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

Advice Memorandum

DATE: July 11, 2003

TO : Rosemary Pye, Regional Director
Ronald Cohen, Regional Attorney
Elizabeth A. Gemperline, Assistant to the Regional Director
Region 1

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

SUBJECT: Saint-Gobain Abrasives, Inc.
Case 1-CA-40476

530-6033-7000
530-6033-7008
530-6033-7028
530-6033-7056-8400
530-6033-7084
530-6067-2025
530-6067-4033-9500

This Section 8(a)(5) case was submitted for advice as to whether the Employer, while bargaining with the Union for an initial collective bargaining agreement, unlawfully insisted on bargaining separately over interim health insurance coverage, and unlawfully implemented its health insurance proposal before reaching bona fide impasse.

We conclude that, on the facts of this case, the Employer was privileged, under the narrow exception articulated in Stone Container[1] and Brannan Sand and Gravel,[2] to bargain over health insurance issues, and that the Employer would have been privileged to implement its health insurance proposal upon reaching a bona fide impasse. We conclude, however, that the parties were not at impasse, nor had they reached any valid deadline for bargaining, when the Employer broke off bargaining and implemented its health insurance proposal. Thus, the Region should issue complaint, absent settlement.

FACTS

Background

UAW, Local 4069 ("the Union") was certified on December 20, 2001, as the exclusive collective bargaining representative for approximately 850 employees employed by

[1] 313 NLRB 336 (1993).

[2] 314 NLRB 282 (1994).

Saint-Gobain Abrasives, Inc. ("the Employer"), at the Employer's Worcester, Massachusetts, facility. The Union and the Employer have been bargaining for an initial collective bargaining agreement since February 2002.[3]

The Union has filed a number of unfair labor practice charges against the Employer. The Region found merit in many of those allegations, including allegations that the Employer unilaterally reduced certain employees' hours from 8 to 7.5 hours a day, unilaterally altered job assignments to certain employees, made a number of pre-certification 8(a)(1) statements, promulgated unlawful rules, and unlawfully suspended one employee in retaliation for that employee's union activity.

On February 3, 2003, a unit employee filed a decertification petition in Case 1-RD-2003. The Region has blocked the processing of that petition, pending resolution of the unfair labor practice charges.

Relevant Bargaining History

For many years prior to the Union's certification, the Employer provided its employees with a health insurance benefit. The Employer annually solicited bids from various insurance providers using established criteria. After reviewing the various bids, the Employer offered employees a choice of providers and plans for the following year. The Employer contributed 90 per cent of the cost of the lowest priced plan;[4] if an employee selected a more expensive option, the employee paid the difference between the cost of the lowest priced plan and the costs of the selected plan, as well as all the defined deductibles, co-insurance, and balance payments required by the particular plan. The Employer continued to offer a health insurance benefit on these bases after the Board certified the Union.

For 2002, the Employer allowed employees to choose Fallon HMO (Plus or Affiliates), CIGNA POS, or CIGNA PPO. CIGNA POS was the lowest cost plan in 2001 and 2002, despite increasing its cost in 2002. Following the 2002 increase, the Employer increased the amount employees

[3] Dates are 2002 unless noted otherwise.

[4] The Employer in 2000, and several months prior to any Union activity, reduced its contribution from 100 per cent of the lowest cost plan.

contributed towards health insurance, but maintained its contribution at 90 per cent of the lowest cost plan.[5]

At a May 20 negotiations meeting, the Employer, through its attorney and lead bargaining spokesman, Thomas Royall Smith ("Smith"), advised the Union that the Employer would, consistent with its longstanding practice, solicit proposals from insurance providers for the 2003 insurance year, though the Employer stated that it did not intend to make any changes to its established health plan. Smith advised the Union representatives that the Employer would provide the Union with more information about the process before the June negotiations meeting.

