

The A. S. Abell Company and Baltimore Typographical Union No. 12. Case 5-CA-7980

June 8, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND WALTHER

On November 10, 1976, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs. Respondent filed reply briefs to the exceptions filed by the Charging Party and the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs¹ and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The A. S. Abell Company, Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

¹ Respondent's request for oral argument is hereby denied because the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this case was held on September 22, 1976, at Baltimore, Maryland, on complaint of the General Counsel against A. S. Abell Company, here called the Respondent. The complaint issued on July 26, 1976, on a charge filed on May 28, 1976, by Baltimore Typographical Union No. 12. The only question to be decided is whether by dealing individually with its active employees and in consequence paying them greater retirement benefits than its current contract with the Union provided, the Respondent violated Section 8(a)(5) of the Act. Briefs were filed by all parties.

¹ In pertinent part the early retirement plan set out in the contract reads as follows:

. . . [A]n early retirement plan for present situation holders shall be

230 NLRB No. 5

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Maryland corporation, is engaged in the publication of daily newspapers in the City of Baltimore, Maryland. During the preceding 12 months, a representative period, its gross revenues exceeded \$200,000; it regularly carries in its papers advertisements of products which are nationally advertised and sold in interstate commerce. I find that the Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Baltimore Typographical Union No. 12 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Insofar as the truly pertinent facts are concerned there is no dispute in this case, no relevant question of credibility at all, and no subordinate issue to be resolved. On the face of the clear and uncontroverted evidence — spoken and documentary — the Respondent violated the statute when it bypassed the Union in its dealings with admittedly union represented employees.

At the time of the events a collective-bargaining agreement was in effect between the Company and the Union; it was due to expire at the end of the year 1976. Two substantive sections of that contract directly related to and gave rise to the events leading to this proceeding. One section provides for a jointly administered pension trust fund, its assets to assure retirement benefits to all employees covered by the contract. Details of how age and years of service determine benefits later to be received under what the contract calls the retirement plan are not set out in the agreement, but that detail is irrelevant to the question of this case. The contract does set out precisely how much money the Company must contribute to the pension fund. The agreement also contains a special clause detailing "an early retirement plan"; this provides that employees who have reached the age of 62, and have worked 5 years, would be paid additional sums directly by the Company if they retired.¹

The second relevant provision, entitled "Job Security," establishes what are called "situations" for "members [of the Union] who are presently employees." The clause then says these individuals [later personally and individually named in an appendix] "will be guaranteed life-time employment under the latest collective-bargaining agreement so long as the newspapers are published . . . subject only to termination of named employees on the list appended hereto by voluntary retirement, resignation, death and dismissals for just and sufficient cause . . ."

made available. The opportunity for early retirement shall be extended on a voluntary basis to all employees of more than five (5) consecutive years of full time service who have reached age sixty two (62).

The related appendix to the contract, or "list appended hereto," then sets out the 361 names of the printers at work, all members of the Union. It is important to note that the "early retirement plan" provided for in the contract itself and identified by precisely those words, applies — again by use of unmistakable language — to "present situation holders." This means, again, the 361 persons individually named in the contract appendix.

Both the ultimate purpose of these clauses and the words used at many places in the fuller language used in the contract are unusual in employer-union contracts. But in plain language, what they mean — and all parties at the hearing agreed that this is so — is that at least up to the end of 1976, when that agreement was to expire, the Respondent bound itself not to remove from its payroll any one of the persons named in the appendix — virtually all of the regular, full-time employees in its composing room. They could retire, as provided; they might die; they might just quit. But unless they misbehaved and merited discharge for "just and sufficient cause," they had to be paid for full-time regardless of whether or not there was any work for them to perform.

