UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

UNIFLEX HOLDINGS, INC.

and **Case No. 29-CA-27718**

LOCAL 348-S, UNITED FOOD AND COMMERCIAL WORKERS, CLC

Tabatha Tyle, Esq., Counsel for the General Counsel.
Marc Zaken, Esq., Edwards, Angell, Palmer & Dodge, LLP, Counsel for the Respondent.
J. Warren Mangan, Esq., O'Connor & Mangan, P.C., Counsel for Charging Party.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on November 15, 2006 in Brooklyn, New York. The Complaint herein, which issued on August 25, 2006, and was based upon an unfair labor practice charge that was filed on May 31, 2006 by Local 348-S, United Food and Commercial Workers, CLC, herein called the Union, alleges that in about March 2006, Uniflex Holdings, Inc., herein called the Respondent, unilaterally modified the terms and conditions of employment of its unit employees by ceasing to make monthly contributions to the Union's Pension Fund, in violation of Section 8(a)(1)(5) of the Act.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

Most of the facts herein are not in dispute. The Complaint alleges, and the Answer admits:

> 7. The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:
>
> > All Respondent's employees, excluding executives, office workers, supervisors and guards as defined in the Labor Management Relations Act.

8. At all material times until about late December 2004, Uniflex, Inc., the predecessor employer to Respondent, herein called Uniflex, was engaged in the manufacture of plastic bags at the Westbury facility and employed the employees of Respondent in the Unit.

9(a) At all material times until about late December 2004, the Union was the exclusive collective-bargaining representative of Uniflex's employees in the Unit, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and was recognized as such representative by Uniflex.

9(b) Such recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective from February 1, 2001 until January 31, 2004, and was extended to December 31, 2004, by written agreement of the parties.

9(c) At all material times until about late December 2004 when Respondent acquired Uniflex's assets, based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of the Unit employees employed by Uniflex.

10. In about late December 2004 Respondent acquired the assets of Uniflex.

11. In late December 2004 or early January 2005, Respondent began operating substantially the same business as that formerly operated by Uniflex, at its facility.

12. In late December 2004, or early January 2005, Respondent hired as a majority of its employees in the Unit, individuals who were previously employees of Uniflex, and since then has continued to operate the same business as Uniflex in basically unchanged form.

15(a) On or about a date prior to January 20, 2005, Respondent recognized the Union as the exclusive collective bargaining representative of its employees in the Unit.

15(b) On January 20, 2005, Respondent and the Union commenced negotiations for a collective bargaining agreement.

Respondent does not admit all of the allegations contained in paragraphs 13, 14, 16 and 17. Paragraphs 13 and 14 allege that by virtue of the allegations contained in Paragraphs 10 through 12, which were admitted by the Respondent, the Respondent is a successor to Uniflex and that at all times since the Respondent acquired the assets of Uniflex, based upon Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of Respondent's unit employees. Respondent denies these allegations, except admits that it is a successor to the extent that it is obligated to recognize and bargain with the Union as the representative of its bargaining unit employees, and that the Union became the exclusive bargaining representative of the employees at the time that the Respondent hired a majority of Uniflex' employees. In response to the allegation contained in Paragraph 16(a) that in about January 2005, Respondent, as successor to Uniflex, set initial terms of employment for its unit employees, Respondent answered that it set the initial terms of employment for these employees in late December 2004. Finally, Paragraphs 16(b) and 17 allege that from January 2005 through February 2006, the Respondent made monthly contributions to the Union's Pension Fund for each unit employee, and since about March 2006, Respondent unilaterally modified the terms and conditions of employment of its unit employees by ceasing to make these monthly Pension Fund contributions. Respondent's Answer, and the basis of the sole

issue herein, is that the Respondent made the contributions to the Union's Pension Fund for this period in error, after telling the Union during the negotiating sessions, that it would not agree to contribute to the Union's Pension Fund, and that it "corrected its error" by ceasing to make these payments to the Union's Pension Fund.

