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

Advice Memorandum

DATE: October 19, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: KCTS Television 530-6067-0150
Case 19-CA-153536 530-6067-2030

The Region submitted this case for advice on whether the Employer had sufficiently finalized its plan to restructure its business, and the decision to terminate bargaining unit members, such that the Employer violated Section 8(a)(5) of the Act by not providing the Union with notice of its plan during negotiations for a successor collective-bargaining agreement.

We conclude that the Employer had sufficiently finalized its restructuring plan as of either 1) February 19, when the Employer's CEO presented the plan to the Board of Directors, or, at the latest, 2) March 30, when the Directors held an informal meeting and confirmed staff reductions pursuant to the plan. Thus, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to disclose its restructuring plan during negotiations.

FACTS

KCTS Television ("the Employer") operates a public television broadcast station in Seattle, Washington. Although it is a public station and does not accept advertisements, it broadcasts national programs and is affiliated with the Public Broadcasting Service ("PBS"). Since February 2010, the International Brotherhood of Electrical Workers Local 46 ("the Union") has represented a bargaining unit of approximately twenty-eight clerical and production staff working for the Employer.[1] In August 2011, the Union and the Employer agreed on a contract, which expired on June 30, 2014.

[1] It appears the Employer also employed about sixty employees outside of the bargaining unit.

In September 2013, the Employer hired an interim CEO to develop a strategic plan to confront the new, largely internet-based media environment. In late 2013, the relationship between the Employer and the Union became contentious. At that time, the Employer announced changes to the unit employees' health benefits. The Union filed an unfair labor practice charge, and the Region deferred it to the parties' grievance procedure.

In early 2014, the Employer announced that the interim CEO would be permanent. Subsequently, in April 2014, the Employer and the Union began bargaining for a new contract. In October 2014, the parties reached agreement on health benefits. However, in November, the Employer changed its bargaining stance significantly. Notably, it requested changes to language in the prior contract protecting unit work from being subcontracted. The subcontracting language soon became a significant point of contention between the parties. Over the course of bargaining, the Union repeatedly asked why the Employer wanted the change. In response, the Employer maintained that it only wanted flexibility and had no intentions or plans to subcontract.

In January 2015,[2] unbeknownst to the Union, the CEO began strategic planning with a management team on how to restructure the business, and these efforts continued throughout much of the parties' subsequent bargaining.

On January 7, the Union membership voted down the Employer's proposed subcontracting clause. In a mediated bargaining session on January 30, a union steward-bargaining committee member explained to the Employer's representatives that the membership's strong opposition to the clause flowed from their belief that the Employer sought the new provision because it wanted to contract out unit work. Further, the steward asked if there were *any* plans about which the Union should be concerned. The Employer again made assurances that it had no plans, and urged the Union to trust it despite the circumstances. In another mediated bargaining session on February 5, following the membership's second rejection of the new subcontracting clause, the Employer declared that it would not agree to a new contract without it.

On February 19, the CEO's restructuring efforts culminated in a presentation of the strategic plan to the Employer's Board of Directors. In a detailed Power Point presentation, the CEO laid out a new direction for the station. The presentation demonstrated a dramatic change in the media environment that required KCTS to shift to more online programming. The CEO presented two alternatives: either a single website platform or a multi-website platform. The presentation also contained a slide on cost structure, forecasting major changes in staffing. The slide projected a

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[2] All subsequent dates are in 2015 unless otherwise indicated.

reduction from 27.09 content full-time employees ("FTEs") to 13.96 FTEs, with only 4.96 being existing positions. For the remaining positions, new employees would be hired. The presentation also contained plans for effectuating this reduction in staff, including a timeline for finalizing terminations, a proposed schedule of public announcements extending through March, and recruitment and hiring phases for new employees. The presentation did not include a "stay the course" alternative.

Following the February 19 meeting, the Directors preferred a single-website approach, while the CEO favored a multi-website approach. From there, preparation for the strategic plan's rollout began. The Employer hired external consultants from human resources and public relations firms to develop strategies to handle terminations pursuant to the restructuring and shape community perception of the changes. In emails throughout February and March, the Employer crafted a public relations strategy to handle anticipated public scrutiny of the predicted "staffing changes." By email dated February 23, the CEO debated with his management team whether to stagger the terminations or implement them on one "bloody" day.

