

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

DATE: December 19, 2014

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: Columbia Sussex Corporation d/b/a
Anchorage Hilton
Case 19-CA-127945

530-8045-3725
530-6050-1662

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) and (1) of the Act under the principles of *McClatchy Newspapers, Inc.*¹ when it unilaterally implemented its health care proposal following a bona fide impasse and, if so, whether the Employer effectively repudiated the unlawful implementation.

We conclude that the unilaterally implemented health care proposal does not come within the *McClatchy* exception to the implementation-upon-impasse rule because, after switching to the new plan, the Employer agreed not to make any changes or to exercise any discretion reserved to it under the new plan before bargaining with the Union, and it has not done so.

FACTS

The Employer, Columbia Sussex Corporation, d/b/a Anchorage Hilton, took over the operation of the Anchorage Hilton hotel in December 2005, and adopted the previous owner's collective-bargaining agreement with UNITE HERE Local 878 ("the Union") covering a unit of approximately 200 employees. Included in this agreement was a provision governing the Alaska Hotel, Restaurant and Camp Employees Health & Welfare Trust ("Union Trust") that was financed by contributions from the Employer, and administered by a Board of Trustees comprised of an equal number of Union and Employer representatives. Employee benefits were then paid in accordance with the Union Trust agreement.

¹ 321 NLRB 1386 (1996), *enfd.*, 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1988).

Following the expiration of the collective-bargaining agreement on August 31, 2008, the parties bargained to a bona fide impasse on March 30, 2009, and the Employer implemented its last, best, final offer on April 13, 2009. While at various points during bargaining the Employer had proposed moving employees from their existing health insurance plan into the Employer's company-wide self-insured plan, it did not implement that portion of its final offer.

After the implementation of the Employer's final offer in 2009, the parties remained at a bargaining impasse until April 25, 2013, when they again began negotiations for a successor agreement. On September 6, 2013, the Employer notified the Union and unit employees that effective October 1, 2013, the employees would be covered under the Employer's health and benefit plan consistent with the terms of its 2009 proposal. However, after the Union filed an unfair labor practice charge alleging a unilateral change, the Employer agreed not to implement the plan without bargaining with the Union.

On October 17, in response to the Union's information request, the Employer provided the Union with a number of plan documents pertaining to its health and benefit plan, as well as the estimated costs of the plan. The Employer also gave the Union a new health care proposal that provided:

Employees covered by this Agreement shall participate in the Columbia Sussex Group Health Plan in accordance with the provisions of such plan, **subject to any modifications or changes applicable to other participating employees that may be adopted by the Plan Administrator.** Current plans and programs include health insurance, dental insurance, basic life insurance, flexible spending, short term disability, long term disability and supplemental life insurance. (Emphasis added.)

According to the plan documents, Columbia Sussex Management, LLC – whose officers are substantially the same as those of the Employer – would administer the plan. The plan documents also vest the plan administrator with broad discretionary authority:

The Plan Administrator shall perform its duties as the Plan Administrator and in its **sole discretion**, shall determine appropriate courses of action in light of the reason and purpose for which the Plan is established and maintained. In particular, **the Plan Administrator shall have full and sole discretionary authority** to interpret all plan documents, including this SPD, and make all interpretive and factual determinations as to whether any individual is entitled to receive

any benefit under the terms of this Plan. Any construction of the terms of any plan document and any determination of fact adopted by the Plan Administrator shall be final and legally binding on all parties (Emphasis added.)

The parties again met for bargaining on January 9-10, 2014, but no agreements were reached at these sessions.² When the parties subsequently met on February 19, the Union presented a package proposal for a successor agreement but the Employer declined to respond at that session. Two days later, on February 21, the Employer sent the Union a letter in which it rejected the Union's proposal in total. The Employer informed the Union that due to the clear impasse, it planned to implement its health care proposal on April 1, and would discontinue its participation in the Union Trust at that time. It also informed the Union that it would move forward with open enrollment so employees could be converted to its health and benefit plan on April 1.³

In its response dated February 28, the Union disputed that the parties were at impasse and proposed that they engage a FMCS mediator. It also requested that the Employer provide a full current proposal and additional dates for bargaining. Subsequent exchanges between the parties were unproductive, however, and on April 1 the Employer moved the unit employees into the company-wide health and benefit plan it had proposed during bargaining.⁴

Over two months later, on June 12, the Employer sent the Union a letter stating that it would not make any unilateral changes to the new health care plan without first notifying the Union of any proposed changes and affording it an opportunity to bargain. To date, there is no evidence that the Employer has made any changes to the plan, or exercised any discretion reserved to it under the plan, since its implementation on April 1.

² Hereinafter, all dates are in 2014.

³ The Employer began enrolling employees in its health and welfare plan on March 3.

⁴ The Region has concluded that the parties were at impasse when the Employer implemented its company-wide health and welfare plan on April 1.

ACTION

We conclude that the unilaterally implemented health care proposal does not come within the *McClatchy* exception to the implementation-upon impasse rule because, after switching to the new plan, the Employer agreed to make no changes to the plan, or to exercise any discretion reserved to it under the plan, before bargaining with the Union.

