

NLRB Tips Scales in Favor of Employers When Drawing Distinctions Between Claims of “Inability to Pay” Versus “Competitive Disadvantage,” and “Surface” Versus “Hard” Bargaining

Article By:

Steven J. Porzio

Laura Franks

In recent weeks, the National Labor Relations Board has issued several employer-friendly decisions, and its September 13 decision in [*Arlington Metals Corp.*, 368 NLRB No. 74 \(2019\)](#) was no exception. In *Arlington Metals*, the Board considered: (1) whether an employer’s statements during bargaining in response to a union’s economic proposals amounted to an asserted “inability to pay,” which would trigger an obligation to provide the union with access to the company’s financial information; (2) whether the employer engaged in bad faith “surface” bargaining by refusing to make financial concessions; (3) whether the employer unlawfully withdrew recognition from the union; and (4) whether following the withdrawal, the employer violated the Act by denying the Union access to its premises.

The Board, reversing the Administrative Law Judge, answered these four questions in favor of the employer.

Background

In *Arlington Metals*, the union was initially certified at the employer’s (Arlington Metal Corp.) Illinois steel processing facility in 2007. By 2013, the parties attended more than 35 bargaining sessions, but no collective bargaining agreement was reached. The employer, twice claiming good faith impasse was reached, unilaterally implemented economic terms and conditions of employment in 2009 and 2012. In 2014, the employer withdrew recognition from the union after receiving a decertification petition signed by a majority of the bargaining unit employees. After withdrawing recognition, the employer denied the union access to its premises for a safety inspection.

Claimed “Inability to Pay” vs. “Competitive Disadvantage”

In general, when an employer claims it is unable to pay what a union demands, the union is permitted to review relevant financial records to assess the truth of the assertions; information the union would

otherwise not be privy to. There, during bargaining sessions in 2013, the employer responded to the union's economic proposals with the following statements:

- "Economic conditions had not changed, but if anything they were weaker," and the employer was "doing the best it could and had kept everyone employed."
- "Production volume was down" and the employer "faced increased costs, increased taxes, and downward pressure on pricing."
- Competitors were "attempting to take business away" and "business was moving."
- The employer "had hoped conditions would improve" but "business had softened" and "[b]oth volume and price were down."
- The "'iceberg'" the employer was on "[was] 'melting'" and the "business had changed."

Reversing the ALJ, the Board found that the above statements did not amount to an asserted inability to pay the union's economic demands. Instead, the Board found the employer's statements "amounted to an assertion of competitive disadvantage," and it therefore had no obligation to provide the union access to its financial records.

Moreover, the Board found that even if the employer's statements amounted to an asserted inability to pay, it had no obligation to respond to the union's "wide-ranging request" (which included requests for a report on business conditions, 4 years of audited financial reports, income statements, balance sheets, cash-flow statements, sales listed by customer, and federal and state income tax returns) because the union failed to narrowly request "specific information to validate specific claims."

Unlawful "Surface" Bargaining vs. Lawful "Hard" Bargaining

The Board also found that the fact that the employer rejected the union's economic proposal and refused to make anything other than a "minor modification" to its economic counterproposal in response did not amount to bad faith bargaining. Rather, the employer's position was typical of the "hard bargaining" between the parties, marked by "various states of deadlock for years," during which both sides only made "minor concessions."

Lawful Withdrawal of Recognition & Denial of Access

Finally, the Board found that the employer lawfully withdrew recognition from the union, and thus lawfully denied the union access to employer premises for a safety inspection. In particular, the Board found that the decertification petition was valid, as there was sufficient evidence of the authenticity of the signatures on the petition, which sufficiently supported the employer's good faith belief the union no longer enjoyed majority support.

Takeaways

When bargaining with a union, employers should always be mindful of the precise language used when rejecting a union's proposals based on company finances, or making other representations

about the company's financial health. Indeed, as seen in *Arlington Metals*, statements made by an employer at the bargaining table may later be scrutinized by an ALJ or the Board. Employers should similarly plan ahead when intending to engage in hard bargaining, as the employer's actions in doing so may be reviewed by the Board. Nevertheless, while a different Board may have sided with the ALJ on each of the four issues presented in this case, the current Board has shown a clear willingness to give employers the benefit of the doubt.

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