**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| TEAMSTERS DISTRICT COUNCIL 2, LOCAL 543-M, | ) | |
| Union, | ) | |
| and | ) | Case: 17-CA-24389 |
| *OMAHA WORLD-HERALD,* | ) | |
| Employer. | ) | |

# REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE


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# I. ARGUMENT

On or about June 4, 2010, the General Counsel electronically filed and served its Answering Brief. This Reply Brief responds to the General Counsel's Answering Brief.

## A. *OMAHA WORLD-HERALD* HAD THE RIGHT TO MODIFY THE PENSION PLAN; THE GENERAL COUNSEL OFFERED NO COMPELLING CONTRARY ARGUMENTS.

### 1. RIGHTS AND WAIVERS EXIST DURING THE CONTRACT TERM

The General Counsel advanced the same error as the ALJ by suggesting that Local 543-M's "standard reopener letter" (GC Br. at 6; ALJD at 3-4) somehow negated contractual rights and waivers during the term of the 2004 CBA. The General Counsel offered no legal argument or record evidence to support the notion that Local 543-M's October 3, 2008 "reopener" letter (GC Ex. 6) – that the General Counsel admitted was sent "prior to the contract's expiration" (GC Br. at 6) – abrogated *Omaha World-Herald's* contractual rights before the 2004 CBA expired.

Proposals made by Local 543-M ***during the 2004 CBA's term, to apply to a new CBA in the future*** did not cancel *Omaha World-Herald*'s then existing negotiated rights. The ALJ and General Counsel attached more weight to a bargaining tactic rather than the substantive result of negotiations. In theory, a party could send a "reopener" letter at any time and remove rights expressed and agreed to in a CBA, under the rationale of the ALJ and General Counsel. Not surprisingly, neither the General Counsel nor the ALJ cited any authority for such a misapplication of the Act. In fact, all authority runs to the contrary. (*OWH* Br. at 27).

### 2. EVIDENCE DEMONSTRATED LOCAL 543-M CLEARLY AND UNMISTAKABLY WAIVED ITS RIGHT TO BARGAIN OVER CHANGES TO THE PENSION PLAN

The General Counsel attempted to seize upon the error perpetrated by the ALJ upon *Omaha World-Herald* with respect to denied evidence involving the bargaining history of Article

28 of the 2004 CBA. The General Counsel baldly asserted that nowhere in Article 28 of the CBA could "it be interpreted that the union forfeited its right to bargain over such changes." (GC Br. at 14). Article 28 of the 2004 CBA stated, in part:

> … inasmuch as the plans cover all employees, not just bargaining unit employees changes in these plans are not subject to Article Five of the Agreement.

(GC Ex. 2 at 14). Yet Article 11 – Drug Alcohol Abuse - of the 2004 CBA also stated, in part:

> … in the event an employee tests positive, a second test will be performed to ensure the accuracy of the first test. When the second test is positive, the Company has the right to take disciplinary or corrective action at its discretion, subject to the provisions of Article 5.

(GC Ex. 2 at 8). The ALJ prohibited any evidence of the bargaining history behind the significance of removing or explicitly agreeing that a contractual matter was subject to Article 5 of the 2004 CBA despite *Omaha World-Herald*'s attempts. (Tr. at 225). The General Counsel's statement "there is no evidence to establish that the parties intended it to mean more and certainly no evidence that it constituted a waiver of the union's right to bargain over the subject" seized on the ALJ's prejudicial error in refusing to permit evidence on the issue. (GC Br. at 14).

The General Counsel stated "the fact that [*Omaha World Herald*'s] benefit plan covers all employees is irrelevant as the Board traditionally rejected the Employer's argument that such language allowed it to make unilateral changes to its benefit plans …" (GC Br. at 14), and cited cases purportedly supporting this claim. However, *Mid-Continent Concrete*, 336 NLRB 258 (2001) involved a first time contract under negotiations; there was ***no CBA in effect, much less contractual language on which the Company relied*** to make unilateral changes. *See* 336 NLRB at 259. In addition, the Employer in *Mid-Continent Concrete*, ***solely*** relied on the fact that changes were Company-wide. *Id*. The instant facts were not analogous.

