

WP Company, LLC d/b/a The Washington Post and Washington Mailers' Union No. 29 Printing, Publishing, and Media Workers Sector of the Communications Workers of America, AFL-CIO. Case 05-CA-036485 and 05-CA-036574

May 9, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

On November 15, 2011, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The sole remaining issue in this case is whether the Respondent violated Section 8(a)(5) and (1) by dealing directly with employees over their ability to take a post-lunchbreak on days when they have voluntarily worked through their scheduled lunchbreak.¹ For the following reasons, we find insufficient evidence to support a finding of direct dealing, and we therefore adopt the judge's dismissal of the complaint.

For years, the Respondent has occasionally asked individual employees to volunteer to work through their scheduled lunchbreak; those employees who volunteered were allowed to take a "post-lunch break" later in their shift. The Acting General Counsel alleges that the Respondent engaged in unlawful direct dealing with individual employees in an effort to induce them to forgo their post-lunchbreaks.

We find that the Acting General Counsel has failed to produce evidence sufficient to establish a direct dealing violation. An employer engages in unlawful direct dealing when it (1) communicates directly with represented employees, (2) for the purpose of establishing or changing their terms and conditions of employment, and (3) to the exclusion of the union.²

Here, the Acting General Counsel does not contend that the Respondent engaged in unlawful direct dealing by asking individual employees to work through their scheduled lunchbreak or by offering them overtime compensation for doing so. Rather, the Acting General

Counsel's theory is that the Respondent dealt directly with individual employees to induce them not to take a post-lunchbreak after working through their scheduled lunchbreak. Although the record establishes that the Respondent occasionally asked individual employees to work through the scheduled lunchbreak, there is no evidence that these communications related to forgoing a post-lunchbreak. For example, employee and union officer Barbara Grossman's testimony that a supervisor had "worked out deals" with employees did not establish that these "deals" related to forgoing a post-lunchbreak, as opposed to simply working through the scheduled lunch break. Similarly, although employee and Union President Mark Pullium testified that he was told that he would be "well compensated" for working through lunch, he was not told that this compensation would be in exchange for forgoing his post-lunchbreak.³ Finally, employee Brian Allen Leroux's testimony that he worked through lunch and received extra compensation for doing so does not establish that the extra compensation was in exchange for giving up his post-lunchbreak.⁴

Because the Acting General Counsel has failed to produce evidence sufficient to establish a direct dealing violation, we adopt the judge's dismissal of that complaint allegation.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Gregory M. Beatty, Esq., for the Acting General Counsel.

Jacqueline M. Holmes, Esq. and *Thomas R. Chiavetta Jr., Esq.*, of Washington, DC, for the Respondent-Employer.

Mark B. Pullium Sr., of Mechanicsville, Maryland, for the Charging Party-Union.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on September 19 and 20, 2011, in Washington, DC, pursuant to an order consolidating cases issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board). The complaint, based upon original charges filed on various dates in 2011 by Washington Mailers' Union No. 29, Printing, Publishing, and Media Workers Sector of the Communication Workers of America, AFL-CIO (Charging Party or Union), alleges that WP Company, LLC d/b/a The Washington Post (Respondent or Employer), has engaged in

¹ The judge dismissed the allegations that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally implementing new policies regarding working through lunch and work assignments. The Acting General Counsel has not excepted to the dismissal of these unilateral-change allegations.

² See, e.g., *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

³ Pullium later clarified that he was twice asked to work through lunch. The first time, he received a post-lunchbreak. The second time, he did not receive the break but did not raise the issue with management because he had already eaten during another scheduled break.

