

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

# Advice Memorandum

DATE: December 31, 2002

TO : Catherine M. Roth, Acting Regional Director  
Region 19  
Cathleen Callahan, Officer-in-Charge  
Subregion 36

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

SUBJECT: Cascade General, Inc. 530-6050-4100  
Case 36-CA-9051 530-6067-2040-  
4500  
530-6067-4066  
530-6067-4066-5000

This case was submitted for advice on whether the Employer violated Section 8(a)(5) by unilaterally eliminating two non-unit positions created by the collective-bargaining agreement. We conclude that the Employer unlawfully eliminated the positions because, even though they were non-unit positions, they inured to the benefit of unit employees and thus vitally affected relations between the Employer and employees. Moreover, by eliminating these positions, the Employer unlawfully altered the mechanism for administering the collective-bargaining agreement. Therefore, the elimination of the two positions was a mandatory subject of bargaining.

### FACTS

Cascade General (the Employer), a ship repair operator in Portland, Oregon, and the Portland Metal Trades Council (the Union), an association of ten unions representing employees at the Employer, are parties to a collective-bargaining agreement (the Agreement). The parties' most recent agreement expired on June 30, 2002.<sup>1</sup> Section 14.1 of the Agreement established a joint labor-management committee (the LMC) "to interpret and work within," and act as a policy making body under, the Agreement. The LMC is comprised of a "Contract Administrator," equal numbers of representatives from the Employer and the Union, and three Deckplate Committee Representatives. The Employer's elimination of the Contract Administrator (CA) and Deckplate Representative (DCR) positions are the subject of this charge.

---

<sup>1</sup> All dates are in 2002.

The Agreement explicitly provides for the creation of the CA and DCR, non-unit positions to help administer work policies established by the LMC and the Employer. In their administering capacities, these individuals served primarily as liaisons between the LMC and employees.

First, Section 14.2 of the Agreement provides for the creation of a Contract Administrator (CA), who "shall assume such duties as the LMC assigns, but shall not decide issues of Employee termination or discipline." The Employer funded the CA position, but this position was neutral and represented neither labor nor management, simply the LMC itself. The CA chaired the LMC, and acted to ensure that the Agreement was administered fairly and consistently throughout the various departments and employees at the Employer. As a representative of the LMC, the CA facilitated communication between the LMC and employees, as well as between the various unions representing employees at the Employer, and managed the DCR's.

The CA had a contractually specified role in the administration of the grievance procedure. Article 20, Section 20.1 of the Agreement establishes a four-step grievance-arbitration mechanism. Step 2 states that the "[CA] or his/her designee shall review the grievance and forward it to the appropriate Employer Representative within two (2) working days." Step 4 provides an option for either party to submit a grievance to a grievance panel. The CA would select the members of the grievance panel, which would consist of two members from labor and two from management. The CA acted in neither a representational nor decision-making capacity in his roles in the grievance procedure.

The CA also oversaw the Employer's peer evaluation review system<sup>2</sup> by notifying employees of their right to sign up for the system, schedules, results of the reviews, and appeal rights. The CA did not act in a representational or decision-making capacity in his role in the peer evaluation review system.

Second, Section 14.3 of the Agreement provides for the creation of three DCR's to "serve on the LMC and LMC

---

<sup>2</sup> The peer evaluation system is a program by which employees may volunteer twice per year to be evaluated by a peer committee made up of four bargaining unit members. The results of the peer review may result in upgrades in job status and increased wages.

Subcommittees<sup>3</sup> and [to] work for the Agreement on LMC related business reporting directly to the [CA]." This provision also states that "DCR's shall assume the duties of communicating to the workforce on Employee related issues." In this capacity, the DCR's were a liaison between the employees and the LMC. Specifically, the DCR's duties included soliciting input from employees prior to the formation of a LMC policy decision, reporting that input back to the LMC and the CA, and facilitating implementation of the procedural aspects of new policies after their formation by the LMC.<sup>4</sup> The DCR's did not act as advocates of employees.

In February, the Employer requested bargaining over the elimination of the CA and DCR's. At that time, the Union agreed only to reduce the number of DCR's from three to two.

In May, the Employer and Union commenced negotiations for a new Agreement. On June 28, the Employer notified the Union that it would cease funding the CA and DCR positions when the Agreement expired. On July 1, the Employer ceased such funding, and laid off the CA and the two DCR's.

