Sutter West Bay Hospitals d/b/a California Pacific Medical Center, a Sutter Health Affiliate *and* California Nurses Association/National Nurses Organizing Committee (CNA/NNOC). Cases 20–CA–34705 and 20–CA–34899

May 25, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On September 21, 2010, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed answering briefs, and the Acting General Counsel and the Charging Party filed reply briefs.

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 conclusions and to adopt the recommended Order.

[1] In agreeing with the judge that the parties reached impasse, we note that, at the October 26, 2009 bargaining session, the parties remained far apart on the principal issue of healthcare and that the Charging Party, while professing to be flexible regarding healthcare, basically adhered to its prior healthcare proposal. After the Respondent declared impasse on October 27, 2009, the parties met again on November 18, 2009, and December 14, 2009. Nevertheless, the Charging Party did not take the opportunity to offer any new healthcare proposals at those meetings. Thus, we agree that the parties were at impasse when, on January 1, 2010, the Respondent implemented its bargaining proposal.

In adopting the judge's finding that the Respondent did not harbor a preconceived intent to implement the SutterSelect healthcare plan as a fait accompli, we particularly rely on evidence that the Respondent recognized that implementing SutterSelect was subject to collective bargaining and that the Charging Party might successfully negotiate to retain existing healthcare benefits instead. For example, in a November 2008 email from Vice President for Human Resources Linda Isaacs to SutterSelect CEO Jackie Bright concerning a 2010 rollout of SutterSelect, Isaacs referred to the need to "start the transition with the C.N.A. and with SEIU" and recognized that implementation was contingent on "get[ing] their buy-in." In addition, Bright testified concerning an "account structure" that was set up in 2009 to enable the Respondent "in essence to say stop and don't allow any [CNA-represented] employees . . . into the health plan." Finally, documentary evidence shows that in August 2009, the Respondent was taking steps to continue offering unit employees the then existing Health Net plan should bargaining yield that outcome.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 25, 1011

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Micah Berul, Esq., and *Carmen Leon, Esq.,* for the General Counsel.

Alan S. Levins, Esq., and *Amy S. Morgenstern, Esq. (Littler Mendelson, P.C.),* of San Francisco, California, for the Respondent.

Marcie Eileen Berman, Esq. (California Nurses Association/National Nurses Organizing Committee), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in San Francisco, California, on May 3, 4, 5, and 6, 2010. The captioned charges were filed on October 20, 2009, and February 4, 2010, respectively, by California Nurses Association/National Nurses Organizing Committee (CNA/NNOC) (Union). On January 29 and March 29, 2010, respectively, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint, and notice of hearing alleging violations by Sutter West Bay Hospitals d/b/a California Pacific Medical Center, a Sutter Health Affiliate (Respondent) of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing briefs have been received from counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record,[1] and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

[1] The parties' joint motion to correct the transcript is granted.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with offices and places of business in San Francisco, California, is engaged in business as a health care institution operating acute care hospitals and related facilities. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $5000 directly from points outside the State of California. It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

Issues

The principal issue in this is whether the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally implementing new terms and conditions of employment.

Facts

1. Bargaining

The facts are not in material dispute. The Respondent employs approximately 2010 registered nurses at four campuses, and has a total employee complement of 6921 individuals, plus a medical staff of over 1100 individuals. The Union represents 816 of these nurses at two of these campuses, known as the California campus and the St. Luke's campus. The parties have had a collective-bargaining relationship since about 1995. Separate 3-year agreements between the Respondent and Union for the nurses at the California campus and the St. Luke's campus expired on June 1, 2007. Since April 2007 the parties have been bargaining at the same table for each separate unit. To the present date no agreement has been reached.

On October 24, 2007, after many bargaining sessions,[2] the Respondent implemented portions of its last, best, and final offer. There were subsequent bargaining sessions in 2008. In March 2008 the Union engaged in a 10-day strike. The last bargaining session prior to the instant set of negotiations was held on July 31, 2008.

