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

Advice Memorandum

DATE: May 26, 2010

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: CBS Broadcasting KYW-TV
Case 4-CA-37264

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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by insisting during negotiations for a successor collective-bargaining agreement that the parties negotiate separate terms and conditions for a group of web employees who were added to the preexisting unit of television employees in a self-determination election. We conclude that the Region should dismiss the charge, absent withdrawal. Although the Employer's proposal would effectively change the scope of the unit, there is no evidence that the Employer has insisted to impasse on this permissive subject.

FACTS

CBS Broadcasting KYW-TV in Philadelphia (the Employer) has had an established collective-bargaining relationship with the American Federation of Television and Radio Artists (the Union) since at least 1970. Historically, the Union represented a unit of approximately 60 electronic news journalists and television announcers-artists. The parties' most recent collective-bargaining agreement was effective October 1, 2008 through September 30, 2009.

In 1998, the Employer established a website and hired employees to perform many of the same functions for this new medium that the electronic news journalists perform for television broadcasts. On January 29, 2009,[1] the Union filed a representation petition in Case 4-RC-21527 seeking to include five web employees (web producers, assistant web producers, and digital journalists) in the unit. The parties entered a Stipulated Election Agreement which provided that if a majority of valid ballots were cast for the incumbent Union, then the employees would "be taken to have indicated their desire to be included in the existing unit[.]" On March 11, four of the five web employees voted

[1] All dates are in 2009 unless otherwise noted.

for the Union. Accordingly, on March 20, the Union was certified to bargain for the web employees "as part of the group of employees which it currently represents."

On August 19, the parties began negotiations for a successor contract for the enlarged unit. The Union proposed that the Employer extend to the web employees the same terms and conditions applicable to the pre-existing unit with two exceptions: (1) the web employees would retain their personal days; and (2) the web employees would have the choice of retaining their current health benefits under the CBS corporate plan or of switching to the AFTRA health insurance plan applicable to the preexisting unit. The Employer took the position that none of the terms and conditions for the preexisting unit would apply to the web employees and proposed an entirely separate contract for those employees.

Thus, on September 18, the Employer's advised the Union by e-mail that it needed to negotiate separate terms and conditions for the web employees "either as a separate contract, a supplement to the existing contract or a separate section to the existing contract." The Union responded that it would negotiate separate provisions for the web employees that deal with wages and working conditions but that other contract terms should apply to the entire enlarged unit. The Employer responded that "[t]he Company's position is that everything relating to the web employees is negotiable, both substance and form[.]"

At the parties' second bargaining session, held September 22, the Union pointed out that the Employer's separate contract proposal for the web employees omitted basic provisions, such as a union security clause, dues checkoff, grievance and arbitration, and a no-strike/no-lockout clause. At the end of the session, the Employer agreed to get back to the Union with a revised proposal.

The Employer's second proposal for the web employees, submitted to the Union on October 13, omitted approximately one-third of the 44 provisions in the expiring collective-bargaining agreement, including the provisions noted by the Union at the prior bargaining session. In addition, the Employer proposed terms that were substantially different from the corresponding terms in the expired contract, including those governing union access, sick leave, vacation, holidays, termination, severance, seniority, outside engagements, retirement, work week, rest between assignments, and absenteeism. In particular, the Employer's proposed management-rights clause was significantly broader than the clause in the parties' prior

agreement and, among other things, removed the just-cause limitation upon discharges.

By letter dated October 29, the Union noted that the Employer's proposals indicated that it had "not abandoned its initial aim of negotiating an entirely separate collective bargaining agreement for web employees" and asserted that the Employer was not bargaining in good faith. In response, by letter dated November 4, the Employer confirmed its belief that "each and every term that is to apply to the web employees is subject to negotiations *ab initio*." The Employer maintained that a separate agreement or supplemental agreement for the web employees was necessary because the existing contract applied to television operations, "a mature business," while the web business is "in its infancy."

