

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**SUTTER CENTRAL VALLEY  
HOSPITALS d/b/a SUTTER  
TRACY COMMUNITY HOSPITAL<sup>1</sup>**

**and**

**Case 32-CA-098549**

**CALIFORNIA NURSES ASSOCIATION/  
NATIONAL NURSES UNITED (CNA/NNU)**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

**I. PRELIMINARY STATEMENT**

On March 13, 2014, Administrative Law Judge Dickie Montemayor, herein the ALJ, issued his Decision and Recommended Order in this matter wherein he found that Sutter Central Valley Hospitals d/b/a Sutter Tracy Community Hospital, herein called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, by implementing changes to the healthcare benefits available to its bargaining-unit employees for 2013 without providing California Nurses Association/National Nurses United, herein called the Union, with adequate prior notice and/or a meaningful opportunity to bargain over those changes, and, indeed, that Respondent had presented the Union with a fait accompli. The ALJ's decision is wholly supported by appropriate findings of fact and conclusions of law.

The record reflects that Respondent was determined from the outset to maintain uniform healthcare benefits for its represented and unrepresented employees alike, and that it intended to

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<sup>1</sup> The name of Respondent appears as the parties stipulated during the hearing before the Administrative Law Judge.

modify its healthcare benefits for 2013 without negotiation, just as it had always done before there was a union. Toward that end, Respondent opened its initial contract negotiations with the Union with a proposal that it retain the right to modify healthcare benefits “without need for negotiations.” Thereafter, while planning its 2013 healthcare benefits changes, Respondent did not advise the Union of its longstanding practice of changing employee healthcare benefits every fall, chose not to consult with the Union while planning its changes to healthcare benefits for 2013 (or even to notify the Union that process was underway), and then rejected the Union’s first proposal out of hand, with no counteroffer, before implementing its planned changes. For these reasons, and as discussed more fully below, the record evidence fully supports the ALJ’s conclusions that Respondent never seriously intended to entertain any proposals from the Union regarding its planned changes to healthcare benefits, and that Respondent failed to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act. Counsel for the General Counsel therefore requests the Board to adopt the ALJ’s decision.

## **II. FACTS**

Respondent operates an acute care hospital in Tracy, California. In March 2012, the Union was certified as the collective-bargaining representative of a unit of over 150 registered nurses at the Tracy facility. (Tr. 36:13-20.) The parties began their negotiations for a collective-bargaining agreement in June 2012. (Tr. 38:6-7.) The Union’s lead negotiator is labor representative Mike Brannan, and Respondent’s lead negotiator is attorney Christopher Scanlan. (Tr. 37:11; 38:1.)

Before bargaining commenced, the Union requested information, including information regarding Respondent’s existing healthcare benefits. (JD 4:24-27.) During the first bargaining session on June 12, 2012, Respondent furnished the Union with a response to the document

request, including copies of its existing healthcare benefit plans. (*Id.*) Respondent also presented the Union with its opening proposal, including a provision that its represented employees would receive identical benefits to its unrepresented employees, and that Respondent would reserve the right to make future changes to health benefits at will, “without need for negotiations.” (Tr. 39:2-7; Jt. Ex. 4(a).) As it acknowledged during the hearing in this matter, Respondent’s intent was to ensure that its represented and unrepresented employees would have uniform benefits “just as they always had before there was a union.” (Tr. 252:12-13.) Although Respondent has had a practice, since at least 2008, of reviewing and making changes to its employee healthcare benefits during the late summer or early fall of each year, Respondent did not advise the Union of that annual practice, either in connection with its opening healthcare proposal, or during the parties’ subsequent months of bargaining. (Tr. 13:15-23; 39:11 – 40:6; 42:10-15.)

**Respondent Waits until Late September 2012 to Notify the Union that it Plans to Change Employee Healthcare Benefits**

Notwithstanding Scanlan’s awareness that Respondent was reviewing and planning changes to its healthcare benefits for 2013, he did not raise the subject with the Union during any of the numerous bargaining sessions that took place in the summer and early fall of 2012. (Tr. 39:21–40:6; 246:9–22.) Respondent’s new healthcare plan premium rates were finalized on August 29, 2012. (Tr. 248:2-5; 19-22.) However, Respondent did not give the Union any indication that healthcare benefit changes were underway until September 19, 2012, when Respondent delivered a letter to Brannan notifying him that it had a practice of annually reviewing its Wellness program,<sup>2</sup> and that it intended to make changes to the program for 2013.

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<sup>2</sup> The Wellness program affords reduced health insurance premium rates to employees who meet certain healthy lifestyle criteria. (Tr. 41:15-25.)