⁴ In citing the testimony of Grossman, Pullium, and Leroux, we note that it was not specifically credited or discredited by the judge. Even if credited, however, the testimony would not change the result herein.

certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that they had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act when in or around November 2010,¹ it implemented a new lunch policy regarding working through lunch without prior notice to the Union, and without affording the Union an opportunity to bargain with the Respondent concerning the conduct and/or the effects of this conduct. Additionally, in or around the same time, the Respondent bypassed the Union and dealt directly with bargaining unit employees regarding working through lunch under the new policy. Lastly, the Respondent in or around January 2011, unilaterally implemented a new policy regarding work assignments without notice or bargaining with the Union.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware limited liability company, with its principal office and place of business in the District of Columbia, has been engaged in the publication of the Washington Post, a daily newspaper. Respondent in conducting its business operations derived gross revenues in excess of \$200,000, subscribed to various interstate news services, including the Associated Press, published various nationally syndicated features, including *The Color of Money*, and advertised nationally and sold products including insurance from Allstate Corporation. 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since at least 1986, the Union has been the designated Section 9(a) exclusive collective-bargaining representative of the Respondent's mailroom employees, and since then has been recognized as such by the Employer. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 18, 1998, to May 18, 2003. The parties' did not extend their collective-bargaining agreement; rather, they commenced negotiations for a successor collective-bargaining agreement in 2003, and ultimately reached a comprehensive tentative agreement in De-

ember 2009 (GC Exh. 3).³ That agreement, however, was rejected on two separate occasions in January and April 2010, by the union membership, and presently no successor collective-bargaining agreement exists between the parties (R. Exh. 22–25). Accordingly, the Respondent informed the Union that the comprehensive tentative agreement was their last, best, and final contract offer.

The mailroom, which is the department involved in this proceeding, sits operationally between the press room, where the papers are printed, and the circulation department, that delivers the papers. The Respondent employs approximately 400 employees in its mailrooms to collate, assemble, and prepare the newspaper for distribution. The bargaining unit is comprised of journeyman mailers, mailroom helpers, and utility mailers.⁴ The Respondent also employs approximately 200 individuals known as "hand inserters," who are hired as a casual labor force on a daily basis to insert flyers manually into each bundled newspaper. The "hand inserters" are not part of the collective-bargaining unit (GC Exh. 2, sec. 6 and 7), and are precluded from performing bargaining unit work as described in section 6 of the parties' expired collective-bargaining agreement.

In accordance with the expired collective-bargaining agreement, employees work 7 hours, exclusive of a 30-minute non-paid lunch period, 5 days a week. During the workday, employees are entitled to three paid 15-minute breaks, one paid 15-minute coffee break for a total of 1 hour daily, and two paid 5-minute wash-up breaks. Section 14(b) of the expired agreement provides that the present practice providing for a coffee break, wash-up times, a break between doubleheader shifts, 15 minutes for monthly chapel meetings, and time to get lunch when it is necessary to work through lunch shall be continued.⁵

³ During the summer of 2006 and 2007, the parties had a number of "off the record" bargaining sessions, however, no progress was made. The parties met again in August 2009, and it was at that time that the Respondent, due to financial challenges especially in decreasing print advertising revenue and reduced circulation in daily and Sunday newspapers, was forced to close its College Park, Maryland production operations. The collective-bargaining sessions that commenced in August 2009, and continued through December 2009, ultimately produced the comprehensive tentative agreement.

⁴ The mailers operate the collating machines, the helpers operate rolling stock to move products, and the utility mailers perform either mailer or helper work depending on production needs.

⁵ Due to operational needs and when equipment malfunctioned, a practice was established where employees were requested by their foreman to work through lunch and were compensated for doing so. If employees then wanted time to get lunch they were permitted to do so. No set time limit was established nor does one appear in the parties past and present collective-bargaining agreements (GC Exh. 2, sec. 14(b); R. Exh. 3, sec. 26). While a few of the foremen permitted 15–20 minutes to get lunch, this occurred on an isolated basis. Indeed, the record confirms that other foremen permitted less time and no firm practice was established that ripened into a term and condition of employment concerning the length of time permitted to get lunch. The record also establishes that some employees who worked through lunch did not seek or request time to get lunch either because they previously took lunch during one of their paid breaks or skipped lunch on days that they worked through lunch. The record further shows that no employee was disciplined if they declined the request of a foreman to work through lunch.

¹ All dates are in 2010, unless otherwise indicated.

² While I issued a "Protective Order" to cover Respondent and Charging Party off-the-record bargaining notes and proposals, no exhibits subject to the Order were introduced into the record (ALJ Exh. 1).

