

Sutter Health Central Valley Region, d/b/a Sutter Tracy Community Hospital and California Nurses Association/National Nurses United, CNA/NU. Case 32–CA–098549

August 27, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On March 13, 2014, Administrative Law Judge Dickie Montemayor issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union filed answering briefs. The Respondent also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its proposed changes to the unit employees' 2013 healthcare and wellness programs, without affording the Union reasonable notice and a meaningful opportunity to bargain. As explained below, we reverse this finding.

Facts

The Respondent is a health care institution operating an acute care hospital in Tracy, California. On March 23, 2012,¹ the Union was certified as the exclusive collective-bargaining representative of a unit of over 150 nonmanagement registered nurses. Thereafter, the parties agreed upon negotiation ground rules, including that all information requests be made in writing. In May, the Union submitted an information request for the Respondent's healthcare and wellness programs. On June 12, the Respondent provided the requested information and its first set of noneconomic and benefits proposals to the Union.

The Respondent had provided healthcare coverage to its employees through Sutter Select, an umbrella of self-funded healthcare plans. In early August, the Respondent provided the Union with cost information for its healthcare programs (health, dental, and vision plans) from 2010 to 2012, including premium rates for both the Respondent and the employees. Anticipating an increase in rates, the Respondent, at some point in 2012, decided to switch to the Sutter Health Central Valley Regional Plan (SHCVH) to increase the risk pool and lower costs. On August 29, the 2013 premium rates for the SHCVH healthcare plans were finalized. The provider network

for these plans was not finalized, however, until September 20.

By separate letters on September 19 and 21, the Respondent notified the Union of its proposed changes, to be effective January 1, 2013, to its wellness and healthcare programs. Detailed comparisons of the 2012 wellness and healthcare programs and the 2013 proposed changes were enclosed. For the first time, the Respondent informed the Union that it had an annual practice of reviewing and modifying its healthcare and wellness programs. The parties stipulated that this annual practice had been in place since at least 2008. The parties also stipulated that the Respondent conducted this review in late summer or early fall; provided information to employees about anticipated changes in September or October; and held and completed open enrollment in October or November "to allow employees to make benefit selections and plan administrators to make any changes and send out employee enrollment cards in time for the new plan year on January 1."² The Respondent's letters stated that it could hold off on providing the enrollment materials to allow time for bargaining over the Respondent's proposed changes if the Union wished. The Respondent also asked the Union if it would like to have additional meetings (beyond the parties' already scheduled bargaining sessions) to discuss the proposed changes in advance of the commencement of open enrollment in November.

On September 20, the Union, by letter, notified the Respondent that it intended to bargain over the Respondent's proposed changes but that it found "no need to have any discussions apart from main table bargaining at this time." It cautioned the Respondent "not to implement any changes to benefit plans affecting bargaining unit Registered Nurses until a ratified collective bargaining agreement [was] in effect."³ The Union also requested information about the wellness plan by October 15. Although the Respondent had asked whether the Union wanted additional meetings to discuss the proposed changes, the Union made no such requests.

On October 2, the parties met for a scheduled bargained session. They briefly discussed the proposed

² The Respondent proposed to offer a different no-cost option for the 2013 plan year. The 2012 no-cost option, in which many employees were enrolled, was still available but would no longer be offered at no cost. Thus, employees would be faced during open enrollment with a major decision—whether to retain their current plan at cost or to opt for the 2013 no-cost plan.

³ Although the Union did not make a second, written request to bargain in response to the Respondent's September 21 letter, the parties understood that, based on the Union's September 20 letter, the Union had requested bargaining over proposed changes to both the wellness and healthcare programs.

¹ All dates are in 2012 unless otherwise indicated.

changes to the healthcare and wellness programs, and the Union accepted the Respondent's offer to have its benefits experts attend the next scheduled bargaining session to provide more information. That same day, the Union sent a flyer to its members advising them of the proposed changes to the wellness program. The flyer noted that "by law Sutter Tracy must continue to offer all benefits without change until we have reached agreement for changes."

