

IN ARBITRATION

In the Matter of the Arbitration Between:

SOUTHERN CONNECTICUT NEWSPAPERS, INC.

Grievance of the Union:
Failure of Employer to
Assure that Gannett
Assumes the Collective
Bargaining Agreement as
A Condition of the Sale
Of Its Assets

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA AND LOCAL 2110, UAW**

Before M. David Vaughn, Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to the Collective Bargaining Agreement in effect from April 11, 2006 through September 30, 2008 (the "Agreement" or "CBA") (Joint Exhibit ("JX") 1) between Southern Connecticut Newspapers, Inc. d/b/a The Advocate (the "Employer, "Company", "SCNI" or the "Advocate"), which is a wholly-owned subsidiary of The Tribune Company ("Tribune"), and the International Union, United Automobile, Aerospace and Agricultural Implement Workers and its Local No. 2110 ("UAW" or the "Union") (together, the Employer and Union are the "Parties" to the proceeding) to resolve a grievance filed by the Union on March 13, 2007 (JX4) which protests the failure of SCNI to ensure that Gannett Satellite Information Network, Inc, and Media West-GSI, Inc. (collectively, "Gannett"), as purchaser of SCNI's assets and operations pursuant to an Asset Purchase Agreement and Disclosure Schedule thereto between Gannett and SCNI dated March 6, 2007 (together, "APA") (JX5, Union Exhibit ("UX") 11A and 11B), assumes the terms of the Agreement as a condition of the sale.

The Employer denied the grievance; and the Parties were unable to resolve the dispute through their further efforts. The Union invoked arbitration and sought and obtained a temporary injunction against the sale of SCNI to Gannett, pending arbitration. See *Local 2110, UAW and SCNI and the Tribune Company*, No.3:07CV412(AVC), USDC, Conn. I was selected by the Parties to arbitrate the dispute.

A hearing was convened in New York City, New York on March 30, 2007 and continued and concluded on March 31, 2007, at which the

Union was represented attorney Henry F. Murray, Esq. of the law firm of Livingston, Adler, Pulda, Meiklejohn & Kelly, PC and the Employer by Jeremy P. Sherman, Esq. of the law firm of Seyfarth Shaw LLP ("Seyfarth"). A court reporter was present at the hearing; and the transcript prepared by him constitutes by agreement of the Parties the official record of the proceeding. Page references to the transcript (only an uncertified copy of which is available at the time this Opinion and Award is prepared) are designated "TI.___" for the March 30th hearing and "TII.___" for the March 31st continuation. The Parties stipulated at the outset of the proceeding that the dispute is properly in arbitration and before me.

The Temporary Injunction against the sale of SCNI's assets expired, by its terms, on April 6, 2007; however, the Employer represented on the record that it would not attempt to close on the sale until April 10, 2007 or issuance of the Opinion and Award herein, whichever might first occur. TI.11-12.

The Parties were afforded full opportunity to present witness testimony and documentary evidence and to cross-examine witnesses and challenge documents offered by the other. For the Union testified former International Representative Wendy Fields Jacobs, Local 2100 President Maida Rosenstein and bargaining committee member/Unit Chair Douglas Dalena. For the Employer testified Seyfarth partner Michael Rybicki, Esq., Tribune Senior Labor Counsel Timothy Fair, SCNI Director of Human Resources Eric Chang and Tribune Vice President of Labor and Employee Relations Howard Weinstein, Esq. Joint Exhibits 1-9 ("JX__"), Union Exhibits 1-11 (A) and (B) ("UX__") (less UX8, which was withdrawn) and Employer Exhibits 1-6 ("CX__") were offered and received into the record. Witnesses were sworn but not sequestered. At the conclusion of the hearing, the evidentiary record was completed and closed.

The Parties elected to close by written briefs. By receipt of the last e-mailed brief on April 3, 2007 and the last hard copy with attachments on April 4, 2007, the record of proceeding closed.

This Opinion and Award is based on the record herein. It considers the arguments and authorities submitted by the Parties and interprets and applies the Agreement.

ISSUES FOR DETERMINATION

The Parties were unable to agree on a statement of the issues. The Union phrased the issues as:

Did the Employer violate Article XV of the CBA when it entered into a purchase agreement with Gannett Satellite Information Network *et al* which excludes the Collective Bargaining Agreement from the assets and liabilities acquired by Gannett? If so, what shall be the remedy?

The Employer proposed the issues as:

Whether the Agreement was violated by SCNI's failure to assure that Gannett assumes the collective bargaining agreement as a condition of the sale of SCI from Tribune to Gannett? If so, what shall be the remedy?

APPLICABLE PROVISIONS OF THE AGREEMENT

Article II of the Agreement, Management Rights, provides, in its entirety:

Section 2.1, Management Rights. The Employer retains traditional rights to manage and direct the affairs of the Employer in all of its various aspects and to manage and direct its employees, including but not limited to the following: to plan, direct, control and determine all the operations and services of the Employer; to establish the qualifications for employment and to employ employees; to schedule and assign work; to establish work; to assign overtime; to determine the methods, means, organization, and number of personnel by which such operations and services shall be made or purchased; to make and enforce reasonable rules and regulations; to discipline, suspend and discharge employees for just cause; to change or eliminate existing methods, equipment or facilities; provided, however, that the exercise of any of the above rights shall not conflict with any of

the provisions of this Agreement. None of these rights shall be exercised in an arbitrary or capricious manner. Nothing contained herein shall be construed as prohibiting filing of a grievance alleging a violation of the express provisions of this Agreement.

Article IV of the Agreement, Grievance Procedure, provides, at Section 4.3:

Section 4.3. Authority of the Arbitrator. The arbitrator shall have no right to alter, amend, nullify, add to, or subtract from the provisions of this Agreement. The arbitrator's decision shall be based solely upon his or her interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented. A decision of an arbitrator rendered in accordance with the terms of this Agreement shall be final and binding.

