

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 BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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The Respondent, Tesoro Refining and Marketing Co. (Mandan, ND Refinery) (“Tesoro” or the “Company”¹), submits this brief in support of its exceptions to the Decision and Recommended Order of the Administrative Law Judge (“ALJ”) in accordance with Section 102.46 of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations.

A hearing on the Complaint in the above-referenced matter was held before ALJ Mark Carissimi in Mandan, North Dakota on November 15-16, 2011. ALJ Carissimi issued his Decision and Recommended Order on February 7, 2012.

STATEMENT OF THE CASE

This case involves allegations that Tesoro unlawfully instituted certain benefit changes on or about January 1, 2011 after refusing and failing to bargain in good faith with the Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 (“Union” or “Local 10”). The Complaint asserts violations of Sections 8(a)(5) and 8(a)(1) of the Act.

The ALJ’s Decision and Recommended Order should not be adopted by the Board for several compelling reasons:

1. As the Board recently reaffirmed in *Picini Flooring*, 355 NLRB No. 123 (2010), when mature bargaining parties have addressed an issue, the Board will not decide what essentially is an interpretive disagreement over the meaning of their understanding. Here, while focused on the removal of the pertinent benefit plans themselves from the current collective

¹ In context, “Company” may refer to Tesoro or its predecessors, *i.e.*, BP Amoco or Amoco. Similarly, “Union” may refer to USW Local 10 or its predecessor locals affiliated with a different international entity, *i.e.*, the Paper, Allied-Industrial, Chemical and Energy Workers Union (“PACE”), or the Oil, Chemical and Atomic Workers Union (“OCAW”). It is undisputed that each of the successor union and employer entities assumed the CBA and consistently relied upon the bargaining history and practices of all predecessors. *Infra*, p. 7.

bargaining agreement (“CBA”), the ALJ failed to give effect both to the express procedures in Articles 2 and 12 of the CBA for dealing with benefit changes, as well as their incorporation of the plans’ reservation of Tesoro’s rights to make changes in the parties’ August 28, 2003 benefits Memorandum of Agreement (“2003 MOA”). All *Picini Flooring* and its predecessors require for dismissal of the Complaint allegations is that Tesoro have a “sound arguable” and/or “equally plausible” basis for its construction of the parties’ labor agreement, which it more than possesses.

2. Tesoro’s ability to make benefit changes is, in fact, covered by the parties’ labor agreement (*i.e.*, Articles 2 and 12 of the CBA and the 2003 MOA), which should be given effect with the “contract coverage” doctrine applied by the District of Columbia Circuit, other courts, and as advanced by various Board Members.

3. Beyond the parties’ labor agreement addressing benefit changes, their and their predecessors’ overall 55-year history establishes that the Union “clearly and unmistakably” waived its right to bargain over the planned changes here. In this case, the Board wades into a decades-old stream, in which every aspect of the parties’ written contracts, and the Union’s unachieved bargaining demands, inaction and acquiescence to mid-term changes, express acknowledgment of the Company’s authority, and consistently unsuccessful litigation all inform the parties’ mutual understanding of Tesoro’s unilateral rights. Neither the Acting General Counsel nor the Charging Party could rebut Tesoro’s evidence that at no point during the parties’ and their predecessors’ 55-year relationship had the Company ever been constrained by law or contract from making mid-term benefit changes. They could not offer a single instance to the contrary, nor does the ALJ point to any.

4. The Union’s failure to bargain in good faith precludes a finding that Tesoro violated the Act. There is no dispute that Local 10, the Section 9(a) representative, never had

authority to enter into a benefits agreement or even to advance binding proposals. Consistent with Board doctrine, Tesoro's good faith cannot be reasonably assessed in light of the Union's unclean hands as to the bargaining process. The ALJ suggests that Local 10's interest in "coordinating" its bargaining with the international USW excused it from failing to have an authorized representative capable of negotiating. Board law is clear, however, that a union may not abdicate its own statutory bargaining responsibilities notwithstanding its desire to coordinate its actions with other labor organizations.

5. Apart from never having an authorized representative capable of negotiating, even if the Union had an alleged Section 8(d) right to bargain over the planned benefit changes, it waived any such right through inaction. Under the Acting General Counsel's theory of the case and the ALJ's findings, by December 15, 2010, no remotely arguable barrier existed to negotiations. Yet despite knowing for nearly five (5) months that any changes -- which were contemplated as companywide -- were targeted for January 1, 2011, Local 10 then did absolutely nothing, including requesting a postponement of Tesoro's plans. Despite being fully aware of those and the Company's long-announced time parameters, the Union did not responsibly and timely participate in negotiations which were offered to it.

QUESTIONS INVOLVED

1. Whether the ALJ erred by failing 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) and similar cases? *See* Exceptions 5-8, 10-11, 13-21, 24-26, 29-32.

2. Whether the ALJ erred by failing to find that the Complaint should be dismissed because Tesoro's ability to make benefit changes is, in fact, covered by the parties' labor agreement (*i.e.*, Articles 2 and 12 of the CBA and the 2003 MOA), which should be given effect

with the “contract coverage” doctrine? To the extent the “contract coverage” doctrine does not reflect Board policy, should the Board reconsider and apply “contract coverage” principles in this case? *See* Exceptions 5-8, 10-11, 13-21, 24-26, 29-32.

3. Did the ALJ err in failing to find that the Complaint should be dismissed because Local 10 “clearly and unmistakably” waived its right to bargain over Tesoro’s proposed benefit changes? *See* Exceptions 1-6, 8, 10, 12-21, 24-26, 29-32.

4. Did the ALJ err in failing to find that the Union’s failure to bargain in good faith (*i.e.*, failing to have a representative with authority to bargain) precludes a finding that Tesoro violated the Act? *See* Exceptions 5-6, 8-9, 13-15, 17-21, 25-32.

5. Did the ALJ err in failing to dismiss the Complaint because even if the Union had an alleged Section 8(d) right to bargain over the planned benefit changes, it waived any such right through inaction? *See* Exceptions 5-6, 8-9, 13-15, 17-27, 29-32.

ARGUMENT

I. Introduction And Overview

As addressed in detail below, the facts -- many of them undisputed -- establish that:

1. the parties’ labor agreement allows Tesoro to make unilateral benefit changes;
2. the relevant contract language has remained consistent for 55 years;
3. Local 10 did not avail itself of the contractual procedures established to address benefit changes;
4. the Union has sought unsuccessfully on numerous occasions to eliminate the Company’s contractual ability to change benefits;
5. the international USW and Local 10 were unable in 2009 to obtain protections against mid-term medical-related benefit changes during negotiations for the CBA;

6. the parties' 2003 MOA, which remains in effect, expressly incorporates Tesoro's plans' reservation of rights to change benefits;

7. the Union has acknowledged the plans' reservation of Tesoro's rights;

8. for the past 20 years, the Company consistently has changed benefits pursuant to its right to do so without any challenge from the Union that it does not possess such an ability;

9. the Union unsuccessfully litigated the issue of the Company's right to make unilateral benefit changes;

10. even if the Union had a Section 8(d) bargaining right as to the January 1, 2011 changes, it did not diligently exercise such an alleged right; and

11. even if the Union had a Section 8(d) bargaining right as to the January 1, 2011 changes, prior to institution of the changes, the Union never had a representative with sufficient authority to negotiate over them.

II. Material Facts

A. The Union Waived Its Statutory Right To Bargain Over Benefit Changes

i. The February 1, 2009 - January 31, 2012 CBA Allows The Company To Make Unilateral Benefit Changes

The February 1, 2009 - January 31, 2012 CBA in effect at the time of the instant benefit changes is not silent regarding Tesoro's authority to make such changes. As Local 10 President Javier Montoya ("Montoya") acknowledged, Article 12 of the CBA sets forth a contractual basis for addressing benefit changes.² (Tr. 91-92).³

² Montoya has been Local 10 President for approximately two years. Before that, he had been Union Vice President for about 10 years and had worked at the Mandan facility for around 20 years. (Tr. 23-24).

Article 12, Section 1 expressly provides that “[i]ssues pertaining to [benefit] plans may be processed in accordance with the provisions of Article 2, Section 1, through 7 of the [CBA] but shall not be subject to referral for arbitration.” (GC 8, p. 23). Article 2, Section 5 establishes a defined procedure for “bargaining” -- as defined by contractual standards -- over changes in employment terms, including benefits. (*Id.*, p. 5; Tr. 92, 124. *See also* JD 10).

By practice, the Union can raise issues regarding planned benefit changes at the parties’ regular monthly labor-management meetings, which also are a forum for negotiations satisfying Section 8(d) of the Act. (Tr. 124).

