

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

TESORO REFINING & MARKETING)	
COMPANY)	
and)	
)	Cases 21-CA-39591
UNITED STEEL, PAPER AND)	21-CA-38647
FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO, CLC; UNITED STEEL,)	
PAPER AND FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO, LOCAL 675)	

**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..... **ii**

I. INTRODUCTION **1**

II. ARGUMENT..... **3**

 A. Tesoro’s Material “Facts” Are Not Supported by the Credible Record Evidence..... 3

 1. The Shell Benefits Agreement between the Union and Shell does not apply to Tesoro. 3

 2. Tesoro did not assume the 2007 Grievance Settlement between Shell and the Union..... 6

 3. The Union never discussed the reservation-of-rights clauses in the employee benefit plans with Tesoro. 6

 4. The 2009 CBA language prohibits Tesoro from decreasing benefits..... 7

 5. The Union demanded to bargain over the announced changes to employee benefits. 9

 6. Tesoro never agreed to bargain over the changes to employee benefits..... 10

 B. The ALJ Did Not Err in Finding Tesoro Violated Sections 8(a)(5) and (1) of the Act..... 11

 C. The Union Did Not Waive the Right to Bargain over the Announced Benefit Changes..... 13

 D. Whether Tesoro Had a “Sound Arguable Basis” for Interpreting the CBA as Allowing It to Unilaterally Change Employee Benefits Is Irrelevant Because No Violation of Section 8(d) Was Alleged..... 17

 E. The Board Should Continue to Decline to Apply the “Contract Coverage” Test..... 20

 F. Tesoro Correctly Asserts that Changes to the Thrift 401(k) Plan Were Removed from the Complaint..... 22

III. CONCLUSION **22**

TABLE OF AUTHORITIES

Cases

<i>Allison Corp.</i> , 330 NLRB 1363 (2000).....	14, 15
<i>American Diamond Tool, Inc.</i> , 306 NLRB 570 (1992)	2, 14
<i>AT&T Corp.</i> , 337 NLRB 689 (2002)	12
<i>Atlanta Hilton & Tower</i> , 271 NLRB 1600 (1984).....	12
<i>Atomic Workers Int’l Union, AFL-CIO v. NLRB</i> , 538 F.2d 1199 (5th Cir. 1976).....	12
<i>Atwood & Morrill Co.</i> , 289 NLRB 794 (1988)	19
<i>Bath Iron Works Corp.</i> , 345 NLRB 499 (2005)	17, 18
<i>Bath Marine Draftsmen’s Assoc. v. NLRB</i> , 475 F.3d 14 (1st Cir. 2007).....	20
<i>C & C Plywood</i> , 148 NLRB 414 (1964).....	20
<i>Chicago Tribune Co. v. NLRB</i> , 974 F.2d 933 (7th Cir. 1992).....	20
<i>Church Point Wholesale Grocery Co.</i> , 215 NLRB 500 (1974).....	12
<i>Georgia Power Co.</i> , 325 NLRB 420 (1988), <i>enf’d. mem.</i> , 176 F.3d 494 (11th Cir. 1999).....	2, 14
<i>Insulfab Plastics</i> , 274 NLRB 817 (1985), <i>enf’d.</i> 789 F.2d 961 (1st Cir. 1986).....	14
<i>Int’l Paper Co. v. NLRB</i> , 115 F.3d 1045 (D.C. Cir. 1997).....	12
<i>Int’l Paper Co.</i> , 319 NLRB 1253 (1995).....	12
<i>J. Picini Flooring</i> , 355 NLRB No. 123 (2010).....	18, 19
<i>Johnson-Bateman Co.</i> , 295 NLRB 180 (1989).....	15
<i>KGTV</i> , 355 NLRB No. 213 (2010)	12
<i>KIRO, Inc.</i> , 317 NLRB 1325 (1995).....	14
<i>Local Jt. Exec. Bd. of Las Vegas v. NLRB</i> , 540 F.3d 1072 (9th Cir. 2008).....	20
<i>Logemann Bros. Co.</i> , 298 NLRB 1018 (1990).....	11
<i>Lou’s Produce, Inc.</i> , 308 NLRB 1194 (1992)	2, 12, 13
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	14

