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**Tesoro Refining & Marketing Company and United Steel, Paper and 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, CLC, Local 675 and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675.** Cases 21-CA-039591 and 21-CA-039647

February 20, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On June 19, 2012, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as discussed below and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a broad range of changes to employee benefits. In doing so, we reject the Respondent's contention that the Union waived its right to bargain over the changes.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. 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 convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. Our modifications include deleting the provisions regarding unilateral changes to the 401(k) plan, as the General Counsel withdrew that allegation before the hearing. In addition, we shall order the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. We shall substitute a new notice to conform to the Order as modified.

The Union represents a unit of the Respondent's employees employed primarily at its Wilmington, California facility. The Respondent, which refines and markets petroleum products, purchased the Wilmington facility from Shell Oil Company in 2007. It assumed the collective-bargaining agreement between Shell and the Union, which was effective through April 30, 2009. The Respondent and the Union later negotiated a successor collective-bargaining agreement effective from May 1, 2009 through April 30, 2012.

In 2002, Shell and the Union negotiated a side letter, referred to as the Shell benefits agreement (SBA), to their then-current collective-bargaining agreement. The SBA provides in relevant part that Shell's benefits plans will replace those of *its* predecessor and concludes:

Should future circumstance require substantial benefits plans modifications, the Company agrees to notify the Union and engage in appropriate discussion/bargaining. Should the parties be unable to reach agreement after such bargaining, the Company reserves the right to implement changes which have been subject to negotiation and which are generally effective in the Company.

The record indicates that when the Respondent assumed Shell's collective-bargaining agreement with the Union, and when the Respondent and the Union reached their successor agreement, all letters of understanding and memoranda of agreement, including the SBA, were accepted by the Respondent and became part of the collective-bargaining agreement between the Respondent and the Union.<sup>3</sup>

On July 28, 2010, during the term of the 2009-2012 collective-bargaining agreement between the Respondent and the Union, the Respondent informed its employees that it was going to implement a broad range of changes to the benefits of unit employees and retirees, including changes to their pension, medical, and life insurance plans. On August 2, 2010, the Respondent advised the Union of its intentions. Although the Union repeatedly demanded bargaining over the announced changes, the Respondent consistently took the position that it was entitled under the plan documents and the collective-bargaining agreement to implement the changes without bargaining. Ultimately, the Respondent implemented the changes as scheduled.<sup>4</sup> Citing *NLRB v. Katz*, 369 U.S.

<sup>3</sup> Although the Union in its answering brief disputes this point, its argument is contrary to the testimony of its own officials that all of the side letters carried over. In any event, in evaluating the Respondent's waiver defense, we assume *arguendo* that the SBA carried over, as the Respondent contends.

<sup>4</sup> Most of the changes were implemented on January 1, 2011, as the Respondent had previously indicated. One change, in the employee educational assistance program, was scheduled to take effect August 1, 2010; the record does not reveal when that change actually occurred.

736, 743 (1962), the judge found that the Respondent presented these changes to the Union as a *fait accompli* and therefore failed to satisfy its duty to bargain over the changes.<sup>5</sup>

The Respondent excepts to the judge's finding of a violation, asserting that the SBA, along with other factors discussed below, is sufficient to establish that the Union waived its right to bargain over the benefits changes at issue. Specifically, the Respondent, citing *Omaha World-Herald*, 357 NLRB No. 156 (2011), contends that the express language of the SBA requires only that the parties engage in "appropriate discussion/bargaining," and therefore that the Respondent was not required to bargain before making the unilateral changes to employee benefits. We disagree. We find, for the reasons set forth below, that the Respondent has failed to establish that the Union clearly and unmistakably waived its right to bargain over the unilateral changes at issue.<sup>6</sup>

In *Omaha World-Herald*, the Board, relying on "an amalgam of factors," found that the union waived its right to bargain over changes to an employee pension plan. 357 NLRB No. 156, slip op. at 1 (2011). One of those factors was the specific language of the parties' contract, which stated that the employer "will advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested." The Board found it significant that the parties chose the terms "discuss" and "explain" rather than "bargain over." *Id.*, slip op. at 2.<sup>7</sup>

