

The Boeing Company and Southern California Professional Engineering Association. Case 21–CA–33549

July 10, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 5, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Union filed a reply brief. Additionally, the Respondent filed a cross-exception, the Union 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,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Jean Libby, Atty., for the General Counsel.
Lawrence A. Michaels, Atty., of Los Angeles, California, for the Respondent and *William R. Hartman, Jr., Atty.*, of Seal Beach, California, for the Respondent.
Robert M. Dohrmann, Atty., of Los Angeles, California, for the Union.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Los Angeles, California on July 9 and 10, 2001. The

¹ The Charging Party Union 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Union argues in its exceptions that the judge erred in finding that the Letter of Understanding that the parties executed did not create a bargaining obligation. Even assuming that this Letter of Understanding imposed such a bargaining obligation on the Respondent, we agree with the judge that the Respondent offered to bargain and that the Union effectively waived bargaining by declining to discuss the issue based on its filing of the instant unfair labor practice charge.

Additionally, we find it unnecessary to pass on the Respondent's cross-exception regarding the admissibility into evidence of the Union's bargaining notes from October 15, 1999, because the judge's ruling denying admission was at most harmless error.

charge was filed October 8, 1999¹ by Southern California Professional Engineering Association (the Union or SCPEA) against The Boeing Company (Respondent) and the complaint was issued March 30, 2001. The issue is whether Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union by unilaterally changing compensation and benefit plans of a group of employees transferring into the Union's bargaining unit following Respondent's merger with McDonnell Douglas Corporation.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the manufacture of aircraft and aerospace products at facilities located in Long Beach and Huntington Beach, California, where it annually purchases and receives at its California facilities goods valued in excess of \$50,000 directly from suppliers located outside the State of California. Respondent 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.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

In December 1996, Respondent acquired the aerospace and defense business of Rockwell International, including its facilities located in Seal Beach and Downey, California, which became a subsidiary of Respondent called Boeing North America (BNA). The BNA engineers, numbering approximately 1400, were not represented by a union. These engineers (affected employees) are at the center of the dispute herein.

In August 1997, Respondent merged with McDonnell Douglas Aircraft Corporation (MDC), which had facilities in Huntington Beach and Long Beach, California. The MDC engineers, numbering about 5,000, were represented by the Union. In 1998 Respondent decided to relocate the affected employees from the former BNA Seal Beach and Downey facilities to the former MDC facilities of Huntington Beach and Long Beach. At that time, Respondent voluntarily recognized the Union as the representative of all engineers who would be located at the Huntington Beach and Long Beach facilities and assumed the obligations of the collective-bargaining agreement in effect May 1, 1996 through March 4, 2001 between the Union and MDC (the SCPEA agreement.) Computer system constraints prevented immediate transfer of the affected employees into the compensation and benefit plans set forth in the SCPEA agreement. Kenneth Eriksen (Mr. Eriksen), Director of Labor Relations for Military Transport Aircraft Division of Respondent, informed the Union president, Don Peter (Mr. Peter), that al-

¹ All dates are in 1999 unless otherwise indicated.

² Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

though Respondent intended to place the affected employees in the SCPEA unit, Respondent had no choice but to delay placement of affected employees into the SCPEA agreement's compensation and benefit plans until computer constraints could be worked out. The parties agreed orally that the affected employees would retain their current benefit plans until the constraints were removed and thereafter would receive the benefits set forth in the SCPEA agreement. Except for the benefit provisions, the implementation of which had to await computer systems alteration, the terms and conditions of the SCPEA agreement applied to the affected employees upon transfer. The affected employees could file a grievance, use the arbitration procedure, and were bound by all unconstrained provisions.

Mr. Eriksen agreed to draft a letter of understanding (First LOU) to reflect the parties' agreement. The First LOU was to contain language allowing the affected employees to remain in the BNA-established benefits, compensation, and work conditions plans until computer programmers made the technological changes necessary to place the affected employees under the SCPEA contract. When the necessary computer programming was completed, Respondent would put the affected employees into the SCPEA benefits and compensation package. Mr. Eriksen testified that prior to October 15, 1998, there was never any conversation between Respondent and the Union about any objective other than placing the affected employees into the SCPEA plan once the constraints were lifted. The First LOU, dated October 6, 1998 essentially provided that benefits, working conditions and compensation for affected employees would remain as established at BNA while system constraints existed. It was never signed.

