UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

LANDMARK FAMILY FOODS, INC., dba CHURCH SQUARE SUPERMARKET,	)	
Respondent,	)	
and	)	CASE NOS. 8-CA-37667 8-CA-38794
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 880,	)	
Charging Party.	)	

CHARGING PARTY'S OPPOSITION TO RESPONDENT'S EXCEPTIONS AND ANSWERING BRIEF IN SUPPORT

Charging Party United Food and Commercial Workers Union, Local No. 880, AFL-CIO ("Charging Party" or the "Union"), by and through counsel, hereby files its Opposition to Respondent's Exceptions and Answering Brief in Support.

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I. INTRODUCTION

Administrative Law Judge Jeffrey D. Wedekind issued a Decision and Order in the instant case, finding that Respondent Landmark Family Foods, Inc., d.b.a. Church Square Supermarket ("Respondent" or "Church Square") committed numerous violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the "Act"). These violations included failing to pay benefit contributions, making unilateral changes in terms and conditions of employment that were never proposed in bargaining, unreasonable delay in providing information, failure to provide other information, threatening to close the store rather than reach a collective bargaining agreement and otherwise bargaining in bad faith with no intent of reaching a collective bargaining agreement.[1]

Respondent filed three Exceptions to Judge Wedekind's Decision and Order. However, two of the Exceptions are to purported findings that Judge Wedekind never made, while the other simply challenges a finding of fact without explaining how it relates to any of Judge Wedekind's conclusions of law. Further, Respondent fails to cite to any portion of the hearing transcript or hearing exhibits to support its assertions that Judge Wedekind's findings were in error. Moreover, even if the Exceptions were valid and meaningful challenges to Judge Wedekind's findings, and even if the Exceptions did include supportive citations to the record, they are entirely without merit.

Lacking any apparent evidentiary basis for its Exceptions, Respondent's brief largely reads as an editorial screed designed to advance a false narrative under which Respondent is cast as victim and the Union as oppressor. In order to advance this narrative, Respondent proffers arguments that are well beyond the scope of the Exceptions and cites to portions of the Decision and Order that are not excepted to, both in clear violation of Board procedure.

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[1] Respondent's Exceptions do not address most of the violations of the Act found by Judge Wedekind, and accordingly, Respondent has waived its right to contest them. 29 C.F.R. Section 102.46(b)(2).

Accordingly, for the reasons set forth below, Respondent's Exceptions should be summarily rejected and Judge Wedekind's Decision and Order should be adopted by the Board.

II. ARGUMENT

A. Respondent's First Exception

1. Judge Wedekind Did Not Base His Finding that Respondent Unlawfully Made Unilateral Changes on the Non-Existence of Impasse

Respondent's First Exception challenges a purported finding that Respondent was not entitled to make unilateral changes in terms and conditions because the parties never reached impasse. (Respondent's Exceptions at 1; Respondent's Brief at 3-6.) However, Judge Wedekind never made such a finding. Rather, Judge Wedekind found that Respondent violated Section 8(a)(5) of the Act, because the unilateral changes Respondent implemented on February 1, 2008 were never proposed during bargaining. (Decision and Order at 7-8.) As a result, Judge Wedekind determined that it was irrelevant whether or not the parties were at impasse. (*Id.* at 8.)

Judge Wedekind next stated that, even if Respondent had implemented terms that were proposed during bargaining, Respondent still failed to establish that the parties were at impasse on February 1, 2008, when the changes were implemented. (*Id.* at 8-12.) However, because the non-existence of impasse was not the basis for the finding that the unilateral change in terms and conditions was unlawful, Judge Wedekind's analysis of the impasse issue is dicta. The finding of a Section 8(a)(5) violation in connection with Respondent's unlawful implementation was based solely on the fact that the terms Respondent implemented were never proposed in bargaining. (*Id.* at 7-8.) This finding is supported by the testimony of the negotiators for both the Union and for Respondent, and is not rebutted by anything in the record. (Hearing Transcript ("Tr.") 324-26, 329, 1147-48.) However, Respondent completely ignores this finding, focusing instead on Judge Wedekind's dicta that followed the finding. Accordingly, Respondent's first Exception should be

rejected and Judge Wedekind's finding that Respondent's unilateral implementation on February 1, 2008 violated Section 8(a)(5) of the Act should be adopted.