The language of the SBA at issue here is significantly different from that used in *Omaha World-Herald*. First, the SBA expressly contemplates that there will be "negotiation" over changes—and not merely (as in *Omaha World-Herald*) that the employer will "explain changes." Second, the SBA never uses the term "discuss" in isolation (as in *Omaha World-Herald*), but instead requires "discussion/bargaining." Third, the SBA, after its initial reference to "discussion/bargaining," then utilizes the

phrase "such bargaining" (as distinct from "discussion") to describe the activity that is to take place. As the Board explained in *Omaha World-Herald*, "had the parties intended to convey a bargaining obligation . . . they likely would have used the term 'bargain.'" *Id.*, slip op. at 2. The relevant provision of the SBA does so here—twice. Rather than indicating the clear and unmistakable waiver of a statutory right, the language of the SBA refers to and reinforces the statutory bargaining obligation by specifying notice, bargaining, negotiation, and the right to implement only after these steps have been taken and if the parties have been unable to reach agreement.

The contract language is not the only significant factor distinguishing this case from *Omaha World-Herald*. Contributing to the majority's finding of waiver in that case was language in the benefit plan documents that reserved to the employer the right to amend the plans at any time. The plan documents themselves were referred to in the parties' collective-bargaining agreement. *Id.* The Respondent here relies on similar reservation-of-rights language in its summary plan descriptions of the benefits, which are incorporated into the parties' collective-bargaining agreement. But this reliance is undercut by the SBA language regarding bargaining rights and the Respondent's acknowledgement in its exceptions brief that "the SBA modifies the Company's ability to otherwise change benefits through its incorporated reservation of rights." In other words, the Respondent concedes that its reservation of rights is superseded by the terms of the SBA and that the SBA requires at least some measure of bargaining.<sup>8</sup> The reservation-of-rights language, therefore, does not support the Respondent's waiver defense.

In sum, two key factors relied on by the Board to find waiver in *Omaha World-Herald* are absent here. There, the Board emphasized the "unique combination of factors that exist[ed]" in that case to establish waiver. *Id.*, slip op. at 3.<sup>9</sup> We conclude that the Respondent has

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The Respondent decided not to implement a previously announced change to its corporatewide vacation policy.

<sup>5</sup> An employer may not unilaterally change employees' terms and conditions of employment without first giving the union adequate notice and engaging in good-faith bargaining until agreement or impasse is reached. *Katz*, supra. It is undisputed that, at the time of the Respondent's implementation here, the parties had not reached agreement and were not at impasse.

<sup>6</sup> Because we reject the Respondent's waiver defense on its terms, we find it unnecessary to rely on the judge's additional finding that the parties' alteration of art. IX in their most recent collective-bargaining agreement barred mid-term modifications and effectively superseded any preexisting waiver.

<sup>7</sup> Chairman Pearce adheres to his dissent in *Omaha World-Herald*, but agrees with his colleagues that the case is distinguishable from the instant case.

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<sup>8</sup> In its exceptions brief, the Respondent further states that where substantial benefit changes are at issue, the Respondent "will not simply act pursuant to its plan rights"; instead, "the SBA establishes an agreed-upon procedure for addressing mid-term benefits changes."

<sup>9</sup> The Respondent also relies on a third factor cited by the Board in *Omaha World-Herald* as support for the finding of waiver: contract language excluding pension plan changes from the parties' grievance and arbitration procedure. In the present case, the Respondent notes that its collective-bargaining agreement excludes benefit changes from arbitration (but not from the parties' grievance procedure). In the face of other factors weighing strongly against a waiver finding, we find this factor insufficient to tip the balance in favor of the Respondent's position. Furthermore, we find that, because the principal factors cited in *Omaha World-Herald* do not establish waiver here, we need not address the Respondent's allegation that the Union's acquiescence in one prior benefits change supports a finding of clear and unmistakable waiver. Cf. *Omaha World-Herald*, slip op. at 3 (noting that acquiescence in past unilateral changes, without more, does not establish waiv-

failed to establish that the Union clearly and unmistakably waived its right to bargain over changes to employee benefits.<sup>10</sup>

er, but observing that the other factors indicating waiver in that case were “corroborat[ed]” by past practice.)

