

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

E.I. DuPONT deNEMOURS & CO., INC.

and

Case 3-CA-27828

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC**

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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I

STATEMENT OF THE CASE

The Regional Director for Region Three issued a Complaint and Notice of Hearing in this matter on March 31, 2011. The Complaint alleges that, among other things, E.I. DuPont de Nemours & Co., Inc., (Respondent) violated Section 8(a)(1) and (5) of the Act. Respondent filed an Answer, admitting certain allegations of the Complaint and denying others, and setting forth affirmative defenses. A hearing was held on October 17 and 18, at Buffalo, New York, before Administrative Law Judge (ALJ) Jeffrey Wedekind. The ALJ issued his Decision and recommended Order on January 24, 2012. Respondent thereafter filed exceptions, which the Acting General Counsel (for ease of reference, the General Counsel herein) answers.

II

THE ISSUE

The sole issue for the Board is whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing changes to certain employee benefits. That question turns entirely upon whether a collective-bargaining agreement between Respondent and the Union was in effect when Respondent implemented the changes, or whether the agreement had expired. As the ALJ correctly found, there was no collective-bargaining agreement in effect on January 1, 2011, when the changes were implemented, (or on September 13, 2010, when they were announced as *fait accompli*), and there had been no agreement in effect since April 30, 2010. Because there was no agreement in effect, the ALJ found that under extant Board law, Respondent's failure to bargain with the Union about these significant changes in employee benefits violated Section 8(a)(1) and (5) of the Act. See E.I. DuPont de Nemours and Co., 355

NLRB No. 176 (August 27, 2010) (Edge Moor) and E.I. DuPont de Nemours, 355 NLRB No. 177 (August 27, 2010) (Louisville works).

The ALJ found that a November 20, 2009 Memorandum of Agreement (MOA) between the parties was ambiguous as to whether it extended the parties' collective-bargaining agreement only to April 30, 2010, or beyond that date. The ALJ found, however, that the weight of the extrinsic evidence supported the conclusion that the parties intended the contract to survive only until April 30, 2010. The General Counsel urges that the Board affirm the ALJ's finding and conclusion in this regard. In his recitation of the facts, the ALJ discussed the parties' July 26, 2010 no strike / no lockout agreement. He did not, however, address the General Counsel's alternate theory that this agreement superseded all prior agreements between the parties and therefore, no collective-bargaining agreement was in effect by July 26, 2010, even if the parties' previous agreements could be read to mean that the parties' 1983 collective-bargaining agreement remained in effect. As argued below, even if the Board disagrees with the ALJ's analysis of the extrinsic evidence surrounding the November 2009 MOA, it should nevertheless find a violation because the July 2010 agreement superseded the MOA. In either case, because they were made during a contract hiatus, the unilateral changes violated Section 8(a)(1) and (5) of the Act.

III

FACTS

The relevant facts in this case are fully and accurately set forth in Section I of the Decision (p. 2, line 11 – p. 10, line 28).

IV

ARGUMENT

In two cases involving other facilities of Respondent, the Board held that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing BeneFlex plans.¹ E.I. DuPont De Nemours, Louisville Works, 355 NLRB No. 176 and E.I. DuPont De Nemours and Co., 355 NLRB No. 177 (Edge Moor) (August 27, 2010). In the Louisville and Edge Moor cases, the unions had contractually waived their right to bargain over plan changes and there was a practice of making such changes during the term of the collective-bargaining agreements. However, the Board held that the contractual waiver ceased to be effective when the agreements expired. Thus, when the contracts expired, their terms and conditions (i.e., the BeneFlex provisions) became fixed until the parties bargained to agreement or impasse. Respondent therefore was not privileged to make plan changes unilaterally between contracts, at Edge Moor or at Louisville, where there was no history of a past practice of making such changes during a contract hiatus.²

In the Louisville and Edge Moor cases, it was undisputed that there were no collective-bargaining agreements in effect when the changes were made. The central issue in this case, however, is whether the 1983 “evergreen” or “rollover” agreement remained in effect at the time Respondent announced changes to BeneFlex as *fait accompli* on September 13, 2010, and on January 1, 2011, when it implemented the changes.

In reaching his conclusion that Respondent violated the Act, the ALJ examined the extrinsic evidence in order to resolve the ambiguity surrounding a November 20, 2009

¹ BeneFlex is a corporate-wide, “cafeteria-style” benefits plan that covers both represented and unrepresented employees. Among the benefits available are health insurance, prescription drug coverage, vision, dental and life insurance and vacation “buyback.” Tr. 33, 262-263.

² Past practices during a contract hiatus are not at issue here because a contract had been in effect continuously since 1983 when the Union served notice in September 2009 to terminate the agreement.

agreement between the parties.³ Contrary to Respondent, the ALJ's Decision is well-reasoned, is supported by the record evidence, and should be affirmed by the Board.

