

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

Advice Memorandum

DATE: June 28, 2004

TO : Robert H. Miller, Regional Director
Region 20

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

SUBJECT: Lasher Service Corporation 530-6001-5025
Cases 20-CA-31330 and 530-6050-1625
20-CA-31632 530-6067-4001-9100
530-6067-4022-0100
530-6067-4033-5000
530-8045-3700
530-8045-8700

These Section 8(a)(5) cases were submitted for advice as to whether the Employer, an automotive sales group, violated the Act by unilaterally implementing a series of post-contract expiration changes in an extra-contractual bonus paid to its parts department employees, and/or by refusing to bargain over those changes and other effects of its decision to transfer certain product lines and unit repair and parts sales work from its existing union-represented facilities to a new, non-unit dealership.

We conclude that the changes in the parts department bonuses were unlawful since there was no indication that the parties intended a contractual provision giving the Employer the discretion to grant or terminate bonuses to survive the expiration of the contract. We also concluded that the Employer violated the Act by refusing to bargain over the effects of its restructuring decision since the changes in the parts department employees' bonuses had substantial, material impact on the employees' compensation. [FOIA Exemption 5

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FACTS

1. Background

The Employer owns and operates several automobile dealerships in California, including a Volkswagen dealership in downtown Sacramento and a combined Volkswagen, Dodge, Acura, Isuzu and Audi dealership on

Florin Road about seven miles southeast of the city. For many years, the Union has represented a single unit of all the Sacramento parts, body shop, and service employees under a series of collective-bargaining agreements. The parties' most recent agreement was effective from April 3, 2000 until April 2, 2003. The bargaining unit has at all times consisted of about 48 employees in the downtown and Florin Road dealerships. Prior to the events at issue here, the unit included about seven parts employees who worked in two separate parts departments at the Florin Road location; one department sold wholesale and retail Dodge, Volkswagen and Audi parts¹ and the other sold wholesale and retail Acura and Isuzu parts. It is unclear whether the downtown Volkswagen dealership had its own parts department and, if so, whether any unit parts employees were employed there.

The 2000-2003 contract included a provision that allowed the Employer to "give a bonus or incentive to an employee . . . apart from his regular hourly rate of pay" and that "[a]ny bonus or incentive shall be effective or discontinued at the Employer's discretion." In negotiations, the Employer proposed an extra-contractual sales-based bonus system for its parts department employees. The proposal set forth a formula for calculating bonuses depending upon whether employees met either of two specified minimum sales thresholds. At the first threshold, the Employer would pay each employee a bonus equaling 0.5% of the employees' combined sales divided by the number of employees in the relevant department; if they achieved the second specified threshold amount, the bonus would increase to 1%. The proposal specified different minimum threshold amounts for each of the two parts departments.

Although the proposal was not incorporated in the contract, the Union and the employees apparently approved of the proposed system. Thereafter, the Employer apparently began paying monthly bonuses to the employees in both Florin Road parts departments under the formula presented to the Union in bargaining. While the Employer's position statements indicate that it may not have adhered to this specific formula and minimum sales amounts throughout the life of the contract, the parts department employees at the Florin Road location have, at all times pertinent here, apparently received a monthly bonus of some

¹ Wholesale parts sales constituted the majority of the Employer's Dodge parts sales.

kind.² In 2002, the average monthly bonuses paid were close to \$200 and comprised about twenty to thirty per cent of the parts department employees' monthly pay.

2. The Employer Restructures its Operations

In early January 2003, while it was preparing for the start of negotiations for a successor collective-bargaining agreement, the Union learned that the Employer planned to open Dodge, Acura and Volkswagen dealerships at a large multi-franchise "auto mall" in nearby Elk Grove, about eight miles southeast of the Florin Road location. In a January 24 pre-bargaining information request, the Union included questions about the new Elk Grove facility, including when the new facility would open, what existing product lines, if any, would be transferred to Elk Grove, and whether the Employer planned to transfer unit employees. Negotiations began on February 20 with the Employer providing the Union with documents and written answers to some of the requested information. Regarding Elk Grove, the Union learned that the new facility was scheduled to open in May or June 2003, that the Employer's Acura, Dodge and Volkswagen product lines would be transferred from Florin Road to Elk Grove, and that there would be no employee transfers to the new facility.

