

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

# Advice Memorandum

DATE: July 22, 2010

TO: Rosemary Pye, Regional Director  
Region 1

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

SUBJECT: Westin Providence Hotel 530-6033-7056-8700  
Case 1-CA-46025 530-6033-7056-9500  
530-6033-2060-8800  
530-6067-2070-6700

The Region submitted this Section 8(a)(1) and (5) case for advice as to: (1) whether the Employer's unremedied unfair labor practices precluded a valid impasse; and (2) whether the Employer insisted to impasse on a nonmandatory subject by failing to remove the subject from its final offer. We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (5) by implementing its final offer because the Employer's unremedied unfair labor practices and insistence on a nonmandatory subject prevented the parties from reaching a valid, good-faith impasse.

### FACTS

The Westin Providence Hotel (the Employer) operates a hotel in Providence, RI, which houses 564 guest rooms, a restaurant, a coffee shop, banquet facilities, and a fitness center. UNITE HERE Local 217 (the Union) represents approximately 200 of the Employer's employees. The parties' most recent collective-bargaining agreement was effective November 1, 2005 through October 31, 2009.

Article 32 of that agreement, entitled "Successorship and Subcontracting" set forth limits on the Employer's right to transfer its interest in the business and subcontract work performed by unit employees. Specifically, Article 32.1 provided, *inter alia*, that the Employer would obtain from any successor a promise to retain the unit employees as a condition of the sale or transfer. The successor would then "be free" to assume the collective-bargaining agreement or maintain terms and conditions until a new agreement was negotiated. Articles 32.2 and 32.3 precluded the Employer from subcontracting any unit work prior to December 31, 2008 and required thereafter advance notice to the Union and an opportunity to bargain over the decision to subcontract and its effects.

In Article 22, the "No Strike - No Lockout" clause, the Union agreed that:

it will not call, engage in or sanction any strike, sympathy strike, picketing, boycott, refusal to handle merchandise or any other interference with the conduct of the Employer's business for any reason whatsoever. This includes, but is not limited to, dealings by the Employer with nonunion suppliers, delivery people, organizations, or other employees not covered by this Agreement. The Union further agrees that it will not interfere with any guest or tenant at the hotel while he/she is a guest or tenant occupying a room or space who sells or exhibits nonunion merchandise or employs nonunion help. . . . Provided further, if the Employer enters into a subcontract or lease . . . , the Union shall be permitted to picket only at the location where the subcontractor's or lessee's employees and/or suppliers enter the property.

#### The Employer's Economic Condition and Cost-Cutting Measures

For many reasons, the Employer was hit hard by the 2008 recession. The Employer had purchased the hotel in May 2005, when it was a 364-room facility, and then constructed a new tower, adding 200 hotel rooms in July 2007. As a result, the Employer assumed an additional debt of \$63.9 million for construction expenses. Moreover, overall costs increased by \$1.4 million from 2006 to 2008. And during the 2008 recession, the hotel experienced declines in occupancy rates and in room rates.

The Employer took a number of measures to address this situation starting in 2009. On January 14, 2009, the Employer imposed a wage and hiring freeze for nonunion employees. On February 5, 2009, it discontinued its matching 401(k) contributions for nonunion employees.

In March 2009, the Employer commissioned a study of its laundry operations. The study concluded that the hotel's equipment was outdated and insufficient for the hotel's expanded capacity; and it would cost \$1 million to replace the equipment and expand the operation. The study recommended that instead the Employer outsource its laundry operations.

By letter to the Union dated March 17, 2009, the Employer asked to open negotiations for a successor agreement, specifically noting that it wanted to discuss revisions to the subcontracting provisions, with the goal of reaching agreement by the time of the contract's expiration on October 31, 2009. The Union responded that

it would need additional time to form a bargaining committee and prepare for negotiations.

The Employer continued with its cost-cutting measures in April 2009. It modified the health insurance plans available to both union and nonunion employees. The Employer also subcontracted laundry operations.<sup>1</sup> In addition, the Employer successfully challenged its tax assessment, lowering its 2009 real estate taxes by \$555,000. Then, in June 2009, the Employer negotiated a temporary reduction in its franchise fees for a savings of \$333,000.

