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

Advice Memorandum

DATE: August 31, 2010

TO : Rosemary Pye, Regional Director
Region 1

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

SUBJECT: Sinclair Broadcasting Group
d/b/a WGME-TV 13
Cases 1-CA-45971 and 1-CA-45995

530-6050-1612-3700
530-6050-1612-7100
530-6050-5075
530-6067-2020
530-6067-2060-7700
530-6067-2080-6200
530-6067-4077

These case were submitted for advice as to: 1) whether the Employer violated Section 8(a)(5) when it announced impasse and unilaterally implemented parts of its Last and Final Offer, including wage and benefit proposals that reserved some discretion in the Employer; and 2) whether the Employer unlawfully discontinued dues deductions from the employees' pay checks at the termination of the contract extension.

We conclude that the Employer did not violate the Act when it declared impasse and unilaterally implemented parts of its Last and Final Offer, including the wage and benefit proposals, noted above, because the parties had reached a deadlock in their negotiations and the Employer's proposals did not leave it so much discretion as to suggest they were offered in bad faith. We also conclude that the Employer lawfully discontinued dues deduction from the employees' pay checks after the termination of the contract extension.

FACTS

Sinclair Broadcast Group, Inc. ("Sinclair") is one of the largest television broadcasting companies in the country. Sinclair owns and operates, programs, or provides sales services to 58 television stations in 35 markets, including the one at issue here, WGME-TV 13 ("WGME" or "Employer"), in Portland, ME. For at least 20 years, the International Brotherhood of Electrical Workers, Local 1837 ("Union"), has represented a unit of approximately 50 of the Employer's technical workers, including photographers, editors, and producers, at WGME.

The last collective bargaining agreement between the parties expired in March 2009. All the unit employees' wages had been frozen under that contract since at least 2008. The parties agreed to extend that contract while they bargained for a new contract; they began negotiations on March 10, 2009, and held approximately 9 bargaining sessions through the end of September 2009.

Prior to the next negotiation session, on October 13, 2009, the Employer emailed the Union a document entitled, "Updated Station Proposal, October 13, 2009." The Employer's email stated that this was the Employer's "Best Offer." At the October 13, 2009 meeting, the Union presented new proposals and counterproposals. The parties discussed the proposals and reached agreement on at least one.

On October 14, 2009, the Employer presented the Union with a proposal called "Station Last and Final Offer, October 14, 2009." Two aspects of the Employer's proposal posed particular impediments to agreement. First, regarding wages, the Employer insisted, based on area wage surveys and its own analysis, on imposing wage cuts in two of the four unit classifications of 5 and 10 percent respectively, in each of the graduated career steps in those classifications. The Employer also proposed that employees that topped-out in their career steps would receive a wage increase equal to the average percentage increase given to all the other employees at the Station. This was a change from the extant contract which provided a negotiated percentage wage increase to topped-out employees in each of the three years of the contract, i.e., 3% in year one, 3% in year two, and 2.5% in the final year of the contract. Second, regarding assignments, the Employer proposed language that would give it more flexibility in assigning unit work to non-unit employees, i.e., managers, non-bargaining unit employees, and other non-IBEW employees at the Station. These assignments, in some cases, were limited to a specific type of work, e.g., "TelePrompTer," and in others, by the classification to which work could be assigned, e.g., AFTRA union members. The Employer's assignment proposal also restricted the Employer from assigning certain types of work out of the unit if it would cause a layoff of unit employees or diminish their working hours.

The Union was not willing to agree to any of these Employer proposals. The Union was not willing to allow the Employer to grant increases for topped out unit employees based on the average percentage increase that it gives to all its other employees. The Union was also unwilling to accept the Employer's proposal concerning the assignment of

unit work to non-unit employees, because although the Employer offered to preserve job rights of incumbents, it would not include a universal job preservation clause and, without one, the Union was concerned that the Employer could eliminate the bargaining unit.

