

Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV and American Federation of Television and Radio Artists, AFL-CIO. Cases 32-CA-13537-1, 32-CA-13537-2, and 32-CA-13537-3

July 29, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 30, 1994, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order, as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV, Fresno, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete paragraphs 2(d) through (f) and substitute the following.

“(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll, business and other records necessary to verify rescission of any merit wage increases requested by the above-named labor organization.

“(e) Within 14 days after service by the Region, post at its Fresno, California facility copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps

¹In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by denying the Union's request for personal service contract information, we note that the Board has previously rejected the same arguments advanced by the Respondent here—i.e., that the disclosure of similar wage information would violate employee confidentiality and privacy interests—when raised by other employers in the broadcasting industry. See, e.g., *WXRK*, 300 NLRB 633, 636 (1990); *WCCO Radio*, 282 NLRB 1199, 1204-1206 (1987), enf. 844 F.2d 511 (8th Cir. 1988); *Radio Station WLOL*, 181 NLRB 560, 561-562 (1970).

²We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since November 8, 1993.

“(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

Jeffrey L. Henze, Esq., for the General Counsel.

Thomas E. Campagne and Sarah A. Wolfe, Esqs. (Thomas E. Campagne & Associates), of Fresno, California, for the Respondent.

Mathis L. Dunn Jr., of Bothell, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLAM J. PANNIER III, Administrative Law Judge. I heard this case in Fresno, California, on May 26, 1994, based on a complaint and notice of hearing issued on February 24, 1994, and an amendment to complaint, issued on May 10, 1994, by the Regional Director for Region 32 of the National Labor Relations Board (the Board). The complaint and amendment to complaint are based on unfair labor practice charges each of which were filed on November 8, 1993,¹ and alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the posthearing brief filed by the General Counsel and the prehearing brief filed by Respondent, as well as the arguments made during the hearing, and on my observations of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV (Respondent) has been a California corporation with an office and place of business in Fresno, California, and has been engaged in the operation of a television station there. In the course and conduct of those business operations during the 12-month period preceding issuance of the complaint, Respondent has derived gross revenues in excess of \$100,000, has held membership in or subscribed to various interstate news services, including the Associated Press, has advertised nationally sold products, and has transmitted programming

¹Unless stated otherwise, all dates occurred during 1993.

originating outside the State of California. Therefore, I conclude that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all material times American Federation of Television and Radio Artists, AFL-CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent and the Union maintain collective-bargaining relationships for employees working at several locations in the western United States. One is at Fresno where, as described in section I, *supra*, Respondent operates television station KJEO. For over 30 years the parties have maintained a bargaining relationship for employees there in an admittedly appropriate bargaining unit of:

All full time and regular part-time Artists who participate in television programs broadcast over the facilities of Respondent that are produced by Respondent (or are produced by others using Respondent's facilities), whether such broadcasts be live, filmed, taped, or otherwise pre-recorded or prepared in advance of broadcast; excluding all other employees, all non-performing employees of Respondent such as secretaries, receptionists, or salespersons, who are not employed more than twice a year on commercials except where auditions have been held among Artists or the advertising account would otherwise be jeopardized, personnel whose appearance is incidental to the performance and whose primary function is to provide atmospheric effect, guards, and supervisors as defined in the Act.

The most recent collective-bargaining contract covering those employees was effective by its terms from July 1, 1990, through July 1, 1993.

In an effort to negotiate a contract to succeed that one, the Union and Respondent participated in negotiating sessions on June 29 and 30 and on July 1 and 26. During the afternoon of that last session, Respondent submitted a fourth set of counterproposals as its "last and final—take it or leave it" counter proposal." But the Union was unwilling to accept it. Nor has it been willing to do so since then. By letter dated August 18, Respondent announced that it "hereby declares that the parties are deadlocked and at impasse. Further, please be advised that, since, we are at good-faith impasse, [Respondent] hereby now exercises its right to unilaterally implement its aforementioned Last, Best and Final Collective-Bargaining proposal," as set forth in its fourth set of counterproposals submitted to the Union on July 26.

By conclusion of the July 26 negotiating session the parties had been unable to reach agreement on five items: insurance, multiple duties pay, union security, merit pay increases, and personal service contracts (PSCs). The first three of them do not give rise to any issue in this proceeding. The parties worked out the insurance dispute. In his brief, counsel for the General Counsel states that "the complaint allegations in this regard are limited to the merit pay system and the negotiation of PSC's [sic] with newly hired employees."

