

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

Advice Memorandum

DATE: August 25, 2016

TO: Ronald K. Hooks, Regional Director
Region 19

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

SUBJECT: KING TV
Case 19-CA-145233

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The Region submitted this case for advice as to whether it should defer to an arbitrator's decision that denied the Union's grievance alleging that the Employer violated the parties' contract by unilaterally changing employees' healthcare plans. We conclude that the Region should defer to the arbitral award because the arbitrator considered the underlying unfair labor practice issue and the decision was not "clearly repugnant" to the Act where the collective-bargaining agreement clearly and unmistakably waived the Union's right to bargain over healthcare plan changes and the Employer announced its changes during the life of the agreement.

FACTS

KING TV ("Employer") operates an NBC-affiliated television station in Seattle, Washington. The International Brotherhood of Electrical Workers, Local 46 ("Union") and the Employer have a long-standing bargaining relationship. The most recent contract between the Union and the Employer was set to expire, by mutual agreement, on October 10, 2014. Section 4.10(C) of the agreement states that "The Company now provides medical, dental, pension, life, disability, and travel accident coverage The Company reserves the right unilaterally to make changes in the benefit programs and plans, but will notify the Union of significant benefit changes."

On October 1, 2014, the Employer notified the Union that it intended to implement three changes effective January 1, 2015: 1) changing employees' recognized paid holidays by eliminating one holiday; 2) implementing a new comprehensive paid-time-off (PTO) benefit policy; and 3) implementing new company-provided health insurance plans. The letter also stated that the changes would be implemented in sixty days and invited the Union to "provide input." On October 2, 2014, the Employer's human resources director sent the Union an e-mail delineating the specific changes the Employer intended to make to the company-provided health

insurance. Specifically, the Employer, which had previously offered a variety of different healthcare plans, had decided to only offer a high-deductible plan with higher employee premiums. The new healthcare plan had an enrollment period from November 3 to November 14, 2014.

On October 14, 2014, the Union filed a grievance over the Employer's three planned changes. The Employer denied the grievance, and the Union and the Employer scheduled the grievance for arbitration. The Employer and the Union met on October 29 and 30, 2014 to bargain for a successor contract. At those bargaining sessions, neither party addressed the Employer's planned changes to employees' health insurance plans. On January 1, 2015, the Employer implemented the changes it had announced on October 1, 2014, including the new health insurance plans.

On January 14 and 15, 2015, the parties met again to continue bargaining for a successor contract. Neither the Union nor the Employer raised the issue of employees' healthcare plans. On January 28, 2015, the Union filed the instant unfair-labor-practice charge alleging that the Employer's unilateral changes were unlawful. On April 29, 2015, the Region deferred the Union's charge to arbitration.

On August 20, 2015, the Union and the Employer arbitrated the grievance. Regarding the Employer's changes to employees' healthcare plans, the Union argued before the arbitrator that the Employer had withheld details about its plans to change medical plans until its October 1, 2014 letter to the Union, only a little more than a week before contract expiration. The Union further argued that allowing the Employer to alter healthcare plans after the expiration of the contract, but before the parties' had reached impasse, would be unlawful under Board law regardless of the waiver language in Section 4.10(C).

On December 17, 2015, the arbitrator issued his decision and sustained the Union's grievance with regard to the Employer's changes to PTO benefits and paid holidays on the grounds that the changes were inconsistent with the collective-bargaining agreement. The arbitrator, however, rejected the Union's arguments that the Employer was not privileged to unilaterally change employees' health insurance plans. The arbitrator observed that the language of Section 4.10(C) "clearly and unmistakably waived" the Union's right to bargain over those changes and that the Employer had decided and announced its changes during the life of the agreement.

ACTION

We conclude that the Region should defer to the arbitral award because the arbitrator considered the underlying unfair labor practice issue and the decision was not "clearly repugnant" to the Act where the parties' collective-bargaining agreement clearly and unmistakably waived the Union's right to bargain over healthcare plan changes and the Employer announced its changes during the life of the agreement.

