



SEVENTH CIRCUIT IMPOSES SUBSTANTIAL SANCTIONS AGAINST EMPLOYER FOR REJECTING TENTATIVE AGREEMENTS AND FAILING TO BARGAIN IN GOOD FAITH

The Seventh Circuit held on March 10, 2023 that a construction company (“Neises”) significantly violated an unambiguous command to bargain in good faith with the union which represents its employees (“the Union”) by retracting, without good cause, the aspects of the parties’ collective bargaining agreement to which it had tentatively agreed in *National Labor Relations Board v. Neises Construction Corporation*.

The Seventh Circuit had ordered Neises to bargain with the Union three times to no avail. In 2018 the National Labor Relations Board (“NLRB”) sought and obtained enforcement of its order requiring Neises to recognize and bargain with the Union. In May of 2019, the NLRB sought to hold Neises in contempt for failing to bargain with the Union, and the Seventh Circuit entered a consent order that required Neises to bargain with the Union not less than once every thirty days. In February 2020, the NLRB again sought to hold Neises in contempt for failing to bargain with the Union and the Seventh Circuit again entered a consent order that required Neises to bargain with the Union at least once every thirty days.

While the 2020 consent order was under submission, Neises and the Union came to tentative agreements on many aspects of the collective bargaining agreement in June of 2020. However, Neises retracted those tentative agreements, and a new attorney for Neises refused to adhere to them, and instead proposed many changes. Neises continued to propose dates to bargain, but the Union refused to bargain until Neises committed to bargain in good faith and honor the tentative agreements as they existed in June of 2020. In April 2021, the NLRB sought to hold Neises in contempt for a third time. The Seventh Circuit appointed a Special Master to resolve the parties’ factual disputes, who concluded that the Board had proven by clear and convincing evidence that Neises should be held in contempt, as the February 2020 judgment and consent order unambiguously commanded Neises to bargain in good faith. The Special Master found that Neises violated this command by, among other things, retracting without good cause numerous tentative agreements that were to be included in a final collective bargaining agreement and did not comply substantially with obligation to bargain in good faith or make reasonable, diligent efforts to do so.

In *National Labor Relations Board v. Neises Construction Corporation*, the Seventh Circuit held that the record clearly and convincingly established that Neises disobeyed the February 2020 consent order. Neises offered three broad objections. First, Neises argued that the Board did not have the authority to file a contempt petition and that the petition was not properly ratified because President Biden unlawfully removed the former NLRB General Counsel, Peter Robb. The Seventh Circuit rejected this argument, noting that the five-member NLRB, on whose behalf the petition is filed in the first place, formally endorsed seeking contempt, as well as the fact that other courts have rejected similar arguments. Next, Neises argued the report improperly decided the parties reached tentative agreements, as the Union’s version of the tentative agreements was substantially different from Neises’s version. The Seventh Circuit rejected this argument, finding that the documents were essentially

the same except for one sentence, there was no material factual dispute over the differences, and a one sentence discrepancy in a thirteen-page document does not cast serious doubt on the remainder of the parties' tentative agreements. Finally, Neises argued they did not violate an unambiguous command because the February 2020 judgment and consent order did not use the phrase "in good faith" and such a phrase is too vague anyway. The Seventh Circuit rejected this argument, finding that a command to bargain necessarily encompasses an order to engage in genuine efforts to reach an accord and that Neises could not avoid contempt simply because the order did not specifically enumerate every possible violative act.

The NLRB asked the Seventh Circuit to impose substantial contempt remedies, most of which were granted. The Seventh Circuit included remedies that included the phrase "good faith," "good cause," and "predictably unacceptable bargaining proposals," despite Neises's subjectivity and ambiguity objections, finding they had already concluded that an order to bargain in good faith is not impermissibly ambiguous and withdrawing tentative agreements without good cause is a sign of bad-faith bargaining.

The Seventh Circuit awarded requirements that Neises: (1) be required to present written proposals on all issues over which the parties had not yet reached a tentative agreement; (2) inform each of its agent or representatives of the 2020 judgment and consent order and contempt adjudication; (3) post notices to employees of the court's orders and contempt adjudication and to file a sworn statement attesting to the steps it has taken to comply; and (4) permit the NLRB access to company facilities to ensure compliance.

The Seventh Circuit also awarded: (1) the NLRB's requested monetary penalty of \$192,400; (2) compensatory damages to the Union; (3) the NLRB's own attorneys' fees at the reasonable rates of a Washington D.C. law firm; (3) a six-month decertification bar for the Union; (4) a prospective fine schedule against Neises in the amount of \$20,000 per violation and \$300 per day for each day the violation persists. Finally, the Seventh Circuit required that the order provide, upon the NLRB's motion, that future negotiations be transcribed at Neises's expense and that Neises provide advance notice to the NLRB and the Union if Neises closes or files for bankruptcy.

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Dated. March 15, 2023

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