Article XI of the Agreement, Complete Agreement and Waiver, provides, at Section 11.13:

No precedents or previous conditions, rules or agreements, shall be recognized in any way, or affect or modify this Agreement unless specifically provided for in this Agreement.

This Agreement represents the complete and entire agreement between the Parties and there are no understandings or agreements, written or oral, relating to rates of pay, hours of work or conditions of employment other than those set forth herein or incorporated herein by reference.

The Union waives the right to bargain over any other matters, other than the express provisions of this Agreement. This Agreement supersedes any prior agreements whether implied, express, written or oral between this Employer and the Union. The Union further acknowledges that there are no past practices of either party that would arise to the level of supplementing, amending or in anyway superseding the express provisions of this agreement or in anyway modifying or infringing on the broad rights of management.

In the event that any of the provisions of this Agreement are or hereafter become unlawful or unenforceable by virtue of any legislative enactment or decision of any court or any agency of competent jurisdiction, the remaining provisions of this Agreement shall be unaffected by such invalidity or unenforceability and this Agreement shall otherwise continue in full force and effect throughout the term of this Agreement.

Article XV of the Agreement, Successors and Assigns, provides, in its entirety:

This Agreement shall inure to the benefit and be binding on the successors and assignees of the Employer and the Union.

FACTUAL BACKGROUND AND FINDINGS

The Parties

The Employer owns and publishes the Stamford, Connecticut *Advocate* and the Greenwich, Connecticut *Time*, both newspapers of general circulation published daily and Sunday in their respective geographic areas. The Union represents a bargaining unit of the Advocate's 35 or so newsroom employees (TI.235) in classifications described in more detail in Article I of the Agreement (JX1). SCNI production employees are represented by the Graphic Communications International Union ("GCIU"), who are covered by a separate collective bargaining agreement.

The Organizing Campaign

The Union undertook a campaign to organize the *Advocate's* newsroom employees in 1996. At that time, SCNI was a subsidiary of Times Mirror. The Employer resisted the Union's efforts. The Parties attempted to persuade employees who would vote on the issue of representation of the justness of their respective causes.

One of the issues in the organizing campaign was employee concerns that the newspaper might be sold. There was considerable turmoil in the newspaper and publishing industries where part of Local 2110's members are employed. The Employer sought to reassure employees that the paper was not for sale but that if ever it were to be sold, a union could not guarantee the security of their jobs. UX1.

The Union prevailed in a National Labor Relations Board election and was certified as exclusive representative of the bargaining unit in 1996 following the organizing campaign. TI.32-33.

Negotiations for an Initial Contract

Following certification, the Parties commenced bargaining for an initial contract. Mr. Rybicki represented the Company; Ms. Fields-Jacobs represented the Union. Both sides brought bargaining committees to the negotiating table.

Given the changes that were then rampant in the publishing and newspaper industries, the Union and bargaining unit were greatly concerned to ensure protection and continuity of the benefits to be achieved in bargaining in the event of sale of the Company. TI.36-38, 58. Accordingly, the Union proposed, in its initial package of proposals submitted on July 16, 1997, a provision titled "CASE OF SALE", which read, in full:

The employer will not sell, transfer, merge or otherwise convey the facilities or any significant part thereof unless, as a condition of any such sale or conveyance, the buyer agrees to assume this collective bargaining agreement.

JX7, JX8.

The Union explained to the Company that the purpose of its proposal was intended to protect the job security and terms and

conditions of employment of bargaining unit employees in the event of the sale of the newspaper. TI. 56-58, 61.

The Employer rejected the Union's language. Mr. Rybicki stated simply that the Company was not interested in the proposal. TI. 79. The Parties were unable to agree on a number of difficult issues, including the Case of Sale provision; and bargaining extended through October of 1997 without agreement. The Union linked its Case of Sale provision to its Union Security proposal, seeking to protect both the Union and, in its view, the bargaining unit members. Ms. Fields-Jacobs told Management during the negotiations that protection of employees in the event of sale would be necessary in any contract. TI.56-58.

Negotiations were difficult; and the Parties remained far apart into the fall of 1997. They engaged in a negotiations campaign in advance of a strike deadline set by the Union for November 4th, election day. TI. 54-55.

On October 29, 1997, the Company presented the Union with a revised, comprehensive offer which it represented to be its final offer. That offer included a provision titled Successors and Assigns which read, in its entirety:

This Agreement shall inure to the benefit and be binding on the successors and assignees of the Employer and the Union.

UX3.

Chief negotiator Rybicki testified that he drafted the Successors and Assigns language in the Employer's final offer based on his review of applicable arbitration cases and authorities focused on preserving the applicability of the Agreement in the event of changes in the legal forms of the Parties. He also reviewed cases involving Successors and Assigns provisions TI. 183, such that he apparently believed the language would not guarantee

that the resulting agreement would be required to be adopted by a purchaser in the event of a sale of the Company's assets.

Mr. Rybicki represented to the Union that the Successors and Assigns language in its October proposal was "as far as [the Company] was willing to go." TI. 56-57, 184, 202-203, 206-207. He testified at the hearing that the purpose of the language he presented was simply and solely intended to protect both Parties in the event of a change in legal form by either of them. TI.191, 203. There is nothing in the record to indicate that such an issue had ever been raised as a concern by either Party during the negotiations. It does not appear that the Employer explained the purpose and intent of the Successors and Assigns language, as Mr. Rybicki described it at the hearing, at the time it presented the package offer or at any other time in the negotiations. TI. 204-205.

Ms. Fields-Jacobs responded to the Successors and Assigns proposal that if everything else in the contract could be worked out, the Union could live with the Company's Article XV language. TI.185. The Union withdrew its Case of Sale language. It does not appear that the Union asked the Employer during the negotiations what its Successors and Assigns language meant, nor did it explain during that period what it understood the Employer's language to mean. Union Local President Rosenstein testified that she understood the language to mean that, if the Company were to sell its assets, the successor would be obligated to adopt the Agreement then to be in effect, as had been the case at publisher Harper Collins, whose employees were also represented by the Union applying the same language. TI. 60, TII.6.

