

29, 2009, and the Employer presented the Union with a detailed proposal on February 16, 2010.¹ Under the Employer's proposal, it would shift from a fully-funded plan to a self-funded plan, offering employees a choice of three options: an Exclusive Provider Organization (EPO), a high Preferred Provider Organization (PPO) and a low PPO. Employees would be required to contribute to the cost of all of the options except for employee-only coverage under the EPO. The EPO offered under the Employer's proposal includes two networks: the Prime Network (consisting of doctors who work at hospitals such as the Employer, owned by Prime or doctors under contract with Prime) and the Anthem Blue Cross Network (the same network available under the existing HMO).

In March, after making its initial proposal, the Employer provided the Union with a number of related documents.² At the end of March, the Employer notified the Union that it wanted to implement its health care proposal effective July 1,³ but would "keep contribution rates the same until [the parties] reach an agreement or impasse." On April 19, the Union informed the Employer that it would not agree to a July 1 implementation date.

During May, the parties continued to bargain about health care, as well as other provisions of the contract. In early May, the Union raised concerns regarding quality of care at Prime facilities, which the Employer proposed employees would utilize. The Union expressed particular concern about high septicemia rates at Prime hospitals.

At a May 4 bargaining session, the Union expressed concerns about premium costs, which would increase for employees under the Employer's proposal. At this same bargaining session, the Employer informed the Union that it wanted to implement its proposal on August 1, rather than July 1. The Union made an information request related to the Employer's health care proposal, which included information regarding the self-funding of the plan, as well as quality of care at Prime hospitals. The Employer in turn provided the Union with summary plan descriptions (SPDs) for the EPO and the PPOs. At this time, the Union noticed that the SPD included a requirement that employees under the EPO have a primary care physician in the Prime

¹ Herein all dates are 2010 unless otherwise indicated.

² The parties dispute whether those documents indicate that employees using the Anthem Blue Cross Network would be required to have a referral from a Prime Network physician.

³ The July 1, 2010 date coincided with the expiration date of the existing Anthem Blue Cross HMO.

network, and that employees would need referrals to go to the Anthem Blue Cross network. At the next bargaining session, the Union expressed its concern that this was a change from the Employer's initial proposal.

On June 14, the Union made a counter-proposal on health care. The proposal prohibited the Employer from increasing deductibles, co-pays, or contributions during the term of the agreement, offered employee contributions for the PPO plans, albeit at lower rates than the Employer proposed, and provided that employees who selected the EPO would not pay premium costs. The proposal also agreed to self-funding of the plan, but included language allowing employees to select a primary care physician from either the Prime or Anthem network.

At a June 15 bargaining session, the Employer informed the Union that it was moving its implementation date from August 1, 2010 to January 1, 2011.

At a July 23 bargaining session, the Union provided the Employer with a new information request, which focused on its concern about quality of care issues at Prime facilities. The Employer presented the Union with a counter-proposal on health care, lowering its initial proposal on contribution rates, rejecting the Union's changes to the schedule of benefits, and rejecting the Union's proposal to allow employees in the EPO to access doctors in the Anthem network without a referral.

On August 9, the Employer responded to the Union's July 23 information request. The Employer refused to provide the requested information, claiming lack of relevance, availability of some of the information from other sources, and privacy and confidentiality concerns. On August 17, the Union responded addressing each of the Employer's concerns, including offering to enter into a confidentiality agreement with the Employer and agreeing to accept documents redacted to protect patient privacy.

On September 1, the Employer distributed a memo to employees stating that effective January 1, 2011, it would be offering a new EPO plan and new PPO plans. It attached a copy of a physician nomination form, inviting employees to request that their doctor be included in the Prime network, and also indicated that additional information about the new plans would be provided before the November open enrollment period. The Union did not agree to or participate in the distribution of this memo.

During the month of September, the Employer held a series of meetings with employees. At those meetings, Employer representatives explained the upcoming January 1,

2011 health care changes, including the introduction of the new EPO plan and increased cost for those employees who wished to continue under the Anthem plan. The Employer also informed employees that counselors would be coming to the facility in November to sign employees up for the health care plan of their choice, and that those who didn't select a plan would automatically be enrolled in the EPO plan, and their dependents dropped from coverage.

