

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

Advice Memorandum

DATE: September 29, 2009

TO : Joseph Barker, Regional Director
Region 13

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

SUBJECT: Chicago Tribune Company 530-6001-5017-5000
Case 13-CA-45275 530-8049
530-8054-1000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act by unilaterally changing health insurance providers prior to the expiration of the parties' collective-bargaining agreement, and/or by unilaterally implementing new health insurance policy terms after the expiration of the parties' agreement. We agree with the Region that the Employer lawfully changed health insurance providers prior to the expiration of the parties' collective-bargaining agreement, and that the Employer violated Section 8(a)(5) by unilaterally implementing new health insurance terms after the expiration of the parties' agreement.

FACTS

Progressive Lodge No. 126, International Association of Machinists (the Union) has long represented a unit of machinist employees of the Chicago Tribune Company (the Employer). The parties' most recent collective-bargaining agreement was set to expire on September 30, 2008,¹ but the parties agreed to extend it through October 31. That agreement states:

The Company has the unilateral right to change, alter, amend, or discontinue health and welfare programs. Selected HMO's offered to employees will be determined by the Company.

On October 10, the Employer sent all employees an e-mail which stated:

Beginning January 1, 2009, all of Tribune's health and wellness benefits will be offered exclusively through United Healthcare (UHC).

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¹ All dates hereinafter are in 2008, unless otherwise noted.

Finally, benefits for union-represented employees are subject to collective bargaining and may be different from what is described in this email; contact your local human resources department for details about union-represented benefits.

Attached to the e-mail was a UHC benefits summary, which set forth the basic terms of a non-HMO health insurance plan. At that time, unit employees were covered by Blue Cross/Blue Shield and CIGNA HMO plans.

At a negotiation session on October 13, the Employer gave the Union a nearly identical copy of the October 10 e-mail, and explained that, as of January 1, 2009, all employees would have UHC non-HMO health insurance plans.² On October 13 and 22, the Union asked for information about past and proposed health insurance plans, including whether or not Union-represented employees would be eligible for long-term disability and flexible spending accounts. The Employer responded that such benefits could be considered as part of an overall tentative agreement on a new contract.

On October 23, the Union sent a letter to the Employer that stated:

The Union objects to any unilateral changes in current coverage or premium payments, and looks forward to negotiating these important issues.

On October 31, the parties had a bargaining session at which the Employer further explained the switch to UHC and provided additional information as to the Employer's proposed non-HMO health insurance plan. In response to the Union's proposal to keep the plan design of the then-current Blue Cross/Blue Shield and CIGNA HMO plans, the Employer agreed to maintain a UHC-provided "shell HMO" through the current negotiations, but stated that it did not want any HMO plans in the new collective-bargaining agreement, whether provided by UHC or not. The Employer did not announce new terms of the UHC "shell HMO" plan, nor did the parties discuss them. There is no evidence that the Employer took any action to contract for, or otherwise decided upon the terms of, the "shell HMO" plan that day, the last day of the parties' contract extension.

² The only exceptions to the UHC-provided health insurance consolidation were union-administered plans, which did not include the Machinists' bargaining unit employees.

On November 2, the Union sent a letter to the Employer confirming that there had been no further extension of the collective-bargaining agreement and objecting to health care changes:

Any contractual waivers by the Union of its right to bargain about changes to mandatory subjects -- including, but not limited to, changes which might otherwise have been permitted under the contractual management rights clause and the health and welfare clause -- are no longer in effect.

In particular, the Union objects to any changes to any terms and conditions of the health and welfare benefit plans in which bargaining unit employees participate, and demands to bargain about any such changes.

On January 1, 2009, the Employer implemented its proposed UHC non-HMO health insurance for non-unit employees and the UHC "HMO shell" for unit employees, ostensibly on a temporary basis. The UHC "HMO shell" has different terms than unit employees' prior Blue Cross/Blue Shield and CIGNA HMO plans, including higher out-of-pocket payments.

On May 1, 2009, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(5) of the Act by unilaterally changing the terms of unit employees' health insurance coverage on January 1, 2009. The Employer has historically changed health insurance providers and policy terms when the parties were operating under collective-bargaining agreements which contained the waiver language set forth above. The Region's investigation has adduced no evidence that the Employer ever made any such changes in health insurance when no collective-bargaining agreement was in effect.³ Negotiations for a successor contract are ongoing, and neither party asserts that impasse was reached.

