

Westinghouse Electric Corporation and International Brotherhood of Electrical Workers, AFL-CIO. Case 6-CA-4806

March 8, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS BROWN AND JENKINS

On November 6, 1970, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Decision and a supporting brief. The General Counsel has filed limited exceptions to the Decision, and a brief in answer to Respondent's exceptions. The Charging Party filed cross-exceptions to the Decision as well as an answering brief to Respondent's exceptions.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, and briefs, and the entire record in the case, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

1. The Trial Examiner found that Respondent declined to bargain with the Union during contract negotiations over the Union's proposals for increased pension and insurance benefits for retirees. Respondent maintained, despite its claim that it was not asserting a "final position," that it had no obligation to bargain with respect to increased benefits on behalf of retirees because retirees are not "employees" within the meaning of Section 2(3) of the Act. Relying on the Board's decision in *Pittsburgh Plate Glass*, 177 NLRB No. 114, the Trial Examiner concluded that benefits accruing to retirees are mandatory subjects of bargaining and that Respondent's failure to bargain with the Union over such matters was a violation of Section 8(a)(5) and (1) of the Act.² We agree, and accordingly adopt that portion of the Trial Examiner's Decision.³

¹ The record shows that the subject of benefits for retirees was discussed on four occasions during negotiations

² Respondent contends that the charge alleging failure to bargain concerning benefits for retirees is barred by Section 10(b). It argues in support of this

2. The Trial Examiner also found that Respondent violated Section 8(a)(5) and (1) when it unilaterally increased pension benefits for retirees after the new collective-bargaining agreement had been executed. There is merit, in our view, in Respondent's exceptions to this finding.

The record reveals that Respondent initiated an increase in pension benefits for retirees on July 10, 1970, effective January 1, 1971. The Union was apprised of Respondent's intention shortly before the plan was announced to the retirees. The Union expressed its objections to the increase in benefits in a letter to Respondent, dated August 5, 1970.

Respondent argues that section 4 of article I of the pension and insurance agreement, dated February 28, 1970, between Respondent and the Union, gave Respondent the right to change the pension benefits without prior notification to or consultation with the Union. That section of the agreement provides:

The Company reserves the right during the term of this Agreement, as to the employees in bargaining units covered by this Agreement, to modify, amend, discontinue, change, add to or terminate . . . the Pension Plan

We find that this section affords Respondent sanction for its unilateral increase in retirees' pension benefits. Accordingly, we shall dismiss that portion of the complaint alleging that Respondent's unilateral change in retiree benefits was a violation of Section 8(a)(5) and (1) of the Act.

The General Counsel and the Charging Party have excepted to the Trial Examiner's failure to order Respondent to mail a copy of the notice to all retirees at their home addresses. The Board found such an order

contention that there is no suggestion of such an allegation in the original or amended charge, and that the second amended charge containing the allegation was filed some 7-1/2 months after the matter was last raised in negotiations

The original charge, filed on November 5, 1969, alleged that Respondent had violated Section 8(a)(5) in the course of the then-current bargaining negotiations with the Union on the basis of five enumerated actions. The charge concluded with the additional allegation that, "By the above acts and by its total conduct in the course of negotiations, the Employer has violated Section 8(a)(5) of the Act." This allegation was repeated in the first amended charge, filed on March 26, 1970.

The Board stated in *Stainless Steel Products, Incorporated*, 157 NLRB 232, 234, that, "It is well established that the Board may base an unfair labor practice finding on any conduct which occurred within the 6-month period prior to the filing of a charge if the complaint issuing thereon alleges the conduct to be an unfair labor practice even though the charge itself did not specify such conduct as a violation of the Act." We find it clear that the language of the original and amended charge "by its total conduct in the course of negotiations" sufficiently encompasses the allegations later specified in the second amended charge and contained in the complaint. See *Plains Cooperative Oil Mill*, 154 NLRB 1003, 1004-05. Accordingly, we reject Respondent's contention that the charge alleging that it refused to bargain regarding improved benefits for retirees is barred by Section 10(b).