On October 5, the Respondent's human resources director, Melanie Wallace sent a memo to all the unit nurses advising them that benefits experts would participate in the parties' next bargaining session, and noting that they should have already received summaries of the proposed changes to the healthcare program. The memo also stated that, contrary to information provided by the Union (presumably referring to the Union's October 2 flyer), the Respondent evaluates and makes changes to benefits for all employees on an annual basis and that it was legally permitted to address benefits for next year on a separate track from overall first contract negotiations. Significantly, the memo stated that 2013 benefits for unit nurses would be finalized only after the Union had been given a full opportunity to bargain over the Respondent's proposals.⁴ On October 9, the Union responded by letter objecting to this communication and demanding that the Respondent "immediately cease and desist all direct communication" with unit nurses about the proposed changes to the healthcare and wellness programs until "agreement or impasse on the issue."

At the parties' October 10 bargaining session, the Respondent presented three representatives to provide information and answer questions regarding the proposed changes to the healthcare and wellness programs. During this session, the Union verbally requested additional information about the wellness program, which the Respondent provided 2 days later.

At the October 19 bargaining session, the parties primarily discussed nonhealthcare issues, although the Respondent asked if the healthcare plans could be discussed. The Union responded that it was still soliciting input from its members and had not yet formulated any counterproposal. During this session, the Union for the first time requested the summary plan descriptions for the 2013 proposed healthcare plans, which the Respondent provided 5 days later. After the session, the Union sent a flyer to its members advising them of the proposed

changes to the healthcare plans and asking for their input.⁵

At the October 25 bargaining session, the Union presented and summarized a counterproposal. The Union's written proposal stated that it was "[e]ffective upon ratification or January 1, 2013 whichever comes later," made no counterproposals to the Respondent's proposed changes to the wellness program; and accepted the Respondent's healthcare plan options but proposed lower premium rates for the employees. The Respondent did not ask any questions, and the parties proceeded to discuss other matters. After a break, the Respondent provided, at the Union's verbal request, a chart showing the employer costs of the 2013 proposed changes. The Respondent stated that, with open enrollment coming up in November, it needed to make a decision. The Union responded that it would look over the new information provided and asked what the Respondent's thoughts were about moving ahead. The Respondent replied that it did not consider the Union's proposal to be a better proposal, but that even if it moved forward with changes to its plans, it would continue to bargain over healthcare and an initial contract.

The Union responded that it was willing to bargain separately over the healthcare issue and suggested that the Respondent continue the same healthcare coverage for unit employees for the following year. The Respondent indicated that rollover would not be acceptable because of increased costs. The Union replied that increased costs did not relieve the Respondent of its duty to bargain and asked if the Respondent was going to submit a counteroffer to the Union's proposal. The Respondent responded that it would not. After the meeting ended, the Respondent told the Union that it was going forward with implementation.

In an October 26 letter, the Respondent formally advised the Union that it was implementing its proposed changes to its 2013 healthcare and wellness programs. On November 1, the Respondent commenced open enrollment for the new plans. In a November 12 letter, the Union advised the Respondent that its unilateral implementation of its proposed changes to the healthcare and wellness programs was potentially unlawful. The letter stated that the Union was willing to reach an agreement over these benefits absent overall agreement, but only on terms lasting for the duration of the parties' initial contract; alternatively, the Union would "accept the current benefits rolling over for another year." The Union also

⁴ The October 5 memo is not alleged to be an unfair labor practice.

⁵ This was the first written solicitation of input. However, the Union asserts that it had talked to unit nurses after prior bargaining sessions about the proposed changes.

requested that the Respondent “cease and desist from the implementation path” to continue “the health and welfare negotiations that had just begun.” The Respondent continued open enrollment as scheduled until November 30, and the employees’ health insurance became effective January 1, 2013.

At the time of the hearing on November 18 and 19, 2013, the parties had engaged in over 40 bargaining sessions and were continuing to negotiate for a first contract.

Analysis

Applying *Stone Container Corp.*, 313 NLRB 336 (1993), and *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994), the judge found that the Respondent did not afford the Union a reasonable opportunity to bargain because it presented its proposed healthcare and wellness program changes as a *fait accompli*. In each of those cases, which dealt with first contract situations, the Board recognized an exception to the general rule that an employer cannot make unilateral changes to terms and conditions of employment absent an overall impasse in negotiations. In *Stone Container*, the Board held that an employer’s unilateral change to terms and conditions of employment was not unlawful where the employer established that the change was made pursuant to a past practice involving a discrete recurring event (an annual wage review), and that it had provided the union with notice of the proposed change and an opportunity to bargain. In *Brannan Sand*, which involved an employer’s annual review of its health plans, the Board, citing *Stone Container*, reaffirmed this discrete recurring event exception, but found that the employer did not satisfy its bargaining obligation because it presented its proposed changes to the union as a *fait accompli*.

