

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 7, 2017

TO: Garey E. Lindsay Regional Director
Region 9

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Dow Chemical Co.
Case 09-CA-198753

240-3367
240-3367-0480-5000
240-3367-0480-5050
530-6067-4001-5000
530-6067-4033-5000
530-8076
625-6625-7600-0000

The Region submitted this case for advice as to whether Dow Chemical Co. (hereinafter “the Employer”) violated Section 8(a)(5) of the Act by announcing the implementation of an Employee Stock Purchase Plan (“ESPP”) to bargaining unit employees and their bargaining representative, the International Chemical Workers Union Council of UFCW Local 970C (“the Union”), and then rescinding the ESPP for unit employees without bargaining with the Union. The Region also sought advice on whether this matter was appropriate for deferral to the parties’ grievance-arbitration machinery under *Dubo Mfg. Corp.*¹

We conclude that the unit employees and their bargaining representative reasonably believed that the ESPP had become an established term and condition of their employment based on the Employer’s representations. We find, therefore, that the Employer’s subsequent rescission of the ESPP without bargaining with the Union was an unlawful unilateral change that violated Section 8(a)(5). We also conclude that deferral under *Dubo* is not appropriate in this case because the statutory question regarding the status of the ESPP and effect of its rescission is closely related to a non-deferrable refusal to provide information charge filed by the Union, and because the grievance-arbitration proceeding would not resolve the statutory issue. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally rescinding the ESPP for the unit employees.

¹ 142 NLRB 431 (1963).

FACTS

The Employer operates a chemical production facility in Elizabethtown, Kentucky, employing both represented and non-represented workers. The Union represents a unit of roughly 130 production and maintenance employees under a collective-bargaining agreement in place through May 2018. Prior to June 2016, the facility was owned by Dow Corning. In June 2016, the Employer purchased the Elizabethtown facility and continued to recognize the Union and honor the prior collective-bargaining agreement. Section 17 of that agreement states, in relevant part, “[t]he Company will provide benefits set forth in the on-line ‘Benefits’ section, accessed via [the Company’s] intranet site. . . . It is agreed that the Company and the Union will have the same core benefits. . . .”

In October 2016, a manager from the Employer’s Human Resources Department gave a number of PowerPoint presentations at the Elizabethtown facility that detailed employment policies and benefits offered by the Employer. Both unit and non-unit employees viewed the slideshow together at various times. There were no separate presentations for workers depending on their unit status. The slideshow discussed the ESPP, which was stated to be open for enrollment in December 2016.

The ESPP slide did not contain any language that indicated it would be made available to only non-bargaining unit employees or that bargaining unit employees were ineligible. In fact, the ESPP slide specifically noted that the ESPP is open to “all employees,” and a later slide noted that all of the subjects mentioned during the HR manager’s presentation “appl[y] to all U.S. salaried and hourly employees, including bargained-for employees, subject to the terms and conditions of applicable collective bargaining agreements.”

After the Employer assumed control of the Elizabethtown facility, Union and management representatives discussed the ESPP several times. In October 2016, the Union’s president told a management official that members of the bargaining unit had expressed displeasure with a proposed increase to health insurance premiums. The Employer official replied that the benefits derived from the ESPP would likely compensate the employees for any increase in premiums. In December 2016, the Employer’s Vice-President of Finance and its new plant manager met with the Union’s joint bargaining committee, which includes the Union president and other officers, and touted the benefits of the ESPP when the Union officials mentioned it. In January 2017,² the Employer’s HR manager informed Union officials that the ESPP would soon be open for enrollment to bargaining unit members, although it is not

² All dates hereinafter in 2017 unless otherwise noted.

clear whether the Union passed this information along to the rank-and-file membership.

In late January or early February, the ESPP enrollment period was announced via the Employer's intranet with the enrollment form made available to all employees. On February 2, however, the Employer notified the Union that it would not be offering the ESPP to bargaining unit employees, which the Union passed on to the employees. The ESPP open enrollment period for the non-unit employees was from February 6 to 17. About six bargaining unit employees attempted to enroll in the ESPP, but were denied by the Employer's Human Resources department because they were ineligible.

On March 2, the Union filed a grievance asserting that the Employer's failure to offer the ESPP to unit employees had breached Section 17 of the collective-bargaining agreement because the Employer was not offering the same "core benefits" to its unit and non-unit employees. On April 12, the Employer denied the grievance asserting that the ESPP was a "wage issue" rather than a benefit.