On June 1, 2009, the Employer informed the Union that it was considering subcontracting some of its operations. The Union maintained that subcontracting would constitute a transfer of assets under Article 32.1 of the contract. The Employer disputed this interpretation, and the parties submitted the issue to expedited arbitration.

The Bank of Scotland, the holder of the Employer's largest loan, notified the Employer on July 30, 2009 that it was no longer in compliance with the Debt Service Coverage Ratio in its Loan Agreement; its revenue had declined to a level below its likely default point.

On September 17, 2009, the Arbitrator issued a decision upholding the Union's interpretations of Article 32. He found that subcontracting of any portion of the Employer's operation would constitute a transfer under Article 32.1 and required the Employer to obtain a guarantee that the subcontractor would maintain job security and wages and benefits. Shortly thereafter, the Employer severed the subcontracting agreements it had reached for the operation of its restaurant and coffee shop and discontinued talks with other potential subcontractors regarding its parking and valet department and the health club. The Employer did not, however, terminate its subcontracting agreement covering laundry operations.

#### The Parties' Contract Negotiations

In the meantime, by letter dated August 28, 2009,<sup>2</sup> the Union had requested to negotiate a successor collective-bargaining agreement. Starting on October 14, the parties

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<sup>1</sup> The Union filed grievances over both of these changes, which are now in arbitration.

<sup>2</sup> All dates from August through December are in 2009 and thereafter are in 2010, unless otherwise noted.

met for a total of 12 sessions before the Employer announced impasse.

At the first session, the Employer provided its initial proposal seeking: a 20% reduction in wages and large concessions in benefits; increases in employee workloads; and an unlimited right to subcontract. Article 5.1 of the expiring contract, the parties' management-rights clause, granted the Employer the right "to sublease any department in whole or part or to subcontract" subject to the restrictions contained in Article 32. As noted above, Article 32 provided for notice to the Union and an opportunity to bargain about any subcontracting and, as interpreted by the Arbitrator, required the Employer to obtain the subcontractor's agreement to maintain job security and wages and benefits. The Employer was now proposing to eliminate Article 32 and add the following Article 5.2:

The rights listed in Article 5.1 may be exercised without prior consultation with the Union. However, whenever a subcontracting decision would result in the layoff of bargaining unit employees, the Employer will give the Union at least 14 calendar days advance notice and will thereafter be available to discuss the effects of the decision.

The Employer proposed no changes to Article 22, the parties' no-strike clause.

The contract expired on October 31. On November 7, the Union organized an informational picket line on the sidewalk in front of the hotel. Three of the employees who participated, including one of the Union bargaining committee members, were on their unpaid lunch break. When they tried to return to work, the Director of Human Resources claimed that they were strikers who had been permanently replaced. The Region has found in related cases that the Employer violated Section 8(a)(1) and (3) by discriminatorily enforcing its break policy and discharging these three employees and violated Section 8(a)(1) and (5) by failing to post the vacancies and hiring the replacements on unilaterally-altered terms and conditions.

This incident significantly increased the Union's distrust of the Employer and resonated throughout the remaining negotiations. For example, the Employer's own notes for the November 18 bargaining session state that "[t]he events of November 7 had an obvious chilling effect on the balance of the discussion."

By letter dated November 23, the Union requested financial information to substantiate the Employer's claims

about its financial condition. The Union sought audited financial statements, balance sheets, statements of operations, and statements of cash flow for the Employer, its "parent company," and the adjacent condo complex. The Employer provided the requested information for the Employer only.

