

**Des Moines Register and Tribune Company and Des Moines Mailers Union Teamsters Local #358 affiliated with International Brotherhood of Teamsters.** Case 18-CA-16243-1

August 20, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On April 24, 2002, Administrative Law Judge William N. Cates issued the attached bench decision.<sup>1</sup> The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting, as a condition of continued negotiations for a new collective-bargaining agreement, that the Union bargain concerning a nonmandatory subject of bargaining: the number of full-time journeymen positions in the Respondent's mailroom. In finding the violation, the judge found that the parties' expired collective-bargaining agreement contained language that created a lifetime job guarantee for certain employees, that the job guarantee was a permissive subject of bargaining, and that the Union was not required to bargain over it when negotiating a new collective-bargaining agreement. The judge also found that, even if the number of full-time journeymen positions was a mandatory subject, the disputed contract language constituted a "clear and unmistakable" waiver of the Respondent's right to bargain over this issue without the

<sup>1</sup> We do not think that this case was suitable for a bench decision. Although the determination whether to issue a bench decision is within the trial judge's informed discretion, the Board has provided guidance concerning the kinds of cases in which a bench decision may be appropriate. Thus:

The cases in which bench decisions are rendered should be only those that "turn on a very straightforward credibility issue; cases involving one day [trials]; cases involving a well settled legal issue when there is no dispute [over] the facts; short single issue cases; or cases in which a party defaults by not appearing at the [trials] . . . . [I]n more complex cases . . . [bench decisions] would likely not be appropriate." Division of Judges *Bench Book*, Section 12-620, citing Proposed Board Guidelines on Bench Decisions, 59 Fed. Reg. 65,942-65,943 (Dec. 22, 1994), adopted as a final rule, 61 Fed. Reg. 6940 (1996), codified at 29 CFR Sec. 102.35.

Because the issue in this case is relatively complex, we think that the judge should have issued a written decision after receiving briefs from the parties and conducting a more thorough analysis of the issue.

Union's consent. The Respondent has excepted to the judge's findings. For the reasons discussed below, we find merit in the exceptions, and we shall dismiss the complaint.

II. FACTS

The pertinent facts are not in dispute. The Respondent publishes a daily newspaper, the Des Moines Register. The Union is the longtime collective-bargaining representative of a bargaining unit of the Register's mailroom employees and has entered into a number of successive collective-bargaining agreements with the Respondent, the most recent covering the period from July 18, 1998, to July 18, 2001.

There are several classifications of employees within the bargaining unit: journeymen situation holders, journeymen nonsituation holders, trainees, and casuals. A journeyman "situation" is a full-time position with regular working days, regular off-days, and a workweek of 37-1/2 hours. The parties agreed in their 1995-1998 collective-bargaining agreement that the Respondent would maintain 70 situations in the bargaining unit.

In anticipation of the Respondent's March 2000 move into a new facility, the parties included in their 1998-2001 collective-bargaining agreement the following provisions concerning the number of situations to be maintained at the new facility:

*Section 3.02*

. . . .

(B) The Company will start operations at the new facility with 40 full-time situations. These situations shall consist of 37-1/2 hours of work per week, with regularly scheduled days of work and regularly scheduled off-days.

. . . .

(D) All situations, other than over-scale/machinists, shall be selected in accordance with priority standing.

(E) The 40 full-time situations will be maintained for as long as 40 of the Journeyman situation holders employed as of the signing of the contract continue to be employed and desiring a full-time situation. Thereafter, the Company shall maintain a number of full-time situations equivalent to the number of Journeyman situation holders employed as of the signing of this contract who remain employed and desiring a full-time situation.

The 1998-2001 agreement expired on July 18, 2001. From July 5 through October 11, 2001, the parties met on several occasions to negotiate a successor agreement. At the first bargaining session, the Respondent proposed reducing the full-time situations from 40 to 22 positions.

The Respondent based this lower number on its operating needs as indicated by 18 months' experience in the new facility. The Union's counterproposal was to eliminate section 3.02(E) and revise section 3.02(B) to require the Respondent to maintain a minimum of 40 situations, without section 3.02(E)'s provision for a downward revision of the minimum number as present situation holders leave the work force.

At the October 10 and 11 sessions, the Union requested information supporting the Respondent's position that the situations to be eliminated were unnecessary to the operation of the mailroom. On October 10, the Respondent, by its representative, William Behan, stated that the parties needed to resolve the journeyman situations and related staffing issues, and if they could not, there was no need for further bargaining. The next day, the Union, by its representative, Ed Cox, announced that it was not interested in negotiating over the number of situations because it considered section 3.02(E) to be a lifetime job guarantee. Behan stated that unless the Union abandoned its unwillingness to bargain over reducing the number of situations provided in section 3.02(E), continuing negotiations would be a waste of time. Behan presented the Union with the Respondent's final offer, which included a proposal reducing the number of situations in the unit from 40 to 22. The parties have stipulated that they are at impasse and that they have neither bargained nor requested to meet for negotiations since October 11, 2000.

