UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

OMAHA WORLD-HERALD

and Case 17–CA–24389

TEAMSTERS DISTRICT COUNCIL 2, LOCAL 543M, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS

William F. LeMaster, Overland Park, Kans., for the General Counsel.

Glenn E. Plosa and ***L. Michael Zinser*** of the ***Zinser Law Firm***, Nashville, Tenn., for Respondent.

David A. Grabhorn, Fullerton, Calif., for the Charging Party.

DECISION

Statement of the Case

JAMES M. KENNEDY, **Administrative Law Judge**: This case was tried in Omaha, Nebraska on July 21-22, 2009, upon a complaint issued on April 29, 2009 by the Regional Director for Region 17. The complaint is based upon an unfair labor practice charge filed on January 22, 2009, later amended, by Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters [1] (the Union or the Charging Party). The complaint alleges that Omaha World-Herald (Respondent), has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act. Respondent denies the allegations in their entirety. All parties have filed post-hearing briefs and they have been carefully considered.

Issues

Although there is little disagreement about the underlying facts, the two biggest differences concern: 1) whether the wording of Article 28 of the collective bargaining agreement establishes that the Union consciously relinquished the right to engage in midterm bargaining over the pension plan, i.e., whether since the collective bargaining contract had been reopened, Respondent was privileged to ignore the Charging Party's demand to bargain over pension plan changes; 2) the viability of past practice as a defense, i.e., whether numerous previous changes to the pension plan and 401(k) plan constitute the Union's waiver of the right to bargain.

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[1] This is the Charging Party's correct name and the caption has been corrected to fix an omission in the original caption.

Findings of Fact

I. Respondent's Business

Respondent admits it is a Delaware corporation with an office and place of business in Omaha, Nebraska, and is engaged in the publication and distribution of a daily newspaper, the *Omaha World-Herald*. It further admits that during the past year, in the course and conduct of its business, it has derived revenues in excess of $200,000, held membership in or subscribed to various interstate news services, and advertised various nationally sold products, including AT&T services. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2] In addition, Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background

For the most part the facts are not in significant dispute. Respondent has had a long collective bargaining relationship, through predecessors, with Graphic Communications Union Local 543-M, which has been affiliated with Teamsters District Council 2 since September 2004. The bargaining unit is:

> All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Since the 1996 collective bargaining agreement, all of the agreements have included an Article 28, titled "Benefits." In 1996, that article read:

> The Company acknowledges that employees are eligible to participate in the retirement plan, group hospital, loss of time and life insurance programs provided the requirements of participation are met. The Company will advise the Union of proposed changes and meet to discuss and explain changes if requested. Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Section Five of the Agreement. [The grievance-arbitration clause.] Employees may retire at age 65.

In the parties' 1999 collective bargaining agreement, Article 28 reiterated the above paragraph, but added another paragraph aimed at the possibility that a 401(k) plan might be established. The new insert says:

> The Company agrees that if the Omaha World-Herald Newspaper Board of Directors approves the implementation of a 401(k) Plan for its employees, pressroom employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted.

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[2] *Nutley Sun Printing Co.*, 128 NLRB 58 (1960).

In the parties' most recent collective bargaining agreement, executed in 2004, Article 28 was slightly revised. In the first sentence of the first paragraph, the term "employees" was changed to "bargaining unit employees." In the second paragraph, the term "pressroom employees" was changed to "bargaining unit employees."

The 2004 collective bargaining agreement was scheduled to expire on February 5, 2009. On October 3, 2008, the Union sent Respondent a re-opener letter to begin negotiations for a new collective bargaining agreement. Respondent's corporate human resources manager, Steve Hoff, replied with a letter announcing the company's intent to terminate the collective bargaining agreement at 12:01 a.m. on February 5, 2009. This, of course, set the stage for negotiations.

The parties held their first bargaining session on December 22, 2008. At the time of the hearing, no new contract had been reached.

B. Unilateral Changes to the Pension Plan

Respondent has provided a pension plan for its employees since 1947. Since at least 1993, the plan has allowed participants to accrue benefits on a monthly basis, calculated by years of service and earnings.

