

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

REVISED

DATE: May 3, 2016

TO: Margaret Diaz, Regional Director  
Region 12

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

SUBJECT: GPD Holdings, Inc. 530-6050-0120  
Case 12-CA-167404 530-6050-0140  
530-6050-0800  
530-6050-0875  
530-6050-0900

This Section 8(a)(5) case was submitted for advice as to whether the Employer unlawfully insisted on including a contract provision in the parties' first contract that granted the Employer the unrestricted right to use supervisors and managers to do bargaining unit work. We conclude that the Employer's provision was an overt exercise in unit exclusion, which therefore constituted a permissive subject of bargaining under the second prong of the Board's *Antelope Valley*<sup>1</sup> test. Therefore, the Employer violated the Act when it conditioned its agreement to a contract upon the provision's inclusion.

**FACTS**

GPD Holdings, Inc. (the Employer) leases employees to Glazer's Premier Distributors, LLC, a distributor of food, spirits, beer, wine, and non-alcoholic beverages in the U.S. Virgin Islands. On April 10, 2015,<sup>2</sup> the United Steel Workers, AFL-CIO, Local Union 9526 (the Union) was certified as the exclusive bargaining representative of the Employer's "full-time and regular part-time drivers, fork-lift drivers, warehouse assistants, and customer service representatives employed by the [E]mployer at its St. Croix warehouse . . ." The certification excluded "all other employees, confidential employees, guards and supervisors as defined by the Act." The unit includes nine employees — two customer service representatives supervised locally by the office manager, and four drivers, one forklift driver, and two warehouse

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<sup>1</sup> *Antelope Valley Press*, 311 NLRB 459 (1993).

<sup>2</sup> Hereafter, all dates are in 2015 unless otherwise noted.

assistants all supervised locally by a warehouse manager and an assistant warehouse manager.

On July 8, the parties held their initial bargaining session. The Union's initial proposal included the following language concerning supervisors and managers performing unit work:

Supervisors and other management personnel not covered herein under this Agreement shall not perform the work of Bargaining Unit employees unless employees are not immediately available and it is essential that the work be carried on. Work performed under this condition is considered emergency and should be of short duration. Maintenance personnel are exempted from the provisions of this paragraph.

The Employer rejected the Union's proposal, explaining that it could not agree to restrict its managers' ability to provide assistance as needed in the very small unit. The Employer pointed out that the office manager regularly answered customer calls and handled issues in the exact same manner as the customer service representatives. Similarly, the Employer explained, the warehouse manager and assistant warehouse manager at St. Croix, along with the operations manager from St. Thomas, regularly helped with picking orders, driving forklifts, and performing delivery runs in the same manner as the bargaining unit warehouse assistants, forklift drivers, and warehouse drivers. The Employer promised that it would present a counterproposal.

On July 9, the parties held their second bargaining session and agreed that the definition of the bargaining unit to be included in the collective-bargaining agreement would use the same language as the unit description in the Board certification. The Employer also presented its counterproposal to the Union's July 8 proposal concerning supervisors and managers performing bargaining unit work. The Employer's counterproposal would have permitted the Employer to "hire and utilize personnel from outside the bargaining unit including from temporary help agencies to perform work traditionally performed by bargaining unit employees," and to "assign or allow persons employed in supervisory, managerial, or other non-bargaining unit positions to perform work traditionally performed by bargaining unit employees." The Union rejected the Employer's proposed language and continued to insist on its July 8 proposal that prohibited managers or supervisors from doing bargaining unit work except in emergencies. On July 10, the Employer withdrew its July 9 proposal and proposed the following new language: "There shall be no restriction on the performance of unit work by supervisors and managers."

The parties held three more bargaining sessions, and, on October 16, the Employer sent the Union an email rejecting the Union's proposal regarding the bargaining-unit-work provision. The Employer again contended that managers

regularly drive forklifts and cover delivery routes, and that the office manager also answers phones, takes orders, and does other customer-service-representative work as part of [REDACTED] regular job. The Employer stated that it would not agree to any restriction on these managers continuing to work as a team with the unit employees to get the job done as efficiently and effectively as possible.

On October 23, the Employer submitted another counterproposal indicating that it would accept the Union's counterproposal regarding worker's compensation if the Union withdrew its bargaining-unit-work proposal. However, the Union rejected the offer and each party continued to maintain their position regarding the bargaining-unit-work provision.

Throughout the next two months, the parties traded several emails regarding their respective bargaining-unit-work proposals, and both sides refused to budge. On November 23, the Employer emailed the Union its "final" contract proposal, which again contained its July 10 bargaining-unit-work provision. The Union rejected the proposal, communicated that it was maintaining its position concerning the bargaining-unit-work provision, and suggested that the parties seek mediation. By November 24, the parties had agreed upon and initialed all contractual provisions except for the one dealing with bargaining unit work.

By email dated December 2, the Employer stated that it could not prevent the Union from attempting to bring in an FMCS mediator on the bargaining-unit-work stalemate but that the Employer would not be able to provide any of the agreed-upon wage increases, start dues checkoff, utilize the grievance and arbitration process, etc., until the parties had a final contract in place. The email also stated that the Employer would not agree to the restrictions on its current operations that the Union's bargaining-unit-work proposal entailed. The Employer also stated that it hoped that the Union would reconsider and allow the status quo on the bargaining-unit-work issue to continue but, if not, the Employer would wait for further action on the Union's part.