*CompuNet Communications*, 315 NLRB 216 (1994) involved profoundly different facts from the instant case. The applicable language in the CBA in *CompuNet* "sets forth a brief summary of the medical benefits and then states that the benefits are described by the actual insurance contract on file." *Id.* at 222.

*United Hosp. Med. Ctr*, 317 NLRB 1279 (1995) involved the following clause:

> … eligible unit employees shall receive the same medical and life insurance benefits available to employees in comparable classifications within the Hospital workspace force.

317 NLRB at 1282. There was no explicit waiver from the grievance and arbitration clause of the CBA, like the 2004 CBA between *Omaha World-Herald* and Local 543-M. Significantly, in *United Hosp. Med. Ctr.*, the Company relied on an arbitrator's award that dismissed the union's grievance that the Company was prohibited from increasing health insurance costs. *Id.* And, as is relevant to the instant matter, ***the ALJ examined the bargaining history of the CBA*** to determine whether the union waived its statutory right to object to a change in the medical plans. *Id* at 1282-83. In the instant case, ALJ Kennedy prohibited any such evidence (Tr. 160, 224-25), yet concluded that there was no evidence to support the notion that Local 543-M waived, through bargaining, its right to object to changes to the Pension Plan (ALJD at 6-7).

Finally, the General Counsel cited *Bonnell/Tredegar Indus., Inc.,* 313 NLRB 789 (1994) for the notion that by excluding changes to the Pension Plan from the grievance and arbitration provision of the 2004 CBA, "there is no evidence to establish that the parties intended it to mean more and certainly no evidence that it constitutes a waiver of the union's right to bargain over the subject." (GC Br. at 14). In reality, in *Bonnell/Tredegar,* the Company argued that a "zipper clause" constituted a waiver of the union's right to bargain about the formula used to calculate a

Christmas bonus. Significantly, the Board concluded that although the formula was not specifically explained in the CBA:

> … it is an implicit term of the Agreement by virtue of the reference to required maintenance of a 'plan' respecting the bonus. An implicit term is just as significant for Section 8(d) purposes as an expressed term. (Extensive citations omitted).

313 NLRB at 791. The applicability of this finding to the instant case is self evident. Reference to "plans" in Article 28 of the 2004 CBA "is just as significant for Section 8(d) purposes as an expressed term." In addition, the language of the *Bonnell/Tredegar* CBA was never described in the decision. Finally, it is worth noting that *Bonnell/Tredegar* evaluated the bargaining history of the parties to determine whether the union waived its right to bargain over the change in the Christmas bonus formula. *See* 313 NLRB at 792.

The design of the General Counsel surfaced in this emotional appeal: "to assert that the Unit's bargaining representative would simply hand over complete control of those issues to Respondent to change at its whim should cause Respondent to blush in embarrassment." (GC Br. at 15). The General Counsel should be admonished for endorsing what it, subjectively, believes a CBA should or should not entail. Lest the General Counsel forget, the Board does not engage in personal critiques of CBA language acceptability. *See, e.g., Midwest Tel. Inc.,* 349 NLRB 737, 783 (2007) ("cases are legion holding that the Board will not analyze an employer's particular contract proposal to determine whether it would be 'acceptable' to the union …").

### 3. The General Counsel Acknowledged that the Contract Coverage Doctrine Applied

The General Counsel stated, "the Pension Plan ***is covered by*** Article 28 'Benefits' of the [2004 CBA]." (GC Br. 7). In spite of acknowledging that the 2004 CBA covered the Pension Plan, the General Counsel argued an unconvincing tautology to support the ALJ's flawed

reasoning. (GC Br. at 18). As explained in *Omaha World-Herald*'s Brief in Support of Exceptions, the contract coverage doctrine applied. (*OWH* Br. at 29-33).

