UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

CERTAINTEED CORP.,

Respondent

and

UNITED STEEL WORKERS INTERNATIONAL UNION, LOCAL 363, A/W UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,

Charging Party

Case No. 08-CA-073922

Filed Electronically with the NLRB

RESPONDENT'S REPLY TO THE ACTING GENERAL COUNSEL'S REPLY IN OPPOSITION TO ITS MOTION TO DISMISS THE COMPLAINT AND RESPONSE TO NOTICE TO SHOW CAUSE

Ruthie L. Goodboe
Allyson A. Miller
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, PLLC
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 593-6400
ruthie.goodboe@ogletreedeakins.com
allyson.miller@ogletreedeakins.com

Attorneys for Respondent CertainTeed Corp.

With the permission of the Board, Respondent CertainTeed Corp. ("CertainTeed" or "Respondent") files this Reply in response to the Acting General Counsel's Reply in Opposition to Respondent's Motion to Dismiss the Complaint and Response to the Notice to Show Cause.

It is undisputed that the parties' collective bargaining agreement (the "Agreement") broadly provides for grievance arbitration of any matter involving an interpretation of the Agreement or an alleged violation of its terms. (Mot. to Dismiss, Exhibit 1, Agreement at Article 16.5). The current matter, which involves a dispute over whether the management-rights language in the Agreement permits CertainTeed to unilaterally implement a tobacco-free workplace policy at the Avery facility, is a matter of contract interpretation clearly subject to arbitration under the Agreement. Because the arbitration clause is susceptible of an interpretation that covers this dispute and the matter is otherwise suitable for prearbitral deferral under the *Collyer* doctrine, the Board should grant CertainTeed's Motion to Dismiss the Complaint and defer the matter to arbitration.

All of the *Collyer* factors favoring prearbitral deferral are present here:

- CertainTeed and the Union are parties to an ongoing collective bargaining agreement and have a long and productive bargaining history.

- Neither the Union nor the Acting General Counsel has alleged any anti-Union animus or hostility in violation of Section 8(a)(3) of the Act.

- The parties' Agreement broadly provides for arbitration of any "differences" involving interpretation of the Agreement or alleged violations of its terms. (Mot. to Dismiss, Exhibit 1, Agreement at Article 16.5).

- The current matter, which involves a dispute over whether the management-rights language in the Agreement permits CertainTeed to unilaterally implement its Tobacco-free Policy at the Avery facility, is a matter of contract interpretation clearly subject to arbitration under the Agreement.

- CertainTeed has re-affirmed its willingness to utilize arbitration to resolve the dispute.

- And, finally, this dispute is well suited to resolution by arbitration because the central issue of whether CertainTeed had the right to implement the Tobacco-free Policy

> without bargaining depends on an interpretation of the management rights language in the existing Agreement and the parties' past practice.

See United Technologies Corp., 268 NLRB 557, 558, 115 LRRM 1049 (1984).

In his Response, the Acting General Counsel utterly fails to address CertainTeed's analysis of the *Collyer* prearbitral deferral factors, preferring instead to advance arguments that were explicitly rejected by the Board in *Wonder Bread*, 343 NLRB 55, 176 LRRM 1229 (2004). As in *Wonder Bread*, the Acting General Counsel here "opposes deferral on the ground that neither the management rights clause nor any other contract provision can reasonably be interpreted as authorizing the alleged unilateral action." *Id*. at 56. The Board should reject this argument, as it did in *Wonder Bread*, because "[d]eferral is appropriate regardless of whether the Board would interpret the management-rights clause as justifying the unilateral change at issue."[1] So long as the arbitration clause is susceptible of an interpretation that covers the dispute (it is) and the *Collyer* factors are otherwise present (they are), under long-standing Board precedent, "[t]he question of the reasonable interpretation of the collective-bargaining agreement is one … for the arbitrator." *Id*. at 55-56.

