UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

SUTTER EAST BAY HOSPITALS d/b/a
SUTTER DELTA MEDICAL CENTER

and Case 20–CA–093609

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED

Jason Wong, for the Acting General Counsel.

Thomas J. Dowdalls, Walnut Creek, California
Rob Hulteng, San Francisco, California
(Littler Mendelson PC), for the Respondent.

Brendan White, Oakland, California,
for the Charging Party Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on May 6 and 7, 2013. On November 19, 2012, California Nurses Association/National Nurses United (the Union) filed the charge in Case 20–CA–093609 alleging that Sutter East Bay Hospitals d/b/a Sutter Delta Medical Center (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On December 11, 2012, the Union filed an amended charge against Respondent. On January 31, 2013, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent Corporation, with an office and principal place of business in Northern California, has been engaged in the operation of an acute care hospital. In the calendar year ending December 31, 2012, Respondent, in conducting its business operations, derived gross revenues in excess of $250,000. Further, Respondent received goods and services valued in excess of $5000 directly from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates an acute care hospital in Northern California. The Union represents a bargaining unit of registered nurses at the hospital. The Respondent and the Union have been party to a series of collective-bargaining agreements, the most recent of which was effective by its terms from September 5, 2008 to August 31, 2011. Bargaining for a successor bargaining agreement began on August 4, 2011. After months of bargaining, Respondent declared impasse and implemented various proposals contained in its last best and final offer. The complaint alleges that Respondent failed and refused to furnish the Union with information relevant to bargaining and therefore, that no legal impasse existed. Thus, the complaint alleges a refusal to bargain in not providing relevant information and unilaterally imposing terms and conditions of employment.

On August 4, 2011, the parties met to begin bargaining for a successor bargaining agreement. At this session Respondent's chief negotiator, Tom Dowdalls, introduced Sutter East Bay Regional Vice President of Human Resources Mark Beiting. Beiting gave a power point presentation to explain the impact of healthcare reform on Respondent and how Respondent's proposals were going to be tailored to that impact. Respondent provided the Union with a paper copy of its power point presentation entitled, "Bargaining for the Future." Beiting stated that negotiations would be different because of the impact of the healthcare reform and that Respondent's proposals would be based on that impact. Beiting said that healthcare reform was going to significantly decrease Respondent's revenue and that Respondent had to react to sustain its revenue stream. Beiting also said that Respondent had to cut its costs to stay viable in the future which was going to be impacted by healthcare reform.

Respondent's presentation included a page entitled, "Our Proposals" which listed three areas of vital concern for Respondent. The third item of concern was "Providing care at Medicare Rates." The presentation stated that the purpose of the power point presentation was, "We want to share the developments in health care that are driving our proposals." Beiting stated that Respondent needed to be able to provide care at the rate it would be reimbursed by Medicare because health care reform was going to significantly decrease its revenue.

While Beiting stressed that Respondent's revenue would decline sharply, it was also clear that there were a number of unknowns. Beiting referred to "The Unknowns" and said that based on McKinsey and company estimates, employers would shift 50 percent of their staff into the healthcare exchanges. Beiting stated that according to the Massachusetts Healthcare Reform experience, exchange insurance premiums were about 50 percent lower than the pre-reform insurance premiums and that hospitals were paid less by these plans.

Prior to its beginning to bargain with the Union, Respondent issued to its nurses a newsletter entitled, "Negotiations to begin with the California Nurses Association." In this letter, Respondent stated, "Both government and consumers are seeking health care at much lower rates. Health care reform will drastically reduce what we are reimbursed from the government for delivering health care to patients with Medicare and other government sponsored and low paying health plans. We need to take steps now that will allow us to deliver care at these payment rates." On August 5, 2011, Respondent issued a letter to its nurses stating how the nurses could obtain a copy of Respondent's power point presentation.

The parties next met on August 22, 2011, for purposes of bargaining. Respondent proposed raising the minimum number of hours a nurse needed to work per week to be classified as regular part-time from 20 hours per week to 30 hours per week. Further, Respondent redefined per diem nurses from those that worked less than 20 hours per week to those that worked less than 30 hours per week. The significance of the proposal was that regular part-time nurses received fringe benefits, while per diem nurses did not receive benefits. Second, Respondent proposed decreasing the amount of education leave nurses received from 5 days to only 1 day. This was significant because nurses used paid education leave to earn continuing education credits, which are necessary for nurses to maintain their certifications.

On August 31, 2011, Respondent offered to agree to a contract extension to allow the parties to continue their negotiations under the terms and conditions of the expired contract. The Union after a week refused this offer.

