

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: February 24, 2000

TO : Rosemary Pye, Regional Director  
Region 1

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Women & Infants Hospital of Rhode Island  
Case 1-CA-37490 530-6001-5000  
530-6083-0150-5000

This case was submitted for advice on the issue of whether the Employer violated Section 8(a)(5) of the Act within the meaning of Section 8(d) by implementing a retirement incentive program without the Union's consent where the parties' collective-bargaining agreement covered the subject matter of retirement.

## FACTS

Women & Infants Hospital of Rhode Island (the Employer) is a non-profit institution in Providence, Rhode Island that provides medical care for women and infants. For many years, the Employer has had a collective-bargaining relationship with District 1199 New England Health Care Employees Union, SEIU, AFL-CIO (the Union), which represents four bargaining units of the Employer's employees. Negotiations leading to the parties' current collective-bargaining agreement were very acrimonious. One of the major areas of disagreement was the level of pension benefits for employees eligible for early retirement. Ultimately, the parties compromised on contract language covering the early retirement of bargaining unit employees. The Employer never proposed, and the parties never discussed, an early retirement incentive program. The final agreement reached by the parties contains no zipper clause and is effective from March 13, 1999 through November 20, 2001.

In early July,<sup>1</sup> the Employer contacted the Union to propose an early retirement incentive program.<sup>2</sup> The

---

<sup>1</sup> All events occurred in 1999, unless otherwise noted.

<sup>2</sup> According to the Employer, the hospital was experiencing budgetary difficulties and proposed the early retirement incentive program as a way to avoid layoffs. A similar

incentive program offered a combination of a one-time cash benefit of \$2,000 to \$10,000 and/or continuation of health insurance coverage for one to five years after retirement, with the specific amount based on years of service and on the number of hours worked weekly. The incentive program would be offered only to employees who otherwise met the pension plan's eligibility requirements.

The Union expressed interest in the Employer's early retirement incentive program and the parties met on several occasions to negotiate the details. Among other areas of disagreement, the Employer was anxious to implement the program by July 30, in order to provide employees with adequate notice under the Older Workers Benefit Protection Act and the ADEA yet still realize a savings by the end of the Employer's fiscal year (on September 30). The Union, on the other hand, wanted to delay implementation of the program until the parties received a ruling on a related pension issue which had already been submitted for arbitration. On Monday, August 2, the Employer sent out the early retirement incentive offer to all employees. Out of 210 eligible employees, 28 accepted the offer, including 17 bargaining unit and 11 non-bargaining unit employees. Although the parties express differing views over whether they agreed to implement the program, the Region credits the Union's version of events which supports the view that no final agreement was reached.

#### **ACTION**

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Sections 8(a)(5) and 8(d) by implementing a retirement incentive program without the Union's consent.

Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours and other terms and conditions of employment." Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "'modif[y] . . . the terms and conditions contained in' the contract: the employer must obtain the union's consent before implementing the change. If the employment conditions the employer seeks to change are not 'contained

---

program had been offered to the employees, with the agreement of the Union, in 1995.

in' the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change."<sup>3</sup>

Furthermore, the Board has found that an employer's unilateral implementation of a new benefit is an 8(d) modification where the general topic of that term of employment was contained in the contract, notwithstanding the fact that the particular benefit implemented by the employer was not contained in the contract or bargained over in contract negotiations. In Martin Marietta Energy Systems,<sup>4</sup> the parties' collective-bargaining agreement called for the employer to provide a particular health insurance plan, which was an indemnity plan. During the term of the contract, the employer began to offer a health maintenance organization plan (HMO) to employees, as well, without the union's consent. There was no change in the existing indemnity plan, and an employee could elect to continue with that plan, but an employee could not elect to be covered by both plans. Like the old plan, the HMO program was optional. The employer argued that there was no midterm modification of the contract, because there had been no change in the negotiated medical insurance plan contained in the collective-bargaining agreement, so that no provision "contained in" the contract had been modified. In a decision approved by the Board, the ALJ found that the employer had modified the contract. Since the employees would have had to give up the original indemnity plan if they chose the HMO, the ALJ found the implementation of the new plan was an "addition" to, or "change" in the existing contract.<sup>5</sup> In reaching his determination, the ALJ also found a "violation" of Section 8(d) on the additional ground that implementation of the new benefit modified a zipper clause that prohibited additions, changes, or amendments to the contract. His decision appears to rest equally, however, on the ground that the new plan modified

---

<sup>3</sup> St. Vincent Hospital, 320 NLRB 42 (1995), quoting Milwaukee Spring Division, 268 NLRB 601, 602 (1984), enf'd 765 F.2d 175 (D.C. Cir. 1985) (fn., citations omitted).

<sup>4</sup> 283 NLRB 173 (1987), enf'd 842 F.2d 332 (6th Cir. 1988).

