

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

Advice Memorandum

DATE: February 17, 2006

TO : Richard L. Ahearn, Regional Director
Region 19

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

SUBJECT: First Transit
Case 19-CA-30032

530-6050-0120
530-6050-0140
530-6050-0800
530-6050-0875
530-6050-0900
530-6067-0100
530-6067-2060-3343
625-8883-2831

This case was submitted for advice as to whether the Employer engaged in bad-faith bargaining in violation of Section 8(a)(5) and in breach of a Settlement Agreement by continuing to assert that the unit employees are statutory supervisors.

We conclude that the Region should set aside the Settlement Agreement and, absent settlement, issue a consolidated complaint alleging that: (1) in late February or early March 2005, the Employer violated Section 8(a)(3) by decimating the bargaining unit of field supervisors and dispatchers in order to thwart the employees' right to unionization and to avoid a bargaining obligation with the Union; and violated Section 8(a)(5) by altering the scope of the unit without the Union's consent, dealing directly with the employees during their "rehire" as transit supervisors, and unilaterally changing the employees' terms and conditions of employment; and (2) beginning in July 2005, the Employer continued to engage in bad-faith bargaining in violation of Section 8(a)(5) by insisting on a change in the scope of the unit.¹

BACKGROUND AND FACTS

I. Pre-Settlement Facts

First Transit (the Employer) operates a commuter bus service in Snohomish County, Washington. In early 2004, Machinists District Lodge 160 (the Union) began organizing

¹ The appropriateness of Section 10(j) injunctive relief will be addressed in a separate memorandum.

a unit of approximately 10 field supervisors and four dispatchers at the Employer's Everett, Washington facility.²

In June 2004, a pre-election hearing was held, in which the Employer argued (unsuccessfully) that the employees in the petitioned for unit were Section 2(11) supervisors. In July 2004, a Decision and Direction of Election issued finding that the employees in the requested unit were not 2(11) supervisors. The Employer's request for review of that decision was denied. In August 2004, the Union was certified (Case 19-RC-14530) as the representative of a unit of approximately 14 "field supervisors and dispatchers."

The parties began bargaining on February 1, 2005.³ During that first bargaining session, the Employer reviewed the representation case transcript, quoted some passages in which employees described their non-supervisory job duties, and announced that, based on its review of the pre-election transcript, it had decided to eliminate the unit field supervisor and dispatcher positions and to create a new "transit supervisor" position.⁴ The Employer stated that the employees in this new position would perform the work previously performed by field supervisors and dispatchers, but that they would also have supervisory responsibilities. The Employer expressed a willingness to engage in effects bargaining but refused to bargain over the decision, stating that it was already made. The Union then requested information that it deemed necessary for effects bargaining.

On February 4, the Employer posted the new transit supervisor positions, for which all 14 unit employees applied. On March 1, all 14 unit employees were offered the new positions. In the new positions, the employees' wages were increased from an average of about \$14.00 per

² Field supervisors work out in the field and investigate problems that arise with the Employer's bus drivers. When incidents arise involving drivers, the field supervisors file reports with managers.

³ All subsequent dates are 2005 unless otherwise noted.

⁴ The Employer admits that the change in duties had not been considered before the representation proceeding, and that up until then management had been satisfied with the employees' duties and the supervisory structure.

hour to about \$20.00 per hour.⁵ The Employer also enrolled them in a different medical benefit program.

In February 2005, the Union filed a Section 8(a)(3) and (5) charge (Case 19-CA-29622), alleging that the Employer unlawfully withdrew recognition and refused to bargain by, among other things, altering the scope of the unit by converting all field supervisors and dispatchers to alleged statutory supervisors without the consent of the Union; informing the Union that it intended to remove work from the bargaining unit; hiring the bargaining unit employees to perform the bargaining unit work in newly created allegedly supervisory positions; dealing directly with the bargaining unit employees; unilaterally changing wages, hours and working conditions; and failing and refusing to engage in effects bargaining. On April 1, the Union filed Charge 19-CA-29708, alleging that the Employer unlawfully refused to provide the Union with requested information.

On April 1, the Employer told the Union that because the "conversion" had been completed and there were no longer any employees in the unit, there was no need to continue negotiations.