When parties in collective bargaining reach a lawful impasse, an employer does not violate the Act by making unilateral changes to the unit employees' employment terms that are reasonably comprehended within its pre-impasse proposals.⁵ A genuine impasse "in effect, temporarily suspends the usual rules of collective bargaining, by enabling the interjection of new terms and conditions into the employment relationship even though no agreement was reached"⁶ In *McClatchy*, however, the Board crafted an exception to the implementation-upon-impasse rule for clauses that confer broad discretionary powers on an employer to unilaterally change employee pay.⁷ The Board held that once implemented such proposals are so inherently destructive of the fundamental principles of collective bargaining that they cannot be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.⁸ The Board reasoned that the ongoing exclusion of the union from meaningful bargaining as to wage rates, leaving them entirely within the employer's discretion, would impact all future negotiations on this key term of employment and would disparage the union by demonstrating its complete inability to act for the employees in this regard.⁹ Moreover, with no objective criteria to limit the employer's discretion in granting merit pay increases, there would be no status quo for the union to bargain from, and the union would thus

⁵ *Richmond Electrical Services*, 348 NLRB 1001, 1003 (2006).

⁶ *McClatchy Newspapers, Inc.*, 321 NLRB at 1389.

⁷ *Id.* at 1391–92.

⁸ *Id.* at 1391.

⁹ *Ibid.* (citing *NLRB v. Katz*, 369 U.S. 736, 746–47 (1962)).

be unable to bargain knowledgeably.¹⁰ The Board has expanded the *McClatchy* exception to the impasse doctrine to other mandatory subjects of bargaining.¹¹

In *KSM Industries*,¹² the Board extended the *McClatchy* rationale to a non-wage proposal and held that the employer violated the Act when, after declaring impasse, it unilaterally implemented a health care proposal, and subsequently changed benefits set forth in the proposal, without notifying and bargaining with the union.¹³ The proposal in *KSM* reserved to the employer sole discretion to change virtually every aspect of the health care plan, including the provider, the plan design, the level of benefits, and the administrator. Approximately one month after impasse was reached in the parties' negotiations, the employer notified the union that it was implementing its health care proposal retroactive to the beginning of the month and that retroactive changes to employee benefits "[had] been made."¹⁴ Relying on *McClatchy*, the Board held that the employer's postimpasse implementation of changes to the health care plan without bargaining with the union violated Section 8(a)(5) because it nullified the union's authority to bargain over a key term and condition of employment, and rendered its implementation "inimical to the postimpasse, ongoing collective-bargaining process."¹⁵

¹⁰ *Ibid.* See also *Royal Motor Sales*, 329 NLRB 760, 778 (1999), *enfd.*, 2 F. App'x 1 (D.C. Cir. 2001).

¹¹ See, e.g., *Mail Contractors of America*, 347 NLRB 1158 (2006) (extending *McClatchy* exception to a proposal allowing employer to unilaterally alter the "relay points" where drivers end their shifts, which would have had a direct effect on their wages), *enforcement denied*, 514 F.3d 27 (D.C. Cir. 2008); *KSM Industries*, 336 NLRB 133, 135 n.6 (2001), *modified in part*, 337 NLRB 987 (2002) (extending *McClatchy* to proposal giving employer discretion in changing health plan). See also *United Grain*, Case 19-CA-100575, Advice Memorandum dated January 3, 2014 (authorizing complaint for discretionary disciplinary procedure); *Arlington Metals Corp.*, Case 13-CA-119043, Advice Memorandum dated May 20, 2014 (same).

¹² 336 NLRB at 133.

¹³ Noting that health insurance, like wages, is a mandatory subject of bargaining and an important term and condition of employment, the Board found *KSM*'s proposal akin to the merit wage proposals in *McClatchy*, and stated that there was "no principled reason" to distinguish *McClatchy* on the basis that health insurance rather than wages were involved. *Id.* at 135, n.6.

¹⁴ 337 NLRB at 990 (quoted fact included in Member Cowen's dissent).

¹⁵ 336 NLRB at 135.

In this case, unlike in *KSM Industries*, although the Employer unilaterally implemented a new health care plan following impasse, it did not implement the plan's discretionary aspects: it explicitly agreed to refrain from making any changes to the plan or exercising any discretion reserved to it under the plan without bargaining with the Union, and the evidence demonstrates that it has not done so.¹⁶ In sum, the Employer has not implemented any discretionary aspects of the plan that would trigger an obligation to bargain under *McClatchy*.¹⁷ We therefore conclude that in the absence of such unilateral action, the Employer did not violate Section 8(a)(5) and (1).¹⁸

¹⁶ See *Woodland Clinic*, 331 NLRB 735, 741 (2000) (explaining that a *McClatchy* violation is committed upon the "actual implementation" of a unilateral change, not by the mere announcement of a unilateral right to make future changes); *Bakersfield Californian*, 337 NLRB 296, 296-298 (2001) (employer's posting of its last, best, and final offers, which included a wholly discretionary merit wage and bonus program, did not violate the Act because the program was not implemented until those increases were granted). See also *McClatchy*, 321 NLRB at 1391 n.24 (suggesting that a wholly discretionary merit wage proposal does not itself establish terms and conditions of employment prior to the actual exercise of that discretion in setting discrete wage rates).

¹⁷ Of course, if the Employer makes any modification to employee benefits, or exercises any discretion in the way that the plan is administered, without bargaining over objective standards and criteria, the Employer will have violated the Act.

¹⁸ As previously noted, the Employer's new health care plan is self-insured. That is, the Employer itself sets the cost of premiums, deductibles, and benefits, and is responsible for paying the employees' claims. Because the Employer thus controls the way the plan is administered, it is in a position to ensure that no changes to the plan will take place without first bargaining with the Union. By contrast, employers that contract with third party insurers for the provision of health care benefits may not have the same ability to prevent changes in those plans. Thus, an employer's unilateral implementation of a health care plan reserving broad discretion in a third party administrator would arguably violate the Act (whether or not the employer offers reassurances that no changes will take place) because the employer may not be in a position to control the changes and therefore to notify and bargain with the union before they take place.

Accordingly, based on the foregoing analysis, the Region should dismiss the complaint, absent withdrawal.

/s/
B.J.K.