<sup>10</sup> For the reasons set forth in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), we reject the Respondent’s contention that the Board should adopt the “contract coverage” standard applied by some courts of appeals. See, e.g., *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). Even under that standard, however, we would find that the Respondent’s unilateral changes violated the Act because the Respondent failed to comply with the bargaining provisions of the SBA. The Respondent asserts that the SBA “covered” the matter by creating a contractual procedure for implementing modifications to employee benefits. Under that procedure, the Respondent was required to “notify the Union and engage in appropriate discussion/bargaining” before concluding that the parties were “unable to reach agreement after such bargaining,” in which case (and only then) the Respondent could “implement changes which have been subject to negotiation and which are generally effective in the Company.” However, the facts here reveal that the Respondent did not even colorably comply with that procedure. Rather, the record shows, and the judge found, that the Respondent repeatedly told the Union that it did not have to bargain concerning the benefit changes, that it had the right to make those changes unilaterally, and that the changes would be implemented on a date certain. In other words, the Respondent presented the changes to the Union as a fait accompli. See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982) (finding fait accompli where “the employer has no intention of changing its mind”), enfd. 722 F.2d 1120 (3d Cir. 1983).

Member Miscimarra finds that the Respondent’s unilateral changes were unlawful under either the “clear and unmistakable waiver” or the “contract coverage” standard, and he does not reach or rely on the majority’s rejection of the latter standard.

The Respondent also argues that it had a “sound arguable basis” for contending that the SBA permitted its benefit changes. Even assuming that such an analysis could be applicable here notwithstanding the absence of an allegation under Sec. 8(d) of the Act of contract modification (see *Bath Iron Works Corp.*, 345 NLRB 499 (2005), enfd. sub nom. *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007)), the Respondent’s “sound arguable basis” defense fails for the same reason as its “contract coverage” defense: there is no way to construe the Respondent’s presentation of a fait accompli as even a remotely arguable interpretation of its contractual obligation under the SBA to discuss/bargain over such a modification. Presenting a fait accompli is the antithesis of any definition of discussion or bargaining.

We further reject the Respondent’s argument that the Union waived bargaining by failing to diligently pursue negotiations. It is undisputed that the Union timely requested bargaining, met with the Respondent, and made multiple information requests. Further, as the judge observed, the Union cannot be held to have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Member Miscimarra agrees that the Union did not waive bargaining, but adds the following observations. In some circumstances, union inaction can constitute a waiver of bargaining rights. See, e.g., *Reynolds Metal Co.*, 310 NLRB 995, 1000–1001 (1993); *Haddon Craftsmen*, 300 NLRB 789, 790 (1990), review denied mem. sub nom. *Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–680 (1975); see generally Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 20.16 at 639 (2d ed. 2004) (discussing cases). And, although the Union timely requested bargaining, met with the Respondent, and made multiple information requests, there is some

## ORDER

The National Labor Relations Board orders that the Respondent, Tesoro Refining & Marketing Company, Wilmington, California, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, Local 675 (the Union) as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All employees of the Los Angeles Refinery, Long Beach Terminal and Wilmington Sales Terminal employed by Tesoro, including employees in the Technician-Laboratory and Technician-Maintenance classifications, but excluding all other Technical employees engaged in Technical work and Office and Supervisory Employees.

(b) At the Union’s request, rescind the unilateral changes made between July 28, 2010 and January 1, 2011, inclusive, in unit-employee pension, medical, educational assistance, and/or group life insurance benefits and/or in retiree medical, dental and life insurance bene-

evidence that it was less than diligent in pursuing bargaining. The Respondent announced various changes on July 28, 2010. The Union was unavailable to meet the week of August 5; the parties’ first meeting did not occur until September 20; and the Union did not request further meetings after a November 9 second meeting. Moreover, the announced changes were not to be implemented until January 1, 2011, leaving ample time for bargaining. But even assuming these facts might lend some support to a waiver finding in some circumstances, Member Miscimarra agrees that such a finding is not warranted in the instant case, where the Respondent presented the Union with a fait accompli and made plain that it had no intention of changing its mind. See *Pontiac Osteopathic Hospital*, supra (“[A] finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver.”).

Finally, there is no merit in the Respondent’s contention that it was somehow improper for the Union to demand bargaining over the proposed changes while simultaneously arguing that the changes represented contract modifications that, under Sec. 8(d) of the Act, could not lawfully be implemented without the Union’s consent. See *Lou’s Produce*, 308 NLRB 1194, 1195 (1992), enfd. mem. 21 F.3d 1114 (9th Cir. 1994).

fits, and restore the benefits that existed before the unlawful changes.