The Region determined that the unit employees were not given supervisory duties in March 2005, and that the Employer's asserted business justification was a sham. As transit supervisors, the employees continue to perform the same duties they performed as field supervisors and dispatchers. The Employer contends that they now also have the authority to discipline, counsel, and coach drivers. However, the evidence shows that the employees received only a two-hour training session in supervision, and there is no evidence that they have to date exercised any 2(11) supervisory authority.⁶

After issuing a Section 8(a)(3) and (5) complaint in Case 19-CA-29622, the Region submitted a request for 10(j) authorization to the Injunction Litigation Branch. On May

⁵ The individual increases ranged from about \$2.00 to \$7.50 per hour.

⁶ Although the Employer contends that some of the transit supervisors have "participated" in issuing discipline, it concedes that the General Manager was also involved in those incidents of discipline. It explains this involvement as necessary because the transit supervisors need additional on-the-job training before they will be allowed to issue discipline independently.

5, 2005, the General Counsel submitted a request to the Board for Section 10(j) authorization in that case, arguing that there was a strong likelihood of succeeding on the allegations that the Employer violated Section 8(a)(3) and (5) by eliminating the unit positions and reclassifying the employees into supervisor positions. The General Counsel concluded that the Employer's elimination of the unit positions and conversion of employees into asserted supervisors violated Section 8(a)(3) and (1) because it was motivated by the Employer's desire to thwart the employees' right to unionization and to avoid a bargaining obligation with the Union. The General Counsel further concluded that the removal of all unit employees, along with their unit work, to supervisory positions constituted a change in the scope of the unit, without the Union's consent, in violation of Section 8(a)(5). In the alternative, the General Counsel concluded that the Employer, at the very least, transferred unit work outside the unit without prior good-faith bargaining with the Union. Finally, the General Counsel concluded that the Employer violated Section 8(a)(5) by dealing directly with the employees during their "rehire" as transit supervisors, unilaterally changing their terms and conditions of employment, and withdrawing recognition from the Union. [FOIA Exemptions 2 and 5

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2. May 2005 Settlement Agreement

On May 17, while the request to the Board for 10(j) authorization was pending, an unfair labor practice proceeding began before ALJ Kocol. Shortly after the record opened, the parties entered into an Informal Settlement Agreement, which was approved by the ALJ. Under the Settlement Agreement, the Employer agreed that it would not: (1) fail and refuse to bargain in good faith with the Union concerning the wages, hours and other terms and conditions of employment of employees in the unit of field supervisors and dispatchers; (2) unilaterally and without the consent of the Union alter the scope of any certified or recognized bargaining unit by removing or eliminating job classifications; (3) eliminate job classifications because the employees have chosen Union representation; (4) bypass the Union and engage in direct dealing; (5) unilaterally change rates of pay, health benefit plans, or other terms and conditions of employment without giving the Union notice and an opportunity to bargain; or (6) fail and refuse to provide relevant information to the Union.

Affirmatively, the Settlement Agreement provided that the Employer would: (1) recognize and, upon request, bargain with the Union as the exclusive bargaining representative of the unit employees concerning their wages, hours and other terms and conditions of employment; (2) maintain the current status quo regarding wages, hours, and benefits until the parties reach agreement or lawful impasse [while stating that "nothing shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits which may have been afforded to the transit supervisors"]; (3) notify and, upon request, bargain with the Union in good faith before changing hourly rates of pay, benefits, or any other conditions of employment; and (4) provide all relevant information the Union requests. The Settlement Agreement also shows that the parties struck out a provision that would have explicitly required the Employer to rescind the position of transit supervisor and restore the positions of field supervisor and dispatchers.

3. Post-Settlement Facts

Following the Settlement Agreement, the parties met for bargaining six times, beginning on July 14 and ending with a breakdown of negotiations on October 12, just prior to the filing of the instant charge.

July 14 Session. The Union alleges that the Employer announced during this session that it could make two of the transit supervisors bargaining unit employees, who could perform work such as laundering uniforms, while the other 12 employees would be converted to statutory supervisors. The Union replied that it intended to bargain over the bargaining unit work historically performed by the 14 members of the bargaining unit because the NLRB had certified it to represent those employees and the parties' Settlement Agreement required the Employer to bargain over the bargaining unit work.

According to the Employer, its attorney began this bargaining session by explaining to the Union that it was struggling over "what constitutes the unit." The Employer told the Union that there were supervisory tasks that needed to get done, and that the work (apparently including the field supervisors' historical duties) should not be performed by members of the bargaining unit. The Union, on the other hand, insisted that the work belonged to the unit and that it was not willing to let statutory supervisors perform that work without a specific contract proposal.