At bargaining sessions on March 7, March 11, and March 14, the Union requested bargaining over the decision to transfer the Employer's Acura, Dodge and Volkswagen franchises to Elk Grove and the effects of that decision on the employees. The Employer refused each request, asserting variously that it was not obligated to bargain about the restructuring, that the new dealerships would not be part of the bargaining unit or covered by the collective-bargaining agreement, and that unit employees would not be transferred from either Sacramento location to Elk Grove. The Employer told the Union that it would consider granting vacation credit to unit employees hired as new employees at Elk Grove. On March 18, the Union filed a grievance over the Employer's refusal to extend the collective-bargaining agreement to the new Elk Grove location. The Employer denied the grievance as legally and substantively unfounded and premature.

² Thus, the Employer has made various assertions without providing any documentary support that, with the exception of one 3-month period in 2003 (see *infra*), it has paid the Florin Road parts department employees a flat 1% of profits/sales divided by the number of employees (a) since long before the contract expired or (b) since September 2003.

At a bargaining session on April 9, the parties discussed which product lines would be moving to Elk Grove and what work would remain in Sacramento. The Employer informed the Union that it would begin selling and servicing two brands of motorcycles at Florin Road in addition to adding a Chrysler-Jeep dealership there. The Employer was unable to answer Union questions about projected work volumes at the new and existing locations, but told the Union that there would be no layoffs.

On April 16, the Union sent a letter to the Employer demanding that it maintain the status quo pending bargaining over the Elk Grove decision and its effects. The letter contained a detailed and extensive list of demands, including that the Employer refrain from granting any promotions, changing employee hours, or hiring new unit employees without first bargaining with the Union.

At the parties' next negotiating session on May 14, the Union repeated its demands for bargaining over the Elk Grove decision and the maintenance of the status quo in Sacramento pending such bargaining. The Employer again refused to bargain and asserted that it had the right to run the company as it pleased.

During this period, the Employer prepared to move its Acura and Volkswagen sales, service, and wholesale and retail parts department operations, equipment, and inventory from Florin Road to Elk Grove, as well as its wholesale Dodge parts sales inventory and operation. The Employer also began interviewing and hiring service and parts employees. The Elk Grove Acura and Volkswagen dealerships opened in mid-June.³ Although several unit employees applied for jobs at the new Elk Grove location, only one parts and four service employees were ultimately hired. A number of unit employees, including some who applied but were not selected to work at Elk Grove, apparently resigned out of concern that there would not be enough work at Florin Road after the Elk Grove location opened. In fact, no unit employees were laid off, new unit employees apparently have been hired, and, as noted above,

³ Contrary to its original plan, the relocation of the Employer's Dodge sales, service and retail parts operations to Elk Grove was indefinitely postponed due to an injunction obtained by another Elk Grove Dodge dealer. That litigation is ongoing. Consequently, the Employer has been unable to proceed with its plans to open a Chrysler-Jeep dealership at the Florin Road location.

the size of the bargaining unit has remained around 48 employees.

In conjunction with the Elk Grove opening, certain tools, manuals and diagnostic equipment were relocated from the Florin Road repair shop to Elk Grove. While it appears that most or all of these items were eventually returned to Florin Road or replaced, unit employees until then had to take time out of their work at Florin Road to retrieve the needed equipment from Elk Grove. In addition, according to Union witnesses, removal of the Acura and Volkswagen work meant that mechanics who had been trained and worked primarily on Acuras and Volkswagens, even if they had some cross-training to perform Isuzu and Dodge repairs, were not able to work at peak efficiency. Union witnesses also generally indicated that some of the mechanics received an unspecified sort of bonus linked to their productivity.⁴ As a result of the new motorcycle lines added to Florin Road, unit mechanics were assigned, for the first time, to perform motorcycle repairs; it is unclear whether they received any training.⁵

3. The Employer Changes the Bonus System

The Employer recognized that the restructuring of its business would have an impact on the parts department employees. It therefore decided, without any notice to either the Union or the affected employees, to unilaterally implement for three months a fixed \$210 bonus to insulate the parts employees from the "chaos" the move to Elk Grove might have on parts sales at Florin Road. The fixed bonus was paid in June, July, and August.

In early October, parts department employees noticed that their September bonuses were greatly reduced to approximately \$84.00. The parts department steward informed the Union of the reduced bonus and shared his impression that although the bonuses had stayed about the same as they always had been (around \$200) until September, gross sales volumes had been significantly lower since the Elk Grove location opened in June. At the next bargaining

⁴ It appears that mechanics had the option under the expired collective-bargaining agreement to work on either an hourly or a flat rate (per job) basis. It is unclear whether any unit mechanics had elected the flat rate option.

