

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

Advice Memorandum

DATE: November 8, 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 unlawfully implemented one of these proposals, known as Side Letter 8, because arbitrability was so inextricably intertwined with the proposal's most contentious element—assignment of unit work to non-unit employees—that its implementation in that form was not reasonably comprehended within the pre-impasse proposal. We further conclude, however, that the Employer did not violate Section 8(a)(5) by implementing a general dispute-resolution provision ("Article III") or a provision concerning assignment of non-unit work to unit employees ("Section 1.3(L)") without the arbitration language contained in the last, best, and final offer. Accordingly, the Region should issue complaint, absent settlement, concerning the unilateral implementation of Side Letter 8, but should dismiss, absent withdrawal, the allegations concerning Article III and Section 1.3(L).

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 threatened both current employees' jobs and the very existence of the bargaining unit in the future. The Employer contends 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." Significantly, 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. While the Union contends that it made substantial movement when it presented a 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 violated Section 8(a)(5) by unilaterally implementing Side Letter 8 without the dispute-resolution language providing for arbitration because arbitrability was so inextricably intertwined with the proposal’s most contentious element—assignment of unit work to non-unit employees—that its implementation in that form was not reasonably comprehended within the pre-impasse proposal. We further conclude, however, that the Employer did not violate Section 8(a)(5) by implementing versions of Article III or Section 1.3(L) without the arbitration language contained in the FFBO. Accordingly, the Region should issue complaint, absent settlement, concerning the unilateral implementation of Side Letter 8, but should dismiss, absent withdrawal, the allegations concerning Article III and Section 1.3(L).

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.

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 “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

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 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).

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 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

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).

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).

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

Side Letter 8

We conclude that the Employer violated Section 8(a)(5) by unilaterally implementing Side Letter 8, because arbitrability was inextricably intertwined with the proposal's most contentious element: assignment of unit work to non-unit employees. Side Letter 8 was a major sticking point in negotiations. The Employer sought 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 proposal, fearing that it would threaten current employees' jobs and potentially decimate the unit in the future. Substantial time was spent negotiating this particular item; the Employer's proposals, including its FFBO, continued to include arbitration as a dispute-resolution mechanism designed to ease the Union's concerns; and the proposal that the Union's membership voted on provided for arbitration.¹⁴ Given the amount of time spent on this issue during bargaining, the importance of work-assignment flexibility to the Employer, and the Union's reasonable fear that the Employer could use the clause to undermine the unit, we find that the Employer included an explicit reference to a version of Article III that provided for arbitration, coupled with an additional reference to "arbitration," as a "quid pro quo" to gain the Union's agreement on work-assignment flexibility.¹⁵

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).

¹⁴ At one point, the Union had proposed removing the arbitration language from Side Letter 8 and substituting it with an agreement to utilize Board unit clarification procedures to resolve unit-placement disputes, in exchange for stronger economic terms. The Employer rejected this proposal, however, because it "significantly modified the jurisdictional relief" of this "key" provision.

¹⁵ *See 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

As such, we conclude that arbitrability is an “inextricably intertwined” and functionally related aspect of the Employer’s proposal in Side Letter 8 to assign unit work to employees outside the unit, and the Employer cannot lawfully implement the latter without the former. And, since the Employer is prohibited from unilaterally implementing an arbitration clause after impasse, the entire intertwined proposal is incapable of post-impasse implementation.¹⁶

Accordingly, the Region should issue complaint, absent settlement, concerning this allegation.

Article III

We conclude that the Employer lawfully implemented Article III—the general dispute-resolution provision—after the parties reached impasse, despite the absence of the arbitration language that had been included in the red-lined FFBO. Initially,

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

¹⁶ An argument could be made that the assignment of unit work to non-unit employees is 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). See *Bechtel Bettis, Inc.*, Case 27-CA-19115, at p.7 n.9, Advice Memorandum dated Mar. 31, 2005. The Region should not make that argument here, however, because the proposal provides objective criteria, i.e., whether the employee is hired into a position similar to those traditionally within the unit or whether the employee’s core responsibilities are work within the jurisdiction of the unit, by which the placement could be contested via a two-step grievance procedure. Compare *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), with *Royal Motor Sales*, 329 NLRB 760, 780 (1999) (grievance-arbitration procedure available for union to challenge employer’s decisions regarding which pay plan to place employees, but proposal had no objective criteria with which to judge employer decisions), *enforced*, 2 F. App’x 1 (D.C. Cir. 2001), and *Quirk Tire Co.*, 340 NLRB 301, 302 (2003) (although union could grieve decision on basis that pay did not reflect marketplace practices, employer’s basic decision to pay either an \$8.90 per hour floor or a higher wage rate could not be challenged).

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.¹⁷ 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.¹⁸ 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.¹⁹

For these reasons, the Region should dismiss this allegation, absent withdrawal.²⁰

¹⁷ 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.

¹⁸ 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).

¹⁹ 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).

²⁰ We note that a union is not required to honor a unilaterally-established grievance procedure, even if the unilateral establishment is lawful under Section 8(a)(5). This is so because Section 8(d) provides that the bargaining obligation does not “compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). Cf. *Advance Industries Division*, 220 NLRB 431, 432 (1975) (concluding that employees were allowed to engage in protected concerted activity and bypass employer’s unilaterally-imposed grievance procedure; only where the parties have *agreed* to a grievance procedure are the employees required to follow it), *enforcement denied in relevant part*, 540 F.2d 878 (7th Cir. 1976).

Section 1.3(L)

We also 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. Unlike 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 side.²¹ Also, the proposed arbitration language at issue, unlike that in Side Letter 8, 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).”²² 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, we would not consider the arbitration clause to be inextricably intertwined with the implemented term, and the Region should dismiss this allegation, absent withdrawal.²³

Consistent with the foregoing, the Region should issue complaint, absent settlement, concerning the unilateral implementation of Side Letter 8, and should dismiss, absent withdrawal, the allegations concerning Article III and Section 1.3(L).

/s/
J.L.S.

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²¹ Generally speaking, providing additional work to bargaining unit employees would not be expected to diminish unit work or eliminate unit positions.

²² By contrast, Side Letter 8 expressly referenced Article III, which, in the red-lined FFBO, made arbitration generally available when grievances were not resolved at the second step.

²³ See generally *Presto Casting Co.*, 262 NLRB at 354-55 (employer lawfully implemented severable components of proposal following impasse).