

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

Advice Memorandum

DATE: December 15, 2017

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: King TV c/o TEGNA, Inc.
Case 19-CA-194833

530-6067-4001-8700

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) by unilaterally implementing, post-impasse, three proposals that differed from the Employer's last, best, and final offer due to the removal of arbitration language. We conclude that the Employer did not violate Section 8(a)(5). Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

IBEW Local 46 ("Union") represents a bargaining unit of twenty-five employees working as engineers and production workers for King TV c/o TEGNA Inc. ("Employer"). The Union has represented the bargaining unit employees since the 1960s or 1970s. The Employer and the Union have attempted to negotiate a successor collective-bargaining agreement ("CBA") since the predecessor CBA expired in October of 2014.

The Employer provided the Union with its opening proposal in October 2014. That proposal included language that would allow the Employer to assign bargaining unit work to non-bargaining unit employees. The Employer explained that it required flexibility in making work assignments to ensure that it could find, develop, and broadcast new types of content that would appeal to a new generation of media consumers. The Union opposed the work-assignment proposal because it believed that it threatened both current employees' jobs and the very existence of the bargaining unit in the future. The Employer asserts that it tried to allay the Union's fears by explaining that the Employer did not want to diminish bargaining unit work or reduce work hours for employees within the unit via its work-assignment proposal. Eventually, this proposal became codified in Side Letter 8.

The parties met for approximately twenty bargaining sessions. Both parties confirm that if a party did not propose changing a provision, the provision would carry over from the expired CBA. On June 15, 2016, the Employer presented the Union

with what the Employer called its Final, Firm, and Best Offer (“FFBO”). Because the FFBO only displayed new provisions—such as Side Letter 8—and descriptions of changes to a handful of CBA provisions, the Union requested that the Employer incorporate the FFBO into a “red-lined” version of the expired CBA (red-lining out those matters deleted and underlining in red subject matter that was added) so that the employees could review the FFBO in context with the expired CBA.

Side Letter 8 to the FFBO addressed the assignment of work outside the unit. In this regard, Paragraph 1(b) of Side Letter 8 stated that it “permits the assignment of work within the jurisdiction of the Union to persons other than those currently in the bargaining unit,” and Paragraph 2 similarly stated that, “subject to other commitments of this side letter, any work within the jurisdiction of the Union may be assigned to or performed by persons outside the bargaining unit.” Various paragraphs of Side Letter 8 contained limitations on the Employer’s right to assign unit work to non-unit employees. For example, Paragraph 3 stated, *inter alia*, that the “core responsibility” for performing unit work would remain with bargaining unit employees; there should be “no diminution of the . . . full-time bargaining unit as a result of . . . this [s]ide [l]etter”; the Employer will “not reduce full-time bargaining unit employees[] regularly scheduled straight-time hours solely due to . . . this side letter”; and the Employer “will not hire or retain a complement of new non-unit employees, freelancers or stringers, for the purpose of displacing the bargaining unit employees from performing work.”

Side Letter 8 also contemplated disputes regarding the placement, in or out of the unit, of employees to whom such bargaining unit work was assigned, and tied resolution of those disputes back to the grievance and arbitration processes found at Article III of the expired CBA. Specifically, Paragraph 4(b) of Side Letter 8 stated: “A party wishing to challenge a unit classification shall give timely notice to the other that they believe it appropriate to change the bargaining unit status of one or more individuals and thereafter the procedures of Article III shall be utilized to resolve this dispute.” The red-lined FFBO contained a version of Article III that provided for arbitration. Furthermore, Paragraph 4(d) of Side Letter 8 stated that, in order to avoid “repetitious disputes,” a resolution as to the unit placement of an individual through informal means or “an arbitration decision . . . shall be determinative as to that person and not subject to rechallenge” absent a material change of fact.

The red-lined version of the FFBO also contained, *inter alia*, the following unmodified provision from the expired CBA:

1.3(L) Assignment of Work. The Employer has the right to assign non-bargaining unit work to unit employees on [a] non-jurisdictional basis, and the Union agrees that assignments of non-unit work may not be used as evidence of accretion. . . . [I]f the Employer seeks to

make an assignment to the bargaining unit and the parties disagree about whether the work is jurisdictional, the parties agree to engage in discussion and reach a resolution using the same process contained in Section 1.3(M). If such process does not result in agreement, the question shall be subject to arbitration only if and when there is an adverse effect on the unit (such as when the Employer reassigns the work outside the unit). Either party may request arbitration within thirty (30) days of the adverse effect on the unit. . . .