Offer, and Payment Over-and-Above Contract Terms

By May 1976 there was not enough work for all the people to do. No one disputed the words of the Respondent's general manager to union agents in May that "We are overstaffed in the composing room," "we . . . have people just standing around in the Composing Room doing nothing." It is clear that the regular pension benefits provided for in the contract through the joint pension trust fund, even with the additional early retirement that employees under age 62 could choose, simply had not been sufficiently attractive to employees to induce enough of them to accept what had been agreed by contract and to get off the payroll. In order to induce some of the unneeded printers to leave and thereby to curtail the unnecessary part of its payroll, the Company decided to offer them more in monthly retirement payments than the contract called for. It prepared a detailed written plan entitled "Voluntary Employment Termination Incentive Payment Options"; employees who could not retire at all under the contract could now get some benefits if they went away; others could get more than the contract provided; under one provision some printers could choose a quick check for about \$15,000 in full payment in place of periodic support. All of this, if only the situation holders would "retire." It is not necessary to set out the details of that plan here. All that matters is that, as the Respondent conceded at the hearing, it substantially departed from the contract provisions. The idea was to offer it individually to each employee on a direct-dealing basis between him and the Company.

The Company told its printers directly of its offer and, during July and August, 54 of them applied for retirement on this new preferred basis, and 38 in fact accepted the money and have left the Company. In the face of its current contract with the Union, the Respondent did this by direct dealing with the employees — unilateral action by the employer, as the cases say, if ever there was such

conduct. In fact, Mr. Becker, then general manager of the Company, told the union officers — President Kees and Chairman Poist — before going to the employees unilaterally, "that participating in that was up to the individual. If he wanted to take the money. And he didn't feel that the Union could tell the person when to quit." To the employees the Respondent made its position even more explicit, for its posted notice read: "We believe that the right voluntarily to leave a position, to start afresh or just plain take it easy, is a basic right of free citizens." The notice then assured the employees the Company would fight any unfair labor practice charge the Union might file.

Before any discussion about law, there is one further fact that is absolutely clear on the record and that must be stated without equivocation, because the briefs submitted by the lawyers after the close of the hearing are above all ambivalent and inconsistent. The Union was at all times opposed to the Company's early retirement plan. In fact it told management, before any step was taken to implement the plan, that it would file National Labor Relations Board charges if the Respondent dared to make the move. And, of course, the Union did file the charge — on May 29, 1975 — after telling the Company it would do so and before the Company dealt with the employees at all.

Conclusion

Retirement and pension benefits later to be given employees presently on the job are conditions of employment within the meaning of that phrase as used in the statute and therefore mandatory subjects of collective bargaining. *Allied Chemical & Alkali Workers of America, Local Union No. 1, v. Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157 (1971). This means the employer may not as to this subject deal with its employees individually, or unilaterally, in disregard of their bargaining agent. And of course this also means that after the employer has bargained with the union about such pensions and retirement benefits, and signed a fixed-term contract precisely detailing the agreed-upon conditions, it may not thereafter deal with its employees individually, or unilaterally, without the approval of their bargaining agent. And that is all this case is about. The Respondent agreed with the Union that 361 people would stay on the payroll — work or no work, but would be given so much but no more after leaving as later compensation for having worked there. If this language seems almost childlike in its simplicity, it is because the briefs of the parties argue contentions and theories that in many respects seem totally foreign to the facts of this case.

I find that the Respondent violated Section 8(a)(5) of the Act by dealing directly with the employees on the subject of how much they would receive in retirement benefits and by in fact paying a number of them over and above the amounts the current contract called for.

The General Counsel's position seems to ignore these fundamental principles of law. The totality of his brief says that because the Union told the Company the subject was a bargainable matter, the Company did not bargain in good faith, took "a fixed and unalterable" stance, a "take it or leave it" attitude, and therefore violated the law because it did not talk about its intentions long enough, or openly

enough, or with a reasonably receptive attitude. The General Counsel takes pains to rebut one of the defense assertions (there are many), that the Company did bargain to impasse. This means, if I read the brief correctly, that had the Respondent discussed its innovative retirement proposal in good faith, but in the end still insisted upon its original proposal, it could implement it with impunity, and never mind the fact the contract bargaining agent never stopped saying it was opposed.

