

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

E. I. DU PONT DE NEMOURS AND COMPANY

and

Case 05-CA-033461

AMPTHILL RAYON WORKERS, INC., LOCAL 992,
INTERNATIONAL BROTHERHOOD OF DU PONT
WORKERS

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT
OF LIMITED CROSS-EXCEPTIONS**

OVERVIEW

Counsel for the Acting General Counsel submits this Brief in Support of Limited Cross-Exceptions concerning the judge's finding that the Union and Respondent bargained over a reservation of rights clause in the Respondent's MEDCAP health care plan. The Answering Brief of Counsel for the Acting General Counsel contains further background information on the case.

The judge found that "[b]y February 26, 1986, the Company began unveiling proposals for the Union's members to participate in MEDCAP. Included in the proposal was a reservation of rights clause[.]" ALJD5:30-31. Other portions of the judge's decision suggest the judge was finding that the parties were indeed discussing MEDCAP in 1986. The judge also stated that "the Company made another proposal, but the Union rejected the proposal as well because of the Company's insistence on including a reservation of rights provision in exchange for the rights to participate in MEDCAP."

ALJD6:12-14. Again, the judge stated “. . . ever since the Union agreed to participate in MEDCAP in 1986.” ALJD9:25-26.

The relevance of this issue is that the Respondent contends that MEDCAP has a reservation of rights clause (there is no dispute about this), the parties agreed on the Union’s participation in MEDCAP in 1986 under the reservation of rights provision, and therefore MEDCAP’s reservation of rights language is a waiver of the Union’s right to bargain over the elimination of MEDCAP and the DAP for new employees. Even though the judge found that the Respondent violated Section 8(a)(5) of the Act by eliminating MEDCAP and the DAP for new employees without bargaining with the Union, the record evidence also shows that there was no discussion about MEDCAP in 1986, and thus the case for adopting the judge’s decision is even stronger.

ARGUMENT

The judge found that the parties bargained the subject of MEDCAP and reservation of rights language in 1986. However, the record evidence indicates that the parties were not bargaining about MEDCAP.

As a preliminary matter, it should be noted that when MEDCAP was first proposed to the Union in 1982, it was referred to as “a redesigned medical care benefits program called MEDCAP,” (R3, Tab 8 at 1), “MEDCAP”, (Id., Id. at 2), and “the MEDCAP program,” (Id. at 2-4). There are many references to the fact that Aetna would be the carrier for this plan at Spruance, but there are no references to “the Aetna Plan” at that meeting. (See R3, Tab 8).

On October 10, 1985, the Contract Committee notes state that management was discussing possible healthcare proposals, or HMS (hospital, medical and surgical

coverage) proposals. (R 3, Tab 15 at DUP008371). The notes state that management had made "[n]o specific proposal." (Id.). The notes state that management mentioned MEDCAP as a plan already in existence within the Company, and that the Company's proposal, when it came, would have the same provisions as MEDCAP. (Id.). At that time, the Company was not making a proposal. (Id. at DUP008372). The contract in existence at the time had a separate Hospital, Medical and Surgical (HMS) Coverage article, Article VIII. (R5). This section was apart from Article VII, which listed the other benefit plans and which also stated those benefits were subject to the various plan documents. (See R5 at Article VII and Article VIII).

The Contract Committee meeting on October 18, 1985 stated that the Company had still not made a formal proposal and that MEDCAP had not been proposed and was not being proposed at that meeting. (R 3, Tab 16 at DUP009382). The Company's contract proposal, as described on November 26, 1985, stated that the Company had to give 30 days written notice of any changes to HMS coverage and that the Company had to bargain over them before implementation. (R3, Tab 17 at DUP008387). The Company's forthcoming HMS proposal in the upcoming year would include a management rights clause. (Id. at DUP008388). At this same meeting, the Union told management it was disagreeing with management's proposed Article XIV for the P&M contract concerning HMS. (Id. at DUP008389). In discussion of the CT&O contract, management reiterated that it had not made a MEDCAP proposal to the Union, which the Union had claimed it was rejecting. (Id. at DUP008391).

