

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**CHEMICAL SOLVENTS, INC. AND  
TURN-TO TRANSPORT, LLC,  
SINGLE EMPLOYERS/ALTER EGOS**

**and**

**CASES 8-CA-39218  
8-CA-39277  
8-CA-39300  
8-CA-39335  
8-CA-39362  
8-CA-39412  
8-CA-61979**

**TEAMSTERS LOCAL UNION 507 A/W  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF  
ADMINISTRATIVE LAW JUDGE IRA SANDRON**

Administrative Law Judge Ira Sandron,<sup>1</sup> issued his decision in this matter on May 15, 2012.<sup>2</sup> The Respondent filed Exceptions and Brief in Support of Exceptions on July 5, 2012. Counsel for the Acting General Counsel respectfully submits this Answering Brief pursuant to Section 102.46(d) of the Board's Rules and Regulations.<sup>3</sup>

Respondent's Exceptions generally address two areas where ALJ Sandron properly concluded that the Respondent violated the Act. The Respondent first excepts to

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<sup>1</sup> Judge Sandron will be referred to as "the ALJ".

<sup>2</sup> JD, 23-12

<sup>3</sup> In this Answering Brief, "ALJD" shall refer to the pages and lines in the ALJ's Decision. "Tr" and the numbers in this Answering Brief shall refer to page numbers in the official transcript of the proceedings; "GC Exh." shall refer to Counsel for the General Counsel's exhibits, "R Exh." shall refer to Respondent's Exhibits, and "Jt. Exh." shall refer to Joint Exhibits.

ALJ Sandron's findings and conclusions that Respondent unilaterally changed its health insurance benefits without affording the Union adequate prior notice and an opportunity to bargain. (ALJD p. 46, lines 38-40). Second, Respondent excepts to the ALJ's findings and conclusions that Respondent, by supervisor John Mitchell threatened a group of production employees with layoffs and/or discharge if they filed grievances. (ALJD p. 33, lines 44-46). Counsel for the Acting General Counsel maintains that Respondent's Exceptions are without merit.

**I. RESPONDENT'S EXCEPTION THAT IT DID NOT UNILATERALLY CHANGE ITS HEALTH INSURANCE WITHOUT AFFORDING THE UNION ADEQUATE PRIOR NOTICE AND AN OPPORTUNITY TO BARGAIN**

Contrary to the Respondent's assertion, the ALJ correctly concluded that the Respondent violated Section 8(a) (1) and (5) of the Act by unilaterally changing its health insurance benefits without providing the Union adequate notice and an opportunity to bargain over the issue. The ALJ's findings are based upon credible record evidence and established Board law.

In support of his decision that the Respondent's actions were unlawful, the ALJ properly noted that the sufficiency of notice regarding a change to a mandatory subject of bargaining, such as health insurance, must be examined in the context of when the employer made the decision to propose a change or had a reasonable expectation that it would do so. (ALJD p. 46, lines 25-26). In the instant case, the ALJ relied on documentary testimony to conclude that the Respondent, in March 2010, had notice from Kaiser of the coming health insurance changes but only gave the Union two weeks notice before implementing the changes. The documents do not support the ALJ on the exact date of the notice from Kaiser but they do establish that the Respondent had at least

several months notice before it notified the Union. Thus the Respondent may be correct to challenge the ALJ on the applicable date, but the Judge's reasoning still holds.

R. Exh. 100 is a summary of the events as recalled by the Respondent's insurance consultant, Paul Catania. In this letter to Colaluca, Catania writes that he, on behalf of the respondent, engaged in the process of exploring changes to the employee health insurance benefits "several months prior to the renewal date." He further notes that at that time, Kaiser informed the Respondent that the same coverage it currently had would cost an additional 26% in premiums. He then engaged in a negotiation process with Kaiser. Thus the document shows that the respondent was well aware of the coming increases in costs months before it told the Union.

In addition, the Respondent admits in the notice it finally gave to the Union (Jt. Exh. 2) that, "For the past month, CSI, with the aid of consultants, has been searching for alternatives that provided similar coverage with increases in premiums that were reasonable or within the 10% increase referenced in the collective bargaining agreement."<sup>4</sup> Since this notice was dated July 14, the Respondent had known for at least a month that an increase was coming. Colaluca's language further implies that the process of negotiating an insurance plan with the providers had been going on for some time prior to the previous month. This is further evidence that the respondent had plenty of advance notice of the increased insurance costs but waited until two weeks prior to the renewal date of its health insurance plan to notify the Union. (Jt. Exh. 2).

