

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

MERCK & COMPANY	:	
	:	
Respondent	:	
	:	
and	:	Case No. 22-CA-090990
	:	
UNITED STEEL WORKERS OF	:	
AMERICA LOCAL 4-575, AFL-CIO	:	
	:	
Charging Party	:	

**BRIEF OF CHARGING PARTY IN OPPOSITION TO RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT**

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Dated: April 22, 2013

The Charging Party, United Steelworkers of America Local 4-575, AFL-CIO, (“Union”) by and through its attorneys, Markowitz & Richman, pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”) submits this Brief in opposition to the Motion for Summary Judgment filed on April 15, 2013 by Respondent Merck & Company (“Merck” or “Employer”) as well as the arguments advanced by the Employer in its supporting brief filed on the same day.¹

PRELIMINARY STATEMENT

The genesis of this case is the Employer’s April, 2012 refusal to bargain over certain undefined changes to retiree health benefits that were to, and did in fact, become effective January 1, 2013. The Employer wanted to make such changes was first brought to the Union’s attention in February, 2012, after the Union and the Employer commenced negotiations for a successor agreement, to become effective May 1, 2012. The nature of the actual changes however was not made at all clear to the Union, at that time or at any point during the period of negotiations. Aware however that the Employer was going to make *some* changes, the Union on or about April 19, 2012 sought to obtain information about the proposed changes and desired to bargain about those changes. At that time, the Employer took the position that Merck was under no obligation to bargain over those changes nor was Merck going to do so. Thereafter, on April 19, 2012, the Union and Employer entered into a Memorandum of Agreement (“MOA”) setting forth certain changes to their collective bargaining agreement, effective May 1, 2012.² Nothing

¹ In opposing the Employer’s Motion for Summary Judgment, the Charging Party also relies upon the arguments advanced in opposition to the Employer’s Motion for Summary Judgment by Counsel for the General Counsel.

² A copy of the MOA is attached to the Employer’s Motion. [See Exhibit B.]. Some provisions are effective May 1, 2012 while others take place at various times during the three year period of the current agreement.

in the MOA expressly waived the Union's desire to bargain over retiree changes. At no point after the MOA was signed did the Employer ever negotiate over the changes that were to become effective on January 1, 2013, notwithstanding the Union's requests that it do so.

On October 12, 2012, the Union filed a charge of unfair labor practices with Region 22 of the NLRB, alleging that the Employer's refusal to bargain over the changes to become effective on January 1, 2013 violated Sections 8(a)(1) and (5) of the Act. On January 30, 2013, on the same day that the Union filed an amended charge, specifically alleging that the implementation of the retiree health changes violated the Act, the Regional Director issued a Complaint in this matter. The hearing in this matter is scheduled to begin on May 13, 2013 before an administrative law judge in Newark, New Jersey.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD NOT BE GRANTED IN THIS MATTER, GIVEN THAT THERE ARE SIGNIFICANT DISPUTES OVER MATERIAL FACTS WITH REGARD TO THE POSITIONS OF THE UNION AND THE EMPLOYER.

As the Employer noted, summary judgment is appropriate but only when the facts are undisputed (Employer Brief at 5-6). Contrary to the Employer's Motion, however, there does remain a significant dispute about whether the Employer did in fact refuse to bargain. More specifically, the Complaint alleges that the Employer refused to bargain (Cmplt., Par. 13). This allegation is expressly denied by Merck. (Answer, Par. 13). While the Employer does offer the affirmative defense that the Union somehow expressly waived its right to bargain over retiree health benefits, it is somewhat unclear *when* or *how* the Union did so waive. As will be explored

further (see pp. 7-10, *infra.*) , the only evidence offered by the Employer appears to be the claim that two provisions of the MOA, which is utterly and completely silent about bargaining over future retiree health care benefits, in some way constitutes a waiver.³ Absent a favorable ruling on *that* claim, the Complaint and the Answer clearly establish a dispute of facts that compels a hearing.

Moreover, it is somewhat premature, to put it, for a decision on the bargaining issue without knowing exactly what was said between the parties during the negotiations process and thereafter as to the specific issue that is the subject of the Complaint. Putting aside the position of the Union as set forth herein that there was no express waiver of either the right to bargain over changes in retiree health or to file the charge that is the subject of the Complaint, the allegation set forth in Paragraph 13 of the Complaint covers a wide variety of circumstances. Assuming *arguendo* that the refusal of Merck to bargain arises out of some express interchange between the parties either in April, 2013 or thereafter, some testimony –absent a stipulation which is not in the record - would clearly be necessary before this matter can be adjudicated. Accordingly, summary judgment is *not* the appropriate vehicle for deciding this matter.

