UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

GODDARD RIVERSIDE COMMUNITY CENTER

and Case Nos. 2-CA-39604
2-CA-39928

LOCAL 74, UNITED SERVICE WORKERS UNION, IUJAT

GENERAL COUNSEL'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD

Dated at Brooklyn, New York
September 29, 2011

James P. Kearns
Counsel for the Acting General Counsel
National Labor Relations Board
2 Metrotech Center, 5th Floor
Brooklyn, New York 11201

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I. STATEMENT OF THE CASE

Based upon unfair labor practice charges filed by Local 74, United Service Workers Union, IUJAT, herein called the Union, in Case Nos. 2-CA-39604 and 2-CA-39928, on December 30, 2010, the Regional Director issued a Consolidated Complaint and Notice of Hearing, alleging that on July 1, 2009 and July 1, 2010, Goddard Riverside Community Center, herein called Respondent, unilaterally changed its employees health insurance plan. The Consolidated Complaint also alleges Respondent failed and refused to bargain with the Union in good faith over its Capital hall employees, in violation of Section 8(a)(1) and (5) of the Act. (GC Ex. 1[1].) On May 23 and 24, 2011, a hearing was held before Administrative Law Judge Raymond Green and on August 3, 2011, Judge Green issued his Decision dismissing the Consolidated Complaint.

II. JURISDICTION

Respondent, an organization with programs located throughout New York City and a principal place of business located at 593 Columbus Avenue, New York, New York, has been engaged in the operation of a private nonprofit agency that provides social services to children, youth and family, older adults, homeless people and poor communities. During the calendar year prior to the issuance of the Complaint, Respondent, in the course and conduct of its operations, derived gross revenues in excess of $250,000 and purchased and received at its New York City facilities, goods and materials valued in excess of $5,000 directly from suppliers located outside the State of New York. Respondent is an employer engaged in commerce within the meaning of 2(2), (6) and (7) of the Act. (GC Ex. 1(i) & (m)).

[1] "GC Ex." and "R Ex." Refer to General Counsel's Exhibit and Respondent's Exhibit. "TR" refers to references to the transcript underlying the hearing in the instant case and ALJD refers to Administrative Law Judge Green's Decision.

III. THE FACTS

A. Unilateral changes in health insurance plan

The material facts in this case are essentially uncontroverted and unless otherwise noted, accurately set forth in Judge Green's Decision. The Union has been the collective-bargaining representative of a unit of Respondent's employees since 1990. The most recent collective bargaining agreement is effective by its terms for the period June 30, 2008 to June 30, 2012. (GC Ex. 1(i) & (m). Article XX of the parties' agreement provides that: "full-time and regular part-time employees and their eligible dependents will be covered by the Agency's health and hospitalization group insurance plan." (R Ex. 2 & 3).

On July 1, 2009, Respondent made a major change to its health insurance plan. The unit employees had been covered by a health maintenance organization plan. With the HMO, a unit employee paid $5 to visit a primary care doctor. (R Ex. 9). On July 1, 2009, Respondent changed from an HMO to a health reimbursement arrangement. Under the HRA, a unit employee with a family now had a $3000 deductible and a single member had a $1500 deductible. (R Ex. 12).

Respondent admits that it decided to change to the HRA without notifying the Union. The Judge found that when Respondent changed its health insurance plan in July 2009, the Union was notified of a *fait accompli* and was not given an offer to bargain about the changes with Respondent. (ALJD p. 8, line 25)

In early May 2009, Respondent committed to its health insurance carrier to change into the HRA without notifying the Union. (Tr. 146). Union business agent Chris Dempsey learned of the change to the health insurance plan in early June 2009, when he received a telephone call from a member asking him about the new HRA health plan. (TR. 96-97). The unit employees were notified of the change to the health insurance on June 2, 2009. (R. Ex. 13). After Dempsey was notified by the member, he called Respondent's assistant director, Salvatore Uy. Uy confirmed that the health plan would be changed and Uy described the

changes to Dempsey over the telephone. (Tr. 97-98). Respondent asserted that the Union received notice of the health care change in May 2009 and that the charge was time barred. The Judge correctly found that Respondent failed to prove its affirmative Section 10(b) defense. (ALJD p. 7, line 32-33)[2].

