

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

Advice Memorandum

DATE: December 8, 2008

TO : Irving Gottschalk, Regional Director
Region 30

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

SUBJECT: Certco, Inc.
Cases 30-CA-18108 and 30-CB-5310

240-3367-0480-5050
240-3367-8362-8044
240-3367-8362-8068
530-6083-0125
530-6083-0150
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554-1483-0125

The Region submitted these cases for advice as to whether: (1) the Union violated Section 8(b)(1)(A) and (3) by refusing to bargain during a contract term about a surcharge imposed by a Teamsters pension fund in response to new statutory funding requirements; (2) the Employer violated Section 8(a)(1) and (5) by thereafter unilaterally reducing the contractual wages to recover the increased cost of pension benefits; and (3) the Section 8(a)(5) allegation should be deferred to the parties' contractual arbitration procedure.

We conclude that the Region should dismiss the Section 8(b)(1)(A) and (3) charge and issue complaint alleging that the Employer violated Section 8(a)(1) and (5) by unilaterally changing the contractual wage rate. We also conclude that it is not appropriate to defer the Section 8(a)(1) and (5) violation to the parties' grievance-arbitration procedure.

FACTS

Certco, Inc. ("the Employer") is a grocery and food distributor, and Teamster, Local 695 ("the Union") is the collective-bargaining representative of the Employer's truck drivers and warehouseman at its Madison warehouse. They have been parties to successive collective-bargaining agreements since the late 1960's, and their most recent collective-bargaining agreement is effective July 1, 2005 through June 30, 2010. Pursuant to their successive

agreements, the Employer has participated in the Teamsters Central States, Southeast, and Southwest Areas Pension Plan ("the Fund"). The Fund is a defined-benefit plan with a fixed contribution rate, set in the parties' collective-bargaining agreement. The Fund is administered by a Board of Trustees, composed of employer and union representatives.

2005 Contract Negotiations

During negotiations for their current agreement, the Employer proposed withdrawing from the Fund and providing the employees with a Section 401K plan in its place. Specifically, at bargaining sessions on May 26 and June 3, 2005, the Employer stated that it was worried about withdrawal liability increasing over time, because other employers had been filing for bankruptcy and withdrawing from the Fund. The parties met with Fund representatives at their next negotiating session on June 10, 2005 to discuss the Fund's funding status. Those representatives indicated that the Fund had an unfunded liability of \$11.25 billion. At the following bargaining session the next month, the Employer again expressed concern over the future viability of the Fund and asked whether there were any circumstances under which the Union would consider withdrawing from the Fund. The Union responded that there were no such circumstances.

By letter dated July 26, 2005, the Fund notified the Employer that the IRS had granted the Fund's request for an extension of the period for amortizing its unfunded liabilities. That letter stated that "[t]he conditions attached to the amortization extension period will require additional contributions to the Pension Fund in order to maintain existing benefits[,] but that additional contributions could now be addressed in the collective-bargaining context rather than through IRS-imposed penalties. In addition, the letter referenced "legislative activity aimed at providing funding reform[,] and stated that the Fund would keep employers informed of future developments. The Union subsequently assured the Employer that it would not face increased costs pursuant to then-existing regulation, i.e., regulation in place prior to the enactment of the Pension Protection Act of 2006 ("PPA"). The parties discussed then-pending pension legislation, but did not reach any conclusions about its import.

On September 13, 2005, the Employer proffered a written proposal to substitute a 401K plan for existing pension benefits. The Union rejected it. Two months later, the Employer agreed to maintain its participation in the Fund. The parties agreed to freeze the Employer's

contribution level at existing rates and to phase in contributions for subsequently-hired warehouse employees over a five-year period.

2008 Pension Fund Assessment

Congress passed the PPA in 2006 to improve the financial health of the Pension Benefit Guaranty Corporation and defined benefit plans. The legislation was effective January 1, 2008. It established three "zones" that correspond to a pension plan's funded status: the red zone (critical), yellow zone (endangered), and green zone. Any pension plan certified as "critical" must establish a rehabilitation plan that improves the pension plan's funding over time. By letter dated March 28, 2008,¹ the Fund notified the Employer that the Fund was in a "critical status" within the meaning of the PPA. Pursuant to that statute, employers were required either to negotiate increases in their contractual contribution rates within thirty days or to pay a 5% surcharge for the remainder of 2008 and a 10% surcharge in 2009.

