UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION and
MID-MICHIGAN CHAPTER

Respondent ANRC - Region
Respondent ANRC - Chapter

and **CASES 7-CA-52033**
7-CA-52288
LOCAL 459, OFFICE AND PROFESSIONAL **7-CA-52544**
EMPLOYEES INTERNATIONAL UNION, AFL-CIO **7-CA-52811**
7-CA-53018

Charging Union OPEIU

and **CASES 7-CA-52282**
7-CA-52308
7-CA-52487

LOCAL 580, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Union Teamsters

COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to §102.46(e) of the Board's Rules and Regulations, the undersigned excepts to the following aspects of the May 5, 2011, Decision of Administrative Law Judge Jeffrey D. Wedekind (hereafter ALJD):

1. The ALJ's finding that the changes to Respondent Region's pension and

401(k) plans that were implemented in the Teamsters' Apheresis and MUA units in May and July 2009 were consistent with, and continued the dynamic status quo, and that changes as applied to those units were not in violation of Section 8(a) (5) of the Act. (ALJD, p. 25, lines 4-7)

2. The ALJ's finding that Respondent Region's July 2009 changes to the pension plan as applied to the Chapter clerical/warehouse unit represented by the OPEIU were not unlawful because they maintained the status quo and not a unilateral change in violation of Section 8(a) (5) of the Act. (ALJD, p. 25, lines 9-16)

Respectfully submitted this 30th day of June 2011.

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BRIEF IN SUPPORT OF EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Brief in Support of Exceptions to the Decision of the Administrative Law Judge.[1]

[1] The following abbreviations are used in this brief:
ALJ-Administrative Law Judge; ALJD-Administrative Law Judge Decision; GC Ex-General Counsel Exhibit(s); Tr.-Transcript; R Ex-Respondent Exhibits.

I. **The ALJ's finding that the changes to Respondent Region's pension and 401(k) plans that were implemented in the Teamsters' Apheresis and MUA units in May and July 2009 were consistent with, and continued, the dynamic status quo and that changes as applied to those units were not in violation of Section 8(a) (5) of the Act. (ALJD, p. 25, lines 4-7)**

II. **The ALJ's finding that Respondent Chapter's July 2009 changes to the pension plan as applied to the Chapter clerical/warehouse unit represented by the OPEIU were not unlawful because they maintained the status quo and not a unilateral change in violation of Section 8(a) (5) of the Act. (ALJD, p. 25, lines 9-16)**

The ALJ in this matter erred in finding that Respondents were simply maintaining the dynamic status quo when they implemented changes to the Teamsters' 401(k) plan on May 1, 2009, and the pension plan on July 1, 2009, as to OPEIU's Chapter unit and the Teamsters' Apheresis and MUA units. (ALJD, p. 24, l. 17-19, and page 25, l. 4-7). Although the ALJ properly acknowledged that the Respondents could not unilaterally implement changes to the OPEIU's and Teamsters' pension plans or the Teamsters' 401(k) plan post contract expiration (ALJD p. 23, l. 22-29), he nevertheless found that prior changes implemented during the terms of the underlying contracts as well as the language in the expired contracts themselves, established a dynamic status quo privileging the Respondent to implement the changes post contract expiration in May and July 2009, prior to bargaining to an overall impasse. The Acting General Counsel respectfully disagrees with the ALJ's finding that a dynamic status quo and past practice existed under these circumstances in any of the bargaining units.

In determining that a dynamic status quo was in effect, the ALJ relied predominantly on ***Post-Tribune,*** 337 NLRB 1279 (2002), finding that Respondents essentially had carte blanche to make sweeping changes to employees' pension and 401(k) benefits. In making such a finding, the ALJ ignores one crucial factual difference between ***Post-Tribune*** and the instant case that renders reliance on ***Post-Tribune*** tenuous: in ***Post-Tribune***, at no time was there a collective bargaining agreement in effect between the parties.

Consequently, in ***Post-Tribune*** the Board had no need to determine whether the changes the employer made to employees' terms and conditions of employment were made pursuant to a contractual waiver or whether such waiver continued past the expiration of the contract. However, the issue of contractual waiver with respect to employees' pension and 401(k) benefits and whether such waiver continued post-expiration is precisely the crux of the instant case. By analyzing the instant facts under ***Post-Tribune***, the ALJ ignores a long line of Board cases that have repeatedly found that contractual waiver ends at the point of contract expiration. **See *Register-Guard***, 339 NLRB 353, 359 (2003) (employer's argument that expired contract allowed it to increase wages not persuasive-such a waiver does not extend beyond the expiration of the agreement); ***Long Island Head Start Child Development Services***, 345 NLRB 973 (2005) (contractual reservation granting the employer sole discretion regarding health benefits did not survive contract expiration); ***Paul Mueller Co.***, 332 NLRB 312, 313 (2000) (management's rights clause expires at contract expiration); ***Beverly Health & Rehabilitation Services***, 335 NLRB 636, 636-637 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir 2003) (once a management's rights clause expires, the waiver expires, and the overriding statutory obligation to bargain controls); ***E. I. DuPont De***

