

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

Advice Memorandum

S.A.M.

DATE: July 31, 2015

TO: Mori Rubin, Regional Director
Region 31

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

SUBJECT: *Henry Mayo Newhall Memorial Hospital*
Case 31-CA-145452

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This case was submitted for advice as to whether the Employer violated the Act by insisting that the Union agree to a contractual mandatory arbitration provision that waives employees' right to engage in collective legal activity. We conclude that the Employer did not violate the Act, as grievance arbitration is a mandatory subject of bargaining.

FACTS

For many years, California Nurses Association (the Union) has represented a unit of registered nurses employed by Henry Mayo Newhall Memorial Hospital (the Employer). In December 2014, the parties began negotiating for a successor collective-bargaining agreement.

From the outset of bargaining, the Employer put forth a series of proposals that would require unit employees to bring certain statutory claims against the Employer only through the parties' grievance arbitration system, and only on an individual basis. While the Employer has somewhat modified its proposals during the parties' negotiations, all of its proposals would require employees to individually arbitrate claims brought under a wide variety of statutes, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Fair Labor Standards Act. However, nothing in the Employer's proposals would preclude unit employees from filing an unfair labor practice charge with the Board.

At the parties' first bargaining session, the Employer's bargaining representative stated that the parties would not reach an agreement without this provision. In later sessions, the Employer's representative told the Union that this provision was

“important language” to the Employer, and that the Union “would not get another dollar” without the inclusion of the provision, and that a successor agreement would not be reached without it. The Employer’s representative provided an anecdote about a lawsuit filed by a non-unit employee that had only worked for the Employer for a month before filing the lawsuit. At the next bargaining session, the Employer’s representative took a large gray three-ring binder that was approximately 10 inches thick, raised it above [REDACTED] head, and threw it on the table, while saying that it was from that lawsuit. When a Union representative asked why the Employer’s representative was engaging in such dramatic behavior, the Employer’s representative responded that [REDACTED] did it to “get it through [the Union representative’s] thick head that there would not be an agreement unless the Union agreed to include this language.” Thereafter, throughout the entire course of bargaining, the Employer’s representative has continued to reiterate that there will be no agreement without a mandatory individual arbitration provision.

In January 2015, the Union filed the charge in the instant case, alleging the Employer is violating Section 8(a)(5) of the Act by insisting that the Union agree to a mandatory individual arbitration provision as a condition to reaching a collective-bargaining agreement. The Union asserts that it cannot lawfully agree to such provisions or waive employees’ Section 7 right to engage in collective legal activity against the Employer, and that the Employer’s proposals are unlawful under *Murphy Oil USA, Inc.*¹ and *D.R. Horton, Inc.*,² because the proposed mandatory individual arbitration provisions would interfere with employees’ Section 7 right to engage in collective legal activity.³

ACTION

We conclude that the Employer did not violate the Act, as grievance arbitration is a mandatory subject of bargaining. It is well established that the arrangements for arbitration of employment disputes are terms or conditions of employment and a mandatory subject of bargaining.⁴ For example, in *Utility Vault Co.*, the Board found

¹ 361 NLRB No. 72 (2014).

² 357 NLRB No. 184 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013).

³ The Region’s investigation has adduced no evidence that would indicate any indicium of bad-faith bargaining, other than the Employer’s insistence on the proposals at issue in the instant case.

⁴ *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991), citing *United States Gypsum Co.*, 94 NLRB 112, 131 (1951).

that an employer violated Section 8(a)(5) of the Act by unilaterally implementing a mandatory arbitration agreement, “[b]ecause the arbitration of such claims is a mandatory subject of bargaining.”⁵ Indeed, we have previously concluded that a comprehensive mandatory individual arbitration agreement similar to that at issue in the instant case was a mandatory subject of bargaining, although we noted that the Board has not expressly held so.⁶ While these cases have arisen in circumstances where employers were alleged to have failed to meet their bargaining obligations, Section 8(d) of the Act expressly sets forth the mutual obligation of *both* parties to bargain over mandatory subjects, enforced against employers through Section 8(a)(5) and against unions through Section 8(b)(3).

