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

Advice Memorandum

DATE: August 8, 2011

TO : Joseph F. Frankl, Regional Director
Region 20

Thomas Cestare, Officer-in-Charge
Subregion 37

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

SUBJECT: Tesoro Corporation 530-6067-4033
Cases 37-CA-8221 and 37-CA-8236 530-8045

These cases were submitted for advice as to whether the Employer violated Section 8(a)(5) by refusing to bargain over, then implementing, changes in health, savings, and retirement benefits. We conclude that the Employer fulfilled its duty to bargain.[1]

GENERAL OVERVIEW OF THE DISPUTE

Background

The Employer, Tesoro Petroleum, operates oil refineries in Alaska, California, Hawaii, North Dakota, Utah, and Washington. In addition to these refineries, the Employer offers gasoline and diesel products for sale under a variety of brand names at over 800 retail locations in the Western United States. The corporate headquarters are in San Antonio, Texas.

The USW represents bargaining units of production and maintenance employees, clerks, operators, and a variety of technicians, at these various locations, with the composition of the unit varying at each location.

The parties have historically participated in bargaining at a national level, referred to as the National Oil Bargaining program. The International Union (representing all Local unions) and one lead employer

[1] These cases arise in the context of a nationwide dispute between this Employer and several other locals of the Union, all involving the unilateral implementation of changes to benefits plans. There are 13 charges concerning Employer facilities in six different states. Each location had its own collective-bargaining agreement and unique facts, resulting in different conclusions for each location. Our conclusions concerning other cases will be set forth in separate memoranda.

(representing the oil industry employers) meet to negotiate basic, industry-wide economic and non-economic terms and conditions. Subsequent bargaining then takes place at a local level. Local employers generally offer the terms reached at the national level and bargain over additional terms and conditions not addressed nationally.

The most recent National Oil Bargaining Program negotiations took place in 2009. The parties discussed medical benefits during the national negotiations, though as was the practice, those discussions addressed employer/employee premium cost allocation as opposed to details of the provisions of the medical plans. At all locations, the collective bargaining agreements were effective from various dates in 2009 through dates in 2012.

The Employer offers a number of nationwide benefit plans to its represented and unrepresented employees, including a 401k savings plan, a pension plan, a life insurance plan, and retiree benefits (medical, dental, and life insurance).[2] Every nationwide benefit plan that the Employer offers its employees contains reservation of rights language in the summary plan descriptions.

The Changes

On July 28, 2010, the Employer's President-CEO sent an email to all employees outlining numerous cost-cutting changes to the benefit plans that the Employer intended to implement on January 1, 2011. The President noted in the announcement that any benefit changes for union-represented employees would be made in accordance with the benefit plan documents and provisions of applicable collective-bargaining agreements.

Within days of the President's email, local management sent letters with further details about the proposed changes to their respective local Union counterparts.

In early August, 2010, each Union Local sent a demand to its local managers to bargain over the changes. The Employer implemented the changes on January 1, 2011.

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[2] The Employer also offers a nationwide medical plan but employees working at the facility involved in these cases are covered under a different medical plan that the parties negotiated locally.

FACTS UNIQUE TO THIS LOCATION

The Union represents the Employer's employees at the Kapolei, Hawaii facility. Section 15.04 of the parties' collective-bargaining agreement sets forth a procedure the parties will follow if the Employer wishes to implement changes in the benefit plans:

> Should the Company wish to implement changes for bargaining unit employees in Employee Benefit Plans that are generally applicable within the Company, the following shall apply:
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> a. The Company will give the Union advance notice of the planned changes and enter into discussions at the request of the Union.
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> b. If the Union disagrees with the planned changes and so requests, the parties will engage a mutually agreeable third party to serve as a mediator in an attempt to resolve the disagreement.
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> c. If the parties are not able to resolve the disagreement, the Company will give the Union not less than ten working days notice prior to proceeding with the implementation.
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> d. If the Union does not give the company notice of intent to cancel the contract within 30 days after receipt of the Company's notice of intent to proceed with implementation, the Articles of Agreement will continue in effect for the remainder of the contract term and the Company may continue with implementation.
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> e. Within 30 days after receipt of the Company's notice of intent to proceed with implementation, the Union may give notice of its intent to terminate the Articles of Agreement effective 90 days after the Company's receipt of Union's written notice . . .