In the past, Respondent also failed to notify the Union when it made changes to its health insurance plan. (Tr.61, 202). In 2002, 2003, 2004, 2005 and 2007, Respondent made changes to its health insurance plans without notifying the Union. In each of those years, Respondent made changes effective July 1 and directly issued memos to unit employees shortly before the changes became effective, without advising the Union. In June 2007 for example, the Employer advised employees that co-pays for a primary care visit remained at $5 but specialist visits increased to $20. (R. Ex. 9). Some years, in 2006 and 2008, for example, there were no changes to the health insurance plan. (Tr. 62). Prior to this material change in 2009 to the HRA, the health insurance changes were much less significant. Business agent Chris Dempsey's predecessors, Richard Kolb and Ahmed Cumberbatch, were not notified by Respondent of the changes and employees did not complain to them to make the Union aware of the changes[3]. (Tr. 61, 198). Apparently prior to the 2009 change, employees failed to

[2] On May 20, 2009, Respondent's Assistant Director Uy sent Respondent's Board member and Counsel, Eric Rosenfeld, an email asking, "shall I contact Chris Dempsey about the health plan today?" Rosenfeld responded that Uy should contact the Union and he said, "Pls make some notes of what conversation transpires. Just in case." (GC Ex. 6). At trial, Uy concedes that he did not contact Dempsey immediately after he received Rosenfeld's email. Uy contends he called Dempsey about the change to the health plan on May 29, 2009. (Tr. 135). Uy contends that after the telephone call with Dempsey, he sent a copy of the plan summary by fax and mail to him. (Tr.136). Dempsey never received it. Although Uy contends that he faxed the document, he has no fax receipt. He also asserts that he mailed the document to the Union. However, Uy did not have use a cover letter and he is not sure if he prepared the envelope. (Tr. 148). Further, the summary plan that Uy allegedly sent to the Union had the incorrect employer's name on it and not Goddard's name. (Tr 136). Uy could not explain why he believed it was on May 29th when he spoke to Dempsey by telephone. He conceded that he did not call Dempsey on May 20th when he received Rosenfeld's email. He also did not make notes as directed to do so by Rosenfeld. Uy said that he believed the Memorial Day holiday was the Monday after he spoke to Dempsey but Memorial day was May 25, 2009. Uy had no documentary evidence to support his assertion that he notified Dempsey and his version did not make sense. The Judge properly found that Respondent's 10(b) defense failed.

[3] Respondent witness Eric Rosenfeld offered some testimony about the 2004 and 2008 negotiations with the Union but he did not provide evidence that the Union was aware of prior health insurance plan changes. (Tr. 193). The parties certainly discussed "health care" over the years when they

complain about the changes to the Union. It should be noted that the Union has not had a shop steward since before 2008. Even when there was a shop steward, her duties were limited to signing up new members and scheduling Union meetings. The shop steward did not negotiate on behalf of the Union, participate in grievance processing or receive notices from Respondent. (TR. 61, 94, 71).

Article XX of the parties' collective bargaining agreement also contains a reopener provision which permits negotiations for the purpose of transferring unit employees into the Union's health and welfare plan on a yearly basis. (R. Ex. 2 & 3). Over the years, the parties have met and negotiated over the terms of transferring Respondent's unit employees into the Union's fund but have not reached agreement. In June 2009, when the Union learned that Respondent changed its health plan to the HRA, Respondent had already committed to its health insurance carrier to make the change. (Tr. 74, 146). Since the health insurance change had already been made, the Union decided to request bargaining under Article XX in an attempt to have the unit employees moved into the Union's health fund. (Tr. 74). The parties met and negotiated over covering the unit employees under the Union's plan but no agreement was reached. (Tr. 74).

