

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 08-13

December 5, 2007

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Cases Involving Severance Agreements Containing Waivers
Executed Prior to the Filing or Investigating of an Unfair Labor
Practice Charge

In BP Amoco Chemical – Chocolate Bayou, 351 NLRB No. 39 (September 29, 2007), the Board deferred to employee severance agreements waiving all claims relating to the employees' terminations in exchange for enhanced severance benefits. The Board majority based its decision on the analysis set forth in Independent Stave¹ and concluded that the presence or absence of unfair labor practice charges at the time the waivers were executed is "not dispositive."²

In Hughes Christensen Co.,³ the Board held that the validity of severance agreements containing waiver language should be governed by the same Independent Stave standards as other private, non-Board settlements.⁴ In Hughes Christensen itself, the Board deferred to a severance agreement that had been executed after the unfair labor practice charge at issue had already been filed, investigated, and dismissed by the Regional Director, but prior to the time the Office of Appeals sustained the union's appeal and authorized complaint. Thus, the region had investigated the charge prior to the severance agreement, and the Board was able to examine the allegations and determine that no additional action was necessary to vindicate the public interest.

Between its decisions in Hughes Christensen and BP Amoco, the Board refused to defer to private agreements executed prior to the filing or investigating

¹ Independent Stave Co., 287 NLRB 740 (1987).

² BP Amoco, above, slip op. at 2 fn. 8.

³ 317 NLRB 633 (1995).

⁴ Under Independent Stave, the Board will determine whether to defer to non-Board settlements of unfair labor practice charges by examining all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements. 287 NLRB at 743.

of a charge.⁵ In Webco, for example, the Board refused to defer to a severance agreement, stating that the fact that the agreement was executed prior to the filing of a charge was “further reason to find that the agreement does not preclude us from affording relief to [the discriminatee].”⁶ Because BP Amoco does not decide this issue likewise, but instead suggests only that the timing is “not dispositive,” there appears to be some tension between the Board’s approach in its prior jurisprudence (Weldun, Webco, and Clark), and its recent decision in BP Amoco.⁷

In order to adequately consider and accommodate these concerns, a new approach to cases involving waiver agreements executed prior to the filing or investigating of an unfair labor practice charge may be warranted. Accordingly, in light of the important issues raised in these cases, please investigate fully and submit to the Division of Advice all otherwise meritorious cases involving severance agreements or other agreements waiving the right to file unfair labor practice charges, where such agreements were executed prior to the filing or investigating of the charge.

If you have any questions concerning this matter, please consult your Assistant General Counsel or Deputy or the undersigned.

/s/
R. A. S.

cc: NLRBU
Release to Public

MEMORANDUM 08-13

⁵ Weldun International, 321 NLRB 733, 734 fn. 6 (1996); Webco Industries, 334 NLRB 608, 611 (2001); Clark Distribution Systems, Inc., 336 NLRB 747, 750-51 (2001).

⁶ 334 NLRB at 611.

⁷ BP Amoco, above, slip op. at 2 fn. 8.