A. The ALJ Was Correct In Finding That The November 2009 Agreement Was Ambiguous

(Exceptions 12 – 17; Brief at 17-20)

Respondent suggests (Br. at pp. 17-18) that the ALJ disregarded the fundamental principle of contract interpretation that an agreement must be read as a whole, and that he failed to consider, or to give sufficient weight to, the second sentence of Section 2 of the agreement:

“This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010.”

The ALJ did not disregard this part of the agreement. Rather, he correctly perceived the ambiguity created by the use of a lower-case “a” in the word “agreement.”⁴ (Decision at 12, lines 9- 22). He also found, correctly, that the absence of the words “and thereafter,” following the word “effect,” as is typical of “evergreen” or rollover provisions, (including the one contained in the parties’ 1983 collective-bargaining agreement) weighed against a finding, urged by Respondent, that the agreement clearly and unambiguously indicated the contract continued beyond April 30, 2010. (Decision at 12, lines 33-42, and fn. 21). The ALJ found, again correctly, that the language of the November 20, 2009 agreement did not clearly and

³ The Board’s authority to interpret collective-bargaining agreements in the context of unfair labor practice cases is well established. Evans Sheet Metal, 337 NLRB 1200, 1201, fn. 2 (2002), citing Mining Specialists, 314 NLRB 268 fn. 5 (1994). The Board will, when required, interpret ambiguous contract termination language to determine if notice is required, and, if so, whether it has been satisfied. Century Wine & Spirits, 304 NLRB 339 (1991). The Board will also consider extrinsic evidence to resolve ambiguity. Doubletree Guest Suites Santa Monica, 347 NLRB 782, 784, fn. 7 (2006). Determination of the parties’ actual intent requires consideration of all the evidence: the language of the agreements signed by the parties, and the relevant extrinsic evidence. Evans Sheet Metal, supra, at 1201.

⁴ Which had been capitalized in the previous sentence, where the reference clearly was to the *collective-bargaining* agreement.

unambiguously support the Union's argument, either. (Decision at 12, lines 22-27; at 13, lines 31-32).

Respondent argues (Br. at 17-19) that there is only one "logical reading" of the MOA, and that is that the collective-bargaining agreement continued beyond April 30, 2010, absent a 60-day notice. Respondent rests its argument on what it presents as "findings" by the ALJ:

"Moreover, ALJ Wedekind specifically rejected the Union's argument that the 60-day written notice provision...applies solely to the parties no strike/no lockout commitment, finding that the 60 (day) notice requirement applied to the entire... MOA."

(Br. at 18, citing Decision at 12, lines 22-25).

The ALJ made no "finding" that the notice requirement applied to the entire MOA (and therefore the collective-bargaining agreement). He simply stated that the phrase "This agreement" could not be read *on its face* to mean, as the Union argued, that the notice requirement applied *only* to the no strike/no lockout commitment. In other words, as the ALJ ultimately concluded, the MOA was ambiguous.

Likewise, Respondent asserts that the ALJ affirmatively "found that the term 'this agreement' in the second sentence...referred to the entire MOA." Again, the ALJ made no such "finding." What he found was that the MOA, on its face, could not be reasonably read to clearly and unambiguously support either the Union's argument or Respondent's. (Decision at 13, lines 36 – 38).

Respondent makes far too much of what appears to be dicta by the ALJ:

The listed "except[ion]" at the end of the (second) sentence, providing that "in no case" will either party strike or lock out prior to April 30, 2010, *suggests* that the provision was intended to address whether and how the contract extension could be terminated prior to April 30, 2010, rather than after.

(Decision at 12, lines 30-33, emphasis added).

As the italicized “suggests” indicates, this was not a “finding” by the ALJ, and Respondent indulges itself in self-serving hyperbole when it asserts that this supposed “finding” was a “substantial basis for the Judge’s ultimate conclusion.” (Br. at 19). Read literally and in isolation, this part of the Decision does seem to conflict with a fact that the ALJ *did* find, and which no party disputes: that the 1983 collective-bargaining agreement was extended at least to April 30, 2010. (In light of that, how could either party terminate the contract extension *before* April 30, 2010?). But Respondent ignores the next paragraph of the MOA, which provides an example of what “this” (the foregoing paragraph) means:

“This means that if either party wanted to take action on May 15, 2010, written notice would have to be provided...no later than March 15, 2010.”

The example, and the ALJ’s later reference to the 60-day notice “terminating the contract extension *agreement*”⁵ (i.e., the MOA) suggests that the ALJ may have earlier omitted the word “agreement” after the word “extension” on page 12, line 33 of the Decision. This makes sense, because either party could have terminated the MOA prior to April 30, 2010, but they still would have been bound by the 1983 contract until at least that date.