On July 1, 2010, Respondent changed its health insurance plan again without notifying or affording the Union an opportunity to bargain. It eliminated the HRA and went back to an HMO without bargaining with the Union. (GC Ex. 1(i) & (m)). Union business agent Dempsey again learned about the change from a member and later called Sal Uy who verified the change would be made. (GC Ex. 1(i) & (m), Tr. 100). The Judge found that when Respondent changed its health insurance plan in July 2010, the Union was notified of a *fait accompli* and was not given an offer to bargain about the changes with Respondent. (ALJD p. 8, line 25)

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unsuccessfully attempted to negotiate an agreement to transfer the unit employees into the Union's health fund. However, Respondent never gave the Union notice of the changes in its plan.

B. Unlawful failure to bargain over new voting group of employees

The Union filed the Petition in Case No. 29-RC-23435, seeking to represent the employees in a voting unit of certain of Respondent's employees working at Capitol Hall located at 166 West 87th Street New York, New York and 140 West 140th Street, New York, New York, herein referred to as the Capitol Hall employees. The Regional Director issued a Certification of Representation on January 13, 2010, and on March 16, 2010, substituted a Certification of Results of Election, adding the Capital Hall employees to the existing Unit. (GC Ex. 1(i) & (m)). After the election, the Union made several requests to bargain with Respondent over the Capitol Hall employees. On April 13, 2010, the parties met for the first and only time to discuss the Capital Hall employees. Union President Sal Alladeen and business agent Chris Dempsey met with Eric Rosenfeld and Sal Uy. At the meeting, Alladeen asked for an agreement that the parties sign off on each issue as they agreed. Rosenfeld said it was not necessary. (TR. 103). The Union made wage, pension and health care proposals. Respondent did not respond to the proposals or refused the Union's requests and made no counter proposals. (Tr. 79-81, 103-104, 236). Rosenfeld even rejected the Union's request for a one cent raise for the group of employees. (TR. 104).

After the short meeting on April 13, 2010, the Union made another request to bargain. Mr. Rosenfeld replied by letter dated April 22, 2010. (R. Ex. 20b). Respondent took the position that the existing collective bargaining agreement should be applied to the Capitol Hall employees and that the parties were at impasse. (Tr. 229, 236, 247).

IV. ARGUMENT

The Judge erred by failing to find Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with the Union over its change to its health insurance benefits. Moreover, the Judge also erred in concluding that the Union acquiesced to Respondent's right to make the changes where there was no record evidence that the Union had knowledge of the earlier changes to the health insurance.

An employer violates Section 8(a)(5) of the Act when it makes a unilateral change to unit employees' terms and conditions of employment concerning a mandatory subject without first giving the union notice and an opportunity to bargain over the change. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F. 3d 859 (8th Cir. 2002). Health insurance benefits are a mandatory subject of bargaining. *United Hospital Medical Center*, 317 NLRB 1279, 1282 (1995). Accordingly, an employer may not unilaterally implement changes to unit employees' health insurance benefits without bargaining to agreement or impasse with the Union (*Mid-Continent Concrete*, 336 NLRB at 259), or without the Union's "clear and unmistakable" waiver of its bargaining rights over the subject matter. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

In both 2009 and 2010, it is undisputed that Respondent changed health insurance plans without notifying or bargaining with the Union about the changes. The Judge correctly found that when Respondent changed its health insurance plan in both July 2009 and July 2010, the Union was notified of a *fait accompli* and was not given an offer to bargain about the changes with Respondent. (ALJD p. 8, line 25). However, the Judge found that the parties, by the terms of their contract and by a longstanding practice, effectively agreed that the Respondent retained the right to change the medical insurance. The Judge found that, "the Union, by its conduct from 2002 to 2008 had 'acquiesced' to the Respondent's 'right' to make the same changes affecting the union employees as it made for its managerial and supervisory employees." (ALJD p.11, line 15-18).

