UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C. BRANCH OFFICE

CONSOLIDATED COMMUNICATIONS, INC.

Respondent

and **Case 16-CA-196201**

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Bryan Dooley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102

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I. STATEMENT OF THE CASE

For most companies and employees, in most years, health insurance costs consistently rise. Through collective bargaining agreements, many unions have ceded to employers the right to annually adjust premiums in response to changes in costs. The Board has held that where a past practice of raising healthcare premiums has been established through a collective bargaining agreement, an employer is privileged to unilaterally raise premiums, even after the expiration of the collective bargaining agreement. In fact, established past practices not only privilege changes, they require them.

In the case at hand, healthcare costs went *down*, making it the rare case. Unusual as the situation may be, the operative legal principles remain the same. Where an employer has a past practice of annually adjusting premiums, absent the consent of its bargaining partner union, it must make those adjustments whether the costs go up or down.

Respondent here did not abide by that principle of good faith bargaining. Rather, Respondent continued to charge employees the same premium payment even though, by its own calculations, assuming maintenance of the status quo in all other regards, its costs had gone down. In doing so, it violated Section 8(a)(5) of the Act.

In demonstrating that Respondent violated its duty to bargain in good faith as alleged, this brief sets forth a statement of the facts, most of which are undisputed, and includes a detailed analysis of Respondent's unlawful conduct.

II. STATEMENT OF FACTS

A. Respondent's Health Insurance Program

Respondent is a self-insured employer. (Tr. 103, LL. 11-13). Prior to the collective bargaining agreement effective October 16, 2007, the Employer covered the full cost of employees' health insurance. (Tr. 27, LL. 12-16; Jt. Exh. 5). Beginning in 2008, under the terms of Article 22 of the 2007 collective bargaining agreement, employees began paying a percentage share of the "total premium." (Tr. 27, LL. 12-16; Jt. Exh. 4). Article 22 has changed in subsequent agreements with the addition of new plans and increases to the percentage of the total premium for which employees are responsible. (Tr. 27, LL. 12-16, Jt. Exhs. 1-4). The actual dollar amount employees are responsible for paying has never been defined in the contractual language, nor has the process for calculating the total premium. (Jt. Exhs. 1-4).

Each year, prior to employees completing open enrollment, Respondent has adjusted the total premium up or down based on the previous year's actual costs. (Tr. 29-30, LL.6-6). From 2013 to 2017, the total premium alternated between increasing and decreasing each year. (R. Exh. 3).

Employees were offered three plans under the terms of the 2013 collective bargaining agreement: the standard plan, plus plan, and high-deductible plan (sometimes referred to as HDHP or CDHP). (Jt. Exh. 2). The plans could be purchased for the employee alone (individual plan), the employee and spouse, or a family. Employees were responsible for different percentages of the premium depending on which plan they chose. For 2016, employees opting for the standard plan were responsible for 20 percent of the total premium, those choosing the plus plan were responsible for 40 percent, and those on the high-deductible plan were responsible for 5 percent. *Id.* For example, the total monthly premium for an individual employee on the standard plan in 2016 was $659.92, making the employee's contractual 20 percent share $131.98 per month. (GC Exh. 5).

B. 2016-2017 Contract Negotiations

The parties began negotiations for a new collective bargaining agreement in September 2016, with the 2013 agreement slated to expire on October 16, 2016. (Jt. Exhs. 2, 6). As negotiations were set to begin, on September 20, 2016, Vice President of Human Resources Ryan Whitlock e-mailed insurance consultant Brooke Oliphant and requested projected premiums for 2017 based on different scenarios. (R. Exh. 3).

