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COLLECTIVE BARGAINING AND EMPLOYEE BENEFITS

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Chapter 18
COLLECTIVE BARGAINING AND EMPLOYEE BENEFITS

I. Introduction

II. Duty to Bargain Over Employee Benefits

A. Duty to Bargain Over Pension, Profit Sharing, and Stock Plans and Benefits

B. Duty to Bargain Over Welfare Plans and Benefits

1. General

An employer must provide actual notice to the union of proposed changes to benefit plans before it can assert the defense that the union waived its right to request bargaining. In *The Am. Nat’l Red Cross, Great Lake Blood Services Region & Mid-Michigan Chapter & Local 459, Office & Prof’l Employees Int’l Union, AFL-CIO & Local 580, Int’l Bhd. of Teamsters*, 2011 WL 1734505 (N.L.R.B. Div. of Judges May 5, 2011) (“Red Cross”), the employer sent a memo in October 2008 to its employees—not the union—that notified them of some changes in benefits to take effect in January 2009. When the union charged that the employer had failed to bargain over these changes, the employer replied that the union should have requested bargaining when it learned of the memo.

The Board held that the employer violated Sec. 8(a)(5) by failing to bargain over these changes. Since the employer never provided notice to the union, the Board also ruled that the employer could not assert that the union waived its right to bargain. In so holding, the Board distinguished *KGTV*, 355 NLRB No. 213 (2010); *Bell Atlantic Corp.*, 336 NLRB 1076 (2001), and *Haddon Craftsmen*, 300 NLRB 789 (1990), review denied sub nom. *Graphic Communications Union, Local 97B v. NLRB*, 937 F.2d 597 (3rd Cir. 1991) (table), cases where the employer provided actual notice to the union of proposed changes in benefits.

The Board stressed that an employer has obligation to provide the union with notice when changes are proposed, not after the employer has already decided to implement them.

2. Retiree Welfare Benefits

III. Circumstances Where Bargaining May Not Be Required Over Plan Issues

A. Attenuated Connection With Plan

B. Conflict With Policies of the NLRA

The Board has held that plan issues were not mandatory subjects of bargaining and/or that unilateral action by an employer respecting them was lawful, because a contrary holding would undermine the policies of the NLRA. See e.g., *ServiceNet, Inc.*, 340 NLRB 1245, 173
Conversely, the Board has held an employer violates the duty to bargain in good faith by unilaterally implementing, post-impasse, a proposed clause providing that virtually all aspects of its medical and dental plans were subject to change at the employer’s discretion. See e.g., *KSM Indus., Inc.*, 336 NLRB 133, 169 LRRM 1445 (2001).

The conflicts with the NLRA are exemplified by the Board’s continuing battle with the Ninth Circuit over unilaterally ceasing dues-checkoff after the expiration of a collective bargaining agreement. See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 (2010); *Local Joint Exec. Bd. of Las Vegas Culinary Workers Union Local 226 v. NLRB*, 540 F.3d 1072, 1082 (9th Cir. 2008); *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007); *Local Joint Exec. Bd. of Las Vegas Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 585 (9th Cir. 2002); *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000).

In the latest development, the Ninth Circuit again remanded the case to the Board after rejecting its 2010 ruling on this issue. See *Local Joint Exec. Bd. of Las Vegas Culinary Workers Union Local 226 v. NLRB*, 657 F.3d 865, 876-77 (9th Cir. 2011). The Ninth Circuit stated that the Board has “three times failed to provide a workable rule, and the parties cannot be expected to wait any longer.” Consequently, the Ninth Circuit determined that the employer violated the duty to bargain in faith by ceasing the dues-checkoff, and the court remanded the case for the limited determination about what relief is warranted.