B. The 8(a)(1) and (5) Allegations

1. Implementation of the new lunch policy

The Acting General Counsel alleges in paragraph 6 of the complaint that in or around November 2010, Respondent implemented a new lunch policy regarding working through lunch without affording prior notice to the Union and affording it the opportunity to bargain with the Employer with respect to this conduct, and the effects of this conduct. The Acting General Counsel further clarified this alleged violation by arguing that the practice of permitting employees who worked through lunch to have a 20-minute period to then get lunch ripened into a term and condition of employment that cannot be changed without notice and bargaining with the Union.

Facts

On October 28, 2009, the Union filed a grievance alleging that one of Respondent's foremen on the run of press (ROP) night shift violated the parties' collective-bargaining agreement (Sec. 14(b)) by not giving an employee who worked through lunch an allotted amount of time to get something to eat and requested to meet in an effort to resolve the matter (R. Exh. 32).

On November 10, the Union filed a grievance alleging that a practice has been established that if an employee works through lunch they are entitled to a 20-minute period to get lunch and this practice is not being followed (GC Exh. 6).

On February 24, 2011, the Union filed a grievance alleging that mailroom managers were soliciting employees to work through lunch and were not providing them the opportunity to get lunch once they completed the work (GC Exh. 7).

Discussion

Section 10(b) of the Act precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon" the charged party. Although the General Counsel may rely on evidence outside the 10(b) period as "background," he is barred from bringing any complaint in which the operative events establishing the violation occurred more than 6 months before the unfair labor practice charge has been filed and served. *Allied Production Workers Union Local 12 (Northern Engraving Corp.)*, 337 NLRB 16 (2001). The statute of limitations under Section 10(b) begins to run, however, only when a party has "clear and unequivocal notice" of a violation of the Act. *Id.* Notice can be actual or constructive. Thus, the Board has found sufficient notice to start the limitations period where a party, "in the exercise of reasonable diligence, should have become aware" of facts indicating that the Act had been violated. *Moeller Bros. Body Shop*, 306 NLRB 191, 192-193 (1992). The burden of showing that a charging party was on notice of a violation of the Act is on the Respondent. *A&L Underground*, 302 NLRB 467, 468 (1991).

The charge in Case 05-CA-036485, that alleges the implementation of a new lunch policy, was filed on March 7, 2011, and a copy was served on the Respondent on March 8, 2011. To satisfy its burden under Section 10(b), the Respondent has to show that the Union knew or could have known by the exercise of reasonable diligence before September 7 that it was

aware of the Employer's policy to prevent employees from getting lunch after they worked through their regular lunch period. In the particular circumstances of this case, I find that the Union had notice of any alleged change in the policy of permitting employees to get lunch pursuant to its October 28, 2009 grievance that raised this issue.

Additionally, the Union admitted that at no time between October 2009, and the present date, did they ever request the Respondent to negotiate over any new lunch policy including permitting employees to enjoy a 20-minute period to get lunch assuming that they worked through their regular lunch period. While the Acting General Counsel argues that in certain circumstances a grievance can serve as a request to negotiate, I reject the proposition in this case for the following reasons. First, while the Union requested to meet for the purpose of resolving the matter in the October 28, 2009 grievance, it framed the request under the provisions of the parties' collective-bargaining agreement and did not reference a request to negotiate over terms and conditions of employment. Second, in the November 10 grievance, the Union did not request to meet or negotiate with the Respondent. Under Board law, "a valid request to bargain, need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." *Marysville Travelodge*, 233 NLRB 527, 532 (1977) (quoting *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971)), *enfd. sub nom. NLRB v. Cofer*, 637 F.2d 1309 (9th Cir. 1981). Here, no such clear request to negotiate and bargain on behalf of employees has been made in either the 2009 or 2010 grievance, particularly noting that the Union was previously aware of alleged violations of the lunch policy when employees worked through lunch.