Article 2, Sections 1-7 permits the Union to file a grievance as to the contractual bargaining procedure; but, consistent with Article 12, such a grievance is not subject to arbitration. (GC 8, p. 6; Tr. 98, 125). Accordingly, consistent with the process described by Article 12, per the CBA the Company can deny the Union’s grievance and implement benefit changes.⁴

ii. The Relevant CBA Language Has Remained Consistent For 55 Years

The language in Articles 2 and 12 establishing a contractual basis for addressing benefit changes has remained consistent for 55 years. The initial CBA governing the Mandan facility was entered into in 1955 between Standard Oil Company and the International Union of

³ The hearing transcript is cited as “Tr. ___;” the General Counsel’s exhibits as “GC___;” and Tesoro’s exhibits as “R ___.” References to the ALJ’s Decision and Recommended Order are cited as “JD ___.”

⁴ The removal of the plans themselves from the CBA is consistent with Tesoro’s ability to make benefit changes. As noted, the parties’ agreements are not silent on the treatment of benefits. The parties’ affirmative understanding through Article 12 that Tesoro is not bound to any particular benefits through the CBA is coupled with both a contractually-created process for addressing any changes, as well as the 2003 MOA (GC 5) which sets forth the basic plans to be provided, and explicitly incorporates those plans’ reservation of Tesoro’s right to change them.

Operating Engineers. During subsequent employer and union transitions, the CBA in effect at the time was assumed by the successor entity, including when Tesoro became the owner.⁵ (Tr. 31, 33, 113, 129, 132, 213; GC 4, p. 2; R 17, pp. 7, 27. *See also* JD 3).

Article 2's and 12's provisions have been identical throughout the entire 55-year labor relationship as to the process for the Union to respond to planned benefit changes. Along these lines, it is undisputed that the parties under Tesoro consistently have relied on previous contracts, past practices, and prior bargaining history, *e.g.*, that preceding both Tesoro and the USW as such, to address and resolve labor issues, including as to benefits. (Tr. 108, 129; 214; GC 6, p. 7, 32; GC 3, p. 7-9, 32-33. *See also* JD 12 n. 13).

iii. The Union Did Not Follow The CBA Procedures For Addressing Benefit Changes

Despite acknowledging that the Union was aware of them, Montoya admitted that Local 10 did not exhaust the Article 2 and 12 procedures for addressing planned benefit changes, *i.e.*, invoking the contractual bargaining procedure and then, if dissatisfied with the outcome, potentially filing a grievance:

Q. So did you understand through Mr. Peterson's response on December 6 that if you wanted to come forward and make proposals, Section 5 was the mechanism for you to do so?

A. You said 'Section 5?'

Q. Yes, sir.

A. Yes, that's what it says.

⁵ Standard Oil Company transitioned to Amoco, and OCAW became the Section 9(a) representative. Amoco merged with British Petroleum to form BP Amoco in approximately 1998. Tesoro purchased the Mandan facility from BP Amoco in 2001. OCAW merged with the United Paperworkers International Union to form PACE in 1999, and PACE merged with the United Steelworkers of America in 2006 to form the USW. (Tr. 24-26, 113, 132. *See also* JD 3-4).

Q. Okay. Now you never filed a grievance over the proposed benefit changes, is that correct?

A. No, sir.

Q. I'm sorry. Is what I said correct?

A. No, sir. Yes, that's correct.

Q. BY MR. DRITSAS: So you'd agree that for an issue involving benefits that the Union had the right to pursue Sections 1 through 5 of the grievance process. Excuse me, 1 through 7.

A. Well, we're aware of that.

(Tr. 91-92, 125).

iv. The Union Has Sought Unsuccessfully On Numerous Occasions To Eliminate The Company's Contractual Ability To Make Unilateral Benefit Changes

Through its bargaining conduct, the Union has long recognized that the Company – pursuant to the Article 2 and 12 process -- has the right to implement benefit changes. Knowing this to be so, on multiple occasions, Local 10 unsuccessfully has sought to eliminate such authority.

It is undisputed that in 2001, during the parties' negotiations for a successor CBA, the Union proposed deleting the provisions of Article 12 which made benefit changes unarbitrable, as well as the language which removed the plans from the CBA. (Tr. 98, 100, 169-170, 208; R 13-14, 40). Significantly, Local 10 did not obtain such revisions in the CBA, reinforcing the existing application of Articles 2 and 12. (Tr. 172, 175. *See also* JD 12). As Mandan Human Resources Manager Leif Peterson ("Peterson") testified without contradiction, the bargaining

goal of the Union in 2001 was to make the benefit plans themselves an arbitrable part of the CBA because the Company had “consistently changed and modified them.”⁶ (Tr. 211).

Indeed, 2001 was not the first time that the Union attempted to constrain the Company’s contractual right to unilaterally change benefits. As part of 1992-1993 successor contract bargaining, Local 10 advanced a similar proposal, which also was rejected, and constituted an unachieved demand. (Tr. 215; R 50. *See also* JD 12).

v. The International USW’s and Local 10’s Inability In 2009 CBA Bargaining To Obtain Protections Against Mid-Term Benefit Reductions Underscores Tesoro’s Ability To Make Unilateral Changes

When the parties negotiate over a successor CBA, benefit issues customarily have been conducted by the USW on a national level, and not in local bargaining. In national negotiations, the USW and a lead employer (in 2009, Shell) bargain certain industry-wide economic and non-economic terms, including benefit cost allocations. The agreed-upon national terms are then presented on the plant level, and bargaining occurs over additional employment terms not addressed in the national negotiations. (Tr. 75, 94. *See also* JD 4.)

Along these lines, it is undisputed that for at least the last 20 years, Local 10 always has sought and accepted coverage under the companywide benefit plans. Mandan never has had any separate plans during that time. *See* JD 4. The Company has made numerous unilateral mid-term benefit changes without any Union challenge since 1992-1993 that the Company does not possess such an ability. (Tr. 100, 102. *See also* JD 14-15.)

In the 2009 successor contract negotiations, *i.e.*, it is undisputed that the international USW was unsuccessful in obtaining a commitment that there be no reduction in medical-related

⁶ Peterson retired as Human Resources Manager at the Mandan facility in July 2011, having served in that position since April 1989. (Tr. 112).

benefits during the term of the CBA. The identical proposal was presented by the Union in local negotiations, also without success. (R 12; Tr. 92-94. *See also* JD 12). Accordingly, both the international USW and Local 10 expressly addressed mid-term medical-related benefit changes during the CBA bargaining process. The clear implication of the international USW's and Local 10's unachieved demand is that there otherwise is no restriction on Tesoro making such revisions.⁷

vi. The Parties' 2003 Memorandum Of Agreement, Which Remains In Effect, Expressly Incorporates Tesoro's Plan Reservation Of Rights To Undertake Unilateral Benefit Changes

Article 12 of the CBA, which addresses benefits, references only some of the plans which actually are provided to the bargaining unit. Other plans which are furnished by the Company and accepted by employees include, *e.g.*, a cafeteria plan and a dental plan.

The benefit plans established by Tesoro are not unanchored to any agreement between the parties, despite the fact that the plans themselves are removed from the CBA, GC 8. Rather, in connection with the BP Amoco-to-Tesoro transition (and the earlier Amoco-to-BP Amoco transaction), consistent with a labor agreement regarding successorship obligations, Tesoro was required to provide benefits which are "reasonably comparable in the aggregate to the package of benefits" of its predecessor. (Tr. 31-32; GC 5, p.1). Compliance with this requirement was the

⁷ This was not the first time that the Union deliberately sought such a restriction through the CBA bargaining process. In the 1992-1993 successor contract negotiations, in addition to the Union's proposal to make structural changes to the way that benefit issues are addressed, Local 10 unsuccessfully advanced the OCAW national proposal that "[t]here shall be no reduction of benefits during the term of this Agreement." (R 51; Tr. 215, 217). Despite the Company making numerous unilateral benefit changes, Local 10 otherwise has never attempted in successor contract negotiations to lock in specific benefits or plan details, but has accepted the plans in their entirety. (Tr. 100, 102. *See also* JD 4.)

product of negotiations between the new employer and the Union.⁸ (Tr. 33-34; GC 5). *See also* JD 3.

In the case of the BP Amoco-to-Tesoro transition, a Memorandum of Agreement was executed by Tesoro and the Union on August 28, 2003, *i.e.*, the 2003 MOA. (GC 5). The 2003 MOA became effective during the term of the February 1, 2002 - January 31, 2006 CBA. (Tr. 37; GC 6). Montoya acknowledged that the 2003 MOA sets forth the benefit plans which are to govern unit employees. (Tr. 71; GC 5).

Significantly, the 2003 MOA expressly states that it “does not alter the rights and obligations both Tesoro and PACE otherwise have under the Parties’ Collective Bargaining Agreement and the Benefit Plans referred to herein.” (GC 5) (emphasis supplied).

