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

Advice Memorandum

DATE: February 24, 2017

TO: Jennifer A. Hadsall, Regional Director
Region 18

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

SUBJECT: WEA Insurance Corporation
Case 18-CA-182305

530-6033-7084-0000
530-6050-1662-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act, following a good-faith impasse, by implementing healthcare and annual bonus proposals that included discretionary provisions. It also seeks advice as to whether the Employer's implementation of its proposals tainted the otherwise good-faith impasse. We conclude that, under *McClatchy Newspapers, Inc.*,[1] the Employer has not exercised the discretion it reserved to itself in its implemented proposal to change its healthcare plan and hence did not violate Section 8(a)(5). We further conclude that the Employer's implemented annual-bonus plan cabins its discretion with definable objective procedures and criteria. Hence, the Employer's exercise of discretion in not paying out a 2016 annual bonus did not violate Section 8(a)(5). Because the Employer did not violate the Act by implementing its proposals, we need not address the question of whether unlawful implementation would have tainted the impasse. Accordingly, the Region should dismiss this charge, absent withdrawal.

FACTS

WEA Insurance Corporation ("the Employer") is an insurance company and trust created by the Wisconsin Education Association Council (WEAC) that provides health insurance plans for public employees in Wisconsin. The United Staff Union ("the USU" or "the Union") represents employees of the Employer and the WEAC. After the enactment of Wisconsin Act 10, a state law that allowed school districts to obtain insurance coverage elsewhere without consulting or negotiating with its employees, enrollment in the Employer's plans declined precipitously, resulting in a drastic loss of revenue. The Employer sought to cut employee benefits in response to these losses.

[1] 321 NLRB 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997).

The parties' most recent collective bargaining agreement ("CBA") spanned October 1, 2012 to September 30, 2015. Under that CBA, Union members paid 10% premiums for health insurance benefits and were eligible for long-term care coverage. It contained no annual bonus program. The parties began negotiating over a new CBA on July 27, 2015, and held thirteen bargaining sessions. Ultimately, they could not agree on the Employer's proposals to place Union members on the same healthcare plan and annual-bonus program (or "variable compensation program") as non-represented employees. As early as November 23, 2015, the Employer made clear that it wanted to retain the right to make discretionary changes to the healthcare plan and annual bonuses.

Regarding the healthcare plan, the Employer proposed to reserve the right to "modify, reduce, or eliminate insurance benefits, so long as the benefits provided to USU members are equal to those provided to the non-represented staff." The Employer also reserved to itself the right to modify employee premium contributions, but capped employee contributions at 12.5% of total annual premium costs. The Employer's proposal for the variable compensation program would allow the Employer's board of directors to determine whether to distribute annual bonuses based on four "enterprise-level results": medical loss ratio, customer satisfaction, administrative expenses, and enrollment. The board sets the benchmarks that must be met in each category and management notifies the board whether the Employer has met these goals.[2] The annual bonus would range from 0 to 2.5% of base pay in year one and up to 5% in years two and three of the CBA. However, no bonuses would be paid out until the Employer becomes profitable again.[3] The Employer gave the Union detailed information about the healthcare plan and the metrics used to determine annual bonuses.

On August 11, 2016, the Employer sent the Union its last, best, and final offer (LBFO) which included its healthcare and variable-compensation proposals, and on September 1, 2016, the Employer declared impasse and implemented its LBFO. Unit employees were to be placed on the same healthcare plan offered to the non-bargaining-unit employees starting January 1, 2017. Employees were expected to continue to pay 10% of premiums, and amounts for deductibles and copays were specified in the LBFO. Long-term-care insurance was cancelled for all employees effective immediately. Employees were also immediately eligible for the variable-

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[2] The Employer provided the Union with the benchmarks for each category for the years 2014–2016.

[3] Because the Employer has not been profitable in recent years, it has not paid out annual bonuses since 2013.

compensation-program annual bonus; however, the Employer was not profitable and did not pay out annual bonuses in 2016.

The Region has concluded that the parties bargained in good faith and reached a good-faith impasse.

ACTION

We conclude that, under *McClatchy Newspapers, Inc.*,[4] the Employer has not exercised the discretion it reserved to itself in its implemented proposal to change its healthcare plan and hence did not violate Section 8(a)(5). We further conclude that the Employer's annual-bonus plan cabins its discretion with definable objective procedures and criteria. Hence, the Employer's exercise of discretion in not paying out a 2016 annual bonus did not violate Section 8(a)(5). Because the Employer did not violate the Act by implementing its proposals, we need not address the question of whether unlawful implementation would have tainted the impasse. Accordingly, the Region should dismiss this charge, absent withdrawal.

