Midwest Power Systems, Inc. *and* International Brotherhood of Electrical Workers, Local Union 499. Case 18–CA–12545

April 4, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by announcing and implementing changes to the future retirement medical and life insurance benefits of current bargaining unit employees without giving the Union notice and an opportunity to bargain about these changes and their effects. Based upon the parties' stipulation of facts and the following opinion, we find that the Respondent's conduct was unlawful.

Procedural Background

The Union filed a charge, amended charge, and second amended charge on February 12 and March 19, 1993, and August 5, 1994, respectively. The Regional Director for Region 18 issued a consolidated complaint on January 23, 1995. Thereafter, the Respondent timely answered admitting in part and denying in part the allegations in the consolidated complaint. In particular, the Respondent denied that it had engaged in unfair labor practices and asserted, as affirmative defenses, that the Union has no authority to bargain on behalf of retirees and that the Union has waived its right to bargain over changes to retiree medical benefits.

On September 21, 1995, the Respondent, the General Counsel, and the Union filed a motion to transfer proceedings to the Board and stipulation of facts. The parties agree that the stipulation of facts and attached exhibits constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waive a hearing before an administrative law judge, the makings of findings of fact and conclusions of law by an administrative law judge, and the issuance of a decision by an administrative law judge. The parties state their desire to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

On November 1, 1995, the Acting Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the Respondent, the General Counsel, and the Union filed briefs.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Midwest Power Systems, Inc., an Iowa corporation with an office and place of business in Des Moines, Iowa, is a public utility engaged in the generation, distribution, and sale of electricity and natural gas. During the calendar year ending December 31, 1994, the Respondent, in the course and conduct of its business, derived gross revenues in excess of $500,000, purchased and received at its Des Moines, Iowa facility goods valued in excess of $50,000 directly from points outside the State of Iowa, and sold and shipped from its Des Moines facility goods valued in excess of $50,000 directly to points outside the State of Iowa. The parties have stipulated, and we find, that the Respondent is an employer 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 PRACTICES

A. *Facts*

The Respondent and the Union are parties to four separate collective-bargaining agreements: the Northern Agreement, the Southern Agreement, the Gas Aagreement, and the Clerical Agreement. According to the terms of each of these agreements, certain employee fringe benefit plans, including health insurance benefits for active and retired employees, are provided by "separate understandings."[1] Separate benefit plans provide both active employee and retiree benefits.

[1] The Southern Agreement, effective from August 1, 1992, to August 1, 1994, and its successor agreement, provide in relevant part that:

> By separate understandings, the parties have provided for certain employee insurance plans. These plans provide for hospital, dental, surgical and medical insurance, group life insurance, and long-term disability insurance. The [Respondent] agrees to continue these plans for the term of this Wage Working Contract.

The Gas Agreement, effective from December 1, 1989, to May 31, 1992, and its successor agreement, provide in relevant part that:

> By separate understanding, the parties have provided certain employee insurance programs. Their plans are embodied in separate agreements and include a Comprehensive Medical Insurance Plan, Dental Plan, Vision Plan, Long-Term Disability Plan, and Group Life Insurance Plan. The [Respondent] agrees to continue them in accordance with separate understandings. It will be the [Respondent's] responsibility to determine which carriers administer these benefit programs.

The Clerical Agreement, effective from February 1, 1993, to February 1, 1996, provides in relevant part that:

> By separate understanding, the parties have provided for certain employee insurance plans. These plans provide for hospital, surgical and medical insurance, group dental insurance, group life insurance and long-term disability insurance.

The Northern Agreement, effective by its dates from August 11, 1994, to February 11, 1996, provides, in relevant part, that "the Union has negotiated fringe benefits which are not contained in this Agreement for Union personnel."

With respect to all four contractual units, employees and retirees are not included in the same pool for purposes of calculating premiums.[2] No portion of active employees' financial contributions for benefits purchase or provide retiree medical benefits. Further, no portion of retiree insurance contributions pay any of the medical insurance costs for active employees.

