

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM GC 20-04

March 27, 2020

TO: Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Case Summaries Pertaining to the Duty to Bargain in Emergency Situations

The Coronavirus pandemic has prompted many questions regarding the rights and obligations of both employers and labor organizations, particularly in light of responsive measures taken to contain the virus. Sometimes these measures have been taken out of prudence; other times they have been required by state, local or federal orders.

Regardless of the reason for any given response to the spread of the virus, many parties are considering the impact on the duty to bargain. Although we are in an unprecedented situation, I wish to make the public aware of several cases in which the Board considered the duty to bargain during emergencies. These include public emergencies as well as emergencies unique to a particular employer. Accordingly, the following case summaries are divided into those two categories. It is my hope that these summaries prove useful to those considering this issue during these challenging times.¹

Case Summaries Touching on Duty to Bargain During Public Emergency Situations

Port Printing & Specialties, 351 NLRB 1269 (2007) (hurricane), *enforced*, 589 F.3d 812 (5th Cir. 2009): Where the parties did not have an existing collective-bargaining agreement, the Board found the employer did not violate Section 8(a)(5) by laying off several employees without affording the union notice or an opportunity to bargain, but did violate Section 8(a)(5) by subsequently using non-unit employees, including a supervisor, to perform unit work. The employer was a commercial printer located in Lake Charles, Louisiana. On September 22, 2005, the mayor of Lake Charles ordered a mandatory evacuation of the city in anticipation of the impending arrival of Hurricane Rita. The employer closed operations and laid off all employees, without affording the union notice or an opportunity to bargain. In the weeks after the hurricane, the employer worked to repair the damage done to its facility and fulfill what client orders remained, using some unit employees but also non-unit employees and a supervisor. Approximately a month after the hurricane, the employer sent unit employees a letter permanently confirming their layoffs. At no time did the employer provide the union notice or an opportunity to bargain over these matters. Citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), the Board explained that an exception to the duty to bargain exists where the employer can demonstrate that “economic exigencies compel[ed] prompt action.” (Brackets in the original.) The Board stressed that this exception is limited to “extraordinary events which are an unforeseen

¹ The case summaries herein are limited to the duty to bargain. This memorandum does not discuss other NLRA issues that may arise during the course of emergency situations.

occurrence, having a major economic effect requiring the company to take immediate action” (quoting *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995)). Applying this rule, the Board found that the impending hurricane and the mandatory citywide evacuation were uniquely exigent circumstances that privileged the employer to lay off unit employees without bargaining with the union. However, the Board also concluded that the employer violated Section 8(a)(5) by failing to bargain over the effects of the layoff after the hurricane, and by failing to bargain over the use of non-unit employees to perform unit work (Member Schaumber dissented on this point). Thus, the Board explained, when the employer made those decisions, the exigency due to the hurricane had passed.

K-Mart Corp., 341 NLRB 702, 720 (2004) (9/11): The ALJ concluded the employer’s layoff after September 11, 2001 where the employer’s anticipated business volume plunged 60 percent and caused it to file bankruptcy by January 2002, was privileged by *Bottom Line*. The ALJ determined the economic fallout resulted in “extraordinary unforeseen events having a major economic effect that required the employer to take immediate action” as contemplated by that Board decision. The ALJ also found the employer gave adequate notice of its need to lay off unit employees to the union, which had failed to request bargaining. However, the issue of the layoff was not presented to the Board on exceptions.

Dynatron/Bondo Corp., 324 NLRB 572, 578-79 (1997) (hurricane), *enforcement denied in relevant part*, 176 F.3d 1310 (11th Cir. 1999): Board adopted ALJ’s conclusion that, during a two-day power outage caused by a hurricane, the employer unilaterally and unlawfully implemented a new policy concerning employee compensation during the hurricane in violation of Section 8(a)(5). It was undisputed that the employer did not attempt to bargain with the union over this compensation structure, and the union only learned of it approximately two weeks later during a bargaining session.

Gannet Rochester Newspapers, 319 NLRB 215 (1995) (ice storm): After employees were required to miss two days of work because local officials banned nonessential travel during a severe ice storm, the employer decided to pay non-represented employees, in accordance with the company’s handbook, for the time they missed. However, the employer required represented employees to either take personal days or go uncompensated. There were two unions representing different units at the employer’s facility: one collective-bargaining agreement in effect at the time of the ice storm was silent regarding compensation for missed work due to weather emergencies, and had a “zipper” clause privileging the employer’s refusal to bargain on uncovered subjects during the life of the contract, whereas the other collective-bargaining agreement, which was likewise silent on compensation for missed work due to weather emergencies, had expired by the time of the ice storm and the parties were negotiating a new agreement. Initially, the Board adopted the ALJ’s conclusion that, inasmuch as the employer had no past practice of paying represented employees for absences due to weather emergencies, the employer did not violate Section 8(a)(3) by paying non-represented employees in accordance with its handbook but refraining from doing so for represented employees. The Board also concluded that the employer did not violate Section 8(a)(5) by requiring represented employees working under the extant collective-bargaining agreement to take personal days or go uncompensated, since that agreement did not address payment for absences due to weather emergencies and the zipper clause indicated the parties’ intent to allow the employer to take unilateral action on items uncovered by the agreement. However, the Board did conclude that the employer violated Section 8(a)(5) with respect to employees covered by the expired contract. The Board observed that wages for lost time due to a weather emergency are a mandatory subject of bargaining, and given that those unit employees were currently working without a contract, the

employer was obligated to afford the union notice and an opportunity to bargain prior to acting unilaterally regarding a mandatory subject of bargaining.