### 4. PAST PRACTICE DEMONSTRATED A WAIVER

The General Counsel claimed that the ALJ "simply did his job in protecting the integrity of the record …" by refusing to admit documents demonstrating that the plans described in Article 28 of the 2004 CBA had historically and repeatedly been changed. (GC Br. at 19). In reality, the ALJ fundamentally altered the record to the detriment of *Omaha World-Hearld*. Despite the General Counsel's attempt to defend the ALJ's error, no one described any harm or burden that would have been borne by simply placing exhibits into a rejected exhibits file. Dismissive statements of "clutter" and "relevance" fail when evaluating the due process rights of *Omaha World-Herald*.

Similarly, the General Counsel's citation to *Sun Electric Corp.* 266 NLRB 37 (1983)[1] was unpersuasive. In *Local No. 1712*, the union alleged that the company's unilateral amendment of the Pension Plan violated the Act. *See* 732 F.2d at 579. The Company asserted that the changes were mandated by federal law and the Board agreed. *Id*. However, nothing in the record indicated that the ALJ undertook any independent legal research to support the conclusion that the change to the Pension Plan was mandated by Federal law, nor did the Company cite any legal authority to claim that the amendment was required by law. *Id.* This is significant to the instant case because there was nothing in the ALJ's decision to suggest that historical changes made to the Pension Plan were required by law. Similarly, there was no evidence that *Omaha World-Herald*'s historical changes to the Pension Plan were "minor

[1] The General Counsel erroneously cited this case. There was no enforcement of a Board decision. Rather, the union's petition for review was denied *sub nom, Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America AM, and its Local No. 1712 v. NLRB* 732 F.2d 573 (7th Cir. 1984).

administrative changes having no impact on the plan beneficiaries …" (ALJD at 10; GC Br. at 20). Quantifying or qualifying historical changes attempts to diffuse the status quo. A change is a change is a change. An objective application of the Act compels correction of the ALJ's error.

The General Counsel advanced the ALJ's erroneous finding that the 2005 "spin off" plan was "nothing more than a continuance of Respondent's single, isolated change to the Pension Plan in 2005." (ALJD at 10; GC Br. at 23). Local 543-M's inaction, in response to the 2005 unilateral changes reflected the parties' bargain. In fact, ***prior*** to the 2005 change, Local 543-M called for a meeting in response to perceived unilateral changes. (Tr. 119-20).

Finally, the General Counsel appeared to confuse status quo and waiver arguments by accusing *Omaha World-Herald* of "merg[ing] status quo and waiver arguments." (GC Br. at 22). *Omaha World-Herald* demonstrated that the status quo evidenced a waiver. The General Counsel appeared not to appreciate this fact. *Omaha World-Herald* froze the Pension Plan in 2005 (ALJD at 10), and *Omaha World-Herald* regularly modified and communicated the modifications of the Pension Plan to Local 543-M. (R Exs. 31-34, 36-44).

### 5. THE RESERVED RIGHTS DOCTRINE APPLIED.

The General Counsel suggested that the 2004 CBA required talismanic language to incorporate the Pension Plan document. Judicial precedent explaining incorporation by reference counsels to the contrary. The ALJ erroneously applied judicial precedent to find a way to argue that the Pension Plan document was not incorporated into the 2004 CBA, rather than objectively applying the facts and precedent.

The General Counsel cited *Trojan Yacht*, 319 NLRB 741 (1995) to argue principles of incorporation by reference. (GC Br. at 24). The General Counsel neglected to represent that *Honeywell Int'l. v. NLRB*, 253 F.3d 118 (D.C. Cir. 2001) ***overruled*** *Trojan Yacht*, particularly

the Agency's errors of judicial interpretation pertaining to contracts. *See* 253 F.3d at 123. The issue was not solely one of how to interpret the Act; rather the issue was how to interpret a contract, of which courts are the primary interpreters. *Id* at 124. The *Honeywell* court explained:

> When an "employer acts pursuant to a claim of right under the parties' agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract at issue." *NLRB v. United States Postal Serv.,* 8 F.3d 832, 837 (D.C.Cir. 1993). And as we have often reminded the Board, when a contract's terms cover a mandatory subject of bargaining, the contract represents the result of the union's exercise of its bargaining rights. *See BP Amoco Corp. v. NLRB,* 217 F.3d 869, 872-73 (D.C.Cir.2000); *United States Postal Serv.,* 8 F.3d at 836; *Connors v. Link Coal Co.,* 970 F.2d 902, 905 (D.C.Cir.1992). An employer cannot be deemed to have "refuse[d] to bargain collectively," 29 U.S.C. § 158(a)(5), over a particular subject when it has bargained over that subject matter and memorialized the results in a contract. Once the Board determines that a contract covers a mandatory subject of bargaining, its interpretive task is at an end. If the parties wish to enforce their contract, they may do so pursuant to an arbitration clause or by bringing suit under 29 U.S.C. § 185.

253 F.3d at 124. What the ALJ and General Counsel failed to acknowledge was that Local 543-M waived its right to bargain over changes to the Pension Plan not only through the explicit removal of the Pension Plan from the grievance and arbitration provision of Article 28 of the 2004 CBA, but also through the incorporation of the plan document – as well as the reservation of rights contained in the plan document – in Article 28 of the 2004 CBA.

*Amoco Chemical Co.*, 328 NLRB 1220 (1999) was yet ***another*** case where the Board's order was denied enforcement. *See BP Amoco Corp. v. NLRB*, 217 F.3d 869 (D.C. Cir 2000). The court, again, interpreted the CBA (as opposed to the Act) to determine that the CBA expressly incorporated the plans which, in turn, reserved to the company the right to amend the plans at any time. *See* 217 F.3d at 869. The court made clear that it did not defer to the Board's interpretation of the CBA (citing *NLRB v. USPS*, 8 F.3d 832 (D.C. Cir. 1993)), and found that referencing the benefit plans in the CBA made the plans part of the CBA. *Id*. As a result of the

plans being part of the CBA, plan provisions not expressly superseded in the CBA permitted the Company to make unilateral changes. *Id* at 874.

Finally, the General Counsel cited *Southern Nuclear Operating Co.*, 348 NLRB 1344 (2006), enfd in part, vacated in part, 524 F.3d 1350 (D.C. Cir. 2008) where the court ***again*** overturned the Board to conclude that the union had surrendered bargaining rights with respect to healthcare retirement benefits. The court found that references to plans – both vague and explicit – incorporated the plans into the CBAs ***including the reservation of rights language contained in the plans***. *See* 524 F.3d at 1359-60. In the instant case, references to the Pension Plan (and 401(k) Plan) were specific. By virtue of Local 543-M agreeing to remove the Pension Plan (and 401(k) Plan) from the grievance and arbitration provision of the 2004 CBA, the parties negotiated *Omaha World-Herald*'s right to unilaterally modify the Pension Plan. No reasonable reading of the 2004 CBA could generate a contrary result.

### B. *OMAHA WORLD-HERALD* HAD THE RIGHT TO UNILATERALLY MODIFY THE 401(K) PLAN EFFECTIVE APRIL 1, 2009; THE GENERAL COUNSEL OFFERRED NO COMPELLING CONTRARY ARGUMENTS

The General Counsel and ALJ both ignored the same unrebutted fact: on January 1, 2009 – during the term of the 2004 CBA – *Omaha World-Herald* unilaterally changed the 401(k) plan with respect to bargaining unit employees.[2] (Tr. 236-37; R. Exs. 48, 52). All employees – bargaining unit and non-bargaining unit – that were previously precluded from matching contributions, were, for the first time, eligible. This change was not bargained; Local 543-M did not demand bargaining; Local 543-M did not file a grievance; and Local 543-M did not file an unfair labor practice charge. (Tr. 237-39).

[2] Local 543-M admitted that it knew that changes to the 401(k) Plan applied to other represented employees at *Omaha World-Herald* (Tr. 128-29), and Local 543-M never attempted to negotiate the 401(k) match amount either before or after implementation of the 401(k) Plan (Tr. 280).

