

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

DATE: June 4, 2018

TO: Paul J. Murphy, Regional Director  
Region 3

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

SUBJECT: WIVB-TV (Nexstar Broadcasting)  
Case 03-CA-210156

240-3367-0113  
240-2267-0415  
240-3367-0460  
240-3367-0887  
240-3367-8362-1000  
530-6033-1450-0000  
530-6033-4200-0000  
530-6033-4220-0000  
530-6033-4240-0000  
530-6067-2040-8037  
530-6067-2040-8050

The Region submitted this case for advice as to whether pre-arbitral deferral under *Collyer*<sup>1</sup> is appropriate where the Employer unilaterally ceased its practice of paying employees on the Union's bargaining committee for work time spent in collective bargaining. We conclude that deferral is not appropriate because the Employer's unilateral change caused a complete breakdown in the parties' collective-bargaining process and affects the employees' statutory right to freely select their bargaining agent. Accordingly, complaint should issue, absent settlement.

**FACTS**

WIVB-TV (Nexstar Broadcasting) ("the Employer") operates a television station that serves the Buffalo, New York area. The National Association of Broadcast Employees & Technicians-CWA, AFL-CIO ("the Union") represents a unit of technicians, news photojournalists/editors, producer/assignment editors, producer/directors/ and artists. The parties have a collective-bargaining agreement that was effective by its terms from March 27, 2013 through March 26, 2017 ("the

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<sup>1</sup> *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

2013-17 contract”), but which has been extended indefinitely. The Employer acquired the predecessor employer on January 27, 2017,<sup>2</sup> recognized the Union, and assumed the contract.

In early February, the parties began negotiations for a successor agreement to the 2013-17 contract. The Union’s bargaining committee consisted of three employees, who were joined by a Union staff representative in May. It is undisputed that the past practice, dating at least as far back as 1999 or 2000, was for employee-members of the Union bargaining committee to be paid for an 8-hour day for time spent engaged in negotiations (“release time”), regardless of whether the employee-member was at the table for more or less than 8 hours. The 2013-17 contract is silent on this issue.<sup>3</sup>

The Employer and the Union bargaining committee met nine times between February 2 and July 21.<sup>4</sup> After each session, the Employer sent an itemized invoice to the Union for their portion of bargaining expenses, consisting of half the cost of the rental of meeting space and food. The Employer paid the bargaining committee members their full 8-hour wage for each of the eight meetings prior to July 21.

During the July 21 session, the Employer’s Regional Vice President informed the Union staff representative that the Employer discovered it had been paying the employee bargaining committee members for release time, that the contract did not require it to do so, and that it would no longer pay them for release time going forward. The Union representative, who had not been involved with negotiating the 2013-17 contract or any prior agreement, informed the employee committee members, who explained that the Employer had always paid a full day’s wage for release time. The Union representative then informed the Employer that the Union considered the payments an established past practice and a mandatory subject of bargaining and expected the payments to continue unless and until a different arrangement was

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<sup>2</sup> All dates hereinafter in 2017, unless otherwise noted.

<sup>3</sup> The contract does contain a “Leave of Absence – Union and Other” provision, which provides that the Union will reimburse the Employer for any overtime paid to employees who replace those engaged in Union business. The Union contends that this provision has never been applied to employees engaged in collective-bargaining negotiations, and the Union had never reimbursed the Employer’s predecessors for regular wages paid to employee bargaining committee members for time spent bargaining.

<sup>4</sup> The parties met on: February 2, 23, and 24; March 28, 29, and 30; May 10 and 11; and July 21.

made and included in a successor agreement. The Regional Vice President disagreed with the Union's position, but made no further comment. The parties met again on August 14 and 15, apparently without either party bringing up the issue.

On September 14, the Employer sent the Union an itemized invoice, but this time it contained line items requesting repayment for all wages and 401(k) contributions paid by the Employer to the three employees for all 11 bargaining sessions from February to mid-August, totaling roughly \$8,750. On October 2 and 3, the parties again held negotiation sessions. By letter dated October 3, the Union responded to the Employer's September 14 communication by reiterating that the longstanding practice of paying employees for release time had never involved the Union reimbursing the Employer for wages, that the matter involved a mandatory bargaining subject, and the Union would not reimburse the Employer unless the parties reached a successor agreement that provided otherwise.