At a June 6 negotiations meeting, the Union's lead negotiator, Carol Knox ("Knox"), asked the Employer to solicit a bid from Blue Cross Blue Shield; the Employer agreed to do so, but noted that Blue Cross Blue Shield had previously declined the Employer's invitation to submit a bid. The Employer in fact solicited a bid from Blue Cross Blue Shield, which again declined to submit a bid.

By late August, the Employer had received and evaluated bids from various insurance companies. Based on its review, the Employer learned that Fallon would not offer its existing HMO plan after December 31, and that employees enrolled in that plan would have to change plans before the end of the year. The Employer proposed reaching an interim agreement that, if accepted, would be effective January 1, 2003, unless superseded by an overall agreement. The Employer submitted its proposal for an interim agreement; that proposal would offer employees a choice of Fallon Direct, Fallon Select, CIGNA POS, or CIGNA PPO; the Employer also proposed CIGNA Catastrophic as a default plan.[6] As Fallon Direct was the lowest cost plan, the

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[5] The Region concluded that the Employer acted lawfully by maintaining its established practice of contributing to employees' health insurance 90 per cent of the low cost plan. See also, Post-Tribune Co., 337 NLRB No. 192, slip op. at 2 (2002); Blue Circle Cement Co., 319 NLRB 954, 955 (1995), enfd. 106 F.3d 413 (10th Cir. 1997).

[6] Fallon Direct and Select plans are, according to Fallon, the replacement plans for Fallon HMO Plus and Affiliates plans. Direct and Select offer virtually identical benefits with the primary difference between the plans being the number of providers available under each plan; employees choosing Fallon Select would have access to significantly more providers than would employees choosing Direct.

Employer proposed that it would contribute 90 per cent of the cost of that plan towards employees' health insurance costs. The 2003 Fallon Direct plan was more expensive than the 2002 CIGNA POS plan, but the increased cost of the 2003 CIGNA POS plan exceeded the cost of the 2003 Fallon Direct Plan by almost $20 per month. The Union did not immediately respond to the Employer's proposal.

From August 29 to November 15, the Union and the Employer met at least 17 times to bargain for an initial collective bargaining agreement, and tentatively agreed to a number of terms, including layoff and recall, seniority, educational assistance, personal leaves, and an employee assistance program. The parties discussed health insurance at most, but not all of these meetings; when the parties did address health insurance, it was but one aspect of the parties' negotiations for an overall agreement.

On September 9, the Union requested information regarding the plans the Employer had offered in its August 29 proposal. At that meeting, Knox told the Employer that unit employees considered the health care benefit to be a significant economic issue and, therefore, the Union opposed resolving the health care issue in isolation. Knox stated that the Union was prepared to address a total economic package, and expected that the parties would conclude negotiations and avoid any situation that would cause employees to lose health insurance benefits. The Union also attacked the Employer's decision to offer Fallon Direct, which the Union claimed was substantially inferior to Fallon HMO. The Employer claimed that the proposal tracked its past practice, and that its proposal was necessary because employees who did not enroll in one of the proposed plans would be forced into the catastrophic plan by default. By the end of the meeting, the Union stated that it would make health care proposals after it reviewed information regarding the Employer's proposal.

From September 12 to September 30, the parties discussed health insurance on a number of occasions, but made little progress towards reaching any agreement.

On October 4, the Employer again raised the possibility that, if the parties did not reach an interim agreement, some employees would default to the catastrophic plan. The Union asserted that the parties could resolve all outstanding contract issues by November 1, and that there was "absolutely no reason" that an agreement could not be reached by January 1, 2003. At that meeting, the Union presented its complete economic proposal, including its health insurance proposal. The Employer did not immediately respond to the Union's proposal.

At the parties' October 10 negotiations meeting, the Employer's human resources manager Mark Stacy ("Stacy") described to Union committee members the process and normal timetable for reenrollment; Stacy summarized his presentation in an October 10 letter to the Union. Also at the October 10 meeting, the Employer provided the Union with a copy of Fallon's letter confirming that Fallon would discontinue its HMO, but would offer its replacement plans, Fallon Direct and Fallon Select.