(Tr. 40:15-16; Jt. Ex. 5.) This was the Union's first notice that Respondent had an annual practice of making changes to its healthcare benefits. (Tr. 42:10-15.) Two days later, on September 21, 2012, Respondent sent a letter to Brannan notifying him that it was also planning to change the health, dental, and vision benefits available to employees for 2013. (Tr. 45:4-24; Jt. Ex. 7.) Respondent's letter stated that open enrollment would begin in November, and that Brannan should let Respondent know immediately if he wished to discuss the changes. (Jt. Ex. 7.)

Respondent's new healthcare benefits package contained significant differences from its existing healthcare benefits package that would negatively impact bargaining unit employees. Respondent was planning to substitute its no-cost healthcare insurance plan option, in which the overwhelming majority of unit employees were enrolled, with a different no-cost option featuring a more limited network of providers<sup>3</sup> and restricted access to specialists. (Tr. 46:8-47:22; Jt. Ex. 7.) In addition, copays and pharmaceutical costs would be increasing, and in some cases doubling. (Tr. 46:17-22; 47:9-11; Tr. 48:5-10; Jt. Ex. 7.) Respondent's proposed changes to the Wellness program included more invasive eligibility requirements, such as a venal blood draw for biometrics screening and tobacco testing. (Tr. 43:3-17; Jt. Ex. 6.)

At the time Respondent announced its planned changes, the parties were in the midst of first-contract negotiations over non-economic issues, and the Union was not expecting a proposal regarding healthcare benefits, which are typically bargained toward the end of negotiations with other economic issues. (Tr. 48:16-22; 163:25-164:3.) The Union had to abruptly change course

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<sup>3</sup> While the 2012 no-cost option had provided access to a Sutter-wide provider network, employees enrolled in the 2013 no-cost plan option would be restricted to receiving services from local physicians and the three acute care facilities in the Sutter Central Valley Region. (Tr. 194:2-6; 17-20; Jt. Ex. 7.) (Tr. 194:9-16.)

in order to familiarize itself with the details of Respondent's existing healthcare benefits,<sup>4</sup> identify concerns with the proposed changes, and gather feedback from its members. (Tr. 48:23-49:7; 53:11-54:5.) Despite that disadvantage, the Union diligently took steps to address Respondent's timeline for bargaining over healthcare benefits, as summarized below.

By letter dated September 20, 2012, the Union requested bargaining over Respondent's proposed Wellness program changes and "all other terms and conditions of employment" affecting bargaining unit employees, and it requested information relating to the proposed changes.<sup>5</sup> (Tr. 44:7-21; Jt. Ex. 6.) During the October 10, 2012 bargaining session, the Union engaged in extensive questioning of Respondent's plan administrators and also requested further information from Respondent. (Tr. 50:1-9; 51:10-52:17; Jt. Ex. 10; R. Ex. 6.) The Union made another information request on October 19, 2012, to which it did not receive a response until October 24, 2012. (Tr. 55:21-56:10; Jt. Ex. 11). Up until that point, the Union still had not been given complete and accurate information regarding employee costs under Respondent's proposal. (Tr. 57:4-9; Jt. Ex. 11.) Meanwhile, the Union had also been soliciting feedback from its members about the proposed changes, which the Union needed in order to formulate its counterproposal because it was new at the facility and had not yet developed a strong familiarity with the members. (Tr. 53:5-8; 53:19-54:13; 71:11-14; 127:19-128:3; 136:25-137:7; 167:20-25; R. Ex. 5; R. Ex. 7.) The task of formulating a timely counterproposal was rendered even

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<sup>4</sup> Although Brannan had previously negotiated contracts for other Sutter facilities, some of which had Sutter Select health benefits and/or a Wellness plan, the plans in place at each facility have their own distinct set of features. (Tr. 79:19-22; 87:2-9; 88:8-10; 160:17-24; 191:19-23.)

<sup>5</sup> The Union did not provide a separate written response to Respondent's September 21, 2012 letter because it believed its September 20, 2012 letter had clearly stated that it wanted to bargain over any healthcare changes, and because it planned to discuss the matter with Respondent at the next bargaining session. (Tr. 49:10-14; 171:11-14.) Respondent understood that the Union was not consenting to its proposed changes. (Tr. 253:24-254:3.)

more difficult for the Union because the parties were also moving forward with their negotiations for a first contract. (Tr. 50:23–51:5; 52:21-24; 55:4-13; 71:18-24.) Nonetheless, Brannan was able to complete a counterproposal within Respondent’s time frame.