Thus, like an interest arbitration clause, a mandatory arbitration agreement that encompasses virtually all disputes that may arise in employees’ working relationship with their employer is “intertwined with and inseparable from” mandatory terms of conditions of employment (including dispute resolution, discrimination, and other employment conditions) such that it is a mandatory subject of bargaining.⁷ In this regard, while the Board has consistently found unlawful bad-faith bargaining where an employer refuses to agree to an effective grievance and arbitration procedure while, at the same time, insisting on a broad management rights clause and a no-strike clause,⁸ the Board has also found that an employer did not violate the Act by,

⁵ 345 NLRB 79, 79 n.2 (2005). See also *id.*, at 83 (“Whether these mandatory subjects should be resolved by arbitration is a matter for collective bargaining”).

⁶ *Montecito Heights Healthcare & Wellness Center*, Cases 31-CA-129743 and 31-CA-129747, Division of Advice case-closing e-mail dated September 16, 2014 (employer violated Section 8(a)(5) by unilaterally implementing a mandatory individual arbitration agreement for statutory claims).

⁷ *Id.* See generally *Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 3 (2011), *enforced sub nom. Rock-Tenn Services, Inc. v. NLRB*, 594 Fed.Appx. 897 (9th Cir. 2014) (citing *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980), *enforced mem.* 685 F.2d 425 (2nd Cir. 1982)).

⁸ See, e.g., *San Isabel Electric Services*, 225 NLRB 1073, 1079 n.7, 1080 (1976) (the employer’s proposals “would strip the union of any effective means of representing its members”), and cases cited therein; *A-1 King Size Sandwiches*, 265 NLRB 850, 860 (1982), *enforced* 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

inter alia, insisting in bargaining on a particular grievance-arbitration provision, in the absence of other indicia of bad-faith bargaining.⁹

As arbitration is a mandatory subject of bargaining, the mere insistence in bargaining on an arbitration proposal does not, by itself, violate the Act. It is well established that, although an employer has a duty to negotiate with a “sincere purpose” to reach agreement, the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position.¹⁰ A party is entitled to stand firm on a position that it reasonably believes is fair and proper, and “an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith.” Rather, while the employer is obliged to make *some* reasonable effort in *some* direction to compose its differences with the union, it is necessary to scrutinize an employer's *overall* conduct to determine whether it has bargained in good faith.¹¹ In the instant case, the Region’s investigation has adduced no evidence showing any indicium of bad-faith bargaining, other than the Employer’s insistence on the proposals at issue in the instant case.

However, while arbitration of employment disputes is a mandatory subject of bargaining, the Board and Courts have recognized that the commitment to arbitrate is different from most other mandatory subjects of bargaining -- because it is a “voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties.”¹² As the Supreme Court emphasized, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . The law compels a party to submit his grievance to arbitration only if he has contracted to do so.”¹³ Hence, “under the NLRA arbitration is a matter of consent.”¹⁴ For this reason, unlike most other mandatory subjects of bargaining,

⁹ See, e.g., *Chevron Chemical Company*, 261 NLRB 44, 46, 60, enforced 701 F.2d 172, (5th Cir. 1983) (grievance-arbitration provision limited to matters of discipline and discharge).

¹⁰ See, e.g., *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984),

¹¹ *Id.*

¹² *Litton*, 501 U.S. at 199, quoting *Hilton–Davis Chemical Co.*, 185 NLRB 241, 242 (1970).

¹³ *Id.* at 200, quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

¹⁴ *Id.* at 201.

arbitration clauses are excluded from the general prohibition on post-contract unilateral changes, and parties are not required to continue to arbitrate disputes that arise after contract expiration.¹⁵ Moreover, as arbitration is a matter of consent, even though an employer can lawfully insist on an arbitration provision in bargaining, it may not unilaterally implement an arbitration provision, even if the parties have reached a bona fide impasse.