First, Whitlock requested the numbers for "[s]tatus quo on the plan design – so assume no changes except medical inflation." *Id.* Whitlock noted, "this acts as our baseline cost." *Id.*

Whitlock then asked for the rates assuming several negotiable changes to the insurance program, including elimination of the plus plan, increasing employee's percentage share of the premiums, adjusting plan benefits to match the plans offered to non-bargaining unit employees, and increasing the standard plan deductible from $1,000 to $1,500. *Id.*

Oliphant returned her projections on September 26, 2016. *Id.* Oliphant noted that the Texas bargaining unit had been "running so well" in terms of underwriting costs that costs had actually decreased by 8.5 percent in 2017 after having increased 36 percent increase the year prior. *Id.* Oliphant reported the total premium would decrease for all three of the existing plans under status quo conditions. *Id.* For example, Oliphant projected the total premium for an individual employee on the standard plan would decrease to $596.67, resulting in a $12.65 reduction to each employee's monthly payment under the contractual 80-20 percent split. *Id.* Oliphant also found that eliminating the plus plan would not affect premiums for the remaining two plans; the premiums for the standard and high-deductible plans would be identical under the status quo and factoring in elimination of the plus plan. *Id.*

During negotiations, the parties discussed several potential changes related to health insurance, including transitioning bargaining unit employees to the insurance plan used by non-bargaining unit employees, elimination of the plus plan, and increases to employees' percentage share of the premium. (Tr. 43-44, LL. 21-4; 63, LL. 12-16; R. Exh. 1). Respondent suggested in vague terms that it expected premiums to be lower in 2017 than in 2016 because of a decrease in claims, but Respondent did not provide or explain the full projections developed by Oliphant to the Union. (Tr. 30-31, LL. 14-23; 102-03, LL. 22-23).

In October 2016, during discussions regarding potentially implementing a wellness program, Respondent provided the Union a side-by-side comparison chart showing proposed premiums for employees choosing to participate in the program and employees choosing not to participate. (Tr. 139-40, LL. 19-18; GC Exh. 6). The total premium numbers used by Respondent in this document (for example, $553.40 for an individual employee on the standard plan) were the numbers calculated by Oliphant in September assuming an increase of the standard plan deductible from $1,000 to $1,500. (GC Exh. 6, R. Exh. 3). Respondent provided the same numbers to the Union to disseminate to employees as the Union was preparing for a ratification vote in March 2017. (Tr. 109-10, LL. 21-4; 143-44, LL. 4-12; GC Exh. 7).

C. Respondent Conducts 2017 Open Enrollment

In December 2016, as negotiations for a successor agreement continued, Respondent completed open enrollment for 2017. (Tr. 108-09, LL. 4-8). Respondent offered employees the same three plans available under the 2013 collective bargaining agreement. (GC Exh. 8). Although, its costs had gone down, Respondent did not adjust the total premium based on its cost projections, instead continuing to apply the 2016 total premium. (GC Exhs. 5, 8).

Neither did Respondent notify the Union in advance of its decision not to adjust the total premiums for 2017. (Tr. 59-60, LL. 12-19). Because the total premium calculation was not something that had historically been negotiated, the Union assumed that, in the absence of any proposal to the contrary, Respondent would complete the annual recalculation as usual. (Tr. 59, LL. 6-20). Based on statements made by Labor Relations Manager Rhetta Bobo, the Union expected that the premiums would be lowered. (Tr. 30-31, LL. 14-23; 102-03, LL. 22-23). The Union realized in early March 2017 that premiums had not been adjusted. (GC Exhs. 2-3).

Negotiations continued until a collective bargaining agreement was signed on May 9, 2017. (Jt. Exh. 1). Ultimately, the parties agreed to eliminate the plus plan and to increase employees' premium share for 2017 to 22.5 percent for the standard plan and to 6 percent for the high-deductible plan, with additional increases scheduled for 2018 and 2019. *Id.*

After ratification of the agreement, Respondent held a second open enrollment for 2017, during which employees who had chosen the now eliminated plus plan were required to select another plan. (Tr. 113, LL. 1-7). Respondent set the total premiums at the rates calculated by Oliphant assuming an increase in the standard plan's deductible from $1,000 to $1,500 (for example, $553.40 for an individual employee on the standard plan). (GC Exh. 4; R. Exh. 3; CP Exh. 1). The Union, however, had never agreed to an increase in the deductible and was unaware that the increased deductible had been factored into the total premium. In late July 2017, the Union challenged the deductible change for the standard plan. (Tr. 65, LL. 6-11). To resolve this dispute, Respondent reset the standard plan deductible to $1,000 and adjusted the total, making the plan exactly the same as it had been the previous year. Respondent adjusted the premiums for that plan to the levels Oliphant had previously identified as a continuation of the status quo (for example, $596.67 for an individual employee). (GC Exh. 4, R. Exh. 3).

