

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

Advice Memorandum

DATE: August 1, 2007

TO : Frederick Calatrello, Regional Director
Region 8

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

SUBJECT: Daido Metal Bellefontaine, LLC	530-6050-0140
Case 8-CA-37205 and	530-6067-2070-6780
United Autoworker of America,	530-6067-2070-6785
Local 1224	554-1450-0140
Case 8-CB-10785	554-1467-3600

These cases were submitted for advice as to whether (1) the Employer violated Section 8(a)(5) by insisting, over the Union's objection, on the presence during bargaining of a paralegal for the sole purpose of using a laptop computer to record the parties' bargaining sessions; and (2) if not, whether the Union violated Section 8(b)(3) when it refused to return to the bargaining table until the Employer ceased insisting upon the presence of the paralegal with the laptop computer.

We conclude, in agreement with the Region, that the Employer violated Section 8(a)(5) when it insisted on the presence of the paralegal using the laptop computer because, like a court reporter or stenographer, the paralegal intended to use and substantially succeeded in using the laptop computer to record a verbatim transcript. Therefore, the Employer insistence upon her presence for this sole purpose amounted to an insistence upon a permissive subject of bargaining.¹ Accordingly, we conclude that the Union did not violate Section 8(b)(3) when it refused to return to the bargaining table until the Employer ceased insisting upon the presence of the paralegal using the laptop computer for this purpose.

¹ See Bartlett-Collins Co., 237 NLRB 770, 772-773 (1978), *enfd.* 639 F.2d 652 (10th Cir. 1981), *cert. denied*, 452 U.S. 961 ("whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to [subjects] encompassed within the phrase 'wages, hours, and other terms and conditions of employment;' the Board would be avoiding its statutory responsibility to promote meaningful collective bargaining if it were to allow "a party to stifle negotiations in their inception over such a threshold issue").

FACTS

Since 1995, the Union has represented production and maintenance employees at the Employer's manufacturing plant. The Union and the Employer have been parties to successive collective-bargaining agreements, the most recent of which was effective from November 5, 2005 through June 29, 2007. The parties have attempted to negotiate a successor agreement since about April 2, 2007.² This dispute involves three bargaining sessions held on May 2, May 14, and May 23. At each of these sessions, the Employer's attorney negotiator, Ron Mason, brought with him paralegal Deborah Scott to take negotiation notes using a laptop computer.

During the first session on May 2, Mason told the Union's Chief Negotiator Young that Scott would be taking notes for him on her laptop. When Young objected, Mason responded that Scott was taking notes, not making a verbatim transcript, and was not a court reporter. Young told Mason that he would proceed with bargaining under protest.

At the May 14 session, Scott again was present using the laptop. Young again objected by reading a letter in which he complained that Scott was creating a "transcript." The letter further stated that if Mason continued to make a stenographic record, the Union would file an unfair labor practice charge and may also suspend bargaining. Mason reiterated his position that Scott was taking notes, not creating a verbatim transcript, and was not a court reporter. Following Young's reading of the letter and Mason's comment, the parties continued to bargain.

During the May 23 session, Young stated that he would like to communicate more during the sessions, but Scott's recording every word he said limited his freedom to speak. Young then made a final demand that Mason stop bringing his "stenographer" to sessions. Mason responded that he would not change his position, and if the Union suspended negotiations over the issue, he would file a charge against the Union.

By letter dated May 24, Young stated that he was filing a charge against Mason's conditioning bargaining on the presence of a "stenographer", and that he was canceling the parties' May 29 bargaining session. By letter dated May 25, Mason reiterated his position that Scott was not a stenographer and the notes were not a verbatim transcript.

² Hereafter all dates 2007 unless otherwise noted.

Mason included in that letter a short sample of some notes taken by Scott.

Upon receiving the May 25 letter, the Union cancelled bargaining sessions scheduled for June 11 and June 12. The parties finally resumed bargaining on June 20 and June 21, after the Employer agreed not to have Scott present with the laptop.

Mason provided the Region with copies of the notes Scott recorded on the laptop.³ The notes are in script format in order to document what appears to be a complete transcript of the sessions. For example, Scott recorded when someone made a cell phone call, when the parties moved a table, and when someone handed out copies of a document.

Mason acknowledged to the Region that Scott's recording captured between 80 and 90 percent of the discussions at each session. Scott stated to the Region that Mason asked her to attend the sessions solely for the purpose of taking notes. Finally, Young asserted, without contradiction, that at each session, Scott began typing when anyone started speaking, ceased typing when the person finished speaking, and did not participate in any discussions.

ACTION

We conclude that paralegal Scott here, like a court reporter or stenographer, intended to use and substantially succeeded in using the laptop computer to create a verbatim transcript. The Employer's insistence on her presence for this sole purpose violated Section 8(a)(5) because the Employer thereby insisted upon a permissive subject of bargaining.