Following this exchange, on December 2 the Union gave the Employer a new set of proposals for the web employees, comprised of the 44 provisions in the expired contract with the exception of new provisions for personal days and health insurance. By e-mail on December 4, the Employer reiterated its position that the terms and conditions in the expired contract could not be applied to the web employees.

The Union filed the instant Section 8(a)(1) and (5) charge on January 8, 2010, alleging that the Employer has failed and refused to bargain in good faith. Since then, the parties have met three times to discuss proposals applicable to the preexisting unit employees but have not addressed terms and conditions for the web employees. The parties agree that they have not reached impasse.

ACTION

We conclude that the Region should dismiss the instant charge, absent withdrawal, because although the Employer's proposed separate terms and conditions for the web employees effectively constitutes a proposed change in the unit, a permissive subject of bargaining, the Employer has not yet insisted to impasse on this proposal.

In Federal-Mogul Corp.,[2] the Board set forth a framework for bargaining for the terms and conditions of employment to be applied to a group of employees added (or "Globed") to the unit through a Globe-Armour self-determination election.[3] The Board held that the parties

[2] 209 NLRB 343 (1974).

[3] See Globe Machine and Stamping Co., 3 NLRB 294 (1937) (directing election to allow employees to determine scope

must bargain for the initial contractual terms and conditions to be applied to the Globed employees and that the employer had violated Section 8(a)(1) and (5) by unilaterally applying the existing collective-bargaining agreement to the setup employees who had been added to the preexisting production and maintenance unit.[4] At the same time, the Board was not "suggest[ing]" that "either party may adamantly insist to impasse upon a totally separate agreement so designed as to effectively destroy the basic oneness of the unit which we have found appropriate."[5] And when the preexisting contract expires, "the Union and the Employer must bargain for a single contract to cover the entire unit[.]"[6]

Thus, in Federal-Mogul, the Board established two separate phases of bargaining after a Globe-Armour election. During the first phase, when a collective-bargaining agreement is still in effect for the preexisting unit, the employer must bargain over the initial terms and conditions for the Globed employees rather than unilaterally apply the existing contractual terms. During the second phase, after the contract has expired, the employer is obligated to bargain over terms and conditions for the overall unit. At no time may the Employer insist to impasse on "a totally separate agreement so designed as to effectively destroy the basic oneness of the unit" that the Board has found appropriate.[7]

Subsequent Board cases have applied Federal-Mogul only in the context of phase one negotiations.[8] The relevant

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of a unit where Board found that either three separate units or one overall unit would be appropriate); Armour and Company, 40 NLRB 1333 (1942) (directing election to determine whether three separate units should be added to existing unit).

[4] 209 NLRB at 343-44.

[5] Id. at 345.

[6] Id. at 344.

[7] Id. at 345.

[8] See, e.g., Wells Fargo Armored Service Corp., 300 NLRB 1104, 1104 (1990) (ordering employer who unlawfully refused to recognize the union as the exclusive representative of Globed employees to bargain over those employees' terms and conditions rather than to automatically extend the existing contract to them); Southern Indiana Gas Co., 284 NLRB 895, 895 (1987), enfd. 853 F.2d 580 (7th Cir. 1988), cert. denied 488 U.S. 1031 (1989) (same).

Advice memos also, for the most part, have dealt with the parties' obligations during the first phase, while the preexisting contract remains in effect.[9]

In the absence of special rules governing phase two negotiations for a recently expanded unit, we apply general Section 8(a)(5) principles. In this respect, the Board's statement in Federal-Mogul that neither party may insist to impasse on a separate contract that would "effectively destroy the basic oneness of the unit"[10] is consistent with the long-established principle that a change in the scope of the unit is a permissive subject of bargaining.[11] Consequently, either party may lawfully propose such a change absent insistence to impasse.[12] A party has the right to present a proposal concerning a permissive subject "even repeatedly," so long as it does "not posit the matter as an ultimatum."[13] Moreover, a proposed change in unit