**C. No Change in Existing Conditions of Employment**

An employer commits an unfair labor practice if it makes material or substantial changes in wages, hours, and working conditions during the term of a CBA. *NLRB v. Katz*, 369 U.S. 736, 742-44 (1962). In *Quality Health Services of P.R., Inc.*, 356 NLRB No. 95 (2011), for instance, the Board held that unilaterally reducing paid holidays and ceasing to provide holiday pay were “material, substantial, and significant” reductions in benefits. In *QHS*, Administrative Law Judge Cates reasoned that the changes must have been significant because the employer’s letters confirmed that labor costs were a factor in the employer’s decisions.

Unless discharged or waived, the duty to bargain concerning benefits continues during the term of the collective bargaining agreement. *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952); *Caribbean Int’l News Corp.*, 357 NLRB No. 133 (2011) (finding unilateral change to employee benefits was unfair labor practice). However, an exception to the general rule that the employer’s unilateral change violates the Act is where the union has “clearly and unmistakably” waived its right to negotiate over the change. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board and the courts will not infer a waiver from general statements in a CBA. Rather, the contract language establishing waiver must be specific, or “it must be shown that the party alleged to have waived its rights consciously yielded its interests in the matter.” See *Allison Corp.*, 330 NLRB 1363, 1365 (2000). See also *California Offset Printers, Inc.*, 349 NLRB 732 (2007); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007); *Baptist Hosp. of East Tennessee*, 351 NLRB No. 12 (2007).

In *Uwanta Linen Supply, Inc.*, 357 NLRB No. 55 (2011), for example, the Board held that the employer violated the duty to bargain in good faith by changing the health insurance benefits without the union’s consent. In *Uwanta*, the Board relied upon the employer’s
admission that it “did not contact the Teamsters or Workers United because we did not believe it would take very long to either reinstate coverage or find another provider.”

Section 8(d) of the NLRA imposes certain notice, bargaining and other obligations upon a party seeking to modify a CBA. 28 U.S.C. § 158(d). In Bath Iron Works, the Board held that for purposes of Section 8(d), whether an employer has unlawfully “modified” a benefit program in the CBA without meeting those obligations depended on whether the employer had a “sound, arguable basis” for its interpretation of the CBA. Bath Iron Works Corp., 345 NLRB No. 33 (2005), aff’d sub nom. Bath Marine Draftsmens Ass’n v. NLRB, 475 F.3d 14 (1st Cir. 2007). Under this analysis, if the employer had a “sound arguable basis” for modifying the contract, no unlawful unilateral change occurred. On the other hand, some “arguable basis” may be insufficient. For instance, the Board held that a Puerto Rico law did not justify deviations from a contractual bonus arrangement. San Juan Bautista Medical Center, 356 NLRB No. 102 (2011) (holding that respondent’s failure to pay a Christmas bonus violated Section 8(a)(5), in part, because the employer was not privileged to rely on Puerto Rico Law 148 for the change).

The remedy for unilaterally changing the employee benefits is to order the employer to cease and desist from making the unilateral change, to rescind the unlawful change, and to restore the status quo ante. See e.g., Bohemian Club, 351 NLRB 1065, 1068 (2007). The remedy also includes making employees whole for the adverse effects of the change. See e.g., Trim Copy of America, 349 NLRB 608, 609-10 (2007). In Goya Foods, 356 NLRB No. 184 (2011), the Board reversed Brooklyn Hospital Center, 344 NLRB 404 (2005), which conditioned the make whole remedy on whether the union accepted the change in benefits. In Goya, the Board reasoned that Brooklyn Hospital was inconsistent with prior precedent and it failed to compensate employees for the economic losses cause by the unilateral change. As a result, in Goya the Board ordered the employer “to make whole bargaining unit employees for all losses suffered as a result of” the unlawful unilateral change, regardless of whether the union ultimately agrees to the change in benefits as part of the collective bargaining process.