We find that the judge properly applied *Stone Container* and *Brannan Sand* as the governing law here—i.e., the parties were engaged in first contract negotiations and they stipulated to the Respondent’s past practice of annually reviewing and modifying its healthcare and wellness programs. However, we find merit in the Respondent’s exceptions arguing that the judge’s *fait accompli* finding is neither supported by current Board law nor the relevant facts.

The Board finds that an employer has presented its proposed changes as a *fait accompli* when the announcement or notification is presented as a final decision or the union was not afforded an opportunity to bargain.⁶ Here, the Respondent did not present its proposed

changes in such a final manner. As described above, the Respondent notified the Union about the proposed changes in the latter part of September. It did so immediately upon finalization of the details of those changes, including the choice of a network provider and consistent with its past practice timeline for giving first notice to employees. It also told the Union that it would delay providing employees with the enrollment materials in order to allow time for bargaining, and it asked the Union’s representatives if they wanted to meet beyond the parties’ already-scheduled first contract bargaining sessions to discuss the proposed changes. Furthermore, the Respondent’s October 5 memo to unit employees stated that the Respondent would finalize 2013 benefits for unit employees only after giving the Union “a full opportunity to bargain over our proposals.” Thus, unlike in *Brannan*, above, the Respondent did not announce a final decision to the employees nor communicate anything to the Union that could lead to a conclusion that bargaining would have been “fruitless.” Cf. *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001) (affirming judge’s finding that employer did not announce decision as *fait accompli* where employer “made no statements at the time of the announcement that would lead a reasonable person to conclude that the decision was irrevocable”). The Respondent informed the Union of the specific details of the proposed changes 6 weeks before the planned commencement of enrollment and over 3 months before planned implementation. The Respondent afforded the Union, at multiple times and in multiple ways, reasonable opportunities to negotiate before the annual changes needed to take effect and negotiations did, in fact, take place. Further, even when the Respondent informed the Union that it would proceed with enrollment and implementation of the proposed changes in accord with the past practice timeline, it made clear that it would continue to bargain over healthcare and wellness programs and an initial contract. In these circumstances, we find that the record supports a finding that the Respondent met its duty to provide the Union with timely notice and a meaningful opportunity to bargain.

ORDER

The complaint is dismissed.

have been “fruitless” because it had no intention of doing anything other than what it had planned to do); see also *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023–1024 (2001) (*fait accompli* found where employer presented changes to its paid time-off policy as final decisions to be implemented and ignored the union’s request to bargain).

⁶ See *Brannan Sand & Gravel*, above at 282 (*fait accompli* found where employer had already announced the changes to its healthcare plans to the employees and advised the union that any discussion would

MEMBER HIROZAWA, concurring.

While I think this is a very close case on the facts, I view the conclusion that a violation has not been established as defensible under the Board's controlling authority, *Stone Container Corp.* and *Brannan Sand & Gravel Co.* Accordingly, I join my colleagues in dismissing the complaint. From the standpoint of the policy of the Act to "encourag[e] the practice and procedure of collective bargaining," 29 U.S.C. § 151, and the basic rules established by the Board to implement that policy, however, this result is hard to justify. Among those basic rules are the prohibition of unilateral changes in terms and conditions of employment without notice to and bargaining with the union, and the requirement that the parties have exhausted the possibilities of agreement as to all mandatory subjects of bargaining before a change in any of those subjects may be made unilaterally. There are many reasons for the latter, overall impasse rule. One is that it is necessary in order for bargaining to function productively. Judge Posner explained:

A negotiation is more likely to be successful when there are several issues to be resolved ("integrative bargaining") rather than just one, because it is easier in the former case to strike a deal that will make both parties feel they are getting more from peace than from war. Howard Raiffa, *The Art and Science of Negotiation* 97-103, 131-32 (1982). If the only thing at issue in a labor negotiation is wages, that is, money, the parties are playing a zero-sum game: a dollar more in wages is a dollar gained by the union but a dollar lost by the employer. But suppose a dues checkoff is also at issue. Since it probably is worth more to the union not to have to dun the workers for their union dues than it costs the employer to deduct the dues from the worker's paycheck and remit them to the union, the union may be willing to give a little in bargaining over wages in order to get the dues checkoff. Similarly, the employer may be willing to "pay" for a no-strike clause by agreeing to a grievance procedure jointly administered by the union and the employer, and that may be a concession that the union very much wants in order to give the workers a sense that the union is protecting them from arbitrary discipline by the employer. With both parties eager for this trade, it may be easier for them to compromise on other issues. The particular trade creates value that can be used to fund, as it were, other concessions by both sides, bringing the parties nearer to the state in which both feel better off with an agreement than with a strike.

Duffy Tool & Stamping, LLC v. NLRB, 233 F.3d 995, 998 (7th Cir. 2000). If one item is excepted from the

bundle of mandatory subjects, the exception both cripples the bargaining process as to that item and impairs the bargaining as to the rest, more or less seriously depending on the relative importance of the excepted item. In my view, the Board in *Stone Container* failed to justify, in terms of policy and broader legal principles, excluding the employer's annual wage increase because it was a discrete event that had been recurring since before the union's certification as the employees' representative. The exclusion is even more destructive, and difficult to justify, when applied to health insurance, changes in which usually impose increased costs and reduced benefits on employees. I think that the Board needs to reexamine its rulings in this area in light of the policies and purposes of the Act.

Jennifer Kaufman and *Catherine L. Ventola, Esqs.*, for the General Counsel.

David J. Reis and *Julia M. Levy, Esqs.*, for the Respondent.
Micah Berul, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. Pursuant to notice this case was tried in Oakland, California, on November 18, 19, 2013. The California Nurses Association/National Nurses United (the Union), filed the charge on February 15, 2013, and the General Counsel issued the complaint on August 27, 2013, alleging violations by Sutter Health Central Valley Region, d/b/a Sutter Tracy Community Hospital (the Respondent) of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent filed a timely answer denying that it violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs were received from counsel for the General Counsel (the General Counsel), the Respondent, and the Charging Party. Upon the entire record,¹ and based upon my observation of the demeanor of the witnesses and consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, is a corporation engaged in business as a health care institution operating an acute care hospital in Tracy, California, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5000 directly from points outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6),

¹ On December 19, 2013, the parties filed a joint motion to supplement the record with what was marked as Jt. Exh. 4(a). The motion was granted and Jt. Exh. 4(a) was admitted into the record.

and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The principal issue in this matter is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to employee healthcare and wellness program benefits for 2013. The issue was more specifically defined by the parties by stipulation.

At trial, the parties stipulated as follows:

Since at least 2008, the Employer in this case had an annual practice of reviewing its self-funded medical and wellness programs and other benefit plans and making modifications at approximately the same time each year. Under this practice, the Employer would review its health benefits programs and wellness plans in the late summer or early fall, provide information to employees about anticipated changes in September or October, and then hold benefits open enrollment in October or November to allow employees to make benefit selections and plan administrators to make any changes and send out employee enrollment cards in time for the new plan year on January 1.

For the purposes of this case only, the General Counsel agrees that the Employer has no burden of establishing that the changes to the health benefit programs and the wellness plans that the Employer proposed to the Union in September of 2012, which are the subject of this proceeding, are consistent with the Employer's preexisting annual practice of reviewing and changing its health benefit and wellness plans.

The General Counsel is not alleging that the Employer was obligated to refrain from implementing its proposed changes to its self-funded health benefits program and wellness plans until an impasse was reached in bargaining for a collective-bargaining agreement as a whole.

The issues in this case are:

(1) Did the Employer provide the Union adequate notice of the proposed changes to its self-funded health benefit programs and wellness plans and a meaningful opportunity to bargain before implementing the changes;

(2) Assuming the employer had afforded the Union with adequate notice and a meaningful opportunity to bargain, was the employer required to bargain to impasse over the proposed changes to its self-funded benefit programs and wellness plans before implementing them? And if so, did the Employer bargain to impasse over the proposed changes before implementation?