#### ACTION

We conclude that the Region should, absent settlement, issue complaint alleging that the Employer violated Section 8(a)(5) by unilaterally eliminating the CA and DCR positions. These positions were a mandatory subject of bargaining since they inured to the benefit of unit employees, and thus vitally affected Employer-employee relations. Furthermore, the Employer had an obligation to bargain about these positions that were part of the mechanism for the parties to administer the Agreement.

An employer violates Section 8(a)(5) of the Act if it unilaterally changes terms and conditions of employment without bargaining in good faith with the union that represents its employees.<sup>5</sup> As the Supreme Court recognized

---

<sup>3</sup> The LMC also contains four subcommittees relating to subjects affecting employees: safety, training, subcontracting, and drug testing.

<sup>4</sup> For example, DCR's informed employees where to go and what to do with respect to a new drug testing policy. Union representatives, however, handle substantive employee problems with new policies.

<sup>5</sup> NLRB v. Katz, 369 U.S. 736 (1962).

in NLRB v. Wooster Div. of Borg-Warner Corp., matters covered by this rule, "mandatory" subjects of bargaining (wages, hours, terms and conditions of employment), are distinguishable from "non-mandatory" or "permissive" subjects of bargaining, about which a party may act unilaterally.<sup>6</sup> Mandatory bargaining subjects are those that "settle an aspect of the relationship between the employer and employees."<sup>7</sup> Matters affecting individuals outside the bargaining unit are not automatically excluded from the scope of mandatory bargaining;<sup>8</sup> they are still mandatory bargaining subjects if they "vitaly affect" terms and conditions of unit employees' employment.<sup>9</sup> An indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject.<sup>10</sup> But matters affecting individuals who are not unit employees are mandatory subjects if those matters materially or significantly affect unit employees' terms and conditions of employment.<sup>11</sup>

---

<sup>6</sup> 356 U.S. 342, 348-49 (1958).

<sup>7</sup> Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 178 (1971); see also International Union of Operating Engineers Local No. 12 (Associated General Contractors of America, Inc.), 187 NLRB 430, 432 (1970) ("The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.").

<sup>8</sup> See United Technologies Corp., 274 NLRB 1069, 1070 (1985), enf'd. 789 F.2d 121 (2d Cir. 1986), citing Teamsters Union v. Oliver, 358 U.S. 283 (1959).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*; see also Pittsburgh Plate Glass, 404 U.S. at 180 (effect of change in retirees' benefits to terms and conditions of employment of active unit employees under the same health insurance contract too "speculative and insubstantial"); The Torrington Co., 305 NLRB 938, 939 (1991), reconsideration denied 307 NLRB 485 (1992) (adverse impact on unit employees' overall financial concerns by the elimination of internal coordination of health insurance benefits that had previously enabled nonunit employees to apply for supplemental coverage of their unit-member spouses' medical expenses was too incidental to become a bargainable subject).

<sup>11</sup> See United Technologies Corp., 274 NLRB at 1070, citing Seattle First National Bank v. NLRB, 444 F.2d 30 (9th Cir. 1971).

Applying these principles, the Board has found that the remuneration of unit employees for performing union representative functions is a mandatory subject of bargaining.<sup>12</sup> These functions concern relations between an employer and its employees, not just between the employer and the union, and are, therefore, mandatory, because the functions are union related matters that inure to the benefit of all unit employees by contributing to more effective collective-bargaining representation. Because these payments to employees benefit unit employees, they "vitally affect" relations between the employer and employees.<sup>13</sup> Significantly, in finding the payments mandatory in all these cases, the Board focused on the impact the payment had on all unit employees and the collective-bargaining process, not on the unit employee status of the individual who received the benefit at issue.

As in the cases above, the functions of the CA and DCR positions were vital to the collectively bargained representation of employees. The CA and DCR's were an integral part of the LMC, a contractually created alliance between the Employer and Union that interprets the Agreement and forms policies pursuant to the Agreement. Even though the CA and the DCR were not direct representatives of the Union, or the Employer, they contributed to more effective representation in the collective-bargaining process. For instance, the DCR's afforded unit employees a voice to convey work-related suggestions and concerns to the LMC. DCR's also helped employees acclimate to new policies formed by the LMC. Significantly, the DCR's were appointed by the Union, which suggests their importance vis-à-vis unit employees, notwithstanding their lack of representative capacity.<sup>14</sup>

---

<sup>12</sup> See Axelson, Inc., 234 NLRB 414, 415 (1978).

