

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TESORO REFINING AND MARKETING CO.

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
LOCAL 10

Case Nos.: 18-CA-19615
18-CA-19644

RESPONDENT'S EXCEPTIONS TO THE DECISION AND RECOMMENDED
ORDER OF THE ADMINISTRATIVE LAW JUDGE

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Dated: March 20, 2012

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Pursuant to Section 102.46 of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, Respondent Tesoro Refining and Marketing Co. (Mandan, ND Refinery) (“Tesoro” or the “Company”) submits the following Exceptions to the February 7, 2012 Decision and Recommended Order of Administrative Law Judge (“ALJ”) Mark Carissimi in the above-captioned matter involving the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 (“Union” or “Local 10”). Tesoro also concurrently submits its Brief in support of its Exceptions, which is incorporated by reference herein.¹

EXCEPTIONS

1. Exception is taken to the ALJ’s finding that “Peterson replied that the Respondent was under no obligation to negotiate regarding this matter in accordance with Article 12 of the contract.” (JD 5:18-19; *see also* 16:20-22). In reaching this finding, the ALJ erroneously failed

¹ Citations to the record are designated as follows: the hearing transcript as “Tr. ___;” the General Counsel’s exhibits as “GC ___;” Tesoro’s exhibits as “R ___;” and references to the ALJ’s Decision and Recommended Order as “JD ___.” Citations to the record in support of the Exceptions herein, where applicable, are more fully set forth in Tesoro’s Brief in support of its Exceptions.

to consider that this alleged statement was based only on Local 10 President Javier Montoya's ("Montoya") account of the conversation. (Tr. 45). Furthermore, Montoya later admitted that nothing in Tesoro's July 29 letter indicated that the Union was not permitted to provide input as to the planned benefit changes. (Tr. 79).

2. Exception is taken to the ALJ's finding that Tesoro "acknowledged that it received the Union's August 5 letter demanding bargaining" (JD 6:8-10) because the ALJ erroneously failed to consider that, in addition to acknowledging the demand to bargain, the Company affirmed its willingness "to discuss the benefit changes at a mutually convenient time." (GC 12; Tr. 47).

3. Exception is taken to the ALJ's finding that "during the pay period beginning on December 19, 2010, and ending on January 1, 2011, the Respondent implemented the proposed change in the 401(k) thrift plan by reducing its matching contribution from 7 percent to 6 percent." (JD 9:5-7; *see also* 17:12-14, 17:43-45). The ALJ erroneously failed to find that this change was not implemented until the issuance of pay records after January 1, 2011. (GC 23; Tr. 66).

4. Exception is taken to the ALJ's conclusion that an "employer violates Section 8(a)(5) and (1) of the Act when it unilaterally institutes a change to a mandatory subject of bargaining prior to reaching a lawful impasse with the bargaining representative." (JD 9:31-33). In reaching this conclusion, the ALJ erroneously failed to find that a labor organization can waive its right to negotiate over a mandatory subject of bargaining either through an express provision in the parties' collective bargaining agreement and/or through past practice, in action, or other conduct. Tesoro excepts to the ALJ's failure to find that the Union waived any alleged bargaining right with respect to the Tesoro benefit changes. *See, e.g., American Diamond Tool*, 306 NLRB 570,

570 (1992) (*quoting Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)), and Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

5. Exception is taken to the ALJ's finding that "the evidence is clear that the Respondent unilaterally implemented its planned changes to employee benefit programs on or about January 1, 2011." (JD 9:34-36). As more fully set forth in Tesoro's Brief in support of its Exceptions, incorporated by reference herein, in reaching this conclusion, the ALJ erroneously: (1) failed to find that Tesoro had a "sound arguable" and/or "equally plausible" basis for its construction of the parties' labor agreement, thereby requiring dismissal of the Complaint under *Picini Flooring*, 355 NLRB No. 123 (2010), (2) failed to find that Tesoro's ability to make benefit changes was, in fact, covered by the parties' labor agreement (*i.e.*, Articles 2 and 12 of the parties' collective bargaining agreement ("CBA") and the 2003 Benefits Memorandum of Agreement ("MOA")), (3) failed to find that the Union "clearly and unmistakably" waived its right to bargain over Tesoro's proposed benefit changes; (4) failed to find that the Union had unclean hands and bargained in bad faith; and (5) failed to find that the Union waived any alleged bargaining right through inaction.

