

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GODDARD RIVERSIDE COMMUNITY CENTER

and

**Case Nos. 2-CA-39604
2-CA-39928**

LOCAL 74, UNITED SERVICE WORKERS UNION, IUJAT

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS- EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(f)(1) of the National Labor Relations Board's Rules and Regulations, the General Counsel, by its Counsel James P. Kearns, hereby submits this answering brief to Respondent's Cross-Exceptions to the Decision and Recommended Order of Administrative Law Judge Raymond P. Green in the above-referenced matter. In his decision, which issued on August 3, 2011, the ALJ dismissed the Complaint in its entirety, failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its employees health insurance plan on July 1, 2009 and July 1, 2010. The ALJ also dismissed the allegation that Respondent unlawfully failed and refused to bargain with the Union in good faith over its Capital hall employees, in violation of Section 8(a)(1) and (5) of the Act. On September 29, 2011, General Counsel filed Exceptions to the ALJ's Decision and a Brief in Support of its Exceptions.

Respondent's six Exceptions are without merit. This Answering Brief addresses issues raised by Respondent's Cross-Exceptions and further supplements the arguments made by the General Counsel in the Brief in Support of Exceptions.

Respondent's first Cross-Exception asserts that judicial estoppel should have barred the General Counsel from issuing the instant Complaint against Respondent. Prior to the hearing, Respondent filed a motion to dismiss the instant Complaint, alleging judicial estoppel. On February 28, 2011, the Board issued an Order Denying Motion and found that the Respondent failed to establish that the Acting General Counsel is estopped from litigating any of the complaint allegations. (unpublished Order.)

Respondent's estoppel argument has no basis in law or fact. The Complaint against the Union in Case No. 2-CB-22304, alleged the Union unlawfully failed to provide information relevant to the parties bargaining over the Union's proposal to move the Unit's health insurance from a Respondent provided plan to a Taft-Hartley plan. The central issue in the instant Complaint is whether Respondent unilaterally changed its Employer provided health insurance plan in 2009 and 2010.

The Court in *New Hampshire v. Maine* noted several factors that courts generally look to in deciding to apply judicial estoppel:

First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. In enumerating these factors, this Court has not established inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. *New Hampshire v. Maine*, 532 US 742, 743 (2001).

In *Lincoln Center for the Performing Arts, Inc.*, 340 NLRB 1100, 1127 (2003), the ALJ, with Board approval, listed the following criteria for the application of judicial estoppel: (1) the issues in both proceeding must be identical; (2) the issue in the prior proceeding must have actually have been litigated and decided; and (3) the issue previously litigated must be necessary to support a valid and final judgment on the merits.

Respondent has not met any of the requirements for judicial estoppel. The issues in the instant case are barely related, much less identical to the issues in 29-CB-22304. The charge that was settled involved the Union's refusal to turn over information relevant to the parties bargaining over whether the Employer would become party to the Union's health fund where the instant case involves unilateral changes to the health insurance plan provided by Respondent. Further the earlier charge was settled and not litigated and therefore no judicial body accepted the General Counsel's position. The General Counsel has not taken inconsistent positions as to whether Respondent bargained over the unilateral changes to the health insurance plan in 2009 and 2010. Respondent's judicial estoppel Exception is without merit.

Likewise, Respondent's second Cross-Exception, asserting that the charge in Case No. 2-CA-39604 was untimely under Section 10(b) of the Act, should also be rejected. In General Counsel's Brief in Support of its Exceptions, the underlying facts were set forth to support the ALJ's correct finding that Respondent failed to

prove its affirmative defense. (General Counsel's Brief, p. 3, fn. 2). In its Cross-Exception, Respondent asserts that notice of the health insurance changes to an employee, Connie Fradera, should be imputed to the Union for 10(b) purposes. Although Fradera had been a shop steward at one time, she was not a steward at the time the changes were made to the health plan in 2009. There had not been a steward since at least April 2008, when Union business agent Dempsey began servicing the site.

Respondent's reliance on *Courier-Journal*, 342 NLRB 1093 (2004) on this issue is misplaced. In *Courier-Journal*, unlike the instant case, there was an actual steward that was a member of the negotiating committee and participated in all bargaining sessions. *Supra*, 1103. Certainly notice to a unit employee is not adequate and will not start the limitation period. Respondent failed to show the Union had notice of the health insurance outside the 10(b) period and therefore did not prove its affirmative defense.

In its third, fourth and fifth Cross-Exceptions, Respondent argues that Article XX of the parties collective bargaining agreement acts as a waiver of the Union's right to bargain over changes to the health insurance plan. It further argues that the "clear and unmistakable" waiver test should not be applied when determining whether a union waived its right to bargain based upon a contract provision. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Instead, Respondent asserts the ALJ erred by failing to adopt the D.C. Circuit's "contract coverage" test for determining whether it was an unlawful refusal to bargain to make mid-term contract changes, citing *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836-7 (D.C. Cir. 1993).

