Peerless Publications, Inc. (Pottstown Mercury) *and* Newspaper Guild of Greater Philadelphia, Local 10. Case 4–CA–6985

26 March 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 9 August 1977 the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The administrative law judge had found that the Respondent's Code of Ethics and General Office Rules, unilaterally promulgated with their constituent penalties, constituted mandatory subjects of bargaining. On exceptions to that decision, the Board affirmed in part and reversed in part the administrative law judge's conclusions. Thus, the Board agreed that the Respondent was obligated to bargain over its General Office Rules, and that its refusal to do so was violative of Section 8(a)(5) and (1) of the Act. Consistent with the Board's decision in the *Capital Times*[2] case, however, a panel majoirty concluded, contrary to the administrative law judge, that the Respondent's Code of Ethics, as a whole, did not affect terms and conditions of employment so as to constitute a mandatory subject of bargaining, but that the Code's "penalty provision, in and of itself, directly affects employment security and, therefore, is a mandatory subject of bargaining." In the majority's view, certain portions of General Office Rule 11, like the substantive provisions of Respondent's Code of Ethics, were "essentially based on ethical considerations designed to enhance the credibility of Respondent's newspaper." Thus the cited portions of General Office Rule 11 (231 NLRB at 245) were excepted from the Board's Order requiring the Respondent to bargain over the General Office Rules, but were treated together with the Code of Ethics in finding that the Respondent was obligated to bargain only to the extent of a penalty provision for violation of such rules.

On a petition for review by the Guild, the Charging Party, and an application for enforcement of its Order by the Board, the United States Court of Appeals for the District of Columbia Circuit on 13 August 1980, issued its decision in the consolidated cases.[3] The court agreed with the Board that "protection of the editorial integrity of a newspaper lies at the core of publishing control" (636 F.2d at 560), and concluded that in order to preserve these qualities, a news publication may, subject to certain constraints, establish reasonable rules designed to prevent activity by employees which would "directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity." (Id. at 561.) However, the court deemed inadequate the rationale used by the Board majority to address the "problems presented by the tension between the employees' right to bargain collectively and the right of the owner of a newspaper to safeguard the credibility of his publication from injury through improper conflicts of interest." (Ibid.) The court also found, contrary to the Board majority, that constituent penalties for violation of rules cannot reasonably "be separated for Labor Act purposes from the substantive provisions which they are designed to enforce." (Ibid.) Accordingly, the court remanded this proceeding to the Board for determinations on the issues in light of the principles enunciated by the court.

On 19 November 1980 the Board, through its Executive Secretary, notified the parties that pursuant to the remand by the court of appeals, all parties might file statements of position with respect to the issues raised by the remand. Thereafter, the Respondent, the General Counsel, and the Newspaper Guild each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On further examination of the issues presented in light of the entire record, including the court's opinion and the parties' statements of positions, the Board has decided to modify its earlier Decision and Order in this proceeding.

First, our consideration of the issues leads us to conclude, in agreement with the court, that, as a general principle, rules and their constituent penalties should not be artificially severed from each other for purposes of collective bargaining under the Act. This is so because the attachment of express or implied penalties for breach of the substantive content is what transforms rules or codes of conduct from mere expressions of opinion or aspiration into terms and conditions of employment. Also, we are convinced that the impracticality of requiring parties to attempt to bargain over fragments, rather than the issues as a whole—i.e., in a vacuum—is not conducive to promoting stability

[1] 231 NLRB 244.

[2] 223 NLRB 651 The Board issued its decision in *Capital Times* subsequent to the administrative law judge's decision in this case

[3] *Newspaper Guild Local 10 (Peerless Publications) v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980)

or effectiveness in collective-bargaining relationships.[4]

We reaffirm the view that protection of the "editorial integrity of a newspaper lies at the core of publishing control,"[5] and that in order to preserve such, a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would "directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity," without necessarily being required to bargain initially. It follows from this privilege—which is directly incident to a newspaper's integrity—that the newspaper will be similarly exempt from mandatory bargaining about disciplinary action for employee breach of the basic rule.[6] It must be emphasized, however, that "[t]he degree of control which may be exercised by a publication in this regard is not open-ended, but must be narrowly tailored to the protection of the core purposes of the enterprise." (Id. fn. 36.) In light of the above, and keeping in mind the language of the court, we deem it appropriate at this point to indicate the general standards under which such unilateral action is to be considered.