In 2005, Respondent terminated pension plan participation for all employees under 50 years old, as well as employees who were over 50 but not yet vested in the plan. As a substitute, Respondent created a retirement spin-off plan for those affected. The spin-off plan was both created and dissolved on December 31, 2005. Upon dissolution of this spin-off, the spun-off employees were given the opportunity to take their money in one of four ways:

1) Cash distribution,
2) Roll it into a qualified plan such as an IRA,
3) Roll it into Respondent's newly created 401(k) plan (discussed below), or
4) Have an annuity purchased for them, which would basically furnish them the same benefit that they had on a monthly annuity basis at the time of their retirement.

The Union did not raise any objections to this 2005 unilateral change. The record does not reflect the choices the employees made.

Three years later, on November 12, 2008, 5 weeks after the reopener/cancellation notices, and 5 weeks before bargaining commenced in late December, Respondent notified Union Chapel Chairman Patrick Edmunds that it planned to freeze further accrual in the pension plan for the remaining active participants, effective December 31, 2008. The cover letter stated that Respondent had mailed notification of the changes to all active pension plan participants to inform them of this decision. The change was, therefore, a *fait accompli*. Edmunds promptly notified the Union's business representative Mike Maddock of Respondent's decision; Maddock forwarded the announcement to David Grabhorn, Vice President "A" for Teamsters District Council 2. [3] The two union officials are officed in California.

A short time later, Respondent approached Maddock to explore the Union's willingness to agree to a voluntary buy-out offer to four named senior pressmen. Maddock reported the approach to Grabhorn. Grabhorn advised Hoff to arrange a meeting to discuss the buy-out

[3] Mr. Grabhorn is also a licensed attorney and served as counsel to the Union during the hearing.

proposals. During the call, Grabhorn also told Hoff that the Union was now insisting upon bargaining over Respondent's plan to freeze further accrual in the pension plan.

On November 19, 2008, Grabhorn, Edmunds and Local President Steve Ryan met with Hoff, human resources/in-house counsel Sue Loerts and manager Christy Gerrick. After discussing the buy-out issue, Grabhorn reiterated the Union's insistence on bargaining over the scheduled pension plan change. Hoff told Grabhorn that the issue had already been bargained between the parties and Respondent had the right to make such changes to the pension plan. Grabhorn responded by denying that there had ever been such bargaining, stating that any changes needed to be agreed upon at the bargaining table.

Subsequent to this meeting, Grabhorn and Michael Zinser, Respondent's legal counsel, agreed to schedule an initial bargaining session for December 22, 2008. At that session, the two sides exchanged initial contract proposals and unsuccessfully attempted to determine ground rules. On December 29, Grabhorn wrote a letter to Zinser proposing dates for further contract negotiations. Additionally, Grabhorn insisted that Respondent not make any changes to the status quo and not implement any changes to the pension plan until after bargaining had concluded.

Zinser sent a letter in response, dated December 31, telling Grabhorn that, under Article 28 of the existing collective bargaining agreement, Respondent had the right to unilaterally change the pension plan. He added that the parties had "already agreed upon the Company's right to make these changes during the term of the current contract. Local 543-M was notified on November 12, 2008, of this change." Zinser specifically cited the portion of Article 28 that reads: "Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Article Five of the Agreement." Finally, Zinser wrote that the pension plan itself reserved the right for Respondent to change the plan. Steve Hoff later testified consistently with Zinser's claim when he stated that Respondent relied on Section 2.3 of the plan to interpret the plan, Section 8.1 of the plan to amend it, and Section 9.1 of the plan to terminate it.

As announced, Respondent did implement the pension plan change on January 1, 2009. On January 21, Grabhorn protested, writing that the parties had not agreed that Respondent could unilaterally make changes to the pension plan. He wrote that the collective bargaining agreement did not contain any waiver of the Union's statutory negotiating rights, that the law required Respondent to maintain the status quo while negotiations were on-going, and that the Union would file an unfair labor practice charge concerning the change.