³ The Employer initially argued that, on several occasions in the past, it unilaterally changed health insurance terms at times when no collective-bargaining agreement was in effect. However, in each of the cited instances, the parties had extended their collective-bargaining agreement so that an agreement containing a Union waiver of its bargaining rights over such changes was in effect. The Employer now argues that a past practice was established regardless of whether prior changes occurred during the term of an effective collective-bargaining agreement.

ACTION

We agree with the Region that the Employer lawfully changed health insurance providers prior to the expiration of the parties' collective-bargaining agreement, and that the Employer violated Section 8(a)(5) by unilaterally implementing new health insurance terms after the expiration of the parties' agreement.

An employer violates Section 8(a)(5) when it makes a unilateral change in unit employees' terms and conditions of employment without first giving the union notice and an opportunity to bargain over the change.⁴ It is well established that health insurance and medical benefits are mandatory subjects of bargaining.⁵ Thus, an employer violates Section 8(a)(5) when it unilaterally changes its health insurance carrier or plan without bargaining to agreement or impasse with the union, unless privileged to do so by a union waiver of bargaining rights.⁶ A union's waiver of bargaining rights must be "clear and unmistakable"⁷ and does not outlive the collective-bargaining agreement that contains it, absent evidence that the parties' intended it to do so.⁸

In cases where there is no clear and unmistakable waiver of the union's bargaining rights, or where a

⁴ See NLRB v. Katz, 369 U.S. 736, 742-743 (1961).

⁵ See, e.g., Mid-Continent Concrete, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); United Hospital Medical Center, 317 NLRB 1279, 1281 (1995).

⁶ Long Island Head Start Child Development Services, 345 NLRB 973, 973 (2005), enf. denied on other grounds 460 F.3d 254 (2d Cir. 2006), on remand 354 NLRB No. 82 (September 25, 2009).

⁷ See, e.g., Provena St. Joseph Medical Hospital, 350 NLRB 808, 810-813 (2007).

⁸ See, e.g., Register-Guard, 339 NLRB 353, 355 (2003) ("contractual reservation of managerial discretion, like the provision relied on by the Respondent, does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive"); Long Island Head Start Child Development Services, 345 NLRB at 973 ("[a] contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of the parties' contrary intentions").

contractual waiver has expired, an employer may nonetheless be able to demonstrate that the parties have established a longstanding past practice that permits the Employer to lawfully change a mandatory subject of bargaining, including health insurance terms.⁹ The Board finds that a unilateral change made pursuant to such a past practice is not a violation of Section 8(a)(5) as it is essentially a continuation of the status quo.¹⁰

Thus, in Courier-Journal, successive collective-bargaining agreements stated that health insurance plans, including any changes to benefits or premiums, would be provided to represented employees on the same basis as nonrepresented employees. The employer regularly made changes under successive contracts and during hiatus periods between contracts with the acquiescence of the union.¹¹ After the expiration of the most recent agreement, the union objected to new unilateral changes, even though the changes were the same for represented and unrepresented employees and were consistent with the type of changes the employer had regularly made in the past. The Board majority held that the changes were lawful, even though there was no longer any contractual waiver in effect, as the changes were "implemented pursuant to a well-established past practice" demonstrated by the prior changes the employer had made, including during hiatus periods between contracts.¹²

In contrast, a past practice is not established when the relevant past "unilateral changes" have been made only during the life of a contract. For example, in Register-Guard,¹³ the Board rejected an employer's past practice defense where the employer made changes after the parties' contract had expired. The employer asserted that it had previously made similar changes without objection from the union and that its action was a continuation of a past practice.¹⁴ The Board noted, however, that the relied-upon

⁹ Courier-Journal, 342 NLRB 1093, 1093-1095 (2004). The Board reaffirmed this position in a companion case, Courier-Journal, 342 NLRB 1148, 1148 (2004).

¹⁰ Courier-Journal, 342 NLRB at 1094, citing NLRB v. Katz, 369 U.S. at 746.

¹¹ Courier-Journal, 342 NLRB at 1094.

¹² Id.

¹³ Register-Guard, 339 NLRB at 356.