The Board applies the "clear and unmistakable waiver" standard in determining whether an employer has the right to make a unilateral change during the life of a collective-bargaining agreement. *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007). Proof of a contractual waiver is an affirmative defense and it is Respondent's burden to show the contractual waiver is explicitly stated, clear and unmistakable. *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000).

Article XX of the parties' agreement provides that: "full-time and regular part-time employees and their eligible dependents will be covered by the Agency's health and hospitalization group insurance plan." (R Ex. 2 & 3). The language of Article XX clearly does not establish Respondent's right to make changes under any test. By agreeing that the unit employees will be covered by Respondent's group insurance plan does not in

itself authorize unilateral changes to that plan and the Union did not “clearly and unmistakably” waive its right to bargain.

In *Trojan Yacht*, the Board held that contract language requiring the maintenance of a pension and savings plan “in the same manner and to the same extent such plans are generally made available and administered on a corporate basis” did not waive the union’s right to bargain about changes to the plan. *Trojan Yacht*, 319 NLRB 741, 742-43 (1995). The language and meaning of Article XX is clear. It does not give Respondent the right to make unilateral substantial changes in health insurance nor is there past practice to establish a basis for finding that the parties had that intention.

With respect to Respondent’s assertion that the ALJ failed to apply the D.C. Circuit’s “contract coverage” test, it should initially be noted that an administrative law judge is constrained to follow the Board rather than the circuit court law, even where there is a conflict between the two, until such time as the Supreme Court has ruled. *Bricklayers Local 17 (California Tile)*, 271 NLRB 1571 (1984); *Regency at the Rodeway Inn*, 255 NLRB 961 fn. 2 (1981); *Iowa Beef Packers*, 144 NLRB 615 (1963), enf. denied in part 331 F.2d 176 (8th Cir. 1964). In the instant case, Board law is clear that the appropriate test is whether there is a clear and unmistakable waiver. Further, the Board has previously had the opportunity to and passed on adopting the D.C. Circuit’s test. See *Provena, supra*.

Under the contract coverage test, once the parties have exercised their right to bargain about a subject by negotiating the provision into the contract, the parties’ rights are fixed and further bargaining is not required on the subject. *Local Union No. 47, IBEW*, 927 F. 2d 635, 640 (D.C. Cir. 1991). Therefore, once a subject is “covered by” the contract, “the union has exercised its bargaining right and the question of waiver is irrelevant.” *Department of Navy v. FLRA*, 962 F.2d 48 at 57, (D.C. Cir. 1992).

The instant case is unlike *US Postal Service, supra*, cited by Respondent, which involved the interpretation of a management rights clause. In *US Postal Service*, the employer reduced certain service and the D.C. Circuit found that the service reductions were within the “clear compass” of the management rights article. *Postal Service*, 8 F.3d at 838. Contrary to the broad management rights provision, Article XX is a narrowly constructed provision. It cannot be found that the Union gave up its right to bargain over a core

benefit by entering into a provision agreeing that the unit employees will be covered by the Employer's health insurance plan. Respondent's argument, taken to its limit, would permit Respondent to cease providing health insurance simply by cancelling the non-unit employees' health insurance policy.

Respondent urges the Board to adopt a less stringent test than the clear and unmistakable waiver test but it failed to offer any justification as to why the instant facts warrant a lower standard. Article XX is narrowly drafted to provide unit employees with health insurance. The clause was negotiated over 15 years ago and has not been changed in later negotiations. By negotiating this provision, the Union cannot be found to have given up its bargaining rights with regard to health insurance coverage. Changing the Board's standard is not warranted.

Finally, Respondent's sixth Cross-Exception is without merit. Respondent argues that when the Union became aware of the health insurance changes in 2009 and 2010, the decision was not a fait accompli. However, the uncontroverted evidence at trial was that Respondent contracted with the health insurance provider to make changes to the health plans in 2009 and 2010, without advising the Union or providing them an opportunity to bargain. In early May 2009, Respondent committed to its health insurance carrier to change to a Health Reimbursement Plan without notifying the Union. (Tr. 146). Likewise, in 2010, Union business agent Dempsey learned that Respondent again changed the health insurance when he was told by a member which was verified by Respondent when he later called Sal Uy. (Tr. 100). Although after the unilateral changes were made, the parties negotiated in an attempt to cover the unit employees under the Union's health insurance fund, Respondent had already made the unlawful unilateral change and these post violation discussions are not relevant to finding a violation.

It is respectfully submitted that the evidence and case law establish that the Judge erred in dismissing the Consolidated Complaint and Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its health insurance plan on July 1, 2009 and July 1, 2010 without affording the Union an opportunity to bargain with Respondent with respect to this conduct. Respondent also violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union regarding the Capital Hall employees. The Board

should reject Respondent's Cross-Exceptions and grant General Counsel's Exceptions.

Respectfully submitted,



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