U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 2 2 2007
CLERK, U.S. DISTRICT COURT
By ________
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CONOCOPHILLIPS COMPANY, a FOREIGN CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2-07CV-178-J
	§	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 351,	§	
	§	
Defendant.	§	

PLAINTIFF'S COMPLAINT TO VACATE LABOR ARBITRATION AWARD

Plaintiff ConocoPhillips Company ("ConocoPhillips" or "Company"), by and through its attorneys, and pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, files this Complaint to vacate in its entirety a June 18, 2007 arbitration award ("Award") issued by Arbitrator AlmaLee P. Guttshall, and in support thereof would show the Court as follows:

PARTIES

1. Plaintiff ConocoPhillips is a corporation duly organized under the laws of the state of Delaware, with its principal place of business in Harris County, Texas. ConocoPhillips operates twelve (12) refineries nationwide, including one in Borger, Texas ("Borger Refinery"). At all times relevant to this dispute, ConocoPhillips has been an employer within the meaning of Section 2(2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(2), and Section 301 of the LMRA, 29 U.S.C. § 185.

2. Defendant International Union of Operating Engineers, Local 351, ("Union") is an unincorporated association. At all times relevant to this dispute, the Union has been a labor organization as defined in Section 2(5) of the NLRA, 29 U.S.C. § 152(5), and Section 301 of the LMRA, 29 U.S.C. § 185, and has been recognized by ConocoPhillips as the exclusive collective bargaining representative for a bargaining unit of operating, maintenance, and clerical employees at the Borger Refinery. The Union may be served with process at 111 E. Coolidge Street, Borger, Texas 79007.

JURISDICTION AND VENUE

3. This Court has federal question subject matter jurisdiction over this action pursuant to Section 301 of the LMRA, 29 U.S.C. § 185.

4. Venue is proper in this District and Division pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 185, because the events giving rise to this action occurred within the jurisdiction of this Court, and the Union is engaged in representing or acting for employee members within the geographic scope of this District and Division.

FACTUAL BACKGROUND

5. The Company and the Union entered into a collective bargaining agreement ("CBA"), effective May 1, 2002 through April 30, 2006, which governed the terms and conditions of employment for operating, maintenance, and clerical employees at the Borger Refinery at all times relevant to this proceeding. A copy of the CBA is attached to this Complaint as Exhibit A.

6. Article VII of the CBA sets forth a four-step grievance procedure for resolving complaints or differences of opinion between the Company and the Union. If the Union is not satisfied with the outcome of the grievance after the first three (3) steps of the procedure, it may

submit the matter to arbitration. Only disputes involving the application or interpretation of terms of the CBA are subject to the grievance procedure.

7. Under Article VII, an arbitrator's jurisdiction is limited to settling disputes that the Company and the Union are unable to resolve after the first three (3) steps of the grievance procedure. Article VII(5) further restricts an arbitrator's authority by providing that "[t]he arbitrator may interpret the existing provisions of this Agreement and apply them to the specific facts of the dispute presented to him, but he shall, however, have no authority to add to, or subtract from, or modify the terms of this Agreement."

8. On April 1, 2004, the Company implemented a written Attendance Control Policy ("ACP") at the Borger Refinery, in an effort to reduce employee absenteeism rates. The ACP streamlined prior unwritten attendance rules and included various changes to how employee absences were measured for progressive discipline purposes.

9. Under the ACP, an employee with four (4) qualifying absences, or "occurrences," within the previous twelve-month period enters the progressive discipline process and receives a verbal warning. If the employee has two (2) occurrences during the twelve (12) months following the date of the verbal warning, he advances to the second step of the progressive discipline process and receives a written warning. If the employee has two (2) more occurrences during the twelve (12) months since the date of the written warning, he moves to the third step of the progressive discipline process and receives a final written warning. Finally, the employee is terminated if he has two (2) more occurrences during the twelve (12) months since the date of the final written warning.

10. On March 10, 2004, the Union filed a grievance in anticipation of the Company's implementation of the ACP. The Company denied the grievance at Steps 1 and 2 on the grounds

it retained the right to revise the attendance rules as a function of management pursuant to Article XII(16) of the CBA. Article XII(16) provides that "managerial functions inherent in the conduct of business by an employer are retained by the Company subject to the terms of this agreement." The Union did not pursue the grievance past Step 2.

