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STATE OF CALIFORNIA — Pete Wilson, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
L' Section
3. n Ness Avenue, Suite 4400
San Francisco, CA 94102

April 2, 1991

Barbara A. Lackman
National Broadcasting Co., Inc.
3000 West Alameda Avenue
Burbank, CA 91523

Re: **National Broadcasting Co., Inc.**
Case No. 26-15839-308

Dear Ms. Lackman:

This letter is intended to respond to your letter of March 1, 1991, addressed to James Curry, Acting Labor Commissioner. This will also confirm our telephone conversations of early March and, in addition, will respond to your letter of March 25th directed to me.

Initially, I wish to take this opportunity to thank you for the very professional manner in which you have responded to my inquiries regarding this case. You are correct in pointing out that the issues are relatively novel; however, I disagree with your conclusion that I agree with you that the collective bargaining agreement exemption in the Wage Orders is ambiguous. Frankly, I believe the IWC Orders are quite clear; it is the federal law in this area that should be clarified.

As I pointed out to you in our conversations, it is not the intent of the Division of Labor Standards Enforcement to interfere in any way with the collective bargaining process. The Division has historically taken a position that is neither employer- nor union-oriented and we intend to see to it that this posture is maintained. However, having said that, we must also recognize our responsibilities under the law in California.

The Industrial Welfare Commission Orders provide that the overtime provisions shall not apply "to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage for such employee of not less than one dollar per hour more than the minimum wage." The facts in this case reveal that the terms of the collective bargaining agreements that have been in place between NBC and NABET far exceed those requirements. The issue, of course, is whether the NBC employees were, in fact, "covered by a collective bargaining agreement" during the period of on or about April 1, 1990, through February 8, 1991.

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As I discussed with you in one of our phone conversations, the Division has a long-established policy that provides that the mere expiration of a collective bargaining agreement will not operate to remove the worker from coverage by the collective bargaining agreement. Absent some other unilateral action by the parties to the expired CBA, the terms and conditions of the agreement (except for arbitration and union recognition) continue. In the vast majority of cases the parties reach agreement and retroactively implement the newly negotiated terms and conditions. In a much smaller number of cases, impasse is declared and either the union strikes or the employer imposes its own terms and working conditions. Even in these cases, however, the parties most often will subsequently reach some agreement and a retroactive collective bargaining agreement is implemented.

It is because of this history of collective bargaining that the Division has taken the position that mere expiration of the agreement will not suffice to trigger the requirement that the employer comply with the overtime obligations contained in the IWC Orders. Measuring the need for overtime compliance from the date of expiration of the contract, absent other actions, would make enforcement of the Orders impossible, for if the parties subsequently reached agreement, and that agreement was retroactive, the overtime obligation would not apply during the period of retroactivity. Therefore, if the Division were to measure the date the obligation of the employer arises to meet the overtime requirements simply from the date of expiration of the CBA, the state would be needlessly inserting itself into the collective bargaining process. It is for this reason that the Division measures the date the employer's obligation arises from the date of the expiration of the contract only if subsequent events indicate that such date did, actually, mark the cessation of the protections contained in that contract. Implementation of unilateral conditions[1] by the employer without subsequent negotiations which result in contract terms which are retroactive to the date of the expiration would make the term "agreement" meaningless for there would be no mutual assent.

Obviously, in providing the exemption from the overtime obligation in the case of workers who are covered by a collective bargaining agreement containing the minimum standards outlined above, the Commission recognized that workers under those circum-

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[1] Even in the event of impasse, however, a subsequent agreement which is retroactive to the date of the expiration of the CBA would require the conclusion that the workers had been employed "under the terms" of the agreement during the period of retroactivity and the employer's obligation to pay overtime pursuant to the IWC Orders could not be enforced. For this reason, the Division will not act to enforce the provisions of the Orders until there clearly is no reasonable chance for a retroactive agreement to be reached by the parties.

stances were probably adequately protected by their collective bargaining agent's representation. Such protection would alleviate the need for the minimum protections afforded by the Industrial Welfare Commission Orders.[2]

In this case, NBC declared an impasse and unilaterally implemented new terms and conditions of employment on or about August 15, 1990. According to our investigation, the selectively-implemented terms and conditions had the effect, *inter alia,* of decreasing per diem allowances paid to employees assigned to out-of-town work; deleted the provisions for additional compensation for those workers required, under certain circumstances, to work on their sixth and seventh day, and reduced the night shift differential for certain workers. Actually, it would not matter which terms or conditions had been implemented, the fact that the implementation is unilateral clearly demonstrates that there was no mutual assent. Thus, it is clear that during that period of time, the collective bargaining agent could not protect the interests of the employees and the enforcement of the minimum standards prescribed by the state becomes necessary.