The Union submitted its first comprehensive economic proposal at the parties' fifth bargaining session, held December 1. That proposal included: a wage freeze for year one and then an 80¢/hour increase for each of the following two years; an additional paid holiday; restoration of health care benefits to the level that existed before April 2009; a 10¢/hr increase in pension contributions for all three years; and benefit coverage for part-time employees. The Union also proposed a prohibition on subcontracting without prior study by management-labor teams. With respect to Article 22, the Union's proposal stated, "[t]he Union does not wish to continue or bargain over non-mandatory limits on our rights to strike or picket, especially our rights to take action against subcontractors in the hotel." The Employer asked the Union to clarify what portion of Article 22 it considered a nonmandatory subject, and the Union responded that any restriction on its right to picket subcontractors and possibly tenants. The parties devoted an hour, about half of this session, to discussion of the November 7 discharges.

On December 12, the Union arranged another public demonstration. Employees picketed on a public sidewalk and distributed handbills at the hotel entrances that called for reinstatement of the three discriminatees. The Employer's Director of Human Resources directed the employees to discontinue handbilling at the entrances; they complied because they feared discharge. The Region has found in a related case that the Employer violated Section 8(a)(5) by unilaterally promulgating a new no-solicitation/no-distribution rule and violated Section 8(a)(1) by threatening the employees who were handbilling.

In the parties' December 17 bargaining session, the Union repeated an earlier e-mailed request that the Employer reinstate the three discriminatees, without prejudice to the parties' claims about the legality of the discharges. The Union believed the Employer was using the employees' reinstatement as leverage in the negotiations. The Union again expressed concern over the Employer's failure to reinstate the discharged employees at the parties' next session, held five days later. The Union stated that the Employer was asking the unit employees to sympathize with its economic position while the Employer was ignoring the economic position of their Union brothers during the holidays. The Union expressed distrust of the

Employer's claims of economic distress, at least in part, because of its interrelationship with other entities.

By letter dated December 30, the Employer transmitted what it would later call its final offer. The Employer outlined three major areas of disagreement on which the parties were "hopelessly far apart": wages and benefits, subcontracting, and work assignment flexibility. The Employer's offer incorporated its initial economic proposals. With respect to Article 22, the Employer stated that it "is not insisting on any permissible [sic] aspect of no strike language in expired agreement and will not let any disagreement over such permissible aspects to stand in the way of an overall agreement."

At the following bargaining session, held January 13, the Union made some movement in its economic proposals, agreeing to defer any sections having an economic impact to year two and transferring 20¢ of its proposed second-year increase to year three. The Union stated that it could not bargain about subcontracting if the Employer insisted on retaining any portion of Article 22 that limited employee contacts with guests, tenants, or nonunion employers.

Three days later, the Union again stationed employees at the three hotel entrances to handbill guests. Twenty minutes later, a security guard told them that they were trespassing. Then, the Employer's General Manager also told them they were trespassing and needed to leave. When they asked what would happen if they refused, he threatened them with adverse consequences. The employees left the entrances and joined a picket line on the public sidewalk.

By letter dated January 21, the Employer rejected the Union's latest proposal because it failed to address the Employer's need for financial concessions and broad subcontracting rights. The Employer again proposed to maintain Article 22 from the expired contract but stated that its proposal "will not prevent an agreement should the Union object to any permissive aspect of the old language." The Employer stated that its December 30 proposal was its final offer.

After another bargaining session, the parties again exchanged correspondence regarding Article 22. On February 10, the Union e-mailed that the third, fourth, and sixth sentences of Article 22 were nonmandatory to the extent that they restricted the Union from lawful common-situs activity directed at other businesses. In a letter of that same date, the Union emphasized the connection between the Employer's demand for broad subcontracting rights and the Union's concern over Article 22. The Union wrote that it did not want to approve of "nearly unlimited

subcontracting" if the Employer would not allow it to leaflet, picket, and boycott subcontractors who "break the law or violate our rights to organize[.]" Noting that this was not an "imagined, invented, or trivial matter[.]" the Union raised the discharges and continuing threats made to handbilling employees. The Union asserted that this had caused it to have to bargain at a "severe disadvantage" and had caused the Union's bargaining committee to lose "a great deal of trust" in the Employer's owners and management. In response, the Employer sent an e-mail asserting that the area in front of the hotel is a work area on private property and employees who handbill there when off-duty are trespassing and subject to discipline.

