REPORT OF THE SUBCOMMITTEE ON COLLECTIVE BARGAINING AND EMPLOYEE BENEFITS

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EMPLOYEE BENEFITS LAW
Chapter 18
COLLECTIVE BARGAINING AND EMPLOYEE BENEFITS

I. Introduction

In 2018, the Supreme Court and the Board issued decisions reaffirming recent notable rulings by each tribunal on collective bargaining and employee benefits. In *CNH Indus. N.V. v. Reese*, 138 S.Ct. 761 (2018), the Court reversed a Sixth Circuit ruling and held that its 2015 decision in *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015) compelled lower courts to disregard the “Yard-Man” inference and to interpret CBAs according to ordinary principles of contract law. Similarly, in *E.I. du Pont de Nemours*, 367 NLRB No. 12 (2018), the Board reaffirmed *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), which reversed earlier decisions prohibiting unilateral post-expiration changes to collectively bargained benefits, notwithstanding expiration of the management-rights clause or ostensible past practice.

II. Duty to Bargain Over Employee Benefits

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

In *StaffCo of Brooklyn, LLC v. National Labor Relations Board*, 888 F.3d 1297 (D.C. Cir. 2018), the D.C. Circuit held that the employer violated the NLRA when it unilaterally discontinued contributions to a union pension plan after the CBA expired. Without a clear waiver of bargaining rights through past practice or plan documents, the employer was obligated to bargain over this change in pension contribution.

B. Duty to Bargain Over Welfare Plans and Benefits

1. General

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

Last year, the United States Court of Appeals for the Ninth Circuit issued another opinion in its disagreement with the Labor Board over *Bethlehem Steel*, 136 NLRB 1500 (1962), regarding whether a dues check off provision survives the expiration of a collective bargaining agreement. See e.g., *Local Joint Exec. Bd. of Las Vegas Culinary Workers Union Local 226 v. NLRB*, 657 F.3d 865, 876-77 (9th Cir. 2011). In *Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129 (9th Cir. 2018), the Court of Appeals vacated the Board’s order concerning an employer’s unilateral termination of the union’s dues-checkoff procedures (following expiration of the collective bargaining agreement) without bargaining to impasse with the union. In a “right-to-work” state, the
Court reasoned that a dues-checkoff is similar to any other mandatory subject of bargaining that the employer cannot cease without bargaining to impasse.

C. No Change in Existing Conditions of Employment

In *E.I. du Pont de Nemours*, 367 NLRB No. 12 (2018), the Board in a 2-1 decision reaffirmed last year’s notable decision to overrule prior cases as stated *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). To summarize, the majority held that the employer’s modification to healthcare benefits were permissible because the reservation of rights provisions of a collective bargaining agreement (involving the union’s right to demand bargaining over the modifications) did not survive contract expiration.

In *Woodcrest Health Care Center*, 366 NLRB No. 70 (2018), the Board held that the employer unlawfully withheld benefits to employees engaged in a certification election while announcing the intent to provide those benefit improvements to employees outside the proposed bargaining unit. The Board reasoned that, although there was no change in benefits for the prospective unit, there was a coercive effect in withholding benefits from eligible voters during the certification process.

D. Waiver or Consent to Changes

1. Provisions Commonly Found in Plan Documents

2. Provisions Commonly Found in CBAs

3. Acts or Omissions Showing Acquiescence

In *Consolidated Communications Holdings, Inc.*, 366 NLRB No. 152 (2018), the Board affirmed the dismissal of the complaint against the employer. The Board agreed that the employer did not commit unfair labor practices by declining to lower health benefit premiums during collective bargaining. The Board reasoned that the parties did not have a past practice because there was insufficient evidence that reducing the premiums each year occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis.

E. Impasse

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

A. Selection of Insurance Carrier

In *Orchids Paper Prod. Co.*, 367 NLRB No. 33 (Nov. 20, 2018), Board concluded that the employer violated the act by changing the employee’s health insurance. The employer first notified the union that it was changing health providers after it had already selected a new provider. Although the employer argued that the General Counsel failed to establish that the change was substantial, material, and significant, the Board noted that “the identity of the employees’ health
insurance carrier is as much a mandatory subject of bargaining as is the level of benefits the employees enjoys.”