At an October 21 meeting, the Union maintained its objection to bargaining health insurance in isolation; argued that it had presented a specific and complete economic proposal on October 4, to which the Employer had not yet responded; and reiterated its position that Fallon Select, rather than Fallon Direct, was the equivalent of the discontinued HMO plan. The Employer assured the Union that the Employer would respond to the Union's health care proposals after the Employer analyzed the proposals' costs.

The parties next discussed health insurance on October 24. Each side argued over whether the Employer could bargain over health insurance separately, the relative merits of the Fallon Direct and Select plans, and whether the Employer or employees ought to absorb the increased insurance costs. The parties ended the meeting after the Employer agreed to present another proposal at the next meeting.

At the parties' October 29 meeting, the parties discussed health insurance, but the Employer did not present another proposal. The Union demanded that the Employer maintain the status quo rather than propose significant changes to employees' health insurance. The Employer disputed the Union's characterization, arguing that Fallon Direct was superior to Fallon HMO. The Employer stated that it would provide the Union with another proposal at the next meeting.

The Employer did provide the Union with a second, alternative proposal on November 6. Without withdrawing its August 29 proposal, the Employer altered it by keeping employees' deductibles and co-pays at 2002 levels. The alternative proposal would raise slightly the premiums for each of the various plans and, consequently, the Employer's contribution.

After a discussion of the various Fallon plans offered in the area, the Employer stated that, if the parties reached an agreement, the Employer wanted to conduct an

open enrollment as early as November 25. As Smith told Union negotiators regarding open enrollment:

> We do need to have something in effect on January 1. We don't know about the open enrollment at this juncture. We don't have an agreement on that. What we are looking at is November 25th – 29th. It would be toward the end of the month. It would probably be that week. Maybe it would go a little beyond that because that is Thanksgiving week, but maybe not. We are not sure we can do that. Anyway, it would be towards the end of November. We will try to get something more precise to you.

At the parties' next bargaining session on November 8, Smith told the Union's negotiators that the parties needed to "do something" about health insurance, and they "need[ed] to do it in the next couple of weeks so people have coverage in 2003." The Employer also stated for the first time that, to avoid jeopardizing employees' plan enrollments, the Employer indicated that a deadline of November 30 for concluding open enrollment may be necessary. Smith told Union negotiators, however, that the parties could continue to bargain over health insurance as part of an overall agreement.

The Union offered two health insurance proposals at a brief meeting on November 13. The Union proposed that the Employer offer Fallon Select, CIGNA PPO, and CIGNA POS, and that the Employer contribute 90 per cent of the least expensive plan.[7] The Union also proposed that employees' deductibles and co-pays remain at 2002 levels, which the Union argued was the status quo. As an alternative, the Union proposed that the Employer offer the four plans under discussion, with deductibles and co-pays at 2002 levels, and the Employer's contribution equal to 90 per cent of the cost of the CIGNA POS plan. The Employer agreed to consider the proposals, but after discussing some of the information the Employer had provided, the Employer rejected the Union's proposals. The Employer rejected the Union's first proposal because it was allegedly inconsistent with its past practice; the Employer rejected the second proposal because it reflected the Union's desire to have everything it wanted. The meeting ended with the Union's lead negotiator accusing the Employer of refusing to bargain over health insurance.

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[7] The Union's lead negotiator noted that the lowest cost plan could not be determined until Fallon provided the Employer with a quote for Fallon Select only, and not in conjunction with Fallon Direct.

The Employer asserts that its vice president of human resources, Dennis Baker ("Baker"),

> was informed on November 14 that [the Employer's benefits coordination vendor] Citistreet would not guarantee completion of the reenrollment process by January 1, 2003 if the [Employer] did not provide the requisite information to begin the necessary computer programming by no later than November 15. [Smith] was informed of the development on the morning of November 15 and the Union was immediately informed.