### III. THE ADMINISTRATIVE LAW JUDGE'S DECISION

The judge found that the language of section 3.02(E) operated as a job guarantee for 40 journeymen situation holders: a provision that did not expire with the 1998–2001 collective-bargaining agreement, but was effective until the last of the 40 situation holders in the unit left the work force. *Detroit Newspapers*, 326 NLRB 700, 705 (1998), revd. on other grounds *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000). He relied on the language of section 3.02(E) stating that the 40 situations would be maintained “as long as 40 of the Journeymen situation holders employed as of the signing of the contract continue to be employed and desiring a full-time position.” The judge found nothing in that provision requiring interpretation or explanation; instead, he held, it clearly established a lifetime job guarantee for qualifying employees. He found, in other words, that the 40 situations for the journeymen employed as of the signing of the 1998–2001 agreement constituted an accrued benefit that survived the 1998–2001 agreement and that could not be changed without the Union's consent. The judge therefore concluded that section 3.02(E) was a permissive, rather than a manda-

tory, subject of bargaining, and that the Respondent violated Section 8(a)(5) and (1) by conditioning continued contract negotiations on the Union's willingness to bargain over the number of situations in the unit.

Alternatively, the judge found that even if section 3.02(E) was a mandatory subject, the language of the provision constituted a clear and unmistakable waiver of the Respondent's right to bargain over this issue. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

### IV. EXCEPTIONS

In exceptions, the Respondent contends that section 3.02(E) is not a lifetime job guarantee, but merely a specific benefit for qualified unit members that is subject to future renegotiation as a mandatory subject of bargaining. The Respondent asserts that the provision was meant as a transitional device during the Respondent's initial operations in its new facility, so that it could obtain a sense of its operating needs as to journeyman situations and then negotiate a new number with the Union. The Respondent acknowledges that employers and unions may negotiate provisions that constitute lifetime job guarantees, but argues that for section 3.02(E) to constitute such a guarantee, it would have to contain an affirmative indication that the parties had agreed that it would not be subject to renegotiation.<sup>2</sup>

The Respondent also excepts to the judge's alternative finding that the language of section 3.02(E) constitutes a clear and unmistakable waiver of its right to bargain in future agreements over the number of situations. The Respondent asserts that neither the contract language nor the bargaining history supports the existence of such a waiver.

### V. ANALYSIS

The issue before us is whether the General Counsel has shown that section 3.02(E) became a contract term that survived expiration of the 1998–2001 agreement. If it did, then under Section 8(d) of the Act, the Union was privileged not to renegotiate it, and the Respondent correspondingly violated Section 8(a)(5) by insisting to impasse on bargaining over changes in the number of journeyman situations, a permissive subject of bargaining under these circumstances.<sup>3</sup> On the other hand, if section

<sup>2</sup> The Respondent also disputes the judge's finding that the Union ceased bargaining over sec. 3.02(E), because the Union never withdrew its proposal to replace sec. 3.02(E) with a permanent minimum of 40 situations.

<sup>3</sup> While parties in contract negotiations may insist to impasse on proposals relating to mandatory bargaining subjects, it is unlawful to insist to impasse on a permissive subject. *Ohio Valley Hospital*, 324 NLRB 23, 24 (1997), citing *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342, 349 (1958). Pursuant to Sec. 8(d), renegotiation of a contract term is a permissive subject for the duration of the con-

3.02(E) did not survive expiration of the agreement, then the number of journeyman situations—defined in terms of number of hours per work week and regularity of work schedules—was a mandatory subject of bargaining and the Respondent did not violate Section 8(a)(5).<sup>4</sup>

We find that the General Counsel has failed to prove that section 3.02(E) survived expiration of the agreement, and thus has not established a violation of Section 8(a)(5).<sup>5</sup> The crucial issue here is the parties' intent with respect to the duration of section 3.02(E), as expressed in their agreement. *St. Vincent Hospital*, 320 NLRB 42 (1995). We begin by examining the language of the provision itself. Following established rules of contract interpretation, if the wording of the provision is ambiguous—that is, unclear or susceptible to more than one interpretation—we turn to extrinsic evidence. *Sansla, Inc.*, 323 NLRB 107, 109 (1997); *Electrical Workers Local 1977 (A. O. Smith Corp.)*, 307 NLRB 138, 139 (1992), citing *Oil Workers Local 1547 v. NLRB*, 842 F.2d 1141, 1144 (9th Cir. 1988).

