

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

# Advice Memorandum

DATE: July 30, 2003

TO : Rosemary Pye, Regional Director  
Ronald Cohen, Regional Attorney  
Paul Rickard, Assistant to the Regional Director  
Region 1

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

SUBJECT: Saint-Gobain Abrasives, Inc.  
Case 1-CA-40817

530-6033-4220-0000  
530-6067-2040-8037  
530-6067-2070-6760  
530-8054-0133-0000  
530-8054-0167-0000

This 8(a)(5) case was submitted for advice as to (1) whether the Region should apply the "clear and unmistakable waiver" or "sound arguable basis" standard to determine whether the bargaining ground rules executed by the Union and the Employer effectively limit the parties' rights to bring particular representatives to bargaining sessions, and (2) whether the Employer was privileged to refuse to meet and bargain after the Union stated it would bring "guests" to a scheduled bargaining session.

We conclude that despite the applicability of the "clear and unmistakable" waiver standard, by agreeing to the ground rules at issue here, the Union limited those bargaining on its behalf to bargaining committee members and designated resource people. When the Union referred to certain individuals it wanted to attend bargaining as "guests," then "officials," and then "resource people," the Employer was privileged to rely on its interpretation of the ground rules and refuse to meet with a group including those individuals, absent some explanation from the Union regarding the individuals' roles in bargaining, if any.

## FACTS

### Background

UAW, Local 4069 ("the Union") was certified on December 20, 2001, as the exclusive collective bargaining representative for approximately 850 employees ("the Unit") at the Employer's Worcester, Massachusetts, facility. The Union and the Employer have been bargaining for an initial collective bargaining agreement since February 2002.

The Union has filed a number of unfair labor practice charges against the Employer. The Region found merit in many of those allegations, including that the Employer unilaterally reduced certain employees' hours from 8 to 7.5 hours a day, unilaterally altered job assignments to certain employees, made a number of pre-certification 8(a)(1) statements, promulgated unlawful rules, and unlawfully suspended one employee in retaliation for that employee's union activity. We also authorized complaint in Case 1-CA-44476, alleging unlawful unilateral implementation of interim health insurance (see Advice Memorandum dated July 11, 2003).

On February 3, 2003, a unit employee filed a decertification petition in Case 1-RD-2003. The Region has blocked the processing of that petition, pending resolution of the unfair labor practice charges.

#### Relevant Bargaining History

At the outset of their negotiations, the Employer and the Union negotiated ground rules for bargaining. On February 13, 2002, the parties executed ground rules that provide, in relevant part:

2. Negotiations shall be closed to the public. .  
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3. Negotiation sessions shall be restricted to bargaining committee members, except when the other side has been notified in advance that a resource person, who is not a member of the bargaining committee, will be attending bargaining sessions along with the identity of that individual. Each party will identify members of its bargaining committee to the other party.

13. The ground rules listed above constitute all the ground rules agreed to by the parties, and they supersede any other agreements the parties may have made regarding ground rules.

14. Neither party waives any right it had prior to the signing of these ground rules.

The parties have generally followed these ground rules throughout bargaining.<sup>1</sup>

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<sup>1</sup> It does not appear that either party has interpreted the ground rules to suggest that only members of the parties' initial bargaining committees would be allowed to

At a March 19, 2003<sup>2</sup> bargaining session, Union representatives advised the Employer that the Union intended to bring several "guests" to the parties' next scheduled bargaining session on March 24. These "guests" would include representatives of French labor organizations, including representatives from the union that represents employees at Saint-Gobain France, and a former Saint-Gobain France employee. Union negotiators stated that the French representatives' visit had been coordinated by a representative of the International Federation of Trade, which is based in Washington, D.C. The Union also advised the Employer that the French delegation was inquiring into the possibility of a plant tour and that, if possible, Union negotiators would like to attend.

The Union also advised the Employer of the Union's intention to conduct a press conference at 8 a.m. on March 24. The Union said it had invited a number of elected officials to attend the press conference, including Massachusetts' Senators John Kerry and Edward Kennedy and Congressman James McGovern. The Union also said that the congressman and senators might want to "stop in" and "say hello to the parties."

The parties proceeded to argue whether, under the ground rules, the Union could bring members of the French delegation or elected officials to bargaining. The meeting ended with each side claiming that the ground rules supported its position. The Union did not, at that time, assert that the individuals were "resource persons."

By letter dated March 20, Employer attorney Thomas Royall Smith ("Smith") advised the Union that the Employer objected to the presence of the French delegation and elected officials at the parties' negotiations, claiming that their inclusion violated "both the letter and the spirit" of the ground rules. Rather, Smith argued, the parties had agreed to close bargaining to the public, and "intentionally limited the presence of non-bargaining committee members to 'resource people[.]'" Smith stated that the Employer was willing to bargain with the Union on March 24, but only if the Union would provide written assurances that the French representatives and elected officials would not attend any bargaining sessions.