Since approximately 1984, the Southern, Gas, and Clerical Agreements plan documents for retiree medical benefits each states that:

> In making these benefits available to retirees, while [Respondent] expects to continue them indefinitely, it specifically retains the right to change the benefits, change the requirements for eligibility, or eliminate the plans altogether at any time without prior notice and this booklet does not constitute a contract or promise by [Respondent] to continue benefits.

The Northern Agreement retiree benefits plan contains a similar reservation clause, providing that:

> In making these benefits available to retirees, while it is expected they will continue, the company specifically retains the right to change the benefits, change the requirements for eligibility, or eliminate the plan altogether at any time and this booklet does not constitute a contract or promise to continue the benefits as described herein.

The Respondent made unilateral changes to retiree medical benefits in the past. In 1982 or 1983, the Respondent unilaterally announced that it would not pay any greater portion of the Medicare hospital deductible than it had paid in 1979 for present and future retirees from the southern, gas, and clerical units. On March 1, 1988, the Respondent unilaterally converted the insurance plan from a "basic" plan to a "comprehensive" plan, and increased the deductible for southern, gas, and clerical units retirees.

During the late 1950s and the 1960s, the Respondent and the Union negotiated changes to the retiree benefits for the northern unit. During negotiations in 1978, the Respondent announced changes to the cost of northern unit retiree benefits, informed the Union that there would be no reference to retiree medical benefits in the contract as the Respondent considered retiree benefits to be a permissive subject of bargaining, and that the Respondent reserved the right to make unilateral changes in retiree medical benefits. In 1982, 1984, and 1986, the Respondent unilaterally instituted changes in the deductible paid by retirees and the coinsurance factors.

[2] In 1992, separate experience pools were established for active and retired employees in the Northern unit. After 1992, the cost for retiree benefits was not paid or allocated to active employees in the Northern unit.

Benefit Changes at Issue

By letter dated October 14, 1991, the Respondent's manager of compensation services informed the Union of changes to medical benefits for retirees in the southern, gas, and clerical units effective January 1, 1993. The Respondent stated that it would pay 40 percent of the premium cost for each retired employee with an additional 3 percent for each year of service in excess of 10 years and retirees would be expected to pay for all future costs. By letter dated October 17, 1991, the Respondent notified active employees of the changes which would be applicable to those active employees who retired after January 1, 1993. The Union and the Respondent discussed these changes on several occasions between October 17, 1991, and January 23, 1992. During the course of these discussions, the Respondent informed the Union that it was willing to listen to the Union's concerns, however, it considered the changes to be a nonmandatory subject of bargaining. Among other concerns, the Union objected to retirees having to pay the entire cost of coverage for their spouses.

By letter dated January 23, 1992, the Respondent's manager of employee relations informed the Union that the Respondent had considered the Union's concerns but would implement the changes as contemplated. On February 3, the Union requested information concerning the changes and the Respondent complied with the information request on March 11. Additional discussions took place between the Union and the Respondent through the summer of 1992. As a result of these discussions the Respondent revised its planned changes and agreed that retirees' spouses would be eligible for an amount equal to one half of the retiree's benefit. The Respondent included this revision in a plan summary issued in October. An October 13 letter from the Respondent informed employees of the revisions.

The Union expressed no agreement to either the original plan or the revised plan. On October 30, 1992, it filed a grievance objecting to the amount retirees would have to pay for their spouse's insurance. On November 2, the Respondent denied the grievance, stating that it was not obligated by contract or Federal law to negotiate retiree medical benefits and, even assuming it were obligated, the matter was not subject to the grievance or arbitration provisions of the contract. The Union appealed the denial of the grievance and, on November 25, the Respondent denied the third step grievance and stated that, for some time, it had "reserved the right to change or terminate retiree medical benefits at any time." On January 1, 1993, the Respondent implemented the proposed changes for those

persons who retired from the southern, clerical, and gas units on or after that date.

