here).

On appeal, the Eleventh Circuit ruled in favor of the Board relying in large part on an October 2020 phone call where the Union's lead negotiated stated a willingness to meet again and offered to survey members about the reasons for the failed ratification vote. The court held the Union's open invitation for future meetings coupled with recent movement on bargaining positions by both parties prior to the declaration of impasse was sufficient to reasonably infer the possibility of future progress.

This case illustrates the difficulty of reaching a genuine impasse in collective bargaining and reaffirms the Board's high standard of analysis. Even where parties may appear to be at a stalemate, the Board will look for any indication that further movement is possible. The decision also reinforces the judicial deference afforded to the Board in cases of impasse even in a traditionally conservative circuit. Because impasse determinations are so fact-specific, the court noted that they are "particularly suited to the Board's expertise."

Employers should consult with labor counsel before any attempt to declare impasse. There are a multitude of factors that could taint an otherwise legitimate impasse and expose an employer to an affirmative bargaining order and substantial liability. To the extent an employer implements any terms and conditions of employment less favorable than those of the status quo terms, the employer could be liable for the cost of reinstating the status quo and potential enhanced make-whole remedies for affected employees. Moreover, given the subjective analysis and high degree of deference to the NLRB, some aggressive bargaining strategies could be perceived as an attempt to fast-track bargaining and reach impasse sooner leading to allegations of bad faith or surface bargaining.

As always, we will continue to track relevant court decisions and related developments at the Board.

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