The concept of "terms and conditions of employment" is itself a broad one—and deliberately so, for Congress intended it to be broad.[7] Thus, rules or codes of conduct governing employee behavior with constituent penalty provisions for breach necessarily fall well within the definitional boundaries of "terms and conditions" of employment. In determining whether an employer may nevertheless impose such a term and condition of employment without prior bargaining, we begin with the principle that "labor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining."[8] In order to overcome this presumption, therefore, it is clear initially that the subject matter sought to be addressed by the employer must go to the "protection of the core purposes of the enterprise." When that is the case, the rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.

Turning to the provisions at issue in this case, we have reexamined the Respondent's General Office Rules and Code of Ethics under these criteria and in light of the court's opinion, and we find that the Ethics Code as a whole, as well as the General Office Rules promulgated by the Respondent, do not withstand such scrutiny and must be rescinded in their entirety. First, in affirming our holding as to the Office Rules (other than those portions of Rule 11 treated with the Code of Ethics) we reiterate our finding that they directly affect terms and conditions of employment, and the conclusion that nothing contained therein is "properly excludable from bargaining as being inherently in the exclusive" prerogative of management such as would exempt it from the normal requirements of mandatory bargaining. (See id. at fn. 38.)

With respect to the Code of Ethics, we note that the court deemed it necessary to distinguish between

> those provisions of the Code which, while central to the Mercury's interest in the preservation of its legitimate managerial prerogatives, affect the employees only minimally, and those which, although not essential to the publication's freedom to conduct its business, do have a significant impact on the employees. [Id. at 561.]
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> Moreover, when there is a conflict between an employer's freedom to manage his business in areas involving the basic direction of the enterprise and the right of the employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck, if possible, which will take [into] account [the] relative importance of the proposed actions to the two parties." [Id. at 562, citing *Machinists Local 1304 (Fibreboard Corp.) v. NLRB*, 379 U.S. 203 at 223 (1964), and *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 179.][9]

[4] Accordingly, our earlier decision in this case and the decision in *Capital Times*, supra, are overruled to the extent that they are inconsistent with our holding here.

[5] Although there may be exceptions to this general proposition (see, e.g., the court's opinion at fn. 33), we see no indication that such are involved here.

[6] As noted by Judge MacKinnon, there may be exceptional cases where an excessive penalty renders a rule mandatorily bargainable.

[7] See discussion at sec. VI of the court's opinion, and accompanying fn. 39–41

[8] Id at sec. VI; see *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 at 178–179 (1971)

[9] With respect to the former statement, it is clear there are multiple permutations depending on the number and complexity of the variables used. Thus, a simple matrix using just the two suggested by the court, i.e., placing the essentiality or nonessentiality to preservation of the employer's interest on one axis, and the resultant minimal or significant impact of the rule on employees on the other, would generate four combinations which can be summarized as follows: (1) nonessential to employer: minimal impact on employee, (2) nonessential to employer: significant impact on employees; (3) essential to employer: minimal impact on employees; (4) essential to employer: significant impact on employees. Where, as here, the penalty for breach of a rule consists of discipline including discharge (either discretionary or automatic) it is clear that the

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Assessing the Respondent's Code of Ethics under the framework discussed above, we find it unnecessary at this time to decide specifically which, if any, of the ethics code provisions may be deemed restricted to subject matter necessary to the "protection of the core purposes of the enterprise" so as to overcome the initial presumption of mandatory bargainability. For assuming arguendo that they would overcome the presumption, we conclude that the Code as actually promulgated by the Respondent must fall in any event because it is deficient in other respects. Thus, the entire Code, together with the office rules of which the Code was deemed a part, applies on its face to "all employees," without appropriate limitation to designated categories of employees (e.g., reporters and editorial personnel as well as maintenance and circulation employees) as to which requirements differ. Moreover, each employee, with no prior requirement or opportunity for bargaining by the employees' representatives, is required by the Code's "Pledge" section to "make himself known now and state his reasons," in the event the employee does not "wholly and fully subscribe" to the tenets of the Code, in effect requiring the employee to bypass the collective-bargaining representative and bargain directly with the Employer. In addition the code provisions are in our view substantially overly broad as promulgated rather than narrowly tailored in terms of their content to meet with particularity what may be legitimate objectives of the Respondent. Also, like the court, we perceive significant differences between a gift from a news source which is designed to influence news coverage on the one hand, and a "freebie" given relatively indiscriminately—particularly so when as frequently occurred at the Respondent, such freebies or tickets were actually distributed by the editor. Similarly, where an employer wishes to address the subject matter of an employee's secondary employment, we deem it incumbent on the employer to distinguish between employment which would constitute a clear and improper conflict of interest, and that which does not. We find no such distinction made here by the Respondent.

