

In 2008, the Employer recognized Teamsters Local 682 (“the Union”) as the exclusive representative of its dump truck drivers. The parties have bargained for successive collective-bargaining agreements, referred to as the Master Dump Agreement, with the most recent agreement effective April 1, 2013 through March 31, 2016. The “Agreement” clause in the collective-bargaining agreement includes the following language:

This Agreement is specifically for dump trucks and or trucks pulling dump trailers. It does not pertain to any type of truck hauling any type of equipment, containers, roll-offs, boxes, water trucks or any type of product or goods that cannot be dumped.

The contract also includes a recognition clause stating that the Employer recognizes the Union as the exclusive bargaining representative for the Employer’s “regular full-time dump truck drivers in the Eastern Missouri geographical jurisdiction of the Union, excluding all office clerical and professional employees, guards, supervisors and all other employees.”

The Employer is one of several material hauling companies that operates in the Union’s jurisdiction. Since at least 2013, these employers have conducted negotiations for a Master Dump Agreement under a pattern agreement arrangement. In 2013, the Union and the Employer negotiated a Master Dump Agreement that served as the pattern agreement that the remaining area contractors, negotiating as one group, entered into with the Union. In 2016, the Employer chose not to be the first to negotiate for a new Master Dump Agreement. In March 2016, the group of contractors, excluding the Employer, and the Union reached agreement for a successor Master Dump Agreement effective April 1, 2016 through March 31, 2019. While the recognition clause in their 2016 successor contract remained the same as that in the Employer’s most recent contract, the group of contractors and the Union agreed to change the language in the Agreement clause to remove the reference to “trucks pulling dump trailers.” The clause that those parties agreed to now reads,

This Agreement is specifically for dump trucks. It does not pertain to any type of truck hauling any type of equipment, containers, roll-offs, boxes, water trucks or any type of product or goods that cannot be dumped. Side dumps/ends dumps only subject to the terms of this agreement as applies to article 9, section 4 (stockpiling) not material hauled to, on, or from a construction site.²

² The Employer asserts that it is the only company in the group of contractors engaged in the pattern agreement bargaining that uses trucks pulling side- and end-dump trailers.

In mid-March 2016,³ the Union and the Employer began bargaining for their own successor Master Dump Agreement. Between March 21 and June 24, the parties held five in-person bargaining sessions and exchanged emails and phone calls concerning negotiations. At the initial session on March 21, the Union submitted a proposal to modify the Agreement clause to read the same as the clause agreed to by the group of contractors. On March 22, the Employer refused to accept the Union's language asserting that the proposal involved a permissive subject of bargaining. As the parties continued to negotiate, the Union began asserting that because the group of contractors had agreed to modify the Agreement clause in their Master Dump Agreement, the Employer was obligated to do the same pursuant to the most favored nations clause in the agreement between the Union and group of contractors. However, the Employer maintained its position that the language was part of the recognition agreement and concerned the scope of the bargaining unit, which is a permissive subject of bargaining, and refused to accept the Union's proposal. As of June 14, the Employer and the Union had reached agreement on all issues for a successor Mater Dump Agreement except for wages and the Union's proposed modification to the Agreement clause.

The Union is also a signatory to a contract with the Associated General Contractors ("AGC"), but the Employer is not a member of the AGC. While the parties bargained for a successor Master Dump Agreement with the Employer, they also began bargaining over having the Employer become a signatory to the Union-AGC agreement. The Union provided the Employer with a copy of its most recent agreement with the AGC, which covers various types of work, including trucks pulling side- and end-dump trailers. The Union took the position that its agreement with the AGC should apply when the Employer is hired to perform this type of hauling work. Specifically, the Union wanted the AGC agreement to cover the work of hauling construction products to construction sites and of hauling non-construction products.⁴ The Employer's drivers would receive significantly higher wages and fringe benefits if they were covered by the AGC agreement when performing these two types of hauling work.

On June 14, by email, the Union declared impasse regarding the parties' negotiations over the AGC agreement. The parties agree that they are also at impasse regarding the Master Dump Agreement because of the Union's proposal to

³ Hereafter, all dates 2016 unless otherwise noted.

⁴ The Union took the position that stockpiling deliveries would continue to be covered by the Master Dump Agreement.

move the work of trucks pulling side- or end-dump trailers from one contract to the other.

On June 15, the Employer filed the charge in the instant case alleging that the Union had insisted to impasse on a permissive subject of bargaining, specifically, over its proposal to modify the language in the Agreement clause.

ACTION

We conclude that under the Board's test in *Antelope Valley Press*, the language that the Union proposed removing from the parties' Master Dump Agreement concerned unit scope, rather than assignment of work, and is a permissive subject of bargaining. Therefore, the Union violated Section 8(b)(3) when it bargained to impasse over the proposal.

