UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAK HARBOR FREIGHT LINES, INC.

and

Cases 19-CA-31797
19-CA-32001

TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, AND 962,

and

19-CA-31526
19-CA-31536
19-CA-31538

TEAMSTERS LOCAL 174

CHARGING PARTY UNION'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS

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I. Re: Waiver – Charging Party Union's Exceptions Nos. 1, 3 and 4

A. The Parties' Agreement that the ALJ Conflated "Separate Concepts"

As detailed in Oak Harbor's Answering Brief, the parties essentially agree on the main issue: Oak Harbor's cancellation notice to the third-party Trusts had no impact on its bargaining obligations to the Union. According to Oak Harbor, "The fact that Oak Harbor cancelled its duty to contribute to the trust funds doesn't remove [benefits] from the ambit of negotiations" and "Oak Harbor did not have the unilateral right to do anything it wanted to do on this subject." OHFL Answering Brief, pp. 24-25. Oak Harbor summarizes its legal posture following cancellation in terms that could have been cribbed from the Union's Brief:

> Oak Harbor believed it had a duty to bargain with the Union regarding benefits for unit employees. This is distinguished from the employer's right to issue notice of cancellation of the Trust Fund's contributions. ***These are two separate concepts***. . . .. [Oak Harbor's cancellation] did not discharge Oak Harbor's duty to negotiate benefits coverage for unit employees with the Union.

Id., at 25 (emphasis added). Thus, Oak Harbor and the Union agree that the cancellation provision in the Trusts' EU and SA forms was "separate" from the parties' bargaining obligations, and that it did not dilute those obligations, including the obligation to maintain the status quo.

The parties likewise agree that the status quo included the obligation to continue to make benefits contributions to the Teamsters Trusts, even after cancellation. In letters dated September 24th and October 2, 2008 (GC 46, 47, 48, 49) Oak Harbor's lead spokesperson, attorney John Payne, informed all of the Trusts:

> Under the NLRA, Oak Harbor Freight Lines is required to continue to make Teamsters [benefits trusts] contributions….

Thus, Payne made clear that the contribution obligation attached to "Teamsters" trusts, not contributions to any other trust or plan of Oak Harbor's choosing.

Therefore, the parties agree that, contrary to the ALJ's holding: (1) the cancellation provision in the EU and SA forms is a "separate concept" from the Company's continuing bargaining obligation; (2) the Company retained an undiluted bargaining obligation even after forwarding its notices of cancellation; (3) the bargaining obligation included the obligation to maintain the status quo; and (4) the status quo included the obligation to make contributions to the Teamsters Benefits Trusts.

B. The Collective Bargaining Agreement's Relevance to Waiver

Contrary to Oak Harbor's claim at page 16 of its Answering Brief the Union never argued that "waiver can only be found in the parties' expired labor agreement." It argued instead that the CBA is the most highly probative evidence of waiver and was improperly ignored.

Likewise, Oak Harbor wrongly contends that "the Union has never asserted that the cancellation provision in the subscription agreements was ineffective or inconsistent with the labor agreement." *See,* OHFL Answering Brief, p. 18. The Union made precisely this assertion in its initial unfair labor practice charge:

> By memoranda dated September 23, 2008, the Company . . . unilaterally terminated the Employer's participation in the Taft-Hartley Benefits Trusts. The Company did so despite that the parties were not at impasse.
>
> * * *
>
> The Company has violated the status quo by terminating its contributions to the Health and Welfare, Pension, and Retiree Health and Welfare Taft-Hartley Benefit Funds to which it contributed prior to the start of the ULP strike.

See, GC 1(g).[1]

[1] The charge was filed on March 13, 2009, just under six months from September 23, 2008, the date Oak Harbor forwarded its notices of cancellation. The only reason the Union stopped pursuing the allegation was because the General Counsel declined to adopt it in its Complaint.

C. *Cauthorne Trucking* and Its Progeny

Oak Harbor does not dispute that every Board or ALJ opinion that has cited *Cauthorne Trucking* has distinguished it in the course of rejecting waiver defenses; no Board or ALJ opinion (until now) has ever cited it in the course of finding a waiver.