The Employer's Last and Final offer also changed the benefits provisions of the extant contract, by eliminating the multiple contractual provisions that described in detail each specific benefit the Employer provided, and replacing those provisions with the following single article:

> Section 4.1: All eligible employees will be able to participate in the same group benefits in the same manner as all other Sinclair employees except as provided otherwise in this Agreement.[1] Such benefits may include but are not limited to:
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> Medical Insurance
> Dental Insurance
> Vision Insurance
> Short-term Disability Insurance
> Maternity leave
> Long-term Disability Insurance…
> Vacation
> Holidays
> Personal Days
> Sick Leave
> Jury Duty Leave
>
> …the Company will advise the Union in advance of any proposed benefit change and if requested the Company will bargain over any change where bargaining is required by law. If the parties are unable to reach agreement, the dispute will be processed under the [grievance/arbitration] provision…"

On December 11, 2009, the parties met again for bargaining. The Union agreed to extend the wage freeze until June 20, 2010 -- which would eliminate increases due under the contract extension -- and presented counterproposals to the Station's Last and Final Offer. The Union's counterproposals included a reduction in the Union's proposed percentage increases for topped-out employees from its initial proposed 3% for the first year,

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[1] Many of the benefits in the prior contract were, in fact, the corporate wide benefit.

3% for the second year, and 4% for the final year to, respectively, 2%, 2%, and 3%. The Employer responded that, although it appreciated the Union's counteroffer, it adhered to its October 14 proposal. It noted that the parties were still far apart and the Employer believed the parties were at impasse. The Union denied that the parties were at impasse. The parties discussed further negotiation dates.

On January 4, 2010, the Employer notified the Union that it believed the parties were at impasse and that it planned to terminate the contract extension in 30 days. The Union responded, on January 6, 2010, stating that it did not agree that the parties were at impasse, and requesting further dates for negotiations.

On February 3, 2010, when the contract extension expired, the Employer stopped collecting Union dues pursuant to the check-off provision of the expired contract.

The parties met again on February 9, 2010. The Union presented counterproposals, including concessions on the assignment of unit work and on several other non-economic items, an extension of the wage freeze to January 2011, and a reduction in its wage proposal for topped out employees to an increase of 0%, 3%, and 3%, respectively for the three years of the proposed contract. Following a break for the Employer to review the Union's counterproposals, the Employer again told the Union that it appreciated the Union's proposals and the movement. But the Employer did not alter its proposal on these key issues. The Employer stated that the parties were still far apart and it did not "make sense to stick around." The Employer said it would consider its options and might implement some or all of its offer. The Union stated it was trying to reach an agreement, it worked hard on the proposals, and was already formulating more proposals.

After that exchange, the parties took another break. After returning to the table, the Union presented counterproposals that included even further reductions in the proposed wage increase for topped-out employees to 0%, 2%, and 2%, respectively, for the three years of the proposed contract. The Employer rejected these proposals and repeated its position that the parties were at impasse. The Union disagreed. In the ensuing days, the Union offered no further counterproposals.

On February 21, 2010, the Employer implemented parts of its October 14, 2009 Last and Final Offer. Those changes included its wage and benefits proposal.

ACTION

We conclude that the parties had reached a stalemate in their negotiations, the Employer's bargaining proposals themselves do not evince bad faith and the Employer had otherwise bargained in good faith. Therefore, the parties were at impasse and the Employer was privileged to implement the proposals contained in its Last and Final Offer. We further conclude that the Employer lawfully ceased honoring the checkoff provision of the contract after it expired. Consequently, the Region should dismiss the charges in their entirety, absent withdrawal.

The Impasse and Implementation

A bargaining impasse will be found where there is no "reason to believe that further bargaining might produce additional movement."[2] Here, the parties held numerous and long bargaining sessions and engaged the services of a Federal Mediator. Nonetheless, there is no dispute that by February, 2010, the parties remained adamant in their respective positions with regard to three fundamental conditions of employment: wages, benefits, and the assignment of unit work. The Employer was insisting on flexibility in these areas, and the Union was adamant that it would not give the Employer discretion to unilaterally determine wage increases to topped-out employees, and was concerned that the Employer's demands for flexibility in the assignment of work could allow the Employer to eventually eliminate the bargaining unit. While the Union made significant concessions on wages and assignment of unit work, up to and including the last bargaining session on February 9, 2010, it made no further proposals after the Employer rejected its last concessionary wage proposal at that final session. Based on the parties' fixed positions on these three critical issues there is no "reason to believe that [at that time] further bargaining might produce additional movement."[3]

A party's bad faith in conducting negotiations, however, may prevent reaching a good faith impasse.[4] Here,

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[2] Rochester Telephone Corp., 333 NLRB 30, 30 n.3 (2001) (Board finds impasse where the "Union's counterproposal… did not create a 'reason to believe that further bargaining would produce additional movement'") quoting from Hayward Dodge, 292 NLRB 434, 468 (1989).