The Judge's conclusion is not supported by the record evidence. There was no evidence introduced at trial that the Union knew about any of the changes in 2002 to 2008. When those changes were made, Respondent directly issued memos to unit employees shortly before the changes became effective, without advising the Union. At trial, the Union's president and business agents testified that they were not aware of the 2002 to 2007 changes to the health insurance plan. In his decision, the Judge did not make a specific finding that the Union

was aware of the earlier changes. However, he stated, "although the union was not directly notified of the changes, the company's notice was openly made to all staff covered by the health plan and it is unlikely that the Union officers and representatives were not aware of these changes either before or after they were made." (ALJD p. 4, line 9-10). Without any record evidence showing that the Union was aware of the earlier changes and based upon his speculation that it was "unlikely" that the Union did not know, the Judge erred in finding that the Union's failure to object to the 2002 to 2007 changes went beyond acquiescence and constituted evidence that the parties understood that the terms of Article XX meant that Respondent retained the right to make these kinds of changes on a unilateral basis. ALJD p.10, line 23-25).

Regardless of whether the Union was aware of the prior unilateral changes, the earlier changes were a series of disparate changes and there was no binding past practice permitting Respondent to make the 2009 and 2010 changes to the health insurance benefits. In *Courier-Journal*, the Board found that the employer's alleged unilateral change in its health insurance plan were implemented lawfully pursuant to a "longstanding," ten year practice of annual changes to benefits and premiums under the parties' successive contracts and during hiatus periods between contracts. *Courier-Journal* 342 NLRB 1093 (2004). The practice had developed under a contractual clause requiring the employer to continue a health insurance plan for unit employees on the same terms in effect for unrepresented employees. The contract further provided that any changes in benefits and premiums would be "on the same basis" as for the unrepresented employees. Id at 1093. The Board found that "the significant aspect of this case" was the union had acquiesced to a past practice of tying premiums and benefits for unit employees to those of the non-unit employees. Id. At 1094. The Board found that the employer's changes were actually a continuation of the status quo and therefore did not violate the Act.

Courier-Journal does not govern the facts of this case. Initially, the Union was not aware of the Employer's changes to the health insurance benefits in prior years. Respondent did not notify the Union in past years when it made a change. Respondent directly advised the unit employees of the changes and did not contact the Union[4]. It should also be noted that Respondent did not make changes consistently on a yearly basis. Many of Respondent's changes prior to 2009, were minor- increasing a co-pay by a couple of dollars, for example. Apparently these changes did not prompt the unit employees to contact the Union or to complain. It was only in 2009, when Respondent drastically changed the health insurance to an HRA with deductibles between $1500 to $3000, when a unit employee called the Union and advised the Union of the change. Since the Union was not aware of the changes in earlier years, it cannot be considered to have acquiesced to the changes and there is no past practice or waiver of the Union's right to bargain over the 2009 and 2010 changes. See *Berkshire Nursing Home, LLC*, 345 NLRB 220, fn.2 (2005) (*Courier-Journal* not applicable where changes in health insurance plans were not consistent with past practice and union had not acquiesced to similar changes.)

Even if it were found that the Union was aware of Respondent's prior unilateral changes, the Employer unlawfully changed health benefits because they were established terms of employment and the Board's holding in *Courier-Journal* does not apply here. In *Courier Journal*, the contractual clause provided for unilateral changes to premiums and benefits to bring the unit employees' plan in line with the unrepresented employees' plan. Here, there is no comparable contract clause establishing an annual practice. The requirement that the unit employees be covered by Respondent's group insurance plan does not in itself authorize unilateral changes to that plan. In *Trojan Yacht*, the Board held that contract language requiring

[4] Although the Union had a shop steward at some points since 2002, notice of the change to the shop steward is not sufficient where the steward, as here, does not have bargaining authority. See *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349 (2003), *Union Child Day Care Center*, 304 NLRB 517, 523 (1991).

the maintenance of a pension and savings plan "in the same manner and to the same extent such plans are generally made available and administered on a corporate basis" did not waive the union's right to bargain about changes to the plan. *Trojan Yacht*, 319 NLRB 741, 742-43 (1995).

