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

Advice Memorandum

DATE: January 31, 2007

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 524-6715-0600
530-6050-1612-5000

SUBJECT: Central Maine Power Company 530-6067-4033-2500
1-CA-43214 and 1-CA-43271 530-8054-9000

The Region submitted these cases for advice as to whether the Employer's announcement that it was suspending all future wage and pay increases under existing pay plans, made to the Union three weeks after its certification and before the parties had commenced bargaining, violated Sections 8(a)(3) and 8(a)(5).[1]

We conclude that, with the exception of the Employer's sporadic increases in its pay grade salary ranges, the enumerated wage programs constitute existing benefits/terms and conditions of employment, which the Employer could not unilaterally suspend. We also agree with the Region that the Employer's suspension of these programs was discriminatorily motivated and thus violated Section 8(a)(3) of the Act.

FACTS

Since September 1, 2001, the Employer has been owned by Energy East, a public utility holding company that owns and operates several electric and gas public utilities in the northeastern United States.

The Union has represented a unit consisting of about half of the Employer's service and maintenance employees for over 60 years. Since February 15, 2005, when it was

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[1] [*FOIA Exemptions 2 and 5*

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certified by the Board in Case 1-RC-21816, the Union has represented a second unit consisting of all System Dispatch Analysts and Area Dispatch Analysts ("Dispatchers").

The Union's campaign to organize the third unit, the one involved in these cases, began in October 2005. The Region has concluded that between November 17, 2005 and the January 13, 2006[2] election in that unit, the Employer violated Section 8(a)(1) of the Act by: telling employees that bargaining would start from scratch or a blank piece of paper, creating the impression among its employees that their union activities were under surveillance by the Employer, and telling employees the Employer intended to make an example out of the unit so that other employees would not organize.[3]

On January 13, a Sonotone[4] election was conducted in the unit, which resulted in the Union being certified in a single professional/nonprofessional unit on January 23. The Union immediately requested bargaining.

By letter dated February 10, prior to the start of any bargaining involving the newly certified Unit, the Employer notified the Union, in pertinent part, that:

> It is the Company's intention to suspend any and all future wage increases and increases in the pay grades' salary ranges under the non-union merit wage program for employees in the above-referenced bargaining unit. To the contrary, future wage increases and modifications to the pay grades' salary ranges for those employees will be collectively bargained by the Company with Local 1837 in conjunction with bargaining over benefits and terms and conditions of employment.
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> CMP is also suspending all other Company plans, programs and policies which provide for additional employee wage compensation, including but not

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[2] All dates are in 2006 unless otherwise stated.

[3] In addition, the Region concluded that, after the Union's successful election, the Employer made several 8(a)(1) statements and threats relating to the loss of benefits as a result of the unit voting for the Union.

[4] Sonotone Corporation, 90 NLRB 1236 (1950)

limited to, the STAR recognition program and future payments under the employee incentive plan.

The three pay plans discussed in the Employer's letter, i.e., the Employee Incentive Plan, the Merit Pay Program, and the STAR Recognition Program, are part of the Employer's written pay plan.[5]

The Employee Incentive Plan has been in effect for at least 30 years for both union and nonunion employees.[6] At the beginning of the calendar year, the Employer's management team sets goals for the corporation and each business area, which are approved by the Board of Directors at its February meeting. At the end of each year, the Employer "looks back" to determine if the targets were reached. The final determination as to whether incentive awards will be paid, and in what amounts, is made in February for the prior calendar year's work, and awards are paid at that time. Award amounts paid to employees are based on each employee's base compensation. An employee must receive an overall "met expectations" rating on his/her individual performance evaluation to be eligible. Over the years, payouts have averaged between 4–7% of base pay. Under Energy East, the payouts have been as follows: 4% plus an additional 1% to 2.5%, depending on the business area, for 2002; 4% for 2003; 4% for 2004; and 4% for 2005.[7]

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[5] The Employer's general salary structure consists of job grades based on job duties, with corresponding wage bands that include low points, mid points, and maximums. The Employer periodically assesses the competitiveness of its salary structure based upon geographic salary surveys and adjusts the wage bands up or down accordingly. The wage bands were updated under Energy East in 2001, and an ad hoc adjustment was made on January 1, 2004, but the wage bands are not updated routinely in any consistent pattern and are not part of the Employer's written wage package.

