

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

DATE: December 4, 2015

TO: Garey E. Lindsay, Regional Director
Region 9

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

SUBJECT: Lakefront Lines/Coach USA
Case 09-CA-156944

530-6050-0120
530-6050-3380
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This Section 8(a)(5) case was submitted for advice as to whether a bus company was privileged to unilaterally disable cruise control on company buses following multiple traffic accidents that, it claims, involved drivers using cruise control. We conclude that the bus company's unilateral change violated Section 8(a)(5). Specifically, we conclude that disabling cruise control was a mandatory subject of bargaining because it affected the drivers' health and safety and the change had a substantial, material, and significant impact on drivers' working conditions. Further, we conclude that the bus company has not shown that the cruise-control change was privileged under *Peerless Publications'* "core purpose" defense because, even assuming this defense applies outside the newspaper industry, the bus company has failed to demonstrate that disabling cruise control on all company vehicles was "narrowly tailored" and "appropriately limited" to address only the company's stated purposes.¹

FACTS

Lakefront Lines/Coach USA (the Employer) operates charter bus services and Megabus, an intercity double-decker passenger bus line, at many locations throughout the United States. Between October 2013 and April 2015, the company recorded at least five accidents involving Megabus drivers in several states, including three in Indiana over a six-month period between October 2014 and April 2015.

¹ See *Peerless Publications, Inc.*, 283 NLRB 334, 335-37 (1987), *on remand from Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d 550, 565 (D.C. Cir. 1980).

According to police reports, the accidents appear to have had a number of potential causes including traveling at high speeds, traffic congestion in construction zones, and poor weather conditions. Megabus passengers were treated for injuries after each accident and, in one case, passengers in another vehicle were killed. The Employer states that cruise control was used by the drivers in all cited accidents, but the accident reports do not reflect whether cruise control was engaged at the time of the accidents or if the use of cruise control was a direct cause of the accidents.

On March 4, 2015,² United Workers of America, Local 322 (the Union) was certified as the representative of all drivers, dispatchers, and mechanics at the Employer's location in Cincinnati, Ohio. Shortly after, the Employer discontinued Megabus operations in Cincinnati, laid off approximately twenty to twenty-five Megabus drivers, and began to operate only charter buses at the Cincinnati location. Many of the charter bus rides extend over several days and include highway driving without breaks for many hours at a time. A majority of the drivers are over age fifty and, as a result, are more prone to blood clots, a condition which affects long-distance drivers of any age.

In May, as a result of the Megabus accidents described above,³ the Employer deactivated cruise control in all of its buses nationwide, including all charter buses driven by unit employees. The Employer's general manager distributed a memo to all employees stating that "[s]afety is our number one priority and the decisions were made with the safety of our passengers and the safety of the traveling public in mind to disable all cruise control in all vehicles immediately." The memo asserts that cruise control was in use on congested roads or in poor weather conditions and accidents occurred because drivers did not deploy brakes in a timely manner. The memo further states that the company's insurance carriers have stated that "cruise control can add to driver inattention" and concludes, "[t]here will be no further discussions concerning use of [] cruise control."

The Employer did not provide notice to the Union before disabling cruise control and has refused to bargain with the Union over the decision.⁴ In addition to the risk

² All dates *infra* are 2015 unless otherwise noted.

³ The Employer's senior vice president stated that there were six preventable accidents involving cruise control over the course of seven months but other evidence provided by the Employer suggests that this statement was made in error. None of the accidents cited by the Employer involved Cincinnati drivers.

⁴ The parties began negotiations for an initial collective-bargaining agreement around September 2015.

of blood clots described above, the Union claims that many drivers are concerned that driving without cruise control affects drivers' lower limbs and backs because they cannot stretch or change positions for hours at a time. One driver, (b) (6), (b) (7)(C), has (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), and is concerned that (b) (6), (b) (7)(C) will not be able to continue working as a driver now that cruise control has been removed from the charter buses.