Even the example given in the MOA, however, was not helpful to the ALJ in deciding whether the language of the MOA, on its face, clearly and unambiguously manifests the intent of the parties. (Decision at 13, lines 13-19). The ultimate finding made by the ALJ -- that the MOU, on its face, does not clearly and unambiguously answer the question whether the contract continued beyond April 30, 2010 -- is correct, and should be affirmed by the Board.

B. The ALJ Correctly Found That The Weight Of The Extrinsic Evidence Supported The Conclusion That The Parties Did Not Intend The Collective-Bargaining Agreement To Continue Beyond April 30, 2010

(Exceptions 4, 9, 16, 18-22, 25-26, 29-31)

**1. The 2006 Unfair Labor Practice Charge Is Irrelevant.
(Brief at 20-22)**

Over objection, the ALJ permitted Respondent to adduce evidence concerning an unfair labor practice charge filed by PACE, the Union's predecessor, in 2006 against Respondent in Case 3-CA-26125. The charge alleged, among other things, that Respondent had violated Section 8(a)(1) and (5) by making unilateral changes to employees' benefits at the Niagara plant, the facility involved here. Some of the benefits at issue in the 2006 charge were provided through BeneFlex. There is, of course, no dispute that the 1983 contract was in effect at that time. Respondent offered this evidence to show that the Union's position in this matter -- that Respondent was privileged to make unilateral changes within BeneFlex while the contract was in effect, but not after the contract (and the BeneFlex waiver) expired -- is somehow inconsistent with the position it took in 2006. It is not. As Union representative Briggs explained, the 2006 charge was based on the Union's interpretation of Article XI, Section 1 of the 1983 collective-bargaining agreement. When the charge was filed in 2006, there was no contract in effect covering the Yerkes unit, the parties were in negotiations, and the Union took the position that changes could not be implemented at Yerkes unilaterally, because there was no collective-bargaining agreement in effect.⁶ As Briggs explained, Section 1 of Article XI required that

⁵ Decision at 13, lines 31-32. (emphasis added).

⁶ A position that is consistent with the Union's position in this matter.

Respondent refrain from making changes to its Industrial Relations Plans and Practices (of which BeneFlex is part) unless the changes were made at all of Respondent's facilities. If Respondent could not make the changes unilaterally at Yerkes, it could not make them at Niagara, or at any of its facilities. Thus, as Briggs testified, the charge did not turn on whether or not there was "an open contract" at the Niagara Plant (Tr. 129-131). The ALJ clearly found this prior case insignificant, as it is not even addressed in the Decision. The Board should find it insignificant as well.

2. The ALJ Did Not "Fail To Appreciate The Significance Of Material Errors In The Union's Sworn Affidavit."

(Brief at 22-23)

In a pretrial affidavit given to a Board agent in November 2010, Union representative and lead negotiator James Briggs testified that the 1983 collective-bargaining agreement had expired on December 9, 2009, pursuant to the Union's notice. For whatever reason, Briggs omitted to mention the November 2009 MOA, which (as no party denies) extended the contract until at least April 30, 2010. (Tr. 59-70).

Somehow Respondent comes to the conclusion, which it urged upon the ALJ, and reasserts here, that this omission reveals that the Union -- until being "reminded" (by whom, it is not clear), of the MOA, and "after realizing that the (Louisville and Edge Moor) cases were fatal to its charge," did the Union construct its "revisionist argument" that the contract expired on April 30, 2010, by the terms of the MOA. (Br. at 22-23).

This line of argument depends in turn upon the argument, discussed above, that the Union believed that Respondent could not lawfully make changes to the BeneFlex plan *during* the term of a contract. As discussed above, the narrow circumstances under which the Union filed its charge in 2006 were explained by Briggs (Tr. 129-131). Far from being a "seminal fact," as

Respondent calls it, the Union's limited challenge to Respondent's otherwise clear right to make such changes during the term of a contract is, as shown above, irrelevant.

The ALJ did not "gloss over" the omission in Briggs' affidavit. He simply did not consider it critical. Whatever the ALJ may have thought of the omission, he did not regard it as an *admission* that Respondent's interpretation of the MOA is correct, or as an attempt to deceive the Board agent.

3. Contrary To Respondent, The Relevant Extrinsic Evidence Does Not Demonstrate That The Parties Intended The Extension of the 1983 Collective-Bargaining Agreement To Continue Beyond April 30, 2010.

(Brief at 24-27)

Respondent asserts (Brief at 24) that its witnesses testified "without contradiction" that the parties intended the contract extension to continue beyond April 30, 2010, and that they intended the 60-day notice provision to apply "simultaneously" to the no strike/no lockout pledge *and* contract termination. Briggs certainly contradicted that testimony in his own. (Tr. 48, 150).

The bargaining minutes from November 2009 do not conclusively support Respondent's interpretation of the MOA, and certainly not do not support its interpretation of the 60-day notice provision. Virtually all of the discussion of a 60-day notice provision on November 13 and 16, 2009 concerned a strike notice, and Respondent's need to train "exempt" (non-Unit) employees to operate the plant in the event of a strike.

