

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

DATE: September 8, 2015

TO: Mori Rubin, Regional Director
Region 31

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

SUBJECT: Fox Television Stations, Inc. as owner and operator of television stations KTTV/KCOP Case 31-CA-147865 530-6033-7084

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by waiting 18 months to implement the vacation policy portion of its last, best, and final offer after initially implementing other proposals. We conclude that the Employer did not violate the Act, given that the parties remained at impasse when the Employer implemented the vacation policy.

FACTS

Fox Television Stations, Inc., as owner and operator of television stations KTTV/KCOP (the “Employer”) operates television stations based in Los Angeles, California. The National Association of Broadcast Employees and Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, Local 53 (the “Union”) represents approximately 57 staff engineers and 20 daily engineers at the Employer’s Los Angeles facility and has had a collective-bargaining relationship with the Employer for 25 years. The last collective-bargaining agreement between the parties expired on June 30, 2011, and the parties bargained for a successor agreement from June 2011—July 2013. On November 26, 2012, the Employer made what became its final offer, which included a proposal to reduce the maximum potential vacation from 6 weeks to 5 weeks.¹

¹ In terms of the Employer’s vacation policy, the Employer’s past practice had been to issue a vacation memorandum in January of each year that informed employees how many weeks of vacation they were eligible for based on years of service and the permissible combinations of weeks of vacation that employees could take. The annual memorandum also stated that employees would be contacted by the Employer and would have a 24-hour window in which to schedule their vacation for the entire year. The Employer’s vacation year typically ran from the beginning of April through the end of March.

On July 9, 2013, the Employer declared impasse and informed the Union that it would implement proposals from its November 26, 2012 final offer on July 15, 2013. Because employees had already scheduled their vacation for the rest of the year at the beginning of 2013, the Employer did not implement the new vacation policy for the 2013-2014 vacation year. The Union filed a charge on July 24, 2013 in Case 31-CA-109881 alleging that the Employer violated Section 8(a)(5) by declaring impasse and unilaterally implementing its final offer, and the Region issued complaint on December 31, 2013. Given that the merits of the Region's charge were to be litigated before the Administrative Law Judge ("ALJ") in March 2014, the Employer again refrained from implementing its vacation policy in January 2014, in order to account for the possibility of an adverse Board decision. However, the ALJ ultimately dismissed the complaint and the Board adopted the ALJ's holding on September 22, 2014. The Employer then made it clear in its January 16, 2015 vacation memorandum that employees would only be entitled to a maximum of 5 weeks for the 2015-2016 vacation year. It is undisputed that the parties remained at overall impasse and that the Union never attempted to bargain about the one-week vacation reduction between the Employer's declaration of impasse and its implementation of the one-week reduction.

ACTION

We conclude that the charge should be dismissed, absent withdrawal. Given that the parties remained at impasse in January 2015, the Employer was privileged to implement the one-week vacation reduction contained in its last, best, and final offer.

It is well-settled that after impasse, an employer may unilaterally implement changes in existing terms and conditions of employment provided that the changes are reasonably comprehended within the employer's pre-impasse proposal.² Moreover, an employer is not required to implement its entire last, best, and final offer, but may choose to implement only portions of its final offer.³ Any unimplemented portions of a

² *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1976), *enfd* 395 F.2d 622 (D.C. Cir. 1968); *Western Publishing Co.*, 269 NLRB 355, 355-56 (1984).

³ *Presto Casting Co.*, 262 NLRB 346, 354 (1982) (citing *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)), *enfd in relevant part*, 708 F.2d 495 (9th Cir. 1983), *cert. denied* 464 U.S. 994 (1983). *See also Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990) ("[o]nce an employer bargains in good faith to impasse, its duty to bargain further is suspended, and it is free to impose all—or part of—its pre-impasse proposals" (emphasis added)).

final offer are considered “dormant,” and possibly subject to later negotiation if the parties choose to take them up again.⁴

Here, there is no evidence—and neither party contends—that the bargaining impasse was ever broken in the 18 months between the Employer’s declaration of impasse and the implementation of the new vacation policy. Even after the Employer’s initial decision to refrain from implementing the vacation policy, the Union made no effort to take up the issue again or bargain about it. Moreover, the Employer made a good-faith effort to accommodate employees’ previously scheduled vacation for the 2013-2014 vacation year, and then abstained from implementing the policy an additional year to await the outcome of the Board’s administrative proceedings.

In these circumstances, where the parties were still at overall impasse and the Union made no effort to bargain over the unimplemented vacation policy, and there is no evidence of bad faith on the part of the Employer, the Employer was free to unilaterally implement the vacation policy contained in its last, best, and final offer.⁵

⁴ *Presto Casting Co.*, 262 NLRB at 354-55 (in holding that the employer did not violate Section 8(a)(5) by implementing only the wage-package portion of its final offer, the Board explained that the implementation-after-impasse doctrine is an economic weapon available to the employer that “changes the circumstances of the bargaining atmosphere” and hopefully moves the parties back towards bargaining)

⁵ The instant case is distinguishable from those cases in which the Board has found a violation because an employer, after impasse, unilaterally implemented a proposal that was inextricably intertwined with another proposal that the employer chose not to implement. *See, e.g., Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992) (individual components of employer’s proposed health plan bear “economic and functional relationship to one another” such that employer was not free to implement only those health plan components detrimental to employees), *enfd* 44 F.3d 1320, *cert. denied* 516 U.S. 974 (1995); *see also The News Journal Company*, Case 4-CA-22689, Advice Memorandum dated August 2, 1994 (employer’s bi-weekly payroll conversion proposal inextricably linked to proposals regarding employees’ right to a pay advance, additional holiday, and increased life insurance such that employer could not choose to solely implement the bi-weekly payroll conversion). Here, there is no evidence that the vacation policy was “inextricably linked” to any other proposal.

For the foregoing reasons, the charge should be dismissed, absent withdrawal.⁶

/s/
B.J.K.

⁶ We additionally note that the initial extension of the 6-week vacation policy did not create a past practice and was merely a continuation of existing terms and conditions of employment. Thus, cases addressing the creation of a past practice are inapposite.