(c) Make unit employees and benefit plans whole for any losses suffered as a result of the unlawful changes, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Wilmington, California facility copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. February 20, 2014

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change the terms and conditions of employment of our bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675 (the Union) as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All employees of the Los Angeles Refinery, Long Beach Terminal and Wilmington Sales Terminal employed by Tesoro, including employees in the Technician-Laboratory and Technician-Maintenance classifications, but excluding all other Technical employees

## TESORO REFINING &amp; MARKETING CO.

engaged in Technical work and Office and Supervisory Employees.

WE WILL, at the Union's request, rescind the unilateral changes to employee benefits that we implemented between July 28, 2010 and January 1, 2011, in unit-employee pension, medical, educational assistance, and group life insurance benefits and in retiree medical, dental and life insurance benefits, and restore the benefits that existed before our unlawful changes.

WE WILL make unit employees and benefit plans whole, with interest, for any losses suffered as a result of our unlawful changes.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

## TESORO REFINING &amp; MARKETING COMPANY

*Jean Libby, Esq.*, for the General Counsel.

*William J. Dritsas and Joshua L. Ditelberg, Esqs. (Seyfarth Shaw, LLP)*, of San Francisco, California, for the Respondent.

*Jay Smith, Esq. (Gilbert & Sackman)*, of Los Angeles, California, and *Mariana Padias, Esq., Assistant General Counsel*, of Pittsburgh, Pennsylvania, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on March 19–21, 2012. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, Local 675 (the Union) filed the charge in Case 21–CA–39591 on November 22, 2010, and the charge in Case 21–CA–39647 on January 14, 2011,<sup>1</sup> and the General Counsel issued the order consolidating cases, consolidated complaint and notice of hearing (the complaint) on November 10, 2011. The complaint, as amended at the hearing alleges that Tesoro Refining & Marketing Company (Tesoro) violated Section 8(a)(5) and (1) of the National Labor Relations Board (the Act) by failing to bargain in good faith when it unilaterally implemented new employee benefits effective January 1, 2011, including thrift 401(k); pension; medical; educational assistance program; group life insurance; retiree medical, dental and life insurance plans; eliminating the medical wave credit; decouple VSP vision from medical benefit participation; eliminating the employee portion of the life insurance contribution for group life-benefit to be paid 100 percent by the Company; reducing life insurance coverage for

employees retiring prior to December 31, 2010, or earlier, to \$10,000; eliminating life insurance as a benefit option for those who retire after January 1, 2011; underwriting postretirement medical premiums based on “retiree only” experience; and eliminating postretirement dental insurance.

Tesoro filed a timely answer that admitted the allegation in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, labor organization status, agency and supervisory status, appropriate unit, and majority and 9(a) status of the Union. Tesoro also essentially admits that it made the changes alleged in the complaint but it denied committing any unfair labor practices and affirmatively asserted, among other things, that the Union waived any right to bargain about the changes.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Tesoro, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Tesoro, a corporation, is in the business of refining and marketing petroleum products and has facilities in Wilmington, California, where it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of California. Tesoro admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

Employers and the Union in this industry have developed their own pattern of bargaining. In short, this pattern consists of bargaining with a lead employer, lately Shell Oil Company, and the national officers of the Union. They resolve national issues and their agreement becomes a pattern that is typically accepted by other employers in the industry and sets the platform for the collective-bargaining agreements. Bargaining also occurs between the various employers and local unions that deal with more localized issues. Together this bargaining results in collective-bargaining agreements.

The Union and employers in this industry have also followed a letter of understanding since 1997 that imposes certain obligations on employers who sell their business. These employers are required to have their purchaser agree that it will recognize the incumbent union and adopt the existing collective-bargaining agreement and other memoranda of agreement. The parties recognized that when a purchaser takes over an existing business the purchaser's benefits plans would replace those of the seller. So the letter of understanding provides that the purchaser's benefits must only be “reasonably comparable in the aggregate” to those of the seller.

The Union represents a unit of Tesoro's employees,<sup>2</sup> including about 225 employees at the Wilmington, California loca-

<sup>1</sup> All dates are in 2010, unless otherwise indicated.

<sup>2</sup> That unit is:

tion. The Union and its predecessor's have represented employees there since about the 1930s. Tesoro purchased this facility from Shell Oil Company in about April 2007. Shell and the Union had a contract running from July 3, 2002, through April 30, 2009; Tesoro assumed that contract. Article IX of that contract in pertinent part, provided:

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, are incorporated herein and made part of this Agreement, provided, however, that:

A. The Company will not voluntarily discontinue, change, or modify the above Plans during the term of this Agreement in such a way so as to decrease the benefits under the Plans to any employee covered by this Agreement provided, however, that periodic adjustments in the actuarial factors used to achieve actuarial equivalence under the Shell Pension Plan shall not be considered as changes or modifications of the Plan and shall not be construed as decreases under the said Plan.

