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

Advice Memorandum

DATE: September 28, 2001

TO : Paul Eggert, Regional Director
Catherine M. Roth, Acting Regional Director
Raymond Willms, Assistant to Regional Director
Region 19

Cathleen Shelton, Officer-In-Charge
Subregion 36

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

SUBJECT: Guard Publishing Co./The Register Guard
Cases 36-CA-9789-1; 9942-1

530-6067-2000
530-6067-2060-3300
530-6067-2070-6700

These cases were submitted for Advice regarding whether the Employer violated Section 8(a)(5) by refusing the Union's demand to remove an illegal contractual provision from contract negotiations for a successor agreement.

FACTS

On November 30, 2000, the Union[1] filed a charge alleging that the Employer[2] violated Section 8(a)(1), (3) and (5) of the Act by submitting in collective bargaining, and then refusing to withdraw, a proposal for an electronic communication system policy that was "facially discriminatory" and that sought "to interfere with the employees' Section 7 rights." On March 30, 2001,[3] the Region dismissed the charge, finding that while the Employer had refused to withdraw its negotiating proposal, the proposal was ambiguous and the Union had done nothing to clarify the proposal.[4]

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[1] Eugene Newspaper Guild/CWA Local 37194.

[2] Guard Publishing Co./The Register Guard.

[3] All dates are 2001 unless otherwise indicated.

[4] The Union appealed the Region's dismissal to the Office of Appeals.

On April 24, the Union filed another charge, alleging that the Employer violated Section 8(a)(1), (3) and (5), as follows:

> by proposing in collective bargaining, and refusing to withdraw such proposal, an electronic communication systems policy which is facially discriminatory and which - as explained by the Employer - would clearly interfere and prohibit the exercise of employee Section 7 rights.

In support of this new charge, the Union submitted clarifying correspondence and bargaining notes. These documents confirmed that the Employer did, by its proposal, intend to prohibit the use of its e-mail system for employee discussion of union-related issues, regardless of whether the communication was initiated or sponsored by the Union. The Employer's only exception to its proposed rule was that it would not prohibit employees from using those systems to promote a decertification petition.[5] On August 13, based upon this newly submitted evidence, the Region revoked its dismissal of the original charge.[6]

ACTION

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[5] On September 7, 2000, in a related case (36-CA-8743), the Union charged that the Employer violated Section 8(a)(1)and (3) by issuing a letter of discipline to the Union President for sending two e-mail messages from the Employer's premises to employee e-mail addresses at the Employer's place of business. Pursuant to a June 12 Advice memorandum, on June 29, the Region issued complaint alleging that the Employer violated Section 8()(1) by maintaining a facially overbroad rule prohibiting all non-business use of e-mail and by prohibiting, discriminatorily, the use of the e-mail system for "dissemination of union information." The trial is scheduled for November 13. The Region has also issued complaint in Case 36-CA-8743-1, alleging that the Employer violated Section 8(a)(1) by prohibiting an employee from wearing a plain green armband in support of the Union and directing that he remove a sign supporting the Union from his car.

[6] The Office of Appeals closed its file on August 14. The Region is currently investigating whether the Employer also is insisting to impasse on the proposal.

We conclude that the Employer violated Section 8(a)(5) and (1) by refusing to withdraw its illegal contractual proposal from the bargaining table.[7]

Neither party may require that the other agree to contract provisions that are unlawful under the Act.[8] As the Board stated in National Maritime Union:

> Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.[9]

At the same time, a party does not necessarily violate the Act by simply proposing or bargaining about an illegal clause.[10] That is because bargaining "might well lead" to a

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[7] The Region has concluded that the Employer's conduct did not violate Section 8(a)(3) of the Act, as alleged by the Union.

[8] Amalgamated Meat Cutters and Butcher Workmen, etc. (Great Atlantic & Pacific Tea Co.), 81 NLRB 1052, 1061 (1949); National Maritime Union (Texas Co.), 78 NLRB 971 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. den. 338 U.S. 954 (1950) (by their insistence on the continuation of a practice which the Act now forbids, as a condition precedent to entering into an agreement); Operating Engineers (York County Bridge), 216 NLRB 408 (1975), enfd. 532 F.2d 902 (3d Cir. 1976), cert. den. 429 U.S. 1072 (1977); Bricklayers Local #5 (Muskegon Contractors), 152 NLRB 360 (1965), enfd. as modified 378 F.2d 859 (6th Cir. 1967).

[9] 78 NLRB at 981-82. See also Eddy Potash, Inc., 331 NLRB No. 71 (2000)(employer violated Section 8(a)(5) and (1) by bargaining to impasse over its proposal for 12-hour shifts, because that was an unlawful subject of bargaining in the circumstances of this case); Amalgamated Meat Cutters and Butcher Workmen, etc., 81 NLRB at 1061 ("when, as here, one of the parties creates a bargaining impasse by insisting, not in good faith, that the other agree to an unlawful condition of employment, that party has violated its statutory duty to bargain"); Honolulu Star Bulletin, 123 NLRB 395 (1959), enf. den. on other grounds, 274 F.2d 567 (D.C. Cir. 1959).

[10] Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766 (1989); National Union of Marine Cooks and Stewards (Pacific American Shipowners Assn.), 90 NLRB 1099 (1950).

proposal that is not illegal and, in any event, the other party "may reject the clause outright."[11] Where, however, the other party has rejected the illegal clause outright, maintenance of the clause serves no lawful bargaining purpose because it is not leading to a legal proposal. Thus, a party's lengthy insistence on an illegal proposal has been found to violate the duty to bargain in good faith, even where the party is not insisting on the proposal to impasse.[12] Applying this reasoning, we conclude that a party violates its duty to bargain in good faith when it refuses the other party's demand to remove an illegal proposal from the bargaining table.

In the instant case, the Region has concluded that the Employer's electronic communication system proposal is unlawful. The Union has rejected the Employer's illegal proposal, but the Employer has refused to take the offending proposal off the table. As discussed above, although the Employer did not violate the Act by simply proposing the illegal clause, its insistence on maintaining the proposal once the Union "reject[ed] the clause outright"[13] serves no lawful bargaining purpose. Accordingly, we conclude that the Employer's refusal to withdrawn its illegal proposal violates Section 8(a)(5) and (1).

B.J.K.

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[11] Schebler Co., 294 NLRB at 773.

[12] California Pie Co., 329 NLRB 968, 974 (1999) (Employer's insistence for over two years on a clause that unlawfully vested control over terms and conditions of employment in a non-majority entity was unlawful. "In view of [employer's] lengthy insistence that this proposal be included in any agreement reached. . . [the employer] violated its duty to bargain in good faith under Section 8(a)(5) and Section 8(d) of the Act").

[13] Schebler Co., 294 NLRB at 773.