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participate in bargaining, or that either side agreed to specifically limit the size of their bargaining committee.

<sup>2</sup> All dates are in 2003 unless noted otherwise.

By letter dated March 21, Robert Madore, a Union official recently added to the Union's bargaining committee, responded that the Union's intention to include its "French resource people complied with the requirements" of the ground rules. Madore stated that Union negotiators would be prepared to meet and bargain on March 24, and expected that the Employer's representatives would be as well.

By letter dated March 21, Smith reiterated that inclusion of the Union's "guests" violated the letter and spirit of the ground rules. Smith further advised that the Employer would not bargain "under the conditions the [Union was] attempting to impose." Smith stated that the Employer was willing to reschedule the March 24 bargaining session, and would be available for bargaining on other, previously scheduled dates.

After Smith and Union representatives exchanged telephone calls and written correspondence, the parties agreed to meet on March 24, without members of the French delegation or elected officials present. The parties met for bargaining on March 24 as scheduled.

There is no evidence that the Union has ever explained to the Employer how members of the French delegation or elected officials might serve as resource people for the Union. The Union has stated in its communications to the Region that members of the French delegation would "provide assistance to the Union in the whole bargaining process, including discussion regarding the pace of negotiations and discussion about the relationship between the parties here and in France."

#### ACTION

The Region should dismiss the charge, absent withdrawal. While Unit employees have a statutory right to choose, through the Union, their representatives and agents for bargaining, the Union clearly and unmistakably agreed to limit those representatives to members of its bargaining committee and resource people. Without deciding whether members of the French delegation, elected officials, or others might qualify as resource people under the ground rules, we conclude that in the narrow circumstances presented here, the Employer was justified in refusing to meet and bargain with the delegation and elected officials until the Union clarified their anticipated roles during bargaining.

The right of employees to designate and to be represented by representatives of their own choosing is a basic policy and fundamental right guaranteed employees by

Section 7 of the Act.<sup>3</sup> Thus, each party to the collective bargaining process has the right to choose whomever it wants to represent it in formal labor negotiations, and the other party has a correlative duty to negotiate with the appointed agents.<sup>4</sup>

A union may, through negotiation, waive or restrict its right to select or designate persons to act on its behalf.<sup>5</sup> Such a waiver of a statutory right, however, cannot simply be inferred from a general contractual provision, and a contractual restriction on a union's right to select persons to deal with the employer on its behalf will not be given effect, if application of that provision would tend to undermine the Union's effectiveness as bargaining representative.<sup>6</sup> Thus, an employer's refusal to bargain with a representative of its employees is not simply a matter of contract interpretation, but rather one that requires the Board to invoke its jurisdiction and exercise its expertise to determine whether a union has waived a basic statutory right of employees.<sup>7</sup>

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<sup>3</sup> Native Textiles, 246 NLRB 228, 229 (1979); United Parcel Service, 330 NLRB 1020, 1022 (2000); Ball Corp., 322 NLRB 948, 951 (1997), citing Capitol Trucking, 246 NLRB 135, 139-141 (1979). See also Dilene Answering Service, 257 NLRB 284, 291 (1981), citing General Electric Company v. NLRB, 412 F.2d 512 (2d Cir. 1969) (the Act bestows on either party the right to be represented and assisted in the manner which it deems best and a concomitant obligation to deal with each other's chosen representatives absent extraordinary circumstances).

<sup>4</sup> Ball Corp., 322 NLRB at 951, quoting Harley Davidson Motor Co., 214 NLRB 433, 437 (1974); Indianapolis Newspapers, 224 NLRB 1490, 1499-1500 (1976).

<sup>5</sup> Shell Oil Co., 93 NLRB 161, 164-165 (1951); Ball Corp., 322 NLRB at 951.

<sup>6</sup> Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); United Parcel Service, 330 NLRB at 1022 (citations omitted); Ball Corp., 322 NLRB at 951 (citations omitted).

