United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 7, 2010

TO : Martha Kinard, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: BP US Pipelines
Cases 16-CA-27232 and 16-CA-27260 530-6067-2070-6760
530-8054
530-8054-7000

The Region resubmitted these cases for advice as to whether the Employer unilaterally changed the Medical Benefits Plan and the 401(k) Employee Savings Plan in violation of Section 8(a)(5) of the Act with regard to its BP Pipeline bargaining unit. We conclude that the Employer did not violate Section 8(a)(5) because the Union clearly and unmistakably waived its right to bargain over the changes.

FACTS

British Petroleum (BP or Employer) operates an oil refinery in Texas City, Texas. Within the refinery there are four subsidiaries of the Employer, each with a separate bargaining unit and collective-bargaining-agreement (CBA). The four subsidiaries are BP South Houston Green Power (BP Green Power), BP Texas City (BP Refinery), BP Amoco Chemical (BP Chemical), and BP US Pipelines (BP Pipelines). All four of the bargaining units are represented by the United Steel Workers (Union).

At the time of the BP/Amoco merger in 1998, the refinery, chemical, and pipeline units were all part of the Amoco Nationwide Council, which included all represented sites within the Amoco Corporate chain. All units were provided benefits under Amoco's core benefits package. At the time of the merger, the Amoco Nationwide Council negotiated with BP/Amoco to modify BP's core benefits to make them "equal in the aggregate" to the existing Amoco core benefits. There were apparently no separate negotiations for the Amoco Pipeline bargaining unit.

All BP employees, whether represented by a union or not, currently participate in the benefit plan, now titled BP's Core Benefits Program (CBP). The CBP includes approximately a dozen separate plans, including the 401(k)

Savings Plan and the Medical Benefit Plan.[1] Both plans contain "reservation of rights" language stating that BP may change the plan at its discretion. The reservation language for the 401(k) Savings Plan states, "The Company reserves the right to change or end the plan at any time without advance notice." The reservation language of the Medical Benefits Plan states, "The Company reserves the right to change or end the BP Medical Program at any time without advance notice." This reservation-of-rights language has been a part of the plan language since 1998.

As noted above, each of the four bargaining units has a separate CBA. The BP Pipelines' CBA states in relevant part:

> ARTICLE 36 General Effective Clause
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> All benefit plans shall be subject to any change or revision that is made generally effective throughout the Company. Benefit Plan changes as a result of effective updates will not be subject to the grievance and arbitration provisions of the contract.

The parties agree that this clause refers to BP's CBP. This same language has appeared in the parties' CBAs since at least 1993. The parties state that the General Effectiveness Clause of the CBA is the only agreement between the parties relevant to the application of the CBP.

The Employer has regularly made changes to both the 401(k) savings plan and the medical benefits plan without objection by the Union. The changes to the 401(k) savings plan include the October 2008 discontinuance of four 401(k) investment options and the corresponding requirement that employees transfer their funds to remaining investment options. Since at least 2004, BP has made annual changes to the medical benefits plan during the terms of the applicable CBAs. These changes include the addition and elimination of HMO options, changed contribution levels, and additional coverage options.[2]

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[1] Other plans include a Dental Plan, Vision Plan, Short-Term Disability, Long-Term Disability, Additional Long-Term Disability, Basic Life and AD&D Insurance, Additional Life and AD&D Insurance, Dependent Life Insurance, Flexible Spending Accounts, Paternity and Adoption Leave, and Other Miscellaneous Benefits.

[2] The parties have litigated a similar dispute over whether "reservation of rights" language in a benefit plan privileged the Employer to make unilateral changes to medical benefits in other bargaining units. See Amoco Chemical Co., 328 NLRB 1220 (1999). The Board found that

The current dispute arose when the Employer announced modifications to the savings plan and health/welfare plan for 2010. In September 2009, the Employer announced that it would reduce the investment options available for the employees' 401(k) savings plan from over 150 to 12. Participating employees would be required to transfer their 401(k) funds to one of the 12 remaining investment options. At the same time, BP also announced changes to the medical benefits plan by adding a second option in the form of a wellness plan that allowed employees to qualify for a lower premium if they lived a healthy lifestyle. No changes to the existing plan were made, and employees were able to keep the existing plan with the same premiums.

The Union requested bargaining over the changes to the 401(k) plan on October 21, 2009, and on December 13, 2009, requested bargaining over the changes to the medical benefits plan. The parties met on January 14, 2010, to allow the Union an opportunity to express its concerns over the changes, but no bargaining occurred. The Union then filed the instant unfair labor practice charges.

The Region previously submitted these and related cases for Advice as to whether the Employer unilaterally changed the Medical Benefits Plan and the 401(k) Employee Savings Plan in violation of Section 8(a)(5) of the Act with regard to each of the four bargaining units. Advice concluded that the Union has clearly and unmistakably waived its right to bargain over those changes with regard to BP Green Power, BP Refinery, and BP Chemical.[3] [*FOIA Exemption 5*

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the Union had not waived its right to bargain, but the D.C. Circuit denied enforcement of the Board's order. See BP Amoco Corp. v. NLRB 217 F.3d 869 (2000). Applying a contract coverage analysis, the D.C. Circuit found that the benefit plan booklets, including the reservation of the right to make unilateral changes, were incorporated into the contract. Thus the Union had waived its right to bargain. BP Amoco Corp. does not collaterally estopp the current charge as the contract language at issue in these charges is not the same as that in the contract language in BP Amoco Corp. See Sabine Towing & Transp.Co., 263 NLRB 114, 120 (1982) (noting that for collateral estoppel to apply "the issue to be concluded must be identical to that decided in the prior decision").

