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

Advice Memorandum

DATE: February 15, 2000

TO: Dorothy L. Moore-Duncan, Regional Director
Region 4

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

SUBJECT: Adelphia Cable Communications Corp.
Case 4-CA-28481, 4-CA-28547

512-5006-5046
512-5036-6713
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This Section 8(a)(1) and (5) case was submitted for advice as to whether an employer violated the Act when it refused to implement wage and benefit increases while the Board resolved a question concerning representation, raised after the relocation of one represented bargaining unit and its consolidation with a second unit represented by a different union.

FACTS

Adelphia Cable (the Employer) operated a cable facility in Dunmore, Pennsylvania where Communications Workers of America (CWA) represented 22 technicians. The most recent collective-bargaining agreement between CWA and the Employer ran from March 1997 to March 2000. In February 1999,[1] Adelphia acquired another cable operator, Verto Corporation, with a facility in Duryea, Pennsylvania. At the time of acquisition, Adelphia agreed to recognize the incumbent union at Duryea, International Brotherhood of Electrical Workers Local 1319 (IBEW), as the representative of the 13 Duryea technicians, and adopted the existing collective-bargaining agreement, with a term from April 1998 to April 2003.

On June 4, Adelphia moved the 22 CWA-represented Dunmore employees to Duryea and consolidated that unit with the IBEW-represented unit. Thereafter, also in June, IBEW filed a petition seeking to represent the merged unit, and CWA

[1] All dates hereafter are in 1999.

intervened. The Regional Director scheduled a September 22 election in which the employees in the merged unit were to determine whether they wished representation by IBEW, CWA or no union.

Under the terms of the IBEW collective-bargaining agreement, the Employer was obligated to increase wages, standby pay, and health care copayments for the IBEW-represented employees on August 5. The Employer did not implement the increases. On August 12, in a memo to all technicians working at Duryea, the Employer stated that its consolidation of the two units and the filing of an election petition by IBEW raised a question concerning representation and that, consequently, it would remain neutral and would not recognize either union until the Board resolved the question. It further declared that upon advice of counsel it had decided that both collective-bargaining agreements were no longer in effect and that it would neither implement the August 5 IBEW contractual increases nor withhold IBEW or CWA dues. It further stated that although it would not observe the contracts in the future, current wages and benefits would remain unchanged pending the Board's proceedings.

On September 24, the Region conducted an election in which CWA won, with a vote of 22 to 13. On October 5, the Region certified CWA.

ACTION

We conclude that the Employer's failure in August to provide the increases to the formerly IBEW-represented Duryea technicians that it agreed to pay in February, when it assumed the IBEW collective-bargaining agreement, violated Section 8(a)(1) of the Act. We further conclude that because the Employer had no collective-bargaining obligation to either union for any employees in the merged unit while the election petition was pending, its failure to implement the August changes did not violate Section 8(a)(5).[2]

[2] The Region dismissed a CWA Section 8(a)(5) charge alleging an unlawful failure to recognize CWA as representative for the entire merged unit, and also determined that the Employer did not violate Section 8(a)(3) when it did not implement the August 5 wage increases, as IBEW alleged.

First, as to the alleged Section 8(a)(5) violation, an employer's merger of two units represented by two different unions into one consolidated unit will lead to a question concerning representation where neither represented unit predominates. Thus, an employer cannot recognize and bargain with either union for the entire unit pending an election.[3] The Board has found that there is not sufficient predominance to erase that question where one group constitutes approximately 63 percent of the merged unit.[4] In such circumstances, an employer violates Section 8(a)(2) of the Act if it recognizes one of the two unions rather than remain neutral before the Board resolves the question concerning representation, and conversely, there could be no unlawful failure to bargain if the employer did not recognize one of the unions.[5] Here, as the Region found, where the larger CWA group constituted less than 63 percent of the merged unit, neither group predominated and an election was required to resolve the question of who, if anyone, represented any employees in the new unit. Therefore, the Employer could not recognize and bargain lawfully with either union while the Board's representation proceedings were pending.

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[3] See Martin Marietta Chemical, 270 NLRB 821, 822 (1984) (where neither union-represented group predominates in a merged unit, a question concerning representation arises, and the Board conducts a new election to resolve the question). Here, the Regional Director concluded that there was such a new merged unit, with neither represented unit predominating, in directing the election.

[4] Martin Marietta Chemical, 270 NLRB at 821. Cf. Boston Gas II, 235 NLRB 1354, 1355-1356 (1978) (no question concerning representation raised, but instead smaller, union-represented group accreted to larger, union-represented group where one union represented about 69.6 percent of merged unit).

[5] Hudson Berlind Corp., 203 NLRB 421, 423 (1973)(employer violated Section 8(a)(2) when it did not remain neutral when faced with conflicting union claims for recognition as representative of newly merged unit and before employees were working in new unit), enf'd. 494 F.2d 1200 (2d Cir. 1974), cert. denied 419 U.S. 897 (1974).