After the Employer's July 28 notice of its intent to make changes in benefits, on August 5 the Union requested bargaining. The Employer agreed to meet to discuss the changes and, on August 19, the Union made a request for information, which it repeated on September 9. The Employer thereafter provided the information, and the Union has not alleged any unlawful delay. By November 16, when the Union had neither responded to the information nor requested any dates for the parties to meet, the Employer notified the Union that if it did not contact the Employer by November 20 regarding the benefits issue, the Employer would proceed according to the contract. On November 19, the Union

expressed an interest to both engage a mediator, but also to delay indefinitely the mediation; the Employer refused. The Employer notified the Union that if it did not indicate a willingness to participate in a mediation conducted no later than December 15, 2010, the Employer would assume that the Union was not interested in mediation. On December 13 the Union indicated that it was prepared to proceed to mediation, and the parties met with the mediator, unsuccessfully, on December 22, 2010. Later the same day, the Employer informed the Union in writing of its intent to implement the changes. The Employer implemented the changes on January 2, 2011, providing less than the 10 working days of notice required by 15.04(c) of the parties' collective-bargaining agreement.

ACTION

We conclude that the Employer fulfilled its duty to bargain in good faith before making changes to the employee benefit plans.

An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment 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.[3] Employee benefits are mandatory subjects of bargaining.[4]

Here, the parties negotiated a procedure for the parties to follow when the Employer wanted to make changes to employee benefits.[5] That procedure was embodied in Section 15.04 of the parties' collective-bargaining agreement. The Employer substantially complied with that procedure. It gave the Union ample notice of its desire to make changes, provided the Union with the information it requested, and was willing to meet "and discuss" the changes with the Union. Rather than meet to discuss, the Union requested mediation, but then desired to delay, indefinitely, the mediation. When the Employer made it

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[3] *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-815 (2007).

[4] *Convergence Communications*, 339 NLRB 408, 412 (2003) (401(k) plans are a mandatory subject of bargaining); *Trojan Yacht*, 319 NLRB 741, 747 (1995)(same); *Loral Defense Systems-Akron*, 320 NLRB 755, 759 (1996) (medical benefits are a mandatory subject of bargaining).

[5] *Cf., The Budd Co.*, 348 NLRB 1223 (2006)(collective-bargaining agreement provided specific grounds and clear procedures for union to challenge a proposed rule).

clear to the Union, approximately four months after its initial announcement, that the parties were running out of time and would have to meet with a mediator no later than December 15, the parties did meet with a mediator but failed to reach agreement. Thus, the Employer met its obligation under the contract to discuss the changes with the Union.[6]

The Employer's December 22 notice of intent to implement after mediation failed did not provide the full ten working days' notice required under 15.04(c). However, we would not find a violation on that basis alone. The Union had four months to avail itself of the contractual options to engage in discussions and mediation. The Employer agreed to meet after the Union's initial demand in early August, but before it would meet, Union made at least two information requests in August and September. It was not until after the Employer insisted in November that the Union move the matter to mediation, that the Union affirmatively requested mediation. Even after this point, the Union attempted to delay mediation indefinitely, a request the Employer refused. Once again in December, the Employer had to again insist that the parties meet for mediation no later than December 15. It is unclear why the mediation was delayed from the 15th to the 22nd, but the Union has not claimed, and given the parties' actions in the preceding months it seems unlikely, that it was due to Employer delay. Taken as a whole, we cannot ignore evidence that suggests the Union was in large part responsible for the delays in implementing Article 15.04.[7]

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[6] When parties agree to "discuss," they mean to discuss and not to bargain. *See*, *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (ALJ, with Board affirmance, "decline[s] to find the words 'bargain' and 'discuss' synonymous").

[7] *AAA Motor Lines, Inc.*, 215 NLRB 793 (1974) (finding unilateral change not unlawful where union was largely responsible for delays in bargaining in the four months preceding implementation). FOIA Exemption 5 [redacted].

In sum, we conclude that the Employer fulfilled its bargaining obligation by complying with the process that the parties established for making changes to employee benefits. Therefore, the Region should dismiss these charges, absent withdrawal.

B.J.K.

[redacted]