

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

Advice Memorandum

DATE: November 24, 2009

TO : Jonathan B. Kreisberg, Regional Director
Region 34

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

SUBJECT: C & D Security, Inc.
Case No. 34-CA-11886

240-3367-3360
240-3367-5075
240-3367-6762-6700
240-3367-8301-3300
240-3367-8362-8000
240-3367-8367-5000

The Region submitted this case for advice as to: (1) whether the Region should defer to an arbitrator's decision that the Employer did not violate the collective-bargaining agreement by unilaterally adding eligibility requirements to job postings; and (2) if not, whether the Union waived its right to bargain over this unilateral change. We conclude that the Region should defer to the arbitral award because it is susceptible to an interpretation that is consistent with the Act. We therefore do not reach the question of whether the Union waived its right to bargain over the alleged unilateral change.

FACTS

On March 1, 2007,¹ C & D Security, Inc. (the Employer) began providing security services at all federal facilities in Connecticut under a contract with the Department of Homeland Security. The Employer's predecessor contractor had a collective-bargaining relationship with the International Union, Security Police and Fire Professionals of America, Local 691 (the Union) covering its guard employees. The Employer hired its predecessor's employees and recognized the Union but refused to adopt the predecessor's collective-bargaining agreement.

On July 12, the Employer and the Union executed a Letter of Understanding (LOU) to resolve certain issues requiring immediate attention, pending negotiations for a collective-bargaining agreement. One such issue involved

¹ All dates are in 2007 unless otherwise indicated.

the filling of open positions. Under the predecessor employer's collective-bargaining agreement, job openings were filled through a posting procedure. The Employer had not utilized this procedure and instead had assigned newly-hired employees to open positions. Under the LOU, the Employer agreed that upon ratification of a collective-bargaining agreement, it would "post all open positions filled in the interim by assignment."

The parties reached agreement on a contract in late August, effective retroactively to March 1. During negotiations for that agreement, the Employer proposed that employees only be eligible to bid on posted positions if they had been in their current jobs for a year. The Union rejected that proposal, and the parties ultimately agreed in Article 13.8, governing job postings, that "[o]nce any employee accepts a new post assignment, that employee will not be eligible to bid on future job postings for at least six months." In addition, Article 12.12 provided that "[s]eniority shall be applicable" to job postings. During bargaining, the parties did not discuss any limitation upon eligibility based on the bidder's disciplinary record.

Article 7 of the collective-bargaining agreement contains a management rights clause that provides in pertinent part:

7.1 The Management of the Company and the direction of its employees, including but not limited to the establishment of reasonable work rules and regulations, the hiring, promoting, demoting and rehiring of employees in connection with any reduction or increase in working forces, the suspending, discharging or otherwise disciplining of employees for just cause are the exclusive functions of the Company, to the extent that any of such matters are not otherwise covered or provided for in this Agreement.

In early September, the Employer provided the Union with a copy of the job posting that it intended to use to rebid the positions filled during the interim period between the Employer's assumption of its Homeland Security contract and the ratification of the collective-bargaining agreement. That posting imposed two qualifications for bidders in addition to the standard job requirements: applicants had to have been discipline free for one year and to have worked continuously in their current positions for six months. The Union objected to both of these qualifications, but the Employer insisted that it was acting within its management rights.

On September 24, the Employer began posting jobs and imposed these two qualifications over the Union's objection. The Union grieved that action on October 3.

In mid-October, employee *FOIA Exemptions 6 and 7(c)* was denied the right to bid on his job because of the discipline-free qualification. As a result, he was demoted from a full-time position to a part-time position.

The second amended charge in this case, filed February 28, 2008, alleges that the Employer violated Section 8(a)(1) and (5) by unilaterally implementing the discipline-free qualification for employees bidding on posted positions and by applying that qualification to reject employees, including *FOIA Exemptions 6 and 7(c)*.² The Region deferred processing the charge under Collyer.³

The parties proceeded to arbitrate the Union's grievance, and the arbitrator issued a decision denying the grievance on December 24, 2008. Specifically, the arbitrator considered whether the Employer's September 24 posting violated the contractual recognition clause, the management rights clause, the posting provision in Article 13-13.8, the seniority provision in Article 12-12, and the "zipper" clause. The arbitrator "concluded that the Company was in a position to impose these requirements because of the management rights clause in the Agreement." She determined that Article 7.1 gave the Employer "the exclusive right to hire employees to the extent that hiring was not otherwise covered or provided for in the Agreement." She then found that Article 12.12's provision that seniority "shall be applicable" to job postings did not mean that the Employer could not consider other relevant factors, such as the employee's disciplinary record. The arbitrator also noted that "the setting of qualifications for hiring is always a management right[,]" suggesting that she may also have relied upon an inherent management rights theory. Ultimately, she concluded that the Employer did not violate either the collective-bargaining agreement or the LOU by requiring that applicants be discipline free for one year and have six months of service in their current positions.