<i>NCR Corp.</i> , 271 NLRB 1212 (1984)	19
<i>NLRB v. United States Postal Service</i> , 8 F.3d 832 (D. C. Cir. 1993)	20, 21
<i>Omaha World-Herald</i> , 357 NLRB No. 156 (2011)	16, 17
<i>Owens-Corning Fiberglas Corp.</i> , 282 NLRB 609 (1987)	15
<i>Provena St. Joseph Med. Ctr.</i> , 350 NLRB 808 (2007)	3, 20, 21
<i>R.P.C., Inc.</i> , 311 NLRB 232 (1993)	14
<i>St. George's Warehouse, Inc.</i> , 349 NLRB 870 (2007)	11, 12
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), <i>enf'd.</i> 188 F.2d 362 (3d Cir. 1951)	11
<i>Tide Water Assoc. Oil Co.</i> , 85 NLRB 1096 (1949)	21
<i>Trojan Yacht</i> , 319 NLRB 741 (1995)	14
<i>Vickers, Inc.</i> , 153 NLRB 561 (1965)	19
<i>WWOR-TV, Inc.</i> , 330 NLRB 1265 (2000)	12

Pursuant to Section 102.46(d)(2) of the Board’s Rules and Regulations, Charging Parties United Steel, Paper and Forestry, Rubber, Manufacturing, Rubber, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“USW”) and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, Local 675 (“Local 675”; collectively, the “Union”) file 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 Respondent’s 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”) erred in finding that Tesoro made unlawful changes to its “thrift 401(k)” plan;² (2) whether the ALJ erred in finding Tesoro violated Section 8(a)(5) and (1) of the Act when it made unilateral changes to mandatory subjects of bargaining because employee benefits were not subject to mandatory bargaining;³ (3) whether the ALJ should have found that the Union waived its right to bargain over employee benefits;⁴ (4) whether the ALJ should have found that Tesoro had a “sound arguable basis” for its interpretation of the parties’ collective-bargaining agreement (“CBA”);⁵ and (5) whether the ALJ erred when he did not apply the

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 March 19-21, 2012, 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 Charging Parties’ exhibits are noted as “CP Ex. ____.” The Administrative Law Judge’s Decision is noted as “ALJD ____.”

² See Exceptions ¶¶ 1, 23-25.

³ See Exceptions ¶¶ 2, 7-11, 14-17, 21-25.

⁴ See Exceptions ¶¶ 3, 6-17, 19, 21-25.

⁵ See Exceptions ¶¶ 4, 6, 9, 12-16, 18, 20, 21, 23-25.

“contract coverage” test to determine whether Tesoro had the authority to unilaterally change employee benefits.⁶ (R. Supporting Brief at 19-20).

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 the credible 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.

Tesoro argues that the party failing to bargain in good faith was the Union. This argument is premised on the idea that, since the Union’s bargaining position was that the CBA did not allow Tesoro to make changes that would result in a decrease to employee benefits, the Union never intended to bargain in good faith. A party can bargain in good faith and simultaneously insist that it is not required to bargain. *Lou’s Produce, Inc.*, 308 NLRB 1194 (1992). If the credible record evidence establishes anything, it is that the party refusing to bargain was Tesoro, not the Union.

Tesoro advances various arguments that the Union did not have the right to bargain over these changes. One argument arises out of the idea that all existing agreements between the Union and Shell, the previous owner of the Los Angeles Refinery (“LAR”), were assumed by Tesoro. The agreements in questions, however, either specifically mentioned Shell benefits, which Tesoro does not offer, or were not in existence at the time Tesoro took over the LAR. These agreements do not amount to a “waiver” under well-established Board law and neither do any of the Union’s actions. *Georgia Power Co.*, 325 NLRB 420 (1988); *American Diamond Tool, Inc.*, 306 NLRB 570 (1992).

⁶ See Exceptions ¶¶ 5-6, 9, 12-16, 18, 20, 23-25.

Tesoro also argues that it had a “sound arguable basis” for its interpretation of the contract. This argument is based on the “contract coverage” analysis favored by a few appellate courts. The NLRB rejects the “contract coverage” analysis, choosing to adhere 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 Credible Record Evidence.

In its Supporting Brief, Tesoro describes facts, some of which are not supported by the record evidence.

1. The Shell Benefits Agreement between the Union and Shell does not apply to Tesoro.

Many of Tesoro’s Exceptions are premised on the “fact” that a 2002 agreement between the Union and Shell, the LAR’s previous owner, about benefits Shell would provide to bargaining-unit employees was assumed by Tesoro. (*See* Exceptions ¶¶ 3-6, 12-16, 18, 21; R. Ex. 3; Tr. 109:15-24). This “fact” is not established by the credible record evidence.

In the oil industry, bargaining over some issues takes place on the national level and other issues are bargained on a local level. One of the provisions negotiated on the national level is a letter of agreement on successorship (“successorship LOA”). (R. Ex. 4 at 13). The successorship

LOA provides that an employer will obligate any successor employer to do three things: recognize the Union, assume the existing CBA and memoranda of agreement (“MOA”), and provide employee benefits “reasonably comparable in the aggregate” to those provided by the predecessor employer. (R. Ex. 4 at 13; Tr. 82:14-15, 86:4-22). This last provision is in recognition of the obvious fact that a successor employer cannot provide its predecessor’s benefits because the successor employer provides its own benefits. The successorship LOA makes this clear by stating that a “successor company *shall not be required to continue the existing employee benefits*” of the predecessor employer. (R. Ex. 4 at 13 (emphasis added); *see also* R. Supporting Brief at 5 (“a successor employer may have different benefit programs” than its predecessor)).