6. Exception is taken to the ALJ's finding that the parties' labor agreements and bargaining history failed to establish a waiver of the Union's right to bargain over the benefits changes. (JD 9:40-15:45). In reaching this finding, the ALJ erroneously (1) failed to find that Tesoro had a "sound arguable" and/or "equally plausible" basis for its construction of the parties' labor agreement, thereby requiring dismissal of the Complaint under *Picini Flooring*, 355 NLRB No. 123 (2010), (2) failed to find that Tesoro's ability to make benefit changes was, in fact, covered by the parties' labor agreement (*i.e.*, Articles 2 and 12 of the CBA and the 2003 MOA), (3) failed to find that the Union "clearly and unmistakably" waived its right to bargain over Tesoro's

proposed benefit changes; (4) failed to find that the Union had unclean hands and bargained in bad faith; and (5) failed to find that the Union waived any alleged bargaining right through inaction, for the reasons set forth in Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

7. Exception is taken to the ALJ's conclusion that "since the plans are specifically excluded from the collective-bargaining agreement there is clearly nothing in the collective-bargaining agreement, including the reservation of rights language included in the summary plan descriptions of the benefit plans, that serves as a waiver of the Union's right to bargain over the changes in plan benefits." (JD 10:14-17). In reaching this conclusion, the ALJ erroneously fails to find that the parties' labor agreement allows Tesoro to make unilateral benefit changes. (*See* Tr. 91-92, 98, 124-125; GC 5; GC 8, pp. 5-6, 23).

8. Exception is taken to the ALJ's findings that "the fact that the Union did not file a grievance under article 2 of the contract is of no consequence since the Union demanded bargaining over the benefit plan changes on several occasions" and because Tesoro "cannot dictate the manner in which a union requests bargaining over planned changes." (JD 10:19-25; *see also* JD 18:20-23). The ALJ erroneously failed to find that Tesoro is not dictating the manner in which the Union requests bargaining. Rather, pursuant to their labor contract, the parties have agreed upon "the mechanism" (Tr. 91-92, 125), for addressing proposed changes. As the ALJ acknowledges, part of that process is bargaining within the meaning of Article 2, Section 5. (JD 10:25-29). But the ALJ then fails to give effect to the remainder of the contractual process: if bargaining is unsatisfactory to the Union, the contract provides that it may file a grievance. Therefore, if the Union is dissatisfied with Tesoro's treatment of benefits issues, the parties – as part of their overall understanding on benefits – have agreed upon how

such matters will be addressed and resolved. (*See* Tr. 91-92, 98, 124-125; GC 5; GC 8, pp. 5-6, 23).

9. Exception is taken to the ALJ's finding that the Union's conduct was consistent with Article 2, Section 5 of the CBA because the "Union made four requests to bargain to Peterson after being informed of the planned benefit changes." (JD 10:29-30). In reaching this conclusion, the ALJ erroneously failed to find that Local 10 lacked authority to negotiate without the permission of the international union, a separate labor organization. (Tr. 86-88). The ALJ also erroneously failed to consider the fact that the Union never made or even tried to formulate any benefits proposals besides a blanket rejection of the changes. (Tr. 79, 106). Furthermore, after the Company provided the information the Union had requested, the Union did not have any further questions, did not seek any further meetings, nor did it seek any postponement of planned changes to study the information provided by the Company. (Tr. 89-90, 120). Moreover, under the parties' contractual process, if the Union is dissatisfied with the outcome of bargaining pursuant to contractual standards, its recourse is to file a grievance under Article 2. (*See* Tr. 91-92, 98, 124-125; GC 5; GC 8, pp. 5-6, 23).

10. Exception is taken to the ALJ's failure to find that the 2003 MOA and the benefit plans' reservation of rights provisions do not constitute a waiver of the Union's bargaining rights and/or provide a "sound arguable" basis for Tesoro's interpretation of the parties' labor contract and/or does not cover the issue in dispute. The ALJ erroneously fails to give effect to the plain language of the 2003 MOA, which describes the plans in which the bargaining unit participates, and rights and obligations of the parties as to benefits. The 2003 MOA expressly incorporates Tesoro's "rights ... under the Benefit Plans", which include its right to change benefits contained within each summary plan description. The ALJ's decision cannot have it both ways. If the ALJ

asserts that the removal of the plans themselves from the CBA means that Tesoro has no right to undertake benefit changes, then the parties' 2003 MOA reiterating Tesoro's rights under the plans would control. Without the plans, there otherwise would be no framework for providing any employee benefits. (JD 10: 32-41; JD 11: 1-46; JD 12: 1-14; *see* Tr. 31-34, 36, 71-75, 133-134, 136, 168, 182; 221-223, 233-237, GC 5, p. 1; GC 6; GC 7, p. 3; R 1-11, 15-16, 18, 32, 36-37, 42, 54.)