D. Waiver or Consent to Changes

1. Provisions Commonly Found in Plan Documents

2. Provisions Commonly Found in CBAs

3. Acts of Omissions Showing Acquiescence

Consistent with general case law under the NLRA, the Board has found that a union’s failure to object to an employer’s past practice with respect to the plan may, in some cases, justify unilateral plan action by the employer, although it does not always have this effect. See e.g., Manitowoc, Ice, Inc., 344 NLRB 1222, 177 LRRM 1341 (2000); Mississippi Power Co., 332 NLRB 530, 165 LRRM 1225 (2000).

In Beacon Sales Acquisition, 357 NLRB No. 75 (2011), the Board held that the employer violated the duty to bargain in good faith by unilaterally implementing health insurance premium increases since the union did not “clearly and unmistakably” waive the right to challenge the
unilateral implementation in a non-Board settlement. Further, the Board held that the employer was not privileged to implement the increase by virtue of an impasse because the parties had not reached an “overall impasse” in bargaining.

In *Church Square Supermarket*, 356 NLRB No. 170 (2011), the Board affirmed Administrative Law Judge Wedekind’s conclusion that the union did not acquiesce to the unilateral failure to make benefit fund contributions or to change the health insurer after the expiration of the labor contract. The employer failed to show that a past practice existed concerning the contributions or that the practice occurred with such regularity and frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis.

E. Impasse

As a general rule, unilateral action by an employer that changes wages, hours, working conditions or other mandatory topics of bargaining violates section 8(a)(5). An employer may unilaterally implement changes in benefits after the parties have reached a bargaining impasse after good faith negotiations. See *The Developing Labor Law*, (BNA, 5th Ed. 2006), Ch. 13, Section VI. However, once the employer implements those changes, they become terms and conditions of employment, and the employer may not unilaterally modify them without good faith bargaining to impasse. *Dayton Newspapers, Inc.*, 354 NLRB No. 32 (2009).

In *KLB Industries, Inc.*, 357 NLRB No. 8 (2011), the Board adopted, over Member Hayes dissent, Administrative Law Judge Goldman’s conclusion that cancelling locked out employees’ health care coverage and denying the locked out employees COBRA eligibility was unlawful. Judge Goldman reasoned that cancelling the coverage did not represent the implementation of a bargaining proposal made before a valid bargaining impasse, making the unilateral change in benefits unlawful.

In *California Pacific Medical Center*, 356 NLRB No. 159 (2011), the Board adopted Administrator Law Judge Wacknov’s dismissal of the unfair labor practice complaint because the employer fully bargained with the union before implementing the last, best, and final offer, which included changes to the health insurance benefits. Judge Wacknov reasoned that the employer gave the union “timely notice” with “extensive bargaining” prior to implementing the healthcare proposal.

IV. Recurring Issues Respecting the Duty to Bargain in Employee Benefit Cases

A. Selection of Insurance Carrier

In *Pye v. Longy School of Music*, 759 F. Supp. 2d 153 (D. Mass. 2011), the court denied the Regional Director’s request for §10(j) injunctive relief as it related to changes made to employee benefits, which included changes in the insurance carrier and increases in deductibles and copays, and changing the amount of employer contributions for two bargaining unit employees. The court held that the benefit changes did not give rise to irreparable harm, finding that the impact that the changes had on the bargaining process were no more easily addressed
now, than after an adjudication on the merits. The court also noted that the change in the insurance carrier to BCBS was “at least arguably beneficial to some employees.”

In Church Square Supermarket, 356 NLRB No. 170 (2011), the Board adopted the ALJ’s findings that the employer violated the Act by changing the employees’ health insurer and ceasing fringe benefit contributions during negotiations for a successor contract. The evidence did not establish that the employer proposed either change at the bargaining table prior to implementation. Moreover, even if the changes were sufficiently similar to prior proposals, there was no genuine impasse. Member Hayes relied on the fact that the employer’s actions were not consistent with any prior proposals and found it unnecessary to rely on the ALJ’s determination that there was no bargaining impasse.

