

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

# Advice Memorandum

DATE: June 17, 2002

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Region 31

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

SUBJECT: Clear Channel d/b/a Capstar 530-6001-5025  
Case 31-CA-25424 530-8045-3700  
530-8045-3725  
530-8045-5000

This Section 8(a)(5) case was submitted for advice as to whether the terms of the parties' expired collective-bargaining agreement (the CBA) permitted Capstar (the Employer) to implement pre-recording of entire radio programs, known as "voice-tracking," for later broadcast on the Employer's station, or whether this action constituted an unlawful unilateral change in working conditions.

We conclude that the terms of the expired CBA did not permit the Employer to unilaterally institute voice-tracking, a mandatory bargaining subject, and thus the Employer violated Section 8(a)(5) by doing so.

### FACTS

The Employer owns and operates a number of Los Angeles-area radio stations, including KOST-FM (the Station), which it purchased in approximately June 2000. When it acquired the Station, the Employer assumed the predecessor's CBA with AFTRA's Los Angeles Local (the Union). The parties did not agree to extend the CBA, which expired by its terms on December 31, 2000.

The expired CBA contained the following provisions, in relevant part:

#### Management Rights

The Union recognizes and agrees that the [Employer] retains all the regular and customary rights, powers, privileges, authority, responsibilities[,] and functions of management, except to the extent that they are expressly and

specifically limited by the provisions of this Agreement.

Working Conditions

With the exception of overtime...no Staff Announcer shall be required to work more than forty (40) hours per week and such hours are to be included in five (5) consecutive workdays....

[E]xcept for part time employees...the workday shall consist of eight (8) consecutive hours....

Definitions and Duties of Staff Announcers

A Staff announcer's duties include such services as are consonant with his employment as a Staff Announcer. Such duties may include, at the [Employer's] option...operation of equipment, including, but not limited to...automation equipment....

Pre-Recorded Services

No pre-recorded services of a Staff Announcer...can be broadcast after thirty (30) days after the Staff Announcer...leaves the [Employer], except on payment of the freelance fees, or...payments pursuant to a personal service agreement not less than freelance rates.<sup>1</sup>

The Employer and Union have been negotiating for a successor agreement since January 2001.<sup>2</sup> Neither party has declared impasse and negotiations are ongoing.

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<sup>1</sup> The only other provisions in the expired CBA concerning the use of pre-recorded material allow: (1) "[r]ecorded material [produced by one staff announcer] including, without limitation, news actualities, public service announcements, commercial announcements, and other spots..." to be used by another staff announcer; and (2) broadcast of "incidental...recorded work product" created by non-unit employees, where "incidental" is defined as "a portion of a program and...not...an entire shift or regular schedule."

<sup>2</sup> All dates refer to 2001, unless otherwise noted.

On January 22, under the heading "New Provisions," the Employer submitted a proposal that would permit it to voice-track a staff announcer's entire radio program for broadcast at a later time.<sup>3</sup> The Union rejected this proposal, as well as the Employer's subsequent voice-tracking proposals to date. According to the Union, the Employer has consistently characterized its voice-tracking proposals as a "new right," rather than a clarification or reaffirmation of an existing right.

In September, the Employer installed voice-tracking software called "Prophet," and trained staff announcers to use it. The Employer first broadcast voice-tracked programs in October. The Union learned that the Employer had begun using Prophet only after its October implementation.

Using Prophet, a staff announcer pre-records the talk between songs, i.e. the voice-track, during his or her regular announcing shift for broadcast at a later time. When the pre-recorded program is broadcast, no staff announcer is present in the studio; rather, a non-unit employee alternates playing music and the staff announcer's voice-track.

As a result of this change, the number of staff announcer positions at the Station has decreased. Thus, part-time staff announcer Gracie works "live" three days a week. However, without any increase in the length of her workdays, Gracie now voice-tracks two additional shows, which are broadcast on her off days and during overnight time slots. After it extended two other staff announcers' shifts by one hour each (consistent with the CBA's eight-hour workday and 40-hour workweek provisions), the Employer eliminated two full-time staff announcer positions.

The Employer has in the past pre-recorded commercial, promotional, and contest announcements, but never entire programs. The limited use of such pre-recorded material never posed a threat to the number of unit positions.

The Employer contends that in addition to past practice, the above four provisions in the expired CBA, when read together, permitted its unilateral implementation of voice-tracking. First, the Employer asserts that the

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<sup>3</sup> By its terms, the proposal granted the Employer "the right to have on-air staff voice-track in shift for play out of shift [and allowed] for the engagement of on-air staff to voice-track weekly/monthly shifts."

