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

Advice Memorandum

DATE: May 5, 2008

TO : Martin M. Arlook, Regional Director
Region 10

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

SUBJECT: Baptist Hospital of East Tennessee
Case 10-CA-37200

530-8045-5000
530-8054-0100
530-8054-2050
530-8054-5000
530-8054-7000

This case was submitted to determine whether the Employer unilaterally altered certain pay practices in violation of Section 8(a)(5). We conclude that complaint should issue, absent settlement, because under the Board's "clear and unmistakable" waiver analysis, as reaffirmed in Provena St. Joseph Medical Center,[1] neither the parties' collective-bargaining agreement nor its bargaining history or past practice privileged the Employer's unilateral change.

FACTS

Charging Party Office & Professional Employees International Union Local 2001 represents a unit of licensed practical nurses and technical employees at Respondent Baptist Hospital of East Tennessee. On September 16, 2007, the Hospital, which had previously changed management companies in response to a severe financial crisis, implemented various hospital-wide pay practice changes aimed at cost savings. These changes affected 1) the manner in which compensation, such as shift differential, is calculated (e.g., second shift differential will be paid beginning at 3:00 pm, rather than noon); the amount of compensation itself (e.g., elimination of payment of minimum call-in hours); and alterations in the eligibility to receive certain compensation or benefits (e.g., no shift differential for positions other than day-shift only). In addition, the Employer implemented a perfect attendance bonus.

[1] 350 NLRB No. 64 (2007).

The parties' most recent collective bargaining agreement, set to expire by its own terms on October 31, 2008, contains a "Management Rights" clause that provides:

> Subject only to provisions expressly specified in the Agreement, the Employer will retain and have exclusive right to exercise the customary functions of management, including … to determine the pay and overtime methods … to establish, change and abolish its policies, practices, rules and regulations and to adopt new policies, practices, rules and regulation, [and] … to determine or change methods and means by which its operations are to be carried on … .

The Union avers that the parties intended the clause "to determine the pay and overtime methods" only to mean that the Employer can determine whether to pay overtime after eight hours per day or eighty hours per pay period.

The contractual "Preservation of Benefits" clause provides:

> In the event the Hospital proposes changes in personnel policies or benefits for all employees, hospital-wide, it will notify the Union in writing of the proposed changes. … In the event an agreement [to the changes] is not reached after good faith bargaining, the Hospital is free to implement such changes as proposed or that may be modified by the negotiating process.

The contractual "Zipper" clause provides:

> The parties hereto expressly agree that this document records all agreements between the parties and that there are no other agreements, written or oral, express or implied, that shall bind either party in any way or other wise control or restrict the actions of either party hereto and that all obligations of the parties are set forth herein.

The contract does not contain specific language incorporating the existing pay policies that the Employer modified in September 2007. It is undisputed that the Employer did not notify the Union of these changes at the time; the Union learned of them through a hospital employee shortly after implementation. In January 2008, the Employer gave the Union notice of its changes pursuant to the contractual Preservation of Benefits provision and the Union subsequently requested bargaining. The Employer has

recently indicated that it will close the facility later this year.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain with the Union over certain unilateral changes to pay practices, as the Union did not "clearly and unmistakably" waive its right to bargain over the matter.

In Provena St. Joseph Medical Center, the Board recently reaffirmed its long-held position that a purported contractual waiver of a union's right to bargain is effective if and only if the relinquishment was "clear and unmistakable."[2] In Metropolitan Edison Co. v. NLRB,[3] the Supreme Court held 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.'" The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in a 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 unilaterally to take the action in question.[4]

The Board's application of its standard in Provena makes it clear that it will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver when a contract does not specifically mention the action at issue.[5] Thus, in interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the

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[2] 350 NLRB No. 64, slip op. at 8 (2007). See also, e.g., Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable").

[3] 460 U.S. 693, 708 (1983).

[4] 350 NLRB No. 64, slip op. at 5, n.19, citing New York Mirror, 151 NLRB 834, 839-40 (1965).

[5] 350 NLRB No. 64, slip op. at 8-9 (Board based its waiver conclusions on such factors as express contractual language, the parties' bargaining history, and the reading of several contractual provisions "taken together").

agreement at issue; (2) the parties' past practices; (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.[6]

Applying those factors here, we conclude first that the Management Rights clause does not expressly authorize the Employer to unilaterally institute the new, non-bargained-for pay practices. The clause broadly accords the Employer the right "to establish, change and abolish its policies, practices, rules and regulations" and "to change methods and means by which its operations are to be carried on …." The Board does not recognize general language of this sort to constitute a clear and unmistakable waiver of statutory rights.[7] The clause is silent on the issues of shift differentials, on-call pay, and attendance bonuses. Nor do we find that the Employer's contractual right "to determine the pay and overtime methods" grants the Employer the right to change employee wages and create new bonuses without bargaining. Rather, by its terms it authorizes the Employer to set the "methods" for allocateing pay in general and overtime in

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[6] The first three of these factors have generally been considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson-Bateman, 295 NLRB at 184-87; American Diamond Tool, 306 NLRB 570, 570 (1992). It is also appropriate to consider any other relevant contract provisions that shed light on the contractual intent of the parties in this regard.