In February 2009 the Respondent sent each employee a letter with attached documents described as "Your Annual Benefit Summary," which contains personalized information concerning the salary and benefits, including health care benefits, the employee received in 2008. Included in these documents is a page describing various plans, including "Comprehensive Health," as follows

> CPMC continues to be one of the few companies offering fully paid health benefits to you and your eligible dependents. The plan included medical, dental and vision coverage.
> NEW: Effective January 1, 2010, a new medical plan option will be offered to all employees under the SutterSelect Medical Plan. The medical plans options are the SutterSelect EPO and SutterSelect PPO.

By letter dated May 28, 2009, after a bargaining hiatus of some 10 months, the Respondent requested the resumption of bargaining. The letter states that because of "significant developments in the national and local economy" the Respondent has undertaken various cost saving measures, including the freezing of pay increases for all employees except for employees earning less than $50,000 per year, and the suspension of "market adjustments in salaries, wages and benefits in 2009." The letter continues as follows

> Given these initiatives and CPMC's ongoing efforts to avoid any unnecessary staff reductions, CPMC also deems it prudent to defer the implementation of CPMC's previously proposed wage increases for June 2009, as they relate both to the California campus and St. Luke's bargaining units. CPMC's decision not to implement future wage increases for the CNA-represented bargaining units is consistent with the many other cost-reduction measures described above, which have already included salary reductions and/or pay freezes for other employees.
>
> In addition, several new issues have arisen that need to be discussed with regard to benefits and other economic issues. Some of these are time-sensitive and will require expedited bargaining. To facilitate the prompt resumption of negotiations, please find enclosed a package proposal for both the CPMC and St. Luke's contracts, which is to be considered as a whole with the prior last, best, and final offers except as now modified. As before, CPMC has not agreed to merge the bargaining units.
>
> Our team is available on June 5, 2009, and June 12, 2009. Please let me know which of these dates CNA's bargaining team is available.

Attached to the letter is the Respondent's "Package Proposal," specifying, inter alia, that the Respondent would be offering health insurance only through SutterSelect self-funded insurance plan designs, rather than the insurers the employees were currently utilizing (HealthNet HMO and Blue Cross PPO). Further, the Respondent was proposing that effective January 1, 2010, newly hired employees would be enrolled in a new retirement plan, the Sutter Health Retirement Plan (SHRP), rather than the existing Retirement Plan for Hospital Employees (RPHP) which would continue to cover employees hired prior to January 1, 2010. And regarding wages, the Respondent was proposing a wage freeze until June 1, 2010, with a 5.0 percent wage increase on June 1, 2010, and a 3.0 percent wage increase on June 1, 2011.

This letter, proposing a wage freeze until June 1, 2010, a different insurer for health insurance beginning January 1, 2010, and a new retirement plan for employees hired on or after January 1, 2010, set the stage for the ensuing negotiations.

[2] The Union and Respondent conducted 15 bargaining sessions in 2007.

Between July 8 and October 1, 2009, there were five negotiating sessions. The chief spokesperson for the Union was Nato Green, labor representative, and the chief spokesperson for the Respondent was Christopher Scanlan, attorney. The Union submitted no package proposal until the meeting of August 27, 2009, because, as Green testified. "we had outstanding proposals from the prior course of bargaining that we weren't prepared to abandon because the Employer decided they wanted to resume."

At the August 27, 2009 session the Union presented a written package proposal that did not include a wage proposal. The proposal did include a healthcare component, in which the Union agreed in principle to SutterSelect as an acceptable insurer for the health plan[3]; however the Union did not agree to the Respondent's benefit designs (premiums,[4] copays and coinsurance), and wanted the benefit designs to remain unchanged from those in effect in 2006.[5] The Union's proposal is as follows

> 1. Health Benefits effective January 1, 2010;
>
> a. Medical Plans: Effective January 1, 2010, Registered Nurses will be eligible to participate in one of the two medical plan designs: the Sutter Select EPO and the Sutter Select PPO. The benefit designs and premium contributions for the EPO shall be identical to those of Healthnet in 2006, and for the PPO shall be identical to those of Blue Cross in 2006. The premium contributions required for the medical plans, if any, shall not change during the life of the agreement.

