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

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Pursuant to Section 102.46(d)(2) of the Board's Rules and Regulations, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10 ("Union") files this answering brief in response to Respondent Tesoro Refining and Marketing Company's ("Tesoro") Exceptions to the Decision and Recommended Order of the Administrative Law Judge ("Exceptions") and Respondent's Brief in Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge ("Supporting Brief").

I. Introduction

In its Supporting Brief,[1] Tesoro presents five questions: (1) whether the administrative law judge ("ALJ") should have found that Tesoro had a "sound arguable basis" for its interpretation of the parties' collective-bargaining agreement ("CBA");[2] (2) whether the ALJ erred when he did not apply the "contract coverage" test to determine whether Tesoro had the authority to unilaterally change employee benefits;[3] (3) whether the ALJ should have found that the Union waived its right to bargain over employee benefits;[4] (4) whether the ALJ erred in failing to find the Union did not bargain in good faith;[5] and, (5) whether the ALJ should have found that the Union waived its right to bargain through inaction. R. Supporting Brief at 3-4.[6]

The Union respectfully requests that the Board affirm the ALJ's Decision and adopt the Recommended Order. Below, we first show that many of Tesoro's "facts" are unsupported by

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[1] All references to Respondent's Supporting Brief are noted as "R. Supporting Brief ___." Respondent's Exceptions are noted as "Exceptions ___." The Transcript of the November 15-16, 2011, hearing are noted as "Tr. ___." The Acting General Counsel's exhibits are noted as "GC Ex. __." The Respondent's exhibits are noted as "R. Ex. ___." The Administrative Law Judge's Decision is noted as "ALJD ___."

[2] *See* Exceptions ¶¶ 5-8, 10-11, 13-21, 24-26, 29-32.

[3] *See* Exceptions ¶¶ 5-8, 10-11, 13-21, 24-26, 29-32.

[4] *See* Exceptions ¶¶ 1-6, 8, 10, 12-21, 24-26, 29-32.

[5] *See* Exceptions ¶¶ 5-6, 8-9, 13-15, 17-21, 25-32.

[6] *See* Exceptions ¶¶ 5-6, 8-9, 13-15, 17-27, 29-32.

the record evidence. We then address Tesoro's arguments that it had the right to make unilateral changes to mandatory subjects of bargaining in the absence of impasse.

There is no dispute that Tesoro unilaterally implemented changes to employee benefits in the absence of impasse. Tesoro's exceptions advance various arguments that the Union did not have the right to bargain over these changes. These arguments center on separate, but sometimes intersecting, issues: the affirmative defenses of waiver and the "sound arguable basis" and the "contract coverage" analysis favored by a few appellate courts.

The NLRB rejects the "contract coverage" analysis, adhering instead to "one of the oldest and most familiar of Board doctrines, the clear and unmistakable waiver standard." *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 810 (2007). An employer's "sound arguable basis" for its interpretation of a contract provision applies only where the issue is an alleged Section 8(d) violation; it does not apply where, as here, the sole allegation is a Section 8(a)(5) unilateral change. Here, Tesoro's only viable affirmative defense is that the Union waived its right to bargain over employee benefits. The ALJ properly concluded Tesoro failed to establish any waiver of the Union's right to bargain.

II. Argument

A. Tesoro's Material "Facts" Are Not Supported by the Record Evidence.

In its Supporting Brief, Tesoro describes facts, "many of them undisputed," but fails to distinguish the disputed from the undisputed facts. R. Supporting Brief at 4. We note the distinctions here.

First, Tesoro states the CBA "allows Tesoro to make unilateral benefit changes." R. Supporting Brief at 4, 5, 29. This "fact" is actually the question presented to the ALJ by Tesoro's waiver defense. *See* GC Ex. 1(g) at 2-3 ¶¶ 7-9, 3 ¶¶ 1-3. Tesoro continues, stating the CBA is

"not silent regarding Tesoro's authority" to unilaterally change benefits and that Article 2, Section 5 of the CBA establishes a bargaining procedure that somehow supersedes the Union's Section 7 right to bargain. R. Supporting Brief at 5-6; GC Ex. 8 at 6. Tesoro does not reference any contractual language in support of this argument.

