

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

OAKLAND PHYSICIANS MEDICAL
CENTER, LLC d/b/a DOCTORS'
HOSPITAL OF MICHIGAN,

Respondent,

and

CASE NO. 7-CA-120931

MICHIGAN ASSOCIATION OF POLICE
(MAP),

Charging Union.

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Statement Of The Case

At issue in this case is whether the Board should defer the allegations contained in this Complaint to the parties' grievance/arbitration procedure in accordance with the Board's deferral policy. The Administrative Law Judge ("ALJ") found that Respondent had not met its burden of proof that the allegations of the Complaint should be deferred to the parties' grievance/arbitration procedure and found, further, that Respondent violated Sections 8(a)(1)(5) and (d) of the Act when it changed the health insurance policy that was in effect for the seven (7) bargaining unit employees who are the subject of this dispute. Respondent respectfully submits that the Complaint be dismissed because the allegations should be submitted to the parties' grievance/arbitration procedure in accordance with the congressional intent evidenced by Section 203(d) of the Labor-Management Relations Act and with board policy. Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies, 268 NLRB 557, 558 (1984).

Question Involved

The only question involved with these exceptions is whether the allegations of the Complaint should be deferred to the parties' grievance/arbitration procedure in accordance with Section 203(d) of the Labor-Management Relations Act and the Board's deferral policy set forth in Collyer Insulated Wire, 192 NLRB 837 (1971) and United Technologies, 268 NLRB 557, 558 (1984).

Argument

Introductory Facts

Respondent operates a hospital providing inpatient and outpatient medical care in Pontiac, Michigan. The Charging Union represents approximately seven (7) of Respondent's employees who perform guard duties, and has had a collective bargaining relationship with Respondent for several years (TR, pp. 31, 106).¹ The parties have had a productive collective bargaining relationship. Indeed, prior to the instant dispute, they met in the Fall of 2013 and modified their collective bargaining agreement regarding compensatory time off for employees (TR, pp. 41, 42).

In 2012, the parties entered into a new collective bargaining agreement that was to expire in April, 2014 (GC EX 7). The new agreement provides bargaining unit employees with the benefit of health insurance (GC EX 7, Article 16). The contract spells out the health insurance coverage the employees were to receive and what percentage of their health insurance premiums the employees were required to pay. And the contract contains the following reservation of

¹ References to the Transcript will appear as "TR", followed by the page number; references to the General Counsel's exhibits will appear as "GC EX" followed by the applicable number; references to Respondent's exhibits will appear as "RESP EX", followed by the applicable number and references to the ALJ's decision will appear as "ALJD", followed by the applicable page and line number.

rights clause: “The Hospital reserves the right to amend the plan design of health insurance benefits other than the premium co-share” (GC EX 7, Article 16, p. 21).

In November, the Hospital was notified by its Benefits Consultant, Edward Maitland, that the health care provider (“NGS”, a/k/a “HAP”) was terminating their contract with the hospital because the Hospital was, essentially, not paying the claims (TR, pp. 81, 82). Maitland was tasked with the responsibility by Respondent to find another health care plan for the bargaining unit employees, found a Blue Cross/Blue Shield Plan that he testified had the same coverage as the former HAP plan, and got the Hospital to sign a contract with Blue Cross/Blue Shield for the new plans, to be effective January 1, 2014 (TR, pp. 88, 90).

On January 1, 2014, Respondent implemented the new health care plan with Blue Cross/Blue Shield that required employees to pay more than 10% of their premiums.

On January 14, 2014, the Charging Union filed Grievance Number 14-004, listing the grievance as a “Contract Interpretation” type grievance and alleging that the Respondent had unilaterally changed the health care plan and the employees’ percentage of the employee contributions (RESP EX 1). A similar grievance was filed on January 28, 2014 (RESP EX 2). Donnell Reed, MAP’s agent responsible for servicing the collective bargaining agreement, testified that the grievances are still pending and it was the Charging Union’s understanding that “it’d all be resolved with the ULP” (TR, p. 64).

Argument

The Allegations Should Be Submitted To The Parties’ Grievance/Arbitration Procedure (Exceptions 1-6)

The Complaint in this matter alleges that Respondent violated the Act by changing its health insurance plan to a “dissimilar plan” and by changing the employee premium contribution percentage. These allegations should be submitted to the parties’ grievance/arbitration procedure

contained in their collective bargaining agreement pursuant to Collyer Insulated Wire, 192 NLRB 837 (1971) and United Technologies Corp., 268 NLRB 557 (1984). The ALJ correctly noted that whether deferral is warranted is a threshold question which must be decided prior to addressing the merits of the allegations in issue (ALJD, p. 10, lines 9-11). Sheet Metal Workers International Association Local #18-Wisconsin, AFL-CIO and Everbrite, LLC, 359 NLRB No. 121, at p. 2 (2013).