⁵ It appears that all of the changes at issue herein occurred at the Employer's Florin Road location and that the downtown Sacramento Volkswagen dealership was unaffected.

session on October 16, the Union asked the Employer whether it had changed the parts department bonus system. The Employer's chief negotiator stated that he would look into the matter but that, in any event, the Employer had the right to change the bonus system under the contract. The Union protested that it did not have that right now that the contract had expired. On November 20, the Employer informed the Union for the first time that it had instituted the fixed \$210 bonus in June, July, and August to insulate employees from the chaos of the adjustment period.

4. Regional Determination Regarding the New Facility

The Region has concluded, and not submitted for advice, that under Dubuque Packing Co.,⁶ the decision to open the Elk Grove facility and transfer product lines from Florin Road turned on factors other than labor costs and that the Employer therefore did not have an obligation to bargain with the Union over its decision. The Region also concluded that the Employer had no obligation to recognize the Union at the new Elk Grove location under Gitano principles.⁷

ACTION

We conclude that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unlawfully altered the parts department employees' bonus system without notice to or bargaining with the Union, and by failing and refusing to bargain over the effects of the decision to restructure the business and transfer product lines and unit work to the new Elk Grove location. [FOIA Exemption 5

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1. The Unilateral Changes in the Bonus System

It is well established that following contract expiration, absent an over-all bargaining impasse, an employer may not make unilateral changes in its union-represented employees' existing terms and conditions of employment.⁸ Only unilateral changes that have a "material

⁶ 303 NLRB 386 (1991), *enfd.* sub nom. UFCW Local 150-A v NLRB, 1 F.3d 24 (D.C. Cir. 1993).

⁷ Gitano Distribution Center, 308 NLRB 1172 (1992).

and substantial" impact on employee working conditions will be considered unlawful.⁹ Moreover, a change need not have a negative impact on employees' terms and conditions of employment to be considered substantial and material; changes that improve such conditions are still subject to the same bargaining obligations as negative changes.¹⁰

It is also well settled that a contractual waiver of a union's statutory right to bargain over changes in terms and conditions of employment "will not be lightly inferred" and must be "clear and unmistakable."¹¹ The waiver of union

⁸ See Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 198, 206-207 (1991) (the Act, independent of a contract, requires preservation of certain existing terms and conditions); Taft Broadcasting, 163 NLRB 475, 478 (1967), *affd. sub nom. American Federation of Television and Radio Artists, AFL-CIO, Kansas City Local v. NLRB, 395 F.2d 622 (D.C. Cir. 1968). See generally NLRB v. Katz, 369 U.S. 736, 747 (1962).*

⁹ Edgar P. Benjamin Healthcare, 322 NLRB 750, 752-753 (1996) ("an employer is not obligated to bargain over changes so minimal that they have no significant, substantial, and material impact on employees' terms and conditions of employment"). See also Nynex Corp., 338 NLRB No. 78, slip op. at 4 (2002) (canceling union representatives' magnetic access cards and requiring them to present identification was not a "material, substantial, and significant" change; new security procedures did not limit union's movement in the plant or deny it access to any employee); Rust Craft Broadcasting of New York, Inc., 225 NLRB 327, 327 (1976) (changing from manually filled in time cards to time clock not material change in employer's control/management of time keeping). Cf. KIRO, Inc., 317 NLRB 1325, 1327 (1995) (employer required to bargain over effects of decision to produce additional weekday news program; production of program resulted in increased workloads, split shifts, and greater productivity demands on employees, which were "material, substantial, and significant" changes in employee working conditions).

¹⁰ See Carrier Corp., 319 NLRB 184, 193 (1995) (unilateral merger of pension funds that resulted in improved fund financial health "material and substantial," and hence unlawful, change even though the merger did not result in any changes in pension coverage, benefit levels, or benefit administration); Wightman Center, 301 NLRB 573, 575 (1991) (\$2 hourly increase unlawful midterm unilateral change).