On October 15, 1998, Respondent and the Union held an "all-hands" orientation meeting at the Long Beach facility for the BNA Seal Beach engineers who would be the first to transfer. In response to questions from the affected employees, Mr. Peter asked them which benefit package they would prefer (when constraints lifted): the SCPEA package or the Boeing Company package being offered to unrepresented employees called the Total Compensation and Benefits Plan. By show of hands, employees nearly unanimously chose the Total Compensation and Benefit Plan. Following the meeting, according to Mr. Eriksen, Mr. Peters requested and Mr. Eriksen agreed that he would try to get corporate approval to the Total Compensation and Benefits Plan for affected employees. He and Mr. Peter agreed that a letter of understanding different from the First LOU was required to reflect the new intent. Mr. Eriksen testified that he told Mr. Peter that while Respondent locally agreed with the request, corporate approval would have to be obtained.

Mr. Peter drafted a new letter of understanding. In paragraph 8, Mr. Peter's draft contained the following sentence: "In recognition of the fact that further negotiations regarding new compensation, working conditions and benefit plans for affected employees are *necessary and advisable*, [emphasis added] it is agreed that the parties shall continue to meet and confer over these [benefits] in order that such mutually agreed upon matters shall be ready to be put in place when systems constraints have been removed." Mr. Eriksen wanted the word-

ing of that sentence changed. He testified that because Respondent had a contract with SCPEA, the affected employees had to be given the SCPEA benefits and compensation package once the systems constraints were removed. He said that the term "advisable" was substituted for "necessary and advisable" at his behest because Respondent considered that while it was required that affected employees be ultimately covered by the SCPEA agreement, it was not required that the parties negotiate for the Total Compensation and Benefit Package. Mr. Eriksen testified that he told Mr. Peter, "Don, you've got to realize, we're going to try to get this [corporate approval of the Total Compensation and Benefit Package] done. But I . . . have no guarantees that . . . we're going to be able to get the corporate office to agree to bifurcate the unit like this and give the BNA engineers the new Boeing compensation package. And so 'necessary,' you know, we need to take 'necessary' out of there, and make it 'advisable.'"

On January 22, Respondent and the Union signed the revised Letter of Understanding (LOU). The preamble stated that the purpose of the LOU was to guarantee certain terms and conditions for the affected employees whose work the Union was certified to represent. The LOU provided in part:

1. Introduction

The Company has informed the SCPEA that system constraints resulting from the merging of McDonnell Douglas, Boeing and BNA prevent immediate conversion of affected employees to the compensation, working conditions and benefit plans in place at the facility to which they are moving.

Paragraph 2 provided that affected employees would continue to be eligible for BNA benefits under the terms of BNA benefit plans until such time as Respondent was prepared to implement changes to the plans. At that time, the Union was to be "notified and further meetings shall be held to negotiate new benefit plans for affected employees. Benefits include, but are not limited to, health insurance, dental insurance, employee retirement income plans, employee savings plans, layoff benefits, life insurance and supplemental accident insurance."

Paragraph 3 provided that employees would continue to be compensated under the BNA compensation systems until such time as Respondent was prepared to implement changes to the plans. At that time, the Union was to be "notified and further meetings shall be held to negotiate compensation programs for affected employees."

Paragraph 4 provided that for the duration of the LOU, affected employees will continue to work under the working conditions established by BNA, including standard workweek, work shifts and leaves of absence.

Paragraph 5 provided that the holiday schedule of the SCPEA agreement would be followed.

7. Representation by the SCPEA

Affected employees transferring from heritage BNA facilities into the SCPEA Bargaining Unit and performing work that is represented by the SCPEA shall be represented by SCPEA. These affected employees shall be represented under the current SCPEA Agreement and have all rights and privileges guaranteed under that agreement with the limited

exceptions as noted in paragraphs 2, 3 and 4 of this Letter of Understanding. Notwithstanding the provisions of the SCPEA agreement, affected employees shall not be treated less favorably in any respect than non-represented "heritage" BNA employees transferred to the Long Beach or Huntington Beach facilities.³

Examples of rights and privileges guaranteed by this paragraph are the right to resolve individual employee grievances under the grievance and arbitration provisions of the SCPEA Agreement, the right to consult with an Association Representative regarding such grievances, the right to freely join the Association, pay dues through payroll deduction and become an active member of the Association.

