

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

# Advice Memorandum

DATE: June 17, 2009

TO : Michael W. Josserand, Regional Director  
Region 27

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

SUBJECT: The Newspaper Agency Corporation                   530-6067-4022-0100  
Case 27-CA-20748                                           530-6067-4022-6200  
                                                                  530-8045-3725  
                                                                  530-8054-0100  
                                                                  530-8054-7000  
                                                                  775-8799-0000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by refusing to bargain with the Union regarding certain effects of the Employer's decision to lay off employees, i.e. the criteria used to select employees for layoff.<sup>1</sup> Applying the Board's clear and unmistakable waiver analysis, as reaffirmed in Provena St. Joseph Medical Center,<sup>2</sup> we conclude that the Union waived its right to bargain over the criteria used to select employees for layoff.

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<sup>1</sup> The Region initially submitted for advice the issue of whether the Management Rights clause survived contract expiration and Advice determined that it did. See The Newspaper Agency Corporation, Case 27-CA-20748, Advice Memorandum dated June 4, 2008. Although that Memorandum stated at fn. 2 that "the Employer was privileged to unilaterally create new layoff procedures and layoff employees," that statement was based on the Region's conclusion in its Request for Advice that the Union had waived its right to bargain over the Employer's unilateral implementation of new layoff procedures. Therefore, our prior Memorandum did not address the instant question, i.e. whether the Union waived its right to bargain over the effects of the layoff decision.

<sup>2</sup> 350 NLRB 808 (2007). The "clear and unmistakable" waiver standard was most recently reaffirmed in Airo Die Casting, Inc., 354 NLRB No. 8, slip op. at 2 (2009).

**FACTS**

The Newspaper Agency, Corp., LLC (the Employer) publishes two daily newspapers in Salt Lake City, Utah. Salt Lake City Mailers Union No. M-21/CWA 14759 (the Union) has represented the Employer's mailroom employees for over 8 years. In December 2005, the parties executed a new two-year collective-bargaining agreement scheduled to expire on December 11, 2007. That Agreement included the following Management Rights clause:

Section 1. The Union recognizes that any and all rights concerned with the management of the business and the direction of the workforce are exclusively those of [the Employer]. [The Employer] retains all of its normal, inherent common law rights to manage the business, whether or not exercised as such rights existed prior to the time any Union became the bargaining representative of the employees covered by the Agreement, except as limited by, and consistent with the rights of the Union and its represented employees as set forth in this Agreement or as established by law, statutes and governmental regulations. The sole and exclusive rights of management shall include, but are not limited to the right to: hire, assign, schedule, layoff, recall transfer, suspend, discharge or otherwise discipline employees for just cause, determine, establish, and implement terms and conditions of employment; establish or continue policies, practices and procedures for the conduct of business and, from time to time, to change or abolish such policies, practices or procedure in order to prevent any redundancy or duplication of work or for any other reason provided such rights and policies are not in conflict with any provision of this Agreement and do not abridge the rights and benefits of employees as conferred by this Agreement; . . . take any other measures which are reasonable and necessary for the orderly, efficient and profitable operation of its business.

\* \* \* \* \*

Section 3. The parties agree that the management rights referenced in this Article or elsewhere in the Agreement shall continue after the expiration of this

Agreement and shall not expire upon expiration of this Agreement.

The Agreement included a "Priority" article that set forth procedures for the assignment of work schedules. It did not refer to layoffs or indicate that its procedures applied to reductions in force. The Agreement also included a "Job Guarantee" article, which limited the Employer's ability to lay off certain employees.<sup>3</sup> The article set forth specific procedures in the event of a reduction in force or layoff with respect to those employees, as follows:

Section 1. [The Employer] agrees that all mailroom journeymen named in Appendix A who are actively employed or on sick leave on the date this Agreement is signed will be guaranteed continuous employment in the mailroom for the remainder of their working lives, subject to the provisions of this Article.