The Board will defer a Section 8(a)(5) case to an arbitral award if: (1) the parties agreed to be bound by the decision of the arbitrator; (2) the proceedings appear to have been fair and regular; (3) the arbitrator adequately considered the unfair labor practice issue; and (4) the award is not “clearly repugnant” to the Act.¹ An arbitrator has adequately considered the issue if: (1) the contractual issue is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented generally with the facts relevant to resolve the unfair labor practice.² An arbitral award is “clearly repugnant” if it is “palpably wrong,” that is, the award is “not susceptible to an interpretation consistent with the Act[.]”³ When determining whether an award is “clearly repugnant,” the Board examines all the circumstances, including the parties’ contract language, bargaining history, and past practices.⁴ The party seeking to avoid deferral to the arbitral award has the burden of showing that deferral is inappropriate.⁵

Applying these principals, we initially conclude that the arbitrator adequately considered the unfair labor practice issue.⁶ In determining that the Employer was privileged to change employees’ health insurance plans without bargaining, the arbitrator examined the contractual language and determined that the Union had

¹ See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955); see also *Olin Corp.*, 268 NLRB 573, 573–74 (1984).

² *Olin Corp.*, 268 NLRB at 574.

³ *Id.*

⁴ *Southern California Edison Co.*, 310 NLRB 1229, 1231 (1993) (Board deferred to arbitral award finding that employer’s contractual reservation of the right to make reasonable safety rules permitted the unilateral imposition of a drug and alcohol testing program, even if the arbitrator’s findings did not comport with the statutory standard for a clear and unmistakable waiver, because “the mere fact that the Board would not have found a waiver is insufficient by itself to establish repugnance”), *petition for review denied sub nom. Utility Workers Local 246 v. NLRB*, 39 F.3d 1210 (D.C. Cir. 1994). See *Smurfit-Stone Container Corp.*, 344 NLRB 658, 660–61 (2005) (concluding arbitral award was not “clearly repugnant” where the arbitrator’s decision upholding employer’s unilateral imposition of new workplace rules was based, in part, on the management-rights clause of the parties’ agreement).

⁵ *Olin Corp.*, 268 NLRB at 574.

⁶ There is no dispute that the parties agreed to be bound by the arbitrator’s decision or that the arbitral proceedings were fair and regular.

clearly and unmistakably waived the right to bargain over the changes. The arbitrator went on to determine that the Employer was permitted to take such action because it did so during the life of the agreement. In resolving the statutory issue, the Board would similarly consider whether the parties' contractual language permitted the Employer to make unilateral changes to its employees' healthcare plans. Because the facts needed to resolve the contractual issue are closely parallel (if not identical) to the facts needed to resolve the statutory issue and the arbitrator's analysis closely followed Board precedent, as discussed in more detail below, the arbitrator adequately considered the unfair labor practice issue in this case.⁷

We also conclude that the arbitrator's decision was not "clearly repugnant" to the Act. The Board and courts have held that an employer generally violates Section 8(a)(5) when it unilaterally changes unit employees' terms and conditions of employment.⁸ It is well established that health insurance and medical benefits are mandatory subjects of bargaining.⁹ Thus, an employer violates Section 8(a)(5) when it unilaterally changes its health insurance carrier or plan without bargaining to agreement or impasse with the union, unless privileged to do so by a union waiver of bargaining rights.¹⁰ A union's waiver of bargaining rights must be "clear and unmistakable"¹¹ and does not outlive the collective-bargaining agreement that contains it, absent evidence that the parties intended it to do so.¹² However,

⁷ See *Dennison National Co.*, 296 NLRB 169, 170 (1989) (deferral appropriate because contractual and statutory issues were factually parallel; arbitrator's analysis that management rights clause permitted employer to eliminate job classification was also determinative regarding the employer's right to take unilateral action under the Act).

⁸ See *NLRB v. Katz*, 369 U.S. 736, 742–43 (1961).

⁹ See, e.g., *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002); *United Hospital Medical Center*, 317 NLRB 1279, 1281 (1995).