Green testified the intent of the Union's proposal was to "essentially agree to the Employer's maintenance and benefits language, and agree to SutterSelect, but to peg the plan design [employee premiums, co-pays and coinsurance] to those that would have been consistent with the remedy under the Kagel arbitration decision." (infra). There was discussion about this, and, according to Green, "We attempted to make clear that this was not an intransigent position, but that our objective was to, as much as possible, restore the status quo, and significantly to have an overall package including on SutterSelect that didn't undercut the other Sutter hospitals and reduce access." Thus, Green explained that the copays and coinsurance under SutterSelect were "much higher than those under the Kagel award, and the monthly premiums for employees who would have enrolled in the SutterSelect PPO plan were higher not only than the Kagel award, but than any of the other Sutter hospitals in the Bay area with CNA."

Except for the Union's agreement in principle to the SutterSelect plans, however, movement by each side on other contract items was characterized by the other side as relatively insignificant and of secondary importance in relation to the overriding issues of health care and wages.

Green testified that at the next bargaining session on September 15, 2009, Scanlan rejected the Union's foregoing healthcare counterproposal; however Scanlan acknowledged "that they [the Respondent] appreciated our openness to accept SutterSelect, but that because it was their intention to have a unified plan offering for all of their employees, union and non-union, all the different unions, that they were unwilling to make any modifications for the CNA bargaining unit."

On August 18, 2009, all employees received an email headed "Health Benefit Forums at CA," as follows

> Beginning Jan. 1, 2010, SutterSelect will be our new medical plan for employees. The SutterSelect plan replaces our current Health Net, Blue Cross and St. Luke's plans (these plans will no longer be offered). CPMC will continue to offer an option to you and your family that is free of monthly premiums. Over the next several weeks, you'll be receiving more information about SutterSelect in advance of Annual Enrollment.
>
> CPMC is pleased to offer a choice of two SutterSelect medical plan options:
>
> Exclusive Provider Organization—EPO Plus (Free for all employees and their family members)
>
> Preferred Provider Organization—PPO (Three tiers of monthly premiums, but free for employees who earn less than $50,000 per year)

At the October 1, 2009 bargaining session the Respondent presented its last, best, and final offer for each of the units. It confirmed this offer in a one sentence letter dated October 8, 2009, as follows

> This will confirm that CPMC's package offer, presented to CNA on the morning of October 1, 2009, and confirmed later again that same day, represents CPMC's last, best, and final offer for each of the St. Luke's and California Campus bargaining units.

The Union's reply letter, dated October 9, 2009, is as follows

> I read your letter as saying that Sutter CPMC/St. Luke's are unwilling to continue bargaining and are unwilling to make any modifications to your proposal or accept any further modifications to CNA proposals. The Medical Center's declaration of yet another Last, Best, and Final does not represent an impasse nor an exhaustion of good faith bargaining. The Medical Center has not bargained in good faith because the Employer has not maintained, for one day since the expiration of the collective bargaining agreements, the lawful terms and conditions of the CBAs. Nor has the Employer provided the necessary and relevant information requested by CNA, in order to fulfill our exclusive representation responsibilities. Nor has the Employer fulfilled the mandate from two (2) arbitrations and one (1) Court mandate to restore the healthcare benefits illegally withheld from CNA represented RNs.
>
> Despite the above facts, CNA continues to be willing to bar-

[3] The Union had previously negotiated collective-bargaining agreements with eight other Northern California Sutter affiliates in which SutterSelect healthcare plans were adopted: Alta Bates Summit; Eden San Leandro; Mills-Peninsula; Marin General; Novato; Santa Rosa; Solano; Delta.

[4] Premiums were to be paid only by certain employees opting for the SutterSelect PPO plan.

