

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

DATE: January 15, 2020

TO: Paul J. Murphy, Regional Director
Region 3

FROM: Richard A. Bock, Associate General Counsel
Division of Advice

SUBJECT: Frazer & Jones Co.
Case 03-CA-236368

530-6067-4055-8900
530-8045-3700-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by implementing mandatory overtime on Saturdays for its maintenance employees without bargaining with their Union. We conclude that under the newly-adopted contract coverage test set forth in *MV Transportation, Inc.*,¹ the Employer's conduct is within the compass or scope of language in the parties' collective-bargaining agreement privileging the Employer to act unilaterally. Accordingly, the Region should dismiss the charge, absent withdrawal.

FACTS

Frazer & Jones Co. ("the Employer") operates an iron foundry outside of Syracuse, New York, where IUE-CWA Local 81300 ("the Union") represents a bargaining unit of about 120 employees in various departments, including 18 employees who work in the maintenance department. At all relevant times, the Employer and Union have been parties to a collective-bargaining agreement containing management-rights and overtime provisions. The management-rights clause, in Article III, states that the Employer has the exclusive right to, among other things, "establish and change working schedules." Article VII, entitled "Wages and Hours," includes Section 12, where subsections (B) and (C) set out the relevant overtime provisions, specifically:²

¹ 368 NLRB No. 66 (Sept. 10, 2019).

² Subsection (A) contains language explaining how the Employer will evenly distribute overtime work among the unit employees in a department. It is not pertinent to whether the Employer was privileged to assign mandatory overtime.

- B. The Company can expect its employees to work a reasonable amount of overtime, providing notice is posted by 11:00 a.m. of the preceding Thursday for Saturday work. The notice will be posted 11:00 p.m. Wednesday for the employees on the third shift.³

Prior notification for emergency or voluntary overtime will not be required.

If production requirements are to result in prolonged overtime, the Company will meet with the Union to discuss the overtime schedule.

- C. The Company and the Union agree that working 12 hours of overtime or being offered the opportunity to work 12 hours of overtime per week meets the requirements under all provisions of this Agreement.

The parties have a history of disagreeing over whether the foregoing contract language permits the Employer to assign mandatory overtime. Although the general practice at the plant has involved the Employer soliciting volunteers for overtime work in a department by posting sign-up sheets, in mid-2017 the Employer required employees in its machine shop to work a certain number of overtime hours per week. The Union filed a grievance and asserted that Article VII, Section 12(B) and (C) did not permit mandatory overtime. The parties agreed they would resolve this dispute during bargaining for a new contract in mid-2018.

Shortly before successor contract negotiations began in 2018, the Employer confirmed that the plant had high levels of airborne silica, which presented both employee safety and OSHA compliance issues. Its outside health-and-safety consultant recommended immediate remedial action. The Employer understood this would require additional maintenance work on the plant machinery generating the airborne silica.

From late July to early August 2018, the parties negotiated a successor collective-bargaining agreement. Among other items, the parties discussed the contract's overtime provisions and exchanged proposals. The Employer took the position that the expiring contract allowed it to assign mandatory overtime, but it also proposed including new mandatory overtime language. The Union rejected the Employer's proposal and stated that the expiring contract did not permit mandatory overtime. The Union proposed modifying Article VII, Section 12(B) to define a "reasonable amount of overtime" as one hour per day and no more than five hours per week and deleting Section 12(C). The Employer rejected that proposal. The parties

³ The Employer operates on a 24-hour basis, with the third shift working from 10 p.m. to 6:30 a.m.

ultimately agreed to leave in place the language from the expiring contract, without conceding their respective interpretations of that language.

On August 6, 2018, the parties signed their new collective-bargaining agreement, which is effective by its terms through August 5, 2023. The agreement contains the same management-rights and overtime provisions quoted above.

After entering the new contract, the Employer determined that additional maintenance work had to be performed on Saturdays when the silica-producing machinery would not be running. The Employer posted overtime sign-up sheets in the maintenance department and about five to eight employees per week volunteered to work a six-hour overtime shift on Saturdays. The Employer determined that not enough maintenance employees volunteered for Saturday overtime to complete the necessary repairs. In September 2018, the Employer proposed creating an additional shift and hiring additional maintenance employees. According to the Employer, the Union opposed this idea because it would have reduced volunteer overtime opportunities for current maintenance employees. The parties also met with an FMCS mediator to discuss alternatives for meeting the Employer's objective of completing additional maintenance work, but they were unable to come to a resolution.

On February 19, 2019, the Employer implemented mandatory Saturday overtime for all 18 maintenance employees. The notice from the plant manager stated that the maintenance department would be "on the emergency scheduled hours until further notice!" It also stated that "[c]urrent maintenance hours during the week and voluntary overtime hours on Saturday are not going to be enough to solve our problem within the suitable time." The notice referred to the plant's need to improve air quality and comply with OSHA regulations, and it directed the maintenance supervisor to provide employees with three-days' advance notice. Since that time, the maintenance employees have been required to work Monday through Saturday, eight hours per day. The Employer has not required any maintenance employee to work more than 12 hours of overtime in a week even with the implementation of the Saturday hours.

The Union filed both a charge and a grievance over the Employer's new policy, but it did not process the grievance to arbitration. The charge alleges that the Employer violated Section 8(a)(5) by implementing the Saturday overtime without bargaining and without a contractual basis. The Union maintains that the contract does not provide for mandatory overtime. The Employer conversely asserts that the management-rights clause and Article VII, Section 12 authorize it to schedule up to 12 hours of mandatory overtime per week.