A. Background

Many of the underlying facts surrounding the allegations are not in dispute. Sutter Tracy Community Hospital is a hospital owned and operated by Respondent Sutter Central Valley Hospitals which is a private, not-for-profit corporation affiliated with Sutter Health. The Union represents a bargaining unit of over 150 nonmanagement registered nurses at the hospital. The Union was certified as the exclusive collective-bargaining unit

representative of the unit employees on March 23, 2012.² In June 2012, the parties began negotiations toward the adoption of an initial collective-bargaining agreement. At the time of the hearing, November 18 and 19, 2013, the parties had engaged in over 40 bargaining sessions. Nevertheless, no final agreement has been reached and the parties are still engaged in negotiations.

The parties were represented in these negotiations by Mike Brannan and Christopher Scanlan. Brannan is the labor representative and acted as Bargaining Lead for the Union. Scanlan is an attorney and legal counsel to Respondent and acted as the chief bargaining table spokesperson for Respondent. Both have been present during all relevant bargaining sessions.

B. The Health Plans

In the years prior, Respondent provided health coverage through Sutter Select an umbrella of self-funded health plans that service Sutter Health employees. Sutter Select establishes and markets health plans for Sutter Health. Rates are set for the plans at the beginning of the calendar year. Sutter Health plans are subject to IRS rules governing cafeteria plans. The IRS rules require that an open enrollment occur prior to the commencement of the plan year on January 1. Because the plans are offered to employees on a pretax basis, the failure to comply with IRS rules could result in employees losing the tax benefits of the arrangement. In order to remain in compliance with the IRS rules, Respondent has in place a practice of conducting an annual open enrollment. This open enrollment is typically held in the fall usually between mid-October and mid-November. The open enrollment process is held during this timeframe to account for the complex logistics involved in implementing the changes associated with the open enrollment process. Practically speaking, in order to account for all of the steps in the process, the entire open enrollment process must be completed by late November each year. This is because employees need to be given sufficient time to make their elections, information must be entered into the healthcare elections computer system, plan administrators need time to test the system, the vendors need time to process files, the insurance vendors require enrollment eligibility in December and ID enrollment cards have to be printed and provided to employees prior to the new year.

² The certified unit consists of:

all full-time, regular part-time, and per diem Registered Nurses employed by Respondent at its facility located at 1420 North Tracy Boulevard, Tracy, California, including Case Manager II, Staff Nurses, and Wound Care Nurses; excluding Employee Health Coordinator, Infection Control Coordinator, Policy & Procedure Coordinator, Quality Management-Infection Control and all other employees, all other professional employees, confidential employees, employees provided by temporary employment and placement agencies, managerial employees, guards, Clinical Nurse Leads, Charge Nurses ("permanent" Charge Nurses), Nurse Managers, Nursing Coordinator, Patient Care Shift Supervisors (House Supervisors), Wound Ostomy Continence Nurse Coordinator, and all other Supervisors as defined in the Act.

C. Bargaining

In May 2012, the Union, consistent with established and agreed upon negotiation ground rules, submitted a request for information regarding Respondent's then existing health benefits. On June 12, 2012, Respondent provided information to the Union which included copies of the health, dental, and medical benefit plans. Similarly on June 12, 2012, Respondent presented the Union with its first set of noneconomic and benefits proposals. Respondent proposed to maintain the status quo and provide identical benefits to both unit employees and non-represented employees. On August 8, 2012, Respondent provided the Union with plan rate information for all of Respondent's health plans.

In 2012, Respondent offered two tiers of health benefit options to its employees through Sutter Select: (1) a no-cost option for employees, called the EPO Plus Option, which gave access to all Sutter Health Facilities; and a PPO option at an additional cost. Because the costs for the EPO Plus Option and the PPO option were set to increase, Respondent looked to other alternatives. Respondent determined that it could best address the issues by aligning its benefits with that of the other Sutter Health Hospitals in the Central Valley Region in an attempt to increase the risk pool and lower the costs of benefits. Respondent determined that switching to the Sutter Health Central Valley Region Plan (SHCVH) would present the best option. On August 29, 2012, Sutter affiliates made the final recommendation for the 2013 premium rates for the health plans. Regional Hospital leadership then worked with Respondent facility leadership and Sutter Select officials to finalize the plans for the switch to the SHCVH plan.