Nemours and Company, 335 NLRB No. 177, slip op. at 1-2 (August 27, 2010) (contractual waiver expires with contract; no past practice established where changes were made during term of agreement privileging the action); and ***E. I. DuPont De Nemours Louisville Works***, 355 NLRB 176 (2010)(same).

In ***E. I. DuPont de Nemours and Company***, 355 NLRB No. 177, slip op. at 1-2 (August 27, 2010), under a factual situation similar to the instant matter, the Board distinguished the holding of the ***Courier-Journal*** line of cases, observing that the changes in ***Courier-Journal*** were lawful because the employer established a past practice of making such changes both when the contract was in effect and during hiatus periods when no collective bargaining agreement was in effect. The employer's practice in ***E. I. DuPont*** was limited to changes made at times when the parties' contract and management-rights provision waiving the Union's right to bargain over such changes, were in effect. Accordingly, in ***E. I. DuPont***, the Board affirmed the holding that the ***Courier-Journal*** cases were inapposite, and the unilateral changes were unlawful. See also ***E. I. DuPont De Nemours Louisville Works***, supra.

The same analysis is appropriate in the instant matter. The ALJ herein noted that Respondents made a number of changes to both the 401(k) plans and pension plans over the years, characterizing most as minor, and others as more significant. (ALJD p. 24, l. 32-45). While the ALJ mentions that the significant changes occurred in July 2005 during the terms of the 2005-2009 Teamsters' contracts, the ALJ fails to mention that ***all*** of the changes Respondent Region relies upon in support of its theory occurred during a ten-year period

commencing in approximately 2000 (Tr. 61-62).[2] Each of these changes was made during the terms of three separate but successive Teamsters' and OPEIU Chapter clerical/warehouse collective bargaining agreements, absent any hiatus. There was no testimony from any witness regarding any contractual hiatus period for any unit. Nor was there any testimony about the Respondent Region and the Teamsters' prior bargaining history.[3] Just as in ***E. I. DuPont***, the prior changes made by Respondents and relied upon by the ALJ occurred during the terms of successive collective bargaining agreements. None of the changes were made post contract expiration during a hiatus period. Thus, these changes cannot be relied upon by the Respondents, or the ALJ, to establish a practice for the unlawful changes in the instant matter.

Regarding the changes the ALJ found significant, he discussed one with respect only to the Teamsters, involving a change in the 401(k) employer matching contribution rate.[4] In 2005, the Respondent Region increased the employer contribution match from 50 to 100 percent match on the first four percent of employee contributions. All other changes made to the 401(k) plan during this ten year period did not involve the employer matching

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[2] On the first day of trial, Respondents' counsel Westcott who was representing the Respondents on the 401(k) and pension issues for all five units (Teamsters' units and OPEIU units) indicated that they were requesting subpoenaed documents for a ten year period from 2000 to present, to support the asserted past practice defense for each Respondent. (Tr. 16-18, 58-61) Westcott further stated that the 401(k) plan came into existence in 2000, and that *he did not know how many changes were made to the pension plan* since the date it was established. (Tr. 61-62)

[3] The 2009 sessions were Sabin Peterson's first contract negotiations with all five units. (Tr. 1499, 1671-1672) Anna Shearer and Tim Smelser were not involved in contract negotiations with the Teamsters. William Smith participated in the 2009 negotiations but never testified regarding the bargaining history between the Region and the Teamster's. (GC Ex 5, R Ex 113 and 114 (Article 28, Apheresis unit); GC Ex 6, R Ex 111 and 112 (Article 30, MUA unit).

[4] The ALJ did not specifically discuss any "significant" changes with respect to the OPEIU Chapter unit pension plan.

contribution rate. Nor did any of the significant changes in 2005, or at any other time during this ten year period, include the ***elimination of pension or 401(k) benefits*** for all employees, or a class of employees such as new hires, until the Respondent implemented the changes to the plans in May and July 2009, post contract expiration.

