

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 24, 2001

TO: F. Rozier Sharp, Regional Director; Leonard P. Bernstein, Regional Attorney; Mike McConnell, Assistant to Regional Director, Region 17

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

SUBJECT: Modine Manufacturing Company, Case 17-CA-21013

530-6083-0125, 530-8045-3700, 530-8054-0133, 530-8054-1000, 530-8054-2000, 530-8054-2050, 530-8054-5000, 775-8775

The Region submitted this Section 8(a)(5) and 8(d) case for advice as to whether the Union waived its right to bargain about changes which the Employer made to the Company retirement savings plan for bargaining unit employees.

FACTS

Modine Manufacturing Company ("the Employer") and UAW Local 710 ("the Union") have a long-term collective bargaining relationship dating from at least the early 1980's. The most recent collective bargaining agreement, which is effective from May 9, 1998 through May 11, 2001, covers all production and maintenance employees at the Employer's Trenton, Missouri facility.

The Employer established a retirement savings plan at its manufacturing facilities nation-wide in April 1976. The plan allowed employees to contribute up to 10% of gross income to the plan. The Employer's contribution percentage initially was a 30% match to the employee contribution in the plan. The Employer has unilaterally increased or decreased its matching contribution percentages periodically throughout the years. The Union has contested the Employer's unilateral changes only once, when the first decrease in the match percentage was implemented. At that time, the Union filed a grievance, which it lost at arbitration because the plan was not included in the contract. ⁽¹⁾

The parties agree that the Employer has changed the plan in the past as follows:

- In January 1977, the Employer increased its match to 5% on 10% of employee contribution;
- In January 1978, the Employer increased its match to 75% on 10% of employee contribution;
- In January 1981, the Employer decreased its match to 50% on 10% of employee contribution;
- In January 1982, the Employer decreased its match to 30% on 10% of employee contribution;
- In October 1983, the Employer increased its match to 50% on 10% of employee contribution; and
- In May 1984, the Employer increased its match to 75% on 10% of employee contribution.

During the 1998 negotiations for the current agreement, the Employer raised the issue of a 401(k) plan. The Union declined to negotiate about a retirement savings plan and did not seek to incorporate the existing plan into the contract. Instead, the Union focused on the pension plan, which the Union viewed as inferior to other plans in the industry. Notes from the 1998 negotiations indicate that the Union focused its attention on increasing the funds in the pension plan because only 50%-60% of the bargaining unit employees participated in the retirement savings plan. During negotiations, the Employer acknowledged that the pension plan was not as comprehensive as other pension plans in the industry, but asserted that the employees had

access to the retirement savings plan in addition to the pension plan.

The parties ultimately agreed to a new collective bargaining agreement effective May 9, 1998 through May 11, 2001, that includes the pension plan, wages and yearly increases through 2001, provisions for cost-of-living increases, and insurance benefits. The agreement does not include the retirement savings plan. The agreement contains a zipper clause, carried over from the previous contract, which states:

The parties expressly declare that they have bargained between them on all phases of hours, wages, working conditions and that this contract represents their full and complete agreement without reservation or unexpressed understanding. Any aspect of hours, wages and working conditions not covered by a particular provision of this Agreement is declared to have been expressly eliminated as a subject for bargaining and during the life of this Agreement may not be raised for further bargaining or negotiation without the written consent of all parties hereto.

In January 1999, the Employer changed the retirement savings plan. The first plan was "frozen" and the current 401(k) plan was implemented. The 401(k) plan initially maintained the same contribution percentages as the frozen retirement plan, and allowed employees to make contributions on a pre-tax basis, but restricted the employees' ability to gain access to the funds in their accounts. The Union did not request bargaining concerning the implementation of the new 401(k) plan, or object to the change in access to funds.

On December 4, 2000, the Employer announced to employees that, for economic reasons, it was decreasing the contribution percentages from the 75% match on up to 10% employee contributions to a 50% match on up to 6% employee gross contributions. The new percentages went into effect on January 1, 2001. The Employer did not notify the Union of the impending changes to the contribution percentages prior to notifying the employees. When the Union contacted the Employer on or about December 6, 2000, after rumors of the change circulated, the Employer informed the Union of the changes.