Montoya acknowledged that as a Union officer, he reviewed the 2003 MOA before he executed it, and understood each parties’ benefits and obligations. Montoya confirmed that the 2003 MOA has never been canceled or revoked, but was in effect during the instant matter. (Tr. 72-73). Importantly, Montoya specifically admitted that he understood the 2003 MOA did not alter any rights that Tesoro had under any of the benefit plans which the Company agreed to provide the bargaining unit. (Tr. 74).⁹ Indeed, the 2003 MOA was explicit that the parties had bargained fulsomely as to such matters and the terms of the agreement: “WHEREAS, Tesoro and

⁸ Montoya understood that the benefit plans referenced in the 2003 MOA were provided to both union-represented and non-union employees across the company. (Tr. 75, 168).

⁹ A structurally identical benefits Memorandum of Agreement was entered into on February 8, 2000 as part of the Amoco-to-BP Amoco transition (“2000 MOA”). The 2000 MOA contained a similar incorporation of benefit plan rights: “This Agreement does not alter the rights and obligations both the Company and the Union otherwise have under both the parties’ collective bargaining agreement and the benefit plans referred to herein.” (Tr. 182; R 42).

PACE have had full opportunity to and have negotiated in good faith regarding this package of Tesoro benefits[.]”¹⁰

vii. The Relevant Benefit Plans Contain A Reservation Of Rights Authorizing Tesoro To Make Changes

The relevant plans and summary plan descriptions in effect at the time of the benefit changes contain clear reservations of Tesoro’s right to make changes. (R 1-11, 15-16, 36-37). *See generally, e.g.*, Local Health Plans - HMO/PPO Supplement, p. 21 (“Tesoro expects and intends to continue the employee benefits described in this SPD indefinitely, but reserves the right to amend or discontinue any or all parts at any time.”). *See also* JD 7 n. 9; JD 10 n. 11.

Notably, identical or substantially similar reservations of Tesoro’s right to make unilateral benefit changes were in effect at the time of the 2003 MOA, which incorporated them into the parties’ labor agreement. (R. 18; Tr. 134).

viii. The Union Acknowledged The Plans’ Reservation Of Rights

Apart from the Union’s express assent to the plans’ reservation of rights in the 2003 MOA, it is undisputed that Local 10 President Montoya acknowledged such rights on behalf of the Tesoro Council.

In connection with contemplated companywide changes in post-retirement health care benefits, there is no dispute that on May 23-24, 2005, Company representatives met with Montoya -- who at the time also was serving as President of the Tesoro Council, a group of union representatives from various Tesoro-owned refineries -- and other union officials regarding Tesoro’s plans. (Tr. 221-223; R 32; R 54. *See also* GC 7, p. 3 (referencing “Council

¹⁰ The comprehensive negotiation process resulting in the 2003 MOA took over a year and a half following Tesoro’s acquisition of the Mandan facility. During such bargaining, the Union was provided with copies of the applicable plans and summary plan descriptions, including the reservation of rights language contained therein. (Tr. 133, 136).

President’’)). Montoya did not deny stating at the meeting: “Even though I recognize you have the right to make these changes, there are some I don’t agree with.” (Tr. 223) (emphasis supplied). *See also* Tr. 235-237). This was following the assertion of Tesoro Managing Director of Labor Relations Earl “Pete” Borths (“Borths”) that the plan documents provide for Tesoro’s ability to make changes. (Tr. 233-234). The ALJ found that Montoya made such an admission. (*See* JD 10). The changes identified duly were made without challenge by the Union as to the Company’s right to implement them. (Tr. 235).

ix. The Company Consistently Has Made Unilateral Benefit Changes Pursuant To Its Right To Do So

As both the procedures of Article 2 and 12 of the CBA and the plan reservation of rights incorporated in the 2003 MOA contemplate that it may do, Tesoro and its predecessors have made a variety of benefit changes without first engaging in Section 8(d) bargaining with the Union. (Tr. 100. *See also* JD 14-15).

Many of these changes have had a significant, less favorable impact upon the bargaining unit, including changes to:

- * available compensation in lieu of long-term disability
- * other aspects of the long-term disability plan
- * the funds available within the thrift plan
- * other terms of the thrift plan
- * the methodology for calculating lump sum distributions under the pension plan
- * retirement calculations and formulas affecting active employees
- * open plan enrollment availability
- * calculation of medical and dental costs
- * a managed health care system
- * sickness and disability qualifications
- * the GATT rate lump sum
- * continuation of stock funds
- * medical plan and savings plan design changes

It is undisputed that the Union never grieved or filed an unfair labor practice charge with respect to any of these changes -- other than an unsuccessful Board charge and other litigation in 1992-1993.¹¹ (Tr. 144-156, 177, 183-184, 190, 192; 212; R 25-34, 36- 41, 43, 45-47).

x. The Union Unsuccessfully Litigated The Issue Of The Company's Right To Make Unilateral Benefit Changes

As part of the fabric of the parties' history and understanding of the Company's rights, in 1992-1993, the OCAW undertook a multi-faceted challenge to (at the time, Amoco's) exercise of its authority to unilaterally change benefits. The OCAW was unsuccessful in all respects. This effort was in addition to the Union's failed attempts in bargaining over the years to restrict such rights, noted *supra*.

In 1993, OCAW filed an ERISA and LMRA Section 301 action in the United States District Court for the Northern District of Illinois with respect to Amoco's unilateral change to a managed health care system. (R 44).

The District Court granted summary judgment to Amoco, finding that there was nothing in the CBA which prevented it from making unilateral benefit changes. (*Id.*, pp. 8-9). Similarly, OCAW filed multiple Section 8(a)(5) unfair labor practice charges with respect to various mid-term benefit changes, which were dismissed.¹² (R 52; Tr. 218-219).

¹¹ Indeed, the Union tacitly understood that consistent with the Company's rights, it could "request" that the Company not undertake certain benefit changes, but that the Company had the ability to act unilaterally. (R 29-30; Tr. 150).

¹² The ALJ rejected as an exhibit R 52, the Board's dismissal of a separate, related unilateral modification charge. (*See* JD 14 n.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. (Tr. 220). Rather, the evidence is being 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. Tesoro

It is undisputed that the language of Article 2 and 12 of the CBA remained unchanged after OCAW's unsuccessful litigation. (Tr. 185-186. *See also* JD 14.) Indeed, the Union entered into the 2003 MOA which underscored that the Company's existing rights remained in force, and incorporated the plans' reservation of rights. (GC 5).

xi. Even If The Union Had An Alleged Section 8(d) Bargaining Right As To The January 1, 2011 Changes, It Did Not Diligently Exercise Such A Right

On July 28, 2010, Tesoro Chief Executive Officer Greg Goff ("Goff") sent Mandan and other Tesoro employees an e-mail communication describing "plans we have developed" to meet budgetary goals, which would include changes to existing thrift, 401(k), pension, medical, educational assistance program, and group life insurance plans. The planned changes were targeted to become effective on January 1, 2011 unless otherwise noted. Goff's communication stated that "[b]enefit changes for union represented employees will be made in accordance with the Plan documents and provisions of the applicable collective bargaining agreements." (GC 9).

xii. Tesoro Engaged In Good Faith Section 8(d) Bargaining Over The Planned Changes While Reserving Its Rights Under The Parties' Labor Agreements

The Union first became aware of Tesoro's planned changes through a telephone conversation between Montoya and Peterson shortly before Montoya received Goff's July 28, 2010 communication.¹³ (Tr. 43-44, 76).

respectfully requests that the rejected evidence be admitted into the record for the limited purpose described.

¹³ A day or two before, Peterson alerted Montoya that he needed to meet with the Union committee on July 29. (Tr. 67-68).

The next day, July 29, Peterson delivered a letter to Montoya, GC 10, which stated that the Company was willing to meet with the Union to discuss the planned benefits changes:

Please be advised that Tesoro intends to implement certain changes to employee benefits consistent with plan documents and applicable provisions of the collective bargaining agreement. A summary of the proposed changes is attached.

The primary reason for making benefits changes is to manage costs and improve our competitive position relative to our peers.

If you wish to discuss this matter, please contact me no later than August 11, 2010 in order to set a mutually agreeable date for a meeting.

In response, Montoya informed Peterson that it was the Union's position that the Company "needed to negotiate its benefits with the Union." (Tr. 45). According to Montoya, Peterson indicated that Tesoro was under no obligation to negotiate consistent with Article 12 of the CBA. (*Id.*). However, Montoya admitted that nothing in the Company's July 29 letter indicated that the Union was not permitted to provide input as to the planned benefit changes. (Tr. 79).

On August 5, 2010, Union Recording Secretary Kent Morrell ("Morrell") sent Peterson a written demand to bargain over the planned benefit changes, stating further that the Union would be making a written request for information "regarding the proposed benefit changes," and confirmed that it wanted to schedule meetings "following the submittal of our information request." (GC 11; Tr. 46).¹⁴

¹⁴ On August 10, 2010, Tesoro held a "town hall meeting" with Mandan employees to explain the planned benefits changes. It is undisputed that the Union had been provided with a copy of the Company's PowerPoint presentation and met with Peterson regarding the town hall meeting shortly beforehand. (Tr. 48, 121; GC 13). As with Goff's communication, the PowerPoint presentation indicated that "[b]enefit changes for union represented employees shall be made in accordance with the Plan documents and provisions of the applicable collective bargaining agreement." (GC 13, p. 3).