[5] Unlike other employees who had their copays, co-insurance, and premiums raised in 2007, the union represented employees, as a result of an arbitration award (infra), were continuing to receive healthcare at the 2006 level.

> gain and remains open to compromise on important issues to reach agreement. Since Sutter CPMC/St. Luke's are not willing to bargain in good faith, CNA sees no value in proceeding with our bargaining meeting scheduled on the 14th [of October]. CNA remains ready to negotiate, and are available to do so. Please notify CN A as soon as the Employer is ready to proceed with negotiations and we will schedule further dates.

On October 26, 2009, the final bargaining session took place. At this meeting the Union made its first wage proposal. As noted above, the Respondent's wage proposal, which had been submitted to the Union on about May 28, 2009, was that wages be frozen until June 1, 2010, because of economic considerations. Thus, it was not until some 4 months later, at the meeting of October 26, 2009, after the Respondent, on October 8, 2009, had put the Union on notice of the Respondent's last, best, and final offer, that the Union made a counter offer on wages. The Union's proposal was that wage increases be granted, retroactive to 2007, as follows

> Wages:
> 2007: 6%
> June 1, 2008; base wages increased across the board by 5.5%
> June 1,2009; base wages increased across the board by 5.25%
> June 1, 2010: base wages increased across the board by 5.25%

Further, the Union modified its August 27, 2009 healthcare proposal (supra) by adding the following language:

> Add:
> Nurses or their covered family members currently in the Healthnet plan who have providers not in the SutterSelect EPO network may add those providers to the network upon written request.
>
> If a nurse or covered family member in the EPO is unable to schedule an appointment with a provider within fifteen days of the request, they may see a provider in the PPO network at EPO copays.[6]

Scanlan testified that the Union's wage proposal was unacceptable as "it was just way off base" from the Respondent's wage proposal.

Scanlan further testified that the Union's revised health care proposal was regressive in that it added impractical options: thus, it incorrectly assumed that employees may simply enroll their physicians in SutterSelect against their will; and, moreover, even if the physician was willing, SutterSelect may not have been willing to enroll that particular physician. Further, the second part of the Union's proposal would give employees who enrolled in the free EPO SutterSelect plan the benefits of the higher cost PPO plan with no additional cost to them. And, in addition, the Union was continuing to adhere to its initial healthcare proposal by insisting on the 2006 copays and coinsurance.

Green testified he told Scanlan that, apparently since August 27, 2009.

> I have tried to be very clear that while that's our written [healthcare] proposal that's currently on the table, we are open to a different plan design provided it does not, it is not a worse plan design than one that we have at the other Sutter affiliates and that it doesn't reduce or disrupt ongoing access to care for our members.

Green further testified

> . . . just as the Employer had wanted to demonstrate their firmness in their commitment to their proposals, we wanted to continue to demonstrate our flexibility about being open to compromise if the Employer also had some flexibility.

Scanlan's testimony on this point is as follows

> Statements were made about flexibility. We were told late in the game that there was flexibility. I didn't see a proposal for anything different from the 2006 co-pay and premium levels. And when we talk about our session on October 26th, the Union confirmed that their proposal was for the 2006 co-pay and premium levels. So I don't disagree that statements were made about flexibility. I just didn't see a proposal that embodied that.

Green stated in his Board affidavit that throughout this set of negotiations, "There was no progress on major issues that they [the Respondent] wanted to implement, specifically wages, retirement, and health benefits, but there were (sic) progress on some things."

Scanlan testified the Respondent believed its health insurance proposal was competitive and in line with what the Respondent was offering other unions, and "in line with what we already intended to adopt for our non-contractual population." Moreover, the plan design would be "locked in," so that during the life of the contract, unlike the prior contract, the Respondent would not have the option of increasing copays and coinsurance; therefore there could not be another situation that had resulted in the prolonged arbitration and court proceedings (infra).

Similarly, regarding the Respondent's wage proposal, Scanlan testified the Respondent had frozen 2009 wages "across the house" except for employees making less than $50,000 a year, and therefore "it would have been an unheard of benefit for this [CNA] employee population alone to be receiving pay increases in the 2009 timeframe."