ACTION

We conclude that the Employer violated Section 8(a)(5) by disabling cruise control on its buses without first bargaining with the Union. Specifically, we conclude that disabling cruise control was a mandatory subject of bargaining because it affected the health and safety of unit employees and the change had a substantial, material, and significant impact on those employees' working conditions. Further, we conclude that the Employer has not shown that the cruise-control change was privileged under *Peerless Publications*' "core purpose" defense because, even assuming this defense applies outside the newspaper industry, the Employer has failed to demonstrate that disabling cruise control on all company vehicles was "narrowly tailored" and "appropriately limited" to address only the Employer's stated purposes.⁵

I. Disabling Cruise Control is a Mandatory Subject of Bargaining and is a Material, Substantial, and Significant Change to Employees' Working Conditions

An employer violates Section 8(a)(5) and (1) of the Act when it refuses to bargain over matters that are mandatory subjects of bargaining.⁶ Mandatory subjects of bargaining include those delineated in Section 8(d) as "wages, hours, and other terms or conditions of employment"⁷ but exclude "managerial decisions at the core of entrepreneurial control."⁸ In order to find a particular subject of bargaining a mandatory subject, it must be "plainly germane to the working environment" of the

⁵ See *Peerless Publications*, 283 NLRB at 335-37.

⁶ See, e.g., *LM Waste Service Corp.*, 360 NLRB No. 105, slip op. at 9 (May 12, 2014) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

⁷ *Id.*, slip op. at 9-10 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)).

⁸ *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 224 (1964) (Stewart, J., concurring); see *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-88 (1981) (employer decision to close part of business for economic reasons not a mandatory subject of bargaining despite affecting working conditions because it involved a change in the scope and direction of the enterprise).

employees.⁹ Conditions and practices on the job that directly impact employees' health and safety are germane to the workplace and thus subject to mandatory bargaining.¹⁰ In such cases, the Board does not determine whether a given change would make a workplace "safer," but rather whether a bargaining representative has raised a legitimate concern regarding the effect of the change on unit employees.¹¹ However, even if a change implicates a mandatory subject of bargaining, the duty to bargain only arises if the unilateral action causes a "material, substantial, and significant change in employees' terms and conditions of employment."¹²

Here, the Employer's decision to disable cruise control was a mandatory subject of bargaining. Unit employees have a genuine concern that disabling cruise control will negatively impact their health and safety.¹³ Drivers will now be required to drive

⁹ *Ford Motor Co.*, 441 U.S. at 498; *Fibreboard*, 379 U.S. at 222 (Stewart, J., concurring).

¹⁰ *See, e.g., Gulf Power Co.*, 156 NLRB 622, 635 (1966) ("safety provisions constitute an essential part of [] employees' terms and conditions of employment"), *enforced*, 384 F.2d 822 (5th Cir. 1967); *see also, New Surfside Nursing Home*, 322 NLRB 531, 534 (1996) (citing *American National Can Co.*, 293 NLRB 901, 904-05 (1989), *enforced*, 924 F.2d 518 (4th Cir. 1991)) (employer required to provide union with information about employees' exposure to chemicals and safety procedures; "health and safety of employees are terms and conditions of employment, and thus mandatory subjects of bargaining").

¹¹ *Northside Center for Child Development*, 310 NLRB 105, 105 (1993) (employer required to bargain over decisions to stop providing guns to its guards and stop requiring guards to carry guns while on duty because this affected the guards' duties and the union had legitimate concerns for the guards' safety; employer's concerns that guns reduced its clients' safety did not insulate it from duty to bargain).

¹² *E.g., Salem Hospital Corp.*, 360 NLRB No. 95, slip op. at 2-3 (Apr. 30, 2014) (unilateral change to dress code policy assigning color coded uniforms to each hospital department had material, substantial, and significant effect on employees).

