

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20, SUBREGION 37

HAWAIIAN TELCOM, INC.

and

Case Nos. 20-CA-069432  
20-CA-069433

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL  
UNION 1357

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Submitted by  
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I. INTRODUCTION<sup>1</sup>

The fundamental issue in this case is whether Respondent violated the Act when it immediately cancelled the health, drug, vision, and dental insurance of employees who participated in a 37.5 hour work stoppage on November 10 and November 11, 2011,<sup>2</sup> despite language in the expired contract that unqualifiedly entitles employees to receive such benefits for 30 days after termination of employment. The ALJ properly determined that the answer is a resounding yes. As set forth below, the ALJ's findings on this and other related issues are legally correct and well-supported by the record and Respondent has offered no persuasive arguments to the contrary.

II. ARGUMENT

A. Respondent Violated Section 8(a)(1), (3) and (5) of the Act by Cancelling Accrued Benefits of Striking Employees<sup>3</sup>

1. The ALJ Correctly Determined that the Benefits Were Accrued<sup>4</sup>

In *Texaco Inc.*, 285 NLRB 241, 245 (1987), the Board articulated the analysis for determining whether an employer violates the Act by denying benefits to employees on

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<sup>1</sup> The Administrative Law Judge is referred to herein as "ALJ." References to the ALJ's decision are noted as "ALJD" followed by the page number(s) and line(s). References to the transcript are noted by "Tr." followed by the page number(s). References to the General Counsel's exhibits are noted as "GC" followed by the exhibit number. References to Respondent's Exhibits are noted as "R" followed by the exhibit number. Respondent's Brief in Support of Exceptions to ALJD is referred to herein as "RBS" followed by the page number(s).

<sup>2</sup> Unless otherwise noted, all dates set forth herein occurred in 2011.

<sup>3</sup> This section addresses the arguments Respondent appears to be making in support of its Exception 18.

<sup>4</sup> This section addresses the arguments Respondent appears to be making in support of its Exceptions 1, 3, 5, 6, and 7.

the basis of a strike. The Board explained that under the test in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the General Counsel bears the prima facie burden of “proving at least some adverse effect of the benefit denial on employee rights.” *Id.* at 245. The General Counsel can meet this burden “by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.” *Id.* at 245. Proof of accrual “will most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice.” *Id.* To be considered “accrued” the benefit must be “due and payable on the date on which the employer denied [it]” in contrast with a benefit that is dependent on the continuing performance of services for the employer. *Id.* (alteration in original) (quoting *Emerson Electric Co. v. NLRB*, 650 F.2d 463, 469 (1981)). An employer may rebut this prima facie showing by proving that it had a legitimate and substantial business justification for its cessation of benefits, such as a clear and unmistakable contractual waiver, which must be explicit, or a reasonable and *nondiscriminatory* interpretation of the contract. *Id.* However, “even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be ‘inherently destructive’ of important employee rights or motivated by antiunion intent.” *Id.*

The ALJ correctly determined that the health, drug, vision, dental, and life insurance benefits at issue were accrued based on “language in the expired agreement that unqualifiedly entitles employees to receive benefits for 30 days after the conclusion of their employment.” (ALJD 9: 19-21). Thus, the parties’ expired agreement states in the sections concerning medical and dental insurance benefits that “coverage for employees and their dependents will end thirty (30) days after termination of

employment” and in the section on life insurance that “coverage will end thirty (30) days after termination of employment.” (GC 2 at 40, 53).<sup>5</sup> All three sections also state that “[t]he benefits provided by this plan will not be discontinued or amended without the agreement of the Company and the Union.” (GC 2 at 40, 53). The ALJ correctly stated that an employee has already earned the entitlement to these benefits by the end of his first day on the job. (ALJD 9: 31-32; Tr. 37-38; GC 2 at 38-39, 53).

Respondent argues throughout its brief that the Board has historically considered medical insurance benefits to be unaccrued, in contrast with accident and sickness or disability benefits. (See, e.g., RBS 1, 2, 10, 12, 13, 15, 17, 19). However, the test set forth by the Board in *Texaco* broadly applies to situations such as this where an employer terminates benefit payments upon commencement of a strike. In explaining that there must be proof that the benefit is accrued, *Texaco* does not restrict the type of benefits that may be deemed accrued, as Respondent claims, but rather states generally that such proof may be found in the collective-bargaining agreement, benefit plan, or past practice. In other words, under *Texaco* the issue is not the type of benefit at issue, but rather whether under the specific facts of the case the benefit was “due and payable” on the date it was denied. In this case, as explained by the ALJ, the benefits were due and owing and thus accrued from the commencement of employment up to thirty days after termination of employment based on the language of the expired agreement.