On April 21, the Union requested information pertaining to the ESPP plan with a ten-day deadline. In pertinent part, Union request 4 asked the Employer to:

Identify all 'core' benefits for non-union Dow Chemical employees (a) at the Elizabethtown, KY facility; (b) in the State of Kentucky; (c) in the State of Michigan; and (d) anywhere, as of January 1, 2017; February 1, 2017; March 1, 2017; and/or any changes to those 'core' benefits since January 1, 2017.

Union request 7 asked the Employer to:

. . . identify (a) each union employee represented by [the Union], who made an attempt to purchase stock at a discount during the open window period in 2017; (b) describe what the result was of each such attempt; and (c) provide copies of any communications to each such employee, regarding each such employee's attempt to purchase such stock. At this time, Dow may redact . . . the amount and/or numbers of shares of stock each employee attempted to purchase, though the Union requests that Dow keep such information available, since the Union may need that information eventually (in order to address possible remedy issues) and will either attempt to obtain a release from any such employees and/or obtain a confidentiality agreement with Dow to obtain the redacted information.

On May 2, after the Union's ten-day deadline had lapsed, the Employer asked for additional time to respond to the information request. The Union did not explicitly answer that request, but instead expressed its desire to submit the grievance to an arbitration panel. On May 10, the Employer agreed to request an arbitration panel but did not respond to the information request.

On June 16, the Employer provided responses to the Union's information request. Regarding request 4, the Employer responded:

You enrolled in the online benefits enrollment during the last 'Annual Enrollment' period in November of 2016. You can access these core benefits through your 'My HR Connection' website. . . . Your Annual Enrollment is the same as those of non-union employees at Etown [sic]. I am not aware of any changes since Annual Enrollment to these programs.

Regarding Union request 7, the Employer stated,

You have indicated in the grievance that you received the email letting you know you were not eligible. You should have a copy of that. That email is the only communication sent to employees that enrolled even though they were not eligible. . . . To our knowledge, none of the Etown [sic] union members who enrolled were successful in their attempt.

The Region has determined that the Employer violated Section 8(a)(5) both by delaying its response to the Union's information request, and by providing deficient responses.

ACTION

We initially conclude that the unit employees and their Union reasonably believed that the ESPP had become an established a term and condition of employment based on the Employer's representations. We find, therefore, that the Employer's subsequent rescission of the ESPP without bargaining with the Union was an unlawful unilateral change that violated Section 8(a)(5). We also conclude that deferral under *Dubo* is not appropriate in this case because the statutory question regarding the status of the ESPP and effect of its rescission is closely related to a non-deferrable refusal to provide information charge filed by the Union, and because the grievance-arbitration proceeding would not resolve the statutory issue. Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally rescinding the ESPP for the unit employees.

A. The Employer Violated Section 8(a)(5) by Unilaterally Rescinding the ESPP for Unit Employees.

It is well settled that an employer may not implement changes to mandatory subjects of bargaining without negotiating to impasse or agreement with its employees' chosen bargaining representative.³ The underlying policy against unilateral changes is to prevent an employer from undermining the collective-bargaining relationship by suggesting to employees the irrelevance of their bargaining representative when it independently sets an important term and condition of employment.⁴ Thus, "whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse. . . ."⁵ This reasoning extends to situations where an employer unilaterally rescinds a term and condition of employment that it previously had unilaterally granted.⁶

³ *NLRB v. Katz*, 369 U.S. 736, 747 (1962). As a preliminary matter, we also agree with the Region that the ESPP is a mandatory subject of bargaining because under the plan employees were allowed to purchase company stock below fair market value, which provided the employees with an emolument of value based on the employment relationship. *Compare Foodway*, 234 NLRB 72, 76 (1978) (stock plan held to be an emolument of value because the employer offered stock at below market value), and *Richfield Oil*, 110 NLRB 356, 359-60 (1954) (stock purchase plan was held to be "wages" and thus an emolument of value because the employer made matching contributions), *enforced*, 231 F.2d 717 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956), *with Pieper Electric*, 339 NLRB 1232, 1236-37 (2003) (stock purchase plan not an emolument of value because it was offered at book value without an employer contribution).