11. Exception is taken to the ALJ's findings and conclusions that "there is no evidence that the parties ever discussed the reservation of rights language contained in the benefit plans during the negotiations for the 2003 MOA" or that "union officials were aware of that language." (JD 11:37-40). In reaching these conclusions, the ALJ erroneously disregards the fact that the 2003 MOA was a negotiated document in which both parties reviewed and executed. The ALJ further disregards the Union's own unrebutted statements acknowledging the reservation of rights language and the Company's right to make such benefits changes. (*See* Tr. 31-34, 36, 71-75, 133-134, 136, 168, 182; 221-223, 233-237, GC 5, p. 1; GC 6; GC 7, p. 3; R 1-11, 15-16, 18, 32, 36-37, 42, 54).

12. Exception is taken to the ALJ's finding and conclusion that "a single statement by one union representative in 2005 does not constitute a clear and unmistakable waiver of the important statutory right of the Union to bargain over the instant changes to employee benefit plans." (JD 11:46-12:2). In reaching this finding and conclusion, the ALJ erroneously disregards both the context in which the statement was made, as well as the entire evidentiary record regarding the parties' 55 year bargaining history and labor agreements that support the Union's admission. (*See* Tr. 100, 144-156, 177, 183-184, 190, 192, 212, 233-237; R25-34, 36-41, 43, 45-47).

13. Exception is taken to the ALJ's finding and conclusion that the "record does not support a finding that the parties' collective-bargaining agreement, the 2003 MOA or Montoya's 2005 statement establishes that the Union waived its statutory right to bargain over any planned changes to employee benefits." (JD 12:4-7). In reaching this conclusion, the ALJ erroneously failed to find that Tesoro had a "sound arguable" and/or "equally plausible" basis for its construction of the parties' labor agreement, thereby requiring dismissal of the Complaint under *Picini Flooring*, 355 NLRB No. 123 (2010), (2) failed to find that Tesoro's ability to make benefit changes was, in fact, covered by the parties' labor agreement (*i.e.*, Articles 2 and 12 of the CBA and the 2003 MOA), (3) failed to find that the Union "clearly and unmistakably" waived its right to bargain over Tesoro's proposed benefit changes; (4) failed to find that the Union had unclean hands and bargained in bad faith; and (5) failed to find that the Union waived any alleged bargaining right through inaction, for the reasons set forth in its Brief in support of its Exceptions, incorporated by reference.

14. Exception is taken to the ALJ's finding that the summary plan descriptions "are not collectively bargained documents." (JD 11:33-34; 12:7-9). In reaching this conclusion, the ALJ fails to find that the comprehensive negotiation process for the 2003 MOA took over a year and a half, the Union was provided with copies of the plans and summary plan descriptions, and the 2003 MOA was explicit that "Tesoro and PACE have had full opportunity to and have negotiated in good faith regarding this package of Tesoro benefits[.]" (Tr. 133, 136; GC 5).

15. Exception is taken to the ALJ's finding that the "oblique reference in the MOA to the retention of rights under the benefit plans is insufficient to find that the reservation of rights language contained in the benefit plans establishes that the Union clearly and unmistakably waived its right to bargain in the future over the mandatory subject of employee benefits." (JD

12:10-13). In reaching this finding and conclusion, the ALJ erroneously disregards the evidentiary record regarding the parties' and their predecessors' 55 year bargaining history and labor agreements that supports the fact that the Union waived its right to bargain. (*See* Tr. 100, 144-156, 177, 183-184, 190, 192, 212, 233-237; R25-34, 36-41, 43, 45-47).

16. Exception is taken to the ALJ's failure to find that the parties bargaining history establishes that the Union waived its right to bargain over the benefits changes. (JD 12:15-13:43). The ALJ admits that on numerous occasions in bargaining, including in 1992-1993, 2001, and 2009, the Union unsuccessfully sought to eliminate the Company's right to make benefit changes. (JD 12:23-13:4; *see* Tr. 100, 144-156, 177, 183-184, 190, 192; R 25-34, 36-41, 43-47).