Respondent's 2009 and 2010 changes were major changes to the health plan and not similar to prior changes. Respondent previously made the following changes to its health care:

> July 1, 2002: an increase in premiums from $.25 to between $10.00 and $37.50 per pay period (R Ex. 4);
>
> July 1, 2003: elimination of HIP as an option; an increase in specialist and prescription plan co-pays (R Ex. 5);
>
> July 1, 2004: change in dental carrier; an increase in prescription co-pays (R Ex. 7);
>
> July 1, 2005: discontinuation of HIP dual option plan, substitution of choice of two Aetna plans (R Ex. 8); and
>
> July 1, 2007: increases in employee contributions, PPO dental rates, specialist and prescription co-pays. (R Ex. 9).

The Board has held that "making a series of disparate changes without bargaining does not establish a 'past practice' excusing bargaining over future changes." *Caterpillar, Inc.*, 355 NLRB No. 91, (2010), slip op. at 3. Instead, any asserted past practice of un-bargained changes in health insurance benefits must be demonstrated by a showing of such "regularity and frequency" that the employees could reasonably expect the practice to continue. Moreover, there must be a "thread of similarity running through and linking the several types of change at issue." Id at 3. In *Caterpillar, Inc.*, the employer changed its prescription drug program on separate occasions, without objection from the union, to require preauthorization for certain prescriptions, to limit quantities on prescriptions for certain drugs and to institute "step therapies" for certain drug families requiring that over-the-counter medications be tried first. The Board found that the union's prior acquiescence to these changes did not establish a practice permitting the employer's implementation of the "generic first" requirement. Instead, the Board

found that the union's acquiescence to prior unilateral changes did not waive its right to bargain over future changes in such terms. Id.

Respondent's changes in the past were like *Caterpillar, Inc.*, a series of disparate changes. Respondent changes included changes to the health care options, the substitution of new carriers, increases in premiums, and changes in co-pays. There was no "thread of similarities running through and linking" these numerous changes. Id.

In sum, the Judge erred in failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the unit employees' health insurance plan on July 1, 2009 and July 1, 2010. The Union was not aware of previous unilateral changes made by Respondent and therefore never acquiesced to those earlier changes. Further, regardless of whether the Union was aware of those prior unilateral changes, there is no binding past practice permitting Respondent to implement unilateral changes in health insurance benefits and the Union did not waive its right to bargain over those changes.

The Judge erred in failing to find Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with the Union over the terms and conditions of employment of the Capital Hall employees. The Judge erred by considering pre-certification discussions to conclude the parties reached impasse.

The voting group of Capital Hall employees had voted in an NLRB election on January 5, 2010, selecting to be represented by the Union as part of the existing unit. The Regional Director issued a Certification of Representation on January 13, 2010, and on March 16, 2010, substituted a Certification of Results of Election, adding the Capital Hall employees to the existing Unit. After the election, the Union made several requests to bargain with Respondent over the Capitol Hall employees. On April 13, 2010, the parties met for the first and only time to discuss the Capital Hall employees. The Union made wage, pension and health care proposals. Respondent did not respond to the proposals or refused the Union's requests and made no counter proposals. Respondent took the position that the existing collective

bargaining agreement should be applied to the new employees and refused to bargain further and stated that the parties were at impasse.

Respondent offered vague testimony at trial that prior to filing the Petition with the NLRB, in October 2009, the parties discussed Respondent voluntarily recognizing the Capital Hall employees. During the course of these discussions, the parties discussed possible terms that could be applied to this group of employees if Respondent recognized the Union as their representative. Respondent did not voluntarily recognize the Union and it filed the Petition with the NLRB. In finding that Respondent appropriately declared an impasse after one short meeting, the Judge stated, "It seems to me that the General Counsel's argument boils down to the fact that there having been only one bargaining session after the Certification of Results, the employer was not entitled to declare an impasse. In this respect, the General Counsel, I think wants to start the clock on bargaining on the date of the Board's Certification of Results (March 16, 2010), and to forget about what happened before." (ALJD p. 17, line 10-14). The Judge went on to state that he would agree with the General Counsel if the April 13th meeting had been the only discussion over the terms for the new voting group.