Tesoro states as "fact" that the monthly labor-management meetings are "a forum for negotiations satisfying Section 8(d) of the Act." R. Supporting Brief at 6. While the monthly labor-management meetings certainly could have been a forum for negotiations and there were monthly labor-management meetings during the time between Tesoro's announcement of the unilateral changes and implementation, here, those meetings were not negotiations. *See* Tr. 57-58; GC Ex. 18 at 2 (only discussion of employee benefits at Aug. 11, 2010, meeting was that Tesoro acknowledged receipt of Union's Aug. 5, 2010, demand-to-bargain letter); Tr. 59; GC Ex. 19 at 2 (only discussion of employee benefits at Sept. 28, 2010, meeting was that information request would be "ready shortly").

Rather, the record evidence shows that, up until December 13, 2010, Tesoro was "sending an equivocal message regarding whether it would engage in meaningful bargaining with the Union over the proposed changes." ALJD at 18:28-30. The ALJ's finding was based on the following facts: Tesoro did not provide the information requested by the Union on August 20 and September 9, 2010, until December 15, 2010; the changes were implemented on December 19, 2010, and January 1, 2011; and the "Union did not have a sufficient opportunity to review the relevant cost information it received in order to assist it in making a proposal prior to" implementation. ALJD 16:32-39, 17:43-18:2; *see* Tr. 45 (Union told Tesoro "that the Company

needed to negotiate its benefits with the Union")[7]; GC Ex. 11 (Aug. 5, 2010, demand to bargain); GC Ex. 14 (Aug. 20, 2010, information request); GC Ex. 15 (Sept. 9, 2010, information request); GC Ex. 16 (Oct. 22, 2010, demand to bargain); GC Ex. 21 (Dec. 15, 2010, Union letter informing Tesoro that, once the Union had an opportunity to review the information requested, the Union would provide bargaining dates); GC Ex. 22 (Tesoro's Dec. 15, 2010, response to information requests); Tr. 63.

Tesoro states "Local 10 did not avail itself of the contractual procedures established to address benefit changes." R. Supporting Brief at 4, 7-8. CBA Article 2, Section 5 specifically states "if the Union desires to bargain concerning a matter affecting the interests of employees in more than one Division, it shall first bargain concerning said matter with the Regional Manager or their designee." GC Ex. 8 at 6. Tesoro repeatedly asserts that the Union failed in its contractual obligations by failing to file a grievance. *See* R. Supporting Brief at 6, 7-8, 22-24, 27-28, 30. The CBA contains no such requirement. Rather, the Union *may* file a grievance, but the CBA also permits bargaining.[8] Here, the Union requested bargaining from Leif Peterson ("Peterson"), the designee of the Regional Manager, four times to no avail. Tr. 45 (Union oral demand to bargain); GC Ex. 11, 16, 21 (Union written demands to bargain); *see also* ALJD at 10:25-30 ("the Union's conduct is, in fact, consistent with article 2, section 5"). Tesoro also declares that the bargaining described in Article 2, Section 5 of the CBA is "defined by

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[7] This demand to bargain was made orally by Local 10 President Javier Montoya ("Montoya") to Leif Peterson ("Peterson"), Tesoro's Human Resources manager at the Mandan refinery. The ALJ found Montoya to "be a credible witness in all respects." ALJD at 6 fn. 7. Tesoro did not except to Montoya's credibility.

[8] The benefit plans are specifically excluded from arbitration, thereby diminishing any incentive the Union would have for bringing a grievance instead of demanding to bargain over disputes regarding benefit plans. GC Ex. 8 at 23.

contractual standards," rather than Section 8(d) of the Act, but provides no basis for this claim. R. Supporting Brief at 6, 7-8.

Tesoro states as "fact" that a memorandum of agreement between the Union and Tesoro ("2003 MOA") "expressly incorporates Tesoro's plans' reservation of rights to change benefits." R. Supporting Brief at 5, 10-12. The 2003 MOA was negotiated when Tesoro bought the Mandan refinery from BP Amoco, the predecessor employer. The 2003 MOA states it "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." R. Ex. 42 at 6. In turn, the CBA states that benefit plans "shall not in any instance be or become a part of the Agreement." GC Ex. 8 at 23. The ALJ found that the benefit plans, and their corresponding documents, were not collectively-bargained documents. ALJD at 10:14-17, 11:34-35. The benefits plans' reservation-of-rights clauses incorporated into the 2003 MOA were not negotiated between the Union and Tesoro and, therefore, cannot operate as a waiver of the Union's right to bargain over benefits. Tr. 34-35.

