SW General, Inc. d/b/a Southwest Ambulance *and* International Association of Fire Fighters, Local I-60. Case 28−CA−177361.

February 13, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

Upon a charge filed on May 27, 2016, by International Association of Fire Fighters, Local I-60 (the Union), the General Counsel issued a complaint and notice of hearing on August 31, 2016, alleging that Southwest Ambulance (the Respondent) has been failing and refusing to bargain collectively and in good faith with the Union within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(5) and (1) by failing to continue in effect all of the terms and conditions of a memorandum of understanding agreed to by the parties regarding the Respondent's defined benefit pension plan. Specifically, the General Counsel alleges that the Respondent implemented a change to how employees' earnings are calculated to determine their monetary benefit under the pension plan. The Respondent filed an answer admitting in part and denying in part the complaint allegations and raising certain affirmative defenses.

On January 17, 2017, the Respondent, the Union, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On September 28, 2017, the Board granted the parties' joint motion.[1] Thereafter, the General Counsel and the Respondent each filed a brief and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and a place of business in Mesa, Arizona, has been engaged in providing emergency medical response transportation services in the Phoenix and Tucson metropolitan areas. In conducting its business operations during the 12 month-period ending May 27, 2016, the Respondent has purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona, and the Respondent has derived gross revenues in excess of $500,000.

The complaint alleges, the Respondent's answer admits, and we find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Stipulated Facts

The Respondent provides emergency medical transportation in the Phoenix and Tucson area. Since about 1992, the Respondent has recognized the Union as the exclusive collective-bargaining representative of a unit of emergency medical technicians, paramedics, and registered nurses, and the parties have maintained a series of collective-bargaining agreements. From the expiration of the parties' 2009−2012 agreement until execution of the 2016−2019 agreement, there was no collective-bargaining agreement in effect between the Respondent and the Union.

Pursuant to the parties' collective-bargaining agreements, the Respondent maintained a defined benefit pension plan from 2004 to 2016, called the Southwest Ambulance Pension Plan (SAPP).[2] Under the SAPP, a participant's "Accrued Benefit" is calculated based on two variables—the participant's "Average Annual Earnings" and her years of credited service. The SAPP provides that a participant's "Average Annual Earnings" is determined by averaging the employee's earnings over the 36 calendar months immediately preceding the date the employee's employment terminates. In addition, under the SAPP, a participant's vested interest in her "Accrued Benefit" is based on the number of full years of service credited to the employee. An employee with less than 5 years of service is 0 percent vested, and an employee with 5 or more years of service is 100 percent vested. Pursuant to an April 14, 2014 arbitrator's award involving a separate matter, the parties agreed that changes to the SAPP must be negotiated between the Respondent and the Union.

[1] The complaint also alleges that the Respondent violated Sec. 8(a)(5) and (1) by failing to continue in effect the portion of the memorandum of understanding governing the method for calculating an employee's years of service under the defined benefit plan. In its September 28, 2017 Order, the Board granted the General Counsel's unopposed request to withdraw this allegation. Accordingly, we do not consider it in this decision.

[2] The parties stipulate that the Respondent continued to provide employees with the defined benefit plan even during the hiatus between the 2009−2012 and 2016−2019 collective-bargaining agreements.

On February 2, 2016, the Respondent and Union executed a Memorandum of Understanding (MOU) regarding the SAPP. Specifically, the parties agreed that, effective June 30, 2016, the "defined pension plan shall be frozen for all participants." The parties also agreed that employees hired after March 1, 2016, would not be eligible to participate in the SAPP. In addition, the parties agreed that, after June 30, 2016, "covered employees service time shall continue to count toward an employee's vesting time but shall not count toward credited service under the plan." The parties further agreed that, effective July 1, 2016, the Respondent would provide the 401(k) matching contributions set forth in the MOU for employees who chose to participate in the Respondent's 401(k) program.

On April 8, 2016, the Respondent adopted an amendment to the SAPP plan documents. Among other things, the amendment provided that "[n]o earnings earned after June 30, 2016 will be credited (i.e. taken into account) in determining a Participant's Average Annual Earnings under the Plan." On May 13, 2016, the Respondent sent the Union and unit employees an ERISA 204(h) notice and Summary Plan Description, which stated, among other things, that the "amounts you earn after the Freeze Date will not be included in determining your Average Compensation [under the defined benefit plan] and the time you work after the Freeze Date will not be included in determining your Years of Benefit Service [under the defined benefit plan]." Prior to the May 13, 2016 notice, the Union had not received notification that the Respondent had adopted the April 8, 2016 amendment to the SAPP.

B. The Parties' Contentions

The complaint alleges that the Respondent failed to bargain with the Union within the meaning of Section 8(d) in violation of Section 8(a)(5) and (1) by implementing a change to the parties' MOU to provide that no earnings earned after June 30, 2016, would be taken into account in determining an employee's Average Annual Earnings under the SAPP.