The Judge erred in considering the October 2009 discussions when reaching his conclusion that the parties were at impasse. Initially it should be noted that Respondent offered only vague and conclusory testimony about the discussions with the Union when the parties were discussing Respondent voluntarily recognizing the Union. Further, the duty to bargain obligation arises at the time of the election. See *Livingston Pipe & Tube* 303 NLRB 873, 879 (1991). Any discussions prior to the election are not relevant. After the Certification, Respondent only met with the Union for a short period on April 13, 2010 and declared an impasse. Respondent clearly failed to bargain in good faith.

Further, Respondent delayed in meeting with the Union to negotiate over the terms and conditions of employment of the Capital Hall employees after the Union sought bargaining. When the parties finally met on April 13, 2010, Respondent refused to consider any of the

Union's proposals, stayed for a short period of time and refused to meet again. Respondent acted unlawfully by offering the Union only one option; apply the existing collective bargaining agreement to the new group of employees.

It should be noted that the Capital Hall employees voted in a self determination *Armour-Globe* election and Respondent has an obligation to bargain with the Union over this new group and not merely insist that the existing contract be applied to the new group. "An *Armour-Globe* self determination election permits employees sharing a community of interest with an already represented unit of employees to vote on whether to join the existing unit." *UMass Memorial Medical Center*, 349 NLRB 369 (2007). Where a new group of employees are added to an existing unit during the term of the existing unit's contract, the newly added group is not automatically included in the agreement covering the existing unit. See *Wells Fargo Armored Service Corp.*, 300 NLRB 1104 (1990), (newly added employees not covered by existing contract). Following a self determination election, an employer must bargain as to the appropriate contractual terms to be applied to the unit's new group of employees. *Federal Mogul Corp.*, 209 NLRB 343 (1974). In *Federal Mogul* the Board held that "We do not perceive either legal or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them.." Id at 344. The employer must maintain the existing collective bargaining agreement covering the historical bargaining unit while the parties negotiate interim contractual terms to be applied to the newly added employees. Id at 343-344. It is not until the existing collective bargaining agreement expires that the parties are obligated to bargain over a single agreement covering the enlarged unit. Ibid.

Respondent's conduct with respect to the negotiations with the Union over the Capital Hall employees is clearly unlawful. Respondent delayed in meeting with the Union and refused to discuss or consider the Union's proposals when it met with the Union. Respondent's position

that the Union's only choice was to have Respondent apply the existing collective bargaining agreement to the Capital Hall employees is a clear violation of the Act.

V. CONCLUSION

It is respectfully submitted that the evidence and case law establish that the Judge erred in dismissing the Consolidated Complaint and Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its health insurance plan on July 1, 2009 and July 1, 2010 without affording the Union an opportunity to bargain with Respondent with respect to this conduct. Respondent also violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union regarding the Capital Hall employees.

Based on the foregoing, it is respectfully requested that the Board issue an order requiring Respondent to cease and desist from engaging the alleged unlawful conduct, restore status quo in the unit employees health care and make employees whole for any loss caused by Respondent's unlawful conduct and bargain with the Union as the exclusive collective bargaining representative of the Capital Hall employees. Accordingly, Counsel for the General Counsel requests that the Board find such violations as alleged in the Consolidated Complaint, and as set forth herein, and that an appropriate remedial order be issued.

Dated at Brooklyn, New York, September 29, 2011.

Respectfully submitted,

James P. Kearns
Counsel for the Acting General Counsel
National Labor Relations Board
Two Metrotech Center, 5th Floor
Brooklyn, New York 11201