Tesoro states as "fact" that 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," because Tesoro was required to provide benefits "reasonably comparable in the aggregate" to BP Amoco's package of benefits. R. Supporting Brief at 10. While compliance with this requirement was met through negotiations between Tesoro and the Union—resulting in the 2003 MOA—Tesoro's obligation did not derive from any collectively-bargained agreement between it and the Union. Rather, Tesoro's obligation stemmed from BP Amoco's successorship agreement with the Union. GC Ex. 4; Tr. 31-32 (successorship agreement required BP Amoco to obligate Tesoro to provide benefits reasonably comparable in the aggregate). This agreement

required BP Amoco to obligate a successor company to establish benefits "reasonably comparable in the aggregate." *Id.* at 2. Therefore, Tesoro was obligated to provide "reasonably comparable in the aggregate" benefits by *BP Amoco*—not the Union. The proposition that Tesoro's compliance to its agreement with BP Amoco somehow incorporated benefit plans into the CBA between Tesoro and the Union, despite the specific language stating that the benefit plans are not included in the CBA, is unsupported.

Tesoro states a legal conclusion as "fact" when it argues that one remark by Local 10 President Javier Montoya serves as the Union's "express assent to the plans' reservation of rights." R. Supporting Brief at 12. It is uncontroverted that Montoya made the statement in question. Tr. 223. Tesoro, however, seeks to have Montoya's single statement serve as a "clear and unmistakable" waiver of the Union's right to bargain over changes to employee benefits. The ALJ specifically found that a "single statement by one union representative in 2005 does not constitute a clear and unmistakable waiver." ALJD at 11:42-12:2; *see also Amoco Chem. Co.*, 328 NLRB 1220, 1222 fn. 6 (1999) ("anecdotal evidence" of union officials' discussion of reservation-of-rights language "falls far short of proving that the Unions have fully discussed and consciously explored the issue of waiving their right to bargain").

Tesoro states that the Union's past attempts to change the language of CBA Article 12 are proof of the Union's recognition that Tesoro had the right to unilaterally implement benefit changes, but neglects to cite any record evidence in support of that supposition. R. Supporting Brief at 8-10. While the Union has certainly sought to further protect its members' benefits through bargaining, Tesoro's alleged right to make changes to employee benefits has never been discussed in any negotiation between the Union and Tesoro. *See* Tr. 34 (no discussion of reservation-of-rights language during negotiations for 2003 MOA); 37-40 (no discussion of

reservation-of-rights language during negotiations for 2002 CBA); 42-43 (no discussion of reservation-of-rights language during negotiations for 2009 CBA).

Tesoro states that the Union failed to "diligently exercise" its bargaining right as a "fact." R. Supporting Brief at 15, 20. Yet, the record evidence shows the Union demanded to bargain four times, submitted two information requests, and negotiated a confidentiality agreement for the requested information. Tr. 49; GC Ex. 11, 14-16, 21; *see also* ALJD at 5:18-6:6, 6:25-32, 7:25-9:8, 10:29-30, 17:43-18:2. The requested information was provided four days before the first changes were implemented on December 19, 2010. GC Ex. 22; Tr. 63 (Union received information after confidentiality agreement was signed), 65-67 (changes to 401(k) plan implemented during Dec. 19, 2010-Jan. 1, 2011, pay period); ALJD at 17:43-45. The ALJ found that, by implementing the changes before the Union had "sufficient opportunity" to review the information provided, Tesoro "foreclosed the possibility of meaningful bargaining." ALJD at 17:43-44, 18:4-16.