As an initial matter, we note that the Employer did not violate the Act by proposing contract terms under which it retained a good deal of discretion over mandatory subjects of bargaining. It is lawful for an employer to insist to impasse upon contract clauses giving it broad discretion over mandatory subjects, provided it otherwise bargained in good faith.[5] In *NLRB v. American National Insurance Co.*,

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[4] 321 NLRB 1386.

[5] *See, e.g.*, *St. George Warehouse, Inc.*, 341 NLRB 904, 907 (2004) (not unlawful for employer to demand broad management rights clause absent indicia that union was left with fewer rights than it would have had absent a contract) (citing *A-1 King Size Sandwiches*, 265 NLRB 850 (1982)), *enforced*, 420 F.3d 294 (3rd Cir. 2005). However, an employer's insistence on sweeping waivers can sometimes indicate bad faith. *Compare Reichhold Chemicals, Inc.*, 288 NLRB 69, 70 (1988) (employer's demand for comprehensive management-rights and no-strike clauses was lawful hard bargaining), *enforced in relevant part sub nom. Teamsters Local Union No. 515 v. NLRB,* 906 F.2d 719 (D.C. Cir. 1990), *with Hydrotherm, Inc.*, 302 NLRB 990, 994–95 (1991) (employer's insistence on management-rights provision giving it unfettered discretion over wages and most terms and conditions of employment amounted to an unlawful demand that the union surrender its rights as exclusive representative). *See also Intermountain Power Service Corp.*, Case 27-CA-16791-1, Advice Memorandum dated Nov. 15, 2000 (concluding that employer's insistence on provisions requiring the union to waive right to bargain over certain mandatory subjects did not constitute bad-faith bargaining).

the Supreme Court held that an employer's insistence on contract clauses that gave the employer complete discretion on promotions, discipline, and work scheduling was not a per se violation of Section 8(a)(5).[6] The Court noted that such flexible contract clauses were quite common, and that Congress intended that the Board should not disrupt the way collective bargaining had been practiced.[7]

Subsequently, the Board in *McClatchy Newspapers, Inc.,* held that it is "lawful for an employer to insist on the retention of discretion under a management rights clause over certain mandatory subjects of bargaining."[8] There, the Board specifically noted that an employer may lawfully "attempt[ ] to negotiate [an] agreement on retaining discretion over wage increases."[9] In *KSM Industries*, the Board extended the *McClatchy* rationale to a non-wage proposal, holding that the employer lawfully bargained to impasse over a discretionary medical and dental insurance proposal.[10] That proposal, on its face, permitted the employer unilaterally to change virtually every aspect of its healthcare plan, including the provider, the plan design, the level of benefits, and the administrator; the sole limitations were requirements that changes would be company-wide and that employee premiums would be capped at a specified dollar amount.[11] In the instant case, the Employer's proposed healthcare plan is similar to the one at issue in *KSM Industries* in that the Employer reserved the right to "modify, reduce or eliminate" all health insurance benefits, so long as it offered the same plan to non-represented employees and subject to a 12.5% cap on

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[6] 343 U.S. 395, 409 (1952).

[7] *Id.* at 406–9.

[8] 321 NLRB at 1388 (holding that although the employer's insistence on the merit-pay proposal was lawful, its implementation of discretionary pay increases, as permitted by its proposal, was unlawful).

[9] *Id.* at 1391.

[10] 336 NLRB 133, 135 (2001). Noting that health insurance, like wages, is a mandatory subject of bargaining and an important term and condition of employment, the Board found the employer's proposal akin to the merit-wage proposals in *McClatchy* and stated that there was "no principled reason" to distinguish *McClatchy* on the basis that health insurance rather than wages were involved. *Id.* at n.6.

[11] *Id.* at 135. Although the proposal called for discussions with the union, the employer admitted that it did not intend to negotiate over changes to the plan.

employee premiums. Thus the Employer was entitled to insist upon its healthcare proposal to good-faith impasse.