Thereafter, on August 18, 2010, Peterson delivered a letter to Montoya in which the Company reserved its rights under the CBA and the benefit plans, but affirmed its willingness “to discuss the benefit changes at a mutually convenient time.” Peterson further informed Montoya that he would contact him to schedule a meeting for such a purpose. (GC 12; Tr. 47).

On August 20, 2010, Morrell sent Peterson an information request on behalf of the Union as to Tesoro’s planned benefits changes “so that our Union will have sufficient information to bargain on behalf of its members in this matter.” (GC 14; Tr. 51). On September 9, 2010, Morrell delivered to Peterson an additional information request “pertinent to collective bargaining.”¹⁵ (GC 15; Tr. 53).

Over two months after Tesoro confirmed that it was willing to meet and discuss its planned benefit changes, and after the Company already had begun responding to Local 10’s information requests (which the Union expressly characterized as bargaining related),¹⁶ on October 22, 2010, Union Vice President Marcus Vogel (“Vogel”) e-mailed Peterson the following:

In response to your letter dated August 18th, 2010 to USW Local 10, we are not asking to discuss the changes in the benefit plan we are asking to bargain over these issues. If Management is in fact refusing our demand to bargain, we are asking on what basis this refusal is based on.

(GC 16; Tr. 54-55).

¹⁵ Both the August 20 and September 9 information requests referred to changes related to “the employee benefits package that covers USW members covered by existing labor agreements at Tesoro’s refineries and related operations.” (GC 14-15).

¹⁶ The Union’s minutes from the parties’ September 28, 2010 labor-management meeting reflect that “Management says Benefit Information we requested will be ready shortly.” (GC 19; Tr. 59).

Peterson responded to Vogel by e-mail on October 26, 2010, again confirming the Company's willingness to bargain: "Management is prepared to meet and discuss benefit plan changes with the Union at mutually agreeable times and locations." (GC 17; Tr. 55).

Indeed, the planned benefit changes were addressed at three of the parties' regular monthly labor-management meetings -- on August 11, September 28, and later on December 13, 2010.¹⁷ (Tr. 56-58; GC 18-20; R 19-21). Moreover, it is undisputed that in response to the Union's objections, on September 24, 2010, Tesoro informed Local 10 that it would not change the vacation policy which provided for a full vacation allotment as of a designated date to an "earn as you go" system as had been planned. (GC 20; R. 19; Tr. 103, 122, 137. *See also* JD 7).

Despite the fact that Tesoro had been engaged in consistent bargaining conduct -- offering to meet, meeting, discussing the planned changes, responding to the Union's information requests¹⁸, negotiating over confidentiality provisions as to certain such requests, revising its contemplated vacation policy changes in response to the Union's opposition -- on December 6, 2010, the Union through a Morrell e-mail to Peterson again inquired as to the Company's willingness to bargain:

The Union is asking for confirmation of the company's stand on negotiating the benefits changes. You gave Javier and I a letter, and you also emailed saying the company was willing to 'discuss' the benefits changes, but is not willing to negotiate this with the Union Is this correct? We would like to clarify and confirm where

¹⁷ It is undisputed that the regular monthly labor-management meetings were a standing forum in which Section 8(d) bargaining could occur -- that in such meetings the Union often asked the Company to make changes or adjustments in employment terms, some of which were granted. (Tr. 77-78, 115).

¹⁸ The Company provided certain benefit plan information to the Union on September 30, 2010 in response to its request. The Union submitted these materials to an international USW benefits analyst, Deborah Edwards ("Edwards"), located in Nashville, Tennessee. for her review (Tr. 81-82, 116-117; R. 1-11. *See also* JD 7).

the company stands with us right now. Please respond back to us by Thursday, December 9, 2010. Thank you for your time.

(GC 17). The same day, Peterson responded to Morrell via e-mail: “In response to your question and to clarify my email of October 22 to Marcus Vogel: The Company is following and prepared to follow Article 12 of the Agreement, including the procedures of Article 2, Sections 1-7 referenced therein. This should answer your question. If not, please let me know.” (*Id.*).

There is no dispute that at no point did Peterson ever tell Montoya that he was unwilling to listen to any input the Union might have on the planned benefit changes. Montoya likewise acknowledges that Peterson never stated that the Company would not negotiate over its plans, or that Tesoro refused to so meet and confer. (Tr. 79-81, 119, 128). Peterson never refused to bargain over the planned changes. (Tr. 123, 229-230).

During the parties’ December 13, 2010 labor-management meeting, Peterson emphasized that Tesoro was willing to consider any proposal the Union might have. Peterson reiterated the same in writing to Montoya on December 15. (Tr. 60; GC 20, 22). In fact, Montoya admitted that at that time Peterson affirmatively encouraged Local 10 to make a proposal if it was going to do so. (Tr. 80).

By mid-December, the parties had been negotiating over confidentiality protections for business-sensitive data requested by the Union for bargaining. (Tr. 120; R 22-23). After executing a confidentiality agreement on December 14, the next day Tesoro provided the remaining information sought by the Union. (GC 22; R 24; Tr. 63, 88-89, 227). There is no allegation in the Complaint that Tesoro was dilatory in responding to the Union’s information requests, or that the Union was prevented from formulating proposals as a result of the Company’s responses.

xiii. The Union Did Not Make Any Bargaining Proposal Prior To The Target Date For Changes, Nor Requested Any Extension Of Time

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.¹⁹ (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).

Having heard nothing further from Local 10, the Company implemented its planned benefit changes on January 1, 2011.²⁰ (Tr. 64).

B. Even If The Union Had An Alleged Section 8(d) Bargaining Right As To The January 1, 2011 Changes, It Never Had A Representative With Sufficient Authority To Negotiate

Even if the Union had an alleged Section 8(d) bargaining right as to the January 1, 2011 changes, at no point did Local 10 have a representative with authority to negotiate over them.

¹⁹ The Union sent the information received from Tesoro to Edwards. Montoya, as Local 10 President, never reviewed any of the information furnished by the Company. (Tr. 89).

²⁰ Contrary to the ALJ's finding, JD 9, a reduction in the 401(k) thrift plan matching contribution was not implemented on December 19, 2010. Rather, as with the remaining proposed changes, it actually was not implemented until January 1, 2011 through pay records issued thereafter. However, the change which was instituted was made retroactive to the beginning of the pay period which encompassed January 1, 2011, *i.e.*, December 19, 2010 (GC 23; Tr. 66).

Montoya acknowledged that Local 10 is the union party to the CBA, not the international USW. The CBA in effect at the time of the benefit changes makes clear that Local 10 is the Section 9(a) representative -- not the international. (*See, e.g.*, GC 8, p.4 (defining the “Union” as Local 10 and providing that the Union is “recognize[d] as the sole and exclusive bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment[.]”). *See also* JD 4, 20). Montoya admitted, however, that not only could the Union not negotiate over benefits without the consent of the international USW, at no point did it ask for or received any such authority.²¹ (Tr. 86-88).

III. Argument

A. Because A “Sound Arguable” Interpretation Of The Parties’ Labor Agreement Permits Tesoro To Unilaterally Change Benefits, The Complaint Should Be Dismissed.

The Complaint should be dismissed because there is a “sound arguable” basis for Tesoro’s position that the parties’ labor agreement permits it to make benefit changes. As a matter of policy, the Board will not serve as the equivalent of an arbitrator and decide what essentially is a repackaged contract dispute. Where, as here, mature bargaining parties have addressed an issue, the Board will not decide what is an interpretive disagreement over the meaning of their understanding.

As the Board recently reaffirmed in *Picini Flooring*, 355 NLRB No. 123, slip op. 2 (2010):

The Board has repeatedly held that “[w]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the union, we will not

²¹ Montoya likewise admitted that Edwards never got back to him about any of the requested information he sent her, and never discussed a proposal with her, or ever asked her for assistance in preparing a proposal. (Tr. 101).

seek to determine which of two equally plausible contract interpretations is correct.’ *Atwood & Morrill*, 289 NLRB 794, 795 (1988). In such cases, the Board will not find an 8(a)(5) violation, leaving the parties to resolve their contract dispute in an appropriate alternative forum. (footnote and additional citations omitted).

Along these lines, the Board holds that:

when an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.

NCR Corp., 271 NLRB 1212, 1213 (1984), *quoted in Picini Flooring, supra; Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949 (2006). *See also Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005); *Crest Litho, Inc.*, 308 NLRB 108, 111 (1992); *Vickers, Inc.*, 153 NLRB 561, 570 (1965).