At the Contract Committee meeting on February 26, 1986, the notes state that the Company was concerned about health care costs, that MEDCAP was an option that could

be used to contain those costs, that management had never proposed MEDCAP, that the parties discussed a clause that would allow “bargaining after a contract had been signed was proposed,” that the Union rejected this clause, and that the Union requested a HMS (hospital, medical and surgical coverage) proposal. (R3, Tab 18 at 1). The notes also show that management said that they had looked at both Blue Cross/Blue Shield and Aetna as carriers, that the carrier was not the important point, but rather that cost containment was. (Id.). After stating the points of management and the Union, the notes state that management had “developed a proposal” that would address both sides’ concerns. (Id. at 2). Then the notes state that management gave the Union a booklet entitled “HMS (Hospital-Medical-Surgical) – Now There is a Choice.” (Id.). The notes further state that management called the Aetna Plan “A New Approach.” (Id.). The record shows that the parties discussed the HMS proposal, “the New Approach,” at this meeting, but the Company is incorrect in asserting that this proposal included MEDCAP. The evidence demonstrates that the Company had “developed a proposal,” a “New Approach,” using Aetna as the insurance carrier and was now proposing this to the Union for use by employees at Spruance as an alternative to coverage by Blue Cross/Blue Shield. Also, unlike the 1982 meeting when MEDCAP really was discussed and the parties referred to it as “the MEDCAP plan,” the notes call this new plan “the Aetna Plan.” (Id. at 5, 6, 7). The Summary Plan Description also called it the “Aetna Plan.” (Id. at 6). The notes also frequently call the subject of their discussion “the HMS proposal.” (Id. at 9). On page 10 of the notes the parties moved on to different subjects.

Accordingly, this detailed discussion of the facts of this meeting shows that the the parties did mention MEDCAP, but that they discussed an HMS proposal containing

coverage by both Blue Cross/Blue Shield and a new plan under Aetna. This February 1986 meeting is key because subsequent meetings again refer to “the Aetna Plan” and “the HMS proposal” discussed at that meeting, and the “HMS documents” distributed at that meeting. (R3, Tab 19 at 1).

The notes from March 4, 1986 further clarify that the parties were not discussing MEDCAP, but rather a new plan administered by Aetna. During the discussion over the management rights clause in the Aetna plan, the Union objected to the Company’s inclusion of language the Company used in MEDCAP, which the Union asserted was not appropriate for an HMS proposal for the contract:

The Union said that is the plan Management has used and referred to since August 29, 1985, when discussing MEDCAP. They said Management offered a MEDCAP Option I and II and now Management is offering the Aetna plan, and that provision is not appropriate. The Union said HMS has been a contract item, and it does not want to change.

(Id. at 3).

On March 12, 1986, the parties again discussed the HMS proposal and the Union complained that communications to employees failed to tell the employees of the Union's objection to the management rights provision. (R 3, Tab 20 at DUP008450). The parties discussed the management rights clause in the HMS proposal, with the Union continuing to object. (Id. at DUP0084551-52). The parties discussed the HMS proposal again on March 21, 1986. (R 3, Tab 21). Management recognized at the outset that the Union had not agreed to its proposal nor to management's recitation of the issues. (Id. at DUP008459). At this meeting, management made another HMS proposal, Article XIV for the P&M contract and Article VIII for the CT&O contract. (Id. at DUP008471-72). Management said this was its best offer and told the Union it would communicate this offer to the employees. (Id. at DUP008473). The Union told management that

bargaining on HMS was not complete. (Id. at DUP008475). The notes also state the Union's continuing dissatisfaction with the Company's attempt to inform employees that the Union did not agree with the management rights clause. (Id. at DUP008476).

It is also important to note that when the parties met on March 12, 1986, the discussion of the Aetna plan began with the heading "Aetna Plan Proposal." (R3, Tab 20 at 9). The notes continue to show that the Aetna plan was a separate plan from MEDCAP, which the company never offered:

The Union said Management approached the Union with MEDCAP in 1981. Then in August, 1985, Management talked about some cost containment features. Management did not make a proposal on MEDCAP. The Union requested Management put in the Union's proposals and let them run for the length of the agreement. The Union said Management is now saying that Management will negotiate, but wants to implement the Management's Rights Clause with Aetna. The Union said Management has been misleading the Union. The Union said Management could come back to the bargaining table if further changes are necessary rather than insist on Management's rights. The Union asked if the Aetna Plan did contain the proposed cost containment provisions, what impact would the cost savings achieved have on the:

- [Percent coverage of services
- [Amount of deductibles
- [Co-pay provisions

(Id. at 10).