The red-lined version of the FFBO also contained an unmodified version of Article III from the expired CBA. Article III was a classic dispute-resolution provision, containing a two-step grievance procedure between the Union and the Employer; if the dispute could not be resolved at these steps, Article III permitted either party to refer the dispute to binding arbitration.

In July 2016, the Union presented the bargaining unit with the red-lined version of the FFBO. After the unit proceeded to vote on and reject it, a Union Representative requested that the parties reconvene negotiations. The Employer expressed doubt that more sessions would be productive because the Union already had the Employer's FFBO. The Union relayed its view that continued negotiations would be productive.

The parties attended a federally mediated bargaining session on September 22, 2016. On that date, the Union proposed a version of Side Letter 8 that did not reference the grievance arbitration provision, but instead proposed that the parties utilize the Board's unit-clarification procedure to resolve disputes, a mechanism that would be available in any case. The Union would have given up arbitration under this proposal in exchange for better wages and benefits. While the Union contends that it made substantial movement when it presented this counterproposal to the Employer, the Employer contends that, because the Union's proposal was substantially different than the Employer's FFBO, it did not justify further negotiations.

The following day, on September 23, 2016, the Employer informed the Union that negotiations were at an impasse. The Union's attorney disputed that the parties were at impasse, contending that the Employer's work-assignment proposal contained in Side Letter 8 was a permissive subject of bargaining. On September 29, 2016, the Employer responded that "there will be no further proposal from the Company" and claimed that the parties were at legal impasse.

The Union filed a charge in Case 19-CA-185180, alleging that the Employer unlawfully declared impasse over a permissive subject of bargaining and that the Employer engaged in bad faith bargaining. On December 19, 2016, the Region

dismissed the charge, explaining that the Board has found work-assignment proposals, such as Side Letter 8, to constitute a mandatory subject of bargaining and that the Employer did not engage in bad faith bargaining.

On March 6, 2017, more than five months after the last bargaining session, the Employer informed both the Union and the bargaining unit employees that, because the parties were at an impasse, it was implementing what it referred to as “Posted Conditions.” The Employer explained that the Posted Conditions were effective immediately and would remain in effect until further notice. The Posted Conditions included, *inter alia*, versions of Side Letter 8, Section 1.3(L), and Article III that differed from the versions in the red-lined FFBO. Specifically, the arbitration language was removed from Article III; only the two-step grievance process remained. Although Paragraph 4(b) of Side Letter 8 continued to reference Article III, it was now referencing a dispute-resolution provision that did not provide for arbitration, and the reference to arbitration was also stricken from Paragraph 4(d) of Side Letter 8. Finally, Section 1.3(L)’s dispute-resolution language no longer referred to arbitration.¹

ACTION

We conclude that the Employer did not violate Section 8(a)(5) by implementing versions of Article III, Side Letter 8, or Section 1.3(L) without the arbitration language contained in the FFBO. Accordingly, the Region should dismiss the charge, absent withdrawal.

It is well settled that, after impasse, an employer may unilaterally implement changes in existing terms and conditions of employment that are consistent with its bargaining proposals.² Furthermore, an employer is not required to implement its entire last, best, and final offer, but may choose to implement only portions of its final offer provided that the changes are “reasonably comprehended” within the employer’s pre-impasse proposal.³ Any unimplemented portions of a final offer are considered

¹ The Posted Conditions also did not include the management-rights, union-security, and no strike/no lockout provisions that were included in the red-lined FFBO.

² *Richmond Elec. Services*, 348 NLRB 1001, 1003 (2006) (citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *review denied*, 395 F.2d 622 (D.C. Cir. 1968)); *Western Publishing Co.*, 269 NLRB 355, 355-56 (1984).

³ *Presto Casting Co.*, 262 NLRB 346, 354 (1982), *enforced in relevant part*, 708 F.2d 495 (9th Cir. 1983), *cert. denied*, 464 U.S. 994 (1983). *See also Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990) (“[o]nce an employer bargains in good faith to

“dormant,” and possibly subject to later negotiation if the parties choose to take them up again.⁴ While an employer may lawfully implement clearly severable components of its proposals, it may not selectively implement components of its proposals that are “inextricably intertwined” with unimplemented components.⁵

In *Plainville Ready Mix Concrete Co.*, for example, the Board held that an employer violated Section 8(a)(5) by unilaterally implementing: (1) the part of its proposed wage package that terminated a gain-sharing and incentive wage plan without implementing the fixed hourly wage increase it had offered in lieu of that wage plan;⁶ and (2) the provisions of its health plan proposal that favored the employer but not the provisions that favored employees.⁷ Similarly, in *Emhart Industries*,⁸ the Board held that an employer violated Section 8(a)(5) when it implemented only two paragraphs of an eight-paragraph striker reinstatement agreement. The Board noted that the implemented provisions “reflected only a relatively small part of the comprehensive system” proposed by the employer and that

impasse, its duty to bargain further is suspended, and it is free to impose all—or part of—its pre-impasse proposals”) (emphasis added).