I further find that the Acting General Counsel did not conclusively establish that the Respondent made any changes to the existing policy that permitted employees after working through lunch to get something to eat for the following reasons. First, the record shows that there are approximately 53 salaried foremen employed at the Respondent's Springfield, VA facility where the mailroom employees work. While the Acting General Counsel alleges that the new lunch policy was unilaterally implemented in November 2010, the evidence presented to support this assertion is not persuasive. For example, representatives of the Union that testified during the hearing, such as James Forsythe and Barbara Grossman could only point to a small number of the 53 salaried foremen that were not adhering to the policy of permitting employees to get something to eat after they worked through lunch. Indeed, Grossman testified that after November 2010, the practice of permitting employees to get something to eat after they worked through lunch continued under a majority of the foremen, some of whom permitted 20 minutes to get lunch. She further testified that while most foremen permitted employees to get lunch, the period was less than 20 minutes, but only a small number of foremen discontinued the practice. Grossman testified that on all occasions that she was requested and agreed to work through lunch after November 2010, her foreman always permitted her time to get lunch. Respondent's Foreman Wanda Jackson testified, due to

operational needs, that she has regularly requested employees to work through lunch and while none of her assigned employees has requested to get something to eat after working through their lunch, she would permit an employee to get something to eat if they requested it.

Second, I note the provision in the expired collective-bargaining agreement that provides in Section 14(b), that the practice of granting time to get lunch when it is necessary to work through lunch shall be continued. Significantly, no specific amount of time to get something to eat is set forth in that section of the agreement. Thus, I find that no new lunch policy has been implemented at the Respondent's facility. At most, the Acting General Counsel established that a small number of the 53 salaried foremen in the mailroom were not adhering to the provisions of Section 14(b), but the majority of foremen were doing so. Such evidence, standing alone, does not amount to a material change in terms and conditions of employment that requires a bargaining obligation under the Act.

Under these circumstances, and based on the discussion above, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged in paragraph 6 of the complaint.

2. Bypass of the Union and dealing directly with employees

The Acting General Counsel alleges in paragraph 7 of the complaint that the Respondent bypassed the Union and dealt directly with its employees in the unit regarding working through lunch under the new policy.

Facts

The Acting General Counsel's evidence in support of this allegation is that Grossman's superintendent Allen Martin informed her that he had worked out deals with employees who agreed to work through their lunch. Union President Pullium testified that he worked through lunch on two occasions after November 2010. He was permitted to get something to eat after working through lunch on the first occasion and the second time he was paid 15 minutes of overtime even though he had previously eaten his lunch.

Discussion

Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice by refusing to bargain collectively with the exclusive representative of its employees. The duty to bargain is defined in Section 8(d). The obligation to bargain in good faith requires, "at a minimum recognition that the statutory representative is the one with whom the employer must deal in conducting negotiations, and that it can no longer bargain directly or indirectly with employees." *General Electric Co.*, 150 NLRB 192, 194 (1964), *enfd.* 418 F.2d 736 (2nd Cir. 1069), *cert. denied* 397 U.S. 965 (1970). Indeed, it is not enough that the employer communicates with its employees about wages, hours, or working conditions; such communication must be made with the intent to, or for the purpose of, circumventing bargaining with the union. *Emhart Industries, Inc.*, 297 NLRB 215, 225 (1989). The Board in *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1965) held that in order to prove unlawful direct dealing in violation of Section 8(a)(5) of the Act the following criteria must be established:

(1) the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made without notice to, or to the exclusion of the union.

In *Emhart*, the Board found that an employer did not engage in direct dealing even though it conducted several mandatory employee meetings, without notice to the union, on procedures for productivity and quality control, topics that were also the subjects of ongoing negotiations with the union. Since the employer was not promising any benefits in these meetings to the exclusion of the union, the Board held that its intent was not to undermine the union and thus there was no unlawful direct dealing.

Under these circumstances, and particularly noting that no material changes in conditions of employment were established or implemented with respect to the lunch policy, it cannot be found that the Respondent bypassed the Union and dealt directly with employees regarding working through lunch as alleged in paragraph 6 of the complaint. *E.I. DuPont de Nemours & Co.*, 301 NLRB 155 (1991) (Board held that employees understood that their participation in the video was voluntary and that the alleged direct dealing did not erode the union's representational status).

3. Unilateral implementation of work assignments

The Acting General Counsel alleges in paragraph 8 of the complaint that in or around January 2011, the Respondent implemented a new policy regarding work assignments without prior notice to the Union and affording it the opportunity to bargain with the Employer with respect to this conduct, and the effects of this conduct.