At the third bargaining session on September 13, 2011, Respondent sought concessions in eight major categories. Respondent sought to reduce the per diem incentive paid to per diem nurses in lieu of benefits. Respondent also sought to reduce the standby/callback pay received by nurses for being on standby duty. Respondent sought to place a cap on accrued paid time off. Respondent also sought to eliminate the extended sick leave program and replace it with a short term disability program. Respondent also sought to reduce its share of employee health insurance premiums. Further, Respondent sought to reduce the number of hours between a nurse's shift and her next shift. Respondent sought to eliminate the "Four for Five" work schedule which allowed some nurses to work for 36 hours and get paid for 40 hours of work per week. Respondent further proposed adding provisions to its medical leave of absence program.

The Union notified Respondent that it intended to engage in a 1-day strike on September 22, 2011. On September 21, Kabba informed Dowdalls that the only way for Respondent to avoid the strike was to "withdraw all of its takeaways." Dowdalls rejected that proposal and the Union engaged in a 1-day strike on September 22.

At the session of January 18, 2012, Respondent made its first wage proposal which would reduce nurse s' wage compensation, including a wage freeze through October 2013. The Union took the position that it could not respond to Respondent's proposals without further information.

On October 11, 2011, Khadijatu Kabba, the Union's chief negotiator made an oral request of information concerning the projected cost savings associated with Respondent's "takeaway proposals." Respondent provided this information at the parties' December 14, 2011 bargaining session.

When Respondent made its wage proposal on January 18, 2012, Kabba made another oral information request pertaining to the projected cost savings associated with their wage proposal. In February 2012, the Union received that information.

In January 2012, Sutter Health affiliate Sutter Santa Rosa reached a tentative agreement with the Union on a contract which did not contain the concessions proposed to the Union at Respondent's hospital. Further, the Union believed that healthcare reform would result in an increase in patients and that Respondent's revenue would increase not decrease as a result of healthcare reform.

In light of Respondent's power point presentation and Respondent's seeking of concessions at three bargaining sessions, Kabba made an oral information request on February 27, 201, requesting information pertaining to the effects of healthcare reform on Respondent. On February 29, 2012, Kabba sent an email to Thomas Dowdalls, Respondent's chief negotiator, requesting a great deal of information regarding the effects of healthcare reform on Respondent's hospital. On March 13, Respondent provided a six-page response that did not meet the Union's request.

On April 24, 2012, Kabba sent a written request for information to Dowdalls:

1. All documents relied upon by McKinsey & Company in preparation of the estimates set forth in Attachment A to your letter to me dated March 13, 2012, as well as a complete copy of any and all reports McKinsey & Company produced relating to projected changes in payer sources as a result of the ACA and a complete explanation of the "proprietary methodology" used by McKinsey & Company in arriving at those estimates. Please also explain what constitutes the "full medical center and not individual campuses," as referred to numbered paragraph one of your March 13 letter. (Please be advised that CAN is willing to sign confidentiality agreement that extends to both the employer and McKinsey & Company governing handling and use of the information requested to the extent a complete response to this request requires the production of any information revealing "proprietary methodology[ies]" used to arrive at the projected changes in payer sources.)
2. With respect to Attachment B to your letter to me dated March 13, 2012 relating to the methodology used to develop changes for the active charge master for SDMC, please provide an explanation why pricing is set at SDMC by considering "prices for similar services or items within departments at Alta Bates Summit Medical Center" in particular, and which "other providers in the market place" were used as sources of data for determining prices for

services identified on the charge master. Please also indicate what specific criteria influenced the choice of "other providers" used in this price setting.