Between the time of the October 1991 announcement of the Respondent's intention to change retiree medical benefits and the actual implementation of those benefits, the Gas Agreement expired and a new agreement was reached on May 28, 1993. The Clerical Agreement expired on January 31, 1993, and a new agreement was negotiated effective February 1, 1993. The Southern Agreement expired on August 1, 1994, and a new agreement was negotiated for the period August 1, 1994, through July 31, 1996. During negotiations for the replacement agreements, no proposals were made regarding retiree benefits.

On June 2, 1994, the Respondent informed the Union of prospective changes to retiree medical insurance applicable to those individuals covered by the Northern Agreement who would retire on or after July 1, 1995. Subsequently, during negotiations for a successor contract for the Northern Agreement which was set to expire on August 11, 1994, the Union made no proposal regarding retiree medical insurance. A June 20, 1994 letter from the Respondent notified active employees of the change to retiree medical benefits for those individuals who would retire on or after July 1, 1995.

On July 13, 1994, the Respondent and the Union reached an agreement for a successor contract for the northern unit. Although the Union did not make any contract proposals during negotiations concerning retiree medical benefits, the Union did file a grievance. The Respondent did not implement any of the proposed changes for retiree medical benefits, and, as a result of negotiations between the Respondent and the Union, the implementation date has been moved from July 1, 1995, to July 1, 1996.

B. *Contentions of the Parties*

Conceding that retirees have no protection under the Act from unilateral changes to their benefits, the General Counsel and the Union argue that the Respondent's October 1991 announcement that medical benefit changes at issue here were changes to the future retirement benefits of current active employees and, as such, a mandatory subject of bargaining. The General Counsel and the Union further argue that the distinction drawn in *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), between mandatory and nonmandatory subjects involves who is affected, not when they are affected.

The Respondent contends that the argument advanced by the General Counsel and the Union is foreclosed by the Supreme Court's decision in *Pittsburgh Plate Glass*, since the changes to medical benefits at issue here can only affect persons who have retired. In sum, the Respondent asserts that active employees are not actually affected by the benefit changes until retirement, at which time they are no longer "employees" with respect to whom there is a statutory obligation to bargain. As affirmative defenses, the Respondent further contends that the Union has waived its right to bargain about retirement benefits, based either on the language of a "reservation clause" contained in each benefit plan and incorporated by reference into the contracts or on the Union's acquiescence in prior unilateral changes to retiree benefits by the Respondent.

C. *Discussion*

In *Pittsburgh Plate Glass Co.*, the Supreme Court considered whether a midterm unilateral modification of insurance benefits for employees who had already retired from bargaining unit work constituted an unfair labor practice under the Act. The Supreme Court concluded that, because retirees were not "employees" within the meaning of Section 2(3) of the Act and their benefits did not "vitally affect" the terms and conditions of employment of bargaining unit employees, the retirees' insurance benefits were not a mandatory subject of bargaining. In reaching this conclusion, however, the Supreme Court expressly stated that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." 404 U.S. 157, 180.

Applying the distinction drawn in *Pittsburgh Plate Glass Co.* to the instant case, we agree with the General Counsel that the Respondent's announcement and implementation of changes in the future retiree medical benefits of active unit employees violated Section 8(a)(5) and (1) of the Act. As noted above, the Act does not restrict the Respondent from changing the benefits of already retired employees. However, the changes prospectively announced by the Respondent affected current active employees who would retire on or after the announced implementation dates. The Supreme Court has clearly stated that the future retirement benefits of current active employees are a mandatory subject of collective bargaining under the Act. Unilateral modification of such benefits constitutes an unfair labor practice. See *Titmus Optical Co.*, 205 NLRB 974, 981 (1981) (not an unfair labor practice to tell already retired employees that employer is discontinuing payment of life insurance premiums for them; but telling current employees that employer will no longer pay insurance premiums for them when they retire is unlawful unilateral change).