With respect to the Respondent's attempts to curtail other outside activities of its employees, i.e., "political involvement, holding public office, service in community organizations," or failure to "conduct their personal lives," outside the office hours so as not to reflect adversely on the Respondent or cause "loss of business or patronage," we concur in the court's pointed comment that such regulation "interferes substantially with the civil and economic rights of the employees (and indeed their private lives)." (Id. at 563.)[10] The preservation of editorial integrity does not necessarily dictate a requirement of employee abstention from political participation or service in community organizations. Nor is there evident a need for a general directive aimed at regulating the employees' conduct of their personal lives, with its inherent potential for "misuse against those with whose political, social, religious, or union beliefs a publisher may disagree," (ibid. at fn. 50), or a prohibition of activities such as an "iffy" ban that hangs like a sword and squarely presents "inescapable" constitutional problems.[11] In the instant case, we find that Respondent has not demonstrated on the record that its regulation of such areas was supported by "clearly defined, directly necessary compensating benefits in terms of the employer's legitimate concerns." Id.

These deficiencies of overbreadth are in our view further compounded by the open-ended nature of the Rules and Code as written by the Respondent. The General Office Rules (of which the Code became a part) stated:

> These rules include, but are not limited to, all of the office rules for your department. Your department head may add to these rules more specific rules which apply to your department. Violation of office rules may be deemed cause for discharge except in the case of those rules where discharge is automatic.

Thus, in addition to the other infirmities discussed above, the Respondent in its rules purported to invest itself with the sole discretion to later impose additional rules subjecting employees to discipline, including discharge, without regard to their content or the presumptive requirements of mandatory bargaining. This caveat—itself unilaterally promulgated without bargaining, which we have previously ordered rescinded—cannot in our view serve to justify a subsequent avoidance of the presumptive requirements of bargaining about terms and conditions of employment, including the delicate and sensitive matters encompassed within the Code's provisions.

We also note that the Code of Ethics provisions here contain some vagueness and certain ambigu-

matter affects the "terms and conditions" of employees, and also that the impact is "significant." Hence none of the code provisions involved here fall in the third category Combinations one and two would also appear eliminated because matters not essential to the Employer's direction of the enterprise would not in any event overcome the initial presumption of mandatory bargainability. Thus, it would seem that the court was contemplating only the fourth combination above in its statement concerning "balancing."

[10] See also *Peerless Publications*, supra, 231 NLRB at 248–249.

[11] See id at 248 fns 10 and 14, and related text.

ities, as well as possibly conflicting requirements. For example, paragraph 4 of the "ETHICS" section provides in part that "Newspaper people will seek news that serves the public interest, despite the obstacles." Section 2 under "FAIR PLAY," on the other hand, provides that "The news media must guard against invading a person's right to privacy." Without intruding into a debate concerning what constitutes "the public interest" in this context (a term which we note is not defined in the Code), or seeking to define what best "serves" that end, we find it unclear from the Code itself whether the "obstacles" which must be overcome under the "ETHICS" section exclude or encompass the "right to privacy" which must be guarded under section 2 of "FAIR PLAY." Nor is it clear whether either or both of the above is intended to be subordinate to paragraph 1 of "ACCURACY AND OBJECTIVITY" which provides: "Truth in all things is our ultimate goal." Paragraph 3 of the latter section asserts: "There is no excuse for inaccuracies or lack of thoroughness," while "FAIR PLAY," section 4, states that "It is the duty of news media to make prompt and complete correction of their errors"; thereby potentially presenting employees with a "Hobson's" choice: i.e., promptly correct an error and be subject to discharge, since there is "no excuse for inaccuracies," or not do so and be likewise subject to discharge for failing to make a "prompt and complete correction" of the error. We find it likewise unclear whether the "public's right to know of events of public importance and interest" as the "overriding mission" of the Respondent's publication, is intended to include an obligation to report stolen documents, or whether there is any limitation on the assertion in the "ETHICS" section that newspaper people must be free of obligation "to *any* interest other than the public's right to know," or to what extent employees must acknowledge the ethic of protecting confidential sources of information. We note also that what may be deemed to have "news value" by one publisher may be considered "insignificant" or pandering to "morbid curiosity" by another.