**The Union Provides Respondent its Initial Counterproposal, and Respondent Rejects the Union’s Proposal and Announces Implementation of its Changes that Same Day**

On October 25, 2012, during a bargaining session, the Union presented Respondent with its first counterproposal.<sup>6</sup> (Tr. 57:16-19; Jt. Ex. 12.) With that proposal, the Union accepted Respondent’s proposed changes to plan structure and the continued use of a wellness program, but it proposed changes to employee costs and rejected the imposition of more invasive requirements for participation in the 2013 Wellness program. (Tr. 59:14–60:6; Jt. Ex. 12.) In Brannan’s estimation, he had made significant concessions that he would not ordinarily make in a first proposal on healthcare, including the tying of premium rates to participation in a wellness program and the assignment of different premium rates to full-time and part-time employees, in an effort to reach an agreement on healthcare benefits on Respondent’s timeline. (Tr. 60:5-19; 61:19–62:4.)

When Brannan provided his counterproposal to Respondent he explained that the Union had not been fully equipped to put a healthcare proposal together under Respondent’s time frame and without knowing Respondent’s other economic proposals, but that the Union was trying to accommodate Respondent. (Tr. 226:11-18; GC Ex. 2(e); R. Ex. 9(e).) Brannan then walked Respondent through his proposal. (Tr. 226:16-18; GC Ex. 2(e); R. Ex. 9(e).) Respondent did not

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<sup>6</sup> Although Brannan’s proposal states that the Union was requesting an effective date of ratification or January 1, 2013, whichever came later, Brannan testified that the Union was willing to reach an agreement over healthcare benefits separate from the overall contract, and it is undisputed that he made that clear to Scanlan. (Tr. 59:8-12; 65:17-20; 138:23–139:3; 139:19-21; 166:1-7; 232:708; 244:24–245:3; 270:21–271:30; Jt. Ex. 16; GC Ex. 2(e).)

ask any questions about the Union's proposal, and the parties went on to discuss other matters. (Tr. 62:5-7; 62:13-14; 65:24-25; 226:20-21.) Later on during the session, Respondent gave the Union a document outlining total healthcare plan costs, which the Union had not previously been provided. (Tr. 62:24 – 63:8; 64:6-14.; Jt. Ex. 13.) At that time, Scanlan indicated that Respondent was more comfortable with its proposed premium costs than with those the Union had proposed, and that Respondent was not persuaded that the Union had the better proposal. (Tr. 64:1-5; 271:9-11.) Scanlan did not ask whether the Union was willing to negotiate over its proposed premium costs. (Tr. 64:18-20; 289:19-23.) Brannan asked if Respondent would provide a counteroffer, and Scanlan said no. (Tr. 272:6-8; 277:2-7; GC Ex. 2(e); R. Ex. 9(e).) Later that day, after the bargaining session had ended, Scanlan informed Brannan that Respondent was going to implement its healthcare proposal. (Tr. 66:7-20).

The next day, on October 26, 2012, Respondent sent the Union a letter reiterating that it was implementing its changes to 2013 healthcare benefits. (Jt. Ex. 14). Respondent's letter stated that it had been "transparent from the outset that our preference is to maintain uniform benefit plans for all of our employees" and that, having received the Union's counterproposal, Respondent "remain[ed] convinced that [its] proposal is both the fairest and most cost-efficient choice for the Hospital." (Jt. Ex. 14.) Respondent's letter also indicated that it was still willing to bargain benefits for an initial contract. (Jt. Ex. 14.) Respondent never indicated that it was willing to bargain further over employee healthcare benefits for 2013. (Tr. 70:5-9.)

Respondent commenced open enrollment for all of its employees on November 1, 2012. By letter dated November 12, 2012, the Union reiterated its position that the Respondent's unilateral implementation of its healthcare benefits changes was possibly unlawful, that the changes must be bargained over, and that the Union was willing to reach an agreement over

healthcare benefits absent an overall agreement. (Tr. 69:2-6; Jt. Ex. 16.) On November 14, 2012, for the second time Respondent presented the Union during their overall contract bargaining with a proposal that Respondent would have the right to change healthcare benefits for all of its employees without need for negotiations. (Jt. Ex. 17.)

**III. THE ALJ CORRECTLY FOUND THAT RESPONDENT DID NOT PROVIDE THE UNION REASONABLE NOTICE AND A MEANINGFUL OPPORTUNITY TO BARGAIN BEFORE IMPLEMENTING CHANGES TO EMPLOYEE HEALTHCARE BENEFITS.**

While employers must generally refrain from making unilateral changes to terms and conditions of employment during contract negotiations prior to overall impasse, the Board recognized a “discrete recurring events” exception to the general rule in *Stone Container Corp.*, 313 NLRB 336 (1993). Counsel for the General Counsel takes no position whether the circumstances of this case would fall within the *Stone Container* exception. Rather, Counsel for the General Counsel maintains that even assuming Respondent was privileged under the “discrete recurring events” exception to make changes to its healthcare benefits for 2013 in the midst of contract negotiations, it nonetheless acted unlawfully by doing so without providing reasonable advance notice and a meaningful opportunity to bargain over those changes.