3. Please provide a complete explanation with relevant documentation of how "gross charges" as referred to in Attachment D to your letter to me dated March 13. 2012 in reference to "charity care" and "bad debt" expenses compare to actual charges collected by SDMC from patients (and/or their insurance carriers) who pay for services.
4. Please provide all information currently existing on anticipated changes to the payer mix that will result at SDMC if the ACA is upheld by the Supreme Court.
5. Please identify all reduction in wages, benefits, and working conditions that have been imposed on registered nurses employed at Sutter Health facilities at which the nurses are not represented by CAN in anticipation of reductions in revenue that will result from implementation of the ACA, identifying such reduction by facility name and category of compensation and/or working condition.
6. Please identify all planned reductions in wages, benefits and working conditions that Sutter Health intends to impose in the future in response to anticipated reductions in revenue that will result if the pending health care reform provisions of the ACA are implemented on registered nurses employed at its facilities at which the nurses are not represented by CAN. To the extent these intended reductions in terms and conditions of employment vary among facilities, please be specific about which changes are planned for each unrepresented facility. Please also provide any documents that exist describing the planned changes.
7. Please provide any and all documentation that exists that substantiate Mr. Fry's claim that "some patients tell us they can't afford to receive care from our doctors and hospitals.
8. Please indicate what plans Sutter Health has for "reduc[ing] costs to make our services as affordable as possible," as Mr. Fry indicates must be done. Please provide any and all documents relating to analysis of the current cost of services, plans, or proposals that have been or are being developed for reducing the amounts that patients and other payers will be billed for services and the dates by which it is anticipated those costs will be implemented.
9. Please provide documentation substantiating Mr. Fry's statement that "Sutter Health also invested $400 million to keep our pension plan full-funded – helping to ensure a secure retirement for employees," along with documentation showing exactly where those funds were invested and the job titles of all participants whose retirement security was affected by that in vestment

On April 25, 2012 Respondent presented its last, best and final contract offer to the Union. Kabba informed Respondent that it needed to respond to her information request of April 24. Dowdalls asked the Union to justify its request for information. Kabba answered "we are entitled to this information."On April 30, Kabba sent a letter to Dowdalls reiterating her April 24 information request and stating the relevance of the information. Dowdalls replied on May 2, stating that requested information was not relevant on its face.

On May 21, Kabba again reiterated her April 24 information request and stated that Respondent's refusal to furnish the information was an impediment to bargaining. Dowdalls did not respond to this letter and did not furnish the requested information.

At the August 14, 2012 bargaining session, Dowdalls declared impasse. Dowdalls stated that the Union's refusal to respond to the last best and final offer would be deemed a rejection of that offer. Kabba stated that the parties were not at impasse because Respondent had not provided the requested information. She asserted that the Union needed the information to properly evaluate and respond to Respondent's proposals. Dowdalls repeated Respondent's position that the information was not relevant.

Respondent sent letters to the Union on August 20, September 18 and 28, stating that the parties were at impasse and that it was going to implement many of its proposals contained in the last, best and final offer on September 30.

The Union responded on September 20, again stating that no impasse existed because Respondent had not provided the requested information. Respondent did not provide the requested information and on September 30, 2012, it implemented certain of its proposals including a reduction in per diem pay, callback pay, and Respondent's share of health care premiums.

Respondent's Defense

Respondent contends that the parties were at impasse on April 25, 2012, when it made its last, best, and final offer. It contends that the information requested by the Union was not relevant for collective bargaining. It contends that it never stated during bargaining that its proposals were based on healthcare reform. Respondent thus contends that its implementation of proposals contained in its last best and final offer was lawful.

III. ANALYSIS AND CONCLUSIONS

A. The Refusal to Furnish Information

The general rule is that an employer has a statutory obligation to supply requested relevant information which is reasonably necessary to the exclusive bargaining representative's performance of its responsibilities. *Boise Cascade Corp.,* 279 NLRB 429 (1986).

It is well established that a union is entitled to whatever information is relevant and necessary to its representation of the bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967); *SBC Midwest,* 346 NLRB 62, 64 (2005). In *Detroit Newspaper Agency,*317 NLRB 1071, 1072 (1995) , citing *General Electric,* 290 NLRB 1138, at 1147, the Board held that "Once a union has made a good faith request for information, the Employer must provide relevant information promptly, in useful form."

Where the information concerns matters outside the bargaining unit, the union bears the burden of showing the potential relevance of the requested information. *National Grid USA*

Serv. Co., 346 NLRB 1235, 1242–1243 (2006); *Dodger Theatricals Holdings, Inc.,* 347 NLRB 953, 967 (2006). The standard for relevancy is a liberal discovery-type standard. *Pennsylvania Power & Light Co.,* 301 NLRB 1104, 1104–1105 (1991) (citing *NLRB v. Acme Industrial Co.,* supra*)*. The information need not be dispositive of the issue between the parties but must merely have some bearing on it. *Pennsylvania Power & Light Co.,* supra at 1105. The requester need show only a potential or probable relevance to give rise to an employer's obligation to provide information. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, at 437 (1967); Shopper's *Food Warehouse Corp.,* 315 NLRB 258, 259 (1994)

An employer's statements and bargaining proposals can make nonunit information relevant in negotiations. *Caldwell MFg. Co.,* 346 NLRB 1159 (2006). In *Caldwell* the union requested information in response to an employer's claim that the union must accept the employer's proposals because of the employer's goal to be more competitive within the industry and that the other plants were more competitive than the union-represented facility. The Board held that the union was entitled to the information requested about those plants to test the accuracy of the employer's claims and to enable it to respond with counterproposals.

