International Brotherhood of Electrical Workers Local 763 and International Brotherhood of Electrical Workers Local 1483, appellants, v. Omaha Public Power District, appellee.

791 N.W.2d 310

Filed December 3, 2010. No. S-10-025.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In an appeal from an order by the Commission of Industrial Relations regarding prohibited practices, an appellate court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings.
4. **Labor and Labor Relations: Public Officers and Employees.** The purpose of Neb. Rev. Stat. § 48-824 (Reissue 2004) is to provide public sector employees with the protection from unfair labor practices that private sector employees enjoy under the National Labor Relations Act, by making refusals to negotiate in good faith regarding mandatory bargaining topics a prohibited practice.
5. **Commission of Industrial Relations.** An employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission of Industrial Relations.

Appeal from the Commission of Industrial Relations. Affirmed.

Robert E. O'Connor, Jr., for appellants.

Robert F. Rossiter, Jr., and Cristin McGarry Berkhausen, of Fraser Stryker, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, McCormack, and Miller-Lerman, JJ.

McCormack, J.

NATURE OF CASE

International Brotherhood of Electrical Workers Locals 763 and 1483 (collectively IBEW) filed a prohibited practices complaint against Omaha Public Power District (OPPD) on July 7, 2009. The complaint alleged that OPPD's implementation of its "Tobacco-Free Worksite" policy (the Policy) to each existing IBEW collective bargaining agreement (CBA) was a "prohibited practice" under Neb. Rev. Stat. § 48-824(1) and (2)(a), (b), and (f) (Reissue 2004). The issue was tried before the Commission of Industrial Relations (CIR) upon stipulated facts. The parties also stipulated at trial that they were at impasse regarding the negotiation of this issue. The CIR found that OPPD did not commit a prohibited practice in implementing the Policy to the existing agreements. IBEW now appeals.

BACKGROUND

The organizations that make up IBEW are labor organizations as defined in Neb. Rev. Stat. § 48-801(6) (Cum. Supp. 2010). OPPD is a political subdivision of the State of Nebraska and an employer as defined in § 48-801(4). IBEW represents two different bargaining units of employees employed by OPPD; each has a separate CBA with OPPD.

The term of both CBA's is June 1, 2007, to May 31, 2010. One of the CBA's provides:

> Other rules and practices, pertaining to working conditions, etc., which obtained on the effective date of the Agreement and which are not in conflict with any of the other provisions of the Agreement, shall remain in effect until revised or discontinued by mutual consent of the Company and the Union or the employees concerned.

In February 2008, the Governor signed the Nebraska Clean Indoor Air Act (the Act), which was codified under Neb. Rev. Stat. §§ 71-5716 to 71-5734 (Reissue 2009). The Act prohibits smoking in enclosed indoor workspaces.[1] Under § 71-5727, the Act defines smoking as the lighting of any cigarette, cigar, pipe, or other smoking material or the possession of any

[1] § 71-5717.

lighted cigarette, cigar, pipe, or other smoking material, regardless of its composition. As a result of the Act's implementation, on May 28, 2008, OPPD notified its three unions of its plan to implement a new 2009 policy concerning a tobacco-free worksite. The parties agreed the implementation of the Act was a mandatory subject of collective bargaining, and in February 2009, OPPD opened up negotiations regarding the new policy. The International Association of Machinists and Aerospace Workers Local Lodge 31, which is the other union that represents OPPD employees, was a party to the negotiations at issue, but declined to join in the proceeding below.

On February 26, 2009, the parties held the first of four negotiation meetings. OPPD began negotiations by presenting the unions with a draft memorandum of understanding. On March 12, the parties met a second time, and the unions presented a joint union proposal, which contained several changes, including an extended implementation date, designated smoking areas, an exception for smokeless tobacco, and a provision regarding the use of cessation medication and sick leave for the purposes of quitting smoking. The parties held a third meeting on March 19, where OPPD presented its counterproposal. The counterproposal reflected OPPD's concessions regarding the use of tobacco during "'unpaid time'" and smoking cessation medication and use of sick leave for the purpose of quitting smoking.

On April 13, 2009, the parties met for a fourth and final time and OPPD presented its final proposal. OPPD sent its last, best, and final offer as a memorandum of understanding to all of the unions on April 17. The letter instructed the unions to notify OPPD of their position by April 30. IBEW declined to accept the final offer. OPPD thereafter notified all three unions that it would unilaterally implement the Policy on June 1, and the Policy was implemented on that date.

The Policy effectively prohibits the use of tobacco products within all company-owned and/or company-occupied buildings and vehicles, including but not limited to all facilities, vehicles, parking lots, parking garages, and private and public land where OPPD is performing work, as well as all sidewalks which OPPD maintains. The Policy defines tobacco products as

"all products used in the form of cigarettes, pipes, cigars and/or any smokeless form." The Policy also prohibits leaving the worksite to use tobacco products and using tobacco products while walking to or from an employee's parked car on OPPD property. The Policy states that if OPPD has reasonable cause to believe an employee is in violation of these prohibitions, OPPD will take corrective action which could include disciplinary action.

IBEW filed a prohibited practices complaint against OPPD. The complaint alleged that OPPD's implementation of the Policy to the existing CBA was a prohibited practice under § 48-824(1) and (2)(a), (b), and (f). The issue was tried before the CIR upon stipulated facts. The parties also stipulated at trial that they were at impasse regarding the negotiation of this issue. The CIR determined that the implementation of the Policy following good faith bargaining to impasse did not constitute a violation of § 48-824, and dismissed IBEW's claim. IBEW now appeals.

ASSIGNMENTS OF ERROR

IBEW assigns that the CIR erred in (1) failing to consider the existence of a valid, binding CBA, (2) relying upon inapplicable case law regarding impasse at contract expiration, and (3) allowing a public employer to unilaterally modify a CBA during its term after bargaining to impasse on a mandatory subject of bargaining.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-825(4) (Reissue 2004), any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[2]

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[2] See *Central City Ed. Assn. v. Merrick Cty. Sch. Dist., ante* p. 27, 783 N.W.2d 600 (2010).

[2] In an appeal from an order by the CIR regarding prohibited practices, an appellate court will affirm a factual finding of the CIR if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[3]

ANALYSIS

[3] Both IBEW and OPPD elected to engage in the collective bargaining process on the present issue. While a unilateral change in a term or condition of employment contained in a CBA may be a breach of contract,[4] the CIR lacks jurisdiction to hear breach of contract claims.[5] IBEW chose to bring this action before the CIR and alleged only that OPPD committed a prohibited practice under Nebraska's Industrial Relations Act (IRA). An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings.[6] Therefore, we will address only whether the implementation of the Policy in this instance was a prohibited practice under § 48-824.

The parties stipulated to the fact that OPPD is lawfully entitled to enact, without negotiation, such provisions of the Policy as are consistent with the Act. The Policy, however, exceeds the statutory requirements of the Act. Specifically, the Policy applies to smokeless tobacco and prohibits the use of tobacco products anytime an employee is on company time, is using company property, or is in company facilities. The Act did not require these additional changes to the CBA.

At issue, then, is whether a public employer can modify conditions or terms of employment during the term of a valid CBA after negotiating to impasse in good faith on a mandatory subject of bargaining, and then unilaterally implementing a change.

IBEW's complaint alleged a violation of § 48-824(1) and (2)(a), (b), and (f) when OPPD unilaterally implemented the

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[3] *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, 278 Neb. 572, 772 N.W.2d 564 (2009).

[4] *Id.*

[5] See *id.*

[6] *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

Policy after reaching impasse in negotiations with IBEW. On appeal, IBEW relies on general principles of contract law and argues that it is impermissible to "insist to impasse, and then implement, a change during the term of the [CBA]."[7] OPPD argues that it did not commit a prohibited practice, because it did not refuse to bargain in good faith and because the parties did in fact reach impasse prior to implementation of the Policy. We agree and affirm the decision of the CIR.

[4] Unilateral implementation of final offers has consistently been discussed in relation to the duty to negotiate in good faith.[8] This is an established tenet of labor law and limits the scope of our analysis to whether OPPD's unilateral implementation of the Policy violates its duty to bargain in good faith. Section 48-824(1) states that it is a prohibited practice for an employer to refuse to negotiate in good faith with respect to mandatory topics of bargaining. The purpose of § 48-824 is to provide public sector employees with the protection from unfair labor practices that private sector employees enjoy under the National Labor Relations Act (NLRA), by making refusals to negotiate in good faith regarding mandatory bargaining topics a prohibited practice.[9]

[5] Prior to deciding the present case, the CIR had not recognized an employer's right to unilaterally implement its final offer upon reaching impasse during the pendency of a CBA. However, the CIR had previously determined that when negotiating upon expiration of a CBA or at its inception, an employer may unilaterally implement a final offer if it does so after impasse and before any proceeding has been initiated before

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[7] Brief for appellants at 21.

[8] See *Labor Board v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962). See, also, *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *review denied sub nom. American Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[9] See Introducer's Statement of Intent, Committee Statement, L.B. 382, Committee on Business and Labor, 94th Leg., 1st Sess. (Feb. 6, 1995).

the CIR.[10] In *FOP Lodge 41 v. County of Scotts Bluff*,[11] the CIR determined that an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the CIR. If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.[12] The CIR here appropriately extended this rule to include the implementations of final offers during the term of a CBA.