The General Counsel's factual assertion that there was no bargaining to impasse is correct, because there never was any bargaining at all. But his implied statement that a party to a contract is ever free to change the terms during the life of the agreement without the consent and approval of the other party is false as a matter of law. See *Equitable Life Insurance Company*, 133 NLRB 1675 (1961). But clearer still is Section 8(d) of the statute:

[W]here there is in effect a collective-bargaining contract covering employees . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract"

* * * * *

"[t]he duties so imposed [by the statute] shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

What this statutory language says clearly enough is that no matter what attempts at persuasion are made by the employer, no matter how good his faith may be, and even assuming persuasive economic justification, the union can hold firm to a "no," and so long as it does so it is an unfair labor practice for the employer to negotiate direct arrangements with the employees which depart from the conditions of employment set out in the contract. So long as a party is not required to *agree*, in the words of the statute, I cannot see how its attempt to explain to the other party why it does not agree, or even its attempt to persuade the employer to a different course, can deprive it of this legal right. What is a contract for, if not to insure stability in otherwise volatile industrial relations? If an employer is free to change the terms at will — however well intentioned and economically explainable its action may be — it would make a mockery of the entire contract concept, which, after all, is the ultimate salutary objective of the entire statute.

Both the General Counsel and the Respondent's briefs belabor the details of what union and company agents said at the two meetings when they talked of the Respondent's new retirement plan. The General Counsel tries to show that the Union bargained well, in good faith, while the Respondent argues that testimony proves it was the Employer who bargained in good faith and the Union, which instead spoke arbitrarily and refused to make reasonable counterproposals, was, in the words of company counsel, "intransigent." It matters not what the parties

said to one another when they met; never did the union negotiators agree the Company could do as it pleased directly with the employees in defiance of the contract.

Informed about the plan for the first time on May 18, the Union — speaking through Theodore Kees, Local 12 president, and Jack Poist, the union chairman, rejected it off hand. With everybody courteous, Kees asked that the Company first give him an opportunity to tell the employees not to accept the new offer, before it invited individual retirements. The Company did that. Kees talked to his lawyer, and, as he entered the second meeting on the 21st, said the matter was negotiable and he would file National Labor Relations Board charges if the Company took any steps to offer the plan to the employees. From the testimony of John Banach, then personnel director, Kees opened the May 21 meeting with "if you put this offer into effect, I'm going to file an unfair labor practice charge. I'm going to fight you all the way on this thing."

On May 24 the Company posted a notice in the composing room informing all employees of the offer. "An offer of voluntary termination and voluntary retirement incentive payments is available in the office of the composing room superintendent." That same day the Union also posted a notice in that room, telling its people the plan was considered to be an unfair labor practice by the Union. The next day the Company posted another notice to the employees saying the plan involved "voluntary acceptance . . . a basic right of free citizens," and that it would resist any unfair labor practice charges filed against it with the National Labor Relations Board.

None of the defenses urged by the Respondent have merit. In 1975 it did the same thing — induced some printers to retire by paying them more than the sum called for in the written contract. The Union did not file charges then. It was not therefore precluded from filing charges with the Board for the unfair labor practices committed in 1976. Individual bargaining with employees over conditions of employment in disregard of both the contract and their bargaining agent is no less an unfair labor practice merely because the company lawyer calls the extra gravy given employees a form of "sweetening"! As to the contention that this Union waived its statutory right to represent the employees through the full gamut of statutory prerogatives it simply has no relationship to this record. See *The Timken Roller Bearing Company*, 138 NLRB 15 (1962), enfd. 325 F.2d 746 (C.A. 6, 1963).