In general, once employees are represented by a labor organization, an employer may not change any employment term which falls within the statutory penumbra of “wages, hours and other terms and conditions of employment” without providing the employee representative with prior notice of a proposed change and an opportunity to bargain concerning it. *NLRB v. Katz*, 369 U.S. 736 (1962). If an employer gives notice too short a time before implementation of its proposed changes, or if, despite giving notice to the union, 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), quoting from *Ciba-Geigy Pharmaceuticals*

*Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1324 (7th Cir. 1983). As discussed below, the ALJ's determination that Respondent presented the Union with a fait accompli in this case is fully supported by the record evidence and applicable caselaw.

Although Respondent paid lip service to its obligation to bargain over the healthcare benefits changes it had planned for 2013, Respondent's course of conduct demonstrates that it never seriously intended to bargain over those changes with the Union. Respondent set the stage for its agenda during the parties' initial bargaining session on June 12, 2012, when it proposed that it would retain the right to modify employee healthcare benefits "without need for negotiations." Thereafter, Respondent went about planning changes to its healthcare benefits for the next calendar year just as it had always done before it had a union. Respondent did not advise the Union that it had an annual practice of changing its healthcare benefits or that the Union should be prepared to bargain health insurance on a separate track from contract negotiations. Notwithstanding that Respondent was meeting regularly with the Union for contract bargaining, it remained silent that it was in the process of planning major changes to employee healthcare benefits for 2013. Respondent did not inform the Union of its plans until after all of the changes to the design and features for its 2013 healthcare benefits had been finalized. If Respondent had seriously intended to negotiate with the Union over those changes, it is unclear why it chose not to consult with the Union during that process. Respondent's conduct in that regard is especially confounding given Scanlan's testimony that healthcare is one of the largest issues at the bargaining table.<sup>7</sup> Under these circumstances, the ALJ reasonably

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<sup>7</sup> Scanlan observed that healthcare negotiations are typically a central issue at the bargaining table, and he referenced at least two examples where bargaining over healthcare at other Sutter facilities continued for years. (Tr. 186:10-14; 280:17-25; 293:1-2.)

concluded that Respondent had not engaged in a course of conduct that would suggest it intended to accommodate any concerns the Union might have.

Further evidence that Respondent never intended to consider any proposals from the Union can be found in Respondent's communications with employees. After Respondent had finalized its planned changes to healthcare benefits for 2013, but before the parties had a chance to bargain over the matter, Respondent advised the Union that it would communicate the new enrollment options with its unrepresented employees. (Jt. Ex. 7.) Given Respondent's clear agenda of ensuring that represented and unrepresented employees all received the same healthcare benefits, Respondent must have been confident at that point that it would not be making any changes to its benefit offerings. Indeed, by October 5, 2012, it had communicated summaries of its plan changes to its represented employees, as well. (Jt. Ex. 8.) These facts alone support the ALJ's inference that Respondent was not planning to consider any counterproposals to its planned healthcare benefits changes for 2013.

Should there be any doubt, however, whether Respondent seriously planned to bargain over changes to its healthcare benefits, those doubts should be dispelled by Respondent's handling of the Union's October 25, 2012 counterproposal, which was flatly rejected. Respondent asked no questions about the Union's proposal, declined Brannan's request to present a counteroffer, and announced its intent to implement its changes all in the same day. Respondent's pre-emptory determination that matters were at an impasse as of October 25, 2012 is singular evidence that it did not intend to engage in any meaningful bargaining with the Union over its proposed changes. However, this pre-emptory conduct is fully consistent with Respondent's unwavering position that it wanted to retain complete control over its employee healthcare benefits notwithstanding the presence of the Union, as first shown in its opening June

12, 2012 healthcare proposal, in which it sought the unilateral right to make any changes to even represented employees' healthcare benefits, and as reiterated in its post-implementation November 14, 2012 healthcare proposal, in which it maintained that same absolutist position.