The Board will find a Section 8(a)(5) violation, however, where a previously unrepresented fringe group of an employer's employees votes to be included in an established unit, and the employer, without bargaining, applies the terms and conditions of the established unit to the fringe group. The employer in that setting may not simply apply the larger group's collective-bargaining agreement to the fringe group, but may bargain with the union over new terms for the fringe group until the larger group's collective-bargaining agreement expires, using the fringe group's existing working conditions as the status quo from which to bargain.[6] Once the larger group's collective-bargaining agreement expires, the employer must bargain with the union over terms for the entire unit.[7] The Board used similar reasoning in holding that when an employer merges two units, each previously represented by the same union, into one new unit, the employer will also violate Section 8(a)(5) if it does not maintain the terms and conditions contained in each group's collective-bargaining agreement pending negotiation of a new contract to cover the employees in the consolidated unit.[8] Further, where an employer has an existing collective-bargaining relationship with one union, it is required to continue to bargain with that incumbent union even if an outside union files a representation petition for the existing unit. The mere timely filing of a valid petition by another union does not negate that bargaining obligation.[9]

Here the Employer was faced with competing claims for recognition after it created a new, consolidated unit with neither group predominant and was required to remain neutral while the Board resolved the question concerning representation. Unlike the employers who are faced with the addition of a fringe group to an existing appropriate unit with an incumbent union, or the merger of two units both represented by the same union, or simply a petition

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[6] Federal Mogul, 209 NLRB 343, 344-345 (1974).

[7] Id. at 344.

[8] See Borden, Inc., 308 NLRB 113, 115 (1992), enf'd. 19 F.3d 502 (10th Cir. 1994), cert. denied 513 U.S. 927 (1994).

[9] See RCA del Caribe, Inc., 262 NLRB 963, 965-966 (1982).

for representation in an existing appropriate unit by an outside union, the Employer in the instant matter had no existing bargaining obligation with either CWA or IBEW after the consolidation during the pendency of the question concerning representation. With no existing bargaining obligation, it did not violate Section 8(a)(5) when it did not consult either union before it made unilateral changes in the IBEW-represented employees' working conditions by refusing to implement the scheduled August changes.

We conclude, however, that the Employer's conduct did violate Section 8(a)(1). An employer's obligation, regarding wage or benefit increases while election proceedings are pending, is to proceed as if the union were not on the scene so as not to interfere with the employees' representation decision.[10] Thus, an employer may not, after promising to provide a benefit or wage increase in the future, cancel that promised benefit or increase after an election petition is filed.[11] When an employer promises to increase compensation, that increase vests and "effect[s] a change in existing conditions of employment," and becomes a term of employment that cannot be altered.[12] Similarly, although an employer may violate the Act if it grants a benefit after an organizing campaign has begun, such a grant is not unlawful if it is not related to the organizing effort, but instead was scheduled before the campaign.[13]

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[10] See, e.g., H.S.M. Machine Works, 284 NLRB 1482, 1484 (1987)(8(a)(1) violation to suspend wage increases after decertification petition filed); Borman's, Inc., 296 NLRB 245 (1989)(Section 8(a)(3) violation).

[11] See Liberty Telephone, 204 NLRB 317, 317, 321-322 (1973) (employer cannot withhold promised wage increase after petition filed).

[12] Liberty Telephone, 204 NLRB at 318.

[13] House of Raeford Farms, 308 NLRB 568, 569 (1992)(employer may grant new wage benefits during organizing drive when its decision to do so occurred before union activities began), enf'd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030; Charles Mfg. Co., 245 NLRB 39, 39 n.1 (1979)(because promise given about one year before election to increase wages became an established condition of

Just as an employer may not cancel a previously promised benefit while an election petition is pending, so too an employer may not alter existing terms and conditions of employment.[14] Existing terms and conditions include prospective wage increases and benefits increases specifically provided for in a collective-bargaining agreement. Thus, contractual provisions for increases to be implemented after the term of a contract are vested terms and conditions of employment where the increases were determined and accrued during the term of the contract.[15]

Applying the above settled principles by analogy here, the Employer violated Section 8(a)(1) of the Act when it chose to cancel the increases. The terms and conditions contained in the collective-bargaining agreements that covered the formerly CWA and IBEW-represented employees, including the prospective IBEW wage increase provisions, constituted the existing working conditions after the merger. Even though the Employer no longer had a contractual or bargaining relationship with either union, the Employer could not alter lawfully those terms while the representation petition was pending without coercing employees.

Although, as the Employer asserts, it could not lawfully recognize and bargain with either CWA or IBEW

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employment, not unlawful to implement increase following union certification). Cf. Acme Bus Corp., 320 NLRB 458, 458, 476-477 (1995)(although employer's grant of increase followed past practice, in context, it was unlawful because employer made clear its intent was to undermine union), enf'd. mem. 198 F.3d 233 (2d Cir. 1999).