<sup>7</sup> Native Textiles, 246 NLRB at 229, fn. 3, citing AMF Incorporated-Union Machinery Division, 219 NLRB 903, 912 (1975). The appropriate standard for determining whether a union has waived a statutory right is the Board's "clear and unmistakable waiver" standard. It is only appropriate to examine whether an employer has a "sound arguable basis" for interpreting a contract provision as a waiver in those cases that involve rights arising solely by virtue of a collective bargaining agreement. See, e.g., Flatbush Manor

An employer may violate Section 8(a)(5) and (1) of the Act when it refuses to bargain unless the union removes a certain person from the negotiations.<sup>8</sup> However, where a union has clearly and unmistakably waived its right to be represented by whomever it wants,<sup>9</sup> or has created some confusion as to the identity of bargaining representatives, the Employer may be privileged to refuse to bargain until the union removes any ambiguity as to the identity of the purported bargaining representatives.<sup>10</sup>

The Employer and the Union are entitled to rely on the ground rules they bargained for.<sup>11</sup> By agreeing to the

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Care Center, 315 NLRB 15, 15 fn. 1 (1994) (the Board specifically rejected the employer's "sound arguable basis" argument, and the employer's reliance on NCR Corp., 271 NLRB 1212 (1984), that the union waived a statutory right). See also, Allied Signal, Inc., 330 NLRB 1201, 1204 (2000) (Board held that ALJ erroneously applied a "sound arguable basis" analysis; case involved more than a "mere breach of contract," making NCR and its progeny inapposite).

<sup>8</sup> See, e.g., Dilene Answering Service, 257 NLRB at 291; Booth Broadcasting Co., 223 NLRB 867, 875 (1976), enf'd. 570 F.2d 1303 (6<sup>th</sup> Cir. 1978).

<sup>9</sup> BASF Wyandotte Corp., 276 NLRB 1576, 1584 (1985) (union clearly and unmistakably waived any right to have anyone other than employees at the negotiating table); Brunswick Corp., 146 NLRB 1474, 1479 (1964) (union waived its right to be represented in grievances by anyone other than bargaining unit members); Shell Oil Company, 93 NLRB at 164 (union waived its right to have anyone but employees represent the union for grievance proceedings).

<sup>10</sup> See, e.g., Scott Lumber Co., 117 NLRB 1790, 1821 (1957), quoting Shell Oil, 93 NLRB at 162 (where union specifically limited its bargaining representatives, the employer was privileged to refuse to bargain with certain individuals until the union provided bona fide credentials). See also, Newell Porcelain, 307 NLRB 877, 878 (1992), rev. denied 986 F.2d 70 (4<sup>th</sup> Cir. 1993) (although employer was willing to bargain with bona fide bargaining representative local, employer lawfully refused to bargain with the local union's agent, the international, where the local and its agent created confusion as to the identity of the bargaining representative, i.e., whether the bargaining agent represented the local or the international).

<sup>11</sup> Central Maine Morning Sentinel, 295 NLRB 376, 379 (1989).

ground rules, the Union clearly and unmistakably waived its right to bring whomever it wanted to assist it in bargaining by specifically limiting its representatives and agents to its bargaining committee and resource people. Further, the Union agreed to identify such "resource" people to the Employer prior to their participation in bargaining. Conversely, the Union also specifically agreed to exclude all others from bargaining.

By first describing the French and elected officials as "guests" who would not be entitled to attend bargaining, and then by changing its nomenclature for those individuals, the Union created confusion as to whether its "guests" were in fact guests or resource people. Because the parties had expressly agreed to exclude the former, the Employer was privileged to refuse to bargain in the presence of outsiders until the Union removed that confusion.

The Union did not remove that confusion. The Union announced its intention to include the French delegation "guests" in bargaining as part and parcel of a description of the Union's anticipated media campaign to advertise the slow pace of negotiations and the parties' failure to reach an agreement. The Union then said that none of its guests would participate in bargaining. When the Employer argued that the ground rules prohibited "the public" from attending bargaining sessions, Union representatives argued that the ground rules did not specifically exclude French or elected officials. Only several days later, after the Employer cited the very limited, bargained-for exception to allow resource people to attend bargaining, did the Union claim that the members of the French delegation were actually "resource people." The Union thereafter never explained to the Employer how the members of the French delegation might serve as resource people for the Union.

Given the broad discretion accorded parties to choose their own representatives for bargaining, the Union would ordinarily have no obligation to justify its choice of resource people. Under the narrow circumstances presented here, however, where the Union initially characterized the individuals as "guests" who would be excluded from bargaining under the ground rules, we conclude that the Union had an obligation to explain how the French delegation might assist it in bargaining.<sup>12</sup> Because the Union failed

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<sup>12</sup> Because the Union did not offer any explanation to the Employer, we need not decide what the Union would have had to show to adequately support its claims here. However, we categorically reject the Employer's argument that the Union may not unilaterally define who its resource people are or might be. The Employer's arguments are contrary to the

and refused to offer the Employer any such explanation, the Employer was justified in refusing to bargain with the Union if the Union insisted on including the disputed individuals.

Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

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explicit language of Section 7, and established Board precedent.