

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMERICAN WATER WORKS COMPANY, INC.,
a/k/a AMERICAN WATER WORKS SERVICE
COMPANY, INC. and its subsidiaries,

Respondent

and

Case No. 29-CA-30676
Hon. Steven Davis

UTILITY WORKERS UNION OF AMERICA,
AFL-CIO,

Charging Party.

Samuel C. McKnight, Esq.
David R. Radtke, Essqs.
Counsel for Charging Party Union
McKnight, McClow, Canzano,
Smith & Radtke, P.C.
400 Galleria Officentre, Suite 117
Southfield, MI 48034
248-354-9650

Anthony B. Byergo
Counsel for Respondent American Water
Ogletree, Deakins
Park Central Plaza
4717 Grand Avenue, Suite 300
Kansas City, MO 64112

Tara A. O'Rourke, Esq.
Counsel for the General Counsel
Region 29
National Labor Relations Board
100 Myrtle Avenue, 5th Floor
Brooklyn, NY 11201

**ANSWERING BRIEF OF UWUA TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND RESPONDENT'S BRIEF IN SUPPORT OF THE EXCEPTIONS**

I. INTRODUCTION

On October 16, 2012, Administrative Law Judge Steven Davis issued a decision finding that American Water Works, Inc. ("American Water Works" or "Company") violated §8(a)(1) and (5)

of the Act by unilaterally implementing the terms of its last, best and final offer which modified and unilaterally changed the terms of the medical plan, retiree health benefits plan (“VEBA”) and the short-term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010 without complying with the requirements of §8(d)(3) of the Act. The ALJ found that American Water Works was the party which gave notice of its desire to modify the current contract and therefore was required to notify the Federal Mediation and Conciliation Service (FMCS) and any state agency where the dispute occurred. It is undisputed that the Company failed to notify any state agency established to mediate and conciliate disputes in the states where the dispute occurred. The ALJ found the dispute occurred in each state where the National Benefits Agreement was set to expire and which could cause disruption. As the initiating party, American Water Works was obligated to notify “*any*” state agency where the dispute occurred, and by failing to do so it violated §8(d)(3) of the Act. Because the Company violated its obligation under §8(d)(3) of the Act, the implementation of its last, best and final offer which modified terms of the medical plan, the VEBA and the short-term disability plan violated §8(a)(1) and (5) of the Act.

The ALJ’s decision is supported by the record evidence and is based on a proper interpretation of the plain statutory language and well-established precedent.

II. FACTS

Since at least 1980, the Company and several National/International Unions have engaged in multi-union bargaining concerning certain subjects, including medical benefits, short term disability benefits and retiree health care benefits, covered by the National Benefits Agreement. All other subjects are bargained at the local level resulting in separate local collective bargaining

agreements. (Stipulations ¶7)¹ The Utility Workers Union of America (“UWUA”) has always taken the lead in negotiating the National Benefit Agreement for the Unions, because it represents the majority of the covered employees. (Stipulations ¶7) The most recent National Benefits Agreement was for the term June 1, 2005 through May 30, 2010. (Stipulations ¶¶7 and 8; R. 15)

In the Spring of 2009, Bob McKeage, the Director of Labor Relations for the Company, telephoned Mike Langford, the President of the UWUA, and requested a meeting to “expedite early negotiations around the National Benefits Agreement.” (R. 16) McKeage and Langford scheduled a meeting at the UWUA’s office in Washington, D.C. for June 17, 2009. (R. 17) Langford asked George Manoogian, a UWUA National Representative, and Shawn Garvey, a UWUA Executive Board member, to attend the meeting. (R. 17) Manoogian was to be the lead negotiator for the UWUA and the other Unions who are party to the National Benefits Agreement. (R. 17)