Tesoro states that it "engaged in good faith Section 8(d) bargaining." R. Supporting Brief at 15. Tesoro did, indeed, meet various times with the Union between the announcement of the unilateral changes and their implementation. At trial, however, when Peterson was asked whether he had ever told the Union that he would "bargain" over the proposed changes, he answered, "I can't say that I used the word 'bargain.' . . . I can't really say that I used the term 'bargaining.'" Tr. 230. The ALJ found that Tesoro did not indicate it would bargain over changes until December 13, 2010. *See* Tr. 45, 49 (Tesoro stated it was "under no obligation to negotiate" changes to employee benefits); GC Ex. 10, 12, 16 (Tesoro stated it would "discuss" changes to employee benefits); GC Ex. 22 (Tesoro Dec. 15, 2010, letter stating it was "willing to consider any proposal regarding benefits the Union may decide to make"). Before that date, Tesoro was

"sending an equivocal message regarding whether it would engage in meaningful bargaining with the Union over proposed changes." ALJD at 18:18-30. "Such conduct is incompatible with the statutory duty to bargain in good faith over mandatory subjects of bargaining." *Id.* at 18:33-34.

Finally, Tesoro states as "fact" that "at no point did Local 10 have a representative with authority to negotiate over" the unilaterally implemented changes and, therefore, the Union engaged in bad-faith bargaining. R. Supporting Brief at 20-21, 36-38. Historically, in the oil industry, bargaining occurs at two levels: national and local. Tr. 27. National-level negotiations occur between the United Steelworkers International Union or its predecessor union and a "lead" oil company. Tesoro has never been the "lead" oil company and has not directly participated in negotiations at the national level. Local-level negotiations at Mandan take place between the Local and Tesoro. *Id.*

Here, Local 10 officials requested information from and bargaining with Tesoro. Tr. 45; GC Ex. 11, 14-16, 21. Once this information was received, it was sent to the International Union's benefits expert. Tr. 64. The Union told Tesoro that, "[f]ollowing a review of the company's response to our [then-]pending information request, we will provide the company with our proposed dates for bargaining." GC Ex. 21. Before the International Union's benefits expert had a chance to respond with advice, however, Tesoro implemented the unilateral changes to employee benefits. Tr. 64, 101. The ALJ found that bargaining was precluded by Tesoro's "implementation of its changes to the benefit plans immediately after it provided cost data to the Union," and not by any action on behalf of the Local or International Union. ALJD at 20:5-17. Given that Tesoro's unilateral changes affected several Steelworkers locals across the country, the Local's wish to coordinate bargaining with the International Union and "also to utilize the

expertise" of the benefits expert was "hardly surprising." *Id.* Tesoro offered no evidence showing the Union engaged in bad-faith bargaining.

B. The ALJ Properly Applied the Board's "Waiver" Standards When He Found the Union Did Not Waive the Right to Bargain Over the Announced Benefit Changes.

Waiver is the only viable affirmative defense asserted by Tesoro. The Board has consistently and emphatically adhered to the principle that waiver of the right to bargain over a mandatory subject is not "lightly inferred." *Georgia Power Co.*, 325 NLRB 420, 420 (1988), *enf'd. mem.*, 176 F.3d 494 (11th Cir. 1999). Waiver is an affirmative defense used to "avoid an otherwise binding bargaining obligation." *R.P.C., Inc.*, 311 NLRB 232, 234 (1993); *citing Insulfab Plastics*, 274 NLRB 817, 821 (1985), *enf'd.* 789 F.2d 961 (1st Cir. 1986). It can be established three ways. *See American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992) (waiver can be "by express provision . . ., by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two"). First, waiver can be established by express agreement when the waiver language is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Meeting this standard requires specificity: the contract language must unequivocally and specifically express waiver of the right to bargain over a particular subject. *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *citing KIRO, Inc.*, 317 NLRB 1325, 1327 (1995). Second, waiver can be established by bargaining history—but only when the party asserting waiver can show that the waived matter was "fully discussed" by both parties and the waiving party "consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB at 1365; *citing Trojan Yacht*, 319 NLRB 741, 742 (1995).Waiver can also be established by past practice, action, or inaction, but "a union's past acquiescence in an employer's unilateral action on a particular subject does not, without more, constitute a waiver by the union of any right it

may have to bargain about future action by the employer in that matter." *Johnson-Bateman Co.*, 295 NLRB 180, 188 (1989). In other words, a right once waived is not waived forever. *See Owens-Corning Fiberglas Corp.*, 282 NLRB 609, 609 (1987) ("union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time").

