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

# Advice Memorandum

DATE: April 18, 2011

TO : William A. Baudler, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pacifica
Case 32-CA-25450

This case was submitted for advice as to whether the Employer violated Sections 8(a)(1) and (5) of the Act by: (1) failing and refusing to comply with an obligation to meet and bargain with the Union over alternatives to employee layoffs prior to implementing any such layoffs; (2) breaching an alleged agreement with the Union that would have allowed employees covered under the Employer's health plan to move to an equivalent Medicare plan as a cost cutting alternative to layoffs; and (3) referring the Union's proposals to the Finance Committee of the Employer's Board of Directors, an action the Union claims was in direct contravention of the collective-bargaining agreement's delegation of bargaining authority to the Executive Director.

## ACTION

For the reasons stated below, we agree with the Region that the instant charge should be dismissed, absent withdrawal, because none of the 8(a)(5) allegations have merit.

With respect to the first allegation, the Employer was not obligated to meet and bargain with the Union over alternatives to layoffs because the Union waived its right to do so in the collective bargaining agreement.[1] Article 12 of the parties' collective bargaining agreement permits the Employer to "reduce the work force due to lack of work or other reasons including economic necessity," but requires that the Employer "actively explore alternatives to the layoffs(s) before the effective date of the layoff, if so requested by the Union." This language does not

[1] Allison Corp., 330 NLRB 1363, 1365 (2000) (finding union waived right to bargain over decision to subcontract where provision of collective bargaining agreement specifically granted the employer the right to subcontract).

create a duty to bargain about alternatives to the layoffs. What it requires is that the Employer "explore alternatives," at the request of the Union. Here, the evidence establishes that the Employer met with the Union, at the Union's request, to discuss the Union's suggestions for alternatives to layoffs, considered and investigated those alternatives and ultimately rejected the Union's suggestions by vote of the Board of Director's finance committee. After that vote, the Employer's Executive Director met with the Union to explain why the proposals had been rejected. Based on these facts, the Employer met its only contractual obligation, which was to "actively explore alternatives to the layoffs."

As to the second allegation, the evidence does not support a finding that the Employer agreed to allow employees covered under its health plans to move to an equivalent Medicare plan as a cost cutting alternative to layoffs. Thus, no agreement was breached. Initially, it is undisputed that the parties never agreed in writing to the Union's proposal. Further, the two Union witnesses themselves have conflicting recollections as to whether an agreement was reached. Thus, one bargaining unit member has notes suggesting that the Employer had orally agreed to this proposal. However, he did not record those notes until sometime after the meeting took place. On the other hand, the Union's shop steward, who was also at the meeting, did not recall that the Employer had agreed to the proposal. Rather, the steward recalled that although the Employer's Executive Director was enthusiastic about the Medicare proposal, she did not agree to it. Moreover, the Executive Director testified that although she agreed to look into the Union's proposal regarding medical benefits, ultimately the Employer rejected the suggestion because of the serious financial risk that it created. Given the absence of any written agreement, and the lack of evidentiary support that the parties verbally reached such an agreement, we conclude that no such agreement was reached and no violation of the Act has been established.[2]

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[2] Nothing in the Act would have prevented the parties from reaching a mid-term agreement to change the contractual provision regarding medical benefits. If the parties had reached a mid-term agreement regarding a change in medical benefits, they would have been bound by Section 8(d) not to alter that agreement. NLRB v. Local 554, Graphic Communications International Union, 991 F.2d 1302, 1306 (7th Cir. 1993) (applying Section 8(d) to mid-term collective bargaining agreement). Here, we find that no such agreement was made.

The Union's final allegation is that the Employer abrogated a delegation of authority in the parties' collective bargaining agreement by submitting the Union's proposals to the Board of Director's finance committee. However, there is nothing in the parties' collective bargaining agreement that would prohibit the Employer from vetting the Union's proposals through its finance committee. Therefore, the Employer did not violate the Act by doing so.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.