We find no merit in the Respondent's argument that the retiree medical benefits at issue are not a mandatory subject of bargaining because the changes do not "vitally affect" active employees, who pay no part of the retiree benefits cost and are not covered in the same medical plan. The "vitally affects" doctrine

cited by the Respondent is the analysis used to determine whether a matter involving an employer's relationship with a third party is a mandatory subject of bargaining. 404 U.S. at 157, 179. It is not relevant to the situation of current bargaining unit employees who have an obvious direct interest in their future retirement benefits as an integral part of their compensation package.

The Respondent further argues that, even if the retirement benefits are a mandatory subject of bargaining, the Union has waived its right to bargain. The Respondent relies in part on the reservation clauses contained in the separate retiree medical plans grant it the unilateral right to change those benefits. We assume, arguendo, that each of the respective collective-bargaining agreements incorporates the retiree plan documents, including the reservation clause. Nevertheless, we find that the plain language of those clauses reserves only the Respondent's right to change or terminate the benefits of "retirees," a right the Respondent already possess under the Act. There is no reservation with respect to the future retirement benefits of active employees. Indeed, such a reservation would make little sense in a document for a medical plan that does not include active employees. Accordingly, we find that there is no clear and unambiguous waiver of the Union's right to bargain over changes to the future retirement benefits of active employees.

We also reject the Respondent's argument that the Union waived its right to bargain by acquiescing to prior unilateral changes to retiree benefits. Although the record contains evidence of prior negotiations over pension issues and contract provisions relating to retirement benefits, a finding of waiver based on prior conduct requires evidence that the matter at issue was fully discussed and consciously explored during negotiations and the Union must have consciously yielded or clearly and unmistakably waived its interest in the matter. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). There is no evidence that the Union ever expressly indicated to the Respondent that it was ceding its right to bargain or that it viewed the Respondent's past unilateral actions as lawful. At most, the record shows the Union's silent acquiescence to certain prior changes in retiree benefits. It is well established that "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." *Exxon Research Co.*, 317 NLRB 675, 686 (1995).

Finally, we reject any contention that the Respondent satisfied its bargaining obligation in discussions with the Union prior to implementation of the changes in retirement benefits. Although the parties met on several occasions to discuss the announced changes, throughout these discussions the Respondent clearly manifested its belief that retirement health benefits were only permissible subjects of bargaining. The Respondent did not engage in good-faith negotiations for the purpose of achieving a mutual understanding. It was willing only to listen to the Union's suggestions and concerns.

CONCLUSION OF LAW

By announcing and implementing changes to the future retirement medical and life insurance benefits of current employees without notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and 2(7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to reinstitute retirement medical benefits comparable to that which was in effect prior to January 1, 1993, for employees covered by the Southern, Gas, and Clerical Agreements who were active employees prior to that date and retired thereafter and to reinstitute retirement medical benefits comparable to that which was in effect prior to July 1, 1996, for employees covered by the Northern Agreement who were active employees prior to that date and retired thereafter. We shall further order the Respondent to make whole those southern, gas, and clerical unit employees who retired after January 1, 1993, and those northern unit employees who retired after July 1, 1996, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any loss of wages and benefits suffered as the result of its unlawful changes to the retirement medical benefits as well as for any medical bills they may have paid directly to health care providers that the retirement medical benefits would have covered. Interest on amounts owing to unit employees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Midwest Power Systems, Inc., Des Moines, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Local Union 499, as the exclusive representative of employees in each of the following appropriate units by unilaterally changing the future retirement benefits of current active employees who would retire on or after the effective date of the changes.