The ALJ addressed each method by which waiver can be established and found Tesoro did not prove the Union waived its right to bargain over employee benefits. First, there is no waiver by express agreement between the parties because the benefit plans are specifically excluded from the CBA. ALJD at 10:14-17; *see* GC Ex. 8 at 23.

Having no specific CBA language showing waiver by express agreement, Tesoro argues that a clause in the 2003 MOA stating the parties "had full opportunity to and have negotiated in good faith regarding this package of Tesoro benefits" is evidence of a "comprehensive negotiation process." GC Ex. 5 at 1; R. Supporting Brief at 30 fn. 27. The 2003 MOA, however, also states the parties' "rights and obligations" under the CBA remain unaltered. GC Ex. 5 at 4. The ALJ properly found that the 2003 MOA contains "no specific language" granting Tesoro the right to unilaterally change benefits. ALJD at 11:28-29, 13:40-43 ("there is no contract language in the collective-bargaining agreement or the 2003 MOA which specifically addresses the Respondent's right to make benefit changes"). Further, the ALJ analyzed and followed a comparable case, *Amoco Chemical*. In that case, as here, the union and employer had never bargained over reservation-of-rights language contained within the benefit plans, the benefit plans were excluded from the collective-bargaining agreement, and there was no language showing the union had waived its right to bargain over changes to the plans. ALJD at 11:1-26.

Rather than being "unsupportable," the ALJ's finding of no waiver was based on a case with a similar fact pattern and well-established Board precedent.

Second, Tesoro failed to establish waiver by bargaining history. The ALJ was unpersuaded by Tesoro's evidence of a "decades-old stream" of history establishing the Union's waiver of the right to bargain. Tesoro failed to establish the "full discussion" and "conscious yielding" of the statutory right to bargain necessary to establish waiver by bargaining history. *Allison Corp.*, 330 NLRB at 1365; *see* ALJD at 11:38-40 (no evidence of bargaining over reservation-of-rights clauses in negotiation for 2003 MOA); 11:42-44 (Montoya's 2005 statement that Tesoro could make changes to benefit plans did not establish waiver); 13:32-34; *see also* Tr. 34, 37-40, 42-43 (no discussion of reservation-of-rights clauses in benefit plans during negotiations). In particular, Tesoro's evidence that the Union had previously tried to change the language of Article 12 through negotiation failed to establish waiver because the benefit plans were "explicitly excluded from the contract." ALJD at 13:31-32.

Finally, Tesoro did not show the Union waived its statutory bargaining right by any past practice of acquiescing to changes in employee benefits. The ALJ properly found no waiver because failure to object to prior changes "does not establish that the Union has waived its right to bargain over the instant changes." ALJD at 15:22-24. In so finding, he cited the Board's long-held view that failure to bargain in the past "does not establish a waiver of the right to bargain over future changes an employer wishes to make, even where those changes are similar to those made by the employer in the past without objection." ALJD at 15:24-30; *citing Amoco Chem. Co.*, 328 NLRB at 1222 fn. 6; *Georgia Power Co.*, 325 NLRB at 421; *Bath Iron Works Corp.*, 302 NLRB 898, 900-901 (1991); *Johnson-Bateman Co.*, 295 NLRB at 187-188.

The ALJ considered but rejected several cases cited by Tesoro in support of its waiver arguments. Tesoro relied on *Ace Beverage Distribution Co.*, 253 NLRB 951 (1980), but that case dealt with a violation of Section 8(a)(3) and (1). The ALJ distinguished it from the instant matter on that basis. ALJD at 13:27-34. *Ball Corp.*, 322 NLRB 948 (1997), was distinguished because, in that case, the Board had to consider contract provisions to determine the issue presented. Here, the benefit plans are specifically excluded from the CBA. ALJD at 13:36-42. The ALJ was also unpersuaded by the portion of *Mt. Clemens General Hospital*, 344 NLRB 450 (2005), Tesoro cited. ALJD at 15:41-42. In that case, no exceptions were filed addressing the employer's unilateral changes to the pension plan and that issue was not reviewed by the Board. ALJD at 15:41-42. Further, the *Mt. Clemens General Hospital* ALJ found specific contract language establishing waiver—a critical element missing here. *Id.* at 43-45. *Vandalia Air Freight, Inc.*, 297 NLRB 1012 (1990), was distinguished because here the Union acted differently from the union in *Vandalia*. Here, the Union immediately requested bargaining after the changes were announced, made information requests in a timely manner, and there is no evidence of an economic exigency allowing the unilateral changes. ALJD at 19:23-30. Likewise, *Jim Walter Resources, Inc.*, 289 NLRB 1441 (1988), was distinguished because here the Union made four demands to bargain, requested relevant information, and was not provided that information until shortly before implementation. ALJD at 19:38-20:3.