On December 7, 2000, the Union requested bargaining with the Employer about the proposed changes and asked that any plans to change the contribution percentages in the 401(k) plan be suspended pending bargaining. The Union simultaneously filed a grievance contesting the changes. The Employer responded that it would address the issue through the grievance process. The Union ultimately withdrew its grievance because the retirement savings plan is not incorporated in the collective-bargaining agreement.

ACTION

We conclude that the charge should be dismissed, absent withdrawal, because the Union waived its right to bargain about the 401(k) plan.

Generally, Section 8(a)(5) requires that an employer may not unilaterally institute changes in subjects concerning wages, hours, and other terms and conditions of employment, such as pensions, before bargaining with the union to a good-faith impasse. Even though the Employer unilaterally established the retirement savings plan, and it was not included in the collective-bargaining agreement, the plan was a condition of employment and therefore a mandatory subject of bargaining.⁽²⁾ Thus, the Employer ordinarily would have an obligation under the Act to bargain with the Union before changing the plan, unless the Union had waived its right to bargain about the plan.

The waiver of a statutory right is not lightly inferred and can be established only if it is clear and unequivocal.⁽³⁾ A waiver may be found, however, where the contract language is specific, and/or the history of prior contract negotiations demonstrates that the subject was discussed and "consciously yielded." Thus, the Board has held:

Before a waiver of the duty to bargain will be found, there must be clear and unmistakable evidence of the parties' intent to waive this right. Such evidence is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.⁽⁴⁾

A waiver of statutory rights will not be inferred from the mere absence from the contract of specific reference to a subject

protected by the Act, or simply because the contract contains a management rights clause or zipper clause.⁽⁵⁾ The Board has stated that: "Even where a zipper clause is couched in broad terms, it must appear from the evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter."⁽⁶⁾

The Board has found a pure contractual waiver of the right to bargain over changes in past practices which were not discussed in bargaining, but only where the zipper clause in the contract specifically provided that the agreement superceded all past agreements, understandings and practices. For example, in Columbus Electric Co., above, the Board found that the employer did not violate Section 8(a)(5) by discontinuing non-contractual Christmas bonuses because a zipper clause therein clearly and unmistakably privileged this conduct.⁽⁷⁾ An examination of the bargaining history and contract language revealed that the parties clearly agreed that the provisions of the collective-bargaining agreement would supersede all prior agreements and understandings, i.e., would "wipe the slate clean," and that the collective-bargaining agreement would govern the parties' "entire relationship" and be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise."⁽⁸⁾ In TCI of New York,⁽⁹⁾

the Board reached the same conclusion where the parties' contract contained the following provision:

This Agreement fully and completely incorporates all such understandings and agreements and supersedes all prior agreements, understandings and past practices, oral or written, express or implied.

Based on the plain language of the contract and the union's failure to "explore the meaning or purpose of this clause," the Board found that the union by "accepting such a strongly worded clause" knowingly agreed to have the current agreement supersede all past practices, including the provision of bonuses.

Absent such specific language, it is clear that no waiver will be found unless there is evidence that the union "consciously yielded" the right to bargain over a particular issue. Such a "conscious yielding" will be found where the parties discussed an issue and did not include it in an agreement with a zipper clause or where there is evidence that the union realized the zipper clause would permit unilateral employer action as to the type of employment condition at issue.⁽¹⁰⁾

Here, the zipper clause by itself does not clearly demonstrate a waiver of the right to bargain over changes in the established non-contractual retirement plan. The zipper clause states that "this contract represents [the parties'] full and complete agreement" and that "any aspect of hours, wages and working conditions not covered by a particular provision of this Agreement is declared to have been expressly eliminated as a subject for bargaining and during the life of this Agreement may not be raised for further bargaining or negotiation without the written consent of all parties hereto." This is not the kind of language which the Board has held to be, in and of itself, a clear and unmistakable waiver of the union's right to bargain over employer changes in non-contractual past practices.

However, based on all the circumstances, we conclude that the Union has clearly and unmistakably waived its right to bargain about changes in the contribution formulas for the retirement savings plan. Thus, during negotiations for the current collective-bargaining agreement, the Union and Employer discussed the plan and its relationship to the contractual pension plan. The Union declined to negotiate regarding the plan and did not seek to include it in the collective-bargaining agreement. As a result of negotiations, the parties agreed to increases in the pension plan and included the pension plan in the collective bargaining agreement.

