

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

Advice Memorandum

DATE: July 31, 2002

TO : Victoria E. Aguayo, Regional Director
William M. Pate, Jr., Regional Attorney
James A. Small, Assistant to Regional Director
Region 21

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

SUBJECT: Midwest Television, Inc., d/b/a 524-0167-1033
KFMB-AM, KFMB-FM, and/or KFMB-TV 524-0183-3333-6700
Cases 21-CA-34787, 21-CA-34788, 530-6067-4033
21-CA-34803

This case was submitted for advice as to whether the Employer violated Section 8(a)(1), (3) and (5) by unilaterally reducing an employee's wages and subsequently threatening to lay off other employees and/or reduce other employees' wages.

We conclude that the Employer violated Section 8(a)(5) by unilaterally reducing an employee's wages, a mandatory subject of bargaining; and Section 8(a)(3), under a Great Dane¹ theory, by reducing an employee's wages without a legitimate and substantial business justification.

FACTS

For more than 50 years, the American Federation of Television and Radio Artists, Local 225 (the "Union"), has represented on-air radio and television personnel employed by Midwest Television, Inc., d/b/a KFMB-AM, KFMB-FM, and/or KFMB-TV (the "Employer"). The parties' most recent collective bargaining agreement was in effect from March 21, 1998 to July 31, 2001.²

Article 9 [WAGES] of the contract permitted the Employer to negotiate wages directly with individual employees and execute personal service contracts (PSCs) as long as the Employer paid the contract minimum ("scale"). The Employer and the Union began negotiating for a successor agreement in about April or May and continued into October. A significant issue during negotiations was the extent to which the successor agreement would permit the Employer to direct deal with employees. The Employer sought to retain the direct dealing language from the 1998-2001 contract, which gave the Employer the unlimited right to direct deal with employees for above-scale wages. The Union sought some limitations on the Employer's ability to

¹ NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) ("Great Dane").

² All dates are in 2001 unless otherwise noted.

direct deal, e.g. requirements that the PSCs have a minimum term of two years and that disputes regarding PSCs be subject to contractual grievance/arbitration procedures.

In April, the Employer began negotiating with employee Richard Moorten for a new PSC, but they were unable to reach agreement. Nonetheless, the Employer began paying Moorten the higher wages it had proposed, apparently due to a payroll error unbeknownst to the Employer.³

After the collective bargaining agreement expired on July 31, the Union notified the Employer that it could no longer direct deal with unit employees. Shortly thereafter, the Employer ceased PSC negotiations with Moorten and, about the same time, discovered that it had been mistakenly paying Moorten above-scale wages that had not yet been agreed upon. The Employer reduced Moorten's wages to scale effective August 18, without providing the Union notice or an opportunity to bargain about the decision.⁴

On September 19, the Employer sent a memorandum to unit employees entitled "Let's set the record straight," in response to a Union letter to employees criticizing the Employer for seeking to reduce employees' wages. The Employer's letter stated, inter alia, that:

First and foremost, if you are reduced to scale, it will be because of [the Union's] bargaining tactics....

As for Hal Clement, he was a victim of the same bargaining tactics that the Union is using again....⁵

[The Union] is again interfering with our ability to pay current employees or new hires more than the Union contract rate. Already we have had to reduce one current [Union] member to scale....

Why don't you ask [the Union] for the truth about what really happened with Hal? Hal and 19 other employees were reduced to scale. Many employees immediately joined those co-workers who had already resigned from the Union and informed [the Employer] that they no longer wanted [the Union] to represent them.... The point is that [the Union] has used its

³ It is unclear precisely when the Employer began paying Moorten above-scale wages, though there is no dispute that it occurred prior to the expiration of the 1998-2001 c/b/a.

⁴ The Region has been unable to secure an affidavit from Moorten.

⁵ The language regarding Hal Clement refers to a prior, similar case, discussed below, at pp. 4-5.

most damaging tactic, which it admits is intended to bring severe economic harm to [the Employer]....