In April 2002, Shell bought the LAR from Equilon. (R. Ex. 3). Equilon had signed the successorship LOA with the Union and was thus obligated to condition Shell’s purchase of the LAR on Shell’s recognition of the Union, assumption of the existing CBA and MOAs, and provision of employee benefits “reasonably comparable in the aggregate” to those offered by Equilon. (R. Ex. 4 at 13). Shell carried out the obligations it owed to Equilon and one of the ways it did so was by negotiating the 2002 Shell Benefits Agreement (“SBA”) with the Union. (R. Ex. 3).

Shell offered LAR employees Shell (and not Equilon) benefits and the SBA was negotiated to ensure that Shell’s benefits would be “reasonably comparable in the aggregate” to Equilon’s benefits.⁷ (R. Ex. 3). The SBA specifically referenced the Shell benefits offered to

⁷ Tesoro makes an argument that the SBA was not limited to the “immediate aftermath of a corporate transition” because the Union and Shell resolved mid-contract grievances under the process set out by the SBA. (R. Supporting Brief at 34). First, Tesoro did not provide any of the grievances which were purportedly resolved by the SBA. The 2007 grievance settlement between Shell and the Union resolved a grievance over 12-hour shift workers. (R. Ex. 4 at 7-8).

LAR employees: the “Dimensions” plan. (R. Ex. 3 at 1; Tr. 109:15-24). The SBA also provided that, “[s]hould future circumstances require substantial benefits plan modifications, [Shell] agrees to notify the Union and engage in appropriate discussion/bargaining.” (R. Ex. 3 at 4).

Shell, like Equilon, signed the successorship LOA with the Union. (Tr. 82:11-14). This required Shell to obligate a successor employer to recognize the Union, assume the existing CBA and MOAs, and provide benefits “reasonably comparable in the aggregate.” (R. Ex. 4 at 13).

In 2007, Shell sold the LAR to Tesoro. (Tr. 386:13). The successorship LOA between Shell and the Union required Shell to obligate Tesoro to carry out the LOA’s three provisions.⁸ Shell carried out its obligation to the Union by including the LOA’s provisions in the purchase-and-sale agreement it negotiated with Tesoro. (Tr. 340:8-13, 341:23-342:2).

Tesoro carried out its obligation to Shell by providing Tesoro benefits that were “reasonably comparable in the aggregate” to Shell’s benefits. Tesoro’s Manager of HR Operations and Labor Relations Earl Borths (“Borths”) met with USW International Vice President Gary Beevers (“Beevers”) and the two agreed that Tesoro’s benefits were similar enough to Shell’s benefits for Tesoro to comply with the terms of the purchase-and-sale agreement between Tesoro and Shell. (Tr. 296:8-16).

In sum, the ALJ was correct when he found that “Tesoro’s reliance on the Shell Benefits Agreement is without merit for many reasons.” (ALJD at 9:12-13). Tesoro was never directly obligated to the Union to provide benefits “reasonably comparable in the aggregate” to Shell’s benefits. Shell had an obligation to the Union to require a successor employer to provide those benefits. In turn, Shell obligated Tesoro to make those provisions. Tesoro did not assume the

Second, Tesoro did not provide any evidence establishing the SBA applies to *any* corporate transition, and was not limited to the transition for which it was specifically designed, namely, the transition from Equilon to Shell.

⁸ Tesoro was not a party to the successorship LOA between Shell and the Union.

2002 SBA because it never provided *Shell* benefits—it provided Tesoro benefits that were “reasonably comparable in the aggregate” to Shell’s benefits. Furthermore, under the purchase-and-sale agreement and according to Tesoro, Tesoro was only obligated to Shell to provide those substantially similar benefits for a one-year period. (Tr. 348:25-349:3). Once Tesoro assumed control of the LAR and provided Tesoro benefits to LAR employees, the Shell Benefits Agreement ceased to control.

2. Tesoro did not assume the 2007 Grievance Settlement between Shell and the Union.

Tesoro also states as “fact,” and premises some arguments on the “fact,” that it assumed a grievance settlement agreement between Shell and the Union. (R. Supporting Brief at 8, 33). Tesoro did no such thing.