On March 5, the Union and the Employer held a final mediated bargaining session, and the Employer made its last, best, final offer, which included the proposed subcontracting clause. To coax the Union into agreeing to the clause, the Employer now offered twenty-four weeks' severance pay for any employee laid off due to subcontracting.

On March 16, the Employer's Vice President of Marketing and Communications presented the Human Resources Director with a working list of staff names and their anticipated departure dates. This list included the names of three bargaining unit members, two of whom the Employer eventually terminated. From March 16 to 23, the Employer revised the list of employees to be terminated pursuant to the restructuring plan.

On March 30, the Board of Directors held an informal meeting at which no minutes were taken. At the meeting, the CEO presented a refined version of the restructuring plan that outlined the specific differences between a single and a multi-website approach. The presentation included a detailed financial analysis of the savings and costs of both alternatives. The number of content FTEs would fall to 13.5 under the single website approach and to 18.5 under the multi-site approach, with net savings of $1.12 million and $629,835, respectively. It also included estimated costs of severance, unemployment payments, and public relations expenditures relating to the terminations. Additionally, both approaches included subcontracting costs: $50,000 under the single website approach and $150,000 under the multi-website approach.

While bargaining was ongoing, the CEO had the actual authority to institute the restructuring plan and discharges on his own at any time. In fact, in an email to the

Chair of the Board of Directors dated March 31, the CEO noted that he had seriously contemplated moving forward absent complete approval by the Directors. However, he concluded that it was best to obtain it. On April 1, the CEO sent an email to the management staff about the informal March 30 Directors' meeting, stating that they could move forward with the strategy at will despite lingering disagreement among the Directors regarding website format.

Although the parties did not have further in-person meetings after March 5, they subsequently finalized the terms of a tentative collective-bargaining agreement by email. On April 3, the Union's membership met and voted to ratify the contract, including the new subcontracting clause. The Union had encouraged its members to vote for ratification, stating that the proposed contract was the best they could get.

On April 10, the CEO emailed the Directors a summary of the conclusions reached at the March 30 meeting for their review. This summary confirmed the decision on staffing changes, and noted that the only remaining decision left open at that meeting was whether to pursue a single or multi-website format. In the message, the CEO made his final decision on website format and reported it to the Board.

On April 23, roughly two weeks after the Union's membership ratified the successor contract, the Employer's Human Resources director emailed the Union about the new strategic plan and advised the Union that some of their members would be impacted. The email indicated that the Employer had been planning these changes for the last eighteen months.[3] Later that day, the Employer confirmed the elimination of two bargaining unit positions.[4]

On April 27, the Union and the Employer met to discuss the discharges. The Human Resources director again said the Employer had been developing the strategic plan for eighteen months. After an inquiry by the Union, the Human Resources director also said the Employer had been planning a reduction in staff since her arrival six months prior. The parties discussed severance, and the Employer offered

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[3] This time line roughly coincides with when the Employer hired the CEO on an interim basis.

[4] On the same day, the Employer also terminated nine non-unit employees as part of its restructuring. The Seattle Post-Intelligencer, a local news source, dubbed the terminations the "Thursday Morning Massacre." *See* Joel Connelly, *"Thursday Morning Massacre": KCTS lays off most of its production staff*, Seattle Post-Intelligencer, (April 26, 2015), http://blog.seattlepi.com/seattlepolitics/2015/04/26/thursday-morning-massacre-kcts-lays-off-most-of-its-production-staff/.

the same package as it provided to non-union employees: twelve weeks' severance pay. The Union asked about the extended, twenty-four week provision they bargained for in return for the subcontracting language. The Employer informed them that, because the discharges were not due to subcontracting, the provision did not apply. In further negotiations over the discharges, the Union attempted to get extended severance for its discharged members, but the Employer refused. Ultimately, the two discharged bargaining unit members received the standard twelve weeks' severance pay.

ACTION

We conclude that the Employer had sufficiently finalized its restructuring plan as of either 1) February 19, when the Employer's CEO presented the plan to the Board of Directors, or, at the latest, 2) March 30, when the Directors held an informal meeting and confirmed staff reductions pursuant to the plan. Thus, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to disclose its restructuring plan during negotiations.