Pre-Recorded Services provision, even standing alone, "clearly confirms" that its implementation of voice-tracking is allowable. Second, the Employer contends that the Definitions and Duties of Staff Announcers clause, which covers "operation of equipment, including...automation equipment," is consistent with that Pre-Recorded Services clause. Third, the Employer argues that the Management Rights clause allows the Employer to take any action not specifically proscribed by another CBA provision. Finally, the Employer notes that its use of voice-tracking still conforms to the CBA's eight-hour workday and 40-hour workweek provisions. The Employer contends, therefore, that the dispute is at most over interpretation of a contract, and that the Board should decline to exercise its jurisdiction.

In addition to submitting evidence contradicting the Employer's asserted past practice, the Union contends that the terms of the expired CBA did not permit the Employer to require staff announcers to voice-track entire programs, nor is there any evidence of a past practice in this regard. In support of its position, the Union notes that the Employer's voice-tracking proposal was submitted under the heading "New Provisions," and that the Employer has consistently characterized voice-tracking as a new right. Additionally, the Union contends that if the Employer's contract interpretation is given effect, the Union's representative function will be undermined because the Employer will be able to eliminate unit positions.

The Region has concluded that there is no past practice that would privilege the Employer's implementation of voice-tracking, and it is undisputed that no impasse has been reached.

#### ACTION

We agree with the Region that the Employer's unilateral implementation of voice-tracking was not permissible under any plausible construction of the terms of the expired CBA. Therefore, a Section 8(a)(5) complaint should issue, absent settlement.

Preliminarily, we note that terms and conditions of employment generally survive the expiration of a collective-bargaining agreement and cannot be altered without bargaining.<sup>4</sup> Thus, the provisions of the expired

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<sup>4</sup> See, e.g., MBC Headwear, Inc., 315 NLRB 424, 424 n.3 (1994), citing Parkview Furniture Mfg. Co., 284 NLRB 947, 971-972 (1987).

CBA at issue here, except for the management rights clause as discussed below at n. 10, remain in effect while the parties negotiate for a successor agreement.

Additionally, mandatory subjects of bargaining are those which set a term or condition of employment or regulate the relation between the employer and employee.<sup>5</sup> Therefore, the implementation of voice-tracking constitutes a mandatory subject of bargaining, because it clearly set a term of employment. Moreover, the evidence reveals that the number of unit positions at the Station has decreased as a result of voice-tracking, which plainly demonstrates an effect on the relation between the Employer and unit employees.

We conclude that contrary to the Employer's assertion and the following precedent on which it relies, the terms of the expired CBA did not permit it to institute voice-tracking, since there is no "sound arguable basis" or "substantial claim of contractual privilege" for the Employer's action. In Vickers,<sup>6</sup> the Board stated that where an employer has a "sound arguable basis" for interpreting its contract in a particular way and acts consistent with that interpretation, the Board will not ordinarily exercise its jurisdiction to determine whether the employer's interpretation is correct, absent evidence of union animus or bad faith. The contract clause there provided that when a new or revised job classification was established, the employer would unilaterally set a temporary wage rate. When two groups of employees voted to join the extant unit, the employer set initial wage rates for them pursuant to its interpretation of the contract. The union demanded that these employees be returned to their pre-election status, which included certain benefits they had enjoyed as unrepresented employees but lost after voting for the union.<sup>7</sup> The Board dismissed the complaint, upholding the

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<sup>5</sup> Womac Industries, 238 NLRB 43, 43 (1978), citing IUOE Local 12 (Associated General Contractors of America, Inc.), 187 NLRB 430, 432 (1970).

<sup>6</sup> Vickers, Inc., 153 NLRB 561, 570 (1965) (internal citations omitted).

<sup>7</sup> However, the union had processed four grievances on behalf of the new unit employees, and agreed to change the contract's recognition clause to reflect their inclusion in the unit.

ALJ's finding that the employer's contract interpretation was both reasonable and tacitly supported by the union's conduct. 153 NLRB at 561, 570.

Relying on Vickers, the Board in NCR Corp.<sup>8</sup> stated that when presented with two equally plausible but conflicting contract interpretations it need not endorse either party's version. At issue there were the meanings of a contract clause restricting unilateral out-of-district transfers, and of a provision that nothing in the parties' contract was to be construed to restrict the employer's right to consolidate, merge, or reorganize any district. The employer notified the union of plans to restructure operations, including removing certain unit work to a new office outside the district. Neither party requested bargaining and within five months the restructuring was complete. The Board dismissed the complaint, holding that the employer's alleged unilateral transfer of unit work was "based on a substantial claim of contractual privilege[,] and noting that there was no evidence of union animus, bad faith, or an attempt to undermine the union's status as collective-bargaining representative. 271 NLRB at 1213.