Nor do out-of-context phrases enhance the defense. The subject was not simply whether or not to retire. The essence of the new plan was how much money was the Employer going to pay its present employees for having worked there. *Carnation Company*, 192 NLRB 237 (1971), is therefore completely inapposite.

Running through the entire defense is the idea that the Respondent had no other choice because it was throwing money away — paying people who were not doing any work. On this record there is no denying the assertion seems true. But economic considerations appropriately govern the thinking of both parties when the collective-bargaining agreement is negotiated; once it is made, the parties are stuck with its terms. If either could change it at

will, there would be no purpose in having any collective-bargaining agreements.

IV. THE REMEDY

I think the real question in this case is what shall the remedy be. Throughout the hearing the Union complained that the Company bought the people out of their jobs, subverted their self-interest with a pittance, gave \$15,000 for jobs worth \$200,000. Normal Board procedures have long been to order a respondent to undo the effects of its illegal conduct, put the people back where they were, restore the status quo. But here again the General Counsel is ambivalent in his position. He was asked at the hearing by the hearing examiner to state precisely what, in his view, remedial action should be, but his brief speaks more of what remedies the General Counsel does not request than what he seeks. He went out of his way to make it clear he does not think the retired employees need be offered an opportunity to return to their jobs. He also says the General Counsel "takes no position whether" the retirees need repay to the Company what extra money they have received for going away if they should choose to return to work. The only clear request of the General Counsel, if he is to be taken literally, is that the Respondent must be ordered to resume paying 355 people full pay (this is the number of individuals still appearing on the contract appendix at the time of the unfair labor practice) without regard to the fact — clear on this record — that there is no work in the composing room for a substantial number of these 355 — in fact, the 38 who have left — to do. From the General Counsel's brief: "The status quo, therefore, is a bargaining unit having 355 composing room employees with the guarantee of life time employment." "General Counsel seeks only the restoration of the previolation conditions in the Respondent's composing room; i.e., a bargaining unit in which 355 employees have a contractual guarantee of life-time employment."

At the hearing the Union seemed to be asking for this also, i.e., that the Respondent call in as conceded sinecures off the street people who may never have worked for it, or been on its payroll. In its brief the Union seems to withdraw from this extreme position. Now it says: "the only proper means of returning the parties to a *status quo ante* is through a restoration of situations to the bargaining unit and payment by Respondent of those dues lost through the absence of these situations." "Only through a restoration of the unit's previolation size may both charging party and the remaining situation holders be made whole." What the Union is really saying here is that while the Respondent need not put people on its payroll if there is no work for them to do, it should be ordered to pay directly to the Union whatever checkoff moneys, or other payroll contributions employees who might work — but in fact are not working — would make. And to make it all the clearer, the Union adds that merely offering reinstatement to the affected employees who have retired "would not cure the problem of Charging Party's continuing lost revenues"

² Although not exactly in point, a phrase from the decision of the Second Circuit Court of Appeals in *E.E.O.C. v. Steam Fitters Local 638*, 13 F.E.P.

There is no precedent in Board law for ordering an employer-respondent to place people on its payroll — persons who have never before been its employees and who therefore have not themselves suffered a hurt at its hands — and pay them while concededly there is no work for them to do. And it has long been an established principle that remedial orders under this statute are not to be punitive in character, but only restorative of the status quo. There is a certain literal logic in the contention that absolute restructuring of the past in this case means reestablishing the artificial arrangement of the unusual, to say the least, contract in effect when the unfair labor practices were committed. But it does not follow, merely because the parties, for reasons sufficient to themselves, saw fit to agree to force payment to employees who do not work, that the Board of necessity ought to be party to such methods. The General Counsel could as well argue that where an unlawfully discharged employee elects not to accept the normal offer of reinstatement following a Board order, the employer must hire a stranger in his place, work or no work.

