United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 30, 2003

TO : Richard L. Ahearn, Regional Director
Region 19

Cathleen C. Callahan, Officer-in-Charge
Subregion 36

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United Restoration, d/b/a/ United Air Comfort
Case 36-CA-9318

530-6033-0150
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530-6067-2070-5000

The Region submitted this Section 8(a)(5) and Section 8(d) case for advice as to whether the Employer's insistence on using its videoconference system to negotiate an initial collective-bargaining agreement with the Union satisfies the Board's face-to-face bargaining requirement. We conclude that videoconference negotiations are not comparable to face-to-face bargaining. Therefore, absent settlement, the Region should issue complaint alleging that the Employer's insistence on conducting negotiations in this manner violates the Act's requirement that it meet and confer in good faith with the Union.[1]

FACTS

United Restoration, d/b/a United Air Comfort (the Employer), maintains its corporate headquarters in Deerfield Beach, Florida and provides various residential heating, ventilation, and air conditioning (HVAC) services nationwide. On April 17, 2003,[2] the Region certified Sheet Metal Workers International Association, Local 16 (the

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[1] The Injunction Litigation Branch will address the propriety of seeking Section 10(j) relief in a separate memorandum.

[2] All dates are 2003.

Union) as the exclusive collective-bargaining representative of the Employer's eight Portland, Oregon employees. Shortly thereafter the Union requested that contract negotiations commence and, after exchanging correspondence, the parties agreed to meet on June 16.

The Employer subsequently insisted that bargaining, including the June 16 session, be conducted via its videoconference system. Thus, the Employer's negotiating team, in Florida, would bargain with the Union's negotiating team, seated in the Employer's Portland office, by way of a secure video link.[3] The Union objected to this demand, proposing instead that the parties meet in person at either the Union's office, the Employer's Portland office, or a mutually agreed upon neutral site. The Union ultimately canceled the June 16 session because the parties were unable to resolve this issue, and no bargaining has taken place to date.

The Employer asserts that negotiating by videoconference would satisfy the Board's face-to-face bargaining requirement, and further defends its position on the grounds that it utilizes videoconferencing to train employees, to hold daily management briefings, and to conduct meetings with employees and vendors. The Employer also maintains that videoconference bargaining is more cost effective and less time consuming than meeting in person, and will ultimately lead to more productive bargaining sessions.

The Union contends that videoconference negotiating is akin to bargaining by telephone, which the Board has held does not satisfy its face-to-face bargaining requirement. The Union further asserts that videoconference bargaining is not a substitute for genuine face-to-face bargaining, i.e., it does not allow for a complete give-and-take of ideas and proposals or permit the parties to gain a "feel" for the other side. The Union is apprehensive about the fact that the videoconference system will allow only one person at a time to speak and will not permit the parties to see everyone on the other side's team. Moreover, despite the Employer's assurances, the Union is concerned

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[3] According to the Employer, it operates the country's largest private videoconference network.

that the Employer will record bargaining sessions, as it initially suggested, and that this concern will engender reticence and distrust.

ACTION

Section 8(d) requires, in relevant part, that parties "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Although the Board, with court approval, has consistently interpreted this language to require that parties negotiate face-to-face,[4] it has never articulated its rationale in this regard. However, as set forth below, we believe that sound justifications exist for requiring parties to conduct their negotiations in person. In light of these justifications, we conclude that the Employer's videoconference system does not fulfill the Board's face-to-face bargaining requirement.

It is well settled that the Board has "wide latitude to monitor the bargaining process,"[5] and "is authorized to

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[4] See, e.g., Fountain Lodge, 269 NLRB 674, 674 (1984) ("The Board has held, '[i]t is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table,' and that '[i]ndeed, the Act imposes this duty to meet,'" quoting United States Cold Storage Corp., 96 NLRB 1108, 1108 (1951), enfd. 203 F.2d 924 (5th Cir. 1953), cert. denied 346 U.S. 818 (1953); Tower Books, 273 NLRB 671, 672 (1984), enfd. 772 F.2d 913 (9th Cir. 1985) (Table), quoting NLRB v. P. Lorillard Co., 117 F.2d 921, 924 (6th Cir. 1941)("The collective bargaining features of the statute cannot be made effective unless [the parties] cooperate in the give and take of personal conferences."). Accord: Redway Carriers, Inc., 274 NLRB 1359, 1377 (1985), quoting Colony Furniture Co., 144 NLRB 1582, 1589 (1963) ("face-to-face negotiations" between "bargaining principals" is "an elementary and essential condition of bona fide bargaining.").