⁴ *Presto Casting Co.*, 262 NLRB at 354-55 (implementation-after-impasse doctrine is an economic weapon available to the employer that “changes the circumstances of the bargaining atmosphere” and hopefully moves the parties back towards bargaining).

⁵ Compare *id.* at 355 (finding that, following impasse, employer could lawfully implement its wage proposal while not also implementing benefit package that had been offered to union as a separate item), with *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992) (finding partial implementation unlawful where terms bore an “economic and functional relationship to each other”), *enforced*, 44 F.3d 1320 (6th Cir. 1995). See also *L. W. Le Fort Co.*, 290 NLRB 344, 344 (1988) (finding that, following impasse, employer unlawfully ceased making health and welfare payments because final offer included continued participation in union plan, but employer lawfully ceased making pension payments, because final offer did not provide for pensions).

⁶ 309 NLRB at 586 (the two proposals were “supplementary” and “part of the total wage package”).

⁷ *Id.* at 587-88 (while the individual elements of the plan were “severably spoken of” and “individually identifiable in the [employer’s] offer,” they were presented as a single plan and bore “an economic and functional relationship to each other”).

⁸ 297 NLRB 215, 217 (1989), *enforcement denied*, 907 F.2d 372 (2d Cir. 1990).

the implemented procedure “differed significantly” from the employer’s proposal because of the omitted provisions.⁹ And, in *Cleveland Cinemas Mgt. Co.*,¹⁰ the employer violated Section 8(a)(5) by unilaterally implementing, after impasse, its proposal to eliminate a bargaining unit “projectionist” position but failing to implement its proposal to create a new “service technician” position, which the employer had presented as the “quid pro quo” for the union to give up the projectionist position.

Aside from the question of whether implemented terms were reasonably comprehended within pre-impasse proposals, the Board and Courts have recognized that arbitration proposals differ from proposals concerning most other mandatory subjects of bargaining. This is because arbitration is a “voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties.”¹¹ For this reason, unlike most other mandatory subjects of bargaining, arbitration clauses do not survive contract expiration, and parties are not required to arbitrate disputes that arise after a contract containing an arbitration provision has expired.¹² Moreover, as arbitration is a matter of consent, an employer may not unilaterally implement an arbitration provision, even if the parties have reached a bona fide impasse.¹³

Article III

We conclude that the Employer lawfully implemented Article III—the general dispute-resolution provision—after the parties reached impasse, despite the absence

⁹ *Id.*

¹⁰ 346 NLRB 785, 788-89 (2006).

¹¹ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (quoting *Hilton–Davis Chemical Co.*, 185 NLRB 241, 242 (1970)). *See also Indiana & Michigan Electric Co.*, 284 NLRB 53, 58-59 (1987) (reaffirming the principle that the obligation to arbitrate arises solely from mutual consent).

¹² *Litton Fin. Printing Div. v. NLRB*, 501 U.S. at 205-09 (refusing to apply a presumption of arbitrability in the context of an expired bargaining agreement, “for to do so would make limitless the contractual obligation to arbitrate”).

¹³ *See Noel Corp.*, 315 NLRB 905, 910 n.31 (1994) (term of employer’s offer concerning arbitration was “matter of contract” that “could not lawfully be imposed unilaterally by the [employer], even after impasse”), *enforcement denied in part on other grounds*, 82 F.3d 1113 (D.C. Cir. 1996).

of the arbitration language that had been included in the red-lined FFBO. Initially, because arbitration is a creature of contract requiring mutual consent, the Employer could not have lawfully implemented the version of Article III from its FFBO.¹⁴ And the Board has signaled that an employer may lawfully implement, after impasse, that portion of its final offer providing for a grievance procedure but without binding arbitration.¹⁵ Moreover, Article III's arbitration procedures did not survive the CBA's expiration in 2014. Therefore, the terms of Article III *without* the arbitration language—i.e., only the two-step grievance process—constituted the lawful status quo. In these circumstances, the Employer did not unilaterally change the lawful status quo when it implemented a version of Article III that only included the grievance procedures.¹⁶

Side Letter 8

We conclude that the Employer lawfully implemented Side Letter 8, despite the absence of arbitration as a dispute resolution procedure, because there is insufficient evidence to establish that arbitrability was inextricably intertwined with the Employer's proposal to assign unit work to non-unit employees. In this regard, the fact that Side Letter 8 from the FFBO specifically referenced Article III—which, at the time, provided for arbitration—does not demonstrate that arbitrability was a “quid pro quo” to gain the Union's agreement on work-assignment flexibility.¹⁷ While

¹⁴ See *Litton Fin. Printing Div.*, 501 U.S. at 201 (“We reaffirm today that under the NLRA arbitration is a matter of consent . . . that . . . will not be imposed upon parties beyond the scope of their agreement.”); *Noel Corp.*, 315 NLRB at 910 n.31.

