

McClatchy requires.² Other aspects of the proposals—the layoff exemption for certain “Level 1” employees and the AS unit disqualification for employees receiving a “Step 4” discipline within the past year—arguably constitute objective criteria, but they apply only to certain subsets of employees and do not narrow the Employer’s discretion regarding the primary decisional factors. Similarly, although the proposals state that seniority will determine plant layoffs and AS unit staffing where employees’ qualifications are relatively equal, the determination regarding employee qualifications is made “in the sole judgment of the Company.” And, the mere fact that the proposals provide for grievance-arbitration over plant layoffs and AS unit staffing does not sufficiently limit the Employer’s discretion under *McClatchy*, where the proposals’ lack of objective criteria saps the grievance-arbitration language of its meaning.³ Accordingly, the Employer’s proposals, on their face, do not satisfy *McClatchy*.

Moreover, the parties’ bargaining history and past practice do not clarify the meaning of the proposals so as to include defined, objective procedures and criteria. Thus, both parties’ bargaining notes indicate that the Union asked the Employer to provide specific information about how it would assess skill, knowledge, ability, and job performance at various sessions throughout the negotiations, and that the Employer did not provide a clear response. For example, according to the Employer’s February 8, 2011⁴ bargaining notes, the Employer stated that it would rely on management judgment rather than tests for all four decisional factors, and that it would not list criteria during bargaining. The Employer was somewhat more forthcoming at the March 28 bargaining session, where, according to the Employer’s bargaining notes, it stated that it would assess employees’

² See *Royal Motor Sales*, 329 NLRB 760, 777, 779-80 (1999), enfd. mem. 2 Fed. Appx. 1 (D.C. Cir. 2001) (using factors such as experience, ability, knowledge, and performance to determine employee promotions and raises, without sufficient objective criteria for assessing those factors, gave employer too much discretion to satisfy *McClatchy* requirements).

³ See *Royal Motor Sales*, 329 NLRB at 780 (although employer’s job placement and advancement decisions would be subject to grievance-arbitration process, the proposals “contain no objective criteria that would form the basis for meaningful grievance arbitration over the [employer’s] decisions”).

⁴ All dates are in 2011.

qualifications the same way it did under the expired contract's "unit layoff" provision, which listed "skill, knowledge, and ability" as decisional factors. However, that provision did not include "job performance" as a decisional factor; explain how skill, knowledge, and ability would be assessed; or assign weight among the various factors. Moreover, based on the Region's investigation to date, the parties did not have sufficient experience applying that unit layoff provision to indicate how the Employer exercised its discretion in implementing unit layoffs. Indeed, according to the Employer's March 28 bargaining notes, the federal mediator asked how the Employer had assessed skill, knowledge, and ability under the expired contract, and the Employer representatives did not answer, even after convening to discuss the matter among themselves.⁵

In a recent position statement to Advice, the Employer asserts that the parties' experience applying the expired contract's unit layoff provision and training and progression program sufficiently clarify the meaning of its proposals. Thus, the Employer states that it applied three of the four criteria—skill, knowledge, and ability—as recently as 2010, when it laid off three water treatment employees. The Employer does not, however, explain how it assessed the unit layoff criteria as to those employees or whether the Union knew how it did so. The Employer also argues that the training and progression program contained in Appendix 2 of the expired contract—which requires employees to pass written and demonstration-based tests in order to advance to a higher grade within a work unit—adequately describes how it would assess skill, knowledge, and ability under its proposals. However, the Employer did not make clear during bargaining that it sought to assess those factors under the progression program. For example, according to the Employer's March 28 bargaining notes, the Employer stated that some factors would be assessed using tests, but when pressed for further details, responded that skill, knowledge, and ability would be assessed based on "demonstration." And, it described "demonstration" as management officials

⁵ If the expired contract and the parties' past practice gave the Employer unbounded discretion in conducting unit layoffs, that would not insulate the Employer from the *McClatchy* requirement that it negotiate definable objective procedures and criteria to impasse or agreement during the *current* contract negotiations before unilaterally implementing its plant layoff and AS unit staffing proposals. *McClatchy Newspapers*, 321 NLRB at 1388, 1391 (although the parties' prior contract had given the employer broad discretion in granting merit wage increases, that history did not permit the employer to unilaterally implement proposal for continued unbounded discretion following subsequent negotiations resulting in lawful impasse).

“watching people work,” rather than the demonstration-based test in the progression program. Moreover, although the progression program includes references to skill, knowledge, and ability, it does not assign weight among those factors, and the Employer does not even assert that it addresses “job performance.” Indeed, the Employer merely states that employees’ job performance has been evaluated by supervisor observation.

Accordingly, the Region should issue a Section 8(a)(5) complaint, absent settlement.

/s/
B.J.K.