Indeed, the Board has held that its deferral policy ensures that where the parties have voluntarily created a dispute mechanism culminating in final and binding arbitration, “it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties” to resolve their conflict using their negotiated process for doing so. United Technologies, *supra* at 558. Additionally, the Board has recognized the congressional intent evidenced by Section 203(d) of the Labor-Management Relations Act that: “Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.” United Aircraft Corp., 204 NLRB 837 (1971). There has been no “honest attempt” by the Charging Union to resolve the underlying dispute here utilizing the arbitration process set forth in the contract. As noted, *supra*, MAP’s Representative, Reed, testified at the hearing that the grievances would be “taken care of” by the filing of the unfair labor practice charge. It would be, therefore, contrary to the principles of the Act for the Board to “jump into the fray” and rule on the unfair labor practice allegations.

Under Collyer and United Technologies, pre-arbitral deferral to the grievance and arbitration procedure is warranted where: 1) the parties’ dispute arises within the confines of a long and productive collective bargaining relationship; 2) there is no claim of animosity to

employees' exercise of Section 7 rights; 3) the parties' agreement provides for arbitration in a broad range of disputes; 4) the parties' arbitration clause clearly encompasses the dispute in issue; 5) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and 6) the dispute is well suited to resolution by arbitration. Sheet Metal Workers, supra.

The ALJ recognized that elements 1), 2), and 5) for deferral are present here (ALJD, p. 10, lines 28-31); however, the ALJ ignored elements 3) and 4), and based her decision solely upon element 6) above, finding that the substantive question is not a question of contract interpretation that is well suited for resolution through arbitration (ALJD, p.10, lines 28-33).

Respondent respectfully submits that all six (6) elements for deferral are present. The record establishes that the parties have had a collective bargaining relationship since at least 2007 and it has been used to resolve serious contractual disputes (TR, pp. 41, 42); the Complaint does not contain allegations against Respondent that are premised upon animosity toward the exercise of Section 7 rights; the parties' collective bargaining agreement provides for arbitration of any dispute regarding interpretation or application of the express provisions of the contract (GC EX 7, Article 6); the arbitration clause clearly encompasses the dispute at issue (viz: did the Hospital have the right to amend the plan design for health insurance benefits (GC EX 7, Article 16, p. 21), and did it change the employee premium contribution percentages without the Charging Union's consent (GC EX 7, Article 16, p. 21); Respondent has asserted its willingness to utilize arbitration to resolve the dispute (TR, p. 157); and the dispute is well suited to resolution by arbitration. Moreover, it is not necessary that *all* elements for deferral be present to warrant deferring a dispute to the parties' private dispute resolution process ("The evidence establishes that ... the majority of the criteria for deferral to arbitration are satisfied here." United

Hoisting & Scaffolding, Inc. (ALJ Decision dated January 31, 2014), 2014 NLRB LEXIS 71; 198 LRRM 1435; affirmed by Board at 2014 NLRB LEXIS 524 (July 1, 2014)).

With respect to whether Respondent had the contractual right to unilaterally change the health insurance benefits plans pursuant to Article 16.1 of the collective bargaining agreement, the ALJ made inconsistent rulings. While she noted that "... the parties may dispute the interpretation of the contract related to amending the plan design ..." (p. 10, lines 43-44), she then found that the issue of Respondent's right to amend the health insurance plan was not appropriate for arbitration because Respondent did not give the Charging Union "notice" of the health plan design amendments until after their implementation, and concluded: "Therefore, the violation of the contract appears so obvious that there can be no contrary interpretation by an arbitration" (ALJD, p. 11, lines 1-5). However, Article 16.1 of the collective bargaining agreement, quoted by the ALJ² does not say *when* the Union is to be given notice of any plan design amendments. The ALJ interpreted the contract to mean "prior" notice, when there is no contract language requiring such. In short, the contract is ambiguous regarding whether Respondent was required to give prior notification of the new health benefit plan to the Charging Union before it implemented same. Therefore, the issue of Respondent's right to unilaterally change the health plan benefit, pursuant to Article 16.1 of the collective bargaining agreement, is a matter that needs interpretation by an arbitrator. An arbitrator can determine whether the contract language granting Respondent the right to "amend the plan design of health insurance benefits (GC EX 7, p. 21) constitutes a complete waiver of the Charging Union's right to object to a change in health care plans. Caritas Good Samaritan Med. Ctr., 340 NLRB No. 6 (2003), cited by the ALJ, to support her decision, is a case where the Board *reversed* an ALJ, who, like

² The Hospital reserves the right to amend the plan design of health insurance benefits other than the premium co-share schedule listed below. The Union will be given notice of any plan design amendments."

the ALJ here, had ruled deferral was not appropriate because the contract language was clear and did not require the expertise of an arbitrator to interpret it (complaint based upon virtually identical allegations as here).