By November 13, 2009, Respondent had begun training exempt employees from other facilities. Tr. 46, 318-319. The Union had made an oral proposal for a contract extension in the November 4 meeting. On November 13, Union vice-president Jim Bright reiterated the Union's proposal for a six-month extension of the contract, an agreement not to strike without 30 days'

notice, and Respondent's cessation of the training. (JX 5, tab 3, p. 013, para. 9; p.14, para. 2.) Respondent's negotiator Idzik stated that Respondent wanted a 60-day notice period: "...to give (the) parties enough time, especially the company, to make sure the plant continues running in the event (the Union struck.>"). Id., p. 13, para. 14.⁷ This was obviously important to Respondent, apart from the issue of contract extension, because the 1983 collective-bargaining agreement did not contain a traditional no strike/no lockout provision. The 1983 agreement contained only a limited provision that prohibited strikes and lockouts on account of grievances. (Tr. 47, 294; JX 1, p. 41).

Much of the discussion on November 16, 2009 was focused on the training issue. Respondent continued to insist upon a 60-day strike notice period. JX 5, tab 4, p. 018-021. Briggs asked why Respondent needed "60 days at the end." Id., p. 20, para. 4. His understanding had been that the contract would be extended to April 30, 2010, before which date the Union could not give notice of a strike, and after which date 60 days' notice would be required before the Union could strike.⁸

Respondent urges that site negotiator Sarazin's response to Briggs must be read in context. (Br. at 24, fn. 9). The General Counsel agrees with that, but disagrees with Respondent's assertion that Sarazin's statement about a "60-day opener" proves that the parties intended the contract to continue after April 30, 2010, subject to a 60-day notice. If the Union's concern with the training of exempts was safety, Sarazin said, then:

"...why wouldn't we want to bring back the people we trained

⁷ Later on November 13, Respondent disseminated an "employee communication" concerning that day's negotiations. This read, in part: "Management began the meeting by presenting a written proposal to the Union to extend the terms of the existing contract through April 30, 2010. If signed, the Union and Management would agree not to strike or lockout prior to April 30, 2010 without sixty days written notice of the intent to do so." (GC 2).

⁸ Idzik stated that his understanding was different, and the Union could give notice at any time before April 30, 2010, but would not be able to strike for 60 days after that. (JX 5, tab 4, p. 020, para. 12, continuing on p. 021).

and refresh them. We believe a 60-day opener is valid. There are a lot of arrangements to be made within that time frame, travel, accommodations, etc....”

JX 5, tab 4, p. 020, para. 5.

Although she used the word “opener,” which can have other meanings, the context indicates that Sarazin was plainly talking about a strike notice when she made reference to a 60-day period.⁹

As Respondent points out, (Br. at 25), the bargaining minutes reflect no discussion in

March

or April of 2010, as to whether the extended contract would expire or had expired on April 30, 2010. But the absence of such discussion if the contract were to expire on April 30 does not necessarily “strain logic,” as Respondent argues. The parties would continue to adhere to the extant terms and conditions embodied in an expired contract until they reached agreement or impasse. There would, therefore, have been no need to discuss it.

The fact that Respondent continued to deduct Union dues after April 30, 2010 is not dispositive. On this point, Respondent selectively cites the testimony of Briggs to make the point that Respondent “ceased deducting Union dues at other USW-represented facilities after the contracts there expired.” (Br.at 25). It is not as simple as that. On cross-examination, Briggs agreed that Respondent had, at two of the three facilities where he had serviced USW bargaining units, “at some point in time ceased dues deductions post contract.” (Tr. 151) Briggs had testified earlier on cross-examination that during a contract hiatus of several years at Respondents Yerkes facility in Tonawanda, New York, Respondent never stopped collecting dues, and that Respondent either collected dues for a time or never stopped collecting them during contract hiatus periods at Louisville and Edge Moor. (Tr. 111-112, 133-135, 142). Moreover, Freeburg testified that the Union had internal discussions in February or March of

⁹ With regard to the 60-day period, Idzik told the Union that: “...in the event you were to give a strike notice, it gives us a good amount of time to work things out.” Id., p. 20, para. 12.

2010 about the about the prospect of having to collect dues directly from the membership, in the event that Respondent ceased checkoff after April 30, 2010. (Tr. 158).

As Briggs testified, the continued collection of dues by Respondent after April 30, 2010 did not “send up a red flag,” because “DuPont didn’t do it all the time. And they didn’t do it in a lot of cases I was involved in.” (Tr. 112) Briggs acknowledged that Respondent never raised dues deduction as an issue after April 30, 2010, but because Respondent “never rushed to do it,”(cease deductions), he “didn’t have a concern about it.” (Tr. 134).

