

UNITED STATES GOVERNMENT
National Labor Relations Board



Memorandum

TO : Roger Goubeaux, Acting
Regional Director
Region 31

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: I.A.T.S.E.
(The Vidtronics Company, Inc.)
Case 31-CB-3018

DATE: February 15, 1979

596-0822
501-8421
536-2581-0160
536-2581-3370
542-0125-9000
542-3333
554-1450-0120
554-1450-0140
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554-1450-7000
554-1467-3033

This Section 8(b)(1)(A), 8(b)(1)(B) and 8(b)(3) case was submitted for advice concerning the issue of, inter alia, whether the Union breached its duty of fair representation by insisting to impasse on a provision pursuant to which some unit work would be performed by union members who were not within the unit.

FACTS

The Employer is engaged in the business of videotape production and, primarily, post-production work. It has always been signatory to its own independent contract with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter "Union"), and has never signed either the industry's Basic Agreement 1/ or the Videotape Electronics Supplemental Basic Agreement. 2/

- 1/ The Basic Agreement is a general agreement, covering all facets of work in the motion picture industry, between the International Union and the Association of Motion Picture and Television Producers (AMPTP), which is the bargaining representative for employers in the multi-employer bargaining unit.
- 2/ This contract, otherwise known as the Green Book, is referenced in the Basic Agreement and covers both the production and post-production phases of videotape work.



Since the Employer was not signatory to these industry-wide agreements, its employees comprise their own separate bargaining unit, are all members of the same local regardless of job specialty, and are used interchangeably across any and all production and post-production job classifications for which the Employer judges them to be qualified technically. Moreover, whereas an employer signatory to the Basic Agreement must perform its production work using employees referred to it from the Industry Experience Roster, the Employer's production work is done by employees chosen by the Employer, rather than from the categories on the Industry Experience Roster. 3/

On July 31, 1978, 4/ the most recent collective bargaining agreement between the Employer and the Union expired. Throughout the course of negotiations which began in early June, the Union demanded, over the strenuous objections of both the Employer and the employee members of the negotiating committee, that no agreement would be executed until the Employer had signed the Basic Agreement and the Green Book. The independent agreement thus would become subordinate to the terms of these two industry-wide contracts, rendering all of the Employer's production work subject to the application of the Industry Experience Roster, 5/ and making the Employer a part of the multi-employer unit. As a practical result, the Employer's

3/ The history and application of the Industry Experience Roster is discussed at length in MPO-TV of California Inc., 197 NLRB 1187.

4/ All dates herein are 1978 unless otherwise specified.

5/ Under the recently expired contract, the Employer was privileged to hire part-time temporary help for production work in accordance with the terms of the Green Book. This required hiring employees from the Industry Experience Roster. However, these non-unit employees were hired only when the Employer could not, as it generally did, utilize its own employees to perform this work.

current employees, who had low roster standing, would have no priority in the assignment of all unit production work which would then be performed by non-unit employees with high roster standing.

On July 28, an agreement was reached between the parties, and was ratified by the employees, concerning wages and other terms and conditions of employment with the only remaining dispute being the Union's insistence that the Employer sign the Basic Agreement and the Green Book and perform all of its production work pursuant to the terms of the Green Book. ^{6/} The parties subsequently agreed to implement the other agreed upon terms of employment. On August 1, the Employer signed the Basic Agreement omitting the provision which required it to become a member of the multi-employer bargaining group. Under the Board's decision in MPO-TV of California Inc., *supra*, this omission would relieve the Employer of any obligation to adhere to the provisions of the Industry Experience Roster in employing personnel to perform videotape production work. ^{7/} In support of its position, the Employer stated that a limitation on its ability to use its own employees for production work could result in a layoff of several of its staff technicians. The Union still refused to sign the contract unless the Industry Experience Roster requirement was incorporated therein, relying on the fact that many of its other members were in need of employment.

^{6/} An individual employee then filed the instant charges alleging that the Union's insistence to impasse on this subject was violative of the Act. The Employer, however, has refrained from filing any charges against the Union.