That same day, the Union submitted a revised proposal, scaling back its proposed wage increases to 50¢ in year two and 65¢ in year three. It also submitted a counterproposal regarding subcontracting that included: an agreement to three months of emergency subcontracting of the laundry department provided that any employees laid off in 2009 as a result of the subcontracting were made whole; the establishment of a joint labor-management study team including experts and mediated by the FMCS; and the setting aside of 50¢/hour paid all recalled laundry department employees for a machine repair fund.

The Employer issued a memorandum on February 21, notifying employees that they had to get permission before taking their breaks and the failure to do so would result in discipline. Although the expired contract contained this requirement, it had not been enforced during the contract term. For this reason, the Region determined in a related case that the Employer unilaterally promulgated a new break policy in violation of Section 8(a)(1) and (5).

Four days later, the Employer wrote to the Union to discuss several pending matters and respond to information requests. With respect to Article 22, the Employer asserted its belief that all limits on Union picketing, handbilling, and boycotting at the hotel are mandatory subjects. The Employer stated that it nevertheless would not insist on language that would restrict the Union from engaging in lawful primary activity directed at other businesses in the hotel; but that if valid reserved entrances were established, the Union would have to respect them. The Employer concluded: "This should confirm that any differences over the Hotel's proposal to continue the old language are not 'deal breakers.'"

On March 2, the Employer reinstated the three discriminatees, without backpay, after learning that the Region had found their discharges violative of Section 8(a)(1) and (3).

The parties met a week later for what would be their final session before the Employer declared impasse. The Union asked that the Employer confirm that the three reinstated discriminatees would be made whole, but the Employer refused. The Union handed the Employer a written response to its February 25 letter. In that response, the Union recounted its efforts to reach an agreement. Toward the end of the letter, the Union asserted that "[o]ne of the biggest ongoing obstacles" to discussion of broader subcontract rights was the Employer's continued vague language regarding Article 22. The Union specifically asked what the Employer was insisting on in that provision and noted that reserve entrances would never work since any guest could be a customer of a subcontractor. In addition, the Union gave the Employer a modified wage proposal. It would agree to a three-year wage freeze with the following conditions: (1) no employee be paid less than 30% of the total compensation paid to any manager; (2) any increase in management compensation be matched on a percentage basis in raises for unit employees; and (3) the unit employees would receive a 25¢/hr raise in any quarter in which the Employer earned a profit.

Two days later, by letter dated March 11, the Employer declared impasse. The Employer reiterated that it viewed the following items as "essential to a sustainable future" and stated that it was clear that the Union would not agree to any of them: a significant reduction in wages with no cost increases in any other areas; the right to subcontract; and postponement of negotiations over any items entailing cost increases until a year from the date of a new contract. The Employer attached a copy of the collective-bargaining agreement with the changes that it would be implementing effective March 14. That agreement contained Article 22 from the expired contract.

Since the Employer declared impasse, the parties have met at the Employer's request to discuss its subcontracting proposals but did not reach agreement. In addition, they have met several times to discuss where employees may handbill. On June 28, the Employer laid off 50 unit employees because their departments were subcontracted.

#### The Union's Charges

The Union filed the instant charge on March 12, alleging that the Employer unilaterally implemented its final offer in the absence of a good-faith impasse. In related cases, the Region has found the following allegations meritorious:

- the Employer violated Section 8(a)(1) and (3) by discriminatorily enforcing a break policy against three employees and terminating those employees on November 7, 2009;
- the Employer violated Section 8(a)(1) and (5) by not posting the resulting vacancies under the contract and by hiring replacements on different terms and conditions than those set forth in the contract;
- the Employer violated Section 8(a)(1) and (5) by unilaterally promulgating a new no-solicitation/no-distribution rule in December 2009 and violated Section 8(a)(1) by threatening employees with discipline for handbilling at the hotel entrance;
- the Employer violated Section 8(a)(1) and (5) by unilaterally promulgating a new break policy on February 21, 2010;
- the Employer violated Section 8(a)(1) and (5) by not reaching an accommodation with the Union regarding its request for disability and workers compensation claims information and by providing a deficient response to the Union's request for information regarding the costs of employee meals.