[7] See, e.g., The Bohemian Club, 351 NLRB No. 59, slip op. at 3 (2007)(right to modify "methods, means and procedures" constitutes "general language" insufficient to act as waiver) ; Hi-Tech Cable Corp., 309 NLRB 3, 4 (1992), enfd. mem. 25 F.3d 1044 (5th Cir. 1994) ("general" contractual right to make "reasonable rules and regulations" insufficient to constitute clear and unmistakable waiver); Johnson-Bateman, 295 NLRB at 185 (contractual right to issue, enforce and change company rules without reference to any specific subject matters is not "express, clear, unequivocal, and unmistakable" waiver). We agree with the Region that the recent Board decision involving the same parties in Baptist Hospital of East Tennessee, 351 NLRB No. 12 (2007), is inapposite insofar as the Board found waiver in reliance on specific language of the contractual Management Rights clause not at issue herein.

particular. The bargaining history confirms this reading inasmuch as evidence indicates that by this clause the parties intended to accord the Employer the right to determine when overtime begins, either after eight hours per day or eighty hours per pay period. Without evidence of a contemporaneous understanding establishing that the Union agreed to give up all control over pay issues by signing off on this clause, we reject the Employer's interpretation that the clause grants it the right to unilaterally create, change and eliminate rules relating to pay and bonuses. That the Employer's interpretation of the clause is unreasonable is highlighted by the significance of the pay issues that it implemented, which strike at the very core of any collective bargaining agreement.

Indeed, the contractual Preservation of Benefits clause contradicts the Employer's interpretation of the management rights clause. It affords the Employer the right to institute mid-term contract modifications regarding "personnel policies and benefits for all employees" only upon notice to the Union of the proposed change prior to implementation, and only upon Union abandonment, agreement or good-faith impasse. It is undisputed none of these conditions was reached here. Insofar as the Management Rights clause does not constitute a clear grant of authority to change pay and benefits, and insofar as the Employer failed to properly invoke the contractual means that would have authorized it to implement its proposals, we conclude that contract language does not establish that the Union "consciously yielded" its statutory right to rely on settled wage and pay policies and practices. Further, in the absence of agreement that the contract would "supersede" all prior agreements and practices, the contractual Zipper clause similarly does not constitute a conscious yielding of the Union's rights to be free from unilateral changes in mandatory subjects of bargaining.[8]

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[8] Compare Ohio Power, 317 NLRB 135, 136 (1995) (zipper clause providing that contract "supersedes" all prior agreements and practices does not constitute conscious yielding of union's rights in light of continuation of disputed practice after contract adoption and union's opposition to employer's unilateral conduct) and Pepsi-Cola Distributing Co., 241 NLRB 869, 870 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981) (zipper clause purporting to "supersede" prior practices not waiver absent union's conscious yielding at bargaining table), with Columbus Electric Co., 270 NLRB 686, 686-87 (1984), enfd. sub nom. Electrical Workers IBEW Local 1466 v. NLRB, 795 F.2d 150

As to the second factor, the evidence regarding past practice does not indicate waiver. There is no evidence that, since entering into the Management Rights clause in 2005, the Employer made any changes to the disputed compensation policies prior to its invocation of the contract to change them here.[9]

As to the third factor, evidence concerning bargaining history does not establish a waiver. As set forth above, there is no evidence to suggest that the parties discussed the elimination and/or modification of settled pay policies at any time prior to the Employer's 2007 unilateral changes. And, as set forth above, the evidence shows the provision in the Management Rights clause affording the Employer the right "to determine the pay and overtime methods" was intended to give the Employer the right to unilaterally determined overtime calculations, not to modify any and all existing, non-contractual pay practices.

Finally, as to the fourth factor, there are no other contractual provisions that would argue in favor of finding a clear and unmistakable waiver here.

For these reasons, we conclude that nothing in the parties' contractual language, past practice, or bargaining history establishes a clear and unmistakable waiver. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally modifying settled pay policies.

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(D.C. Cir. 1986), in which the Board dismissed an allegation that the Employer unlawfully discontinued non-contractual Christmas bonuses in reliance on a contractual zipper clause, which the parties agreed would supersede all prior agreements and understandings, i.e., would "wipe the slate clean".

[9] Evidence that the clause in the 2005-08 agreement remained unchanged from previous agreements under which the Employer consistently abided by the disputed pay practices would bolster the argument that the clause is not a waiver of the Union's right to bargain over the matter at issue here.