At June 17, 2009 meeting, McKeage was accompanied by Sean Burke, the Company’s Vice President of Human Relations. (R. 18) McKeage opened the meeting by talking about “getting together to get a early start, create a timeline, logistics, ... to put together a timeline about the entire logistics of national bargaining.” (R. 18) Burke discussed the rising costs in health care, that the Company wanted employees to pay more for health care and those subjects would be the “main topics at the national bargaining.” (R. 18) The Union officials listened to the Company negotiators and said little, because “it was the Company agenda.” (R. 19-20)

In terms of bargaining logistics, McKeage asked the Union to “look at some dates he put together.” (R. 85) McKeage also stated that he would prepare updated contact information for the various Locals covered by the National Benefits Agreement; that he would arrange hotel

¹ (Stipulations ¶___) denotes a paragraph in the Stipulations of the Parties which is Joint Exhibit 1; (R. __) denotes transcript page; (GC Ex. __) denotes General Counsel Exhibits; (Resp. Ex. __) denotes Respondent Exhibits; (ALDJ p. __) denotes ALJ Decision page.

accommodations for negotiations; that he wanted to set a deadline for anticipated Union information requests; that he would identify a “data source” to provide the Unions with information; and that he wanted to schedule a follow-up meeting. (R. 18-21) The UWUA agreed to a follow up meeting in Washington, D.C. in early December 2009. (R. 19)

On June 29, 2009, McKeage wrote Manoogian and Garvey “summarizing our meeting last week” and listing “next steps” for negotiations of a successor National Benefits Agreement. (GC Ex. 2) The e-mail listed a series of Company undertakings regarding “next steps” in bargaining; encouraged the Union to submit any data requests by December 1, 2009; and confirmed the December 1, 2009 meeting in Washington, D.C.²

On November 20, 2009, McKeage wrote Manoogian and Garvey a list of some of the “action items from our 6/17 meeting in Wash. . . . [and] some additional items for discussion on . . . [December] 3rd.” (GC Ex. 3) Attached to McKeage’s email was a power point agenda entitled “National Benefits Negotiations - Company/Union Meeting - December 3, 2009 (Pensacola, Florida).” (GC Ex. 3) The Company’s “action items” for negotiations included determining the Union negotiation team; scheduling 9 tentative bargaining dates; and establishing ground rules for negotiations. (GC Ex. 3) McKeage also changed the Company’s deadline for the Union’s information request from December 1, 2009 to February 26, 2010. (GC Ex. 3) At the December 3, 2012 meeting, the parties went over the National Benefit Negotiations document attached to McKeage’s November 20, 2009 email. (GC Ex. 3; R. 36-37)

On February 26, 2010, Manoogian wrote McKeage requesting information regarding negotiations. (GC Ex. 4) Manoogian wanted to satisfy the February 26, 2010 date McKeage had

² McKeage and Manoogian subsequently re-scheduled the December 1, 2009 meeting for December 3, 2009 in Pensacola, Florida for their mutual convenience. (R. 35)

established for the Union information request. (R. 38-39) On April 8, 2010, McKeage confirmed in writing the hotel locations and accommodations for the May, June and July bargaining dates proposed by McKeage. (GC Ex. 6)

The first bargaining session with the Company's bargaining team and the Union National Benefits Committee (i.e., the Unions) occurred on May 4, 2010. (Stipulations ¶9) During the morning of the May 4, 2010 meeting, Burke made a presentation to the Unions regarding the Company's desire need for benefit changes and cost shifting to employees for health care. After lunch, McKeage distributed and explained the Company's proposals to the Unions. (GC Exs. 7 and 9; R. 44-48, 93-95) After the Company presented and explained its proposals to the Unions, the Unions presented and explained their proposals to the Company. (GC Ex. 8; R. 44-48, 93-95)

Between May 4, 2010 and September 28, 2010, the parties met 15 times in Linthicum, Maryland; Philadelphia, Pennsylvania; and Chicago, Illinois. (Stipulations ¶11) On July 20, 2010, McKeage wrote "confirm[ing] our negotiations schedule for August 17-19, 2010 to discuss National Benefits." (GC Ex. 10) The letter also announced the Company would "contact FMCS for the assistance of a Federal Mediator;" offered additional dates for negotiations; and stated "***the National Benefits Agreement does expire on July 31st.***" (GC Ex. 10) (Emphasis supplied.)