In our view, the language of section 3.02(E) is ambiguous as to the duration of the provision. Contrary to the judge's finding, the language in question—which recites that the "40 full-time situations will be maintained for as long as 40 of the Journeyman situation holders employed as of the signing of the contract continue to be employed and desiring a full-time situation"—does not, by its terms, indicate that the arrangement was intended to survive the expiration of the collective-bargaining agreement and to be effective until the last situation holder leaves the Respondent's employ.<sup>6</sup> (Emphasis added.) Although the language could bear that interpretation, it also could mean only that the number of situations would not be reduced (unless a situation holder left) during the life of the contract. In this respect, the usual rule of contract interpretation is that, without further clarifying language, the duration of a provision of a collective-bargaining agreement is determined by the terms

tract, even though the term may concern the wage, hours, or other terms and conditions of employment of unit employees.

<sup>4</sup> It is well settled that issues relating to unit employees' hours and work schedules are mandatory subjects. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 902 fn. 19 (2000); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992).

<sup>5</sup> The General Counsel bears the ultimate burden of proving every element of a claimed violation of the Act. *Western Tug & Barge Corp.*, 207 NLRB 163 fn. 1 (1973).

<sup>6</sup> The employment guarantee here, like most terms and conditions of employment, survived the expiration of the contract in the sense that the Respondent was required to maintain the status quo until the parties negotiated a new agreement or bargained in good faith to impasse. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). The question is whether that guarantee survives as a contractual obligation.

of the overall agreement. See *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606 (7th Cir. 1992) (en banc), cert. denied 510 U.S. 909 (1993). The collective-bargaining agreement here had a 3-year term, and section 3.02(E) does not contain any language expressly extending its duration beyond that term.<sup>7</sup> Consequently, the Respondent's interpretation of the language as creating only a minimum number of situations, subject to renegotiation at the expiration of the 1998–2001 agreement, is at least as plausible as the Union's interpretation that it was meant to be a lifetime job guarantee.

Given this ambiguity, we normally would look to extrinsic evidence indicating the parties' intent as to the duration of the provision. *Diplomat Envelope Corp.*, 263 NLRB 525, 536 (1982), enf. mem. 760 F.2d 253 (2d Cir. 1985). Such evidence could include "bargaining history, the parties' interpretation of the contract, the conduct of the parties, and the legal context in which the contract was negotiated." *Electrical Workers Local 1977 (A. O. Smith Corp.)*, 307 NLRB at 139. Here, however, the record contains no such objective evidence that might illuminate the parties' intent in agreeing to this provision.<sup>8</sup> Instead, we have only opposing testimony by the

<sup>7</sup> There is no "prescribed formula" for determining when a provision survives the expiration of a collective-bargaining agreement. *Bidlack v. Wheelabrator Corp.*, supra, 993 F.2d at 607. In cases involving lifetime job guarantees, however, the provisions have contained explicit language announcing an ongoing existence apart from the duration of the underlying agreement, and sometimes have even been contained in a separate agreement. See *Cumberland Typographical Union No. 244 v. Times & Alleganian Co.*, 943 F.2d 401, 402–403 (4th Cir. 1991) ("The terms of this article shall continue in force through succeeding agreements unless changed by mutual agreement between the parties."); *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1120–1121 (6th Cir. 1981) (separate agreement explicitly states that "it is to supersede any and all existing contracts and/or agreements between the parties 'and is permanent unless cancelled by mutual agreement of both' parties."); *Washington Star Co.*, 273 NLRB 391, 392 (1984) (separate agreement with clause stating that it "will not be subject to amendment or revision in future collective-bargaining negotiations.") The judge cited the Board's decision in *Detroit Newspapers*, supra, which found that a lifetime job guarantee was a fixed-term contract under Sec. 8(d), as supporting his conclusion that the similar language of sec. 3.02(E) created a lifetime job guarantee contingent on the work lives of the current situation holders. 326 NLRB 700, 704–706. In *Detroit Newspapers*, however, the lifetime job guarantee had been embodied in a separate Memorandum of Understanding, which stated that it "shall be ongoing and part of all future collective-bargaining agreements and shall not be subject to amendment except by mutual consent of the parties." 326 NLRB at 704. We are reluctant to infer a lifetime job guarantee in the absence of some language of this sort.

<sup>8</sup> The Respondent excepts to the judge's refusal to allow into evidence the Respondent's collective-bargaining agreement with the pressmen's union, which allegedly contained a job guarantee explicitly worded to survive the expiration of the collective-bargaining agreement. The Respondent asserts that this agreement would have shown that its bargaining representatives would have utilized more explicit language if it intended to create a lifetime job guarantee with the Un-

parties' representatives as to their subjective impressions—not expressed during bargaining—as to the duration of the provision.