Case Summaries Touching on the Duty to Bargain During Emergency Situations Particular to an Individual Employer

Cyclone Fence, Inc., 330 NLRB 1354 (2000) (lack of financial credit): The Board granted the General Counsel's Motion for Summary Judgment and found that the employer, which was in bankruptcy, violated Section 8(a)(5) by unilaterally closing one of its facilities, terminating all employees who worked there, and failing to pay their wages and fringe benefits after discovering that its lender had terminated its line of credit. The Board, citing *Nathan Yorke, Trustee*, 259 NLRB 819 (1981), concluded that while the "emergency situation" the employer confronted might excuse its failure to bargain with respect to the decision to close its operations, it did not excuse the employer's failure to bargain over the closing's effects.

Hankins Lumber Co., 316 NLRB 837 (1995) (log shortage): The Board determined, *inter alia*, the employer violated Section 8(a)(5) by unilaterally laying off employees at a lumber mill due to a log shortage. The Board determined the log shortage had been a chronic problem and there was no "precipitate worsening" of the problem that required immediate action prior to bargaining with the union. The Board noted that the case was distinguishable from *Brooks-Scanlon, Inc.*, 247 NLRB 476 (1979) for several reasons, among which were the fact that the employer in *Hankins* had initially offered to bargain over the permanent layoffs before retracting that offer and proceeding with the layoffs unilaterally.

Brooks-Scanlon, Inc., 247 NLRB 476 (1979) (log shortage), *petition for review denied*, 654 F.2d 730 (9th Cir. 1981) (table): The Board determined the employer did not violate Section 8(a)(5) by closing part of its plant—the sawmill—without bargaining with the union, with which it had a current collective-bargaining agreement. Thus, the employer determined that a projected decline in the amount of harvestable pine trees in the surrounding forests warranted shuttering the sawmill. Notwithstanding that the employer determined to close its operation nearly two months in advance of actually doing so, the Board concluded that a variety of factors—including the activities of conservation groups and the anticipated needs of other area lumber companies—created a set of "economic factors so compelling that bargaining could not alter them." The employer did, however, negotiate with the union regarding the effects of the partial closure.

Raskin Packing Company, 246 NLRB 78 (1979) (lack of financial credit): The Board determined that an employer, while not required to bargain over the decision to abruptly close operations, nevertheless violated Section 8(a)(5) by failing to bargain over the effects of the closure. The employer was a slaughterhouse in Sioux City, Iowa. On October 21, 1977, the employer, after discovering its credit line was discontinued, decided to immediately close the plant, and notified the union shortly afterwards. The employer then held talks with employees, with the union's knowledge, about potentially selling the plant to the employees. After these initial talks, the union notified the employer that it was requesting bargaining with respect to employees' terms and conditions of employment that would be involved in any reopening of the plant. The employer ignored the bargaining request and held another meeting with employees regarding a potential reopening of the plant. The Board determined that the employer did not violate Section 8(a)(5) by having initial discussions with the employees because the union did not initially object to those discussions, but was in violation of 8(a)(5) after it continued to discuss reopening the plant after the union's bargaining demand.

Virginia Mason Hospital, 357 NLRB 564 (2011): The Board held that an employer violated Section 8(a)(5) by unilaterally implementing a flu-prevention policy without affording the Union notice and an opportunity to bargain. The employer was an acute care hospital in Seattle, with approximately 5,000 employees, approximately 600 of whom were registered nurses represented by the union. The employer unilaterally implemented a policy, during the term of the parties' collective-bargaining agreement, requiring all nurses who had not received a flu immunization shot to either take antiviral medication or wear a protective mask. The ALJ held the employer to be excused from its bargaining obligation based on the test set forth in *Peerless Publications*, 283 NLRB 334 (1987), as: (1) the policy went directly to the employer's core purpose: to protect patient's health; (2) the policy was narrowly tailored to prevent the spread of influenza; and (3) the employer limited the requirement to nurses who refused to be immunized. The Board reversed, noting that the Board had, since the issuance of *Peerless*, sharply limited its applicability outside of its specific factual context. Thus, the employer in *Peerless* was a newspaper, and the unilaterally implemented policy in that case—a code of ethics—implicated the newspaper's First Amendment rights. Therefore, the Board determined, that case "injected a constitutional element" into the analysis that was simply missing in the healthcare context. Member Hayes, dissenting, explained that he did not believe *Peerless* "has been—or should be—limited to its facts[,]" and that the *Peerless* test merely expressed in broad terms when an employer may unilaterally establish rules that are designed to protect the "core purpose of its enterprise." In Member Hayes' view, the employer's flu-prevention policy satisfied this test for the reasons articulated by the ALJ.

/s/
P.B.R.