[5] McClatchy Newspapers v. NLRB, 131 F.3d 1026, 1031 (D.C. Cir. 1997), citing Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404 (1982).

order the cessation of behavior which...inhibits the actual process of discussion...."[6] In performing this role, the Board has determined, albeit without discussion, that an employer violates Section 8(a)(5) when it insists on negotiating by telephone or mail;[7] implicit in that determination is the Board's conclusion that "face-to-face" bargaining is necessary for an effective negotiating process.[8]

Although videoconferencing is arguably more like face-to-face negotiations than bargaining by telephone would be, there are ways in which it is clearly inferior to in-person negotiations. Collective-bargaining negotiations necessarily involve communicating difficult messages, and strong differences of opinion are to be expected. Only in true face-to-face bargaining can parties contemporaneously exchange draft language and submit written proposals (which in many instances are likely to be prepared or revised spontaneously during the course of a bargaining session), sign-off on tentatively agreed-upon terms in the midst of bargaining, or hold sidebar conferences with members of the other side's negotiating committee. Furthermore, only in face-to-face bargaining can the parties observe nuances of eye contact and body language, not only on the part of the individual speaking but also on the part of those observing.[9] Finally, the Union's apprehensions about

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[6] NLRB v. Katz, 369 U.S. 736, 747 (1962).

[7] See, e.g., Fountain Lodge, 269 NLRB at 674, citing Alle Arecibo Corp., 264 NLRB 1267, 1273 (1982).

[8] Webster's defines the term "face-to-face" as, "1. within each other's sight or presence : involving close contacts : in person < a *face-to-face* meeting of the two leaders > < we met *face-to-face* for the first time >." Webster's New International Dictionary Unabridged (3d ed. 1971) (italics in original).

[9] See, e.g., Robert S. Adler & Elliot M. Silverstein, When David Meets Goliath: Dealing with Power Differentials in Negotiations, 5 Harv. Negot. L. Rev. 1, *70 (2001), and sources cited at n. 287 and n. 288 (noting that even where a party deflects a question his or her body language "may speak volumes," and that "[O]ne needs particularly not only

speaking candidly when it cannot be certain as to who is in the room and as to whether the sessions are being recorded are not unreasonable. For all of these reasons, and consistent with established Board precedent, we conclude that the parties will most effectively reach consensus by negotiating in person rather than via the Employer's videoconference system.

In addition, the Board has long recognized that first contracts "usually involve special problems."[10] Thus, although we consider the above factors relevant to any contract negotiation, they are particularly germane here, where the newly certified Union seeks to negotiate its first contract with the Employer, and the parties consequently have no established bargaining relationship or history to guide them in their endeavor and have not established a relationship of trust which is crucial to effective negotiations.

We are unpersuaded by the Employer's contention that its insistence on videoconference bargaining is lawful because it utilizes videoconferencing in various other aspects of its business. None of the other uses the Employer makes of its system -- i.e., training employees

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to listen to the answer, but also to observe the other side's body language during responses. Body language sometimes conveys more useful information than spoken words because it is often involuntary and, therefore, revealing. In some cases, the nervous refusal to answer or inability to give direct eye contact when stating a demand discloses more than the actual words of the response."). See also, Charles S. Loughran, Negotiating A Labor Contract: A Management Handbook 183 (2d ed. 1992) ("Of course, the tone and volume of voice, facial expression, and context of negotiations will...influence how [a] message is perceived.").

[10] See, e.g., APT Medical Transportation, 333 NLRB 760, 761 (2001) (concurring opinion), quoting N.J. MacDonald & Sons, Inc., 155 NLRB 67, 71 (1965). In N.J. MacDonald, 165 NLRB at 71-72, the Board noted that parties negotiating a first contract often struggle to formulate contract language, a difficulty unlikely to arise in an established bargaining relationship.

and conducting meetings with management, employees, and vendors -- involves dynamics comparable to those which a collective-bargaining relationship requires.

In light of the foregoing considerations, we conclude that the Region should issue a Section 8(a)(5) complaint, absent settlement, alleging that the Employer's insistence on videoconference bargaining violates its statutory duty to meet and confer in good faith with the Union.

B.J.K.