¹³ *Cf. AK Steel Corp.*, 324 NLRB 173, 181-83 (1997) (finding requirement that all employees wear shoe guards at work a mandatory subject of bargaining where rule was aimed at improving workplace safety but unit employees disagreed that shoe guards should be universally required); *see also Oil, Chemical & Atomic Workers v. NLRB*, 711 F.2d 348, 361 (D.C. Cir. 1993) (holding that employers were required to provide bargaining representatives information regarding employee exposure to workplace hazards where employees expressed legitimate concerns for their health and safety).

for long periods without an opportunity to stretch their limbs, which may lead to increased risk of blood clots, especially because the majority of drivers are over age 50. And at least one employee may need to choose between ^{(b) (6), (b) (7)(C)} health (such as the employee with the ^{(b) (6), (b) (7)(C)}) and ^{(b) (6), (b) (7)(C)} job. Moreover, the Employer framed the decision as one resulting from concern for the safety of its bus passengers. As drivers of those vehicles, safety concerns apply equally, if not more so, to unit employees.¹⁴ Under these circumstances, the Employer's decision to disable cruise control was clearly germane to the working environment and the Union has raised a legitimate concern on behalf of unit employees.¹⁵

Furthermore, the disabling of cruise control was a material, substantial, and significant change in employees' working conditions. Unit employees operate charter buses for long distances, often involving multiple days of travel with many lengthy stretches on interstate highways. Now, without cruise control, the drivers are deprived of a basic tool of their trade, which they had likely used on a daily basis.¹⁶ And, as discussed above, employees have expressed genuine concern for their health

¹⁴ *Cf. Northside Center*, 310 NLRB at 105 (concluding employer decision to no longer require guards to carry guns in order to protect their clients' safety was a matter of legitimate concern for unit employees who would no longer have access to guns for their own safety).

¹⁵ The Employer's elimination of cruise control was also subject to mandatory bargaining because it was not a change in the basic scope, nature, or direction of the Employer's business. *Cf. AG Communication Systems Corp.*, 350 NLRB 168, 171-72 (2007) (finding employer had no duty to bargain about decision to purchase another company and close and integrate that company's operations; this was a "core entrepreneurial management decision" that was instituted to increase profitability by merging duplicative departments and other reasons unrelated to reducing labor costs), *enforced sub nom. IBEW Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009).

¹⁶ *Compare Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 2-3 (Aug. 29, 2014) (finding change to employer training policy that eliminated credit for instructor-led training and limited paid hours for training was material, substantial, and significant) *with Crittenton Hospital*, 342 NLRB 686, 686-87 (2004) (concluding revised dress code policy prohibiting nurses from wearing artificial nails not significant and therefore not subject to mandatory bargaining where prior policy strongly discouraged artificial nails); *see also Northside Center*, 310 NLRB at 105 (decision to no longer provide guns or require employees to carry guns was a substantial change to employees' duties).

and safety on the job as a result of the change to their working conditions.¹⁷ In these circumstances, disabling cruise control was a material, substantial, and significant change to unit employees' working conditions and subject to mandatory bargaining.

II. The Employer's Unilateral Action is Not Justified by a "Core Purpose" Defense

In *Peerless Publications*, the Board considered whether a newspaper publisher was required to bargain with a union representing its employees prior to implementing an employee code of conduct.¹⁸ The code of conduct included a number of rules addressing the newspaper staff's ethical obligations and implemented penalties for an employee's failure to abide by the code. Accepting the case on remand from the D.C. Circuit, the Board reaffirmed the principle that work rules generally constitute mandatory bargaining subjects because work rules affect terms and conditions of employment.¹⁹ However, the Board stated that a newspaper publisher may not necessarily be required to bargain over reasonable rules addressing editorial integrity because, in that industry, protecting the newspaper's editorial integrity "lies at the core of entrepreneurial control."²⁰ Applying this principle, the Board laid out a three part-test. First, in order to overcome the presumption of mandatory bargaining, the subject matter sought to be addressed by an employer's rule must relate to protecting the "core purposes of the enterprise."²¹ Second, the employer must show that the rule is "narrowly tailored in terms of substance, to meet . . . only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous..."²² And, third, the rule must be "appropriately limited . . . to affected employees to accomplish those necessarily limited objectives."²³