During the bargaining discussions on the retirement savings plan, while the Employer arguably implied that some kind of 401(k) plan would be available, the Employer did not expressly or impliedly promise to keep the retirement plan unchanged.⁽¹¹⁾ Although the plan itself contains provisions allowing the Employer to modify or terminate the plan, and the Union was aware of these terms, the evidence is unclear whether that language was in the previous plan in existence during negotiations. In any event, the Union was aware, when it entered into the Agreement, that the Employer had on several occasions unilaterally modified the prior retirement plan. Although its past acquiescence in such changes cannot operate as a waiver of its right to bargain over this one,⁽¹²⁾

the Union's awareness of the Employer's past unilateral actions vis-à-vis the plan, coupled with its decision not to include it in the Agreement and its agreement to the zipper clause, indicate a conscious relinquishment of its right to bargain over such changes.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

¹ Apparently the Union did not file Board charges then.

² Gas Machinery Co., 221 NLRB 862, 863 (1975) (Christmas bonus given for seven years was mandatory subject); Nello Pistoresi & Son, Inc., 203 NLRB 905 (1975), enf. denied 500 F.2d 399 (9th Cir. 1974) (Christmas bonus given for two years was mandatory subject). Compare Henry Vogt Machine Co., 190 NLRB 122 (1971), enfd. 456 F.2d 248 (3d Cir. 1972), where one of the factors in determining that the bonuses were not mandatory subjects of bargaining was that the bonuses were given intermittently.

³ Metropolitan Edison v. NLRB, 460 U.S. 693, 708 (1983); Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983), and cases cited therein; Rockwell International Corp., 260 NLRB 1346, 1347 (1982).

⁴ Columbus Electric Co., 270 NLRB 686 (1984), affd. sub nom. Electrical Workers IBEW Local 1466 v. NLRB, 795 F.2d 150 (D.C. Cir. 1986), citing Bancroft-Whitney, 214 NLRB 57 (1974).

⁵ Ciba-Geigy Pharmaceuticals Division, above at 1017; Kay Fries, Inc., 265 NLRB 1077, 1084 (1982), enfd. 722 F.2d 732 (3d Cir. 1983); Rockwell International Corp., above, at 1347.

⁶ Angelus Block Co., 250 NLRB 868, 877 (1980), citing Rockwell-Standard Corporation, 166 NLRB 124, 132 (1967); Radioear Corporation, 214 NLRB 362, 364 (1974). Cf. GTE Automatic Electric Inc., 261 NLRB 1491, 1491-1492 (1982) (employer was privileged to invoke a zipper clause as a shield against the union's midterm demand for bargaining over a new benefit sought by the union, despite the fact that there was no discussion about the benefit - which had not yet been contemplated - in contract negotiations).

⁷ 270 NLRB at 687.

⁸ Id. at 686-687. The employer there also sent a letter, in response to interrogatories by the union concerning the zipper clause language, which stated: "[T]o avoid any misunderstanding as to the Company's intention . . . we wish to terminate all [past] agreements . . . our 8(d) notice was to wipe the slate clean before the new contract goes into effect."

⁹ 301 NLRB 822, 823 (1991).

¹⁰ See Bancroft-Whitney, 214 NLRB at 57 (prior annual bonus practice was brought to union's attention during bargaining over initial contract, union never asked to bargain over that issue, and union agreed to a zipper clause and a clause providing that "all wages and other benefits to be received are contained in this agreement"); Radioear, 214 NLRB at 364 (union consciously yielded right to bargain over non-contractual turkey bonus when it proposed a provision that would have required the maintenance of existing non-contractual benefits, and then agreed to execute a contract that did not contain that provision and contained a zipper clause waiving the right to bargain over any subjects not covered by the agreement); Johnson-Bateman, 295 NLRB 180 (1989) (drug testing program was not even mentioned during contract negotiations, so it could not have been "consciously explored" and the right to bargain waived).

¹¹ Compare Pepsi-Cola Distributing Co., 241 NLRB 869, 870 (1979) (failure to include employer bonus program in contract not waiver, especially since in negotiations employer expressed intent to continue program and successor was made aware of the practice before changing it). This case does not present the issue of whether the Employer could have unilaterally eliminated the retirement plan.

¹² See Owens-Corning Fiberglass, 282 NLRB 6009 (1987).