Nor does the fact that neither party raised the matter of arbitrating grievances after April 30, 2010 necessarily demonstrate a consciousness on their part that the contract continued in effect after that date. Respondent may be correct that it never informed the Union that it would not arbitrate grievances after April 30. (Br. at 25) But there is also no evidence that the Union sought to arbitrate any grievances post-expiration. In this regard, Briggs explained that, much like the parties’ history with dues deduction, Respondent and the Union “did it (arbitrated grievances) for nine years at Yerkes. I’m telling you, look at the record. It wasn’t a concern.” (Tr. 112). Parties may voluntarily arbitrate disputes arising after contract expiration. See Indiana & Michigan Electric, 284 NLRB 53 (1987); Nolde Bros. v. Bakery Workers, Local 358, 430 U.S. 243. (1983). Briggs’ testimony that Respondent did so during a nine-year contract hiatus at Yerkes was un rebutted.

Respondent assails the ALJ’s logic in concluding from the extrinsic evidence that the parties’ intent was to extend the 1983 contract to April 30, 2010, and not beyond. (Br. at 26-27). However, the logic of Respondent’s arguments is faulty. Respondent asserts that it would not have been in the Union’s interests, at the time the MOA was signed in November 2009, to allow the contract to expire on April 30, 2010. This, Respondent argues, is because it could discontinue dues deduction and refuse to arbitrate grievances without notice after April 30, while the Union would still be required to give 60 days’ notice before it could strike “in response” (Br.

at 26). This argument rests on the faulty assumption that the Union inevitably *would* strike in that event. It also ignores the fact, which is abundantly clear from the record and the unique nature of Respondent's operation, that it would not be in the Union's interest, or anyone's, for the plant to be shut down by a strike the Respondent was unprepared for, which was the whole point of the 60-day notice.¹⁰ If the sodium and lithium cells froze over, it would be so cost-prohibitive to rebuild them that the plant would likely close forever. (Decision at 4, lines 16-26).

4. The Weight Of The Extrinsic Evidence Supports The ALJ's Conclusion That The Parties Did Not Intend To Extend The 1983 Contract Beyond April 30, 2010.

(Brief at 27-36)

The ALJ summarized the extrinsic evidence that he relied upon in forming his ultimate conclusion about the parties' intent respecting the MOA. (Decision p. 14, line 11 – p. 16, line 9). Respondent asserts that none of the evidence cited by the ALJ “withstands scrutiny.” (Br. at 28). To the contrary, the ALJ drew reasonable conclusions from the evidence before him, and found that the weight of the extrinsic evidence supported the argument of the General Counsel and the Union that the parties did not intend the 1983 contract to continue beyond April 30, 2010.¹¹

(a) The ALJ Reasonably Concluded That It Would Not Have Made Sense For The Union To Agree To Extend The Contract Indefinitely Beyond April 30, 2010.

(Brief at 28-29)

Respondent asserts that the Union “has not identified and cannot identify, any logical reason why the parties would not have agreed, in November 2009, to permit the continued extension of the 1983 (contract) beyond April 30, 2010.” (Br. at 28). Whether or not

¹⁰ It also ignores the evidence, discussed above, that the Union was not especially concerned about the prospect of Respondent actually taking these actions in light of the bargaining history at other USW-represented facilities, most notably the nearby Yerkes plant.

¹¹ And, in contrast, that little extrinsic evidence supported Respondent's contrary view.

Respondent thinks that they were logical, the Union had its reasons. And, contrary to Respondent, the Union has articulated them. As Briggs testified:

...(T)o open a contract and then extend it forever while you're negotiating would just allow him (*sic*) to continue what we were trying to defeat...which was the unilateral changes. And we thought April 30 was a good time frame, if you look at a lot of collective bargaining, to get a contract done.

(Tr. 47-48)

That the Union was not clairvoyant, and turned out to be wrong about how quickly the parties could come to an agreement, does not mean that its thinking in November 2009, or Briggs' explanation of it at the hearing, was illogical. Simply stated, the Union wanted to hold Respondent's feet to the fire, as it were. The Union was well aware that extending the contract to April 30, 2010 meant that the changes to BeneFlex that it objected to in October 2009 would go into effect at the beginning of 2010. But if the parties reached a new agreement by April 30, that would not matter. If they did not, and the extended contract expired, Respondent would not be privileged to make unilateral changes to BeneFlex in 2011, because terms and conditions would have been fixed until an agreement or a lawful impasse was reached.

(b) The ALJ Correctly Concluded The Parties' Discussion Of The 60-day Notice Provision In The MOA Pertained To Strikes Or Lockouts, Not To Contract Expiration.

(Brief at 29)

Respondent does little more than assert that, contrary to the ALJ,¹² there is "no evidence that the parties ever contemplated that the required 60-day notice to terminate the MOA and the (contract) extension ...was something different from the 60 days' written notice required before either party could engage in a strike or lockout." Of course there is evidence, and plenty of it, that virtually all of the discussion of "60 days" at the bargaining table in November 2009 -- even

Sarazin's use of the phrase "60-day opener," when read in its full context -- concerned Respondent's need to prepare for a strike and to operate the plant in the event of a strike.