¹⁵ Cf. *Indiana & Michigan Electric*, 284 NLRB at 55 (finding that employer violated Act by unilaterally abandoning grievance procedure after contract expired; “changes in th[e] dispute resolution system [must] be made only after the parties concerned have agreed to them *or otherwise adequately bargained over the matter*”) (emphasis added).

¹⁶ Cf. *id.* at 54 (employer violated Section 8(a)(5) by unilaterally abandoning last step in the grievance process, which, “[u]nlike arbitration,” was not a consensual surrender of rights); *Bethlehem Steel Co.*, 136 NLRB 1500, 1503 (1961) (unilateral abandonment of contractual grievance procedure after contract expired violated Section 8(a)(5)), *enforced in relevant part*, 320 F.2d 615 (3d Cir. 1963).

¹⁷ Cf. *Cleveland Cinemas*, 346 NLRB at 788-89 (employer's post-impasse implementation of proposal to eliminate unit position, without also implementing complementary proposal to create new unit position, violated 8(a)(5), because

Side Letter 8 was a major sticking point in negotiations, there is no evidence that either party proposed that a deal was contingent on including arbitration as the mechanism for dispute resolution. The Union even proposed a version of Side Letter 8 that would have dispensed with arbitration as the dispute resolution mechanism, relying instead on the Board's unit clarification procedures, if the Employer would agree to increased wages and benefits. Nor is there evidence that the Employer referenced arbitration in the proposal so as to persuade the Union to accept its position on flexible work assignments. Rather, it appears that other aspects of the Side Letter 8 proposal were designed to ease the Union's concerns, such as promising that "core responsibility" for performing unit work would remain with bargaining unit employees and that there should be "no diminution" of the full-time bargaining unit.¹⁸

Section 1.3(L)

We conclude that the Employer lawfully implemented Section 1.3(L)—the provision concerning the assignment of non-unit work to unit employees—despite the absence of the arbitration language contained in the red-lined FFBO's version of the provision. Like Side Letter 8, arbitrability was not inextricably intertwined with Section 1.3(L)'s assignment-of-work term. Initially, there is no bargaining history or other evidence suggesting that the Employer's ability to assign non-unit work to unit employees was a major issue in bargaining or was particularly important to either

employer had presented new position as "quid pro quo" for elimination of existing position).

¹⁸ Although the assignment of unit work to non-unit employees is arguably a "key" term and condition of employment that is subject to the no-implementation-on-impasse rule of *McClatchy Newspapers*, 321 NLRB 1386 (1996) (post-impasse implementation of merit pay proposal unlawful because proposal vested employer with unbridled discretion, effectively depriving union of representational function), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), there is no violation here under *McClatchy* because of the objective limitations on the Employer's discretion and because the Union retains the ability to contest the non-unit status of employees who are assigned unit work via a two-step grievance procedure. *See Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 118 (D.C. Cir. 2000) (employer lawfully implemented merit-pay proposal after impasse, notwithstanding *McClatchy*, because employees could contest size of pay increase through grievance procedure).

side.¹⁹ Also, the proposed arbitration language at issue would actually have *limited* employees' access to arbitration. Thus, under Section 1.3(L) of the red-lined FFBO, arbitration would only be available if the assignment of non-unit work to unit employees had "an adverse effect on the unit (such as when the Employer reassigns work outside the unit)." Moreover, before the Union could invoke even this limited right to arbitration, Section 1.3(L) of the FFBO required the Union to avail itself of Section 1.3(M)'s (New Technology) dispute-resolution procedure, which contemplated negotiations by a Joint Labor Management Committee and, potentially, FMCS mediation. Accordingly, the arbitration clause was not inextricably intertwined with the implemented term.

Consistent with the foregoing, the Region should dismiss the charge, absent withdrawal.

/s/
J.L.S.

ADV.19 -CA-194833.Response.KingTV. (b) (6), (b) (7)

¹⁹ Generally speaking, providing additional work to bargaining unit employees would not be expected to diminish unit work or eliminate unit positions.