As the ALJ observed, Respondent's argument that the Union "squandered" its bargaining opportunity is disingenuous given that Respondent had no intention of considering the Union's proposal.<sup>8</sup> Moreover, the record shows that despite being caught off guard by Respondent's proposal, the Union scrambled to familiarize itself with Respondent's existing healthcare benefits, gather information from Respondent and its members, and formulate a counterproposal, all the while continuing contract negotiations and working within Respondent's compressed time frame. This is not a case where the Union showed no inclination to do anything but object.<sup>9</sup> Rather, the Union promptly requested bargaining and then formulated a good faith counterproposal that made significant progress toward reaching an agreement with Respondent:

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<sup>8</sup> Incidental to Respondent's claim that the Union squandered its bargaining opportunity, Respondent also contends that the Union's alleged belief that no changes could be implemented until the parties had reached an overall impasse in bargaining provides evidence of bad faith bargaining. Whatever the Union's agents may have believed or communicated to members regarding the applicable legal standard, the Union was nonetheless willing to reach a separate agreement over 2013 healthcare benefits, and there is no dispute that Brannan communicated that position to Scanlan.

Respondent misstates the record when it states, at page 32 of its brief, that the Union demanded Respondent to freeze health benefits until the parties could agree on an overall contract. Scanlan's testimony reflects that he understood Brannan's position to be that he wanted to reach an agreement on healthcare that would be effective for the term of the collective-bargaining agreement; it does not reflect that Brannan was unwilling to reach an agreement on healthcare until the entire contract was negotiated. (Tr. 233:24 – 234:3.) In fact, Scanlan confirmed that Brannan had made it clear that he was willing to reach a separate agreement on healthcare. (Tr. 244:24 – 245:1.)

<sup>9</sup> Compare *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004) (no Sec. 8(a)(5) violation where the union was given notice of planned healthcare changes but waited until after implementation to request bargaining).

the Union agreed to Respondent's use of a wellness program despite its unpopularity<sup>10</sup> and agreed to Respondent's proposed plan structure despite the new limitations; but it asked for some concessions on cost. Furthermore, notwithstanding Respondent's portrayal of the Union as cavalierly uninterested in bargaining over healthcare, the record reflects that all the while that the clock was ticking on healthcare, Respondent itself continued to present unrelated bargaining proposals to the Union.<sup>11</sup> In view of the rather complicated nature of healthcare benefits, and given that the parties continued to bargain over other matters, the Union's inability to present a counterproposal before October 25, 2012 can hardly be construed as evidence that the Union had no interest in bargaining.<sup>12</sup>

In view of the totality of the circumstances discussed above, the record fully supports the ALJ's conclusion that Respondent did not seriously intend to engage in meaningful bargaining with the Union over its planned healthcare changes. Respondent was committed to implementing its healthcare plan changes regardless of the Union's response, which is why it advised the Union of its intent to do just that immediately after receiving the Union's first

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<sup>10</sup> The Wellness program has been a contentious issue at other Sutter facilities. (Tr. 88:2-13.)

<sup>11</sup> Between September 19 and October 25, 2012, Respondent presented the Union with proposals on subjects including probationary periods, discrimination, strikes and lockouts, bulletin boards, new hires, union access, time off for union business, grievance procedures, retirement, and census issues. (GC Ex. 2(a) – 2(e); R. Ex. 9(a) – 9(e).)

<sup>12</sup> Respondent's claims about the timing of the Union's proposal are further belied by the record evidence that once the Union had provided its counterproposal, there was still time for the parties to bargain if Respondent had been interested in doing so. While Respondent presented testimony that, as a practical matter, it likes open enrollment to be completed by the end of November, Internal Revenue Service regulations do not require completion until January 1. (Tr. 319:21-23; 320:10-14; 322:1-6; 322:18-23.) Furthermore, Respondent was not required to place all of its employees on the same plan, and it could have begun open enrollment for its unrepresented employees. (Tr. 273:16-19.) If the parties continued bargaining and ultimately did reach impasse on the issue, Respondent could have folded its represented employees into its then-existing plan. (Tr. 273:25 – 274:3.)

counterproposal. For these reasons, Counsel for the General Counsel respectfully requests the Board to adopt the ALJ's determination that Respondent presented its healthcare benefits changes to the Union as a fait accompli.

Even if the Board does not agree with the ALJ's legal conclusion that Respondent's conduct amounted to a fait accompli, for the reasons discussed above and as further discussed below, the record evidence nonetheless establishes that Respondent failed to provide the Union with reasonable notice and a meaningful opportunity to bargain. Respondent's attempts to undermine the ALJ's conclusion that Respondent denied the Union a meaningful bargaining opportunity rely on cases which, upon close examination, contain mitigating circumstances absent from the facts of this case.