Respondent attempts to distinguish *Gulf & Western Mfg. Co.*, 286 NLRB 1122 (1987), a post-*Texaco* case involving health insurance benefits, on the grounds that the employees whose benefits were found to have accrued were disabled employees. (RBS

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<sup>5</sup> Respondent’s medical insurance plans include health, drug and vision coverage. (Tr. 36).

13-14). This is beside the point. The expired collective-bargaining agreement in *Gulf & Western* generally provided that health insurance would terminate “[w]hen employment is terminated” but extended insurance for up to three months “for an authorized medical including Workman’s Compensation, or maternity leave.” *Id.* at 1123. Based on this contract language, and under the analysis set forth in *Texaco*, the Board concluded that eligible employees “who were on an authorized medical, workers compensation, or maternity leave were entitled to receive group health insurance without cost, based on past performance and with no further work required until their leave exceeded the maximum 3-month period.” *Id.* at 1124. Thus, contrary to Respondent’s argument, *Gulf & Western* stands for the proposition that an employer may not cancel medical insurance benefits during a strike if the parties’ contract provides that they will continue for a time after termination of employment. In this case, the class of employees who are entitled to receive employer-provided insurance for thirty days after termination of employment is even broader than the class in *Gulf & Western*.

Citing pre-*Texaco* case law, Respondent argues that medical insurance benefits are a form of current compensation, like wages, that may be withheld or suspended during a strike. (See, e.g., RBS 10-12, 20). In *Gulf & Western*, the Board rejected the employer’s argument “that the premium payments were not an accrued benefit but were tantamount to wages, i.e., payment for the contemporaneous rendering of work.” *Id.* at 1124. The Board found that “no reasonable interpretation” of the contractual language would support this interpretation, but rather that the medical premium payments were an accrued benefits for employees on an authorized leave whose leave did not exceed three

months. *Id.* at 1124. Similarly, in this case, no reasonable interpretation of the contractual language supports Respondent's argument.

2. The ALJ Correctly Analyzed the Language in the Expired Agreement<sup>6</sup>

Respondent argues that the ALJ's analysis of the expired agreement's benefits provisions was incorrect and incomplete. (RBS 15-22). Initially, Respondent claims that the contractual language providing for the continuation of benefits until thirty days "after termination of employment" does not apply to strikers "unless the strikers were terminated. . . ." (RBS 16). However, the contractual language "after termination of employment" is broad enough to include the ceasing of active employment, and is not limited to situations in which an employee has been terminated. Also, as explained by the ALJ, even if Respondent is correct and the employment of the striking employees did not "'terminate' in the relevant sense. . . . the agreement does not contemplate a scenario (apart from agreement by Respondent and the Union) under which their benefits could be cancelled." (ALJD: 11-12.)

Respondent also disputes the ALJ's reliance on the language in Articles 28.1, 38.1, and 39.1 of the expired agreement that "[t]he benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union." (RBS 18). Respondent points to the sentence immediately preceding the one relied on by the ALJ and argues that when read in total the articles give Respondent "substantial

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<sup>6</sup> This section addresses the arguments Respondent appears to be making in support of its Exceptions 4, 9, 10, 11, 12, 13, 14, and 15. Although not specifically argued in RBS, the issues raised in Respondent's Exceptions 17, 19, and 20 are possibly encompassed in pages 15 through 22 of RBS, which is addressed in this section.

discretion regarding the administration of the plan. . . .”<sup>7</sup> (RBS 19; GC 2 at 38, 53). The ALJ does not dispute that Respondent has discretion regarding “the minutiae of a large insurance program,” which the expired agreement specifically limits to carrier selection and plan administration. (ALJD 12:9; GC 2 at 38, 53). Nevertheless, the ALJ correctly concluded that the expired agreement and plan documents give “Respondent no discretion in the decision whether or not to furnish the benefits in the first place.” (ALJD 12: 9-12).