¹⁴ Id. at 355.

contractual provision was a contractual reservation of managerial discretion and, therefore, that the provision did not survive expiration of the contract, in the absence of evidence that the parties intended it to survive.¹⁵ The Board further noted that all but one of the other changes had occurred during the life of the contract and that the union's acquiescence in that one change did not waive its right to bargain over the new changes.¹⁶

In the instant case, the parties' collective-bargaining agreement contained language that clearly and unmistakably waived the Union's bargaining rights during the term of the agreement, giving the Employer "the unilateral right to change, alter, amend, or discontinue health and welfare programs." Under this language, the Employer has regularly changed health insurance providers and policy terms during the term of past collective-bargaining agreements. Thus, on October 13 (during the term of the parties' contract extension), when the Employer clearly and unequivocally informed the Union of its decision to switch all employees to UHC health insurance plans, the Employer was acting consistently with the language of the parties' agreement privileging the Employer to unilaterally change health programs during the term of the agreement. The Employer indicated that the decision to switch was final and, on January 1, 2009, the Employer switched employees to UHC plans as announced. Therefore, as the Employer acted pursuant to the Union's clear and unmistakable waiver of bargaining rights when it changed health insurance providers to UHC, we agree with the Region that the Employer lawfully made this change.¹⁷

¹⁵ Id., citing Ironton Publications, 321 NLRB at 1048; Blue Circle Cement Co., 319 NLRB 954, 954 (1995), enf. granted in part, denied in part on other grounds 106 F.3d 413 (10th Cir. 1997).

¹⁶ 339 NLRB at 355-356 ("[n]or does this one instance establish a past practice of unilaterally implementing [changes] after the contract expired").

¹⁷ In any case, given the Employer's clear and unequivocal announcement of this change on October 13, the Union's May 1, 2009, charge would appear to be untimely as to this allegation. See, e.g., Allied Production Workers Local 12 (Northern Engraving Corp.), 331 NLRB 1, 2 (2000), reaffirmed 337 NLRB 16, 17-18 (2001) (10(b) period commences when a party has clear and unequivocal notice of a violation of the Act).

Unlike the change in the identity of the health insurance provider, however, the Employer never announced the terms of the unit employees' health insurance prior to the expiration of the parties' contract extension. Thus, in its initial discussions with the Union, the Employer proposed to cover the unit employees under the UHC non-HMO plan. When the Union proposed to keep the plan design of the then-current Blue Cross/Blue Shield and CIGNA HMO plans, the Employer agreed to maintain a UHC-provided "shell HMO" on a temporary basis. However, it did not set forth the policy terms of the UHC "shell HMO" plan, the parties never discussed policy terms, and there is no evidence that the Employer took any action to contract for, or otherwise finalize the terms of, the UHC "shell HMO" plan before the collective-bargaining agreement expired. Indeed, the Employer never set forth UHC "HMO shell" plan terms before its unilateral implementation on January 1, 2009, with different terms than unit employees' prior Blue Cross/Blue Shield and CIGNA HMO plans, including higher out-of-pocket payments. Because these changes in the plan's terms apparently occurred after contract expiration,¹⁸ and no evidence indicates that the Employer and the Union intended the contractual waiver to be effective beyond the term of the extended contract, the Employer's January 1, 2009, changes in plan terms were not covered by the Union's contractual waiver of bargaining rights. That waiver had expired on October 31 along with the rest of the parties' collective-bargaining agreement.

The Employer also failed to establish a past practice privileging it to make unilateral changes in the plan's terms because none of the Employer's prior changes occurred during a contract hiatus period. All of the Employer's past changes were made during the term of a collective-bargaining agreement or extension that contained a waiver of the Union's right to bargain about the changes. Therefore, as in Register-Guard, the Employer's right to make past unilateral changes was based on a contractual waiver of bargaining rights, not past practice,¹⁹ and the

¹⁸ [FOIA Exemption 5

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¹⁹ Thus, the instant case is also distinguishable from Shell Oil Co., 149 NLRB 283 (1964). In Shell Oil, the Board found a post-contractual unilateral right to subcontract based on a "past practice" of subcontracting during the

Union's waiver did not survive the expiration of the contract. In contrast to Courier-Journal, in which prior changes were made during both contract periods and contract hiatuses, the Employer's unilateral changes made only during the life of the contract do not establish a past practice permitting it to make unilateral changes after the contract expired. Therefore, we agree with the Region that the Employer's post-contract-expiration unilateral changes violated Section 8(a)(5).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act by unilaterally implementing new health insurance terms on January 1, 2009. We agree with the Region that the Employer lawfully changed health insurance providers prior to the expiration of the parties' collective-bargaining agreement.

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term of the collective-bargaining agreement; however, the employer's right to subcontract was not based on a collective-bargaining agreement clause allowing subcontracting. Here, on the other hand, the Employer's right to unilaterally change health plans was pursuant to a collective-bargaining agreement clause in which the Union waived its right to bargain.