There was extensive discussion of the 60-day notice period during the bargaining sessions on November 13, 16 and 17, 2009. The parties' discussion about a notice period was focused exclusively on strikes and lockouts, and Respondent's need for adequate time to train a contingency workforce in the event of a strike. That discussion was intertwined with the ongoing training of exempt employees, to which the Union objected. Virtually none of that discussion related to the expiration or termination of the extended collective-bargaining agreement.¹³

Notably, on November 13, Idzik stated that:

"The whole reason for 60 days would be to give parties enough time, especially the company, to make sure the plant continues running in the event you strike."

JX 5, tab 3, p. 013, para. 14.

Clearly, this discussion of the notice period does not relate to the duration or termination of a contract extension. Any extension of the contract, without an accompanying no-strike agreement, would not have protected Respondent because the 1983 contract did not contain a traditional no strike/no lockout provision.

Respondent's witnesses testified that Sarazin's reference to a "60-day opener" at the table on November 16, 2009 meant a 60-day notice to open the (extended) contract for negotiations. (Tr. 183, 269). This interpretation, rightly rejected by the ALJ,¹⁴ is not supported by Respondent's bargaining minutes, which reveal that Sarazin was talking about something else: the re-training of exempt employees who had already been trained, but who Respondent might need to call upon if the Union gave notice to strike. Referring to the Union's objection to the training, Sarazin stated:

¹² Decision at 14, lines 22-31.

¹³ JX 5, tab 3, p.013, para. 9 – p. 014, para. 7; tab 4, pp. 18-20, p. 21, paras. 1-6; tab 5, p. 042, paras. 6-13.

“Well if it is truly safety, why wouldn’t we want to bring back the people we trained and refresh them(?) We believe a 60-day opener is valid. There are a lot of arrangements to be made within that time frame, travel, accommodations, etc.”

JX 5, tab 4, p. 20, para. 5.

Respondent’s entire argument on this point is premised upon its assertion that the ALJ, “correctly, rejected the Union’s argument that the 60-day notice provision in (the MOA) applies solely to the parties’ no strike/no lockout commitment,” citing the Decision at page 12, lines 23-27. That is not what the ALJ said. What the ALJ did say was that the phrase “This agreement,” could not be reasonably interpreted, on its face, to apply only to the no strike/no lockout provision of the MOA.

(c) The February 23, 2010 Agreement Respecting Limited Service Employees Does Not Prove That The Extended 1983 Contract Expired On April 30, 2010 -- Or That It Did Not Expire.

(Brief at 30-31)

On February 23, 2010, the parties entered into an agreement on limited service employees, (LSEs), which also extended the parties’ no strike/no lockout agreement through September 13, 2010, the end of the “summer standards” period.¹⁵ (JX 4). The LSE agreement did not otherwise refer to the November 2009 agreement, nor did it contain any provisions respecting the status of the 1983 contract or the training of exempt employees.

Respondent argues that the ALJ erred in stating that it would have been unnecessary for the parties to extend the no strike/no lockout commitment if the entire MOA, which contained its own no strike/no lockout provision, continued beyond April 30, 2010. (Decision at p. 14, line 40 – p. 15, lines 5-8). Even if Respondent is correct on that point, however, a different result is not compelled. The LSE agreement simply does not answer the question whether the extended contract terminated on April 30, 2010, or continued after that date.

¹⁴ Decision at 16, lines 25-38.

There is no dispute about the following facts. The 1983 collective-bargaining agreement contained no provision respecting LSEs (and their employment was therefore a subject of bargaining). In February 2010, Respondent had concerns about training LSEs for the summer standards period, even though it was several months away, because it took time to recruit, train and orient the LSEs. The Union had its own concerns; it did not want LSEs to be used as a contingency workforce in the event of a strike or lockout.¹⁶ Respondent, on the other hand, did not want to invest in the training of LSEs and be unable to use them if the Union struck.¹⁷

The LSE agreement addressed the concerns of each party: there would be no strike or lockout before September 14, 2010, the end of the summer standards period. This effectively made the use of the LSEs as a contingency workforce a non-issue.

The Union, absent the extension of the MOA's no strike commitment, could conceivably have struck Respondent at some point during the summer standards period, regardless of how the MOA is interpreted as to contract expiration.¹⁸ Thus, Respondent had reason to seek additional protection (just as the Union had reason to seek assurance that the LSEs would not be used as a contingency workforce). The LSE agreement addressed both concerns by modifying the "exception" in the MOA and moving the earliest date that the parties could strike or lock out from May 1, 2010 to September 14, 2010. It does not, however, answer the question, one way or the other, whether the extended contract continued beyond April 30, 2010.

