



United States Government  
NATIONAL LABOR RELATIONS BOARD  
Region 18  
330 South Second Avenue  
Suite 790  
Minneapolis, MN 55401-2221

Office: (612) 348-1757  
Fax: (612) 348-1785  
www.nlrb.gov

April 17, 2012

Lester Heltzer  
National Labor Relations Board  
Office of the Executive Secretary  
1099 14th St., NW  
Washington, D.C. 20005-3419

Re: Tesoro Refining and Marketing Co.  
Cases 18-CA-019615 and 18-CA-019644

Dear Mr. Heltzer:

On February 7, 2012, Administrative Law Judge Mark Carissimi issued a decision in the above-captioned case, and on March 20, 2012, Respondent filed exceptions and a supporting brief. After carefully reviewing Judge Carissimi's well-reasoned opinion as well as Respondent's exceptions and brief, Counsel for the Acting General Counsel contends that Respondent's defenses to the charge are unsupported by the trial transcript, exhibits, and established caselaw and do not necessitate a detailed response. Please accept this letter in lieu of a formal answering brief. Counsel for the Acting General Counsel urges that Judge Carissimi's decision be affirmed.

Respondent's exceptions decry the exact reasons we issued Complaint in this case: Respondent made unilateral changes to employee benefits, the parties' labor agreement did not permit Respondent to do so, and the Union did not waive its right to bargain over such changes. The ALJ did not err in reaching his decision. He weighed the testamentary and documentary evidence presented to him at trial, the parties' post-hearing briefs, and existing caselaw, and reached a well-founded conclusion that Tesoro did violate Sections 8(a)(5) and (1) of the Act by implementing unilateral changes to employee benefits without affording the Union the opportunity to bargain.

*Respondent's exceptions are mere restatements of defenses already rejected by the ALJ.*

*A. The parties' labor agreement does not grant Respondent the authority to make unilateral changes*

Contrary to Respondent's assertions, the ALJ correctly determined that the parties' labor agreement does not grant Respondent authority to make unilateral benefit changes. This issue was central to the entire case. The ALJ thoroughly addressed this point. Article 12 of the parties' collective bargaining agreement provides that "Benefit Plans of the Company.... shall not in any instance be or become part of this Agreement." Thus, because the benefit plans are

explicitly excluded from the collective-bargaining agreement, it follows that there is nothing in the agreement that serves as either a waiver of the Union's right to bargain over the changes in plan benefits or as a grant of unilateral power to Respondent. The ALJ recognized that the 2003 Memorandum of Agreement expressly incorporates Tesoro's rights under the benefit plans, and that the benefit plans do have reservation of rights language within them. However, the ALJ also recognized that there was no evidence that the parties had ever bargained about the reservation of rights language at either the local or national level, and there was only "scant evidence" that union officials were aware of the language.

Respondent excepts that the ALJ erred in failing to conclude that it had a "sound arguable" basis for its interpretation of the contract. Respondent applies the wrong standard; the "sound arguable" basis standard only applies where the allegation is a Section 8(d) violation. Here we have a Section 8(a)(5) violation, a unilateral change, and the Acting General Counsel need only show that there was a mandatory subject of bargaining and Respondent made a significant change to it without bargaining.

The ALJ's ruling is well-reasoned and need not be revisited by the Board.

*B. The Union did not waive its right to bargain over benefit changes*

*i. The Union did not waive its right by signing the labor agreement*

The ALJ thoroughly addressed the issue of waiver and reached the well-reasoned decision that the Union did not waive its right to bargain over benefit changes. Caselaw is clear that a waiver of the right to bargain over a mandatory subject of bargaining must be clear and unmistakable. In the case at hand the record reflects clear and unmistakable attempts by the Union to have Respondent recognize and bargain with it. For the reasons stated above: there is no specific language in the 2003 MOA regarding Respondent's right to change benefit plans unilaterally, the reservation of rights language was buried within the summary plan descriptions, and there is a lack of evidence that the parties discussed the reservation of rights language within these plans, it is clear that the Union did not waive its right to bargain by way of signing the labor agreement.

