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Impasse: The 'Obscenity' of Labor Law

Professing his inability to describe "obscenity," U.S. Supreme Court Justice Potter Stewart authored the famous line, "I don't know how to define it, but I know it when I see it."

Impasse is the equivalent of "obscenity" in the National Labor Relations Act: whether impasse exists is "a matter of judgment based on an evaluation of the parties' bargaining history against standards that are imprecise at best." (*Laborers Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 552 [1988].)

Significance of Impasse

Ordinarily, an employer who unilaterally changes terms or conditions of employment violates the act. After bargaining to impasse, however, an employer may implement changes "reasonably comprehended" within its pre-impasse proposals. (*Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996); *Taft Broadcasting Co.*, 163 NLRB 475, 478 [1967].)[1]

Unilaterally implemented changes may not differ substantially from those proposed during negotiations. Nevertheless, an "employer need not implement all of its pre-impasse proposals, but the changes must be in line with or no more favorable than those offered prior to impasse ... which the union has rejected." (*Emhart Industries v. NLRB*, 907 F.2d 372, 376 [2d Cir. 1990].)

In *Telescope Casual Furniture*, 326 NLRB No. 60 (1998), the employer stated that if the union did not accept its final offer, it would implement a less favorable alternative offer. When the union rejected the final offer, the employer implemented the alternative one. The board found the employer's action "completely comprehended" by the final offer.

In contrast, in *NLRB v. Plainville Ready* *Mix*, 44 F.3d 1320 (6th Cir. 1995), the company eliminated incentive and profit-sharing plans as proposed, but did not implement proposed wage increases. The court affirmed the board's finding of a violation:

In order to fully protect their clients' rights, attorneys engaged in collective bargaining must know impasse when they see it.

In cases involving the implementation of only a portion or portions of the final proposal ... the employers did not implement only the negative portions of a separate component of the final proposal, such as a wage plan ... but implemented, for example, the wage plan, but not the benefit plan. In other words ... portions of the final offer that constituted comprehensive, integrated entities.

An employer cannot splinter off or fragment proposals presented as a comprehensive system in such a way that the portions implemented are not reasonably comprehended as unrelated in the employer's previous offers. Otherwise, the character of the implemented plan takes on a different meaning (increased cost) from that offered ... (increased costs and benefits).[2]

Even when impasse exists, an employer may not unilaterally implement terms that are "contract-bound" or involve a statutorily protected right.[3] Nor may the employer implement a proposal that gives it too much discretion in matters of great significance.

For example, in *McClatchy Newspapers, Inc.*, 321 NLRB No. 174, 153 LRRM 1137, 1141 (1996), the board ruled the employer unlawfully implemented a merit-pay proposal because it retained unchecked discretion to grant increases "without notice to or participation by" the union.

Noting the proposal contained no objective standards, the board stated, "nothing ... precludes an employer from making merit wage determinations if definable and objective procedures and criteria have been negotiated to agreement or to impasse."[4]

'Detroit Typographical'

In contrast, in *Detroit Typographical Union v. NLRB*, 216 F.3d 109, 118 (D.C. Cir. 2000), the court vacated the board's finding that the employer unlawfully implemented its merit-pay proposal because the employer provided written details, including guaranteed minimums and projected average increases.

Moreover, although excluded from arbitration, employees could grieve unsatisfactory increases. The court contrasted *McClatchy* as "an unusual situation where an employer provided no details at all of its merit pay plan."[5]

In most cases, implementation is not permitted until an overall impasse exists on the agreement as a whole. (*Naperville Ready Mix v. NLRB*, 242 F.3d 744 [7th Cir. 2001].) Alone among the U.S. courts of appeals, however, the Fifth Circuit holds that deadlock on one issue can constitute impasse.[6]

The board recognizes two exceptions to the total impasse rule — where unforeseen

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business exigencies prevent bargaining to impasse, see, e.g., *Quality House of Graphics*, 336 NLRB No. 40 (2001), or when the union avoids bargaining, see, e.g., *Serramonte Oldsmobile*, 318 NLRB No. 6 (1995).

Inasmuch as employers can unilaterally alter conditions of employment upon impasse — but not before — labor negotiators must recognize the existence (or absence) of impasse.

The board has "no fixed definition of an impasse ... which can be applied mechanically to all factual situations." (*Dallas Gen. Drivers Local Union v. NLRB*, 355 F.2d 842, 845 [D.C. Cir. 1966].)

Recognizing Impasse

Impasse has been described or addressed in a number of ways, including:

- The "deadlock reached after good-faith negotiations have exhausted the prospects of concluding an agreement." (*Taft Broadcasting*, 163 NLRB at 478.)
- "[W]hen the parties have discussed the matter and, despite their best efforts to achieve agreement, neither is willing to move from its position," (*Tampa Sheet Metal*, 129 LRRM at 1192).
- When "there [is] no realistic prospect that continuation of discussion at that time would ... [be] fruitful." (*American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).
- "Mere rejection of a bargaining proposal does not create an impasse." (*Visiting Nurse Services v. NLRB*, 177 F.3d at 58.)
- "[F]utility, rather than mere frustration, discouragement or apparent gamesmanship is necessary to establish impasse." (*Grinnell Fire Protection Systems v. NLRB*, 236 F.3d 187, 199 [4th Cir. 2000].)

When defining impasse, the board and courts consider all circumstances, including: bargaining history; good faith of the parties; the number and duration of bargaining sessions and continued bargaining (or not); the nature, importance, and extent of open issues; statements or understandings concerning impasse; the existence of a strike; union animus; and actions inconsistent with impasse. (See *Tru Serv Corp. v. NLRB*, 2001 U.S. App. Lexis 18759, 168 LRRM 2037, 2041 (D.C. Cir. 2001); *Taft Broadcasting*, 163 NLRB at 478.)[7]

In *Tru Serv*, the court vacated the board's finding that no impasse existed because the board improperly rejected the employer's assertion that its "final offer" was final.

