

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 02

NBCUNIVERSAL MEDIA, LLC

and

NEWSGUILD OF NEW YORK, LOCAL
31003, TNG/CWA

Case 02-CA-262640

POST-HEARING BRIEF OF RESPONDENT
NBCUNIVERSAL MEDIA, LLC

Dated: January 29, 2021

Nick Rowe, Counsel
NBCUniversal Media, LLC
30 Rockefeller Plaza, Suite 4752E-A
New York, NY 10112
(212) 664-7464
nick.rowe@nbcuni.com

Attorney for Respondent

PRELIMINARY STATEMENT

This proceeding arises out of a corporatewide decision made by NBCUniversal Media, LLA (“Respondent”) in or around Spring 2020 to rollback the 2020 merit increases for certain employees within qualifying categories across the company. Respondent’s News Digital business subunit applied that decision to its employees, which impacted *a fraction* of Charging Party’s unit members. The rollback, then, was not an attempt by Respondent’s News Digital subunit to unfairly or unlawfully target union members or to subvert Charging Party’s status as collective bargaining representative. Instead, that decision was part of a much larger, companywide initiative – which impacted thousands of employees – to cut costs in the face of an unprecedented worldwide pandemic that has had a dramatic negative economic impact on large swaths of the global economy and Respondent’s overall business. Based on existing Board caselaw, Respondent and its News Digital subunit was *not* required to bargain to impasse over this decision; indeed Charging Party’s demand for preferential treatment on this topic in the face of the thousands of other employees whose salary increases were also rolled back fails as a matter of fact and as a matter of law.

Because Respondent’s News Digital business subunit, which supervises and manages Charging Party’s unit employees, comported with a budget-based decision made on a corporate-wide basis, it is a past practice which may be implemented unilaterally without notice and bargaining. Furthermore, because News Digital management retains a large measure of discretion in determining the amount of merit increases granted to its individual employees on an annual basis, the decision to rollback those increases for a small subset of unit employees is in line with past discretionary decisions by News Digital regarding whether and how much of a merit increase to grant its individual employees on an annual basis. Such decision may therefore be lawfully unilaterally implemented under *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017),

and progeny. Therefore, in light of that and Charging Party's written waiver of its right to bargain over this matter, News Digital's 2020 unilateral rollback decision was lawful.

FACTUAL BACKGROUND

Respondent is a large multinational corporation which is made up of, in part, numerous business units. Jt. Ex. 1, Stip. 1. The NBC News Group is one of those business units and is composed of subunits including the News Digital subunit. Id. In December 2019, Charging Party was certified as the exclusive bargaining representative for the following unit of employees employed within Respondent's the NBC News Group News Digital subunit:

Included: All full-time and regular part-time editorial employees employed by NBC News Digital to create editorial content for initial distribution on NBC News Digital platforms (currently nbcnews.com, TODAY.com, msnbc.com, NBC News Now, and Stay Tuned), including editors, reporters, producers, writers, production assistants, editorial designers, animators, and graphic artists.

Excluded: All other employees, including employees based outside the United States, independent contractors, confidential employees, managerial employees, temporary employees, guards, and supervisors as defined under the National Labor Relations Act. GC Ex. 2.

Respondent's Annual Merit Planning Process:

Since at least 2015 and continuing annually, certain of Respondent's business units and/or subunits, including News Digital, participated and continue to participate in an annual merit planning process in which management of the business unit and/or subunit determine, at their discretion, whether individual employees should receive an annual salary increase based on merit and, if so, how much the increase will be. Jt. Ex. 1, Stips. 2, 3, 6, 8. The total amount that may be

