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

DATE: November 16, 2012

TO: Karen P. Fernbach, Regional Director
Region 2

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

SUBJECT: Rai Radio Televisione Italiana Spa & Rai Corp.,
As a single employer
Case 02-CA-079087

530-6050-0825-3300
530-6067-4011-0100
530-6067-4011-1100
530-6067-4011-4800
530-6067-4011-6900
530-8090-0100
530-8090-6000

This case was submitted for advice regarding whether the Employer violated Section 8(a)(5) and (1) when it eliminated its production operation, contracted out the production work, and terminated the workers in that bargaining unit, without giving the Union an opportunity to bargain over the decision. We conclude that, applying *Dubuque Packing*,[1] the Employer did not have a duty to bargain about the decision.

FACTS

Rai Corp ("the Employer"), a New York corporation, is a wholly owned subsidiary of Rai SpA, an Italian company wholly owned by the Republic of Italy. Rai SpA operates an Italian television station. The Employer provides production services for Rai SpA journalists covering news stories in the US. The Employer's revenues are derived from transactions with Rai SpA, its sole customer and funding source.

The Employer and Rai SpA maintain separate offices and accounting operations. However, Rai Corp documents describe the chairman of Rai Corp as a Rai SpA employee. The president of Rai SpA is chairman of the Rai Corp Board and CEO of Rai Corp. The Deputy General Director of Rai SpA is also on the Rai Corp Board.

---

[1] 303 NLRB 386 (1991), enf'd in rel. part 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), and writ dismissed 511 U.S. 1138 (1994).

Although Rai Corp's president has controlled Rai Corp's day-to-day operations, Rai Corp by-laws require the president to propose any policies governing the hire, fire, transfer, and promotion of Rai Corp employees to its chairman, who is Rai SpA's president.

In November 2011, the Rai SpA Board decided to restructure its operation and reduce its footprint outside Italy in order to optimize its efficiency, effectiveness, and flexibility, and to reduce cost. In a statement regarding the reorganization of its global operations, Rai SpA's Deputy Director General announced that, as part of this worldwide restructuring, it was closing Rai Corp. In addition to Rai Corp, Rai SpA closed numerous other offices, including Beirut, Buenos Aires, Istanbul, Madrid, Moscow, Nairobi, and New Delhi.

The Employer's 25 production employees in New York are represented by NABET ("the Union"). In late 2011, the Employer notified the Union that it was seeking bids to outsource unit work because Rai Corp was closing. The Employer stated that the production work was being eliminated because operating expenses, including rent, were too high; that Rai SpA had decided to standardize production methods globally; and that it was moving to an ad hoc system for obtaining production services through outsourcing. In December 2011, the Employer confirmed to the Union its plan to eliminate production work in the US and offered to bargain with the Union over the effects of the termination of unit employees. The Union made a request for information related to the elimination of production work by the Employer in New York. The Employer partially complied with the request, omitting information regarding non-unit employees and indicating it would follow up with Rai SpA to provide information under its control. Following the Employer's response, there was no further communication between the parties regarding the information request.

The Union met with the Employer several times beginning in February 2012[2] to discuss an enhanced severance package for terminated unit employees. At the first session, the Employer told the Union that Rai SpA had decided to reduce the number of journalists in New York, and that it was closing numerous correspondent offices across the globe and restructuring the remainder of them as it continued to move its operations outside of Italy to a model without fixed infrastructure costs. The Employer also stated that the decision to eliminate production work in New York was unrelated to labor costs or Union animus. Rather, it was the result of the non-renewal of the Rai SpA service agreement which made the maintenance of office space and retention of employees unnecessary.

[2] Herein all dates are 2012 unless otherwise noted.

At the next bargaining session, the Employer informed the Union that it would no longer have an office in New York, and that it would use AP offices when production work in New York became necessary. The Union proposed a daily hire agreement, which would provide employment for unit employees if future Rai SpA production work was performed in New York. The Employer ultimately rejected the proposal because whomever Rai SpA used to provide production work on an as-needed basis would likely be required to bear the infrastructure and management responsibilities for employees and would be contractually responsible for the quality of work and performance of the employees.

In April, the Employer advised the Union that as of April 12, it would no longer perform the production work and that it would thereafter auction off equipment and furniture and close by May 15. The Employer also informed the Union that Rai SpA would be paying AP to perform production work for a short period of time on an as-needed basis. The Employer refused the Union's request to negotiate a successor collective-bargaining agreement since production work was still being done in New York. A decision on the Union's proposal for enhanced severance was deferred until the Employer could speak with Rai SpA.

On April 13, the Employer entered into a bridge agreement with AP whereby AP would provide support services to Rai SpA journalists including space and editorial and production services. This agreement expired on July 31, and the option to continue on a month to month basis expired October 31. The agreement also granted AP free use of the Employer's equipment on a temporary basis to facilitate the transition. On May 31, the Employer surrendered its New York offices to the landlord.

The Union contends that the elimination of production work in New York was mere subcontracting, not a total closure, and therefore, there was a duty to bargain over the decision itself, not just the effects. The Employer contends that, although it is admittedly a subsidiary of Rai SpA, they do not constitute a single employer. The Employer further contends that, even if the two entities constitute a single employer, there was no bargaining obligation regarding the decision to close Rai Corp because it involved a change in the manner in which the company obtains production services across the globe, and in the scope and direction of the business, not merely the replacement of one set of workers with another.[3] The Employer also contends that there was no bargaining obligation under *Dubuque Packing* because the decision did not turn on labor costs and, even if labor costs were a factor, the Union could not have

[3] *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

offered labor concessions to address the Employer's prohibitively expensive lease or Rai SpA's decision to unilaterally terminate the service agreement.[4]

ACTION

We conclude that Rai Corp and Rai SpA are a single employer. We further conclude, however, that Rai Corp did not violate Section 8(a)(5) and (1) by terminating its production operations in New York without first bargaining over the decision with the Union.[5] Specifically, although the decision to eliminate its production operations was not a partial or complete closure, applying *Dubuque Packing*, even if labor costs were a factor, the Union could not have offered labor cost concessions sufficient to change the employer's decision.

Rai Corp and Rai SpA are a single employer

In determining whether or not two nominally separate employing entities constitute a single employer, the Board looks to four factors: common ownership, common management, interrelatedness of operations, and common control over labor relations. No single factor is controlling, and the single-employer inquiry turns on the presence or absence of an arm's length relationship between nonintegrated entities.[6] Applying these factors, Rai Corp and Rai SpA are a single employer. First, the Employer is admittedly a wholly owned subsidiary of Rai SpA. Second, common management exists: the president of Rai SpA is also the chairman of the Rai Corp Board and the CEO of Rai Corp, and the deputy general director of Rai SpA is on the Rai Corp Board. Third, the evidence demonstrates that Rai Corp and Rai SpA operations are interrelated. Rai Corp was established and funded by Rai SpA to exclusively support Rai SpA journalists, who could not produce international news segments without the production services provided by Rai Corp employees.[7] The service agreement notwithstanding, there was an absence of arms length negotiation

---

[4] *Dubuque Packing Co.* 303 NLRB at 391.

[5] Thus, it is unnecessary to reach the Employer's contractual waiver theory.

[6] *See The Dow Chemical Co.*, 326 NLRB 288 (1998) (citing *Radio Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965)).