The successorship LOA between Shell and the Union obligated Shell to require any successor employer to assume any “existing” MOAs between Shell and the Union. (R. Ex. at 13). Tesoro purchased the LAR from Shell in April 2007. (Tr. 386:13). Shell and the Union came to an agreement on the grievances on October 11, 2007. (R. Ex. 6). Tesoro could not have assumed the 2007 grievance settlement at the time it purchased the LAR for the simple reason that the grievance settlement did not yet exist. Since Tesoro did not assume the 2002 Shell Benefits Agreement or the 2007 grievance settlement between Shell and the Union, it cannot point to the language in those agreements as proof of its right to make unilateral changes. (*See* R. Supporting Brief at 8).

3. The Union never discussed the reservation-of-rights clauses in the employee benefit plans with Tesoro.

Tesoro states as “fact” that “the Union accepted the [Tesoro] benefit plans’ reservations of rights allowing for mid-term changes” when Tesoro bought the LAR from Shell in 2007.

(R. Supporting Brief at 5). While all but one of the Tesoro benefit plans do include reservation-of-rights clauses, (R. Ex. 8 at 2, 10 at 6, 11 at 2, 12 at 6), Tesoro’s Manager of HR Operations and Labor Relations, Earl Borths (“Borths”), testified that those clauses were not discussed at any time during meetings about Tesoro’s purchase of the LAR bargaining-unit employees. (Tr. 303:20-22, 343:12-16). In fact, the only presentation specifically designed for bargaining-unit employees at the LAR about Tesoro benefit plans when Tesoro took over the LAR did not include any statement that Tesoro had the right to amend or discontinue the benefit plans at any time. (R. Ex. 9 at 2; Tr. 345:2-10). And, Tesoro can point to no evidence that the reservation-of-rights clauses were discussed at meetings between Borths and USW International Vice President Gary Beevers about Tesoro’s purchase of the LAR—the most Tesoro can produce is the fact that the majority of Tesoro benefit plans contain reservation-of-rights clauses. (*See* R. Supporting Brief at 5 fn. 8).

Tesoro has not produced credible evidence of any discussion about reservation-of-rights clauses with the Union before the September 20 and November 9, 2010, meetings. Having never discussed Tesoro’s reservation of rights, the Union could not have waived the right to bargain over Tesoro’s ability to amend, modify, or change those plans in any way, discussed further *infra* at II.C.

4. The 2009 CBA language prohibits Tesoro from decreasing benefits.

Tesoro states as “fact” that no “substantive term or understanding” of the previous CBA changed during 2009 negotiations. (R. Supporting Brief at 9-10). Yet, CBA Article IX, the section describing employee benefits, underwent a significant change. The previous CBA with Shell stated:

The Employee Benefit Plans, namely the Plans included in the Company's CARE, PROTECTION, BALANCE, WEALTH, and LEARNING Plans subject to the provisions of the summary plan descriptions (SPD's) which shall determine all questions arising under and in connection with the Plans . . .

(GC Ex. 5 at 15; GC Ex. 3 at 5). In 2009, Tesoro drafted changes to Article IX, which the Union accepted:

Except as otherwise provided herein, Tesoro's Health and Welfare Plans applicable to employees are subject to the provisions of the summary plan descriptions (SPD's) which shall determine all questions arising under and in connection with the Plans . . .

(GC Ex. 5 at 15 (emphasis added); GC Ex. 6 at 6).⁹ In both the previous and 2009 CBAs, Article IX continued, stating:

The Company will not voluntarily discontinue, change or modify the above Plans during the term of this Agreement in such a way as to decrease the benefits under the Plans to any employee covered by this Agreement . . .

(GC Ex. 6 at 14).

No matter what the parties discussed at the 2009 negotiations, the resulting, Tesoro-drafted, Article IX language is unambiguous: the Tesoro plans are subject to the provisions of the summary plan documents *except for* when benefits are changed in a way to decrease benefits.¹⁰

(GC Ex. 5 at 15-16; GC Ex. 6 at 6). If employee benefits were decreased—as they were in January 2011—the SPDs would not control and, therefore, the reservation-of-rights clauses contained within those SPDs would not be in effect.

⁹ These 2009 changes to the CBA underscore the weakness in Tesoro's argument that the 2002 Shell Benefits Agreement "existed to alter Article IX." (R. Supporting Brief at 32). That situation would give the 2002 SBA the strange power of altering the future. Furthermore, if the SBA *did* control changes to employee benefits, there would have been no need to change the CBA's language.

¹⁰ It is undisputed that the unilaterally-implemented changes resulted in a decrease of employee benefits. (GC Ex. 9, 10).