The Employer, however, has not provided any evidence regarding the details of the asserted communications between the Employer and Citistreet, or the Employer and the Union.[8]

The parties' November 15 bargaining session lasted almost five hours. The parties briefly discussed health insurance early that day when the Employer provided the Union with information relevant to the Employer's insurance proposals. Smith raised the health insurance issue again when, "recognizing there [was] a dispute" over health care, he asked Union negotiators which of the Employer's proposals the Union would choose, if it had to. Before the Union could answer, Smith told Union negotiators they did not have to "weigh in" if they did not want to; the Union did not express a preference for either plan. Before and after these brief exchanges, the parties bargained over other matters, such as attendance and union representation, with no apparent sense of urgency.

At the close of the November 15 session, Smith advised the Union that the Employer would implement its November 6 proposal for interim health care, effective January 1, 2003:

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[8] Specifically, there is no evidence regarding whether or under what circumstances Citistreet imposed a deadline for open enrollment, if at all. The Employer does not explain how Baker was contacted, or by whom; what precisely was communicated to Baker; or whether Citistreet's refusal to guarantee "completion of the reenrollment process" meant that employees would be denied health insurance, or merely that the delivery of identification cards or other plan materials might be delayed. Perhaps more important, the Employer does not specify what Union representative was informed of the deadline, what the Union representative was told, or by whom.

> On the medical insurance issue, we are going to implement our alternative proposal on January 1, 2003. We don't think we can wait any longer. We are going to implement the alternative proposal, which we think is as close as we can get to the status quo given what Fallon did. We will have an open enrollment from November 25 through November 30th, but not on Thanksgiving Day. We will continue to talk about medical insurance and economics, but we must do something to make sure that people have medical insurance on January 1.

Later that day, the Employer posted a flyer to advise employees of its decision to implement.

At no time during the November 15 meeting did any Employer representative mention that Citistreet had imposed an inflexible deadline on the Employer, that the parties had to reach agreement or impasse that day to avoid disrupting employees' insurance coverage, or that the Employer considered the parties to be at an impasse regarding health insurance.

After the Employer implemented, the Union raised concerns that employees on vacation during open enrollment might miss the opportunity to enroll in a particular plan and, therefore, lose their health insurance. The Employer told the Union's negotiators that, if employees were unable to enroll during the scheduled open enrollment, they could contact their supervisor and enroll using a "paper enrollment" rather than a telephonic enrollment that would be required of other employees. When pressed for specific deadlines for employees to finalize their selections, Stacy told Union negotiators, "There is no drop dead date. [Citistreet] will do this through the end of the year."

ACTION

We conclude that the Employer was privileged to seek bargaining for the discrete issue of interim health insurance where coverage was scheduled to expire during the parties' negotiations for an initial agreement. Had the parties bargained to a good-faith impasse without reaching agreement, the Employer would have been privileged to implement its latest proposal without reaching impasse for an overall agreement. The parties, however, were not at impasse, nor had they reached any valid deadline for bargaining, when the Employer implemented its alternative proposal. Thus, the Employer's implementation was unlawful, and the Region should issue complaint, absent settlement.

I. The Employer Could Lawfully Bargain To Impasse For An Interim Health Insurance Agreement Prior To An Impasse in Overall Bargaining.

Generally speaking, where parties are engaged in negotiations for a new agreement, an employer may not unilaterally implement changes unless and until the parties have reached an overall impasse on bargaining for the agreement as a whole.[9] Two exceptions to that general rule are (1) when a union delays bargaining and (2) "when economic exigencies compel prompt action."[10] The Board allows that there may be economic exigencies where, although not sufficiently compelling to excuse bargaining altogether, the employer will satisfy its bargaining obligation by providing the Union with adequate notice and an opportunity to bargain over its proposals that are intended to respond to the exigency, and by bargaining to impasse over the particular matter.[11] The Board has explicitly limited these economic exigencies to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action".[12] Thus, "absent a dire financial emergency...economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage or supply shortages do not justify unilateral action."[13]

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[9] Pleasantview Nursing Home, 335 NLRB No. 77 slip op. at 2 (2001); Bottom Line Enterprises, 302 NLRB 373 (1991), enfd. sub nom. Master Window Cleaning, Inc. v NLRB, 15 F.3d 1087 (9th Cir. 1994).