Vince Schaller, the CEO of the Respondent, and Rafael Ricardo Chavez, the Pension Fund Manager for the Local 348 Pension Fund, were the sole witnesses herein. There were no substantive variances between their testimony. The Respondent purchased the assets of Uniflex in late December 2004 through the bankruptcy proceeding. At the time of this purchase, Schaller was aware that Uniflex had a collective bargaining agreement with the Union. By letter dated December 30, 2004, he wrote to Anthony Fazio, president of the Union:

> This is to inform you that Brynwood Partners has recently completed the purchase of the assets of Uniflex, Inc. out of bankruptcy. The new company formed by Brynwood Partners as a result of this asset purchase is named Uniflex Holdings, Inc. Brynwood Partners purchased the assets of Uniflex, Inc., but did not assume all its liabilities or contractual obligations, including, but not limited to, the collective bargaining agreement and the extension of the agreement dated September 30, 2004 between the Union, Local 348-S UFCW AFL-CIO and Uniflex, Inc.
>
> Uniflex Holdings, Inc. will review its operational and staffing needs over the next few weeks and make decisions regarding the manner in which the business will be operated going forward. Employees of Uniflex, Inc. are invited to apply for positions with Uniflex Holdings, Inc. and will be notified of this opportunity on December 30, 2004.
>
> Uniflex Holdings, Inc. is of course mindful of its obligations as a potential successor pursuant to the National Labor Relations Act. If we determine that Uniflex Holdings, Inc. is a successor entity and obligated to bargain with Local 348-S UFCW, AFL-CIO, we will contact you to discuss a new contract.

At a meeting with the Uniflex employees on December 30, 2004 Schaller told them that the terms and conditions of employment would be changed from the prior contract that Uniflex had with the Union and that the Respondent would be publishing these new terms of employment in a handbook which would be given to them as soon as it was completed. At the conclusion of this meeting, the Respondent distributed a memo to employees entitled: "Acquisition of Uniflex, Inc.", stating:

> This is to inform you that the assets of Uniflex, Inc. have been purchased out of bankruptcy by Brynwood Partners. Brynwood Partners purchased the assets of Uniflex, Inc., but did not assume all of its liabilities or contractual obligations, including, but not limited to, the collective bargaining agreement and the extension of the agreement dated September 30, 2004 between the Union, Local 348-S UFCW AFL-CIO and Uniflex, Inc. Therefore, the collective bargaining agreement between Local 348-S UFCW AFL-CIO and Uniflex, Inc. is no longer in effect.
>
> Uniflex Holdings will review its operational and staffing needs over the next few weeks and make decisions regarding the manner in which the business will be operated going forward. Employees of Uniflex, Inc. are invited to apply for positions with Uniflex Holdings. Accompanying this memorandum is an application for employment with Uniflex Holdings. I encourage you to fill it out and return it to our human resources department as soon as possible.

> Employees of Uniflex, Inc. will be temporarily employed by Uniflex Holdings pending completion of your application, review of supporting documentation and the final hiring decision. Uniflex Holdings will make numerous changes to your terms of employment. You will be provided with a new Employee Handbook, which details all the company's policies and practices.
>
> Additionally, Uniflex Holdings will offer employees healthcare benefits and a 401K Retirement Plan. We are currently gathering information to create a company benefit package and should have additional information for you shortly.
>
> Additional changes may also be made in the coming weeks.

At the conclusion of the meeting on December 30, 2004 all of Uniflex' employees filled out employment applications for the Respondent; approximately 80% of Uniflex' employees were hired by the Respondent. On January 17, 2005, the Respondent distributed to its employees an Employee Handbook; included under the classification "Benefits Summary" is the statement that the Respondent would provide medical, dental, 401k and life insurance coverage to all full time employees after 90 days of employment. Schaller testified that in January 2005 the Respondent implemented a 401K plan for its employees and at that time began making payments to the plan for its unit employees.

Sometime in about January 2005 the Respondent notified the Union that it was recognizing the Union as the bargaining representative of its unit employees and the parties met for their initial bargaining session on January 20, 2005. Attending for the Union were Chavez and Milton Shkop, as well as a shop steward. Attending for the Respondent were Schaller and Malissa Cantor. The Union presented four proposals to the Respondent at this meeting: a three year contract effective February 1, 2005, 40 cent wage increases to all non-probationary period employees on February 1, 2005, February 1, 2006 and February 1, 2007, contributions to the Union's welfare fund of $170 per employee per month commencing on February 1, 2005, increasing to $190 per month on February 1, 2006 and $210 a month on February 1, 2007, and contributions to the Union's pension fund of $25 per month per employee commencing on February 1, 2005, increasing to $30 and $35 a month on February 1, 2006 and February 1, 2007. Schaller responded that the Respondent was agreeable to a checkoff provision, and "…that we were going to table the wage increases for the time and that we were going to agree to a welfare fund contribution and that we definitely would not be participating or making any contributions to the Pension Fund." By letter dated January 21, 2005, Schaller wrote to Fazio, *inter alia*:

> The Company agrees to pay to District 5 Health & Welfare Fund the sum of $149 per person per month, retroactive to January 1, 2005, to provide health and welfare benefits to the members of the bargaining unit employed by the Company on and after that date.
>
> The Company agrees that upon receipt from any bargaining unit employee of a written assignment, which shall not be irrevocable for a period of more than one (1) year, or beyond the termination date of any prevailing collective bargaining agreement (whichever occurs sooner), it will deduct monthly and remit to the Union the amount of the monthly dues and the initiation fees uniformly required from bargaining unit employees.
>
> The Company looks forward to further negotiations with the Union to reach an initial collective bargaining agreement. The above agreement shall remain in place subject to further negotiations and a final collective bargaining agreement.

