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No Limits (Revisited): D.C. Circuit Holds That Hotel Improperly Limited Bargaining Subjects

Labor Relations Update on **July 17, 2024**

The D.C. Circuit just issued a cautionary decision to employers trying to set "ground rules" in negotiations that limit the topics of bargaining. As we previously covered, in December 2022, the National Labor Relations Board ("NLRB" or "Board") found that Troutbeck Company, a company that owns a hotel in Brooklyn, 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.

On July 12, 2024, in *Troutbeck Company, LLC d/b/a Brooklyn 181 Hospitality, LLC v. NLRB*, a D.C. Circuit panel upheld Board's decision.

Factual and Procedural History

The Union, the New York Hotel and Motel Trades Council, has an area-wide agreement with employers in the New York area and sought to have the Company adopt the agreement with minor modifications with regards to the Company's Brooklyn hotel. The Company refused, and during bargaining, the Company's negotiator attempted to establish "ground rules" which required the parties to first discuss non-economic terms, before turning to the economic subjects at issue. The Union rejected this proposal and argued that it would not agree to restrain the parties' ability to freely discuss terms during bargaining. Even though the Union rejected its proposal, the Company continued to focus bargaining only on non-economic terms. The Union, on the other hand, demanded that the Company present a comprehensive proposal on economic issues, or a counter-proposal to economic terms that it previously proposed. After multiple bargaining sessions, the parties acknowledged the Board would have to resolve the dispute. After the Board's decision in favor of the Union on December 16, 2022, the Company petitioned for review with the D.C. Circuit in February 2023.

Majority Opinion

In a split decision, the court upheld the Board's opinion that the Company's bargaining tactics violated Section 8(a)(5) of the Act for failure to bargain in good faith. The court cited Board precedent that "an employer violates Sections 8(a)(5) and 8(a)(1) when its refusal to bargain over economic subjects until all non-economic subjects are resolved 'unreasonably fragment[s] the negotiations and drastically reduce[s] the parties' bargaining flexibility.'" Here, the court found that that Company's persistent refusal to discuss economic terms before non-economic terms were resolved unreasonably fragmented negotiations. The court highlighted the Board's finding that after six bargaining sessions over 11 months, the parties did not reach agreement on a single provision.

The court swept aside the Company's various arguments in favor of setting aside the Board's ruling, including that: "the Board misunderstood the intent behind its bargaining strategy, disregarded the effects of the Union's conduct, failed to consider the impact of the COVID-19 pandemic, deviated from Board precedent, and improperly sided with the Union's substantive bargaining position." The court instead focused on the fact that the Company refused to discuss economic topics until all non-economic topics were resolved, and therefore upheld the Board's order.

The Dissent

The dissent sharply criticized the majority's deference to the Board, accusing the majority of ignoring "the totality of the circumstances" and essentially creating a *per se* rule "that an initial refusal to discuss mandatory bargaining subjects will constitute an unfair labor practice." The court addressed the dissent's critiques, finding that it was the Company's persistent refusal over several bargaining sessions to address the Union's economic proposals that constituted a violation of the Act.

Takeaways

The Company's bargaining strategy and ground rules proposal here appear to be an attempt to get the Union to deviate from the area-wide agreement in material ways in order to secure a deal that included economic terms that were below the area standards. Getting a union to agree to deviate from industry standard – particularly an agreed-upon area-wide agreement – may be difficult in any context, and this unique fact pattern must be considered when assessing a bargaining strategy that seeks to address non-economic terms first.

Regardless, the court's language should give pause to any employer seeking to insist on this or a similar strategy. Companies often seek to address non-economic topics before bargaining over economic topics, typically, as a means of seeking momentum at the bargaining table on non-economic items before addressing the more "big ticket" economic issues. The Act generally indicates that the Board and courts should avoid opining on the substance of parties' bargaining positions and instead just ensure that the parties are bargaining in good faith. The court and the Board's rulings arguably delve into the substance and serves as a stark reminder that the strategy employed here may violate the Act if it is tantamount to a party refusing to discuss mandatory subjects of bargaining.

As we remarked previously, 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 extreme caution in light of the D.C. Circuit's decision enforcing the Board's order. If the other side agrees with this "ground rule," then there is far less of a potential issue. However, this strategy can backfire if the other side refuses to segment the bargaining subjects. If that occurs, and while these cases are heavily fact-dependent, if one party refuses to bargain over certain subjects, the Board may find a violation of the Act for failure to bargain in good faith.

We will continue to monitor the subject for any updates.

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