[3] Id.

[4] Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. AFTRA v. NLRB 359 F.2d 622 (D.C. Cir. 1968)

there is no allegation that the Employer engaged in bad faith bargaining by its statements or conduct; but we examined the extent to which the Employer's bargaining proposals might evince bad faith. The Board will examine the content of the employer's proposals only to determine "whether they indicate an intention by the Respondent to avoid reaching an agreement; it is not a subjective evaluation of their content."[5] Thus, the Board will not consider merely whether a proposal is acceptable or unacceptable to a party. Rather, the Board will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."[6]

The Board has found bad faith bargaining based in part on an employer's insistence on unilateral control over wages and benefits. For instance, in A-1 King Size Sandwiches,[7] the employer insisted on unilateral control over merit increases, manning, scheduling and hours, layoff, recall, the granting and denial of leave, promotions, demotions and discipline, the assignment of work outside the unit, and changes in past practice. The employer there also proposed a broad no-strike clause and explicitly excluded discipline and discharge decisions from the grievance-arbitration procedure.[8] The Board found a Section 8(a)(5) violation, adopting the ALJ's finding that the employer's proposals, "would strip the union of any effective method of representing its members. . ."[9] The ALJ had noted that, if accepted, the proposed contract would have left the union with substantially fewer rights than if it relied solely on its certification.[10]

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[5] Litton Microwave Cooking Products, 300 NLRB 324, 327 (1990), enf'd 949 F.2d 249 (8th Cir. 1991), cert. den. 112 S.Ct. 1669 (1992).

[6] Reichhold Chemicals, 288 NLRB 69 (1984), aff'd in relevant part 906 F.2d 719 (D.C. Cir. 1990); Fairhaven Properties, Inc., 314 NLRB 763, 770 (1994). See also, Regency Service Carts, 345 NLRB 671, 675 (2005).

[7] 265 NLRB 850 (1982), enf'd 732 F.2d 872 (11th Cir. 1984), cert. den. 469 U.S. 1034.

[8] Id. at 851-859.

[9] Id. at 859, quoting from San Isabel Electrical Services, 225 NLRB 1073, 1080 (1976).

[10] Id. at 860. See, also Regency Service Carts, 345 NLRB 671, 675 (2005) (in the context of other indicia of bad

We conclude that the Employer's proposals on the three critical areas of disagreement, i.e., the assignment of unit work, wages, and benefits, were not designed to frustrate collective bargaining and therefore do not evince bad faith. The Employer was not insisting on complete unilateral discretion to assign unit work; its proposal contained limits on the type of work that could be assigned and the class of employees to which it could be assigned. It also limited the Employer's right to assign work out of the unit if doing so would have an adverse impact on unit employees. Such a limited discretion proposal would not be analogous to the proposals found to demonstrate bad faith in A-1 King.[11]

And, while the Employer was demanding some discretion in its wage and benefit proposals, neither proposal, either separately or in combination, would have given the Employer the type of unilateral control demonstrated in A-1 King such that the proposals themselves would demonstrate an intent not to reach agreement. The Employer's wage proposal contained provisions that would constrain its unilateral discretion. The proposal establishes a basic wage scale for those unit employees who had not "topped out", maintaining the pre-existing framework of four unit classifications and career step increases within each of

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faith, Employer's proposals were unlawfully broad where they included: unfettered control of work rules, discipline, and discharge; unilateral discretion to grant seniority, leaves of absences, merit increases, and subcontract unit work; and a grievance procedure which precluded arbitral review of this discretion coupled with a broad no-strike provision).