*ii. The Union did not waive its right by past practice*

Respondent contends that the Union's failure to oppose changes in the past means it has waived its right to bargain. The parties' bargaining history is inconsequential. First, the current parties differ from those that were party to the earlier agreements and changes. Second, a union choosing not to demand bargaining over changes in the past does not establish a waiver of the right to bargain over future changes even when those changes are similar to those made in the past without objection. Contrary to Respondent's exception, a single statement made by the Local Union President in 2005 does not establish that the Union had fully discussed and consciously yielded its right to bargain over changes in benefit plans in the future. The ALJ addressed this clearly and concisely.

The ALJ similarly concluded that the parties' litigation history is inconsequential and refused to admit into evidence an unfair labor practice charge from 1993 alleging that a predecessor entity, Amoco, violated Section 8(a)(5) by making changes to medical care benefits. He rejected the exhibit because a Regional Director's administrative dismissal or refusal to proceed on a charge is not an adjudication on the merits and does not preclude future litigation of the subject matter. Further, a withdrawn charge has no probative value regarding current allegations. Respondent argues that the withdrawal of the charge indicates that a predecessor union understood it did not have the right to bargain, but the exhibit just as easily asserts that the

predecessor union made a pattern of demanding that a predecessor entity recognize and honor its right to bargain over mandatory subjects of bargaining.

*iii. The Union did not waive its right by choosing the wrong course of action*

Respondent takes exception to the ALJ's finding that the Union's failure to file a grievance over the benefit changes does not mean it waived its right to bargain. The collective bargaining agreement does state that issues pertaining to benefit plans may be processed through the grievance procedure outlined in Article 2 of the contract but are not subject to arbitration. However, as the ALJ explained in his decision, Respondent cannot dictate to the Union the manner in which it should challenge planned benefit changes. Thus, the fact that the Union did not file a grievance does not establish that the Union waived its right to bargain.

The facts show that the Union made multiple deliberate attempts to bargain; it did not waive its right. Respondent informed the Union on about July 28, 2010, via telephone, that it intended to implement changes on January 1, 2011. On about July 29, 2010, Respondent handed a letter to the Union regarding the changes, and told Respondent that it needed to negotiate benefits with the Union. Respondent said that it was under no obligation to negotiate. (Tr. 44-45, GCX 10). The Union made a written demand for negotiations on August 5, 2010. (Tr. 45-46, GCX 11) Respondent replied, stating that it would be willing "to discuss the benefit changes." (Tr. 47, GCX 12) The Union told Respondent again on September 1 that it needed to bargain the benefits, and again, Respondent said it had no obligation to do so. (Tr. 49) On October 22, the Union wrote to Respondent and said that it was not asking to discuss the changes but was asking to bargain. (Tr. 54, GCX 16) Again, Respondent said that it was "prepared to meet and discuss benefit plan changes with the Union." (GCX 16) On December 6, the Union *again* expressed its desire to bargain over the benefit changes in an email to Respondent. (Tr. 55-56, GCX 17) Thus, starting almost immediately after learning about Respondent's intended changes, the Union made distinct demands to bargain and Respondent denied each one. Respondent's "willingness to discuss" the changes does not rise to the level of its statutory obligation to bargain with the Union over these mandatory subjects of bargaining, so the Union did not make a proposal or schedule a meeting. It was not until December 13, 2010 that Respondent stated that it was willing to consider a proposal from the Union; the changes were expected to be implemented on January 1, and evidence shows the changes were implemented even prior to that. Thus, that the Union neither made any proposals, requested further meetings, nor sought postponement of implementation is not evidence of its waiver or bad faith; it is only evidence that by the time Respondent agreed to negotiate with the Union, implementation of the unilateral changes was a fait accompli.