Here, no union animus or intent to undermine the Union has been alleged or shown. To the contrary, both Tesoro’s good faith bargaining conduct regarding the benefit changes at issue (discussed in greater detail, *infra*), as well as the evidence introduced of the parties’ history and practices establish that fundamentally the parties have had a constructive relationship. The instant case boils down to a *bona fide* disagreement over contract rights.

The ALJ focuses on the provision of Article 12 of the CBA in which the “Benefit Plans of the Company ... shall not in any instance be or become a part of this Agreement.” (GC 8, p. 23; JD 10). But the ALJ fails to give effect to the rest of the article, as well as other aspects of the parties’ labor agreement.

The parties were not silent in the CBA as to their treatment of benefits, an essential employment term. That the benefit plans themselves were removed from the CBA must be considered with the remainder of Article 12’s provisions. Article 12 establishes an express

procedure for addressing benefit changes. By reference to Article 2, Sections 1-7, it permits the Union to pursue “bargaining” – as defined by contract standards developed under the CBA – regarding planned changes. If such bargaining does not resolve any outstanding issues, the parties have agreed that the matter may be grieved; but, importantly, is not subject to arbitration. Even if the Article 2 and 12 process is invoked by the Union to object to a planned change, the parties’ agreement permits the Company to implement the change at its conclusion. Here, Montoya admitted that Article 2, Section 5 was “the mechanism” the CBA provides for the Union to initiate issues regarding proposed benefit changes; and, further, that Local 10 did not file a grievance over the planned changes at issue. (*Supra*, pp. 5-8).

Moreover, the CBA is not the only instrument of the parties’ labor agreement which addresses benefit changes. The 2003 MOA, which Montoya acknowledged remains in effect, is also part of the parties’ labor agreement as an understanding supplemental to the CBA. It clearly states that it “does not alter the rights and obligations both Tesoro and PACE otherwise have under the Parties’ Collective Bargaining Agreement and the Benefit Plans referred to herein.” (GC 5) (emphasis supplied). Thus, the parties expressly have incorporated the benefit plans into the 2003 MOA, including the rights contained in those plans for Tesoro to make unilateral changes. The 2003 MOA similarly represents the parties’ mutual understanding as to benefits.²²

The ALJ’s decision errs in multiple respects. First, while acknowledging that the Article 2 and 12 process exists, the ALJ suggests that Tesoro is seeking to “dictate the manner in which the [Union] requests bargaining in over planned changes in a mandatory subject of bargaining.”²³

²² The 2003 MOA plainly recites that the parties “have had full opportunity to and have negotiated in good faith” in this regard. (GC 5).

²³ The ALJ’s reliance upon *Bell Atlantic Corp.*, 332 NLRB 1592, 1595 (2000) is obscure, *e.g.*, it does not state expressly such a holding. In any event, the instant situation is different –

(See JD 10.) The Company is doing no such thing. Rather, by contract, Local 10 and Tesoro have agreed on “the mechanism” (Tr. 91-92) for addressing proposed changes. As the ALJ admits, part of that process is bargaining within the meaning of Article 2, Section 5. (See JD 10.) But the ALJ then reads out of existence the remainder of the process: if bargaining is unsatisfactory to the Union, the filing of a grievance under Article 2, Sections 1-7, as expressly provided for in Article 12. If the Union does not like the Company treatment of benefits issues, the parties – as part of their overall understanding on benefits – have agreed on how such matters will be addressed and resolved.

If this process was not intended as the parties’ mutual understanding on how to deal with benefits issues, it would be meaningless in light of the ALJ’s conclusion that Tesoro has a statutory obligation to bargain to agreement or impasse over any planned benefit change.

Moreover, the ALJ similarly fails to give effect to the plain language of the 2003 MOA. As Montoya acknowledged, the 2003 MOA describes the plans in which the bargaining unit participates, and rights and obligations of the parties as to benefits. *See supra*, pp. 10-12.²⁴ The 2003 MOA expressly incorporates Tesoro’s “rights ... under the Benefit Plans” – which include its right to change benefits.²⁵ 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 rights for *NCR/Picini Flooring* purposes – which is incorrect given the remainder of Article 12 and Article

here, the parties agreed on a process which not only included bargaining (the sufficiency of which, if questioned, is a matter of their contract), but also a grievance procedure.

²⁴ As the ALJ found, the 2003 MOA, which Montoya acknowledges remains in effect, was the product of “bargain[ing] regarding the benefits of the employees in the Mandan unit.” (JD 4.) Part and parcel of that bargain is the understanding that the “Benefit Plans” – including the plan reservation of the rights – are a source of rights between the parties.

²⁵ What other “rights” would Tesoro have?

2 – then the parties’ 2003 MOA reiterating Tesoro’s rights under the plans controls. Without the plans – in their entirety – there otherwise would be no framework for providing employee benefits at all at the facility.

Similarly, the 2003 MOA vindicates Tesoro’s rights under the “Parties’ Collective Bargaining Agreement.” (See JD 4). Those rights include the ability to unilaterally act consistent with the Article 2 and 12 procedures, in addition to the plans’ reservation of rights. Otherwise the reference to CBA benefit rights would be a nullity and make no sense.

Accordingly, there is a contractual basis for Tesoro’s possessing the right to undertake benefit changes. It plainly satisfies the Board’s “sound arguable” basis and/or “equally plausible” thresholds, which is all that the *NCR/Picini Flooring* cases require.²⁶

This ability for the Company to make benefit changes consistent with Articles 2 and 12 has not changed since the original CBA in 1955. It is underscored by the 2003 MOA. Further, for *NCR/Picini Flooring* purposes, every aspect of the parties’ bargaining history, past practice, and prior litigation reinforces Tesoro’s interpretation and application of the parties’ labor agreement on benefits.

Bargaining History: On numerous occasions in bargaining, the Union unsuccessfully has sought to eliminate the Company’s right to make benefit changes. In successor CBA bargaining in both 1992-1993 and 2001, the Union deliberately sought to make the benefit plans part of the CBA and issues regarding them arbitrable. It is undisputed that the reason for this was because of the Company’s benefit changes. (*Supra*, pp. 8-10. See also JD 12). Put simply, if the

²⁶ That benefit disputes are not arbitrable under the parties’ labor agreement is not relevant to an *NCR/Picini Flooring* disposition. As in 1992-1993, the Union may bring an action under 29 U.S.C. § 185 (Section 301 of the Labor Management Relations Act) if it believes there has been a violation of the agreement. As the Union understood in 1992-1993, that is the “appropriate alternative forum.” *Picini Flooring, supra*.

Company did not possess the right to make benefit changes, and the Union did not understand this, the Union would not have attempted to constrain such a right. Similarly, if the Company did not have the ability to change benefits, the international's and Local 10's unsuccessful proposals in successor CBA bargaining in 1992-1993 and 2009 (*i.e.*, as to the labor agreement currently in effect) to prohibit reduction of mid-term medical benefits would make no sense. (*See also* JD 13). The Union's two-decade bargaining conduct consistently acknowledges the Company's right.

Past Practice: There is no dispute that the Company consistently has made numerous, substantial benefit changes for nearly the last 20 years without challenge by the Union that it lacks the ability to do so. (*Supra*, pp. 8-11, 13-15. *See also* JD 14-15). This, moreover, is wholly consistent with the fact, as the ALJ found, that:

[h]istorically, the Mandan facility had always been subject to an employer's national employee benefit plans and [the 2003 MOA] did not change this practice. Thus, the unit employees at the Mandan facility were covered by the Respondent's national benefit plans. ... The Mandan facility has always been subject to the Respondent's national employee benefit plans and has never had a benefit plan that applied only to the employees at the facility.

(JD 4). Given the national benefit structure which Local 10 has desirously availed itself of, it is inconsistent with common sense to conclude that benefits were intended to be balkanized in the manner the ALJ suggests.

Litigation History: In 1992-1993, OCAW launched a comprehensive, multi-faceted attack upon the Company's right to make benefit changes, filing both a Section 301/ERISA federal court complaint, and unfair labor practice charges. It is undisputed that these challenges were unsuccessful in all respects. The same CBA language that was in effect at the time of the litigation remains in effect. Accordingly, the Union already has called the question as to the Company's ability to change benefits, and the Company's right has been vindicated. Indeed,

with the OCAW litigation in memory, the parties entered into the 2003 MOA which expressly reiterated the Company plans' reservation of rights, and incorporated them into the parties' labor agreement. (*Supra*, pp. 14-15. *See also* JD 13-14, 14 n. 14).

Far from not addressing benefit changes in their labor agreement, the parties have not let such an important subject go unattended. This dispute implicates a disagreement over Tesoro's rights under the instruments of the parties' understanding. At bottom, the Union is seeking to enlist the Board to revisit and change the results of what the Union could not achieve through either bargaining or prior litigation over the Company's rights. As the Board recognizes in the *NCR/Picini Flooring* line of cases, it is patently wrong for the Board to exercise its institutional authority to favor a party in such a circumstance.