⁴ *See, e.g., Kurdziel Iron of Wauseon*, 327 NLRB 155, 155 (1998), *enforced mem.*, 208 F.3d 214 (6th Cir. 2000).

⁵ *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (quoted in *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997)).

⁶ *T.T.P. Corp.*, 190 NLRB 240, 240, 242 (1971) (Board holding that the employer's unilateral rescission of a pension plan that it unilaterally implemented years earlier without union objection or request for negotiations violated Section 8(a)(5)). *See also McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391, 1394-96 (1998).

It is also well settled that terms and conditions of employment include not only what an employer has granted, but also, in some situations, what an employer *proposes* to grant.⁷ Thus, if an employer announces a benefit in a way that creates a reasonable expectancy of the employment relationship, it cannot unilaterally rescind that benefit.⁸ In such circumstances, as in circumstances where an employer unilaterally changes a contractual benefit, the employer's actions indicate to employees that it has the power to alter their terms and conditions of employment without their union's input.

Armstrong Cork Co. v. NLRB is illustrative. There, after a union filed a representation petition but prior to the election, the employer announced a wage increase for all of its employees, pending certification by the Wage Stabilization Board ("WSB").⁹ The company employed two classes of workers: production and mechanical.

⁷ *Armstrong Cork Co. v. NLRB*, 211 F.2d 843, 847 (5th Cir. 1954), *enforcing* 103 NLRB 133, 134-35 (1953); *Liberty Telephone*, 204 NLRB 317, 317-18 (1973); *May Department Stores Co.*, 326 U.S. 376, 384-86 (1945).

⁸ *Cf.*, *Liberty Telephone*, 204 NLRB at 317-18 (a unilateral change is unlawful from the time it is announced, even if the change is not ultimately implemented; ". . . in determining whether a particular matter or program is a term and condition of employment which is subject to collective bargaining, the Board and courts have properly considered whether the program is a reasonable expectancy of the employment relationship . . ."); *ABC Automotive Products Corp.*, 307 NLRB 248, 249-50 (1992) (employer made unlawful unilateral change where new health benefits were announced even though never implemented because striking employees never returned to work; "such an announcement would cause a reasonable employee to assume that . . . a condition of employment would have changed [T]he unilateral change was effectively implemented when it was announced."), *enforced mem.* 986 F.2d 500 (2d Cir. 1992); *Kurdziel Iron of Wauseon*, 327 NLRB at 155-56 (finding 8(a)(5) violation where "[e]ven if the announced reduction [in break time] did not finally result in the actual curtailment of employees' breaks, the damage to the bargaining relationship was accomplished."); *CJC Holdings*, 320 NLRB 1041, 1041 n.2 (1996) (finding 8(a)(5) violation where employer announced intent to change employees' dental insurance; "the promise itself, even if not immediately carried out, changed the terms and conditions of employment."), *enforced per curiam*, 110 F.3d 794 (5th Cir. 1997).

⁹ *Armstrong Cork Co.*, 211 F.2d at 844. To provide some context to understand the facts in *Armstrong*, the Wage Stabilization Board was a successor agency of the National War Labor Board and was responsible for recommending wage control

The union petitioned for and won an election to represent the company's mechanical employees. During a bargaining conference after the election, the union informed the employer that it did not want any changes to conditions of employment without consultation.¹⁰ The next day, the employer withdrew its wage increase request before the WSB and granted the portion of the promised increase that was permissible under WSB regulations only to the non-unit, production employees.¹¹ The Board determined that the employer violated Sections 8(a)(1), (3) and (5) of the Act by denying the mechanical employees in the bargaining unit the promised wage increase.¹²

The 5th Circuit upheld the Board's findings, specifically concluding that the employer's "action in cancelling the proposed wage increase and granting merit increases affecting its mechanical employees, without consulting with their union as requested, constituted unilateral action which naturally tended to undermine the authority of their certified bargaining representative, and violated [Sections 8(a)(5) and (1)] of the Act."¹³ The court also dismissed the employer's argument that it was obligated to cancel the wage increase in order to comply with the union's instruction to make no changes to terms and conditions of employment. The court found that withdrawing the proposed increase was itself a unilateral change, even though it was subject to approval from the WSB, because "the definition of [conditions of employment] includes not only what the employer has already granted, but also what he proposes to grant."¹⁴

Here, as with the announced wage increase in *Armstrong Cork*, the Employer's initial announcements of the ESPP to unit employees and reinforcing representations to Union officials established a term and condition of employment. In October 2016, the Employer's HR manager met with groups of employees, including individuals in

policies during the Korean War to ensure economic stability and consistent production during wartime.

