

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

# Advice Memorandum

DATE: May 25, 2011

TO : Robert Chester, Regional Director  
Region 6

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

SUBJECT: Keywell, LLC 596-0420-5000  
Case 6-CA-37249 596-0460

This case was submitted for advice as to whether the Employer's unilateral implementation of a change in the work schedules and defined work week of bargaining unit employees constitutes a continuing violation of the Act allowing complaint to issue, or whether the charge is barred by Section 10(b) because the Employer implemented the new work schedule and work week more than six months prior to the Union's filing of the charge. We agree with the Region that the Union's charge is time-barred by Section 10(b).

### **FACTS**

The Union has represented a unit of production and maintenance employees at the Employer's West Mifflin, Pennsylvania facility for many years. Article XII of the parties' current collective-bargaining agreement (entitled "Hours of Work and Overtime") states, among other things, that the standard workweek shall start on Monday and consist of "eight (8) consecutive hours each day for five (5) days or ten (10) consecutive hours each day for four (4) days, provided the days off are consecutive."

On April 9, 2009, the Employer presented the Union with a proposed Memorandum of Agreement (MOA) regarding implementation of a new work schedule consisting of continuous 12-hour shifts and a change in the start of the workweek from Monday to Sunday. On April 13, the parties met to discuss the proposed MOA. Although the Union did not agree to the proposed changes, the Employer announced that it would implement its proposal on May 3, 2009. On May 1, the Employer again presented the proposed MOA to the Union. The Union refused to execute this agreement and insisted on bargaining. On May 3, the Employer implemented the change in the work schedule and the start of the workweek.

On May 5, 2009, the Union filed a grievance regarding these changes. An arbitration hearing was held in February 2010. On June 18, 2010, the arbitrator issued an award

granting the grievance. The arbitrator concluded that the Employer violated Article XII when it unilaterally changed the work schedule and the start of the workweek. The award stated that the Employer must bargain with the Union in order to maintain the new schedule, but that "[f]or reasons of stability and efficiency, the new schedule can stay in place while the Parties are bargaining." The award also provided a remedy for any employee who lost overtime on the first Sunday of the new schedule.

The parties met five times between July and September 2010 to bargain over these issues but were unable to reach an agreement. On January 19, 2011, the Union sent a letter to the arbitrator informing her that no agreement had been reached and asking her to clarify the award. On February 9, the arbitrator responded that she no longer had jurisdiction over the matter.

On February 25, 2011, the Union filed the instant unfair labor practice charge alleging that the Employer violated Section 8(a)(5) and (1), over the preceding six months, by regularly and continuously violating the collective-bargaining agreement by unilaterally changing the employees' work schedules.

#### **ACTION**

We agree with the Region that the Union's charge is untimely under Section 10(b) and should be dismissed, absent withdrawal.

Section 10(b) precludes issuance of a complaint based upon any unfair labor practice occurring more than six months prior to the filing of the charge and as to which the charging party had clear and unequivocal notice.<sup>1</sup> When an employer unilaterally discontinues a contractual benefit, the 10(b) period begins to run when the union receives clear and unequivocal notice that the employer no longer intends to honor that contract provision. Once the charging party receives such notice, it cannot challenge as separate violations the employer's subsequent refusal, more than six months following that notice, to implement the same benefit because that action does not constitute a new unilateral change; rather, the employer is merely adhering to its initial, previously announced decision to

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<sup>1</sup> See, e.g., Allied Production Workers Union Local 12 (Northern Engraving Corp.), 331 NLRB 1, 2 (2000); AMCAR Div., ACF Industries, 234 NLRB 1063, 1063 (1978), modified on other grounds, 596 F.2d 1344 (8<sup>th</sup> Cir. 1979).

discontinue the benefit.<sup>2</sup> For example, in Continental Oil Co.,<sup>3</sup> the Board held that an employer's adherence to its method of allocating overtime, which was initially established more than six months before the filing of the unfair labor practice charge, was not a unilateral change within the 10(b) period and not a continuing violation.<sup>4</sup> The ALJ, affirmed by the Board, noted that the employer had announced its changed method of allocating overtime to employees twice in writing and that it then followed its method under two subsequent agreements without protest.

Similarly, in Arrow Line, Inc.,<sup>5</sup> the Board held that an employer's adherence to its method of calculating vacation pay, which was initially established four years before the filing of the unfair labor practice charge (and applied during the parties' 1996 and 1999 contracts), was not an unlawful midterm modification of the parties' collective-bargaining agreement even though it diverged from the explicit terms of the contract. In finding the charge time-barred, the Board emphasized that the union had clear and unequivocal notice that the respondent had adhered to a different vacation pay practice long before the Section 10(b) period, and that the employer had merely continued to pay vacation benefits to employees based on the understanding it had applied since 1996 without protest.<sup>6</sup>

In the instant case, the Employer provided clear notice to the Union in April 2009 that it no longer intended to honor Article XII of the contract; at that

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<sup>2</sup> See The Arrow Line, Inc., 340 NLRB 1 (2003); Continental Oil Co., 194 NLRB 126 (1971).

<sup>3</sup> 194 NLRB at 126.

<sup>4</sup> The Board has also held that when an employer unilaterally discontinues a contractual benefit that formerly was granted on a periodic basis (such as a benefit fund contribution), then each refusal to grant that contractual benefit within the applicable 10(b) period constitutes a separate and distinct violation, a "self-contained unfair labor practice" that can be remedied upon the filing of a charge within six months after each denial of that particular benefit. See Farmingdale Iron Works, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981). As noted by the Region, this case, unlike Farmingdale, does not involve a periodic fringe benefit but rather a change in work schedules affecting every employee every day.

<sup>5</sup> 340 NLRB at 1.

<sup>6</sup> Ibid.

time, it announced that it would be implementing the proposed schedule changes outlined in the MOU on May 3, 2009. Indeed, on May 5, after the proposal had been implemented, the Union filed a grievance over these changes. A continuing violation theory does not apply here because the Employer announced at the outset that it was changing the work schedule and work week. Thus, as in Continental Oil Co. and Aaron Line, by failing to follow the contractual scheduling provisions in later weeks, months, and years, the Employer was merely adhering to the method of scheduling that it had announced and established outside the 10(b) period.

Since the Union's charge is untimely under Section 10(b), it should be dismissed, absent withdrawal.

B.J.K.