The General Counsel contends that the Respondent's April 8, 2016 amendment to the SAPP to adopt a cutoff date of June 30, 2016 (also referred to as the freeze date), for the purpose of calculating an employee's Average Annual Earnings under the SAPP constitutes a significant mid-term modification of the MOU. According to the General Counsel, the modification is significant because, as a result of the expiration of the 2009−2012 CBA, the unit employees have not had a salary increase since 2011. Thus, freezing their earnings as of June 30, 2016, effectively locks the employees into their salary rates under the 20092012 CBA for purposes of calculating their benefits under the SAPP. Citing *Bath Iron Works Corp.*, 345 NLRB 499 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007), the General Counsel asserts that this mid-term modification is unlawful because the Respondent had no sound arguable basis under the MOU for making the change. In this regard, the General Counsel contends that the MOU is a comprehensive document that specifically and unambiguously delineates the parties' agreement on a number of matters, but does not provide for any change to the method of calculating an employee's Average Annual Earnings because the parties did not agree to any such change in the MOU.

The Respondent asserts that the General Counsel cannot prove that it engaged in an unlawful mid-term contact modification because its actions were premised on a reasonable, plausible interpretation of the MOU. In this regard, the Respondent asserts that the plain language of the MOU establishes that, with the exception of the crediting of service for vesting purposes, the parties agreed to freeze the SAPP in exchange for new 401(k) plan benefits. The Respondent asserts that the exception to permit the continued accrual of years of service for vesting was necessary to allow employees who were not yet vested in the SAPP on the freeze date to do so. In addition, the Respondent asserts that because the parties specifically agreed in the MOU to continue crediting service for the purposes of vesting under the SAPP, but not for crediting future earnings increases, this is strong evidence that the parties did not intend to permit future earnings increases to be used in calculating an employee's Accrued Benefit after the freeze date. Finally, the Respondent contends the General Counsel advances a reading of the MOU that would render the parties' agreement to "freeze" the SAPP meaningless by permitting the limited exception from the freeze for continued accrual of credited service for vesting purposes to also cover future earnings.

C. Discussion

As alleged by the General Counsel, the question presented in this case is whether the Respondent engaged in an unlawful mid-term contract modification of the parties' MOU. The Board will not find a mid-term contract modification violation if the respondent establishes that it had a "sound arguable basis" for its belief that the contract authorized its unilateral action. See, e.g., *Bath Iron Works*, above, 345 NLRB at 502.[3] Where, as here, the dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or an attempt to un-

[3] Member McFerran expresses no opinion on whether *Bath Iron Works*, above, was correctly decided. As it represents extant Board precedent, she applies it here for institutional reasons.

dermine the Union, the Board does not seek to determine which of two equally plausible contract interpretations is correct. See, e.g., *American Electric Power*, 362 NLRB No. 92, slip op. at 3 (2015), citing *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (2006).

In the MOU, the parties agreed that the SAPP "shall be frozen for all participants" effective June 30, 2016. The parties further agreed that, effective June 30, 2016, the "covered employees service time shall continue to count toward an employee's vesting time but shall not count toward credited service under the plan." The Respondent asserts that a plain language reading of the MOU establishes that the parties intended to freeze the SAPP completely as of June 30, 2016, with a limited exception carved out to address vesting under the SAPP. As such, the Respondent interpreted the MOU to freeze, as of June 30, 2016, the two components used to determine an employee's Accrued Annual Benefit under the SAPP – a participant's annual earnings and her credited service time – but to permit employees to continue accruing credited service time solely for the purpose of vesting in the SAPP. The Respondent contends that interpreting the MOU this way is necessary to ensure that employees who were not yet fully vested in the SAPP on June 30, 2016, would still be permitted to reach the vesting threshold identified in the SAPP and not forfeit completely their retirement benefit under the defined benefit plan by virtue of the parties' agreement to freeze the plan.

Relying on the above interpretation of the MOU, the Respondent amended the SAPP plan documents on April 8, 2016, to provide that no earnings after the freeze date would be taken into account in determining an employee's Average Annual Earnings under the SAPP. Whether or not the Respondent's interpretation of the MOU is correct, we find that it is reasonable and provides a "sound arguable basis" for its belief that the MOU authorized its April 8, 2016 amendment to the SAPP. The General Counsel's interpretation of the MOU may also have merit, but, as stated above, the Board does not pass on which interpretation is best.[4] As we have found that the Respondent has presented a reasonable interpretation of the MOU, we find that the General Counsel has failed to prove that the Respondent modified the MOU with the Union, within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 13, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] In his brief to the Board, the General Counsel also asserts that the Respondent's April 8, 2016 amendment to the SAPP constitutes an unlawful unilateral change in violation of Sec. 8(a)(5) and that the Union did not waive its right to bargain over the change. As the Board has previously explained, however, where, as here, a change is alleged to be an unlawful mid-term contract modification, the Board assesses whether the respondent had a sound arguable basis under the contract for the modification and does not apply the "clear and unmistakable waiver" standard used for allegations of Sec. 8(a)(5) unilateral changes. See *American Electric Power*, above, 362 NLRB No. 92, slip op. at 1.