Oak Harbor's reliance upon 20-year-old General Counsel memoranda to rehabilitate *Cauthorne Trucking* is ironic. The clearest evidence of the General Counsel's position with respect to the inapplicability of *Cauthorne Trucking* to the facts of this case can be found in the General Counsel's Complaint and the General Counsel's Exceptions to the ALJ Decision; there is no need to look in the archives to determine that position. Further, *Duck Soup* and *Harvey Industries* are distinguishable. In particular, the waiver provisions relied upon in both cases were contained in the parties' negotiated collective bargaining agreement. Here, there is no waiver in the parties' CBA.

Oak Harbor's ostensible distinction of *Allied Signal Aerospace, Inc.*, 330 NLRB 1216 (2000), which itself distinguishes *Cauthorne Trucking*, significantly fails to address the principle for which it was cited in the Union's Brief in Support. The *Allied Signal* majority accused the dissent of "misperceive[ing] the essential issue in this case" by muddling contractual obligations with bargaining obligations following contract expiration. The Union argued that the ALJ's analysis shared the identical defect, and, lacking a response, Oak Harbor's Answering Brief simply ignores the argument.[2]

D. The EU and SA Forms as Extrinsic Evidence

Oak Harbor's claim that the EU's and SA's are not themselves extrinsic evidence is unpersuasive. It is undisputed that the documents are forms issued by third parties and that they

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[2] The Union's discussion of *Allied Signal* can be found at pp. 26-27 of its Brief in Support.

are signed in the course of implementing the promises contained in the collective bargaining agreement, but are not contained in the agreement itself.

E. The Need to Analyze Extrinsic Evidence in Addition to the EU and SA Forms

Oak Harbor evades the purpose for which the Union cited *Provena Hospitals*, 350 NLRB 808, 813 (2007). The Union quoted *Provena* for the principle, "If a waiver is won – in clear and unmistakable language – the employer's right to take future unilateral action should be apparent to all concerned." *See,* Union's Brief p. 17. Oak Harbor fails to address this principle, undoubtedly because extrinsic evidence uniformly corroborates that it has consistently eschewed any "right to take future unilateral action." As such, there cannot be a waiver under *Provena.*

Oak Harbor's treatment of *Rosdev Hospitality* and *Indianapolis Power and Light Company* is half-hearted at best. Oak Harbor's purported distinctions of the cases occupies a total of five lines of text, despite that the Union's Brief in Support discussed both extensively. With respect to *Rosdev Hospitality*, Oak Harbor ignores that the seniority language forming the basis of the employer's waiver defense was indeed unambiguous. As the ALJ explained, it became ambiguous only when "viewed in conjunction with an established past practice of crediting seniority earned with prior employers," *i.e.* extrinsic evidence.[3] Moreover, Oak Harbor evades *Indianapolis Power*'s instruction that "careful consideration be accorded extrinsic evidence bearing on the parties' intent," even where the Board would have "little trouble" finding a waiver of bargaining if it were "faced only with the language of the agreement."[4]

In contrast, Oak Harbor is unable to cite any Board authority for the proposition that extrinsic evidence should be disregarded when a waiver is based upon unambiguous contract language (let alone language in an inherently ambiguous third-party document). *Quality*

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[3] *Rosdev Hospitality* is discussed at page 20 of the Union's Brief in Support.
[4] *Indianapolis Power* is discussed at page 21 of the Union's Brief in Support.