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<sup>4</sup> Colaluca's letter further suggests that the Respondent had been looking for a way to unilaterally impose a new plan by keeping the increase to less than the contractually mandated 10% increase. When it could not reach the 10% threshold, it, in effect, acted unilaterally by only giving two weeks to respond, a time insufficient to bargain such a major change. Given the short time frame imposed on the Union, the Respondent's intent all along was to act unilaterally.

Respondent failed to present a witness to testify on this issue. Joint Exhibit 2 clearly demonstrates that Respondent was informed by its health insurance provider that continued similar coverage would cost in excess of an additional 20% in premiums. It also shows that the Respondent had been searching for alternatives for at least a month. The notice of change was provided to the Union on July 14, 2010, and the renewal/effective date was August 1, 2010. Since Respondent had notice of the new premium costs for at least a month or longer prior to contacting the Union, it afforded the Union insufficient time to bargain and created what amounted to a *fait accompli*. (Jt. Exh. 2, pg. 1) Thus, while ALJ Sandron may have been incorrect about the date that the Respondent first learned that major premium increases were coming, he nevertheless accurately found, based on the record evidence, that the Respondent knew of the plan changes months before it gave notice to the Union.

The fact that notice was given two weeks prior to the change is undisputed, and a departure from its past practice. For example, in June 2008, the Respondent, by its Attorney Thomas Colaluca, notified Union Secretary Albert Mixon, almost two months prior to the renewal policy date that its health insurance carrier had proposed an increase that was outside of the contract terms and that the parties should negotiate a change as provided under the contract. (R. Exhs. 47, 48, 52) In 2008, the matter was resolved in a timely manner because the parties had adequate time to meet and bargain. Had the Employer taken similar action in 2010 as compared to 2008 the parties may have found a mutually agreeable solution.

The two week notice given in the instant case was inadequate given that the new plan was not comparable to the insurance benefits negotiated in 2009. A comparison of

the current health benefit plan for 2009 and the proposed 2010 plan discloses that employees were not required to pay any deductible in 2009, and paid an annual deductible in the 2010 of \$250.00/\$500.00 based on single or family coverage. (Jt. Exh. 17) Employees under the 2009 plan were not required to pay a co-insurance premium. Under the new plan employees had to pay 20%. (Jt. Exh. 17) Likewise, the new plan added and/or increased co-pays for services such as inpatient hospital services, surgical services, emergency services, urgent care, and costs related to generic and brand name prescription drugs. (Jt. Exh. 17) Additionally, there was an increase in annual out of pocket expenses for individual/family plans. (Jt. Exh. 17) Respondent also announced that it was eliminating the employees' dental plan unless the employees were willing to absorb the full dental plan costs. (Jt. Exh. 3) This number of significant changes made it even more critical that Respondent provide the Union as much notice as possible.

As noted above, the Respondent, by Attorney Colaluca, first informed Union Secretary Albert Mixon about the changes in the health plan in an email sent on July 14, 2010. The e-mail explicitly stated that the change would be effective August 1, 2010. Mixon responded to Respondent's e-mail regarding these changes on or shortly after July 16, 2010. (Tr. 592-593) Mixon stated that he held a short telephone discussion with Attorney Colaluca and/or Manager Jerry Schill regarding the changes in which he indicated that he wanted to meet and bargain on the subject. Mixon explained, however, that he and the Union's business agents were out of town for about a week attending a pre-scheduled engagement. (Tr. 592-593) As a result, he would not be able to meet until July 29, 2010.

On July 23 2010 and again on July 28, 2010, Respondent announced to its employees that they were required to select an option under the new health insurance plan by July 30, 2010 or their current benefit election would remain unchanged and subject to increased deductibles, co-pays, and other changes. (Jt. Exhs. 4, 5) The fact that employees were notified as early as July 23 and no later than July 28, 2010 that the change in their insurance would be effective on July 30, 2010, demonstrates that the Respondent intended to make the change without bargaining with the Union. S&I Transportation, 311 NLRB1388 (1993).<sup>5</sup> Simply put, Respondent had made the decision to change its health insurance plan and implement it before it ever met with the Union. See Brannen Sand & Gravel Co., 314 NLRB 282 (1994). This evidence alone supports the conclusion that Respondent was on a predetermined course of unilateral action.