On April 3, the Employer requested by letter that the Union bargain within the next two weeks. On April 7, the Union left a message for the Employer, refusing to meet. The Employer responded by letter on that same date, stating that the parties had agreed that there would be no increases in the Employer's pension contributions during the contract term, and the Union was obligated at a minimum to negotiate the effects of the change in contribution rates.

Failing to receive a response, the Employer's Executive Vice-President and Chief Operating Officer notified the Union on April 25 that the Employer would deduct 15¢ per hour from the unit employees' scheduled July 1 wage increases. The Employer explained that it had calculated that the 5% surcharge that it would have to start paying to the Fund represented 15¢ per hour for each employee; therefore, with this wage decrease, the bargained compensation to employees would remain the same.

A week later, the Union responded that it was the Fund, not the Union, that had imposed the surcharge; that the surcharge was analogous to increased costs imposed by a third-party business such as increased fuel costs; and that the PPA did not warrant opening the collective-bargaining agreement for an adjustment of contractual wages or benefits. The Employer responded a few days later,

¹ All dates are in 2008 unless otherwise indicated.

rejecting the Union's analogy and again requesting to bargain over the effects of the surcharge. The Employer did not pay the surcharge with its May pension contributions, but began paying the surcharge after the Fund threatened significant penalties.

On July 7, the Employer filed the charge in Case 30-CB-5310, alleging that the Union violated Section 8(b)(1)(A) and (3) by refusing to bargain over the increased Fund assessments imposed under the PPA. On July 9, the Employer notified the unit employees that the July 1 scheduled wage increase would be reduced by 15¢ per hour to recover its increased pension costs. The Union filed a contractual grievance on July 11 and a Section 8(a)(1) and (5) charge in Case 30-CA-18108 on August 18, based upon the Employer's unilateral reduction of the contractual wage increase. The Employer has denied the contractual grievance. The Union has requested to strike arbitrators, but the Employer said that it was not yet ready to do so.

ACTION

We conclude that the Region should dismiss the Section 8(b)(1)(A) and (3) charge, because the Union had no obligation under Section 8(d) to bargain about mid-term changes in wages and benefits. The Region should issue a Section 8(a)(1) and (5) complaint, however, based upon the Employer's unilateral reduction of contractual wage rates during the term of the collective-bargaining agreement. Moreover, the Region should not defer the Section 8(a)(1) and (5) allegation to arbitration, because: (1) the contractual wage term is unambiguous and there are no issues of contract interpretation requiring an arbitrator's expertise; and (2) the Employer's asserted defense would require an arbitrator to rule upon the statutory question of whether the Union breached its duty to bargain.

I. The Union Did Not Violate 8(b)(1)(A) and (3).

Section 8(d) expressly states that the duty to bargain in good faith does not require either party "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period" absent a reopener clause. Accordingly, a union generally does not violate Section 8(b)(3) by failing to bargain in good faith in response to a request for a mid-term contract modification.² There is generally "no obligation either to

² Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 773 (1989), enfd. in part and enf. denied in part on other grounds 905 F.2d 417 (D.C. Cir. 1990) (dismissing Section 8(b)(3) allegation that union unlawfully insisted

bargain or to accede to" an employer's request for a mid-term modification of the contract.³

The Board set forth a narrow exception to this general rule in Sheltering Pines Convalescent Hospital, finding a duty to bargain mid-term about a statutory change that was not within the parties' contemplation at the time they negotiated their collective-bargaining agreement.⁴ The California legislature increased state payments to nursing facilities that were to be utilized to raise wages and benefits for nonadministrative personnel and reduce employee turnover. The employer neither passed the increased funds on to employees, nor offered to bargain, claiming that the effective contract controlled wage increases. The Board held that in this "highly unusual -- if not unique --" situation, the employer violated Section 8(a)(5) by refusing to bargain about the allocation of these additional funds earmarked for employees.⁵ In so doing, the Board expressly distinguished cases finding no union obligation to bargain about mid-term wage changes sought by an employer because of financial difficulties, because those cases involved "risks within the contemplation of the parties at the time they entered their respective collective-bargaining agreements."⁶

Here, the Employer requested that the Union bargain during the contract term in order to obtain economic relief from increased pension costs imposed by a third-party -- the Fund. Under Section 8(d), the Union had no duty to bargain over or to agree to such mid-term relief. Moreover, because the risks of increased pension costs were expressly contemplated by the parties during negotiations and were the subject of bargaining proposals and negotiations, the limited exception set forth in Sheltering

upon Section 8(e) clause as condition for granting employer mid-term economic relief).