Facts

On August 3, 1999, the Union filed a grievance asserting that "hand inserters" by putting bundles on the conveyor belts at the Respondent's College Park, MD facility violated Section 6 of the parties' collective-bargaining agreement as these employees were performing bargaining unit work. On September 21, 1999, the Union referred the underlying grievance to arbitration. The Respondent defended its conduct by arguing that the disputed work had been performed by the "hand inserters" for some time and it did not intend to change the practice.⁶

By letter dated September 27, 1999, the Respondent replied to the Union's referral to arbitration of the helpers' jurisdiction grievance and pointed out that the mailroom has been making similar assignments to the "hand inserters" for quite some time including even before the parties' collective-bargaining agreement was signed in May 1998. The Union ultimately decided not to refer the matter to arbitration.

On November 24, 2009, the Union filed a grievance alleging that the "hand inserters" were observed stacking complete bun-

⁶ The 1991-1997 collective-bargaining agreement between the parties covering helpers indicates that "hand inserters" may be assigned to put complete bundles on two designated lines at each of the Respondent's mailrooms (R. Exh. 3-p. 2, sec. 3(b)).

dles onto skids which is bargaining unit work that should be performed by helpers (R. Exh. 17).

On September 1, the Union filed a grievance alleging that “hand inserters” were stacking behind the tie machine lines in violation of Section 6 of the parties’ expired collective-bargaining agreement (R. Exh. 1). Forsythe testified that this is the same issue (stacking behind the tying machines) that the Charging Party was concerned about when it filed the subject unfair labor practice charge and is alleged in paragraph 8 of the complaint.

On November 3, the Union filed a grievance alleging that the “hand inserters” were placing complete bundles on the lines in violation of the parties’ expired collective-bargaining agreement (GC Exh. 4).

On March 1, 2011, the Union filed a grievance asserting that the “hand inserters” are putting bundles of papers on the lines and taking them off the press lines in violation of Section 6 and 7 of the parties’ expired collective-bargaining agreement (GC Exh. 5).

None of the grievances filed by the Union in 2010 or 2011 have been referred to arbitration.

Discussion

First and foremost, it is noted that the Acting General Counsel did not introduce any evidence in its case in chief that the Respondent, as alleged in paragraph 8 of the complaint, implemented a new policy regarding work assignments in and around January 2011. For this reason alone, it cannot be established that the Respondent violated Section 8(a)(1) and (5) of the Act concerning this allegation.⁷ I further find, based on the reasons discussed below, that the Respondent did not violate Section 8(a)(1) and (5) of the Act regarding the implementation of a new policy regarding work assignments as alleged in paragraph 8 of the complaint.

The charge in Case 05–CA–036574, that alleges the implementation of a new policy regarding work assignments, concerns the issue of “hand inserters” performing bargaining unit work. That charge was filed on April 20, 2011, and a copy was served on the Respondent on April 26, 2011. To satisfy its burden under Section 10(b), the Respondent has to show that the Union knew or could have known by the exercise of reasonable diligence before October 20, that it was aware of the Employer’s policy to assign bargaining unit work involving the placement and removal of complete bundles on the conveyor belts or press lines, to “hand inserters.” In the particular circumstances of this case, I find that the Union had notice of any alleged change in the policy of permitting “hand inserters” to perform the work of placing or removing complete bundles from the conveyor belts or press lines pursuant to the grievances it filed on August 3 and November 24, 1999, and September 1, that raised the same or similar issues. Under these circumstances, the April 20, 2011 charge is untimely and the underlying allegation must be dismissed. *El Paso Elec. Co.*, 355 NLRB 558 (2010) (filing a grievance over the same practice

more than 6 months before filing its unfair labor practice charge is grounds for finding the charge untimely).