Building Contractors Inc., at 342 NLRB 429 (2004) and *In Re America Piles Inc.*, 333 NLRB 1118 (2001) are not waiver cases. They invoke the time-honored "parol evidence" rule, which is often cited in contract cases to prohibit the use of extrinsic evidence to vary the unambiguous terms of a collective bargaining agreement. It is significant that Oak Harbor was unable to locate a single Board decision applying the parol evidence rule in a waiver case.[5]

Mary Thompson Hospital, 296 NLRB 1245 (1989), relied upon by Oak Harbor, is inapposite. In that case, the finding of waiver is based on an insurance Plan expressly incorporated "into the body of the agreement between the parties." *Id.,* at 1249. Here, the parties clearly chose *not* to incorporate the EU and SA forms into their agreement. As noted in the Union's Brief, the parties' contract incorporated a different Trust document (the "Agreement in Declaration") at Article 17.04, but never mentioned the EU and SA forms. *See,* GC 2, p. 33.

F. The EU and SA Forms as Ministerial Documents

Oak Harbor misinterprets *Schmidt-Tiago Const. Co.*, 286 NLRB 342 (1987) and *American Distributing Co.,* 264 NLRB, 1413 (1987). As detailed in the Union's Brief, the *Schmidt-Tiago* Board affirmed the ALJ's rejection of the employer's waiver defense based upon Teamsters Taft-Hartley Trust documents. In particular, the ALJ emphasized that they were executed for the technical purpose of "complying with the requirements of § 302 of the Act," rather than for reasons related to Section 8(a)(5). *See*, Union's Brief p. 25. The *American Distributing* Board likewise affirmed the ALJ's rejection of the employer's waiver defense based on Teamsters Pension Trust documents which were expressly referred to as "ministerial[]".

[5] *See*, Union's Brief in Support, Footnote 12, in which the Union previously noted the significance of this analytical contrast between contract and waiver cases.

G. The Ambiguity Inherent in the EU and SA Forms

Oak Harbor forthrightly concedes all of the facts that support a finding that the EU and SA forms are inherently ambiguous. Oak Harbor does not dispute that the forms were created, drafted and issued by a third party, not by the bargaining parties themselves. It likewise concedes, at page 18, "the fact" that the parties did not bargain the language in the EU and SA.

II. Re: The Oregon Warehouseman's Trust – Charging Party Union's Exceptions 5 and 6

Oak Harbor has already admitted to Region 19 that, "[i]f no such Subscription Agreement exists, then [his] notice to cancel was legally void." CP 2, p. 2 (April 29, 2009 letter to Region 19 investigator Janet Little). The Board should reject Oak Harbor's attempt to repudiate this representation, despite acknowledging that there is indeed no SA at the OWT.

In any event, Oak Harbor Answering Brief appears to be defending a decision other than the one the ALJ issued. Contrary to Oak Harbor's assertion, one searches the ALJ's Decision in vain for a "factual conclusion that a health and welfare subscription agreement was in place covering the Oregon Warehouseman's Trust Fund." *See,* Answering Brief, p. 32 (emphasis in original). Similarly, the ALJ never adopted Oak Harbor's novel "equitable estoppel" analysis, nor did he find that the Union acquiesced in Oak Harbor's unilateral action or that Oak Harbor acted in detrimental reliance upon statements made by the Union.

In fact, the ALJ simply missed the issue. It is too late for Oak Harbor to bootstrap the ALJ's mere oversight into a long and complicated analysis involving factual findings the ALJ never made and legal analyses he never undertook.

In addition, Oak Harbor distorts the facts:

- Trust Administrator Mark Coles gave undisputed testimony that the OWT could and would have continued to accept contributions from Oak Harbor even after receiving Payne's cancellation letter (GC 45(a)), because OWT did not have a subscription agreement providing for cancellation. *See,* TR. p. 903,

lines 4-13. Thus, Oak Harbor's claim that Coles did not learn that the OWT could accept contributions from Oak Harbor until one week before trial is simply wrong.[6]

- The OWT declined to accept contributions as proposed in Payne's September 24, 2008 letter (GC 47) because, as Coles explained, Payne proposed to discriminate between members of the bargaining unit in the payment of contributions. *See,* TR. p. 904, lines 10-24.[7]

- OWT's letter rejecting Payne's proposal to make contributions on a discriminatory basis (GC 52) makes no mention of a subscription agreement. Oak Harbor's claim that OWT's conduct was "identical to that of the Washington Trust Funds and the Pension Trust" is baseless. *See,* Answering Brief, p. 33.