The Employer had not remedied any of these violations prior to its declaration of impasse.<sup>3</sup>

#### ACTION

We conclude that the Employer's unremedied unfair labor practices aimed at chilling the employees' exercise of their Section 7 rights to handbill the hotel's customers, together with its refusal to take its bargaining proposal to limit those rights off the table, had a significant effect on the parties' negotiations and precluded the parties from reaching a good-faith impasse. Accordingly, the Region should issue complaint alleging that the Employer's implementation of its final offer violated Section 8(a)(1) and (5).

#### Applicable Legal Principles

We begin with a discussion of the legal principles governing the two issues in this case: (1) whether the parties could reach a good-faith impasse while the

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<sup>3</sup> Although the Employer reinstated the three discriminatees nine days prior to declaring impasse, at that time the Employer had refused to commit to back pay.

Employer's unfair labor practices remained unremedied; and (2) whether the Employer unlawfully insisted to impasse on continuation of Article 22 in any subsequent agreement.

### 1. Good-Faith Impasse

Generally, the question of whether the parties to collective-bargaining negotiations have reached an impasse "is a matter of judgment."<sup>4</sup> The Board traditionally looks to the bargaining history, the parties' good faith, the length of the negotiations, the importance of the issue(s) precluding agreement, and the parties' contemporaneous understanding to determine whether the parties reached a good-faith impasse.<sup>5</sup>

Unremedied unfair labor practices, committed before or during collective-bargaining negotiations, may taint a declaration of impasse.<sup>6</sup> Not all unfair labor practices will preclude a valid impasse; only serious unfair labor practices that "detrimentally affected the negotiations ... and contributed to the deadlock" will lead to a conclusion that impasse was declared improperly.<sup>7</sup> Typically, unremedied unfair labor practices can contribute to deadlock either by increasing friction at the bargaining table or, in the case of a unilateral change, by moving the baseline for negotiations.<sup>8</sup>

Thus, the Board repeatedly has found that an employer violated Section 8(a)(5) by implementing its final offer, where impasse was declared in the wake of serious unfair labor practices that directly contributed to the parties' failure to reach an agreement. For example, in Noel Corp., the Employer improperly declared impasse where it had discriminatorily discharged many of the striking employees.<sup>9</sup> The Board found that "negotiations foundered

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<sup>4</sup> Taft Broadcasting Co., 163 NLRB 475, 478 (1967).

<sup>5</sup> Ibid.

<sup>6</sup> Dynatron/Bondo Corp., 333 NLRB 750, 752 (2001).

<sup>7</sup> Id. at 752-53 (discriminatory discharges of five bargaining committee members and one vocal union supporter and repeated unlawful unilateral changes directly impeded negotiations and precluded good-faith impasse).

<sup>8</sup> Id. at 752, citing Alwin Mfg. Co. v. NLRB, 192 F.3d 133, 139 (D.C. Cir. 1999).

<sup>9</sup> See 315 NLRB 905, 910-11 (1994), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996).

in part" because the Employer refused to reinstate the strikers as a group; in fact, that refusal caused the Union to break off negotiations.<sup>10</sup> Similarly, in Circuit-Wise, Inc., the Employer's significant unremedied unfair labor practices -- including unilateral changes in health insurance benefits and schedules in the midst of negotiations, insistence on a permissive subject, and failure to furnish information relevant to its profit-sharing and drug-testing proposals -- precluded a valid impasse.<sup>11</sup> In particular, unilateral changes involving a major issue at the table seriously undermine the union's bargaining position and make agreement more difficult to reach, so that any resulting deadlock is not a valid impasse.<sup>12</sup>

On the other hand, unremedied unfair labor practices that have no "causal nexus" to the deadlock do not taint the impasse.<sup>13</sup> Likewise, an unlawful refusal to furnish relevant information that does not relate to the "core issues" separating the parties does not preclude a valid impasse.<sup>14</sup>

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<sup>10</sup> Id. at 911.

<sup>11</sup> See 309 NLRB 905, 918-19 (1992).