B. Increases in Employee Contributions

In Caterpillar v. NLRB, 2011 WL 2555757 (D.C. Cir. May 31, 2011), the court denied Caterpillar’s petition for review of a Board order finding that Caterpillar violated the Act when it unilaterally implemented a “generic first” prescription drug program. Under the program, employees had to pay the full retail price for brand-name drugs whenever a generic equivalent was available unless the prescribing physician specified that the generic equivalent was not appropriate. Employees previously could choose between generic and brand name drugs, so long as they paid the increased co-pay. The court held that the Board reasonably concluded that the new program was a material, substantial change that required bargaining and that the prior changes to employees’ prescription drug benefits did not establish a past practice.

In Quality Roofing Supply Co., 357 NLRB No. 75 (2011), the Board found that the employer violated the Act by unilaterally increasing health insurance premiums for its union-represented employees. The employer argued that the union waived its right to file a charge challenging the unilateral change when it entered into a February 2009 non-Board settlement that required the union to “inform” the NLRB that it would be withdrawing all pending unfair labor practice charges or appeals with prejudice. At the time, there was a pending charge challenging a false claim of a bargaining impasse. The subsequent charge challenged the unilateral implementation of increase in contributions. Thus, the withdrawn charge and the subsequent charge involved different claims and there was no clear and unmistakable waiver of the right to bargain.

C. Failure to Contribute to a Plan

In Uwanta Linen Supply, Inc., 357 NLRB No. 55 (2011), the Board granted a motion for default judgment after the insurer filed an untimely answer that, in any event, effectively failed to deny the substance of the complaint’s allegations. The answer failed to deny the cessation of the unit employees’ insurance coverage or even deny the employer’s responsibility for the cessation of coverage. Thus, the Board found that the employer unlawfully failed to maintain group health insurance for its employees in two separate bargaining units, without providing notice and an opportunity to bargain.

In Irving Ready-Mix, Inc., 357 NLRB No. 105 (2011), the Board adopted the ALJ’s ruling that the employer violated the Act by ceasing to make retirement fund contributions
required by its last contract with the union. The ALJ found that the employer did not bargain with the union before changing the pension benefits.

In *Church Square Supermarket*, 356 NLRB No. 170 (2011), discussed above, the Board adopted the ALJ’s findings that the employer violated the Act by failing to make fringe benefit contributions while the parties were negotiating for a successor contract and had not reached an impasse.

In *Décor Group Inc.*, 356 NLRB No. 180 (2011), the employer did not argue that there was in impasse in bargaining that permitted it to cease paying Health Fund contributions, as required by the expired collective bargaining agreement. Instead, the employer believed that it could stop making the payments at the end of the contract. The Board found that the employer violated the Act by failing to provided notice or an opportunity to bargain and also rejected several defenses raised by the employer. First, it was not necessary to defer the unfair labor practice charge to the parties’ grievance and arbitration procedure. This is because any grievance filed regarding the failure to contribute did not “arise under” the expired contract, but was instead triggered by events that occurred after the contract’s expiration. Second, the employer was not permitted to stop making payments on behalf of all of its employees on the grounds that only 27 percent of the employees utilized the Health Fund. To the contrary, it was bound by the expired contract to continue making fund payments for all employees. Third, the Board rejected the defense of *res judicata* and collateral estoppel based on the voluntary dismissal of a lawsuit brought by the Fund’s Trustees, finding that there was no final judgment on the merits. Finally, the Board declined to dismiss the complaint because of the Union’s “unclean hands.”

In *Republic Windows & Doors, LLC*, 356 NLRB No. 175 (2011), the Board granted a motion for default judgment and ordered make whole relief after the employer ceased remitting moneys deducted from employees’ paychecks for contributions to their 401(k) retirement plans and ceased matching contributions on those moneys, as required by the collective bargaining agreement. *See also Buggy Whip*, 356 NLRB No. 80 (2011) (granting motion for default judgment after employer terminated monthly contributions to pension and welfare funds on behalf of unit employees following expiration of the CBA without providing notice and an opportunity to bargain); *ACE Green*, 356 NLRB No. 97 (granting motion for default judgment after employer refused to recognize and bargain with union that represented employees of predecessor employer and, among other things, changed health and welfare and pension contributions).