In the absence of unambiguous contract language and probative extrinsic evidence of the parties' intent, we are unable to ascertain the parties' intent in agreeing to this provision. *Plasterers Local 627 (Jack Hart Concrete)*, 274 NLRB 1286, 1287–1288 (1985). Therefore, we find that the General Counsel has not proved that section 3.02(E) was intended to be a lifetime job guarantee, immune to renegotiation over the Union's opposition. It necessarily follows that, contrary to the judge, the General Counsel has also failed to prove that a contractual waiver of the right to bargain about the job guarantee survived expiration of the 1998–2001 agreement.

In conclusion, we find that the General Counsel has failed to show that the number of situations is a permissive subject of bargaining under Section 8(d) or that the Respondent waived its right to bargain over the subject. Accordingly, the Respondent did not violate the Act by insisting to impasse on this issue, and we shall dismiss the complaint.<sup>9</sup>

#### ORDER

The complaint is dismissed.

#### BENCH DECISION

##### STATEMENT OF THE CASE<sup>1</sup>

WILLIAM N. CATES, Administrative Law Judge. The gravamen of this case concerns whether the following provision in the parties most recently expired collective-bargaining agreement constitutes a job guarantee for certain bargaining unit employees.

*Article III Section 3.02(E)* The 40 full-time situations will be maintained for as long as 40 of the Journeyman situation holders employed as of the signing of the contract continue to be employed and desiring a full-time situation. Thereafter, the Company shall maintain a number of full-time situations equivalent to the number of Journeyman situation holders employed as of the signing of this contract who remain employed and desiring a full-time position.

At the close of a 1-day trial in Des Moines, Iowa, on April 24, 2002, and after hearing oral argument by Government and company counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and

ion. Because we are dismissing the complaint, we find it unnecessary to pass on whether the judge properly excluded this evidence.

<sup>9</sup> We reject the Respondent's argument that the Union had not ceased bargaining over sec. 3.02(E) because it never formally withdrew its proposal to replace the provision. This assertion is contradicted by the parties' stipulation that they are at impasse.

<sup>1</sup> The name of the Company appears as corrected by amendment at trial.

conclusions of law. This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the Board.

For the reasons stated by me on the record at the close of the trial, I found Des Moines Register and Tribune Company (Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by conditioning continued contract negotiations and reaching any collective-bargaining agreement with the Des Moines Mailers Union Teamster Local #358, affiliated with International Brotherhood of Teamsters (the Union) on the Union's willingness to bargain concerning the number of full-time situation journeyman positions that would be in the unit. I concluded, on the undisputed facts of this case, that bargaining concerning the number of full-time situation journeymen positions in the bargaining unit was not a mandatory subject for the purposes of collective bargaining. I found the situation journeymen provisions set forth above are extant to the expiration of the collective-bargaining agreement and that the provisions constitute a job guarantee with accrued and vested rights for certain specific job holders until the last job holder ceases to work or desires to work for the Company. *Detroit Newspapers*, 326 NLRB 700 at 705 (1998). In concluding that the number of situation journeymen positions in the unit, under these circumstances, was a permissive subject of bargaining, I found the Company could not validly insist, as it did, to impasse with the Union on that subject before negotiating on other mandatory bargaining subjects still open for negotiations. I further concluded the Union could validly negotiate, as it did, for a while on the subject matter and then cease to do so without impacting the permissive nature of the bargaining subject. Although I found the language from the prior collective-bargaining agreement to clearly, on its face, constitute job guarantees without any interpretation or construction beyond its own meaning, I also concluded, *arguendo*, that had I found the subject matter of the number of situation journeymen in the unit to be a mandatory subject of bargaining I would nonetheless conclude the Company clearly and unmistakably waived its right to bargain on that matter. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

The Company's refusal since October 11, 2001, to continue bargaining until the situation journeyman issue was negotiated further violates Section 8(a)(5) and (1) of the Act.

I certify the accuracy of the portion of the transcript, as corrected,<sup>2</sup> pages 144 to 162, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

#### CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>2</sup> I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attachment C [omitted from publication].

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend the Company be ordered to bargain in good faith with the Union and that it cease and desist from conditioning continued negotiations with the Union on the Union's agreeing to negotiate further concerning the number of situation journeymen positions to be included in the bargaining unit.

[Recommended Order omitted from publication.]

APPENDIX A

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....

This is my decision in the matter of Des Moines Register and Tribune Company herein Company case 18-CA-16243-1. First I wish to thank the parties for their presentation of the witnesses, documents, and other evidence. Each of you are a credit to the party you represent. It is seldom that a case comes along like this one where the parties are very cooperative, they know what it is they wish to present, present

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it, make their arguments, and move on. It not only has been a pleasure to hear this case, it's been a pleasure to be in Des Moines, Iowa.