Additionally, the Union admitted that at no time between August 1999, and the present date, did they ever request the Respondent to negotiate over the issue of “hand inserters” performing bargaining unit work. While the Acting General Counsel argues that in certain circumstances a grievance can serve as a request to negotiate, I reject the proposition in this case for the following reasons. First, while the Union requested to meet for the purpose of resolving the matter in the August 3 and November 24, 1999 grievances, it did not do so in the grievance filed on September 1. Moreover, any request to meet with the Respondent was framed under the provisions of the parties’ collective-bargaining agreement and did not reference a request to negotiate over terms and conditions of employment. *McGraw-Hill Broadcasting Co., Inc.*, 355 NLRB 1297 (2010) (just filing a grievance does not satisfy the union’s affirmative duty to request bargaining). Under Board law, “a valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.” *Marysville Travelodge*, 233 NLRB 527, 532 (1977) (quoting *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208, (1971), *enfd. sub nom. NLRB v. Confer*, 637 F.2d 1309 (9th Cir. 1981)). Here, no such clear request to negotiate and bargain on behalf of employees has been made in either the 2009 or 2010 grievances particularly noting that the Union was previously aware of “hand inserters” performing bargaining unit work.

The Respondent further defends its conduct and asserts that no policy changes regarding work assignments were implemented requiring a bargaining obligation, that the parties bargained to a good-faith impasse on the terms of a successor collective-bargaining agreement with some or all of the alleged changes being encompassed in their preimpasse bargaining proposals, and that the Union, based on past practice, clearly and unmistakably waived its right to bargain over any changes in work assignments involving “hand inserters.”

Section 8(a)(5) of the Act makes it unlawful for an employer to make unilateral changes to benefits that are mandatory subjects of bargaining without negotiations with the exclusive collective-bargaining representative of its employees. *NLRB v. Katz*, 369 U.S. 736 (1962). Therefore, an employer may not make unilateral changes in conditions of employment unless the union expresses a clear and unmistakable waiver of its right to bargain. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *California Pacific Medical Center*, 337 NLRB 910 (2002).

A waiver occurs when a union “knowingly and voluntarily relinquishes its right to bargain about a matter. . . . When a union waives its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require ‘clear and unmistakable’ evidence of waiver and have tended to construe waivers narrowly.” *Department of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir.

⁷ The Acting General Counsel conceded that if he did not introduce evidence on the record regarding a January 11, 2011 unilateral change in work assignments, those allegations could be dismissed.

1992). Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been “fully discussed” and “consciously explored” during negotiations. *Davies Medical Center*, 303 NLRB 195, 204 (1991). Failure to mention a mandatory subject of bargaining does not constitute a waiver of the right to bargain; rather, the Board requires “a conscious relinquishment by the union, clearly intended and expressed.” *Elizabethtown Water Co.*, 234 NLRB 318, 320 (1978).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties’ past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties’ intent. See *Johnson-Bateman*, 295 NLRB 180, 184–187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 (1984).

The record conclusively establishes that during negotiations prior to the expiration of the parties’ collective-bargaining agreement on May 18, 2003, and through December 16, 1999, when the parties reached a comprehensive tentative agreement (GC Exh. 3),⁸ there were numerous instances when the issue of “hand inserters” performing bargaining unit work was “fully discussed” and “consciously explored.” For example, Respondent’s collective-bargaining notes fully support this assertion (R. Exh. 8 at p. 7, R. Exh. 9 at pp. 7, and 19, R. Exh. 10 at pp. 2, 19, and 21, R. Exh. 11 at pp. 3, 4, 7, and 13, R. Exh. 12 at pp. 2, 3, and R. Exh. 13 at p. TWP007470). Moreover, the parties agreed to include in Section 7 of the comprehensive tentative agreement the results of their negotiations permitting “hand inserters” to continue to be assigned the placing of complete bundles on, and unstacking of complete bundles from, the conveyor lines (GC Exh. 3).

Therefore, I find that the Union waived any right to engage in negotiations over the allegations alleged in paragraph 8 of the complaint.

In determining whether there was an impasse in negotiations, one begins with the proposition that the burden of establishing an impasse rests on the party asserting it, in this situation, the Respondent. *North Star Steel Co.*, 305 NLRB 45 (1991). A lead case on this issue, *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), stated:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered. In deciding whether an impasse in bargaining existed.