[14] Liberty Telephone, 204 NLRB at 318.

[15] See Mohawk Liqueur Co., 300 NLRB 1075, 1083 (1990) (cost of living adjustment to be effective after contract expired accrued during term of contract; failure to grant violated Section 8(a)(5)), enf'd. 951 F.2d 1308 (D.C. Cir. 1991); Struthers Wells Corp., 262 NLRB 1080 (1982), enf. denied in relevant part 721 F.2d 465, 472 (3d Cir. 1983); Meilman Food Industries, 234 NLRB 698 (1978) enf'd. mem. 593 F.2d 1370 (D. C. Cir. 1979).

while the question concerning representation was pending, and therefore did not violate Section 8(a)(5) when it did not, it was not privileged to withhold the previously promised specific increases. Once the Employer agreed to assume the IBEW collective-bargaining agreement at the acquisition from Verto, the terms embodied in that contract, including prospective wage and benefit increases, became vested conditions of employment, just as an employer's promise to pay an increase in the future becomes an established condition at the time the promise is made. The Employer promised to provide those terms by assuming the contract and could not alter those established working conditions while the representation petition was pending.[16]

The Employer might argue that it was attempting to avoid unlawful conduct by not implementing the increases. In those cases where an employer previously provided benefits in a haphazard or indefinite manner, and fears violating the Act by granting those benefits after an election petition is filed, an employer may avoid committing an unfair labor practice by informing employees that it suspended the benefits only to avoid the appearance of interference with the election and by reinstating those benefits following the election proceeding.[17] The Employer

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[16] McDonnell Douglas Aerospace Services Co., 326 NLRB No. 151, JD at 5-6 (Sept. 30, 1998)(employer promised new benefits before the employees were represented, but following certification, it withheld the promised benefits, asserting they were subject to negotiation, thus violating Section 8(a)(5) and (1) by unilaterally changing a benefit that vested at the time the promise was made); United Aircraft, 199 NLRB 658, 662 (1972), enf'd. in relevant part 490 F.2d 1105 (2d Cir. 1973).

[17] See Borman's Inc., 296 NLRB at 247-248 (violation where employer suspended indefinitely practice of regular annual wage increases after union filed petition, "put the onus for that action on the Union," and did not inform employees acted to avoid improper appearance); Times Wire & Cable Co., 280 NLRB 19, 29 (1986)(violation to suspend annual review of wages during election proceedings while placing onus on Union for loss of increase). Compare Village Thrift Store, 272 NLRB 572 (1983)(no violation where, with history of irregular benefits, employer deferred future

here, however, did not satisfy this test for it did not notify the employees that it was suspending the promised benefits to avoid the appearance of interference with the election. Rather, the Employer stated that it was remaining neutral while the Board representation proceeding was pending and that it simply would not implement the contractual increases. The Employer did not reinstate the benefits after the election. In such circumstances, the cancellation of the increases was unlawful under Section 8(a)(1).

Although the Employer argues that it would be disruptive to provide different compensation to the two groups of employees, the Board has rejected such arguments in other contexts, finding instead that such differences motivate the parties to reach a new agreement.[18] Thus, following certification, the Employer may bargain with the CWA over new working conditions for the consolidated unit. The status quo for that bargaining, however, must include the previously promised increases for the formerly IBEW-represented employees, and the Employer must bargain before implementing any alterations.[19] If, following

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payments after informing employees that it did so to avoid appearance of unlawful interference).

[18] See Borden, Inc., 308 NLRB at 115 ("bifurcated status quo" likely will "prompt both parties to negotiate an agreement expeditiously"). See generally Four Winds Services, Inc, 325 NLRB 632 (1998)(differences in compensation rates dictated by two statutes, Davis Bacon and Service Contract Act, do not undermine unit appropriateness).

[19] See McDonnell Douglas Aerospace Services Co., 326 NLRB No. 151, JD at 5 (bargaining after certification required before an employer could change promised, but unpaid, benefits, which had vested before the election; union did not waive bargaining over the withholding of the benefit). See also Liberty Telephone, 204 NLRB at 317-318 (following certification, employer violates Section 8(a)(5) if it unilaterally alters working conditions by canceling scheduled wage increase).

certification, the Employer does not bargain from that status quo, it will violate Section 8(a)(5).[20]

CONCLUSION

We conclude that the Employer violated Section 8(a)(1) of the Act when it canceled the promised increases. The Region should dismiss the Section 8(a)(5) allegation regarding the August failure to implement the scheduled increases, absent withdrawal, on the basis that the Employer had no bargaining obligation at the relevant time.

B.J.K.

[20] See United Aircraft Corp., 199 NLRB at 658 n.2, 662 (unlawful after a union is certified to withhold promised wage increases and to assert that those increases previously promised are subject to negotiation).