¹⁰ *Id.*

¹¹ *Id.* The employer subsequently asked the WSB to approve the balance of the previously announced wage increase only for the non-unit, production employees. The WSB approved that request.

¹² *Id.* at 846.

¹³ *Id.* at 847 (internal citations omitted).

¹⁴ *Id.* (internal quotations omitted).

the bargaining unit, to introduce the Employer's policies and repeatedly stated that the ESPP would be made available to them. His PowerPoint presentations did not differentiate between unit and non-unit employees. Indeed, one slide in the presentations specified that the ESPP was for "all employees," and another slide stated that all of the policies he had discussed also applied to "bargained-for employees."¹⁵ Subsequently, when the Union's president informed the Employer that unit employees were upset about proposed increases to health insurance premiums, the Employer replied that benefits from the ESPP would offset those increased costs for the unit employees. In December 2016, the Employer's Vice-President of Finance and the new plant manager touted the benefits of the ESPP to the Union's joint bargaining committee. In January 2017, the Employer even informed the Union that it would soon be time for open enrollment for the ESPP, and it made the enrollment form available to unit employees. In short, all of the Employer's communications regarding the ESPP from October 2016 until February 2, 2017 unequivocally conveyed that the unit employees would be allowed to participate in the ESPP.¹⁶

¹⁵ This latter slide also stated that the benefits discussed were available to all employees, "subject to the terms and conditions of applicable bargaining agreements." This language did not clearly indicate that the ESPP or any of the other programs presented would not be made available to the unit employees, and in fact the "same core benefits" language of Section 17 in the collective-bargaining agreement would suggest to employees that they would be included. Furthermore, the subsequent representations made by various Employer officials to the Union touting the benefits of the ESPP cut strongly against the notion that the Employer ever provided clear notice before February 2, 2017, that the ESPP would not be available to the unit employees.

¹⁶ The Employer's statements to the Union officials (in addition to the HR manager's statements made directly to the unit employees) can be used to show that the Employer's communications about the ESPP had established a term and condition of employment. *See Century Wine & Spirits*, 304 NLRB 338, 347 (1991) (Board held that in order for an employer to properly implement a term and condition of employment, it must give "timely notice to the employees' representative"), *vacated on other grounds*, 317 NLRB 1139 (1995). *Cf., e.g., Elf AutoChem North America*, 339 NLRB 796, 796 (2003) (finding, in the alternative, that employer became "perfectly clear" successor when it informed union by letter that it would maintain current terms and conditions of employment pending negotiation of a new contract); *Canteen Co.*, 317 NLRB 1052, 1052-53 (1993) (finding employer was "perfectly clear" successor because by the time "[r]espondent expressed to the [u]nion its desire to have the predecessor employees serve a probationary period, the [r]espondent had effectively and clearly communicated to the [u]nion its plan to retain the predecessor employees"), *enforced*, 103 F.3d 1355 (7th Cir. 1997).

Thus, in October 2016, and certainly by late January 2017, the ESPP had become an established employment term for the unit employees.¹⁷ The Employer then rescinded the ESPP for unit employees on February 2 without bargaining to impasse with the Union over that mandatory subject, and thereby violated Section 8(a)(5).¹⁸

As with the announced wage increase in *Armstrong Cork*, it is irrelevant that the Employer rescinded the term before it was implemented because, as set out above, the Employer's statements alone had established the ESPP as an employment term the unit employees reasonably expected. Nor can the Employer justify its conduct by asserting that it merely reversed a prior unilateral grant of a favorable employment term. The Union never objected to the ESPP as a new term for the unit employees, and "whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse."¹⁹

B. The Region Should Not Defer the Unilateral Change Allegation Under Dubo.

The Board will defer a case to the grievance-arbitration machinery under *Dubo* when: 1) the dispute is cognizable under the arbitration procedure; 2) the dispute is being voluntarily processed through the procedure, and 3) there is a reasonable chance that the use of the arbitration procedure will resolve the dispute.²⁰ However, the Board will not defer refusal to provide information cases.²¹ Moreover, when an

¹⁷ See the cases cited at notes 7 & 8, above.