On September 19, 2012, during a bargaining session, Scanlan presented Brannan a letter addressed to Brannan and signed by Melanie Wallace the human resources director. The letter provided that it was, "notification that consistent with our practice we intend to make certain changes to the wellness program for the next calendar year." (Jt. Exh. 5, p. 1.) The letter explained the intended changes and further noted that "we are prepared to hold off on providing enrollment materials to bargaining unit RN's through the end of October, to ensure adequate time for bargaining if you wish to bargain these proposed changes with us. (Id. at p. 2.) The following day Marti Smith, a union labor representative responded to the letter from Wallace. In the letter, Smith notified Wallace of the Union's intent to "exercise our right to bargain this along with all other terms and conditions of employment for Registered Nurses at Sutter Tracy. We see no need to have any discussions apart from main table bargaining at this time. You are therefore cautioned not to implement any changes to benefit plans affecting bargaining unit Registered Nurses until a ratified collective bargaining agreement is in effect." (Jt. Exh. 6, p. 1.) Smith also noted that in order to, "embark upon main table bargaining" they would need information related to the plan and requested that Respondent provide the information by October 15, 2012. (Id.)

On September 21, 2012, Wallace wrote Brannan to notify him of Respondent's "plan to adopt, effective January 1, 2013, certain changes to health, dental, vision and wellness benefits." (Jt. Exh. 7, p.1.) The letter, which briefly outlined the planned changes and stated, "because 2013 benefits will need to be the

subject of open enrollment in November, please let us know immediately if you would like to meet to discuss any of the above changes." (Jt. Exh. 7, p. 2.) Wallace also noted that they would "delay releasing any materials to STCH RNs until we have had an opportunity to hear from you about the issue. If we do not hear from you within one week of this letter we will assume that you do not object to the implementation of the proposed changes for STCH RNs. If you do wish to meet with us, we can discuss with you at our next scheduled bargaining session (October 2nd)." (Id.)

On October 2, 2012, the parties met again and the wellness program benefits and health care changes were briefly discussed. Respondent offered to have its benefits experts attend the next scheduled bargaining session to provide information regarding the planned changes. The Union sent out a flyer to its members advising of the proposed changes to the wellness plan and in its flyer noted that "by law Sutter Tracy must continue to offer all benefits without change until we have reached agreement for changes." (R. Exh. 5.)

By October 5, 2012, summaries of plan changes were provided to employees by Respondent. On October 5, 2012, Melanie Wallace the human resources director referencing these summaries sent a memo to all Sutter Tracy Community Hospital (STCH) registered nurses. In the memo, Wallace stated,

[T]here has been some confusion about whether a contract with the union must be in place in order for STCH to implement these benefit changes. Contrary to information provided by the union, a contract does not need to be in place in order for these changes to be implemented. STCH evaluates and makes changes to our benefits for all of our employees every year. Since no union contract has ever been in place, STCH is legally permitted to address benefits for next year on a separate track from our overall contract negotiations. However, we will finalize RN benefits for 2013 only after the C.N.A. has been given a full opportunity to bargain over our proposals. It is our preference and strong desire for RNs to participate in the same 2013 open enrollment process as the rest of the STCH employees." (Jt. Exh. 8.)

On October 9, 2012, Marti Smith sent a letter, on behalf of the Union, objecting to Wallace's October 5, 2012 memorandum and demanded that Respondent cease and desist all direct communication with the registered nurses regarding the proposed changes, "until the parties have bargained and reached agreement or impasse on the issue." (Jt. Exh. 9.)

On October 10, 2012, the next bargaining session was held and Respondent made available three representatives to provide information and answer questions regarding the planned changes. The parties met again on October 19, 2012. The discussions focused on non-health benefits issues because the Union was still soliciting input from its members and it had not yet formulated any counterproposal. The Union however did request the Summary Plan Descriptions (SPD) at this meeting. After the October 19, 2012 meeting, the Union sent out a flyer to its members asking that they "weigh in on Sutter's proposed changes to our benefits and wellness program." (R. Exh. 7.)

On October 24, 2012, at 2:31 p.m. Scanlan via email provided the Union with the SPDs which included a chart that referenced copays, deductibles, and out of pocket expenses for the new plan. The next bargaining session took place the next day on October 25, 2012. At that session, the Union presented its “counter-proposal” to Respondent’s proposal on health benefits (medical, dental and vision). (Jt. Exh. 12.) Brannan, while handing out the proposal, referenced the difficulty the Union faced with coming up with a counterproposal given the “time constraints.” (GC Exh. 2e.) Brannan thereafter summarized the Union’s proposal. Respondent didn’t ask any questions about the union proposal and the parties proceeded to discuss other matters. (R. Exh. 9(e).)

