



Employee discipline was not mentioned anywhere else in the agreement, but the Employer loosely applied a progressive disciplinary system. Although this system was not rigidly followed, discipline usually started with a written warning, followed by suspension and discharge.

Following the expiration of the collective-bargaining agreement, the parties bargained to a bona fide impasse on March 30, 2009, and the Employer implemented its last, best, and final offer on April 13, 2009. Among the provisions implemented was the section of the management rights clause quoted above, which the parties had agreed to in negotiations. The Employer did not implement the contractual grievance and arbitration provision, though it told the Union it would agree to continue the grievance procedure short of arbitration.

On December 27, 2011, the Employer issued three-day suspensions to two housekeepers for unsatisfactory work performance. The Union filed grievances on behalf of the housekeepers on January 4, 2012, arguing that the employees should have received warnings for a first offense. The Employer denied the grievances on January 9. It noted photographic evidence of unclean rooms, and the importance to the hotel of that particular suite of rooms. In addition, the Employer pointed out the disciplinary discretion allowed under the above-quoted management rights clause and that it had never rigidly followed a progressive disciplinary system under the old contract.

### ACTION

We conclude that the Employer did not violate Section 8(a)(1) and (5) when it implemented the disciplinary portion of the management rights clause because the clause does not grant the Employer the unfettered discretion that the Board in *McClatchy* found to be inherently destructive of the collective-bargaining process.

When in the course of collective bargaining, the parties reach a lawful impasse, it “in effect, temporarily suspends the usual rules of collective bargaining, by enabling the interjection of new terms and conditions into the employment relationship even though no agreement was reached.”<sup>2</sup> Such post-impasse implementations help break the impasse, ultimately fostering collective bargaining towards a final agreement.<sup>3</sup> In *McClatchy*, however, the

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<sup>2</sup> *McClatchy Newspapers, Inc.*, 321 NLRB at 1389.

<sup>3</sup> *Id.* at 1380–90.

Board crafted a narrow exception to the implementation-upon-impasse rule for clauses that confer broad discretionary powers on an employer to unilaterally change employee pay.<sup>4</sup> The Board held that such proposals are so inherently destructive of the fundamental principles of collective bargaining that they cannot be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.<sup>5</sup> The Board reasoned that the ongoing exclusion of the union from meaningful bargaining as to wage rates, leaving them entirely within the employer's discretion, would impact all future negotiations on this key term of employment and would disparage the union by demonstrating its complete inability to act for the employees in this regard.<sup>6</sup> Moreover, with no objective criteria to limit the employer's discretion in granting merit pay increases, there would be no status quo for the union to bargain from, and the union would thus be unable to bargain knowledgeably.<sup>7</sup> The *McClatchy* exception to the impasse doctrine has been expanded from merit pay to other mandatory subjects of bargaining.<sup>8</sup>

In determining whether an implemented proposal grants an employer too much discretion in changing terms and conditions of employment, the

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<sup>4</sup> *E. I. du Pont & Co.*, 346 NLRB 553, 560 (2006), *enforced*, 489 F.3d 1310 (D.C. Cir. 2007).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1391 (citing *NLRB v. Katz*, 369 U.S. 736, 746–47 (1962)).

<sup>7</sup> *Id.* See also *Royal Motor Sales*, 329 NLRB 760, 778 (1999), *enforced*, 2 F. App'x 1, (D.C. Cir. 2001).

<sup>8</sup> See, e.g., *Mail Contractors of America*, 347 NLRB 1158 (2006) (extending *McClatchy* exception to a proposal allowing employer to unilaterally alter the “relay points” where drivers end their shifts, which would have had a direct effect on their wages), *enforcement denied*, 514 F.3d 27 (D.C. Cir. 2008); *KSM Industries*, 336 NLRB 133, 135, 135 n.6 (2001) (extending *McClatchy* to proposal giving employer discretion in changing health plan). See also *Agrifos Fertilizer, LLC*, Case 16-CA-065274, Advice memorandum dated April 26, 2012 (authorizing complaint for discretionary layoff provision); *Bechtel Bettis, Inc.*, Case 27-CA-19115, Advice memorandum dated Mar. 31, 2005 (authorizing complaint for provision granting employer discretion to reassign employees to non-unit work).

Board analyzes whether the employer's discretion is limited by "definable objective procedures and criteria."<sup>9</sup> For instance, in *Royal Motor Sales*, the employer's implemented proposal called for merit pay raises based on "experience, ability, knowledge, and performance," without specifying what these terms meant or providing objective criteria for assessing decisional factors.<sup>10</sup> The Board found these general criteria to be too subjective, in essence giving the employer impermissibly broad discretion.<sup>11</sup> Moreover, while the plan permitted the union to grieve and arbitrate pay decisions, the Board held that the lack of objective criteria would prevent any meaningful grievance arbitration.<sup>12</sup> In contrast, in *E. I. du Pont & Co.*, the Board found that an implemented proposal that provided the employer discretion over health plan details but required the cost be split fifty-fifty between employees and the employer was sufficiently limited by objective criteria to not fit the *McClatchy* exception.<sup>13</sup>

In the instant case, we conclude that the Employer's implemented disciplinary clause does not come within the *McClatchy* exception to the implementation-upon-impasse rule because the clause contains definable objective criteria. The Employer's disciplinary policy limits its discretion to impose discipline by providing that any suspension, discipline, or discharge must be "for cause." Courts and arbitrators see no significant difference between "for cause" and "just cause" absent evidence that the parties intended a difference.<sup>14</sup> Cause, or just cause, is generally accepted to mean "the traditional causes of discharge [or lesser discipline] in the particular industry."<sup>15</sup> In other words, it is "what a reasonable person would find

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<sup>9</sup> See *Royal Motor Sales*, 329 NLRB at 779.

<sup>10</sup> *Id.* at 779–80.

<sup>11</sup> *Id.* at 781.

<sup>12</sup> *Id.* at 780.

<sup>13</sup> 346 NLRB at 560 (the implemented provision "is a narrow, specific clause that, by its terms, sets limits on the Respondent's discretion to act with respect to healthcare.")

<sup>14</sup> See Elkouri & Elkouri, *How Arbitration Works* 887 (5th ed. 1997). The Employer confirmed this interpretation in its submitted position statement.

<sup>15</sup> *Id.*

sufficient,” creating an “objective rather than a personal subjective test.”<sup>16</sup> A widely used rubric in arbitrations to determine if discipline was meted out with just cause is the “seven-factor test.”<sup>17</sup> Under this test, an employer’s action meets the test for just cause discipline if: (1) the employee was forewarned of the consequences of her actions; (2) the employer’s rules are reasonably related to business efficiency and performance that might be expected from the employee; (3) an effort was made before discipline to determine whether the employee was guilty as charged; (4) the investigation was conducted fairly and objectively; (5) substantial evidence of the employee’s guilt was obtained; (6) the rules were applied fairly and without discrimination; and (7) the degree of discipline was reasonably related to the seriousness of the employee’s offense and the employee’s past record.

By limiting the Employer’s discretion to impose discipline based on the objective criteria of cause, the implemented disciplinary clause does not raise the problems presented in *McClatchy*. Unlike in *McClatchy*, the implemented disciplinary clause creates a stable status quo that is easily explainable to the Union’s members.<sup>18</sup> Further, as discussed above, it has a generally accepted meaning in the industry, incorporating an objective standard. Moreover, this clause does not empower the Employer to repeatedly change the terms and conditions of employment without Union input, and does not bypass the Union in its role as the collective-bargaining representative.<sup>19</sup> Rather, if the Employer wishes to change the status quo, it first will have to notify the Union and bargain to impasse over the proposal. If the Employer begins

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<sup>16</sup> *Scott v. Riley Co.*, 645 F.2d 565, 568 n.4 (7th Cir. 1981) (quoting *Local 205 UE v. GE Co.*, 172 F. Supp. 53, 56 (D. Mass. 1959)).

<sup>17</sup> See, e.g., *Enterprise Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359 (Mar. 28, 1966); Adolph M. Koven & Susan L. Smith, *Just Cause: The Seven Tests* (2d ed. 1992).

<sup>18</sup> Cf. *McClatchy Newspapers, Inc.*, 321 NLRB at 1391. For an example of a union explaining just cause to its members, see *Using the Seven Tests*, UE Steward (United Elec., Radio, & Mach. Workers of Am., Pittsburgh, Pa.), Nov. 2005, available at <http://www.ueunion.org/php/phpdnl.php>.

<sup>19</sup> Cf. *McClatchy Newspapers, Inc.*, 321 NLRB at 1391.

disciplining employees without just cause,<sup>20</sup> without first having bargained to impasse to change the disciplinary procedure, it will be a violation of Section 8(a)(5).<sup>21</sup> Finally, unlike in *Royal Motor Sales*, if the Union wishes to break impasse by resuming bargaining, it will have the fixed status quo of “just cause” from which to bargain.<sup>22</sup>

Accordingly the Region should dismiss the charge, absent withdrawal.

/s/  
B.J.K.

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<sup>20</sup> The Union has not asserted nor submitted any evidence that the employees here were disciplined without cause.

<sup>21</sup> If the Employer disciplines employees without just cause, the Union may also have recourse to the courts under Section 301 of the LMRA. *See McNealy v. Caterpillar, Inc.*, 139 F.3d 1113, 1120 (7th Cir. 1998) (holding that while some circuits refuse to allow Section 301 to be used to enforce terms and conditions implemented after lawful impasse, other circuits that recognize an implied interim agreement enforceable under Section 301 are correct); *Moreno v. L.A. Child Care & Dev. Council, Inc.*, 963 F. Supp. 876 (C.D. Cal. 1997) (finding that an employer’s unilaterally implemented “for cause” provision was enforceable under Section 301).

<sup>22</sup> *Cf. Royal Motor Sales*, 329 NLRB at 778.