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Section 3. If, for any reason, any employees covered by this job guarantee and hired prior to March 31, 1955, is determined excess to [the Employer]'s needs, a reduction in force will be accomplished first by attrition; second, by transfer to another available job within [the Employer] paying at or above the then-existing mailroom pay scale for which the employee is qualified ([the Employer] to provide such training as is necessary); and third, by termination by [the Employer].

Section 4. In the event of termination of any employee named in Appendix A by [the Employer] (except for retirement, resignation, death, permanent and total disability, or discharge for just cause), [the Employer] will provide severance payment based on the following formula . . .

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<sup>3</sup> Appendix A lists 29 employees, all of whom were hired prior to September 1, 1984. None of the employees referred to in this article were laid off here.

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Section 6. It is also agreed that if any employees named in Appendix A are terminated because of a decrease in need of people in the mailroom, such persons (if available) will be rehired in the reverse order in which they were laid off.

In October 2007, the parties began to bargain for a successor agreement. During the course of negotiations, the Employer indicated to the Union that it was planning to cut back on employees at the beginning of the new year.<sup>4</sup> On or around December 17, 2007, the Employer's head of Human Resources made a formal announcement to the mailroom employees that the Employer intended to lay off a number of employees early in the new year. Immediately following this announcement, two Union representatives, who were also members of the bargaining committee, approached the Human Resources official and asked if the layoffs could be conducted according to the procedures set forth in the Priority provision. They explained that this would result in layoffs by seniority. The Human Resources official rejected the Union's request.

On December 17, 2007, the Union filed a grievance with the Employer. The grievance cited the Priority article of the parties' collective-bargaining agreement and stated: "This is on the company laying off full time people and continuing the hiring of part time employees. If this is to be done it should be done by priority..." The Employer denied the grievance, asserting that nothing in the parties' Agreement required it to conduct layoffs by priority.

On January 2, 2008, the Employer laid off 7 mailroom employees. The employees were selected according to a rating system created by the Employer without any input from the Union.<sup>5</sup>

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<sup>4</sup> There is no evidence that the parties discussed the extent of the layoffs or how the layoffs would be conducted at this time.

<sup>5</sup> According to the Employer, the rating system considered such factors as the employees' attendance records and their

On January 4, the Union filed grievances protesting each of the layoffs, asserting that the Employer terminated the employees without just cause. In denying the individual grievances, the Employer explained that the employees had been let go as part of an economic reduction in force and that it was privileged by the Management Rights clause to conduct layoffs as necessary.<sup>6</sup>

### **ACTION**

We conclude that the Employer did not violate Section 8(a)(5) by refusing to bargain with the Union regarding the criteria used to select employees for layoff because the Union clearly and unmistakably waived its right to bargain over those effects.<sup>7</sup>

In Provena, the Board reaffirmed its long-held position that a purported waiver of a union's right to bargain is effective only if the relinquishment was "clear and unmistakable."<sup>8</sup> Provena dealt with a union's waiver of

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ability to perform their work and operate required equipment.

<sup>6</sup> The Employer has refused to arbitrate the grievances since the layoffs occurred after the parties' collective-bargaining agreement had expired. Thus, deferral is inappropriate in this case.

<sup>7</sup> Layoff selection criteria is encompassed within effects bargaining. See, e.g., Clements Wire, 257 NLRB 1058, 1059 (1981) ("Although an employer may properly decide that an economic layoff is required, once such a decision is made the employer must nevertheless notify the union and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected"); All American Gourmet, 292 NLRB 1111, 1135 (1989). See also Otis Elevator Co. III, 283 NLRB 223, 223 (1987) (although employer was privileged to unilaterally transfer employees pursuant to management rights clause, employer still had to bargain with union about transfer selection criteria).