After the Union presented its counterproposal, and after the parties returned from a break in the meeting, Respondent provided the Union with a document that outlined total 2013 healthcare plan costs. This information had not been provided to the Union prior to their formulation of the “counter offer.” Upon presentation of the information, Scanlan indicated that with open enrollment coming up in November “we need to figure out what we are going to do,” intimating that a final decision needed to be made regarding the plan. Brannan responded that they would look over the information provided and asked what Scanlan’s thoughts were about moving ahead. Scanlan replied that he didn’t think that the Union had persuaded him that it had the better proposal. (GC Exh. 2(e).) Scanlan also indicated that if they did move forward with the plan they would continue to bargain over health care and a contract. Brannan responded by indicating that the Union was willing to bargain separately over the health care issue and also suggested that the Unit continue with its current coverage and roll it into the next year. Scanlan indicated that roll over wouldn’t be acceptable because of increased costs. Brannan responded that increased costs didn’t relieve the employer of its duty to bargain. Brannan asked if Respondent would submit a counteroffer to their proposal. Scanlan responded that they would not. After the meeting ended, Scanlan informed Brannan that Respondent was going forward with the implementation of its healthcare proposal. The next day, on October 26, 2012, Scanlan sent a letter to Brannan advising that the hospital-wide 2013 benefit plan first described in the letters of September 19 and 21, 2012, would be implemented. (Jt. Exh. 14.) Four days later, on November 1, 2012, Respondent commenced open enrollment for the new plan.

By letter dated November 12, 2012, the Union reiterated its position that Respondent’s unilateral implementation of its healthcare benefits changes was potentially unlawful and that it was willing to reach an agreement over healthcare benefits absent overall agreement. (Jt. Exh. 16.) Respondent replied to the letter on November 14, 2012, with a proposal that would give Respondent the right to change healthcare benefits for all of its employees “without need for negotiations.” (Jt. Exh. 17.) The language in the proposal related to healthcare mirrored that of Respondent’s original proposal submitted on June 12, 2012. (Jt. Exh. 4(a).)

D. Discussion and Analysis

Section 8(a)(5) requires that an employer, “bargain collectively with the representatives of his employees.” Section 8(d) defines that obligation to include, “the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . .” In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court made clear that an employer violates Section 8(a)(5) and (1) of the Act if it changes terms and conditions that are mandatory subjects without providing the union representing its employees with prior notice and the opportunity to bargain about such subjects. It is also well settled that an employer that acts precipitously and presents unilateral changes as a *fait accompli* fails to meet the requirement set forth above in *Katz*. See also *UAW-Daimler Chrysler National Training Center*, 341 NLRB 431, 433 (2004).

In *Stone Container Corp.*, 313 NLRB 336 (1993), the Board recognized an exception to the general rule that an employer must refrain from making unilateral changes during contract negotiations.³ *Stone Container* involved an annual wage review which occurred during the time the parties were involved in negotiations for an overall agreement. The Board held that because it was a “discrete event,” the employer, after giving notice and providing an opportunity to bargain, was privileged to implement changes without waiting until an overall impasse if, when given the opportunity to bargain, the Union did not submit any counterproposal or raise the issue during negotiations.⁴

The Board reaffirmed its holding in *Stone Container* in a number of cases directly related to health care benefits.⁵ In *Brannan Sand & Gravel*, 314 NLRB 282 (1994), the Board reaffirmed that an employer is not required to refrain from implementing the changes [involving a discrete annually recurring event] until an impasse has been reached in bargaining for a collective-bargaining agreement as a whole. But the Board distinguished the case from *Stone Container* holding that unlike the facts presented in *Stone Container*, the respondent in *Brannan* failed to satisfy its obligation to provide the union with timely notice and a meaningful opportunity to bargain over the changes in employment conditions. The Board reasoned that Respondent presented the health plan changes as a *fait accompli* and therefore violated Section 8(a)(5) and (1) by unilaterally implementing the health plan changes.

I find that in this case, as in *Brannan Sand and Gravel*, Respondent did not afford the Union a reasonable opportunity to

³ I concur with the General Counsel that the exigency exception relied upon by the Board in *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995), is inapplicable to this case as Respondent failed to demonstrate that the exigency was caused by external events, was beyond the employer’s control, and/or was not reasonably foreseeable.