Applying this test in *Peerless*, the Board assumed without deciding that the publisher's code of conduct was restricted to subject matters necessary to protect the

¹⁷ Cf. *Crittenton Hospital*, 342 NLRB at 686 (no evidence that unit employees wore artificial nails under prior policy or that change would be significant to them).

¹⁸ 283 NLRB at 334-37.

¹⁹ *Id.* at 334-35.

²⁰ *Id.* at 335.

²¹ *Id.*

²² *Id.*

²³ *Id.*

employer's "core purposes" and therefore overcame the presumption of mandatory bargaining. However, the Board concluded that the code of conduct failed the second step of the test because the rules were overbroad, rather than narrowly tailored, and included prohibitions, for example, on employees' political activities away from work. And finally, the Board found that the code of conduct also failed the third step because it applied to all employees without any exception, such as maintenance and circulation employees.²⁴

In subsequent decisions, the Board has declined to extend *Peerless Publications*, concluding that *Peerless* "was decided within the unique context of the newspaper industry and is of limited applicability outside of the narrow factual situation presented in that case."²⁵ In explaining why *Peerless* has been limited to the newspaper industry, the Board has noted that the *Peerless* test was devised in response to the D.C. Circuit's concerns over a governmental body potentially interfering with a newspaper's free speech rights.²⁶ In other words, the employer's

²⁴ *Id.* at 336; see also *ANG Newspapers*, 343 NLRB 564, 565-66 (2004) (dismissing complaint claiming newspaper-employer interfered with reporter's Section 7 rights by warning him of conflict of interest due to its legitimate interest in maintaining editorial integrity; further, assuming without deciding that *Peerless* applied in 8(a)(1) context, Board stated that isolated warning made to one employee, aimed at protecting the credibility and integrity of the newspaper, was narrowly tailored and appropriately limited).

²⁵ *King Soopers, Inc.*, 340 NLRB 628, 629 (2003) (rejecting employer argument that it had no duty to bargain over the effects of decision to install accuracy scanners in its retail pharmacies because it protected the employer's core purpose of providing accurate prescriptions medications); see also *WGE Federal Credit Union*, 346 NLRB 982, 982 n.2, 987-990 (2006) (rejecting credit union employer claim that unilaterally imposed rule prohibiting employees from electioneering for credit union board of directors during working time was not subject to mandatory bargaining because it was necessary to protect credit union's "core purpose" of financial stability); *Virginia Mason Hospital*, 357 NLRB No. 53, slip op. at 3 (Aug. 23, 2011) (finding *Peerless* inapplicable, "consistent with a line of Board decisions that have sharply limited its reach," to hospital's unilateral implementation of face mask policy for non-immunized nurses).

²⁶ See *id.*, slip op. at 4-5; *Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB*, 636 F.2d at 560 ("[E]ditorial control and the ability to shield that control from outside influences are within the First Amendment's zone of protection and therefore entitled to special consideration.").

“core purposes” fell within the “First Amendment’s zone of protection.”²⁷ The Board also cautioned against expanding the “core purpose” exemption beyond the newspaper industry because, together with the exemption from bargaining about changes in the basic direction, scope, or nature of the enterprise, it would “swallow the rule that decisions affecting employment conditions are subject to mandatory bargaining.”²⁸

Here, we reject the Employer’s reliance on *Peerless Publications*. First, the Employer is a transportation provider and the Board has not recognized the validity of a “core purpose” defense outside of the newspaper industry. Indeed, the Board has declined to extend *Peerless* to other industries in which customer safety is paramount, such as healthcare providers, because permitting an employer to avoid bargaining over subjects affecting its core purpose would eviscerate the duty to bargain over employees’ terms and conditions of employment.²⁹ Further, as discussed above, the decision to disable cruise control was germane to the work environment of unit employees and not a managerial decision at the core of entrepreneurial control.