Respondent's failure to adjust the total premium for 2017 based on the total premium reduction it calculated under status quo conditions resulted in employees being overcharged for health insurance from January 1, 2017 through July 1, 2017, a period of six months, as outlined below. (GC Exhs. 5, 9; R. Exh 3).

Individual or Group Policy	**Employee's contractual contribution**	**Total premium applied as of 1/1/17 (2016 calculation) / employees' contractual share**	**2017 total premium as calculated under "status quo" conditions / employees' contractual share**	**Employees' share monthly difference (2017 vs. 2016)**
		Plus Plan		
Ind.	40 percent	$695.99 / $278.400	$629.12 / $251.65	-$26.75
Ind. and spouse	40 percent	$1,440.69 / $576.28	$1,302.28 / $520.91	-$55.36
Ind. and children	40 percent	$1,350.21 / $540.08	$1,220.50 / $488.20	-$51.88
Ind. and family	40 percent	$2,122.76 / $849.10	$1,918.82 / $767.53	-$81.58
		Standard Plan		
Ind.	20 percent	$659.92 / 131.98	$596.67 / $119.33	-$12.65
Ind. and spouse	20 percent	$1,366.04 / $273.20	$1,235.11 / $247.02	-$26.18
Ind. and children	20 percent	$1,280.25 / $256.06	$1,157.54 / $231.51	-$24.54
Ind. and family	20 percent	$2,012.76 / $402.56	$1,819.85 / $363.97	-$38.58
		High-Deductible Plan		
Ind.	5 percent	$575.77 / $28.78	$520.95 / $26.05	-$2.74
Ind. and spouse	5 percent	$1,191.84 / $59.60	$1,078.37 / 53.92	-$5.67
Ind. and children	5 percent	$1,116.99 / $55.84	$1,010.65 / $50.53	-$5.32
Ind. and family	5 percent	$1,756.10 / $87.80	$1,588.90 / $79.45	-$8.36

III. <u>CREDIBILITY</u>

The Board gives weight to the ALJ's credibility determination as he "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). The ALJ may assess all aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication. *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977). Besides these evaluations, "credibility resolutions are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (citing *Panelrama Centers*, 296 NLRB 711, fn. 1 (1989); *Gold Standard Enterprises*, 234 NLRB 618, fn. 4 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979); *V & W Castings*, 231 NLRB 912, 913 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978)).

The material facts in this care are generally undisputed. However, there is a dispute as to whether Director of Labor Relations Rhetta Bobo told the Union early in negotiations about an anticipated reduction in 2017 premiums. General Counsel's witnesses Darrell Novark and Eddie Edds both testified credibly that Bobo indicated premiums would decrease. (Tr. 30-31, LL. 14-23; 102-03, LL. 22-23). Bobo's alleged statement that premiums were expected to decrease because claims were down or because the Unit's numbers were good is consistent with the analysis completed by Oliphant for Respondent in September 2016, and with Oliphant's comment that the bargaining Unit's health costs were "running so well." (R. Exh. 3).

Conversely, Bobo's denial that she made those statements, on the basis that too many factors were uncertain because of the ongoing negotiations, is inconsistent with the clear takeaway from Oliphant's analysis, completed in September 2016, that premiums would go down under any of the scenarios she had analyzed. (Tr. 169, LL. 1-16). Furthermore, an early conversation about an expected premium reduction is also referenced in Respondent's bargaining notes for May 4, 2017, where Bobo admits that she "may have said" that premiums were "projected to be on trac[k] for [a] decrease." (GC Exh. 9 at 53).

Thus, because the testimony of Novark and Edds is more consistent with the documentary evidence, and because of their straightforward demeanor, their testimony should be credited over Bobo's.

