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

Advice Memorandum

DATE: April 28, 2010

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: Pro Quo Books – Revelle Enterprises
Case 8-CA-38604

This Section 8(a)(5) case was submitted for advice concerning whether the Employer was privileged to implement new job classifications with new wage rates upon installation of automated machinery, after bargaining to impasse with the Union over temporary wage rates for these jobs but before reaching impasse on a collective-bargaining agreement.

We conclude that, in light of the exigent circumstances created by the completion of the installation of the automated equipment, the Employer was privileged to implement, at good faith impasse, the provisional wage rates that it proposed to the Union, even though the parties had not reached impasse on the agreement as a whole.

FACTS

The Employer is engaged in the wholesale buying and retail selling of used books, principally over the internet. Consistent with that end, the Employer operates a production operation that sorts its bulk purchase of books by weight from libraries and charities into appropriate categories, according to condition, ISBN (International Standard Book Number) number and potential pricing. Prior to September 2009, that process had been done manually by employees in the pre-entry department, who were classified as confirmers, floor jockeys and sorters. The record does not make clear what the confirmers do; the floor jockeys deliver the books to the sorters, who are responsible for sorting the books by condition, recording the ISBN numbers, scanning the barcode, weighing, stacking the sorted books into bundles and placing them into small containers, then transferring them to larger ones when a certain number has been accumulated.

Pre-entry sorters were paid based on an incentive-based system. During the initial 3-week proficiency period for the pre-entry job, the employee was paid $9.00 per

hour. After the training period, the pay varied between minimum wage and $10.25 per hour plus applicable bonus based on the number of books processed per day over a two-week period and other factors. According to that system, sorters were paid as follows:

- average 1300 or fewer books per day for 2-week period = 5 cents per book with minimum wage floor based on hours worked
- average 1301-1350 books per day for 2-week period = $9.50 per hour
- average 1351-1400 books per day for 2-week period = $10.00 per hour
- average 1400 books or over per day for 2-week period = $10.25 per hour
- bonus in the amount of 5 cents per book for all books entered over 13,510 in the applicable two-week period.

In October 2008, the Employer decided to automate part of the pre-entry, sorting process. Sometime in late February, 2009[1] the Employer reached final terms with a logistics contractor on the price for installation of a computer-controlled conveyor system.

Meanwhile, on February 26, the Union filed a representation petition for a unit of the Employer's shipping and production employees, including the employees in the pre-entry department. A Board election was conducted on April 3, and the Union was certified on April 14.

Immediately following the Union's certification, the Employer notified the Union of its automation plans, and beginning on April 15, the parties held the first of a series of collective-bargaining meetings. At the first meeting, the Employer explained its planned installation of an automated conveyor system that would scan, weigh, sort and distribute books, and that installation of the equipment would directly affect confirmers, floor jockeys, and sorters, which would be replaced by new positions of placers, boxers and labelers with different duties. The Employer informed the Union that the unit would lose about 30 employees because of the automation, reducing it to about 50 employees. The Employer also presented the Union with a written proposal, setting forth its intention to install the equipment in June 2009 and proposing certain selection and separation procedures for employees affected by the installation of the equipment.

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[1] All dates hereafter are in 2009.

The parties next met on April 21 or 22. The Union responded in writing to the Employer's initial proposal, countering with a layoff procedure based on plant-wide seniority and payment of a lump sum pay benefit to any employee actually laid off.

The Employer modified its position to reflect that the jobs would first be available to those employees with the greatest seniority within the affected department, provided the employee was able to perform the essential functions of the job. In addition, the Employer proposed for the first time that non-selected employees would be placed in layoff status with recall rights.

At an April 29 session, the parties continued to exchange written proposals about how employees in the affected jobs could be selected for the new jobs, and about a separation-pay benefit for employees who were laid off as a result of the new system. The Employer agreed to the Union's proposal to include a voluntary separation option for all unit employees, not just those in the affected positions.

At a May 12 bargaining meeting, the parties reached agreement concerning the separation pay for those employees who voluntarily elected to be laid off. Under the agreement, all employees in the facility had the option to take voluntary separation and receive a special payment in exchange for a release. Affected employees in the jobs being eliminated could choose to go on layoff with recall rights and receive a special pay package, or could choose to leave employment with an enhanced special pay package. Under either option, the employee would receive payments in exchange for a signed release agreement.