³ Ibid. See also Boeing Co., 337 NLRB 758, 762-763 (2002) (no Section 8(a)(5) violation because "no party to a collective-bargaining agreement may be compelled either to discuss contract changes or to agree to them"); Connecticut Power Co., 271 NLRB 766, 766-767 (1984) (employer did not violate Section 8(a)(5) by refusing to bargain over its own proposal for a mid-term wage increase).

⁴ 255 NLRB 1195, 1196-1197 (1981).

⁵ Id. at 1196.

⁶ Id. at 1196, fn. 6.

Pines is inapplicable here. The Employer knew the Fund was severely underfunded and that pension reform legislation was pending, but nevertheless, the parties agreed to continued participation in the Fund. In addition, the Employer did not seek language granting it economic relief in the event of increased pension costs.⁷ The Employer also did not propose a reopener clause requiring the Union to negotiate in the event that pending pension legislation was enacted. In these circumstances, the Union's refusal to reopen the contract and grant the Employer the bargain that it failed to obtain in contract negotiations did not violate Section 8(b)(1)(A) and (3).

II. The Employer Violated Section 8(a)(1) and (5).

The Board has long held that an employer violates Section 8(a)(1) and (5) by failing to pay contractual wage rates.⁸ Neither economic necessity,⁹ nor the union's refusal to resolve the matter constitutes an adequate defense to such a violation.¹⁰ In Nassau County Health Facilities Assn., the Board adopted an Administrative Law Judge's decision applying these principles to find a Section 8(a)(5) violation based upon an employer's refusal

⁷ Cf. Calmat Co., 331 NLRB 1084, 1087, fn. 19 (2000) (parties' expired contract contained a clause stating that in the event of legislation resulting "in a higher contribution rate to meet funding requirements, the increased contribution rate will come out of the wage package").

⁸ E.g., Grane Health Care, 337 NLRB 432, 435-436 (2002) (unilateral increase in contractual wage rates); Master Plastering Co., 314 NLRB 349, 351 (1994) (unilateral reduction of contractual wage rates); Hotel Donatello, 311 NLRB No. 101, slip op. at 1-2 (1993) (failure to pay contractual wage increases).

⁹ Wightman Center, 301 NLRB 573, 575 (1991) (employer claimed wage increase necessary to retain LPNs and meet state staffing requirements in order to stay in business); Hotel Donatello, 311 NLRB No. 101, slip op. at 1 (employer asserted financial inability to pay) Oak Cliff-Golman Baking Co., 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975) (same).

¹⁰ Hotel Donatello, 311 NLRB No. 101, slip op. at 1. See also Oak Cliff-Golman Baking Co., 207 NLRB at 1064 (Section 8(d) "granted the Union the privilege it exercised to refuse to grant consent").

to grant contractual wage increases after the State froze the employer's Medicaid payments.¹¹ The Judge ruled that the employer could not make this mid-term modification "even though he has previously offered to bargain with the union on the subject and the union has refused."¹² The Judge also rejected the employer's financial necessity defense.¹³

Even where the Employer claims that the mid-term modification is necessitated by statutory or regulatory requirements, an employer violates Section 8(a)(5) by unilaterally implementing, provided that the employer has some discretion as to how to implement the legal requirements.¹⁴ As long as the employer "had some choices over which the parties could have bargained[,]" the employer may not act unilaterally.¹⁵ "While the mandate and requirements of other Federal statutes may serve to limit the area of discretion which a party may exercise in fulfilling his bargaining obligation," the obligation to bargain in good faith is not "minimized or obviated."¹⁶ The employer is relieved from the obligation to bargain only where a specific change in terms and conditions is statutorily mandated, such as work rule changes required by the Occupational Health and Safety Act¹⁷ or increases in

¹¹ 227 NLRB 1680, 1683-1684 (1977). Accord Rego Park Nursing Home, 230 NLRB 725, 727 (1977) (same); Sun Harbor Manor, 228 NLRB 945, 946-947 (1977) (same).

¹² 227 NLRB at 1683.

¹³ Id. at 1684.

¹⁴ See, e.g., Trojan Yacht, 319 NLRB 741, 743 (1995) (rejecting employer's defense that a unilateral freeze of benefit accruals was required by revised tax statute); Keystone Consolidated Industries, 309 NLRB 294, 297 (1992), rev'd on other grounds 41 F.3d 746 (D.C. Cir. 1994) (rejecting employer's defense that it was "'legally compelled' to proceed unilaterally" in implementing pension plan changes pursuant to the Internal Revenue Code and ERISA).