³ To the extent that this finding is in conflict with the decision of the U.S. Court of Appeals for the Sixth Circuit in *Pittsburgh Plate Glass Co. v. NLRB*, 427 F.2d 936 (cert. granted), we respectfully disagree and adhere to our view until such time as the U.S. Supreme Court has passed on the matter.

appropriate in *Pittsburgh Plate Glass, supra*, to insure that retirees receive notice of the Board's decision. Accordingly, we shall modify our Order to include a provision for mailing the notice to all retirees at their home addresses.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Westinghouse Electric Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit, concerning benefits for retired employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of the employees in the unit described above with respect to benefits for retired employees and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Mail a copy of the attached notice marked "Appendix"⁴ to each retired employee and post copies at its represented maintenance and repair plants. Copies of said notice, on forms to be provided by the Regional Director for Region 6, after being duly signed by a representative of Respondent, shall be mailed or posted, as appropriate, immediately upon receipt thereof. The posted notices shall be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

⁴ In the event that this 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board"

CHAIRMAN MILLER, concurring and dissenting in part:

I agree with my colleagues that Respondent did not violate the Act by unilaterally changing the benefits of retirees. Nor would I find a violation based on Respondent's refusal to negotiate regarding the benefits paid current retirees. As I have previously indicated, I agree with the decision of the U.S. Court of Appeals for the Sixth Circuit in *Pittsburgh Plate Glass Co. v. N.L.R.B., supra*, that retirees are not "employees" within the meaning of the Act.⁵ Accordingly, I would dismiss the complaint in its entirety.

APPENDIX

NOTICE TO EMPLOYEES

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

WE WILL NOT refuse to recognize and bargain collectively with International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit concerning benefits for retired employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, on request, with the above-named union as the exclusive representative of the employees in the appropriate unit with respect to benefits for retired employees and, if an understanding is reached, embody such understanding in a signed agreement.

WESTINGHOUSE ELECTRIC
CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty

⁵ See *Hooker Chemical Corporation, a wholly owned subsidiary of Occidental Petroleum Corp.*, 186 NLRB No 49, fn 2

Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

IVAR H. PETERSON, Trial Examiner: I heard this case on September 2 and 3, 1970,¹ in Pittsburgh, Pennsylvania, upon a charge, twice amended, by the International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the Union, which resulted in a complaint issued by the Regional Director for Region 6, on June 29. The charge and the complaint alleged that the Respondent had engaged in unfair labor practices violative of Section 8(a)(5) and (1) of the Act. In its answer the Respondent denied that it had committed any unfair labor practices. At the hearing, the complaint was further amended and amendments to the answer were received. At the conclusion of the hearing, time for filing briefs was fixed and extended until October 14, 1970.

Upon the entire record in the case, including able briefs filed by counsel for the General Counsel and counsel for the Respondent, and from my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

The Respondent, a Pennsylvania corporation with its principal office in Pittsburgh, is engaged in the manufacture, sale and distribution of electrical appliances and products in various States of the United States. During the year immediately preceding issuance of the complaint, the Respondent admittedly purchased and received goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania, for use at its facilities within that Commonwealth. The Respondent admits, and I find that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

The Union, admittedly, is and I find, a labor organization within the meaning of the Act.

III THE UNFAIR LABOR PRACTICES

A. *Background and Issues*

For some years the Union has represented about 1,000 employees in 23 of the Respondent's 56 maintenance and repair plants located in various states of the Union. Prior to the termination of the immediately preceding collective-bargaining agreement, on September 17, 1969, the parties commenced negotiations which, after some 40 sessions, terminated in a new agreement executed on February 28, 1970, effective until June 11, 1973.

The current agreement, as well as prior agreements, contained provisions relating to the pension and insurance benefits of retired employees. Retirees were, prior to their retirement, members of the bargaining unit and, as such, were covered by and received benefits under the then-existing collective-bargaining agreements.