At the May 12 session, the Employer stated that it intended to pay employees in the new classifications a flat wage rate of $8.00 per hour. The Employer took the position that these were new jobs and involved new equipment, and were very simple jobs that required no skills and very little training. The Union protested that the proposed wage rate would be a unilateral change. The Employer disagreed, repeating its claim that these were new jobs. The Union told the Employer that it wanted to talk to its lawyer.

The parties continued to discuss the wage rates for the new classifications at a May 22 bargaining session. The Union told the Employer that its proposed wage rate of $8.00 an hour was totally unacceptable and that it was not going to agree to that rate. The Union argued that all terms and conditions of employment, including wages, should remain the same until a contract was negotiated. The Union

proposed that the employees in the new positions be paid the "average" incentive pay of all pre-entry employees over the last several months, or about $9.93 per hour. The parties agreed to disagree on the wage issue, and signed off on the agreement concerning the separation pay for employees who voluntarily elected to take a layoff or separate their employment. The parties set a follow-up meeting for June 4.

On or about May 28, pursuant to the Union's request, the Employer forwarded the Union a letter setting forth its proposal on wage rates for the new jobs. Specifically, the Employer proposed a "provisional rate of $8.00 per hour" for the new jobs, which meant that the rate would be put in place when those jobs were filled but would remain subject to bargaining. In addition, the Employer promised that it would not propose a lower hourly rate during negotiations for an overall contract, and that any higher rates ultimately put in place as a result of bargaining would be applied and paid retroactively to affected employees.

On about May 29, Plant Manager Stan Revelle held a meeting with employees and read a letter, which was later distributed. The letter, titled "Options for Separation or Layoff," stated that "the Company and the Union have reached an agreement for a procedure for implementation." The letter then addressed the options for employees regarding separation or layoff. Regarding the wage rates for the new positions, the letter stated as follows:

> Wage Rate for Jobs Working with New Equipment: The Company and the Union have discussed the jobs that will be in place in connection with the new automated systems. . . . There has not been any agreement over the wages to be paid for these jobs.
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> The Company has proposed to the Union that a "provisional wage rate" of $8.00 per hour apply to these jobs once they start….
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> Note: We cannot comment further on the proposal regarding the wage rate, because that is subject for bargaining for the Union. But we do want those in the affected areas to know what the last Company proposal is so that can be taken into account when making decisions about the various options available.

At the outset of the next bargaining session, in June, the Union gave the Employer a written proposal regarding the wage rates for the new positions, proposing rates of $12 per hour. The Employer rejected that proposal and suggested that the parties work on the remainder of the contract. The Union agreed with the Employer that the

parties would work on the wage rates for the new classifications after they had negotiated some noneconomic issues.

Ultimately, the Employer did not get the automated system fully installed until September. Between the June bargaining session and the September installation, the parties continued to meet and discuss noneconomic issues. In August, the parties returned to economic issues and exchanged economic proposals. Regarding the newly established classification, the Union proposed $12 per hour, with $1.00 per hour raises in 2010, 2011 and 2012. The Employer maintained its position of $8.00 per hour with raises at the second contract year anniversary date.

On about September 28, the Employer completed the installation of the automated conveyor system and put it into operation. The employees working with the automated system were paid $8.00 per hour, consistent with the Employer's provisional wage offer. The parties have not reached agreement on a contract. There are currently about 25 employees working in the new classifications of placer, labeler and boxer; a large number of employees elected to separate their employment in June, and no employees were involuntarily laid off. The Region has concluded that the new jobs are different than the previous pre-entry jobs, i.e., the conveyor system now performs the functions of stacking, weighing, and sorting the books, enabling each employee to process thousands of more books per shift than they previously could process.

ACTION

We conclude that, upon completion of the installation of the automated equipment, the Employer was privileged to implement provisional wage rates for the new classifications, even though the parties had not reached impasse on the agreement as a whole.