[10] Bottom Line, 302 NLRB at 374.

[11] RBE Electronics of S.D., 320 NLRB 80, 82 (1995).

[12] Id., at 81; Hankins Lumber Co., 316 NLRB 837, 838 (1995); Angelica Health Care Services, 284 NLRB 852, 852 - 853 (1987).

[13] RBE, above, 320 NLRB at 81 (citations omitted). See also, Maple Grove Health Care Center, 330 NLRB 775, 778 (2000) (increased health insurance premiums did not constitute "compelling economic circumstances" sufficient to justify unilateral action); Massachusetts Coastal Seafoods, 313 NLRB 731, 733 (1994) (employer's need to "maintain economic viability" did not justify unilateral change to employees' health insurance). Cf., Exxon Co., U.S.A., 315 NLRB 952, 952 (1994) ("outside events or circumstances . . . might properly be invoked as legitimate reasons" to act hastily regarding employees' health insurance).

In addition to its exception allowing for limited bargaining in the face of extraordinary economic exigencies, the Board has recognized another narrow exception to the general rule prohibiting piecemeal bargaining. Where, during contract negotiations, a discrete event, i.e., the discontinuance of a health insurance plan, "simply happens to occur while contract negotiations are in progress" and thus bargaining can not wait for an overall impasse in negotiations, the Board has dispensed with its requirement that the parties reach an agreement or impasse in overall bargaining before an employer may implement a change in response to or anticipation of the discrete event.[14] Thus, as in cases of extraordinary economic exigency, an employer may in certain circumstances seek bargaining over a discrete issue, and implement its proposed changes after it provides the union adequate notice of the proposed changes and an opportunity to bargain, without reaching impasse on an overall agreement.

Although Fallon, rather than the Employer, discontinued the Fallon HMO plan, we do not think the situation presented here was the kind of "extraordinary economic exigency" the Board contemplated in RBE Electronics or its progeny. There is no evidence that the parties' failure to reach an interim agreement for employees' health insurance would have any economic effect on the Employer's business. Indeed, the Employer only predicted that employees might lose coverage under a Fallon plan and, therefore, would have only minimal coverage under the CIGNA catastrophic plan. Thus, we fail to see how such an impact on employees, however unwelcome and unfortunate, would constitute an extraordinary economic exigency that would relieve the Employer of its ordinary obligation to bargain with the Union.[15]

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[14] Brannan Sand & Gravel, 314 NLRB 282, 282 (1994) (employer was not obligated to refrain from implementing its proposed changes to health insurance program, a discrete event that occurred during negotiations for an initial contract); Stone Container, 313 NLRB 336, 336 (1993) (employer lawfully bargained with union over annual wage increase apart from bargaining for an overall agreement; wage increase was a discrete event, scheduled to occur during negotiations for an initial agreement). See also, Alltel Kentucky, Inc., 326 NLRB 1350, 1350 fn. 4 (1998).

[15] See e.g., Maple Grove, above, 330 NLRB at 778; Massachusetts Coastal Seafoods, above, 313 NLRB at 733.