Next, even assuming that the “core purpose” defense applies in the transportation industry, and that the Employer’s decision to disable cruise control was necessary to protect its “core purpose” of “providing safe passenger bus services,” we conclude that the Employer’s unilateral action fails the other steps of the *Peerless* test. Specifically, disabling cruise control on all company vehicles was not “narrowly tailored” to address only the Employer’s legitimate and necessary objectives, nor was it limited to only appropriate employees.

Initially, the decision was not “narrowly tailored” because the Employer has not shown that cruise control directly caused any of the cited bus accidents. In fact, the more immediate causes of these accidents were poor weather conditions and driver

²⁷ See *Virginia Mason Hospital*, 357 NLRB No. 53, slip op. at 5.

²⁸ See *id.*, slip op. at 5 (citing *Edgar P. Benjamin Healthcare Center*, 322 NLRB 750, 752 (1996) (rejecting nursing home employer’s “core purpose” argument that it had no duty to bargain over new rule subjecting employees’ packages to mandatory, random searches where employer was responding to theft of patient property)); see generally *First National Maintenance Corp. v. NLRB*, 452 U.S. at 676.

²⁹ See *Virginia Mason Hospital*, 357 NLRB No. 53, slip op. at 5 (observing that health care employer has same duty to bargain over employees’ terms and conditions as employers in other industries, despite potential implications for patient care); see also *King Soopers*, 340 NLRB at 629 (rejecting employer argument that it had no duty to bargain over scanner policy that was designed to protect “core purpose” of safely dispensing medications).

error, such as failing to slow down in a work zone. And, even if the Employer can show that cruise control caused the accidents (e.g., that the driver failed to slow down in a work zone because cruise control reduced his or her attention), the Employer could have taken more measured steps to address the objective of passenger safety. These steps could include temporarily disabling cruise control on some of its buses to gauge the effect of cruise control, restricting the speed at which cruise control can be used, or providing employees with training on appropriate use of cruise control. Instead, the Employer took the drastic action of disabling cruise control on all of its buses and warned employees that there would be “no further discussions” regarding this decision.

Furthermore, disabling cruise control was not “appropriately limited” to affected employees. The bus accidents cited by the Employer all involved double-decker Megabuses, rather than the charter buses driven by the current unit employees. The Employer, therefore, could have aimed its response at the type of bus that appears to be at the root of the problem,³⁰ rather than simply disabling cruise control across the board on all of its buses and thereby affecting terms and conditions for all drivers.³¹ For these reasons, the Employer’s decision fails both the second and third steps of the *Peerless* test. By disabling cruise control in all its buses, the Employer went further than necessary to achieve its stated objectives.³²

In sum, disabling cruise control was a mandatory subject of bargaining, and the Employer has not proven an affirmative defense that would negate its responsibility

³⁰ Although the Employer has ceased Megabus services at the Cincinnati location, the Employer still offers Megabus services at other locations.

³¹ See *ANG Newspapers*, 343 NLRB at 566 (concluding that, if Board were to apply *Peerless* test in 8(a)(1) context, newspaper-employer warning to reporter about potential conflict of interest in addressing city council on behalf of union while simultaneously writing article about city council’s activity would be “narrowly tailored” and “appropriately limited”).

³² *Peerless Publications*, 283 NLRB at 336-37 (concluding employer’s code of conduct was both overbroad as written and inappropriately limited because it applied to all employees across the board).

to provide the Union with notice and an opportunity to bargain. Thus, the Region should issue complaint, absent settlement.

/s/
B.J.K.

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