### 1. THE 2004 CBA COVERED THE RIGHT OF *OMAHA WORLD-HERALD* TO MODIFY THE 401(K) PLAN.

Article 28 of the 2004 CBA applied to benefit plans. (GC Ex. 2 at 14). The General Counsel attempted to rewrite the CBA by claiming that a provision explaining that a 401(k) plan would be added was the only relevant provision of Article 28 of the 2004 CBA. (GC Br. at 26). The General Counsel failed to read the ***totality*** of Article 28. (*OWH* Br. at 42-43). Indeed, when evaluating waiver, the totality of the circumstances must be considered. *See e.g. Eugene Iovine, Inc.*, 353 NLRB No. 36 (September 30, 2008).

### 2. THE 401(K) PLAN WAS INCORPORATED BY REFERENCE.

For the same reasons explained with respect to the Pension Plan, the 401(k) plan was incorporated by reference into the 2004 CBA.

### 3. PAST PRACTICE ENTITLED *OMAHA WORLD-HERALD* TO CHANGE THE 401(K) PLAN WITHOUT BARGAINING.

Despite the General Counsel's assertions of a "shotgun approach" (GC Br. 27), *Omaha World-Herald* demonstrated a past practice (or attempted to demonstrate a past practice despite the ALJ's restrictions) of changes to benefits described in Article 28 of the 2004 CBA. The General Counsel asserted that *Omaha World-Herald* reached for a "plausible argument" to support the idea that a change to benefits, generally, included changes to the 401(k) plan – a benefit. (GC Br. 28). The General Counsel (as well as the ALJ) missed the point and failed to see the forest by focusing only on a tree. The 401(k) plan was a benefit described in Article 28 of the 2004 CBA. *Omaha World-Herald* had a past practice of modifying benefits described in Article 28 – the provision of the CBA that governed *Omaha World-Herald*'s right to make changes to the 401(k) plan. And, like the ALJ, the General Counsel ignored the stubborn fact that *Omaha World-Herald* modified the 401(k) plan effective January 1, 2009.

### 4. THE EXTRA-CONTRACTUAL RIGHT TO MODIFY THE 401(K) PLAN SURVIVED THE EXPIRATION OF THE 2004 CBA.

The General Counsel missed the mark in citing cases pertaining to management rights extending beyond the expiration of a CBA. (GC Br. at 29). *Omaha World-Herald* argued that the rights contained in the 401(k) plan survived the expiration of the 2004 CBA because the 401(k) plan, itself, was a term and condition of employment that survived the expiration of the 2004 CBA. This makes perfect sense and promotes industrial stability[3], an ostensible goal of the Act. The General Counsel offered no plausible legal theory to deny this construct; the explicit rights[4] embodied in this extra-contractual term and condition of employment must survive concurrent with the extra-contractual benefits explained in that same document.

## II. CONCLUSION

WHEREFORE, for the reasons stated in this Reply Brief, for the reasons stated in its Brief in Support of Exceptions, and for any additional reasons deemed appropriate by the Board, *Omaha World-Herald* respectfully requests that NLRB Case No. 17-CA-24389 be dismissed.

DATED: June 18, 2010 at Nashville, Tennessee

Respectfully submitted,

**THE ZINSER LAW FIRM, P.C.**

/s/ L. Michael Zinser
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[3] Local 543-M discussed the Pension and 401(k) Plan changes with the two other unions at *Omaha World-Herald*, and no other union filed an unfair labor practice charge. (Tr. 128-29). The ALJ erred, however, in disallowing further evidence on these facts. (Tr. 129-31).

[4] Section 8(a) (3) of the Act addresses grandiose claims of discrimination. Similarly, parties can negotiate limits to extra-contractual rights.

## CERTIFICATE OF SERVICE

I, the undersigned, certify that the foregoing REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was filed electronically with the NLRB Executive Secretary on this 18th day of June, 2010, and also served on the following, via email:

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