> Nothing ... indicates the Company had not bargained to its fullest capacity. [T]he Union's self-serving statement ... that the parties were not at impasse and ... [request] for additional meetings is insufficient to demonstrate the Union's desire to pursue further negotiations.
>
> Absent conduct demonstrating a willingness to compromise further, a bald statement of disagreement by one party ... is insufficient to defeat an impasse. ... Similarly, a vague request ... for additional meetings, if unaccompanied by an indication of the areas in which the party foresees future concessions, is equally insufficient ... where the other party has clearly announced that its position is final.

Similarly, in *Detroit Typographical*, the employer expressed its belief that impasse existed, but granted the union's request for another meeting. At that meeting, the union made no counterproposals, but simply asked questions about the employer's proposal. The D.C. Circuit found impasse because "if the Guild really had wished to bargain . . . asking questions was not enough."

In contrast, in *Grinnell Fire Protection*, the court found no impasse existed because the union, among other things, continued to make substantive moves, asked the company where it needed further concessions, and suggested mediating the outstanding issues.

In *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991), the court found no impasse existed because, although the parties met 12 times, they delayed discussing wages until the last meeting. Thus, they did not have enough time to "fully explore and negotiate the Association's finally revealed full hard core economic position."

Changed circumstances that indicate negotiations may move forward will end an impasse. In *U.S. Cold Storage Corp.*, 96 NLRB 1108 (1951), the board found that a strike ended the impasse.

Less drastic action can also end an impasse. For example, in *Raven Services*, the court found impasse broken because election of a new union representative, the impending expiration of the employer's service contracts, and passage of two years since impasse occurred "offered the possibility for productive bargaining."[8]

More than general statements are necessary to break an impasse.

> A party's bare assertions of flexibility on open issues and its generalized promises of new proposals do not clearly establish any change. ... [T]here must be substantial evidence in the record that establishes *changed circumstances* sufficient to suggest that future bargaining would be fruitful.
>
> [I]t is incumbent on the party asserting that the impasse has been broken to point to the changed circumstances.[9]

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(1) Upon impasse the duty to bargain is temporarily suspended, but resumes if impasse ends. Moreover, several impasses may occur during one negotiation. See *NLRB v. Plainville Ready Mix*, 44 F.3d 1320 (6th Cir. 1995). Accordingly, individual employers may not withdraw from multi-employer bargaining simply because impasse exists. *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

(2) See also *Loral Defense Systems v. NLRB*, 200 F.3d 436 (6th Cir. 1999) (lawful to implement reservation of right to "amend or modify" health plan; unlawful to later "change" plans); *L.W. Le Fort*, 290 NLRB No. 45 (1988) (lawful to discontinue pension contributions because offer did not include contributions, but unlawful to discontinue medical contributions which offer included).

(3) See, e.g., *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991) (arbitration); *McClatchy Newspapers, Inc.*, 321 NLRB No. 174, 153 LRRM 1137, 1141 (1996), enf'd, 131 F.3d 1026 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998) (union security, dues check-off, no-strike).

(4)See also *Anderson Enterprises v. NLRB*, 2001 U.S. App. Lexis 18001, 167 LRRM 2704 (D.C. Cir. 2001) (cannot implement proposal giving employer unchecked ability to assign employees to pay classifications); *KSM Industries*, 336 NLRB No. 7 (2001) (cannot implement proposal giving employer sole discretion to fundamentally change benefits); *Liquor Industry Bargaining Group*, 333 NLRB No. 137 (2001) (proposal to eliminate pay protections and have complete discretion demonstrated intent to frustrate bargaining).

(5) See also *Edward S. Quirk Co. v. NLRB*, 241 F.3d 41, 45 (1st Cir. 2001) (implementation reserving right to "increase wages above the contract rates to stay competitive" lawful because proposal "appeared to contain more in the way of standards" than *McClatchy*"); *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir 1997) (implementation of permanent subcontract lawful where employer provided union full details).

(6) See, e.g., *Raven Services v. NLRB*, __ F.3d. __, 171 LRRM 2606, 2611, n.8 (5th Cir. 2002). See also *Visiting Nurse Services v. NLRB*, 177 F.3d 52, 58 (1st Cir. 1999) ("one or two issues [may] so dominate ... negotiations that the Board [could find] that impasse on those one or two issues amounts to a bargaining deadlock"). But see *Duffy Tool and Stamping v. NLRB*, 233 F.3d 995, 997-98 (7th Cir. 2000) (criticizing fifth circuit's view).

(7) Unremedied unfair labor practices ("ULPs") preclude impasse if "the existence of these [ULPs] . . . contributed to the deadlock." *Alwin Mfg. v. NLRB*, 192 F.3d 133, 138 (D.C. Cir. 1999) (unilateral adoption of production standards prevented impasse). Compare *Detroit Typographical*, 216 F.3d at 121 (ULP about "relatively unimportant" issue did not prevent impasse); *L.W. Le Fort*, 290 NLRB No. 45 (threats to employees unrelated to negotiations did not prevent impasse).

(8) See also *Grinnel*, 236 F.3d at 197 (court considered only negotiations after appointment of union trustee).

(9) *Serramonte Oldsmobile v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996). See also *Civic Motor Inns*, 300 NLRB 774 (1990) (bare assertions of "flexibility" and generalized promises of "new" proposals did not end impasse).

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