5. The Union demanded to bargain over the announced changes to employee benefits.

Tesoro offers various “facts” intended to show the Union had no intention to bargain over the changes to employee benefits. (*See* R. Supporting Brief at 11 (Union “refused . . . to meet to address” the benefit changes before September 20, 2010), 12 (Union was unavailable to meet on August 9, 2010), 14-18 (“Union’s Position Was That Article IX Of The CBA Governed Tesoro’s Planned Benefit Changes”). The Union’s actions, however, are inconsistent with the idea that it never intended to bargain.

Tesoro fails to mention that the Union made several demands to bargain over Tesoro’s proposed unilateral changes to employee benefits, both in writing and orally. (GC Ex. 8, 11 (“As the exclusive bargaining agent of these employees the Union is making a demand to bargain any such changes [to employee benefits]”), 21(a): Tr. 72:1-2, 72:20-21, 73:10, 168:19-21, 185:9-10, 231:4-12, 232:8-9, 449:18-20). There is also no mention of the fact that Tesoro admitted the Union demanded bargaining over employee benefits. (*See* GC Ex. 16(a) (Tesoro letter to Union captioned “Los Angeles Bargaining Response” and admitting Union’s August 5, 2010, letter “demand[ed] bargaining”); R. Ex. 35 at 1 (Tesoro’s notes of Nov. 9, 2010, meeting, “[Union] sent demand to bargain letter).

Not only did the Union demand to bargain several times, but the Union requested information that was “necessary and relevant to bargaining over the previously announced changes to benefits. (GC Ex. 22 at 1; *see also* GC Ex. 15, 17). These information requests were not fully provided until January 5, 2011—days after Tesoro’s announced changes were implemented on January 1, 2011. (CP Ex. 3; Tr. 238:24-25). The Union never had any time to review the information it requested and which was necessary to be able to draft proposals. (Tr. 254:8-23).

6. Tesoro never agreed to bargain over the changes to employee benefits.

Tesoro alleges as “fact” that it did not refuse to bargain with the Union over the announced benefit changes. (R. Supporting Brief at 13, 15). There was, however, no bargaining on Tesoro’s part. The LAR’s HR Manager, Elias Reyna (“Reyna”), only met with the Union’s designated spokesperson, Rick Latham (“Latham”),¹¹ twice, on September 20, 2010, and November 9, 2010. (Tr. 167:14-21).

No bargaining occurred at either of these sessions. At the September 20 meeting, Reyna testified that his intent was to “answer questions, to go through [the announced changes] with [the Union].” (Tr. 440:12-15, 167:14-21, 438:5-8; GC Ex. 21(a) at 1-2). At the November 9, 2010, meeting, Reyna agreed with Union member Mike McFarland’s (“McFarland”) summary of the September 20 meeting, including McFarland’s statement that no bargaining occurred at that meeting. (Tr. 231:22-25; GC Ex. 21(a) at 2). At the November 9, 2010, meeting, Reyna also stated that Tesoro was “not necessarily agreeing to bargain” and that the 2002 Shell Benefits Agreement allowed Tesoro to make the announced changes. (Tr. 232:13-21, 233:5-6, 449:24-25; GC Ex. 8, 21(a) at 2).

At the hearing, both the Union and Tesoro presented testimony about the September 20 and November 9 meetings. (Tr. 43-168 (Rick Latham, USW Subdistrict Director and spokesperson for negotiations), 170-207 (Ryan Heustis, Local 675 Tesoro unit chair), 208-279 (David Campbell, Local 675 Secretary-Treasurer), 361-489 (Elias Reyna, Tesoro LAR HR Manager)). The ALJ did not find Reyna’s testimony credible insofar as it “suggest[ed] that Tesoro engaged in discussions with the Union” because “Reyna’s demeanor while giving this

¹¹ See CP Ex. 1 (letter to Borths designating Latham as Local 675’s spokesperson for negotiations).

testimony revealed a degree of discomfort as he tried to straddle the fence between what actually occurred at the meeting and what Tesoro's legal position was at trial." (ALJD at 8:39-45).¹²

B. The ALJ Did Not Err in Finding Tesoro Violated Sections 8(a)(5) and (1) of the Act.

Tesoro argues that "this case presents an artificial, unviable failure-to-bargain charge." (R. Supporting Brief at 20-25). This argument is premised on the idea that the subject of employee benefits was never an open mandatory subject between the parties because the Union believed the CBA did not allow Tesoro to implement its announced changes to employee benefits plans—and, without an open mandatory subject, there can be no failure to bargain. (R. Supporting Brief at 20). Essentially, Tesoro's affirmative defense asserting the Union has "unclean hands" is an allegation of bad-faith bargaining, i.e., bargaining without the intention to reach an agreement. (See R. Supporting Brief at 24).