8. Duration of this Letter of Understanding

The Company and the Association agree that this Letter of Understanding shall remain in force and effect until the systems constraints resulting from the merging of McDonnell Douglas, Boeing and BNA have been removed and until the Company and the Association reach agreement on the new compensation, working conditions and benefit plans to be applied to the affected employees. In recognition of the fact that further negotiations regarding new compensation, working conditions and benefit plans for affected employees are advisable, it is agreed that the parties shall continue to meet and confer over these salaries and terms and conditions of employment in order that such mutually agreed upon matters shall be ready to be put in place when systems constraints have been removed.

Mr. Peter testified that the intent of the LOU was twofold: first, to allow the affected employees to maintain their existing benefits while system constraints were being worked out since Respondent did not have the systems capacity to place the affected employees into SCPEA contractual benefit plans; and second, to negotiate new benefits when system constraints were lifted. Mr. Peter testified that the Union contemplated that once the system constraints were lifted, the parties would then negotiate a benefits plan for the affected employees: "Either total compensation or SCPEA or somewhere in the middle. I don't know. I mean, if you look at historically what happened, we negotiated some piecemeal items. And it just depended on our needs and the Company needs, as to where we would end up . . . I mean, everything, at least in my mind, was negotiable." According to Mr. Peter, but for the system constraints, Respondent "would have had a good case . . . for transitioning initially into SCPEA benefits," but since the company couldn't immediately do so, in exchange for granting Respondent a transition period, the Union was to have a say in what the benefits for affected employees would be. Mr. Peter did not, however, testify to any such discussion with any representative of Respondent. Mr. Peter agreed, essentially, that there was no discussion over any plans or possible benefit variations other than the Total Compensation and Benefit Plan and the SCPEA plan:

³ Mr. Eriksen credibly testified that this sentence referred to the period during which system constraints existed, and represented Respondent's guarantee that if it changed benefits for the unrepresented BNA employees during the period, it would provide the same benefits for the affected employees.

Mr. Michaels: And was any proposal made at that time, other than get them the total compensation plan?

Mr. Peter: We never—at the point that this was drafted and agreed to, Mr. Eriksen knew what the Union's preference was, what the members'—affected members' preference was. He knew what local management's preference was. But it was negotiable. I mean, we knew that it was negotiable. And he knew that it was negotiable.

....

Mr. Michaels: [Affected employees] wanted the total compensation plan. [Mr. Eriksen understood that, is that correct?

Mr. Peter: He understood that that's what our preference was. But I wouldn't characterize it as a proposal.

Mr. Michaels: Whether you characterize that as a proposal or not, was anything else that you would characterize as a proposal made?

Mr. Peter: Other than transitioning eventually to total comp, I would say no. We didn't put forward any other proposal.

When asked if he had discussed with Mr. Eriksen the statement in paragraph 2 of the LOU that "further meetings shall be held to negotiate new benefit plans for affected employees," Mr. Peter testified, "I would say no. Because the—I mean, the . . . sentence clearly says that . . . the company and the Union shall meet and negotiate new benefit plans . . . the Company never suggested that that language be revised." Mr. Peter testified he was aware that Mr. Eriksen did not believe Respondent had an obligation to negotiate with the Union over the Total Compensation and Benefit Plan but that Respondent was willing to do so.⁴

Shortly after the LOU was signed, Doug Potter (Mr. Potter) replaced Mr. Peter as union president.

Respondent's local management submitted the Union's request for the Total Compensation and Benefit Plan to corporate office and pursued discussions with corporate management over the next nine months. Of concern to Respondent's corporate management were pending negotiations with the Seattle Professional Engineering Association (SPEA) whose contract expired in 2000, benefits for unrepresented employees, and future contract negotiations with SCPEA for a successor agreement to the one due to expire in March 2001.⁵ Corporate managers noted that granting the Total Compensation and Benefits Plan to the affected employees would result in a bifurcation of the SCPEA unit for compensation and benefits purposes, which they thought inadvisable.