<sup>8</sup> 350 NLRB at 811-13.

its right to bargain over a managerial decision, and subsequent cases have not addressed effects bargaining. Previous Board decisions establish, however, that effects bargaining over a decision is treated separately from the decision itself and must be independently waived in a clear and unmistakable fashion.<sup>9</sup>

In Good Samaritan Hospital, for example, the Board held that although the parties' management rights clause operated as a clear and unmistakable waiver of the union's right to bargain over the employer's decision to implement new staffing matrices, the Union did not waive its right to bargain about the effects of the decision, namely the impact on nurses' workloads and their ability to meet mandatory performance standards.<sup>10</sup> The Board explained that "[c]ontractual language waiving a union's bargaining rights as to a certain decision does not constitute a waiver of the right to bargain over that decision's effects....In the absence of a clear and unmistakable waiver by the union concerning effects bargaining, such bargaining is still required."<sup>11</sup> In Allison Corp., the Board held that although the parties' management rights clause "plainly grant[ed] the [employer] the right to subcontract without restriction," the union did not waive its right to bargain over the layoffs that occurred as a result of its lawful decision to subcontract unit work because there was no clear and unmistakable waiver by the union as to "the subject of effects bargaining in general, or bargaining regarding the effects of subcontracting specifically."<sup>12</sup> And in Kiro, Inc., the Board held that the union did not

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<sup>9</sup> See, e.g., Natomi Hospitals of California, Inc. (Good Samaritan Hospital), 335 NLRB 901 (2001); Allison Corp., 330 NLRB 1363 (2000); Kiro, Inc., 317 NLRB 1325 (1995).

<sup>10</sup> The parties' management rights clause granted the employer the right "to decide the number of employees to be assigned to any shift or job" and "to determine appropriate staffing levels." Id. at 902.

<sup>11</sup> Id.

<sup>12</sup> 330 NLRB at 1365-66.

waive its right to bargain over the effects of the employer's decision to produce an additional news program because the management rights clause made no "specific reference to the employer's rights to increase working hours or to increase the workload when changing schedules and assignments."<sup>13</sup>

The D.C. Circuit, as set out in Enloe Medical Center v. NLRB, has declined to apply the Board's "clear and unmistakable waiver" test to subjects already covered by a collective bargaining agreement; rather, its view is that with respect to "questions of 'waiver,'" the "proper inquiry" is one not of statutory interpretation but of contract interpretation, i.e., "whether the subject that is the focus of the dispute is 'covered by' the agreement."<sup>14</sup> In Enloe Medical Center,<sup>15</sup> the Board held that the union had not waived its right to bargain over the effects of the employer's new, mandatory on-call policy. The D.C. Circuit, reversing the Board, stated that "[w]hether the parties contemplated that the collective bargaining agreement would treat the effects of a decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether."<sup>16</sup> The court then interpreted the contract to conclude that the parties did not intend to reserve to the union the right to bargain separately over the effects of the decision. The court stated:

It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision. . . . there would

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<sup>13</sup> 317 NLRB at 1327-28.

<sup>14</sup> Enloe Medical Center v. NLRB, 433 F.3d 834, 838-39 (D.C. Cir. 2005), reversing 343 NLR 470 (2004).

<sup>15</sup> 343 NLRB 470 (2004), enf. den. 433 F.3d 834 (D.C. Cir. 2005).

<sup>16</sup> 433 F.3d at 838-39.

have to be some language or bargaining history to support the proposition that the parties intended to treat the issues separately... In the collective bargaining context [], the question is not whether the Board's policy is consistent with the Act, but rather what is the appropriate interpretation of a contract - i.e. did the parties intend the dichotomy?<sup>17</sup>

Although the Board has not specifically addressed waiver of effects bargaining since Enloe Medical Center v. NLRB, it has reaffirmed its "clear and unmistakable" standard for determining whether the union waived its right to bargain during contract negotiations.<sup>18</sup> Accordingly, there is no basis to conclude that the Board would abandon its longstanding application of the "clear and unmistakable" standard in determining whether the union waived its right to bargain over the effects of the employer's decision.