Although retirees were removed from the seniority list and had no recall rights following their retirement, they were, on occasion, recalled for employment by the Respondent and often accepted for employment by other employers. During World War II, it was quite common for employees of retirement age to remain in or return to, as the case may be, employment in the bargaining unit. Under the constitution of the Union, retirees are permitted to remain as active union members, and, in consequence, eligible to participate in union meetings and vote on any issue.²

Bargaining sessions began on September 17, 1969, and at that meeting the Union presented its collective-bargaining proposals. It made proposals for increased insurance and pension benefits for retirees then in retirement. At the meeting on October 6 the parties discussed the issue of increased benefits for retirees, and thereafter, it was raised and discussed at the October 7, 21, and 22 meetings. During these several sessions, the Respondent's representatives, as I assess their positions, refused to engage in meaningful bargaining about retirees, claiming that the Respondent viewed them as no longer its employees.

Preliminary, I think it plain that the individuals herein involved are encompassed within the term "employee" as defined in the Act. As stated above, my frame of reference are the decisions of the Board and those of the Supreme Court. I have, with interest, read the Decision of the Court of Appeals for the Sixth Circuit in the *Pittsburgh Plate Glass* case. With all deference I am constrained to follow the Board's decision in that case, in view of the strictures placed upon Board Trial Examiners by the Act and the Board's decisions.³

In consequence, within this frame of reference, we address ourselves to the factual merits of this proceeding.

As previously stated, the contracts between the parties, for some years past, had contained provisions relating to retired employees. In the negotiations, on October 6, 1969, the issue of increased benefits for persons in that category was discussed; the same issue was raised in the negotiations on October 7, 21, and 22. I think it fair to say, upon an appraisal of the details of these discussions, that the position of the Respondent was that it was not, in law, obliged to negotiate with respect to retired employees for the reason that they were not its employees. In this regard, it may be observed that while the Respondent's representatives testified that the Respondent had never taken a "final position" with regard to this subject, the minutes made by the Respondent of the October 6 and 7 sessions reveal that the Respondent was, in fact, taking the position it was not obliged to deal with the Union regarding the subject of increased benefits for retirees.⁴

While there can be no question that during the negotiations the Respondent made no counterproposals regarding increased benefits for retirees, the Respondent's position, during the negotiations, was that the new National Agreement executed on February 28 did not contain any increased benefits for retired employees. In view of, or despite, this position of the Respondent, its director of labor relations, Clark Frame, on July 8 telephoned the Union and spoke with Richard Mills, an International representative.

² Here, in passing, it should be noted that unlike employees of the Respondent, union members who retire from the electrical construction industry are permitted to attend meetings but have no voice or vote. However, these employees are members of the Electrical Workers Benefits Association, another organization somehow associated with the Union, and they can vote on pension and insurance matters under the Union's pension plan.

³ *Prudential Insurance Agents*, 119 NLRB 768, *Lenz Company*, 153 NLRB 1399.

⁴ In this connection it is instructive to read the Respondent's minutes of the October 6 and 7 sessions.

¹ Unless otherwise indicated all dates refer to the year 1970.

Frame told Mills that Respondent was intent on making "an upward adjustment in the pensions of retired employees." This discussion was the only one that occurred between the parties with respect to a change in the benefits applicable to retired employees. Under date of July 10, the Company wrote to the Union, which the latter received on July 13, and to each retiree in the bargaining unit that, effective on January 1, 1971, retirees would receive an increase in monthly benefits.

The Union did not immediately respond or react to this announcement. Indeed, the Union's first and only response was a letter, over the signature of Mills, the International representative, dated August 5, protesting and objecting to the change.⁵

Minutes of the several sessions, beginning October 6, are in evidence. The issue of added benefits for present retirees was discussed during these sessions, including the sessions on October 21 and 22. During these discussions, representatives of the Respondent maintained the position that it was not obliged to bargain with respect to their benefits for the reason that retired employees were not in the status of employees.