On or about February 8, 1991, the National Broadcasting Company and NABET did reach agreement on a new contract to be effective that date. But during the period March 31, 1991, through February 7, 1991, the workers effectively had no protection. For instance, the right to arbitrate grievances which arose under the terms of the CBA between April 1, 1990, and February 8, 1991, did not exist and any alleged grievances which arose during that period of time could not be remedied. It is the guarantee of basic protections such as grievance arbitration which is enjoyed by most workers employed under the terms of a collective bargaining agreement which is the *quid pro quo* for the exemption allowed by the Commission. Absent any of the protections usually afforded to workers under a CBA, there is no consideration for the extension of the exemption from the overtime requirements.

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[2] The statement in your January 18th letter to Deputy Alice Watson to the effect that "the policy underlying Section 3(F) is to allow for an exception to the Wage Order's overtime provisions when employees perform services pursuant to collectively-bargained overtime provisions" is incomplete. The policy is to allow an exception to the overtime requirements set out in the minimum standards adopted by the Commission when the employee's rights are protected by the terms of a collective bargaining agreement. The Orders simply set out minimum standards which must be met in the collective bargaining agreement before the exception is applicable. One of the minimum standards which must be present in the collective bargaining agreement is the right to premium rates for overtime; but the Orders leave to the parties the definition of "overtime" and the amount of the "premium". The rationale for the exception is the fact that the worker is adequately protected.

I have read each of the cases which you have cited. Frankly, I do not find them in the least persuasive. As I am sure you will agree, there are no cases directly on point. I understand your position and I believe that you have argued it well. However, in view of the well-established rules of statutory construction which require that remedial legislation be broadly construed to effect the remedy it is designed to implement, coupled with the equally important consideration that exceptions from the requirements of remedial legislation must be narrowly construed, I can find no reason for excepting NBC from the overtime provisions of the California Industrial Welfare Commission Orders in regard to those NBC employees employed in this state who were not "covered by a collective bargaining agreement" between April 1, 1990, and February 7, 1991.

In your letter of March 25th, you express your opinion that it would be inappropriate for a suit to be filed based upon the complaints which have been filed with our Los Angeles BOFE unit. The Division agrees that such a suit would be inappropriate at this time. However, that decision is based not upon the merits of the issues raised, but upon the legislative mandate imposed upon the Labor Commissioner by the provisions of Labor Code §90.5. The enforcement plan of the Division, consistent with the language of §90.5(c), is concentrated in industries, occupations, and areas in which employees are relatively low paid and unskilled and in those in which there has been a history of violations of the minimum wage and overtime laws. In view of the current limited resources available to the Division coupled with the relatively high pay and skill of the affected employees, enforcement by way of a suit against NBC under these circumstances would not be in keeping with the Division's legislatively imposed mandate. However, any employee affected may file a claim with the appropriate District Office where the claim will be handled through the Hearing process provided for in Labor Code §98(a) et seq.

In view of the fact that you requested copies of the briefs filed in the matter of *Livadas v. Aubry* which is currently before the Ninth Circuit, I will anticipate the defense you may raise regarding the provisions of Labor Code §229. In the instant case it is only the minimum standards set out in the IWC Orders which are at issue and the Hearing Officer need not interpret or apply any of the terms of the CBA because there exist objective standards in the Orders for determining the amount of damages.

Mr. Ralph M. Phillips, Esq., of the firm of Wohler, Kaplon, Phillips, Vogel, Shelley & Young, representing NABET and, I assume, the interests of the workers, has written to me about this matter and asked that he be apprised of the Division's opinion. I will provide Mr. Phillips with a copy of this letter for his information.

Again, I would like to thank you for your professional courtesy. Your grasp of the law and the issues in this case made our telephone conversations interesting and enlightening. It continues to be a pleasure to deal with you.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

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