[3] See BP US Pipelines, 16-CA-27232, et al., Advice Memorandum dated July 26, 2010.

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ACTION

We conclude that the Employer did not violate Section 8(a)(5) of the Act by unilaterally changing the Medical Benefits Plan and 401(k) Employee Savings Plan because the Union clearly and unmistakably waived its right to bargain over the changes in the BP Pipelines collective-bargaining agreement.

An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment[4] without first giving the union notice and an opportunity to bargain over the change, unless authorized to do so by a union waiver of bargaining rights.[5]

In Provena St. Joseph Medical Center, the Board reaffirmed its long-held position that a purported contractual waiver of a union's right to bargain is effective only if the relinquishment is "clear and unmistakable."[6] In Metropolitan Edison Co. v. NLRB, the Supreme Court held that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'[7] The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in a contract. As the Board noted in Provena, a waiver may be found if the contract either "expressly or by necessary implication" confers on management the right to unilaterally take the action in question.[8]

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[4] 401(k) plans are a mandatory subject of bargaining. See, e.g., Convergence Communications, 339 NLRB 408, 412 (2003); Trojan Yacht, 319 NLRB 741, 747 (1995). Medical benefits are also a mandatory subject of bargaining. See, e.g., Lorel Defense Systems-Akron, 320 NLRB 755, 759 (1996).

[5] Provena St. Joseph Medical Center, 350 NLRB 808, 810-813 (2007).

[6] Id.

[7] Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

[8] Provena, 350 NLRB at 812, fn.19, citing New York Mirror, 151 NLRB 834, 839-840 (1965).

The Board's application of its standard in Provena makes it clear that it will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver when a contract does not specifically mention the action at issue.[9] Thus, in interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.

In applying the first Provena factor to contract language tying unit employees' terms and conditions of employment to those of nonunit employees, the contractual language must be examined to determine whether the union waived its right to bargain over changes to those terms and conditions of employment. To be a waiver, the language must manifest union assent to changes affecting unit employees whenever the employer changes the terms of nonunit employees' benefits. For instance, a general statement that unit employees would "participate in the [c]ompany's health and life insurance programs on the same basis as other employee members of the group" did not evidence a waiver by the union. That clause was too ambiguous to reflect union assent to the existence of an employer right to make changes in nonunit employees' health coverage that would be binding on represented employees.[10]

In contrast here, we find that the language of the General Effectiveness Clause supports a finding that the Union expressly waived its right to bargain over the benefit plan changes at issue. Unlike the neutral language in Trojan Yacht and Rockford Manor that only generally tied unit employees' benefits to those of nonunit employees, the contract here expressly provides that the benefit plans "shall be subject to" any change or revision that is "made

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[9] Provena, 350 NLRB at 815.

[10] Rockford Manor Intermediate Care Facility, 279 NLRB 1170, 1172-73 (1986). Accord, Trojan Yacht, 319 NLRB 741, 742-43 (1995) (employer's unilateral freeze of benefit accruals in pension and savings plan covering both unit and nonunit employees not authorized as to unit employees by labor contract provision that plan "will be maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis;" the clause neither authorized a cessation in benefit accruals nor waived the union's right to bargain over such change).

generally effective throughout the Company."[11] By agreeing to subject the contractual benefits to changes in the overall plan, the Union agreed that the Employer's unilateral changes to the company-wide benefits would be binding on the unit employees. Indeed, the clause goes on to confirm the Union's ceding of this authority to make these changes by further stating that, "Benefit Plan changes as a result of effective updates will not be subject to the grievance and arbitration provisions of the contract."

The other Provena factors further support the conclusion that the Union waived its right to bargain over the changes. Regarding the second factor (the parties past practice), the Union has failed to object to routine changes to both the Medical Benefits Plan and the 401(k) plan, including the Employer's unilateral elimination of four 401(k) investment options in October 2008. As to the third factor, the parties' bargaining history is neutral. There is no evidence as to what the parties discussed at the national level when they agreed to modify the plan in the 1998 negotiations, and there were apparently no separate negotiations concerning the Amoco Pipeline bargaining unit. The Employer has provided a core benefits plan to unit employees for at least 17 years under the terms of the General Effectiveness Clause, and the reservation-of-rights language has been a part of the plan language since at least 1998.[12] The benefit plan booklets that contain the reservation-of-rights language have been publicized to employees and the Union for many years, and the Union has long been aware of the Employer's position on the issue. Yet even after the D.C. Circuit's decision in BP/Amoco Corp. v. NLRB,[13] which held that the Union had waived its right to bargain over changes made to bargaining unit employees' medical benefits, the Union has not attempted to change or strengthen the contract language with respect to its right to bargain over changes to the benefit plans. As to the fourth factor, there are no other sections of the CBA or other agreements that shed light on the parties' intentions. The parties agree that the General Effectiveness Clause of the CBA is the only agreement between the parties relevant to the application of the CBP.

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[11] The parties agree that "benefit plans" refers to the CBP. And the changes at issue here were effective "throughout the Company."

[12] The predecessor Amoco plan also contained a reservation-of-rights provision. See Amoco, 328 NLRB at 1220.

[13] 217 F.3d at 869, discussed above at footnote 2.

Accordingly, we conclude that the Union has clearly and unmistakably waived its right to bargain over the changes made to the BP Pipeline bargaining unit's terms and conditions of employment.

B.J.K.