

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

**CONSOLIDATED COMMUNICATIONS,
INC.**

Respondent,

Case 16-CA-196201

and

**COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO**

Charging Party.

CONSOLIDATED COMMUNICATIONS, INC.'S POST-HEARING BRIEF

Respectfully submitted,

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a straightforward case. The single issue is whether Consolidated Communications, Inc. (CCI) violated the Act by allegedly unilaterally failing to adjust health care premiums for bargaining unit members in Lufkin-Conroe on January 1, 2017. The evidence establishes that it did not.

The General Counsel's case rests solely on establishing that a past practice existed in which CCI, in the absence of a ratified collective bargaining agreement, consistently adjusted health care premiums on January 1 of each year. The General Counsel failed to satisfy its burden because it did not produce any evidence of regularity or frequency, i.e., that the Lufkin-Conroe bargaining unit members could reasonably expect CCI to adjust health care premiums after the collective bargaining agreement expired, and a successor contract was not ratified. Rather, upon expiration of the collective bargaining agreement on October 15, 2016, the Company maintained the status quo until a successor contract was ratified on May 9, 2017, as was required by Board law. Indeed, for CCI to adjust premiums on January 1, 2017, it would have required it to pick a totally arbitrary number, as the parties were still actively negotiating key aspects of the health insurance plan, such as number of plans, plan design, and allotment of premium shares. The parties continued negotiating health insurance until the final day of negotiations on May 4, 2017.

Because the General Counsel failed to meet its burden of establishing that CCI violated Section 8(a)(5), the Complaint should be dismissed in its entirety.

II. BACKGROUND

A. Consolidated's business

Consolidated is a broadband-service company that services residential, commercial, and carrier. Tr. 200. Consolidated is located in 24 states. Tr. 200. Approximately 150 employees work at CCI's Conroe, Texas location, with 80-90 of those employees being in the bargaining

unit. Tr. 200. In Lufkin, Texas, there are approximately 90 bargaining unit members. Tr. 200-201.

B. Historical background of CBAs between the Union and CCI

CCI and the Union have been parties to successive collective bargaining agreements for decades. *See generally* Jt. Exs. 1-5. The uncontradicted evidence established that the parties in Lufkin-Conroe always ratified a successor contract by January 1 of the subsequent year. Jt. Exs. 1-5. Indeed, Darrell Novark, then-Union President who attended all of the bargaining sessions between the Union and CCI for Lufkin-Conroe, testified that in his experience, this was the first time the Union and CCI had not ratified a successor contract by January 1. Tr. 47.

C. Negotiations between the Union and CCI regarding health insurance

The parties began negotiations on or about September 21, 2016 for a successor collective bargaining agreement. Jt. Ex. 6. The relevant collective bargaining agreement between the parties was in place from October 16, 2013 until it expired on October 15, 2016. Jt. Exs. 2 and 6.

1. Negotiation committees

The parties agree that the Union's bargaining committee consisted of: Stephanie Collier, Eddie Edds, Darrel Novark, and Mark Franken. Jt. Ex. 6. Franken served as the Union's chief spokesperson. GC Ex. 9. The parties agree that the Company's bargaining committee consisted of: Rhetta Bobo, Mike Cannon, Kerry Wiggins, and Kayla Martin. Jt. Ex. 6. Bobo served as the Company's chief spokesperson. Tr. 132.

2. Article 22 (Health Insurance) was negotiated 22 times during the 2016-2017 negotiations between the Union and CCI. Overall, the parties had 23 negotiation sessions.

The parties agree that Article 22 (Health Insurance) was negotiated on the following dates:

September 21, 2016	September 22, 2016	September 28, 2016
September 29, 2016	September 30, 2016	October 5, 2016
October 6, 2016	October 10, 2016	October 11, 2016
October 12, 2016	October 17, 2016	November 2, 2016
November 3, 2016	November 7, 2016	November 9, 2016
November 30, 2016	December 1, 2016	January 18, 2017
January 19, 2017	February 28, 2017	March 7, 2017
May 4, 2017		

Jt. Ex. 6; R. Exs. 1 and 2. Thus, the parties agree that health insurance was negotiated 22 of the 23 times the Union and CCI met to negotiate the successor contract. Jt. Ex. 6. Moreover, Novark testified, “[t]here was a lot of discussion over insurance.” Tr. 41.