[Y]our job security and pay is directly connected to our success, which greatly depends on our ability to pay you and new hires above scale without interference from the Union. As you know, no other station in this market is being placed under these prohibitive restrictions and conditions.

On September 26, the Union, which was not aware that any current employee had been reduced to scale until it obtained a copy of the September 19 letter, requested information regarding the pay reduction. The Employer then informed the Union that Moorten was the employee who had been reduced to scale.

On October 8, the Employer provided the Union with a written offer, stating that it was not a final offer "right now," but that it might be by the end of the negotiating session. The parties then discussed on-air television reporter Adriana Alcaraz's decision to seek employment elsewhere as her PSC was set to expire on November 1 and the Employer was unable to negotiate a new PSC. The Employer stated that it was concerned that if it lost any more reporters that it would have to scale back on news and eliminate jobs, and that it could not hire new, quality talent because of the Union's bargaining position. After the meeting ended, the Employer faxed the Union a message stating its belief that the parties were at impasse and that the proposal was the Employer's last, best, and final offer. Unlike its prior proposals, the Employer's October 8 offer did not include any direct dealing language. The Union then sent a facsimile to the Employer requesting clarification on whether the Employer was no longer seeking a direct dealing provision.

During a negotiating session on October 9, the Employer provided the Union with a letter responding to the Union's October 8 facsimile. The Employer stated that its final proposal contained no direct dealing language because the Union's direct dealing proposals, which limited the Employer's ability to direct deal, were unacceptable, and it was concerned the Union would file ULP charges if its final offer contained a permissive bargaining subject. The Employer further stated that without an agreement on direct dealing, the Employer would not be able to execute new PSCs with employees and would reduce their wages to scale once their existing PSCs expired. The Employer added that without the ability to direct deal, its stations would suffer financially, and it might have to reduce news programming, lay off employees, revisit its final offer and reduce economic commitments. The parties did not meet again. On about October 30, the Employer withdrew

recognition from the Union based on a decertification petition.⁶

RELATED PROCEEDINGS

In a prior similar case, the Division of Advice authorized complaint alleging that the Employer violated Section 8(a)(5) by insisting to impasse on a permissive subject of bargaining (seeking permanent permission to direct deal with all employees for PSCs) and implementing unilateral changes (reducing employees' wages) in support of that unlawful bargaining position. Complaint was also authorized on the theory that the Employer violated Section 8(a)(3) by reducing an employee's wages and constructively discharging him, based on evidence of anti-Union animus and a finding that the Employer's conduct was "inherently destructive" of employee rights under Great Dane.⁷ An ALJ rejected the 8(a)(5) allegations and the 8(a)(3) "inherently destructive" theory, but found merit to the 8(a)(3) allegation based on anti-Union animus and a separate "inherently destructive" theory.⁸ That case is pending before the Board on exceptions.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally reducing an employee's wages, a mandatory subject of bargaining, and Section 8(a)(3), under a Great Dane theory, by reducing an employee's wages without a legitimate and substantial business justification.

A. The Employer violated Section 8(a)(5) by unilaterally reducing an employee's wages.

⁶ The Union has filed several other charges against the Employer which were not submitted for advice, alleging, inter alia, that the Employer violated Section 8(a)(1), (3) and (5) by engaging in bad-faith and surface bargaining; declaring impasse when impasse had not been reached; terminating and/or demoting employees for retaliatory purposes and in order to shrink the bargaining unit; and instigating and/or supporting a decertification petition and unlawfully withdrawing recognition. [FOIA Exemption 5

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⁷ Midwest Television, Inc. d/b/a KFMB Stations, Case 21-CA-32858, Advice Memorandum dated May 28, 1999.

⁸ KFMB Stations, JD(SF)-38-01 (May 4, 2001), 2001 WL 1598718.