Both agree there have been numerous changes related to the pension plan over the years. The question is how material these changes have been and how significant their impact has been upon the employees. Respondent introduced numerous exhibits which, it claimed, show a significant history of past practices that demonstrates a waiver by the Union. However, federal tax laws required many of these changes. Meanwhile, those that were not affected by the tax laws were of minimal importance, or were internal operational matters having no consequence upon plan participants. The only change of real significance was the 2005 change, which, as noted, the Union did not oppose.

C. Unilateral Changes to 401(k) Plan

Respondent first allowed a portion of its bargaining unit employees to participate in a 401(k) plan on January 1, 2006. The implementation of this plan was based on paragraph 2 of Article 28, which states:

> The Company agrees that if the Omaha World-Herald Newspaper Board of Directors approves the implementation of a 401(k) Plan for its employees, pressroom employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted.

To implement this plan, the *Omaha World-Herald* became a participant in the Midlands 401(k) Plan, begun by Midlands Newspapers, Inc., its sister company, which allowed for employees to invest up to 5% of their wages with a 50% match from their employer. On January 1, 2007, the Midlands plan changed its name to the *Omaha World-Herald 401(k) Plan*. A year later, on January 1, 2008, Respondent's corporate parent consolidated all the 401(k) plans operated by its subsidiaries and formed a new plan. The new plan adopted a model created by the Koley Jessen law firm. Each subsidiary employer now had discretion over the amount its matching contribution, if any, it would be. Employees who still remained in the pension plan were not allowed to take part in the matching aspect of the program, though they could open an account and make deposits. On January 1, 2009, when the pension accrual freeze went into effect, those employees were made eligible for the 401(k) matching contribution.

On March 2, 2009, Hoff delivered another missive to Chapel Chairman Edmunds via the night supervisor. In the letter, Hoff stated that the letter was intended to give the Union advance notice that "effective April 1, 2009, the Respondent intended to suspend its discretionary matching contribution to all employee 401(k) deferrals for the remainder of the 2009 Plan Year."[4] Edmunds immediately informed Grabhorn and Maddock. On March 3, Respondent posted a notice on a bulletin board at its facility to inform all participating employees of its decision to suspend its matching contributions. On April 1, 2009, while still in the midst of ongoing contract negotiations, Respondent implemented the change. This all occurred, of course, after the preceding collective bargaining contract had ended, but at a time when bargaining was under way.

III. Analysis and Conclusions

Counsel for the General Counsel contends that Respondent violated Section 8(a)(5) and (1) of the Act by materially amending the defined benefit pension plan and the 401(k) retirement plan without affording the Union an opportunity to bargain with Respondent about these changes. Respondent agrees it unilaterally amended the plans. However, it asserts that the collective bargaining agreement, past practice, and the various plan documents provided it with the explicit right to make these changes.

A. Pension Plan

Respondent admits to materially amending the pension plan when it eliminated the future accrual of pension benefits. Respondent contends it had the right to make the changes unilaterally because (1) the 2004 collective bargaining agreement contained a "clear and unmistakable" waiver in Article 28; (2) this involved a reasonable interpretation of a contract clause, and since this is a contract dispute, it is beyond the authority of the Board to deal with it;

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[4] That meant that the newly-eligible – those whose pension benefits had been frozen on December 31, 2008 – could only obtain 3 months of the match in their newly opened 401(k) account.

(3) the Union had waived its right to bargain due to the past practice of the parties; and (4) the Pension Plan document reserved Respondent's right to make unilateral changes because it had been incorporated into the collective bargaining agreement.

1. Clear and Unmistakable Waiver standard

The Act is well settled concerning claimed waivers of statutory rights. The Board has adhered to the clear and unmistakable waiver standard as far back as 1949.[5] Since then, the Supreme Court has held that a waiver of employee statutory rights will not be inferred from general contractual provisions. Moreover, to be recognized, the waiver must be clear and unmistakable.[6] History, then, establishes that the Board has consistently utilized this standard.[7]

Accordingly, Respondent must show that the Union clearly and unmistakably waived its right to bargain about the pension plan. Respondent points to the revised Article 28, found in the 2004 collective-bargaining agreement, as the clear and unmistakable waiver in this case:

> Inasmuch as the plans cover all employees, not just bargaining unit employees, changes in these plans are not subject to Article 5 of the Agreement. [The grievance-arbitration clause.]