¹⁵ LSEs and summer standards are explained at page 7 of the Decision, lines 12-24.

¹⁶ Whether LSEs would be bargaining unit or non-unit employees under a new collective-bargaining agreement was a subject that the parties were bargaining about.

¹⁷ It has never been made clear why Respondent could not have done so, in the absence of an agreement not to do so.

¹⁸ If the entire MOA, including the collective-bargaining agreement, remained in effect, as Respondent argues, the Union could have struck with 60 days' notice on May 1, or at any time after that. The same is true if the extended 1983 contract expired on April 30, 2010, because the no strike/no lockout agreement would still remain, and there was no absolute commitment not to strike after April 30, only a 60-day notice requirement.

(d) The July 26, 2010 Interim Agreement, And The Extrinsic Evidence Surrounding It, Shows That Parties Did Not Consider The 1983 Contract To Be In Effect At That Time.

(Brief at 32-34)

Unlike the February 23, 2010 LSE agreement, the parties' July 26, 2010 interim no strike/no lockout agreement does shed light on the matter of whether the extended 1983 contract had expired. The ALJ was correct in so finding.

On its face, the July 26 agreement does not refer to the MOA or the extended 1983 agreement.¹⁹ The ALJ properly evaluated the extrinsic evidence surrounding the July 26 agreement -- the July 21, 2010 telephone conversation between Briggs and Idzik -- in forming his conclusions.

Initially, it is inaccurate to suggest, as Respondent does at page 34, footnote 11, that the ALJ discredited Briggs as a witness. He merely observed that Idzik's contemporaneous notes of the conversation did not reflect specific statements that Briggs testified he made at the time. (Decision at p. 8, lines 23-46, p. 9, lines 1-24). The ALJ relied on Idzik's notes, specifically the following excerpt, in which Idzik took notes of what Briggs said:

Open K – What's there is there – Oct new health care-
leverage to get things done –

(R 6).

Respondent's argument that Briggs' use of the term "open contract" during the July 21 conversation, as opposed to "terminated" or "expired," meant that the 1983 collective-bargaining agreement remained in effect can not be taken seriously.

The Union's letter of September 4, 2009 does recite that "notice is served to open the contract." JX 2. As the language of Article XVIII reveals, opening the contract by invoking

¹⁹ As argued below, however, the last sentence may be interpreted as the embodiment of the Union's insistence that it was not interested in further extending the contract.

Section 2 of Article XVIII is not the same as terminating it by invoking Section 1. A fair reading of Section 2 is that it is a provision for mid-contract bargaining on any or all of the contract's provisions. Conceivably, the parties could, under Section 2, bargain a completely new agreement without ever terminating. However, the Union's notice specifically invoked Section 1 of Article XVIII. There is no mention of Section 2. The invocation of Section 1 is immediately followed by the phrase "notice is served to open the contract." In the very next sentence, there is reference to the announced "expiration date." In the second paragraph, there is reference to the "said termination provisions" of the contract. A fair reading of JX 2 as a whole reflects the Union's intent to terminate the 1983 collective-bargaining agreement. The parties' conduct also sheds light on the Union's intentions and how Respondent understood those intentions. Respondent would not have been concerned with securing the Union's agreement to extend the contract into 2010 if the contract had only been "open for bargaining," and not terminated. There would have been no need for an extension in that case.

On October 13, 2009, even as Briggs said that the Union had "served notice that the contract was open," Idzik took note of the December 9 "expiration date," and Briggs said that the Union was agreeable to discussing an extension of the contract as the parties got closer to that date. JX 5, tab 1, p. 001, paras. 2-5. An extension would have been unnecessary if the contract was being "opened" and not "terminated." Even though Article XVIII of the 1983 collective-bargaining agreement draws a clear distinction between opening and terminating the contract, it is clear that Respondent understood Briggs to be using the term "open" to mean "terminated," whether or not it was technically correct. The record reveals that Briggs was not the only one who did. Respondent's minutes of November 4, 2009 recite that "It has been 26 + years since the contract was last open." JX 5, tab 2, p. 004, para. 1. Clearly not. It had been opened on numerous occasions since 1983. Tr. 32-33, 270; JX 1, p. 1. Of course the minutes make perfect sense if the speaker was using "open" as a synonym for "terminated."