In essence, PSCs are the product of a "star" system in such industries as broadcasting, entertainment, and professional sports. That is, they are contracts negotiated and executed directly between an employer and a high visibility employee, with the latter normally represented by an agent and, perhaps, by an entertainment attorney, as well. Usually PSCs provide some terms—such as compensation, penalties for attempts to resign before the PSCs' term expires, exemption from any disputes resolution procedure of nonrenewal of employment on expiration of a PSC—which differ from those in the collective-bargaining contract otherwise governing the employment terms of an employee-party to a PSC.

The Union has never objected to negotiation and execution of PSCs between Respondent and unit employees. Article 13.05, "*Minimum Terms*," on page 36 of the 1990–1993 contract, pertained to that subject:

This Agreement states the minimum terms for employment of an Artist, and the Company will not employ an Artist on terms less favorable to him than those stated in it. Consequently, any contract the Company may have with an Artist shall be deemed modified to accord with this Agreement, except to the extent such contract provides more favorable terms for the Artist. However nothing in this agreement will prevent the Company from agreeing with an Artist on higher compensation or other benefits for either services covered by this Agreement or additional services.

According to Respondent, historically that provision—which is identical to one appearing in, at least, the contract preceding the 1990–1993 one—allowed it exemption from three areas of its collective-bargaining contract: from wage increases that ordinarily would be granted during the collective-bargaining contract's term, from grievance and arbitration provisions whenever an employee's employment was not continued following expiration of a PSC, and from having to provide severance pay to such an employee.

During the June-July negotiations each party made proposals for greater specificity in article 13.05. By conclusion of the July 26 session, the Union's proposed revision of it read:

This Agreement states the minimum terms for employment of an Artist, and the Company will not employ an Artist on terms less favorable to him or her than those stated in this agreement. Consequently, the Company may enter into PSC's [sic] or other contracts. However, any PSC or other contract which the Company may now have or may later enter into with an Artist shall be deemed modified to accord with this Agreement, *except* when the PSC or other contract provides more favorable terms for the Artist than this Agreement. Further, nothing in this Agreement will prevent the Company from agreeing with an Artist on higher compensation or other benefits for either services covered by this Agreement or additional services.

In contrast, Respondent was proposing a revision that would read:

This Agreement states the minimum terms for employment of an Artist, and the Company will not employ an Artist on terms less favorable to him or her

than those in this agreement. Consequently, the Company may enter into PSC's [sic] or other contracts. However, any PSC or other contract which the Company may now have or may later enter into with an Artist shall be deemed modified to accord with this Agreement, *except* when the PSC or other contract (when considered as a whole) provides more favorable terms for the Artist than this Agreement (when considered as a whole); *and/or except* when the salary within the PSC or other contract exceeds the CBA minimum salary by 20%. Further, nothing in this Agreement will prevent the Company from agreeing with an Artist on higher compensation or other benefits for either services covered by this Agreement or additional services.

Briefly, while the subject is focused, the General Counsel contends that PSCs are not a subject encompassed by Section 8(d) of the Act. Accordingly, alleges the General Counsel, it is no more than a permissive bargaining subject and by bargaining to impasse concerning it, Respondent violated Section 8(a)(5) and (1) of the Act. In opposition, Respondent presented some evidence attempting to show that the July 26 impasse had not resulted from a deadlock about the subject of PSCs. In any event, argues Respondent further, PSCs are encompassed by Section 8(d) of the Act and, consequently, are a mandatory subject concerning which parties can legitimately negotiate to impasse. Should it be determined that Respondent is correct in that further argument, that PSCs are a mandatory bargaining subject, the General Counsel advances an alternative allegation based on the course of events pertaining to PSCs and, as well, pertaining to merit increases for employees not parties to PSCs. The latter was also a subject concerning which the parties had reached deadlock on July 26.

As to that subject, the Union had initially proposed annual automatic increases for non-PSC employees. Respondent countered with a proposed merit system, whereby each non-PSC employee's performance would be evaluated annually and Respondent would determine, in its sole discretion, the amount of merit increase, if any, that employee would be awarded. As a part of that overall program, Respondent proposed creation of a merit pay pool from which funds for individual merit payments would be drawn.

Though not particularly enamored by the concept of a merit system, the Union was willing to propose on July 26 a plan providing for 2-percent fixed annual increases for all non-PSC employees, with an additional amount equal to 2 percent of their total compensation annually being placed in the merit pool, from which individual merit increases would be drawn pursuant to Respondent's above-described proposed system. By contrast, Respondent's July 26 merit wage proposal was for a fixed 1-percent increase and a 2-percent merit pool deposit during the first contract year. But there would be no further automatic increases during either of the succeeding contract years. Instead, during the second one an amount equal to 3 percent of non-PSC employees' wages would be deposited into the merit pool, followed by an amount equal to 4 percent during the final contract year. The Union was unwilling to accept that proposal.