By letter dated January 31, 2005, counsel for the Union wrote to counsel for the Respondent stating that its position was that the Respondent was a "perfectly clear" successor to Uniflex and therefore it must adhere to the terms and conditions of employment in effect with Uniflex until such time as the Respondent and the Union agree to any changes thereto. Counsel for the Respondent responded to this letter on February 11, 2005, stating that it purchased the assets of Uniflex, and was not a "perfectly clear" successor to Uniflex.[1]

The Respondent prepared a Contract Proposal dated March 3, 2005 for a contract that would be in effect until March 31, 2008. The proposal contains provisions for management rights, recognition, Union security, hours of work, wages, holidays, paid time off, layoff and seniority, wage increases[2], jury duty, death in the family, welfare fund contributions, a discharge clause, contracting of work, military service, shop steward and committee, visitation, check-off, grievance procedure, bulletin boards, safety and pay for lost time, uniforms and tools and no strike or lockouts. This proposal does not refer to the Union's Pension Plan or contributions to the Union's Pension Plan. The parties met on March 4, 2005. Schaller testified that he was asked at this meeting if the Respondent would be making contributions to the Union's Pension Fund, and he responded that the Respondent had no intention of contributing to the Union's Pension Fund. Throughout the negotiations, Chavez' position was that the Union wanted the new agreement to provide that the Respondent would participate in, and contribute to, the Union's Pension Fund. Chavez testified that during these negotiations the Respondent never agreed to make the contributions to the Union's Pension Fund.

On March 10, 2005, Schaller was given a memorandum prepared by the Union setting forth the Union's "…estimate of Uniflex's withdrawal liability assuming it withdraws from the Plan during 2005." The estimate of the Respondent's liability, according to the Union, was between $1,200,000 and $1,600,000. The matter was referred to arbitration by the Union and an arbitration is pending on the issue. At the bargaining session on March 10, 2005, Schaller again told the Union that the Respondent was not going to make any contributions to its pension fund. Schaller testified further that at a bargaining session in June 2005, the parties reached agreement on wage increases for, at least, 2005 and 2006 and these increases were implemented. The parties also reached agreement on layoff policy at this meeting. No further meetings were held between the parties.

As stated above, the Respondent made payments to the Union's Pension Fund for its unit employees from January 2005 through February 2006. Schaller testified that he first discovered this in March 2005 when he was informed by the Respondent's auditors that the Respondent had been making contributions to the Union's Pension Fund since January 2005. They asked if he had approved of these payments and he said that he was not even aware of them. At that time the Respondent ceased making these pension fund contributions to the Union, and wrote to the Pension Fund asking that the contributions made between January 2005 and February 2006 be returned to the Respondent. Admittedly, Respondent did not negotiate with the Union regarding its decision to stop making these payments in about March 2006. At a meeting in June 2006, Chavez asked Schaller why the Respondent stopped making these payments and Schaller told him that they never agreed to make the payments and that they were made in error. Between January 2005 and March 2006, nobody from the Union or the Pension Fund told Schaller that the Respondent was making these pension fund contributions.

[1] Counsel for the General Counsel stated that she is not alleging that the Respondent is a "perfectly clear" successor to Uniflex.

[2] The Schedule A listing the proposed wage increases is not part of the exhibit in evidence.

In his testimony explaining the payments to the Union Pension Fund from January 2005 through February 2006, Schaller testified that in December 2004, Uniflex was "in complete disarray." The company had been under bankruptcy protection for six months, key employees had left and there were no established working rules in existence. Record keeping was "almost nonexistent." The Uniflex headquarters was sold in order to raise capital and the warehouse was moved on three occasions. Because of this, employee files were missing. Further, because of this turmoil, there was turnover of employees, including the chief financial officer, the individual responsible for payroll and the payment for other liabilities. This individual was terminated in April 2005 and his replacement, Steven Lucey was not hired until May or June 2005. During the interim period, three employees handled the financial responsibilities until Lucey began his employment. On June 10, July 20 and October 20, 2005, Schaller signed, or countersigned, the checks to the Union's Pension Fund. He testified that during that period, a stack of checks was often placed in front of him to sign, usually on the day that they had to be sent out, and "I just did not pay attention to the payee." In addition to these checks, the Respondent transmitted to the Union a monthly statement for each unit employee stating the amount of Union dues deducted and transmitted, together with the amount of "Union Welfare" and "Union Pension" payments transmitted to the Union.