ACTION

² The Union had dropped its objection to the six-month continuous-service requirement.

³ See Collyer Insulated Wire, 192 NLRB 837 (1971).

We conclude that the Region should defer to the arbitral award in this case because it is susceptible to an interpretation that is consistent with the Act. Accordingly, the Region should dismiss the instant charge, absent withdrawal.

The Board will defer to an arbitral award where the arbitration proceedings were fair and regular, all parties agreed to be bound by the award, the arbitrator considered the unfair labor practice issue, and the award is not "clearly repugnant" to the Act's purposes and policies.⁴ The party seeking to set aside the arbitral award has the burden of showing that deferral is inappropriate.⁵

Here, the deferral question turns upon whether the arbitral award is "clearly repugnant." An award is "clearly repugnant" if it is "palpably wrong" and "not susceptible to an interpretation consistent with the Act[.]"⁶ When determining whether an award is "clearly repugnant," the Board examines all the circumstances, including the parties' contract language, bargaining history, and past practices.⁷ An award may be susceptible to an interpretation consistent with the Act even if it is not "totally consistent" with Board precedent.⁸

As a preliminary matter, we note that changes in job qualifications for unit employee positions are a mandatory subject of bargaining and therefore the Employer cannot unilaterally implement them unless the Union has waived its right to bargain.⁹ Further, the Board consistently has held

⁴ See Olin Corp., 268 NLRB 573, 573-74 (1984); Spielberg Manufacturing Company, 112 NLRB 1080, 1082 (1955).

⁵ Olin Corp., 268 NLRB at 574.

⁶ Ibid.

⁷ Southern California Edison Co., 310 NLRB 1229, 1231 (1993), petition for review denied sub nom. Utility Workers Local 246 v. NLRB, 39 F.3d 1210 (D.C. Cir. 1994) (Board deferred to arbitral award finding that employer's contractual reservation of the right to make reasonable safety rules permitted the unilateral imposition of a drug and alcohol testing program).

⁸ Olin Corp., 268 NLRB at 574.

⁹ See, e.g., Cardi Corp., 353 NLRB No. 97, slip op. at 1, 5 (2009) (employer violated section 8(a)(5) by unilaterally implementing a rule requiring that unit employees possess a

that a waiver of bargaining rights must be "clear and unmistakable" and that a generally worded management rights clause does not in itself establish an effective waiver.¹⁰

Nevertheless, the Board has deferred to arbitral awards which did not apply this statutory waiver standard, so long as the arbitrator relied on contractual language, bargaining history, and/or past practice to determine that the parties intended to permit the unilateral action at issue.¹¹ Thus, the Board has deferred to awards upholding unilateral action "justified by a contractual management-rights clause ... even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver."¹²

valid driver's license as a condition of employment); Grand Rapids Press of Booth Newspapers, 327 NLRB 371, 376 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000) (employer violated Section 8(a)(5) by unilaterally imposing a local residency requirement for substitute pressmen). See also United Cerebral Palsy of New York City, 347 NLRB 603, 607 (2006) (unilateral changes to procedures for posting vacancies violated Section 8(a)(5)).

¹⁰ See Provena St. Joseph Medical Center, 350 NLRB 808, 810-12 & fn.19 (2007); Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("the Board has repeatedly held that generally worded management rights clauses or "zipper" clauses will not be construed as waivers of statutory bargaining rights").

¹¹ See Southern California Edison Co., 310 NLRB at 1231 (deferral where contract gave employer "the right to draft reasonable safety rules for employees," and parties' past practice and bargaining history supported conclusion that unilaterally-implemented drug and alcohol testing program was a safety rule); Dennison National Co., 296 NLRB 169, 170 (1989) (deferral where arbitrator relied on parties' past practice and general management rights clause to conclude contract permitted unilateral elimination of job classification).