ACTION

We conclude that under the contract coverage test recently adopted in *MV Transportation*, the Employer's action here is within the compass or scope of Article VII, Section 12 of the parties' current collective-bargaining agreement, which grants the Employer the right to unilaterally assign up to 12 hours of mandatory overtime per week. Because the Employer has not assigned maintenance employees more than 12 hours of overtime per week, the Region should dismiss the charge, absent withdrawal.

In *MV Transportation*, the Board overturned the "clear and unmistakable waiver" standard set forth in *Provena St. Joseph Medical Center*,⁴ and adopted the "contract coverage" standard to determine whether an employer's unilateral action is permitted by a collective-bargaining agreement.⁵ The contract coverage standard provides that the Board will now give "effect to the plain meaning of the relevant contractual language, [and] apply ordinary principles of contract interpretation," and that it "will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally."⁶ The contract coverage standard recognizes that a "union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject."⁷ If the contract does not cover a disputed unilateral change, the Board then considers whether the union

⁴ 350 NLRB 808, 810-11 (2007).

⁵ *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 1, 11 & n.28.

⁶ *Id.*, slip op. at 11 (clarifying that the contract need not "specifically mention, refer to or address the employer's decision at issue" because so long as the "contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally").

⁷ *Id.*, slip op at 8, 11 (quoting *NLRB v. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993)). See also *Department of Navy v. FLRA*, 962 F.2d 48, 62 (D.C. Cir. 1992) (holding that employer actions "covered by" a collective-bargaining agreement means that the public employer and the "union *had already bargained* with respect to those matters") (emphasis in original); *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (adopting "contract coverage test to determine whether the [u]nions have already exercised their right to bargain").

waived its right to bargain over the change through application of the clear and unmistakable waiver standard, i.e., “whether the union ‘surrender[ed] the opportunity to create a set of contractual rules that bind the employer, and instead cede[d] full discretion to the employer on that matter.’”⁸

In *MV Transportation*, the Board applied the foregoing principles to determine whether a management-rights clause granting the employer the right “to manage its business . . . to decide and assign all schedules, work hours, work shifts,” to “assign” employees, “to discipline and discharge for just cause[,] and to adopt and enforce reasonable work rules,” and “to issue, amend and revise policies, rules and regulations,” privileged the Employer to unilaterally change several work policies.⁹ The Board concluded that these provisions demonstrated the parties’ mutual agreement to grant the Employer the right to unilaterally: add tasks to the list of assignments that could be performed by employees on light duty work status; modify the safety policy by reclassifying what constituted major, moderate, and minor incidents and the disciplinary consequences of violating the new policy; modify the disciplinary policy for failing to adhere to an assigned work schedule; modify job duties by requiring a new “security sweep” of vehicles that if not completed would subject employees to a separate progressive disciplinary policy; and, revise training requirements for improper or unsafe behavior detected by in-vehicle cameras.¹⁰ Therefore, the employer did not violate Section 8(a)(5) by unilaterally implementing the new work policies because doing so was squarely within the compass or scope of the parties’ agreement.¹¹

Applying these principles here, Article VII, Section 12(B) and Section 12(C), when read together, grant the Employer a contractual right to assign mandatory overtime up to 12 hours. Article VII, Section 12(B) states that the Employer “can expect its employees to work a reasonable amount of overtime, providing [sic] notice is posted by 11:00 a.m. of the preceding Thursday for Saturday work. The notice will be posted 11 p.m. Wednesday for employees on the third shift.” Section 12(C) then states that “[t]he [Employer] and the Union agree that working 12 hours of overtime or being offered the opportunity to work 12 hours of overtime per week meets the requirements under all provisions of this Agreement.” Accordingly, the plain meaning

⁸ *MV Transportation*, 368 NLRB No. 66, slip op. at 12 (citation omitted).

⁹ *Id.*, slip op. at 15-16.

¹⁰ *Id.*, slip op. at 15-19.

¹¹ *Id.*, slip op. at 16.

of these two provisions, together, permits the Employer to unilaterally assign unit employees a reasonable amount of overtime, which is defined as up to 12 hours per week.¹² The Employer's unilateral implementation of eight hours of mandatory overtime on Saturdays fell within the compass and scope of that language. Thus, the Employer's unilateral change did not violate Section 8(a)(5).¹³

Nor does the parties' bargaining history dictate a different conclusion. During successor contract negotiations in late-July and early-August 2018, the parties expressed opposing interpretations of Article VII, Section 12, with the Employer stating that it permitted mandatory overtime and the Union stating it did not. Neither party agreed to the other's proposal, as referred to above, leaving the contractual language intact. Thus, the issue is whether that contract language privileged the change. We conclude the Employer has the better argument here, as the conclusion we reach is consistent with the plain meaning of the two provisions.

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
R.A.B.

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¹² Contrary to the Employer, we would not rely on the language in the management-rights clause granting the Employer the right "to establish and change working schedules." That language typically pertains to setting starting and quitting times for regular work shifts and not to imposing mandatory overtime beyond those shifts.

¹³ Cf. *United Technologies Corp.*, 300 NLRB 902, 902-03 (1990) (pre-*MV Transportation* case finding union clearly and unmistakably waived its right to bargain over employer's decision to increase voluntary Saturday overtime shift from five to eight hours where management-rights clause gave employer sole right to determine "shift schedules and hours of work" and overtime provision did not address the issue; Board found no violation despite fact employer three years' earlier had bargained with union when it wanted to decrease same shift from eight to five hours).