Before the August 17, 2010 meeting in Chicago, McKeage "decided to reach out to the Chicago FMCS office and seek assistance from the Federal Mediation and Conciliation Service . . . I picked up the phone and called the office in Chicago. They contacted me back and said they would assign Javier Ramirez to be our mediator and asked that I reach out to him and schedule the hotel where the negotiations were going to take place." (R. 130) Later, McKeage sent a couple cryptic e-mails to Mr. Ramirez. (Resp. Ex. 1) No representative of American Water Works ever contacted a state mediation agency. (Stipulations ¶13)

On September 16, 2010, the Company gave the Union its final proposal. (GC Ex. 13; R. 70)
In early October 2010, the Company advised employees that it would implement its final proposal on January 1, 2011. (Stipulations ¶17) And it did. (Stipulations ¶18)

III. LEGAL ANALYSIS

A. American Water Works' Claim That it Was Not The Initiating Party in The Negotiations For The National Benefits Agreement Is Contrary to The Established Facts.

The Company contends that Manoogian's February 26, 2010 request for information to McKeage constituted the "written notice" under §8(d)(1) of the Act and therefore made the Union the "initiating party" with respect to the proposed termination or modification of the 2005-2010 National Benefits Agreement. (GC Ex. 4) That is an after-the-fact legal justification without any basis in fact. The actual facts are as follows:

- There is no record evidence that the UWUA ever was "the party desiring such termination or modification [of the 2005-2010 National Benefits Agreement]."
- Manoogian's February 26, 2010 information request to McKeage followed meetings called by McKeage to initiate negotiations because the Company desired to modify the 2005-2010 National Benefits Agreement. (R.16-21, 36-37)
- Manoogian's February 26, 2010 letter was written at McKeage's insistence. (GC Ex. 3)
- The February 26, 2010 letter does not, in any respect, reference a "proposed termination or modification" of the 2005-2010 CBA. (GC Ex. 4)
- Parties with a bargaining relationship routinely make information requests before, during and after the term of a CBA. An information request is not written notice of the proposed termination or modification of a CBA.
- The record evidence is that the Union *never* desired to terminate or modify the 2005-2010 National Benefits Agreement. Indeed, the Union was continually reminding the Company that it had no right to change the terms of the 2005-2010 CBA.³

³ In fact, the Union wanted to maintain the existing contract. See Manoogian's September 10, 2010 letter (attached to Respondent's Exhibit 1) "remind[ing] you [i.e., the Company] that our members' benefits remain in effect throughout the bargaining process."

In short, Manoogian's February 26, 2010 information request plainly is not §8(d)(1) written notice of the proposed termination or modification of the 2005-2010 National Benefits Agreement.

Here, the Company clearly was the "initiating party" and the "party desiring modification" of the 2005-2010 National Benefits Agreement. This is proven by the following actions of American Water Works:

- McKeage requested the June 17, 2009 meeting to "expedite early negotiations around the National Benefits Agreement." (R. 16)
- At the June 17, 2009 meeting, Burke advised the Union of the Company's desire for major modifications in health care; and McKeage "talked about getting together to get an early start" on negotiations. (R. 18)
- At the June 17, 2009 meeting, McKeage proposed bargaining dates and outlined various tasks he would perform regarding bargaining logistics; McKeage scheduled a December 2009 meeting to follow up on bargaining matters; and McKeage even established a time frame for the Unions to submit an information request to the Company. (R. 18-21, 85)
- In June 2009 and again in November 2009, McKeage *wrote* the Union regarding "next steps" for negotiations; confirmed the Company's proposed bargaining dates; arranged hotel accommodations for negotiations; informed the Unions to determine their bargaining team; and proposed discussions on ground rules for negotiations. (GC Ex. 3)
- At the December 3, 2009 meeting, the parties discussed the items set forth on the document emailed to the UWUA on November 20, 2009 by the Company entitled "National Benefits Negotiations -- Company/Union Meeting." (GC Ex. 3, R. 38-39)