The Employer paid the three employees on the bargaining committee for the October 2 and 3 bargaining sessions, just as it had for all prior sessions. On November 3, the Employer notified the Union by letter that the Union should inform the employee committee members to not submit time cards for release time at all in the future. In a separate interaction on the same day, the Employer unambiguously stated to the Union that the Employer would no longer pay employees for bargaining from that point forward.

Following the Employer's announcement, the Union requested that the next previously scheduled bargaining session be moved to the employees' non-work hours. The parties agreed to meet from 5 to 7 pm on November 28, and they subsequently met on December 6 from 5 to 7 pm. The parties have not been able to agree on any additional meeting times and have not met again. The Union has requested that additional bargaining sessions take place exclusively on non-work time during the evening or on weekends. The Employer has rejected, without explanation, the Union's request for all the meetings to take place during off-hours and instead has proposed alternating, "one on, one off" sessions, where one meeting would take place during non-work hours and the next during working hours. The Union has rejected this offer and is opposed to bargaining during working hours if the three employee committee members are not paid release time in accordance with the prior practice.

### **ACTION**

We conclude that deferral is not appropriate because the Employer's abrupt unilateral change caused a complete breakdown in the parties' collective-bargaining process and affects the employees' statutory right to freely select their bargaining agent. Accordingly, complaint should issue, absent settlement.

Under *Collyer*, the Board permits pre-arbitral deferral of a charge alleging a Section 8(a)(5) violation when certain conditions are met. Specifically, the Board finds such deferral appropriate when the dispute arises out of a long and productive collective-bargaining relationship; there is no claim or evidence of employer animosity towards the exercise of protected rights; the contract calls for arbitration in a broad range of disputes and/or the arbitration clause clearly encompasses the claim; the charged party shows a willingness to utilize and be bound by the arbitration process; and, arbitration would be able to resolve both the contractual and unfair labor practice disputes in accordance with the policies and purposes of the Act.<sup>5</sup> This deferral policy is centered on the principle that encouraging parties to agree on a method of dispute resolution and holding them to that agreement is an integral component of encouraging collective bargaining.<sup>6</sup> At the same time, the Board's deferral policy is one of discretion and "is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed."<sup>7</sup>

Essential to the Board's policy favoring deferral is that the parties have a functioning bargaining relationship devoid of conduct that indicates disregard for their contractual responsibilities. The Board, therefore, will refuse to defer charges alleging violations of the Act that involve a complete breakdown in the collective-bargaining process.<sup>8</sup> In such situations, or where there is evidence of one party repudiating the bargaining process, rejecting bargaining principles, or other indicators that the bargaining relationship has collapsed, it would not effectuate the

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<sup>5</sup> *Collyer*, 192 NLRB at 841-42 (quoting *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142 (1969) (holding that where the "contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the [u]nion and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties"); *United Technologies Corp.*, 268 NLRB 557, 558-559 (1984) (also phrasing the final factor as whether the "dispute was eminently well suited to resolution by arbitration").

<sup>6</sup> See *United Technologies*, 268 NLRB at 559.

<sup>7</sup> *Id.* at 560. See also *Collyer*, 192 NLRB at 840 ("The Board's authority, in its discretion, to defer to the arbitration process has never been questioned by the courts of appeals, or by the Supreme Court.").

<sup>8</sup> See, e.g., *AMF, Inc.-Union Machinery Division*, 219 NLRB 903, 912 (1975).

policies of the Act to defer to a dispute resolution process that will fail to provide an effective solution.<sup>9</sup> Nor would it effectuate the Act's policies for the Board to defer in such situations because it has the exclusive authority, and the duty, to encourage the practice and orderly procedure of collective bargaining.<sup>10</sup>

In keeping with the foregoing general principles, the Board has not *Collyer* deferred cases involving midstream unilateral changes to negotiated ground rules, including unilateral cessation of release time payments, because such conduct not only violates Section 8(a)(5), but also severely disrupts the mechanics of the parties' bargaining relationship.<sup>11</sup> For example, in *AMF, Inc.-Union Machinery Division*, the employer unilaterally withdrew from bargaining after the local union sought to include about ten outside negotiators from the AFL-CIO on its bargaining committee.<sup>12</sup> The employer cancelled negotiations, refused to meet, cut employee hours until the union agreed to negotiate without the outside negotiators, and tried to

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<sup>9</sup> See e.g., *United Technologies*, 268 NLRB at 560 (noting the Board will not defer where there is a "rejection of the principles of collective bargaining") (quoting *General American Transp. Corp.*, 228 NLRB 808, 817 (1977) (Members Penello and Walther, dissenting)); *Collyer*, 192 NLRB at 845 (Member Brown, concurring) (deferral inappropriate where there is a "repudiation of the collective bargaining process").