IV. <u>LEGAL ANALYSIS AND ARGUMENT</u>

Section 8(d) of the Act confers on employers a duty to meet and confer in good faith about wages, hours, and other terms and conditions of employment. An employer violates this statutory bargaining duty by changing terms and conditions of employment without giving the union notice and an opportunity to bargain, unless the union waives its statutory right to bargain. *NLRB v. Katz,* 369 U.S. 736, 743 (1962); *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007); *Control Svcs., Inc.*, 303 NLRB 481, 484 (1991), *enforced mem.*, 975 F.2d 1551 (3d Cir. 1992). Unilateral changes are unlawful because they are "tantamount to an outright refusal to negotiate" and represent a "circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743, 746. In addition, unilateral action "minimizes the influence of organized bargaining" and "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). As a practical matter, it is difficult to bargain if an employer is free, during the course of bargaining, to modify the very terms and conditions that are the subject of those negotiations. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

The prohibition on unilateral changes means that existing terms and conditions of employment continue by operation of statute while the parties bargain for a collective-bargaining agreement. *Litton*, 501 U.S. at 206-07; *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987). Importantly, the obligation to maintain the status quo while bargaining is the same whether the circumstances involve a newly-certified union or the expiration of a collective-bargaining agreement. *Litton*, 501 U.S. at 198. In the context of an expired contract, the existing status quo reflects the terms explicitly established by that expired agreement as well as implied contract terms. *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 784, 787-88 (1991), *enforced*, 984 F.2d 1562 (10th Cir. 1993); *Holiday Inn*, 284 NLRB at 916.

The status quo that must be maintained during bargaining encompasses not only the existing wage and benefit rates, but also may include regular patterns of changes to those terms and conditions of employment. *See Mission Foods*, 350 NLRB 336, 337 (2007); *Oneita Knitting Mills, Inc.*, 205 NLRB 500, 500 n. 1 (1973). Thus, change itself can be a part of the status quo. If change occurs with such frequency that employees can reasonably expect the practice to continue or reoccur on a regular and consistent basis, this pattern of change becomes a term and condition of work itself, a form of past practice. *Caterpillar, Inc.*, 355 NLRB No. 91, slip. op. at 3 (Aug. 17, 2010). *See also Mission Foods*, 350 NLRB at 337. These so-called "past practices" are an essential part of the status quo that must be maintained during negotiations for a contract. See *Raytheon Company*, 365 NLRB No. 161 (December 15, 2017)("the Board has found that the Act *required* employers to act unilaterally…even though the past wage increases involved substantial employer discretion.") Thus, an expected change that is consistent with past practice represents a "mere continuation of the status quo" and does not violate Section 8(a)(5). *Katz*, 369 U.S. at 746; *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002). Correspondingly, the cessation of a past practice represents a deviation from the status quo and is therefore unlawful. *Daily News of Los Angeles*, 315 NLRB 1236, 1236-41 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996). An employer's practice becomes an established term and condition of employment if it occurs with enough regularity and frequency that employees would reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 659 (Aug. 26, 2011).

The Board's recent decision in *Raytheon Company*, 365 NLRB No. 161 (December 15, 2017) reaffirms these longstanding principles. In that case, the Board overruled *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016), to hold that the employer was privileged to make changes to employees' health benefits during contract negotiations consistent with established past practice, notwithstanding that the past practice arose pursuant to an expired management rights clause. *Raytheon*, 365 NLRB No. 161 slip op. at 16. The present situation is the inverse of *Raytheon*, but the same principles apply. *Raytheon* reinforces the proposition that "an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past." *Ibid.* It does not modify employers' corresponding obligation to bargain before deviating from such past practice. *Daily News of Los Angeles*, supra.

In this case, employees' monthly health insurance premiums have historically been calculated based on two numbers: the total premium, which Respondent has independently calculated based on its expenses without negotiation, and the employees' percentage share, which has been negotiated with the Union and laid out in the contract. Each year, Respondent has adjusted the total premium up or down based on its costs, resulting in an increase or decrease to the premiums paid by employees. It is clear that employees would reasonably expect that, if the Employer's costs for 2016 decreased, a portion of those savings would be passed on to the employees based on their contractual percentages. Respondent's continued application of the 2016 total premium frustrated this expectation.