11. Approximately twelve (12) months later, the Company revised the ACP in order to address the problem of short-term absences at the Borger Refinery. Under the modified ACP, an employee can advance through the progressive discipline procedure based not only on his number of occurrences, but also on the percentage of time he is absent from work.

12. On May 3, 2005, the Union filed a grievance in response to the Company's revision of the ACP. Once again, the Company denied the Union's grievance on the grounds the changes were made as a function of management under Article XII(16) of the CBA. The Union chose not to advance the grievance beyond Step 1.

13. Still unable to meet its target absentee rate, the Company effectuated additional changes to the ACP on September 19, 2005. Chief among these changes was a new rule that employees cannot take unpaid leave under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, concurrently with the Company's paid short-term disability ("STD") leave. The revised ACP requires an employee whose absence qualifies for FMLA and STD leave to designate the absence as either FMLA or STD leave, but not both.

14. The Company also modified the ACP to include absences taken as STD leave as occurrences for progressive discipline purposes. As before, absences designated as FMLA leave are not considered occurrences and do not affect an employee's status within the progressive discipline program.

15. Prior to revising the ACP, the Company solicited the Union's input. The Union offered a number of suggestions, including that employees remain allowed to take FMLA and STD leave concurrently. At no point did the Union oppose the Company's decision to count STD absences as occurrences for disciplinary purposes.

16. While the Company was able to incorporate several of the Union's suggestions into the revised ACP, it declined to follow the Union's recommendation that employees be allowed to take FMLA and STD leave concurrently.

17. On September 21, 2005, the Union filed a grievance over the Company's decision not to allow employees to take FMLA and STD leave concurrently. On the grievance form, the Union described the nature of the grievance simply as "Discontinued running STD benefit concurrent with FMLA benefit." The Company denied the Union's grievance at Steps 1 through 3, after which the Union appealed the grievance to arbitration.

18. Pursuant to the CBA, the parties jointly selected Arbitrator AlmaLee P. Guttshall ("Arbitrator" or "Arbitrator Guttshall") to arbitrate the grievance. A hearing was held before Arbitrator Guttshall on February 28, 2007, in Borger, Texas. Following the arbitration hearing, both parties submitted post-hearing briefs.

19. On June 18, 2007, Arbitrator Guttshall issued her Award, which sustains the Union's grievance and orders the Company to allow its employees to take FMLA and STD leave concurrently. A copy of the Award is attached to this Complaint as Exhibit B.

20. In her Award, Arbitrator Guttshall found that the Company violated the CBA by revising the ACP so that absences taken as STD leave would count as occurrences for disciplinary purposes. She concluded that this revision impermissibly altered the "substance" of

the STD benefit by subjecting employees who take STD leave to the progressive discipline procedure. The Arbitrator observed:

> Under the revised policy, an employee on an 8-hour-a-day schedule who was on STD leave for a maximum of approximately 31 days would be terminated. An employee on a 12-hour a day schedule who was on STD leave for approximately 21 days would be terminated. As noted earlier, STD benefits end when employment ends. Implementing an attendance control policy that changes the amount of time for which the employee is eligible for STD benefits guaranteed by Article VIII(1)(C) from 52 weeks to approximately 31 days (in the case of an 8-hour employee) or 21 days (in the case of a 12-hour employee) is a violation of the CBA absent some other justifying factor.

21. Arbitrator Guttshall also found that the Company violated the CBA because the FMLA mandates that an employee be allowed to take FMLA and STD leave concurrently. The Arbitrator determined that the CBA incorporates the FMLA, so any violation of the FMLA is consequently a violation of the CBA as well.

CAUSES OF ACTION

22. ConocoPhillips incorporates paragraphs 1 through 21, above, as though fully set forth herein.

23. The Arbitrator's Award is improper and cannot be enforced because Arbitrator Guttshall exceeded her contractual authority by deciding an issue wholly outside the scope of the grievance. The issue that the Union grieved — and subsequently submitted to arbitration — was whether the Company violated the CBA by revising the ACP to prohibit employees from taking FMLA and STD leave concurrently. At no point during the grievance procedure, including arbitration, did the Union ever challenge the Company's right to count STD absences as occurrences for disciplinary purposes. Accordingly, the Arbitrator exceeded the scope of her contractual authority by deciding an issue she was not asked to settle.