It is well established that a unilateral change in terms and conditions of employment, after contract expiration but before negotiation to impasse, violates Section 8(a)(5).⁹ On the other hand, an employer may make unilateral changes regarding permissive subjects of bargaining without violating 8(a)(5).¹⁰

The Employer violated Section 8(a)(5) by reducing Moorten's wages to scale after the contract expired and without providing the Union with notice or an opportunity to bargain over that decision. Wages are a mandatory subject of bargaining.¹¹ We reject the Employer's contention that Moorten's above-scale wages were a permissive subject of bargaining because they were established within the ambit of a contractual "direct dealing" provision, itself a permissive subject of bargaining.¹² The Union effectively waived its statutory right to bargain regarding above-scale wages during the term of the 1998-2001 contract by agreeing to the direct dealing provision in Article 9.¹³ However, such a waiver is limited to the time during which the contract that contains it is in effect.¹⁴ Once the 1998-2001 contract expired, the

⁹ Bethlehem Steel Company (Shipbuilding Div.), 136 NLRB 1500, 1503 (1962). See also NLRB v. Katz, 369 U.S. 736, 743 (1961).

¹⁰ See generally Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185 (1971).

¹¹ NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

¹² See Indiana & Michigan Electric Co., 284 NLRB 53, 55 (1987) (as a general rule, an employer must bargain about post-expiration changes in terms and conditions of employment regardless of how those terms came to be initially established). Contra KFMB Stations, JD(SF)-38-01.

¹³ We need not address the Union's contention that the terms of the 1998-2001 contract did not actually permit the Employer to unilaterally reduce employees to scale upon the expiration of a PSC.

¹⁴ See Ironton Publications, 321 NLRB 1048, 1048 (1996) (employer violated 8(a)(5) by unilaterally granting merit pay increase to employee, post-contract expiration, because union's contractual waiver of right to bargain regarding mandatory subject of bargaining, i.e. the timing and amount of merit pay increases, did not survive the expiration of the contract). See also Holiday Inn of Victorville, 284 NLRB 916, 916 (1987) ("management rights" clause, which authorizes employer to unilaterally change matters that are mandatory subjects of bargaining, is a union's waiver of its right to bargain over such matters, and normally does

Employer was obligated to either bargain with the Union or obtain another waiver before altering Moorten's wages.¹⁵ The Employer did neither.

We likewise reject the Employer's contention that the unilateral reduction of Moorten's wages was lawful because it was done in accord with an established "past practice," as the Employer had unilaterally reduced two employees' wages to scale during the term of the 1998-2001 contract. The Employer's ability to lawfully reduce those employees' wages derived solely from the Union's contractual waiver. In Beverly Health & Rehabilitation Services, the Board recently rejected the contention that a union's waiver of its right to bargain, embodied in a management rights clause which expired with the collective bargaining agreement, established a "status quo" that continued beyond contract expiration.¹⁶ The same logic applies in the instant case.

Finally, the Employer's argument that it reduced Moorten to scale in order to correct a payroll error is unavailing. For example, in Mid-Wilshire Health Care Center,¹⁷ a company mistakenly implemented wage increases set forth in a tentative agreement that had not been approved by the company's president. The president unilaterally rescinded the wage increases after learning about the mistake about a month later. The Board found a Section 8(a)(5) violation, holding that the employer was not obligated to sign the tentative agreement, but that it had to bargain with the union in order to lawfully correct its mistake.

[FOIA Exemption 5

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not survive the expiration of the contract); Paul Mueller Co., 332 NLRB No. 29, slip op. at 2 (2000).

¹⁵ We note that an employer can violate Section 8(a)(5) where it makes a unilateral change directed at only one employee. See Carpenters Local 1031, 321 NLRB 30, 32 (1996).

¹⁶ 335 NLRB No. 54, slip op. at 3 (2001). See also Owens-Corning Fiberglas, 282 NLRB 609, 609 (1986) (union's prior acquiescence in employer's unilateral changes does not waive its right to bargain over such changes for all time; clear and unmistakable waiver required).

¹⁷ 337 NLRB No. 7, slip op. at 2 (2001).

[FOIA Exemption 5, cont'd.

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B. The Employer violated Section 8(a)(3), under a "Great Dane" theory, by reducing an employee's wages without a legitimate business justification.