However, as arbitration provisions, including comprehensive mandatory individual arbitration provisions, are mandatory subjects of bargaining, there is no reason that the Union could not lawfully agree to the Employer's proposals -- it is well established that "the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances, the union may even bargain away his right to strike during the contract term . . ." ¹⁶ In this regard, we conclude that a union can waive employees' substantive right to engage in collective legal activity against the Employer. While a union generally can waive employees' Section 7 rights during collective bargaining, if it does so clearly and unmistakably,¹⁷ a union cannot waive the statutory rights of individual employees to engage in activities pertaining to decisions regarding union representation, i.e., whether to retain their bargaining representative, to change their bargaining representative, or to have no bargaining representative at all.¹⁸ In *Magnavox*, the Supreme Court held that a union is not empowered to waive employees' individual Section 7 right to distribute literature on employer property in non-work areas because that activity implicated employees' exercise of their right to choose a bargaining representative. The Court contrasted a union's waiver of the right to strike -- which is primarily economic in nature and presupposes that the selection of the bargaining representative remains free -- with a waiver of rights that effectuate employees' free choice of their bargaining representative, such as employee distribution of literature at the workplace.¹⁹

¹⁵ *Id.* 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").

¹⁶ *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) (citations omitted).

¹⁷ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

¹⁸ *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325-26 (1974).

¹⁹ *Id.*, at 325.

While *Magnavox* and its progeny have generally focused on precluding union waiver of employees' right to distribute literature or engage in solicitation,²⁰ the Board has applied the same principle in other contexts related to employees' Section 7 right to express their views regarding their union representation. For example, in *Universal Fuels*,²¹ the Board held that a union could not agree to a rule that prohibited employees from communicating about pay or benefits -- even though the rules were "not expressly related to status of an incumbent union," the maintenance of the rules was "equally destructive of employees' rights to oppose or support an incumbent union." Similarly, in *American Federation of Teachers of New Mexico*,²² the Board found that a union could not agree to an employer prohibition of "lobbying . . . on personnel matters," which employees would reasonably understand as encompassing questions of union representation and collective bargaining. In all of these cases, the rights found not to be waivable under *Magnavox* expressly or implicitly had a nexus to employees' free choice of bargaining representative. As the Supreme Court has emphasized, "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative."²³

In contrast, the Employer's proposals in the instant case would require unit employees to bring certain statutory claims *against the Employer* only through the parties' grievance arbitration system, and to only bring their claims *against the Employer* on an individual basis.²⁴ As to whether a union and an employer can lawfully agree to an arbitration clause that waives employees' right to bring their claims in court, the Supreme Court has expressly held that they can.²⁵ And, as to

²⁰ See, e.g., *Samsonite Corporation*, 206 NLRB 343, 347 n.4 (1973) (publishing and distributing a newsletter criticizing the union's support of various provisions in the employment contract and protesting unsafe working conditions); *Yellow Cab Inc.*, 210 NLRB 568, 569, 569 n.3 (1974) (distribution); *Eastex, Inc.*, 215 NLRB 271, 271-72 (1974), enforced 550 F.2d 198 (5th Cir. 1977), affirmed 437 U.S. 556 (1978) ("a union cannot waive the Section 7 solicitation rights of the employees it represents").

²¹ 298 NLRB 254, 256 (1990).

²² 360 NLRB No. 59, slip op. at 4, fn. 2 (2014).

²³ *Metropolitan Edison*, 460 U.S. at 705-706, quoting *Magnavox*, 415 U.S. at 325.

²⁴ Nothing in the Employer's proposals would preclude unit employees from filing an unfair labor practice charge with the Agency.

²⁵ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 252, 256, 260 (2009) ("The decision to fashion a collective-bargaining agreement to require arbitration of employment-

whether a union and an employer can lawfully agree to an arbitration clause that waives employees' right to bring claims against their employer collectively, we note that, while such waivers involve employees' substantive Section 7 rights, they do not impair the employees' choice of their bargaining representative or involve expression against or for their union in any way. Rather, where such waivers are expressly limited to waiving employee rights to engage in collective legal activity against their employer, as here, there is no aspect of this waiver that relates to employees' choice of their bargaining representative or expression regarding their union representation. Thus, the principles set forth in *Magnavox* are not applicable, and we conclude that a union and an employer *can* lawfully agree to an arbitration clause that waives employees' right to bring claims against their employer collectively.