Respondent contends that, since the parties agreed the Pension Plan was not grievable and not arbitrable, the clause constitutes a clear and unmistakable waiver of the union's right to bargain over any changes to the pension plan.

Furthermore, the sentence prior to the Article 5 reference raises other issues. It states:

> The Company will advise the Union of proposed changes and meet to discuss and explain changes if requested.

The dictionary definition of "discuss" provides multiple potential meanings, including: (a) "to investigate by reasoning or argument; (b) "to present in detail for examination or consideration . . ."; or (c) "to talk about."[8] Accordingly, the agreement to "discuss" could mean either (b) or (c). If so, must Respondent simply tell the Union of its plans, or, after telling the Union, would the issue would be up for debate and negotiation, as one would see in traditional bargaining? The point is not which definition applies, but rather, the fact that multiple definitions could apply.

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[5] *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949). In addition, *Tide Water* has special application here, as the plans in question covered all of Respondent's employees, not simply the represented employees. In that circumstance, the Board in *Tide Water* observed: "…practical difficulties encountered by an employer in negotiating about a pension plan with the representative of a portion of his employees, all of whom are covered by a company-wide pension plan, do not eliminate his duty to bargain within an appropriate unit."

[6] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[7] *See Johnson-Bateman Company*, 295 NLRB 180 (1989); *Provena Hospitals*, 350 NLRB 808 (2007); *Verizon North, Inc.*, 352 NLRB 1022 (2008); *Quebecor World Mt. Morris II, LLC*, 353 NLRB No. 1 (2008).

[8] *Merriam-Webster Online Dictionary*.

Beyond that, the phrase “meet to discuss and explain changes” provides separate meanings if the connector “and” is taken in either the conjunctive or the disjunctive. In the disjunctive, the discussion and explanation are unrelated. In the conjunctive, the discussion and the explanation are to occur simultaneously. These simple linguistic variants also demonstrate that a finding of a “clear and unmistakable” waiver cannot be made. There are simply too many choices. Accordingly, the phrase must be deemed ambiguous. In my view, Respondent’s logic is too untethered to conclude that the Union ever waived its right to bargain.

2. Contract coverage approach

As an alternative theory, Respondent asserts that language in the collective bargaining contract authorizes it to make pension plan changes. This defense is not on waiver grounds, but is instead a contention that the Union is trying to obtain a benefit that it could not when it entered into the collective bargaining contract. According to this theory of defense, the contract already governs matters concerning pension plan changes, in the sense that the Union has, under the expressly bargained-for terms of the agreement, specifically permitted Respondent to take the steps that it took. As Respondent readily acknowledges, it seeks to invoke the so-called "contract-coverage" defense, which has had some limited success at the appellate court level and has acquired some followers at the Board level. The theory has not been addressed by the Supreme Court under that name.

Indeed, the proponents of this defense seem to have deliberately ignored Supreme Court law on the point which has specifically adopted the Board's traditional "clear and unequivocal waiver" analysis in disputes such as this. A unanimous Court in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), reh. den. 386 U.S. 939 (1967), an icon case which is well-embedded in Board jurisprudence, rather thoroughly discussed the appropriate analysis to be applied. Indeed, in my view, it specifically rejected the model that is now being described as the contract-coverage theory. A short discussion will illustrate the point.

In *C & C Plywood*, the employer and the union had entered into a collective bargaining contract which established specific wage rates for each job in the plant, the so-called 'classified wage scale'. The contract stated that the issue of wages were 'closed' during the life of the contract. Indeed, although there was a grievance process, the contract did not provide for arbitration of any dispute. But, the contract did allow the employer an option to pay a premium rate to any employee who had shown some special fitness, skill or aptitude. Less than 3 weeks after the collective bargaining agreement was signed, the employer announced that its glue spreader crews would receive a premium rate if they met certain weekly/monthly production standards. The union complained that not only was this a departure from the classified wage scale, it was actually a wage system inconsistent with the negotiated terms, that is, an unlawful unilateral change. The employer responded by invoking the premium pay provision as a legitimate justification. It asserted that the new pay system should be considered a reward for any employee who had shown some special fitness, skill or aptitude.