The parties agree that they exchanged proposals on the following dates: September 6, 2016 (Company); September 20, 2016 (Company); October 6, 2016 (Company); October 11, 2016 (Company); October 12, 2016 (Union and Company); October 17, 2016 (Union and Company); November 3, 2016 (Union); November 7, 2016 (Company); November 9, 2016 (Union); December 1, 2016 (Union); February 7, 2017 (Company); February 27, 2017 (Union); March 7, 2017 (Union); and May 4, 2017 (Union). Jt. Ex. 6; R. Exs. 1 and 2. The evidence establishes that each of the exchanged proposals included a proposal regarding plan design, the number of plans, allotment of premium shares, retiree medical benefits, and other healthcare related issues. R. Exs. 1 and 2; GC Ex. 9.

D. The Union’s Charge

On April 3, 2017, the Union filed a charge alleging that CCI “violated its obligation to bargain with the Charging Party Union in good faith by unilaterally without notice to the Union changing terms and conditions of employment with respect to employer-employee cost sharing for health insurance” GC Ex. 1(a).

Importantly, at the time the charge was filed the parties were still actively engaged in negotiations about health insurance. *See* R. Exs. 1 and 2; GC Ex. 9. According to Vivian Schott, Vice President of Compensation and Benefits for CCI, one of her roles in the 2016-2017 negotiations was deciding that CCI wanted to eliminate the plus plan. Tr. 202. This was a decision she and Ryan Whitlock, Vice President of Human Resources, her supervisor, made because the Company “had already eliminated that with the nonunion plan.” Tr. 202-03. To this end, CCI consistently proposed to the Union that the plus plan should be eliminated. R. Ex. 2; GC Ex. 9. The Union admits that the parties, upon Franken’s appearance at the table on November 2, 2016, actually started moving further away from the Company in terms of agreeing to an allotment of premium shares. *See* Tr. 74-83. Novark testified that the Union did not agree with the Company about the number of plans until “the very end.” Tr. 41-42.

As noted above, the parties continued to exchange proposals and negotiate about health insurance until May 4, 2017, the day the parties executed a tentative agreement. Jt. Ex. 6; R. Exs. 1 and 2. Indeed, the proposals exchanged by the Union and CCI demonstrate that plan design, the number of plans, allotment of premium shares, among other topics about health insurance were still being negotiated until the final day of negotiations. Jt. Ex. 6; R. Exs. 1 and 2.

E. The Company kept health insurance benefits the same for bargaining unit members until a successor CBA was ratified on May 4, 2017.

CCI maintained the same benefits for the Lufkin-Conroe bargaining unit members as of January 1, 2017 because “nothing had been agreed upon.” Tr. 194. On direct examination, Novark testified that he did not expect the percentage bargaining unit members paid to change before a new contract was ratified. Tr. 37. Indeed, Novark testified that he knew “that everything was supposed to stay the same.” Tr. 37.

CCI did an open enrollment for the bargaining unit members in Lufkin-Conroe in December 2016 because “the premiums for medical plans are taken out pretax, which makes them subject to cafeteria plan Section 125 rules, and those rules require that you offer an open enrollment period at least once every 12 months.” Tr. 194, 209.

F. Tentative Agreement and CBA ratified

A Tentative Agreement was reached on May 4, 2017; and a collective bargaining agreement was ratified on May 9, 2017. Jt. Ex. 6.

Regarding Article 22 (Health Insurance), the newly ratified successor contract eliminated the plus plan. Jt. Ex. 1. Furthermore, the total premiums for the standard plan increased from 20% (for 2014, 2015, and 2016) to 22.5% for 2017, 24% for 2018, and 25% for 2019. *Id.* Lastly, the high deductible plan’s total premium increased from 5% (for 2014, 2015, and 2016) to 6% for 2017, 7% for 2018, and 8% in 2019. *Id.*

G. Allegations in the Complaint

The Complaint alleges that on “[a]bout January 1, 2017, Respondent, unilaterally and contrary to its past practice, failed to adjust health care premiums for employees in the Unit” in violation of the Act. GC Ex. 1(c).

III. ARGUMENTS AND AUTHORITIES

A. The parties failed to ratify a successor bargaining agreement before January 1, 2017. The General Counsel failed to establish that CCI could have calculated the final total premium costs for the Lufkin-Conroe bargaining unit members on January 1, 2017.