The parties met again on September 30. At this session the Employer declared that health care was a "single critical issue" and that it would not negotiate about any other subjects. The Union presented a number of proposals to the Employer, including an updated counter-proposal on health care. The Union also indicated that it could not agree to any Employer proposal requiring employees to go to a primary care physician within the Prime Network because the Employer had not provided any of the requested information on quality of care. The parties continued to discuss health care, and the Employer provided a new proposal which eliminated one of the two PPOs originally offered. The Union did not agree to the combination of the PPOs and emphasized its positions that the EPO should be free to employees and dependents, and that they should be allowed to choose from doctors in either the Prime or Anthem networks.

On October 21, the parties held their last bargaining session. After the Union made proposals on several issues, the Employer provided the Union with a comprehensive proposal that it called its "final offer." With respect to health care, the Employer reinstated the two PPO options, a high or low PPO. While the Employer indicated that this was its last, best and final offer on the EPO plan, it encouraged the Union to make proposals on other subjects, including the PPO, but indicated that it would not reach agreement on the whole contract without reaching agreement on the EPO. The parties also discussed the fact that the Employer's proposal did not conform to the health care reform law. The Employer stated that it intended to amend the plan documents to conform to the new law.

In correspondence after this bargaining session, the parties disputed whether they were at impasse. On November 2, the Employer opened enrollment on the plans as described in its October 21 offer and coverage went into effect on January 1, 2011.

ACTION

We conclude that the Employer violated Section 8(a)(1) and (5) by unilaterally implementing its proposal on health care because, when it implemented, the parties had not reached an overall impasse in bargaining nor was health

care a "single critical issue" on which the parties had reached impasse.

1) The parties had not reached an overall impasse in bargaining

Where parties have reached a good faith impasse, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals."⁴ However, an employer violates its duty to bargain in good faith by implementing unilateral changes before the parties have reached impasse on bargaining for the agreement as a whole.⁵

In determining whether a bargaining impasse exists, factors the Board considers include the good faith of the parties in negotiations, the importance of the contested issues, and the contemporaneous understanding of the parties as to the state of negotiations.⁶ A good-faith impasse is reached when further discussion of mandatory issues would be futile and "there is no realistic possibility" that bargaining would be "fruitful."⁷ The Board has specifically held that an employer's failure to provide relevant information precludes it from declaring a good faith impasse.⁸

⁴ *Taft Broadcasting*, 163 NLRB 475, 478 (1967). See also *Pavilions at Forrestal*, 353 NLRB No. 60, slip op. at 1, 2 (2008), affirmed by 356 NLRB No. 6 (2010) (no impasse where employer refused to provide information concerning health insurance plan that might have caused union to reconsider employer's proposal); *Genstar Stone Products*, 317 NLRB 1293, 1294 (1995) (unlawful refusal to provide information pertaining to its health care proposal precluded employer from declaring impasse).

⁵ *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

⁶ *Taft Broadcasting Co.*, 163 NLRB at 478.

⁷ *Cotter & Co.*, 331 NLRB 787, 787 (2000), enf denied, sub nom., *TruServe v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001) (quoting *Television Artist AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968)).

⁸ See e.g. *Stella D'Oro Biscuit Co.*, 355 NLRB No. 158, slip op. at 1 n.3, 11 (2010) (no valid impasse where employer did not provide information that was necessary for union to evaluate whether employer's position was justified and may have led union to adjust its position); *E.I. Du Pont de Nemours & Co.*, 346 NLRB 553, 558 (2006) (impasse precluded where employer did not provide information necessary for union to create counterproposal).

At the outset, we note that the Region has already authorized complaint based on the Employer's refusal to provide any information in response to the Union's July 23, 2010 request. The Employer's refusal to provide the relevant information prevented the Union from engaging in meaningful bargaining because the information was essential to its ability to evaluate the Employer's health care proposal. That proposal made significant changes to the existing plan, including requiring employees to use the Employer's facilities and network of doctors for their medical care. The Union had legitimate concerns about the quality of care at those facilities, and its information request dealt in particular with quality of care and employee choice of doctors. Information from the Employer responsive to the Union's concerns about the quality of care at its facilities might have permitted the Union to move closer to the Employer's proposal, such as by accepting more choice limits. Thus, the Employer's failure to provide this information interfered with bargaining and precludes it from declaring a good-faith impasse.