In *KLB Industries, Inc. d/b/a National Extrusion & Mfg. Co.,* 357 NLRB No. 8 (2011) a union made an information request pertaining to the employer's position during negotiations that certain bargaining concessions were necessary to improve the competiveness of the facility. The Board held that the union was entitled to this information because in the course of bargaining, the employer made the information relevant and created the obligation to provide the requested information.

In the instant case, Respondent made a presentation at the first bargaining session in which it stated that healthcare reform was going to affect its business and that it had to bargain and make proposals accordingly. Respondent argued that healthcare reform would drastically reduce reimbursements from the Government and that it needed to take steps to deliver healthcare at reduced payment rates. Respondent made the same point in a letter to the nurses. Thereafter, Respondent proposed numerous takeaways or concessions from the prior bargaining agreement. While Respondent never stated at the bargaining sessions that its proposals were based on healthcare reform, it never withdrew its initial position that healthcare reform required drastic reductions in costs. Accordingly, I find that Respondent's bargaining placed in issue the affects of healthcare reform and that Respondent was, therefore, obligated to furnish the Union with the requested information.

The Question of Impasse

The general rule is that when parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home,* 335 NLRB 96 (2001), *citing Bottom Line Enterprises*, 302 NLRB 373 (1991).

The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion . . . would be fruitful." *Saint-Gobain Abrasives, Inc.,* 343 NLRB 542 556 (2004).

The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967).

A party's refusal to furnish information on relevant issues precludes a finding of a good-faith impasse because it prevents full exploration of significant issues. *E. I. du Pont de Nemours & Co.,* 346 NLRB 553, 558 (2006), enfd. 489 F.3d 1310 (D.C. Cir. 2007). The Board has held that a union cannot engage in bargaining over major concessions sought by the employer if the employer does not provide it with relevant information necessary for the union to evaluate the proposed concessions or formulate informed counterproposals. . *E. I. du Pont de Nemours & Co.,* supra; *Stella D'Oro Biscuit Co.,* 355 NLRB 769 (2010).

Accordingly, I find that no valid impasse existed when the Respondent declared impasse and that no valid impasse existed when Respondent unilaterally imposed terms and conditions from its last, best and final offer. I therefore, find that Respondent violated Section 8(a)(5) and (1) when it unilaterally imposed certain terms and conditions of employment from its last best and final offer.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing terms and conditions of employment on September 30, 2012.

4. Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with information relevant for collective bargaining.

5. Respondent's conduct above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Accordingly, I shall order Respondent to rescind the waiver and release forms signed by bargaining unit employees. Respondent will be ordered to rescind its unilateral changes and ordered to make whole employees for any losses they have suffered as a result of the unilateral changes plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[1]

ORDER

The Respondent, Sutter East Bay Hospitals, d/b/a Sutter Delta Medical Center, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to bargain collectively by unilaterally implementing terms and conditions of employment on September 30, 2012.

(b) Refusing to furnish the Union with information relevant for purposes of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All Nurses covered by the collective-bargaining agreement between Respondent and the Union effective from September 5, 2008, through August 31, 2011.

(b) On request by the Union, rescind any unilateral changes it has implemented in its employees' terms and conditions of employment.

(c) On request by the Union, make whole all bargaining unit employees for the losses they suffered as a result of Respondent's unilateral changes, plus interest. [2]

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[1] 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.

[2] Respondent shall reimburse any backpay recipient for amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination, See *Latino Express,* 359 NLRB No. 44 (2012)

(d) Within 14 days after service by the Region, post at its facility in Northern, California copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2012.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 20, a sworn certification of a responsible official on a form provided by Region 20 attesting to the steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. July 23, 2013

_____
Jay R. Pollack
Administrative Law Judge

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively by unilaterally implementing terms of our last offer to the Union.

WE WILL NOT refuse to furnish the Union with information relevant for purposes of collective bargaining.

WE WILL NOT In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All Nurses covered by the collective-bargaining agreement between Respondent and the Union effective from September 5, 2008, through August 31, 2011.

WE WILL on request by the Union, rescind any unilateral changes we have implemented in our employees' terms and conditions of employment.

WE WILL make whole all bargaining unit employees for the losses they suffered as a result of our unilateral changes, plus interest.

Sutter East Bay Hospitals d/b/a Sutter Delta Medical Center
(Employer)

Dated: _____ By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5183.