Respondent argues in its Exceptions that it extended the renewal deadline beyond August 1, 2010. It further asserts that Union Secretary-Treasurer Mixon testified that the parties continued to bargain throughout August 2010 because of an extended deadline. Respondent claims that Mixon's statement somehow establishes that the Employer, prior to August 1, 2010, extended the renewal date. The respondent thus argues the Union was given adequate notice and opportunity to bargain over the health insurance change. Respondent's assertions in this regard are meritless, and its contentions that August negotiations and Board law related to the August negotiations should be considered to support its position should be summarily dismissed. Contrary to Respondent's contentions, the documentary evidence and Mixon's testimony on direct, as discussed later, provides otherwise.

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<sup>5</sup> Employee Joseph Cieslinski credibly testified that he first received notice of the health insurance changes on July 28, 2012, and that the notice was simply posted next to the time clock. (Tr. 412-413) There was no mention in the notice to employees of this change being subject to bargaining with the Union.

It is undisputed that the parties met for the first time on July 29, 2010. The Respondent readily admits that the new health insurance coverage was not comparable to the current coverage and therefore did not comply with the contract. (Tr. 597; R. Exh. 152)<sup>6</sup> The parties discussed the proposed coverage, but were unable to resolve the matter. Mixon requested that the Employer extend the current health insurance to give the parties time to negotiate. (Tr. 596-597) No such extension was granted. (R. Exh. 151-152; Tr. 601)

Because there was no resolution or extension of time provided, Union Secretary Treasurer Mixon and other Union officials met with bargaining unit employees at Respondent's facility on Friday, July 30, 2010 to discuss the unilateral change in health insurance. (Tr. 606) Mixon cautioned employees that they may not be eligible for insurance coverage if they failed to enroll in one of the options offered by Respondent prior to the deadline imposed by the Respondent of Friday, July 30, 2010. (Tr. 611) Mixon unequivocally stated that the Employer had violated the contract and failed to timely notify the Union and negotiate the health insurance changes, and that the Union might have to strike over the changes. (Tr. 608-609) At that time, the Respondent had not agreed to extend the renewal deadline of Sunday, August 1, 2010. The bargaining unit employees had no choice but to select an option as required by the Respondent. Since the Union had not been given an adequate opportunity to bargain, it was faced with a fait accompli.

Given these circumstances, it is of no consequence that at some point, an exact date not having been provided by either party, the Respondent obtained a 30 day extension for enrollment and choosing options. The changes had already been

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implemented. In an e-mail dated August 1, 2010, Colaluca notified Mixon that he was aware that Mixon had made comments to CSI employees regarding a union work stoppage in response to the health insurance issue. (Jt. Exh. 6) In his e-mail Colaluca wrote, "If we can find **an alternative with the same core benefits**, at the contractually agreed price, **CSI can opt out of the present plan with 30 day notice to the provider**. In the meantime, the present plan provides the employees with the same core benefits as **the previous plan with premium increases** that are in compliance with the Collective Bargaining Agreement. Please give us dates when we can meet." (Jt. Exh. 6) Thus Respondent's Counsel acknowledged that the new insurance plan was in effect as of August 1, 2010, with its premium increases and other changes. Although he claimed that Respondent could opt out of the plan with a 30 day notice to the provider, the fact was that the terms of the new plan were already in effect.

Equally significant, a review of Respondent's Exhibit 152, (Union's Bargaining Notes to the parties' August 5, 2010 meeting), discloses that Colaluca, at the beginning of the meeting, reiterated that the new plan was in effect but that the parties could still opt out of it. (R. Exh. 152, pg. 1). The notes also reveal that all union members had signed the health insurance election forms provided them by the Employer by the July 30 deadline. (R. Exh. 152 pg. 3) Thus, contrary to Respondent's contention, the documentary evidence demonstrates that Respondent had not obtained an extension of the old plan prior to August 5, 2010. Even if it had, the fact remains that once the Employer announced the health insurance changes to its employees and mandated that

the forms be returned by July 30, 2010, the Union was faced with a fait accompli, and no subsequent bargaining could change these facts or fully remedy the violation.<sup>7</sup>

It is well established that an employer violates Section 8(a) (5) of the Act by failing to bargain a mandatory subject to impasse or providing a notice of an intended change in advance to permit a meaningful opportunity to bargain. Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180 (1971).