B. Tesoro's Ability To Make Benefit Changes Is Covered By The Parties' Labor Agreement

As discussed *supra* at pp. 5-8, the parties' labor agreement gives Tesoro the right to make unilateral benefit changes. The parties did not simply leave their understanding silent as to benefits treatment. Rather, as shown, they covered the issue through the Article 2 and 12 procedures, and through the 2003 MOA.

Where, as here, "a bargain resolves any issue, it removes the issue *pro tanto* from the range of bargaining." *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993) (internal quotation omitted). Accordingly, where parties have addressed a matter through their labor agreement, "the union has exercised its bargaining right and the question of waiver is irrelevant." *Id.* *See also Connors v. Island Creek Corp.*, 970 F.2d 902, 905 (D.C. Cir. 1992); *Local Union No. 47, IBEW, AFL-CIO v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991) (holding when labor agreement defines pertinent rights "it is incorrect to say that the union has 'waived'

its statutory right to bargain; rather, the contract will control and the ‘clear and unmistakable’ intent standard is irrelevant.”); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1994).

For 55 years, the parties’ labor agreement has allowed the Company to make unilateral benefit changes, and it has done so on numerous such changes consistent therewith. The Union’s unsuccessful challenges to such a right underscore that this right exists. It should be given effect, and the Complaint dismissed for this reason as well.

To the extent that the Board may rely on prior decisions such as *Children’s Hospital Medical Center of Northern California*, 351 NLRB 569, 571 (2007) and *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) to decline to apply the “contract coverage” approach enunciated by the District of Columbia Circuit, Tesoro requests that it reconsider the holdings and reasoning in those cases. *See also, e.g., Exxon Research & Engineering Co.*, 317 NLRB 675, 676-677 (1995) (Member Cohen, dissenting in part), *enf. denied* 89 F.3d 228 (5th Cir. 1996); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836-837 (1999) (Member Hurtgen, dissenting in relevant part), *enf. granted in part and denied in part* 233 F.3d 831 (4th Cir. 2001); *California Offset Printers*, 349 NLRB 737, 738 (2007) (Member Schaumber, dissenting); *Provena St. Joseph Medical Center*, 350 NLRB 808, 816-818 (2007) (Chairman Battista, dissenting).

Contract coverage also is a factor in the Board’s “clear and unmistakable waiver” approach, discussed *infra*, while more than warranting dismissal under the Board’s *NCR/Picini Flooring* doctrine.

C. The Union “Clearly And Unmistakably” Waived Its Right To Bargain Over The Planned Benefit Changes

Beyond the parties’ labor agreement addressing benefit changes, their overall 55-year history establishes that the Union “clearly and unmistakably” waived its right to bargain over the

planned changes here. *See, e.g., Provena St. Joseph Medical Center*, 350 NLRB 808, 810-815 (2007).

A “clear and unmistakable” waiver can “occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.” *American Diamond Tool*, 306 NLRB 570, 570 (1992) (*quoting Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)).

All of the parties’ agreements, understandings, actions, and inactions over decades consistently point to the same conclusion -- that Tesoro has the right to make unilateral benefit changes.

The Parties’ Labor Agreement: As noted *supra*, the ALJ erroneously treats the removal of the benefit plans themselves from the CBA as if the parties had no express understanding at all regarding an important issue as benefits and changes thereto. The Company and the Union did not leave such matters unaddressed throughout their 55-year relationship. Had they done so, the hearing record would have been completely different from what it was -- with the Company and Union having engaged in Section 8(d) bargaining to agreement or impasse on a myriad of benefit changes. The undisputed record is the precise opposite.

First of all, the CBA is not silent about benefits. Rather, it affirmatively removes the plans themselves from the CBA. As discussed *infra*, from the parties’ bargaining history and practices, they consistently have understood this to mean -- since it was introduced into the original CBA in 1955 -- that the Company has unilateral control over benefits (except as otherwise modified, *e.g.*, through the 2003 MOA).

Along these lines, the ALJ ignores the remainder of Article 12, and fails to give it effect. Article 12 (and its reference to Article 2) delineate a procedure for addressing planned benefit changes, which allows them to be “bargained” if the Union desires to do so. That is what has occurred over the years, with planned mid-term changes being addressed in the parties’ regular monthly labor-management meetings, or occasionally during a special meeting(s). If the Union is unhappy with the outcome of such discussions, the Article 2 and 12 procedures then permit it to file a grievance over the matter, which invokes a different process of consideration. Montoya admitted that the Union was well aware of its ability to do so, but did not pursue such a grievance here. Importantly, the Article 2 and 12 procedures do not allow the Union to arbitrate the planned changes. If the grievance process has been invoked, it ends and the Company may make its changes.

If that were not enough, in the 2003 MOA -- and in the 2000 MOA before it -- the Company and the Union expressly incorporated Tesoro’s rights under the plans into another agreement, which Montoya acknowledged remains in force. Here, as well, the ALJ disregards pertinent contract language. It is not meaningless and it is not a nullity. It specifically reiterates the parties’ mutual understanding that the Company has benefit-related rights under both the CBA and the plans. Those rights include the ability to unilaterally act consistent with the Article 2 and 12 procedures --otherwise the reference to CBA benefit rights would make no sense -- and in accordance with the plans’ reservation of rights. To find otherwise would be to inappropriately read this provision out of existence.²⁷

²⁷ The ALJ suggests that the summary plan descriptions including Tesoro’s reservation of rights are “not collectively bargained documents.” (JD 11). The ALJ ignores 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

Giving the parties' labor agreement on benefits effect, it establishes "expressly or by necessary implication," *Provena*, 350 NLRB at 812 n. 19, that Tesoro may unilaterally change benefits.

Bargaining History: As discussed *supra*, the parties' bargaining history is consistent with their understanding that the Company may make benefit changes. If that were not the case, the Union's numerous, unsuccessful attempts over the years to eliminate the Company's right to do so would be nonsensical.

As noted *supra*, in successor CBA bargaining in both 1992-1993 and 2001, the Union tried and failed to make the benefit plans part of the CBA and issues regarding them arbitrable. Peterson testified -- and the Union did not dispute -- that the reason for this was to resist the fact that the Company had the right to change benefits. *Supra*, pp. 8-9. Accordingly, if the Union did not fully recognize that the Company had the ability to make unilateral benefit changes, it would not have proposed to abrogate such a right. The identical CBA language (*i.e.*, Articles 2 and 12) remained in the CBA following those unsuccessful attempts to remove it. Indeed, thereafter, the parties entered into the 2003 MOA which underscored the rights which the Union had been unable to eliminate.

Along these lines, if the Company did not have the ability to change benefits, the international USW and Local 10 would have had no reason to unsuccessfully propose in successor CBA bargaining in 1992-1993 -- and in 2009 for the current CBA -- that medical

explicit that "Tesoro and PACE have had full opportunity to and have negotiated in good faith regarding this package of Tesoro benefits[.]" *See supra*, pp. 11-12. For the ALJ to assert that the Union was not a knowledgeable bargaining participant and somehow should not be held to its express understanding simply is unsupported.

benefits could not be reduced mid-term. The obvious implication of these proposals is that the Company can do so. *See* JD 12.

In this case, the Union is seeking to obtain through Board litigation what it had an opportunity to achieve -- and failed to attain -- through bargaining. This is inappropriate and contrary to Board policy. *See, e.g., Ace Beverage Distribution Co.*, 253 NLRB 951, 952 (1980) (“Under these circumstances, to find a violation here would give the Union through an unfair labor practice proceeding what it sought---but could not achieve---through good-faith negotiations at the bargaining table. As Respondents urged at the hearing, ‘The contract falls where it falls and in effect, contrary to the agreement of the parties, what the General Counsel is attempting to do is re-write the agreement...[.]’”) (footnotes omitted); *Ball Corp.*, 322 NLRB 948, 952 (1997) (“Other factors also weigh strongly in favor of the Union’s interpretation of the contract. ...If Local 93 or the International were powerless to prevent such practices, then the consequence would be in effect be two separate Local unions, notwithstanding union rejection of the Company’s initial proposal in this regard. The Company would thereby achieve what it could not get at the bargaining table.”).²⁸

Moreover, as part of the parties’ bargaining history, beyond doing so in the 2003 MOA, the Union expressly acknowledged the plans’ reservation of Tesoro’s rights. As discussed *supra*, in May 2005, in connection with planned benefit changes, Company representatives met with representatives of the Tesoro Council, *i.e.*, a group of union representatives from various Tesoro-

²⁸ The ALJ’s attempt to distinguish *Ace Beverage* and *Ball Corp.*, JD 13, misses the mark. Both here and in those cases, the union was unsuccessful in bargaining in obtaining pertinent contract changes. The sound policy reasons for not awarding a party rights or benefits that they could not achieve through statutory bargaining is equally compelling. Moreover, that the Union felt impelled to make the proposals it did is notable evidence that the 2003 MOA and Articles 2 and 12 of the CBA have the meaning to which Tesoro has ascribed to them.

owned refineries. During that meeting, Tesoro clearly asserted its plan rights to make unilateral benefit changes. In response, Montoya -- also serving as President of the Tesoro Council -- acknowledged: "Even though I recognize you have the right to make these changes, there are some I don't agree with." (emphasis supplied). The changes at issue subsequently were made without challenge by the Union as to the Company's right to implement them. (*Supra*, pp. 12-13).