[6] The plan document describes eligibility as "All regular, full-time and part-time non-union and union employees of the Company shall be eligible to participate in the Plan.. .."

[7] Though requested, the Employer did not provide data for the years prior to 2002, stating that it believed this information was not relevant because the plan changed with the Energy East takeover.

The Merit Pay Program increases an employee's salary by a percentage of his base salary. Increases are premised on the employees' semi-annual evaluations, and the Employer's conclusion regarding whether market forces dictate an increase for that particular job classification. Increases of between 0 and 4% were given to individual employees under the Merit Pay Program on July 1, 2002, November 1, 2003, and June 26, 2005. No increases were given in 2004 and none are anticipated for 2006.

The STAR Recognition Program rewards significant employee contributions, beyond normal job expectations, that make the company more efficient, responsive to customers and profitable. The Employer describes this program as part of its Integrated Total Compensation Program. The awards under this program are one-time cash payments of between $100 and $5,000. There is no established schedule for the provision of these awards.[8]

ACTION

We conclude that the enumerated pay plans constitute existing benefits/terms and conditions of employment for the unit employees, and that the Employer's suspension of these benefits violated Section 8(a)(3) and (5).

The suspended pay programs were existing terms and conditions of employment for unit employees

Whether programs such as these have become established terms and condition of employment depends on whether the employees have a reasonable expectation of receiving raises or bonuses under these programs.[9] Employees' expectations may be based on an employer's past practice of giving increases on a scheduled or otherwise regular basis. In

[8] Between July 1, 2004 and July 14, 2006, approximately 37 STAR awards have been given to employees at CMP, including one award (awarded prior to January 2006 and in the amount of $1,500) to an employee now employed in the unit.

[9] United States Postal Service, 261 NLRB 505, 506 (1982). The question of whether the Employer's suspension of these programs violated Section 8(a)(3) and (5) depends on whether they were established terms and conditions of employment. See Phelps Dodge Mining Co., 308 NLRB 985, 986 (1992) enf. denied 22 F. 3d 1493 (10th Cir. 1994)(8(a)(3)); Daily News of Los Angeles, 315 NLRB 1236, 1240-1241 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997)(8(a)(5)).

this regard, where the timing of merit pay increases is predictable or regular, indefiniteness as to the amount of an increase does not preclude employees from having a reasonable expectation of receiving an increase.[10] Moreover, even where the amount and timing of any increases are "irregular," a merit pay program will still be considered a term and condition of employment where increases have been calculated as a percentage of wages and regularly have been described as part of the economic package provided to employees.[11]

On the other hand, where an employer has exercised complete discretion over merit pay increases, i.e., the increases were not based on employee evaluations or other fixed criteria and were not codified in any written company policy, there may be no reasonable expectation of receiving an increase and no established term or condition of employment. Thus, in American Mirror,[12] the Board determined that an employer did not violate the Act when it gave wage increases to unrepresented employees but decided to withhold those increases from a unit of employees during an organizational campaign, since the employer had in the past exercised full discretion over both the timing and the method of calculating any increases.

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[10] Eastern Maine Medical Center v. NLRB, 658 F.2d 1, 108 LRRM 2234 (1st Cir. 1981); Gary Gannett Publishing Co., 295 NLRB 379 (1989) (some discretion regarding the amounts of set annual increase is not fatal to the increase being a condition of employment); Daily News of Los Angeles, 315 NLRB 1236 (1994) (merit increases were a condition of employment where employer's discretion extended to the amounts of the increases but the increases were tied to the employees' anniversary dates). See also Onieta Knitting Miles, supra at 500 fn. 1.

[11] See Phelps Dodge Mining Company, 308 NLRB at 985 n. 3 and 1000, enf. denied, 22 F.3d at 1493, cited with approval in North American Pipe Corp., 347 NLRB No. 78, slip op. at p. 3 (2006) (one time grant of 100 shares of stock to all employees found to be gift rather than term and condition of employment because it was not tied to work performance, wages, hours worked, or other "employment-related" factors, as was the case in Phelps Dodge).

