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

Advice Memorandum

DATE: August 8, 2011

TO : William A. Baudler, Regional Director
Region 32

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

SUBJECT: Tesoro Refining and Marketing Company
Cases 32-CA-25477, 32-CA-25478,
32-CA-25547, and 32-CA-25548

530-6067-2070-6760
530-6067-4033
530-8045
530-8054-1500
530-8054-2000
530-8054-7000

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 Union waived its right to bargain over the changes.[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

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[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 benefit 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 all Local unions) and one lead employer (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 medical plan, 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.

[2] Employees working at the Employer's Hawaii and Washington facilities are covered under different medical plans that were negotiated locally.

FACTS UNIQUE TO THIS LOCATION

The Union represents the Employer's employees at the Golden Eagle Refinery and Golden Eagle Chemical Plant, both located in Martinez, California. Benefits are addressed in Article 18 (for the refinery) and Article 21 (for the chemical plant) of the relevant collective-bargaining agreements:

> Article 18 (Refinery)
> This agreement shall in no way affect the status of employees, on whose behalf it was made, with respect to benefits derived from or participation in any benefit plan of Company that may be in effect for employees generally during the term of this agreement excluding, however, any plans or benefits covered elsewhere herein.
>
> Article 21 (Chemical Plant)
> This agreement shall in no way affect the status of employees under any of the Company's benefit plans, and there shall be no discrimination against any employee for any reason whatsoever in the administration of the benefits of such plans.
>
> 2002 Memorandum of Agreement
> "[a]ll benefits shall be subject to the terms and conditions of the respective benefit plans and insurance policies, which shall be controlling."[3]

It appears that the 2002 MOA is still in effect.[4]

After the Union demanded bargaining, the Employer expressed a willingness to "discuss" the changes, but maintained it was permitted to make the changes under Articles 18 and Article 21 of the respective collective-bargaining agreements, the 2002 Memorandum of Agreement (2002 MOA), and the reservation of rights clause contained in each benefit plan. The parties met four times for these discussions.

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[3] The parties executed a 2002 MOA for each of the units.

[4] Though the Union initially argued that the 2002 MOAs were not incorporated into the collective-bargaining agreements, the Union clarified upon further investigation that the 2002 MOAs in question were, in fact, in the binder that contained all effective letters of agreement. Our analysis, therefore, is based on the conclusion that the 2002 MOAs were still in effect during the relevant period.

ACTION

We conclude that these charges should be dismissed, absent withdrawal. The Employer did not violate Section 8(a)(5) by refusing to bargain or implementing the unilateral changes in question as the 2002 MOA was a clear and unmistakable waiver of the Union's right to bargain over changes to benefits.

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.[5] Employee benefits are mandatory subjects of bargaining.[6]

The employees have received a variety of medical, pension, retirement, life insurance, and 401k benefits for some time, and these benefits have become part of the employees' terms and conditions of employment. If the Employer wished to make changes to the benefits, it must bargain over those changes, absent a waiver.

Waivers must be "clear and unmistakable" and will not be inferred "from a general contractual provision" unless 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. When a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver.[8] 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.[9] The factors to consider in determining whether or not an effective waiver exists are:(1) the wording of the

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

[6] *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).

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

[8] *Provena St. Joseph Medical Center*, 350 NLRB at 810-815.

[9] *Id.* at 812, fn.19, citing *New York Mirror*, 151 NLRB 834, 839-840 (1965).

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 2002, the parties agreed that the terms of employee benefit plans are "controlling" as to the benefits for unit employees. This agreement, memorialized in the 2002 LOA, reflects the parties' agreement that they would look to the benefit plan documents to address questions about those plans. The benefit plans, themselves, contain reservation of rights language giving the Employer the right to make changes and modifications to the plans. Therefore, by agreeing that the terms of the plans would control, the Union agreed that the Employer had the right to make changes to the plans, and therefore clearly and unequivocally waived its right to bargain over the Employer's decision to make changes to the benefit plans.[10]

Since the 2002 LOA "specifically mention[s] the action at issue," it is not necessary to consider the remaining *Provena* factors.

Accordingly, the Region should dismiss these charges, absent withdrawal.

B.J.K.

[redacted]

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[10] *Mary Thompson Hospital*, 296 NLRB 1245 (1989)