IV. Analysis

The facts herein are not in dispute. In December 2004, the Respondent acquired the assets of Uniflex and on about December 30, 2004 the Respondent hired approximately 80% of Uniflex' bargaining unit employees. Respondent, as a successor to Uniflex, recognized the Union as the collective bargaining representative of its unit employees and began negotiations with the Union on January 20, 2005. Between that date and June 2005, the Respondent and the Union agreed upon certain terms and conditions of employment for the employees, including wage increases, layoff procedures, welfare contributions, and dues checkoff, and the Respondent has implemented these agreed upon subjects. It is also clear from the record, and I find, that during this period and thereafter, the Respondent made it clear to the Union that it would not agree to participate, or pay into, the Union's Pension Fund, and in lieu thereof, the Respondent implemented a 401K plan for its employees. The record further establishes that from January 2005 through February 2006 the Respondent made the required pension fund contributions to the Union for its bargaining unit employees. There can be no question that these payments were made in error, without Schaller's knowledge, even though he signed three of the checks. As stated above, throughout the negotiations, Schaller told the Union that the Respondent would not agree to participate in the Union Pension Fund. Further, I find that Chavez was aware that these pension fund payments were made in error. From January 2005 through February 2006 he was present during negotiations when Schaller said that the Respondent would not participate in the Union's Pension Fund, yet he never said anything to Schaller during this period about the Union's receipt of these pension fund payments from the Respondent.

The sole allegation herein is that the Respondent violated Section 8(a)(1)(5) of the Act by unilaterally ceasing to make the pension fund payments to the Union in about March 2006. Counsel for the General Counsel, in her Brief, argues that by making the pension fund contributions for fourteen months, this subject became a term and condition of employment which was undertaken by the Respondent, and obligated the Respondent to maintain it until such time as it bargained in good faith with the Union to agreement or impasse. While admitting that it did not negotiate with the Union prior to the cessation of these pension fund payments, the Respondent defends that these payments were made in error and, when it became aware of the error, it corrected the error by ending these payments. Counsel for the Respondent, in his

Brief, argues that one parties' unilateral mistake regarding a term and condition of employment is not binding, so long as the other party knew, or should have known, of the mistake. It is clear that the Union was aware of the fact that these payments were being made in error. Schaller often told the Union that he would not contribute to, or participate in the Union's Pension Fund, and the Union acted on this knowledge by sending him the March 10, 2005 memorandum setting forth the Respondent's potential liability for withdrawing from the fund, and invoking arbitration on the issue.

In *Eagle Transport Corporation*, 338 NLRB 489, 490 (2002), the employer notified employees at all of its facilities except the Cocoa facility, where a union had just been certified, that they would be receiving a wage increase. However, as a result of a computer programming error, the employees at the Cocoa facility also received this wage increase. Two weeks later, when it learned of the error, the employer corrected the situation and returned the employees to their previous wage rates. In finding that this did not violate Section 8(a)(1)(5) of the Act, the Board stated:

> This was not a situation involving the granting and subsequent rescission of a wage increase. Rather, an administrative error resulted in the miscalculation of wages in a single paycheck, and the Respondent promptly corrected the error upon discovering it. We find that this correction did not involve a change in the employees' terms and conditions of employment and, therefore, did not require bargaining.

With the exception of the subject involved, wages versus pension fund payments, and the time period of the error, two weeks as compared to thirteen months, this case is right on point. Record keepers at the Respondent inadvertently made these payments to the Union Pension Fund and, upon the discovery of the error, it was corrected and the payments were discontinued. I therefore find that because these payments were made in error, which the Union was aware of, the Respondent may lawfully discontinue the payments to the Union's Pension Fund, without first negotiating with the Union about the subject, and recommend that the Complaint herein be dismissed in its entirety.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Respondent's employees, excluding executives, office workers, supervisors and guards as defined in the Act.

4. The Respondent did not violate Section 8(a)(1)(5) of the Act by failing and refusing to make contributions to the Union's Pension Fund beginning in about March 2006, as alleged in the Complaint.

On these findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended[3]

ORDER

It is recommended that the Complaint be dismissed in its entirety.

Dated, Washington, D.C., January 3, 2007.

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Joel P. Biblowitz
Administrative Law Judge

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.