1. Tesoro's exceptions are based on an erroneous interpretation of waiver.

In its Supporting Brief, Tesoro makes several arguments concerning the Union's purported waiver that merit discussion. Tesoro mentions a 1993 ERISA and LMRA Section 301 suit between a predecessor union (Oil, Chemical, and Atomic Workers International Union) and a predecessor employer (Amoco) over unilateral changes to employee benefits, without explaining

precisely how that suit is relevant to the present dispute. R. Supporting Brief at 14-15. In that case, summary judgment was granted for the employer. *Id.* at 14. But, as the ALJ noted, Section 301 does not address the duty to bargain and the benefit plans here are specifically excluded from the CBA and, therefore, inappropriate for a Section 301 breach-of-contract suit. ALJD at 14:9-15. Tesoro also cites an unfair labor practice charge filed by a predecessor union in 1993 in protest of unilateral changes to employee benefits.[9] Tesoro believes that these two previous disputes—between different bargaining parties—offer a "historical understanding of benefit changes" at the Mandan refinery. R. Supporting Brief at 14 fn. 12. Whatever understanding these two cases suggest, they do not establish the Union's waiver of its right to bargain over employee benefits in 2010 with Tesoro under well-settled NLRB case authority.

Tesoro also seeks to draw a parallel between the instant case and *Omaha World-Herald*, 357 NLRB No. 156 (2011). R. Supporting Brief at 35. In that case, the Board held that the union clearly and unmistakably waived its right to bargain over changes to the pension plan when a distinct "amalgam of factors" was present. *Id.* at slip op. 1. The Board emphasized that the finding of waiver was based on the "totality of the circumstances presented" and that "[n]o prior decisions have involved the unique combination of factors that exists in this case." *Id.*at slip op. 3.[10] First, the pension plan was not described in the CBA. The Board made clear that this factor, "standing alone," would not establish waiver. *Id.* at slip op. 2. Second, the CBA explicitly excluded the pension plan from the grievance and arbitration procedure and explained that this

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[9] That unfair labor practice charge was not admitted into the record. ALJD at 14 fn. 14.

[10] Significantly, the Board cites to *Amoco Chemical* as a prior decision distinguishable from *Omaha World-Herald*. In *Amoco Chemical*, as here, no waiver was found because the reservation-of-rights clauses were "simply mentioned in collective-bargaining agreements as a general source of information about plans," the CBA contained "no terms obligating [the] employer to 'discuss and explain' changes," and there was no explanation as to why the benefit plans were excluded from the grievance and arbitration procedure. 357 NLRB at slip op. 3 fn. 9.

exclusion was "*because* the plans cover all employees, not simply represented ones." *Id.* (emphasis in original).

Most critically, the *Omaha World-Herald* parties' labor agreement provided that the employer "would advise the Union and, upon request, 'meet and discuss' changes to the plan, rather than bargain over them." *Id.* The Board found that it was "surely significant that the parties chose the terms 'discuss' and 'explain' rather than 'bargain over'" in describing the process that would govern changes to the pension plan. 357 NLRB at slip op. 2. "Indeed, had the parties intended to convey a bargaining obligation with respect to changes to the pension plan, they likely would have used the term 'bargain.'" *Id.*

Here, the parties *did* use the term "bargain." As the ALJ found, the instant situation is more similar to *Amoco Chemical* than *Omaha World-Herald* because the benefit plans were mentioned in the CBA as a source of information about the plans, there is no explanation of why benefit plans are excluded from arbitration, and, most significantly, the CBA specifically allows the Union to *bargain* over benefit plans. ALJD at 11:1-26; GC Ex. 8 at 6, 23. Indeed, the CBA's express reference to bargaining instead of merely meeting to "discuss and explain changes" is what distinguishes this case most from *Omaha World-Herald* and undermines Tesoro's argument that meeting and discussing satisfied its contractual bargaining right.