17. Exception is taken to the ALJ's failure to find that *Ace Beverage Distribution Co*, 253 NLRB 951 (1980) and *Ball Corp.*, 322 NLRB 948 (1997) govern the instant matter. (JD 13:6-43). Both here and in those cases, the Union was unsuccessful in obtaining pertinent contract changes in bargaining. The sound policy reasons for not awarding a party rights or benefits that they could not achieve through statutory bargaining are equally notable. Moreover, that the Union felt compelled to make the proposals it did establishes that the 2003 MOA and Articles 2 and 12 of the CBA have the meaning to which Tesoro has ascribed to them, as described in Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

18. Exception is taken to the ALJ's failure to find that the OCAW's unsuccessful 1994 litigation does not further establish that Tesoro has the unilateral right to make benefit changes under the parties' labor agreement. (JD 13:45-14:18). This unsuccessful litigation is persuasive bargaining history; and, in addition to the Union's failed attempts to change the parties' labor

agreement, establishes that Articles 2 and 12 of the CBA and the 2003 MOA provide Tesoro with the right to make benefit changes. (Tr. 150, 185-186, 218-220; R 29-30, 44, 52).

19. Exception is taken to the ALJ's failure to admit into evidence an unfair labor practice charge filed in September 1993 by the OCAW alleging that Amoco violated Section 8(a)(5) and (1) by making changes to medical care benefits at the Mandan facility. (JD 14, fn. 14). As stated in Tesoro's offer of proof, the earlier dismissal is not sought to be introduced as binding or precedential in this case. The evidence was offered as part of the parties' historical understanding of benefit changes. Given that OCAW previously called the question of the Company's rights without success, it is relevant to the parties' comprehension of the Company's authority; and that, against such a backdrop, the Union has been unable to change the applicable CBA language. (Tr. 220).

20. Exception is taken to the ALJ's finding that the Union's failure to demand bargaining over numerous previous benefit changes is not evidence of the parties' understanding of Tesoro's rights and the Union's waiver of the right to bargain over benefit changes. (JD 14: 20 – 15:45). See Tr. 100, 144-156, 177, 183-184, 190, 192; R 25-34, 36-41, 43-47; *Omaha World-Herald*, 357 NLRB No. 156 (December 30, 2011).

21. Exception is taken to ALJ's failure to find that *Mt. Clemens General Hospital*, 344 NLRB 450, 460 (2005) supports Tesoro's position regarding waiver. (JD 15:32-45).

22. Exception is taken to the ALJ's finding that Tesoro implemented its proposed change in the 401(k) thrift plan on or about December 19, 2010, and that the Union "did not have a sufficient opportunity to review the relevant cost information it received in order to assist it in making a proposal prior to the Respondent's implementation of its proposed changes." (JD 17:

12-22, 43-45; *see also* JD 9:5-7). The ALJ erroneously failed to find that this change was not implemented until the issuance of pay records after January 1, 2011. (GC 23; Tr. 66). The ALJ further failed to find that the Union did not make any benefits proposal beyond its earlier opposition to vacation changes, did not formulate any proposals, made no further meeting requests, nor sought any postponement of planned changes to study the information provided by Tesoro, not had any questions about such information, nor initiated any bargaining-related communications whatsoever with the Company between December 15, 2010 and January 1, 2011. (Tr. 79, 89-90, 106-107, 120).

23. Exception is taken to the ALJ's conclusion that it was not until December 13, 2010 that the Company "clearly indicated it would bargain over the changes it indicated it would make to the benefit plans." (JD 18:18-20). The ALJ failed to find that while reserving its rights under the parties' labor agreement, Tesoro never told the Union it was refusing to bargain over its planned benefit changes. (Tr. 79-81, 119, 123, 128, 229-230). Moreover, everything Tesoro actually did — both prior to and after December 13, 2010 — constituted typical bargaining conduct. It offered to meet with the Union. The parties met and conferred regarding the Company's plans. Tesoro timely and fully responded to information requests. Tesoro appropriately negotiated with the Union as to confidentiality protections for certain information. And, Tesoro revised its plans (*i.e.*, as to the vacation policy) in response to the Union's opposition. (Tr. 47-48, 51, 53-60, 63, 77-81, 88-89, 103, 115, 119, 121-123, 128, 137, 227, 229-230; GC 12-20, 22; R 19-21, 24).

24. Exception is taken to the ALJ's finding that Tesoro's action in delaying implementation of the vacation policy changes does not establish that it was engaged in good-faith bargaining. (JD 18, fn. 17). The ALJ's conclusion erroneously fails to consider the fact that Tesoro's delay

of the vacation changes evidences its willingness to bargain in good faith. (GC 20; R. 19; Tr. 103, 122, 137).