2. Respondent Provides No Citations to the Record in Support of its First Exception

Even if Judge Wedekind had found a Section 8(a)(5) violation due to the non-existence of impasse, Respondent's First Exception still fails. Respondent's First Exception relies on two contentions: (i) that the parties were at impasse because the Union was inflexible with respect to negotiations over pension contributions; and (ii) that the parties were at impasse because Respondent's financial situation rendered it unable to pay the pension contribution increase proposed by the Union. (Respondent's Brief at 4-6.)

Under the Rules and Regulations of the Board, both exceptions and briefs in support must include citations to the portions of the record relied upon in challenging the administrative law judge's findings. 29 C.F.R. Section 102.46(b)(1)(iii) ("each exception ... shall designate by precise citation of page the portions of the record relied upon"); 29 C.F.R. Section 102.46(c)(3) ("any brief in support of exceptions shall contain, in the order indicated, the following ... the argument ... with specific page reference to the record"). Respondent fails to provide a single citation to the record to support its assertion in its First Exception of alleged Union inflexibility regarding pension contributions, either in the Exception itself or in its Brief in Support. (Respondent's Exceptions at 1; Respondent's Brief at 3-6.) This failure to provide even a single citation is fatal to Respondent's argument.

Respondent's contention that impasse was triggered by its alleged financial inability to pay pension contributions also suffers from a total absence of citations to the record. (*Id.*) Respondent does cite to portions of the record for the proposition that Respondent's negotiator, David Levine, informed the Union of Respondent's financial circumstances. (Respondent's Brief at 6.) However,

Mr. Levine's act of informing the Union of alleged financial problems does not equate to evidence of actual financial problems, and Respondent does not assert otherwise. With respect to Respondent's assertion that it was actually suffering from financial distress, Respondent does not point to anything in the record, choosing instead to merely restate the assertion repeatedly, as though by repetition it can overcome a failure to cite to actual evidence.

In the absence of any citation to the record in support of its First Exception, the Exception should be summarily rejected.

3. In Any Event, the Record Supports a Finding that the Parties were not at Impasse

As noted above, Judge Wedekind determined that it was not necessary to determine whether or not the parties were at impasse in order to find a violation of Section 8(a)(5) of the Act, because the unilateral changes implemented subsequent to the claimed impasse were never proposed during bargaining. (Decision and Order at 7-8.) Nevertheless, Judge Wedekind engaged in a thorough analysis of the facts and relevant law and found that, even if the unilateral changes implemented by Respondent were based on proposals made at the bargaining table, the changes would still be unlawful because the parties never reached impasse. (*Id.* at 8-12.)

Even if the non-existence of a valid impasse was the basis for Judge Wedekind's determination that the unilateral changes violated Section 8(a)(5), as Respondent's First Exception incorrectly assumes, and even if Respondent had provided citations to the record in support of its arguments, the Exception should still be rejected, because the evidence of record overwhelmingly supports a finding that impasse was not reached.

As noted above, Respondent offers two arguments in support of its First Exception. First, Respondent claims that the Union was inflexible with respect to negotiations over pension contributions. (Respondent's Brief at 4-5.) Next, Respondent contends that the parties were at

impasse because its financial situation rendered it unable to pay the pension contribution increase proposed by the Union. (*Id.* at 4-6.) As explained below, both arguments are without merit. Moreover, Respondent's argument relies on a blatant misstatement of the facts in the record.

a. The Record Shows Considerable Flexibility on the Part of the Union

The evidence of record, as discussed extensively by Judge Wedekind, demonstrates that the Union showed considerable flexibility in bargaining over pension contributions. (Decision and Order at 8-12.) The record shows that the Union first proposed a $0.30 per hour increase in pension contributions on January 15, 2007. (Tr. 222.) The Union clarified during later bargaining sessions that the increase would be retroactive to the expiration of the collective bargaining agreement, which occurred on February 2, 2007. (Tr. 232-33, 256-58.) In subsequent negotiations, the Union attempted in several ways to work with Respondent to mitigate the effect of this proposed pension increase.[2] First, the Union agreed to a lower pension contribution rate for new part-time employees. (Tr. 270, 277-78, 341-43, 1106; G.C. Ex. 20(c).) Next, the Union modified its proposal such that the pension increase would be paid prospectively only. (Tr. 343, 1151-1153; G.C. Ex. 20(c).) Finally, after the Union received long-delayed financial information from Respondent following Respondent's claim of an inability to pay, the Union withdrew its proposal for a pension increase. (Tr. 595-96; G.C. Ex. 61.) In light of this evidence, all of which Respondent ignores, the record demonstrates that the Union was eminently flexible in negotiating pension terms. Accordingly, Respondent's argument to the contrary should be rejected.