¹¹ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

bargaining rights embodied in contractual provisions granting managerial discretion is normally limited to the term of the contract, unless there is a clear indication that the parties intended that discretion to extend beyond the contract's expiration.¹² This is because such reservations of managerial discretion are not terms or conditions of employment, but rather are contractually limited waivers of the statutory bargaining right.¹³

Initially, we conclude that upon expiration of the contract, the parts department bonuses, which had been paid regularly throughout the life of the contract and at the time of expiration comprised about twenty to thirty percent of the parts employees' monthly pay, were an established part of their terms and conditions of employment and could not be unilaterally changed by the Employer.¹⁴ Further, the changes in the bonus system were "material and substantial." Thus, the initial unilaterally instituted \$210 fixed rate was only slightly higher than the average parts department bonuses in the preceding year. However, when the Employer unilaterally eliminated the fixed bonus after three months, and unilaterally reinstated a sales-based bonus calculation method, the parts department

¹² Blue Circle Cement Co., 319 NLRB 954, 954 (1995), enfd. in relevant part 106 F.3d 413 (10th Cir. 1997) (contractual provision reserving to the employer "the final right to allotment of vacation" did not authorize post-expiration changes in employee vacation scheduling where the contract did not provide for that right to survive the contract); Register-Guard, 339 NLRB No. 47, slip op. at 3-4 (2003) (employer violated 8(a)(5) by unilaterally implementing new sales commissions following contract expiration; contract provision granting employer "sole discretion" to pay wages in excess of the contract rates did not privilege the changes where there was no evidence the parties intended the employer's discretion to survive the contract).

¹³ Ironton Publications, 321 NLRB 1048, 1048 & n.5 (1996); Holiday Inn of Victorville, 284 NLRB 916, 916 (1987).

¹⁴ Cf. Philadelphia Coca-Cola Bottling Co., 340 NLRB No. 44, slip op. at 5 (2003) ("an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue").

bonuses plummeted.¹⁵ The fact that only a small portion of the unit was affected by the changes in the parts department bonuses does not otherwise render the Employer's changes immaterial or insubstantial, as the Board has found 8(a)(5) violations where unilateral employer decisions affected only a single employee in a bargaining unit.¹⁶

The parties' contractual provision giving the Employer the right to institute, change or eliminate bonuses at its discretion did not privilege these unilateral changes. This provision would appear to have been a clear waiver of the Union's statutory right to bargain over bonuses during the life of the contract.¹⁷ However, as in Blue Circle Cement¹⁸ and Register-Guard,¹⁹ there is no evidence

¹⁵ Cf. Bonnell/Tredegear Indus., 313 NLRB 789, 792 n.5 (1994), enfd. 46 F.3d 339 (4th Cir. 1995) (rejecting employer defense that implementing a fixed \$100 Christmas bonus payment in place of the typical \$300 to \$400 calculated under the established noncontractual bonus formula was not a material, substantial, and significant change).

¹⁶ See Georgia Power Co., 325 NLRB 420, 420 n.5 (1998), citing Torrington Co., 305 NLRB 938, 939, n.7 (1991) (rejecting employer's argument that unilateral changes in retiree benefits were too small to support a finding that the changes were substantial and material; "if a change involves the terms and conditions of employment of unit employees, it is a mandatory bargaining subject even if only a relatively few employees are affected"); Carpenters Local Union No. 1031, 321 NLRB 30, 32 (1996) (requiring one unit employee to work an extra one-half hour daily represented a substantial change in working conditions that could not be imposed unilaterally; "the Board is not precluded from finding an 8(a)(5) violation where the employer's unilateral decision affected only one employee"); Sheraton Hotel Waterbury, 312 NLRB 304, 307 (1993) (unilateral reduction in one unit employee's hours unlawful); Central Broadcast Co., 280 NLRB 501, 517-518, 535 (1986) (unilateral increase in salaried unit employee's hours unlawful unilateral change).

¹⁷ See Allison Corp., 330 NLRB 1363, 1365 (2000) (clause specifically constituted a waiver of the right to bargain over a decision to subcontract where it stated that the employer had the exclusive right to subcontract).

¹⁸ 319 NLRB at 954.

¹⁹ 339 NLRB No. 47, slip op. at 3-4.

indicating that the parties intended the waiver to survive after the contract expired. While it is not entirely clear what formula the Employer has used to calculate parts department bonuses in and after September 2003, the Employer's unilateral institution and subsequent cessation of the fixed \$210 bonus and resumption of the sales-based formula together constituted an unlawful course of conduct.²⁰

Accordingly, a Section 8(a)(5) complaint alleging that the Employer unilaterally made changes in the parts department bonuses is warranted, absent settlement.