The General Counsel's above-mentioned alternative allegation is based on the actual implementation of both the PSC and merit pay proposals by Respondent. As to the former,

the Union agreed at the July 26 negotiating session that Respondent could continue honoring existing PSCs and, moreover, could negotiate and execute succeeding PSCs with employees who were then parties to them, but whose PSCs expired after July 26. It is undisputed, however, that the Union stated that it opposed negotiation of PSCs with any employee newly hired by Respondent after July 26.

Nevertheless, the parties stipulated that two employees—Kevin Landers and Kenneth Crumpton—had been hired after the asserted July 26 impasse and that “they simultaneously signed the PSC's [sic] and were employed.” They further stipulated that since July 26 merit increases, some in amounts more than others, had been granted to all unit employees not covered by PSCs. In fact, because Respondent has placed more than the proposed amount in the merit pool, the merit increases have averaged at least 4 percent. Finally, Respondent never notified the Union and afforded it an opportunity to bargain about individual merit increase awards. Nor did it notify the Union that PSCs were being negotiated with Landers and Crumpton, although it did tell each of those two employees that he had a right to notify the Union and ask it to participate in the negotiations for his PSC.

There is no basis for concluding that Respondent had been uncertain or unclear regarding the Union's position about no negotiations for PSCs directly with newly hired employees. Aside from the above-described undisputed fact of what had been said about the subject before the July 26 session had concluded, the Union restated that position in a letter sent to and received by Respondent's vice president and general manager, Donald C. Drilling, an admitted statutory supervisor and agent of Respondent within the meaning of Section 2(13) of the Act. That letter is dated August 24 and responds to Respondent's August 18 letter. In it, the Union objects to implementation of Respondent's “last, best and final proposal” and demands that dates and times be coordinated to continue bargaining on terms for a contract. The letter also states:

This letter also confirms that [the Union] has rescinded [Respondent]'s right to negotiate Personal Service Contracts effective July 26, 1993, for any newly hired employees. Any PSC negotiated after July 26, 1993 for any new hire is considered by [the Union] to be null and void. In order to prepare for further negotiations, [the Union] hereby demands copies of *all* existing PSC's [sic] with bargaining unit employees and the names and addresses of the bargaining unit. Please forward these documents to me immediately.

Having received no response to that letter, by letter dated September 21 the Union again requested “continued bargaining,” challenging Respondent's position that “a legitimate impasse” had been reached. The September 21 letter repeats the above-quoted demand for information made in the August 24 letter:

In addition, [the Union] demanded and still demands copies of all existing Personal Service Contracts (PSC's [sic]) with bargaining unit employees as well as the names and addresses of the bargaining unit. Please forward these documents to me immediately. You may recall that [the Union] and [Respondent] discussed several issues concerning PSC's [sic] in detail during bar-

gaining and no solution was reached. In order to continue our discussions copies of the requested PSC's [sic] are relevant and necessary.

By letter dated October 19, Respondent's counsel replied to both letters from the Union. It asserts that impasse had been reached and, accordingly, that it was proper under the Act for Respondent to implement its last offer of July 26. As to the Union's objection to negotiation and execution of PSCs with newly hired employees, counsel's letter states:

In other words, if and when, [Respondent] decides to hire a new employee and desires to enter into a Personal Service Contract with that employee, then and only then will your so-called rescission of [Respondent]'s "right to negotiate Personal Service Contracts" be a relevant dispute. In the meantime, however, please be advised that it is [Respondent]'s position that this issue has been thoroughly negotiated to good-faith impasse and that [Respondent] has implemented its position in this regard, which is in essence, its long standing past practice as confirmed by the bargaining proposals. As you recall, the bargaining proposal includes the promise to advise the potential newly hired PSC employee of [Respondent]'s recognition of [the Union] and the employee's right to involve [the Union] in the PSC bargaining process. Further, that unilaterally implemented proposal includes a proviso that the PSC arrangement will exceed the Collective Bargaining Agreement scale.