<sup>12</sup> See, e.g., Lafayette Grinding Corp., 337 NLRB 832, 833 (2002) (unilateral cessation of health and welfare fund payments where such payments were "a major issue in the negotiations"); Titan Tire Corp., 333 NLRB 1156, 1158-59 (2001) (unilateral transfer of plant equipment and refusal to provide information regarding the transfer changed baseline on job security issue).

<sup>13</sup> Washoe Medical Center, 348 NLRB 361, 362 (2006) (unilateral wage increase was not an issue in 30 subsequent bargaining sessions over a period of nearly a year and a half). Accord Quirk Tire, 330 NLRB 917, 917 (2000), enfd. in part and enf. denied in part on other grounds, 241 F.3d 41 (1<sup>st</sup> Cir. 2001) (no evidence parties discussed or were influenced by employer's unlawful failure to make insurance fund payments).

<sup>14</sup> See, e.g., Sierra Bullets, LLC, 340 NLRB 242, 243 (2003) (information requested regarding overtime issue was unrelated to four issues union considered necessary to an agreement). Compare E.I. du Pont & Co., 346 NLRB 553, 558 (2006), enfd. 489 F.3d 1310 (D.C. Cir. 2007) (impasse precluded where employer refused to provide information that related directly to employer's proposed subcontracting).

## 2. Insistence on a Nonmandatory Subject

Neither party may insist on a nonmandatory subject as a condition precedent to entering a collective-bargaining agreement.<sup>15</sup> But a party may lawfully include a nonmandatory subject in a bargaining package and bargain to impasse over that package, if both parties voluntarily engage in bargaining over the nonmandatory subject.<sup>16</sup> It is insistence to impasse "in the face of a clear and express refusal" by the other party to bargain about the nonmandatory subject that violates Section 8(a)(5).<sup>17</sup> Absent "a clear and express refusal" by the union to bargain about a nonmandatory subject, an employer's inclusion of that subject in its final offer does not constitute unlawful insistence to impasse.<sup>18</sup> There also is no violation if insistence on the nonmandatory proposal did not "contribute[] to the impasse in any discernible way."<sup>19</sup>

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<sup>15</sup> NLRB v. Borg-Warner Corp., 356 U.S. 324, 349 (1958).

<sup>16</sup> See KCET-TV, 312 NLRB 15, 15-16 (1993) (employer failed to demand that nonmandatory subject be removed from the table and willingly bargained about the matter).

<sup>17</sup> Pleasantville Nursing Home, 335 NLRB 961, 964 (2001), revd. in pertinent part 351 F.3d 747 (6<sup>th</sup> Cir. 2003) (employer's conditioning continuation of union security clause upon elimination of union initiation fee violated Section 8(a)(5)).

<sup>18</sup> Union Carbide Corp., 165 NLRB 254, 255 (1967), affd. sub nom. Oil, Chemical and Atomic Workers Local 3-89 v. NLRB, 405 F.2d 1111 (D.C. Cir. 1968) (complaint dismissed where union did not oppose employer's injection of nonmandatory issue until its inclusion in employer's final offer, four weeks after the issue was first presented).

<sup>19</sup> ACF Industries, 347 NLRB 1040, 1042 (2006) (impasse not invalidated by employer's proposed early termination of the parties' separate insurance and pension agreements where employer's insistence on that nonmandatory subject did not contribute to the parties' impasse). Accord Taft Broadcasting Co., 274 NLRB 260, 261 (1985) (valid impasse reached where nonmandatory subject was "not the issue over which the parties reached impasse" and was just one of several unresolved issues).

The Employer's Unremedied ULPs and Insistence on a  
Nonmandatory Subject Prevented a Valid Impasse

Applying these principles here, we conclude that the parties were not at a good-faith impasse when the Employer implemented its final offer. The Employer engaged in serious unfair labor practices and insisted to impasse on a nonmandatory subject for a single purpose -- to restrict Union handbilling of hotel guests in response to the Employer's subcontracting. This course of action contributed significantly to the parties' deadlock in negotiations and precluded a good-faith impasse.