Thereafter, the parties sought the assistance of an FMCS mediator. On December 8, the parties' attempt to mediate the issue ended with neither party changing its position from its written proposal. The Employer has not implemented its final offer, and the parties have not bargained since December 8.

### ACTION

We conclude that the Employer's proposed bargaining-unit-work provision was an overt exercise in unit exclusion, which therefore constituted a permissive subject of bargaining under the second prong of the Board's *Antelope Valley* test. Therefore, the Employer violated the Act when it conditioned its agreement to a contract upon the provision's inclusion.

It is well established that the assignment of work is a mandatory subject of bargaining. Accordingly, a party may insist to impasse upon the inclusion in a collective-bargaining agreement of a proposal dealing with assignment of work.<sup>3</sup> It is equally well established that “[u]nit scope is not a mandatory bargaining subject.”<sup>4</sup> Thus, a party may propose to bargain over the scope of the unit, but may not insist to impasse on that subject.<sup>5</sup>

In *Antelope Valley*, the Board developed a two-step test to determine whether an employer’s work-assignment proposal is a mandatory or permissive subject of bargaining.<sup>6</sup> First, if the employer’s proposal changes the unit description, it is a permissive subject.<sup>7</sup> If the employer’s work-assignment proposal does not purport to change the description of the unit, it is a mandatory subject of bargaining, unless the proposal would “deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit.”<sup>8</sup> The Board noted that, depending on the circumstances, “such a contention could be raised [by the union] in a unit clarification proceeding or in an 8(a)(5) context.”<sup>9</sup>

The Board recently applied the *Antelope Valley* test in *WCCO-TV*.<sup>10</sup> In *WCCO-TV*, the employer sought to incorporate into the parties’ successor contract a letter of agreement that granted the employer the right to cross-utilize two reporters or producers represented by another union to perform bargaining unit work on a daily basis. The parties reached impasse over the inclusion of the letter of agreement or similar language.<sup>11</sup> The Board concluded that, under the first prong of the *Antelope*

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<sup>3</sup> *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (finding that subcontracting unit work is a mandatory subject of bargaining).

<sup>4</sup> *Bozzuto’s, Inc.*, 277 NLRB 977, 977 (1985).

<sup>5</sup> *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

<sup>6</sup> 311 NLRB at 461.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 461 n.8.

<sup>10</sup> 362 NLRB No. 101, slip op. at 2 (May 29, 2015).

<sup>11</sup> *Id.*, slip op. at 1-2.

*Valley* test, the employer's proposed language did not change the unit description, because when the employer implemented the proposal the union still represented the unit of photojournalists. The Board further concluded that nothing in the employer's proposal precluded the union from challenging the unit placement of the employees represented by the other union through "any . . . avenue lawfully available to it," e.g., an unfair labor practice proceeding, a unit clarification proceeding, or a contractual grievance-arbitration procedure.<sup>12</sup> Therefore, the Board found that the employer's work-assignment proposal was a mandatory subject of bargaining under *Antelope Valley*, and that the employer did not violate the Act by insisting to impasse over the proposal.<sup>13</sup>

In *Taylor Warehouse Corp.*,<sup>14</sup> on the other hand, the Board applied the *Antelope Valley* test and concluded that the employer unlawfully bargained to impasse over its proposal to assign unit work to employees of a subcontractor whose employees were expressly excluded from the bargaining unit. Although the employer's proposal did not alter the unit description, it effectively denied the union the right to assert that it represented the individuals to whom unit work was assigned.<sup>15</sup> Accordingly, the proposal was an "overt exercise in unit exclusion" and constituted a permissive subject of bargaining under the second prong of the *Antelope Valley* test.<sup>16</sup>

We conclude, like in *Taylor Warehouse*, that the Employer's proposal is an overt exercise in unit exclusion and, therefore, constitutes a permissive subject of bargaining under the second prong of the *Antelope Valley* test. The Employer's proposal, which states that "[t]here shall be no restriction on the performance of unit work by supervisors and managers," clearly concerns assignment of work and does not alter the unit description, i.e., "all full-time and regular part-time drivers, forklift drivers, warehouse assistants, and customer service representatives employed by the employer at its St. Croix warehouse." Therefore, we would not find the proposal to be a permissive subject of bargaining under the first prong of the *Antelope Valley* test. However, by granting the Employer the unlimited right to assign unit work to

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Taylor Warehouse Corp.*, 314 NLRB 516 (1994), *enforced*, 98 F.3d 892 (6th Cir. 1996).

<sup>15</sup> *Id.* at 527-28.

<sup>16</sup> *Id.* at 528.

supervisors and managers, the provision would effectively deprive the Union of the right to “contend that the persons performing the work after the transfer are to be included in the unit.”<sup>17</sup> Not only are supervisors expressly excluded from the description of the bargaining unit set forth in the Board certification, but they are also excluded from the statutory definition of “employee.”<sup>18</sup> Accordingly, the Employer’s written proposal is a permissive subject of bargaining under the second prong of the *Antelope Valley* test, and the Employer violated Section 8(a)(5) by conditioning its agreement to a contract upon that provision’s inclusion.

/s/  
B.J.K.

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<sup>17</sup> *Antelope Valley Press*, 311 NLRB at 461.

<sup>18</sup> See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (finding charge nurses to be statutory supervisors excluded from the definition of “employee” under the Act and, therefore, excluded from petitioned-for unit of registered nurses).