spent by a business unit or subunit is the “merit budget figure.” Jt. Ex. 1, Stip. 3. The merit budget figure is not determined by individual business units or subunits, but instead is determined on a corporate-wide basis by Respondent’s corporate Compensation group. Jt. Ex. 1, Stips. 3, 4, 8. For the period January 2015 through July 2020, Respondent’s corporate Compensation group designated a three (3%) percent merit budget figure, which represents a dollar amount equivalent to three percent of the combined salaries of employees that are eligible to participate in the annual merit planning process. Id. Although the merit budget figure as determined by the corporate Compensation group during that period was three (3%) percent annually, there is no requirement that the Compensation group designate three (3%) percent as the merit budget figure, such figure could be lower than three (3%) percent, and employees are not guaranteed any specific increase amount and may get no increase at all regardless of what the Compensation group designates as the merit budget figure. Jt. Ex. 1, Stips. 4, 6. During that same period, (1) neither the News Group business unit nor the News Digital subunit had a role in the determination of the merit budget figure, and (2) News Digital utilized, on an annual basis, the merit budget figures as determined annually by Respondent’s corporate Compensation group. Jt. Ex. 1, Stips. 4, 5, 7. Also during that same period, some News Digital employees that participated in the merit planning process received salary increases of less than three (3%) percent, as determined by News Digital management. Jt. Ex. 1, Stip. 9.

2020 Merit Planning Process as Impacted by COVID-19:

On or around January 13, 2020, Respondent representative Jason Laks spoke with Charging Party representative Ben Dictor and notified Charging Party that it intended to include Charging Party’s unit members in the annual merit planning process for 2020. GC Ex. 5. Dictor

responded by email dated January 17, 2020 and indicated that Charging Party “is agreeable to having the Company proceed with its annual evaluation and compensation changes as it would in the usual course of business.” Id. As described above, News Digital for its 2020 merit planning process utilized the three (3%) percent merit budget figure as determined by the corporate Compensation group and in March 2020 implemented salary increases in various amounts to certain unit members as determined by News Digital management within the three (3%) percent merit budget figure through the merit planning process. Jt. Ex. 1, Stips. 4, 7, 8.

On May 5, 2020, in response to the worldwide COVID-19 outbreak, Respondent CEO Jeff Shell sent an email to employees explaining that COVID-19 has had a significant impact on the company’s financial performance. GC Ex. 19. In that email Shell stated

At NBCU, there is no question that the current environment is having a significant impact on our company’s performance. While many parts of our television operation are enjoying increased ratings, most segments of the company are operating in a very difficult environment. Our theme parks are closed, most of our scripted film and television productions have ceased, sports programming (including the 2020 Olympics) has been delayed, and advertising revenue is starting to fall.

Shell’s and the company’s approach in responding to the COVID-19 impact included, among other things, an intent to “address our expense base, but do so in a way that is logical, fair and equitable across each of the businesses[.]” Id. at 2. Shell went on further to explain that

in order to deal with the depth of this crisis and its effect on our company we need to also address our cost base. As you may know, I have asked my leadership team to work with finance and human resources to find cost savings in each of their respective businesses. Some of the options are straightforward, like cutting travel and entertainment budgets or outside consultants, while others will be more challenging.

And while we do not believe in a one-size-fits-all approach, we do plan to take a couple of actions across the entire company. As a first step, the senior leaders who comprise the Executive Committee have volunteered to take a 20% reduction to their salaries. We also plan to roll back the most recent salary increases for our exempt employees who have salaries in excess of \$100,000. For the vast majority of you, this means reversing the recent merit increase that just went into effect in early March. This rollback will be implemented in early June on a go-forward basis. It does not include our Parks employees, as they have already taken salary reduction actions. Because there are nuances based on the terms of your employment and country location, all employees will receive follow-up information as we get closer to June. In the meantime, please review this Q&A and connect with your managers and HR representatives if you have further questions. We know that these changes are difficult, and hopefully we can get to the other side of this crisis as fast as possible so that we can resume our growth.