Finally, Tesoro argues that "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." R. Supporting Brief at 27. This is a gross misstatement of the issue. The benefit plans are explicitly excluded from the CBA and the parties have never bargained over the reservation-of-rights clauses Tesoro relies upon as authority to make the unilateral changes to employee benefits. What the Union seeks here is enforcement of its statutory right to bargain

over a mandatory subject. That right can only be eliminated by the Union's waiver, which Tesoro has failed to establish by credible evidence. The ALJ's Decision and Recommended Order should be adopted by the Board.

C. The Board Should Continue Its Adherence to the Waiver Standard and Decline to Apply the "Contract Coverage" Test.

Tesoro excepts to the ALJ's finding that the CBA did not give Tesoro the right to make unilateral benefit changes. R. Supporting Brief at 27. Tesoro argues that this issue was covered in negotiations for the CBA and the 2003 MOA.[11] Tesoro's argument is based on the "contract coverage" theory. Under this theory, "the question of waiver is irrelevant" because the concept of waiver is "analytically distinct" from whether the union has already exercised its right to bargain over an issue. *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).[12]

The "contract coverage" test effectively eliminates the right to bargain over a mandatory subject of bargaining during the life of a collective-bargaining agreement if that subject is mentioned or referred to in the CBA and goes against well-established NLRB case authority. *See C & C Plywood*, 148 NLRB 414, 417 (1964) (allowing an employer the right to unilaterally change employment terms "is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact"). The D.C. Circuit explains that a CBA "establishes principles to govern a myriad of fact patterns" and maintains that "it is naïve to assume that bargaining parties

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[11] Incidentally, Tesoro's right to make changes to employee benefits, or lack thereof, was not discussed during the course of either of these negotiations. *See* Tr. 37, 42-43.

[12] The Seventh Circuit also endorses this test. *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). The First Circuit has stated its endorsement of this test, but then analyzed it using the "sound arguable basis" theory, leaving the implications of its decision unclear. *Bath Marine Draftsmen's Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *see also Provena St. Joseph Med. Ctr.*, 350 NLRB at 808 fn. 1. The Ninth Circuit has declined to adopt the "contract coverage" test. *Local Jt. Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1080 fn. 11 (9th Cir. 2008).

anticipate every hypothetical grievance and purport to address it in their contract." *NLRB v. United States Postal Service*, 8 F.3d at 837. Yet, because the "contract coverage" theory examines whether a union "*has exercised*" its right to bargain (and, if so, does not allow the right to be exercised again during the life of the CBA), a union must do exactly that: anticipate every possible effect of a clause and consider whether it has bargained away the right to address that issue again during the life of the CBA. *Id.* at 836 (emphasis in original). Further, this theory assumes that the determination of whether a matter is covered by the CBA is an issue of contract interpretation, overlooking the fact that the statutory right to bargain is also implicated. *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 fn. 17 (2007).

The Board has consistently declined to follow the "contract coverage" theory and, instead, applies a "waiver" analysis, considering whether a union has "contractually relinquished" its statutory right to bargain. *Provena St. Joseph Med. Ctr.*, 350 NLRB at 811 fn. 17, 812 ("The Board has never departed from [the waiver] standard.").[13] This protects the union's right to bargain with an employer before a unilateral change to a mandatory subject can be made because it requires the "bargaining partners [to] unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Id.* at 811. This standard has been applied since 1949 and is now "deeply engrained in the administration of the Act." *Id.* at 812; *see Tide Water Assoc. Oil Co.*, 85 NLRB 1096 (1949). [14]

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[13] Here, the ALJ declined to apply the "contract coverage" test because of the Board's clearly-indicated adherence to the "clear and unmistakable" waiver standard in *Provena St. Joseph Medical Center*. ALJD at 12 fn. 12.

[14] Because the waiver standard is so "deeply engrained" in the Act's administration, any the departure from it would have a detrimental effect on agreements bargained with that standard in mind. "Changing the standard . . . would create a significant and unbargained-for shift of rights to employers and away from employees and unions, who previously thought they were assured

As in *Provena St. Joseph Medical Center*, the Board should decline to use the "contract coverage" test and reassert its "adherence to one of the oldest and most familiar of Board doctrines, the "clear and unmistakable" waiver standard." 350 NLRB at 810.