Respondent points to Articles 5.1.1 and 5.1.4 in the “interpretation” section of the expired agreement and argues that the benefit provisions are limited to “any person who performs work for the Company.” (RBS 20). Section 5.1.4 defines “regular employee” as “any employee who has completed the probationary period” and Section 5.1.1 defines “employee” as “any person who performs work for the Company for a regular stated compensation and whose job duties are within the scope of the collective bargaining agreement.” (GC 2: 3). Respondent asserts that a person on strike should not receive benefits during the strike since he is “not a person who ‘performs work.’” (RBS 20). Under Respondent’s argument, no employee would ever be entitled to the continuation of coverage for thirty days after termination of employment because by definition someone whose employment with Respondent has ceased is not someone who “performs work for the Company.” This argument, which ignores and eliminates the provisions extending

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<sup>7</sup> Sections 28.1, 38.1, and 39.1 of the expired agreement state in pertinent part as follows:

The selection of the carrier and the administration of the [plan] will rest with the Company provided the level and quality of the benefits remain the same. The benefits provided by the plan will not be discontinued or amended without the agreement of the Company and Union.

insurance coverage for employees to “thirty days after termination of employment,” is nonsensical and appropriately disregarded.

B. The ALJ Correctly Found that the Striking Employees Suffered a Deprivation of Benefits<sup>8</sup>

Respondent cites *Texaco* and argues that the striking employees did not experience an “actual deprivation” of benefits because “[n]o employee suffered any loss or gap in coverage.” (RBS 8). The facts in *Texaco* are distinguishable from those in this case. In *Texaco* “[b]y agreement of the Union and the Respondent, the employees’ insurance coverage remained intact, their premium contribution rates remained the same, and for two months of the strike the Respondent’s premium contributions were paid from a surplus account created in large part from unused portions of the Respondent’s prior contributions.” *Texaco*, 285 NLRB at 247. In contrast, employees in this case were sent COBRA notices informing them that their health and basic life insurance had been canceled as of November 10 and they were not notified that they would be re-enrolled in the insurance plans until November 14. (GC 10 & 13; Tr. 63-64; 71-72). The ALJ therefore correctly found that that the employees’ insurance “coverage, except for life insurance, did in fact cease during the tenure of the strike” and “[t]he fact that it was eventually restored does not change the reality that it was, for a period of time, taken away from them.” (ALJD 9: 16-17).

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<sup>8</sup> This section addresses the arguments Respondent appears to be making in support of its Exception 2.

C. Respondent's Waiver Argument is Appropriately Disregarded<sup>9</sup>

According to Respondent, the ALJ's decision implies that Respondent has waived what it believes is its absolute "legal" and "historical right" to suspend health insurance benefits during a strike. (RBS 22-23). Initially, the waiver cases concern statutorily protected rights and there is no statutory right that permits an employer to cancel benefits during a strike. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705, 708 (1983). In addition, Respondent exaggerates the scope of the ALJ's decision, which is based on the specific facts of this case. As explained by the ALJ, this case establishes that an employer may not cancel benefits for those who have gone on strike "where, as here, the agreement combines a rigid guarantee of continued benefits with a broad promise to continue paying those benefits for a period of time after employment ends." (ALJD 12: 36-41). Respondent's hyperbole is appropriately ignored.

D. The ALJ Correctly Concluded that Respondent Violated the Act by Excluding Striking Workers From the Coverage of its Dental Plan<sup>10</sup>

As determined by the ALJ, Respondent violated the Act when without consulting with the Union it altered the terms of its dental plan to "baldly discriminate[ ] between employees who leave their posts as union supporters, i.e., those who strike, and those who abandon their tasks nonconcertedly as individuals." (ALJD 14: 19-22). The ALJ properly found that Respondent's action of changing the dental insurance plan to deny benefits outright to striking employees exceeds the "administrative authority bestowed on

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<sup>9</sup> This section addresses the arguments Respondent appears to be making in support of its Exception 16.

<sup>10</sup> This section addresses the arguments Respondent appears to be making in support of its Exception 21.

Respondent and invades the substantive guarantee of the agreement.” (ALJD 15: 36-37; GC 2 at 53).

Respondent argues that it was privileged to alter the terms of its dental plan because it merely confirmed its legal right to withhold or suspend dental insurance benefits during a strike. (RBS 24). For the reasons set forth above, and as thoroughly explained in the ALJ’s decision, under the facts of this case Respondent had no legal right to terminate dental insurance coverage for employees who participate in a strike. Thus, Respondent’s arguments are unavailing and the ALJ’s conclusions should not be disturbed.