II. THE COMPLAINT IS NOT TIME-BARRED, GIVEN THAT THE ACTUAL VIOLATION DID NOT TAKE PLACE UNTIL APRIL 19, 2012.

Paragraphs 12 and 13 of the Complaint make clear that the Union’s request for bargaining over retiree health care benefits was made on April 19, 2012. Given that the charge

³ Indeed, if anyone were entitled to seek summary judgment, at least insofar as the waiver defense has been advanced by the Employer, it would be Counsel for the General Counsel and the Charging Party.

was filed on October 10, 2012, and served the following day, the Section 10(b) defense is clearly without merit.

In order for the affirmative Section 10(b) defense to be applicable, a party must have “clear and ‘unequivocal notice of a violation of the Act.’” *Bouille Clark Plumbing*, 337 NLRB 743, 750 (2002), *citing*, *Al L. Underground*, 302 NLRB 467, 69 (1991). See also, *Leach Corp.*, 312 NLRB, 990, 991 (1993), *enf’d*, 54 F.3d 804 (D.C.Cir. 1995); *Desks, Inc.*, 295 NLRB 1, 11 (1989). A mere statement of intent is insufficient to start the 10(b) period; only when the unfair labor practice occurs does the limitation period of six months commence. *Leach Corp, supra.*, *citing* *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 547 (3d Cir. 1983). Moreover, “...the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b).” *Chinese American Planning Counsel*, 307 NLRB 410 (1992).

In the instant matter, the Complaint itself alleges that the demand for bargaining and Merck’s refusal to do so occurred on April 19, 2012. All that Merck did prior to this date was given the Union notice that it intended to make certain changes in retiree health benefits at the beginning of the following year. The actual violation, i.e., the notice by the Employer that it declined to bargain, only took place on April 19, 2012, within the Section 10(b) period. Thus, until the Union made its demand to bargain *and* Merck declined, it is unclear how any allegation that Merck had somehow violated the Act could have been made.

Reliance by the Employer on *St. Barnabas Medical Center*, 343 NLRB 1125 (2004) is misplaced. In that case, the Board held that an employer had met its burden of demonstrating the union had clear and unequivocal notice of what the Board characterized as contract repudiation outside the 10(b) period. 271 NLRB, *supra.*, at 1126. Thus, if repudiation occurs on a particular

date, any *subsequent* contract breaches “..are deemed consequences of the initial repudiation...” 271 NLRB, *supra.*, citing *A&L Underground, supra.* In *St. Barnabas*, the union knew quite well that the employer had refused to apply the terms of the collective bargaining agreement to certain specific classifications outside the Section 10(b) period. Thus, by its terms, *St. Barnabas* stands for the proposition that only direct knowledge of an act constituting contract repudiation starts the statute of limitations running. The logic utilized in *St. Barnabas* hardly gives succor to Merck here; in this case, all that the Union knew outside the Section 10(b) period, i.e, before April 10, 2012, was that Merck intended to make certain changes. The Union certainly did *not* know until April 19, 2012 that Merck would refuse to bargain over those changes.

Perhaps even less applicable, both in factual and legal terms, is the other decision by the NLRB, *U. S. Postal Service Marina Mall Processing Center*, 271 NLRB 397 (1984). The facts in the instant matter are quite different from those in *U. S. Postal Service Marina Mall Processing Center* that led the Board there to apply Section 10(b). There, the Board held that notice to an employee that he would be removed from the Postal Service’s payroll was sufficient to commence the Section 10(b) period; that he was technically kept on the payroll in a nonpay/nonduty status was deemed by the Board insufficient to defeat the employer’s Section 10(b) defense. In so holding, the Board, noting that several courts of appeals⁴ had rejected its prior line of reasoning, to wit, that notice on one day that removal would occur on a date certain in the future did not trigger the statute of limitations, announced a new rule, simply that

⁴ *Nazareth Regional High School v. NLRB*, 549 F.3d 873 (2d Cir. 1977), denying enforcement in relevant part *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976); *California School of Professional Psychology v. NLRB*, 583 F.2d 1099 (9 Cir. 1978). See also, *NLRB v. Longshoremens ILWU Local 30*, 549 F.2d 698 (9 Cir. 1978).

unequivocal notice of an adverse employment action, even if the action itself were to take place in the future, commenced the Section 10(b) period. 271 NLRB, *supra.* at 399-400.⁵

The distinction again between the Board decision in *U. S. Postal Service Marina Mall Processing Center* and the facts here are is not at all difficult to fashion. The date of the announcement of the decision that supposedly violated the Act was quite clear in *U. S. Postal Service Marina Mall Processing Center, supra.* In the case at issue here, the violation only takes place *after* the bargaining demand by the Union; that refusal to bargain, the first point at which the Charging Party in this matter has “clear and unequivocal notice” of the Employer’s illegal action, at a time that falls within the Section 10(b) period.