In *California Pacific Medical Center*, 356 NLRB No. 159, the Board's conclusion that the employer "did not harbor a preconceived intent" to implement its healthcare plan was contingent on persuasive factors that are not present here. In that case, the Board relied on evidence that the employer recognized that the union might successfully negotiate to retain existing healthcare benefits, including evidence that there was an account structure in place to enable the employer to carve its represented employees out of the healthcare plan, and evidence that the employer was taking steps to allow its represented employees to stay on its existing healthcare plan if bargaining should yield that outcome. *Id.*, slip op. at 1, fn. 1. By contrast, Respondent here was transparent from the outset that it never considered providing different healthcare benefits to its represented and unrepresented employees, and it presented no evidence to the contrary. *Alcoa, Inc.*, 352 NLRB 1222 (2008), also presented an entirely distinguishable set of circumstances from the instant case. In that case, the employer made multiple requests for a counterproposal, and the union offered nothing. It was within that framework that the Board

found the employer “had no duty to initially offer substantive concessions” in order to meet its bargaining obligation. Here, Counsel for the General Counsel is not claiming that Respondent was required to offer concessions with its initial healthcare proposal. Rather, evidence of Respondent’s failure to afford a meaningful bargaining opportunity is found in Respondent’s refusal to consider the Union’s counterproposal or even engage in any dialogue over the alternative offered by the Union.

Respondent’s contention that it afforded the Union adequate notice is also without merit. By Respondent’s calculation, it gave the Union 40 days to bargain – through the beginning of open enrollment on November 1, 2012<sup>13</sup> – but that bargaining opportunity was squandered because the Union did not provide its counterproposal until a “mere” 6 days before the open enrollment deadline.<sup>14</sup> Assuming that Respondent truly intended to afford the Union the full 40 days to bargain, its protest over the timing of the Union’s counterproposal rings hollow. Indeed, Respondent argues elsewhere in its brief that an employer can meet its obligation to bargain with as little as 4 days notice.<sup>15</sup> In light of that position, Respondent’s wholesale discounting of the remaining 6 days that it ostensibly allotted for bargaining is inexplicable – unless Respondent had no intention of considering the Union’s proposal to begin with.

In previous cases relied on by Respondent, the Board has found lesser time periods than the Union was afforded here to be adequate for bargaining. Those cases involved different circumstances and therefore do not illustrate that the time frame afforded to the Union in this case was adequate. Even those cases relied on by Respondent that are most analogous to the

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<sup>13</sup> Respondent’s brief at 36.

<sup>14</sup> Respondent’s brief at 37-38.

<sup>15</sup> Respondent’s brief at 35.

instant case, because they involve changes to healthcare, are distinguishable. In *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542 (2004), the union was aware of the employer's plan to make changes to its healthcare plan for about 6 months before the employer announced implementation of its changes. Conversely, the Union in this case was taken by complete surprise by Respondent's proposal, and as a result it was not prepared to engage in abbreviated bargaining over healthcare. In *St. Mary's Hospital of Blue Springs*, 346 NLRB 76 (2006), the union was given close to 2 months' notice before the employer announced implementation of its changes and, contrary to the situation at hand, the parties in that case exchanged proposals back and forth before the employer implemented its changes. In *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004), the union did not request bargaining until after the employer announced implementation of its changes. Moreover, the union in that case was aware in advance that the employer made adjustments to its healthcare plan at the end of each calendar year.

*Bell Atlantic Corp.*, 336 NLRB 1076 (2001), relied on by Respondent to show that it had no obligation to disclose its plans regarding healthcare benefits to the Union before they were finalized, is also inapposite. Although the Judge in that case reasoned that the employer was under no obligation to inform the union that it was considering the possibility of closing one of its facilities before its plans were finalized, the Judge was basing his analysis on a set of facts where the employer delayed implementation of its decision for 6 months after it provided notice to the union. The Judge found that 6 months provided "more than ample time to bargain about it had the Union showed any interest in doing so." 336 NLRB at 1088. Here, of course, the changes were more than a mere possibility, since Respondent makes modifications to its healthcare benefits every year. Even so, Respondent might have waited until after all the details were finalized to announce its intentions without running afoul of its duty to bargain had it

afforded adequate time for bargaining, as the employer did in *Bell Atlantic*. Instead, it allowed only 5 weeks. Given the scope of the changes and their importance to the bargaining unit, the Union's lack of familiarity with the existing healthcare benefits, and the parties' preoccupation with first-contract bargaining, it was reasonable for the ALJ to conclude that good faith bargaining in this case required more notice.

For the reasons discussed above, Counsel for the General Counsel respectfully asks the Board to adopt the ALJ's determination that Respondent never seriously intended to bargain with the Union over its changes to healthcare benefits and that it accordingly presented the Union with a fait accompli, or, at a minimum, that Respondent failed to afford the Union adequate notice and a meaningful opportunity to bargain over its changes to healthcare benefits, in violation of Section 8(a)(5) and (1) of the Act.