The ALJ properly stated that the standard to determine the initiating party under §8(d)(3) is which party desires to modify the contract. (ALJD p. 7) The ALJ correctly found the Company, by the above-listed actions, desired to modify the National Benefits Agreement and initiated negotiations to achieve the goal, stated on June 17, 2009, to contain the cost of health care and shift more costs onto employees. (ALJD pp. 7-9)

The Company continued to show its desire to modify the contract by its words, documents and actions over the next 18 months, until it announced the implementation of its proposal on September 16, 2010.

B. The Board's Holding in *Nabors Trailers* Supports The Decision of The ALJ.

In its Exceptions and supporting Brief, the Company cites *Nabors Trailers*, to argue that it was not the initiating party under Section 8(d)(1) of the Act. 294 NLRB 1115 (1989) The Company's reliance on *Nabors Trailers* is misplaced. In fact, *Nabors Trailers* supports the conclusion that American Water Works, just like the employer in that case, was the initiating party desiring modifications of the contract.

In *Nabors Trailers*, the parties met once to discuss a possible Christmas bonus and the union representative told the management representative he would send the employer a "letter" on two occasions. The union never discussed negotiations and never sent the employer a letter or written notification initiating negotiations. It was the employer that sent the union a letter serving notice of its desire to open negotiations pursuant to §8(d)(1). 294 NLRB at 1117. Later, the employer sent a letter to FMCS to notify it of the on-going negotiations. Within three days of the employer's letter to FMCS, it unilaterally implemented wage cuts. 294 NLRB at 1116-19.

The Board held that the employer initiated negotiations by its letter to the Union. 294 NLRB at 1120. The Board rejected the employer's claim that the union initiated negotiations by attending a meeting to discuss a Christmas bonus or by the union representative's statements that the union would write a "letter." *Id.* The Board found that the union's actions did not amount to initiating negotiations. In fact, the union in *Nabors Trailers* never intended to initiate negotiations, because it wanted the contract to roll over and continue for another year. *Id.* The employer, on the other

hand, did intend to open contract negotiations to seek concessionary contract modifications (whether the union opened negotiations). *Id.*

Here, the Company's actions are in stark contrast to the union's activities in *Nabors Trailers*. Unlike the union in *Nabors Trailers* (and like the employer in *Nabors*), American Water Works wanted to modify the 2005-2010 National Benefits Agreement in order to reduce the cost of health care benefits. This is evidenced by the initial discussions on June 17, 2009 between the Company and the Union representatives, where Burke stated the rising costs of health care and the Company's desire to increase employee contributions would be the "main topics at the National bargaining." (R. 18) Unlike the union in *Nabors Trailers*, which used subterfuge to try to trick the employer into allowing the contract to roll over, American Water Works was **driving** the parties into negotiations so that it could make significant changes in health care benefits. Indeed, the teaching of *Nabors Trailers* is that American Water Works, like the employer in *Nabors Trailers*, is the initiating party under §8(d)(1) of the Act.

In addition to the Company's various communication initiating bargaining between June and December 2009, there is undisputed record evidence that the Company presented and explained its initial written proposal before the Union made a proposal. (GC Ex. 7, R. 44-48, 93-95) And McKeage testified that the Company's initial proposals to the Union **did constitute written modification** of the 2005-2010 National Benefits Agreement.

Q. [By Mr. Byergo] Mr. McKeage, in presenting the company's proposals, on May 4th, did that proposed modification and/or termination in the existing National Benefits Agreement?

* * *

[Judge Davis] Could you repeat the question, please.

Q. [By Mr. Byergo] In presenting the company's proposal, and the union presenting its proposal does that not in fact propose specific modifications of the existing National Benefits Agreement?

* * *

[McKeage] Yes.
(R. 139-140)

Therefore, even under McKeage's version of events, the Company, which put in writing its entire modification, is the initiating party desiring modification of the existing 2005-2010 National Benefits Agreement.