The General Counsel’s case rests entirely on the faulty premise that CCI had a past practice of adjusting health care premiums for employees on January 1. The General Counsel failed to establish that adjusting health care premiums was possible as of January 1, 2017. Moreover, the General Counsel also failed to establish that CCI, in the absence of a current

collective bargaining agreement, ever unilaterally adjusted health care premiums. Rather, the evidence established that CCI only adjusted health care premiums after the parties had ratified a collective bargaining agreement. In essence, CCI simply implemented bargained for and agreed upon terms when it previously adjusted health care premiums.

Brooke Oliphant, an Account Executive at Arthur J. Gallagher, an insurance brokerage firm, has had CCI as a client since 2003. Tr. 183, 185. She is the account executive for all of CCI's locations. Tr. 185. Oliphant testified that she assists CCI by "helping with their strategic planning for renewals and . . . long-term goals for the plan." Tr. 184. Oliphant testified that she could not calculate the final premium for the Lufkin-Conroe bargaining unit members because "[t]here was no contract in place, so I didn't know what plans that they would be enrolling in in 2017." Tr. 193. Oliphant, however, did calculate the final premium costs for the bargaining unit members at CCI's other locations because "[t]hey all had contracts in place already, so they knew what their plans would be for the upcoming year." Tr. 194.

Similarly, Schott testified that because the parties had not ratified a contract by January 1, 2017, "we did not know what changes were in place . . . we didn't know where we were going, so we left everything as status quo, as is." Tr. 209-10. Schott stated that she and Whitlock decided to maintain the status quo because "[t]here was nothing to work with. We didn't have a contract to work with, to know where we were heading with this, so we left it as it." Tr. 210. Accordingly, the General Counsel failed to establish that CCI could have adjusted the health care premiums as of January 1, 2017.

B. CCI used multiple factors to calculate health insurance premiums for the Lufkin-Conroe bargaining unit members.

Oliphant testified that she was involved in calculating the insurance cost projections for the Lufkin-Conroe location in 2016. Tr. 185. According to Oliphant, cost projections are when

“we try to budget what the upcoming year’s costs are going to be and try to determine premiums and what charge is going to be associated with it.” Tr. 185. To calculate a premium cost:

We look at a lot of factors. We look at the fixed costs, which include like their administration fee, their carrier, the cost of stop-loss insurance premiums. We look at claims experience. We look at what kind of plan changes we’re looking at, if any, what types of plans they have, what the benefit designs themselves are, if they’re making plan changes or not. We look at the value of that.

We have to factor in medical trend, which is inflation, depending on, you know, how far out we’re projecting. And then in the case of Lufkin-Conroe, the dental and vision premiums are also included in there, so we have to look at those as well.

We also look at enrollment, enrollment assumptions...we look at how many people are enrolled in each plan, how many dependents are on the plan as well, because that can factor into it.

Tr. 185-86. All of these factors were used to calculate CCI’s premium. Tr. 186.

Schott testified similarly that premium costs are calculated by “so many factors,” including:

. . . claims is definitely one of them . . . [b]ut it’s trend and inflation. You know medical costs are going up. It’s things even like the prescription plan, the change in there, as more and more people use specialty drugs. That’s a big part of our costs that we have to take a look at

It’s the cost of our administrator services. It’s the cost for Blue Cross/Blue Shield to handle the claims. It’s the cost of a stop loss. You know, what stop-loss level should we even have it at, so that changes the cost of the plan.

The copays drive changes. The deductibles, the out-of-pocket, the in-network/out-of-network costs drive claim costs. How many people go into the plan, what our assumptions are, who’s going to move – say, we eliminated the plus plan. How many – where do we assume those people are going to go? Are they going to go into the high deductible plan, or are they going to go into the standard plan? We have to make those assumptions.

And then what type of people do you have? Do you have family coverage? Do you have single folks in there? Those all play a factor in the cost.

Tr. 205-06. Plan design is another factor used to calculate premium costs, according to Schott.
Tr. 206-07.

1. Premium costs cannot be calculated solely using claims experience.

Importantly, Oliphant testified that a premium could not be calculated using only claims experience. Tr. 186-87. CCI's premium costs could not be calculated using only claims experience "[b]ecause it's only one of the factors. You have to look at everything combined . . . like fixed costs are a decent chunk of it, and you need to know what the plan design's going to be in order to calculate a premium. You have to factor in inflation." Tr. 187.