[2] In addition to the Union's proposals to directly reduce pension costs, the Union made a number of proposals designed to reduce Respondent's non-pension costs, thus mitigating the overall impact of the proposed pension increase. These proposals included a wage freeze in the first year of the contract, a removal of a bonus provision, a change in the definition of full time employment and a reduction of the cap on health care contribution increases from 12% to 8% to 5%. (Tr. 221, 226, 238-42, 278-79; G.C. Ex. 20(c).)

b. Respondent's Argument that its Financial Struggles are Evidence of Impasse is a Backdoor Attempt to Assert an Untimely Economic Exigency Defense

Respondent also contends that its financial problems are themselves evidence of impasse. (Respondent's Brief at 4-5.) However, Respondent fails to cite to a single case in support of its novel argument that financial hardship itself causes impasse. In the absence of any legal authority for its position, Respondent's argument appears to be a backdoor means of asserting that it its unilateral implementation was lawful under the economic exigency exception. *See RBE Electronics of S.D., Inc.*, 320 N.L.R.B. 80 (1995). However, Respondent never asserted this as an affirmative defense. (G.C. Ex. 1(x)). Therefore, it cannot be raised now. *See Leiferman Enterprises, LLC*, 352 N.L.R.B. 152 (2008). Further, as Judge Wedekind noted, Respondent did not argue at the hearing that its unilateral implementation was justified by economic exigency, a finding that Respondent fails to challenge.[3] (Decision and Order at 7, fn 13.) Lacking any legitimate basis for arguing economic exigency at this late date, Respondent attempts to shoehorn such an argument in by disguising it as a component of its impasse argument. This ploy should be rejected, and Respondent's attempt to advance an economic exigency argument for the first time in its Exceptions should fail.

c. Respondent's Claim that Impasse was Reached Relies on a Misstatement of a Critical Fact

Respondent alleges (again without any citations to the record) that the parties reached impasse in February 2008. (Respondent's Brief at 3.) In making this allegation, Respondent states

[3] Respondent does note in its Brief that Judge Wedekind "suggest[ed] that there was no 'economic exigency' that prevented Respondent from maintaining current benefits". (Respondent's Brief at 5.) However, a reading of the Decision and Order reveals that this "suggestion" was based on a finding that Respondent neither argued economic exigency nor offered any evidence that would have supported such an argument. (Decision and Order at 7, fn 13.) Respondent fails to challenge these findings. In any event, none of Respondents three Exceptions challenge any element of Judge Wedekind's findings relating to economic exigency, so Respondent's discussion of this issue in its Brief is inappropriate. 29 C.F.R. Section 102.46(c) ("any brief in support of exceptions shall contain no matter not included within the scope of the exceptions").

that the parties began bargaining over a successor agreement "in January 2007 and they continued negotiations until February 3, 2008." (*Id.* at 2.) Respondent does not cite to any portion of the record in support of his claim that negotiations ended in February 3, 2008, which was the approximate date on which Respondent unilaterally implemented its never-proposed terms and conditions. (Tr. 819-21.) In fact, Respondent's claim is a blatant misstatement of a critical fact. The record shows that negotiations did not end on February 3, 2008, but, rather, that the parties engaged in further negotiations on February 4, February 27, March 31 and April 2, 2008. (Tr. 316-23, 333-46, 379-385, 534-539.) These subsequent negotiations fatally undermine Respondent's argument that the parties were at impasse on February 3, 2008. *See Richmond Electrical Services*, 348 N.L.R.B. 1001, 1003-04 (2006). Therefore, it is not surprising that Respondent would attempt to mislead the Board by claiming that negotiations ended on February 3, 2008.

For all of the reasons set forth above, both procedural and substantive, Respondent's First Exception should be rejected.

B. Respondent's Second Exception

1. Judge Wedekind Did Not Make a Finding Regarding the Failure to Timely Provide Financial Records

In its Second Exception, Respondent addresses an alleged finding by Judge Wedekind that Respondent acted in bad faith in connection with its response to the Union's requests for financial statements. (Respondent's Exceptions at 1-2; Respondent's Brief at 6-7.) However, Judge Wedekind never made such a finding, because this was not an allegation of the General Counsel's Complaint. (Decision and Order at 11, fn 19, 14.) In fact, Judge Wedekind's Decision explains in considerable detail that the failure to provide financial information is not part of the bad faith

bargaining charges. (*Id.* at 11, fn 19.) Since Respondent's Second Exception challenges a non-existent finding, it should be rejected.[4]

2. Respondent Provides No Citations to the Record in Support of its Second Exception

As with the First Exception, Respondent again fails to cite to anything in the record in support of its argument that it did not act in bad faith in failing to provide financial records. (Respondent's Exceptions at 1-2; Respondent's Brief at 6-7.) Rather, Respondent simply asserts that it was justified in failing to provide the records because the request for the records was "harassment" and because the Union allegedly "knew what the requested records would show". (Respondent's Brief at 7.) Respondent's editorial assertions are not evidence, and in the absence of any citations to the evidence of record, in either the Exception itself or in the supporting Brief, Respondent's Second Exception should be rejected even if it did challenge an actual finding made by Judge Wedekind.