It became apparent that the parties were at loggerheads about the supervisory or non-supervisory status of the employees who had been members of the certified unit. The Union suggested that the parties temporarily set aside bargaining on this issue and concentrate on bargaining over wages and other terms of a complete agreement. After the parties caucused, the Union alleges that the Employer presented the Union with two options. The Employer would either: (1) transfer approximately two employees out of the asserted statutory supervisor group to perform non-supervisory work (such as laundering uniforms) and to be represented by the Union, while the other 12 employees would remain statutory supervisors; or (2) maintain the status quo, which the Union interpreted to mean that the 14 bargaining unit employees would maintain their status as asserted statutory supervisors due to the Employer's March 2005 "conversion" of all bargaining unit employees to the newly created transit supervisor position.

The Union pressed the Employer for a proposed collective-bargaining agreement. After a lunch break, the Employer provided the Union with a contract proposal. It did not contain any specifics on wages or benefits, but the Employer informed the Union that it wanted to return the bargaining unit employees' wage rates to the rates that were in place prior to the unfair labor practice hearing, which would amount to reducing wages from around \$18-\$20 per hour to around \$14 per hour. The Union informed the Employer that it needed time to go through the Employer's proposal and requested future bargaining dates.

August and September Sessions. The parties met and bargained on August 31 and September 1, 7, and 8. During these four sessions, the parties went through the proposed collective-bargaining agreement in detail and reached tentative agreements on many provisions. However, consistent with the Union's earlier suggestion, the parties tabled the contentious issue of "who belonged in the unit."

October 12 Session. The parties began this session by reviewing the most recent contract proposal, checking corrections, and verifying that all tentative agreements had been incorporated. The Union made some counter-offers on many of the articles that remained open, and the Employer suggested additional language changes.

As to wages, the Employer alleges that the Union proposed that unit employees receive 40 percent more per hour than the bus drivers. As it had proposed at an earlier session, the Employer proposed returning the employees' wages to their levels before the conversion to transit supervisors. It suggested that the parties bargain

about wage increases from the prior rates, and proposed a two-percent yearly increase. The Employer explained that it had increased the employees' wage rates because it had converted them to statutory supervisors. The Union, in support of its significantly higher wage proposal, cited the industry wage rates for field supervisors. After these discussions, the Union requested that the Employer present its complete proposal.

After a two-hour break, the Employer announced that it had "decided" that it must have "bona fide" supervisors, i.e. supervisors under the Act, and that it had "no need for field supervisors." The Union replied that the parties had already been through this, and that the Employer could hire as many supervisors as it needed, but the work belonged to the Union. The Employer stated that it would just transfer the work to the bona fide supervisors. At this point, the shop steward asked, "Who are statutory supervisors?" The Employer replied, "You are." The shop steward asked "So, you are going to transfer the work from me to me?," and the Employer responded, "Yes."

The Union at about this point requested that the parties finish negotiating over the details of an agreement covering bargaining unit work. According to the Union, the Employer's attorney replied that he thought it would be a waste of time to continue negotiations because the Employer was going to transfer the work to the "bona fide supervisors." The Union then asked when the Employer had made the employees statutory supervisors, and it responded that it had done so in late February or early March 2005. The Employer explained that the employees' duties had changed because they now coach, counsel, and participate in discipline, and that the employees had received a two-hour training session on how to do this.

The Union then asked the Employer's attorney to clarify a statement he had made. The Union noted that at one moment the Employer contended that it was bargaining over the 14 field supervisors, and at another moment it contended that the 14 employees were statutory supervisors to which it had transferred the bargaining unit work. The Employer replied that it was making both contentions. In response, the Union stated that the Employer was engaging in surface bargaining and that it would file a charge with the NLRB. The Union ended the meeting and cancelled the bargaining session that had been scheduled for the following day.

That same day, the Union filed the instant charge (Case 19-CA-30032), alleging that the Employer decimated the bargaining unit of field supervisors and dispatchers in

retaliation for employees' Union activities; altered the scope of the unit without the Union's consent; withdrew all unit work; and engaged in surface and/or bad-faith bargaining resulting in an effective withdrawal of recognition. The Union also requested Section 10(j) injunctive relief.