<sup>10</sup> See generally *United Technologies*, 268 NLRB at 559-60 (stating that the Board is not "insensitive to the statutory rights of employees in deciding whether to defer" because it refuses to defer where arbitration would not resolve the dispute because, among other reasons, "respondent's conduct constitutes a rejection of the principles of collective bargaining"); *AMF*, 219 NLRB at 912 (ALJ, affirmed by the Board, noting that a dispute over selection of bargaining representatives "goes to the heart of [the Act's policies]" and therefore should be determined by the Board, recognizing the Board's "special competence in dealing with unfair labor practice issues emerging from a serious disruption to the negotiating process") (quoting *Harley Davidson Motor Co.*, 214 NLRB 433, 439 (1974)).

<sup>11</sup> See *AMF*, 219 NLRB at 912; *Proctor & Gamble Mfg. Co.*, 248 NLRB 953, 973, 975 (1980), *enforced in relevant part*, 658 F.2d 968 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982). See also *Western Block Co.*, 229 NLRB 482, 483-84 (1977) (holding employer's conduct to constitute a "rejection of the principles of collective bargaining" "where it unilaterally began charging the union for the work time that unit employees spent on union business, and then deducted those amounts from the dues it was obligated to remit to the union under the parties' contract; deferral was not an issue in the case).

<sup>12</sup> *AMF*, 219 NLRB at 903.

bypass the union and deal directly with employees.<sup>13</sup> The employer's defense was that the case should have been deferred to arbitration, claiming the expired collective-bargaining agreement prohibited the union from having more than five members on the bargaining team.<sup>14</sup> The Board upheld the ALJ's refusal to defer. While acknowledging that the employer raised a cognizable contract interpretation issue, the ALJ held that deferral was inappropriate because the issue presented by the complaint related to "a complete breakdown in contract renewal negotiations, rather than a routine contract violation" and involved "a statutory dispute – right of a union to select its own bargaining agents – that goes to the heart of the Act's purposes and policies."<sup>15</sup> As a result, the ALJ concluded that the Board was obligated to use "its own special competence in dealing with unfair labor practice issues emerging from a serious disruption to the negotiating process" and apply statutory remedies to "facilitate a resumption of negotiations and provide a means to preclude a tense situation from being aggravated by further unfair labor practices."<sup>16</sup> Because the unfair labor practice claim was intertwined with the collapse of the bargaining relationship, Board action was necessary to reestablish the parties' bargaining relationship, rather than merely resolve a dispute over an employment term.<sup>17</sup>

In *Proctor & Gamble Mfg. Co.*, the Board similarly concluded that pre-arbitral deferral was inappropriate where the employer's unlawful conduct, including

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<sup>13</sup> *Id.* at 909.

<sup>14</sup> *Id.* at 910 (although it had expired, the parties agreed to extend their contract on a day-to-day basis until a successor contract was negotiated).

<sup>15</sup> *Id.* at 912 (quoting *Harley Davidson*, 214 NLRB at 439). Both *AMF* and *Harley Davidson* involved the same employer, the same AFL-CIO negotiating committee, and the same allegation of interference with the union's choice of bargaining representative. In *Harley Davidson*, the ALJ, with Board approval, declined to defer because an arbitral decision would not have fully resolved the unfair labor practice issue because if the arbitrator found that the contract controlled the union's selection of its representatives, the arbitrator would not be able to decide whether such a contractual restriction was lawful under the Act. And if the arbitrator found the contract did not restrict the union's choice of representatives, the arbitrator would still lack the capacity to rule on the employer's alternative defense, that the union was unlawfully attempting to force the employer to bargain beyond the scope of the appropriate bargaining unit. *Harley Davidson*, 214 NLRB at 434, 439.

<sup>16</sup> *AMF*, 219 NLRB at 912.