C. Respondent's Third Exception

1. Respondent's Third Exception Challenges Only a Finding of Fact Without Tying it to a Conclusion of Law

Respondent's Third Exception challenges Judge Wedekind's finding of fact relating to the Union's flexibility and willingness to compromise during negotiations in February, March and April 2008.[5] (Respondent's Exceptions at 2; Respondent's Brief at 6-7; Decision and Order at 9.) However, Respondent's challenge to Judge Wedekind's finding of fact is not tied to any of Judge

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[4] Judge Wedekind does find that the Union's requests for the financial information were appropriate and not motivated by bad faith. (Decision and Order at 10-11.) However, Respondent's Exceptions do not challenge this finding. Instead, Respondent unambiguously challenges a supposed finding that "Respondent acted in bad faith and in violation of the Act in responding to Union's [sic] requests for financial statements". (Respondent's Exceptions at 1-2.)

[5] Although the Third Exception does not explicitly specify a time period to which it relates, the Exception cites to page 9 of the Decision and Order, wherein Judge Wedekind made the challenged finding with respect to negotiations in February, March and April 2008. (Decision and Order at 9.)

Wedekind's legal conclusions, nor does Respondent explain in any way its relevancy to any such conclusions. (*Id.*) Accordingly, the Third Exception is essentially meaningless.

Because Respondent has neglected to explain how the challenged factual finding relates to any of Judge Wedekind's legal conclusions, its Third Exception should be rejected.

2. Once Again, Respondent's Exception Lacks Citation to the Record

As with the first two Exceptions, Respondent's contention that the Union was inflexible and unwilling to compromise during negotiations in February, March and April 2008 lacks citations to the record. (Respondent's Exceptions at 2; Respondent's Brief at 6-7.) Respondent's only citation in connection with this argument is to a single page of the hearing transcript, in which Union negotiator Mike Krzys testified that the Union consistently proposed a $0.30 pension contribution increase from the outset of negotiations through April 2008. (Respondent's Brief at 6-7; Tr. 417.) Respondent mischaracterizes this testimony as showing that the Union knew about Respondent's alleged financial difficulties, and that the Union "continued to insist" on increases in health care contributions. (Respondent's Brief at 6-7.) However, the portion of the transcript cited does not address the Union's supposed knowledge of Respondent's financial condition, nor does it address any proposed increases in health care contribution rates. (Tr. 417.) Respondent appears to have simply made this testimony out of whole cloth.

Lacking any citations beyond the single (mischaracterized) page of the transcript, Respondent again resorts to editorializing, accusing the Union of "harassment", "unsavory motivations" and "strong-arm tactics". (Respondent's Brief at 6-8.) These ad hominem attacks do not substitute for evidence, which Respondent neglects to provide. This is reason enough for the Exception to be rejected.

3. The Factual Finding Challenged is Supported by the Record

As noted above, Respondent's Third Exception challenges a factual finding without tying it to any of Judge Wedekind's legal conclusions, and lacks citation to the record. However, even if these defects were not fatal to Respondent's Third Exception, the finding challenged is in fact well-supported by the evidence of record.

Contrary to Respondent's position, the record contains abundant evidence of the Union's flexibility and willingness to compromise during the negotiations in February, March and April 2008. During this time period, the Union agreed to a lower pension contribution rate for new part-time employees. (Tr. 341-43, 1106; G.C. Ex. 20(c).) It also withdrew its proposal that pension increases would be paid retroactive to the expiration of the collective bargaining agreement, and agreed to allow the increases to be paid prospectively only. (Tr. 343, 1151-1153; G.C. Ex. 20(c).) In addition, the Union agreed to withdraw its proposal for payment of a bonus to Respondent's employees. (Tr. 341; G.C. Ex. 20(c).)