D. Whether Tesoro Had a "Sound Arguable Basis" for Interpreting the CBA as Allowing It to Unilaterally Change Benefits Is Irrelevant Because No Violation of Section 8(d) Was Alleged.

As stated in the ALJD, the issue in this case is "whether the Respondent had an obligation to bargain over changes in employee benefits when the benefit plans are explicitly excluded from the contract." ALJD at 13:30-32. The Complaint alleged violation of Section 8(a)(1) and (5) for Tesoro's failure and refusal to bargain collectively and in good faith. GC Ex. 1(e) at ¶ 9.

Tesoro tries to muddy the waters of this clear-cut complaint by advancing its claim of having a "sound arguable basis" for making the unilateral changes to benefits in the absence of impasse. This argument would be relevant if a violation of Section 8(d) were alleged—but no such allegation was made. *See* GC Ex. 1(e). The differences between a "unilateral change" case—as here—and a "contract modification" case are fundamental and significant "in terms of principle, possible defenses, and remedy." *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005). In a unilateral change case, the General Counsel is only required to show the existence of "an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining.* The allegation is a *failure to bargain.*" *Id.* at 501 (emphasis in original). Here, the Acting General Counsel has met its burden. Waiver is a defense in a unilateral change case; the remedy is a bargaining order. *Id.*

In a contract modification change case, "the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere

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of the right to bargain collectively over matters that were not explicitly waived." *Provena St. Joseph Med. Ctr.*, 350 NLRB at 813.

to the contract." *Id.* A defense to a contract modification charge is that the union consented to the change; determining whether the union consented or not requires interpretation of the contract. *Id.* Thus, the "sound arguable basis" standard is "necessarily implicated . . . [because] a contract modification does not exist if there is a good faith reliance on a sound and arguable interpretation of the contract." *Id.* at 502.

Put another way, a unilateral change case approaches the same issue as a contract modification case, but from a different angle: in a unilateral change case "the issue is whether the contract *privileges* the conduct," whereas, in a contract modification case, the issue is "whether the contract *forbade* the conduct." *Id.* at 502 (emphasis in original). The privilege in a unilateral change case, if it exists, is a waiver of the right to bargain. The ALJ analyzed this issue and, finding no waiver, he concluded Tesoro violated Section 8(a)(1) and (5) of the Act. Tesoro's exceptions stating the ALJ failed to give Tesoro's interpretation of a particular contract or document are based on the argument that those documents did not forbid the unilateral changes. *See* R. Exceptions at ¶¶ 5-6, 10-11, 13. As such, those arguments are extraneous to the issue at hand.

Tesoro also relies on *J. Picini Flooring*, 355 NLRB No. 123 (2010) as a recent affirmation of the "sound arguable basis" standard. R. Supporting Brief at 21-22; 355 NLRB No. 123 (2010). But, in *J. Picini Flooring*, neither party excepted to the ALJ's reliance on *Atwood & Morrill Co., Inc.*, 289 NLRB 794 (1988),[15] or the ALJ's "finding that the dispute between [the parties] involves a matter of contract interpretation." 355 NLRB slip op. at 5. Since the Board's practice

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[15] In *Atwood & Morrill*, the Board held that when 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 seek to determine which of two equally plausible contract interpretations is correct." 289 NLRB at 795; *citing NCR Corp.*, 271 NLRB 1212, 1213 (1984).

is to limit review of the ALJ's decision to the exceptions submitted by the parties, the appropriateness of the "sound arguable basis" standard was not before the Board.

III. Conclusion

For the reasons stated above, the Union respectfully requests that the ALJ's Decision and Recommended Order be adopted.

Respectfully submitted,

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

April 17, 2012

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Charging Party's Answering Brief to Respondent's Exceptions to the Decision and Recommended Order of the Administrative Law Judge was served via electronic mail this 17th day of April, 2012 upon:

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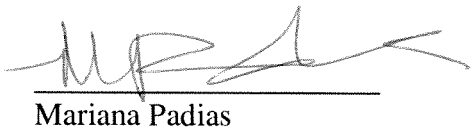

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