*C. The Union had the proper authority to bargain with Respondent and did not bargain in bad faith*

Though Respondent takes exception to the fact that the ALJ did not conclude that the Local Union did not have the proper authority to bargain and therefore was bargaining in bad faith, the ALJ's decision is correct in determining that the Union *did* have proper authority. Bargaining occurs at two levels: the national level, between the lead company and the International Union, and the local level, between Respondent and the Local Union. The collective bargaining agreement states that Local 10 is the bargaining representative, and Local President Javier Montoya's signature appears on the agreement as well as the 2003 MOA. It is true that the Union said it waited for direction from International before making proposals; when the Union got summary plan descriptions and cost data, it sent the information to its International benefits expert. This does not mean that the Local did not have authority to offer proposals; it

means that the Local wanted its benefits expert to review the information. When Respondent announced its intended changes, it made the announcement company-wide. It is not surprising that the Union would want to utilize the International's benefits expert and even coordinate its response with International.

*D. That Respondent delayed implementation of vacation policy changes does not indicate its willingness to bargain in good faith*

Contrary to Respondent's exception, the fact that it delayed implementation of vacation policy changes does not evidence its willingness to bargain in good faith. If Respondent were willing to bargain in good faith, it would not have denied the Union the opportunity to bargain over all of the changes in the instant case. Further, there is no evidence that the delay in implementation of the changes to the vacation policy is related to a willingness to bargain with the Union. In fact, Respondent *did* eventually unilaterally implement a changed vacation policy on January 1, 2012. This Region issued a Complaint regarding that unilateral implementation, and the issues presented in the pending trial are reminiscent of those addressed in this case: Respondent gave notice that there was going to be a change but then refused to recognize the Union's right to negotiate over the changes and implemented the changes without affording the Union the opportunity to bargain.

*Respondent raises an additional issue that was not examined at trial but is not supported by documentary or testimonial evidence*

*A. Respondent's exception that the ALJ erred in determining the date of the change to the 401k benefit is inaccurate, but it is also inconsequential*

At trial, General Counsel offered evidence in support of its argument that Respondent unilaterally implemented benefit changes during the pay period beginning December 19, 2010, only 6 days after finally agreeing to consider a proposal from the Union. The ALJ accepted into evidence a pay stub dated January 7, 2011 with a beginning date of December 19, 2010 and an end date of January 1, 2011, that says that Respondent matched 6% of the 401k contribution. Testimony provided that Respondent previously matched 7%. (GC Ex. 23, Tr. 66) Respondent did not object to the exhibit, but now claims that the change was not implemented until January 1 and was then made retroactive to the beginning of the pay period which encompassed January 1. Respondent offered no evidence to support this theory at trial. Even if it could prove this date disparity, whether the change was implemented in the pay period ending on January 1 or *beginning* on January 1 is truly inconsequential. By the time Respondent agreed to consider a proposal from the Union, the changes were fait accompli.

For all of the reasons outlined above, and in reliance on the evidence submitted at trial and the caselaw introduced in our post-hearing brief, the Acting General Counsel urges that Judge Carissimi's decision be affirmed in all respects.

Very truly yours,



ABBY E. SCHNEIDER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the Letter to the Executive Secretary on Behalf of Counsel for the Acting General Counsel were served by electronic mail on the 17<sup>th</sup> day of April, on the following parties:

William J. Dritsas, Attorney  
Seyfarth Shaw LLP  
560 Mission Street, Suite 3100  
San Francisco, CA 94105  
WDritsas@Seyfarth.com

Joshua L. Ditelberg, Attorney  
Seyfarth Shaw LLP  
131 S. Dearborn Street, Suite 2400  
Chicago, IL 60603  
JDitelberg@Seyfarth.com

Bruce Fickman, Attorney  
United Steel, Paper and Forestry, Rubber,  
Manufacturing, Energy, Allied Industrial  
and Service Workers International Union  
Five Gateway Center, Room 807  
Pittsburgh, PA 15222  
BFickman@usw.org

Mariana Padias, Attorney  
United Steel, Paper and Forestry, Rubber,  
Manufacturing, Energy, Allied Industrial  
and Service Workers International Union  
Five Gateway Center, Room 807  
Pittsburgh, PA 15222  
MPadias@usw.org

  
Abby E. Schneider  
Counsel for the Acting General Counsel