

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD<sup>1</sup>  
REGION 32**

**SMURFIT-STONE CONTAINER  
ENTERPRISES, INC.**

**and**

**Cases 32-CA-24480  
32-CA-24725**

**DISTRICT COUNCIL NO. 2,  
LOCAL NO. 388-M, affiliated with  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**GENERAL COUNSEL'S BRIEF IN REPLY TO  
RESPONDENT'S ANSWERING BRIEF**

On April 5, 2010, Administrative Law Judge Jay R. Pollack issued his Decision and Order dismissing the complaint in this matter. The General Counsel and the Union have filed exceptions and supporting briefs to the Judge's Decision and Respondent has filed an answering brief to those exceptions. The following is Counsel for General Counsels' reply to Respondent's answering brief.<sup>2</sup>

**A. The 2004 "Framework" Agreement and Respondent's Implicit Waiver Argument Based Thereon**

The core of Respondent's answering brief is that in 2004 - five years before the events in question in this case - Respondent and the Union reached agreement on a "framework" for all future plant closing negotiations.<sup>3</sup> According to Respondent, the

---

<sup>1</sup> Herein called the Board.

<sup>2</sup> References to the Judge's decision are listed as "ALJD \_:\_;" references to Respondent's answering brief are listed as "RB;" references to the hearing transcript are listed as "Tr.;" references to the General Counsel's exhibits are listed as "GC;" and references to Respondent's exhibits as "R."

<sup>3</sup> Respondent also contends that the General Counsel's exceptions should be stricken because they fail to meet the minimum requirements of Section 102.46 of the Board's Rules and Regulations. Contrary

Union, by agreeing to this framework, specifically agreed to include early contract termination as part of any future plant closure agreements and/or made that permissive subject of bargaining so intertwined with mandatory subjects such that Respondent's insistence on early contract termination during the 2009 Fresno plant close/effects bargaining was not unlawful. Although it chooses not to say so, Respondent's argument is fundamentally a waiver argument, namely, that the Union, by agreeing to the 2004 framework agreement, thereby waived its right to object to Respondent's insistence on early contract termination as part of any plant closure/effects agreement. Accordingly, the central question is whether there is clear and unmistakable evidence to support such a waiver defense, and the short answer is no.

The record contains very few facts relating to the parties' 2004 framework agreement and they are as follows. In 2004 Respondent and the Union were engaged in two separate sets of negotiations. One set of negotiations involved the parties' attempt to negotiate a plant closure/effects agreement relating to Respondent's then-San Jose facility. Those negotiations were successful and resulted in a closure agreement (herein called the San Jose Closure Agreement) that contained four central components: suspension of seniority; a formula for severance pay; continuation of medical benefits for a specified period of time; and early termination of the then-San Jose contract. More specifically, the San Jose Closure Agreement's early contract termination language provided as follows:

---

to Respondent's contentions, the General Counsel's exceptions and its brief in support thereof fully comply with Section 102.46.

The current Collective Bargaining Agreement dated June 16, 1998 – June 15, 2004 between the parties shall remain in full force and effect under the terms of this Termination Agreement until all operations cease and the Plant closes or no bargaining unit worker or employee remains, whichever is later, at which time the Collective Bargaining Agreement will be considered null and void at this facility.

The second set of 2004 negotiations involved the parties' attempt to negotiate renewal contracts for about 12 other Respondent facilities. During these negotiations the Union proposed a detailed formula for severance pay in the event of plant closure. Respondent countered with an assurance that it would negotiate future closure agreements that would be patterned after the San Jose Closure Agreement. (Tr. 68) Based on that assurance, the Union withdrew its severance formula proposal and agreed to retain the general severance language contained in the old contracts. There is nothing in writing that memorializes the 2004 framework agreement or otherwise sets forth or explains what was specifically agreed to or how the framework agreement was supposed to operate. Rather, it appears that the 2004 framework agreement consists simply of Respondent's oral assurance, and the Union's acceptance of it.