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[9] See SPEEA Local 2001 (The Boeing Company), Case 27-CB-5025, Advice Memorandum dated July 28, 2008 (union did not violate Section 8(b)(3) by refusing to accede to employer's demand for a new contract for the entire newly-expanded unit during the term of an existing contract); Twin Coast Newspapers Inc., Case 21-CA-28345, Advice Memorandum dated February 28, 1992 (employer did not violate Section 8(a)(5) by insisting to impasse on contract provisions for Globed employees that were different from those in existing contract). Cf. Robert Wood Johnson University Hospital, Case 22-CA-27693, Advice Memorandum dated May 29, 2007 (Advice concluded that although the employer had an obligation to extend to the Globed employees the terms of a successor agreement that were germane to the entire unit, there was no evidence that it had failed to do so).

[10] 209 NLRB at 345.

[11] See, e.g., Reichhold Chemicals, 301 NLRB 1228, 1228 (1991), enfd. 953 F.2d 594 (11th Cir. 1992).

[12] E.g., Reading Rock, Inc., 330 NLRB 856, 861 (2000) (no violation where employer repeatedly proposed excluding lease drivers from the unit but never insisted on it to impasse or "as a price for an overall agreement"); Tarlas Meat Company, 239 NLRB 1396, 1397 (1979) (no violation where both parties proposed changes to the scope of the unit and the employer's proposal did not cause the impasse).

[13] Detroit Newspapers, 327 NLRB 799, 800 (1999) (citation omitted), revd. on other grounds 216 F.2d 109 (D.C. Cir. 2000) (union did not insist to impasse or strike in support

scope does not in itself constitute bad faith bargaining, absent an overall course of bad faith conduct.[14]

Here, the Employer has proposed substantially different terms and conditions for the web employees that would effectively separate those employees from the unit that they voted to join.[15] The Employer's latest proposal omits approximately one-third of the provisions in the expired contract, including provisions for which there is no basis for non-applicability to this group of employees such as grievance arbitration, union security, dues checkoff, and a no-strike/no-lockout clause. The Employer also proposes several terms that are substantially different from the corresponding terms in the expired contract, including provisions governing management rights, union access, sick leave, vacation, holidays, termination, severance, seniority, outside engagements, retirement, work week, rest between assignments, and absenteeism. We therefore conclude that the Employer has, in effect, proposed to change the scope of the overall unit.

However, absent insistence to impasse, the Employer is free to repeatedly make proposals regarding this permissive

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of nonmandatory proposal to merge parties' single-employer, single-union units).

[14] E.g., Grosvenor Resort, 336 NLRB 613, 615 (2001) (employer's bad faith bargaining was shown by its premature declaration of impasse, insistence to declared impasse on change in unit scope, and unilateral implementation of new terms and conditions); Chester County Hospital, 320 NLRB 604, 620-23 (1995) (overall refusal to bargain in good faith evidenced by employer's harsh and regressive proposals, proposal to alter the scope of the unit, fixed intention not to consider union security or checkoff, and piecemeal approach to negotiations).

[15] See Reichhold Chemicals, Inc., 301 NLRB at 1231-32 (employer unlawfully insisted to impasse on separate supplemental contracts for each of the facilities in the multiplant unit, with terms governing schedules, wage rates, shift differentials, holidays, and job classification systems and the no-lockout/no-strike clause); Carrier Corporation, Case 3-CA-21287, Advice Memorandum dated November 9, 1998 at 4, 9-11 (employer unlawfully insisted to impasse on a separate addendum for one facility in a multiplant unit that included a broader management rights clause and separate terms regarding, *inter alia*, the probationary period, bumping rights, training, vacation selection, grievance procedure, supervisor performance of unit work, and contract duration).

subject. Neither party is alleging that they have reached impasse in their negotiations. Instead, the parties are continuing to meet, and the Employer's second set of proposals for the web employees demonstrates some limited movement. Nor is there any evidence that the Employer has exhibited bad faith in any other respect, either during negotiations or away from the table. In these circumstances, we conclude that to date, the Employer has not insisted to impasse on a permissive subject of bargaining. Accordingly, the Region should dismiss the instant Section 8(a)(5) charge, absent withdrawal.

B.J.K.