The most logical explanation of the remaining statement --“Oct health care - leverage to get things done”-- is that Respondent would be unable to effect unilateral changes to the Beneflex plan for the year 2011 if there was no contract in place, and the Union would use that prospect as “leverage” to conclude a new agreement. Respondent’s argument to the contrary, that the Union believed it had “leverage” even *during* the term of an agreement, is premised on another, faulty, argument: that the Union’s filing of an unfair labor practice charge in 2006 reveals a completely different mindset on the Union’s part, that it had a sudden epiphany when the Board issued its Louisville and Edge Moor decisions in August 2010, and there followed a wholesale revision of history by the Union in this case. As Briggs’ testimony (Tr. 130-131) reveals, and as argued above, the Union’s pursuit of the charge in 2006 does not prove what Respondent claims it proves. And, as the ALJ noted, (Decision at 9, fn. 13), Briggs had participated in the Louisville and Edge Moor negotiations, was familiar with the litigation that resulted in the Board’s decisions, and was present at the hearing in at least one of the two cases. Briggs did not need to “revise” anything; he was conversant with the General Counsel’s theory in both the Louisville and Edge Moor cases, well before the Board issued its decisions.

(e) Alternatively, The Board May Find That The July 26, 2010 Interim Agreement Substituted For The November 2009 MOA, Thus Terminating The Extended 1983 Contract.

Based on the last sentence of the July 26, 2010 interim no strike/no lockout agreement: “No other promises or representations are intended or made by either party with regard to any subject(s) other than strike or lockout,” the Board may find that, even if the 1983 collective-bargaining agreement remained in effect after April 30, 2010, the interim agreement of July 26, 2010 was a complete substitute for the November 2009 MOA, and therefore no contract was in place when Respondent announced and then implemented the unilateral changes to BeneFlex.

The ALJ did not reject this theory. As noted in the Decision, (at p. 8, lines 17-18), this language was drafted by Idzik, following his July 21 conversations with Briggs, and it was

included at the Union's request. Although Respondent's witnesses testified that the Union never explained why it wanted this language in the agreement, (Tr. 216-217, 339-340), an important legal document, it evidently did not ask the Union why. The most likely explanation is that Respondent understood why the Union wanted it.

The July 26, 2010 interim agreement also contained a provision on the training of exempt employees:

“Management will not train exempt employees on hourly jobs for purposes of strike contingency training unless sixty (60) days written notice to terminate *this agreement* has been given by either party.”

JX 6, second paragraph (emphasis added).

If the November 20, 2009 MOA, which provided that “Training may recommence upon notice of termination of the contract extension,” was still in effect, there was no need for a provision on training in the July 26, 2010 agreement. It is thus clear that the July 26, 2010 agreement was a complete substitute for any prior understanding between the parties.

(f) The ALJ Correctly Evaluated The Statements Of Respondent's Agent, Kenneth Williams, As Evidence That There Was No Collective-Bargaining Agreement In Effect When Respondent Announced Unilateral Changes To The Beneflex Plan.

(Brief at 35-36)

Briggs asserted during the September 13, 2010 meeting called by Respondent to announce the BeneFlex changes that would be implemented in 2011, and again in the September 27 negotiating session, that the changes being announced violated the Board's August 27, 2010 decisions in the Louisville and Edge Moor cases. Respondent's human resources manager Kenneth Williams did not assert that the situation was different at the Niagara Plant because the 1983 collective-bargaining agreement was still in effect. He simply replied that Respondent did not agree with the Board's decisions. Tr. 55-58, 343-348; JX 5, tab 44, p. 378, paras. 7-10.

Respondent claims that when Briggs objected to the announced BeneFlex changes

and cited the Board's recent decisions in the Louisville and Edge Moor cases, its human Resources Manager, Kenneth Williams, was unaware of the very Board decisions he said that Respondent disagreed with and was "weighing (its) options" in regard to. Thus Respondent explains Williams' failure to assert, in response to Briggs, that the 1983 collective-bargaining agreement remained in effect.

Respondent asserts that "the undisputed record shows that Mr. Williams had not read the *DuPont* decisions in September 2010." (Br.at 35). Of course, there is no evidence that Williams read the decisions. Clearly, though, he had enough familiarity with them to say that Respondent disagreed with them, and was "weighing (its) options." Williams was vague in his response to cross-examination questions about what he may have learned about the Board's *DuPont* decisions between September 13 and 27, and what conversations he had with other members of Respondent's bargaining team. (Tr. 349-350). Given that Respondent's bargaining team included an attorney, Idzik, and given plant manager Richard Wallden's close and regular contact with Respondent's team, (Tr. 171-172, 317), it is hard to imagine that the subject did not come up before the September 27 meeting, when Williams reiterated that Respondent disagreed with the Board.²⁰

**C. The ALJ Correctly Applied Board Precedent
(Brief at 36-39)**

Respondent essentially argues that the Board should in this case overrule its 2010 decisions in the Louisville and Edge Moor cases. The ALJ correctly declined to address those arguments, (Decision at 18, lines 5-12), noting that he was bound by the Board's precedents. There is no compelling reason for the Board to re-examine these precedents.

V

CONCLUSION

For the reasons set forth above, Respondent's exceptions should be overruled, and the Decision of the Administrative Law Judge and his recommended Order should be affirmed.

Buffalo, New York
3 April, 2012

Respectfully submitted,

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²⁰ Especially where the Board decisions in question involved *this* respondent.