Normally, when parties in collective bargaining reach a lawful impasse, an employer does not violate the Act by making unilateral changes to terms and conditions of employment so long as these changes were reasonably comprehended within its pre-impasse proposals.[12] However, *McClatchy* carved out an exception to the implementation-upon-impasse rule. Under *McClatchy* and its progeny, an employer may not lawfully implement any discretionary changes to certain key terms and conditions of employment without bargaining with the union, even after reaching good-faith impasse, because the Board deems the unilateral imposition of discretionary terms "inimical to the postimpasse, ongoing collective-bargaining process."[13] The Board in *McClatchy* held that, once implemented, such discretionary proposals are so inherently destructive of the fundamental principles of collective bargaining that they cannot be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.[14] The Board reasoned that the ongoing exclusion of the union from meaningful bargaining over a significant term such as wages, leaving that key term of employment entirely within the employer's discretion, would impact all future negotiations on this issue and would disparage the union by demonstrating its complete inability to act for the employees in this regard.[15] In *KSM Industries*, the Board applied the *McClatchy* exception to a non-wage proposal, holding that an employer violated Section 8(a)(5) when, after declaring impasse, it unilaterally implemented a healthcare proposal and exercised its discretion to unilaterally change the benefits therein without notifying and bargaining with the union.[16] There, the Board explained that the employer's action

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[12] *See, e.g.*, *Richmond Electrical Services, Inc.*, 348 NLRB 1001, 1003 (2006) ("An employer does not violate the Act by making unilateral changes that are reasonably comprehended within the employer's preimpasse proposals if the employer has bargained in good faith to impasse prior to its unilateral implementation.") (citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967)).

[13] *KSM Industries*, 336 NLRB at 135; *see also McClatchy Newspapers, Inc.*, 321 NLRB at 1389–91.

[14] 321 NLRB at 1390–91.

[15] *Id.* at 1391 (citing *NLRB v. Katz*, 369 U.S. 736, 746–47 (1962) (holding that the employer violated Section 8(a)(5) by implementing a discretionary merit-raise system without bargaining about it with the union)).

[16] 336 NLRB at 133.

nullified the union's authority to bargain over a key term and condition of employment.[17]

The Board has clarified that, under *McClatchy*, an employer violates Section 8(a)(5) when it takes action "pursuant to a clause that gives it unfettered discretion to act, even if the clause itself was placed into effect after impasse."[18] For example, in *Woodland Clinic*, the Board held that the employer did not violate Section 8(a)(5) by implementing a discretionary merit-based "pay-for-performance" program until it "actually implemented" or "actually granted merit wage increases to unit employees."[19] Similarly, in *Bakersfield Californian*, the Board held that the employer did not violate Section 8(a)(5) by posting its last, best, and final offer, which included a wholly discretionary merit-wage and bonus program; rather, the employer would violate the Act if and when it exercised its discretion to grant such wage increases and bonuses without bargaining with the union.[20] Indeed, in *McClatchy*, the Board noted that "[t]he Court's rationale in *Katz* strongly suggests that a wholly discretionary merit wage policy . . . does not itself 'establish' terms and conditions of employment at any point prior to the actual exercise of this discretion in setting discrete wage rates for unit employees."[21]

However, an employer does not violate *McClatchy* if it includes "definable objective procedures and criteria" in its proposals that limit its discretion and address

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[17] *Id*. at 135.

[18] *E. I. Du Pont & Co.*, 346 NLRB 553, 560 (2006), *enforced*, 489 F.3d 1310 (D.C. Cir. 2007); *see also Kane Manufacturing*, Case 6-CA-34558, Advice Memorandum dated Nov. 21, 2005 at 6 ("The Board has made it clear . . . that there is no violation under *McClatchy* and *KSM Industries* until the employer actually takes some action that would require bargaining but for the unilaterally implemented proposal.").

[19] 331 NLRB 735, 740–41 (2000).

[20] 337 NLRB 296, 298 (2001).

[21] 321 NLRB at 1391 n.24 (citing *Katz*, 369 U.S. at 746–47); *see also Columbia Sussex Corporation*, Case 19-CA-127945, Advice Memorandum dated Dec. 19, 2014 at 6 (concluding that the employer did not violate the Act by unilaterally implementing a new healthcare plan following impasse because it had not exercised the discretionary aspects of the plan). *But see Quirk Tire*, 340 NLRB 301, 302–303 (2003) (holding that employer violated 8(a)(5) by merely implementing wage proposal that gave it broad discretion to determine wage rates without finding that employer had exercised its discretion to unilaterally change wages).