ACTION

We conclude that the Region should set aside the Settlement Agreement and, absent settlement, issue a consolidated complaint alleging that the Employer's actions violated Section 8(a)(3) and (5) of the Act, as discussed below.

1. The Settlement Agreement should be set aside due to the Employer's bad-faith bargaining.

As an initial matter, we agree with the Region that the Employer engaged in bad-faith bargaining after entering into the Settlement Agreement, which required it to bargain in good faith with the Union concerning the wages, hours and other terms and conditions of employment of employees in the unit of field supervisors and dispatchers. After entering into the Settlement Agreement, the Employer continued to assert that the bargaining unit employees had all been converted to statutory supervisors. At the first bargaining session (on July 14), the Employer told the Union that it would either: (1) transfer approximately two employees out of the asserted statutory supervisor group to perform non-supervisory work such as "laundering uniforms," while the remaining 12 employees would remain statutory supervisors; or (2) maintain the status quo, i.e., all 14 would remain non-unit transit supervisors. At the last session, however, the Employer allegedly stated that it would be a waste of time to continue bargaining because the Employer was going to transfer the work to the "bona fide supervisors." And, when the Union asked the Employer for a complete proposal, the Employer announced that it had decided that it must have bona fide supervisors.

We recognize that the Employer proposed returning the unit employees' wages to their prior rates, with annual increases of one or two percent from the prior rates, and that the parties were able to reach tentative agreements on some contract provisions. However, these proposals and agreements were made only in the context of the parties having agreed to set aside the issue of scope of the unit. Rather than indicating good-faith on the part of the Employer, they are essentially meaningless in light of the Employer's persistent demands and stated "decision" to convert all unit employee positions into statutory

supervisor positions. Given that position, there would be no unit employees to whom the terms and conditions being discussed would apply.

The Employer's conduct in continuing to assert that the entire bargaining unit had been promoted to statutory supervisor position effectively decimated the newly certified unit without the consent of the Union and clearly prevented meaningful bargaining on any subject. The Union was left in the position of bargaining for a non-existent unit.⁷ The Employer's conduct thus constituted a continued unilateral attack on the unit inconsistent with a good-faith attempt to comply with the terms of the Settlement Agreement. Accordingly, the Employer breached the Settlement Agreement, which should be set aside.

2. A Section 8(a) (3) and (5) complaint should issue, absent settlement.

We agree with the Region's original complaint allegation that the Employer's elimination of the unit positions and conversion of employees into asserted supervisory positions in late February or early March violated Section 8(a) (3) and (1) because it was motivated by its desire to thwart the employees' right to unionization and avoid a bargaining obligation with the Union. From the beginning of the employees' efforts to achieve representation, the Employer opposed the employees' efforts at unionizing on the grounds that they were supervisors. After the Union was certified and the parties were ready to begin bargaining, the Employer sought to accomplish what it was unsuccessful at doing during the representation proceeding: to deprive the employees of their right to organize by claiming that they were all supervisors.

The Employer contends that it converted the unit employees to supervisors because it needed additional supervision to improve its operations. That assertion is belied by the facts. The employees in the newly created transit supervisor positions continue to perform only the same non-supervisory tasks that they have always performed; there is no evidence that they have exercised any 2(11)

⁷ The Union proposed tabling the "composition of the unit" issue in hopes that an agreed-upon contract would eliminate the issue. However, instead of eliminating it, it just took longer for the Union to realize that the Employer was not budging from its position that the unit employees were and are supervisors.

supervisory authority to date.⁸ They have received only one short training session (two to three hours) on how to coach, counsel, and discipline employees, and this occurred only after the Region issued a complaint and requested authorization for Section 10(j) relief in Case 19-CA-29622. Moreover, the Employer admits that it had no plans to change employees' duties or reclassify employees prior to the organizing campaign and that it decided to do so only upon review of the representation proceeding transcripts. It also admits that it was satisfied with its operations when the field supervisors and dispatchers were performing only non-supervisory duties. The Employer has established no coherent, let alone legitimate, business justification for its conduct. Accordingly, the elimination of unit positions and conversion of employees to asserted supervisory positions was motivated by a desire to deprive them of Union representation in violation of Section 8(a)(3).⁹

We also agree with the Region's original complaint allegation that the removal of all unit employees, along with their unit work, to supervisory positions was a change in the scope of the unit without the Union's consent, in violation of Section 8(a)(5).¹⁰ As noted by the Region, it

⁸ Although some of the employees have participated in issuing discipline with the Assistant General Manager, the Employer concedes that they do not yet have the authority to independently discipline because, at this time, they still do not have the requisite experience.