<sup>5</sup> 283 NLRB at 175. Cf. St. Vincent Hospital, supra, in which the Board found that an employer modified the health insurance provisions contained in its collective-bargaining agreement by discontinuing existing health plans and offering new ones in their place.

the parties' contractual provision regarding the indemnity plan.

Similarly, in C & S Industries, Inc.,<sup>6</sup> the Board found an employer's unilateral implementation of a wage incentive program was a modification of its collective-bargaining agreement. The agreement established an hourly wage rate for each job classification, but was silent regarding any form of wage incentive system. The Board held that, although the contract made no specific mention of wage incentives, such incentives were "inseparably bound up with" and therefore "an aspect of the payment of wages, a subject expressly covered by the contract."<sup>7</sup> Thus, where a particular subject matter has been included in a collective-bargaining agreement, an employer violates Section 8(a)(5) within the meaning of Section 8(d) by making changes in that area without the union's consent, even if the particular changes implemented are not explicitly covered by the contract. As one ALJ recognized, such a unilateral modification allows an employer to accomplish what it was unable to accomplish by bargaining, and disturbs the carefully balanced arrangement provided through the collective-bargaining process.<sup>8</sup>

The Board has never decided whether a retirement incentive program such as the one in this case is "contained in" a collective-bargaining agreement that includes the general topic of pensions. In Mead Corp.,<sup>9</sup> the

---

<sup>6</sup> 158 NLRB 454 (1966).

<sup>7</sup> Id. at 459. The Board went on to say that any doubt of the breadth of the wage provision was removed by a contractual provision that expressly prohibited any change in the method of payment without the written consent of the parties. While this additional contractual provision supported the Board's decision, it was arguably not necessary to it. Thus, the absence of a contract provision expressly prohibiting the Employer from making any changes in the retirement program without the Union's consent is not dispositive.

<sup>8</sup> See Wrought Washer Mfg. Co., 197 NLRB 75, 82 (1972) (the Board refused to affirm the ALJ's recommended order, finding that the dispute should be deferred to the parties' grievance procedure under Collyer Insulated Wire, 192 NLRB 837 (1971)).

<sup>9</sup> 318 NLRB 201 (1995).

Board considered whether an employer's unilateral implementation of a retirement incentive program was a violation of the Act. In that case, as here, the parties' collective-bargaining agreement required the employer to maintain a retirement plan, but was silent regarding a retirement incentive program. However, in that case, unlike here, the parties' collective-bargaining agreement also contained a zipper clause that excluded all matters from further negotiation for the duration of the contract, whether or not previously mentioned. As a result, the Board agreed with the General Counsel that the employer's unilateral implementation of the retirement incentive plan was an 8(d) modification of the zipper clause. Although the charging party in that case argued that the retirement incentive program was an 8(d) modification of the contract's pension article, the Board found that it was unnecessary to reach that issue because the General Counsel did not contend that the program was a modification of the pension article.<sup>10</sup>

In the instant case, the subject of early retirement was specifically addressed by the parties' collective-bargaining agreement. In fact, the level of pension benefits for employees eligible for early retirement was one of the major areas of disagreement between the parties during the latest round of contract negotiations. The Employer's mid-term implementation of the early retirement incentive program offered employees an additional benefit which had not been negotiated between the parties, and required employees to choose between the unilaterally implemented program or the negotiated benefits for early retirement. Therefore, the implementation of the new plan was an "addition" to, or "change" in, the existing contract. Although the contract did not specifically provide for an early retirement incentive program, we conclude that the Employer's unilateral implementation of the early retirement incentive program was a modification of a term and condition of employment contained in the parties' collective-bargaining agreement.

---

<sup>10</sup> In that case, since the theory of violation was based upon the zipper clause and the complaint did not allege a modification of the pension clause, the General Counsel "conceded" that the retirement incentive program was not part of the parties' agreement. *Id.* at 202. As a result, the Board "assume[d] arguendo" that the employer would have been free to implement such a program after bargaining to impasse. *Ibid.*

Although the Board stated in Mead that the retirement incentive program at issue there was not a term of the parties' collective-bargaining agreement, Mead is clearly distinguishable from this case. First, the parties' contract in that case did not provide for early retirement benefits. Thus, the retirement incentive program was not as inextricably related to a term of that contract as is the case here. In addition, since Mead was litigated on the basis of the zipper clause contained in the parties' agreement, the Board specifically stated that it was not necessary to reach the issue of whether the unilateral implementation of the retirement incentive program was a modification of the contract.<sup>11</sup> Here, since there is no zipper clause in the parties' agreement, it cannot be said that the Employer waived its right to unilaterally implement terms and conditions of employment after bargaining to impasse. However, since we conclude that the retirement incentive program was a term and condition of employment contained in the parties' agreement, and the Employer was not privileged to implement the program even if impasse had been reached, we find it unnecessary to decide whether the parties had reached impasse.

Accordingly, absent settlement, the Region should issue a Section 8(a)(1) and (5) and 8(d) complaint, consistent with the above analysis.

B.J.K.

---

<sup>11</sup> 318 NLRB at 202.