¹⁵ Trojan Yacht, 319 NLRB at 743.

¹⁶ Foodway, 234 NLRB 72, 77 (1978) (employer unlawfully implemented unilateral changes in stock option plan in order to conform to the Internal Revenue Code).

¹⁷ Murphy Oil USA, 286 NLRB 1039, 1042 (1987).

wages required under the minimum wage provisions of the Fair Labor Standards Act.¹⁸

Here, as in Nassau County Health Facilities Assn., the Employer made a mid-term unilateral modification in the contractual wage rate in response to a legislative act that affected its finances. The PPA did not in any way require this change; instead the Employer devised its own plan to recoup the cost of complying with the PPA. And neither the Union's refusal to reopen the contract, nor the financial burden of the new surcharge excuses the Employer's unilateral revision of the contractual wage rate. Accordingly, this unilateral change violated Section 8(a)(1) and (5).

III. Deferral Is Not Appropriate.

The Board typically does not defer unilateral change allegations to arbitration where an employer admittedly fails to pay contractual wages or benefits.¹⁹ The rationale for these decisions is that the contractual breach does not involve a question of contractual interpretation requiring the special competence of an arbitrator. Thus, the Board's jurisdiction "clearly encompasses not only the authority but the obligation" to protect the statutory bargaining process against conduct "so disruptive to one of its principal functions - the establishment and maintenance of a viable agreement on wages."²⁰ Wages are the most important aspect of the employment relationship that Congress remitted to the mandatory process of bargaining.²¹

¹⁸ Standard Candy Company, 147 NLRB 1070, 1073 (1964). See also Sun Electric Corporation, 266 NLRB 37, 44 (1983), petition for review denied 732 F.2d 573 (7th Cir. 1984) (employer did not violate Section 8(a)(5) by unilaterally making perfunctory changes to pension plan required by the ADEA and implementing DOL and IRS regulations, where expired contract expressly provided that pension plan was to be conformed to state and federal laws).

¹⁹ See, e.g., New Mexico Symphony Orchestra, 335 NLRB 896, 897-898 (2001) (failure to pay wages in a timely manner because of lack of funds); R.T. Jones Lumber Co., 313 NLRB 726, 727 (1994) (failure to pay pension fund contributions and health insurance premiums); Struthers Wells Corp., 245 NLRB 1170, 1171, fn. 4 (1979), enfd. mem. 636 F.2d 1210 (3d Cir. 1980), cert. denied 452 U.S. 916 (1981) (failure to grant merit wage increases).

²⁰ New Mexico Symphony Orchestra, 335 NLRB at 898.

²¹ Id. at 897-898; R.T. Jones Lumber Co., 313 NLRB at 727.

The Board also does not find deferral of unilateral change allegations appropriate when those allegations are "closely intertwined" or "inextricably related" to nondeferrable allegations requiring resolution of statutory issues.²²

Here it is undisputed that the Employer failed to grant the full July 1 wage increase required by the contract. As in New Mexico Symphony Orchestra, it would not be appropriate to defer that contractual violation to the parties' grievance-arbitration procedure. Moreover, the Employer's defenses to that violation would require an arbitrator to resolve the statutory question of whether the Union breached its duty to bargain about the Fund increase. Thus, the contract violation is "closely intertwined" with nondeferrable statutory issues. We therefore conclude that deferral is not appropriate.

Accordingly, the Region should dismiss the Section 8(b)(1)(A) and (3) charge in Case 30-CB-5310, absent withdrawal, and issue a Section 8(a)(1) and (5) charge in Case 30-CA-18108, absent settlement.

B.J.K.

²² See, e.g., Medco Health Solutions of Spokane, Inc., 352 NLRB No. 78, slip op. at 2-3 (2008) (no deferral where unlawful unilateral implementation of performance standards was "closely intertwined" with refusal to provide information allegations); Windstream Corp., 352 NLRB No. 9, slip op. at 1, n.1 (2008) (no deferral where unilateral implementation of new ethics policy was "inextricably related" to direct dealing allegation); Avery Dennison, 330 NLRB 389, 390-391 (1999) (no deferral of question of whether unilateral transfer of unit work was privileged by management-rights clause where, if it were not, there would be statutory issues regarding the employer's subsequent withdrawal of recognition).