Montoya's admission of Tesoro's rights was undisputed and un rebutted at the hearing despite his availability and opportunity to do so. The ALJ found that he made them, yet refused to give them any weight whatsoever. (*See* JD 4, 10-11).

The unsuccessful Union litigation in 1992-1993 is an equally instructive element of the parties' bargaining history. As noted *supra*, OCAW unleashed a multi-prong attack on the Company's exercise of its right to make benefit changes. The question was called, similar to here. The Union's Section 301/ERISA lawsuit, and its Section 8(a)(5) charges -- none of which succeeded -- were all directed at the same fundamental issue: whether the Company could unilaterally change benefits. The answer on all fronts was: yes.²⁹

Since that time, not only has the Union similarly been unsuccessful in changing the operative CBA language which consistently has been in effect, the 2003 MOA only reiterated the Company's rights. In 2009 CBA bargaining, there was no reason for the Company to revisit the meaning of Articles 2 and 12 or the 2003 MOA. It had been well-established through the

²⁹ The ALJ essentially points out that the Union's unsuccessful Section 301 litigation did not decide the issue of Section 8(a)(5) obligations. (*See* JD 14). That is true enough as far as it goes, but it ignores the reason that and the earlier unfair labor practice litigation was introduced (or sought to be introduced) at the hearing. It is persuasive bargaining history. It, combined with the history of either Union acquiescence to unilateral changes or failed attempts through negotiations to limit or eliminate the Company's rights paint a decades-old, consistent picture which infuses the meaning of Articles 2 and 12 and the 2003 MOA.

parties' prior history, all of which favored the Company rights. Their meaning has been tested, and is settled.

The Union's agenda in this case is straightforward: after a passage of time, go back to the Board to try to reverse its previous unsuccessful efforts to abrogate the Company's rights. The parties' bargaining history, however, is consistent and belies such an effort.

Past Practices/Union Action and Inaction: It bears recognizing that the Union's practice – for as long as collective memory served at the hearing – has been to obtain companywide benefits. The bargaining unit has fully reaped the marketplace advantages of such participation. No evidence was presented that Mandan ever has had discrete plans, and the Union has never bargained for separate benefits. (*Supra*, p. 9. *See also* JD 4). Understandably, however, in offering and managing companywide benefits, the flexibility to make changes across the system is a critical Company interest.

Against this backdrop, the undisputed evidence is that for decades, the Company has made numerous unilateral mid-term benefit changes. Many of these changes have been substantial and less favorable to the Union. Since the Union's unsuccessful litigation in 1992-1993, and over the course of several CBAs containing the identical provisions vindicated as allowing Company-directed changes – and buttressed further by the 2000 and 2003 MOAs – the Union has never challenged the Company's asserted unilateral rights. (*Supra*, pp. 13-14. *See also* JD 14-15).

Other than in 1992-1993, the Union's 55-year acquiescence to the Company's and its predecessors' unilateral rights is complete and consistent. It has never otherwise objected in any forum to the Company's many adverse changes, or bargained restrictions on future changes in response to such changes. If the past practice element of "clear and unmistakable waiver"

analysis has any meaning, it surely must here. *See Mt. Clemens General Hospital*, 344 NLRB 450, 460 (2005) (finding undisputed evidence showing that the Union never bargained over any changes, never requested to bargain over them, and never objected to any of the changes) (“The circumstances here present a stronger case for finding no violation because here there is no contractual language which provides for a collectively-bargained TSA plan. Instead, there is a 20 year history of making unilateral changes to the TSA program, which was accepted without opposition by the Union.”).

It is compelling that neither the Acting General Counsel nor the Charging Party could rebut Tesoro’s evidence that at no point during the parties’ and their predecessors’ 55-year relationship had the Company ever been constrained by law or contract from making mid-term benefit changes. They could not offer a single instance to the contrary, and the ALJ found none.

In this case, the Board wades into a decades-old stream, in which every aspect of the parties’ written agreements, and the Union’s unachieved bargaining demands, inaction and acquiescence to mid-term changes, express acknowledgment of the Company’s authority, and consistently unsuccessful litigation all inform the parties’ mutual understanding of Tesoro’s unilateral rights.

The instant situation is in the same vein as the Board’s recent decision in *Omaha World-Herald*, 357 NLRB No. 156 (December 30, 2011). In *Omaha World-Herald*, the Board found that “an amalgam of factors” supported the employer’s contention that the Union waived its right to bargain over changes to employees’ pension plan during the term of the collective bargaining agreement. In the Board’s view, several elements of the parties’ labor contract, the applicable plan documents, and past practice supported this conclusion.

These factors included exclusion of the pension plan itself from the labor contract, the plan's reservation of rights language, past union acquiescence in unilateral changes, the labor contract's removal of plan changes from the grievance and arbitration provisions in order to preserve uniformity of coverage between bargaining unit and non-unit employees, and contract language underscoring that mid-term bargaining was not required over plan changes. Slip op. 1-3.

The circumstances here are not materially different. Here, the benefit plans themselves are removed from Article 12 of the CBA. But as in *Omaha World-Herald*, rather than leave the 55-year relationship silent as to benefits, the parties and their predecessors addressed them through a contractual bargaining and grievance procedure which, at the end of the day, explicitly excludes arbitration and permits the Company to act unilaterally. The backdrop to such a procedure here, as there, is the need to efficiently administer benefit plans which extend beyond the coverage of the discrete bargaining unit. Reflective of such a uniform benefit structure, the 2003 MOA – also a labor contract between the parties – vindicates both the Article 2 and 12 process for dealing with mid-term benefit issues, as well as the plan reservations of rights which allow Tesoro to make changes. Moreover, here, there is a consistent, decades-old history of Union acquiescence to a myriad of mid-term changes; indeed, unlike in *Omaha World-Herald*, there is a similarly compelling history of unachieved Union bargaining demands and litigation which further informs and confirms the Company's rights.

D. The Union's Failure To Bargain In Good Faith Precludes A Finding That Tesoro Violated Section 8(a)(5) Of The Act

The Union's unclean hands preclude a finding that Tesoro violated Section 8(a)(5) of the Act. It is undisputed that at no point following the Company's announcement of its planned benefit changes on July 28, 2010 did the Union, despite its assertion of a bargaining right, ever

had sufficient authority or willingness to meaningfully negotiate.³⁰ *See supra*, pp. 20-21. Thus, even if *arguendo* the Union possessed a Section 8(d) bargaining right, its conduct made good faith negotiations impossible.

Local 10 is the Section 9(a) representative for Mandan, not the international USW. The CBA makes clear that Local 10 is recognized as the sole and exclusive bargaining representative; the international USW is not a party to the CBA. (GC 5. *See also* JD 3, 4, 20). Along these lines, the Union's bargaining demand and information requests were made by and on behalf of Local 10, which acknowledged that it is the exclusive representative. (*See, e.g.*, GC 11, August 5, 2010 bargaining demand from Local 10 Recording Secretary Morrell ("As the exclusive representative of these employees the Union is making a demand to bargain any such changes.")).

Despite being advised of the Company's plans for over five (5) months prior to the target date for changes, Local 10 was never in a position to bargain over them. Montoya admitted that Local 10 was powerless to negotiate, and did not even attempt to remove any intraunion barrier to doing so. (*See supra*, pp. 20-21). Such complete lack of bargaining authority throughout the entire process constitutes bad faith. *See, e.g., Vandio d/b/a/ Professional Eye Care*, 289 NLRB 1376, 1391-1392 (1988); *S-B Mfg. Co.*, 270 NLRB 485, 492 (1984).

The Board holds that where a bargaining party, by its own conduct, prevents good faith negotiations from being conducted, the other party's conduct is incapable of being reasonably assessed; and, a violation may not be found. *See Irving Ready-Mix, Inc.*, 357 NLRB No. 105 (2011) slip op. at 13 (no Section 8(a)(5) violation where union's bad faith created situation in

³⁰ The only exception apparently is with respect to discussion of the vacation policy at the regular monthly labor-management meetings.

which employer's good faith could not be tested); *Chicago Tribune Co.*, 304 NLRB 259, 260 (1991) (“[T]he Board stated long ago that ‘a union’s refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer’s own good faith can be tested. If it cannot be tested, its absence can hardly be found.’”) *Times Publishing Co.*, 72 NLRB 676, 683 (1947).” (footnote omitted).