However, we agree with the Region that the Employer here lawfully sought bargaining for an interim agreement covering the annual offering of its health insurance plans which expired at the end of 2002, a discrete event that "simply happened to occur" while contract negotiations were in progress. Thus, bargaining limited to proposals on interim health insurance was privileged under Stone Container and Brannan Sand and Gravel. In addition to the normal process of soliciting bids for the upcoming year, Fallon had notified the Employer that it intended to discontinue the HMO plan and that its change would be effective December 31, 2002. Thus the Employer had no control over what plans Fallon might offer, what increases CIGNA might impose, or when such changes might occur; it could only control how it reacted to the providers' changes to their various plans. Because the parties might have to act prior to an overall bargaining impasse to ensure continued health insurance coverage, the Employer proposed that the parties bargain for an interim agreement to provide employees with health insurance options, but continue to bargain for an overall agreement that would also address health insurance for employees.

The evidence does not establish that the Employer engaged in bad faith bargaining over the discrete issue of interim health insurance. While the Employer was hesitant to abandon its health insurance proposals, it did not refuse to compromise. Moreover, the Employer did not insist on bargaining only about health insurance or otherwise refuse to bargain over other issues in deference to the looming cessation of Fallon HMO. On the contrary, the Employer continued to bargain with the Union, provided the Union with certain information related to the Employer's health insurance proposal, and reached tentative agreement on a number of non-economic issues. Indeed, other than its attempt to address the discrete issues associated with Fallon's changes, there is no evidence that the Employer has attempted to deal with bargaining subjects seriatim. In these circumstances, the Employer's actions in bargaining for interim health insurance was lawful under the narrow exception articulated by the Board in Stone Container and Brannan Sand and Gravel.

II. The Employer Unlawfully Implemented Its November 6 Health Insurance Proposal in the Absence of an Impasse.

Even though the Employer was privileged to bargain for an interim agreement on health insurance, we conclude that the Employer unlawfully implemented its alternative health insurance proposal. There is no evidence that the parties

were at impasse, or that they had reached any valid deadline for bargaining to be completed on November 15, when the Employer implemented.

The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it.[16] Whether a bargaining impasse exists is a matter of judgment. The Board considers bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations when deciding whether an impasse in bargaining existed.[17] The Board also considers whether parties demonstrated flexibility and willingness to compromise in an effort to reach agreement.[18] Thus, the Board will find a genuine impasse in negotiations exists only when the parties are warranted in assuming that further bargaining would be futile, or when there is "no realistic possibility that continuation of discussion at that time would have been fruitful."[19] In short, the Board requires that *both* parties must believe that they are at the end of their rope.[20]

The Employer has not established, indeed, it does not argue, that the parties had reached the Board's definition of impasse, which the Employer deems "unworkable" in the circumstances presented here. The evidence shows that, as of November 15, the parties were not at impasse on the issue of interim health insurance. Regardless whether the parties appeared far from agreement, each side had

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16 Naperville Ready Mix, Inc., 329 NLRB 174, 183 (1999); Serramonte Oldsmobile, 318 NLRB 80, 97, enfd. 86 F.3d 227 (D.C. Cir. 1996).

17 Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

18 Cotter & Co., 331 NLRB 787, 787 (2000), enf. denied sub nom. TruServ v. NLRB, 254 F.3d 1105 (D.C. Cir. 2001), cert. denied sub nom. Teamsters, Local 293 v. TruServ, 534 U.S. 1130 (2002); Wycoff Steel, 303 NLRB 517, 523 (1991).

19 Cotter & Co., above, 331 NLRB at 787; Larsdale, Inc., 310 NLRB 1317, 1318 (1993), citing PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).

20 Grinnell Fire Protection Systems Co., 328 NLRB 585, 585 (1999) and cases cited there; Larsdale, Inc., above, 310 NLRB at 1318.

expressed their willingness to compromise and reach an interim agreement as soon as possible that would provide employees with options for health insurance. The parties had recently exchanged proposals and the Employer had agreed to provide requested information. There is no indication that either side believed they were at traditional impasse. Indeed, unless the parties had reached a firm, mutually agreed upon deadline, there is no basis to conclude that further bargaining would have been futile or that there was no realistic possibility that further bargaining would have been fruitful.[21]

The Employer advances the argument that "impasse here must require no more than notice, the opportunity to bargain and good faith negotiations to the extent practicable within the time constraints." Assuming, *arguendo*, that the Employer's definition of impasse were consistent with Board law, the Employer's bargaining notes and other documentary evidence show that the parties had not reached any valid deadline for bargaining.

