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Let The Chips Fall: When Is An Impasse An Impasse?

December 14, 2015 | | National Labor Relations Board,Labor And Employment

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When is an impasse a legal impasse? That's a decision that courts and the NLRB have kicked around for many years. Last week, the United States Court of Appeals for the D.C. Circuit affirmed an NLRB decision finding that an employer jumped the gun in declaring that an impasse had been reached largely because its conduct and statements at the table differed from post-bargaining letters declaring a last and final position and impasse. In *Mike-Sells Potato Chip Company v. NLRB,* No. 14-1021, the court noted that the company had presented a close case and even commiserated that its "predicament was unfortunate," but the court concluded that the NLRB was right in finding that the parties were not at impasse in bargaining and as a result, the company could not implement the terms of its last and final contract offer. The NLRB largely adopted the administrative law judge's (ALJ) opinion in coming to the conclusion that no impasse existed. As noted in the ALJ's opinion, the parties had reached some agreements and they "went back and forth" on three central issues -- pensions, health benefits and route sales drivers' commissions. According to the ALJ, when the parties met for the last time before the contract's expiration date, the company did not indicate that day that it had made a final offer or that an impasse had been reached. Both parties indicated they were open to scheduling further negotiating sessions, even though as it turned out they were unable to schedule another meeting date prior to the expiration date. The ALJ noted that two days after the last bargaining session, the company informed the union in writing that their last offer at the table was in fact a last and final offer. Two days thereafter, according to the ALJ, again in writing, the company declared that they were at impasse. The ALJ's opinion emphasized that the union had made concessions and that where a party has already made significant concessions indicating a willingness to compromise further, it would be wrong to find impasse merely because the party making concessions was unwilling to capitulate immediately. Among other things on appeal, the company argued that the ALJ focused on progress on peripheral matters instead of focusing on the parties' positions on the key issues of pension, health benefits and commissions. The D.C. Circuit noted on review that "it is often said by both the Board and courts that an impasse exists when both parties believe bargaining has reached a dead end." However, to require the parties to reach a "contemporaneous understanding" or a "mutual agreement" as to impasse would mean that "an employer would virtually never be entitled to implement a final offer. It would, in effect, require the union's consent." The law regarding impasse, the court explained, is that "if an employer maintains a firm position, and has made clear that acceptance of its position on particular issues is essential to agreement, a union's last minute movement, short of agreement, will not avoid an impasse." However,

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"if an employer remains firm in collective bargaining as to one or more essential issues and credibly declares a last offer **in the negotiations**, a last offer that is consistent with and follows logically from its negotiating position, a union's failure to agree creates an impasse." Thus, in *Mike-Sells*, the court carefully examined the company's offers at the table and the Union's response to each of the three central issues and determined that "it would not have been apparent to a neutral observer" that at the close of the bargaining on November 14, "the parties had run into a brick wall." Moreover, at no time at the bargaining table did the company declare its positions to be a last and final offer or to assert that the parties were at impasse. Indeed, the letter declaring impasse came about "abruptly, seemingly inconsistent with the tenor of the negotiations" just four days prior. The D.C. circuit concluded that "Under those circumstances, we think the Board's determination that an impasse had not been reached is a legitimate finding (a mixed question of fact and law). Petitioner had not displayed the requisite firmness on the key issues in negotiations, it had not made a last offer – a necessary if not a sufficient condition – nor declared an impasse in the crucial bargaining session." A copy of the court's decision is available here.