All of these changes were agreed to between February 1, 2008 and April 2, 2008, which is the first time Respondent stated that it had an inability to pay the proposed pension increase. (Tr. 379-80, 534-35.) Once Respondent made this representation, the Union requested financial records to verify the claim. (Tr. 380, 534-535, 539, 1146.) Once that information was finally provided on October 1, 2009 (18 months after it was requested), the Union withdrew its proposal for a pension increase. (Tr. 561-62, 595-96; G.C. Ex. 61.)

Given these facts, none of which Respondent challenges, Judge Wedekind's determination that the Union remained flexible and willing to compromise during the negotiations in February, March and April 2008 is clearly supported by the overwhelming weight of the evidence in the record.

D. Much of the Discussion in Respondent's Brief Falls Well Beyond the Scope of the Exceptions and Lacks Citation to the Record

As discussed above, Respondent took exception to three purported findings: (i) that the parties were not at impasse; (ii) that Respondent acted in bad faith in connection with its responses to the Union's request for financial information; and (iii) that the Union remained flexible and willing to bargain during negotiations in February, March and April 2008. The Board's Rules and Regulations clearly provide that "any brief in support of exceptions shall contain no matter not included within the scope of the exceptions". 29 C.F.R. Section 102.46(c). Therefore, Respondent is prohibited from addressing issues that are outside the scope of those three Exceptions. However, in blatant disregard of this directive, Respondent's brief is larded with editorial comment that has nothing to do with the three Exceptions.

Respondent complains about payroll audits performed by the benefit plans to which Respondent is required to contribute, even though none of the three Exceptions address any findings with respect to the audits. (Respondent's Brief at 1-2.)

Respondent claims that existence of an alleged "understanding" with the Union that not all employees would need to be included in the bargaining unit, an issue without the slightest connection to the Exceptions. (Respondent's Brief at 1.)

Respondent addresses alleged threats by the Union to file Board charges and to strike, issues that are well outside the scope of the Exceptions. (Respondent's Brief at 2, 7-8.)

Respondent discusses an alleged lack of communication between the parties, even though this issue bears no connection to the Exceptions. (Respondent's Brief at 3.)

Respondent raises the issue of its withdrawal liability that would result from its cessation of contributions to the collectively bargained pension plan, even though this issue has nothing to do with any of the Exceptions. (Respondent's Brief at 7.)

Most egregiously, Respondent discusses at length its financial condition, its purported lack of sophistication, and the supposedly "depressed area" in which it operates. (Respondent's Brief at 1-2, 3-8.) These issues are well outside the scope of Respondent's challenges to purported findings relating to existence of impasse, the Union's request for financial information or the Union's flexibility during negotiations.[6]

Not only are these issues far outside the scope of the Exceptions, they are raised without a single citation to the record. Lacking any citation to the record, or any connection to the Exceptions, Respondent's self-serving editorial comments serve only to paint itself as a victim and the Union as a persecutor. In place of so much as a single shred of evidence to support this false narrative, Respondent instead hurls invective, calling the Union "disingenuous" and "unsavory", and accusing it of "harassment" and "strong-arm tactics". (Respondent's Brief at 2, 7-8.) The insults and baseless innuendo peppering Respondent's Brief would be easier to ignore if they were not part of a larger pattern of anti-Union animus exhibited by Respondent. (Decision and Order at 23-24, fn 40; GC Ex. 107.) This animus was properly considered by Judge Wedekind in determining that Respondent engaged in bad faith bargaining, a determination that is further supported by the animus exhibited in Respondent's Brief. (Decision and Order at 22-25.)

[6] Respondent may argue that the issue of financial condition falls within the scope of the First Exception relating to impasse, based on Respondent's theory that its financial condition is evidence of impasse. (Respondent's Brief at 3-6.) However, none of Respondent's Exceptions themselves mention the issue of financial condition, nor do any of the pages of the Decision and Order cited in the Exceptions include any findings relating to Respondent's financial condition. (Respondent's Exceptions at 1-2; Decision and Order at 8, 9, 15.)

III. CONCLUSION

For the forgoing reasons, Respondent's Exceptions should be rejected and Judge Wedekind's Decision and Order should be adopted in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Charging Party's Opposition to Respondent's Exceptions and Answering Brief in Support, which was filed through the Board's electronic filing system, was served by electronic mail on this 15th day of December 2010 to:

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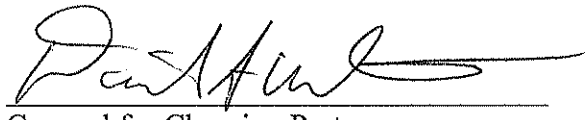

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