

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

DATE: September 1, 2015

TO: Karen P. Fernbach, Regional Director
Region 2

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

SUBJECT: Kirkstall Road Enterprises, Inc.
Case 02-CA-141495

530-6033-7000
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The Region submitted this case for advice as to whether the provisions of the Affordable Care Act (“ACA”)¹ created an economic exigency under *Bottom Line Enterprises*² and *RBE Electronics of S.D.*³ such that Kirkstall Road Enterprises, Inc. (“the Employer”) could unilaterally implement an ACA-compliant health care plan for bargaining unit employees represented by Writers Guild of America, East (“the Union”) during initial contract bargaining absent overall impasse.

We agree with the Region that the Employer violated Section 8(a)(5) by unilaterally implementing a health care plan where the ACA did not create an economic exigency, and the Employer neither provided the Union adequate notice and an opportunity to bargain nor bargained to a bona fide impasse. First, we agree with the Region that the portion of the ACA dealing with Employer-sponsored health plans does not “require” the Employer to provide health insurance to its employees, and instead gives the Employer the choice either to provide some type of ACA-compliant

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

² 302 NLRB 373 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994) (unpublished decision).

³ 320 NLRB 80 (1995).

plan or be subject to an “assessable payment.”⁴ Because the ACA provides the Employer with discretion on how to comply, including whether to offer health insurance, and if so, what type of plan to offer, it did not relieve the Employer of all bargaining over implementation of an ACA-compliant plan.⁵

Second, we agree with the Region that the parties were not at overall impasse, as is generally required by *Bottom Line Enterprises*.⁶ Indeed, both parties agree that they were not at overall impasse when the Employer unilaterally implemented the EP Cares plan on November 17, 2014.⁷

Third, we agree with the Region that, under *RBE Electronics of S.D.*, the Employer cannot rely on the ACA to support a claim of economic exigency under either the “extraordinary events” exception that would allow the Employer to forgo bargaining altogether, or the lesser economic exigency exception that would permit implementation after bargaining to impasse over the issue of health insurance.⁸

⁴ I.R.C. § 4980H (2013); Final Rule on Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) (codified at 26 C.F.R. pts. 1, 54, and 301).

⁵ See *Trojan Yacht*, 319 NLRB 741, 743 (1995) (making necessary changes to employer’s pension plan to conform with new IRS requirements did not excuse employer from providing union with notice and opportunity to bargain over several available options to implement needed changes); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (finding no violation for increasing wages for employees previously below minimum wage to comply with FLSA, but finding violation for unilateral wage increase for remaining employees for the sole purpose of maintaining wage differentials).

⁶ 302 NLRB at 374 (when parties are engaged in negotiations, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses “a duty to refrain from implementation at all, unless and until an overall impasse has been reached for the agreement as a whole”). The Board also noted two “limited exceptions to this general rule:” (1) when a union engages in tactics to avoid or delay bargaining; and (2) when economic exigencies compel prompt action. *Id.* There are no allegations that the Union engaged in any dilatory tactics.

⁷ All dates refer to 2014 unless otherwise noted.

⁸ 320 NLRB at 81-82 (employers are allowed to forgo bargaining in the face of “extraordinary events which are ‘an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action,’” but remain obligated to provide a union with adequate notice and an opportunity to bargain to impasse [over

Under the “extraordinary events” exception, the Employer failed to provide any evidence to support a claim that complying with the ACA created either a “dire financial emergency” or that the event was “an unforeseen occurrence.”⁹ Regarding the latter point, the parties had been discussing health care since bargaining began in 2012, the Employer specifically proposed an ACA-compliant plan at the September 2 bargaining session, and, at the October 16 meeting, the Employer informed the Union that open enrollment was scheduled for November 17. Further, ACA compliance could not have been unforeseen where at the October 16 meeting, in response to the Union’s query, the Employer stated that it would offer the proposed plan only to non-bargaining unit employees if the parties had not reached an agreement by the date of open enrollment.

Moreover, under the lesser economic exigency exception, the ACA did not “compel” the Employer to take “prompt action” because the ACA did not require the Employer to provide health insurance.¹⁰ Even assuming the Employer’s need for prompt action, it will not be able to avail itself of *RBE Electronics*’ lesser exigency exception to justify its conduct because we conclude, in agreement with the Region, that the Employer did not give the Union adequate notice and opportunity to bargain or bargain to impasse over health insurance. Regarding notice and opportunity to bargain, the Employer consistently failed to provide the Union with complete plan details for even the most basic aspects of the EP Cares plan, such as plan deductibles. That occurred despite the Union’s regular requests for additional plan information at each of the bargaining sessions leading up to implementation. Indeed, the Employer did not provide the Union with the full details of the EP Cares plan until three weeks after implementation. Further, it was not until a phone call between the Employer’s attorney and the Union’s Executive Director on November 14, i.e., three days before implementation, that the Employer informed the Union that, despite its earlier assertion, it had changed its position and now believed that the ACA compelled it to implement the proposed health care plan on both unit and non-unit employees on November 17. That did not leave the parties with adequate time to engage in meaningful bargaining. We also agree with the Region that the parties were not at impasse on the health care issue. Contrary to the Employer’s assertion that the sole remaining issue was the amount of the Employer’s monthly contribution, the evidence shows that the parties had not even reached agreement on a plan where the Employer maintains that the Union stated at the November 12 bargaining session that it would

the single issue] in the face of an “economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely”) (citations omitted).

⁹ *Id.* at 81.

¹⁰ *See Id.* at 82.

not agree on health insurance until an overall contract was reached.¹¹ The parties also had bargained over the terms of a different plan in 2013, and their lack of agreement over the terms of the EP Cares plan in late 2014 could have resulted in consideration of additional health plans. Moreover, the parties could not have been at impasse over the terms of a health care plan where the Employer had not provided the Union with the full details of the proposed plan before it was implemented. This same evidence also establishes that the parties did not have a “contemporaneous understanding” that health plan negotiations could go no further because the Union had insufficient health care plan information to arrive at such an understanding.¹²

Based on the foregoing analysis, we conclude that the Employer violated Section 8(a)(5) by unilaterally implementing the EP Cares health care plans on November 17.

/s/
B.J.K.

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¹¹ Although the Union denies stating at the November 12 session that it required reaching overall agreement before agreeing on health insurance, it stated to the Region during the charge investigation that it did not want the Employer to unilaterally offer the EP Cares plan to the bargaining unit employees prior to agreement on the full contract because that plan, as proposed, was not acceptable. In any event, the Employer’s assertion about the status of negotiations on November 12 constitutes an admission-against-interest that demonstrates the Employer was aware that the parties had not even reached agreement on the health care plan itself.

¹² *RBE Electronics*, 320 NLRB at 82. See *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 840-41 (2004) (genuine impasse exists when parties are warranted in assuming that further bargaining would be futile or when there is “no realistic possibility that continuation of discussion at that time would have been fruitful”); *CJC Holdings*, 320 NLRB 1041, 1045 (1996) (valid impasse requires “contemporaneous understanding” by the parties that the state of negotiations could go no further), *enforced* 110 F.3d 794 (5th Cir. 1997); *Ford Store San Leandro*, 349 NLRB 116, 121 (2007) (impasse requires deadlock and it is not established simply by showing that employer had lost patience in bargaining with union).