Enclosed with the October 19 letter was a list of names and addresses of all bargaining unit employees. Indicated on that list were the ones who were working under PSCs. As to the Union's request for copies of all PSCs, however, counsel's letter continues:

[L]et the record reflect that you did *not* make such request until *after* impasse was declared. At no time during the bargaining process did you ever ask for a copy of the Personal Service Contracts. Your desire to obtain PSCs [sic], when you did not find them relevant at all during the bargaining process, now appears punitive. As you are aware, there are strong confidentiality and relevancy concerns, as well as employee privacy issues, involved when a bargaining union requests a copy of a Personal Service Contract only after impasse has been declared. Therefore, please be advised that [Respondent] has no objection whatsoever to your obtaining copies of the PSC's [sic] directly from the employees themselves. That is why [Respondent] has marked on the enclosure (once again for you) those employees currently operating under Personal Service Contracts. But [Respondent] does not want to involve itself directly in the potential confidentiality and privacy issues. Therefore, you should approach the employee directly or have your shop steward do so. This is particularly appropriate since your request is made long after impasse was declared and is irrelevant to the bargaining process.

IV. DISCUSSION

Before addressing the General Counsel's alternative allegations, it is best to dispose of the independent allegation that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with copies of all PSCs with unit employees. As discussed in section III, *supra*, PSCs are employment contracts which Respondent negotiates directly with unit employees. They set forth terms under which those employees will be employed by Respondent, covering such subjects as compensation and conclusion of employment on expiration of the particular PSC. Obviously, those subjects are among ones which, under Section 8(d) of the Act, go to "the core of the employer-employee relationship," *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965), and, consequently, information concerning them is presumptively relevant. That is, absent some additional consideration, an employer violates Section 8(a)(5) and (1) of the Act if it refuses to disclose to a statutory bargaining agent such information pertaining to bargaining unit employees.

As set forth in the October 19 letter, lack of good faith was one such additional consideration which Respondent advanced to challenge the Union's request for copies of all existing PSCs. In that regard, Respondent pointed specifically to the fact that no request had been made for them until after impasse had been asserted on July 26. Yet, assuming *arguendo* that a valid impasse had then been reached, it did not serve to terminate altogether the bargaining relationship between the Union and Respondent. For, although an impasse means that "the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless," *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete*, 779 F.2d 497, 500 fn. 3 (9th Cir. 1985), quoted with approval *Laborers Health & Welfare Trust v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 fn. 5 (1988), an impasse is nonetheless viewed as "only a temporary deadlock or hiatus" in bargaining for a collective-bargaining contract, *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), during which "there [is] no realistic possibility that continuation of discussion at that time would have been fruitful." *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

The bargaining process, itself, contemplates that passage of time following such a hiatus will lead one or the other party to modify its positions(s) on deadlock issues, *ibid.*, and, once that occurs, all parties are obliged to resume negotiations in a renewed effort to reach agreement on terms for a collective-bargaining contract. Accordingly, even had impasse actually occurred on July 26, it served only to interrupt the ongoing process of bargaining for a contract; it did not serve to interrupt or suspend the Union's status as the statutory bargaining agent of employees in the historic bargaining unit.

As a general proposition, during such a hiatus in negotiations for a contract, an employer's duty to disclose relevant information is no different, and certainly no less, than exists before impasse. For, "wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement," *Whitin Machine*

Works, 108 NLRB 1537, 1541 (1954), enfd. 217 F.2d 593 (4th Cir. 1954), since “a labor organization’s right to relevant information is not dependent upon the existence of some particular controversy or the need to dispose of some recognized problem.” (Citations omitted.) *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 361 (D.C. Cir. 1983). Consequently, Respondent cannot justify its refusal to provide PSCs to the Union on the general ground that the request for them had not been made until after impasse had been asserted.

Furthermore, as stated in counsel’s above-quoted October 19 letter, article 13.05 had been one of the subjects contributing to the overall July 26 deadlock in negotiations. Given the foregoing description of what the Act contemplates for the negotiating process following an impasse, that article’s language would naturally be one area where one or both parties might be able to modify positions as a basis for restarting negotiations. Thus, there is no inherent illogic in the Union’s request for copies of existing PSCs, even though none had been requested prior to July 26. That is, as an incident to formulating proposals which might remove the obstacle of an overall deadlock in negotiations, there would be an inherent logic in a bargaining agent’s desire to inspect documents relevant to a subject that led to an asserted impasse, so that it could determine what modifications in its existing proposal(s), if any, might be presented to an employer.

Not only can it not be concluded that lack of good faith can be naturally inferred from a postimpasse request for relevant information, but in this case specific evidence regarding the basis for the Union’s request for all existing PSCs precludes any conclusion that its request had been made in other than good faith. National Representative Mathis L. Dunn Jr., the Union’s chief negotiator, testified that prior to negotiations, he had no particular reason to challenge Respondent’s representations that it was not eroding contract terms in PSCs which it had negotiated and executed with unit employees. Nonetheless, he pointed out, “we have seen across the country a move where personal service contracts are taking on more latitude than was intended by the language of Section 13.05” and, once the subject was brought into focus during the negotiations, “I was concerned about what [Respondent] was doing in light of the fact that we had not reviewed those documents in the history of the relationship.” Furthermore, Dunn testified that certain statements made by Respondent’s negotiators “relative to what was contained in the” PSCs and, given the added “fact that we could not resolve our concerns at the bargaining table,” led him to become “concerned about future employees.”

