

# No Limits: Board Finds Hotel Improperly Limited Bargaining Subjects

**Labor Relations Update** on **December 21, 2022**

On December 16, 2022, the National Labor Relations Board (“NLRB” or “Board”) issued its decision in *Troutbeck Company, LLC d/b/a Brooklyn 181 Hospitality, LLC*, among the latest in an eventful string of rulings over the last two weeks. In a 2-1 decision (Chairman McFerran and Member Prouty in the Majority, with Member Ring dissenting), the Board held that Troutbeck Company, LLC (“Company”) violated Sections 8(a)(5) and (1) of the National Labor Relations Act (“Act”) when it refused to bargain with the New York Hotel and Motel Trades Council, AFL-CIO (“Union”) over economic subjects until all non-economic subjects had been resolved.

This case provides an important cautionary tale that engaging in the practice of refusing to negotiate over certain bargaining subjects until other issues are agreed to can violate the Act.

## ***Factual Background***

The Company owns a hotel in Brooklyn where the workforce is represented by the Union. In June 2020, at the parties’ second bargaining session, the Company’s negotiator proposed several “ground rules,” including that the parties first discuss the non-economic terms of the agreement before turning to the economic subjects at issue. The Union rejected the rule, stating that “we do not want to constrain the parties’ capability to freely explore and discuss any items, such as specific proposals, terms, or conditions, during bargaining sessions.”

The Company then proposed a modified version of the rule: “The parties agree to focus primarily on non-economic subjects before turning to economic subjects, but it is understood that this general framework does not preclude either party from raising and freely discussing any item at any point in the bargaining process.” The Union also rejected this rule, stating that the Company was not entitled to “preclude the parties from bringing up certain subjects.”

Despite the Union's rejection of the rule, the Company moved forward with bargaining focusing only on non-economic terms first. Meanwhile, the Union made economic proposals to which the Company refused to respond until the non-economic proposals were settled. The Company refused to provide a comprehensive proposal or counter-proposal on all issues, despite the Union's repeated requests for one.

A 7-month hiatus of bargaining followed due to the COVID-19 pandemic and its impact on the hotel industry. When bargaining continued in 2021, the parties continued to disagree about the mechanics of bargaining—the Company disagreed with the Union's refusal to discuss individual topics without a complete proposal from the Employer, and the Union argued that meaningful bargaining could not occur until it received a wage proposal. Both parties agreed to leave this issue for the Board to decide.

### ***Majority Decision - Company Violated the NLRA***

The Board held that the Company violated Section 8(a)(5) of the Act for failure to bargain in good faith as a result of its bargaining tactics. The NLRB reasoned that while parties may make good-faith proposals and agree to certain ground rules regarding the subject and sequence of negotiated terms, there was obviously no such agreement here between the parties.

Citing longstanding precedent, the Board concluded that the Company "unreasonably fragmented the negotiations and drastically reduced the parties' bargaining flexibility," by insisting on an agreement concerning non-economic items before responding to the Union's proposal regarding economic issues. Moreover, as a result of the back-and-forth, rather than negotiating over the substantive terms at issue, the parties "expended significant bargaining time discussing how negotiations would be conducted."

### ***Dissent - Company Did Not Violate the NLRA***

Member Ring dissented, finding that the COVID-19 pandemic and good-faith disputes between the parties accounted for their inability to make progress in the negotiations. Specifically, he noted that the Company reasonably proposed negotiating subsets of certain topics, starting with non-economic subjects, while the Union conveyed a preference for reviewing an agreement in its entirety. Member Ring emphasized that “[w]hile the Board has held that a party violates [the Act] by refusing *indefinitely* to bargain about economic matters until all non-economic matters are resolved, no such refusal has been proven here.” Member Ring’s dissent stressed that the Board’s majority decision undermined the system of collective bargaining by intervening prematurely in parties’ still-ongoing negotiations.

### **Takeaways**

The decision serves as a reminder about how the Board may view certain strategies utilized by a bargaining party, even commonly-used tactics like the one at issue in *Troutbeck*. Although this tactic—insisting that the parties bargain over non-economic terms before moving to economic terms—is not a *per se* violation of the Act, bargaining parties should proceed with caution in light of the Board’s decision. If the other side agrees with this “ground rule,” then there is no issue. However, this strategy can backfire if the other side refuses to segment the bargaining subjects. While these cases are heavily fact-dependent, if one party insists on refusing to negotiate over certain subjects, then the Board may find that such conduct evidences a desire not to reach agreement in violation of the duty to bargain in good faith under the NLRA.

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