^{7/} Nonetheless, the Employer would continue its practice established under the expired collective bargaining agreement of hiring Roster personnel for production work on a part-time temporary basis.

The parties maintained their respective positions until November 2 when the Employer and the Union executed a collective bargaining agreement in which the Employer finally acceded to the Union's demand that the Employer become part of the industry's multi-employer bargaining unit. As a compromise, however, the parties agreed that the Employer would remain privileged to assign its own staff employees to work on production without regard to their Industry Experience Roster status, provided that the employees had seniority status with the Employer as of March 1, 1977. 8/ This agreement limited the applicability of such "grandfather" rights to situations where production work takes place within the Employer's production facilities. Thus, this agreement permits a preference in the assignment of outside production work for non-unit Industry Experience Roster employees over unit employees, and fails to "grandfather" and thus protect the work opportunities of those eleven of the fifty unit members who were not employed as of March 1, 1977. 9/

ACTION

It was concluded that, absent settlement, complaint should issue alleging that the Union violated Sections 8(b)(1)(A) and 8(b)(3) by insisting to impasse on and agreeing to a provision requiring the Employer to accord a preference to one group of employees to the detriment of some unit employees in the assignment of its

8/ The date of March 1, 1977, is significant because the Union and the AMPTP opened the Roster on that date, for a six-month period, to employees who had secured sufficient qualifying experience for roster placement from employers who were not members of the multi-employer bargaining unit. Cf. MPO-TV of California Inc., supra.

9/ Since it is unknown what percentage of bargaining unit work is performed outside the Employer's production facilities, the impact of this limitation on the "grandfather" rights of unit members is unclear.

production work. ^{10/} However, the Section 8(b)(1)(B) allegation should be dismissed, absent withdrawal. In this regard, the evidence does not demonstrate that the Employer was "restrained or coerced" in the selection of its bargaining representative. The mere fact that the Union refused to sign the recently negotiated collective bargaining contract until the Employer agreed to join a multi-employer bargaining unit would not be considered restraint or coercion absent a threat or use of economic weaponry or force. Moreover, it was noted that the Employer ultimately agreed to become part of the Association, and did not file a Section 8(b)(1)(B) charge invoking its statutory right to be independent of the Association.

As a preliminary "jurisdictional" matter, it was noted that all of the instant charges pending against the Union could be reviewed on the merits despite the fact that the charges were filed by an individual employee rather than the Employer. ^{11/} An individual clearly has standing to file a Section 8(b)(1)(A) or 8(b)(1)(B) charge. Although the General Counsel has exercised his discretion not to proceed on certain kinds

^{10/} The allegations contained in the charge were not viewed as rendered moot by the subsequent execution of the collective bargaining agreement because the "grandfather" rights have not been extended to all unit employees with respect to all unit production work. Rather, a preference in work assignments still exists in favor of Industry Experience Roster employees over 22 percent of the unit, and the "grandfathering" does not apply to production work performed outside the Employer's own production facilities.

^{11/} Section 102.9 of the N.L.R.B. Rules and Regulations, Series 8, as amended, January 1, 1965, provides:
A charge that any person has engaged in or is engaging in any unfair labor practice . . . may be made by any person.

Cf. Monroe Manufacturing Co., 167 NLRB 1074 n. 2, modified on other grounds, 403 F. 2d 197 (C.A. 5, 1968); Utility Workers Local 111 (Ohio Power Co.), 203 NLRB 230 n. 1, enforced, 490 F. 2d 1383 (C.A. 6, 1974).

of individually filed refusal to bargain charges, the Section 8(b)(3) charge involved here will be processed, since the alleged refusal to bargain is inextricably intertwined with an alleged breach of the duty of fair representation and the evidence indicates that the Union and the unit employees have divergent interests in the matter.