Similarly, in Jack Hart Concrete,<sup>9</sup> the parties were signatories to a short-form agreement that bound them to honor the terms of successive master agreements. The short-form agreement contained a provision by which either party could give notice of its desire to terminate application of the short-form agreement within five days of the termination of the "applicable" master agreement. Pursuant to this provision, the employer notified the union of its intent to terminate the short-form agreement, and of its desire to negotiate a separate contract for its employees. The union refused to bargain, claiming the employer's notice was neither timely nor effective. Finding that the termination provision was ambiguous on its face and that the parties' differing interpretations were equally plausible, the Board declined to assert jurisdiction under Vickers and dismissed the Section 8(b)(3) complaint. 274 NLRB at 1288. In this regard, the Board noted the absence of any extrinsic evidence clarifying the precise meaning of the termination provision, and that there was no evidence of bad faith on the union's part in refusing to bargain. Ibid.

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<sup>8</sup> 271 NLRB 1212, 1213 (1984).

<sup>9</sup> Plasterers Local 627 (Jack Hart Concrete), 274 NLRB 1286 (1985).

Applying the foregoing principles to the instant case, we conclude that the Employer cannot demonstrate a sound arguable basis or a substantial claim of contractual privilege in defense of its actions. Initially, we note that a management rights clause does not survive the expiration of a collective-bargaining agreement.<sup>10</sup> Thus, the Employer's reliance, in part, on the expired CBA's management rights clause in support of its position is misplaced. Even if the clause did not expire with the CBA, it is well settled that the Board will not infer a waiver of the statutory right to bargain over a mandatory subject of bargaining absent a clear and unmistakable relinquishment of that right.<sup>11</sup> To satisfy this standard, the contract language must be specific or it must be shown that the matter sought to be waived was fully discussed, and consciously explored and yielded.<sup>12</sup> Thus, we find that the CBA's broadly worded management rights clause would not, in any event, amount to a clear and unmistakable waiver of the Union's right to bargain over the implementation of voice-tracking.

We next conclude that unlike Vickers, NCR, or Jack Hart Concrete, above, involving disputes fairly clearly encompassed by the contract provisions at issue, the remaining CBA provisions relied on by the Employer here cannot reasonably be construed as covering its right to implement voice-tracking. First, we reject the Employer's contention that the "Pre-Recorded Services" provision by itself "clearly confirms" that its institution of voice-tracking was permissible. This provision is plainly limited to how long and under what circumstances the Employer may broadcast a staff announcer's pre-recorded material after she or he leaves the Station. And, given that the expired CBA's only other reference to pre-recorded material is to short and "incidental" spots (the only types of pre-recordings staff announcers had regularly made prior to the voice-tracking at issue), we conclude that that the Pre-Recorded Services provision contemplated only those types of pre-recordings, and not voice-tracking entire programs.

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<sup>10</sup> See Ryder/ATE, Inc., 331 NLRB No. 110, slip op. at 1 n.1 (2000), and cases cited therein.

<sup>11</sup> See, e.g., Trojan Yacht, 319 NLRB 741, 742 (1995).

<sup>12</sup> Ibid., citing Angelus Block Co., 250 NLRB 868, 877 (1980).

Second, the "Definitions and Duties of Staff Announcers" section fails to support the Employer's position. Thus, however consistent this clause may be with the foregoing provision, the mere fact that the "operation of ... automation equipment" -- a broad and generic classification -- is included in staff announcers' job descriptions does not render the Employer's unilateral implementation of voice-tracking permissible. Since it is obvious that the Station uses "automation equipment," we conclude that the Employer cannot reasonably interpret this provision as providing it with a sound basis for implementing voice-tracking.

Third, we find it irrelevant that voice-tracking was accomplished without having to extend staff announcers' shifts. Obviously, had the Employer abrogated the expired CBA's provisions concerning the length of the workday or of the workweek in doing so, it would have independently violated Section 8(a)(5).<sup>13</sup> We are aware of no case in which an otherwise unlawful unilateral change in terms of employment was found lawful simply because it did not result in an unlawful unilateral change in unit employees' hours of work.

Finally, extrinsic evidence further undermines the Employer's argument that the expired CBA permitted it to implement voice-tracking. Thus, consistent with the terms of the expired CBA, the only pre-recordings staff announcers had ever produced prior to Prophet's introduction were short commercial, promotional, and contest announcements. Additionally, the Employer's initial voice-tracking proposal was submitted under the heading "New Provisions" and, according to Union testimony, the Employer has consistently characterized voice-tracking as a new right it sought.

In all these circumstances, we conclude that the Employer cannot establish a sound arguable basis or a substantial claim of contractual privilege that permitted it to unilaterally institute voice-tracking. Therefore, absent settlement, the Region should issue a Section 8(a)(5) complaint.

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<sup>13</sup> See, e.g., Keeler Die Cast, 327 NLRB 585, 589 (1999) (employer's unilateral change in work schedules without affording union notice or opportunity to bargain violated Section 8(a)(5)), and cases cited therein.

B.J.K.