This is an unfair labor practice case prosecuted by the National Labor Relations Board's, herein Board, General Counsel, herein government counsel, acting through the Regional Director for Region 18 of the Board following an investigation by Region 18's staff. The Regional Director for Region 18 of the Board issued a Complaint and Notice of Hearing herein complaint on March 22, 2002, based upon a charge filed on November 30, 2001, by the Des Moines Mailers Union Teamster Local # 358 affiliated with the International Brotherhood of Teamsters, herein Union.

The facts herein are admitted, stipulated, or undisputed. It is essential that I set forth certain of those facts at this point in the Bench Decision which I shall now do. It is admitted the Company is an Iowa corporation with an office and place of business in Des Moines, Iowa where it's engaged in the publication of a daily newspaper in and for Des Moines, Iowa and surrounding areas. During the twelve months preceding the issuance of the complaint herein, a representative period, the Company derived gross revenues in excess of \$200,000. During the same time period, the Company, in conducting its business operations just described, held membership in or subscribed to interstate news services, published various national syndicated

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features, and advertised various nationally sold products. The complaint alleges, the parties admit, the evidence establishes, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the National Labor Relations Act as amended herein Act.

The complaint alleges, the parties admit, and I find the Union is a labor organization within the meaning of 2(5) of the Act. I find Company vice-president J. Austin Ryan, packaging center manager Brian Robbins, and vice-president of human resources Joyce M. Ray are supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act. The only reason I state that in the decision is that they participated at various times in the negotiations between the Company and the Union. It is admitted, and I find, that William A. Behan is legal counsel for the Company, and an agent of the Company within the meaning of Section 2(13) of the Act. It is stipulated, and I find, "all employees covered by this agreement who are employed to do work in connection with the operation of the newspaper mailroom of the Company, herein more fully described" referred to herein as the unit, constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. I find that at all times material herein the Union has been the designated exclusive collective bargaining representative of the employees in the unit I just described and has been recognized as such by the

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Company. This recognition has been embodied in successive collective bargaining agreements. The most recent covering the period July 18, 1998 through July 18, 2001.

I find the Union as the representative of a majority of the employees in the unit I just described, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and by virtue of Section 9(a) of the Act, has been and is the exclusive representative of the unit for the purposes of collective bargaining.

It is stipulated that at all material times herein the Union has requested the Company to recognize it as the exclusive collective bargaining representative of the unit and bargain collectively with the Union as the exclusive collective bargaining representative of the unit. It is admitted that since October 11, 2001 and continuing thereafter the Company has insisted, as a condition of continued contract negotiations in reaching any collective bargaining agreement, the Union bargain concerning the number of full-time situation journeymen positions in the unit.

I note for clarification of the record in this Bench Decision that a full-time situation journeymen position has been referred to in the previous collective bargaining agreements as a "situation". It appears a "situation" is a full-time journeymen position with regular working days and regular off

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days and consists of a 37 1/2 hour work week. The specific complaint allegations are that bargaining concerning the number of full-time situation journeymen positions in the unit is, in the circumstances of this case, not a mandatory subject of bargaining for the purposes of collective bargaining.

It is also alleged the Company's insistence since October 11, 2001, and thereafter, as a condition of continued contract negotiations in reaching any collective bargaining agreement with the Union, that the Union bargain concerning the number of full-time situation journeymen positions in the unit constitutes

interference with and restrains and coerces employees in the exercise of rights guaranteed them in Section 7 of the Act, and constitutes a failure and refusal on the part of the Company to bargain collectively and in good faith with the exclusive bargaining representative of its employees in violation of Section 8(a)(1) & (5) of the Act. The Company, by its answer, denies having violated the Act in any manner alleged in the complaint.

This case requires no credibility resolutions. I state I carefully observed the two witnesses as they testified and have utilized such in arriving at the facts herein. I have also considered the two witness' testimony in relation to each other's testimony and in light of the exhibits presented herein. If there is any evidence that I rely on that might seem to contradict the facts I have set forth, I have not ignored such

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evidence but rather have discredited or rejected it as not reliable or trustworthy. I have considered the entire record in arriving at the facts herein. The parties have had collective bargaining agreements for a number of years. As I just noted, the most recent collective bargaining agreement expired by its terms on July 18, 2001. The collective bargaining agreement previous to the most recently expired one was effective from 1995–1998. An issue of overriding importance for the Company and the Union in the instant case is the number of situations the Company must make available to the bargaining unit. As I indicated earlier, a situation is a full-time journeyman position with regular working days and regular days off. A full-time situation journeyman works 37 1/2 hours per week. In the 1995–1998 collective bargaining agreement it was agreed between the parties the Company would maintain 70 situation journeymen positions in the bargaining unit.

