United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1269 **September Term, 2010**

FILED ON: MAY 31, 2011

CATERPILLAR INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 10-1292

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

Before: TATEL and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

J U D G M E N T

The petition for review and cross-application for enforcement were considered upon the briefs, the appendix, and the oral arguments of the parties. Although the issues present no need for a published opinion, they have been accorded full consideration by the Court. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement of the Order be granted.

Caterpillar Inc. filed this petition for review of a decision of the National Labor Relations Board finding that the company violated § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5), when it unilaterally implemented "Generic First" as a change to its employees' prescription drug benefit program. The Board cross-applied for enforcement of its order requiring Caterpillar to rescind "Generic First" and make whole any employees adversely affected by the change.

Caterpillar claims that the Board's decision "departs from established precedent without reasoned justification." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004). Under Board precedent, a unilateral change in the terms and conditions of employment violates § 8(a) of the Act if it is "material, substantial, and significant," *Flambeau Airmold Corp.*, 334 N.L.R.B. 165, 165 (2001), and it "alter[s] the status quo," *Post-Tribune Co.*, 337 N.L.R.B. 1279, 1279 (2002). A change does not alter the status quo when an employer follows a well-established past practice. *Id.* at 1280. Caterpillar contends that its "Generic First" prescription drug program did not make a material change to its employees' prescription drug benefits or alter the status quo.

We have jurisdiction to consider the company's contentions. Section § 10(e) of the Act gives the court jurisdiction to consider objections to the enforcement of an order that have been "urged before the Board, its member, agent, or agency." 29 U.S.C. § 160(e). Caterpillar argued to the administrative law judge that the "Generic First" program was neither a material change to benefits nor an alteration of the status quo. The ALJ agreed. The Board rejected as untimely Caterpillar's cross-exceptions and answer to the General Counsel's exceptions to that ruling. Nonetheless, Caterpillar's arguments based on the Board's precedent were clearly before the Board, and the company "cannot be said to have waived its . . . argument for failing to [timely] except to a ruling in its favor." *Gardner Mech. Servs. v. NLRB*, 115 F.3d 636, 641 (9th Cir. 1997).

On the merits, we do not think the Board departed from established precedent with respect to either finding. Before the "Generic First" program, Caterpillar's employees were free in most instances to choose between generic and brand-name prescription drugs as long as they were willing to pay an increased co-payment when they opted for brand-name drugs. Under the "Generic First" program, employees had to pay full retail price for brand-name drugs whenever a generic equivalent was available unless the prescribing physician specified that generic substitutions were not appropriate. The Board reasonably concluded that the program increased the costs to

employees who exercised their discretion under the benefit plan to choose brand-name drugs and was thus a material, substantial and significant change. *See Flambeau*, 334 N.L.R.B. at 166; *Palm Court Nursing Home N.H., L.L.C.*, 341 N.L.R.B. 813, 819-20 (2004).

The Board also reasonably concluded that Caterpillar's prior changes to its employees' prescription drug benefits did not establish a past practice such that its employees could have expected further changes like the "Generic First" program. At most, Caterpillar demonstrated that the union had waived its right to bargain over several prior changes to the prescription drug program. Board precedent is clear that a "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Corning Fiberglas Corp.*, 282 N.L.R.B. 609, 609 (1987). The facts before the Board were easily distinguishable from precedent in which an employer's past practice occurred with such regularity and frequency that it became the status quo. *See, e.g.*, *Post-Tribune Co.*, 337 N.L.R.B. at 1280; *Daily News of L.A.*, 315 N.L.R.B. 1236, 1236-37 (1994); *A-V Corp.*, 209 N.L.R.B. 451, 452 (1974).

To the extent that Caterpillar makes a separate objection that the "Generic First" program was authorized by the previously bargained-for group insurance plans, we do not have jurisdiction to consider it. The administrative law judge rejected this claim. Caterpillar did not renew the argument before the Board. *See Parsippany Hotel Mgmt. v. NLRB*, 99 F.3d 413, 417-418 (D.C. Cir. 1996).

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk