



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 18
330 2ND AVE S
STE 790
MINNEAPOLIS, MN 55401-2221

Agency Website: www.nlr.gov
Telephone: (612)348-1757
Fax: (612)348-1785

September 3, 2013

Hon. Gary Shinnors
Executive Secretary
National Labor Relations Board
1099 14th St., N.W.
Washington, D.C. 20570

Re: WCCO-TV
Case No.: 18-CA-100535

Dear Mr. Shinnors:

Counsel for the Acting General Counsel submits this letter in lieu of an answering brief to exceptions with respect to the above-captioned case. Respondent's exceptions are without merit, and each will be discussed in turn. Counsel for the Acting General Counsel respectfully requests that the Board reject Respondent's exceptions and uphold the Judge's Decision that Respondent violated Section 8(a)(1) and (5) of the Act when it unlawfully insisted to impasse on changing the scope of the bargaining unit, a permissive subject of bargaining.

***Antelope Valley Applies Here, as the Bargaining Unit is Defined
in Terms of Work Performed, not Job Classifications***

Respondent's exception to the Judge's finding that the bargaining unit is defined by work performed rather than by job classification is entirely without merit. The Unit is clearly defined by work performed in the parties' collective-bargaining agreement ("contract"), which the parties stipulated to in the Stipulated Record. Accordingly, the Board's test in *Antelope Valley* applies here.

The contract should be read as intended, starting with Section 1.05 of the contract, which provides: "Unit or Bargaining Unit means collectively the Employees covered by this Agreement. . ." (Jt. Ex. E.) Similarly, Section 4.01 reads: "The Company recognizes NABET-CWA as the sole and exclusive collective Bargaining Agent for all Employees now and hereafter employed in the Bargaining Unit as defined in Paragraph 1.03. . ." (*Id.*) Section 1.03 defines "Employees" as "individual[s] employed by the Company [defined in Section 1.01] designated as a full-time Photojournalist and/or a Temporary Photojournalist in the news department. . ." (*Id.*) Section 1.04 defines "Photojournalist" as the following:

A Photojournalist operates cameras, recorders and related equipment, and/or edits videotape (or its successor recording medium/media, e.g., video disc), used in electronic newsgathering. A Photojournalist may also be assigned to perform other duties associated with the gathering, recording and producing [of] news programs and documentaries, such as but not limited to preparing, interviewing, writing and transmitting news material. It is understood that on a non-exclusive basis, Photojournalists will continue to be assigned to perform such functions for the Internet, including the Company's website (wcco.com at the time this agreement is entered into), provided that the making of such assignments, even on a frequent basis, shall not be established or result in jurisdiction becoming exclusive, and shall not result in a binding past practice that would preclude the Company from assigning such work to others in the future.

(*Id.*)

Respondent correctly asserts that the parties' contract provides that the Union is the exclusive collective-bargaining representative for employees, which are defined as photojournalists in Section 1.03 of contract. However, Respondent would have the Board stop reading the contract at this point. Yet just as "Employees" is defined, so too is "Photojournalists." Extending Respondent's faulty logic, one could posit that the Unit is actually "Employees," failing to read the definition of "Employees" in Section 1.03. However, this renders Section 1.03 meaningless. Similarly, failing to define "Photojournalist" by its duties as laid out in Section 1.04 would render Section 1.04 meaningless.

Moreover, the parties' Stipulated Record is clear that Section 1.03 and 1.04 must be read in concert. The parties stipulated that the Unit is defined as all Photojournalists (Stip. R. at ¶ 7(a)), and that "[t]he Unit is further defined by its work duties in Section 1.04" of the contract, which then states Section 1.04 in its entirety (Stip. R. at ¶ 7(b)). In fact, Respondent even reads Sections 1.03 and 1.04 in concert in its own brief in support of its exceptions to the Board at pages 5-6.

Finally, Respondent's reliance on the Board's decision in *McDonnell Douglas Corporation* is wholly misplaced. 313 NLRB 868 (1994), *remanded on other grounds*, 59 F.3d 230 (D.C. Cir. 1995). There, the Board denied the employer's motion for reconsideration, in part noting that *Antelope Valley Press*, 311 NLRB 459 (1993), did not apply because the unit was defined by job classification rather than work assignment. However, there was no argument in *McDonnell Douglas* to the contrary. Indeed, the Board stated, "the unit descriptions of the employees in question in this case are computing analysts, computing engineers, computing specialists, and senior computing specialists." *Id.* at 868 n.5. Likewise, in the Board's preceding decision in the same case, the Board stated: "The 1987-1990 agreement covered employees in certain job classifications. . ." *McDonnell Douglas Corp.*, 312 NLRB 373 (1993). To the contrary, here, the bargaining unit is clearly defined by work performed, and the Board's test laid out in *Antelope Valley* for determining whether a proposal is a permissive subject of bargaining must be applied.

Applying *Antelope Valley*, Respondent Has Unlawfully Insisted to Impasse on a Permissive Subject of Bargaining

As with its first exception, Respondent wrongly argues that *Antelope Valley* does not apply, because the bargaining unit is defined by job classification rather than work performed, but the essence of its second exception is that Respondent is requesting this Board to overrule *Antelope Valley*. Respondent posits that the Board should return to *Storer Communications*, an antecedent case to *Antelope Valley*, in reconciling what Respondent claims to be poor public policy. However, *Antelope Valley* was decided in direct response to the poor public policy *Storer Communications* and its earlier progeny had set – namely that, where bargaining units were defined in terms of work performed rather than job classification, the Board’s decisions under its previous “either/or” semantic debate were in direct contravention of one another. *See Antelope Valley*, 311 NLRB at 461. The *Antelope Valley* test arose out of a need to set a more stable rule in those situations where, as here, the bargaining unit is defined by work performed. Accordingly, the Board should not overrule its sound decision in *Antelope Valley*, which has had a stabilizing effect on this challenging area of labor law.

Respondent is making such specious arguments because it knows that, if *Antelope Valley* applies here, Respondent necessarily loses. The Judge even acknowledged that, in order for Respondent to win, the Board would have to overrule *Antelope Valley*. (J.D. at 6.) However, the Judge properly applied the Board’s reasoned decision in *Antelope Valley* to the instant case (J.D. at 5, 6), and his correct finding that Respondent “*attempt[ed] to deprive the [U]nion of the right to contend that the persons performing the work after the transfer are to be included in the unit*” 311 NLRB at 461 (emphasis added), should be upheld.

Respondent, not the Union, has Unlawfully Insisted to Impasse on a Permissive Subject of Bargaining

Respondent’s third and fourth exceptions rest upon its unfounded accusation that the Union, rather than Respondent, unlawfully insisted to impasse on removing Letter of Agreement #3 (“LOA3”) from the parties’ contract. Respondent mistakenly argues that LOA3 permanently modified the scope of the bargaining unit. Although some version of LOA3 had been included in the parties’ contracts beginning in 1992 through the present, the specific provision which is at issue here permitting two AFTRA-represented employees to perform the Union’s “principal purpose” functions (their job duties) on a daily basis – was only first introduced in the parties’ 2009-2012 contract. (Stip. R. at ¶ 11(a); Jt. Ex. E.) Furthermore, that specific provision only became effective on April 1, 2011, *not* in 2009 as Respondent appears to misstate in its brief at pages 19 and 22, which corresponded exactly with when Respondent’s contract with AFTRA ended and, thus, bargaining between Respondent and AFTRA over the reciprocal provision commenced. When Respondent was unsuccessful in securing a reciprocal cross-jurisdictional provision with AFTRA, the Union immediately filed a grievance over AFTRA-employees performing the Union’s bargaining unit work, *not*, as Respondent suggests at page 19 of its brief, over Respondent’s “fail[ure] in its duty to exercise best efforts.”¹ (Stip. R. at ¶ 11(e).)

¹ Respondent’s bold assertion, unsupported by the Stipulated Record, that the Union “subsequently withdrew that arbitration demand without any concession from Respondent that

Most importantly, however, is that the Union, in agreeing to include the new cross-jurisdictional provision at issue here in the parties' 2009-2012 LOA3, clearly placed a contingency on the provision's inclusion and thus never permanently agreed to permit two AFTRA-represented employees to perform the Union's bargaining unit work on a daily basis in perpetuity. Moreover, Respondent cannot meet its burden to demonstrate that the Union clearly and unmistakably agreed to waive its right to represent all photojournalists and permanently modify the bargaining unit scope.

In support of its position that the bargaining unit scope was amended in the parties' 2009-2012 contract to permanently and in perpetuity permit two AFTRA-represented employees to perform the Union's bargaining unit work every day, Respondent cites *Antelope Valley's* companion case, *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993). There, the parties had, some years prior, bargained into the contract a supplemental agreement entitled "Work Assignment." The employer had originally proposed deleting language in the contract immediately following the unit description, defined in terms of job duties, which stated: ". . . and the appropriate collective bargaining unit consists of all employe[e]s performing any such work" from the mark-up of copy until being ready for the printing press. *Id.* at 467. Instead, the parties agreed to language permitting non-unit employees, such as those in the classified advertising, editorial, and news departments, to perform tasks historically performed by the unit in certain specific circumstances. *Id.* The Board went on to find that, in agreeing to the Work Assignment, the parties had permanently modified the unit, principally because the parties agreed that certain employees, despite performing bargaining unit work, would be excluded from the unit in the future.

Respondent's reliance on *Bremerton* is misplaced. The language from the parties' 1992-1995 LOA3, which has been maintained in the parties' contract through the most recent contract, allows Respondent to assign photojournalist work to employees outside of the Union's bargaining unit, namely AFTRA and International Brotherhood of Electrical Workers employees, in certain limited circumstances. (Jt. Ex. G at 20, ¶ 7.) That language does not constitute a modification of unit scope. Moreover, the provision at issue here – permitting two AFTRA-represented employees to perform the Union's bargaining unit work on a daily basis – is separate from the language permitting AFTRA and IBEW employees to perform photojournalist work in very limited and specific circumstances and, importantly, did not *permanently* modify the bargaining unit scope. It is a narrow but important point that the Union placed a *contingency* on its acquiescence to the cross-utilization provision. This provision, only first introduced in the parties' 2009-2012 contract and effective only beginning April 1, 2011, is not only set aside from the language permitting AFTRA and IBEW employees to perform the Union's "principal purpose" functions in limited circumstances and on non-routine bases, but it also required Respondent to seek reciprocal cross-utilization in its collective-bargaining agreement with AFTRA. (Stip. R. at ¶¶ 11(a), 11(b); Jt. Ex. E.) Moreover, in bargaining over the cross-utilization provision, the Union proposed that Respondent obtain a reciprocal provision with AFTRA or face revocation of the provision from the parties' agreement. (Stip. R. at ¶ 11(b); Jt. Ex. H.) Although Respondent did not agree to the Union's proposal, the clear import of the contingency

the Union's position was justified" should not be considered. (*See* Respondent's brief at page 19.) There is absolutely nothing in the Stipulated Record to support this claim.

language included in the cross-utilization provision indicates that the Union would not agree to such language in the future unless Respondent secured a reciprocal provision with AFTRA. Consequently, when Respondent failed to do so, the Union promptly filed a grievance and informed Respondent it would not agree to similar language in the future. (Stip. R. at ¶¶ 11(d), 11(e).)

Thus, unlike in *Bremerton Sun*, where all of the parties, including the union and the General Counsel there, agreed that the Work Assignment agreement had the effect of permanently modifying the bargaining unit scope, *see* 311 NLRB at 469, neither the Union nor Counsel for the Acting General Counsel make any such concession here. Simply put, there is no evidence that the parties intended that the newly included cross-jurisdictional provision extend beyond the expiration of the parties 2009-2012 contract.

Respondent also incorrectly argues that it was the Union that engaged in bad faith bargaining by insisting on deleting LOA3 in its entirety from the parties' contract. Respondent fails to acknowledge, however, that Respondent, not the Union, has insisted to impasse on including the cross-jurisdictional provision – a permissive subject of bargaining. It is mere speculation what position the Union would have taken in bargaining, *i.e.* whether the Union would have insisted to impasse on excluding the remaining language in LOA3, had Respondent not insisted to impasse on the permissive cross-jurisdictional provision contained in LOA3. Moreover, if Respondent believed that the Union had unlawfully insisted upon abolishing LOA3 in its entirety, the proper course of conduct for Respondent would have been to file a charge with the Board and for the Regional Director to conduct an investigation to determine whether the Union's conduct was unlawful. However, no such charge was ever filed. Thus, this speculative and hypothetical issue concerning the Union's alleged bad faith bargaining is simply not before the Board here.

Furthermore, for the same reasons explained immediately above, Respondent cannot meet its burden to show the Union, by temporarily permitting two AFTRA-represented employees to perform the Union's bargaining unit work on a daily basis, clearly and unmistakably agreed to waive its right to represent all photojournalists or permanently modify the bargaining unit scope. *See Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000), *review denied sub nom. Honeywell, Int'l, Inc. v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) (explaining it is burden of party asserting waiver to show waiver is explicitly stated, clear, and unmistakable). To find a waiver of such a right, "the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Trojan Yacht*, 319 NLRB 741, 742 (1995). In determining whether a waiver is clear and unmistakable, the Board considers context and specific circumstances. The Board has concluded that an unmistakable waiver can occur in three ways: "by specific contract language, by the parties['] conduct including bargaining history and past practices, or by a combination of both." *Energy Cooperative, Inc.*, 290 NLRB 635, 636 (1988).

Here, none of the three circumstances indicates such a waiver occurred. First, there is no specific contract language indicating that the Union waived its representational rights in the future by agreeing to the 2009-2012 version of LOA3. Indeed, the cross-jurisdictional provision

specifically requires Respondent to seek a reciprocal provision with AFTRA, and during bargaining the Union made clear that failure to secure reciprocity would be fatal to the cross-jurisdictional provision's inclusion in the future. (Stip. R. at ¶¶ 11(c), 11(e); Jt. Exs. E at 21, H.) Moreover, the Union's conduct, including bargaining history, also does not support a finding of waiver. Upon Respondent's failure to secure cross-jurisdictional language with AFTRA, not only did the Union grieve Respondent's act of assigning the Union's bargaining unit work to AFTRA employees, but the Union also expressly stated to Respondent in October 2012 that it would not agree to the cross-jurisdictional provision in any successor agreement. (Stip. R. at ¶ 11(e).) During recent bargaining throughout January to March, despite Respondent's insistence that the cross-jurisdictional provision remain in the contract, the Union maintained its position that it would not agree to include that provision again. (Stip. R. at ¶¶ 12(c), 12(e).) Finally, since neither contract language nor the Union's conduct supports a finding of waiver, the combination of them likewise does not do so. Accordingly, Respondent cannot meet its burden to demonstrate that, by agreeing to the cross-jurisdictional provision only first introduced in the parties' 2009-2012 contract, the Union clearly and unmistakably agreed to permanently modify the bargaining unit scope.

Likewise, it is well settled that parties do not waive their right to refuse to include a proposal on a particular permissive bargaining subject merely because they willingly bargained on that subject in the past. *See, e.g., Taylor Warehouse Corp.*, 314 NLRB 516, 528 (1994) (“[E]ither party may resist or engage in bargaining about the unit description as if it were a mandatory subject, without losing the right to refuse to include a proposal on that topic in the contract”) (internal citations omitted). To hold otherwise would discourage parties from freely bargaining on non-mandatory subjects so as to avoid risking waiver of the right to reject those proposals in the future. *NLRB v. Davison*, 318 F.2d 550, 558 (4th Cir. 1963).

Conclusion

Counsel for the Acting General Counsel respectfully requests that the Board uphold the Judge's correct decision, remedy, and order, finding that Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully insisting to impasse on a permissive subject of bargaining – a change in unit scope.

Respectfully submitted by:

/s/ Rachel A. Centinario
Rachel A. Centinario
Counsel for the Acting General Counsel

cc:
Mark Engstrom, Esq.
Judiann Chartier, Esq.