B. Increases in Employee Contributions

C. Failure to Contribute to a Plan

In *StaffCo of Brooklyn, LLC v. Nat'l Labor Relations Bd.*, 888 F.3d 1297 (D.C. Cir. 2018), the Court of Appeals affirmed the Board’s conclusions that the employer violated the Act when it discontinued contributions to the pension plan following the expiration of the collective bargaining agreement. The Court found that one of the plan documents, a Policy for Continuation of Coverage Upon Expiration of a Collective Bargaining Agreement (“the Policy”) did not constitute a waiver of the union’s right to bargain. The Court concluded that there was no language in the Policy that expressly provided the employer with a unilateral right to cease making pension contributions. Instead, the conclusion that the Policy language permitted the employer to cease contributions depended on an inference. Accordingly, the Policy lacked the clarity needed to constitute a waiver of the union’s right to bargain about pension contributions. The Court also rejected the employer’s argument that there was an implied waiver by a failure to timely demand bargaining as well as the employer’s affirmative defense of impossibility, finding that the employer failed to meet its burden that the plan would have refused the contributions.

V. The Duty to Supply Information

In *Ingredion, Inc. d/b/a Penford Products Co.*, 366 NLRB No. 074 (May 1, 2018), the employer violated the Act by failing to timely provide information regarding employee insurance and pension benefits. The Board concluded that this information was “presumptively relevant.” Moreover the employer’s delay of 2.5 months in providing the information violated the act, particularly because the employer did not establish a valid reason for the delay.

VI. Interference and Discrimination Cases and Related Issues

A. Threats to Withdraw or Promises to Grant Benefits

In *Hendrickson USA, LLC & Gary Pemberton*, 366 NLRB No. 7 (Jan. 25, 2018), the Board in a 2-1 decision held that the employer violated Section 8(a)(1) during a union organizing drive by telling employees that the employer and the union “would begin the negotiating process from scratch.” The Board found that the employer “conveyed that if employees authorized a union at its facility, they would lose their current wages and benefits,” which constituted “a threat and essential guarantee by [the employer] that by bringing in the Union, all negotiations for wages and benefits would start at zero.”

A March 14, 2018, ALJ decision found that an Employer violated Section 8(a)(1) by announcing to unit employees who had just voted for union representation that their pension plan would be frozen. *Giant Eagle, Inc., Respondent, & United Food & Commercial Workers Int'l Union, Local 23, CIC, Charging Party*, JD-19-18, 2018 WL 1325594 (Mar. 14, 2018). The ALJ noted this announcement constituted a violation notwithstanding the employer’s contention (which
the ALJ accepted) that the mailing was sent to union employees inadvertently as part of a larger mailing to nonunion employees.

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

VII. Arbitration of Benefit Issues Under Collective Bargaining Agreements

The Sixth Circuit case reported last year, *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Kelsey-Hayes Company, TRW Auto Holdings et al.*, 854 F. 3d 862 (6th Cir. 2017), was granted cert. and was vacated and remanded on February 26, 2018 for further consideration in light of *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018). *Kelsey-Hayes Company v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America*, 138 S.Ct. 1166 (2018). In the CNH case, the Supreme Court reversed a judgment in favor of lifetime benefits for retirees holding that under ordinary principles of contract law, the expired CBA did not create a vested right to lifetime health benefits and that the court could not create an ambiguity in the CBA by declining to apply the CBA’s general durational clause and then inferring vesting. The Supreme Court made it clear that the list of considerations found in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) could not be used as evidence of ambiguity as the holding in *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015) required the analysis be based strictly on ordinary principles of contract law, which was inconsistent with the Yard-Man analysis.

In *Ronald A. Cup v. Ampco Pittsburgh Corporation*, 903 F.3d 58 (3d Cir, 2018), a case involving a dispute over retiree health benefits, the Third Circuit reversed a District Court ruling ordering arbitration. Ampco, a successor owner of a manufacturing plant represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“Union”), announced plans to eliminate a healthcare plan for retirees established by the previous owner and to replace it with a reimbursement program, which was more costly to the retirees. The affected retirees opposed the change and argued that it violated a Memorandum of Agreement (“MOA”) regarding the status of the retiree health plan which stated that it would remain the same under the new ownership. The Union filed a grievance, but the Company rejected the grievance on the basis that the retirees were not represented by the Union and could not avail themselves through the grievance procedure. The Union and Ronald Cup, an affected retiree, filed suit to compel arbitration under the LMRA, to enforce the CBA and, alternatively, made an ERISA claim if the Court determined that the Company did not have to arbitrate the dispute. The District Court issued a ruling compelling arbitration on the basis of the broad language of the grievance procedure in the CBA and based on the strong federal policy in favor of resolving labor disputes through arbitration. The District Court also dismissed the Union’s
other claims without prejudice. Interpreting the CBA according to ordinary principles of contract law, the Circuit Court reversed and remanded because the CBA, which had an arbitration clause, did not mention any retiree health plan, and the MOA, which addressed the retiree health plan but did not have an arbitration clause, had not been incorporated into the CBA.