Before addressing ourselves to the evidence, it might be appropriate to observe that the Union made no claim that the Respondent had refused to bargain concerning retirees until the second amended charge was filed on June 16, 1970, some 3-1/2 months after the conclusion of the collective-bargaining agreement following rather lengthy negotiations between the parties.

The subject of benefits for retirees was discussed on only three occasions during the somewhat prolonged negotiations. At the morning and afternoon sessions on October 6, 1969, and at a meeting on October 7, this subject was briefly discussed while Mr. Dickenson, the Union's expert on pension and insurance matters, was present; the last occasion at which this matter was raised was on October 21.

Mr. Gervas Closson, assistant director of labor relations and the Company's representative during the negotiations, testified that at the morning meeting on October 6, Dickenson, the Union's pension and insurance expert, stated, among other things, that the Union was interested in improvements in insurance and pension benefits for retirees. In this connection, Closson replied that the Respondent, in times past, had never bargained for retirees for the reason that it did not consider them to be employees. During the afternoon meeting on that day, when the subject again came up, Closson pointed out he was not taking a final position as to whether or not the Respondent would bargain for retirees, and that nothing was final in this area. At the October 7 meeting, so Closson testified, Dickenson stated again that the Union was interested in improved pension and insurance benefits, and Closson remarked that the Union knew what he had stated the day before and that he had not changed his position. In the October 21 meeting, after going through the proposals made by the Company, the

⁵ Frame testified that on July 8, he telephoned Paul Menger, the Union's director of manufacturing, and, being unable to reach him, spoke with Mills. He explained to Mills that the Respondent was prepared to make an upward adjustment in the pension benefits of retired employees, made some explanation of the formula, and told Mills that the Respondent's plans in this regard would be released on July 10. Frame informed Mills that he was making a series of telephone calls to the principal unions with which the Company bargained, and that Mills raised no objection with respect to this proposal. A month later, on August 8, Menger acknowledged the letter the Union had received from Frame and protested the timing of the announcement. There is no evidence, as I view the record, indicating that the Union raised any objection regarding the proposed announcement made by Frame or requested any meeting regarding the matter.

spokesman for the Union, Mr. Babish, remarked that the Company had included nothing for retirees. In this connection, it might be observed that the testimony of Babish does not differ materially from that of Closson, the Company's spokesman. Babish related that on October 6, when Dickenson raised the subject, Closson stated that the Company did not bargain with regard to retired employees because it did not consider them as current employees. Babish continued to relate that on October 7, when the subject of pension benefits for retired employees was raised, with particular reference to the cost of living, Closson responded by stating that the Company did not bargain with respect to retired employees.

Cross-examined, Babish stated that Closson said that the Respondent had "never bargained over pensioned persons in the past." Moreover, Babish admitted that the minutes made by the Union concerning the October 6 meeting disclosed the following exchange between Closson and Victor Verdelkel, an International representative of the Union:⁶

V. V.: Are you saying we won't be negotiating this item?

G. C.: We never have in the past. *We haven't given you a final position on anything*, we don't recognize any obligation to retirees for they are not employees." [Emphasis supplied.]

The Company minutes, Respondent's Exhibit 5, also show in the afternoon meeting of October 6, 1969, the following discourse:

Verdelkel: If you are not saying you won't negotiate, are you saying you can't do anything.

Closson: We haven't given you any final position on this. We are just saying we haven't negotiated anything on benefits for retired employees in the past. This is our judgment.

Succinctly stated, the Respondent's position, as I understand it, is that it has and had no obligation to bargain with respect to the increased benefits on behalf of retirees. It argues that retirees are not "employees" within the meaning of the Act and, in consequence, it has no duty to treat with the Union or the representatives of the employees with respect to retirees. In short, as I understand the Respondent's position, retirees deal, by reason of their status, with the Respondent as individuals, and not collectively. In this regard, the Respondent principally relies upon the recent decision of the Sixth Circuit Court of Appeals in *Pittsburgh Plate Glass*, 427 F. 2d 936. In its brief, the Respondent recognizes that I, as a Trial Examiner of the Board, am bound by the Board's decisions, even though they may differ from those of a court of appeals; subject, of course, to definitive decisions by the Supreme Court or reversals of decisions by the Board. There is no essential dispute about the facts of this case. The legal issue, as I view it, is whether the Respondent, in violation of the requirements of the Act, altered the benefits of its retired employees. A subsidiary contention advanced by the Respondent is whether the delay of the Union—approximately 1 month—constitutes acquiescence in the alteration in retired employees' benefits.