The Northern Division Unit. All employees covered by the "northern" collective bargaining agreement between the Respondent and the Union effective August 11, 1994 to August 11, 1996; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The Southern Division Unit. All employees covered by the "southern" collective bargaining agreement between the Respondent and the Union effective from August 1, 1992 to August 1, 1994; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The Gas Unit. All employees covered by the "gas physical" collective bargaining agreement between the Respondent and the Union effective from June 1, 1994 to May 31, 1996; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The Clerical Unit. All employees covered by the "clerical" collective bargaining agreement between the Respondent and the Union effective from February 1, 1993 to February 1, 1996; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Reinstitute retirement medical benefits comparable to that which was in effect prior to January 1, 1993, for employees covered by the Southern, Gas, and Clerical agreements who were active employees prior to that date and retired thereafter and reinstitute retirement medical benefits comparable to that which was in effect prior to July 1, 1996, for employees covered by the Northern agreement who were active employees prior to that date and retired thereafter.

(c) Make whole, with interest, those Southern, Gas, and Clerical unit employees who retired after January 1, 1993, and those Northern unit employees who retired after July 1, 1996, or their estates, for any losses they may have suffered as a result of the Respondent's unilateral change in the retirement medical benefits.

(d) Within 14 days after service by the Region, post at its facility in Des Moines, Iowa, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 1993.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HIGGINS, dissenting.

I conclude that Respondent had a right to make the changes involved here. Accordingly, I dissent.

The collective-bargaining agreements here refer to "separate understandings" regarding retirement benefits. The "separate understandings," i.e., the retirement benefit plans, provide that Respondent "specifically reserves the right to change the benefits . . . without prior notice." Consistent with this language, Respondent unilaterally changed the benefits in 1982, 1983, and 1988. And, consistent with this language, I conclude that Respondent lawfully made the changes in benefits at issue here.

My colleagues argue that the Respondent has violated Section 8(a)(5) as to current employees. I disagree. Under *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), an employer is free to change benefits for current retirees. However, as my colleagues point out, a change in benefits may nonetheless be bargainable, on the view that the future benefits of current employees are affected. Even if this principle is correct as a general matter, it does not control in this case. For, in language that could not be

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

clearer, Respondent has reserved the right to change benefits without prior notice.

I agree with my colleagues that a past practice of acquiescence to changes may not itself establish Respondent's right to make the current change. However, that past practice sheds light on the meaning of the reservation clause. In this case, it reaffirms the clear meaning of the clause, i.e., Respondent can unilaterally change retiree benefits.

Based on the above, I conclude that the Union knowingly waived its bargaining rights as to the particular changes involved here.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local Union 499, as the exclusive representative of the employees in the bargaining units by unilaterally changing our retiree medical benefits of current active employees who were eligible to retire subsequent to the effective date of the changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 if the Act.

WE WILL, on request, bargain with the Union and put in writing, and sign any agreement reached on terms and conditions of employment for our employees in the bargaining units:

> The Northern Division Unit. All employees covered by the "northern" collective-bargaining agreement between the Respondent and the Union effective August 11, 1994 to August 11, 1996; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.
>
> The Southern Division Unit. All employees covered by the "southern" collective-bargaining agreement between the Respondent and the Union effective from August 1, 1992 to August 1, 1994; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.
>
> The Gas Unit. All employees covered by the "gas physical" collective-bargaining agreement between the Respondent and the Union effective from June 1, 1994 to May 31, 1996; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.
>
> The Clerical Unit. All employees covered by the "clerical" collective-bargaining agreement between the Respondent and the Union effective from February 1, 1993 to February 1, 1996; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL reinstitute retirement medical benefits comparable to that which was in effect prior to January 1, 1993, for employees covered by the Southern, Gas and Clerical Agreements who were active employees prior to that date and retired thereafter and reinstitute retirement medical benefits comparable to that which was in effect prior to July 1, 1996, for employees covered by the Northern Agreement who were active employees prior to that date and retired thereafter.

WE WILL make whole, with interest, those Southern, Gas, and Clerical unit employees who retired after January 1, 1993, and those Northern unit employees who retired after July 1, 1996, or their estates, for any losses they may have suffered as a result of the our unilateral changes in the retirement medical benefits.

MIDWEST POWER SYSTEMS, INC.