The ALJ acknowledges that Local 10 is the statutory bargaining representative at Mandan. (JD 20). He then excuses Local 10 from abdicating its negotiating responsibility by asserting that it appropriately “coordinate[ed] its bargaining with the International Union.” *Id.*

Local 10, however, went beyond mere coordinated bargaining. Rather, the uncontroverted record evidence is that it lacked any authority to negotiate at all without permission of the international USW, a separate labor organization. That is unlawful, and it bars a bad faith bargaining allegation against Tesoro. *See, e.g., Don Lee Distributor, Inc.*, 322 NLRB 470, 471 (1996), *enfd.* 145 F.3d 834 (6th Cir. 1998) (“Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units.” *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), *enfd.* 490 F.2d 1383 (6th Cir. 1974)”); *International Paper Co.*, 309 NLRB 44, 45 (1992).

Because it is undisputed that Local 10 had no authority or willingness to enter into an agreement or even to advance binding proposals, the Complaint also should be dismissed for this reason.

E. Even If The Union Had An Alleged Section 8(d) Right to Bargain Over The January 1, 2011 Changes, It Waived Any Such Right Through Inaction

Beyond never having a representative with authority to negotiate, even if the Union had a Section 8(d) right to bargain over the January 1, 2011 changes, it waived any such right by

otherwise failing to exercise it diligently. Even under the Acting General Counsel's theory of the parties' conduct, the undisputed facts establish that the Union did not responsibly and timely participate in the negotiations that were offered to it.

The undisputed facts show that Tesoro engaged in good faith conduct consistently throughout. The Union was given advance notification of Tesoro's plans prior to Goff's communication to bargaining unit employees. Montoya admitted that at no point did Tesoro inform the Union it was refusing to negotiate over them, nor ever so refused to meet and confer. (*Supra*, pp. 16, 19).

Local 10 duly made bargaining-related information requests, and there is no dispute -- much less any allegation -- that the Company responded to them in a timely and complete manner. Certain information was provided within a few weeks, with the remainder supplied immediately after the parties negotiated and entered into a confidentiality agreement, which the Board contemplates is an appropriate approach to sensitive information. (*Supra*, p. 19. *See also* JD 8 n. 10). *See, e.g., Metropolitan Edison Co.*, 330 NLRB 107, 107-110 (1999). There is no allegation in the Complaint that Tesoro's information request responses prevented the Union from formulating proposals or otherwise from bargaining. Accordingly, where the Union made no such contention and filed no such charge, it is inappropriate for the ALJ to find that Tesoro's information request responses affected the Union's ability to actively participate in bargaining.

The planned benefit changes were addressed at three of the parties' regular monthly labor-management meetings; it is undisputed that such meetings may serve as a forum for Section 8(d) negotiations. Indeed, there is no dispute that in response to the Union's opposition at such a meeting, Tesoro abandoned its plans to change the vacation policy. (*Supra*, p. 18. *See also* JD 7).

Consistent with the foregoing, there is no evidence that the Union was presented with a *fait accompli* as to the Company's plans, nor did the ALJ find one. Indeed, in his opening statement, Counsel for the Acting General Counsel did not so allege, nor did the Union at the hearing.

The ALJ found 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 (footnote omitted). The facts adduced at the hearing present a different picture. While reserving its rights under the parties' labor agreement,³¹ Tesoro never told the Union it was refusing to bargain over its planned benefit changes. Montoya plainly admits this. (*Supra*, pp. 18-19). 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. They conferred regarding the Company's plans. Tesoro timely and fully responded to information requests.³² It appropriately negotiated with the Union as to confidentiality protections for certain information. Tesoro revised its plans (*i.e.*, as to the vacation policy) in response to the Union's opposition.

³¹ Indeed, it is not unlawful or a *fait accompli* for an employer to present its position on changes as a fully developed plan. Even informing a union that its position would not change does not constitute a *fait accompli* where the union is afforded an opportunity to bargain. *See, e.g., McGraw-Hill Broadcasting Company, Inc.*, 355 NLRB No. 123 (2010) ("A union is entitled to bargain over a decision even after it has been made, but before it has been implemented. Similarly, an employer is not required to bargain before making its decision, but it is required to delay implementation to allow for good-faith collective bargaining once the decision has been made.") (footnote omitted); *The Boeing Co.*, 337 NLRB 758, 763 (2002); *Alltel Kentucky, Inc.*, 326 NLRB 1350, 1350-1351, 1356 (1998); *Haddon Craftsmen*, 300 NLRB 789, 790-791 (1990). Here, it is undisputed that Tesoro never told the Union it would not bargain over its plans, and in fact revised them after conferring with Local 10. *Supra*, pp. 18-19.

³² There is no finding that it did not. *See JD passim.*

The Acting General Counsel’s assertion that communicating a willingness to “discuss” planned changes does not evidence a readiness to “bargain” over them is untenable under the express language of the Act.

Section 8(d) itself defines “bargaining” as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]” 29 U.S.C. § 158(d) (emphasis supplied). Section 8(d) goes on to explicitly state that “the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period[.]” *Id.* (emphasis supplied).

Accordingly, indicating a readiness to “discuss” terms is wholly consistent with -- and does not somehow foreclose -- a willingness to “bargain,” which Montoya concedes the Company never refused to do. Indeed, the Board regularly has treated the terms as equivalent and interchangeable.³³

³³ See, e.g., *Kay Fries, Inc.*, 265 NLRB 1077, 1077 (1982) (“Finally, the record reveals that, when protesting the rule to Wasilewski, the Respondent’s personnel director, Union President Paul agreed to discuss alternatives to the rule at an upcoming grievance meeting on September 29. We find that such action constituted a timely protest and request to bargain over the proof requirement and that, therefore, the Respondent’s unilateral imposition of such violated Section 8(a)(5).”) (emphasis supplied); *Cessna Aircraft Co.*, 172 NLRB 696, 706-707 (1968) (“the union must do more [than merely object]; it must enforce its bargaining rights diligently by attempting to persuade the respondent to alter its decision if it found the decision unacceptable. While it is true that the respondent indicated that its decision was not bargainable, this did not reflect, in the context of all the facts and surrounding circumstances, an uncompromising attitude which foreclosed bargaining.... Additionally, the respondent offered to discuss any problems or adverse effects that the Union foresaw would be created by these changes.”) (emphasis supplied); *Elton Johnson d/b/a/ Print Quic*, 262 NLRB 857, 858 (1982) (“Complaint paragraph 11(b) alleges that Respondent unilaterally laid off 11 named unit employees ...without affording the Union prior notice and/or a meaningful opportunity to discuss and/or bargain over the effects of the layoff and business closure on unit employees.”) (emphasis supplied).

Even by Local 10's own conditions and the ALJ's holding, no later than December 13 – or at latest the 15th – the Union had no excuse not to engage in bargaining. No remotely arguable barrier existed. The day before, Peterson made it unanswerably clear to the Union that Tesoro was willing to consider any proposal the Union might have. Indeed, Montoya acknowledged that Peterson affirmatively encouraged Local 10 to offer a proposal if it was going to do so. (*Supra*, p. 19). On the 14th, with the parties having executed an appropriate confidentiality agreement, the Union received the remaining materials responsive to all of its information requests.

Despite knowing for nearly five (5) months that any changes – which were contemplated as companywide – were targeted for January 1, 2011, Local 10 then did absolutely nothing. It presented no proposals. It did not even formulate any proposals. It did not review any of the information supplied by the Company in response to its own requests. It had no further questions regarding Tesoro's planned changes. It requested no meetings. Nor did the Union seek any postponement of the Company's plans. It communicated nothing whatsoever to the Company about the situation. (*Supra*, pp. 19-20).

Under such circumstances, even if the Union possessed a right to bargain, it waived any such right through inaction. It is well settled 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. *See, e.g., Bell Atlantic*, 332 NLRB 1592, 1595-1596 (2000); *Vandalia Air Freight, Inc.*, 297 NLRB 1012, 1013 (1990); *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988) (collecting cases and noting that “[h]ere, the Respondent provided the Union with at least 10 days’ notice of the change. The Board has on occasion found as little as 2

days' notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient. Therefore, we cannot agree with the judge that 10 days did not provide a meaningful opportunity to bargain.”) (footnotes omitted); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977).

Here, despite being fully aware of the Company's plans and long-announced time parameters, Local 10 did not responsibly and timely participate in negotiations which were offered to it. The Complaint also should be dismissed on this basis.

CONCLUSION

For the foregoing reasons, the Decision and Recommended Order of the ALJ should be reversed and not adopted by the Board, and the Complaint should be dismissed in its entirety.

Date: March 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2012, a copy of **Respondent's Brief In Support Of 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:

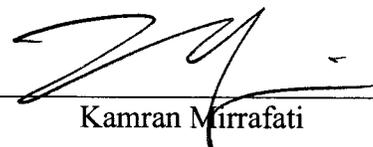
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