Additionally, the ALJ found that deferral of the allegation that Respondent violated the Act by changing the premium co-share schedule requires no interpretation of the parties' contract and, therefore, the special expertise of an arbitrator is unnecessary (ALJD, p. 10, lines 44-45; p. 11, line 1). She further found that this allegation is so "intertwined" with the issue of Respondent's unilateral right to change the health insurance plan for the employees that the two issues cannot be separated and, therefore, deferral of the Complaint allegations to the parties arbitration process is not appropriate (ALJD, p. 11, lines 8-11). As set forth above, the issue of Respondent's right to change the basic health care plan applicable to its employees without the Charging Union's consent turns upon the interpretation of whether the Employer had the right to do so under Article 16 of their collective bargaining agreement. An Arbitrator can determine whether the contract language granting the Respondent the right to "amend the plan design of health insurance benefits" (GC EX 7, p. 21) constitutes a complete waiver of the Charging Union's right to object to a change in health care plans, making this allegation of the Complaint appropriate for deferral.³ Saying, then, that deferral of this allegation is not appropriate because it is "intertwined" with the issue of premium co-shares makes no more sense than saying the issue of premium co-shares should be deferred because it is intertwined with the issue of changing the health insurance benefit plan. In short, the "intertwined" rationale is unavailing.

³ The Arbitrator can also decide whether the coverage between the "old" and the "new" plans is "similar" (GC EX 7, p. 22, Article 16.4). Edward Maitland, Respondent's Benefit Consultant, testified that the new plan has all the same coverage as the former plan and even provides for a lower payment by the employees for generic drugs (TR, pp. 90, 97). The ALJ did not rely upon Article 16.4 of the collective bargaining agreement in reaching her conclusion that deferral here would be inappropriate.

Not surprisingly, the ALJ cited no case law to support her rationale.⁴ Further, the Board has deferred unilateral change allegations based upon broad management rights language and even in situations where no specific contract language was in dispute. See E.I. DuPont & Co., 275 NLRB 693 (1985 (involving alleged unilateral changes in work schedules) and Standard Oil Co. (Ohio), 254 NLRB 32 (1981) (involving an alleged unilateral implementation of a comprehensive medical examination)

In short, the criteria for deferral set forth under Collyer and United Technologies are met and deferral of the Complaint's allegations to the grievance and arbitration procedure under the parties' collective bargaining agreement is appropriate. This is particularly so, as there has been no "honest attempt" by the Charging Union to resolve this dispute under the agreed-upon contractual method of dispute resolution set forth in the contract. "[D]eferral of the allegations will foster the Act's mandate by requiring the parties to abide by their agreed-to method of resolving such disputes through the grievance and arbitration procedure and by encouraging them to resolve their dispute through bargaining within the grievance procedure." Inland Container, supra. Indeed, it would be contrary to the basic principles of the Act for the Board to rule on the Complaint's allegations. United Technologies, supra, at p. 558; United Aircraft, supra. Accordingly, the Complaint should be dismissed. Sheet Metal Workers, supra; United Hoisting & Scaffolding, supra.

⁴ And while the Board has held that allegations regarding unilateral changes in wage rates are particularly unsuited for deferral in that they constitute a basic repudiation of the bargaining relationship and the principles of collective bargaining, Oak Cliff-Golman Baking Company, 207 NLRB 1063, 1064 (1973), the Board distinguishes cases such as Oak Cliff from situations such as here, involving alleged unilateral changes in terms "less vital" to the essence of the employment relationship, because the latter do not constitute a wholesale rejection of collective bargaining in and of itself. (See Inland Container Corp. 298 NLRB at 716 (1990), n. 3) ("there is no contention or evidence that the Respondent has refused to follow major portions of its bargaining agreement, repudiated its relationship with the Union, or engaged in other actions amounting to the total repudiation of the principles of collective bargaining") . Indeed, Collyer, supra itself, deferred a unilateral change involving a skilled employee wage premium and an incentive rate increase for some employees.

Conclusion

Deferral of the Complaint's allegations to the grievance and arbitration procedure under the parties' collective bargaining agreement comports with the Board's deferral policy and is consistent with the principles of the Act; accordingly, the Complaint should be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

Copies of Respondent's Brief In Support of Exceptions To Administrative Law Judge's Decision have been electronically transmitted to Scott Preston, Counsel for the General Counsel, National Labor Relations Board, Region 7, (Scott.Preston@nlrb.gov) and M. Catherine Farrell, Esq., Counsel for the Charging Union (Catherine@farrellesq.com) on September 2, 2014.

/s/ K.C. Hortop

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