To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time prior to implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli. Intersystems Design Corp., 278 NLRB 759 (1986). These are the facts here.

Accordingly, the Board should sustain ALJ Sandron's findings and conclusion that Respondent violated Section 8(a) (5) of the Act by unilaterally changing its health insurance plan without adequate notice and opportunity to bargain with the Union.

**II. RESPONDENT'S EXCEPTION THAT TRAVIS HREHA'S TESTIMONY SHOULD NOT BE CREDITED OVER SUPERVISOR JOHN MITCHELL IN ORDER TO DETERMINE THAT RESPONDENT VIOLATED SECTION 8(A) (1) OF THE ACT.**

Contrary to Respondent's assertion, ALJ Sandron correctly concluded that Supervisor John Mitchell violated Section 8(a) (1) of the Act by threatening production

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<sup>7</sup> Contrary to Respondent's assertions, the Respondent could have left the current health insurance plan in place and assumed the responsibility for the premium increases over 10% since it was responsible for providing inadequate notice and time to bargain. While the Employer asserts that "economic exigencies compelled prompt action", the record is void of any evidence that the Employer was financially unable to assume the increase for a limited time. Accordingly, such a defense, offered after the fact, is without merit.

employees with layoff and/or discharge if they filed grievances. (ALJD p. 33, lines 44-46)

As a matter of law, Counsel for the Acting General Counsel notes that the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). Counsel for the Acting General Counsel submits that the record evidence presented supports Judge Sandron's credibility resolution concerning this issue.

As a matter of background, the threats made by Supervisor Mitchell were in reference to Respondent Chemical Solvent Inc. having laid off bargaining unit drivers and subcontracting their work.

ALJ Sandron recognized that Hreha's testimony was detailed, compelling and certainly more credible than the blanket denial made by Mitchell. Hreha provided the location and the names of employees that were present when the statements were made. (Tr. 728-730) Significantly, he gave specific details as to the setting in which Mitchell made the statement. To illustrate, Hreha testified that Mitchell held a group meeting regarding work issues and mentioned that there may be an increase in overtime because of certain work. Mitchell stated that he did not want anyone to complain about the overtime and "don't file any grievances about it because you'll end up like your drivers." (Tr. 733) Hreha further testified that co-worker Steve Verebek asked Mitchell, "What do you mean we'll end up like the drivers?" Mitchell responded that they did not have a strong union (Tr. 753) He was clearly saying that if they pursued their grievances, the production employees could also end up on layoff or have their work subcontracted.

Hreha also testified that Mitchell made similar comments about not ending up like the drivers in the presence of employees while discussing a problem with their work. (Tr. 739) Hreha testified that Mitchell snickered when he made the comments. (Tr. 741-742). Even more compelling, Hreha testified that he did not file a grievance “because I did not want to end up like the drivers. I still need my job.” (Tr. 743)

By observing Hreha’s demeanor, Judge Sandron determined that he was “clearly a reluctant witness for the Acting General Counsel.” (ALJD p. 11, lines 9-11) Because Hreha was candid and appeared that he was not making any efforts to slant his testimony either for or against Respondent, he concluded that his testimony was reliable. *Id.* at lines 10-12. There was simply no reason to believe that employee Hreha harbored animus toward his current employer, and therefore no reason to doubt the truthfulness of his testimony regarding Mitchell’s threats to him individually or against other employees. Flexsteel Industries, 316 NLRB 745 (1995).

Based on these facts the Board should sustain ALJ Sandron’s findings and conclusions that Respondent violated the Act by John Mitchell coercively threatening employees with layoffs and or discharge if they filed grievances.

Respectfully Submitted,



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**PROOF OF SERVICE**

I attest that a copy of the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge Ira Sandron were e-mailed on this 27th day of July, 2012 to the following:

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