In evaluating whether there has been a clear and unmistakable waiver, the Board considers the precise wording of the relevant contract provisions.<sup>19</sup> Generalized management rights clauses that do not refer to any particular subject area do not operate as a waiver of statutory bargaining rights.<sup>20</sup> Absent specific contractual

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<sup>17</sup> Id. at 839.

<sup>18</sup> See Airo Die Casting, Inc., 354 NLRB No. 8, slip op. at 2; Provena, 350 NLRB at 811-13.

<sup>19</sup> Airo Die Casting, Inc., 354 NLRB No. 8, slip op. at 2, citing Provena, 350 NLRB 808.

<sup>20</sup> See Enloe Medical Center, 343 NLRB 470, 475 (2004), enforcement denied 433 F.3d 834 (D.C. Cir. 2005) (contractual right to promulgate and implement new policies, which authorized unilateral change to mandatory on-call policy, did not operate as a waiver by the union of its right to bargain over the effects of the employer's implementation of the new on-call policy; "There is no mention of a waiver of the right to effects bargaining over the on-call policy"). See also Provena, 350 NLRB at 815, n.34; Dorsey Trailers, Inc., 327 NLRB 835, 836 (1999),

language, an employer must show "that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter."<sup>21</sup>

In Metropolitan Edison Co. v. NLRB, the Supreme Court, agreeing with the Board's approach, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'"<sup>22</sup> The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized in *haec verba* in the contract. As the Board noted in Provena, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right to unilaterally take the action in question.<sup>23</sup>

The Board's analysis in Provena illustrates these principles. The Board first considered the employer's unilateral implementation of a monetary incentive policy to encourage nurses to volunteer to work extra shifts during a holiday period. The Board found that no contractual provision expressly addressed incentive pay, concluding that a contractual provision to pay "extraordinary pay" for extra hours worked when the employer determined that extra hours were needed did not encompass the incentive policy.<sup>24</sup> Further, in the absence of any evidence that the parties had consciously explored, or that the union intentionally relinquished its right to bargain over this topic, the

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enfd. in relevant part 233 F.3d 831 (4th Cir. 2000); Cypress Lawn Cemetery Ass'n, 300 NLRB 609, 615 (1990).

<sup>21</sup> Airo Die Casting, Inc., 354 NLRB No. 8, slip op. at 2, citing Trojan Yacht, 319 NLRB 741, 742 (1995) and Angelus Block Co., 250 NLRB 868, 877 (1980).

<sup>22</sup> 460 U.S. 693, 708 (1983).

<sup>23</sup> 350 NLRB at 812, n.19, citing New York Mirror, 151 NLRB 834, 839-40 (1965).

<sup>24</sup> Id. at 815, n.34.

Board concluded that the union had not waived bargaining over the policy.

The Board then considered the employer's unilateral implementation of an attendance and tardiness policy. In contrast to the incentive policy, the Board concluded that the contract did "explicitly authorize[]" the employer's implementation of a disciplinary policy on attendance and tardiness.<sup>25</sup> The Board found that several provisions of the management rights clause - granting the employer the right to "change reporting practices and procedures and/or introduce new or improved ones," "make and enforce rules of conduct," and "suspend, discipline and discharge employees" - when taken together, amounted to an explicit authorization of the employer's unilateral action.<sup>26</sup>

The Board's analysis in Provena makes clear that when a contract does not explicitly mention the employer action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver.<sup>27</sup> In interpreting the parties' agreement, the relevant factors include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past practice; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.<sup>28</sup>

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<sup>25</sup> Id. at 815.

<sup>26</sup> Id.

<sup>27</sup> Id. See also New York Mirror, 151 NLRB at 840 (in determining waiver, the Board is "not restricted to the contract provisions themselves but may properly evaluate them against the elucidating background of their bargaining history").