Further, on July 20, 2010, the Company wrote the Union a letter which stated:

This letter is to confirm our negotiations schedule for August 17-19, 2010 to discuss National Benefits . . . [W]e will . . . contact FMCS for the assistance of a Federal Mediator . . . *the National Benefits Agreement does expire on July 31st.* (GC Ex. 10)

This letter also constitutes written notice to the UWUA of the Company's desire to propose modifications to the National Benefits Agreement. To that end, the Company informed the UWUA that it would contact FMCS for the assistance of a federal mediator.⁴

In sum, as the ALJ found, the record evidence clearly establishes that American Water Works was the initiating party under §8(d)(1) of the Act.

C. American Water Works Failed to Meet the Requirements of §8(d)(3) by Failing to Notify Any State Mediation Agency Where the Dispute Between the Unions and American Water Works Occurred.

Section 8(d)(3) provides that the initiating party notify "*any* state . . . agency established to mediate and conciliate disputes within the state . . . where the dispute occurred. . . ." It is undisputed that American Water Works failed to notify any state mediation agency about the dispute between American Water Works and the Unions over the negotiations of the National Benefits Agreement.

⁴ This case is similar to the facts in *Nabors Trailers* in one important way -- in both cases the employer, as the initiating party, contacted FMCS about negotiations.

(Stipulations ¶13) It is undisputed that American Water Works, and its subsidiaries, are located in several states and that the dispute occurred in each of the states represented by the Unions party to the National Benefits Agreement. (GC Ex. 1(o); Stipulations ¶6) These states include: Pennsylvania, New Jersey, California and Illinois. Each of the above-named states have state mediation agencies established to mediate and conciliate disputes occurring within their state. *Id.*

Section 8(d)(3) does not provide an exception to the requirements of the initiating party to notify state agencies if a dispute occurs in more than one state. The Company cannot cite a single case in support of its claim that where there is a multi-state agreement the initiating party is relieved of its obligation to notify *any* state agency. That is because there is no authority for such a proposition. The §8(d)(3) requirement to notify “*any*” state agency” cannot mean “*no* state agency.”

In fact, the Board has repeatedly stated that §8(d)(3) expresses the clear Congressional intent to minimize the interruption of commerce from strikes and lockouts and to further the use of mediation to settle labor disputes before they reach the stage where there will be a work stoppage. *Boghosian Raisin Packing Co.*, 342 NLRB 383, 384 (2004); *Amalgamated Meatcutters, Local 576*, 140 NLRB 876, 879 (1963). This goal is no less important in situations where there are multi-state negotiations.

Despite the plain language of §8(d)(3), American Water Works argues that in negotiations that concern multi-state bargaining units, the requirements of §8(d)(3) are void. This unsupported assertion was properly rejected by the ALJ. Testimony at the hearing from mediation officials from Pennsylvania and New Jersey established that both of those state agencies would have assisted in the mediation and conciliation of the disputes regarding the negotiations of a successor National Benefits Agreement.

In an attempt to read the requirement to notify state agencies out of the statute, American Water Works raises an unfounded state sovereignty argument, claiming that state mediation agencies do not have authority to exercise extraterritorial jurisdiction over multi-state negotiations where a majority of the employees involved are not within the state. Once again, this claim is without any precedential support. It is also not supported by logic. State mediators only have the authority to mediate. They do not have the authority to force agreement by any party to negotiations. American Water Works' "concerns" over out-of-state mediators exercising extraterritorial authority in other states are nonsensical. (AWW Brief pp. 20-22)⁵

D. American Water Works' Claim That the "National Benefits Committee" (And Not the UWUA) Is the Party to the National Benefits Agreement is Contrary to the Facts.