V. The Duty to Supply Information

In *NLRB v. Whitesell Corp.*, 638 F.3d 883, 894-895, 190 LRRM 2769, enf’g 355 NLRB No. 134 (8th Cir. 2011), the employer violated its duty to provide information by failing to provide information on how its vacation proposal would impact employees’ already-earned benefits and how its merit pay proposal was administered at its other facilities. It also cancelled a voluntary supplemental accident fund without bargaining on the issue.

*Whitesell Corp.*, 357 NLRB No. 97, 191 LRRM 1462 (2011) examined several alleged failures or delays in providing information after the employer, unilaterally having declared
impasse and implemented its proposal, was ordered by the USDC for the Southern District of Iowa to bargain in good faith. Of several allegations relating to providing information relevant to proposals for employee benefits, the one found actionable was Respondent’s failure to define “full time employment” for the purposes of eligibility for the health insurance benefit that the parties were negotiating. The ALJ found that the respondent gave contradictory answers over a period of nine months before it provided an answer to the union and held that the NLRA was violated by respondent’s delay in providing information.

In *Regency House of Wallingford, Inc.*, 356 NLRB No. 86, 190 LRRM 1065 (2011), a case first heard in 2002, the Board found Respondent guilty of unlawfully withholding information about, inter alia, the pension, fringe benefits, wages, and the weekend bonus plan. Later Respondent withdrew recognition of the union based upon a decertification petition and contended it had no further obligation to provide such information. Because the information was necessary and relevant to the union’s position as bargaining agent, respondent’s reliance upon the decertification petition to deny the union the information was unlawful.

In *New Vista Nursing and Rehabilitation*, 357 NLRB No. 69, 191 LRRM 1431 (2011) (summary judgment in a refusal-to-bargain case), the respondent employer violated the NLRA by refusing to provide any information, including: total costs to the employer for health, dental, vision, life insurance and pension/retirement plan; the names of employees covered by health insurance in the categories of single, family, employee/spouse, and employee/child; documents reflecting health insurance premiums paid by unit employees; the summary plan descriptions for health, life, dental and retirement benefits; documents reflecting the unit employees who opted out of health coverage; and, documents reflecting paid time off benefits of holidays, vacation, sick days, personal days, and the related accrual formulas. The Board ordered that the employer provide all information.

VI. Interference and Discrimination Cases and Related Issues

A. Threats to Withdraw or Promises to Grant Benefits

In *Dodge of Naperville, Inc.*, 357 NLRB No. 183 (2012), the employer violated the Act when it told employees that they could work at its new location, but they would not have union benefits, they would not be a union operation, and that they would be discharged if they engaged in a strike and be unable to collect unemployment.

In *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011), the employer violated Sec. 8(a)(1) of the Act when it told employees that they would lose their gain share bonuses, because they would not be eligible, and other benefits, such as incentive dinners, cups, and t-shirts, if the employees selected union representation.

In *Pride Ambulance Co.*, 356 NLRB No. 128, 190 LRRM 1265 (2011), the employer violated Section 8(a)(1) when it told employees that they would incur a 90-day waiting period to re-activate their health insurance if they struck.