It is not material whether Dunn’s concerns may prove unwarranted once exiting PSCs are inspected by the Union. “The ‘discovery’ standard of relevancy applies precisely because the union cannot decide what role it will seek to play until it obtains concrete, adequate information.” *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129 (4th Cir. 1979). In sum, there is no basis for concluding that the Union’s request for copies of all existing PSCs had been made in other than good faith, simply because it had not been made until after impasse had been advanced.

A second ground on which Respondent contests producibility of existing PSCs is, as recited in its October 19 letter, that they contain confidential information, disclosure of which would invade the privacy of employees party to

them. Yet, there is no evidence that any one of those employees had ever “made any request to [Respondent] that it refrain from disclosing personal [service contract] information.” *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1378 (7th Cir. 1991). Nor is there any evidence that Respondent had assured even a single employee-party to a PSC that its terms would be kept confidential, much less that those terms would not be revealed to the employees’ statutory bargaining agent. Finally, there is no evidence which would support a contention, nor conclusion, that the Union would likely make an improper use of PSCs disclosed to it.

Given the policy bases underlying bargaining agents’ right to relevant information, it would not be consistent with the principles of collective bargaining under the Act to allow an employer, or even a unit employee, to preclude disclosure of relevant information which goes to “the core of the employer-employee relationship,” *Curtiss Wright Corp. v. NLRB*, supra, on the basis of a generalized assertion of confidentiality or privacy. To be sure, there is a place under the Act for both of those concepts. But, based on the evidence presented in this proceeding, this is not one of them.² Therefore, I conclude that by failing and refusing to provide copies of PSCs executed by bargaining unit employees, as requested by the Union in its letters of August 24 and September 21, Respondent violated Section 8(a)(5) and (1) of the Act.

Turning to the General Counsel’s alternative allegations, given the current state of the law it is difficult to predict what resolution the Board might require under the second one. That allegation proceeds from the possible conclusion that a genuine impasse had been reached on July 26. It then challenges implementation of Respondent’s postimpasse merit increases, as well as the negotiation and execution of PSCs with employees hired after that date, on the basis of the doctrine enunciated in *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied sub nom. *Electrical Workers IBEW Local 111 v. Colorado-Ute Electrical Assn.*, 112 S.Ct. 2300 (1992).

As that citation reveals, the *Colorado-Ute* doctrine was not accepted by the United States Court of Appeals for the 10th Circuit. Nor was it adopted by the United States Court of Appeals for the District of Columbia in *NLRB v. McClatchy Newspapers*, 964 F.2d 1153 (1992). Of course, as the General Counsel points out, I am obliged to follow the Board’s decisions, leaving it to the Board to make its own peace with the circuit courts of appeals. In this situation, however, the Board’s position is no longer as certain as was the fact in the immediate wake of *Colorado-Ute*. For, by notice to parties dated July 17, 1992, the Board invited statements of position on that doctrine and, presumably, is evaluating its continued viability. No decision has issued as a result of the notice’s invitation for statements. In consequence, there is no basis for concluding whether the *Colorado-Ute* doctrine continues to be accepted by the Board, based on a rationale

²No PSCs were produced in this proceeding. So it is not possible to evaluate all of the subjects covered by them in the light of subjects encompassed by Sec. 8(d) of the Act. Some PSC subjects may not be mandatory subjects of bargaining. Some particular PSC subjects may, indeed, be protected from disclosure by valid and recognized confidentiality and privacy concerns. Based on the record, however, there is no basis for reaching conclusions in those areas as to particular terms in Respondent’s PSCs with employees in the unit represented by the Union.

more acceptable to the 10th and District of Columbia Circuits, or whether, instead, the Board will modify that doctrine, or perhaps abandon it altogether, so that it no longer applies to facts such as those presented in the instant case or, alternatively, applies differently than would be the fact under *Colorado-Ute*.

Fortunately, it is not necessary to address those possibilities, since I conclude that the predicate for the General Counsel's alternative allegation—existence of a valid impasse—did not exist on July 26. Accordingly, I shall dismiss that alternative allegation. Furthermore, I deny the motion to amend the complaint made in the General Counsel's brief. By it, the General Counsel seeks to add an allegation that Respondent further violated Section 8(a)(5) and (1) of the Act by implementing merit increases in amounts exceeding those specified in its final offer. That motion to amend, however, is also predicated on an underlying conclusion that a valid impasse had been reached. As stated above, and as explained below, I conclude that there was no valid impasse. As a result, there is nothing to be gained by, first, granting a motion to amend and, then, dismissing the allegation added by that amendment.