Moreover, it is not true that the contract guaranteed continued existence of a unit of "355 composing room employees," as the General Counsel asserts. There is a confusion of terms here; the words "job" and "situation" are bandied about interchangeably, but as used in the context of this case they have totally different meanings. In my experience, a job refers to a condition where there is certain work to be done and an employee performs it; the man has a job, works at it, and therefore is a paid employee. As used in this case — in the written contract and by the union representatives at the hearing — a "situation" is a job in which there may or there may not be any work to be performed, where the man on the "job," or in the "situation," works or does not work — depending upon whether or not there is any work to be performed — but is paid regardless of whether he works.

There is another reason for denying this request that the Respondent be ordered to call people from who knows where and pay them now for "standing around doing nothing." The contract does not say the Employer agrees to pay people even if it should have no work for them to do; it says it shall pay "members who are presently employees . . . named . . . on the list appended hereto" In plain language this means Joe, Sam, and Harry — or all the Joes, Sams, and Harrys individually identified by name in the appendix to the contract — have a contractual right to be paid even if there is no work for them. The contract does not say that if any of these quit, die, retire (or refuse to accept the Respondent's offer of reinstatement as provided for here?), the Respondent is obligated; to call someone from off the street — even if it has no work for him to do, and pay him also.²

I also find no merit in the Union's suggestion that the Respondent be ordered to pay to the Union whatever moneys it would have forwarded had the 38 now retired employees never left work. I suppose the moneys, not detailed in the brief, include such things as dues checkoff, pension contributions, and health and welfare payments. A

cases 705, is not totally inapposite: "we are not in the business of redistributing the wealth"

labor organization has no existence apart from its members. And any assets payable to it by an employer must be predicated upon work performed by employees — members of or represented by the Union. Payments are not made by an employer to a union on the basis of theoretical abstractions.

The 38 employees who were unlawfully induced to leave their jobs must be offered an opportunity to return to work if they so desire. They are also free to remain in permanent retirement. If they do return, they must be made whole, and paid for what wages they lost on the job for having left. As usual, any interim earnings they have had will be deducted from their lost wages with the Respondent in the event of their return. In this special case, the measure of interim earnings will include what payments the Respondent in fact gave them in the form of preferred benefits under the plan, including, wherever it may have happened, the \$15,000 offered as single payment benefit.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set out in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By dealing individually and unilaterally with its employees concerning pension and retirement benefits and by paying them pension and retirement benefits in excess of the conditions set out in its current collective-bargaining agreement with Baltimore Typographical Union No. 12, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ³

The Respondent, The A. S. Abell Company, Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dealing individually and unilaterally with its employees concerning pension and retirement benefits while a collective-bargaining agreement covering such conditions of employment is in effect between the Respondent and Baltimore Typographical Union No. 12, or paying them pension and retirement benefits in excess of the amounts provided for retirement and pension benefits in its contract, without approval of the contracting Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their

rights to self-organization, to form, join or assist Baltimore Typographical Union No. 12, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to each of the 38 employees who retired during the year 1976 pursuant to the Respondent's innovative early retirement plan immediate reinstatement to their prior positions or, if such positions no longer exist, to comparable positions, without prejudice to their seniority and other rights and privileges.

(b) Make whole all the foregoing employees for any loss of pay or benefits they may have suffered by reason of their retirement, in the manner set forth in the section of this Decision entitled the "Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Baltimore, Maryland, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁴ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT offer to our employees individually benefits in terms and conditions of employment, including particularly pension and retirement benefits, in excess of the terms set out in our current contract with Baltimore Typographical Union No. 12.

WE WILL NOT pay individually to our employees pension and retirement benefits in excess of the terms set out with respect to those conditions in our current contract with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist Baltimore Typographical Union No. 12, or any other labor organization, and to engage in other concerted activities for the purposes of collective bargaining or

other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer reinstatement to each of the 38 employees who during 1976 retired pursuant to our voluntary retirement plan and make them whole for any loss of earnings they may have suffered in consequence of their separation from employment.

THE A. S. ABELL COMPANY