Tesoro's argument overlooks several significant facts and points of law. First and foremost, Tesoro was the party that refused to bargain, not the Union. "In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines 'the totality of the [party's] conduct, not just isolated aspects of it.'" *St. George's Warehouse, Inc.*, 349 NLRB 870, 872 (2007); quoting *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990). The credible record evidence establishes that the Union demanded bargaining several times, both in writing and orally. (GC Ex. 8, 11, 21(a); Tr. 72:1-2, 72:20-21, 73:10, 168:19-21, 185:9-10, 231:4-12,

¹² Tesoro excepted to the ALJ's credibility determinations. (Exceptions ¶ 9). The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence proves that those resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*. 188 F.2d 362 (3d Cir. 1951). The record evidence here does not establish that the ALJ's credibility resolutions are incorrect.

232:8-9, 449:18-20; R. Ex. 35 at 1). The Union also made three information requests.¹³ (GC Ex. 15, 17, 22). These acts are not consistent with a party trying to shirk a bargaining obligation but, rather, with a party seeking to engage another in bargaining.¹⁴ The credible evidence further establishes that Tesoro never agreed to bargain, *see supra* at II.A.6.

Second, Board cases hold that a union does not bargain in bad faith when it demands bargaining, requests information, and meets for bargaining sessions, even when it takes the position that it is not required to bargain over a particular issue. *See Lou's Produce, Inc.*, 308 NLRB 1194 (1992); *Int'l Paper Co.*, 319 NLRB 1253, 1264 (1995) (unions' "[a]damant insistence on a bargaining position fairly maintained is not in itself a refusal to bargain in good faith"), *enforcement denied sub nom. Int'l Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997); *WWOR-TV, Inc.*, 330 NLRB 1265 (2000); *St. George's Warehouse*, 349 NLRB at 871-872 ("[a] party is entitled to stand firm on a position if he reasonably believes it is fair and proper"; quoting *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). Furthermore, the Board has held that a "refusal to bargain cannot be equated with [a] 'refusal to recede from an announced position' advanced and maintained in good faith." *Int'l Paper Co.*, 319 NLRB at 1265; quoting *Church Point Wholesale Grocery Co.*, 215 NLRB 500, 502 (1974), *aff'd. sub nom. Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 538 F.2d 1199 (5th Cir. 1976). Thus, the Union's belief

¹³ Some of the Union's information requests were still pending at the time that Tesoro unilaterally implemented the changes to employee benefits on January 1, 2011. Although the failure to respond to information requests is not part of the allegations here, the information request was not fulfilled until January 5, 2011. (CP Ex. 3; Tr. 238:24-25). Tesoro's allegation that the Union did not diligently pursue bargaining because it never advanced a proposal is without merit. (R. Supporting Brief at 36). The Union was unable to make any proposal without the information requested. (Tr. 254:14-23).

¹⁴ Tesoro relies upon cases involving situations in which the union failed to request bargaining, unlike the Union here, which demanded bargaining several times. (R. Supporting Brief at 36; citing *KGTV*, 355 NLRB No. 213 (2010); *AT&T Corp.*, 337 NLRB 689 (2002)).

that the CBA did not allow Tesoro to decrease employee benefits did not prohibit the Union from engaging in good-faith bargaining.

In a case similar to the facts presented here, the Board found a union did not refuse to bargain when, like here, it stated it had no obligation to bargain. *Lou's Produce*, 308 NLRB at 1194. The employer had unilaterally implemented a new health insurance program while the union believed the previous health insurance agreement had automatically renewed. *Id.* at 1195. The union offered to negotiate over the health insurance and, because of this offer, the Board held that the union had not engaged in bad-faith bargaining nor refused to bargain—even when the union asserted its position that it was not required to bargain. *Id.*

Thus, Tesoro's allegation that "[t]he Union cannot purport to demand genuine Section 8(a)(5) bargaining; then, contend that it does not actually have to negotiate, and that Tesoro must obtain its agreement to any changes" cannot stand. (R. Supporting Brief at 23 (emphasis in original)). The record evidence establishes the Union was willing to bargain and Board decisions show the Union could seek to engage in bargaining while lawfully maintaining a position that the CBA did not allow Tesoro to make the announced changes to employee benefit plans. As the ALJ correctly found, the party refusing to bargain over the announced changes to employee benefits was Tesoro. (ALJD at 9:1-10).

C. The Union Did Not Waive the Right to Bargain over the Announced Benefit Changes.

The ALJ decided that the charges presented to him were straightforward enough that "an extended analysis" was not necessary to resolve this case. (ALJD at 9:1). He simply found that "Tesoro never offered to bargain in good faith with the Union" and thus "[fell] short [of] the obligation to bargain" over changes to employee benefits. (ALJD at 9:6-10). The ALJ only addressed the issue of waiver in terms of whether the Union waived its right to bargain with

Tesoro over employee benefits in the Shell Benefits Agreement. (ALJD at 9:12-23). The ALJ found the Union did not waive its right to bargain in the SBA and, moreover, his finding that Tesoro violated Section 8(a)(5) and (1) of the Act when it failed to bargain with the Union establishes that Tesoro's waiver defense was not persuasive.

