

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

Advice Memorandum

DATE: July 26, 2010

TO : Martha Kinard, Regional Director
Region 16

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

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

BP Amoco Chemicals
16-CA-27233 and 16-CA-27261

BP South Houston Green Power
16-CA-27234 and 16-CA-27262

BP Texas City
16-CA-27235 and 16-CA-27263

The Region submitted this case 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 four collective bargaining agreements. 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

A. Background

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).

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. The wellness plan 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.

B. Core Benefits Plan

All BP employees, whether represented by a union or not, participate in 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, which states that BP may make changes to 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.

C. Collective Bargaining Agreements

As noted above, each of the four bargaining units have separate CBAs.

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.

1. BP Green Power

BP Green Power's CBA includes a Memorandum of Agreement (MOA) that addresses the medical plan and 401(k). The MOA states in relevant part:

Article XXIII - Benefits
Section 1 - Health and Benefit Plans

A. The Company and the Union have agreed to harmonize with BP's Core Benefit Program. The Company has provided the Union with copies of Benefit Plans, and the terms under which they will be provided to employees. Following are the Benefit plans available to Employees:

- Medical Plan
- 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 Available
- Dependent Life Insurance
- Flexible Spending Accounts
- Paternity and Adoption Leave
- Other Miscellaneous Benefits

B. The Company will provide the Company's 401(k) Savings Incentive Plan and the match is 7%, Pension Plan, and Post-Retirement Medical Plan

C. Medical benefits provided to union Employees shall consist of the identical benefits provided to non-represented employees. The Union expressly understands and agrees that the right to modify the mix of benefits in this package (by adding, increasing, reducing or eliminating any given benefit including Company and/or Employee contribution levels) is reserved exclusively to the Company without need for negotiations. In the event the Company does so modify the mix of benefits, the Company will notify the Union in advance of any such changes.

2. BP Refinery

The BP Refinery CBA also contains a MOA concerning employee benefits. In relevant part it states:

IT IS HEREBY STIPULATED AND AGREED, by and between [the Company and the Union] that the following

Employee Benefit Plans are generally set forth in the current Benefit Plan Booklets. However, it is understood that certain provisions in the Booklet have been superseded by negotiation between the parties.

- Employee Savings Plan
- Employee Stock Ownership Plan
- Sickness and Disability and Occupational Illness and Injury Plan
- Group Life Insurance
- Long-Term Disability
- Comprehensive Medical Plan
- Employee Retirement Plan
- Dental Assistance Plan
- Educational Assistance Plan

Products North America, Inc. Medical Plan

Effective April 1, 1996 and for the term of this agreement, the Company's contribution towards the BP Products North America, Inc. Medical Plan will be based on an employer contribution of 80% of cost and employee contribution of 20% of cost. The Company's contribution towards the cost of coverage under approved HMO's will be based on an 80% contribution, but in no case to exceed the dollar amount paid toward the cost of coverage under the BP Products North America, Inc. Medical Plan as described above, with participating employees paying the balance of the cost.

[Irrelevant material omitted]

Employee Savings Plan

Effective February 1, 1988 the Company will match up to 7% for employees with 15 or more years of service, in accordance with the provisions of the Employee Savings Plan.

[Irrelevant material omitted]

It is agreed that no dispute, grievance or question arising in connection with the various Benefit Plans or this Memorandum of Agreement shall be subject to Arbitration.

It is further understood and agreed that all matters pertaining to the above stated Plans have been discussed in negotiations and no items are outstanding for further negotiations during the term of this agreement.

3. BP Chemical

The BP Chemical CBA contains a MOA that addresses both the medical plan and savings plan. In relevant part it states:

IT IS HEREBY UNDERSTOOD AND AGREED, by and between [the Company and the Union] that the following Employee Benefit Plans are generally set forth in the Benefits Plan Booklet. However, it is understood that certain provisions in the booklet have been superseded by negotiations between the parties.

- Educational Assistance Program
- Employee Savings Plan
- Sickness and Disability and Occupational Illness and Injury Plan
- Group Life Insurance Plan
- Long-Term Disability Benefits Plan
- BP Amoco Medical Plan
- Dental Assistance Plan
- Dental Maintenance Plan
- Vacation Policy

The following benefit plan changes were negotiated for the contract period beginning February 1, 1996:

1. Effective April 1, 1996 and for the term of this agreement, the Company's contribution towards the BP Amoco Medical Plan will be based on an employer contribution of eighty percent (80%) of cost and an employee contribution of 20 percent (20%) of cost. The Company's contribution toward the cost of coverage under approved HMO's will be based on an eighty percent (80%) contribution, but in no case to exceed the dollar amount paid toward the cost of coverage under the BP Amoco Medical Plan, as described above, with participating employees paying the balance of the cost.
2. [Dental Plan]
3. [Long-Term Disability]
4. All provisions of the other benefit plans remain unchanged.

