

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

WCCO-TV

and

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS -
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO (NABET-CWA)**

Case 18-CA-100535

Rachel A. Centinario, Esq.

for the General Counsel.

Mark W. Engstrom, Esq., New York, New York

for the Respondent.

Judiann Chartier, Esq. Washington, D.C.

for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was submitted to me on a stipulated record on June 15, 2013. The National Association of Broadcast Employees and Technicians-Communications Workers of America (NABET) filed the charge on May 7, 2013. The General Counsel issued the complaint on May 17, 2013. The issue before me is whether Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse in collective bargaining negotiations on an allegedly permissive subject of bargaining.

FINDINGS OF FACT

I. JURISDICTION

Respondent is the Columbia Broadcasting System's Minneapolis, Minnesota affiliate. For the calendar year 2012, Respondent derived gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$5,000 directly from points out of Minnesota. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning

of Section 2(2), (6), and (7) of the Act and that NABET (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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NABET is the exclusive bargaining representative of a unit defined as, “all individuals employed by Respondent as a full-time Photojournalist and/or a Temporary Photojournalist in the news department or any successor department, excluding all other employees, guards and supervisors as defined in the Act.”¹ The Union has represented this unit at least since 1992.

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Since 1992, the Union and Respondent have agreed to permit employees of Respondent, who are represented by other unions, to perform a limited amount of bargaining unit work. Some of Respondent’s employees are represented by the International Brotherhood of Electrical Workers (IBEW) Local 292, the American Federation of Television and Radio Artists (AFTRA) and Teamsters Local 792. Letter of Agreement #3 in the 1992-95 collective bargaining agreement between Respondent and the Union provided:

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7. It is also understood that other WCCO-TV Employees covered by IBEW and AFTRA Agreements may perform the “principal purpose” functions under this Agreement, including by way of example, the operations of lightweight, professional or home-type electronic cameras outside of studios, but only if such functions are performed in support of their own principal functions. Such assignments will not be made on a routine basis but will be limited principally to the following:

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- A. In a situation where the nature of the assignment calls for unconventional reporting techniques.
- B. The assignment is an undercover assignment, or one which requires the use of a hidden camera.
- C. There is a limited access to the event.
- D. The assignment involves coverage of a sensitive or private event.

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Where a Reporter, Producer or Technician operates a camera under the circumstances described above, he/she may also operate equipment related to the assignment, such as video tape recorder or edit equipment.

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It is understood that the Company may not assign a Reporter or Producer under 6 or 7 herein to operate a camera for another Reporter or Producer. In no event will a Reporter or Producer operate a camera or associated equipment on a story with which the Reporter or Producer is not directly involved.

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¹ A definition of the term “photojournalist” is set forth in Section 1.04 of the 2009-12 collective bargaining agreement. Suffice it to say that a “photojournalist” is an employee whose primary function is to operate a camera, sound recording device and related equipment and/or edits videotape or its successor media.

Exhibit G, Letter of Agreement # 3, pp. 20-21.

The April 6, 2009 – December 31, 2012 collective bargaining agreement contained the identical or almost identical provision.² However, it added the following language:

5 During the 2009 negotiations the parties agreed to cross utilization of functions between AFTRA and NABET-CWA.

10 Notwithstanding paragraph 6, the parties agreed that beginning April 1, 2011 the Company may assign up to two (2) AFTRA employees (Reporters or Producers) per day to perform the “principal purpose” functions under this Agreement, including by way of example, the operation of lightweight, professional or home-type electronic camera outside of studios, but only if such functions are performed in support of their own principal functions (also called “one-man bands”).

15 It is understood the Company may not assign an AFTRA member (Reporters or Producers) to operate a camera for another AFTRA member (Reporters or Producers). In no event will an AFTRA member (Reporters or Producers) operate a camera or associated equipment on a story which the AFTRA member (Reporters or Producers) is not directly involved.

20 The Company agrees that it will seek agreement from AFTRA for at least an equal (up to two (2) per day) of cross utilized NABET-CWA employees to perform the “principal purpose” functions in the AFTRA agreement. Further the Company agrees that any NABET-CWA employee shall be upgraded to the applicable AFTRA rate (if the rate is higher than the applicable NABET-CWA rate) for the functions performed.

25 The Company will use its best efforts to obtain an agreement with AFTRA to allow an equal number of NABET-CWA employees to be cross-utilized. The Company further agrees to provide cross-training to any NABET-CWA employee assigned to perform such duties, in addition the Company also agrees to provide follow-up training to any NABET-CWA employee who requests it.

30 Exhibit E.

35 This new language was added to the 2009-2012 collective bargaining agreement after Respondent rejected the following paragraph proposed by the Union in 2009:

40 This paragraph shall expire on December 31, 2011 unless the Company has obtained an agreement with AFTRA to allow up to an equal number of cross utilized of NABET-CWA employees as described above. If the Company has obtained agreement with AFTRA to allow up to an equal number of cross utilized NABET-CWA employees, this paragraph shall remain part of the Agreement.

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² This agreement was extended to March 31, 2013, but has now expired.

In its collective bargaining negotiations with AFTRA in 2011, Respondent proposed on three occasions that the agreement include cross-utilization of NABET employees for “principal purpose” functions in the AFTRA agreement. AFTRA rejected these proposals and cross-utilization language was not included in the AFTRA contract which became effective on July 1, 2011.

After negotiations with AFTRA were completed, Respondent assigned its AFTRA employees to perform camera functions consistent with Letter of Agreement #3 in the contract with NABET. NABET filed a grievance, which was rejected by Respondent. On October 16, 2012, NABET withdrew from arbitration of the grievance and informed Respondent that Letter of Agreement # 3 would expire upon expiration of the 2009-December 31, 2012 contract. NABET also informed Respondent that it viewed Letter of Agreement #3 to be a permissive subject of bargaining. Respondent replied by informing the Union that it regarded Letter of Agreement #3 to be a mandatory subject of bargaining.

In negotiating for a successor collective bargaining agreement, Respondent has proposed and insisted since January 14, 2013, that the Union agree to include Letter of Agreement #3 in a successor collective bargaining agreement.³ On March 12, 2012, Respondent’s Chief Negotiator Ron Terrone informed the Union that there would be no successor agreement without the Letter of Agreement #3 language.⁴ The Union informed Respondent that it would not agree to include Letter of Agreement #3 in any successor collective bargaining agreement. The parties agree that Respondent and the Union have bargained to impasse.

Analysis

In the instant case, the parties agree on the facts and the applicable legal standard. They differ on how that standard is to be applied to the facts of this case.

The General Counsel and NABET contend that Respondent has bargained to impasse on a permissive subject of bargaining. If Respondent did so, it violated Section 8(a)(5) and (1), *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 (1958), *Taft Broadcasting Co.*, 274 NLRB 260 (1985). The General Counsel and the Union characterize Respondent’s conduct as insisting on a change or modification in the scope of the bargaining unit, which constitutes a permissive subject of bargaining, *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993).

Respondent contends that it bargained to impasse only on mandatory subjects of bargaining. It characterizes its proposals concerning Letter of Agreement #3 as a matter of work assignment. Respondent argues that a transfer of work assignments from unit employees to non-

³ Respondent proposed to include its IBEW employees in the terms of Letter of Agreement #3, but rescinded this proposal.

⁴ Respondent’s proposal of March 12, 2013 is contained in Exhibit K. It is not materially different from the language in the 2009-2012 agreement.

unit employees is a mandatory subject of bargaining on which it is entitled to bargain to impasse.⁵

5 All three parties rely on the Board's decision in *Antelope Valley Press*, 311 NLRB 459 (1993) and *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993). In *Antelope Valley Press* the Board dismissed the complaint, finding that the employer did not insist on changing the unit description and did not attempt to deny the Union the right to assert that any individuals to whom unit work might be assigned were unit members. In *Bremerton* it reached the opposite conclusion on the grounds that the employer bargained to impasse on a proposal that precluded inclusion of the employees to whom work was being transferred from being in the bargaining unit.

15 In *Antelope Valley*, the Board noted the tension between unit scope and the introduction of new technology. It recognized that bargaining proposals may sometimes have aspects of both a unit description and a work assignment provision. It purported to abandon an "either/or" approach to better enable it to resolve such matters while recognizing and accommodating the legitimate concerns of the parties. The Board adopted a two-step approach: First, the Board determines whether the employer has insisted on a change in the unit description. If it has done so, the proposal is clearly permissive. An employer may make changes with regard to a permissive subject of bargaining only with the union's consent, *Aggregate Industries*, 359 NLRB No. 156 (July 8, 2013), slip opinion at 4.

25 If the employer has not insisted on a change in the unit description, the Board will consider whether the transfer of work deprives the union of the right to contend that the persons performing the work after the transfer are to be included in the bargaining unit. If that is not the case, the employer's proposal is a mandatory subject of bargaining about which the employer may bargain to impasse.

30 The General Counsel and Charging Party contend this is a simple straight-forward case. Respondent, in its brief, contends it is far more complicated. I leave it to the Board to consider what I deem to be the fairly complex issues raised by Respondent's brief, which, if I understand them, are:

- 35 1. *Antelope Valley* and *Bremerton* are not applicable to this case because the unit in this matter is defined by job classification (photojournalist) rather than by the work performed. I conclude the opposite as one has to read Section 1:04 of the parties' collective bargaining agreement to determine what constitutes a photojournalist. That section defines photojournalist by the work performed.
- 40 2. Letter of Agreement #3 modified the scope of the bargaining unit, so that it is actually the Union that is insisting on bargaining over a permissive subject by demanding a return to the contract language that existed prior to 2009. I reject this argument in that there was no change to sections 1.03 and 1.04 of the collective bargaining agreement, which defines the scope of the bargaining unit.

⁵ The Board has held that the transfer of unit work to supervisors is a mandatory subject of bargaining. An employer may not make such a transfer without bargaining with the representative of the affected unit employees, *Regal Cinemas*, 334 NLRB 304 (2001).

3. Finding a statutory violation is bad public policy in that it locks Respondent into a pattern of work assignments that make no sense in light of changing technology. In this regard it strikes me as strange that contracting to another employer or independent contractor is a mandatory subject of bargaining, while shifting work to one's own employees who are represented by another labor organization is a permissive subject, *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 258 (2006); *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); *Torrington Industries*, 307 NLRB 809 (1992). Nevertheless, it is for the Board, not this judge to reconsider Board precedent, which I deem to lead to the conclusion that Letter of Agreement #3 is a permissive subject of bargaining.

In the instant case, WCCO made no attempt to change the unit description of photojournalists. However, by specifying that the employees to whom work is to be transferred are AFTRA members, it effectively precluded the Union from asserting jurisdiction over some of the employees performing the unit work of camera operation.

The General Counsel and the Union rely heavily on *Taylor Warehouse Corp.*, 314 NLRB 516, 527-28 (1994). In that case, the Board adopted the findings of the judge, who concluded that the employer bargained to impasse on a permissive subject. She relied heavily on the fact that although the employer did not alter the description of the bargaining unit, it transferred work to employees who never could be considered members of the bargaining unit. That is close to the situation presented in instant case. Although the unit description of the AFTRA bargaining unit does not appear in this record, I infer that there is a clear demarcation between employees in the AFTRA unit, i.e. Reporters and Producers, as opposed to "Photojournalists." Thus it appears that Letter of Agreement # 3 from the 2009-12 contract shifts unit work to employees who would never fall within the unit description in the NABET contract.

I conclude that under current Board law, Respondent violated Section 8(a)(5) and (1) by bargaining to impasse over a permissive subject of bargaining.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall, on request, bargain in good faith with the Union as the exclusive representative of its photojournalists, without bargaining to impasse over the inclusion of Letter of Agreement # 3 in the collective bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

5 The Respondent, WCCO-TV, Minneapolis, Minnesota, its officers, agents, successors,
and assigns, shall

1. Cease and desist from

10 (a) Bargaining to impasse over a permissive subject of bargaining, i.e., Letter of
Agreement # 3 from the parties' 2009-2012 collective bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees
in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of its
photojournalist employees concerning terms and conditions of employment and, if an
20 understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its Minneapolis, Minnesota
facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms
provided by the Regional Director for Region 18, after being signed by the Respondent's
25 authorized representative, shall be posted by the Respondent and maintained for 60 consecutive
days in conspicuous places including all places where notices to employees are customarily
posted. In addition to physical posting of paper notices, the notices shall be distributed
electronically, such as by email, posting on an intranet or an internet site, and/or other electronic
means, if the Respondent customarily communicates with its employees by such means.
30 Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,
defaced, or covered by any other material. In the event that, during the pendency of these
proceedings, the Respondent has gone out of business or closed the facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to
all current employees and former employees employed by the Respondent at any time since
35 March 12, 2013.

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⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice
reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a
Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations
Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C., July 22, 2013.

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with The National Association of Broadcast Employees and Technicians-Communications Workers of America (NABET) by insisting to impasse on the inclusion of Letter of Agreement # 3, which allowed us to transfer bargaining unit work to AFTRA employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of our photojournalist employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WCCO-TV

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.