⁴ Mr. Peter's testimony was sometimes vague and not entirely responsive. Under cross-examination it was nearly equivocal. He would not give a direct answer to the twice-asked question of what the parties anticipated doing if Respondent did not agree to grant affected employees the Total Compensation and Benefit Plan, but only repeated that "the intent was to reach an agreement." I credit Mr. Eriksen's testimony where it conflicts with that of Mr. Peter.

⁵ Pursuant to a stipulation of the parties received post-hearing, it is noted that Respondent and the Union negotiated the terms of a new collective-bargaining agreement effective March 5, 2001, which was ratified by Union membership on July 13, 2001.

Sometime in mid-1999, Respondent notified the Union that the system constraints would be removed by January 1, 2000. In October, Respondent's corporate office rejected the proposed application of the Total Compensation and Benefits plan to the affected employees, and on October 5, Mr. Eriksen so informed Mr. Potter. Mr. Potter asked for written confirmation. Mr. Eriksen, by letter dated October 6, wrote in pertinent part as follows:

The Company has carefully considered the option of negotiating an agreement with SCPEA to grant some or all of the post-merger Boeing non represented employee benefit plans to the pre-merger BNA employees currently and prospectively represented by SCPEA; however, we have decided that the best course of action for now is to place these employees in the contractually agreed upon benefits plans currently being offered to all other SCPEA represented employees. The same consideration and conclusion was made and applies to all other Company compensation programs and working conditions.

We would like to meet Friday, October 8, 1999 to discuss our decision further.

Mr. Potter told Mr. Eriksen the Union could not meet on October 8, and faxed him a letter dated October 8, which stated, in part:

[The] LOU clearly and unambiguously states that no changes will be made to the wages, hours and conditions of employment of the [BNA] employees who have, or will in the future, transfer to locations and job classifications represented by the Association without first negotiating such changes. The company's unilateral "decision" in this matter is clearly unacceptable.

.....

As a result, the Association hereby demands that the company live up to its commitments to negotiate any changes for the ... BNA employees prior to any such changes being implemented.

According to Mr. Potter, the purpose of his October 8 letter was not to request negotiations about affected employee benefit plans but to formalize his complaint that Respondent, through the October 6 letter, said they were not going to negotiate. The Union also filed the instant charge on October 8.

Upon receipt of the letter, Mr. Eriksen telephoned Mr. Potter and explained that Respondent was not refusing to negotiate, but that they weren't willing to negotiate an agreement on the Union's proposal to grant the Total Compensation and Benefit Plan to the affected employees. The parties arranged to discuss the matter at a meeting already scheduled for October 15 to discuss a new patent benefit for SCPEA unit employees.

At the October 15 meeting, Mr. Eriksen and William Hartman, Respondent's in-house labor attorney (Mr. Hartman) explained Respondent's reasons for rejecting the Union's proposal to give the Total Compensation and Benefit Plan to the affected employees. The Union raised a concern about affected employees being moved into the SCPEA pension plan without being given credit for years worked for vesting purposes. Mr. Eriksen said Respondent would take care of that. During disc-

ussion regarding the Total Compensation and Benefit Plan, Mr. Potter pointed out that Respondent had taken one position and the Union had taken another, and they could not "seem to come to any agreement." Mr. Hartman and Mr. Eriksen recalled that Mr. Potter said, in effect, that there was nothing more to discuss about the Total Compensation and Benefit Plan. Mr. Potter testified that he might have said there was nothing left for the parties to talk about.⁶

According to Mr. Eriksen, Respondent considered there was nothing more to be done: "[W]e tried and we couldn't get it done. We needed to put [the affected employees] into the SCPEA contractual package." Mr. Eriksen told the Union that if there was something Respondent had not yet considered, they would be willing to consider it, but that they had made their decision. Mr. Potter testified that although Mr. Eriksen said Respondent wanted to sit down and negotiate with the Union, Mr. Potter believed things had moved beyond a point where he thought the parties could negotiate. According to Mr. Potter, at this time, there was no proposal the Union wanted to ask Respondent to consider. The Union never offered any benefit proposal for the affected employees other than the Total Compensation and Benefit Plan.