Infirmities such as these may be deemed tolerable where an employer wishes merely to announce its own goals as an adjunct to attempting to improve the quality of its publication or enhancing its credibility. But they are not acceptable where, as here, an employer seeks unilaterally to impose such imprecision on employees in the form of rules which affect their terms and conditions of employment, and for breach of which the employees may be subject to discharge. In the latter situation, where the impact on employees is self-evident and significant, the necessary remedy is rescission. Accordingly, we shall revise our prior Order in this proceeding, as set out in full below, to require that the provisions of the Code of Ethics, as well as the General Offices Rules, be rescinded in their entirety.

We wish to make it clear that our decision does not preclude the Respondent from establishing completely new ethics code and rules provisions subject to the standards set forth above, where the content of such rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom applicable; provided, however, that such statements of ethics and rules requirements do not improperly impinge on the relevant rights of the affected employees.

ORDER

The National Labor Relations Board orders that the Respondent, Peerless Publications, Inc. (Pottstown Mercury), Pottstown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Newspaper Guild of Greater Philadelphia, Local 10, on request, about terms and conditions of employment embodied in the Respondent's General Office Rules and Code of Ethics, including their penalty provisions.

(b) Unilaterally promulgating or changing rules or codes of conduct, including any penalty provisions, which affect wages or terms and conditions of employment, or enforcing such unilaterally promulgated rules or penalty provisions, without giving the Union notice and the opportunity to bargain.

(c) Unilaterally implementing the penalty provisions of the present Code of Ethics by warning letters.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, or interfering with the Union's efforts to bargain collectively with it with respect to the following appropriate unit:

> All employees in the Editorial, Circulation, Maintenance, Telephone Operator and Advertising Departments, but excluding the managing editor, city editor, circulation manager, confidential secretary to the Publisher, county string correspondents, commission advertising salesmen, and the national, display and classified advertising managers.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind in writing the General Office Rules and the Code of Ethics, including the penalty provisions.

(b) On request, bargain with the Union concerning terms and conditions of employment to be contained in any revised General Office Rules or Code of Ethics, including any penalty provisions, and, if an agreement is reached, embody it in a signed agreement.

(c) Rescind and withdraw from personnel or other files maintained by the Respondent copies of or references to the warning letters issued to employees Dougherty and Smith dated 16 May 1974, and rescind any other disciplinary actions which resulted from enforcement of this penalty provision, notify the employees in writing that this has been done and that the discipline will not be used against them in any way, and make employees whole for any losses they may have suffered by reason of the enforcement of these penalty provisions in the manner set forth in the remedy section of the Board's decision in this proceeding, reported at 231 NLRB 244 (1977).

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Pottstown, Pennsylvania, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, concurring.

I concur in the result.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Newspaper Guild of Greater Philadelphia, Local 10, on request, about terms and conditions of employment embodied in the General Office Rules and Code of Ethics.

WE WILL NOT unilaterally promulgate rules or codes of conduct or penalty provisions affecting wages or terms and conditions of employment, or enforce such unilaterally promulgated rules or penalty provisions, without giving the Union notice and the opportunity to bargain.

WE WILL NOT unilaterally implement the penalty provisions of the Code of Ethics by warning letters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, or interfere with the Union's efforts to bargain collectively with us with respect to the following appropriate unit:

> All employees in the Editorial, Circulation, Maintenance, Telephone Operator and Advertising Departments, but excluding the managing editor, city editor, circulation manager, confidential secretary to the Publisher, county string correspondents, commission advertising salesmen, and the national, display and classified advertising managers.

WE WILL rescind in writing the General Office Rules and the Code of Ethics, including penalty provisions.

WE WILL, on request, bargain with the Union concerning terms and conditions of employment to be contained in any new General Office Rules and Code of Ethics, including any applicable penalty provisions, and, if agreement is reached, embody it in a signed agreement.

WE WILL rescind and withdraw from personnel or other files copies of, or references to, the warning letters issued to employees Dougherty and Smith, dated 16 May 1974 and any other disciplinary actions which resulted from our enforcement of these penalty provisions and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL make the employees whole for any losses they may have suffered by reason of any enforcement of such penalty provisions, with interest.

PEERLESS PUBLICATIONS, INC.
(POTTSTOWN MERCURY)