E. The ALJ Properly Concluded the Respondent Violated Section 8(a)(1) by Sending COBRA Packets to Striking Employees<sup>11</sup>

The ALJ correctly determined that Respondent violated the Act by announcing the cancellation of accrued life, health, drug, vision and dental benefits to striking employees by mailing COBRA packets to the employees.<sup>12</sup> Respondent argues that the ALJ erred because its “withholding or temporary suspension of the medical and dental insurance benefits in this case was in no way unlawful, but rather was the consequence of HT’s exercise of its well-established legal right to do so.” (RBS 25). Once again, as set forth above and explained in the ALJ’s decision, the benefits at issue in this case were accrued and certain benefits were unlawfully discontinued by Respondent. Therefore, the

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<sup>11</sup> This section addresses the arguments Respondent appears to be making in support of its Exception 22.

<sup>12</sup> As explained by the ALJ, “[a]lthough the [COBRA] letter reports the cancellation of life insurance benefits along with health and dental coverage, life insurance was not actually stopped.” (ALJD 16: 21-23; Tr. 68, 70-71, 84).

ALJ appropriately found that Respondent's announcement of this cancellation to employees violates Section 8(a)(1).

F. The ALJ's Recommended Order and Remedy are Appropriate<sup>13</sup>

Respondent objects to the ALJ's Recommended Order as being "unwarranted, unnecessary, and overbroad." (RBS 26). The ALJ's cease and desist order and remedy are appropriate and in line with Board practice. To the extent the Board agrees with Respondent that the ALJ's recommended cease and desist language should be modified, Counsel for the Acting General Counsel respectfully suggests that the cease and desist language in *Texaco*, 285 NLRB at 248, and *Gulf and Western Mfg. Co.*, 286 NLRB 1125, are broad enough to address Respondent's concerns.

Respondent also argues that the ALJ's recommended order is "unwarranted, overbroad and punitive" because it provides for a make whole remedy and the preservation of records. It was appropriate for the ALJ to include in her Recommended Order a make whole remedy in the event that there are employees who were denied any accrued health, drug, vision and/or dental benefits. It follows that it also was appropriate for the ALJ to require Respondent to preserve records necessary to analyze any backpay due under the terms of the Recommended Order.

G. Respondent's Exceptions Not Argued with Specificity Should Be Disregarded

Section 102.46(b)(1) of the Board's Rules and Regulations states that:

Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed

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<sup>13</sup> This section addresses the arguments Respondent appears to be making in support of its Exception 23.

the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions. . . .

These are “the minimum requirements with which exceptions to an administrative law judge’s decision must comply in order to merit consideration by the Board.” *Bonanza Sirloin Pit*, 275 NLRB 310 (1985). Under the rules, any exception which does not comply with these requirements “may be disregarded.” Rules and Regulations Section 102.46(b)(2).

Respondent did not file any exceptions regarding the ALJ’s determination that Respondent violated Section 8(a)(3) with respect to the employees on Union leave. (See ALJD 13). In addition, Respondent’s brief contains no argument regarding this issue. The ALJ’s ruling on this issue thus remains unchallenged and is appropriately affirmed.

Respondent’s Brief in Support of Exceptions also contains no argument regarding its Exception 8 concerning ERISA. This unsupported exception should be rejected.

Respondent refers to the timing of the strike in its brief. (See RBS p. 5 at n.3, p. 28.) Respondent’s counsel attempted to adduce testimony about this in the hearing, but ultimately withdrew his question based on the ALJ’s response to an objection. (Tr. at 28-29). Thus there is no record testimony concerning this point, which in any event has no relation to the issues in this case.

#### H. Oral Argument is not Appropriate in this Case

Respondent has requested oral argument. Oral argument is not appropriate or necessary in this case which involves clear and concise facts, discrete issues, and no novel issues of law.

III. CONCLUSION

For the reasons discussed above, Counsel for the Action General Counsel respectfully submits that the ALJ's findings of fact and conclusions of law were fully supported by the record evidence. Accordingly, the Decision and Recommended Order of the ALJ should be adopted by the Board.

Dated at Honolulu, Hawaii, this 21st day of November 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions has this day been served as described below upon the following persons at their last-known address:

1 copy	James Severson, Esq. Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111	VIA E-Mail
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1 copy	Perry Confalone, Esq. Perry Confalone, LLLC 841 Bishop Street Davies Pacific Tower, Suite 2116 Honolulu, HI 96813	VIA E-Mail
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DATED at Honolulu, Hawaii, this 21<sup>st</sup> day of November 2012.



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