It is agreed that no dispute, grievance or question arising in connection with the various Benefit Plans or the Memorandum of Agreement shall be subject to Arbitration.

4. BP Pipeline

The BP Pipelines' CBA states in relevant part:

ARTICLE 36 General Effective Clause

All benefit plans shall be subject to any change or revision that is made generally 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.

D. Past Changes

The Employer has recently 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. These changes include the addition and elimination of HMO options, changed contribution levels, and additional coverage options.²

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

² The Union has previously filed Section 8(a)(5) charges with the Board alleging that the Employer unlawfully made unilateral changes to bargaining unit employees' medical benefits. See, Amoco Chemical Co., 328 NLRB 1220 (1999). The Board found that 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 & Transportation 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").

over the changes in the BP Green Power, BP Refinery, and BP Chemical collective bargaining agreements. [FOIA Exemption 5

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An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment³ 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.⁴

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."⁵ 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.'⁶ 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.⁷

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.⁸ Thus, in interpreting the parties' agreement, the relevant factors to consider

³ 401(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., Loel Defense Systems-Akron, 320 NLRB 755, 759 (1996).

⁴ Provena St. Joseph Medical Center, 350 NLRB 808, 810-813 (2007).

⁵ Id.

⁶ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

⁷ Provena, 350 NLRB at 812, fn.19, citing New York Mirror, 151 NLRB 834, 839-840 (1965).

⁸ Provena, 350 NLRB at 815.

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.

1. BP Green Power

Applying the above factors to the BP Green Power CBA, we conclude that the Union clearly and unmistakably waived its right to bargain over the changes.

The first factor, the wording of the sections at issue, supports a finding that the Union waived its right to bargain over the changes. Article XXIII of the BP Green Power CBA incorporates by reference the 401(k) Employee Savings Plan and Medical Benefits Plan, including the reservation language found in the plans, into the contract. The first sentence states that "[t]he Company and the Union have agreed to harmonize with BP's Core Benefit Program. The Company has provided the Union with copies of the Benefits Plans, and the terms under which they will be provided " In the list of plans found below the quoted language, both the Medical Benefits Plan and 401(k) Employee Savings Plan are listed.⁹ Black's Law Dictionary defines harmony as "[a]greement or accord; conformity."¹⁰ Thus, a plain reading of the first sentence states that the parties agree to bring the Health and Benefit Plans into conformity or agreement with the CBP. The second sentence, which states that "[t]he Company has provided the Union with copies of the Benefits Plans, and the terms under which they will be provided," specifically references the "terms" of the Benefits Plans and states that Benefits Plans will be provided under these terms. A list of the Benefits Plans that the parties intend to incorporate then includes both the 401(k) Employee Savings Plan and the Medical Benefits Plan. Further, Section B of Article XXIII states that BP will "provide the Company's 401(k) Savings Incentive Plan." This sentence again specifically references the 401(k) Savings Plan and states that the plan to be provided will be the "Company's" or CBP plan. These sentences, taken together, clearly show that the parties intended the Plans to be incorporated by reference.

⁹ The 401(k) Employee Savings Plan is among the plans grouped as "Other Miscellaneous Benefits."

¹⁰ 734 (8th ed. 1999). See also, Webster's New World Dictionary of the American Language 638 (2nd College Edition., The World Publishing Co. 1972) (defining harmonize as "to bring into agreement.").

Article XXIII of the CBA also contains an express waiver of the right to bargain over changes made to the Medical Benefits Plan. Section C of Article XXIII states that "[t]he Union expressly understands and agrees that the right to modify the mix of benefits in the package (by adding, increasing, reducing or eliminating any given benefit including Company and/or Employee contribution levels) is reserved exclusively to the Company without need for negotiations." Thus, in addition to incorporating the Plans by reference, the CBA contains language that clearly constitutes a waiver by the Union of the right to bargain over changes made to the Medical Benefits Plan.

We are aware that the above express waiver of the Union's right to bargain over changes made to the Medical Benefits Plan does not also contain an express waiver as to the 401(k) plan. However, in light of the clear contract language discussed above, incorporating all the plans by reference, the failure of the contract to also provide for the express waiver of the 401(k) plan does not prevent a finding of waiver.