In addition to its failure to provide information, the Employer's overall conduct during negotiations supports a finding that the parties had not reached a good-faith impasse on October 21, 2010 when the Employer made its "final offer" on health care. The Board has held that an announced unilateral change to a mandatory subject of bargaining is unlawful, even if it is not actually implemented, where the announcement would cause a reasonable employee to view the change as effectively implemented.⁹ Here, at the time that the Employer declared impasse in late October, it had already announced to employees in early September that the new health care plan would be changed effective January 1, 2011. Thus, although the changes were not ultimately implemented until January, the Employer presented them to employees in September as a fait accompli. Indeed, when the Employer made the September announcement, it both informed employees of the upcoming November open enrollment period, and provided them with physician nomination forms so that they could request that their physicians be added to the network. The Employer also explained to employees at meetings held in

⁹ See *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992) (by unilaterally announcing changes in mandatory terms and conditions of employment, the employer diminished the union's relevance as the employee's bargaining representative and damaged the bargaining relationship); *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155-156 (1998); *CJC Holdings*, 320 NLRB 1041, 1041 fn. 2 (1996).

September that if they failed to select a plan during open enrollment, they would be automatically enrolled in the EPO plan, and their dependents would be dropped from coverage. Thus, a reasonable employee would have believed in early September that the Employer had made its decision to change health plans and that the decision was not subject to bargaining with the Union.

Further, there was no contemporaneous understanding by the parties that they had reached impasse. Rather, the parties' conduct at the last bargaining session demonstrates otherwise. Thus, at the October 21 bargaining session, the parties continued to exchange proposals and reach agreement on issues. Indeed, on health care, the Employer acknowledged that it needed to amend its proposal and SPD to conform to the health care reform law.

2) The parties had not reached impasse on a single critical issue of health care

There is also no merit to the Employer's contention that it lawfully implemented its health care proposal because it was a single critical issue in bargaining over which the parties had reached impasse.

In certain circumstances, "[p]arties need not reach impasse on all bargaining issues before an employer may lawfully implement its bargaining proposals. A single issue. . . may be of such overriding importance that it justifies an overall finding of impasse on all of the bargaining issues."¹⁰ Where an employer asserts that impasse on a single critical issue justifies its implementation of its bargaining proposal, the employer must demonstrate three things:

first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to the a breakdown in the overall negotiations - in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.¹¹

The party asserting impasse bears the burden of proof.¹²

¹⁰ *CalMat Co.*, 331 NLRB 1084, 1097 (2000).

¹¹ *Id.*

For the following reasons, we conclude that the Employer has not met its burden of proving that the parties reached impasse over the single critical issue of health care at the end of October.

As to the first factor, as discussed above, there was no bargaining impasse in large part because the Employer unlawfully failed to provide the Union with information crucial to the negotiation process pertaining specifically to health care - the issue that the Employer claims was the single critical issue in negotiations. Moreover, the fact that on October 21 the Employer continued to make changes to its proposal, and also acknowledged that it still needed to amend the plan to conform to the health care reform law, support the conclusion that the parties were not at impasse on health care at that time.

As to the second factor, the Employer has failed to establish that health care was a single critical issue. In that regard, the Board requires a finding "that there can be no progress on any aspect of negotiations until the impasse relating to the critical issue is resolved."¹³ Here, the Employer explicitly invited the Union to continue to make proposals on other subjects after it made its "final offer" on health care. In addition, while health care was undoubtedly an important issue in negotiations, the evidence does not establish that it was critical. The Employer did not make a proposal on health care until the third bargaining session, and then proceeded to alter that proposal numerous times, including the date of implementation. The Employer also bargained over many other subjects during the parties' sixteen bargaining sessions, and reached agreement on some of those subjects. Thus, even after the Employer declared health care to be a single critical issue, and indeed the only issue it would bargain about, it continued to bargain and reach agreement on other issues. These facts are inconsistent with the claim that health care was a single critical issue.

As to the third factor, as described above, there was no breakdown in overall negotiations as a result of a failure to reach agreement on health care, and progress on other aspects of negotiations continued. Further, the failure to reach agreement on health care was due in large part to the Employer's unlawful conduct, most particularly its refusal to provide relevant information regarding the health care proposal.

¹² *North Star Steel Co.*, 305 NLRB 45 (1991), enf'd 974 F.2d 68 (8th Cir. 1992).

¹³ *CalMat Co.*, 331 NLRB at 1097.

Accordingly, we conclude that the Employer's unilateral implementation of its proposal on health care was unlawful because the parties had not reached impasse, either in overall bargaining or on a single critical issue of health care. Thus, the Region should issue complaint, absent settlement.

B.J.K.

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