---

[1] Moreover, contrary to the Acting General Counsel's assertions, the Board likely would find the management rights language in the parties' Agreement explicitly authorized CertainTeed's unilateral implementation of the Tobacco-free Policy. Indeed, in *Provena Hospitals*, 350 NLRB 808, 815, 182 LRRM 1589 (2007) -- a case cited by the Acting General Counsel -- the Board found the union clearly and unmistakably waived its right to bargain over the implementation of an attendance policy even though, as here, the parties' agreement did not identify the specific conduct at issue as a management prerogative. In that case, the Board found management rights language giving Provena the general rights to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees," when taken together, explicitly authorized the unilateral implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements. Similarly, here, even though the parties' Agreement does not refer to the specific right to implement a tobacco-free workplace policy, the management rights language in the Agreement reserves to CertainTeed the general right to establish workplace rules and regulations and the consequences for failing to adhere to those rules. (Mot. to Dismiss, Exhibit 1, Agreement at Art. 29). As in *Provena*, this language evidences the Union's clear and unmistakable waiver of its right to bargain over the implementation of the Tobacco-free Policy.

The Acting General Counsel's attempts to distinguish *Wonder Bread* are unavailing. First, the fact there was no government regulation or requirement compelling CertainTeed's implementation of the Tobacco-free Policy is wholly irrelevant given the Board did not rely on this factor at all in finding prearbitral deferral appropriate in *Wonder Bread*. Second, it is irrelevant that the Union has not filed a grievance. The only relevant inquiry under the *Collyer* doctrine is whether the *employer* has expressed its willingness to utilize arbitration to resolve the dispute. *United Technologies Corp.*, 268 NLRB at 558. CertainTeed has repeatedly affirmed its willingness to do so and, in fact, has offered to waive timeliness and other procedural defenses to the filing or processing of the grievance and to expedite the process by taking the matter directly to arbitration. Neither the Union nor the Acting General Counsel contend this dispute is not arbitrable; the Acting General Counsel merely notes in his Response the Union has not admitted that it is. (*See* Resp. in Opp. to Mot. to Dismiss at 6). Finally, contrary to the Acting General Counsel's bald assertions, the grievance arbitration clause in the parties' Agreement is almost identical to the one in *Wonder Bread*.[2] The Acting General Counsel does not (because he simply cannot) explain why this dispute – the resolution of which necessarily depends on an interpretation of the management-rights language in the Agreement – would not be arbitrable under the Agreement. Accordingly, because it cannot "be said with positive assurance that the arbitration clause is *not* susceptible of an interpretation that covers the asserted dispute," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960) (emphasis added), and the matter is otherwise suitable for prearbitral deferral under the *Collyer* doctrine, the Board must "hold the parties to their bargain by directing them to avoid substituting the

---

[2] *Compare* Mot. to Dismiss, Exhibit 1, Agreement at Arts. 16.1, 16.5 ("differences" between CertainTeed and the Union "involving interpretation of this Agreement and alleged violations of its terms") *with Wonder Bread*, 343 NLRB at 56 ("any difference … between the Company and the Union as to the interpretation" of the agreement).

Board's processes for their own mutually agreed-upon method for dispute resolution." *United Technologies*, 268 NLRB at 559.

CertainTeed, therefore, respectfully requests the Board to grant its motion and dismiss these proceedings in favor of the arbitration procedure set forth in the parties' Agreement.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, PLLC

/s/ Ruthie L. Goodboe
RUTHIE L. GOODBOE
ALLYSON A. MILLER
34977 Woodward Avenue, Suite 300
Birmingham, MI 48009
(248) 723-6143 (Phone)
(248) 593-2603 (Facsimile)
ruthie.goodboe@ogletreedeakins.com
allyson.miller@ogletreedeakins.com

Dated: September 7, 2012

Attorneys for Respondent CertainTeed Corp.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

CERTAINTEED CORP.,

Respondent

Case No. 08-CA-073922

and

Filed Electronically with the NLRB

UNITED STEEL WORKERS INTERNATIONAL UNION, LOCAL 363, A/W UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,

Charging Party

CERTIFICATE OF SERVICE

I certify that on September 7, 2012, a copy of the foregoing document was *Electronically Filed* as a .pdf document on the NLRB's website http://www.nlrb.gov and delivered by First Class Mail to:

Christopher Martinez, Staff Representative
United Steel Workers Union, AFL-CIO
District 1, Subdivision 4
955 Commerce Drive
Perrysburg, OH 43551-5261

/s/ Ruthie L. Goodboe
Ruthie L. Goodboe, Esq.

13110986.1