The Parties negotiated for the next two days, working in part from the Employer's Final Offer, and reached agreement on October 31, 1997. The language regarding Successors and Assigns was as stated in the Employer's final offer. In the Union's explanation of the terms of the tentative agreement which was being submitted to the Union's membership for ratification, it simply quoted the

language agreed upon and did not opine as to its meaning. JX9. The Union's membership ratified the contract (TI. 60) on October 31, 1997.

Approximately one week after the completion of negotiations, the Advocate's Publisher, William Rowe, reported to his Times-Mirror superior a summary of the agreement. He stated, with respect to any potential sale "we have avoided any major hindrance to potential sale of the Company by agreeing to a one sentence Successors and Assigns clause." EX5. Mr. Rowe was not present at the negotiations and apparently based his summary on what Mr. Rybicki told him. TI.207-208. The memo made no mention of any change in the legal forms of the Parties or the impact of such changes on the status of the Agreement.

The initial Agreement was finally executed on January 29, 1998. The contract covered the period from October 31, 1997 through June 30, 1999. JX2. There was no occasion to test the Successors and Assigns language of the 1996-1999 Agreement during its term, as the Employer did not sell, or propose to sell, its assets.

1999 Negotiations for a Successor Agreement

Negotiations for a successor Agreement were conducted in 1999. Mr. Rybicki again represented the Company. TI.105-106. Agreement was reached on a successor contract. The issues of the consequences of sale of the newspaper were not discussed in the negotiations; and no changes were made or proposed with respect to Article XV. *Id.*

2000 Acquisition of SCNI by The Tribune Company

In 2000, SCNI and other Times-Mirror properties were merged into Tribune. SCNI did not change corporate form as a result of the acquisition but became a business unit of The Tribune company. TI.278. No successorship issues were triggered with respect to

SCNI by the transaction. The agreement negotiated in 1999 continued by its terms after the merger.

2002-2003 Tribune-GCIU Negotiations

In January of 2002, SCNI, represented by Tribune, commenced negotiations with GCIU. That union also had a Successors and Assigns provision in its agreement, but the Employer was successful in eliminating the language from the new agreement reached in July of 2002, based on an assertion that it needed "consistency" in Tribune properties and that Tribune agreements did not generally have Successors and Assigns provisions. TI.114-115.

2002-2003 Tribune-UAW Negotiations

Negotiations for a third agreement between SCNI and the UAW began in the fall of 2002, and culminated in an agreement in November of 2003 after protracted bargaining. In those negotiations, the Employer's chief spokesman was Tribune Senior Labor Counsel James Kulas. Local President Rosenstein represented the Union in the negotiations. High on the Employer's priorities was elimination of the Successors and Assigns provision, which, through Mr. Kulas, it proposed at the outset of the negotiations and maintained until close to the end. TI.109, UX4, UX5. The Union did not propose any change to Article XV. TI. 240, 253.

According to the testimony of Ms. Rosenstein, Mr. Kulas repeatedly stated during the negotiations that the Employer's reasons for getting rid of the provision was that it represented a form of "co-management" which was not consistent with Tribune policy (TI.114-115, 228, 253) and that, while the provision might be in the interest of the Union, it was not in the interest of employees. TII.7.

Ms. Rosenstein testified that Mr. Kulas asserted that a Successors and Assigns provision in an agreement created no guarantee of job security for individual employees; and he

illustrated his point with a story, which he repeated several times during the negotiations, about a newspaper in Palo Alto, California, whose press room and composing room employees were covered by a collective bargaining agreement which included a Successors and Assigns provision. According to Mr. Kulas, because of the requirement that any purchaser assume the existing labor agreement, the company was unable to sell the paper and it ceased publication, leaving the employees without jobs. TI.114, 221-222.

The Union asserted in response to the Kulas Palo Alto story that the agreement there included lifetime job guarantees which made that agreement onerous to potential purchasers. It pointed out that no such term was found in the SCNI/UAW Agreement. The Union asserted during the negotiations, in response to Mr. Kulas, that the story was, therefore, inapposite.

Ms. Rosenstein testified that she rejected Kulas' arguments about the divergent interests of the Union and employees, telling him that the continuation of the Agreement in the event of sale guaranteed employees their contractual rights. TII.9-10, 15-16. She also testified that she briefed the Union's membership in writing during the negotiations on the Company's proposals, which she understood and described as not obligating a new owner to honor the contract. TI.147, UX6. She conceded that the Union's bargaining committee did not during the negotiations describe its understanding about the meaning of the existing language and that no representative from either Party ever stated that the Successors and Assigns language would require the Company to have any purchaser assume the Agreement. TI.223, 238, TII.15. She asserted that they had no reason to do so, as it was the Employer which was seeking to eliminate the language. TII.6, 13.

As the negotiations approached their end, Management, now represented by Tribune Attorney James Osick, dropped its demand for elimination of Article XV. TI, 120-121. The language from the original 1997 contract thus remained in the contract, on which agreement was reached in October of 2003. The Parties added during

the negotiations the Complete Agreement and Waiver provision, quoted above as Section 11.13. TI.220, JX1.

The 2005–2006 Negotiations

Negotiations for a new Agreement were conducted in 2005–2006. Mr. Osick again represented the Company. The issues of the consequences of sale of the newspaper were not discussed in the negotiations; and no changes were made or proposed with respect to Article XV. TI.122–124. Agreement was reached. The Agreement remains in effect. It expires on September 30, 2008. JX1.