¹⁸ See the cases cited at notes 7 & 8, above.

¹⁹ *NLRB v. Dothan Eagle, Inc.*, 434 F.2d at 98. See also *T.T.P. Corp.*, 190 NLRB at 244 (Board adopting the ALJ's finding that the unilaterally created pension plan was a term and condition of employment and that "[g]ood faith compliance with Sections 8(a)(5) and (1) of the Act presupposes that an employer will not alter existing 'conditions of employment' without first consulting the exclusive bargaining representative selected by his employees, and granting it an opportunity to negotiate on any proposed changes.") (quoting *Armstrong Cork Co.*, 211 F.2d at 847); *McDonnell Douglas Aerospace Services Co.*, 326 NLRB at 1394-96.

²⁰ See "Procedures for Application of the *Dubo* Policy to Pending Charges," GC Memorandum 79-36, dated May 14, 1979.

²¹ See, e.g., *Postal Service*, 280 NLRB 685, 685 n.2 (1986), enforced, 841 F.2d 141 (6th Cir. 1988); *Team Clean, Inc.*, 348 NLRB 1231, 1231 n.1 (2006); *NLRB v. Acme*

unfair labor practice allegation is intimately connected to such a non-deferrable allegation, the Board will likewise find that the connected allegation is not subject to deferral under *Dubo*.²² In *Postal Service*, the Board denied the respondent's motion to defer to the parties' grievance-arbitration procedure under *Dubo* because the Section 8(a)(5) allegation regarding unilateral discontinuance of out-of-schedule premium pay was "intimately connected" to the refusal to provide information allegations.²³ In applying this principle against deferral, the Board also has stated that if it "must hear and resolve one issue, it makes no economic sense to refrain from deciding a closely related issue."²⁴

Here, Union information requests 4 and 7 sought information to support the Union's grievance that the ESPP was a "core benefit" under the Section 17 of the parties' contract that unit employees attempted to enroll in because they believed it was available to them. Those information requests are closely related to the issue of whether the ESPP had become a term and condition of employment that the Employer could not unilaterally rescind. Thus, because the Board will not defer resolving the information request allegations, it makes little economic or procedural sense to defer the closely related unilateral change allegation.

Deferral of the unilateral change allegation is also inappropriate here because the arbitration proceeding will not resolve this statutory issue. In the arbitration proceeding, the Union seeks a determination that the ESPP is a "core benefit" the

Industrial Co., 385 U.S. 432, 437-38 (1967); *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 439 (D.C. Cir. 2002).

²² *Postal Service*, 302 NLRB 918 (1991).

²³ *Id.* The Board applies this same non-deferral principle in cases arising under *Collyer Insulated Wire*, 192 NLRB 837 (1971), although using different descriptors to describe the relationship to the non-deferrable allegation. See, e.g., *American Commercial Lines*, 291 NLRB 1066, 1069 (1988) ("inextricably related"), *overruled on other grounds*, *J.E. Brown Electric*, 315 NLRB 620 (1994); *Arvinmeritor, Inc.*, 340 NLRB 1035, 1035 n.1 (2003) ("closely intertwined"); *S.Q.I. Roofing, Inc.*, 271 NLRB 1, 1 n.3 (1984) ("close interrelationship"). Cf. *Clarkson Industries*, 312 NLRB 349, 353 & n.21 (1993) (finding deferral of Section 8(a)(5) allegations involving unilateral changes appropriate because they were "not closely related" to the refusal to provide information allegations).

²⁴ *Clarkson Industries*, 312 NLRB at 352, cited in *Arvinmeritor, Inc.*, 340 NLRB at 1035, n.1.

Employer was obligated to offer the unit employees under Section 17 of the contract rather than a “wage issue” that the Employer claims is not subject to the provision. In the unfair labor practice proceeding, the issue is whether the ESPP had become an established term and condition of employment such that, absent bargaining to impasse, its rescission constituted an unlawful unilateral change that violated Section 8(a)(5). An arbitrator will not resolve this statutory issue. Thus, because the arbitration procedure cannot fully resolve the dispute, deferral under *Dubo* is not appropriate.

CONCLUSION

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally rescinding the ESPP, which was an established term and condition of employment. Based on the analysis above, this allegation is not appropriate for deferral under *Dubo*.

/s/
J.L.S.

ADV.09-CA-198753.Response.DowChemical. (b) (6), (c)