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

Advice Memorandum

DATE: September 9, 1996

TO : Richard L. Ahearn, Regional Director
Region 9

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

SUBJECT: Chillicothe Gazette
Case 9-CA-33746

This Section 8(a)(5) case was submitted for advice on whether under Colorado-Ute[1] the Employer unlawfully made changes in employee work schedules where the Employer previously had bargained to impasse and then implemented a clause providing the Employer with the right to unilaterally change work schedules.

The prior bargaining agreement covering a unit of three printing employees expired in 1991 and contained the following provision entitled Section 33:

> The foreman shall have the privilege of calling his force or any part of it to work at different hours, including the right to transfer employees from day to night work, or vice versa, subject to priority. Reasonable notice of changes in regular starting times shall be given by the foreman.

The 1991 negotiations for a successor agreement resulted in a bargaining impasse. In April 1992, the Employer implemented its impasse proposal including the above Section 33. During these negotiations, neither party proposed any changes to this provision nor was there discussion over employee work hours.

Following implementation of its impasse proposal, the Employer made several changes in unit employee work schedules. Although it gave notice to the affected employees as per Section 33, it provided no notice nor opportunity to bargain to the Union. The Union objected to

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[1] Colorado-Ute Electric Association, Inc., 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991).

a number of these changes and actually filed a grievance over a change implemented in December 1995 as well as over the changes in the instant charge. The Employer denied these grievances relying upon its implementation of Section 33. The Union asserts that all of the changes made after the April 1992 impasse implementation were minor and temporary, except the changes involved in the instant charge, which were made on March 13, 1996.

On that date, the Employer implemented without notice to the Union several permanent changes in employee work schedules. For example, one unit employee was moved from a day shift to a night shift which including working Sundays. The resulting grievance over these changes referred to above was denied; arbitration was unavailable since the contract had expired.

We conclude, in agreement with the Region, that the Employer unlawfully implemented the above work schedule changes and that further proceedings are not barred by Section 10(b).

In Colorado-Ute, the Board held that an employer can lawfully insist to impasse on a merit pay proposal giving the employer unlimited discretion to determine merit wage increases and, at impasse, consider employees for merit wage increases based upon the procedures and criteria that had been proposed to and discussed with the union.[2] However, the Board also concluded that because such a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory bargaining rights, a bargaining impasse did not privilege the employer's unilateral exercise of its discretion in granting merit increases.[3] In Colorado-Ute and McClatchy Newspapers, supra, the Board held that the employer violated Section 8(a)(5) by implementing merit wage increases without first consulting the union as to the timing and amounts of these increases. The Board reasoned that an employer cannot implement unilaterally a proposal for unlimited management discretion, because it amounts to

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[2] 295 NLRB at 608, 610.

[3] Id. at 608-610.

a waiver of the union's right to bargain, over a determination of merit wage increases.

We recognize that Section 33 had been agreed to in the prior, expired contract. However, we would not argue that under Colorado-Ute a union's prior agreement, in an expired contract, to a waiver of its bargaining rights privileges an employer to unilaterally implement that same waiver after reaching impasse. To the contrary, the underlying rationale of Colorado-Ute is fully applicable in these circumstances, viz., the Employer is purporting to act under a unilaterally implemented bargaining waiver. It is simply irrelevant that the Employer may have been able to act under the agreed to waiver before the prior contract had expired. We also note that it is well settled that a management rights clause purporting to waive the Union's bargaining rights expires with the contract absent evidence of the parties' intention to the contrary.[4] The Employer has adduced no evidence showing that the parties intended Section 33 to survive contract expiration. Since the only justification for the Employer's changes is the impasse implementation of Section 33, those changes were unlawful.

We also reject the Employer's argument that complaint against the March 1996 changes is barred by Section 10(b). We concede that the underlying implementation of Section 33 occurred outside 10(b) and may not be attacked.[5] However, the March 1996 changes implemented pursuant to that impasse

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[4] See, e.g., Ironton Publications, Inc., 321 NLRB No 148 (1996) (management rights clause waiver of union bargaining rights did not survive expired contract absent the parties' intention to the contrary).

[5] In prior Advice cases, we have made an additional alternative argument to the rationale in Colorado-Ute that the actual implementation of a waiver of union bargaining rights violates Section 8(a)(5), standing alone, in the absence of further changes purporting to be privileged under the implemented waiver. See AmeriGas, Inc., Case 1-CA-31995, Advice Memorandum dated April 19, 1995; The Detroit News, Case 7-CA-37417, Advice Memorandum dated December 5, 1995. Thus, under this additional alternative theory, the Employer's mere implementation of Section 33 violated the Act in 1992.

provision clearly occurred within the 10(b) period. Since those changes were unilateral and not privileged by any extant contractual provision or effective Union waiver of bargaining rights as discussed below, they were unlawful and subject to complaint.

Finally, we reject the Employer's argument that the Union's failure to object to the prior changes under the impasse implemented Section 33 amounted to a Union waiver of objections to all future changes under that provision. It is well settled that a union's acquiescence to previous unilateral changes does not operate as a waiver of its rights to bargain over such changes for all times.[6]

In sum, further proceedings are warranted alleging that the Employer's March 1996 unilateral work schedule changes violated Section 8(a)(5).

B.J.K.

[6] Owens-Brockway Glass, 311 NLRB 519, 526 (1993), and cases therein cited.