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

Advice Memorandum

DATE: July 25, 2000

TO : Louis J. D'Amico, Regional Director
Region 5

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

SUBJECT: The Baltimore Sun
Cases 5-CA-28862, 5-CB-9033

385-7567
530-6050-1040
530-6067-2070-6701
530-8074

These Section 8(a)(5) - Section 8(b)(3) cases were submitted for advice as to whether the employer is privileged to insist on bargaining about all mandatory subjects for newly accreted employees or whether those employees are covered under the extant collective-bargaining agreement.

FACTS

The Washington-Baltimore Newspaper Guild, Local 35 has long represented the Employer's news, commercial and other nonmechanical employees in a single unit which now has some 650 employees. The most recent contract runs from June 23, 1999 to June 24, 2003. In 1994, the Employer established its Promotions and Events department, since renamed and herein called the Brand Builders Department. The Guild filed a petition in Case 5-UC-344, in which it claimed that the Brand Builders were properly part of the unit. After hearing, the case was transferred to Region 9 and renamed Case 9-UC-429. On December 11, 1997, the Regional Director for Region 9 issued his Decision and Clarification of Bargaining Unit in which he found that the nonsupervisory Brand Builders employees, numbering 4-5, were part of the Guild's unit. The Employer filed a request for review, which the Board denied on October 22, 1999.[1]

The Employer staffed the Brand Builders department largely with new employees hired from outside. While the

[1] In Case 9-UC-430, Region 9 simultaneously clarified the unit to include 5-6 employees in the Sunspot or website division. The Employer has refused to bargain as to the website employees. On April 7, 2000, the Board issued a bargaining order with respect to the website employees.

work of the Brand Builders is integrated with that of other commercial department employees and while the two groups work in close physical association, the Brand Builders employees have duties which differ from those of the other commercial department employees and their job titles differ from the job titles set forth in the collective-bargaining agreement.

Beginning in October 1999, the Guild demanded bargaining as to the wages of the Brand Builders employees, and has insisted that the extant collective-bargaining agreement determines all other terms and conditions of employment for the Brand Builders. The Employer, on the other hand, while amenable to bargaining, has proposed bargaining about all terms and conditions of employment. Each party has filed a charge claiming that the other has refused to bargain.

ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by insisting on bargaining about all terms and conditions of employment for the newly accreted employees.

In Section 8(a)(5) cases, the Board routinely finds accreted employees are covered by the contract covering their unit. For example, in Westinghouse Electric,[2] the employer maintained a distribution center in Laurel, Maryland, where the appliance servicemen were covered by a contract. The Board found that the employer's appliance servicemen at the new Manassas, Virginia facility were an accretion to the unit, and ordered the employer to honor the Laurel contract (except for the union security clause) at Manassas. In St. Regis Paper Company[3] the union represented the employer's auto mechanics at Bucksport, Maine. The employer opened a garage at Colson Field, applied the contract to that site, and then opened a garage at First Lake, and assigned Bucksport and Colson Field mechanics to First Lake. The Board ordered the employer to apply the Bucksport contract to the First Lake mechanics.

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[2] Westinghouse Electric Corp., 206 NLRB 812 (1973), enforcement denied 506 F.2d 668 (4th Cir. 1974).

[3] St. Regis Paper Company, 239 NLRB 688 (1978), vacated and remanded as to the bargaining order but enforced on other grounds 674 F.2d 104 (1st Cir. 1982).

In Progressive Service Die Company, 323 NLRB 183 (1997), the unit was all employees making dies. The employer purchased a competitor, brought the competitor's employees to its plant, and put all of them under the contract with the exception of an "EDM" programmer-operator. The Board found the programmer-operator to be an accretion to the unit, and ordered the employer to apply the contract to him as well. The foregoing cases control the instant situation.

By contrast, when employees come into a unit by means of a self-determination election (so-called "Globed" employees), these employees do not automatically come under the terms of the extant collective-bargaining agreement.[4] We conclude that Federal-Mogul is applicable only in situations where employees come into a unit by means of a self-determination election, not accretion. The Board has not applied Federal-Mogul principles to accretion cases.[5]

We note that there is an important factual difference between a self-determination election where the new group of employees may be represented in two or more wholly appropriate units, and accretions. In the latter situation, the Board "will find a valid accretion 'only when the additional employees have little or no separate

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[4] Federal-Mogul Corporation, 209 NLRB 343 (1974); Wells Fargo Armored Service Co., 300 NLRB 1104 (1990). See "NLRB-An Outline of Law and Procedure in Representation Cases," September 30, 1999, Section 21, p. 223.

[5] In King's Daughters Medical Centers, Case 9-CA-30717, Advice Memorandum dated August 13, 1993, we concluded that the employer violated Section 8(a)(5) by unilaterally changing the wages of employees newly added to the union through a unit clarification proceeding. Thereupon the employer reduced the accreted employees' shift differential to those set forth in the collective-bargaining agreement. Although we authorized a complaint on the theory that Federal-Mogul applied, we now conclude that Federal-Mogul does not govern. However, we note that we would have reached the same result in *King's Daughters, had we applied the analysis used in this case. In King's Daughters,* the newly accreted employees' job classifications and wages were not set forth in the collective-bargaining agreement, and the shift differential was part of wages. Thus we would have reached the same result under a Jacobs Manufacturing analysis, infra.

group identity and thus cannot be considered to be a separate appropriate unit and the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted'."[6] In these circumstances, it is fair to presume that the parties contemplated that the contractual provisions they bargained would be applicable to all unit employees, including employees who would become part of the unit via accretion.

In the instant case, the Board accreted the Brand Builders employees into the unit. Thus, applying traditional accretion law, the Employer could not lawfully insist on bargaining as to matters already covered by the collective-bargaining agreement. However, as to matters not covered by the existing contract, the principles set forth in Jacobs Manufacturing[7] apply: the duty to bargain extends only to subjects neither discussed during negotiations nor embodied in any of the terms of the collective-bargaining agreement.

Here, the collective-bargaining agreement does not prescribe wage rates for employees performing the functions of the Brand Builders unit employees, but does set forth all the other terms and conditions of employment of the new unit employees. Hence the sole matter for bargaining is the wage rates of the new employees.

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by insisting on bargaining about matters already covered in the collective-bargaining agreement. It follows that the Section 8(b)(3) charge should be dismissed, absent withdrawal.

B.J.K.

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[6] Compact Video Services, 284 NLRB 117, 119 (1987); Towne Ford Sales and Town Imports, 270 NLRB 311 (1984), enfd. 759 F.2d 1477 (9th Cir. 1985), Safeway Stores, Inc., 256 NLRB 918 (1981).

[7] NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 683-684 (2nd Cir. 1952), enfg. 94 NLRB 1214 (1951).