The General Counsel's principal allegation is that PSCs are not a mandatory subject of bargaining, as defined in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), and, thus, while Respondent had been free to make proposals concerning their negotiation and execution directly with unit employees, it could not bargain to a valid impasse concerning them that would allow it to, then, implement its last offer of July 26. Of course, it is settled that where an impasse has been created, even in part, by insistence on bargaining about a permissive subject, such an impasse is not valid under the Act, *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988), and none of the terms of a final offer predicated on such an improper impasse can be lawfully implemented. *Boise Cascade Corp.*, 253 NLRB 462 (1987).

An employer's proposal that it be allowed to negotiate directly with the unit employees, or some of them, concerning one or more of their "wages, hours, and other terms or conditions of employment," within the meaning of Section 8(d) of the Act, cannot be classified as a mandatory subject to bargaining within the meaning of *NLRB v. Borg-Warner Corp.*, supra. Under Section 9(a) of the Act, the bargaining agent of employees in an appropriate unit is "the exclusive representative[] of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Emphasis added.) "To allow direct bargaining would eviscerate the mandate of Section 9(a) of the Act that representatives duly elected by majority vote be the exclusive bargaining agent of all the employees in a bargaining unit." *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1176 (3d Cir. 1989). Direct bargaining with one or more represented employees, rather than with their statutory bargaining agent, "substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by [those] employees." *NLRB v. Borg-Warner Corp.*, supra at 350. See also *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 674 (1944).

As a result, although an employer may lawfully make proposals for direct bargaining, or for limited direct bargaining, with unit employees, it cannot create a valid impasse by such

bargaining. For, "a license for the employer to go to impasse over whether it has to deal with [a statutory bargaining agent] . . . is the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union's role in the process." *Toledo Typographical Union v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990). See also *Newspaper Guild Local 9 v. NLRB*, 938 F.2d 284, 289 (D.C. Cir. 1991).

To be sure, Respondent regards its PSCs' terms as enhancement, as opposed to replacement, of the terms of any collective-bargaining contract with the Union. Yet, even if that is completely accurate, the difference is one of degree, rather than of kind. Inherently, even bargaining for enhanced contractual terms "eviscerate[s] the mandate of Section 9(a) of the Act," *Hajoca Corp. v. NLRB*, supra, by "substantially modify[ing] the collective bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees." *NLRB v. Borg-Warner*, supra.

Furthermore, its final proposed modification of article 13.05 would allow Respondent greater latitude in directly bargaining for PSCs than merely adding to whatever contractual terms may ultimately be agreed on in a contract. For that proposal expressly measures PSC terms against those of any contract under a standard of "when considered a whole[.]" Inherently, that standard allows negotiation of some PSC terms less favorable to employees party to PSCs than those in the contract, so long as those less favorable terms are offset by other ones more favorable than contractual terms. In short, the practical effect of that proposal is to permit Respondent to reopen and renegotiate on an individual basis some provisions already agreed on and embodied in a written contract with the Union. In consequence, Respondent's final proposed article 13.05 is not so benign for the bargaining process as its portrays.

It is accurate that Respondent has not been opposed to allowing a representative of the Union to be present whenever a PSC is negotiated directly with a unit employee. But its willingness to allow union presence has been contingent on a request by the employee involved in those direct negotiations. Permitting a unit employee to make that type of decision, as to whether to have the Union present during direct bargaining for a PSC, is effectively "the precise equivalent to demanding proof again of its authority to represent . . . that employee." *Bethlehem Steel Co.*, 133 NLRB 1347, 1364 (1961), aff'd. in relevant part *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

Were the Union to agree to Respondent's final offer, moreover, there would seemingly be no room for the Union to exercise its representative function with regard to proposed modifications diminishing particular terms in any collective-bargaining contract between the parties. So long as any such diminished contractual terms were offset by enhanced other terms, leaving the PSC more favorable "considered as a whole," or so long as the PSC exceeded the contractual salary minimum by 20 percent, then the Union would have no basis for objecting to even a PSC with terms that eviscerated portions of the collective-bargaining contract regarded by the Union as significant. Instead, the Union would be relegated to the role of spectator at possible piecemeal renegotiation of a contract on which it had already once reached agreement with Respondent.