Charged as an unfair labor practice under Section 8(a)(5), the trial examiner dismissed the complaint on the grounds that it was a contract dispute. The Board reversed, ruling that the union had not ceded power to the employer to unilaterally change the wage system from one which permitted particular employees to receive premium pay for their special skills, to one which incentivized the higher scale on the level of production met by the crew as a whole.

It can readily be seen that *C & C Plywood* is nearly congruent with the facts adduced here. As in that case, the collective bargaining contract here contains a clause which Respondent asserts permits it to have made the changes in the pension plan, even though even

a casual reading shows that the clause does not clearly apply – much like the clause in *C & C Plywood* can be seen as not addressing what the employer did. In *C & C Plywood,* the employer argued that since the contract contained a provision which might have allowed the employer to institute the wage plan in question, the Board was powerless to determine whether that provision did authorize the change. Being powerless, it argued, the Board had no authority, and the matter needed to be decided under contract law, most likely Section 301 of the Act.

The Court was not persuaded. It held that the Board was not construing the collective bargaining contract in order to determine the nature of the contractual rights that the agreement accorded the parties. Instead, it observed that the Board had "merely enforce[d] a statutory right which Congress considered necessary to allow labor and management to get along with the process of reaching fair terms and conditions of employment -- 'to provide a means by which agreement may be reached.'" *Id.*, at 429. It further observed, relying on its decision in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270 (1956), reh. den. 351 U.S. (1956), that it might be necessary to construe language of a collective bargaining agreement in an unfair labor practice context, and that the Board had the power to do so. If the Board had no such power, it noted, particularly in circumstances where arbitration was unavailable, it would be inconsistent with the legislative scheme, since it would place obstacles in the way of the Board's effective enforcement of an employer's statutory duties. In other words, if the Board couldn't look to the meaning of the contract, that would first force the union into the court system to obtain a ruling on the contract dispute, and thereafter require the union to seek statutory vindication before the Board. Clearly, it said, that was not Congress's intention. A two-step process such as that was held to be contrary to Congress's purpose of rapid, efficient resolution of labor disputes.

The Court then turned to a question not reached by the appellate court's decision -- whether the Board was incorrect in determining that the employer had no unilateral right to make the change it did. It observed that the Board had "relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context. [Citation to law review article omitted.] *Nor can we say that the Board was wrong in holding that the union had not forgone its statutory right to bargain about the pay plan inaugurated by the respondent*…." (Emphasis added.) *C & C Plywood Corp.*, supra, at 430-431.

The Court's reference to 'foregoing a statutory right' is a specific reference to what is generally referred to as 'a clear and unequivocal waiver.' Justice Stewart and the rest of the Court well knew that the statutory rights accorded a union under the Act trump ambiguous language found in a collective bargaining contract, and require further bargaining to clarify the parties' mutual intent -- particularly where arbitration is unavailable.

Indeed, in the underlying case (*C & C Plywood*, 148 NLRB 414 at 416), the Board had specifically utilized the "clear and unmistakable waiver" analysis approved by the Court. It relied directly on its 1961 decision in *Proctor Mfg. Corp.*, 131 NLRB 1166 at 1169 (1961), as well as the Sixth Circuit's decision in *Timken Roller Bearing v. NLRB*, 325 F.2d 746 (1963), cert. den. 376 U.S. 971 (1964). Those cases, in turn, can be traced to *Tide Water Oil*, supra, in 1949. Based on that history, I fail to understand why the 'contract coverage' theory of defense has gained any traction whatsoever. In my view, the theory is valueless as a legal rationale. It has not been a viable theory since the Court decided *C & C Plywood* in 1964.

Thus, Supreme Court and Board precedent remain firmly on the side of the clear-and-unmistakable waiver standard.[9]

Moreover, the contract coverage approach sets traps for the unwary. Such a doctrine only encourages arguing that the bare mention of a topic in a collective bargaining contract would mean the parties have had a chance to bargain over every aspect of that subject, and thus the contract is determinative.[10] However, this approach only leads to greater labor strife and would grind the collective bargaining process to a halt.[11] Unions would become perpetually wary of any particular language in an agreement, and would be forced to deal with the sharp practice of an employer using a minor detail to declare a subject 'bargained over'. This would transform bargaining into a game of "gotcha," and provide employers an incentive to skim over the details of as many collective bargaining agreement clauses as possible because they would have the unfettered right to implement changes as they saw fit. Such situations would lead to a greater number of contract disputes flooding the court system. This is clearly not where Congress instructed labor and management to go.