The article then provided for only a limited number of items that could be subject to the grievance-arbitration provisions of the contract and prohibited any strike or work stoppage because of any dispute or question arising in connection with any of the benefit plans. The article then continued:

#### 5. Shell Savings Plans

Nothing in these articles shall in any way effect any rights of any person under the provisions of the Shell Savings Plans or the rules and regulations in any respect thereto. The said Plans and rules and regulations shall determine all questions arising thereunder.

....

In sum, article IX of that contract required that Shell not decrease the benefits it provided to any represented employee for the term of the contract. Of course, after Tesoro purchased the facility from Shell and assumed the existing contract the employees became covered by the various Tesoro benefit plans instead of the Shell benefit plans described in the contract. The Union agreed that the Tesoro benefit package was "comparable in the aggregate" to the Shell benefit package.

Pattern bargaining occurred in 2009 as the old Shell/Union contract was set to expire. The national pattern was set and Tesoro and the Union accepted the resulting pattern and negotiated the remaining issues and a new contract. In doing so, Tesoro and the Union used the existing Shell/Union contract as a starting point. They agreed to a handful of changes to that contract and then proceeded to "clean up" language in that

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All employees of the Los Angeles Refinery, Long Beach Terminal and Wilmington Sales Terminal employed by Tesoro, including employees in the Technician-Laboratory and Technician-Maintenance classifications, but excluding all other Technical employees engaged in Technical work and Office and Supervisory Employees.

contract. In that process Tesoro proposed and the Union agreed the language in article IX described above should be revised as follows:

*Except as otherwise provided herein, Tesoro's Health and Welfare Plans applicable to employees are subject to the provisions of the summary plan descriptions (SPDs) which shall determine all questions arising under and in connection with the Plans, are incorporated herein and made part of this Agreement, provided, however, that:*

A. The Company will not voluntarily discontinue, change, or modify the above Plans during the term of this Agreement in such a way so as to decrease the benefits under the Plans to any employee covered by this Agreement provided, however, that periodic adjustments in the actuarial factors used to achieve actuarial equivalence under the Tesoro Pension Plan shall not be considered as changes or modifications of the Plan and shall not be construed as decreases under the said Plan. [Emphasis added.]

Thus Tesoro, like Shell, obligated itself not to decrease benefits under its benefit plans for the term of the contract. The Tesoro contract with the Union runs from May 1, 2009, through April 30, 2012.

#### B. Changes

On July 28, Tesoro sent a message to its employees announcing, among other things, changes in employee benefits. In that regard Tesoro announced:

The following changes will be effective January 1, 2011, unless otherwise noted:

- Thrift 401(k)—the maximum dollar for dollar match will change to 6% of eligible pay (base pay only).
- Pension—we will transition our current Final Average Pay Plan to a Cash Balance Account for services earned on or after January 1, 2011. This change will not impact the benefit you have earned through December 31, 2010.
- Medical—premium costs paid by the company for staff employees will be standardized at 80% of the cost of the Base Plan (currently the AETNA PPO Plan).
- Educational Assistance Program—the program will be reinstated effective August 1, 2010, with modified reimbursement levels.
- Group Life Insurance—this benefit will be provided to all eligible employees at no cost.

....

Benefit changes for union represented employees will be made in accordance with the Plan documents and provisions of the applicable collective-bargaining agreements.

Indeed, in its answer Tesoro:

[A]dmits that on or about July 28, 2010, it "announced to employees its intent to implement certain changes in Southern California Unit employee benefits, including thrift 401(k); pension; medical; educational assistance program; group life

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insurance; and retiree medical, dental and life insurance plans for current Southern California Unit employees.”

On July 28, Elias Reyna, Tesoro’s human resources manager, called Ryan Christopher Huestis who has worked at the Wilmington refinery as a maintenance employee for over 22 years; Huestis is also unit chair for the Union. Reyna explained that he wanted to meet with the Union’s negotiating committee to show the committee a presentation that he planned to give to employees concerning the benefit changes. However, Huestis was not able to assemble his team to meet with Reyna.

Around this same time Tesoro sent the Union a letter indicating:

Please be advised that Tesoro intends to implement certain changes to employee benefits consistent with plan documents and applicable provisions of the collective bargaining agreement.