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).

Waiver can be established three ways. *See American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992). 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”).

In the present matter, the Union never waived the right to bargain over employee benefits by express agreement. The 2009 CBA contains no language showing a “clear and unmistakable” waiver of that right. (GC Ex. 6). The 2002 Shell Benefits Agreement does not apply to Tesoro and neither does the 2007 grievance settlement between Shell and the Union, *supra* at II.A.1-2. (See ALJD at 9:12-23). Even if the 2002 Shell Benefits Agreement were to apply to Tesoro, Tesoro has not produced credible evidence establishing that the requirement that Shell engage in “appropriate discussion/bargaining” over changes to employee benefits is a waiver of the Union’s right to bargain under the NLRA. (R. Ex. 3 at 4). And, as the ALJ points out, the change to the language of Article IX of the 2009 CBA

made clear that the only exceptions to [Tesoro’s] commitment to maintain benefit levels level were limited to those set forth in the contract. This language rendered the Shell Benefits [Agreement] meaningless as it was not contained in the contract. Moreover, just as Shell and the Union could and did agree to alter that side agreement by contractual language, so could Tesoro and the Union. And Tesoro did just that when it agreed with the language of article IX of the contract that committed it not to decrease benefits for unit employees during the term of the contract.

(ALJD at 9:17-23).

Tesoro’s purported right to make changes was never “fully discussed” by the parties and the Union never “consciously yielded” its right to bargain over employee benefits, including the alleged reservation-of-rights clauses. Tesoro can only establish that most of the employee benefit plans included reservation-of-rights clauses, not that the issue was discussed. (R. Supporting Brief at 5 fn. 8). Thus, the bargaining history between the parties does not establish the Union waived that right. *Allison Corp.*, 330 NLRB at 1365.

And, although Tesoro alleges the contrary, the Union never waived its right to bargain over employee benefits by past practice, action, or inaction. (*See* R. Supporting Brief at 35-36). The Union requested bargaining several times, made information requests, and negotiated a confidentiality agreement for the requested information. (Tr. 67:10-11, 72:1-2, 72:20-21, 73:10, 168:19-21, 181:22-23, 185:9-10, 231:4-12, 449:18-20; GC Ex. 8, 21(a), 23, 24; R. Ex. 7, 35). Thus, the credible record evidence does not establish the Union ever waived its right to bargain over employee benefits and the ALJ did not so find.

Tesoro looks to *Omaha World-Herald*, 357 NLRB No. 156 (2011), for a “highly similar” situation where an “amalgam of factors” showed a union waived its right to bargain over employee benefits. (R. Supporting Brief at 28-29). The ALJ was not persuaded that the instant situation presents “highly similar” facts to those of *Omaha World-Herald*. (ALJD at 9:39-10:2). The ALJ correctly noted that, in *Omaha World-Herald*, the contract only required the employer “to advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested.” (ALJD at 9:44-10:2; *quoting Omaha World-Herald*, 357 NLRB No. 156 slip op. at 2).

Here, the 2009 CBA prohibited Tesoro from making any changes to employee benefits that would result in a decrease. This is neither “highly similar” to *Omaha World-Herald* nor a waiver of the right to bargain. The *Omaha World-Herald* Board found it was “surely significant that the parties chose the terms ‘discuss’ and ‘explain’ rather than ‘bargain over.’” 357 NLRB No. 156 slip op. at 2. The 2002 Shell Benefits Agreement, however, required Shell to engage in “appropriate discussion/bargaining” with the Union over changes to employee benefits. (R. Ex. 3 at 1 (emphasis added)). This language is substantially different from “discuss and explain.” And,

even if the 2002 SBA were to apply to Tesoro, Tesoro presented no credible evidence to show that “bargaining” means something different than the right to bargain under the NLRA.¹⁵

Tesoro also asserts that the language in the 2009 CBA “better supports a bargaining waiver” than that of *Omaha World-Herald* because “the Company’s plans and SPDs themselves are expressly incorporated into” that agreement. (R. Supporting Brief at 29). This argument ignores the first clause of Article IX, drafted by Tesoro, explaining that the SPDs control *except for when Tesoro decreases employee benefits*, as it did here. (GC Ex. 6 at 6).

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

The Complaint alleged violations of Section 8(a)(1) and (5) for Tesoro’s failure and refusal to bargain collectively and in good faith. (GC Ex. 1(g) ¶ 10). 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 Section 8(d) violation were alleged—but no such allegation was made. (*See* R. Supporting Brief at Attachment 2; ALJD at 9:25-37 and 9:fn. 3).