The other Provena factors 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 recent changes to both the Medical Benefits Plan and the 401(k) plan. These changes include the elimination of four 401(k) investment options in October 2008. As to the third factor, the parties' bargaining history, there is no evidence suggesting that the Union did not waive its right to bargain. In this regard, it is noteworthy that since the prior D.C. Circuit decision, which held that the Union had waived its right to bargain over changes made to bargaining unit employees' medical benefits, the Union has not strengthened 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.

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

2. BP Refinery

Applying the Provena factors to the BP Refinery CBA, we conclude that the Union clearly and unmistakably waived its right to bargain over the changes.

As to the first Provena factor, the BP Refinery MOA language supports a finding that the Union has waived its right to bargain over the changes because the language, when viewed in its entirety, incorporates the CBP. The BP Refinery MOA concerning employee benefits states that the parties "agree[...that the following Employee Benefit Plans are generally set forth in the current Benefits Plan Booklets. However, it is understood that certain provisions in the Booklets have been superseded by negotiation between the parties." The MOA then lists a number of plans, specifically including the 401(k) Savings Plan and the Medical Benefits Plan, and then provides the negotiated exceptions that supersede the plan booklets. Among the negotiated changes, none affect the reservation language found in the plan booklets. The MOA concludes with a zipper clause providing that "[i]t is further understood and agreed that all matters pertaining to the above stated Plans have been discussed in negotiations and no items are outstanding for further negotiations." This language makes it clear that the parties bargained over the Plans and intended for the terms of the CBP to be incorporated, except as otherwise negotiated. As the plan documents expressly waive the Union's right to bargain over both the 401(k) Saving Plan and the Medical Benefits Plan, the fact that the plan was incorporated by reference into the CBA demonstrates waiver.

Again, the other Provena factors provide no evidence to suggest a contrary finding. The Union failed to object to the recent changes made by the Employer to both the Medical Benefits Plan and the 401(k) plan, the Union did not seek to strengthen the contractual language concerning waiver since the D.C. Circuit decision, and there are no other contractual provisions that shed light on the parties' intent. Accordingly, we conclude that the Union has waived its right to bargain over the changes made to BP Refinery employees' terms and conditions of employment.

3. BP Chemical

Applying the Provena factors to the BP Chemical CBA, we conclude that the Union clearly and unmistakably waived its right to bargain over the changes.

As to the first Provena factor, the wording of the BP Chemical MOA states that the "following Employee Benefit Plans [which include the Medical Benefits Plan and 401(k)

Employee Savings Plan] are generally set forth in the Benefit Plan Booklets. However, it is understood that certain provisions . . . have been superseded by negotiations." The MOU then goes on to describe the negotiated changes that supersede the CBP, none of which negate the employer's right to unilaterally change the plans, and ends by expressly stating that "[a]ll provisions of the other benefit plans remain unchanged." This language clearly incorporates the CBP, including the reservation language, except as provided for in the negotiated exceptions. As the negotiated exceptions do not limit the employer's discretion to change the plans, the parties specifically agreed that the other provisions of the plans remained unchanged, and the plans themselves waive the Union's right to negotiate over the changes made to the 401(k) and Medical Benefits Plans, we conclude that the wording of the MOU sections strongly suggest waiver.

The other Provena factors 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 recent changes to both the Medical Benefits Plan and the 401(k) plan. These changes include the elimination of four 401(k) investment options in October 2008. As to the third factor, the parties' bargaining history, there is no evidence suggesting that the Union did not waive its right to bargain. In this regard, as above, it is noteworthy that since the D.C. Circuit decision, which held that the Union had waived its right to bargain over changes made to bargaining unit employees' medical benefits, the Union has not strengthened 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.

4. BP Pipelines

[FOIA Exemption 5

[*FOIA Exemption 5*].¹¹ Accordingly, the Region should investigate the source of the parties' agreement that the CBP applies and under what circumstances it applies, and resubmit its recommendation to Advice.

In sum, we conclude that the Union has clearly and unmistakably waived its right to bargain over the changes made to the 401(k) Savings Plan and the Medical Benefits plan in regard to BP Green Power, BP Refinery, and BP Chemical.¹² In regard to BP Refinery, we conclude that the Region should investigate further and resubmit its recommendation to Advice.

B.J.K.

¹¹ [*FOIA Exemption 5*

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¹² In view of our conclusion that the Union has clearly and unmistakably waived its right to bargain over the changes, and the fact that the contract language here is different than the contract language considered in BP Amoco Corp. v. NLRB, there is no need to address any effect that the D.C. Circuit's decision would have on the instant case. 217 F.3d 869 (2000).