We have previously noted that decisions under the NLRA are helpful in interpreting the IRA, but are not binding.[13] Under the NLRA, the general rule is that an employer has the right upon impasse to implement its final offer with respect to a mandatory subject of bargaining.[14] This has been applied to negotiations taking place during the term of a CBA.[15]

Section 8(a)(5) of the NLRA, codified at 29 U.S.C. § 158(a)(5) (2006), requires that an employer bargain with the union before effecting changes in terms and conditions of employment.[16] But if the parties reach good faith impasse in negotiations, the employer generally does not violate § 8(a)(5)

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[10] See, *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984), *affirming* 5 C.I.R. 441 (1982); *General Drivers & Helpers Union, Local No. 554 v. Saunders County, Nebraska*, 6 C.I.R. 313 (1982).

[11] *FOP Lodge 41 v. County of Scotts Bluff*, 13 C.I.R. 270 (2000).

[12] *Id.*

[13] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

[14] *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, 939 F.2d 1392 (10th Cir. 1991).

[15] See *id.*

[16] *Id.*, citing *Taft Broadcasting Co., supra* note 8. See 29 U.S.C. § 158(a)(5).

by thereafter implementing changes consistent with those proposed to the union.[17]

> "'That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a duty to agree to the union's counterproposals or to make a concession. . . . The employer's duty to bargain does not give the union a right to veto the proposed changes by withholding consent. If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations.'"[18]

Section 8(d) of the NLRA imposes a mutual obligation on the employer and the representative of employees to bargain in good faith.[19] Nebraska's IRA does not contain a provision similar to § 8(d) of the NLRA. However, as previously stated, under § 48-824(1), it is a prohibited practice for a party to refuse to negotiate in good faith. Therefore, the duty to negotiate in good faith is mandated under both statutory schemes.

The IRA's good faith bargaining requirements provide a statutory check which supports the findings of the CIR in this case. The duty to negotiate in good faith on mandatory topics of bargaining is to be enforced by the application of § 48-824(1). Good faith bargaining requirements ensure that an employer will not simply "go through the motions" of discussing mandatory topics of bargaining and then take unilateral action by implementing its own terms. This requirement, coupled with the requirement that the parties reach a genuine impasse on the issue, ensures that an employer will not achieve its terms in bad faith.

NLRA cases which have recognized an employer's right to unilaterally implement changes to conditions of employment at

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[17] *Id.*

[18] *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, *supra* note 14, 939 F.2d at 1404 (emphasis omitted).

[19] 29 U.S.C. § 158(d).

impasse have reasoned that this right is counterbalanced by a union's right to strike and the statutory duty to bargain in good faith under § 8(d). Employees of a Nebraska public power district are not permitted to strike under the IRA.[20] However, employees have been provided other protections in lieu of the right to strike. Namely, employees are entitled to initiate prohibited practices proceedings before the CIR. Further, the CIR has jurisdiction over certain "industrial disputes involving governmental service."[21] As used in the IRA, the term "industrial dispute" includes "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment."[22] When a party brings an industrial dispute, the CIR has the power to establish or alter conditions of employment.[23] As stated above, an employer may not unilaterally implement its final offer after a petition has been filed with the CIR. The union, therefore, may bring an industrial dispute when the parties have reached impasse on a mandatory subject of bargaining. This gives the union the power to ask the CIR to establish appropriate working conditions under the circumstances and effectively bars the employer from unilaterally implementing its final offer. These protections adequately counterbalance the employer's right to implement its final offer when impasse is reached.

Both parties agree that the Policy at issue is a mandatory topic of bargaining. The parties have stipulated that OPPD bargained in good faith and that negotiations reached a genuine impasse. The changes implemented by OPPD were contained in preimpasse proposals, and the implementation occurred before any petition was filed with the CIR. The facts of this case support the findings of the CIR and are not contrary to

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[20] § 48-801 and Neb. Rev. Stat. § 48-802 (Reissue 2004).

[21] Neb. Rev. Stat. § 48-810 (Reissue 2004).

[22] § 48-801(7).

[23] Neb. Rev. Stat. § 48-818 (Reissue 2004).

law. Recognizing an employer's right to implement changes unilaterally under the circumstances described above does not adversely affect the policy behind the IRA. We therefore affirm.

CONCLUSION

For the reasons stated above, we affirm the order of the CIR.

AFFIRMED.

STEPHAN, J., not participating.

IN RE TRUST OF LEO A. HRNICEK, ALSO KNOWN AS L.A. HRNICEK, M.D., DECEASED. ADRIENNE H. BRIETZKE, APPELLANT, V. FIRST NATIONAL BANK NORTH PLATTE, APPELLEE.

792 N.W.2d 143

Filed December 3, 2010. No. S-10-192.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Contracts: Equity.** The right of retainer lies in equity.
5. **Limitations of Actions: Judgments.** It is axiomatic that a court's order is not subject to a statute of limitations defense.

Appeal from the County Court for Morrill County: RANDIN ROLAND, Judge. Affirmed.

Paul E. Hofmeister and Joseph A. Kishiyama, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellant.

John K. Sorensen, of Sorensen, Mickey & Hahn, P.C., for appellee.