The Proposed Sale of SCNI

On March 6, 2007, SCNI announced an agreement with Gannett, to close by March 31, 2007, whereby Gannett would acquire the assets of SCNI for \$78 million. The APA provides that the *Advocate* will continue to be published and that Gannett will hire a majority of the *Advocate's* newsroom employees. UX11A&B. The APA also spells out the terms and conditions of employment applicable to newsroom employees after the sale. Many of the terms are the same as bargaining unit employees receive under the Agreement, but some are different. *Id.*, JX5, JX6. The APA is short on descriptions of how Gannett will operate the newsroom. Specifically excluded from assets/liabilities to be acquired by Gannett is the Agreement.

On March 6th, Gannett advised *Advocate* newsroom employees that they would be required to re-apply for positions with it and advised them specifically that Gannett would not assume the Agreement as part of the sale. TI.268, JX5. A job application was also provided, which specifically makes employees “at will”. UX9.

Gannett has already extended individual offers of at-will employment to 33 of 36 bargaining unit employees in the *Advocate* newsroom, as well as to some unspecified numbers of managers and

supervisors. TI.240, UX10. As of the date of hearing, there is no indication that any have accepted the offer¹. TI.248.

Gannett apparently contemplates closing SCNI's production facility and transferring production to a Gannett facility in White Plains. Thus, all or most production employees, including those represented by the GCIU, will lose their jobs.

Tribune Vice-President of Human Resources Weinstein testified that Tribune and Gannett reached agreement on a purchase price in early December of 2006, but not on other terms. TI.281. According to the testimony of Mr. Weinstein, during those follow-on negotiations between Tribune and Gannett, Tribune proposed to Gannett that it assume the Agreement. TI.281-283. Mr. Weinstein gave as the reason that the Employer simply thought it better for employees to continue to be covered by the Agreement. TI.294. He reported that Gannett rejected the Employer's several efforts to include adoption of the Agreement as part of or incident to the sale, but that the Company never asked why. TI.295-297. Finally, testified Mr. Weinstein, Gannett indicated that such a condition (as well as several others) would be a "walk away" issue. TI.288-289. Tribune dropped the request that Gannett assume the Agreement, resolved the other issues and executed the APA.

Insofar as the record indicates, neither Tribune, SCNI or Gannett contacted the Union at any time during the negotiations concerning the status of the Agreement. Gannett has not recognized the Union nor commenced to bargain with it.

APA Terms

The terms of the APA (including its schedules) provide that Gannett will purchase most of SCNI's assets, including all

¹I note that an employee would have little incentive to accept Gannett employment on the terms offered, foregoing contractual protections and accepting at-will status, during the pendency of this proceeding and the litigation, one possible (although not certain) result of which may be that the terms of the Agreement continue, either under SCNI, Gannett or some third party.

necessary to continue to publish the paper. The APA exclude the transfer of most, but not all, of Tribune's liabilities. It continues most of SCNIs' commercial contracts, but specifically rejects assumption of the Agreement. UX. 11A, 11B.

Under the APA, Gannett agrees, as indicated, to offer employment to the large majority of newsroom employees and details the terms of compensation to be substantially the same (albeit with some differences) and with a promise not to reduce compensation except for individual performance issues or as part of a large scale reduction. The terms and conditions of employment to which Gannett does not commit include just cause protection, access to grievance/arbitration procedures, Union security and dues checkoff. In order to obtain employment with Gannett, employees will sign individual employment applications which, as indicated, will make them employees at will.

The Litigation

The Union brought suit against SCNI in Federal District Court for the District of Connecticut to enjoin the sale of the Employer's assets to Gannett. *Supra*. On March 28, 2007, the Court issued a preliminary injunction to maintain the *status quo* for a period ending April 6, 2007 (the Company's Brief sets that date as April 5, 2007, but that appears from review of the injunction to be in error) or upon issuance of the Opinion and Award in the arbitration of the instant grievance, whichever first occurs.

The Union asserted in its opening statement at the hearing that the Company has admitted in court papers that Gannett is a successor and that Gannett has also admitted successorship. The Union did not cite specific pleadings or other documents or statements establishing such express admissions; and it does not appear that such admissions are part of the record.

The Arbitration Proceeding

The Union grievance was denied by the Company on the basis that the Agreement does not require assumption of the Agreement by the purchaser as a condition of sale. It was processed on an expedited basis, and the hearing was scheduled and conducted, the evidentiary record completed and the record of proceeding closed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing and in thorough, able briefs. They are briefly summarized as follows:

The Union argues that it met its burden to prove that the Employer's agreement to sell its assets to Gannett, a successor, conditioned on Gannett not assuming the Agreement is a violation of Article XV of the Agreement. It asserts that the clear language of the Agreement requires that it "inure to the benefit of and be binding on" the Company's successors and assigns. UAW argues that the language should be applied in accordance with its clear meaning and intent to require the Employer to condition the sale of its assets on requiring the purchaser to assume the Agreement, which by its terms remains in effect until September 30, 2008.

The Union contends that the requirement that the Agreement be binding on the Employer's successors in interest clearly reaches a purchaser of the Employer's assets which will, according to the terms of the APA, continue to publish the paper in its present form and operate the business, utilizing a majority of the Employer's represented newsroom employees, unless a majority of those employees decide to give up their jobs. It points out that the APA even establishes the conditions under which Gannett will become a successor, but still provides that Gannett will not assume the Agreement.

The Union argues that its interpretation of the meaning of the language is supported by the history of the bargaining in both the

first negotiations between the Parties in which they adopted the present Successors and Assigns language and the bargaining history from the 2002-2003 negotiations in which the Employer fought hard to exclude that language, which SCNI now asserts to have had little meaning. UAW denies that it was the intent of the Parties that the hotly-contested language to be mere window-dressing. It points out that the Union's stated concern in proposing related language in 1996 was not to guarantee perpetual employment for bargaining unit employees, but to protect their terms and conditions of employment in the event the Employer might sell its assets to a successor. The Union asserts that the meaning which the Company ascribes to Article XV - to protect against corporate restructuring or changes in legal form - is not supported by the language, which clearly references "successors", a term with a clear meaning under the National Labor Relations Act ("NLRA").