2. Effects Bargaining

An employer's duty to bargain encompasses the obligation to bargain about the effects on employees of a management decision that has an impact on terms and conditions of employment but is not itself subject to a bargaining obligation,²¹ and to do so in a meaningful manner at a meaningful time.²² Where changes in employee working conditions constitute such a bargainable effect, an

²⁰ See Boise Cascade Corp., 304 NLRB 94, 96 (1991) (employer's unilateral grant of benefits to employees was unlawful, as was its unilateral rescission of the benefits).

²¹ See generally First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677 n.15, 679-682 (1981); Bridon Cordage, 329 NLRB 258, 259 (1999); Litton Financial Printing, 286 NLRB 817, 819-821 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990). See also Holly Farms Corp., 311 NLRB 273, 278 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. granted on other grounds, 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996) (refusal to bargain over effects of nonmandatory merger of operations; new employment terms "were not an inevitable consequence of the functional integration of the transportation departments," but merely one of several responses to changed circumstances). Cf. King Soopers, Inc., 340 NLRB No. 75, slip op. at 1, 2-3 (2003) (although employer may not have been required to bargain over its decision to install scanners in its pharmacies, it was obligated to bargain over "zero tolerance" work rule implementing the decision that subjected employees to discipline).

²² First National Maintenance Corp. v. NLRB, 452 U.S. at 677-678 n. 15 (duty to bargain over effects that arise in connection with a partial closing must occur at a time when the bargaining will be meaningful).

employer violates Section 8(a)(5) and (1) of the Act by implementing those changes without bargaining with the union.²³

The Region has determined that the Employer was not required to bargain with the union over its decision to restructure its operations. However, applying the foregoing principles, we conclude that the Employer's consistent rejection of the Union's multiple timely requests for bargaining over the effects of the restructuring decision on the bargaining unit was unlawful. Initially, our conclusion above that the unilateral changes in the parts department bonus system had a material and substantial impact indicates that the Employer's privileged restructuring had some impact on employees that was subject to bargaining. Further, the Employer's decision to ameliorate the "chaotic" effects of the restructuring on the parts department employees by implementing the fixed \$210 bonus from June through August is, in effect, an Employer admission that the employees would be adversely affected by its privileged managerial decision. The subsequent unilateral termination of the fixed rate and resumption of a sales-based bonus calculation in September was also a bargainable effect because the impact of the restructuring was still resulting in diminished parts sales at Florin Road.²⁴ Had the Employer engaged in proper effects bargaining, the Union could, for example, have tried to secure a higher fixed bonus amount and/or sought to extend such a benefit for a longer period of time in order to insulate the parts employees from the ongoing depressed sales. By refusing to bargain over these effects, the Employer thwarted the Union's ability to protect and represent the bargaining unit employees. Accordingly, the complaint should also allege, absent settlement, that the Employer's overall refusal to engage in effects bargaining violated Section 8(a)(5).

As to the effects bargaining obligation, it appears that evidence adduced during the investigation indicates that the Employer's decision to restructure its business

²³ See NLRB v. Litton Financial Printing Div., 893 F.2d 1128, 1133-1134 (9th Cir. 1990).

²⁴ The Employer's explanation that the decline in parts department bonuses after August was due to insufficient help, and its concomitant decision to turn away potential customers, are tantamount to a further admission that the restructuring had a substantial impact on the unit employees.

arguably had a significant impact on other working conditions. These include, but are not limited to, the impact on the productivity of unit mechanics, particularly those who previously had extensive experience with and primarily serviced Acuras and Volkswagens. The removal of those product lines could have a significant impact on the productivity of mechanics who are now performing work on products for which they have little or no training. These mechanics, as well as any assigned to the new motorcycle work, would be similarly hampered in their ability to perform. To the extent the Union's claims that some mechanics were eligible for productivity bonuses and/or had elected the contractual option to work on a flat per-job rate can be confirmed, the impact of having to perform unfamiliar work would clearly be significant. Employee efficiency and productivity would also have been significantly affected when mechanics had to spend work time retrieving or waiting for the tools and other equipment that had initially been moved to Elk Grove.

Like the changes in the parts department bonuses, all of these matters could have been addressed and ameliorated in effects bargaining.²⁵ [FOIA Exemption 5

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B.J.K.

²⁵ To offset the impact of performing unfamiliar work on the mechanics' productivity, the Union might have secured additional training benefits, more lenient performance standards, additional compensation during the transition, or credit for work time spent retrieving supplies and equipment from Elk Grove, etc.