In regards to the last of these factors, the “contemporaneous understanding of the parties as to the state of the negotiations,” if either negotiating party remains willing to move further to-

ward an agreement, this would support a finding of no impasse. In *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), the Board stated: “A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.” In *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), citing *Pillowtex Corp.*, 241 NLRB 40 (1979), and *PRC Recording Co.*, 280 NLRB 615 (1986), the Board stated that it has defined an impasse as the point in time during negotiations when the parties are warranted in assuming that further bargaining would be futile and when both parties believe “that they are at the end of their rope.”

Applying these cases to the lengthy negotiations between the Respondent and the Union in an effort to reach a successor collective-bargaining agreement, I find that the Respondent has sustained its burden of establishing that an impasse existed in April 2010, when the union membership rejected for the second time the last, best, and final contract offer proffered by the Respondent.

As background to this finding, the record establishes that the parties engaged in protracted and difficult negotiations for a successor collective-bargaining agreement commencing in March 2003 (prior to the expiration of their collective-bargaining agreement on May 18, 2003), up to and including December 16, 2009, when the parties reached a comprehensive tentative agreement subject to ratification by the union membership. There is no dispute that the union membership rejected the comprehensive tentative agreement on two occasions, and the Respondent made it crystal clear in a letter dated April 20 that the comprehensive tentative agreement is the Employer’s last, best, and final contract offer, and its terms will not improve with time (R. Exh. 24). I also note that on April 1, the Union submitted revised proposals to the Respondent, however, none of those proposals made any changes to the “hand inserters” issue concerning performing bargaining unit work (R. Exhs. 18 and 21). Likewise, those proposals did not change the provisions of Section 7 of the comprehensive tentative agreement that privileged the “hand inserters” to be assigned the placing of complete bundles on, and unstacking of complete bundles from the conveyor lines (R. Exhs. 7 and 8). The last formal negotiating session between the parties occurred on April 1, as evidenced from the Respondent’s collective-bargaining notes of that date (R. Exh. 20). Those notes confirm that the Respondent did not agree to any of the Union’s proposals.

The record establishes, and all parties agree, that no additional proposals have been exchanged by the parties since April 1, and no additional collective-bargaining sessions have been scheduled or held.

Under these circumstances, I conclude that the parties were at the end of their rope and hopelessly at impasse in their negotiations to reach a successor collective-bargaining agreement. *GATX Logistics, Inc.*, 325 NLRB 413 (1998). Therefore, I find that Section 7 in the comprehensive tentative agreement privileges the Respondent to continue assigning the “hand inserters” the placing of complete bundles on, and unstacking of complete

⁸ While the parties continued to meet on a sporadic basis between 2003 and 2009, no substantial progress was made until the comprehensive tentative agreement was reached in December 2009.

bundles from the conveyor lines without engaging in negotiations with the Union (GC Exh. 3).

The Respondent further argues that a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo and not a violation of Section 8(a)(5) of the Act. *Courier-Journal*, 342 NLRB 1093, 1095 (2004).

In this regard, the Respondent conclusively established that the practice of assigning the “hand inserters” the placing of complete bundles on and the unstacking of complete bundles from the conveyor lines had existed for many years prior to the allegation in paragraph 8 of the complaint that a new policy was implemented regarding work assignments. Indeed, the record confirms that the Union raised this issue in grievances filed in 1999 about “hand inserters” performing bargaining unit work and that the work being challenged by the Union has always been performed by the “hand inserters.” *Haddon Craftsmen, Inc.*, 297 NLRB 462 (1989) (dismissing union’s claim that the employer violated Section 8(a)(5) by transferring certain insert work to nonunit employees because the record established that nonunit employees had “customarily performed” the same type of work in the past). Moreover, the parties agreed in negotiations leading to the comprehensive tentative agreement that “hand inserters” were authorized to perform the disputed work (GC Exh. 3, sec. 7).

For all of the above reasons, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged in paragraph 8 of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not unilaterally implement a new lunch policy regarding working through lunch, did not bypass the Union and deal directly with bargaining unit employees regarding the new lunch policy nor did it implement a new policy regarding work assignments without notice to or bargaining with the Union. Therefore, the Respondent did not fail and refuse to bargain collectively and in good faith with the Section 9(a) representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The complaint is dismissed.

⁹ 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.