

Leading the News

Unfair Labor Practices Court Holds NLRB Erred in Faulting Employer's Unilateral Step After Impasse

A bulk mail contractor did not violate a statutory duty to bargain with an American Postal Workers Union local in Urbandale, Iowa, when it unilaterally moved a transportation "relay point" that affected some drivers' wages after the parties had reached a bargaining impasse and the union was on strike, the U.S. Court of Appeals for the District of Columbia Circuit ruled Jan. 29 (*Mail Contractors of Am. v. NLRB*, D.C. Cir., No. 06-1338, 1/29/08).

Overturing a National Labor Relations Board decision for the union, the appeals court found that following an impasse in bargaining on a new labor agreement, Mail Contractors of America (MCA) was free to implement unilaterally the terms of its final offer, which included a management rights clause giving MCA the right to shift "relay points" to which employees drove and on which their pay was partially based. The union had contended that Mail Contractors had violated the National Labor Relations Act by shifting a relay point from York, Neb., to Havelock, Neb., without bargaining because the employer's decision effectively reduced some union members' pay.

Board Relied on Precedent

Adopting an administrative law judge's recommendation, NLRB ruled in August 2006 that Mail Contractors had unlawfully failed to bargain before moving the relay point, citing the principles set out in *McClatchy Newspapers Inc.*, 321 NLRB 1386, 153 LRRM 1137 (1996), which was enforced by the D.C. Circuit in *McClatchy Newspapers Inc. v. NLRB*, 131 F.3d 1026, 157 LRRM 2023 (D.C. Cir. 1997).

In *McClatchy*, the board had ruled that although employers generally may unilaterally implement terms of their final offer after a bargaining impasse, an employer could not implement a proposal that gave it unfettered discretion to set wages, a mandatory subject of bargaining. In the Mail Contractors case, the ALJ reasoned that changes in relay points materially affect employees' wages and working conditions and therefore are a mandatory subject of bargaining. Applying *McClatchy*, the ALJ ruled that Mail Contractors could not lawfully implement the management rights clause because it granted the employer unlimited discretion to move relay points and thereby affect the wages and hours of its employees.

In affirming the ALJ, two NLRB members agreed that "the unilateral change had a direct effect on wages" and therefore was barred by the *McClatchy* precedent. Then-NLRB Chairman Robert J. Battista separately wrote that under its 2001 collective bargaining agreement with the union, Mail Contractors had given the union advance notice of relay point changes and that in bargaining for the new contract, there was no evidence MCA intended to change that past practice (180 LRRM 1467). Mail Contractors appealed to the D.C. Circuit and NLRB in turn asked the court to enforce its order.

Employer's Right to Implement After Impasse

Granting the employer's appeal, the D.C. Circuit ruled that NLRB erred in holding that Mail Contractors was not entitled unilaterally to implement the relay point provision after its contract negotiations with the union had reached an impasse.

Although the court said it grants considerable deference to NLRB's interpretations of the act, it ruled

that the board's decision was arbitrary, capricious, and inconsistent with proper interpretation of the statute. "When an employer and a union reach impasse over a mandatory subject of bargaining, either side may resort to economic warfare--a strike, a lockout, etc.--and 'the employer's statutory duty to maintain the status quo during post-contract negotiations ends,' " Judge Douglas H. Ginsburg wrote. "The employer then may 'make unilateral changes that are reasonably comprehended within his pre-impasse proposals.' The rationale for this rule is that the employer's unilateral imposition of the final offer 'breaks the impasse and therefore encourages future collective bargaining."

An employer's right to deploy its economic weapons after impasse is not absolute and NLRB may restrict the employer's conduct in order to facilitate the collective bargaining process, the court acknowledged. In affirming NLRB's *McClatchy* decision that barred the employer from unilaterally imposing a merit pay proposal, the D.C. Circuit endorsed the board's reasoning that the provision "might irreparably undermine [the union's] ability to bargain."