Obviously, as a general proposition, high visibility employees are entitled to seek whatever compensation the market will bear. Equally obviously, to remain competitive Respondent needs to be able to compete for the services of such employees. Yet, the Union has not been oblivious to that situation. So far as the record discloses, historically it has accommodated the search of the one, and the need of the other, within the framework of the bargaining process contemplated by the Act. And, so far as the evidence shows, the Union remains willing to continue doing so. But to protect its own statutory representative status, as well as the efficacy of whatever contractual terms may eventually be agreed on, the Union seeks agreement on the boundaries of whatever extra-statutory direct bargaining, and inherent diminution of its own representative status, it is willing to allow. The Act protects its right to do so. Bargaining to impasse about that subject "is the antithesis of good faith collective bargaining," *Toledo Typographical Union v. NLRB*, supra, and unilateral implementation of the terms of a final proposal concerning it violates Section 8(a)(5) and (1) of the Act.

In that respect, it should be noted that a proposal for direct bargaining with unit employees differs from proposals for management-rights provisions. The latter allow an employer to take action during a contract's term, without further bargaining or notice to a bargaining agent, on its own initiative. In a sense, so, too, does a proposal for direct bargaining with unit employees. Action under management-rights provisions, however, does not involve supplemental or additional bargaining with unit employees concerning an employer's action. It contemplates no more than action taken by an employer on the basis of its own decision to do so. In contrast, negotiation of PSCs inherently requires bargaining with individual unit employees. They are necessarily a party to whatever action the employer ultimately takes. And to the extent that such negotiations and resultant employer action involve mandatory bargaining subjects, the negotiation of PSCs necessarily invades an area reserved under the Act for exclusive bargaining representatives.

Respondent argues that PSCs had been only a tangential aspect of the purported July 26 impasse. According to it, union security had been, as its vice president and general manager Drilling testified, "99.9 percent to 100 percent of the issue at the table." Asked specifically if the Union's final proposal pertaining to article 13.05 would have been accepted by Respondent had the Union agreed to Respondent's union-security proposal, however, Drilling conceded, "not with the more favorable conditions, because then you'd have the severance package and you'd have the percentage increases on top of the personal service contracts." Accordingly, there is no basis for concluding that the deadlock over modifying article 13.05 had not been an element of the overall deadlock occurring on July 26 and, as counsel's October 19 letter acknowledges, an element of the impasse asserted after that date by Respondent.

Respondent filed a prehearing brief, moving for dismissal of the complaint. To the extent that it is based on the General Counsel's alternative no. 2 allegation, I grant that motion. Since I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting merit wage increases and by negotiating and executing PSCs with employees hired after July 26, because there was no valid impasse on that date or thereafter, however, I deny the portion

of Respondent's motion directed to the General Counsel's alternative no. 1.

CONCLUSIONS OF LAW

Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV has committed unfair labor practices affecting commerce by refusing to provide relevant information requested by American Federation of Television and Radio Artists, AFL-CIO—the exclusive representative under Section 9(a) of the Act of employees in an appropriate bargaining unit of

[a]ll full time and regular part-time Artists who participate in television programs broadcast over the facilities of Respondent that are produced by Respondent (or are produced by others using Respondent's facilities), whether such broadcasts be live, filmed, taped, or otherwise pre-recorded or prepared in advance of broadcast; excluding all other employees, all nonperforming employees of Respondent such as secretaries, receptionists, or salespersons, who are not employed more than twice a year on commercials except where auditions have been held among Artists or the advertising account would otherwise be jeopardized, personnel whose appearance is incidental to the performance and whose primary function is to provide atmospheric effect, guards, and supervisors as defined in the Act—

and, further, by bargaining to impasse concerning a non-mandatory subject, by unilaterally granting merit wage increases to employees in that unit after July 26, 1993, and by negotiating PSCs with employees in that unit hired after July 26, 1993, at a time when no valid impasse in bargaining existed, in violation of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having concluded that Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to supply American Federation of Television and Radio Artists, AFL-CIO with copies of all existing personal service contracts with unit employees, as requested by that labor organization in its letters of August 24 and September 21, 1993, and, further, if requested to do so by that labor organization, shall rescind all post-July 26, 1993 merit pay increases and personal service contracts executed with unit employees hired after that date.³

³It is standard remedial procedure to permit the bargaining agent to make the final determination as to whether or not to seek rescission of unilateral changes which have benefited employees whom it represents. See, e.g., *Herman Sausage Co.*, 122 NLRB 168 (1958), enf. 275 F.2d 229 (5th Cir. 1960), and *East Belden Corp.*, 239 NLRB 776, 797 (1978). Thus, Respondent is not allowed to make that determination and, even if it did rescind those unilaterally granted increases and negotiated PSCs with employees hired after July 26, that would not satisfy the criteria for repudiation of these unfair labor practices, as set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Bargaining to impasse about the permissive bargaining subject of personal service contracts, and about any other subject not encompassed by Section 8(d) of the National Labor Relations Act, with American Federation of Television and Radio Artists, AFL-CIO the exclusive representative of all employees in the appropriate bargaining unit of:

All full time and regular part-time Artists who participate in television programs broadcast over the facilities of Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV that are produced by it (or are produced by others using its facilities), whether such broadcasts be live, filmed, taped, or otherwise pre-recorded or prepared in advance of broadcast; excluding all other employees, all non-performing employees of Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV such as secretaries, receptionists, or salespersons, who are not employed more than twice a year on commercials except where auditions have been held among Artists or the advertising account would otherwise be jeopardized, personnel whose appearance is incidental to the performance and whose primary function is to provide atmospheric effect, guards, and supervisors as defined in the Act.

- (b) Unilaterally implementing terms of an asserted final bargaining offer when no valid impasse exists in negotiations with the above-named labor organization, as the representative of all employees in the above-described appropriate bargaining unit.

- (c) Refusing to promptly furnish the above-named labor organization with copies of all existing personal service contracts, as requested in that labor organization's letters of August 24 and September 21, 1993, which is relevant information necessary for it to perform its responsibilities as the bargaining agent for all employees in the above-described appropriate bargaining unit.

- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Bargain in good faith with the above-named labor organization as the exclusive bargaining representative of all employees in the appropriate bargaining unit described in paragraph 1(a), above, and embody any agreement reached in a written contract.

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (b) Immediately supply the above-named labor organization with all existing personal service contracts with employees in the appropriate bargaining unit described in paragraph 1(a), above, as requested in that labor organization's letters of August 24 and September 21, 1993.

- (c) If requested by the above-named labor organization, rescind merit wage increases granted after July 26, 1993, to employees in the appropriate bargaining unit described in paragraph 1(a), above, and, further, personal service contracts executed with employees in that appropriate bargaining unit who were hired after July 26, 1993.

- (d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll, business and other records necessary to verify rescission of any merit wage increases requested by the above-named labor organization.

- (e) Post at its Fresno, California facility copies of the attached notice marked "Appendix."⁵ Copies of the notice on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

- (f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint and amendment to complaint be, and are, dismissed insofar as they allege violations of the Act not found here.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT bargain to impasse about the permissive bargaining subject of personal service contracts, nor about any other subject not encompassed by Section 8(d) of the Act with American Federation of Television and Radio Art-

ist, AFL-CIO as the exclusive representative of all employees in the appropriate bargaining unit of:

All full time and regular part-time Artists who participate in television programs broadcast over the facilities of Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV that are produced by it (or are produced by others using its facilities), whether such broadcasts be live, filmed, taped, or otherwise pre-recorded or prepared in advance of broadcast; excluding all other employees, all non-performing employees of Retlaw Broadcasting Company, a subsidiary of Retlaw Enterprises, Inc., d/b/a KJEO-TV such as secretaries, receptionist, or salespersons, who are not employed more than twice a year on commercials except where auditions have been held among Artists or the advertising account would otherwise be jeopardized, personnel whose appearance is incidental to the performance and whose primary function is to provide atmospheric effect, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT unilaterally implement the terms of an asserted final bargaining offer when no valid impasse exists in negotiations with the above-named labor organization, as the representative of all employees in the above-described appropriate bargaining unit.

WE WILL NOT refuse to promptly furnish the above-named labor organization with copies of all existing personal service

contracts, as requested in that labor organization's letters of August 24 and September 21, 1993, which is relevant information necessary for it to perform its responsibilities as the bargaining agent for all employees in the above-described appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any of your rights set forth above which are guaranteed by the Act.

WE WILL bargain in good faith with American Federation of Television and Radio Artist, AFL-CIO as the exclusive bargaining representative of all employees in the appropriate bargaining unit described above, and embody any agreement reached in a written contract.

WE WILL immediately supply the above-named labor organization with all existing personal service contracts with employees in the above-described appropriate bargaining unit, as requested in that labor organization's letters of August 24 and September 21, 1993.

WE WILL, if requested by the above-named labor organization, rescind merit wage increases granted after July 26, 1993, to employees in the above-described appropriate bargaining unit and, if requested by the above-named labor organization, WE WILL rescind personal service contracts executed with employees in that appropriate bargaining unit who were hired after July 26, 1993.

RETLAW BROADCASTING COMPANY, A SUBSIDIARY OF RETLAW ENTERPRISES, INC., D/B/A KJEO-TV