¹⁰ *Long Island Head Start Child Development Services*, 345 NLRB 973, 973 (2005), *enforcement denied on other grounds*, 460 F.3d 254 (2d Cir. 2006), *on remand*, 354 NLRB 684 (2009).

¹¹ See, e.g., *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–13 (2007).

¹² See, e.g., *Register-Guard*, 339 NLRB 353, 355 (2003) ("A contractual reservation of managerial discretion, like the provision relied on by Respondent, does not survive expiration of the contract that contains it, absent evidence that the parties intended it to survive."); *Long Island Head Start Child Development Services*, 345 NLRB at 973 ("[a] contractual reservation of management rights does not extend beyond the expiration of the contract in the absence of the parties' contrary intentions").

decisions made and announced during a contract, but implemented after contract expiration, may be privileged by a contractual waiver.¹³

In the instant case, the parties' collective-bargaining agreement contained language that clearly and unmistakably waived the Union's bargaining rights concerning healthcare plans during the term of the agreement.¹⁴ Thus, Section 4.10(C) gave the Employer "the right unilaterally to make changes in the benefits programs and plans," and only required the Employer to "notify the Union" of significant benefit changes. It contained no language referencing any obligation to bargain with the Union about such changes. Thus, on October 2, 2014 (when the parties' contract was in effect), the Employer acted consistently with the contractual language privileging the Employer to unilaterally change health programs by clearly and unequivocally informing the Union that it had decided to eliminate all other health insurance options except a modified version of the high-deductible PPO plan, effective in sixty days.

Although the healthcare changes only went into effect after the contract (and, hence, the waiver) had expired, the Employer made the decision and announced it during the term of the agreement while the language privileging the Employer to unilaterally change health programs was in effect. Indeed, the Employer's October 1 and October 2 correspondence with the Union, during the contract's term, indicated

¹³ See *Chicago Tribune*, Advice Memorandum dated September 29, 2009, Case 13-CA-045275, at 6 (concluding employer that announced change of health insurance provider pursuant to contractual bargaining waiver during the term of the contract, which would not take effect until contract expired, did not violate Section 8(a)(5)); *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1238 (D.C. Cir. 2012) (finding that employer lawfully implemented new health plan unilaterally as of date it announced new plan—when parties were at impasse—even though employees only became covered under new plan months later, when impasse had been broken; court noted, inter alia, that employer's announcement was explicit and definitive). Cf. *Swift Independent Corp.*, 289 NLRB 423, 428–29 & n.11 (1988) (finding that 10(b) period for plant-closure allegations began to run as of dates of actual closures rather than employer's announcements; employer's plans at time it notified union were *inchoate* and *imprecise* regarding their timing and circumstances, and employer changed and altered its plant-closure plans several times before implementation), *enforcement denied on other grounds*, 887 F.2d 739 (7th Cir. 1989).

¹⁴ There is no evidence of the parties' past practices or relevant bargaining history regarding changes to health plans, and the contract did not contain other provisions that may shed light on the parties' intent regarding Section 4.10(C). See *Provena St. Joseph Medical Center*, 350 NLRB at 810–13. Accordingly, our waiver analysis is based solely on the wording of Section 4.10(C).

that the decision was final, and, on January 1, 2015, the Employer switched employees to the new plan as announced. The Employer's announcement of its changes to the healthcare plans on October 1 were fully developed and choate; the only reason implementation was delayed until January 1, 2015 was to coincide with the November 3 through November 14 open period for employee enrollment in the new healthcare plan.¹⁵ Based on the foregoing, including the absence of Board precedent concerning this issue, we would not find that the arbitral award upholding the Employer's action on contractual waiver grounds was "clearly repugnant" to the Act.

Accordingly, the Region should defer to the arbitral award and dismiss, absent withdrawal, the Section 8(a)(5) allegation.

/s/
B.J.K.

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¹⁵ See *Comau, Inc. v. NLRB*, 671 F.3d at 1238 (in finding that new health plan was implemented as of the date it was announced, rather than later date coverage went into effect, court noted that the delay "merely reflected the fact that the mechanics of transferring" employees from the old plan to the new plan "required extensive preparation" entailing "a number of steps").