Following the October 15 meeting, Mr. Eriksen authorized Respondent to distribute open enrollment information for the SCPEA benefits plan to the affected employees.⁷ Mr. Eriksen also notified upper management by email of October 15 that Mr. Potter had "acknowledged that we had bargained to impasse over the issue of what benefits and compensation packages should be offered to [the affected employees]. On October 20, the charge herein was served on Respondent.

Learning of Mr. Eriksen's email message, Mr. Potter, by letter dated October 28, wrote to Mr. Eriksen, in part, as follows:

This email erroneously stated that SCPEA has acknowledged impasse regarding the requirement (per LOU dated 1/22/99) to negotiate benefits changes for affected BNA represented employees.

SCPEA's position is that the Company is obligated to live up to its commitments as stated in the January 22nd Letter of Understanding. This position remains unchanged.

Upon receiving this letter, Mr. Eriksen telephoned Mr. Potter on November 1 and told him that he and Mr. Hartman believed that the parties had bargained to an impasse on October 15. Mr. Eriksen told Mr. Potter, "But, look, if you think we're not at impasse and if you think there's some more to talk about, let's get together and talk about it. If you have some other ideas, let's talk about it."

Mr. Potter answered, "Well, it's in the hands of the lawyers now. I'll have to get back with you on that."

Mr. Eriksen said, "Well, we've got two months before this thing is implemented. There's plenty of time . . . to agree on something and get it implemented by 2001, by January 1. So,

⁶ Mr. Potter appeared sincere and forthright in testifying, but his recall was not impressive. He frequently recalled additional information or modified his answers upon additional questioning. Where his testimony conflicts with that of Mr. Eriksen, I credit Mr. Eriksen.

⁷ Open enrollment began November 1, but the change of affected employees to the SCPEA benefits plan did not take effect until January 1, 2000.

let's get together and talk about it." Mr. Potter said he would have to get back to Mr. Eriksen. During the next two months, in conversations with Mr. Potter, Mr. Eriksen on two or three occasions raised the issue of negotiations over the affected employees' benefit plan, pointing out that Mr. Potter had never gotten back to him and suggesting the parties meet. Mr. Potter consistently replied that the lawyers and Board were looking at it, and the Union was not yet prepared to meet. Mr. Potter testified that he refused to meet with Mr. Eriksen because the Union had filed an unfair labor practice. Mr. Potter testified: "[T]he Company, in my mind, had clearly given us an answer of where they stood on [the issue of the Total Compensation and Benefit Plan]. And, at this point, I felt it should be in front of a third party because of behavior and some of the correspondence that's been passed around." According to Mr. Potter, he wanted to leave it up to the Board. Mr. Potter never agreed to a negotiating meeting, the Union never made a demand to bargain about the proposed transfer of affected employees into the SCPEA benefit plan, and the parties never met again after October 15 regarding the benefit plan issue.

On January 1, 2000, the affected employees were transferred from the BNA benefit plan to the SCPEA plan. The SCPEA plan differed materially from the BNA and SCPEA plans.⁸

B. Discussion and Findings

The parties frame the pivotal issues herein as whether Respondent and the Union reached impasse in bargaining over compensation and benefits plans for the affected employees and, concomitantly, did or did not unilaterally apply the SCPEA compensation and benefits plans to those employees. I believe the parties have missed the fundamental issue: whether Respondent had any duty to bargain over these matters.

Section 8(d) of the Act provides that "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract..." except under certain specified procedural conditions precedent to the contract's expiration. The Board notes that while Section 8(d) prevents termination or modification of existing collective-bargaining agreements, "it is always possible to amend a contract in mid-term by mutual voluntary consent." *Communications Workers (New York Telephone Co.)*, 186 NLRB 625, 628 (1970). If mid-term bargaining takes place pursuant to a reopener provision in the contract, such bargaining proceeds through the same course bargaining takes when no contract is in effect, i.e. with attendant good-faith bargaining obligations and resort to actions normally allowed so long as the procedural requirements of Section 8(d) are met. *Speedrack, Inc.* 293 NLRB 1054, 1055 (1989). In the absence of a reopener provision in the contract, parties to a collective-bargaining agreement are under no obligation to bargain during mid-term of the agreement. *Kohler Co.*, 292 NLRB 716 (1989). That is true even if the parties have en-