In the collective bargaining agreement that expired on July 18, 2001 the parties, through negotiations, agreed the Company would maintain 40 situation journeymen positions with a proviso that I shall refer to shortly. It is undisputed that, at the time of the negotiations for the collective bargaining agreement that expired on July 18, 2001, the Company was in the process of planning for and constructing a new facility. The collective bargaining agreement that expired on July 18, 2001 had components dealing with both the Company's old downtown Des

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Moines, Iowa facility and the Company's new facility located in South Des Moines, Iowa. The new location portion of the collective bargaining agreement came into effect at the time the Company moved into its new facility in March 2000 and its terms remained in effect until the collective bargaining agreement expired on July 18, 2001. In the collective bargaining agreement that expired on July 18, 2001 the parties agreed the Company would maintain 40 situation journeymen positions in the bargaining unit. This agreement is set forth in Article 3 Section 3.02(E) of the new location component of the collective bargaining agreement. That section reads in its entirety as follows, "The 40 full-time situations will be maintained for as long as 40 of the journeymen situation holders employed as of the signing of the contract continue to be employed and desiring a full-time situation. Thereafter the Company shall maintain a number of full-time situations equivalent to the number

of journeymen situation holders employed as of the signing of this contract who remain employed and desiring a full-time position." The proviso I referred to earlier is the Company would have been allowed to reduce the number of situation journeymen positions to the actual number of journeymen remaining at the time the Company commenced operations in its new facility if there had been less than 40 journeymen situation holders remaining at that time, or during the life of the collective bargaining agreement.

The parties commenced negotiations for a new collective

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bargaining agreement on July 5, 2001 to replace the one that had expired on July 18, 2001. The parties met on July 6, August 29, August 30, October 10, and October 11, 2001. The primary focus during these bargaining sessions will be somewhat limited to the actions or inactions of the parties on July 5, 2001 and October 10 and 11, 2001. The Company presented a contract proposal at the first bargaining session that proposed a reduction in the number of full-time situation journeymen unit positions from 40 to 22. The Company's chief negotiator explained that the reduced number was based on the number of full-time journeymen positions actually needed as determined by 18 months of operation in the new South Des Moines, Iowa facility. The Union presented a contract proposal at the July 5, 2001 bargaining session at which it proposed to eliminate Section 3.02(E) and revise Section 3.02(B), a related provision, to read "the Company shall maintain a minimum of 40 situations." Union negotiator Colwill explained the Union felt the change gave it a better guarantee of job security for the situation journeymen than Section 3.02(E) did because of Section 3.02(E)'s proviso that allowed the number of situation journeymen to drop below 40 if attrition resulted in the number of situation journeymen going below 40. The unit consists of situation journeymen who, as I have noted earlier, have regular work days, regular off days, and 37 1/2 hours of work per week. There are also non-situation journeymen employees who must pick their shifts and

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are not guaranteed certain days off, for example, and there are also trainees and casual or part-time employee members of the bargaining unit.

On October 10, 2001 the parties met for a bargaining session at which the parties negotiated regarding the number of situation journeymen to be maintained in the unit and other related staffing matters such as an increase in the utilization of and number of hours available to part-time or casual employees.

On October 10 and 11, 2001 the Union asked for information to support the Company's position that it had more full-time situation journeymen than it actually needed and was attempting to eliminate unnecessary workers. The Company provided the requested information. In that regard it's perhaps helpful to note that the work performed in the mailroom, or packaging center as it is currently known, is not what it was years ago of mailing newspapers to subscribers. Currently the mailroom or packaging center employees package the newspapers in the truest sense of the word. They stuff inserts into the paper, such as sales inserts, the comics, and related items. This type work

is seasonal as during the Christmas and Mother's Day holiday season. Or perhaps even Secretary's Day, which I understand is today. So if you haven't taken care of your secretary you may want to. Also, the inserts are greater on certain days of the week than on others. This, according to the Company, results in

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flexibility that is needed with part-time or casual employees rather than the fixed work schedule that goes with the regular full-time situation journeymen employees.

At the conclusion of the bargaining session on October 10, 2001 the parties agreed to meet again the next morning, October 11, 2001 with time over the evening hours for the parties to prepare their positions on the two subject matters they had discussed or covered that day. According to union negotiator, Colwill, company negotiator, Behan, said the parties needed to resolve the situation journeymen and related staffing concerns and if they could not, there was really no need to bargain further.