<sup>13</sup> See *id.*; see also BASF Wyandotte Corp., 276 NLRB 1576, 1583 (1985) (payments to union committeemen for release time to administer grievance procedure, mandatory subject of bargaining); Midstate Telephone Corp., 262 NLRB 1291, 1298 (1982), *enfd.* in relevant part 706 F.2d 401 (2d Cir. 1983) (reimbursement of employees' per diem and travel expenses for union negotiating committee work, mandatory subject of bargaining); American Ship Building Co., 226 NLRB 788, 793 (1976), *enfd.* 574 F.2d 636 (D.C. Cir.), *cert. denied* 439 U.S. 860 (1978) (wages paid to employees during presentation of grievances, mandatory subject of bargaining).

<sup>14</sup> See, e.g., Ohio Power Co., 317 NLRB 135, 142 (1995) (ALJD *affd.* without exceptions) (practice of allowing union

Like the DCR, and the employees and union committeemen in the above cases, supra notes 12 and 13, the CA position also "inured to the benefit" of unit employees. Although the CA was hired from the outside and not appointed by the Union or the Employer, his functions nonetheless contributed to more effective collective bargaining representation by assisting employees with vital terms and conditions of employment. The CA's participation in the peer evaluation review system by, among other things, notifying employees of their participation and appeal rights, helped employees navigate the procedural aspects of a means by which they could obtain increased job status and wages. Similarly, the CA assisted employees with the procedural aspects of the contractual grievance-arbitration mechanism by setting up meetings and processing paperwork. After the Employer eliminated the CA position, unit employees no longer received this Employer-funded, neutral assistance with policies established by the LMC and the Employer.

Also, as the chair of the LMC, the CA played a vital role in the ongoing collective-bargaining process. As described above, the parties agreed to establish the LMC to "interpret and work within" that Agreement, and to act as a policy making body under the Agreement. As such, the LMC was the mechanism these parties chose to drive their collective-bargaining relationship. The CA was the link between the parties and that process. The CA, on behalf of the parties, administered the Agreement and advised both parties about its meaning and application. In that role, the CA position is a mandatory subject of bargaining because the means by which terms and conditions of employment are administered are as much a mandatory subject of bargaining as an agreement's actual terms establishing those conditions.<sup>15</sup>

The centrality of the CA to the collective-bargaining process is further exemplified by his role in

---

officers to attend worker's compensation hearings during worktime without pay inured to the benefit of unit employees; the officers assisted unit employees by explaining to them their rights under the law, helping them complete forms, and providing moral and emotional support before and during worker's compensation hearings).

<sup>15</sup> See NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967) ("[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.").

the grievance mechanism. The CA reviews and processes employee grievances at Step 2, and selects grievance panel members at Step 4.<sup>16</sup> Because of the CA's role in the grievance process, the Employer materially affected the contractual grievance-arbitration mechanism<sup>17</sup> when it unilaterally eliminated the CA position.<sup>18</sup>

In sum, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act by unilaterally eliminating the CA and DCR positions.

B.J.K.

---

<sup>16</sup> Although the CA is akin to a third party, as he represents neither the Union nor the Employer, we note that he had no decision-making authority in the grievance procedure. This case is therefore not governed by the principle that parties need not bargain over an expired agreement's arbitration provisions. That principle is based on the consensual surrender of economic power, which the parties are free to use if collective bargaining fails to result in agreement. See The Hilton-Davis Chemical Co., 185 NLRB 241, 243 (1970). Instead, the grievance procedure, and the CA's role in it, involve "no consensual surrender of the economic power which the parties are otherwise free to utilize." See Newspaper Printing Co., 221 NLRB 811, 820 (1975).

<sup>17</sup> It is clear that the grievance process survived expiration of the Agreement on June 30. See Indiana & Michigan Electric Co., 284 NLRB 53, 54 (1987) (a contractually established grievance resolution system survives the contract's expiration and may be changed only by mutual agreement of the parties).

<sup>18</sup> See Newspaper Printing Co., 221 NLRB at 820 (1975) (employer unlawfully altered the grievance procedure even though it agreed to meet with the union, but not through the procedure established by contract). See generally Caterpillar, Inc., JD 161-96, 1996 WL 33321654 (NLRB Division of Judges) (although employer had no duty to bargain over the elimination of the superintendent position, employer could not unilaterally remove the second step of the contractual grievance procedure, in which the superintendent played a significant role).