Thus, shortly after the parties began negotiations, the Employer took the severe action of discharging three employees for handbilling hotel guests for a short period of time during their break. The Director of Human Resources told these employees that they were considered strikers and had been permanently replaced. These discharges were based solely on the employees' Union and protected, concerted activity, in violation of Section 8(a)(1) and (3).<sup>20</sup>

This unlawful conduct significantly increased friction at the bargaining table. The Employer's own bargaining notes documented that the discharges had a chilling effect on negotiations. Throughout the ensuing negotiations, the Union repeatedly requested that the Employer reinstate these employees, but the Employer consistently refused. At the December 22 session, the Union expressly linked its lack of sympathy for the Employer's economic condition to the Employer's lack of sympathy for the discriminatees' economic condition.

Moreover, the Employer engaged in other unlawful conduct designed to chill the employees' exercise of their Section 7 right to handbill hotel guests. The Employer unilaterally promulgated a no-solicitation/no-distribution rule in December and a new break policy in February and repeatedly threatened handbilling employees with discipline. In fact, considering this conduct in combination with the November 7 discharges, it was as if the Employer had

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<sup>20</sup> See, e.g., Santa Fe Hotel & Casino, 331 NLRB 723, 723 (2000) (hotel-casino violated Section 8(a)(1) by enforcing no-distribution/no-solicitation rule to prohibit off-duty employees from handbilling at main entrances).

unilaterally re-implemented the no-strike provisions of Article 22.<sup>21</sup>

At the same time that the Employer was engaging in this unlawful conduct, it was refusing to take Article 22 off the table despite the Union's repeated refusal to discuss restrictions on employee rights to handbill, picket, or boycott subcontractors.<sup>22</sup> In its first comprehensive economic proposal, the Union stated that it did not want either to continue or to bargain over limits on its rights to strike or picket subcontractors in the hotel. This "clear and express refusal" to discuss a nonmandatory subject was reiterated several times at the bargaining table and in correspondence. The Union explained that it could not consider the Employer's demand for greater flexibility to subcontract if the Employer was going to insist on restricting the Union's right to take lawful action against subcontractors. Yet, the Employer never took the language off of the table, despite its assertion that the language was not a deal breaker. And the Employer included that language in the final offer that it announced it was implementing.

Moreover, the Employer's insistence on this nonmandatory subject contributed in a discernable way to the parties' deadlock. The parties' disagreement over Article 22 was inextricably bound up with discussion of the subcontracting issue; and in declaring impasse, the Employer expressly named its subcontracting proposal as one of the essential matters on which the parties couldn't reach agreement. Therefore, the Employer unlawfully insisted to impasse on this nonmandatory subject.

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<sup>21</sup> See Roosevelt Memorial Medical Center, 348 NLRB 1016, 1016 (2006) (no-strike clause involves surrender of statutory rights and therefore cannot be implemented without union's consent).

<sup>22</sup> It is well established that provisions that do not address the employer's relations with its own employees and deal instead with the employer's relationship with other employers, the employer's relationship with the union, or the union's relationship with others are nonmandatory subjects. See, e.g., Mental Health Services, Northwest, 300 NLRB 926, 927 (1990) (proposal to restrict union from opposing employer's funding by campaigning against a tax levy); Hall Tank Company, 214 NLRB 995, 1000 (1974) (union liability provisions of no-strike clause); Arlington Asphalt Company, 136 NLRB 742, 745-47 (1962) enfd. sub nom. NLRB v. Davison, 318 F.2d 550 (4<sup>th</sup> Cir. 1963) (clause requiring union to indemnify employer for unlawful secondary activity).

Based on the totality of the Employer's conduct, we conclude that the parties were not at a valid impasse when the Employer announced that it was implementing its final offer.<sup>23</sup> Accordingly, the Employer violated Section 8(a)(1) and (5) by implementing that offer.

B.J.K.

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<sup>23</sup> However, the information that the Employer failed to provide did not relate to the core issues separating the parties, and, therefore, the Employer's failure to furnish that information did not taint the impasse.