Even if these past changes were made during a contractual hiatus period, a period when the prior collective bargaining agreement expired – which the Acting General Counsel does not concede – one change over a ten-year period of time to the 401(k) employer matching contribution rate does not establish a *dynamic status quo or past practice*, especially where as here the post expiration change at issue effectively eliminates the plan by discontinuing matching contributions. Likewise, a one time change to the pension plan in 2005 does not equate to a past practice or dynamic environment. Respondents bear the burden in establishing the existence of a past practice, a burden they have failed to satisfy. ***E. I. DuPont,*** supra at p. 13.

The ALJ's finding that the contract language, coupled with an existing practice of implementing certain changes in the absence of opposition by the Teamsters, established a dynamic status quo is also in error. (ALJD p. 24, l. 17-19.) There is absolutely no evidence in the instant record that the OPEIU Chapter Unit, the Teamsters—or Respondents for that matter—intended that the contractual language in their respective contracts to extend beyond the terms of those agreements. The ALJ's reliance on the language in all three of the contracts at issue, such as "shall continue to participate" and "will participate in..." is insufficient to establish the parties' intent to have the language continue post contract

expiration, and is ambiguous at best. As ALJ Bogas noted in ***E. I. DuPont,*** which the Board enforced, and referenced in ***E. I. DuPont Louisville Works,*** 355 NLRB 176 (2010):

> According to the Respondent, the phrase "shall continue" shows that the parties agreed that the contractual right to make unilateral changes was to continue indefinitely, not just continue for the term of the contract. I do not agree that this language refers to the period beyond expiration ....
>
> ***E. I. DuPont*** at p.12.

The language in the OPEIU Chapter unit contract and the Teamsters' contracts is clearly ambiguous on this point because it fails to explicitly state that the provisions will survive post contract expiration, and is subject to more than one interpretation. The Board's treatment of waiver language is a guiding principle on this point. In assessing waivers, the Board has found that it is not sufficient to find that contractual language can be reasonably interpreted to cover certain conduct. ***Provena,*** 350 NLRB at 812, 822 n.19 (quoting ***Metropolitan Edison***, 460 U.S. at 708). See also ***Verizon North, Inc.,*** 352 NLRB 1022, 1022 (2008) (no clear and unmistakable waiver where contractual language regarding "leave of absence" was susceptible of two interpretations).

In addition, the record is bare of any past bargaining history on this matter which could shed light on what the parties' intentions were with respect to the language surviving contract expiration. Finally, as previously mentioned, all of the changes Respondents made occurred during the terms of agreements which had language either allowing the amendment, or indicating bargaining unit employees would participate in the plan. Accordingly, even

assuming the contract allowed the amendments over the 10 year period of time, the language privileging changes during the duration of these agreements expired with the agreements. ***Paul Mueller Co.,*** supra, at 313. The contract provisions in the instant case are the equivalent of single-issue management-rights clauses, and it is well established that a management's right clause does not survive the expiration of the contract embodying it. ***Beverly Health & Rehabilitation Services***, supra, at 636-637; ***Holiday Inn of Victorville,*** 284 NLRB 916 (1987).

Additionally, Respondents have not established a past practice of changes implemented during a hiatus sufficient to relieve them of the duty to bargain to an overall impasse in negotiations. Accordingly, Respondent Region's post contract expiration changes to its 401(k) matching contribution in May 2009, and pension plan in July 2009 with respect to the Teamsters, and Respondent Chapter's post expiration changes to the OPEIU pension plan in July 2009, were unilateral changes in violation of Section 8(a)(1) and (5) of the Act. The ALJ's ruling should be reversed with respect to the OPEIU Chapter Unit and the Teamsters' MUA and Apheresis units. Doing so would add consistency to the ALJ's decisions by reconciling his ruling regarding the Teamsters' units with his rulings for the OPEIU Collections and LCD units, where violations of Section 8(a)(1) and (5) were found when Respondent Region and Respondent Chapter unilaterally changed the same 401(k) and pension plan, under the same circumstances. (ALJD p. 25, l. 18-46)

CONCLUSION

WHEREFORE, Counsel for the Acting General Counsel respectfully request that the Board grant the above Exceptions and modify the Administrative Law Judge's Decision and Order accordingly.

Dated at Detroit, Michigan this 30th day of June 2011.

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CERTIFICATE OF SERVICE

I certify that on the 30th day of June 2011, I e-filed **Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision** and **Brief in Support of Exceptions of Counsel for the Acting General Counsel to the Decision of the Administrative Law Judge**, and copies were also served electronically on the following parties of record:

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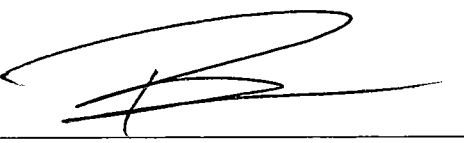

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