Scanlan testified that at the conclusion of the October 26, 2009 meeting he viewed the parties as being "farther apart than when we had gone into the meeting. I mean the healthcare issue was just drifting away. The wages were, we were just on different planets on the wages."

On the next day, October 27, 2009, the Respondent wrote to the Union, declaring the parties were at impasse and announcing it would implement portions of its last, best, and final offers, including its SutterSelect health benefits and its Sutter Health Retirement Plan proposals. The letter further states

> Beginning with our initial request to resume bargaining, CPMC has repeatedly made clear that its proposals are time-sensitive, particularly as they relate to benefits that employees must select in open enrollment. That time has now arrived

[6] The Union continued to maintain that the SutterSelect PPO copays be at the lower 2006 Blue Cross PPO levels.

> and the parties are at impasse despite five months of efforts by CPMC to reach agreement with CNA.

While there were several subsequent meetings at the Union's request, there was no specific agenda for these meetings; bargaining proposals were not discussed. The parties appear to agree that these meetings were more for the purpose of sharing information regarding the transition to SutterSelect which, according to Scanlan,

> . . . was this issue about if people decided to stay in a closed network [EPO] but their provider wasn't going to be in the closed network, but they were already seeing someone for chronic or acute conditions, how would that be managed.

On November 16, 2009, open enrollment for SutterSelect began for all of Respondent's employees, including employees of both CNA bargaining units; and on January 1, 2010, SutterSelect and SHRP were implemented for all employees, including employees of both CNA bargaining units.

2. Arbitrations and District Court proceedings

As set out in the Union's aforementioned October 9, 2009 letter to the Respondent, the Union, as part of its rationale that the Respondent was not bargaining in good faith, stated that the Respondent had not " fulfilled the mandate from two (2) arbitrations and one (1) Court mandate to restore the healthcare benefits illegally withheld from CNA represented RNs." In fact this had been a persistent theme of the Union that Green reiterated at nearly every negotiating session. The history of this dispute is as follows.

In November 2006, during the term of the June 1, 2004, to June 1, 2007 collective-bargaining agreement, the Respondent informed all employees enrolled in the then current healthcare plans of increases in their copays and coinsurance effective January 1, 2007. With regard to the nurses covered by the collective-bargaining agreement, the Respondent believed that specific contract language gave it the right to make such changes during the mid-term of the parties' collective-bargaining agreement.

The Union did not file a grievance over this matter until January 24, 2007, after the changes had been implemented, This contract dispute was submitted to arbitration. On March 14, 2008, some 10 months after the expiration of the contract, Arbitrator John Kagel ruled in favor of the Union, and required that the Respondent rescind the increases in copays and coinsurance effective January 1, 2007, and pay employees "the difference between what they paid and what they would have paid at the 2006 levels."

In effect, this was solely a reimbursement remedy. The arbitrator said nothing about whether the Respondent should reinstate the plans for the CNA nurses so that they would not be out-of-pocket for copays and coinsurance until such time as they were reimbursed for their out-of-pocket expenses.

Although the Respondent complied with this reimbursement remedy, the effected CNA nurses were significantly inconvenienced by having to submit reimbursement forms to the Respondent each time they saw a physician, ordered prescriptions, or were hospitalized. The Union sought to resolve the matter by seeking an additional remedy from the arbitrator. Again the Union was successful. The arbitrator issued his decision on September 30, 2008, and amended the remedy by requiring the Respondent to reinstate the insurance coverage "so the Bargaining Unit Nurses do not have to go through a claims process nor to miss any benefits to which they are entitled under the agreement." [7]

The Respondent failed to comply with this additional remedy, apparently because of the added expense to the Respondent; however the Respondent continued reimbursing the nurses for their additional out-of-pocket expenses. As a result, the Union sought enforcement of the arbitrator's decisions in federal district court through a request for summary judgment.[8]