The primary reason for making benefit changes is to manage costs and improve our competitive position relative to our peers.

If you wish to discuss this matter, please contact me by no later than [sic] August 12, 2010, in order to set up a mutually agreeable date for a meeting.

An attachment indicated that benefit changes were:

1. Thrift Plan 401(k)—Limit the maximum dollar-for-dollar match to 6% of eligible pay. Exclude bonus and unscheduled overtime from eligible matching pay.
2. Eliminate medical waive credit.
3. Decouple VSP vision from medical benefit participation. VSP vision benefit will be made available as a “stand alone” benefit with an 80/20 premium cost split.
4. Eliminate the employee portion of the life insurance contribution for group life—benefit to be paid 100% by the company.
5. Implement “Earn-As-You-Go” vacation.
6. Reduce life insurance coverage for employees retiring prior to December 31, 2010, or earlier to \$10,000. Coverage will be eliminated, effective January 1, 2016.
7. Eliminate life insurance as a benefit option for those who retire after January 1, 2011.
8. Underwrite post-retirement medical premiums based on “retiree only” experience.
9. Eliminate post-retirement dental insurance January 1, 2011.
10. Eliminate post-65 medical insurance as of January 1, 2014.

Again in its answer Tesoro:

[A]dmits that on or about August 2, 2010, it “notified Local 675 of its intent to implement certain changes in Southern California Unit employee benefits, including thrift 401(k); eliminating the medical wave credit; decouple VSP vision from medical benefit participation; eliminating the employee portion of the life insurance contribution for group life benefit to be paid 100% by the company; implementing ‘Earn-As-You-Go’ vacation; reduce life insurance coverage for em-

ployee retiring prior to December 31, 2010, or earlier, to \$10,000; eliminating life insurance as a benefit option for those who retire after January 1, 2011; underwriting post-retirement medical premiums based on ‘retiree only’ experience; eliminating post-retirement dental insurance January 1, 2011; and eliminating post-65 medical insurance as of January 1, 2014” for current Southern California Unit employees.

The Union responded by letter dated August 5 that included the following.

The Union is in receipt of your letter . . . in which the Company outlines changes it intends to make to United Steelworkers-represented employee benefits. As the exclusive bargaining agent of these employees the Union is making a demand to bargain any such changes.

On August 13, the Union sent a letter to Tesoro requesting information about the announced changes. The letter ended:

The Union reserves the right to submit followup information requests as needed to ensure it has information sufficient to aid it in carrying out its duty to bargain over the proposed changes to achieve a result beneficial to the workers it represents at the Tesoro facilities.

On August 20, Tesoro responded:

The Company is in receipt of your letter . . . demanding bargaining . . . concerning planned benefit changes.

The Company’s planned benefit changes are consistent under its rights under the Plans to make such changes, as is contemplated by our collective bargaining agreement. . . .

Accordingly, while fully reserving and without prejudice to our contractual rights to undertake its planned changes, the Company is willing to discuss the planned changes at a mutually convenient time.

So Reyna met with employees on August 20; Huestis attended. Reyna made the power point presentation and gave employees a handout of that presentation. The handout explained the reasons for the changes in benefits, the benefits that would be changing and how they would be changed. Reyna explained to the employees that all applicable provisions of collective-bargaining agreements would apply to represented employees.

On September 20, Tesoro met with the Union to explain the changes. During that meeting, Reyna explained that Tesoro was making the changes to be cost effective and to optimize the asset; he then provided the Union with information that detailed the changes that were to occur; this was similar to the presentation that Tesoro had earlier made to the employees. During that meeting Rick Latham, the Union’s director of sub district 1 in the district 12 division, protested that the Union considered those matters to be mandatory subjects of bargaining that Tesoro could not unilaterally reduce. Reyna explained that there was a 2002 memorandum from Shell that was still in effect and that the memorandum trumped the language in the collective-bargaining agreement. The Union asked questions about the details of the changes and Tesoro provided that information. The Union complained that the planned changes in vacation

policy would not work at the Los Angeles refinery. Reyna admitted at that meeting that the vacation accrual method that Tesoro planned to implement would not work at the Los Angeles refinery.

On September 22, Reyna sent the Union the following message.

Attached is the document (Attachment #1) that I referred to during our discussion on Monday regarding the 2011 benefit changes. I have also included an additional document (Attachment #2) where both parties referenced and recognized the Benefits agreement in addition to the fact that the agreement supersedes the benefits language within the collective bargaining agreement.

As mentioned, the Successorship Letter has been adhered to and applied which recognized the Union at acquisition (May 11, 2007) and adopted the labor agreement and all existing Memoranda of Agreement. (Attachment #3).

Please advice [sic] if you have any further questions or if you would like to further discuss at your convenience.

....

Attachment 1 to the message was a 4-page agreement dated June 26, 2002, between Shell and the Union covering the Shell benefits plans to be applicable to unit employees beginning January 1, 2003. This agreement provided that the Shell benefit plans described therein would replace the benefit plans of Shell's predecessor. That agreement concludes:

Should future circumstance require substantial benefits plans modifications, the Company agrees to notify the Union and engage in appropriate discussion/bargaining. Should the parties be unable to reach agreement after such bargaining, the Company reserves the right to implement changes which have been subject to negotiation and which are generally effective in the Company.

The agreement states:

The Shell benefits plans are described in the attached document entitled "Dimensions" which contain Summary Plan Descriptions of such plans, which govern their content and administration.

In turn, "Dimensions" is a several inch thick binder dated January 1, 1998. Attachment 2 was a letter dated October 12, 2007, from Shell to the Union setting forth an agreement between them that settled a grievance that the Union had filed while Shell still owned the facilities. This letter contained the following:

The parties hereby agree that, as regards for the former Shell Los Angeles Refinery 12-hour shift workers, the Summary Plan Descriptions contained in the "Dimensions" benefits Booklet, which was incorporated by reference in the Shell Benefits Agreement dated June 26, 2002, govern the content and administration of the Shell Benefit Plans, not local labor agreements and/or any other supplemental 12-hour shift agreements.

Also on September 22, Reyna informed the Union that Tesoro

was no longer intending to change its corporate-wide vacation policy effective January 1, 2011, but that the other intended changes remained.

Another meeting was held on November 9. Latham suggested that Tesoro delay implementing the changes until the expiration of the contract, but Reyna rejected that suggestion. Latham said that the Union was still demanding to bargain about the changes and Reyna replied that Tesoro did not feel that it had to bargain and that it had the right to make the changes. Reyna explained that these were corporatwide changes and the changes would become effective January 1, 2011.

Finally in its answer Tesoro:

[A]dmits that on or about January 1, 2011, it "implemented new Southern California Unit employee benefits, including thrift 401(k); pension; medical; educational assistance program; group life insurance; retiree medical, dental and life insurance plans; eliminating the medical wave credit; decouple VSP vision from medical benefit participation; eliminating the employee portion of the life insurance contribution for group life benefit to be paid 100% by the company; reducing life insurance coverage for employee retiring prior to December 31, 2010, or earlier, to \$10,000; eliminating life insurance as a benefit option for those who retire after January 1, 2011; underwriting post-retirement medical premiums based on 'retiree only' experience; and eliminating post-retirement dental insurance January 1, 2011, for current Southern California Unit employees."

The foregoing facts are based on the pleadings, documentary evidence and the credible testimony of Latham, Huestis, and David Campbell, secretary treasurer for the Union. To the extent that Reyna's testimony suggests that Tesoro engaged in discussions with the Union akin to bargaining I do not credit it. The documentary and other credible evidence make clear that Tesoro decided to implement the changes and presented the Union with a fait accompli. And Reyna's demeanor while giving this 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.

### C. Analysis

In my view an extended analysis is not needed to resolve the issues in this case. An employer may not make changes in the working conditions of union-represented employees without first, upon request, bargaining with the union. *NLRB v. Katz*, 369 U.S. 736, 746 (1962). Here Tesoro never offered to bargain in good faith with the Union; instead, it took the position that it had the right to make the companywide changes to reduce labor costs and gave no indication that it would deviate from its intent to implement those changes effective January 1. In this context, Tesoro's offer to "discuss" the changes falls short the obligation to bargain over the changes. *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25, slip op. at 3 (2011).