In *Longview Fibre Paper and Packaging, Inc.*, 356 NLRB No. 108, 190 LRRM 1277 (2011), the employer violated the Act by telling employees that its previously announced plan to
convert to an improved paid time off plan would not take place if the union won the election and instead would have to be negotiated; the judge found that it implied that if the employees wanted to see the improved plan take place, it should vote against the union. The employer also threatened that employees could not participate in the 401(k) plan, which would be replaced by a lesser plan. The employer violated the Act by “maintaining…in its written company pension plan, an eligibility provision that automatically foreclosed employees from participating if they were represented by a union.” (fn.3)

B. Benefit Plan Provisions Related to Union Status

1. Exclusions From Coverage Based on Union Status

2. Credit Provisions Based on Union Status

3. Benefits for Employees on Union Leave

C. Treatment of Employee Benefits During a Strike

In *Pride Ambulance Co.*, 356 NLRB No. 128, 190 LRRM 1265 (2011), the employer unlawfully terminated strikers, but also told them that, if they were reinstated to their positions, they must wait 90 days before they could be eligible for health care benefits. The employer maintained that the waiting period was mandated by the plan. However, the Board majority found that because the strikers were unlawfully terminated, the 90-day period was also unlawful. Even were that not the case, the decision cited several cases for the proposition that “the Board held employers to be responsible for the full restoration of returning strikers’ insurance benefits, despite the terms of the insurance plans themselves.” *Id.* at 4. The decision cited *Cone Bros. Contracting Co*, 158 NLRB 186, 187-188 (1966): “[T]he right to insurance coverage had accrued to the employees” and “strike activity does not entail acceptance after the strike of a smaller quantum of vested job rights and privileges.”

VII. Arbitration of Benefit Issues Under Collective Bargaining Agreements

The Eighth Circuit reversed a district court decision compelling arbitration of a retiree health dispute. In *Newspaper Guild of St. Louis, Local 36047, TNG-CWA v. St. Louis Dispatch, LLC*, 641 F.3d 263 (8th Cir. 2011), the employer unilaterally implemented a change to its retiree health plan, which required retirees for the first time to contribute 30% of the cost of their health insurance premiums. The union filed a grievance and the employer refused to arbitrate. The union then filed a district court action seeking a motion to compel. The district court noted that the arbitration would cover the dispute under the terms of the expired CBA only if the CBA conferred vested rights, but the court refused to decide that issue because to do so would be to rule on the merits of the dispute. Nonetheless, the district court ordered the employer to arbitrate so that an arbitrator could consider the issue in the first instance.

The Eighth Circuit, in accordance with its prior decision in *Crown, Cork & Seal Co. v. Int’l Ass’n of Machinists & Aerospace Workers*, 41 EBC 2104 (8th Cir. 2007), reversed the district court’s decision and held that the issue of vesting must be decided to determine whether or not the dispute is arbitrable and remanded the case to the district court.
VIII. Preemption Under the NLRA and LMRA

A. NLRA Preemption

B. LMRA Section 301 Preemption

The Sixth Circuit reversed a district court finding that Section 301 of the LMRA preempted a long-running dispute between CNH and the UAW. *CNH Am. LLC v. UAW*, 645 F.3d 785, 51 EBC 1813 (6th Cir. 2011). This decision was the latest series of litigation battles between the UAW (and its retirees) and CNH, the successor to Case Corporation, related to retiree health benefits. *See Reese v. CNH Am. LLC*, 47 EBC 1385 (6th Cir. 2009) and *Yolton v. El Paso Tenn. Pipeline Co.*, 36 EBC 2217 (6th Cir. 2006).

The retirees, funded by the UAW, had previously obtained a preliminary injunction barring CNH from unilaterally terminating their healthcare benefits in *Yolton*. CNH then sued UAW claiming that its participation in the first litigation violated provisions of its current CBA and a VEBA agreement and that the UAW committed several state law torts during the negotiations for the agreement by misrepresenting that the UAW had authority to negotiate on behalf of the retiree class involved in the *Yolton* litigation. The district court held that the UAW did not breach the agreement or the CBA and held that Section 301 of the LMRA preempted CNH’s state law claims.

The Sixth Circuit reversed and held that the state law tort claims brought against the union did not require the court to interpret the CBA and therefore were not preempted by Section 301. The Court reasoned that the claims focused on pre-contractual conduct and not the terms of the CBA.