24. Even if the Arbitrator were authorized to determine whether the Company could count STD leave as occurrences, the Award is also improper and cannot be enforced because Arbitrator Guttshall impermissibly concluded that the Company could not substantively modify the STD benefit. In reaching this conclusion, the Arbitrator acted contrary to Article VIII(2) of the CBA, which expressly reserves to the Company the exclusive right to establish the conditions, rules, and regulations of the STD benefit. She also directly violated Article VII(5) by "adding to, subtracting from, or modifying" the Company's collectively-bargained right to set the terms and conditions of the STD benefit.

25. Moreover, the Arbitrator's conclusion that the revised ACP substantively changed the STD benefit has no rational basis in the contract or the evidence presented at the arbitration hearing. The Arbitrator inexplicably surmised that the revised ACP changes the amount of time for which an employee is eligible for STD benefits from 52 weeks to 31 or 21 days, when in reality, no such change took place. The Arbitrator's further conclusion that "[t]his amounts to little more than six weeks, substantially less than the legislatively mandated 12 weeks guaranteed by the FMLA," is equally indefensible, since employees remain free to take twelve (12) weeks of unpaid FMLA leave annually.

26. The Award is also improper and cannot be enforced because Arbitrator Guttshall exceeded the scope of her contractual authority by reaching beyond the CBA and interpreting the FMLA. Article VII(5) of the CBA limits the role of an arbitrator to "interpret[ing] the existing provisions of this Agreement and apply[ing] them to the specific facts of the dispute presented to him." Arbitrator Guttshall acted contrary to this contractual mandate by looking past the CBA and interpreting a federal statute to require that employees be allowed concurrent FMLA and

STD leave. Consequently, the Arbitrator exceeded her authority and the Award cannot be enforced.

27. Arbitrator Guttshall's determination that the FMLA requires the Company to allow employees to take FMLA and STD leave concurrently also violates Article VII(5) of the CBA by adding to and/or modifying the terms of the CBA. Article VI(4)(B) of the CBA describes the terms and conditions under which an employee may take FMLA leave:

> The company will provide the availability of family leave to all team members in the event of a birth or adoption of a child or the serious illness of a child, spouse or a parent. The leave will be without pay and will be granted for up to a maximum of twelve (12) weeks in a twelve (12) month period. A team member may request more than one family leave within a twelve (12) month period, but the total time on leave within that period may not exceed twelve (12) weeks. Credited service will accrue during the period covered by the family leave of absence. The leave will be granted with the understanding that the team member will be reinstated to the position held prior to the leave or to a comparable position. (In general, a team member who completes a period of leave will be returned either to the same position held prior to the leave or a position equivalent in pay and benefits.)

28. Since neither Article VI(4)(B) nor any other provision of the CBA provides that employees be allowed to take FMLA and STD leave concurrently, Arbitrator Guttshall's imposition of this requirement constitutes an addition and/or modification of the terms of the CBA, in direct violation of Article VII(5).

29. In addition to exceeding the scope of her authority and improperly modifying the terms of the CBA, Arbitrator Guttshall incorrectly interpreted the FMLA as a matter of law. Nothing in the FMLA itself, the accompanying Federal Regulations, or the relevant case law requires an employer to allow its employees to take FMLA and STD leave concurrently. Accordingly, this finding has no basis in either law or contract.

30. Based upon the foregoing, the Arbitrator's Award fails to conform with the dictates of federal labor policy and should not be enforced.

PRAYER

WHEREFORE, PREMISES CONSIDERED, ConocoPhillips respectfully prays that this Court:

(1) Set aside and vacate the Award of Arbitrator Guttshall, dated June 18, 2007;

(2) Reinstate ConocoPhillips' policy requiring employees to choose either FMLA or STD leave, but not both; and

(3) Grant such other and equitable relief as ConocoPhillips may be entitled to receive under the law.

Respectfully submitted,

WINSTEAD PC

By: ______________________

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