By any reading of the record, it is unclear what the parties actually agreed to in their 2004 framework agreement. What is clear, however, is that the parties have widely divergent views of what that framework agreement is. According to Robert Scheer, Respondent's labor relations counsel, it was his "belief" that the parties had agreed to what he called "four component closure bargaining in future cases, as established as (sic) San Jose," but that the four components did not have to be identical to those contained in the San Jose Closure Agreement. (Tr. 143) Union representative David Grabhorn, however, testified that he understood the framework agreement to mean that the parties

were free to negotiate whatever “deviations” from the San Jose Closure Agreement they could agree to, but if they were unable to negotiate such a different agreement, then the San Jose Closure Agreement would be implemented as a default agreement. The Judge did not attempt to resolve these differing views of the 2004 framework agreement; rather, he found simply (and only) that “the parties agreed that Respondent would not act inconsistent with the San Jose agreement, if there was to be a plant closure.” (ALJD 5:7-8)<sup>4</sup> The Judge’s sparse decision does not further explain what the parties’ actual agreement was, and it does not explain what “not act inconsistent with the San Jose agreement” means, and nothing in the record explains these matters either.

There is thus nothing in writing that explains whether “acting consistent” with the San Jose Closure Agreement means having terms identical to those contained in that agreement, or, if that is not what it means, then when and under what circumstances would non-identical terms still be “consistent” with the San Jose Closure Agreement.<sup>5</sup> There is also nothing in writing that explains whether the four components of the San Jose Closure Agreement were supposed to be just the starting point for further closure bargaining, from which the parties can deviate or even abandon; whether they (or some version of them) were intended to be necessary components of any closure agreement;

---

<sup>4</sup> Significantly, the Judge did not make any findings adopting Scheer’s understanding of what the 2004 framework agreement was.

<sup>5</sup> In this regard, the San Jose Closure Agreement was more restrictive regarding early termination than any of the early termination proposals that Respondent made during the Fresno effects bargaining. Thus, the San Jose Closure Agreement provided for early contract termination only after all operations ceased and/or when there were no longer any bargaining unit employees, whichever occurred later, while Respondent’s early contract termination proposals for Fresno consistently called for termination before the last bargaining unit employee ceased working and before operations fully ceased at the facility. The Judge made no findings concerning whether Respondent’s Fresno early contract termination proposals were, or were not, “consistent” with the San Jose Closure Agreement or, therefore, whether Respondent itself was, or was not, complying with the 2004 framework agreement.

whether all of the components (or only some of them) were necessary components of any closure agreement; or whether they were to comprise the “default” agreement if the parties were unable to negotiate a closure agreement different from the San Jose Closure Agreement.

Given this state of affairs, it is clear that the evidence fails to establish that the Union waived anything when it agreed to the 2004 framework agreement, let alone that it specifically waived its right to object to Respondent’s insistence on early contract termination during future closure bargaining. In this regard, it is well settled that a waiver of a statutory right must be clear and unmistakable and will not be inferred from general contractual provisions. It is also well established that a waiver may be established through bargaining history and past practice as well as by contractual provisions. However, regardless of the type of evidence used to establish waiver, the evidentiary standard remains the same: the evidence must be clear and unmistakable.<sup>6</sup> Furthermore, the burden of proof on establishing waiver is on the party asserting it.<sup>7</sup> For the reasons discussed above, Respondent has failed to establish through clear and unmistakable evidence that the Union waived any aspect of its right to bargain over the effects of future plant closures.

Similarly, the evidence fails to establish that, because of the 2004 framework agreement, the permissive subject of early contract termination involving Respondent’s Fresno facility became inextricably intertwined with the mandatory subjects of

---

<sup>6</sup> *Metropolitan Edison Co. v. NLRB*, 460 NLRB U.S. 693 (1983); *Windstream Corp.*, 352 NLRB 44, 50 (2008); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).