Again the Union believed it was successful. On July 30, 2009, less than a month after the beginning of the instant set of negotiations, United States District Judge Charles R. Breyer, in a 6-page decision, granted the Union's request for summary judgment. Under the "Discussion" section of his Order, the Judge states, inter alia, "Accordingly, although the Court confirms the awards on behalf of CNA, the Court cautions that the awards should be read only to restore the parties to the position they would have been in at the expiration of the agreement had CPMC not breached the CBA." The judge also states: "Under the Court's reading of the awards, CPMC had the duty to reinstate the terms of the CBA as of January 1, 2007 until there was an impasse or a new agreement was reached." However, under the "Conclusion" section, the judge states: "For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED. The awards are CONFIRMED insofar as they reinstated the agreement from the time of CPMC's breach until the expiration of the CBA."

Both the Respondent and Union interpreted the judge's order as validating their respective positions. The Respondent continued to refuse to reinstate the former insurance plans, but, although it believed it was no longer under an obligation to do so, continued reimbursing the nurses for their additional out-of-pocket expenses.[9] The Union filed a motion for contempt of the Court's Order.

Judge Breyer conducted a hearing on the Union's contempt motion on October 16, 2009, and, having reviewed the matter prior to the hearing, summarily denied the motion prior to any argument on the merits. Then during a subsequent colloquy in which the Judge stated his understanding of the situation and the Union presented its counter arguments, the judge stated, "it's clear that an impasse was reached" apparently during the first set of negotiations that ended on July 31, 2008 (supra). Thus, combining what the judge stated in both his written decision and during the course of the contempt hearing, the judge seems to have been of the opinion that because of the impasse there could be no contempt. The Union denied that an impasse had been reached, stating that "impasse" is a "legal term of art

[7] The two arbitration decisions by Arbitrator John Kagel are sometimes referred to by the parties as the "Kagel award(s)" (infra).

[8] The record does not indicate the date the Union filed this district court proceeding.

[9] The Respondent continued to reimburse the unit nurses for their additional out-of-pocket expenses until January 1, 2010, when the SutterSelect plans became effective.

and is a determination that the National Labor Relations Board makes under various circumstances." The judge suggested the Union could take the matter to the NLRB or appeal his order to the Ninth Circuit. The Union did not appeal the judge's Order; nor did the Union attempt to bring the matter before the Board except as noted below.

Accordingly, Judge Breyer's Order stands as the law of the case, and resolves the contract dispute.

3. Analysis and conclusions

The aforementioned contract dispute was ongoing in federal district court throughout the instant set of contract negotiations (July through October 16, 2009). This may at least partially explain why the Union was reluctant to agree to the additional bargaining sessions repeatedly requested by the Respondent, even though the Union was well aware of the time sensitive nature of the Respondent's healthcare proposal.[10] Indeed, Green acknowledged the Union was looking for some bargaining leverage and believed that if the Respondent had been ordered by the Court to comply with the arbitrator's decisions, that is, to restore the status quo ante by fully reinstating the 2006 healthcare plan, the Union could have utilized this bargaining leverage to its advantage in order to extract meaningful concessions from the Respondent during this round of contract negotiations.

On the basis of the foregoing facts, I find, and the General Counsel implicitly seems to agree, that the matter of the arbitration awards and the resulting district court litigation is essentially a nonissue in this proceeding except as background to the extent it may provide a rationale for the Union's approach to bargaining. As the General Counsel states in his brief

> The Union took a reasonable amount of time, both during the bargaining sessions, and in between sessions, given that Respondent had forced the Union to negotiate from a hole by failing to abide by the arbitration awards and restore the status quo.

Regardless of the Union's frustration with the outcome of the arbitration and district court proceedings, this self-described "hole" is not a legally cognizable one that the Respondent was required to "fill" as a condition precedent to good-faith bargaining.

The overriding issue in this proceeding is whether, on October 27, 2009, the parties were at an "impasse" in negotiations as defined and explicated by Board precedent. As set forth by the Board in *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1969)

> Whether an impasse exists is a matter of judgment. The 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, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed.