The Union points out that the ASA contemplates that the new paper will continue to be published by Gannett and that the purchaser will hire a majority of its employees. It asserts that the Employer has, by the provisions of the APA, admitted that Gannett will be a successor and maintains that, by those terms, Gannett has also acknowledged its successor status. Since the Agreement explicitly makes the Agreement binding on SCNI's "successors", UAW contends that Company's sale of its assets without conditioning the sale on Gannett's adoption of the Agreement is a violation of that Agreement. To construe the language as meaning anything less would render the negotiated language meaningless, it maintains.

The Union contends that its interpretation of the language is supported by the bargaining history: under its original proposal, the terms of the Agreement would have been binding on any purchaser of the Company and would have attached to the facilities of the Company, without regard to whether the purchaser would be a "successor". The language later proposed by the Company and adopted by the Parties limits the obligation to assume the Agreement to successors. To protect the contract in the event of

sale was the stated concern of the Union and was the effect of the compromise language proposed by the Company. The Union contends that the explanation of the purpose of the language advanced by Mr. Rybicki - to protect against changes in the legal form of the Parties - was a concern never raised or discussed by either Party in negotiations and was not raised by Mr. Rybicki when he presented the compromise language.

The Union points out that SCNI tried vigorously to have the Successors and Assigns language removed from the contract in the 2003-2003 negotiations, a position which it maintains is inconsistent with the Company's position that the language merely addressed the consequences of possible changes in legal form. Moreover, asserts the Union, the Company's spokesman in those negotiations, Mr. Kulas, supported its position by repeating the Palo Alto story, the premise of which was the assumption of the agreement in consequence of a sale. Such justification would not have been relevant if the language meant only to protect the Agreement from changes in the legal forms of the Parties, it contends.

Citing authorities, the Union argues that basic principles of contract interpretation favor its position, first, it argues that contracts must be construed so as to give meaning to all their terms, a principle rejected, in the Union's view, if the Company's interpretation of Article XV were to be adopted. Moreover, it contends, language which is unclear and susceptible of more than one interpretation should be construed against the drafter ("*contra proferentem*"), in this case, the Company.

The Union concedes that there are two lines of arbitral authority with respect to the enforceability of Successorship provisions. The first, and in the Union's view, most legitimate line of cases takes successorship requirements at their face value and holds the employer to bind any successor to adopt the agreement.

The Union cites, in support of its position, cases including *Boardman Company*, 91 LA 489 (1988) (Haar, Arb.) and *Schneier's Finer Foods*, 72 LA 881 (1979) (Belkin, Arb.). In the latter case, points out UAW, the arbitrator applied NLRB precedent, found the successorship language used therein to evidence a clear intent to bind the employer and found a violation of that obligation by the employer when it entered into a buy-sell agreement which did not require the purchaser to adopt the agreement. The Union maintains that the relevant facts of that case parallel the instant situation and should produce the same result. It rejects as distinctions without differences the Company's assertion that the language is different. It points out that in *Boardman*, Arbitrator Haar found the purchaser to be a successor and that language making the agreement binding on successors to evidence clear and unambiguous intent that the purchaser be bound. The Union cites and discusses other cases to the same ends. It maintains that language in some of those cases that successors "enter into" the agreements are also distinctions without differences.

The Union argues that the cases cited interpret Successorship provisions in contracts like any other provisions, examining the language and, if it indicates that the contract is to be binding on successors, then determining whether a purchaser is, in fact, a successor. UAW urges that same examination and result in this dispute.

The Union rejects the second, so called "Active Duty" line of cases, which hold that Successorship provisions impose no liability on a seller unless the governing agreement contains language which obligates the employer to obtain a commitment from the purchaser to assume the contract. In the absence of such language, "Active Duty" cases hold that a company's failure to require a purchaser to adopt the agreement does not establish a violation. UAW maintains that the reasoning in "Active Duty" cases is flawed because they fail to give effect to simple, clear and sufficient language. It points to *Wyatt Manufacturing*, 82 LA 153 (1983 (Goodman, Arb.) as the most thorough and scholarly of these cases and to the

arbitrator's conclusion that "the seller should not be made to account for the decisions of the buyer unless the agreement identifies that responsibility in no uncertain terms." UAW rejects the premise that contracts must not lightly be assumed to limit a party's ability to contract with third parties, asserting that many types of common, accepted, provisions (such as subcontracting) do so. The Union argues that is not a reason to ignore the meaning of the language. Indeed, it points to the reasoning of Arbitrator Levine in *Herbert J. Caplan*, 81 LA 22 (1983) (Levine, Arb.) as recognizing that "a business cannot avoid an obligation it has incurred by agreeing that a purchaser of the business will not assume the obligation." The Union rejects other cases cited by the Company as flawed in logic and defective at law.

The Union argues that the analytical complexities of the "Active Duty" cases can be avoided by applying the language at face value to bind successors; as a successor, the Company must bind Gannett. In the alternative, contends the Union, the Agreement may be read simply to prohibit the Employer from taking action inconsistent with its successorship obligations, a duty the Company breached by entering to the APA provisions contrary to its contractual duty.

The Union points out that complexities found in a number of the "Active Duty" cases, such as financial distress in the business being sold, are not present in the instant situation, where SCNI is profitable and there is no claim of hardship, or the purchaser's failure to employ a majority of seller's employees, which raise questions whether the purchaser is, in fact, a successor. It contends that there is no legal issue in this case whether Gannett is a "successor" for purposes of the application of labor law, as it will continue operations and hire a majority of employees. Moreover, argues UAW, the breach of which it complains is the result of an affirmative action which the Company took in signing

the APA with Gannett on terms facially inconsistent with its obligations under the Agreement.