⁹ See, e.g., Venture Packaging, Inc., 294 NLRB 544, 551-53 (1989), enfd. mem. 923 F.2d 855 (6th Cir. 1991) (employer's reclassification of unit employees to supervisors, after unsuccessfully opposing their inclusion in unit, in the absence of legitimate business considerations violated 8(a)(3)); Sands Motel, 280 NLRB 132, 141 (1986) (reclassification of desk clerks to supervisory positions after employees unionized violated 8(a)(3) in the absence of business justifications). See also, Matson Terminals, Inc., 321 NLRB 879, 879 (1996), enfd. 114 F.3d 300 (D.C. Cir. 1997) (accelerated conversion of employees into supervisors after receiving recognition request from union was 8(a)(3)); Dickerson-Chapman, Inc., 313 NLRB 907, 939-40 (1994) (drafting of new job descriptions and promotion of employees into those positions after representation petition was filed violated 8(a)(3)).

¹⁰ See, e.g., Mt. Sinai Hospital, 331 NLRB 895, 895 (2000), enfd. 8 Fed. Appx. 111 (2nd Cir. 2001) (unpublished decision) (employer unilaterally altered the scope of the unit when it effectively removed the position of sous chef

is well settled that once a specific job classification has been included within the scope of a bargaining unit by Board action or agreement of the parties, an employer cannot remove the position without first securing either the consent of the Board or the bargaining representative.¹¹

In addition, we agree that the Region should allege, as it did in its original complaint, that the Employer violated Section 8(a)(5) by dealing directly with the employees during their "rehire" as transit supervisors, unilaterally changing their terms and conditions of employment, and withdrawing recognition from the Union.

[FOIA Exemptions 2 and 5

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from the unit and reclassified the employees who occupied the position but continued to have them do the same work); Holy Cross Hospital, 319 NLRB 1361 (1995) (after the Board decided in a UC proceeding that "house supervisors" were statutory employees, the employer unlawfully created a new, non-unit position called "shift manager," transferred the unit employees and much of their work to the new position, and virtually eliminated the house supervisor position); Facet Enterprises, Inc., 290 NLRB 152, 152 (1988), enfd. in rel. part 907 F.2d 963, 975-976 (10th Cir. 1990) (proposal to remove classification from the unit under the guise of promoting incumbent to a supervisory position, where the employee's job duties did not change and thus there had been no genuine promotion, constituted an attempt to change the composition of the unit, on which the employer may not insist to impasse); Wackenhut Corp., 345 NLRB No. 53, slip op. at 5-6, 8 (August 2005) (employer eliminated the sergeant positions and transferred the sergeants' job duties to nonunit lieutenants, and eliminated the "CAS/SAS operators" from the bargaining unit and reclassified those operators as nonunit lieutenants, without securing the consent of the Union or seeking approval of the Board).

¹¹ See, e.g., Beverly Enterprises, 341 NLRB No. 38, slip op. at 1 (2004) (removal of employees along with their work, rather than mere transfer of work to nonunit employees, was a change in the scope of the unit requiring the union or Board's consent); Wackenhut Corp., above, slip op. at 8.

[FOIA Exemptions 2 and 5, cont'd.

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3. [FOIA Exemptions 2 and 5]

[FOIA Exemptions 2 and 5

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¹² [FOIA Exemptions 2 and 5

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¹³ [FOIA Exemptions 2 and 5

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¹⁴ [FOIA Exemptions 2 and 5

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[*FOIA Exemptions 2 and 5*

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CONCLUSION

Accordingly, the Region should set aside the Settlement Agreement and, absent settlement, issue a consolidated complaint alleging that: (1) in late February or early March 2005, the Employer violated Section 8(a)(3) by decimating the bargaining unit of field supervisors and dispatchers in order to thwart the employees' right to unionization and avoid a bargaining obligation with the Union; and violated Section 8(a)(5) by altering the scope of the unit without the Union's consent, dealing directly with the employees during their "rehire" as transit supervisors, and unilaterally changing the employees' terms and conditions of employment; and (2) beginning in July 2005, the Employer engaged in bad-faith bargaining in violation of Section 8(a)(5).

B.J.K.