The Supreme Court has held that some employer conduct is so "inherently destructive" of employee interests that it may be deemed proscribed by Section 8(a)(3) without independent proof of an underlying improper motive.²⁰ That is, some conduct carries with it the unavoidable consequence of discriminating on the basis of union activity which is not only foreseeable but which must have been intended; the conduct thus bears its own indicia of intent.²¹ A determination that an employer's conduct is "inherently destructive" does not end the inquiry. Rather, the Board must weigh any asserted "legitimate and substantial" business justification against the impact on employee rights in order to determine whether the employer has committed an unfair labor practice.²² Even if the employer conduct is not "inherently destructive," but rather has a "comparatively slight" impact on employee interests, the Board may infer discriminatory intent if the employer does not proffer a legitimate and substantial business justification for its conduct.²³

In International Paper Co., the Board held that an employer's implementation of a proposal to permanently

¹⁸ [FOIA Exemption 5 .]

¹⁹ [FOIA Exemption 5

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²⁰ Great Dane, 388 U.S. at 33.

²¹ Ibid.

²² International Paper Co., 319 NLRB 1253, 1267 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997).

²³ Great Dane, 388 U.S. at 34.

subcontract unit work during a lawful lockout was "inherently destructive."²⁴ In reaching this conclusion, the Board set forth four "guiding principles" for determining whether "inherently destructive" conduct occurred.²⁵ These principles include determining the severity of the harm to employees' Section 7 rights²⁶; determining the temporal impact of the employer's conduct²⁷; distinguishing between an employer's hostility to the collective bargaining process and actions in support of its substantive bargaining positions;²⁸ and determining whether employer conduct discourages collective bargaining in the sense of rendering it an apparently futile exercise.²⁹

²⁴ 319 NLRB at 1270.

²⁵ Id. at 1269-70.

²⁶ See, e.g., Aztech Electric Co., 335 NLRB No. 25, slip op. at 3-4 (2001) (employer's facially neutral policy of not hiring employees who earned 30% more or less than wages paid by employer in most recent year was inherently destructive of employee rights because it had predictable and actual effect of penalizing union supporters; previous employment by union contractor rendered applicants ineligible).

²⁷ See International Paper Co., 319 NLRB at 1271 (permanent subcontracting of unit positions during lawful lockout inherently destructive as impact of employer conduct not limited to particular bargaining dispute, but rather adversely affects future exercise of protected employee rights). Cf. Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976) (granting retroactive pay increase to strikers who had returned and remained at work on a certain date not inherently destructive, as it was limited to a particular instance and could have no "far reaching effects that would hinder future bargaining"); Inter-Collegiate Press v. NLRB, 486 F.2d 837, 845 (8th Cir. 1973) (operating with temporary replacements during lockout not inherently destructive, as conduct did not create "visible and continuing obstacles to the future exercise of employee rights").

²⁸ Cf. Boilermakers Local 88 v. NLRB, 858 F.2d 756, 763 (D.C. Cir. 1988) (temporarily replacing locked out employees demonstrated employer hostility to employees' substantive bargaining position, but not to the collective bargaining process itself).

²⁹ See Esmark, Inc. v. NLRB, 887 F.2d 739, 749 (7th Cir. 1989) (Board could find that employer's closure of plants for purpose of evading application of master agreements after union refused midterm modification of agreements, and employer's subsequent rehiring of employees under new terms and conditions of employment, communicated to employees that collective bargaining was a "futile exercise").

Here, the Employer's unilateral reduction of Moorten's wages had a foreseeable negative impact on the exercise of employee organizational rights. Throughout the parties' negotiations, the Employer maintained the position that it would only agree to a direct dealing provision that granted it unlimited discretion to direct deal for above-scale wages; any provision requiring any Union involvement or input was unacceptable. The Employer's September 19 letter imputes Moorten's wage reduction - as well as potential wage reductions for other employees - to the Union's bargaining position, despite the fact that the Employer could lawfully continue paying PSC wage rates following PSC expiration or, alternatively, institute wage changes via bargaining with the Union. Thus, in essence, the Employer's unilateral reduction of Moorten's wages to scale - particularly in light of the September 19 letter - warns employees that they can and will be punished because of the Union's bargaining position. The letter even implies that employees would be better off without the Union. Since obtaining above-scale wages is of the utmost importance to unit employees, the Employer's conduct foreseeably would encourage unit employees to abandon their support of the Union's bargaining position and possibly abandon the Union altogether.