Id. Thus, Respondent's decision to rollback the 2020 merit increases was part of a company-wide initiative determined at the corporate level. Id.; Jt. Ex. 1, Stip. 10. Approximately 42 of 166 News Digital employees that were members of Charging Party's unit were impacted by this rollback. GC Ex. 8, Tr. 69. Neither the NBC News Group business unit nor the News Digital subunit had the ability to change the corporate-wide merit increase roll-back decision. Jt. Ex. 1, Stip. 10. In conversations Respondent representative Laks had with Charging Party representative Dictor and others subsequent to the May 5, 2020 rollback announcement, Respondent took the position that it did not have to bargain over the rollback decision because the merit planning process itself was discretionary and the rollback was part of that process as indicated by CEO Shell. Tr. 57.

ARGUMENT

1. The Unilateral Decision by News Digital to Comport with a Corporatewide 2020 Rollback Decision is Not Unlawful Because it is Consistent with the Operational Past Practice of News Digital Comporting with the Corporatewide Merit Budget Determinations

As an initial matter, there is no merit to General Counsel’s potential argument that the principle of past practice articulated in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), et al., is inapplicable to cases involving first contract bargaining. See, e.g., *Wendt Corporation*, 369 NLRB No. 135 slip op. at 6-8 (Jul. 29, 2020) (the Board in a case involving first contract bargaining did not discard Respondent’s *Raytheon* past practice argument on the basis that the parties had not agreed to an initial collective bargaining agreement). In *Raytheon*, the Board held that an employer may unilaterally continue to take actions that are consistent with an operational past practice. *Raytheon*, 365 NLRB No. 161 slip op. at 4. Such actions maintain the status quo of the past practice, and therefore they effect no change requiring that the union be given prior notice of the contemplated action and opportunity to bargain. *Id.*, slip op. at 5. An employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion. *Id.*, slip op. at 16. In that way, *Raytheon* overturned the holding articulated in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016) (*DuPont*) that bargaining would always be required, in the absence of a CBA, in every case where the employer’s actions involved some type of “discretion”. *Id.*, slip op. at 1. *Raytheon* also expressly overruled the restrictive interpretation of the similarity standard set forth in *DuPont*, and the precedent upon which that holding relied. *Mike-Sells Potato Chip Co.*, 368 NLRB No. 145, slip op. at 5 (2019). With respect to that standard, an employer is not required to prove that it had the same reasons, economic or otherwise, in order to establish that

actions in line with a prolonged pattern of recurrent actions are similar in kind and degree to prior actions. *Mike-Sells*, slip op. at 6.

In *Mike-Sells*, the employer exercised broad discretion in determining what, when, and how many company driver routes would be sold in accord with operational needs over a multi-year period, but the “frequently repeated” action taken in each instance was always the sale of a route services by a company driver to an independent distributor. *Id.*, slip op. at 5. In this case, the “frequently repeated” action taken by News Digital management during at least the five year period leading up to 2020 was that it comported annually with and utilized the merit budget figure as determined on a corporate-wide basis by Respondent even though it had no role in the determination of that figure. Jt. Ex. 1, Stips. 4, 5, 7. Thus, in June 2020, Respondent’s News Digital subunit comported with the corporate-wide decision to roll-back the merit salary increases as a cost-cutting measure to address the negative impact of COVID-19 on the company’s overall performance. Jt. Ex. 1, Stip. 10; GC Ex. 19. The latter action, then, was similar in kind and degree to prior actions taken by News Digital management given the recurring action of abiding by and comporting with a budget-based decision made on a corporate-wide basis with respect to the merit planning process. The specific reason for the 2020 corporate-wide budget-based merit increase rollback decision, i.e., COVID-19, or the reason(s) for the prior corporate-wide merit budget figure determinations are irrelevant to the *Raytheon* similarity standard analysis given that “[n]othing in the controlling Board precedent...suggests that an employer must have the same reasons, economic or otherwise, in order to establish that actions in line with a prolonged pattern of recurrent actions are similar in kind and degree to prior actions.” *Mike-Sells*, slip op. at 6. Moreover, given that the “frequently repeated” action by News Digital of comporting with a budget-based decision made on a corporate-wide basis with respect to the merit planning process

occurred annually for at least five consecutive years leading up to the May 2020 corporate rollback decision, employees would reasonably expect that practice to reoccur on a consistent basis. *Raytheon*, slip op. at 4. Based on the above, Respondent has established a past practice and thus was not obligated to bargain with Charging Party over the contested News Digital merit increase rollback.