<sup>17</sup> *Id.*

unilaterally ceasing release time payments, caused the parties' bargaining process to effectively break down.<sup>18</sup> The employer operated four plants that each had an independent, in-house union that bargained with the employer individually. The unions wanted to establish a multi-plant unit and decided to initiate that process by placing a member from each of the other three unions on the in-house bargaining team for each of the other plants during upcoming contract renewal negotiations, while making clear they were not bargaining on a multi-plant basis.<sup>19</sup> After the unions announced their intention, the employer unilaterally altered what had been long-established bargaining rules, including no longer paying employee-bargaining committee members for release time, refusing to hold negotiations outside of normal working hours, barring "outsider" employee-negotiators from entering other facilities for negotiations, moving sessions off-site, and, at some of the plants, refusing to provide employees union and/or vacation leave to prevent them from traveling to other plants for collective bargaining.<sup>20</sup> While the employer continued negotiating with the individual unions at some of the plants, the employer refused to meet with any bargaining team that had an "outsider" member on it, which effectively halted negotiations with a full bargaining committee of the unions' choosing.<sup>21</sup> The unions alleged that the employer was violating Section 8(a)(3) and (5) and putting up unlawful roadblocks to interfere with their right to choose their bargaining representatives.<sup>22</sup> The employer asserted that some of the charges, specifically those regarding the unilateral cessation of release time payments and denial of requested union and vacation leave to attend negotiations, should have been subject to pre-arbitral deferral. The Board affirmed the ALJ's finding that deferral was inappropriate.<sup>23</sup> The ALJ noted that the basic issue in the case was whether the employer was engaged in a calculated effort to unlawfully interfere with the union's fundamental statutory right to choose its bargaining representatives.<sup>24</sup> Even though the release time and leave issues involved past practice and were arguably contractual, they were part and parcel of the allegedly unlawful conduct. Deferral

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<sup>18</sup> *Proctor & Gamble*, 248 NLRB at 953.

<sup>19</sup> *Id.* at 957.

<sup>20</sup> *Id.* at 956, 966.

<sup>21</sup> *Id.* at 966.

<sup>22</sup> *Id.* at 955.

<sup>23</sup> *Id.* at 953, n.2.

<sup>24</sup> *Id.* at 969.

would only have served to “fragmentize the issues” by severing deferrable issues from the overarching statutory question, which would not effectuate the policies of the Act.<sup>25</sup> Further, because the employer’s conduct was designed to be an impediment to good-faith bargaining, the ALJ and Board additionally determined that deferral of the release time and leave issues was inappropriate because of the adverse effect on the bargaining process that resulted from breaching the bargaining ground rules midstream.<sup>26</sup>

Applying this precedent, deferral is inappropriate here because several *Collyer* factors are not met and the Employer’s conduct has severely disrupted the mechanics of collective-bargaining. Regarding the latter point, *AMF* demonstrates that deferring to contractual dispute resolution machinery does not effectuate the policies of the Act, one of which is to foster collective bargaining, when the alleged violation undermines the parties’ bargaining process. The parties have not met since December 2017 and have been unable to reach agreement on the fundamental issue of how to resume negotiations. The impetus for this breakdown was the Employer’s abrupt unilateral change to its own position on release time payments. The Union then made a reasonable offer to meet outside of working hours, which would allow the employees’ to not exhaust their leave or forego wages and 401(k) contributions to participate. While the Employer has ostensibly indicated its willingness to compromise by agreeing to meet during non-work hours — provided the next meeting is during work hours — in reality it has offered the Union and the unit employees a Hobson’s Choice that will impair its employees’ right to select their bargaining representatives (since the chosen representatives may be unwilling to serve at great personal cost).<sup>27</sup> The Employer has not offered any reason for why the Union’s offer to meet solely during

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 973. See also *USW Local 1014*, Case 13-CB-17122-1, Advice Memorandum dated Oct. 31, 2002, at 5 (relying on *Proctor & Gamble* for principle that unilateral change in ground rules violates Section 8(a)(5) where the employer “acted in bad faith”); *Stevedoring Services of America*, Case 21-CA-35481, Advice Memorandum dated March 19, 2003, at 5 (relying on *Proctor & Gamble* for the principle that a breach of negotiating ground rules can violate Section 8(a)(5) where there is an “adverse effect on the bargaining process”).

<sup>27</sup> See *AMF*, 219 NLRB at 912; *NLRB v. General Electric Co.*, 412 F.2d 512, 517 (2d Cir. 1969) (“This right of employees and the corresponding right of employers, see section 8(b)(1)(B) of the Act . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme. In general, either side can choose as it sees fit and neither can control the other’s selection. . .”).

non-work time was not a workable solution, particularly in light of the long history of paying employees for release time. As a result, the Employer's alleged violation here is very similar to those in *AMF* and *Proctor & Gamble*, because the underlying issue has an effect on the unit employees' statutory right to freely select their bargaining representatives, which is a matter best left for Board action.