25. Exception is taken to the ALJ's failure to find that *Vandalia Air Freight, Inc.*, 297 NLRB 1012 (1990) and *Jim Walter Resources, Inc.*, 289 NLRB 1441 (1988) do not support Tesoro's position that the Union waived any alleged bargaining right. (JD 18:36-20:3). These cases stand for the proposition that when an employer notifies a union of planned changes in employment terms, it is incumbent upon the union — if it requests bargaining — to pursue the process in a diligent manner. Failure to do so waives any statutory bargaining right. It is not enough for a union to merely protest planned changes, it must make itself available as an active participant in negotiations. Here, the Union did not actively participate in negotiations because it did not make or even formulate any benefits proposals. (Tr. 79, 106). The Union even failed to ask for a postponement of the benefits changes in order to have additional time to formulate any such proposals.

26. Exception is taken to the ALJ's finding that the Union did not engage in tactics designed to delay or undermine bargaining, and did not waive any alleged bargaining right through inaction. (JD 19:32-36). There is no dispute that either before or after receiving the information it requested, the Union did not make any benefits proposal beyond its earlier opposition to vacation changes. (Tr. 79). Indeed, the Union did not even formulate any proposals, nor sought the assistance of any other person or party in doing so. (Tr. 106). Moreover, despite long knowing the Company's target for effectuating any benefits changes (Tr. 76), it likewise is undisputed that Local 10 made no further meeting requests, nor sought any postponement of planned changes to study the information provided by the Company, nor had any questions about such information. (Tr. 89-90, 120). Indeed, the Union initiated no bargaining-related

communications whatsoever with Tesoro between December 15, 2010 and January 1, 2011. (*Id.*; Tr. 107). Such conduct clearly constitutes bad faith tactics designed to delay bargaining.

27. Exception is taken to the ALJ's finding that the timing of Tesoro's responses to the Union's information requests affected the Union's ability to formulate proposals and bargain over the proposed benefits changes. (JD 7:19-23; 9:4-5; 17:1-9, 25-35; 18: 1-16). There is no Complaint allegation that Tesoro was dilatory in responding to the Union's requests, or prevented the Union from formulating proposals or bargaining over the proposed benefit changes.

28. Exception is taken to the ALJ's failure to find that the Union did not have a representative with authority to bargain in good faith. (JD 20:5-17). The ALJ erroneously excuses Local 10 from abdicating its statutory negotiating responsibility by asserting that it appropriately "coordinate[ed] its bargaining with the International Union." (JD 20:13). Local 10, however, went beyond mere coordinated bargaining. Rather, the uncontroverted record evidence is that the Union admitted it was powerless to negotiate over benefits without the consent of the international union, and at no point did it ask for or received any such authority. (Tr. 86-88; *see also* GC 5, 8, 11). Such complete lack of bargaining authority throughout the entire process constitutes bad faith.

29. Exception is taken to the ALJ's conclusion that Tesoro "violated Section 8 (a)(5) and (1) by failing to bargain in good faith with the Union regarding the changes to its employee benefit plans in the Mandan unit and by its unilateral implementation of the changes to the plans commencing on or about December 19, 2010." (JD 20:19-22). *See* prior Exceptions, *supra*, and Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

30. Exception is taken to the ALJ's conclusions of law (JD 20:25-45) for the reasons described in the prior Exceptions, *supra*, and Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

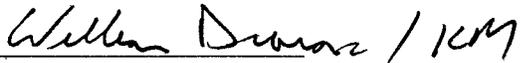
31. Exception is taken to the ALJ's proposed remedy (JD 21:1-15) for the reasons described in the prior Exceptions, *supra*, and Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

32. Exception is taken to those portions of the ALJ's recommended order (JD 21:20-22:35), including the appendix, for the reasons described in the prior Exceptions, *supra*, and Tesoro's Brief in support of its Exceptions, incorporated by reference herein.

For the foregoing reasons, the ALJ's findings, conclusions and proposed remedy should not be adopted by the Board. The Complaint should be dismissed.

Dated: March 20, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2012, a copy of **Respondent's Exceptions To The Decision And Recommended Order Of The Administrative Law Judge** was submitted by e-filing to the National Labor Relations Board. I further certify that I caused the foregoing document to be served through electronic mail delivery in accordance with Board Rules & Regulations Rule 102.114 upon:

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