2. In Any Event, the 2020 Rollback Decision was Part of the Merit Planning Process and thus Was Lawfully Unilaterally Implemented Because the Merit Planning Process Historically was Implemented at the Discretion of News Digital Management and Charging Party Waived any Right to Bargain it May Have Had

Even if the 2020 rollback implemented by News Digital is found not to be part of a past practice of comporting with budget-based decisions made on a corporate-wide basis with respect to the merit planning process, the rollback is an action that is in line with the broad discretion News Digital retained in implementing the annual merit planning process. Thus it is part of the annual merit planning process and no bargaining is required.

Part of the annual merit planning process at-issue in this matter, which was implemented annually by News Digital during the period January 1, 2015 through July 1, 2020, involves a determination, at the discretion of News Digital management, of whether to grant a salary increase based on performance and, if so, how much. Jt. Ex. 1, Stips. 2, 6. Not every employee that participates in the annual merit planning process is guaranteed a specific salary increase amount or any increase at all. Jt. Ex. 1, Stip. 6. Thus, News Digital management exercises and/or retains wide discretion in determining the salary increase amount, if any, to be designated to individual employees as part of the annual merit planning process. Because News Digital retains this large measure of discretion in determining the amount of merit increases, the decision to roll back 42 of

approximately 166 unit employees is akin to a decision to give a small or no increase to a small subset of high earning unit employees constituting approximately 25% of the unit. In other words, the 2020 rollback was a discretionary employer action that was in line with News Digital's (1) retained discretionary right to give *no* increase to employees and (2) in any event was similar in kind and degree to past discretionary decisions by News Digital to give some of its editorial employees that participated in the merit planning process salary increases lower than the three (3%) percent target as determined on a corporate-wide basis. Jt. Ex. 1, Stip. 9. The 2020 rollback, then, was *not* an outright rescission of the merit planning process increases for Charging Party's unit employees – indeed, a substantial majority of those unit employees were not impacted. Based on this, the rollback was similar in kind and degree to News Digital's past practice with respect to the merit planning process and therefore there was no bargaining obligation regarding that decision.

Finally, Charging Party indicated on January 13, 2020 that it was “agreeable to having the Company proceed with its annual evaluation and compensation changes as it would in the usual course of business.” Because that merit planning process, as described above, involves the broad exercise and retention of discretion by management in giving some or no increases, Charging Party by its January 13 agreement clearly and unmistakably waived any right it may have had to bargain over Respondent's discretionary merit determinations. As such the 2020 rollback does not violate the Act.

CONCLUSION

Based on the above, there is no violation of the Act and the Complaint must be dismissed.

Respectfully Submitted,



Dated: January 29, 2021

Nick Rowe, Counsel
NBCUniversal Media, LLC
30 Rockefeller Plaza, Suite 4752E-A
New York, NY 10112
Telephone: (212) 664-7464
Email: nick.rowe@nbcuni.com

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CERTIFICATE OF SERVICE

I certify that a copy of Post-Hearing Brief of Respondent NBCUniversal Media, LLC was electronically filed with the Division of Judges via the Agency's E-Filing system on January 29, 2021 and pursuant to Sec 102.5(f) of the Board's Rules and Regulations a copy was served electronically via email to the following parties:

Thomas Lamadrid
thomas@eisnerdicator.com

Ruth Weinreb
ruth.weinreb@nlrb.gov

Dated: January 29, 2021



Nick Rowe, Counsel for Respondent
30 Rockefeller Plaza, Suite 4752E-A
New York, NY 10112
Telephone: (212) 664-7464
Email: nick.rowe@nbcuni.com