It is well established that the assignment of work is a mandatory subject of bargaining.⁵ Accordingly, a party may insist to impasse upon the inclusion in a collective-bargaining agreement of a proposal dealing with assignment of work.⁶ It is equally well established that "[u]nit scope is not a mandatory bargaining subject."⁷ Thus, a party may propose bargaining over the scope of the unit, but may not insist to impasse on that subject.⁸

However, when a contract defines a bargaining unit in terms of the nature of the work the unit employees will perform, rather than in terms of specific job classifications, it may be difficult to determine whether a party's proposal regarding who is to perform certain work concerns the assignment of work or a change in unit scope.⁹ In *Antelope Valley Press*, the Board developed a two-step test to determine whether a party's work-assignment proposal is a mandatory or permissive subject of

⁵ See, e.g., *WCCO-TV*, 362 NLRB No. 101, slip op. at 2 (May 29, 2015).

⁶ *Id.* (citing, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (finding that subcontracting unit work is a mandatory subject of bargaining)).

⁷ *Id.* (citing *Bozzuto's, Inc.*, 277 NLRB 977, 977 (1985)). See also *Aggregate Industries*, 359 NLRB 1419, 1421 (2013), reaffirmed and incorporated by reference in 361 NLRB No. 80 (2014), enf. denied __ F.3d __, 2016 WL 3213001 (D.C. Cir. June 10, 2016); *Grosvenor Resort*, 336 NLRB 613, 617 (2001); *United Technologies Corp.*, 292 NLRB 248, 249 & n.8 (1989), enf. 884 F.2d 1569 (2d Cir. 1989).

⁸ *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

⁹ See, e.g., *Aggregate Industries*, 359 NLRB at 1421.

bargaining.¹⁰ First, if the party's proposal seeks to change the unit description, it is a permissive subject.¹¹ Second, if the work-assignment proposal does not purport to change the description of the unit, but seeks added language allowing work to be transferred out of the unit, it is a mandatory subject of bargaining, unless the proposal would "deprive the [opposing party] of the right to contend that the persons performing the work after the transfer are to be included in the unit."¹² The Board noted in *Antelope Valley* that, depending on the circumstances, such a contention could be raised by the opposing party in a unit clarification proceeding or in the context of a bad-faith bargaining charge.¹³

The cases applying *Antelope Valley* clarify how the Board distinguishes between permissive proposals on unit scope and mandatory proposals on work assignments. For example, in *Bremerton Sun Publishing Co.*, the expired contract defined the union's jurisdiction as covering work beginning with the mark up of copy and continuing until the material was ready for the printing press.¹⁴ The employer insisted to impasse on its proposal to delete the accompanying clause stating that the "bargaining unit consists of all employees performing any such work." The Board held that because this proposal deleted the unit definition in the expired contract, it was a permissive subject on which the employer could not insist to impasse.¹⁵

In *WCCO-TV*,¹⁶ 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 the bargaining unit work of its photojournalists on a daily basis. The employer and charging-party union reached impasse over the inclusion of the letter of agreement or similar language.¹⁷ Applying its *Antelope Valley* test, the Board initially concluded that, under the first

¹⁰ *Antelope Valley Press*, 311 NLRB at 461.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 461 n.8.

¹⁴ 311 NLRB 467 (1993).

¹⁵ *Id.* at 470-71.

¹⁶ 362 NLRB No. 101, slip op. at 2.

¹⁷ *Id.*, slip op. at 1-2.

prong the employer's proposed language did not change the unit description because the charging-party union continued to represent a unit of photojournalists. The Board then concluded that nothing in the employer's proposal precluded the charging-party union from challenging the unit placement of the employees represented by the other union through "any . . . avenue lawfully available to it," including an unfair labor practice proceeding, a unit clarification proceeding, or a contractual grievance-arbitration procedure.¹⁸ Therefore, because the charging-party union continued to have the right to contend after the transfer of work that the employees performing the work were in the unit, the Board found that the employer's work-assignment proposal was a mandatory subject of bargaining, and that the employer did not violate the Act by insisting to impasse over it.¹⁹

However, in *Taylor Warehouse Corp.*,²⁰ the Board also applied the *Antelope Valley* test and concluded that the employer unlawfully bargained to impasse over its proposal to have only the non-union employees of a sister company perform a certain type of warehouse work.²¹ Although the employer's proposal did not alter the unit description under the test's first prong, it effectively denied the union the right to assert that it represented the employees to whom the relevant unit work would be assigned.²² 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.²³

Applying these principles, we conclude that the Union's proposal involved a change to unit scope, which is a permissive subject of bargaining, and that the Union

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Taylor Warehouse Corp.*, 314 NLRB 516 (1994), *enfd.* 98 F.3d 892 (6th Cir. 1996).