Under the clear-and-unmistakable waiver standard, the focus of the parties is sufficiently narrowed so that they do not have to consider every potential iteration of an issue that may or may not appear down the road. They can focus on the issues that are at stake, and if a clear and unmistakable waiver does occur, "the employer's right to take future unilateral action should be apparent to all concerned."[12]

Thus, contract language should not be allowed to trump the statutory rights involved, as connected to the obligation to bargain in good faith, unless the contract language or other evidence amounts to a clear and unequivocal waiver. Here, the question is whether the Union waived its right to bargain over the pension plan. Much as the Court perceived the Board's role in *C & C Plywood Corp.*, in rejecting contract coverage as a defense, I am simply enforcing the statutory duty to bargain in good faith.

3. Past Practice

Respondent next contends that its past practice, coupled with the Union's acquiescence to those past practices, afforded Respondent the right unilaterally to change the pension plan. The Supreme Court has long held that a unilateral change made pursuant to a longstanding practice is basically a continuation of the status quo and not a breach of the bargaining obligation.[13]

In *Courier Journal I*,[14] the Board found that the respondent had an established past practice of increasing employees' contributions for health insurance premiums for all employees. The Company had made such increases, without formal notice, in 1992, 1993,

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[9] *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693; *Provena Hospitals*, 350 NLRB 808.

[10] *Provena Hospitals*, 350 NLRB at 818. (Battista, C. dissenting) (stating that it is only necessary that provisions be no more than "relevant to the dispute").

[11] Id. at 813.

[12] *Id.*

[13] *NLRB v. Katz*, 369 U.S. 736, 746 (1962).

[14] 342 NLRB 1093 (2004).

1994, 1999, 2000 and 2001, and the Union had acquiesced each time.[15] The Board held that a subsequent change in 2002 was implemented pursuant to this well-established past practice.[16]

In the instant case, Respondent pointed to a multitude of changes they have made over the last 10 years. The difficulty with this evidence is that, taken as a whole, it is a transparent attempt to flood the record with irrelevant documents. Respondent did introduce documents evidencing changes in the pension plan, but many of these changes appear to be legislative or regulatory-mandated changes. One such example would be the first amendment, which was pursuant to the government-mandated Economic Growth Tax Relief Reconciliation Act of 2001. As this is a government requirement, the Union had no authority to challenge the amendment. Despite that, Respondent cites this government mandate as an example of Union acquiescence. I am unpersuaded. Moreover, most of its other changes deal with minor administrative changes having no impact on the plan beneficiaries. These cannot amount to evidence of acquiescence, either.

Similarly, Respondent points to changes in other benefits, including vision and dental insurance, life insurance, and other medical insurance, as proof of acquiescence. These have no bearing on the pension plan and I reject them as being irrelevant to the pension plan issue presented here.

Both parties can, however, agree to one significant change prior to their current conflict. In 2005, Respondent froze access to the pension plan for all employees under 50 years old, and employees who were over 50 but not yet vested in the plan. As set forth above, those individuals had four options for how to take their money, one of which was the Company-sponsored 401(k) plan. The Union did acquiesce in this instance and readily admits to it.

Even so, one instance of acquiescence does not amount to a waiver *in futuro*. It is only a single event or transaction, not the stuff of a past practice. Furthermore, even with this single circumstance, "[a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time."[17] This has been a Board standard for over 40 years, and applies even when such further changes arguably are similar to those in which the union may have acquiesced in the past.[18] The 2005 incident has not established a past practice proving any sort of waiver of the right to bargain.

4. Incorporation of the Pension Plan document

Respondent finally contends the Pension Plan document reserved the right for Respondent to modify the Pension Plan at its discretion. As an abstract matter, an outside document, such as the pension plan document at issue, can be incorporated into a collective bargaining agreement. If the parties have agreed to incorporate such a document, its terms can be considered bargained for, as much as anything in the collective bargaining agreement itself.