⁴ It is undisputed, and I find, that in this case, the Union did not waive its right to bargain and in fact took active steps to exercise its right.

⁵ See, *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004), *Saint-Gobain Abrasives*, 343 NLRB 542 (2004), and *St. Mary’s Hospital of Blue Springs*, 346 NLRB 776 (2006).

bargain and presented the health care plan and wellness program benefit changes as a *fait accompli*.

E. The Denial of a Meaningful Opportunity to Bargain

Good-faith bargaining requires timely notice and “meaningful opportunity to bargain” regarding the employer’s proposed changes, as no genuine bargaining can be conducted where the decision has already been made and implemented. See *Pontiac Osteopath Hospital*, 336 NLRB 1021, 1023–1024 (2001), *Castle Hill Health Care Center*, 355 NLRB 1156, 1189 (2010), and *S & I Transportation*, 311 NLRB 1388 (1993).

I find there is sufficient objective evidence in the record to support the finding that Respondent made up its mind regarding its health care plan and wellness benefit proposals early on in the process and never seriously intended to bargain with the Union over the matters. The record includes a clear expression of Respondent’s intentions at the outset of bargaining as well as after the announced implementation of the health care plan and wellness program benefit changes. Respondent unequivocally asserted that its position was to offer the same health benefits it was offering to nonrepresented employees and reserve exclusively to itself the right to add, increase, reduce or eliminate any given benefit *without the need for negotiations* (emphasis added). (Jt. Exh. 17.)

Other objective evidence of the Respondent’s intent is found in the timing of the notice to the Union.⁶ It is undisputed that Respondent knew about the intended changes well in advance of its notification to the Union and was behind the scenes planning changes. It is also undisputed that Respondent had in mind a November launch for the open enrollment which would require that the plan be in place and ready to go. Nevertheless, Respondent purposely delayed informing the Union about both its annual practice and/or the planned changes that were underway. This is true despite the fact that Respondent was regularly meeting with the Union regarding other issues. Respondent instead chose to inform the Union only after all the plan features and changes had been finalized.

Other evidence of Respondent’s intent is found in the direct communication with represented employees of the summaries of its planned changes. This communication took place even before the Union was afforded the opportunity to present its counterproposal. (Jt. Exh. 8.) A reasonable inference to be drawn from this evidence is that the summaries were final and Respondent had no intention of altering them. If Respondent had a genuine interest in bargaining it would not have sent the proposals to the employees without providing the Union an opportunity for input regarding them. When the Union presented its counterproposal not a single question was asked of them.

⁶ Respondent argues that the Union engaged in “bad faith” bargaining on account of its delay in submitting its counterproposal and “squandered” its opportunity to bargain. Respondent cannot be heard to complain about the timing of the Union’s counterproposal when it had no real intention of considering it.

Nor was the Union given the opportunity to consider or study the newly presented plan cost information. The undisputed evidence of record is that the Union’s counter proposal was flatly rejected.

I find that a reasonable inference to be drawn from the totality of all of this evidence is that Respondent never really intended to bargain with the Union and the notice of proposed changes provided to the Union was simply a means to inform it of a *fait accompli*. Applying the reasoning and rationale set forth above in *Brannan Sand & Gravel*, I find that Respondent violated Section 8(a)(5) and (1) of the Act.

In view of my findings above, I need not reach the issue of whether bargaining to impasse was required or other subsidiary issues related to impasse.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(5) and (1) of the Act by implementing its health care plan and wellness program changes unilaterally changing terms and conditions of employment without providing reasonable notice and an meaningful opportunity to bargain about such changes.
4. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent was at liberty to make changes applicable to unrepresented employees. However for those represented employees, Respondent shall be required to make the unit employees whole in all respects for all losses whatsoever resulting from the changes in benefits beginning on January 1, 2013, through the present, and shall return all unit members to the status quo ante health care plan and wellness program, until such time as the Union expressly agrees to those changes in the health plan, or a collective-bargaining agreement or an impasse in negotiations is reached as provided in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest to be computed as provided for in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). This includes reimbursing unit employees for any expenses resulting from Respondent’s unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons*, *supra*.

[Recommended order omitted from publication.]