Concerning the Section 8(b)(1)(A) charge, although a union is permitted a "wide range of reasonableness" in the area of contract negotiations, nonetheless, that broad discretion is limited. ^{12/} Thus, a union may agree on certain contract proposals which will affect certain groups whom it represents more or less favorably than others, provided that it acts reasonably and in good faith. ^{13/} The duty of fair representation requires that variations in the impact of certain contract terms upon different classes of employees be "based on differences relevant to the authorized purpose of the contract," ^{14/} and not the result of arbitrary reasons or unfair classifications. ^{15/} Once it is shown that a union has preferred

^{12/} Ford Motor Co. v. Huffman, 345 U.S. 330, 338. See generally, Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?, 126 U. Pa. L. Rev. 251, 257 (1977).

^{13/} Ford Motor Co. v. Huffman, *supra*, at 337-38. Cf. Teamsters, Local No. 671 (Airborne Freight Corp.), 199 NLRB 994, and Warehouse Union, Local 860 (The Emporium), 236 NLRB No. 101. In both cases, the unions were held to have violated Section 8(b)(1)(A) because of their failure to represent unit employees in a fair and impartial manner which resulted in the discharge of some unit employees. Thus, in Airborne Freight, the Board found a breach of the duty based on the union's bargaining stance which reflected a complete abdication of its role as the collective bargaining representative of certain unit employees. In The Emporium, the finding of a violation was premised on the union's continued demand for a wage increase which it knew would lead to the termination of some unit employees and its failure to so advise the unit employees.

^{14/} Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 203 (1944). See generally, Local 157, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Republic Die and Tool Co.), Case 7-CB-4234, Advice Memorandum dated Feb. 16, 1979.

^{15/} Miranda Fuel Co., 140 NLRB 181, 185-86, enforcement denied, 326 F. 2d 172 (C.A. 2, 1963). For example, in Barton Brands, Ltd., 213 NLRB 640, as modified in 228

one group of employees over another group in the course of contract negotiations, the burden rests upon the union to articulate and prove some rational justification for its actions. 16/

In the instant case, the Union represented Vidtronics employees in a single-employer unit for some time. It has now sacrificed the jobs of some of these employees in favor of others who have had no experience in that unit, although they apparently have had experience in the multi-employer unit into which Vidtronics was entering.

The mere fact that a union sacrifices the jobs of employees whom it represents does not necessarily constitute a breach of the duty of fair representation. The question is whether there is a reasonable or rational basis for the action, as distinguished from an arbitrary or invidious basis. For example, it may well be that a union could agree to a provision whereby minorities were accorded a preference in work assignments as part of affirmative action efforts, even though such action resulted in the displacement of unit employees.

In the instant case, the Union argues that it was acting in the interest of employees on the Roster, 17/ i.e. to give unemployed statutory employees who have relatively high industry experience a chance to share in the work performed by currently employed statutory employees who have relatively low industry experience.

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15/ NLRB 889, the Board found that a union violated its duty of fair representation when it entailed the seniority of a group of its employees for the purpose of advancing the political cause of a union official. The objective of satisfying the desires of a majority of the unit at the expense of the minority was rejected as a valid justification.

16/ See, e.g., General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.), 217 NLRB 616, 618, enforced, 545 F. 2d 1173 (C.A. 9, 1976). Although that case concerned the duty of fair representation in the context of contract administration, it would be argued that the requirement that the Union have a rational basis for its action also applies to contract negotiations.

17/ At all relevant times, the Roster apparently has operated in a non-discriminatory manner.

The work-sharing rationale has been approved as a reasonable justification by the Board in the context of the operation of an exclusive hiring hall where the problem of unemployment was present. ^{18/} Thus, absent proof of invidious discrimination, the Union's demand that the Employer assign its production work to employees with high Industry Experience Roster standing arguably also falls within the wide range of discretion afforded to a union, if sufficient evidence existed to prove that the Union was thereby trying to spread the work in an equitable manner among those whom it represents. However, the Union's asserted rationale does not withstand scrutiny. There is no basis for believing that the Union's proposal would, in fact, spread the work more equitably. Thus, the evidence does not show that those receiving the preference by virtue of their high standing on the Roster have been unemployed for greater periods of time than those employees who are performing the production work at the present time. Rather, it appears that high Roster standing is a function of an employee's length of experience and not a function of his or her length of time unemployed. ^{19/} Since the Union's sole asserted justification cannot be shown to have a rational base, the clause which takes away the jobs of employees with long experience in the historic unit was arbitrary and thus constituted a breach of its duty of fair representation in violation of Section 8(b)(1)(A). ^{20/}

^{18/} See, e.g., New York Typographical Union Number Six, ITU (Lawrence F. Cafero), 144 NLRB 1555, affirmed, 336 F. 2d 115 (C.A. 2, 1964).