Taking up first the question of the Union's acquiescence in the changes made, it ought to be observed that the Board's decisions, sustained by the courts, make it clear that any waiver of rights in this connection must be "clear and unmistakable." The time lapse here involved, approximately 1 month, does not indicate to me that the Union had relinquished its rights to protest in an official manner the actions taken by the Respondent.

I have, with care, studied the agreements between the

⁶ V. V. refers to Verdelkel, and G. C. refers to the statements made by Mr. Closson.

parties and, in particular, the relevant provisions touching upon the controversy before me. These matters are in the record and, necessarily, available to reviewing authority. I think it suffices to state that the contractual provisions do not, in this factual situation, serve to exonerate the Respondent.

The Respondent, so it seems to me, contends that retired persons are not members of the bargaining unit and, in consequence, no obligation devolves upon the Respondent to bargain with the Union with respect to items concerning them. There can be little dispute about the fact that an employer is obliged to bargain with the representative of his employees regarding various aspects affecting retired employees. The Respondent's principal reliance, as I read its brief, is upon the decision of the Court of Appeals in *Pittsburgh Plate Glass Company, supra*, in which the Court held that the general definition of employees in Section 2(3) of the Act is superseded by the provision in Section 8(a)(5), to the effect that an employer has a duty to bargain collectively only with the representative of *his employees*. In short, the Respondent contends that, by reason of their status, retired persons are no longer employees of the Respondent and, in consequence, the Respondent is relieved of any duty to bargain with respect to their emoluments or status.

As a Trial Examiner of the Board, it seems obvious that I am constrained, regardless of my personal views, to follow the decisional precedents of the Board, in areas where they have not been altered by the decisions of the Supreme Court of the United States. Under these precepts, I think it fairly plain that I am bound by the Board's decision in *Pittsburgh Plate Glass Company*, 177 NLRB 911, in which the Board stated that the protection of the Act "is not narrowly limited to those who are recorded on the employer's current payroll. Indeed, employees, who have been actually employed for a sufficient number of years to have earned a pension, have deep legal, economic, and emotional attachments to a bargaining unit which measurably exceed the attachments of others who have been held to be employees."

I think it reasonably plain that the benefits accruing to retirees are mandatory subjects of collective bargaining, absent a clear and unmistakable waiver by the collective-bargaining representative. I think it necessarily follows that an employer who refuses to discuss with the exclusive representative a matter relating to retired persons, or who on his own motion changes the terms and conditions relating to retired persons without prior notice to the bargaining repre-

sentative or before a collective-bargaining impasse is reached, violates the Act. See *Flowers Baking Company, Inc.*, 161 NLRB 1429, 1436, and cases cited therein at fn. 17.

Disregarding as I must my private views of the legal consequences of this case, I am constrained to find that, consistent with Board and Court precedents, the Respondent has infringed the Act in the respects alleged in the General Counsel's complaint. I therefore find that it violated Section 8(a)(5) and (1).

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(5) and (1) of the Act, it will be recommended that it cease and desist therefrom and take the necessary affirmative action to effectuate the policies of the Act. In addition to recommending that the Respondent bargain upon request with the Union respecting benefits for retired employees, it will also be recommended that, if so requested by the Union, the Respondent rescind any adjustment in pension benefits for retired employees which Respondent unilaterally instituted.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
 3. All employees in the unit set forth in appendix A to the complaint constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
 4. At all times since October 6, 1969, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
 5. By refusing on and after October 6, 1969, to recognize and bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, concerning benefits for retired employees, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
- [Recommended Order omitted from publication.]