This conclusion is consistent with the Board's decisions in *Murphy Oil* and *D.R. Horton*.²⁶ Thus, in *Murphy Oil*, the Board expressly distinguished unlawful arbitration agreements imposed on unrepresented employees from lawful arbitration agreements agreed to by a union. The Board noted that "courts have understood the NLRA to permit *collectively-bargained* arbitration provisions,"²⁷ and stated that:

An individual arbitration agreement, imposed by employers on their employees as a condition of employment and restricting their rights under the NLRA, is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen bargaining representative and an employer that has complied with the statutory duty to bargain in good faith.²⁸

discrimination claims is no different from the many other decisions made by parties in designing grievance machinery. . . The NLRA provided the [u]nion and the [employer] with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims").

²⁶ We agree with the Region that, if the proposals at issue in the instant case had been unilaterally imposed on unrepresented employees, they would be unlawful under *Murphy Oil* and *D.R. Horton*.

²⁷ 361 NLRB No. 72, slip op. at 10 (emphasis in original).

²⁸ *Id.*

Perhaps even more significantly, when Member Johnson noted in dissent “a union’s undisputed power to waive rights employees otherwise would possess,”²⁹ the Board majority responded by accepting this proposition and explaining:

That an employer may collectively bargain a particular grievance-and arbitration procedure with a union is not to say that it may unilaterally impose any dispute-resolution procedure it wishes on unrepresented employees, including a procedure that vitiates Section 7 rights.³⁰

Similarly, in *D.R. Horton*, the Board acknowledged that the Supreme Court has held that unions may agree to arbitration clauses in collective bargaining that waive employees’ rights to bring actions in court,³¹ and underscored that “[i]t is well settled . . . that a properly certified or recognized union may waive certain Section 7 rights of the employees it represents -- for example, the right to strike -- in exchange for concessions from the employer.³² The Board stressed that:

The negotiation of such a waiver stems from an *exercise* of Section 7 rights: the collective-bargaining process. Thus, for purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.³³

Thus, in contrast to unrepresented employees, as to which an employer’s unilateral imposition of a mandatory individual arbitration agreement acts to extinguish employees’ right to act collectively, such a provision agreed to in collective bargaining vindicates represented employees’ right to act collectively. Indeed, the collective-bargaining process is itself the exercise of employees’ right to act collectively.

Finally, we note that the Board reasoned in *Murphy Oil* that an employer’s imposition of an individual mandatory arbitration agreement is unlawful because it “reflects and perpetuates precisely the inequality of bargaining power that the Act

²⁹ *Id.*, slip op. at 48, n.68.

³⁰ *Id.*, slip op. at 15.

³¹ 357 NLRB No. 184, slip op. at 10, citing *Pyett*, *supra*.

³² *Id.*, citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).

³³ *Id.*

was intended to redress,” and “strips [employees] of the collective, equalizing power that Section 7 envisions.”³⁴ The Board has explained the effect of such an agreement is that, “at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.”³⁵ Such concerns further support the lawfulness of mandatory arbitration agreements agreed to by a representative union. Whether or not the Union and the Employer here ultimately agree to a provision addressing collective legal activity, it is the process of lawful collective bargaining that is mandated by the Act, not any particular substantive outcome that may result from that process.

Therefore, as: (1) the Employer and the Union could lawfully agree to the Employer’s proposals; (2) either the Employer or the Union could lawfully insist in bargaining on a particular arbitration provision -- a mandatory subject of bargaining -- in the absence of other indicia of bad-faith bargaining; and (3) these conclusions are consistent with *Murphy Oil* and *D.R. Horton*, we conclude that the Employer did not violate the Act by insisting that the Union agree to its proposed arbitration provisions. Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal. However, as discussed above, because arbitration is a matter of consent, and a party can be required to submit to arbitration only if it has *agreed* to do so, the Employer may not unilaterally implement these provisions, even if the parties reach a bona fide impasse in bargaining.

/s/
B.J.K.

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³⁴ 361 NLRB No. 72, slip op. at 13.

³⁵ *D.R. Horton*, 357 NLRB No. 184, slip op. at 5, quoting *J. H. Stone & Sons*, 33 NLRB 1014, 1023 (1941), *enforced in relevant part*, 125 F.2d 752 (7th Cir. 1942).