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 alleging a violation of Section 8(a)(5) and (1), the General Counsel is only required to show the

¹⁵ Tesoro points to Borths’ testimony that “Tesoro’s understanding was that [discuss/bargain] is a contractual standard does not require an impasse within the meaning of NLRA doctrine.” (R. Supporting Brief at 7 fn. 12; Tr. 311:17-312:18). The ALJ accepted Borths’ testimony only as it established Borths’ “thought processes as to what led the company to do what it did.” (Tr. 312:16-18). Borths had no part in negotiating the 2002 SBA and did not offer testimony about discussions between the Union and Shell as to the meaning of “discussion/ bargaining”—indeed, Borths *could* not offer such testimony. Borths’ testimony, therefore, does not establish that the language in the 2002 SBA changed the employer’s bargaining obligation.

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*.”¹⁶ *Id.* at 501 (emphasis in original). Here, the Acting General Counsel has met its burden. Waiver is a defense in a unilateral change case and the remedy is a bargaining order. *Id.*

In a contract modification change case alleging a Section 8(d) violation, “the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere 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,” while, 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. In the present matter, the ALJ found Tesoro’s unilateral implementation of changes to employee benefits violated Section 8(a)(5) and (1) of the Act and that all of Tesoro’s affirmative defenses, including its assertion that the Union waived the right to bargain, failed. (ALJD at 10:6-16).

Tesoro relies on *J. Picini Flooring*, 355 NLRB No. 123 (2010), as a recent affirmation of the “sound arguable basis” standard. (R. Supporting Brief at 36-39). But, in *J. Picini Flooring*,

¹⁶ Thus, Tesoro’s statement that “[t]his is not really a case about bargaining” is inaccurate. (R. Supporting Brief at 37).

neither party excepted to the ALJ's reliance on *Atwood & Morrill Co.*, 289 NLRB 794 (1988),¹⁷ 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 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 in *J. Picini Flooring*.

Tesoro also asserts that it is beyond the Board's statutory mandate to decide contract disputes. (R. Supporting Brief at 38). Tesoro cites to a case stating that "[a] breach of contract is not an unfair labor practice," but fails to include the rest of the footnote: "the Board is not divested of jurisdiction to remedy an unfair labor practice because the conduct complained of may also have violated the terms of a collective-bargaining agreement." *Vickers, Inc.*, 153 NLRB 561, 570 n. 12 (1965). *Vickers* continues, noting that the union could have sought arbitration by filing a grievance for the contract violation alleged in that case. *Id.* at 570 n. 13. That option was not available to the Union here because the CBA specifically prohibits grievances related to the employee benefit plans.¹⁸ Nothing prohibited the Union from bringing a refusal-to-bargain charge or from the ALJ finding that Tesoro did, in fact, refuse to bargain.

¹⁷ 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).

¹⁸ Article IX.2.B. of the 2009 CBA states: "No dispute, grievance or question in connection with the above Plans will be subject to arbitration; except that . . . any dispute concerning the following only as they apply to these Plans, may be arbitrated in accordance with the provisions of Article XV: (1) Length of service. (2) Pay class or normal rate of pay, whichever is applicable. (3) If the computation of benefits was correct in accordance with the provisions of the above Plans as established by (1) and (2) above, and if such benefits were paid." (GC Ex. 6 at 6).

E. The Board Should Continue to 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 changes to employee benefits. (R. Supporting Brief at 39-40). Tesoro argues that this issue was covered by the 2002 Shell Benefits Agreement. (*Id.*). First, as discussed *supra* at II.A.1 and as the ALJ found, Tesoro did not assume the Shell Benefits Agreement. (ALJD at 9:12-23). Second, 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).¹⁹

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. This 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 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

¹⁹ 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).

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 omitted). 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; *see also id.* at 812 (“The Board has never departed from [the waiver] standard.”). Applying the waiver standard protects a 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).²⁰

This case presents no reason to depart from this well-established standard.

²⁰ 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 of the right to bargain collectively over matters that were not explicitly waived.” *Provena St. Joseph Med. Ctr.*, 350 NLRB at 813.

F. Tesoro Correctly Asserts that Changes to the Thrift 401(k) Plan Were Removed from the Complaint.

Changes to the “thrift 401(k)” plan were removed from the Complaint and were not litigated in front of the ALJ. (R. Supporting Brief Attachment 1).

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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August 21, 2012

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Charging Parties' Answering Brief to Respondent's Exceptions to the Decision and Recommended Order of the Administrative Law Judge was served via electronic mail this 21st day of August, 2012 upon:

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