[12] 269 NLRB 1091 (1984).

Examining the Employer's Employee Incentive Plan, the Merit Pay Plan, and the STAR Recognition Program, under the principles noted above, we conclude as follows:

1. Employee Incentive Plan

Under this plan, relatively uniform bonuses, ranging from 4-7% of an eligible employee's base salary, have been given in February for over 30 years. Employees thus have a reasonable expectation that these bonuses will be given to eligible employees. We conclude, therefore, that the Employee Incentive Plan is an existing term and condition of employment.

2. Merit Pay

Pay increases under the Employer's merit pay program, which have varied between 0 and 4% of an employee's base salary for any given individual employee, have been provided at irregular intervals over the past four years. However, the program is part of the Employer's written wage structure, increases are premised on a twice yearly employee evaluation under fixed criteria and a review of market wages for similar jobs, and are given as a percentage of the employee's base salary. In these circumstances, we conclude that employees have a reasonable expectation of being considered for a merit increase, and thus that the Employer's merit pay program should be considered an existing term and condition of employment in this unit.[13]

3. STAR Recognition Program

The amounts awarded under this program are lump sum payments which vary between $100 and $5,000, and vary as to the time they are awarded. The program is not specifically tied to employee evaluations, and the payments do not reflect a percentage of base salary. Nonetheless, the Employer describes this program as part of its Integrated Total Compensation Program and eligibility for payments is based on employee performance beyond normal job expectations. We conclude that the Employer's inclusion of this program in its written wage package, and its payment of numerous awards under the program in recent years (including a recent payment of $1,500 to a unit employee), have created a reasonable expectation that employees will be considered for payments under this program as part of their compensation. We conclude, therefore, that the STAR

[13] See Phelps Dodge Mining Company 308 NLRB at 986 n.3 and 1000.

program is an existing term and condition of employment for unit employees.[14]

The suspension of all future wage and pay increases under the enumerated plans violated Section 8(a)(3) of the Act

The Employer's Employee Incentive Plan, the Merit Pay Program and the STAR Recognition Program are all existing terms and conditions of employment and the Employer has not provided any business justification for suspending these programs as to represented employees. The failure to do so supports the inference that the Employer's motive for the suspension of these programs vis-à-vis only represented employees was to retaliate against their selection of union representation.[15] Further, the timing and breadth of the suspension contributes to an inference of discriminatory motive. In this regard, the letter unnecessarily suspends "any and all future" wage increases at a time when there was no expectation of an imminent increase under any of the enumerated programs and before the parties had even commenced bargaining for a first contract. Moreover, the Employer's direct threat to "bargain from scratch" and "make and example out of the unit" is strong evidence of a

[14] As was noted above, the Employer's base salary for employees in enumerated wage bands has been adjusted by the Employer on an ad hoc basis based on geographic salary surveys. As the Region notes, these bands are not updated routinely in any consistent pattern. This procedure appears to be an entirely internal matter, and is not part of the Employer's written wage plan for its employees. In these circumstances, we conclude that this practice is not part of the employees existing terms and conditions of employment and to the extent the February 10th letter can be read to suspend this practice, we do not find it unlawful under either Section 8(a)(3) or Section 8(a)(5) of the Act.

[15] See Phelps Dodge Mining Co., 308 NLRB at 996-998. This is not a case where the employer is simply refusing to provide "new benefits," that it has provided to its non-union employees, to Union employees. Cf. The B.F. Goodrich Co., 195 NLRB 914, 915 (1972) (withholding of "new benefits," that were provided to non-union employees, from union employees not necessarily violative without showing of animus.)

discriminatory motive for conduct that constituted an apparent fulfillment of that threat.[16]

Accordingly, complaint should issue, absent settlement alleging that the Employer's suspension of any and all future wage increases under these programs violated Section 8(a)(3) of the Act.