In general, an employer that is engaged in negotiations for a collective-bargaining agreement may not unilaterally implement changes in terms and conditions of employment unless and until the parties have reached an overall impasse on bargaining for the agreement as a whole.[2] However, in Bottom Line, the Board recognized "two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and 'when

[2] Bottom Line Enterprises, 302 NLRB 373 1991),enfd.sub nom. Master Window Cleaning, Inc. v. NLRB, 15 F.3d 1087 (9th Cir. 1994).

economic exigencies compel prompt action.'"[3] In explanation of the latter exception, the Board has noted that there are circumstances when "management does need to run its business, and changes in operations toward that end often cannot await the ultimate full fledged contract bargaining."[4] In such circumstances, "consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if [it has given notice and an opportunity to bargain to the union, and] either the union waives its right to bargain or the parties reach impasse on the matter proposed for change."[5]

Application of the Bottom Line exception "attempts to maintain the delicate balance between a union's right to bargain and an employer's need to run its business."[6] Therefore, the analysis is, of necessity, "not easily susceptible to bright line rules."[7] However, because the exception is limited to situations where time is of the essence, an employer must show "a need that the particular action proposed be implemented promptly."[8] The employer must also show that "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable."[9]

Moreover in time-sensitive circumstances, "the amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation."[10] Thus, in circumstances where it is necessary to put a change in place quickly, "bargaining[] to be in good faith, need not be protracted."[11]

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[3] RBE Electronics of S.D., Inc., 320 NLRB 80, 81 (1995), quoting Bottom Line, 302 NLRB at 374 (footnotes omitted).

[4] See RBE, 320 NLRB at 81, quoting, Dixon Distributing Co., 211 NLRB 241, 244 (1974).

[5] RBE, 320 NLRB at 82.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] RBE, 320 NLRB at 81, citing Dixon Distributing Co., 211 NLRB at 244.

Relying on RBE, in Mail Contractors of America, Inc.,[12] the Board held that the employer lawfully implemented its proposed change in health insurance coverage during negotiations for an overall collective-bargaining agreement. The Board noted that the employer had made the decision to implement the health insurance changes before the onset of union activity, and therefore it did not violate the Act when it later implemented the change while the parties were trying to negotiate an initial collective-bargaining agreement and had not reached an overall impasse. Furthermore, the employer had notified the union that it "was ready to negotiate something different, if the Union wished," but the union clung to its position that the employer should not implement. As the Board observed, "[i]f the [e]mployer] had not implemented the company-wide plan for the KC unit, those employees would have been without health insurance."[13]

In Dixon Distributing Co.,[14] relied on in RBE, the employer implemented changes in employees' delivery routes after the union's victory in the election but before the union's certification. The Board held that the employer satisfied its duty to bargain with the union to impasse over the change when it met with union representatives on a single occasion for 20 minutes during which there was an airing of the issues and both sides set out their positions. The Board concluded that the employer had made the decision concerning the route changes before the advent of union activity, and that it was necessary to put them into effect without further delay because of the need to serve a new customer.[15]

We conclude that, in light of the exigent circumstances created by the completion of the installation of the automated equipment, the Employer was privileged to implement its proposed provisional wage rate, at good faith impasse, even though the parties had not reached impasse on the agreement as a whole. Thus, a pre-election decision had been made to automate, the completion of the installation of the automation equipment required prompt action in staffing the production line, and a wage rate had

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[12] 346 NLRB 164, n.1, 175 (2005).

[13] Id. at 164 n.1, 175.

[14] 211 NLRB 241 (1974).

[15] Id.

to be set for those new positions.[16]

The Employer gave the Union notice of its plans to commence and complete installation of the automated equipment, and the Union was on notice of the timeframe in which it had to reach an agreement with the Employer over the effects of the automation decision, including the wage rates for the new classifications. Although the parties could not reach agreement about these wage rates by the initial June, or the later September, installation date, they exchanged proposals and counterproposals on two occasions and stated their reasons for their respective proposals.[17] By mutual agreement, the parties then decided to focus on other matters. The Employer has stated that it remains open to bargaining about the "permanent" wage rates for the new classifications, and that if a higher rate is ultimately agreed on for those classifications in the context of an agreement as a whole, it would pay any agreed-upon wage rate retroactively to the date of the September installation. Under these circumstances, although we would not find that the parties reached impasse on contractual wage rates (given their mutual understanding that they would continue to negotiate contractual wage rates), we conclude that the parties bargained to impasse on provisional rates for these jobs, and that, under RBE, the Employer was privileged to implement those provisional rates prior to overall impasse on the collective-bargaining agreement.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[16] We find persuasive the Employer's argument that the prior wage rate, which was based largely on incentive pay, was not translatable to these new jobs.

[17] See Liquid Carbonic Corp., 277 NLRB 851, 865 (1985) (the employer bargained in good faith where it explained the reasons for its subcontracting decision, offered to allow the union to audit its books, and solicited an alternative from the union).