That sort of distinction has not been lost on the Board. In *Leach Corp, supra.,* at 991, n. 7, the Board expressly limited the reason utilized in *U. S. Postal Service Marina Mall Processing Center, supra.* “...to discriminatory discharge cases, but not to situations like...issues...involving contract repudiation and refusal to bargain. See also *United States Can Co.,* 305 NLRB 1127, 1141 (1992), *enf’d.* 984 F.2d 864 (7 Cir. 1993).

Thus, the Employer’s assertion that the Complaint is barred by Section 10(b) is predicated on a misreading of the law governing application of the statute of limitations. Given that it was not until April 19, 2013 that the Employer’s refusal to bargain occurred, the charge was filed in a timely fashion and thus the Employer’s position as to application of Section 10(b) should be rejected.

⁵ In reaching its decision in *United States Postal Service Marina Mall Processing Center, supra.,* at 398-399, the Board also relied on the Supreme Court’s decisions in *Delaware State College v. Ricks,* 449 U. S. 250 (1980) and *Chardon v. Fernandez,* 454 U. S. 6 (1981). In each case-, there was a definitive announcement of a purportedly illegal act - each case some form of employment termination - that was made with the actual departure taking place thereafter.

**III. THE CHARGING PARTY DID NOT WAIVE ITS RIGHT TO BARGAIN
OVER THE PROSPECTIVE CHANGE IN RETIREE HEALTH
BENEFITS.**

The Employer maintains that the Union, by entering into an agreement that provides that retiree health insurance can be altered during the term of the agreement at the Company's sole discretion, waived the right to bargain over such a change. (Employer Brief at 7-9). This contention ignores the fact that the language, by its terms, does not expressly and unequivocally waive that right. In order for the Board to find that such a waiver existed, it must be clear and unmistakable. *Johnson-Bateman Co.*, 294 NLRB 180, 184 (1989). To the extent that a party alleges waiver based on language, such language must be specific, clear and unmistakable. *NLRB v. Metropolitan Edison Co.*, 460 U.S. 693, 708 (1983); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 092 (6 Cir. 1996); *Mt. Sinai Hosp.* 331 NLRB 894 (2000); *Amoco Chemical Co.*, 328 NLRB 110, 1221-122 (1999) *enf. denied sub nom. BP Amoco v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000).

In the instant matter, the language may give the Employer "sole discretion", the phrase Merck has fastened upon. However, there was and is no explicitly waive bargaining over this issue. The question of sole discretion focuses instead on whether there are *contractual* limits on the changes. In this case, the Employer may have a valid defense to a contractual grievance, alleging that the changes proposed to retiree health care violated the collective bargaining agreement between the parties. But whatever contractual rights may have been given to Merck, there is nothing in the plain language of the clause relied upon by the Employer that provides that Merck somehow can change the benefit in question without first *bargaining* with the Union.

Indeed, such is the case even if there were a mid-term modification of retiree health benefits. The violation alleged in the Complaint perhaps becomes even more significant because the alleged violation during the course of negotiations for an entirely new labor agreement. In other words, regardless of what authority the parties might have agreed to give to the Employer during the *term* of the contract with respect to changes in retiree health care (notwithstanding the Employer's obligation to bargain before going ahead with the changes), certainly when the parties enter into negotiations for the new agreement, the Employer's defense here cannot be sustained. Assume *arguendo* that the terms of a collective bargaining agreement provided that an employer had the unfettered discretion to grant merit wage increases during the term of a labor agreement and that the parties explicitly agreed that the employer need not bargain over such changes nor could such increases be grieved (neither the case here). Such an agreement however, hardly would constitute a waiver of the right of the union to demand bargaining during contract negotiations over merit increases that were announced before but were to become effective after the date of a new agreement. Cf. *Blue Creek Coal, Inc.*, 310 NLRB 1240 (1993). See also *Racetrack Food Services, Inc.* 353 NLRB 687 (2008); *Long Island Head Start Child. Dev. Servs.* 345 NLRB 973 (2005).

The Board does in fact examine bargaining history along with contract language in considering whether there has been a clear and unmistakable waiver. *Mead Corp. v. NLRB*, 697 F.2d 10013 (11 Cir. 1983); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2 Cir. 1982); *Trojan Yacht*, 319 NLRB 741, 742 (1995); *American Diamond Toll*, 306 NLRB 570 (1992); *Pertec Computer Corp.*, 284 NLRB 810 (1987); *European Parts Exch*, 270 NLRB

1244 (1984). The cases relied upon by the Employer can therefore distinguished.⁶ In *Provena Hospitals d/b/a Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board read, *in para materia*, a variety of employer rights contained in a long time contract provision to reach the conclusion that a union had waived the right to bargain over a new disciplinary policy with respect to attendance and tardiness. One such right involved the right to change reporting practices, another to make rules of conduct and, finally, the last element the right to discipline employees. Thus, the Board held, the *combination* of all these provisions that had been contained in a series of collective bargaining agreement for over 15 years without change, constituted a waiver. 350 NLRB, *supra*. at 815.

