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Board Affirms Right to Unilaterally Implement Changes to Benefit Plans Based on Waiver, Foreshadowing Potentially Looser Standard for Contractual Waivers

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The NLRB continues to churn out decisions post-Labor Day. On September 4, in a 2-1 decision, (Chairman Ring and Member Kaplan, with Member McFerran dissenting), the NLRB found that E.I. DuPont De Nemours did not violate the NLRA by unilaterally implementing changes to its company-wide retiree medical and dental plans based on the unions' waiver of the right to bargain over such changes.

Although not reversing precedent, the Board signaled its inclination to reconsider what a collective bargaining agreement must contain to meet the "clear and unmistakable" waiver standard when an employer seeks to modify or terminate an existing benefit plan, suggesting in a footnote that a CBA need only make a brief, general reference to a benefit plan that includes a "reservation-of-rights" clause, rather than an express reference to that clause or to plan documents of which it is a part.

Key Facts

DuPont has company-wide medical and dental plans that apply to active members of the bargaining unit and retirees. Three facilities were involved in the case: Richmond, Nashville and Louisville, where employees are represented by different locals of the International Brotherhood of the DuPont Workers. Each unit has had its own collective bargaining agreement and separate bargaining histories with DuPont, but at all those locations the unions have agreed to participate in the company-wide plans.

The benefit plans contained a reservation-of-rights provision, which provided that the employer retained the right to modify or terminate the benefit plan at its discretion. The CBAs contained an "Industrial Relations Plans and Practices" article that listed the applicable company-wide benefit plans, and recognized the employer's right to make changes to or terminate the plans, subject to any restrictions set forth in the article and applicable benefit plan documents.

In 2013, the employer ceased providing Medicare-eligible retirees (MERs) medical and dental coverage through the plans, and instead provided them with funds to purchase secondary medical and dental health benefits through a health reimbursement agreement. This change would apply to current bargaining unit members when they become MERs. The local unions were provided advance notice of the changes and objected; DuPont unilaterally implemented those changes pursuant to its reservation-of-rights authority.

Board Majority's Decision Finding Waiver of the Right to Bargain

The Board reversed the ALJ and found that an "amalgam" of factors established a clear and unmistakable waiver of DuPont's bargaining obligation:

- **Contractual Language:** The parties' collective bargaining agreements incorporated reservation-of-rights language from the benefit plan documents, enabling DuPont to terminate or modify the plans at its discretion; the CBAs further acknowledged that participation was "subject to the provisions of such Plans."
- **Bargaining History:** The parties' bargaining history also supported a waiver finding because during negotiations, the unions expressly agreed to participate in the plans subject to DuPont's reservation of rights to modify or terminate.
- **Past Practice**: Although a union's acquiescence standing alone cannot operate as a waiver, the majority found that waiver can be inferred from past practice, even a single instance. Here, over several decades DuPont had implemented numerous changes to the plans unilaterally, without union objection.

These factors, taken together, supported the conclusion that the unions waived the right to bargain over the changes implemented to DuPont's company-wide plans for retirees.

Member McFerran's Dissent

Member McFerran dissented, reasoning that there was no evidence of contractual waiver pursuant to the reservation-of-rights clauses in the CBAs. Moreover, bargaining history and past practice cannot compensate for the absence of contractual language evidencing a union's clear and unmistakable waiver. The dissent cautioned that the majority's endorsement of the notion that an "amalgam" of factors could establish waiver in a particular case, would undermine the "clear and unmistakable waiver standard."

Takeaways: Language Necessary to Establish Waiver and More Changes on the Horizon

As noted, this case did not reverse precedent, but is noteworthy nonetheless for what it instructs regarding modification/termination of benefit plans, and the contractual language required to demonstrate waiver and the right to act unilaterally.

In brief, the current state of the law is such that for a contractual waiver over an employer's right to unilaterally modify or terminate the terms of a benefit plan, the CBA must:

- Specifically include reservation-of-rights language; or
- Specifically reference plan documents or summary plan descriptions that contain reservation-of-rights; or
- Provide that participation in the plan is subject to the terms of the plan (which contains the reservation-of-rights language).

The real significance of this decision is the Board's foreshadowing of future action. The Board recognized the current, not uncommon tension between the Board and the D.C. Circuit Court of Appeals regarding the quantum of proof required to establish that a benefit plan, including reservation of rights language, has been effectively incorporated by reference in a CBA.

The Board has held that a CBA must expressly incorporate the reservation of rights clause by reference or expressly incorporate the summary plan description that contains such language. On the other hand, the D.C. Circuit has held that "brief, general references" to a benefit plan in a CBA is sufficient to incorporate by reference all provisions of the plan, including reservation-of-rights language. *See, e.g., Amoco Chemical Co.*, 328 NLRB 1220 (1990), *enf. denied* 217 F.3d 869 (D.C. Cir. 2000). While the facts of this case did not require the Board to grapple with this issue and overturn precedent (because, according to the majority, the agreements specifically incorporated by reference the plan documents), the fact that the Board noted it "would be willing to reconsider" its precedent on this issue, clearly signals a willingness to move in the direction of the D.C. Circuit on this issue once the right case comes along.

So, stay tuned!

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