III. The Employer's Evidence Does Not Establish, And The Employer's Actions Contradict, Any Assertion That A Vendor-Imposed Deadline For Open Enrollment Forced The Employer To Implement Its Alternative Proposal On November 15.

A. There Is No Evidence Of A Vendor-Imposed Deadline

The Employer asserts, without evidence, that in order to guarantee completion of the enrollment process by January 1, 2003, Citistreet imposed, on November 14, a November 15 deadline for the Employer to provide the requisite benefit information. The Employer's assertions notwithstanding, the Employer's actions suggest that a vendor-imposed deadline, if one actually existed, was never communicated to Union negotiators and apparently played little, if any, role in the Employer's decision on November 15 to implement its alternative proposal.

The Employer's bargaining notes show that no Employer representative mentioned Citistreet's alleged deadline at any time during the parties' November 15 bargaining session, which lasted almost five hours, and included brief discussions related to the parties' health insurance proposals. Smith did not refer to Citistreet's alleged deadline when he announced, without warning, that the

[21] See, e.g., Grinnell, above, 328 NLRB at 585; Naperville Ready Mix, above, 329 NLRB at 183; Serramonte, above, 318 NLRB at 98.

Employer had decided to implement its alternative health insurance proposal. It is reasonable to assume that, if Citistreet had imposed a deadline, the Employer would have at least mentioned it to the Union while there was still time to bargain for an interim agreement, and certainly would have relied on it when announcing its decision to implement.

B. There Is No Evidence That Union Negotiators Knew That Citistreet Would Set A Deadline For Completing Open Enrollment Without Adequate Notice To The Employer.

We also reject the Employer's claim that "the Union was fully aware that bargaining for 2003 health insurance needed to come to a conclusion in mid-November." The Employer cites its continual urging the Union to bargain for an interim agreement, but also Union bargaining committee members' collective experience with the reenrollment process as evidence that Union negotiators knew what to expect. The Employer's evidence fails to support its assertions.

The Employer described on October 10 the process and normal timetable for reenrollment. The Employer also mentioned at different times during bargaining that "time was running out" to reach an interim agreement and that the parties could not wait until December to resolve the interim health insurance issue. The employer, however, was also working with Citistreet to change or shorten the reenrollment process, ostensibly, to foster the parties' efforts to reach an agreement.[22]

The Employer's bargaining notes also show that the Employer's initial references to November 30 as a deadline for open enrollment did not establish that date as an absolute deadline.[23] For example, Smith's November 6 comments that the Employer did not "know about the open

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[22] The Employer has not presented any evidence related to its communications with Citistreet regarding a compressed reenrollment process.

[23] The Region states in its memorandum that the Employer on November 8 announced a November 30 deadline for bargaining for an interim agreement. The Employer's bargaining notes, Knox's bargaining notes, and [*FOIA Exemption* 7(D),] however, all indicate that the November 30 deadline set by the Employer was for open enrollment.

enrollment at th[at] juncture" and that the Employer would "try to get something more precise" to the Union about open enrollment confirm that not even the Employer could know for certain when the parties would need to conclude bargaining for an interim agreement.

On November 8 Smith told the Union's negotiators that the parties needed to "do something" about health insurance, and they "need[ed] to do it in the next couple of weeks so people have coverage in 2003." While Smith's comments convey the Employer's sense of urgency, there is no indication that the Employer or Citistreet would need a certain period of lead-time to conduct open enrollment from November 25 – 29. It is clear, however, that the Employer believed the deadline for interim bargaining was "weeks" away. Thus, there is only one additional bargaining session, November 13, before implementation, and at that session the Employer agreed to study the Union's proposals.