In *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), the Board concluded that a union had waived the right to bargain over the discontinuation of pension fund contributions because the labor agreement expressly incorporated the terms of the pension plan itself which expressly included the ability the right of the employer to terminate the plan. This stands in stark contrast to the exclusion of such right from a collective bargaining agreement when the language from a plan is not incorporated. See, e.g. *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111 (D.C. Cir. 1986); *KBMS*, 278 NLRB 826 (1986). Moreover, in both *Provena Hospital*, *supra*. and *Mary Thompson Hospital*, *supra*., the changes at issue were, of course, mid-contract modifications uninterrupted by any labor negotiations for an entirely new collective bargaining agreement. The factual situation here represents a different set of circumstances and, accordingly, a full hearing is necessary to explore the underlying question of whether the circumstances that might justify a finding of waiver in fact exist.

⁶ Merck cited *Quebecor World Mt. Morris II, LLC*, 353 NLRB 1 (2008) *pet. for review denied*, 572 F.3d 342 (7 Cir. 2009) in support of its petition. In light of the fact that this decision was decided by a two member Board and thereafter the Supreme Court held in *New Process Steel v. NLRB*, 130 S.Ct. 2645 (2010) that a two member Board did not constitute a proper quorum, the Union maintains that the precedential value of this decision is dubious..

IV. THE UNION DID NOT WAIVE THE RIGHT TO FILE UNFAIR LABOR PRACTICE CHARGES

The Employer's final argument in support of its Motion for Summary Judgment is that the Union, in the MOA that ended the contract negotiations, having signed a provision stating that the parties had negotiated in good faith and met all collective bargaining obligations, waived its right to file charges. As with its other arguments, this waiver contention by Merck is devoid of merit.

First and foremost, the language relied upon by Merck is *not* expressly a waiver of the right to file charges *or* a settlement of existing charges in a non-Board context. In *Septix Waste, Inc.*, 346 NLRB 494 (2006), relied upon by the Employer, the parties agreed by stipulation to settle a set of unfair labor practice charges. In essence then, the parties in *Septix Waste* entered into a non-Board settlement with respect to specific allegations. In the context of that settlement, the union expressly agreed any and all claims about which charges had been filed were resolved by that settlement (with the exception of several issues). Thus, the Board, in a 2-1 decision, held that the private settlement stipulation would be given full force and effect and bar another Section 8(a)(1) allegation made by the union which involved facts that were known to the Union at the time it entered into the private settlement agreement.

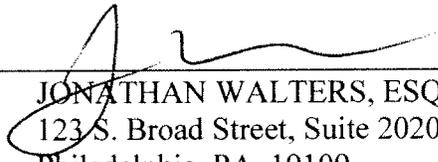
The MOA is hardly a resolution of specific unfair labor practices. Indeed, it is simply not a settlement as that term is used in *Independent Stave Co.*, 287 NLRB 740 (1987), the Board decision that sets forth the standards utilized by the NLRB in determining whether it should honor a private, non-Board settlement. Rather, the MOA is merely an agreement by the parties about bargaining generally, devoid of specificity and, perhaps, more important, focusing on the

issues about which there were negotiations during the agreement that led to the contract that became effective on May 1, 2012. Given that the demand was made by the Union in April, 2012, and that bargaining on this topic could well have post-dated the MOA, a potential fact that warrants hearing, given that the actual change was not due to take place for another seven (7) months, the Employer's assertion of waiver must be rejected and a hearing is clearly required to determine what went on in negotiations.

CONCLUSION

Based on the arguments set forth above, the Employer's Motion for Summary Judgment should be denied and the hearing scheduled in the above matter for May 13, 2013 should proceed.

Respectfully submitted,
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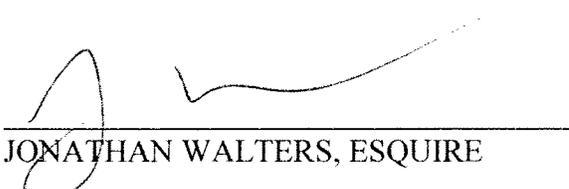
CERTIFICATE OF SERVICE

I hereby certify that I served this date a copy of the Charging Party's Brief in Opposition to the Respondent's Motion for Summary Judgment by electronic mail upon:

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