**IV. RESPONDENT'S IMPLEMENTATION OF ITS HEALTHCARE CHANGES BEFORE THE PARTIES HAD REACHED IMPASSE ON THE MATTER PROVIDES A SECOND BASIS FOR FINDING ITS CONDUCT UNLAWFUL.**

Counsel for the General Counsel does not dispute the ALJ's determination that it is unnecessary to reach the issue of whether the parties were at impasse over Respondent's healthcare proposal at the time Respondent implemented its changes in order to dispose of the issues in this case. For the reasons stated above, Respondent's unlawful actions have already been established based on its failure to provide the Union with adequate notice and a meaningful opportunity to bargain.

Should the Board elect to reach the additional question of whether an impasse requirement should be imposed in this case, however, Counsel for the General Counsel urges the Board to find: 1) that an impasse requirement is warranted under the circumstances of this case; and 2) that the parties had not reached impasse before Respondent implemented its changes.

In previous cases involving negotiations over discrete recurring events – involving circumstances not present here – the Board has intimated that an impasse requirement might be warranted, but found it unnecessary to reach the issue under the posture of those cases. In *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542 (2004), *enfd.* 426 F.3d 455 (1st Cir. 2005), the Board adopted the Judge’s finding that the parties had reached impasse over the Respondent’s health insurance proposal before the Respondent announced implementation, and accordingly found it unnecessary to reach the issue of whether impasse was a prerequisite to implementation.<sup>16</sup> In *St. Mary’s Hospital of Blue Springs*, 346 NLRB 776 (2006), the Board found it unnecessary to reach the issue of whether the Respondent was required to negotiate to impasse before implementing its proposed healthcare changes because the parties had “exhausted all possibilities of reaching agreement over the healthcare issue before the deadline.” 346 NLRB 776 at fn. 4. As discussed below, both of these cases are both factually, and therefore legally, distinguishable from the instant case.

In *Saint-Gobain*, it was unnecessary for the Board to resolve the issue of whether impasse was a prerequisite to the employer’s implementation of its healthcare proposal because it had adopted the Judge’s finding that the parties were at impasse. The Judge’s finding that the parties were at impasse was predicated on a set of facts where the employer’s healthcare plans were being canceled by its carrier and the failure to select new plans by a certain deadline would have left employees with only catastrophic insurance benefits, both the union and the employer had “formulated a hard economic position early in the process,” and, after over 2 ½ months notice, numerous bargaining sessions, and the exchange of proposals back and forth, the parties were

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<sup>16</sup> Board Member Walsh indicated that in his view, impasse in bargaining is always a prerequisite to implementation of a bargaining proposal in situations governed by *Stone Container Corp.*, 313 NLRB 336 (1993).

unable to reach an agreement by the deadline. 343 NLRB at 556-560. Here, as discussed more fully below, Respondent in our case was not faced with such an exigency. Furthermore, there were no back and forth proposals – Respondent flatly rejected the Union’s first proposal and declined the Union’s request to make a counteroffer.

In *St. Mary’s*, the employer announced implementation of its proposed healthcare changes only after the parties had placed contract negotiations on hold and focused their bargaining sessions on healthcare for a two month period, at the end of which the union canceled further scheduled sessions because further bargaining would have been unproductive. 346 NLRB at 779. In finding that the employer had satisfied its bargaining obligation, the Judge noted that the employer had not been inflexible, but had adopted one of the union’s proposals and had presented the union with an alternative proposal allowing the union to obtain its own health insurance. *Id.* at 783. The Judge also emphasized that the employees in that case would have been left with no insurance at all if the parties did not reach an agreement by a certain date. *Id.* at 779. In contrast, the parties here had not bargained in depth over healthcare, nor had the Union signaled that further bargaining would be futile at the time Respondent announced implementation. Furthermore, Respondent did not make any concessions to the Union or offer any alternative proposals. Accordingly, the kinds of mitigating facts relied on by the Board in *St. Mary’s* to find that the parties had “exhausted all possibilities” of reaching an agreement are not present in the instant scenario.

The Board in both *Saint-Gobain* and *St. Mary’s* declined to decide whether the employers there were required to bargain to impasse before implementation because, as a practical matter, the evidence in both cases indicated that the parties were in fact at impasse. There is no such indication in this case and, therefore, the Board may wish to explicitly address the issue.