In addition, as noted at the outset, several of the *Collyer* criteria for when pre-arbitral deferral is appropriate are not satisfied here. Initially, the parties do not have a long and productive bargaining relationship, but rather a new relationship that has collapsed following the Employer's unexpected unilateral change to the bargaining rules in the middle of negotiations. The Employer is a successor that did not take over operation of this facility until one week before negotiations began for an agreement to succeed the 2013-17 contract. Second, the Employer's actions demonstrated animosity to its employees' exercise of protected statutory rights. Specifically, the Employer punished employees who volunteered to serve as bargaining committee members by abruptly changing the longstanding, and Employer-adopted, policy of making release time payments and adopting the position that continued exercise of Section 7 rights would result in loss of wages and 401(k) contributions.<sup>28</sup> And the Employer seeks to continue punishing them by insisting, without any explanation for its position, that some negotiation sessions must occur during their work day. An arbitration award would not address the deleterious effect of the Employer's conduct on the unit employees' Section 7 rights.

Despite the preceding, the Employer maintains that this case should be deferred under *Collyer* because the bargaining relationship has merely stalled over a routine contract dispute and an arbitral decision on the contractual issue would also resolve the alleged unfair labor practice. The Employer's position is that the contract does not require release time payments by its terms and that a contractual zipper clause superseded the parties' past practice so that it has no obligation to continue the payments. The Employer asserts that these contractual arguments are arguably within an arbitrator's competence to determine and an arbitrator's decision, one way or the other, would resolve the parties' fundamental dispute and allow them to resume negotiations.

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<sup>28</sup> See *Proctor & Gamble*, 248 NLRB at 975. See also *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (antiunion animus established based on circumstantial evidence such as unilaterally implemented policy that violated Section 8(a)(5)); *NLRB v. General Electric Co.*, 418 F.2d 736, 757 (2d Cir. 1969) ("Given the effects of take-it-or-leave-it proposals on the [u]nion . . . , the Board could appropriately infer the presence of anti-[u]nion animus. . . ."), *cert. denied*, 397 U.S. 965 (1970).

It is an appropriate exercise of the General Counsel's discretion to reject these arguments. While the Board routinely finds that pre-arbitral deferral is appropriate in cases that involve both contractual and unfair labor practice issues, it does so in circumstances where the conduct's primary effect is on an employment term or condition, the *Collyer* factors are met, and the unfair labor practice has not caused a breakdown in the collective-bargaining process itself.<sup>29</sup> As in *AMF*, this case does not involve a routine contract dispute merely affecting an employment term "arising in the course of a bargaining relationship stabilized by an existing collective bargaining agreement of fixed duration," but rather involves an alleged unfair labor practice that amounts to an "alleged obstruction of the negotiating process."<sup>30</sup> Because the Employer's midstream change in position on this significant issue has resulted in an inoperable relationship early in negotiations for what is essentially an initial contract, Board action, rather than arbitration, is better suited to "facilitate a resumption of negotiations and provide a means to preclude a tense situation from being aggravated by further unfair labor practices."<sup>31</sup>

Accordingly, complaint should issue, absent settlement.

/s/  
J.L.S

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<sup>29</sup> See, e.g., *Roy Robinson Chevrolet*, 228 NLRB 828, 828-29 (1977) (deferring charge involving unilateral layoffs of unit members where, *inter alia*, an arbitrator's decision on contractual issue would fully remedy the unfair labor practice issue and there was no evidence of the employer repudiating the collective-bargaining relationship or otherwise interfering with the bargaining process); *Transport Service Co.*, 282 NLRB 111, 111-112 (1986) (finding case involving refusal to comply with contractual work-week terms was well suited for deferral because unilateral conduct did not rise to the level of a total repudiation of the contract or a rejection of collective bargaining); *Inland Container Corp.*, 298 NLRB 715, 716 (1990) (deferring charge concerning unilateral implementation of drug testing policy because there was "no contention or evidence that the [employer had] refused to follow major portions of its bargaining agreement, repudiated its relationship with the Union, or engaged in other actions amounting to the total repudiation of the principles of collective bargaining").

<sup>30</sup> *AMF*, 219 NLRB at 912.

<sup>31</sup> *Id.*