[7] *Boich Mining Co.*, 301 NLRB 872 (1991) (interrelatedness outweighed the independent aspects of the two entities where the two companies combined materials to create product sold to its customers).

between Rai Corp and Rai SpA in establishing a fee for service schedule,[8] and when the agreement was not renewed, Rai SpA instructed Rai Corp to enter the bridge agreement with AP to assist Rai SpA in the transition to the contractor hired to perform work previously done by Rai Corp. Fourth, regarding control over labor relations, although the Rai Corp president controls the day-to-day operations of Rai Corp, the Rai Corp by-laws require the president to propose to the chairman of Rai Corp, who is the current president of Rai SpA, policies governing the hire, fire, transfer, and promotion of Rai Corp employees. In addition, it was the Rai SpA Board that decided to close Rai Corp, and Rai Corp had to consult the president of Rai SpA during effects bargaining before accepting or rejecting the Union's severance proposal.[9]

Rai Corp did not have a duty to bargain with the Union over the decision to terminate its US production operations and contract the work

We conclude that applying *Dubuque Packing,* the decision to close Rai Corp and contract the production work was not a mandatory subject of bargaining because, to the extent that labor costs were a factor, the Union could not have offered concessions sufficient to alter the decision to reduce Rai SpA's global footprint by eliminating infrastructure, reducing the number of journalists located in the US, and obtaining production services on an ad hoc basis going forward.

Initially, we note that although *Dubuque Packing* specifically concerned a work relocation decision, we have applied its principles to other "Category III" decisions – those which have a direct impact on employment but have as their focus the economic profitability of the employing enterprise[10] – that fall within the spectrum between *Fibreboard*[11] and *First National Maintenance.*[12]

---

[8] *See Iron Workers California District Council (Madison Industries)*, 307 NLRB 405, 408 (1992).

[9] *See Emsling's Supermarket*, 284 NLRB 302, 302 (1987) enf'd 872 F.2d 1279 (7th Cir. 1989) ("the fundamental inquiry is whether there exists overall control of critical matters at the policy level"); *Spurlino Materials, LLC*, 357 NLRB No. 126 (2011) (finding single-employer status despite absence of common day-to-day management; relevant inquiry in common management prong is whether there is common control over critical policy-level decisions).

[10] *See First National Maintenance Corp.*, 452 U.S. at 677.

[11] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (employer's failure to bargain over its decision to subcontract maintenance work previously performed by bargaining-unit employees violated Section 8(a)(5)). The present case is not simply a

Under *Dubuque Packing*, the General Counsel must first show that the employer's decision involves a relocation of unit work "unaccompanied by a basic change in the nature of the employer's operation."[13] The employer must then come forward with evidence to rebut the General Counsel's prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, that the work performed at the former plant will be discontinued entirely and not moved to the new location, or that the employer's decision involves a change in the scope and direction of its enterprise.[14] Alternatively, the employer may rebut the General Counsel's prima facie case by affirmatively demonstrating that labor costs were not a factor in the decision, or that even if labor costs were a factor, the union could not have offered labor cost concessions sufficient to change the employer's decision to relocate.[15]

Here, Rai SpA's decision to close Rai Corp, and thereby terminate all unit employees, did not constitute a basic change in the direction or scope of the business. Although the Rai SpA Board decided to restructure certain aspects of its operations,

---

Fibreboard subcontracting situation because the Employer did not merely substitute "one group of employees for another to perform the same work in the same plant under the ultimate control of the same employer." *See also Torrington Industries*, 307 NLRB 809, 810 (1992) (quoting *Fibreboard*). Rather, Rai Corp sold its equipment and surrendered the property it was leasing to perform the work, and entered into a contract with AP to provide production services for Rai SpA journalists using AP's facilities, equipment, and employees.

[12] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (holding there is no duty to bargain over an economically-motivated decision to shut down part of a business). *First National Maintenance* does not apply because there was no change in the scope or direction of the company, nor has the Employer gone out of a discrete part of its business. *See also Dallas and Mavis*, 346 NLRB 253, 258 (2006) (the decision to replace employee drivers with owner-operators was not a change in the scope, nature, and direction of its enterprise pursuant to *First National Maintenance*). *See e.g., The Topps Co.*, Case 04-CA-25444, Advice Memorandum dated April 28, 1997, at pp. 7-8; *The Atlanta Ballet*, Case 10-CA-36426, Advice Memorandum dated November 13, 2006, at p. 6.