²¹ The respondent employer and the sister company in *Taylor Warehouse* were a single employer. *Id.*, 314 NLRB at 518, n.2.

²² *Id.* at 527-28.

²³ *Id.* at 528. Cf. *Steelworkers Local 14693 (Skibeck, P.L.C.)*, 345 NLRB 754, 755 (2005) (union violated Section 8(b)(3) by effectuating a unilateral change in unit scope when it disclaimed any interest in representing certain employees in the contractual bargaining unit thereby making it possible for another union to represent those employees).

violated Section 8(b)(3) by insisting to impasse over that proposal.²⁴ Initially, we conclude that the Union's proposal violates the first prong of the *Antelope Valley* test.²⁵ The Union sought to alter the unit description by removing drivers operating "trucks pulling dump trailers" from the contractual unit, although it included proposed language making clear that drivers performing stockpiling work would remain in the unit. In short, as in *Bremerton Sun*,²⁶ because the Union proposed changing the actual unit description clause to exclude certain employees from the contract's coverage, its proposal involved a permissive subject of bargaining.

Second, regardless of whether the Union's proposal altered the unit description, we conclude that as in *Taylor Warehouse Corp.*, the Union's proposal constitutes a permissive subject under the second prong of the Board's *Antelope Valley* test because

²⁴ As a preliminary matter, we agree with the Region that the *Antelope Valley* test applies to the current case even though the unit description here is based on references to both a job classification and work performed. Specifically, the recognition clause states that the Employer recognized the Union as the representative of all of its employees in a specific job classification, i.e., "regular full-time dump truck drivers" in the Union's jurisdiction. The Agreement clause then clarifies that the Union represents those dump truck drivers who perform certain types of work, i.e., the operation of "dump trucks and trucks pulling dump trailers." It also clarifies that the Union does not represent drivers who operate "any type of truck hauling any type of equipment, containers, roll-offs, boxes, water trucks or any type of product or goods that cannot be dumped." Thus, despite the reference to a specific job classification in the recognition clause, the language regarding the work to be performed in the Agreement clause is necessary to provide a meaningful unit definition in the contract. Cf. *Bremerton Sun Publishing Co.*, 311 NLRB at 470 (noting that while one section of the recognition clause stated that "journeymen and apprentices" were covered by the contract, reference to those classifications alone did not define the appropriate bargaining unit).

²⁵ Although we are not aware of any case where the Board applied the *Antelope Valley* test to a *union's* proposal, we conclude that is it the proper analysis to apply regardless of the party presenting the proposal when, as here, the issue is whether the proposal involves work assignment or unit modification. In any event, in *Steelworkers Local 14693 (Skibeck, P.L.C.)*, 345 NLRB at 755, the Board held that a union violated Section 8(b)(3) by effectuating a unilateral change in unit scope when it disclaimed interest in representing certain employees in a contractual bargaining unit, which is similar to proposing contract language to accomplish the same objective.

²⁶ 311 NLRB at 470.

it would deprive the Employer of the right to contend that the employees performing the transferred work are included in the bargaining unit. Again, the Union's proposal seeks to modify the Agreement clause by removing "trucks pulling dump trailers." Because of this "overt exercise in unit exclusion," the Employer cannot subsequently assert in any avenue lawfully available to it, such as an unfair labor practice, unit clarification, or a contractual grievance-arbitration proceeding, that the drivers performing that work are in the unit covered by the Master Dump Agreement. The Union's proposal goes beyond a mere reassignment of work out of the unit, and instead seeks to limit the employees it represents under the Master Dump Agreement.²⁷ In other words, the Union is disclaiming its interest in representing the drivers who perform the removed work because they would be outside of the contractual bargaining unit that the Employer now recognizes.²⁸ Accordingly, the Union's proposal is a permissive subject of bargaining under the second prong of the *Antelope Valley* test, and the Union violated Section 8(b)(3) by insisting to impasse over its inclusion in the successor Master Dump Agreement.

/s/

B.J.K.

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²⁷ See *Steelworkers Local 14693 (Skibeck, P.L.C.)*, 345 NLRB at 755 (union violated Section 8(b)(3) by effectuating a unilateral change in unit scope when it disclaimed any interest in representing certain employees in the contractual bargaining unit).

²⁸ The fact that the Union and Employer are also negotiating over whether the AGC contract would cover the employees performing the work to be removed from the coverage of the Master Dump Agreement has no bearing on the current Section 8(b)(3) charge. That the employees who perform the relevant work may be represented by the Union under a different contract does not change the fact that the Employer would be precluded from asserting in a legal proceeding that those employees are in the unit covered by the Master Dump Agreement.