Further, with the entire course of bargaining as background, the Board defines impasse "as the point in time of negotiations when the parties are warrented in assuming that further bargaining would be futile. . . Both parties must believe that they are at the end of their rope." *AMF Bowling Co.*, 314 NLRB 969, 978 (1994); *ACF Industries*, 347 NLRB 1040, 1042 fn. 4 (2006). However, ". . . an impasse does not necessarily mean that bargaining is at an end. Indeed, if a party makes a new substantive proposal, the impasse can be broken." Ibid.

The General Counsel does not contend that the firm positions taken by the Respondent regarding healthcare and wages were unreasonable or unwarranted or contrived to preclude the reaching an agreement; or that 5 months (May 28 through October 26) was not a sufficient amount of time for the parties to discuss whatever they wanted to discuss; or that the Respondent failed to sufficiently respond to the Union's questions during the bargaining sessions; or that the Respondent failed to timely and sufficiently respond to the Union's many information requests for voluminous amounts of information; or that the Respondent committed or failed to remedy unfair labor practices that would preclude good-faith bargaining.

The General Counsel maintains that on October 26, 2009, the parties were not at impasse, and that further bargaining would have resulted in progress toward the reaching of an agreement.

The record evidence is clear that during the entire course of bargaining since about 2007 the parties agreed on certain contract items.[11] Further, during the instant set of negotiations, the Union withdrew certain proposals that were particularly objectionable to the Respondent; and additionally, the Union agreed in principle to SutterSelect as the insurer of its members. As the General Counsel contends, this demonstrates negotiating movement and progress by the parties.[12]

However, it is abundantly clear, and I find, that as of the end of the October 26 negotiating session the parties believed further bargaining would be futile regarding the two issues of overriding significance, namely, healthcare and wages; and that the parties further believed their failure to agree on both of these issues would preclude the finalizing of an agreement regardless of the resolution of other less significant issues. Thus,

[10] The Respondent presented evidence specifying the numerous of dates it proposed for bargaining because of the time sensitive nature of its healthcare proposal. Further, it presented evidence documenting the Union's failure to timely arrive at the agreed-upon negotiating site(s) and detailing the extended caucuses taken by the Union's negotiating team during the course of negotiations, thus impacting on negotiating time. Also, the Respondent presented evidence of the Respondent's compliance with the Union's extensive information requests, and the Union's failure to agree upon a confidentiality agreement, offered by the Respondent to protect patient privacy, so that it could furnish additional information to the Union. And finally, the Respondent presented evidence showing the extensive time taken up during negotiations with discussions regarding the information requested by the Union. The Union, in rebuttal, furnished explanatory evidence. It seems unnecessary under the circumstances to recount the specific evidence presented on this issue by the parties.

[11] Many had been agreed upon prior to the instant set of negotiations.

[12] However, it appears that Green may disagree with the General Counsel that the Union's agreement in principle to SutterSelect may constitute progress. Thus, as noted above, Green stated in his Board affidavit that throughout this set of negotiations, "There was no progress on major issues that they [the Respondent] wanted to implement, specifically wages, retirement, and health benefits, but there were (sic) progress on some things."

as noted above, Green candidly set forth his understanding of the status of negotiations as follows

> . . . just as the Employer had wanted to demonstrate their firmness in their commitment to their proposals, we wanted to continue to demonstrate our flexibility about being open to compromise if the Employer also had some flexibility.