Manitowoc Ice Inc., 344 NLRB 1222 (2005) is wholly inapplicable. The lynchpin of the majority's analysis is that the union "did not challenge" the employer's assertion that its profit sharing plan was a "nonnegotiable management prerogative" and that the union therefore "led the other party to reasonably believe that it could deal unilaterally with the subject." *Id.*, at 1223, 1224. Here, there is no claim that the Union agreed that Oak Harbor had the right to deal unilaterally on benefits issues. To the contrary, the Union has consistently contended precisely the opposite. *See,* GC 75(a) (Union's 2/18/09 letter); GC 77 (Union's 2/25/09 letter). Indeed, as detailed in the Union's Brief, even Oak Harbor has never contended it could act unilaterally.[8]

Americana Health Care Center, 273 NLRB 1728 (1985) lends even less support to Oak Harbor. As Oak Harbor characterizes the decision, the *Americana Health Care* Board held that "the employer could not lawfully rely on the lack of a sick leave provision in the signed labor agreement to justify its unilateral termination of sick leave benefits . . . ." *See,* Answering Brief,

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[6] Coles did indeed confirm that the OWT would accept retroactive contributions from Oak Harbor if the ALJ ordered it to do so. *See,* TR. p. 910. However, this basis for accepting contributions came after, and was supplemental to, Coles's earlier testimony that the OWT could have continued to accept contributions even after Payne's cancellation.

[7] Payne proposed to make payments on behalf of so-called "cross over" employees but not on behalf of replacement workers. Payne admitted that he knew that discriminating between cross over and replacement workers violated Trust rules. *See,* TR. p. 1122, lines 18-24; TR. p. 1123, lines 21-24.

[8] *Manitowoc Ice, supra,* has never been cited by the Board. The Board once affirmed an ALJ decision in which the decision was distinguished. *See, Wise Alloys Inc.,* 347 NLRB 1302 (2006).

p. 37. In our case, as in *Americana Health Care*, the Union seeks a holding that Oak Harbor cannot rely upon the lack of a cancellation clause in a nonexistent subscription agreement to justify its unilateral action. Moreover, *Americana Health Care* involved a simple clerical error; the parties neglected to include a sick leave provision that had been fully negotiated and agreed upon during bargaining in the final copy of their collective bargaining agreement. Here, by contrast, Oak Harbor does not even claim, let alone prove, that it and the Union negotiated a subscription agreement with the OWT that included a cancellation provision.

III. Re: The Evidentiary Exception – Charging Party Union's Exception No. 7

Oak Harbor's Answering Brief strongly supports the Union's claim that the excluded evidence was highly relevant and was appropriately introduced in rebuttal. In its Brief in Support, the Union argued that certain testimony on redirect by Oak Harbor Labor Relations Representative, Bob Braun, justified the Union's effort to introduce the excluded exhibits and rebuttal testimony. *See,* Union's Brief in Support, p. 31 (quoting testimony at TR. p. 1308). Specifically, Braun testified that he had bargained the content of Teamsters Benefits Trust subscription agreements on at least a dozen occasions. In its Answering Brief, Oak Harbor repeatedly relies upon this identical testimony in support of its waiver argument. *See*, OHFL Answering Brief, pp. 19, 23 (relying on transcript p. 1308). Thus, Oak Harbor demonstrates that, through Braun, it raised for the first time on Braun's redirect the claim that Oak Harbor had previously made changes to EU and SA forms and that the Union knowingly declined to bargain the forms with Oak Harbor. The excluded exhibits and testimony establish that, in fact, Oak Harbor had *never* bargained the content of the EU and SA forms with the Union and that the parties had signed them without discussion or change for at least the 20 years prior to the hearing. Braun's claim, if true, related to employers other than Oak Harbor.

IV. The Union's Requested Remedy

The details of the requested remedy are beyond the scope of this Reply Brief.[9] However, because Oak Harbor devoted considerable attention to the issue, the Union responds briefly.