The parties met on October 11, 2001 and for the first time ever at that bargaining session the Union announced it was not interested in negotiating regarding 3.02(E) of the most recently expired collective bargaining agreement because it considered that paragraph to constitute a job guarantee. The Union, for the first time, took the position it was a permissive subject of bargaining and it chose not to bargain any farther about it. Company attorney, Behan, testified the Company was surprised by the Union's position in as much as the Union had never taken that position before in any of its contract negotiations with the Company. It is helpful to note that in the contract prior to the most recently expired one, the parties negotiated from the Company maintaining 70 situation journeymen positions in the

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unit to 40, with no indication the earlier number of 70 constituted a job guarantee for that number of unit employees. The Company informed the Union at the session on October 11, 2001 that it viewed the situation journeymen and part-time help matters to be a primary concern to it and without a resolution of those matters it would not be beneficial to continue negotiations.

In summary, it is clear the Company informed the Union the matter regarding the number of situation journeymen positions in the unit had to be resolved before the parties could move forward on other outstanding matters. It is likewise clear the Union informed the Company it considered Section 3.02(E) of the most recently expired collective bargaining agreement, which I quoted earlier, to be an employment guarantee and that the Union did not wish to further discuss any reduction in the number of situation positions in the unit. The Company, at the bargaining session on October 11, 2001, presented its final offer to the Union which included a proposal that reduced the number of situation journeymen positions in the unit from 40 to 22.

There have been no negotiations since October 11, 2001 nor has either party requested of the other to meet for negotiations. The parties stipulated they are, rightly or wrongly so, at an impasse.

For the benefit of this Bench Decision I shall briefly discuss the parties positions. The government contends Section

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3.02(E) of the most recently expired collective bargaining agreement clearly and unambiguously provided an ongoing commitment to provide job guarantees for 40 situation journeymen in the unit. The government asserts Section 3.02(E) provides three fixed terms that warrant finding the provisions of Section 3.02(E) survives the contract expiration. First, the government argues the provisions of the section states the Company will "maintain" 40 situation journeymen positions. The government contends "maintain" means exactly that. The government asserts this language requires no interpretation to understand its clear meaning. Secondly, the government contends the language states these 40 journeymen positions will come from a pool of journeymen employed at the time the contract was executed by the parties. The government asserts the Company currently employs 40 plus 12 situation journeymen in the unit. Thirdly, the government asserts the language of Section 3.02(E) provides these 40 situation journeymen positions will be maintained for as long as they remain employed and desiring a full-time situation. The government contends, however, this is not an open ended contract as the provision terminates when the last guaranteed situation journeymen holder, defined in Section 3.02(E), no longer desired employment. The government argues Section 3.02(E) of the most recently expired collective bargaining

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agreement is a provision that is properly and validly applicable after the expiration of the collective bargaining agreement without the necessity for execution or renegotiation of or in a further new contract. The government contends the language of Section 3.02(E) creates a benefit previously negotiated that continues to accrue until there are no longer any situation journeymen employed desiring to be employed by the Company. The government contends that a carryover provision, such as Section 3.02(E), survives the contract's expiration and, thus, is a permissive subject of bargaining. Finally, the government contends the Company violated the Act when it conditioned further bargaining over unresolved mandatory subjects upon agreement to bargain over a permissive bargaining subject, namely Section 3.02(E).

The Company's position is that the subject matter of the number of situation journeymen positions is a mandatory subject of bargaining and that, as such, it may propose, as it did, changes in the number of situation journeymen in the unit and insist even to impasse on the subject matter. The Company asserts Section 3.02(E) is not a job guarantee provision. The Company indicates it has, in other situations, not applicable here, negotiated job security agreements but that in those cases such is clearly and expressly set forth in the language of the agreement. The Company asserts that such is missing from the present situation. The Company asserts the subject matter of Section 3.02(E) deals with the number of employees, the hours and days they will work, what days they will and will not work,

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and such constitutes mandatory bargaining matters. The Company contends the only way this mandatory subject could be converted to a permissive bargaining matter is if it waived its right to do so. The Company vigorously asserts it has not waived its right to negotiate the subject matter of Section 3.02(E). Simply stated, the Company argues the government's position that the subject matter of the situation journeymen positions is a permissive subject of bargaining is nothing more than a waiver argument on the government's part. The Company argues a waiver argument must fail for at least two specific reasons. First, the Company would argue Section 3.02(E) of the most recently expired collective bargaining agreement does not expressly or even by implication relinquish the Company's right to bargain changes to this contract clause in the future. Secondly, the Company asserts the bargaining history between the parties does not support a waiver. The Company asserts there was no discussion that the language would constitute a waiver and no discussion, whatsoever, of any intentions that it would carry forward into successive agreements. The Company also argues the number of situation journeymen positions guaranteed by the contract is a critical issue to the Company and is one of the primary bargaining objectives for it in its negotiations with the Union. The Company asserts it may, as it has, proceed validly to impasse with the Union over this issue.