In *Mary Thompson Hosp.*, 296 NLRB 1245, 1246 (1989), the collective-bargaining agreement included a section specifically stating that the pension benefits plan was incorporated into the collective bargaining agreement. That plan included a clause reserving to the Employer the right to terminate the plan. Likewise, the pension plan here includes a clause

[15] *Id.* at 1094.
[16] *Id*.
[17] *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987).
[18] *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

allowing for substantive amendments. Respondent argues, therefore, that *Mary Thompson Hosp.* should control. However, the case is clearly distinguishable. In *Mary Thompson Hosp.* the collective bargaining agreement explicitly incorporated the pension plan document itself. That is not true here. Respondent's collective bargaining contract with the Union only states that participants must meet the plan's requirements for participation. That is hardly the language of incorporation by reference, for there must be an express intent to incorporate an outside document, such as the pension plan, for the doctrine to be applicable.

It has also been held that, where a collective bargaining contract explicitly refers to a benefit plan, such a reference amounts to an incorporation of the terms of that plan. See, e.g., *B.P. Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000). In that case, though, the language in the collective bargaining agreement was far more detailed than what has been presented here. Indeed, the court quoted the operative language, observing:

> The two Texas City, Texas agreements recite that specified "Employee Benefit Plans," including the "Amoco Medical Plan," "are generally set forth in the current Benefits Plan Booklet[s]," although "it is understood that certain provisions in the Booklet have been superseded by negotiation between the parties." [Transcript reference and footnote omitted.] The Wood River, Illinois, and Yorktown, Virginia facilities' agreements provide: "Benefit plans for the Company ... will continue in force during the life of this Agreement with the understanding that these Plans may be bargained upon but will not be subject to arbitration." [Transcript reference and footnote omitted.] *In each case, the quoted language explicitly makes the plans a part of the collective bargaining agreement*, subject to specific, negotiated variations. (Emphasis added.) Id. at 873-874.

Here, unlike *B.P. Amoco,* there is no mention of the outside plan document in the collective bargaining agreement. Therefore, with no express reference to the plan document, it cannot be said that Respondent's pension plan has been incorporated by reference into the collective bargaining contract. Accordingly, Respondent's incorporation by reference argument fails.

B. 401(k) Plan

Respondent admits to materially amending the 401(k) plan when it ceased its matching contributions for plan participants. Respondent contends it had the right to make unilateral changes for reasons similar to those invoked with regard to the pension plan. Respondent grounds its assertions in the second paragraph of Article 28 of the contract, which states:

> The Company agrees that if the Omaha World-Herald Newspaper Board of Directors approves the implementation of a 401(k) Plan for its employees, pressroom employees will be eligible to participate in such a plan the same as all other employees based on the provisions of the plan adopted.

This section of the Article contains significantly less supporting language than that featured in the preceding paragraph concerning the pension plan. Once again, there is insufficient support to find a waiver by the Union, either through the implicit language or purported past practice.

Aside from the language, the only difference between the freezing of the pension plan accruals and the cessation of the matching contribution to the 401(k) plan was that the former occurred during the course of the contract (though it was open for negotiations), while the latter occurred after the contract had been terminated and bargaining was in progress.

An employer violates its duty to bargain if, while negotiations are in progress, it unilaterally institutes changes in existing terms and conditions of employment.[19] Unilateral action by an employer that modifies mandatory topics of bargaining is a per se violation of Section 8(a)(5).[20] When such unilateralism occurs during bargaining, it is generally proof that the employer has not bargained in good faith.[21]

The exception to this rule is if impasse has been reached in negotiations. If impasse is reached after good-faith negotiations, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals."[22] The existence of an impasse is a question of fact, and occurs after good faith negotiations have exhausted the prospects of concluding an agreement.[23] Furthermore, if impasse is reached, the impasse can end suddenly with any changed condition or circumstance that renews the possibility of fruitful discussion.[24]

There is no issue of impasse in the current dispute. In *Taft Broadcasting Co*., the Board evaluated a bargaining dispute involving at least 23 separate bargaining sessions and multiple general mediations. Here, the parties conducted only **one** bargaining session. This single session, which took place on December 22, involved the initial exchange of proposals and nothing more. Before the two parties could meet again, Respondent unilaterally ceased its contribution to the 401(k) plan, in violation of the Act, hardly the stuff of impasse.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, it will be ordered to cease bargaining in bad faith with the Union by making unilateral changes in the wages and terms and conditions of employment, specifically the pension and 401(k) benefits.