The Employer argues that the Union negotiators' collective experience with health insurance enrollment would have put them on notice that negotiations would have to end by mid-November to ensure a November 25 – 29 open enrollment. However, there is no evidentiary basis to establish that any member of the Union's team had any experience dealing with a compressed reenrollment period. Given the unique circumstances presented here, where even the Employer expressly claims that it was surprised by Citistreet's actions, the Union negotiators could not have known that bargaining would have to conclude at some unknown, but expected time in mid-November.[24]

C. The Employer Implemented Its Alternative Proposal Because It Refused To Compromise Further, Not Because Citistreet Imposed Any Deadline.

[24] Because we conclude that the parties were not at impasse, nor had they reached a valid deadline before the Employer implemented, we need not determine what a "reasonable" deadline for bargaining would have been. We note, however, that it would have been reasonable for the Union to believe that the earliest deadline for bargaining for an interim agreement would have been November 22. A November 22 deadline would be the shortest time available for bargaining that would be consistent with Smith's claim on November 8 that the parties would "need to do something in the next couple of weeks." November 22 is also consistent with the Employer's express desire to hold open enrollment from November 25 – 30 or "the end of November" as Citistreet would only need a long weekend to process data and prepare benefit packets.

We conclude that the Employer's statements and actions on November 15 are wholly inconsistent with its post-hoc assertions that it implemented its proposal on that day only because Citistreet imposed a deadline the day before. If, as the Employer claims, it found out on November 14 that November 15 was the last day for bargaining for an interim agreement, the Employer would have told the Union's negotiators; there is no evidence that it did. Moreover, if such a deadline existed, the Employer logically would have insisted on bargaining only about health insurance on November 15 until the parties reached an agreement or impasse, saving less important matters for later; the Employer mentioned insurance only in passing before announcing it would implement the alternative proposal. Finally, if Citistreet had forced the Employer's hand, the Employer would have said as much when it announced its decision to implement; instead, the Employer claimed it "thought" it had to act because it thought it was "as close as [it could] get to the status quo."[25] Rather than reacting to Citistreet's alleged deadline, the Employer's evidence shows that it acted because it compromised as much as it wanted to and wanted to avoid any additional expenses for Citistreet's services.

D. A November 30th Deadline For Open Enrollment Was Artificial; Employees Could Have Enrolled In Any Plan Until December 31, 2002.

The Employer warned that if the parties did not reach an interim agreement for health insurance, employees enrolled in the Fallon plans would default to the CIGNA catastrophic plan. To avoid that result, the Employer claims, Citistreet set a November 30 deadline for employees to enroll in a particular plan for coverage to be effective January 1, 2003. The Employer's statements to the Board agent investigating this case, communications to the Union, and bargaining notes, however, all establish that there was no hard deadline or "drop dead date" for enrollment.

The Employer explicitly stated there was no "drop dead date" when it responded to the Union's concerns that the shortened enrollment period, conducted over a holiday,

[25] In a January 21, 2003 meeting with the Board agent investigating the charge, attorneys for the Employer justified the Employer's implementation by asserting that it felt it had compromised as much as it could. At no time during that meeting did the Employer assert that Citistreet imposed a November 15 deadline to guarantee its completion of the insurance process.

might cause some employees to lose their health insurance. The Employer assured the Union that employees could enroll using a "paper enrollment" and that Citistreet would accommodate employees' choices "through the end of the year." These assurances demonstrate that open enrollment could have been conducted after November 30; the only apparent requirement would have been to provide Citistreet with sufficient time to input benefit information and print and deliver benefit packets.[26]

In sum, we conclude that the parties were not at impasse, nor had they reached any valid deadline when the Employer implemented. Thus, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully implemented its alternative health insurance proposal.

B.J.K.

[26] Based on Citistreet's actual performance, this process could have been accomplished in three to seven days.