[13] *Dubuque Packing Co.*, 303 NLRB at 391.

[14] *Ibid.*

[15] *Ibid.*

Rai SpA continues to use journalists to produce the same international news programming as before, using AP to provide necessary production services previously performed by unit employees.[16] Thus, a prima facie case can be established under *Dubuque Packing* that the Employer's decision was unaccompanied by a basic change in the nature of its operation.

The Employer also cannot affirmatively show that labor costs played no part in its decision to contract production operations. The Employer's decision to eliminate its own production operation, as opposed to a system of paying for production services on an as-needed basis, was motivated in part by the high cost of maintaining such an operation. These involved, inter alia, the cost of a lease, a fixed infrastructure including equipment, and the cost of a permanent, full-time production staff. Thus, indirect labor costs were at least one of the expenses Rai SpA sought to reduce in creating a more efficient method for meeting its new business model.

We conclude, however, that to the extent that labor costs were a factor, the evidence demonstrates that the Union could not have offered concessions sufficient to change the Employer's decision to terminate its New York production operation and contract the work. As an initial matter, we note that the New York decision was part of a corporate-wide plan to reduce its overall journalist presence in the US and throughout the world, to standardize Rai SpA's global production methods, and to obtain those services on an ad hoc basis. Once Rai SpA reduced its US footprint, including the number of journalists performing work, the need for regular, full-time production services correspondingly decreased. It thus became cost prohibitive to maintain the same production operation, involving not just a full-time production staff, but also an entire infrastructure, including a lease for New York office space and production equipment. Given the enormity of the cost savings involved, the Union could not have offered concessions that would have overcome these factors.[17]

---

[16] *See Embarq Corp.*, 356 NLRB No. 125, slip op. at 2 (March 31, 2011) (office closure due to nation-wide plan to restructure operations from multiple customer service call centers to a few mega-centers not a basic change in the nature of employer operations; employees still providing same customer service in the same manner as before). *See also Stroehmann Bakeries, Inc.*, 318 NLRB 1069, 1077-1078 (1995) (employer's extensive reorganization of its operations leading to the termination of all unit positions was not a change in the nature of its business because it continued to deliver baked goods in the same service area as before); *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1371 (1982) (employer's decision to outsource shrimp preparation work did not alter the nature and direction of its business where it was still engaged in the business of supplying foodstuffs to its stores as before).

[17] *Id.* at 15 (union could not have offered concessions to address the employer's decision to move call center where non-monetary factors included moving to a

This became evident when the Union proposed a daily hire agreement to address the Employer's need to obtain production services solely on an ad hoc basis: its proposal would still have required the Employer to continue to lease office space, maintain equipment, and employ management personnel in New York, the exact infrastructure it sought to rid itself of during its restructuring of production operations. The Union never challenged the Employer's assertion that the costs would be prohibitive. Given these circumstances, the Union could not have offered concessions sufficient to change the Employer's decision to terminate its New York production operation.[18]

Accordingly, the Region should dismiss the charge, absent withdrawal, because the Employer did not have a duty to bargain about its decision to eliminate its production operation and contract the work.

/s/
B.J.K.

---

company-owned building closer to its primary customer base). *See also Kaumagraph Corp.*, 316 NLRB 793 (1995) (no concessions possible where employer relocated unit work to another facility due to its inability to negotiate lower rent, a lack of new business, and a demand from its primary customer to move its operations to other facility closer to that customer's location).

[18] Because the Union's information request relates to Rai SpA's decision to contract unit work, and because we have concluded that the Employer did not have an obligation to bargain over that decision, the information sought is not relevant and the Union is not entitled to it. See *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004).