The Union urges that the grievance be sustained and that the Employer be ordered to refrain from completing the sale to Gannett on the terms of the APA which reject Gannett's assumption of the Agreement. It asserts that the alternative to an order of specific performance would require the calculation of damages and separate arbitrations to recover those damages. Moreover, contends the Union, it is impossible to convert non-economic terms and conditions of employment lost to employees if Gannett purchases SCNIS assets but does not assume the Agreement into damages. An Award ordering SCNI to refrain from concluding the agreement with Gannett on terms which permit Gannett to avoid the contract is the appropriate, and the sole effective, remedy, it contends.

The Company argues that the Union failed to carry its burden to prove that SCNI violated its contractual obligations when it failed to require Gannett to assume the Agreement as a condition of the sale of the Company's assets. It asserts that my authority must be based on and is limited solely to interpretation of the express terms of the Agreement. SCNI contends that the Union failed to prove that its interpretation of the language of the Successors and Assigns provision is correct. It points out that the express language of Article XV does not obligate the Company to require a buyer to assume the terms of the Agreement in the event SCNI sells the business or assets thereof. The Company maintains that there is no evidencethat the Parties interpreted the language at the time it was negotiated in the manner advanced by UAW. It contends that the language was intended merely to protect the Parties from changes in legal form and not from the type of transaction at issue in this proceeding.

The Company points out that Section 11.23 of the Agreement makes the express terms the complete agreement of the Parties and disclaims any other understandings or agreements, thereby excluding

from consideration the "Case of Sale" contract language proposed by the Union but rejected by the Company, which would have explicitly required the Company to make a seller's assumption of the Agreement a condition of any sale. SCNI maintains that the Union's case rests on inferences that the language which was adopted still carries that meaning, despite rejection of the Union's language. As to the Union's argument that the Company's efforts in the 2002-2003 negotiations to have the Successors and Assigns language removed from the Agreement must mean that it requires the Company to bind a party to whom it might sell to assume the Agreement, SCNI maintains that there is no evidence.

The Company argues that the "overwhelming number" of previous arbitration awards which have addressed successorship issues have held that in order to find that a seller has an obligation to ensure that a purchaser assumes a collective bargaining agreement between the seller and a union representing its employees, the language of the agreement must explicitly so provide and/or there must be other, compelling circumstances not present in the instant situation.

The Company argues that the Union failed in its efforts during the 1996-1997 negotiations to have "Case of Sale" language included in the Agreement. It asserts that the Union is now attempting to have the language of the Agreement interpreted as if its "Case of Sale" proposal had been included. That, maintains the Company, represents an attempt to obtain in arbitration what it failed to achieve in negotiations. It asserts that the meaning the Union ascribes to the contractual language is incorrect; and it argues that the actual meaning of Article XV does not apply to the facts presented.

The Company argues that the Union's interpretation of the language would require a purchaser of its assets to be, or become, a Successor and would restrict the Company in its ability to sell its business. Such restrictions are disfavored by the courts as a matter of policy, it asserts, citing authorities. SCNI maintains

that restrictions on its right to sell the business and waiver of its statutory rights to sell the business should not be imposed on the Company in the absence of clear restrictive language. The Company contends that the Agreement contains no such waiver and, for that reason, I should not construe the language to require such a result.

The Company asserts that Gannett has not, by its actions to date, become a successor, pointing out that it has not hired, or agreed to hire, incumbent employees and has advised applicants that it intends to change some terms and conditions of employment after it takes over. SCNI contends that course of action is sufficient to make Gannett not a "Successor" within the meaning of Federal labor and negates any obligation or ability to recognize the Union until the Union achieves majority status in the *Advocate's* newsroom, following Gannett's assumption of control, let alone assume the Agreement. The Company emphasizes that Article XV does not require it to sell only to a purchaser who is a Successor prior to closing on the sale. It maintains that the issue is whether the Company violated its obligation under the Agreement by not requiring Gannett to assume the Agreement, not what Article XV might have required, at some future point when Gannett might become a Successor.

The Company argues that the Union failed to carry its burden and urges that the grievance be denied.

DISCUSSION AND ANALYSIS

Issues

I find the issue to be as defined by the grievance: Whether the Agreement was violated by SC&I's failure to assure that Gannett assumes the collective bargaining agreement as a condition of the sale of SCI from Tribune to Gannett? If so, what shall be the remedy? I am not persuaded that the differences in the framing of

the issues by the respective Parties is determinative of the outcome of the dispute.

Burden of Proof

In this contract interpretation grievance, it was the Union's burden to prove that the Company's actions were in violation of the Agreement. For the reasons which follow, I am persuaded that the Company's actions did, in fact, violate its obligations under Article XV of the Agreement.

Interpretation and Application of Express Language

It is my task to interpret and apply the express language of the Agreement so as to give effect to the mutual intent of the Parties. The Agreement specifically instructs me and limits my authority. I "have no right to alter, amend, nullify, add to, or subtract from the provisions of this Agreement. [My] decision shall be based solely upon [my] interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented.

It is well-established in arbitration that contract language is to be interpreted so as to effectuate the intent of the parties who negotiated it. Intent is best and most simply ascertained by analysis of the language they have used. In the instant dispute, the language of the Agreement is simple and, I believe, clear. Article XV of the Agreement, titled Successors and Assigns, provides, in its entirety:

This Agreement shall inure to the benefit and be binding on the successors and assignees of the Employer and the Union.

To interpretation of that language I now turn.

"Be Binding On"

The first part of the sentence requires that the Agreement "inure to the benefit of and be binding on" those entities covered by it. For an agreement to be "binding on" a party, that Party must either adopt the Agreement directly - as by executing the document - adopt the document through executing some document external to the Agreement itself - as by executing the APA adopting the Agreement - or adopt the Agreement by order of a forum of competent jurisdiction or operation of law. The clear requirement of the negotiated language is that the Agreement is to be binding, in accordance with its terms, as against the entities covered by the provision.