It is well settled that a party's insistence on the presence of a court reporter, stenographer, or the use of a recording device to make a verbatim record of collective-bargaining negotiations or grievance meetings constitutes unlawful insistence on a permissive subject of bargaining, because the presence of such a third party or inanimate device making a verbatim transcription tends to inhibit the free and open discussion necessary for conducting

³ Mason provided edited versions of the notes from the May 2 and 14 sessions; these edited versions contain complete words and correct spelling in an attempt to replicate the sessions. Mason provided both the unedited and edited versions of the May 23 session notes.

successful collective bargaining.⁴ The Board in Bartlett-Collins noted that "experts in the field of labor relations have expressed their opinion that the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining"; the presence of a stenographer or recording device hampers easy expression, stultifies discussion, tends to formalize proceedings, and reduces the spontaneity and flexibility necessary for successful bargaining.⁵ However, since merely taking notes, which are not verbatim transcripts, does not tend to inhibit discussion, insistence on note taking does not constitute unlawful insistence upon a permissive subject of bargaining.⁶

The instant case involves substantially the same circumstances as those in Bartlett-Collins. Mason insisted upon Scott's presence for the sole purpose of using the

⁴ Bartlett-Collins Co., supra. See also Pennsylvania Telephone Guild (Bell Telephone), 277 NLRB 501, 501-502 (1985) (extending Bartlett-Collins to use of tape recorder in grievance meetings); Hutchinson Fruit Co., 277 NLRB 497, 498 (1985) (same).

⁵ 237 NLRB at 773, n. 9. See also Pennsylvania Telephone Guild, 277 NLRB at 501 (if a verbatim recording is being made, parties involved in grievance meetings will not manifest the requisite "spontaneity and flexibility" and "the important element of open and honest dialog may be replaced by a formalistic monologue of posturing and speechmaking").

⁶ See NLRB v. Bartlett-Collins Co., 639 F.2d 652, 656 n.3 (10th Cir. 1981), enfg. 237 NLRB 770 (rejecting as "exaggerated" and "frivolous" employer's claim that the Board's order meant that "no record of bargaining can be made, not even notes, memoranda, or minutes;" the court emphasized that "the Board limited its ruling to situations in which a party insists to impasse on the presence of a court reporter during negotiations or the use of a device to record those negotiations"); Sport Air Traffic Controllers Organization and Air Force Flight Test Center, Edwards Air Force Base, California, 52 FLRA 339, 350 (1996) (in applying Bartlett-Collins principles to hold that federal employee union violated Federal Service Labor-Management Relations Statute by insisting on tape recording contract negotiations, administrative law judge observed that "[n]one of this is to deny the value to the parties of making adequate bargaining notes" and that "[n]ote-taking is not objectionable").

laptop to record the bargaining sessions. Like the court reporter in Bartlett-Collins, Scott was a non-participant in the actual bargaining and her sole purpose was to use the laptop to record the sessions. Scott's behavior at the bargaining sessions, typing any time a bargaining participant spoke, was stenographic behavior which had the same effect of inhibiting free and open discussion. Scott also intended to record and substantially succeeded in recording a verbatim transcript.

A review of Scott's laptop recordings reveals that Scott attempted to capture everything said or done at the bargaining session, clearly indicating that her intent was to create a verbatim, stenographic type transcript. Scott recorded in a script format which included such detailed information as a cell phone call, the parties moving furniture, and when a bargaining session participant distributed copies of a document. Scott also substantially succeeded in her effort to record a verbatim transcript. Although Scott may not have been able to capture 100% of the sessions, she accurately captured between 80 to 90 percent.

In sum, Scott possessed the same exclusive recorder status as a court reporter, and intended to record and substantially succeeded in recording a verbatim transcript, all of which had the same inhibitory effect on bargaining as did the court reporter in Bartlett-Collins. We therefore conclude that the Employer unlawfully insisted upon a permissive subject of bargaining when it insisted upon Scott's presence for this sole purpose.⁷

This case is distinguishable from Entergy Nuclear Operations,⁸ where a full participant in grievance discussions used a laptop computer to take notes that were not a verbatim transcript. In that case, we concluded that the employer's insistence on its participant's using the laptop for note taking, which did not inhibit the grievance discussion, did not constitute an unlawful insistence of a permissive subject of bargaining. In contrast, paralegal Scott here was not a full participant in the bargaining sessions; she was present solely to record those sessions.

⁷ Thus, we do not address the separate question of whether a party may insist upon the presence of a person who is not actively engaged in substantive bargaining discussion but is present solely to take "detailed notes" during that bargaining.

⁸ Entergy Nuclear Operations, Inc., Case 1-CA-43228, Advice Memorandum dated November 28, 2006.

Moreover, it is evident from Scott's actual notes that she intended to record, and substantially succeeded in recording, a verbatim transcript.

In sum, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by insisting on the presence of paralegal Scott for the sole purpose of recording a verbatim transcript of bargaining sessions, because that is a permissive subject of bargaining. Additionally, the Region should dismiss, absent withdrawal, the charge against the Union.

B.J.K