Other notes from that meeting do not show that the parties were discussing MEDCAP. For example:

Management said they did not offer MEDCAP in 1981 and they informed the Union then that MEDCAP was being looked at, but a proposal was not being offered. Management said in 1985 they again looked at MEDCAP. They went to Blue Cross-Blue Shield to see if they could provide an Option I or Option II and BC-BS said they could. Management looked at Blue Cross' capability and decided they could not provide the type service Management wanted for employees. Management then asked Blue Cross-Blue Shield how savings comparable to MEDCAP could be achieved. Blue Cross-Blue Shield said Pre-Admission Review should save about 5%. After much consideration, Management decided to offer both.

(Id. at 11). One could speculate that “Management decided to offer both” might mean offering BC/BS and MEDCAP to employees in order to give options and contain costs. However, the more likely reading of this passage is that the Company went to BC/BS to see if they could offer something like Option I and Option II of MEDCAP and MEDCAP’s cost containment provisions, and the Company “decided to offer both,” an Option I and II and the cost containment of pre-admission review, both contained in BC/BS.

The notes from the May 28, 1986 refer to a May 14 meeting, which is not in the record and which the Union stated was not accurately recorded in the minutes. (R 3, Tab 22 at DUP008480). At this meeting, the Union stated "the problem with the Aetna Plan is the Management's Rights Clause." (Id. at DUP008481). "The Union said it is interested in health care benefits that are contractually negotiable, not the carrier." (Id.). The minutes state that the Union had rejected management's HMS proposal at the previous meeting. (Id. at DUP008482). The Union complained that management did not want a clause in the contract recognizing oral agreements. (Id. at DUP008487).

The minutes show that the parties met again on September 5, 1986. (R 3, Tab 23. The Union objected to references to the new Aetna plan in the contract. (Id. at DUP008492). The Company suggested that it would draft two clauses, one with a specific reference to the new Aetna plan, and another with a general reference. (Id.). The Union's preference was no mention at all, but if it had to be mentioned the Union thought it should go in the Industrial Relations Plans and Policies article, Article VII, with a footnote like the DAP because it had a management rights clause. (Id.).¹

¹ At the time, the DAP was in the contract. As stated above, the parties agree it is no longer in the contract.

At a meeting on September 15, 1986, management told the Union that it did not want the new Aetna plan mentioned in the IRPP section of Article VII because it was not a corporate plan (and Article VII plans were), and the Company did not want to be tied down by the one-year notice restrictions in Article VII. (R 3, Tab 24 at DUP008499). The notes state that the Union stated "HMS should be mentioned where everything else is that is involved in Management's Rights (IRP&Ps)." (Id. at DUP008502). Management rejected this and the Union said it would get back to management. (Id. at DUP008503).

Apparently the parties met on September 25, 1986 and discussed the Aetna reference for the CT&O contract, but this is not in the record. (R 3, Tab 25 ("The Union said it is taking the same stance towards this as that taken by the CT&O in its meeting of yesterday.")). The Union chose a non-specific reference to another plan being offered in the P&M contract, without a specific reference to Aetna. (Id.).

This detailed recitation of the facts shows that the parties were not bargaining over MEDCAP in 1986, but rather a new proposal developed by the Company. Company witness Linda Derr, who was not present at the 1986 negotiations, testified that retirement healthcare was referred to as the Aetna plan. (Tr. 237). This testimony sheds no light on the negotiations in 1986, and, also, it does not follow that if MEDCAP is an Aetna plan, then all Aetna plans are MEDCAP. Indeed, the evidence cited above demonstrates that the Aetna plan negotiated in 1986 was not MEDCAP.

The party asserting waiver bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810, fn. 2 (1984). In this case, the evidence shows that the Respondent cannot prove that the parties discussed MEDCAP in 1986. Accordingly, the Board should find that the Respondent has failed to prove this point, and

bolster the judge's finding that the Union did not waive its right to bargain over the elimination of MEDCAP for new employees.

CONCLUSION

For all these reasons, the record supports a finding that the parties did not bargain about or come to any agreement concerning MEDCAP in 1986.²

Respectfully submitted,

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² In two places, the judge made an inadvertent error in calling changes made in 2006 "1986 changes." There is no dispute that the changes at issue in this case were made in 2006.

CERTIFICATE OF SERVICE

I hereby certify that this Counsel for the Acting General Counsel's Brief in Support of Limited Cross-Exceptions was electronically filed on October 31, 2011, and, on that same day, copies were electronically served on the following individuals by email:

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