"Successors and Assigns"

The entities who are bound to apply the terms of the Agreement are the successors and assigns of each of the Parties. The parties to a contract are assumed to intend that their words be given their normal and usual meaning in the absence of evidence of a contrary intent. In the instant situation, the Union representatives do not appear to be lawyers, but the Employer was represented and advised by attorneys throughout the various negotiations and the Union representatives are labor relations professionals. Clearly, the words in the phrase "successors and assigns" have non-technical meanings, but the phrase is a legal term of art, actually with somewhat different meanings in different areas within the law. As labor relations professionals, I am persuaded that the Union and Company representatives intended the term "Successors and Assigns" to be interpreted and applied as the term is used in labor law. In the context of this case, the claimed "Successor" is a "Successor Employer". The Parties both borrow for their interpretation of the phrase from case law developed under the National Labor Relations Act ("NLRA").

The broad definition of the term "Successor Employer" in the context of labor relations is found in *Roberts Dictionary of*

Industrial Relations, 4th Ed. (BNA, Washington, 1994). It reads, in part: . . . [a] corporation . . . tak[ing] over the operations of other companies determined to have inherited the predecessor's obligations under the [NLRA]." The Successor is subject to the predecessor's obligations under the NLRA, depending on whether there is continuity of the work force, whether there is continuity in the employing industry, whether there is continuity in the appropriateness of the bargaining unit and the impact of any hiatus in operations. Courts have held that the substantive terms of a collective bargaining agreement may not be imposed on the new owner based on application of the Statute, although some rights (such as the processing of unfair labor practices or arbitration) may survive the change in ownership. Citations omitted. However, to this rule is an important exception, applicable here, where a contract specifically provides that a Successor must assume its terms.

The Company argues, in essence, that the Parties intended the term "Successor" employer to carry with it the interpretations of the National Labor Relations Board and Courts. It maintains that, although Gannett has contracted to continue to operate the business in its present form and to offer employment to a majority of the represented employees, since the sale is not complete, Gannett is not operating the business and none of the Companies represented employees have yet accepted employment, so Gannett is not yet a successor employer and the contractual Successorship provision does not apply.

I am not persuaded that the term is appropriately read in such a manner. In the first instance, I am persuaded that Gannett will be a Successor Employer, within the meaning of the term and the intent of the Parties, at the instant the sale closes and Gannett assumes ownership of SCNI's assets. The APA commits Gannett to operate the business and conduct its operations, continuing publication, as before and to employ a majority of SCNI's employees on substantially similar economic terms. It has effectuated that commitment by sending letters offering employment to 33 of 36

newsroom employees. That no one has yet accepted is the logical consequence of the dispute now pending and the lack of contractual protections and some loss of benefits in the Gannett offer. If the term Successor were interpreted to exclude purchasers in Gannett's position from coverage of a Successorship provision, then any dispute as to that coverage would freeze the purchaser's Successorship status, the exception would swallow the rule and the negotiated provision would become empty of its clear meaning. I do not believe that is what the language requires and I do not believe that is what the Parties intended. The Parties did not fight so hard to produce contract language which would have no effect. I hold that the negotiated language makes Gannett a Successor for purposes of requiring it to assume the terms of the Agreement. The Award so reflects.

Bargaining History And Principles of Contract Interpretation

The clarity and simplicity of the language allows a determination as to its meaning, without resort to evidence outside of the four corners of the Agreement. However, both Parties argue, to their own purposes, that the language is clear, but to contrary ends. Both Parties submitted evidence and argument examining bargaining history, analyzing arbitration authorities and advancing principles of contract interpretation. I have reviewed the record in light of those arguments of the Parties. I find bargaining history, certain arbitral cases and principles of contract interpretation each to be consistent with and to support my conclusion that the Successors and Assigns provision of Article XV requires that Successors adopt the terms of the Agreement and that Gannett will be, in fact, a Successor employer for purposes of that provision at the instant it acquires the assets of SCNI, requiring that it assume the Agreement.

The evidence of bargaining history for the first contract persuades me that the Union's concern, which was clearly communicated to the Company, was that the agreement to result from

the negotiations be binding on any buyer to whom the Company might sell. The "Case of Sale" language would have provided that result. Indeed, the Case of Sale language was broader in its coverage than mere Successorship and would have applied to any purchases.

I am also convinced that the Company's Successors and Assigns provision, offered toward the end of the 1996-1997 negotiations, was intended by the Company to be understood by the Union as a compromise which would retain a requirement that a purchaser of the Company or of its assets be bound by the terms of the Agreement if the purchaser is a Successor. The Employer's argument, based on Mr. Rybicki's testimony, that the purpose of the language was to provide continuity of the Agreement in the event of a change in form by either Party is unconvincing, for a number of reasons.

First, the Company knew very well the Union's concerns to which the language was responding. Mr. Rybicki represented the language - implicitly but clearly - as a compromise from what the Union had proposed when he explained that "this (the Successors and Assigns language) is as far as we can go". Second, no one on either side had ever during the negotiations raised a concern as to the impact on the continuity of the Agreement of possible changes in the legal forms of the Parties; and it would make little sense at that late stage in difficult negotiations to propose language to solve a problem nobody had. Third, if that were the purpose of the language, then why did Mr. Rybicki - according to his testimony - develop the language by reviewing the arbitration cases on successorship? If it were the consequences of changes in the legal forms of the respective Parties which his draft was to address, he would presumably have researched in different areas. Finally, if the consequences of changes in corporate forms were the purpose, as an experienced draftsman, Mr. Rybicki would not likely have used the term "Successors and Assigns", with all of the legal connotations that term carries in labor relations.

The Company's explanation as to the purpose of the 1997 language it proposed is more likely mere after the fact

rationalization to attempt to avoid the consequences of the Successorship language. The language may also have been an attempt to mislead the Union, attempting to use language which the Union might find sufficient but which the Company believed - but did not state - might withstand actual application to a successorship situation. Neither alternative carries the day for the Company: to the extent that the opposing interpretations suggest ambiguity, the language is appropriately construed against the Company as the drafter of the language and because, by Mr. Rybicki's testimony, the Company never explained the meaning or intent of the language to the Union as being something different than the plain meaning of the words.