⁸ Differences in the health plans included higher premiums, no preferred provider option, no coverage for employees working less than 32 hours per week, and absence of no-cost catastrophic, dental or vision coverage. Other benefit differences included vacation days, adoption assistance, and layoff provisions.

gaged in discussions or bargaining of midterm modification subjects. Thus, the Board has held that "Section 8(d) protects a party to a collective-bargaining agreement from incurring a bargaining obligation on proposing a midterm contract modification when the contract does not contain any reopener language." *Connecticut Light & Power Co.*, 271 NLRB 766 (1984), overruling *Equitable Life Insurance Co.*, 133 NLRB 1675 (1961). In *Connecticut Light & Power*, the Board found that the employer did not violate the Act when it refused to bargain over a midterm contract modification which it had proposed, stating:

Section 8(d) does not state that parties may not propose midterm modifications. Nor does it state that a contract cannot be changed after the parties sign it. Rather, it states that no party to a collective-bargaining agreement may be compelled either to discuss contract changes or to agree to them. The section does not qualify the right to refuse to discuss or agree to contract changes, and it makes no distinction between the parties. Thus, nothing in this section suggests a party making a midterm proposal should be treated differently from a party receiving such a proposal. As the recipient of a midterm proposal clearly has no duty to discuss or agree to it, we find the party proposing a midterm modification does not incur a bargaining obligation by tendering its proposal. . . . Thus, in the absence of reopener language, we find Section 8(d) protects every party to a collective-bargaining agreement from involuntarily incurring any additional bargaining obligations for the duration of the agreement. *Id.* at 767.

Here, in anticipation of the transfer of unrepresented engineers (affected employees) into a much larger unit of SCPEA-represented engineers, Respondent recognized SCPEA as the bargaining representative of the affected employees and assumed SCPEA's collective-bargaining agreement as covering them. As Counsel for the General Counsel notes in her brief, upon recognition of the Union as the representative of the affected employees, "both Respondent and SCPEA assumed that the wages, hours, and other terms and conditions of employment of the engineers to be added to the unit would be governed by the collective-bargaining agreement between Respondent and SCPEA after they were transferred." Having agreed to be bound by the SCPEA agreement, Respondent was foreclosed from repudiating it during its term. *E.S.P. Concrete Pumping, Inc.*, 327 NLRB 711, 712 (1999).⁹

At about that same time, Respondent notified SCPEA of its technological inability immediately to effect the placement of the affected employees into the compensation and benefit plans of the SCPEA agreement. Respondent asked the Union to permit affected employees to remain in their existing plans until system constraints could be removed. By this request, Respondent proposed a midterm modification of the SCPEA agreement to which Respondent had been legally bound since its assumption and to which it was legally bound for its full term.

⁹ The Union does not argue that Respondent assumed only a portion of the SCPEA agreement, i.e., provisions other than the compensation and benefit plans, and, in any event, the Board is disinclined to find that a successor adopted part, but not all of a collective-bargaining agreement. *Pesco Products, Inc.*, 331 NLRB 1546 (2000).

The Union agreed to the modification. When the Union thereafter requested that the Total Compensation and Benefit Plan be applied to the affected employees, the Union sought an additional midterm modification of the SCPEA agreement. Although not legally obligated to do so, Respondent agreed to consider the change. Respondent did not, however, incur a bargaining obligation by doing so. *Id.*; *Yale University*, 334 NLRB 990 (2001).

Even assuming, as the General Counsel argues, that the LOU constituted an agreement by Respondent to bargain over the terms of a compensation and benefit plan different from those contained in the SCPEA agreement, that does not, in my opinion, establish a general bargaining obligation. The parties already had an existing agreement, and there is no evidence that it contained a valid reopener clause. The ability of the parties to amend the agreement, midterm, by mutual voluntary consent does not confer the full panoply of establish bargaining duties just because the parties agree in writing to discuss midterm modifications. See *Sheet Metal Workers (Schebler Co.)* 294 NLRB 766 (1989) *enf. in pert.* part 905 F.2d 417 (D.C. Cir. 1990); *CWA (New York Telephone)*, 186 NLRB 625 (1970). Here, Respondent agreed to consider granting the Total Compensation and Benefit Plan to the affected employees, and it did consider that issue. Respondent thereby met whatever bargaining obligation, if any, it may have had with regard to midterm contract reopening. As the court stated in enforcing *Standard Fittings Co.*, 285 NLRB 285 (1987): “Absent an express reopener, neither the union nor the employer ever waives the statutory right to refuse to consider, or to continue to consider, changes in the collective-bargaining agreement while the agreement is still in force.” 845 F.2d 1311, 1314 (5th Cir. 1988). Further, there is no tacit agreement to reopen the SCPEA agreement and thereby incur a bargaining obligation simply by Respondent’s consideration of the Total Compensation and Benefit Plan for affected employees. See *Herman Brothers, Inc.*, 273 NLRB 124 *fn. 1* (1984).