I shall state my conclusion up front and then attempt to explain in detail how I arrived at the conclusion. I am fully persuaded that the language of Section 3.02(E) of the parties most recently expired collective bargaining agreement constitutes a job guarantee for 40 situation journeymen—which provision survived the expired collective bargaining agreement. When one reads the language of Section 3.02(E), its clarity becomes readily apparent. The parties, in good faith, negotiated and agreed that “40 full-time situations will be maintained for as long as 40 of the journeymen situation holders employed as of the signing of the contract continue to be employed and desiring a full-time position.” I find that sentence means what it says. There is nothing about that provision that requires any interpretation or explanation on my part to reach the conclusion I do, that it constitutes a job guarantee for those qualified for its provisions. It is an unambiguous statement, as long as 40 journeymen situation holders that were employed on the day the most recently expired collective bargaining agreement was signed will be, if they desire and continue to be employed, to have such a position. The provision that the number of those meeting the qualifications could drop below 40 if certain conditions are met does not detract from my finding. In fact, it would demonstrate that the terms of the contract provision are simply being carried out. Stated differently, I find the 40 situation journeymen positions for those employed on the date of the

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signing of the most recently expired collectively bargaining agreement as set forth in Section 3.02(E) thereof constitutes a job guarantee vested benefit that has accrued and survives the contract's expiration and may not be changed without the consent of the Union.

I find the Union does not have to bargain about changes to Section 3.02(E) of the parties most recently expired collective bargaining agreement in that a party is not required to negotiate over terms and conditions of employment accrued under a previous contract that has already been negotiated.

I find carryover provisions that survive a contract's expiration, such as Section 3.02(E), at issue herein, are permissive subjects of bargaining because such are accrued rights as a result of previous contract terms.

I am persuaded the Union could, as it did, negotiate for a while on the subject matter of Section 3.02(E), and then cease to do so without jeopardizing its position that the provision in question constitutes a job guarantee about which it need not negotiate. The fact the Union never, in prior negotiations nor until the last day of current negotiations, advance the contention Section 3.02(E) constituted a job guarantee does not detract from its ability to assert such a contention of a contractually provided job guarantee.

Guidance from the case law does not require any specific language to constitute a job guarantee provision. It only needs

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to be clear that is what has been agreed to between the parties as expressed in the writings executed by the parties. The language of Section 3.02(E), in my opinion, clearly constitutes a job guarantee that is in effect until the last person meeting the requirements has left the employment of the Company.

Even if I concluded the subject matter of Section 3.02(E) in its present posture in the most recently expired collective bargaining agreement was a mandatory subject of bargaining, I would conclude the Company waived its right to bargain the matter. The language, as earlier discussed, is clear and unmistakable and foreclosed further negotiations on the matter without the Union's consent.

The clear language used in Section 3.02(E) does not need any further clarification, such as language that it would continue into the next contract or that it constituted a waiver of the right to further negotiate on it. Such language is not necessary to constitute a waiver. It need only be that the language is clear and unmistakable in its effect, and that it exactly what happened herein. I find, as alleged in the complaint, that the Company violated Section 8(a)(5) and (1) of the Act when, on October 11, 2001 it conditioned continuing bargaining on unresolved mandatory bargaining subjects on the Union's agreeing to negotiate non-mandatory matters, namely the number of situation journeymen to be in the unit.

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I shall order the Company, upon request of the Union, to bargain in good faith with the Union concerning the terms and conditions of employment of the unit employees and if an agreement is arrived at to, upon request, reduce the same to writing and execute it.

I specifically direct that the Company not condition bargaining on the Union agreeing to negotiate concerning the number of situation journeymen in the unit in as much as I have concluded such is a permissive subject of bargaining.

I shall also direct that the Company post a notice that I shall prepare and attach to the certification of this Decision.

It is my understanding that the Court Reporter will provide me a copy of the transcript within ten calendar days of today. After I have been provided that transcript, I will certify those pages of the transcript that constitute my decision. I will make corrections thereon, if necessary. I will indicate what those corrections are in an attachment to my Bench Decision. I will attach thereto a notice that is to be posted and then I will certify all of that as my decision.

It is my understanding that from that point the time period for filing exceptions or an appeal to my decision runs. However, I invite you to consult the Board's Rules and Regulations

rather than rely on my understanding of it, but it is my understanding that the appeal period runs from the time I certify the Bench Decision, not from today.

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Let me again state that it has been a pleasure to hear this case and to be in Des Moines, Iowa, and with that this hearing is closed.

(At 6:35 p.m. the hearing in the above titled matter closed.)