The Act requires an employer and its employees' exclusive bargaining representative to fulfill their statutory duty to engage in collective bargaining "in a meaningful manner and at a meaningful time."[5] In contract negotiations, information that pertains to a subject affecting the bargaining unit is highly relevant, for "[u]nless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiation cannot occur."[6] Thus, "an employer violates Section 8(a)(5) when it conceals from the bargaining representative of its employees its intention with respect to its future operations."[7] Such conduct by an employer renders the collective-bargaining process meaningless because it "prevent[s] a union from taking steps through negotiation and economic

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[5] *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981) (discussing the nature of an employer's obligation to bargain over the effects of its decision to close its business).

[6] *Local 13, Detroit Newspaper Printing & Graphic Commc'ns Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979) (finding union had violated Section 8(b)(3) by failing to provide employer with requested information). *See also NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) (in finding that employer had violated Section 8(a)(5) by refusing to provide requested financial information to support its claimed inability to pay wage increase proposed by the union, the Court stated "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims").

[7] *Royal Plating & Polishing Co.*, 160 NLRB 990, 994 (1966).

action to protect represented employees."[8] However, an employer's decision about the future structure of its business must be sufficiently definite and final before it warrants disclosure to a union.[9] Absent such certainty, it would be counterproductive to the bargaining process "to require employers officiously to convey, during contract negotiations, every thought or possibility mentioned in management discussions concerning cost-cutting efforts to meet an economic downturn, regardless of how speculative the matters under consideration might be, or whether they would ever be implemented."[10]

In *Royal Plating*, the Board held that the employer violated Section 8(a)(5) by unlawfully failing to bargain over the effects of its decision to close the plant where it had withheld from the union its decision to sell the plant.[11] While "engaging in ostensible collective-bargaining negotiations with the [u]nion" for a successor contract, the employer effectively hid its true intentions.[12] It was clear in that case that the employer had "reached a definite decision to close down" its plant before the

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[8] *Valley Mould & Iron Co.*, 226 NLRB 1211, 1212 & n.3 (1976). *See also Standard Handkerchief Co.*, 151 NLRB 15, 18 (1965) ("Good faith would certainly require that [the employer] advice [sic] the [u]nion that moving of the plant was under consideration . . . [The employer's] failure to do so reduced the negotiations which did occur, to no more than an exercise in frivolity" that constituted bad-faith bargaining).

[9] *Compare Waymouth Farms*, 324 NLRB 960, 961-62 & n.7, 968 (1997) (agreeing with ALJ that the employer bargained in bad faith over plant closure agreement by never informing the union it had purchased new plant only six miles away; employer repeatedly misled union by claiming it was still considering out-of-state locations after it already had entered purchase agreement for nearby facility), *enforced in relevant part*, 172 F.3d 598, 600 (8th Cir. 1999), *with Valley Mould & Iron Co.*, 226 NLRB at 1213 (adopting ALJ decision that employer did not bargain in bad faith where the General Counsel provided only isolated and ambiguous testimony that layoffs had been "in the wind").

[10] *Valley Mould & Iron Co.*, 226 NLRB at 1213.

[11] 160 NLRB at 992.

[12] *Id. See also Standard Handkerchief Co.*, 151 NLRB at 16-19 (affirming ALJ's finding that employer bargained in bad-faith by not disclosing that it was "seriously contemplat[ing]" moving its plant while bargaining for a successor contract with the union, demonstrating a purpose of keeping "the [u]nion on the 'string' until the negotiations regarding the move…were finally concluded.").

parties held their first bargaining session.[13] Indeed, the employer entered an irrevocable agreement to sell the plant about ten days before the parties signed a new contract, and it intentionally misled the union after contract execution by stating it was not closing the plant.[14] The Board found that the employer's concealment robbed the union of any meaningful opportunity to bargain over the effects of closing, rendering the bargaining that did occur "an exercise in frivolity."[15]

Conversely, in *Valley Mould*, the Board affirmed the ALJ's finding that an employer did not violate Section 8(a)(5) when it laid off six unit employees shortly after signing a collective-bargaining agreement with the union.[16] There, the ALJ rejected the argument that the employer during bargaining concealed from the union an intention to effect the adverse personnel changes.[17] The ALJ found that the testimony of one union steward that an employer official had stated during a grievance meeting that the layoffs had been "in the wind" months before the parties executed the new collective-bargaining agreement was not an adequate showing that the employer had sufficiently definite plans for layoffs. The evidence, therefore, was "too slender a reed to bear the weight of a statutory remedy."[18]