^{19/} See, MPO-TV of California Inc., *supra*.

^{20/} Although the Region may rely on supportive language in Airborne Freight, *supra*, and The Emporium, *supra*, the cases are distinguishable from the instant matter. As noted *supra*, in the former, the union ceased to be the representative of employees performing certain unit work; here, the Union will remain the representative of the employees who will perform the unit work. In Emporium, the union failed to apprise the employees as to how the clause would affect them.

It would also be argued that the Union's insistence on this provision constituted a refusal to bargain in violation of Section 8(b)(3). Although the scope of unit work is a mandatory subject about which a union is free to bargain to impasse,^{21/} such insistence loses its protected status when the proposal is unlawful under Section 8(b)(1)(A).^{22/}

The complaint should not allege, however, that the Union violated Section 8(b)(3) when it insisted to impasse on the proposal that the Employer join the multi-employer bargaining unit. It is well established that the designation of an employer's representative for purposes of collective bargaining is a nonmandatory subject.^{23/} Therefore, the Union's refusal to sign a contract agreed upon in all other respects was impermissible under Section 8(b)(3). Nonetheless, since the Employer ultimately did agree to join the AMPTP, and the record does not support an inference that coercion was used to procure the Employer's consent to the provision,^{24/} a Section 8(b)(3) allegation premised on the Union's demand that the Employer join and be bound by negotiations in the multi-employer unit is unwarranted.

^{21/} Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

^{22/} See International Longshoremen's Local No. 13 (Pacific Maritime Association), 192 NLRB 260, affirmed, 210 NLRB 952, enforced, 549 F. 2d 1346 (C.A. 9, 1977).

^{23/} See, e.g., Retail Clerks Union, Local 770 (Fine's Food Co.), 228 NLRB 1166; Southern California Pipe Trades District Council No. 16 (Aero Plumbing Co.), 167 NLRB 1004; Metropolitan District Council of Philadelphia (McCloskey & Co.), 137 NLRB 1583.

^{24/} Cf. Warehousemen's Union Local 17 (Los Angeles By-Products Co.), 182 NLRB 781, enforced, 451 F. 2d 1240 (C.A. 9, 1971), where the Board found that the execution of a collective bargaining agreement does not render a Section 8(b)(3) charge moot where the union coerced the employer to do so by engaging in a strike and other forms of economic pressure.

The allegation that the Union violated Section 8(b)(1)(B) by insisting to impasse that the Employer designate the AMPTP as its representative in future contract negotiations should be dismissed. Although it is not necessary to prove that a union has engaged in such tactics as violence, intimidation or economic reprisals in order to establish "restraint or coercion" within Section 8(b)(1)(B), 25/ a mere insistence to impasse on a permissive contract term does not constitute unlawful "restraint or coercion." 26/ There is no indication that the Union ever engaged in any other form of pressure than an insistence to impasse on the subject. Moreover, the Employer never filed a charge in protest of the Union's action, and it subsequently signed a contract agreeing to this provision and now argues, in conjunction with the Union, that the issue is moot. In view of all of the aforementioned factors, noting particularly the lack of evidence of coercion, and the fact that Section 8(b)(1)(B) was designed primarily to protect the Employer, further proceedings with respect to this allegation would not effectuate the policies of the Act.



H.J.D.

25/ Sheet Metal Workers, Local 59, 227 NLRB 520, 521.

26/ Local 80, Sheet Metal Workers (Turner-Brooks, Inc.),
161 NLRB 229.