[11] It appears that the Employer's proposals regarding the assignment of unit work deal with assigning unit work to non-unit employees without moving employees out of the unit to do the work. Such proposals are mandatory subjects of bargaining upon which the Employer may lawfully insist on until impasse. See, e.g., Storer Communications, 295 NLRB 72 (1989), enfd. 904 F.2d 47 (D.C. Cir. 1990). If the evidence demonstrates otherwise, or if further investigation discloses that the Employer is moving job classifications out of the unit, or transferring unit employees out of the unit to do unit work, then the Region should consider whether the Employer is unlawfully insisting on the permissive subject of changing the scope of the unit. See, e.g., McDonnell Douglas, 312 NLRB 373, 378 (1993). See also, NBC Universal, Inc., Cases 2-CA-39208, et al. Advice Memorandum dated June 16, 2010, pp. 13-18.

those classifications. And, the discretion the Employer was seeking to give annual increases to topped-out employees would have been limited by a formula based on the average of the increases given to other employees. Therefore, the Employer's discretion would have been bound on one hand by the contractual wage rate and, on the other, by the average percentage of the wage increases given to other employees. Thus, while the Employer was insisting on some discretion as to wages, it was not without limits.

As with its wage proposal, the Employer's benefits proposal also contains provisions that would constrain its unilateral discretion. Initially, we note that the fact that the Employer insisted on corporate-wide benefits to create uniformity in the benefits for its union and non-union employees, in and of itself, does not violate the Act.[12] Furthermore, while reserving to itself the authority to make benefit changes, the Employer's proposal required it to notify the Union before making such changes, bargain over the changes if the Union requested, and subjected its decision to the grievance/arbitration procedure.[13] Moreover, unlike A-1 King Sandwich and its progeny, the Union here would be free to strike in support of its positions in mid-term bargaining over such proposals because the general no-strike clause in this contract would not prohibit a strike during the reopening of the contract.[14] We therefore conclude that the Employer's corporate-wide benefits proposal does not give the Employer such open discretion as to strip the Union of its ability to effectively represent the employees.

In sum, the Employer's proposals do not reserve to itself such control over terms and conditions of employment that the Union would be left with substantially fewer

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[12] See, e.g., Shell Oil Company, 194 NLRB 988 (1974).

[13] Cf. Amerigas, Inc. 1-CA-31994, Advice Memorandum dated April 19, 1995 (complaint authorized where the employer insisted on a company-wide benefit program which reserved to the employer unfettered discretion to modify or terminate any plan. The employer's decision to modify or terminate the plans was not subject to bargaining or grievance-arbitration, and the union would not be able to strike over that decision.)

[14] Hydrologics, Inc., 293 NLRB 1060, 1062 (1989) (broad no-strike provisions that do not address the reopener do not suspend the union's right to strike with regard to bargaining the reopened subject.)

rights than if it relied solely on its certification. Therefore, the Employer's proposals themselves do not evince bad faith, and the Employer did not violate the Act by insisting on these proposals to impasse and then implementing them. The Region should dismiss this allegation, absent withdrawal.

Dues Checkoff Provision

We conclude that the Employer lawfully ceased collecting dues under the dues checkoff provision of the expired contract. There is no dispute that the Employer stopped collecting dues after the contract extension expired. Under Bethlehem Steel Co.,[15] an employer's obligation to continue a dues checkoff arrangement expires with the contract that created the obligation. Therefore, the Employer's action is privileged under current Board law. In his original complaint and in briefs on remand in Hacienda II[16] the General Counsel has specifically declined to urge the Board to overrule Bethlehem Steel. It would therefore not be prudent here to urge the Board to reconsider this longstanding precedent until the Board decides the more narrow issue in the remand in Hacienda II. Consequently, this allegation should be dismissed, absent withdrawal.

B.J.K.

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[15] 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d. Cir. 1963)

[16] See General Counsel Brief, in Hacienda II (currently before the Board), pp.15-16, dated January 12, 2009, from Hacienda Resort, 351 NLRB 504 (2007)(Hacienda II), vacated and remanded sub nom. Local Joint Executive Board of Las Vegas v. NLRB, 540 F.3d 1072 (9TH Cir. 2008) (dealing with the obligation to maintain dues checkoff post-contract expiration when the contract did not contain a union-security clause).