The affirmative action will include an order making employees whole for any loss to their pension plan and 401(k) accounts, together with interest. Interest shall be calculated in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, it will be ordered to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole, I hereby make the following

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[19] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

[20] *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *Beverly Health & Rehab Servs., Inc.,* 317 F.3d 316 (D.C. Cir. 2003), reh. en banc den. 2003 U.S. App. Lexis 6287.

[21] *See Visiting Nurse Servs. v. NLRB*, 177 F. 3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000); *NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995).

[22] *Taft Broadcasting Co.*, 163 NLRB at 478.

[23] *Id.*

[24] *Airflow Research & Mfg. Corp.*, 320 NLRB 861 (1996); *Circuit-Wise, Inc.*, 309 NLRB 905 (1992).

Conclusions of Law

1. Respondent, Omaha World-Herald, is an employer engaged in an industry affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is an appropriate bargaining unit:

   All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

4. On December 31, 2008, Respondent violated Section 8(a)(5) and (1) when, without bargaining with the Union despite the Union's request that it do so, it froze the accrual of benefits to those bargaining unit employees who were participating in the pension plan.

5. On April 1, 2009, Respondent violated Section 8(a)(5) and (1) when, without bargaining with the Union, it ceased making its matching contribution to employee accounts.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [25]

ORDER

Respondent, Omaha World-Herald, Omaha, Nebraska, its officers, agents, and representatives, shall

1. Cease and desist from:

   a. Unilaterally, without first bargaining with the Union, freezing the accrued pension benefit of all participating employees.

   b. Unilaterally, without first bargaining with the Union, suspending its matching contributions to the 401(k) plan.

   c. In any other manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

   a. Bargain collectively in good faith with the Union concerning the pension plan and the 401(k) plan for those employees the following appropriate bargaining unit:

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

All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by the Employer at its facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

b. Upon written request by the Union, and in the manner set forth in the Remedy section, reinstate the pension plan as it existed on December 30, 2008.

c. Upon written request by the Union, and in the manner set forth in the Remedy section, reinstate the 401(k) plan as it existed on March 31, 2009.

d. Within 14 days of the Board's decision, make whole the employees in the bargaining unit, together with interest, for any benefits they may have lost due to the unlawful unilateral changes, as set forth in the Remedy section of this decision.

e. Within 14 days after service by the Region, post at its operation in Omaha, Nebraska copies of the attached notice marked "Appendix." [26] Copies of the notice, on forms provided by the Regional Director for Region 17 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 31, 2008.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

_____

James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C., March 26, 2010

[26] If this Order is enforced by a Judgment of the 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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change the terms and conditions of employment of our bargaining unit employees without first bargaining with **Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters**. More specifically,

WE WILL NOT unilaterally freeze the accrued pension benefits of the bargaining unit employees who were participating in the pension plan on December 31, 2008.

WE WILL NOT unilaterally suspend our matching contributions to the 401(k) plan with respect to bargaining unit employees who held 401(k) accounts on March 31, 2009.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you as set forth above.

WE WILL rescind the changes we made to the pension plan and the 401(k) plan on January 1, 2009 and April 1, 2009, respectively, and **WE WILL** make whole the affected employees for losses, including interest, which are connected to the decisions we made without first bargaining with **Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters**.

WE WILL bargain in good faith with **Teamsters District Council 2, Local 543M, affiliated with International Brotherhood of Teamsters** before any changes to the pension plan or the 401(k) plan are made insofar as they have an impact on bargaining unit employees.

The bargaining unit is:

All regular full-time and regular part-time journeyman pressmen and apprentice pressman, including leadmen, employed by us at our facility in Omaha, Nebraska, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

OMAHA WORLD-HERALD

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

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 ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.