On the other hand, in the absence of overall bad faith bargaining, or insistence to impasse on a permissive bargaining subject, the Employer's conduct did not reflect a hostility to the collective bargaining process, and the negative impact on employee rights arguably will persist only for the duration of this bargaining dispute. Thus, it might be difficult to argue that the Employer's conduct was "inherently destructive" of employees' Section 7 rights.

It is clear, though, that the Employer's conduct would have at least a "comparatively slight" effect on the exercise of Section 7 rights. We conclude that the Employer's reduction of Moorten's wages was a Section 8(a)(3) violation under Great Dane, even if it had only a "comparatively slight" effect on employee rights, because the Employer has not proffered a legitimate business justification for its conduct.³⁰ While the Board has held

³⁰ See Century Air Freight, 284 NLRB 730, 731-32 (1987) (Board declined to determine whether employer's unilateral termination of trucking operation and subcontracting of unit work due to its fears of a strike had "inherently destructive" or "comparatively slight" effect on employee rights, because employer did not provide legitimate and substantial business justification); Capehorn Industry, 336 NLRB No. 29, slip op. at 2 (2001) (Board declined to determine precise extent to which employer's acts of replacing strikers and permanently subcontracting unit work adversely affected employee rights, because employer failed to provide legitimate and substantial business justification).

that an employer's use of an economic weapon in support of its bargaining position constitutes a legitimate and substantial business justification,³¹ it is also clear that the use of economic weaponry during bargaining "is subject to one crucial qualification - the party using it must at the same time be engaged in lawful bargaining."³² The Employer's "economic weaponry" - the reduction of Moorten's wages to scale - was itself an unlawful 8(a)(5) unilateral change, and therefore cannot be deemed a legitimate and substantial business justification. The Employer has proffered no other justification.³³

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³¹ Central Illinois Public Service Co., 326 NLRB 928, 931-32 (1998), affd. 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000) (employer's use of lockout to counter union's "inside game" strategy and to attempt to compel union to accept its particular bargaining position constituted legitimate and substantial business justifications).

³² Daily News of Los Angeles, 315 NLRB 1236, 1243 (1994). See also Branch International Services, Inc., 310 NLRB 1092, 1103-1105 (1993), enfd. mem. 145 LRRM 2512 (6th Cir. 1993) (lockout to coerce union to accept offer containing unit change was not in support of a legitimate bargaining position); Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1085 (D.C. Cir. 1991), enfg. 292 NLRB 1234 (1989) (where employers' unilateral implementation of final wage offer constituted unfair labor practice, it did not qualify as "legitimate bargaining position" that could be supported through use of lockout); Swift Independent Corp., 289 NLRB 423, 431 (1988) (shutdown of company and discharge of employees, followed by reopening and rehiring of employees without contract, not justified by employer's desire to make operations more attractive to potential purchasers, because the "desire to evade collective-bargaining obligations, though economically motivated, is not a legitimate justification in this context"), remanded on other grounds sub nom. Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989).

³³ We would reject any argument the Employer might raise that it had a legitimate and substantial business justification for reducing Moorten's wages to scale in order to lower the Employer's operating costs. Thus, the unilateral change was in support of a bargaining proposal - granting the Employer the ability to directly negotiate above-scale wages - which would if anything increase the Employer's labor costs. Cf. International Paper Co. v. NLRB, 115 F.3d 1045, 1052 (D.C. Cir. 1997) (permanent subcontracting deemed a legitimate business consideration because it would bring "substantial economic benefits," e.g. cutting overtime costs and cost of providing on-site facilities for replacement workers).