In the present case, we conclude that the facts are much closer to those in *Royal Plating* because the CEO's presentation to the Board of Directors on February 19 marked a point at which some reduction in staff became sufficiently definite. In his presentation, the CEO provided two alternatives that each included sizeable staff reductions that would inevitably affect the terms and conditions of employment of bargaining unit employees. He did not offer any option for maintaining the status quo. Although the CEO did not have full Board agreement on which restructuring alternative to pursue until after the Union membership ratified the collective-

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[13] *Royal Plating & Polishing Co.*, 160 NLRB at 992.

[14] *Id.* at 992-93.

[15] *Id.* at 993 (quoting the ALJ in *Royal Plating & Polishing Co.,* 148 NLRB 545, 556 (1964)); *see also Penntech Papers, Inc.*, 263 NLRB 264, 265, 275-76 (1982) (affirming ALJ's finding of bad-faith effects bargaining where employer's creditors had already initiated foreclosure on the plant property but employer maintained that layoffs were only "indefinite" to secure another purchaser), *enforced*, 706 F.2d 18 (1st Cir. 1983).

[16] 226 NLRB at 1212.

[17] *Id.* at 1213.

[18] *Id.*

bargaining agreement, he had the actual authority to implement either restructuring option and the accompanying discharges at any time. Indeed, by late March, the CEO had already seriously considered moving forward absent the Directors' approval.

Further bolstering the conclusion that the Employer had sufficiently definite plans to discharge unit employees by February 19 are the initiatives the Employer *itself* took to prepare for the terminations on and after that date. Not only did the CEO's February 19 presentation propose substantial discharges, but it fully laid out the mechanisms for implementing them: a timeline for finalizing personnel reductions, phases for recruiting and hiring new employees, and a proposed schedule of public announcements extending through March. Throughout February and March, high level officers discussed in detail how to handle impending "staffing changes." In February, the Employer hired external consultants from human resources and public relations firms to develop strategies to handle the terminations and the community's ensuing reaction. In an email dated February 23, the CEO asked his management team whether it was best to conduct the discharges over a period of time or on one "bloody" day. By March 16, the Human Resources Director had a working list of staff names and their anticipated departure dates that included three bargaining unit members, two of whom the Employer ultimately terminated.

In the alternative, however, we conclude that the Employer should have disclosed its restructuring plan to the Union no later than after the informal Directors' meeting confirmed staff reductions on March 30. The CEO's presentation at that meeting contained a financial analysis detailing not only the savings expected from staff reductions, but the costs of ensuing severance, unemployment benefits, and greater expenditures on public relations needed to respond to community scrutiny. In fact, these projected increases in public relations proved justified.[19] While the Employer denied any intention of subcontracting during bargaining, the CEO's presentation at the March 30 meeting included the estimated costs of doing exactly that. Although no minutes were taken at that meeting, subsequent emails on April 1 and April 10 summarizing what had occurred at that meeting confirm that staff reductions had been decided upon. All that remained after March 30 was the choice between a single or multi-website interface. Though the Employer had yet to finalize which staff would be terminated, the restructuring and terminations were sufficiently certain to occur.

Thus, the amount of evidence in the present case showing the definite nature of the Employer's decision distinguishes it from *Valley Mould*. Where *Valley Mould* involved only the uncorroborated testimony of a union-side employee that layoffs had been "in the wind" for a few months, this case involves a detailed timeline of Employer preparation for a major restructuring of its business. In sum, the Employer

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[19] *See supra* note 4 (noting the highly critical response by local news to the discharges).

here had reached a level of certainty in its plans that merited their disclosure to the Union.

Regardless of which date is used, both occurred while negotiations were ongoing and the Union, in the context of challenging the Employer's desire for a subcontracting clause, repeatedly had expressed its concern with the Employer wanting to eliminate bargaining unit jobs. The Employer's failure to disclose its settled plans prevented the Union from meaningfully representing the unit employees and rendered the parties' successor contract negotiations an "exercise in frivolity." Consequently, the Employer engaged in bad-faith bargaining that violated Section 8(a)(5).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to disclose its intended restructuring plan and accompanying discharges to the Union during bargaining.

/s/
B.J.K.

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