The suspension of all future pay increases under the enumerated plans violated Section 8(a)(5) of the Act

It is well established that an employer may not unilaterally change the existing terms and conditions of employment for its union-represented employees, but must maintain those conditions pending notification to the union, and upon the union's request, bargain with the union over those proposed changes until either an agreement or an impasse is reached.[17] Therefore, an employer may not discontinue the practice of giving pay increases under established programs without giving the Union an opportunity to bargain and bargaining to impasse.[18]

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[16] See, e.g., Willamette Industries, 341 NLRB 560, 563 (2004). It is unnecessary to decide whether the Employer's conduct was also "inherently destructive" of employee Section 7 rights, where, as here, there is ample evidence of a discriminatory motive.

[17] NLRB v. Katz, 369 U.S. 736 (1961).

[18] See Carolina Steel Corp., 296 NLRB 1279, 1284-85 (1989); Daily News of Los Angeles, 315 NLRB 1236 (1994) affd. 73 F.3d 406 (D.C. Cir. 1996) cert. denied 519 U.S. 1090 (1997)(employer violated the Act when it unilaterally discontinued merit increases during contract negotiations with the union, but prior to any meaningful bargaining over economic issues.) See also Oneita Knitting Mills, 205 NLRB 500 n.1 (1973)("An employer with a past history of a merit increase program neither may discontinue that program…nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once the exclusive bargaining agent is selected…. What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.")

The Employee Incentive Plan, the Merit Pay Program, and the STAR Recognition Program are existing terms and condition of employment in this unit, and thus the Employer could not act unilaterally with regard to them. Although no wage increases were due under any of the programs, and thus no wage increase was actually denied, nonetheless, the Employer's suspension of any and all future wage increases under all of the programs as well as its suspension of those programs themselves all constituted a unilateral change in the employees' terms and condition of employment.

The Employer asserts that it was privileged to implement these changes pursuant to the "discrete recurring event" exception to the general rule prohibiting unilateral changes during contract negotiations. Under this exception, if a term or condition of employment concerns a discrete recurring event, and that event is scheduled to occur during negotiations for a contract, the employer may lawfully implement a change in that term or condition prior to an overall bargaining impasse if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice.[19] The Employer argues that its wage programs qualify under the "discrete recurring event" exception, that its February 10 letter was sufficient to put the Union on notice of this change, and that the Union, despite its general request to bargain, failed to specifically request bargaining about these wage suspensions thereby waiving its right to bargain over these matters. We reject that contention.

First, the Employer's suspension of "any and all future wage increases" clearly went beyond what is permitted by the narrow "discrete recurring events" exception, which is limited to permitting changes to benefits scheduled to be paid while contract negotiations are underway. See TXU Electric, supra at 1407. Second, as we show below, there was no discrete recurring event under any of the Employer's wage programs scheduled to occur during bargaining so as to exempt it from the normal impasse rule.

While payments under the Employee Incentive Plan are predictable, i.e., they are paid in February of every year, there is no evidence that this payment was likely to have come due during bargaining for this contract. Thus, at the time the Employer sent its February 10, 2006 letter, the next increase due under that plan would have been in

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[19] Neighborhood House Assn., 347 NLRB No. 52, slip op. at 2, citing TXU Electric Co., 343 NLRB 1404(2004), and Stone Container Corp., 313 NLRB 336 (1993).

February 2007, more than 12 months after the Union's request for bargaining. Given the parties' bargaining history in the most recently certified dispatchers unit, where the parties reached an agreement in 7 months, we agree with the Region that payment under this plan would not likely have occurred during contract bargaining at all, and certainly would not have occurred until long after the notice of suspension. With regard to the Merit Pay Program, the Employer asserted that no increase was likely to occur for 2006. Similarly, there was no evidence that any employee performed commensurate with the criteria enumerated in the STAR Recognition Program which would have qualified them under that program for an award scheduled to occur during bargaining. Therefore, no "discrete recurring event" was scheduled to occur under the enumerated programs exempting the Employer from normal impasse rules.

Accordingly, complaint should issue, absent settlement alleging that the Employer's suspension of the Employee Incentive Plan, its Merit Pay Program, and the STAR Recognition Program violated Section 8(a)(3) and (5) of the Act.

B.J.K.