National Labor Relations Act Guarantees Employer Must Maintain Health Insurance When Contract Expires!

Unilateral Changes During the time a collective bargaining agreement is in effect, the employer may not change a working condition that is a mandatory subject of bargaining, without first bargaining with the union (29 U.S.C.A. § 158(d**) Even after the collective bargaining agreement expires, the employer must maintain the status quo and may not unilaterally change mandatory subjects of bargaining,** until the parties have reached an impasse (*Louisiana Dock Co. v. NLRB*, 909 F.2d 281 [7th Cir. 1990]). This proscription against unilateral changes continues even if the employer disputes that the union is the exclusive representative (*Livingston Pipe & Tube v. NLRB*, 987 F.2d 422 [7th Cir. 1993]; *NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442 [7th Cir. 1989]).

ADDITIONAL CASE LAW:

In Circuitwise, case number 308 NLRB 1091 (1992), the US Federal Government found that an Employer must offer comparable health insurance with no increase to employees, even if the cost of that insurance has increased, until the certified union has had a full and complete opportunity to bargain a new contract with the Employer. This means that once UE becomes certified as the new union, Pride and SOI must provide comparable health insurance to that which used to be provided by Local 68.

Overnite Transp. Co., 335 NLRB 372, 373 (2001) ("It is well settled that absent compelling circumstances, an employer that chooses unilaterally to change its employees' terms and conditions of employment between the time of an election and the time of certification does so at its own peril if the union is ultimately certified.").

Priority One Services, Inc., 331 NLRB 1527 (2001) (noting that changes to a health plan "are not simply benign technical changes, but are precisely the type of changes that would tend to undermine the Union's perceived authority as the bargaining representative of the employees and to interfere with the employees' free choice in an election.").

Brannan Sand and Gravel Co., 314 NLRB 282 (1994) (finding that an employer's unilateral changes in deductions, copayments, and employee contributions in the employee health insurance plan constituted a Section 8(a)(5) violation).

Circuit-Wise, Inc., 308 NLRB 1091 (1992) (finding an employer's act of unilaterally increasing employee contributions to a health plan, even if the increases were merely passed along from the insurance carrier, constituted a Section 8(a)(5) violation).

Seventh Circuit Court of Appeals Rules That Operating Engineers Must Continue to Provide Health Care After Defeated in an NLRB Election!

The Seventh Circuit Court of appeals has ruled that an employer is still obligated to contribute to benefit funds for the life of the CBA even though the employees decertified the union. The case is *Midwest Operating Engineers Welfare Fund et al. v. Cleveland Quarry et al.*, Case Nos. 15-2628, -3221, -3861, 16-1870, 2016 WL 7367826 (7th Cir. Dec. 20, 2016),

In this case, employees of Cleveland Quarry and two other subsidiaries of RiverStone Group, Inc. ("the Company") in three separate International Union of Operating Engineers (IUOE) bargaining units of the Company voted to decertify the Union in 2013. At the time, the Union and the Company were party to five year collective bargaining agreements expiring in 2015. The Company took the position that decertification of the Union, which allowed it to set its own terms and conditions of employment, ended any contractual obligation to contribute to the multiemployer welfare and pension funds ("Funds").

However, the Funds sued for the unpaid contributions. They prevailed in the District Court in three separate cases involving the three different subsidiaries before three separate Federal District Judges. The Company then appealed all three rulings. The Seventh Circuit Court of Appeals found that the parent, RiverStone, was the actual Defendant and recognized that the collective bargaining agreements were unenforceable as to the Union, but nevertheless found that the Funds had the right under ERISA to bring a suit for delinquent contributions under 29 U.S.C. § 1145.

The Court based its decision on the theory that when the Funds promised to provide a level of benefits to the employees, by allowing the employer to participate in the Funds under the terms of the CBAs, that created a binding contractual promise. The Court also recognized that the Funds were third-party beneficiaries to the CBAs and thus entitled to enforce them even if the Union could no longer do so. The Court found that after the decertification, RiverStone's employees were no longer working "under the terms of" the collective bargaining agreement. This meant RiverStone could pay them lower wages or otherwise change the terms of their employment from what the collective bargaining agreement had provided. However, the Court also ruled that "so far *as benefit law* is concerned the employees were still working 'under the terms of' the collective bargaining agreement."

The Court referenced its prior *Central States, Southeast & Southwest Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663, 669 (7th Cir. 2005), in finding that "the union is not the only party with standing to enforce" an employer's obligation to contribute to an employee welfare plan, and noted that the Multiemployer Pension Plan Amendments Act "authorizes multiemployer plans to sue for delinquent contributions owed 'under the terms of the plan or under the terms of a collectively bargained agreement.' " 420 F.3d at 670.

The Seventh Circuit is not the only circuit finding that an employer's contractual obligations to participate in multiemployer funds can survive decertification, withdrawals of recognition, and disclaimers of interest. However, there is a split among the circuits. The Ninth Circuit has found that when a bargaining unit ceases to exist, whether by decertification or contract repudiation given the existence of a one person bargaining unit, any existing contract becomes void, not voidable, ending the employer's obligation to contribute to employee benefit plans. Conflicting cases decided in the Ninth Circuit include *Laborers Health & Welfare Trust Fund v. Westlake Development*, 53 F.3d 979 (9th Cir. 1995) (contract repudiation); *Sheet Metal Workers' Int'l Ass'n v. West Coast Sheet Metal Co.*, 954 F.2d 1506