the *McClatchy* concerns.[22] For instance, in *E. I. du Pont & Co.*, the Board found that a health-insurance proposal providing the employer with discretion over the overall cost-allocation structure of the plan (the cost of premiums, new benefits, and employee contributions), but which required additional costs to be split equally between employees and the employer, was sufficiently limited by objective criteria to not violate *McClatchy*.[23] Similarly, in *Monterey Newspapers, Inc.*, the Board held that the employer's discretionary pay system for outside new hires, which allowed it to set initial pay rates within predetermined pay bands, was "tightly circumscribed" and hence also did not violate *McClatchy*.[24] By contrast, in *Royal Motor Sales*, the Board held that the employer unlawfully implemented discretionary merit-wage increases that lacked clearly defined objective standards and criteria for assessing merit.[25] Specifically, the implemented proposal called for merit-pay increases based on "experience, ability, knowledge, and performance," without specifying or defining those terms, giving the employer overly broad discretion.[26] Similarly, in *Quirk Tire*, the employer implemented a post-impasse wage proposal that permitted it to choose paying its commercial operations employees either $8.90 per hour or "current marketplace pay practices" for the term of the contract.[27] Assuming that "current marketplace pay" could produce a quantifiable rate, the Board held that the employer had retained unfettered discretion to make recurring unilateral decisions during the contract term over which of the two wage rates to pay its employees.[28]

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[22] *Royal Motor Sales*, 329 NLRB 760, 778–79 (1999).

[23] 346 NLRB at 559–60 (finding that the implemented provision "is a narrow, specific clause that, by its terms, sets limits on the Respondent's discretion to act with respect to healthcare").

[24] 334 NLRB 1019, 1021 (2001) (noting that "[o]nce the new hires became part of the Respondent's work force, any subsequent raises or changes in their compensation would be matters on which the Respondent would be required to bargain with the Union. . . ." and that "wage rates established in any collective-bargaining agreement negotiated between the Respondent and the Union would presumably apply to all employees, including new outside hires").

[25] 329 NLRB at 779–80.

[26] *Id.*

[27] 340 NLRB 301, 302 (2003).

[28] *Id.*

In the instant case, the Region concluded that the Employer lawfully proposed and insisted to impasse that unit employees would be placed on the same healthcare plan and annual-bonus program as non-represented employees. Both of these proposals provided the Employer with some degree of discretion over mandatory subjects of bargaining, and are therefore subject to scrutiny under *McClatchy*.[29] The Employer placed unit employees on the new healthcare plan on January 1, 2017, pursuant to its implemented proposal in which it reserved the right to unilaterally "modify, reduce, or eliminate" healthcare benefits. However, the Employer has not exercised its discretion to unilaterally change any terms of the plan. While the Employer cannot lawfully make discretionary changes to the plan without bargaining with the Union, the mere post-impasse implementation of the healthcare plan did not violate the Act.[30] Unlike the healthcare plan, the Employer did exercise its discretion with regard to the variable compensation program when it refrained from paying out annual bonuses at the end of 2016. However, the program does not run afoul of *McClatchy* because it cabins the Employer's discretion to make unilateral decisions that would be inherently destructive to the Union. Rather, it establishes a single set of definable objective procedures, criteria, and timing for granting annual bonuses: the board must establish and consider enterprise-level goals, receive management's report on whether the board's goals have been met, and the Employer must turn a profit. Here, the Employer's procedurally bound consideration of its financial health before paying out annual bonuses is akin to the "narrow, specific clause that, by its terms, sets limits on the [employer's] discretion" that the Board found lawful in *E. I. du Pont*,[31] distinguishable from the merit-wage proposal in *McClatchy*, where the employer was granted "carte blanche authority" over wage increases, "without limitation as to time, standards, criteria, or the [Union's] agreement . . . ."[32]

In sum, we conclude that the Employer has not exercised the discretion it reserved to itself in its implemented proposal to change its healthcare plan. Hence, it has not triggered an obligation to bargain with the Union and has not violated Section 8(a)(5). We also conclude that the Employer's variable compensation program sufficiently cabins Employer discretion with objective procedures and criteria and therefore does not violate the Act. Because the Employer did not violate the Act with its implementation of the healthcare plan or bonus program, we need

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[29] 321 NLRB 1386.

[30] *See, e.g.*, *Bakersfield Californian*, 337 NLRB at 298; *Woodland Clinic*, 331 NLRB at 740–41.

[31] 346 NLRB at 560.

[32] 321 NLRB at 1390–91.

not address the question of whether unlawful implementation would have tainted the impasse. Accordingly, the Region should dismiss this charge, absent withdrawal.

/s/
B.J.K.

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