Oak Harbor chooses not to address the authorities cited by the Union in support of its remedial request, thereby implicitly conceding their applicability. In *Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70*, 295 NLRB 1123 (1989) the Board found that the Union violated Section 8(b)(3) when it refused to abide by an agreement regarding health and welfare coverage. The Board affirmed the ALJ's Order that the Union "cooperate in the preparation and signing of the documents necessary to execute our agreement for WTWT coverage." *Id.*, at 1124.[10] In describing the remedy, the ALJ expressly referenced "subscription agreements:"

> Affirmatively, my Order provides that respondent, upon Emery's request, shall immediately join and assist Emery in preparing and signing the basic contract documents, subscription agreements, and other instruments necessary to fully execute their agreement for WTWT coverage for the Oakland unit employees.

See, 295 NLRB at 1135; *see* also, 295 NLRB at 1137 (Order).[11] In *Merryweather Optical Company*, 240 NLRB 1213 (1979) the Board first adopted standard remedial language in cases involving an employer's failure to forward contributions to employee benefits trusts as required under a current or expired collective bargaining agreement. There, the NLRB stated, "We shall order the respondent to make whole its employees by transmitting the required contributions to the [Taft-Hartley Trust] with interest . . .." 240 NLRB at 1216.

Although *Merryweather Optical* involved failures to make trust contributions during the term of a collective bargaining agreement, its remedial language has routinely been applied in

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[9] Remedial issues absorbed fourteen pages of the Union's post-hearing brief to the ALJ.

[10] The decision never says what "WTWT" stands for. It is possible the case involved the very same Washington Teamsters Welfare Trust involved in our case.

[11] *See* also, *South Coast Refuse Corp.*, 2000 WL 33662350 (NLRB Division of Judges, 2000) (employer must execute documents required by Trust); *Pacific Coast Baking Company*, 1986 WL 6546464 (NLRB GC, 1986) (employer's refusal to execute health and welfare trust fund documents constituted "an unlawful unilateral change in terms and conditions of employment").

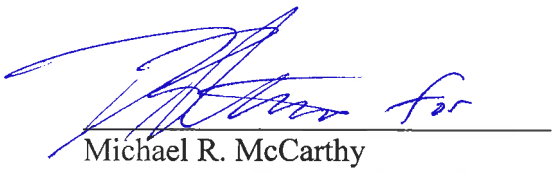
cases involving changes to the status quo after contract expiration. *See, e.g.*, *Stella D'Oro Biscuit Company Inc.*, 355 NLRB 158, *10 (2010) (incorporating *Merryweather Optical*).[12]

H.K. Porter, 397 U.S. 99 (1970), relied upon by Oak Harbor, is irrelevant. In *H.K. Porter*, the NLRB ordered the employer to include a dues check off clause in its collective bargaining agreement with the union. *See,* 397 U.S. at 102. In doing so the Board relied upon opinions from the District of Columbia Circuit Court of Appeals in which it held that in certain circumstances a "check off may be imposed as a remedy for bad faith bargaining." *Id.* The Supreme Court reversed the Board and the Circuit Court, holding that the Board is "without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.*

In our case, we have the very thing that was missing in *H.K. Porter*: the company's agreement. Oak Harbor already signed a collective bargaining agreement requiring contributions to the Benefits Trusts. There can therefore be no legitimate claim that an order to comply with those provisions as part of the post-expiration status quo violates *H.K. Porter* or its progeny.

DATED this 8 day of April, 2011 at Seattle, Washington.

Respectfully submitted,



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[12] As explained in *G and T Terminal Packaging Company, Inc.*, 246 F.3d 103 Footnote 28 (2nd Cir., 2001), an aspect of *Merryweather Optical* involving interest calculation was implicitly overruled by *New Horizons for the Retarded, Inc.*, 283 NLRB 1173, 1174 (1987). *Merryweather Optical* remains good law and is still frequently cited for the remedial language quoted in the text.