Tesoro's reliance on the Shell benefits agreement is without merit for many reasons. To give just a few reasons, that agreement on its face deals with Shell's benefits, not Tesoro's benefits. And it is not at all clear that the Shell benefits agreement even waived the Union's right to bargain; remember it

## TESORO REFINING &amp; MARKETING CO.

required Shell “to notify the Union and engage in appropriate discussion/bargaining” before making substantial modifications to the benefit plans. Indeed, the language change to article IX, that Tesoro itself suggested, made clear that the only exceptions to its commitment to maintain benefit levels were limited to those set forth in the contract. This language rendered the Shell benefits plan side letter 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 in article IX of the contract that committed it not to decrease benefits for unit employees during the term of the contract.<sup>3</sup>

Tesoro makes much of the fact that the General Counsel did not allege or litigate whether the changes it made breached article IX of the contract and therefore violated Section 8(d). Moving from that point it points to evidence in the record that the Union indicated that it felt article IX of the contract governed the issue of whether changes could be made rather than the Shell benefits agreement. From there Tesoro concludes that this shows that the Union was unwilling to bargain and therefore this relieved Tesoro of its obligation to bargain. But this argument too fails for a number of reasons. First, it presupposes a willingness to bargain by Tesoro in the first instance and I have found above that Tesoro was unwilling to do so; a union need not bargain against itself in such a situation. And while I do not find an 8(d) violation in this case I am not precluded from assessing Tesoro’s defense in the context of the contractual language. In this regard, the Union’s comments concerning the effect of article IX of the contract are fully consistent with my findings described above concerning the meaning of that article.

In its brief Tesoro argues that the facts in this case are “highly similar” to the facts in *Omaha World-Herald*, 357 NLRB No. 156 (2011), where the Board relied on an amalgam of factors to find that the union waived its right to bargain. I disagree. In that case one of the factors relied on by the Board was that the contract required the employer only “to advise the Union of proposed changes [to the pension plan] and meet to discuss and explain changes if requested.” Slip op. at 2. Here, article IX of the contract required Tesoro to maintain benefit levels during the term of the contract.

## CONCLUSIONS OF LAW

By unilaterally implementing new employee benefits effective January 1, 2011, including thrift 401(k); pension; medical; educational assistance program; group life insurance; retiree medical, dental and life insurance plans; eliminating the medical wave credit; decouple VSP vision from medical benefit participation; eliminating the employee portion of the life insurance contribution for group life-benefit to be paid 100 percent by the Company; reducing life insurance coverage for employees retiring prior to December 31, 2010, or earlier, to \$10,000; eliminating life insurance as a benefit option for those

<sup>3</sup> I note that the complaint does not allege, and I therefore do not decide, whether the changes violated Sec. 8(d) in that the Union’s consent was needed.

who retire after January 1, 2011; underwriting postretirement medical premiums based on “retiree only” experience; and eliminating postretirement dental insurance for employees represented by the Union at its Wilmington, California, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall require that Respondent make employees whole for any loss of earnings and other benefits resulting from the unfair labor practices as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner described in *Ogle Protective Service*, 183 NLRB 682, 683 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). I shall require the Respondent to make contributions to the various plans on behalf of the employees and to make the plans whole for any losses they may have suffered as a result of the unfair labor practices in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

## ORDER

The Respondent, Tesoro Refining & Marketing Company, Wilmington, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing new employee benefits effective January 1, 2011, including thrift 401(k); pension; medical; educational assistance program; group life insurance; retiree medical, dental and life insurance plans; eliminating the medical wave credit; decouple VSP vision from medical benefit participation; eliminating the employee portion of the life insurance contribution for group life-benefit to be paid 100 percent by the Company; reducing life insurance coverage for employees retiring prior to December 31, 2010, or earlier, to \$10,000; eliminating life insurance as a benefit option for those who retire after January 1, 2011; underwriting postretirement medical premiums based on “retiree only” experience; and eliminating postretirement dental insurance for employees represented by the Union at its Wilmington, California facility.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the employees and benefit plans whole in the manner described in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Wilmington, California, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 19, 2012

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement new employee benefits, including thrift 401(k); pension; medical; educational assistance program; group life insurance; retiree medical, dental and life insurance plans; eliminating the medical wave credit; decouple VSP vision from medical benefit participation; eliminating the employee portion of the life insurance contribution for group life-benefit to be paid 100 percent by the Company; reducing life insurance coverage for employees retiring prior to December 31, 2010, or earlier, to \$10,000; eliminating life insurance as a benefit option for those who retire after January 1, 2011; underwriting postretirement medical premiums based on "retiree only" experience; and eliminating postretirement dental insurance for employees represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 675, at its Wilmington, California facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the employees and benefit plans whole in the manner described in the remedy section of this decision.

TESORO REFINING & MARKETING COMPANY