Counsel for the General Counsel contends that an impasse requirement is warranted in this case in part because there were no exigent circumstances requiring Respondent to make changes to its self-funded employee healthcare benefits for 2013. See *RBE Electronics of S.D.*, 320 NLRB 80, 82 (1995) (holding that where an employer in the midst of negotiations is confronted with an economic exigency requiring prompt action, the employer may, after providing adequate notice and an opportunity to bargain, act unilaterally if either the union waives its right to bargain *or the parties reach impasse on the matter proposed for change*) (emphasis added). In the instant case, Respondent indicated that its unwillingness to delay making healthcare changes for its represented employees was driven by its desire to avoid absorbing increased costs.<sup>17</sup> (Tr. 232:4-19; 233:14-17; GC Ex. 2(e); R. Ex. 9(e).) This is not the type of situation where a valid exigency excusing the need for further bargaining should be found. Compare *Saint-Gobain*, above, wherein a valid exigency was found based on the carrier's elimination of the health insurance plans in which half of employees were enrolled, and they would have been left with no health insurance. 343 NLRB at 556. See also *RBE Electronics*, above, requiring an employer to demonstrate that an exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. 320 NLRB at 82. Counsel for the General Counsel further contends that the imposition of an impasse requirement is warranted in the instant case because Respondent itself created the urgency in this case by failing to give the Union adequate advance notice of its intent to make changes to healthcare benefits. In these circumstances, fairness

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<sup>17</sup> Respondent was also put off by the Union's desire to reach an agreement on healthcare benefits that would span a time frame of greater than one year, because Respondent's costs went up every year. (Tr. 233:14-17.) Brannan explained that while it was the Union's preference to "lock up healthcare benefits for longer than one year," the Union would have been open to a one-year deal had the Respondent responded to its proposal. (Tr. 142:24 – 143:9.)

dictates that Respondent should refrain from implementing its changes before bargaining to impasse over the matter.

Should the Board decide that an impasse requirement is warranted in the circumstances of this case, Counsel for the General Counsel requests the Board to find that the parties were not at impasse when Respondent announced implementation of its healthcare changes. Respondent contends that impasse was reached at the end of the bargaining session on October 25, 2012, after it received the Union's first counterproposal. (Tr. 34:19-21; 272:19-23.) But the parties had not reached impasse at that time. When the Union presented Respondent its first counterproposal, it gave no indication that it was inflexible or unwilling to compromise.<sup>18</sup> Indeed, the Union suggested the opposite by asking Respondent if there would be a counteroffer. Furthermore, Brannan credibly testified that the Union had room to move at that time, both on premium costs and on the components of the Wellness program. (Tr. 65:11-13.) Respondent, for its part, rejected the Union's proposal out of hand and without discussion. In these circumstances, neither party could have been at "the end of its rope"<sup>19</sup> and there was a realistic possibility that continuation of discussion would have been fruitful.<sup>20</sup> Accordingly, the parties had not reached impasse before Respondent implemented its proposal.

In summary, although the Board has left open the question of whether an employer must bargain to impasse over the discrete matter at issue in a *Stone Container* situation, if the Board

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<sup>18</sup> Scanlan conceded that Brannan never indicated his initial offer was a final offer, or that the Union was unable to move on costs. (Tr. 272:24 – 273:6.)

<sup>19</sup> *Grinnel Fire Systems Inc.*, 328 NLRB 585, 585 (1999), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001), and cases cited therein.

<sup>20</sup> *See Cotter & Co.*, 331 NLRB 787 (2000) review granted in *rel. part* 254 F.2d 1105 (D.C. Cir. 2001) (the Board will find a genuine impasse in negotiations only when there is "no realistic possibility that continuation of discussion at that time would have been fruitful").

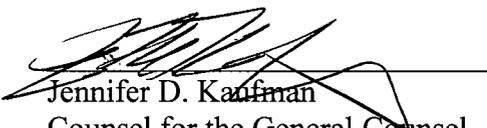
decides to reach that question here, Counsel for the General Counsel respectfully urges the Board to conclude that it would further the purposes and policies of the Act to impose such a requirement in this case, particularly given that there were no exigent circumstances that would excuse implementation prior to impasse and Respondent itself created the need for quick action. For the reasons discussed above, Counsel for the General Counsel also urges the Board to find that the parties were not at impasse when Respondent implemented its healthcare proposal.

**V. CONCLUSION**

Counsel for the General Counsel submits that the foregoing, and the record as a whole, establishes by a preponderance of the evidence that Respondent has committed violations of Section 8(a)(1) and (5) of the Act. Accordingly, Counsel for the General Counsel respectfully asks the Board to overrule Respondent's exceptions and adopt the ALJ's decision in this matter.

**DATED AT** Oakland, California this 22nd day of May 2014.

Respectfully submitted,

  
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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**SUTTER CENTRAL VALLEY HOSPITALS,  
d/b/a SUTTER TRACY COMMUNITY HOSPITAL**

**and**

**CALIFORNIA NURSES ASSOCIATION/  
NATIONAL NURSES UNITED (CNA/NUU)**

**Case(s) 32-CA-098549**

**Date: May 22, 2014**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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May 22, 2014

Date

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Name



Signature