<sup>7</sup> *Litton Systems*, 283 NLRB 973, 973-974 fn. 6 (1987).

bargaining arising from that facility's closure, such as to entitle Respondent to insist on early contract termination. Rather, as discussed more fully in the General Counsel's exceptions brief, early contract termination is a matter that is collateral to the type of severance cost-fixing issues that the Board has recognized as being appropriate for insistence to impasse, see, e.g., *Borden, Inc.*, 279 NLRB 396 (1986), and Respondent's reliance on the purported 2004 framework agreement does not alter the character of its early termination proposal as falling outside the limited scope of issues for which insistence to impasse is allowed in a severance-bargaining context.

**B. Respondent's Contention That Respondent Did Not Insist to Impasse on a Permissive Subject of Bargaining Is Without Merit**

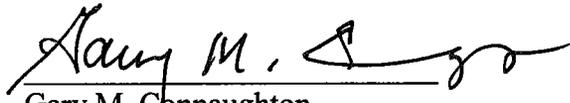
Respondent's argument on the impasse issue is nothing more than an extension of its waiver argument. Thus, Respondent does not deny that it insisted throughout bargaining that any severance agreement must provide for the early termination of the Agreement when some bargaining unit employees were still employed or deny that this insistence led to the breakdown of negotiations. Instead, Respondent argues that it was entitled to be "adamant" on this issue because the parties had already agreed in the 2004 framework agreement that early termination of the contract would be part of any closing agreement. However, since the 2004 framework agreement did not involve the Union's waiver of any bargaining rights, Respondent's arguments about impasse must also be rejected and the General Counsel's exceptions pertaining to the impasse issue must be sustained.

**Conclusion**

For the reasons set forth above, it is respectfully requested that Board reject Respondent's arguments in its answering brief, find merit to the General Counsel's exceptions, and find that Respondent violated Section 8(a)(1) and (5) as alleged in the Consolidated Complaint and order the appropriate remedies.

**DATED AT** Oakland, California this 2<sup>nd</sup> day of June 2010.

Respectfully submitted,



Gary M. Connaughton  
Counsel for the General Counsel  
National Labor Relations Board  
Region 32  
1301 Clay Street, Room 300N  
Oakland, CA 94612-5224

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMURFIT-STONE CONTAINER  
ENTERPRISES, INC.

and

DISTRICT COUNCIL NO. 2,  
LOCAL NO. 388-M, affiliated with  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS

Cases 32-CA-24480  
32-CA-24725

DATE OF MAILING: June 2, 2010

**AFFIDAVIT OF SERVICE OF THE GENERAL COUNSEL'S BRIEF  
IN REPLY TO RESPONDENT'S ANSWERING BRIEF**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by email upon the following persons, addressed to them at the following addresses:

Lawrence H. Stone, Esq.  
Jackson Lewis  
725 South Figueroa Street, Suite 2500  
Los Angeles, CA 90017  
[stonel@jacksonlewis.com](mailto:stonel@jacksonlewis.com)  
**E-MAIL**

Robert J. Scheer  
Labor Relations Counsel  
Smurfit-Stone Container Enterprises, Inc.  
2363 Boulevard Circle, Suite 4  
Walnut Creek, CA 94595  
[rscheer@smurfit.com](mailto:rscheer@smurfit.com)  
**E-MAIL**

David Grabhorn  
Teamsters District Council No. 2  
Local Union 388M  
710 East Commonwealth Avenue  
Fullerton, CA 92831  
[grabhornd123@charter.net](mailto:grabhornd123@charter.net)  
**E-MAIL**

Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW, Suite 11610  
Washington, DC 20570  
**E-FILED**

Subscribed and sworn to before me this 2<sup>nd</sup> day of June 2010.

DESIGNATED AGENT

/s/ Frances Hayden  
NATIONAL LABOR RELATIONS BOARD