In *Post-Tribune*, 337 NLRB 1279 (2002), the Board held that the employer did not violate Section 8(a)(5) when it unilaterally raised the dollar amount of employees' health insurance contributions because it maintained the same percentage split between employer and employee contributions as it had prior to the union's election. The Board determined that the percent split represented the lawful status quo and that the employer did not alter the status quo even though premiums increased. *Id.* at 1281. Similarly, here, the status quo was the percentage split laid out in the expired collective bargaining agreement. Based on its established past practice, Respondent would have been privileged to implement an increase to the total premium if its costs had increased. Respondent is not privileged to simply ignore its past practice because it happens, in this case, to benefit employees.

To the extent that Respondent was required to complete open enrollment before the end of 2016 in the absence of a signed agreement, this case is similar to situations in which the Board has addressed discrete, recurring practices that happen to fall while bargaining is still ongoing, such as annual wage adjustments. In such cases, the Board has held that employers are not required to bargain to overall impasse before deviating from the past practice, but must provide the union notice and a meaningful opportunity to bargain about the decision. *See Stone*

Container Corp, 313 NLRB 336, 336 (1993), and *TXU Electric Co.*, 343 NLRB 1404, 1406 (2004).

Although negotiations were ongoing in December 2016, including negotiation of potential changes to health insurance, Respondent had already calculated the total premium under a variety of possible bargaining outcomes, including maintaining the status quo. The status quo calculation completed by Oliphant explicitly isolates the reduction to premiums attributable purely to factors *not* being negotiated, i.e., the previous year's underwriting costs and medical inflation. Contrary to Respondent's contentions, maintenance of the status quo would have been application of these total premium figures to the contractual percentage split. Respondent may have been obligated to take some action on open enrollment prior to the end of 2016, but it was obligated to provide the Union notice and an opportunity to bargain if it intended to deviate from its past practice. It failed to do so.

The Union provides an alternative framing for the case, essentially that by failing to apply the revised total premiums, Respondent charged employees more than their contractual share and thus unilaterally changed terms and conditions of employment. This framing is consistent with the General Counsel's theory of the case. As an illustrative example, between January 1 and July 1, 2017, an individual employee on the standard plan paid 20 percent of $659.92, the total monthly premium figure for 2016, amounting to $131.98 per month. The correct total premium figure under status quo conditions, as calculated by Respondent in September 2016, was $596.67. The $131.98 paid by employees was about 22 percent of the total premium for 2017, which is inconsistent with the clear language of the expired contract.

Thus, under either framework, Respondent was required by the Act to adjust the premium total to be consistent with its own calculations. It failed to do so, and failed to notify the Union of its intent to do so, and through these omissions, violated Section 8(a)(5) of the Act.

V. CONCLUSION

For all of the reasons advanced above, the General Counsel respectfully requests a finding that Respondent violated the Act as alleged in the Complaint. The General Counsel also respectfully seeks a make-whole remedy and order (including backpay, with interest, for any financial losses suffered by employees as a result of Respondent's unfair labor practices), a cease and desist order, and a notice posting. The General Counsel further seeks all other relief as may be deemed appropriate to remedy the unfair labor practices alleged.

DATED at Fort Worth, Texas this 21st day of February, 2018.

Respectfully submitted,

/s/

Bryan Dooley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge has been served this 21st day of February, 2018, via electronic mail upon each of the following:

David Lonergan
Hunton & Williams, LLP
1445 Ross Ave., Suite 3700
Dallas, Texas 75202
Email: dlonergan@hunton.com

Amber M. Rogers
Hunton & Williams LLP
1445 Ross Ave., Suite 3700
Dallas, Texas 75202
arogers@hunton.com

David Van Os
David Van Os & Associates, PC
8626 Tesoro Drive, Suite 510
San Antonio, Texas 78217
dvo@vanoslaw.com

Matt Holder
David Van Os & Associates, PC
8626 Tesoro Drive, Suite 510
San Antonio, Texas 78217
matt@vanoslaw.com

/s/
Bryan Dooley
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102