The "National Benefits Committee" is the term the lawyers used as a shorthand description for the group of Unions that bargained together for the National Benefits Agreement. Each of those Unions is a separate party to the Agreement. There is no such organization as the "National Benefits Committee." The UWUA is signatory to the National Benefits Agreement. (GC Ex. 1(o)) The mythical "National Benefits Committee" is *not* signatory to the National Benefits Agreement. *Id.* No group or association party to the 2005-2010 CBA is called the National Benefits Committee. *Id.* The UWUA has historically acted as the agent or representative of the Unions that are party to the National Benefits Agreement because it represents the largest number of members covered by the National Benefits Agreement. (Stipulations ¶7) Manoogian explained how the Unions work

⁵ American Water Works' alternative contention that state mediators only have authority in multi-state negotiations where a majority of the employees in the bargaining units are within a single state is also without precedent. And there is no record evidence regarding how many unit employees work for American Water Works subsidiaries in the respective states covered by the National Benefits Agreement.

together in response to counsel's question as to how the Unions would "develop that consensus among the groups."

Q. [By Mr. Byergo] And while you served as the chief spokesman in your own backroom or your own caucus room, you worked to develop that consensus among the groups, right?

A. [By Mr. Manoogian] We discussed the proposals.

Q. Did you have authority to speak for any other union?

A. I guess the only way I can answer that is if the union didn't show, if another union for whatever reason didn't show, they just didn't show. And the unions that were there would make whatever decision they needed to make.
(R. 92)

There is no doubt that the Company (*not* the Union) desired modification or termination of the 2005-2010 National Benefits Agreement. The Company requested a meeting in mid-June 2009 "to expedite early negotiations around the National Benefits Agreement." And the Company advised the Union at that meeting of its desire for major modifications in health care. On June 29, 2009, the Company wrote the Union summarizing the meeting; the things the Company would undertake to organize negotiations; and the Company's desire to have the Union assemble a data request. On November 20, 2009, McKeage wrote the Union with the "action items" for National Benefit negotiations.

The Company now contends that these communications could not have been written notice of its desire to modify or terminate the 2005-2010 CBA, because the UWUA did not have authority to act for the other Union parties to the 2005-2010 CBA. But there is no record evidence that the UWUA ever acquired formal "authority" to act on behalf of the other union parties. The UWUA is simply the *de facto* agent of the Unions in their dealings with American Water Works for the purposes of the National Benefits Agreement. That is a historical function the UWUA has performed for a considerable period of time, including in June of 2009, when the Company started

the ball rolling to modify the 2005-2010 CBA. Moreover, whether or not one representative or the other has full authority to “negotiate” is not an element of §8(d) of the Act. The Company admittedly is a signatory party to the 2005-2010 National Benefits Agreement; the UWUA also is a signatory party. The Company had authority to give notice of its desire to modify or terminate the 2005-2010 National Benefits Agreement to the UWUA. And it did.

IV. CONCLUSION

For the above-stated reasons, the UWUA respectfully requests that the National Labor Relations Board affirm the findings and conclusions of the Administrative Law Judge and adopt the Remedy and Recommended Order set forth in his Decision.

Respectfully submitted,

McKNIGHT, McCLOW, CANZANO
SMITH & RADTKE, P.C.

By: /s/ David R. Radtke
DAVID R. RADTKE (P47016)
SAMUEL C. McKNIGHT (P23096)
Counsel for Charging Party Union
400 Galleria Officentre, Suite 117
Southfield, MI 48034
248-354-9650
Smcknight@michworklaw.com
Dradtke@michworklaw.com

Dated: December 20, 2012

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STATEMENT OF SERVICE

The undersigned states that on December 20, 2012, she served the Answering Brief of UWUA to Respondent's Exceptions to the Decision of the Administrative Law Judge and Respondent's Brief in Support of the Exceptions upon the following parties by electronic mail:

Anthony B. Byergo
Counsel for Respondent American Water
Ogletree, Deakins
Park Central Plaza
4717 Grand Avenue, Suite 300
Kansas City, MO 64112

Tara A. O'Rourke, Esq.
Counsel for the General Counsel
Region 29
National Labor Relations Board
100 Myrtle Avenue, 5th Floor
Brooklyn, NY 11201



Karen Ann Purslow
Karen Ann Purslow