I have reviewed the written summary descriptions of the contract prepared by both Management and the Union during and after the negotiations. Both presentations are somewhat ambiguous. The Company's summary was not prepared by a negotiator. Both were prepared for specific purposes, the Company's memo for review by the publisher's boss at corporate and the Union's for purposes of facilitating ratification. They do little to enlighten the Parties' understandings and intent at the table.

The Company's argument that the language is either mere housekeeping, intended to protect against possible future changes in legal forms the Parties might take, or that it is ineffective to convey any Successorship obligation in the event of a sale of assets is belied by the vigor with which Management fought in 2003-2004 to get the language removed from the Agreement. More to the point, however, the arguments made by Mr. Kulas in those negotiations that Successorship provisions do not provide employees with security would be unnecessary if Management did not understand the Successors and Assigns provision to require that Successor employers be bound to the terms of the Agreement. Similarly, the Palo Alto story cited by Mr. Kulas would have been irrelevant if the language here at issue did not require successors to be bound by the terms of the Agreement.

Prior Arbitration Cases

The Parties concede that there are two lines of arbitral "authority" interpreting Successorship provisions. I note that am tasked to interpret and apply the express language of the Agreement to the particular facts presented in order to ascertain and apply the intent of the Parties to that contract. To be guided by arbitration awards from some other contract arising from other facts and analyzed by some other arbitrator would exceed my authority. Prior awards between other parties are non-precedential and are entitled only to such weight as the persuasiveness of the analysis therein justifies.

Nevertheless, the Employer argues that the line of authority it describes as "Active Duty" is "overwhelming" and should be adopted. The Union asserts that the "plain meaning" cases are more persuasive and should be adopted. I note that there are more "Active Duty" cases in the set of cases provided than "plain meaning" cases, but I am not convinced that either line of cases in the relatively small sample (29 or so cases) is so "overwhelming" as to require adoption of the analysis on that basis.

The thrust of the "Active Duty" cases seems to be that parties who agree by contract to require purchasers to assume the terms of their contract must then also establish an active mechanism or give an additional instruction to the employer to actually do something to effectuate the successorship provision. I am not convinced.

The absence of an "Active Duty" provision may impact on the availability of a specific remedy, but the lack of an additional duty does not negate an otherwise-clear commitment by the parties to a contract that Successor purchasers be bound to adopt the terms of their agreement. It is certainly the case that some Successorship provisions must be interpreted and applied in very trying circumstances, and a number of the Active Duty cases which I reviewed have the feel of a needed remedy in search of an after-the-fact rationale. The remaining justifications scattered through

the "Active Duty" cases, such as imputing particular policy considerations in the interpretation of the language or assuming that the parties did not intend their language to create substantive rights and obligations are merely speculative rationalizations, rather than interpretation and application of controlling contract language. I do not find the "Active Duty" analysis to be persuasive.

The holdings and analysis in the line of cases which puts stock in applying the plain meaning of Successorship language are more convincing and avoid the necessity to invent or infer reasons for the decision. Those cases support my conclusion that the language at issue in this proceeding requires the Company to make the terms of the Agreement binding on Gannett.

Remedy

As indicated, the language at issue in this proceeding requires the Company to make the terms of the Agreement binding on a Successor. I find Gannett to be a Successor, both legally and within the contemplations and intent attributable to the Parties. That having been said, Gannett's obligation to recognize and bargain with the Union after it acquires SCNI's assets, continues its operations and hires its employees does not create privity of contract between Gannett and the Union. The Agreement is only binding on SCNI and the Union. A different mechanism to enforce SCNI's obligation with respect to successorship is necessary.

The "Active Duty" line of cases would apparently draw from the lack of additional language that there was no intention to require the Employer to take action with respect to Gannett to enforce application of the Agreement. That analysis does not control the instant situation. Where the language requiring a Successor to adopt the contract is clear, that limitation does not make sense. The employer bound by a successorship provision has the power and the duty to require a purchaser to agree to adopt the contract as a condition of the sale and not to enter into a buy-sell agreement

which does not obligate the purchaser to assume the contract. Stated another way, such an employer may not, without violating its then-present collective bargaining agreement, enter into a buy-sell agreement which does not include that requirement. If the employer has entered into such a buy-sell or asset purchase agreement, it may not execute the agreement without violating its obligation under the agreement between the employer and union.

The Company placed itself with respect to Gannett in the situation described in the previous paragraph. I hold that for the Company to execute the APA which includes Gannett's disavowal of the Agreement and lacks a commitment by Gannett to be bound by the Agreement is a violation of Article XV thereof. The violation is not excused by the Company's efforts, later abandoned, to have Gannett assume the Agreement. The Award orders the appropriate remedy.

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A W A R D

The grievance is sustained. SCNI violated Article XV of the Agreement when it failed to require that Gannett assume the terms of the SCNI-UAW collective bargaining agreement (JX1) as a condition of the sale of SCNI from Tribune to Gannett and, conversely, by entering into an asset purchase agreement (the APA, UX11A & B) with Gannett which excludes the SCNI-UAW Collective Bargaining Agreement from the assets and liabilities to be acquired by Gannett.

Neither SCNI nor Tribune shall execute the APA, or any other agreement for the purchase of its assets, except as any such asset purchase agreement shall include the SCNI-UAW Collective Bargaining Agreement (JX1) in the assets and liabilities to be acquired by Gannett and shall make the terms of the Agreement (JX1) binding on Gannett, effective as of the date of sale and continuing through the expiration of the term of the Agreement (JX1).

Issued at Clarksville, Maryland this 9th day of April, 2007.

/s/ M. David Vaughn
M. David Vaughn
Arbitrator

AFFIRMATION

I, M. David Vaughn, of Clarksville, Maryland, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

4/9/07

/s/ M. David Vaughn

Date

M. David Vaughn