In *McClatchy*, the board's concern was that since the proposal gave the employer unfettered discretion to set bargaining unit employees' pay, "the union could not know what criteria, if any, the employer was using to award individual salary increases; instead, it faced a discretionary cloud." The court in *McClatchy* also accepted the board's rationale that the union could appear "impotent to its members" if it had no information to relay regarding the employer's criteria for setting wages.

"Most important for purposes of the present case, [the D.C. Circuit] noted that the board had confined its decision to provisions governing wages because wages are 'a key term and condition of employment and a primary basis of negotiations,' " Ginsburg wrote.

***McClatchy* Exception Does Not Apply**

The board, however, should not have applied *McClatchy* to the current case, in which Mail Contractors was not attempting unilaterally to impose a wage provision, but rather exercising its right to structure its operations by moving its relay points in response to shifting business conditions, the court said.

NLRB's decision that Mail Contractors had violated the act was "arbitrary and capricious for three reasons," Ginsburg wrote. "First, the management rights provision at issue here is utterly unlike the provision in *McClatchy* or the provision at issue in any subsequent case to which the board has applied *McClatchy*. Second, it is inconceivable the provision will jeopardize collective bargaining in the affected unit--the stated concern underlying *McClatchy*. Finally, the board's decision here would impinge upon the employer's ability to run its business more severely than did *McClatchy* itself or any of its sequellae."

The court emphasized that *McClatchy* was based on the "paramount importance of wages as a mandatory subject of bargaining" and that subsequent rulings applying that decision all involve provisions giving employers wide discretion to set wages.

In contrast, Mail Contractors' placement of a relay point is a "quintessentially managerial decision: its location presumably will affect the efficiency of the company's operations but it will have no material effect upon the company's wage bill," the court said. "If, as a result of changing a relay point, some drivers lose work, then other drivers will gain as much work; meanwhile, the bumping provision that MCA implemented as part of its final offer prevents management from manipulating relay points to give significantly more hours to less senior drivers."

Although NLRB contended that placement of relay points is subject to *McClatchy* because it will directly affect wages, the court said such effect is "no more significant, however, than the effect of any management decision about the scheduling of work or its allocation among plants."

'Pragmatic Reasons' for *McClatchy* Not Present

The court said this case presents neither of the "pragmatic reasons" for the board's *McClatchy* decision: that given the employer's ability to set wages on unknown criteria, the union would be unable to bargain knowledgeably and that it would appear "impotent" to its members. Mail Contractors' change of a relay point does not preclude "meaningful bargaining" on wages and it is "fanciful" to suggest that the union would appear "impotent" to members because the employer unilaterally changed a relay point, the court said.

"As the strike-induced move illustrates, the events that prompt MCA to change a relay point are both sporadic and sufficiently unexpected that the parties could not have realistically addressed those in the CBA; accordingly, management's reservation of the right to respond to them posed no realistic threat to the process of collective bargaining," the court said.

NLRB's decision impeded the employer's ability to implement its final offer after impasse to a far greater degree than barring the wage proposal in *McClatchy*, the court said, because "neither the ALJ nor the union ever suggested there might be fixed criteria MCA could have offered and then implemented after impasse to govern the placement of relay points."

"In other words, because no nondiscretionary provision appears possible, the board's decision would effectively preclude MCA from ever changing a relay point after impasse," Ginsburg wrote. "That would be both anomalous, considering that MCA was free to implement provisions regarding more fundamental aspects of bargaining, and inconsistent with the narrow exception in *McClatchy* to the general rule allowing the employer to implement its final offer after impasse."

Judges David S. Tatel and Janice Rogers Brown joined in the opinion.

Jeffrey W. Pagano of Crowell & Moring in Washington, D.C., represented Mail Contractors of America. Kira Dellinger Vol of NLRB in Washington, D.C., represented the board.

Text of the court's decision appears in Section E

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