<sup>28</sup> The first three of these factors have traditionally been considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson Bateman, 295 NLRB 180, 184-87 (1989); American Diamond Tool, 306 NLRB 570, 570 (1992). Provena also makes clear that it is appropriate to consider any other relevant contract provisions or bilateral agreements that shed light on the

Applying the above factors here, we conclude that the Union did clearly and unmistakably waive its right to bargain: although the Management Rights provision alone is too ambiguous to ascertain the parties' intent, other contractual provisions demonstrate that the Union consciously yielded its right to bargain over the layoff selection criteria.

With respect to the first factor, the Management Rights provision is ambiguous as to whether the Union has waived its right to bargain over the layoff selection criteria. Although waiver may be found based on a combination of clauses, there is no combination of clauses here that clearly authorize the Employer to take unilateral action.<sup>29</sup> The Management Rights provision grants the Employer a list of enumerated rights, including the right to "layoff." It also grants the Employer the right to "establish or continue policies, practices and procedures for the conduct of business and, from time to time, to change or abolish such policies, practices or procedures," and "take any other measures which are reasonable and necessary for the orderly, efficient and profitable operation of its business." However, none of these provisions clearly refer to the Employer's right to unilaterally create selection criteria. Further, the right to "establish" or "change" practices and procedures for the "conduct of business" does not clarify or expand the Employer's rights included in the right to "layoff." Therefore, the first factor, standing alone, does not clearly establish a waiver by the Union.

As to the second factor, the parties' past practice does not shed light on whether the Union waived its right to bargain about the effects of the layoff decision because

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contractual intent of the parties in regard to the change at issue. 350 NLRB at 815, n.34.

<sup>29</sup> Compare Provena, 350 NLRB at 815 (union waived its right to bargain over decision to impose attendance and tardiness policy where management rights clause explicitly permitted the employer to introduce or change reporting practices and procedures, make and enforce rules of conduct, and suspend, discipline and discharge employees.)

the Employer has apparently never laid off mailroom employees.

*[FOIA Exemptions 2 and 5*

.] While the existing bargaining history evidence does not indicate whether the parties consciously explored or discussed the Employer's right to unilaterally determine layoff selection criteria, other contract provisions suggest that such discussions occurred. Thus, as to the fourth factor, the Agreement's "Job Guarantee" article does provide evidence demonstrating that the Union waived its right to bargain over layoff selection criteria for the employees. The Job Guarantee article specifically limits the Employer's unilateral right to lay off a specific group of employees, i.e. the 29 employees listed in Appendix A.<sup>30</sup> It also contains provisions covering the effects of any layoffs that did take place on those employees, namely the manner in which layoffs and recalls would occur and the amount of severance pay employees would receive. The fact that the parties negotiated layoffs and the effects of those layoffs with respect to one particular group of employees clearly demonstrates that the matter was discussed and that the Union chose not to negotiate about, or was unable to reach agreement over, the effects of layoffs on the remaining employees.

The Union asserts that the Agreement's "Priority" article, which requires assignments to be made on the basis of seniority, prevents the Employer from unilaterally creating layoff selection criteria. However, the Priority article by its terms applies to the assignment of work schedules and not to layoffs; thus, it does not limit the Employer's right to unilaterally implement layoff selection criteria. In sum, although the wording of the Management Rights clause is ambiguous as to whether it addresses layoff selection criteria, other provisions of the collective-bargaining agreement demonstrate that the parties left to the Employer the discretion to unilaterally implement layoffs, including establishing selection criteria for the employees not covered by the "Job Guarantee" article.

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<sup>30</sup> As mentioned above, none of those employees were laid off here.

For these reasons, we conclude that the Union clearly and unmistakably waived its right to bargain over the effects of the Employer's decision to layoff, including the criteria used to select employees for layoff. Accordingly, the Region should dismiss the charge, absent withdrawal.<sup>31</sup>

/s/  
B.J.K.

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<sup>31</sup> [*FOIA Exemptions 2 and 5*