In other words, the Union's purported continued flexibility was dependent upon a condition precedent, namely, a demonstration of flexibility by the Respondent. Indeed, at that late stage of time sensitive negotiations, Green's mere assertions of flexibility, unaccompanied by further concrete proposals, constituted a signal to Scanlan that Green was waiting for Scanlan to make the next move.[13] The Respondent had advanced its candid, consistent, and reasonable position throughout negotiations that all employees, regardless of union representation, be subject to a wage freeze and be enrolled in their choice of the SutterSelect healthcare plans. Clearly, Green understood that the Respondent, having presented its last, best, and final offer, and having rejected outright the Union's October 26 offer, was not flexible on these matters and, as Green acknowledged, ". . . wanted to demonstrate their firmness in their commitment to their proposals." Accordingly, neither party, at that point, had anything further to offer. Therefore, I find, they were at impasse. See *Larsdale, Inc*., 310 NLRB 1317 (1993); *Saint-Gobain Abrasives*, 343 NLRB 542, 559–560 (2004). Nor did the Union attempt to break the impasse by subsequent "concrete" offers of compromise regarding wages or healthcare. *ACF Industries,* supra.

The General Counsel contends that various communications from the Respondent to the unit nurses demonstrates a preconceived intent to implement the new SutterSelect healthcare plan as a fait accompli, thereby rendering the ensuing negotiations meaningless.[14] The record shows that, with certain exceptions, it had been the Respondent's modus operandi over many years to send to all employees, union or nonunion, the same regular mail or email communications regarding matters of general concern and, in addition, to include such matters in its periodic newsletters that were made available to all employees. It was assumed the employees would ignore those portions of the communications that did not apply to them; further, it was believed disclaimers advising particular groups of employees whether they may or may not be impacted by a particular item, or to what extent, would have been unwieldy and unnecessary. Thus, while it appears it would have been possible to tailor particularized communications to employees according to their union affiliation or other distinct classification, it was simply less burdensome to simultaneously send communications of general concern, including the change to SutterSelect, to all of its 6921 employees plus some additional 1000 active medical staff. This seems to be a reasonable approach, under the circumstances, to the dissemination of very important information to a large and diverse community of employees.

Moreover, unlike the dissimilar factual situation in *Brannon Sand and Gravel Co.*, 314 NLRB 282 (1994), relied upon by the General Counsel, the Respondent did give the Union timely notice, did offer to bargain, and did thereafter bargain extensively with the Union prior to implementing it's healthcare proposal. I therefore find no merit to this contention of the General Counsel.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended.[15]

ORDER

The complaint is dismissed in its entirety**.**

Dated, Washington, D.C., September 21, 2010

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[13] Although the Union and General Counsel would characterize the Union's aforementioned October 26, 2009 healthcare proposal as a demonstration of flexibility, I agree with Scanlan's assessment that the proposal was regressive and that it merely compounded the differences between the parties, as the Union continued to insist on the 2006 plan design. Moreover, if, at least in part, the Union's ultimate goal was to modify the plan design so that it would more closely comport with SutterSelect plan designs previously agreed to by the Union with other Sutter affiliates, the Union could have made such a straightforward proposal. That it did not make such a straightforward proposal demonstrates, in my opinion, the reluctance of the Union to agree to anything other than the 2006 plan design coupled with SutterSelect as the insurer.

[14] Jonica Brooks, a unit member and union advocate, testified that the Respondent's president and CEO, Martin Brotman, said the following to a small group of some 20 employees during a periodic brown bag or "President's Update" meeting on February 15, 2008, nearly a year and a-half prior to the beginning of the instant set of negotiations: "I do not negotiate, I will not negotiate, I implement." Brotman testified that during this series of meetings he said he would not negotiate away the Respondent's right of free speech, referring to a union "neutrality" proposal that would inhibit the Respondent from presenting its viewpoint to its employees regarding union matters. Further, Brotman testified he said to the group that he did not negotiate because, in fact, he did not personally attend negotiating sessions. Whatever Brooks understood Brotman to be saying about negotiating in 2008, or whatever Brotman did say, there is no showing that the Respondent, either then or now, was avoiding its bargaining responsibilities under the Act. Thus, there is no contention that the Respondent, during that set of negotiations, failed to bargain in good faith; and, as Brotman testified, since that date the Respondent has entered into "many" collective-bargaining agreements. I therefore accord Brook's testimony no weight relative to the fait accompli argument raised by the General Counsel.

[15] 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.