In *Buffalo Laborer’s Welfare Fund v. DiPizio Construction Company*, 318 F.Supp.3d 591 (W.D.N.Y. 2018), the District Court declined to compel arbitration as the arbitration clause in the CBA covered disputes between the employer and the Union, and the Fund, which was the plaintiff, was not a party to the CBA.

**VIII. Preemption Under the NLRA and LMRA**

**A. NLRA Preemption**

**B. LMRA Section 301 Preemption**

In *Alaska Airlines v. Schurke*, 898 F.3d 904 (9th Cir., Aug. 1, 2018), *petition for cert. filed* October 30, 2018, a plaintiff challenged her employer’s denial of her request to use vacation time to care for a sick family member. The employee claimed a right granted under the Washington Family Care Act (“WFCA”), Wash. Rev. Code § 49.12.270. The WFCA is a Washington state law that guarantees a worker flexibility to use accrued sick leave or other paid leave for family medical reasons provided that workers invoking the WFCA must generally “comply with the terms of the [CBA] or employer policy applicable to the leave,” except that they need not comply with terms or policies “relating to the choice of leave.” Wash. Rev. Code § 49.12.270(1).

The employer argued against the employee’s compliant filed with the Washington Department of Labor & Industries (“L&I”) with two principal objections: 1) L&I did not have jurisdiction to hear the complaint because the matter was really a CBA dispute and reserved for the Railway Labor Act (“RLA”) and application of the related body of law developed under the Labor Management Relations Act (“LMRA”), and 2) the state law should not be applied to the CBA vacation leave provisions and was essentially preempted by the relevant provisions of the RLA and LMRA. The L&I did not address the jurisdictional argument, but held for the employee and found that RLA preemption does not apply where the state law claim can be resolved independently of any CBA dispute, citing the Supreme Court holding of *Hawaiian Airlines v. Norris*, 512 U.S. 246, 256-58 (1994)(describing the same standard in the LMRA § 301 context).

While the L&I proceeding was ongoing, the employer filed a federal lawsuit arguing that the L&I action was preempted because the dispute was in fact bound to a arbitrate dispute over the CBA. The employee was not a party to the federal lawsuit, but her Union intervened on her behalf. The district court held that the WFCA claim was unrelated to any dispute over the meaning of the CBA, relying on a long line of RLA and LMRA cases. *See Livadas v. Bradshaw*, 512 U.S. 107, 124-25 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) and *Burnside v. Kiewit Pac. Corp.*, 491 F. 3d 1053, 1060 (9th Cir. 2007).

On appeal the employer renewed the argument that the RLA preempts the employee’s WFCA claim. A divided panel of the 9th Circuit held that RLA preemption did apply to the WFCA “because the right to take leave arises solely from the CBA. *Alaska Airlines v. Schurke*, 846 F. 3d
1081, 1093 (9th Cir. 2017). The 9th circuit granted rehearing en banc and affirmed the judgment of the district court. The en banc panel found that under both the RLA and LMRA § 301, federal preemption extends no further than necessary to preserve the role of grievance and arbitration, and the application of the federal labor law, in resolving CBA disputes. The sole fact that a state law cause of action is conditioned on some term or condition of employment that was collectively bargained does not itself create a CBA dispute. The employer filed a petition for certiorari on October 30, 2018 that is pending a decision from the Supreme Court.

In International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Honeywell International, Inc., 11-cv-14-36 (E.D. of Mich. March 29, 2018), the district court held that the employer was liable to pay retirees’ full health premiums for the length of a 2011 CBA, but the employer had no future liability to provide retiree healthcare. In the course of the district court litigation, defendants raised a counterclaim that the union failed to exercise due diligence or lacked authority to negotiate on behalf of the trustees the terms of the 2011 CBA. The union filed a motion for summary judgment on this issue and argued that the LMRA preempted the counterclaim because it required interpretation of the CBA. The court denied the union’s motion and on this issue the court held that the LMRA did not preempt the counterclaim because analysis of the conduct of union was all that was required not any interpretation of the CBA. After the full decision was issued by the district court, both parties appealed to the Sixth Circuit.