¹² See Motor Convoy, 303 NLRB 135, 136 (1991) (deferral to award that was "susceptible" to interpretation that superseniority was necessary to the performance of steward duties even though opinion did not expressly apply that statutory standard); Denison National Co., 296 NLRB at 170 (deferral appropriate notwithstanding arbitrator's failure to use "clear and unmistakable waiver" standard).

On the other hand, the Board has refused to defer where the arbitrator determined only that the unilateral action at issue was not prohibited by the collective-bargaining agreement.¹³ For example, in Kohler Mix Specialties, where the arbitrator had found only that the contract did not prohibit the employer from unilaterally subcontracting its over-the-road delivery operation, the Board refused to defer to the award because it was not conclusive of the statutory issue.¹⁴ The absence of a contractual prohibition is "not tantamount" to a finding that the Union waived its right to bargain and agreed to authorize unilateral action.¹⁵

Similarly, the Board has held that deferral is not appropriate where an arbitrator relies upon contractual silence and "a 'basic management prerogative'" or "residual management rights" to uphold unilateral action.¹⁶ In Columbian Chemicals Co., the Board upheld the Judge's finding that an award was "repugnant" to the Act where the arbitrator did not rely upon a management rights clause but found, "*quite apart from the contract,*" that the employer had a "'management prerogative'" to unilaterally establish

¹³ See Kohler Mix Specialties, 332 NLRB 630, 631 (2000) (no deferral where arbitrator concluded contract did not prohibit unilateral subcontracting); Haddon Craftsmen, 300 NLRB 789, 790 fn.5 (1990), review denied mem. sub nom. Graphic Communications International Union, Local 97B v. NLRB, 937 F.2d 597 (3d Cir. 1991) (no deferral where arbitrator found contract did not specifically bar unilateral reclassification of employees but did not find a contractual reservation of the right to undertake unilateral action); Armour & Co., 280 NLRB 824, fn.2 (1986) (no deferral where arbitrator merely found employer was not contractually prohibited from taking unilateral action at issue and did not consider whether the union waived its right to bargain).

¹⁴ 332 NLRB at 631.

¹⁵ Ibid.

¹⁶ See Columbian Chemicals Co., 307 NLRB 592, fn.1 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1993) (no deferral where arbitrator found unilateral changes to absenteeism policy were exercise of "basic management prerogative"); Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, fn.3, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (no deferral where arbitrator relied upon "residual management rights theory" and contractual silence to uphold unilateral implementation of attendance control policy).

plant rules and then found nothing in the contract that took away that prerogative.¹⁷

Here, the arbitrator expressly found that the management rights clause of the parties' contract authorized the Employer's unilateral imposition of the one-year discipline-free requirement for bidders of posted positions. Although she also examined the contract for prohibitions of the unilateral action, she did so as part of her interpretation of the management rights clause language limiting the exercise of the enumerated rights "to the extent that any of such matters are not otherwise covered or provided for in this Agreement." She also properly considered the parties' bargaining history and past practice in determining that the employer's unilateral action did not violate the contract. The fact that the Board might have reached a different result under Provena, as well as the arbitrator's failure to explicitly apply the clear and unmistakable waiver standard, do not render her award "repugnant" or "palpably wrong."

Moreover, to the extent that the arbitrator may also have relied upon a non-contractual "inherent management rights" prerogative to set hiring qualifications, the award is nonetheless "susceptible" to an interpretation consistent with the Act. In Smurfit-Stone Container Corp., the Board deferred to an arbitral award even though the arbitrator relied in part on an "inherent management rights" theory in finding that the employer had the right to unilaterally implement a new attendance policy.¹⁸ The employer had argued that its actions were privileged both by the contractual management rights clause and by inherent management rights. The Board found that the award was "at least susceptible" to an interpretation that it was based on the arbitrator's construction of the management rights clause.¹⁹ Applying that analysis, the arbitral award here is likewise susceptible to an interpretation that it was based on a construction of the management rights clause. In fact, the arbitral award at issue here is even more clearly based on an interpretation of the parties' agreement than the award at issue in Smurfit-Stone Container.

Under these circumstances, we conclude that the arbitral award here is susceptible to an interpretation

¹⁷ 307 NLRB at 592, fn.1, 594 (*italics in original*).

¹⁸ 344 NLRB 658, 659 (2005).

¹⁹ Id. at 660.

that is consistent with the purposes and policies of Section 8(a)(5) and does not violate the Spielberg "clearly repugnant" standard. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.