The General Counsel also urges that by the terms of the LOU Respondent committed itself to bargaining over the terms of a compensation and benefit plan different from either the SCPEA plan or the Total Compensation and Benefit Plan if the latter were rejected by Respondent’s corporate office. The LOU does not unambiguously show any such agreement, and the parole evidence offered supports a conclusion that Mr. Eriksen intended, and Mr. Peter understood his intent to be, that if the Total Compensation and Benefit Plan were not acceptable to Respondent’s corporate office, the SCPEA plan would be applied to affected employees.¹⁰

As set forth above, I have concluded that Respondent had no obligation to bargain with the Union over the terms of a compensation and benefit plan different from that incorporated in the SCPEA agreement. But even assuming that Respondent in signing the LOU created a full bargaining obligation to negoti-

¹⁰ Where an agreement is ambiguous, it is appropriate to resort to parole evidence or other extrinsic evidence to determine its meaning. *Sansla, Inc.*, 323 NLRB 107, 109 (1997); *Operating Engineers Local 3 (Joy Engineering)*, 313 NLRB 25 (1993). I find sufficient ambiguity in the LOU to justify consideration of evidence regarding intent.

ate with the Union over a customized compensation and benefit plan, I find that Respondent met its obligation. The Union had a nearly three-month advance notice that Respondent had rejected the Total Compensation and Benefit Plan for the affected employees. Not only did the Union fail to request that Respondent bargain about variations of that plan or about the terms of a new and different plan, it positively refused to meet and bargain with Respondent. A Union has an obligation to seize the bargaining opportunity afforded by advance notice of a proposed employment condition change or risk waiver of its statutory right. *Jim Walter Resources*, 289 NLRB 1441 (1988). A union does not preserve its statutory bargaining right by declining to meet and negotiate while seeking to assert a bargaining right by protesting an employer’s conduct or by filing an unfair labor practice charge, as the Union did here. See *Bell Atlantic*, 332 NLRB 1592, 1598 (2000); *American Diamond Tool*, 306 NLRB 570 (1992); *Associated Milk Producers*, 300 NLRB 561 (1990); *Citizens Bank of Willmar*, 245 NLRB 389 (1979). There is no evidence that Respondent’s conduct relieved the Union of its obligation to pursue the bargaining opportunities repeatedly offered by Respondent. While the union may have thought Respondent’s mind was made up and that further bargaining was futile because Respondent seemed set on applying the SCPEA plans, it is not unlawful for an employer to present its position as a fully developed plan. Even informing a union that its position would not change does not relieve a union from its responsibility to request bargaining. *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998); *Haddon Craftsmen*, 300 NLRB 789 (1990). Moreover, there is no evidence that Respondent might not have been amenable to alterations in the SCPEA plans. The Union’s conduct suggests that its sole objective was to obtain the Total Compensation and Benefit Plan for the affected employees and that it had no real intent to negotiate any other plan. Its adamant insistence that matters be worked out through a “third party” or the Board creates a strong inference that the Union wanted to obtain through Board processes what it had no power or ability to obtain through traditional bargaining. Such constitutes a waiver of any statutory bargaining rights that might have existed in this situation.¹¹

Accordingly, I find the General Counsel failed to meet his burden of proving that Respondent violated Sections 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union regarding compensation and benefit plans to cover the affected employees. Therefore, I recommend the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed.

¹¹ In light of my findings herein, I find it unnecessary to consider the issue of whether the parties reached impasse at the October 15 meeting.

¹² 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.