Schott testified that in her 12 years' experience of negotiating collective bargaining agreements for various CCI locations, including for Lufkin-Conroe, CCI has "never" solely used claim experience to calculate premium costs. Tr. 207-08. Specifically, Schott testified that claims experience is:

. . . not enough. It's just . . . there's so much more. I mean, costs are going up all the time, so we have to at least have even an inflation rate in there. We have to know how we want to set up the different – what prescriptions are covered. We have the union the co-share, the deductibles, the plan design . . . if we do change any plans, if we drop a plan or add a plan, or if we change the plan design, that could drive people into a different plan, so we got to pull all those factors in to how you decide where you think the premiums are going, once you put those factors into an algorithm, and then A.J. Gallagher calculates that for us.

Tr. 208.

2. The Union knew claims experience was not the sole factor used to determine premium costs.

The Union unconvincingly claims that it believes claims experience was the sole factor used to calculate premium costs. Indeed, Novark testified that, as the Union's President, he knew that the plus plan was expensive for the Company and would have an impact on what CCI paid in a total premium (Tr. 42); CCI explained to the Union during negotiations that it only

wanted one insurance plan because it was more expensive to have multiple plans (Tr. 44-45); and he knew that the number of plans went into calculating the premium cost (Tr. 45). Novark also testified that he “absolutely” knew there could be a lot of things that are taken into consideration for premium other than just experience. Tr. 50-51.

Franken, the Union’s lead negotiator, testified that he knew experience was not the only factor used to calculate the total premium. Tr. 70. Rather, he admitted that he thought it was the “primary factor.” Tr. 69-70. Franken, however, admitted that he never looked at the algorithms CCI used to calculate its premiums. Tr. 70. Indeed, Franken further admitted that he never spoke to Novark, Schott, or CCI’s consultant about how CCI’s premiums are calculated. Tr. 70. Importantly, Franken testified that he based his allegation that CCI’s total premium costs were calculated based solely on claims experience on “[d]ifferent experiences I’ve had with other companies, AT&T, Mobility, Verizon.” Tr. 70. Thus, because Franken did not base his assertion on experience with CCI, the Administrative Law Judge should disregard his testimony. As the Union’s lead negotiator, Franken admits that he did not make any attempt to actually discover how CCI calculated its total premium costs. Indeed, he testified that he had not even met Schott until the day of the hearing. Tr. 70.

Moreover, Schott testified that the Union was aware that the above-referenced factors were used to calculate a total premium cost, based on the questions the Union’s bargaining committee asked when she made a presentation about benefits. Tr. 208-09. Specifically, Schott testified that she was asked several times by the Union ““If we added this, would that change the premium. If we change the deductible, would that change the premium? If we change the copay, would that change the premium?” . . . I mean, to ask those questions, you would have to have known that that was part of the decision-making for a premium.” Tr. 208-09.

The General Counsel's case is based on the incorrect assertion that CCI solely used claims experience to adjust health care premiums, and thus should have been able to adjust premiums on January 1, 2017. The overwhelming evidence establishes that the General Counsel's assertion is false—claims experience is one of numerous factors used to calculate the total premium. Furthermore, the evidence establishes that CCI needed a ratified successor contract before it could actually calculate the total premium costs. Without having all of the final agreed upon terms, CCI would have simply been making an arbitrary adjustment to health care premiums.

C. The General Counsel failed to satisfy its burden because it did not establish that Consolidated unilaterally failed to adjust health care premiums for the Lufkin-Conroe bargaining unit members.

“The General Counsel bears the burden, of course, to prove a violation of Section 8(a)(5). The General Counsel meets that burden . . . when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. At that point, the burden shifts to the employer to show that the unilateral change was in some way privileged.” *Pan Am. Grain Co., Inc.*, 351 NLRB 1412, 1414 n. 9 (2007). The Board has found unilateral changes to be material, substantial, and significant where, among other things, those changes impair employee choice or discretion related to employee benefits or change the costs to employees of such benefits. *In Re Caterpillar, Inc.*, 355 NLRB 521, 523 (2010).

Furthermore, it is well-established that an employer violates Section 8(a)(5) and (1) of the Act if it changes the wages, hours, or terms and conditions of employment of represented employees without providing the Union prior notice and an opportunity to bargain over such changes. *See NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997). This obligation extends to situations where a collective-bargaining agreement has expired and

negotiations on a new contract are ongoing. *See, e.g., Laborers Health & Welfare Trust Fund for North California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n. 6 (1988); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). In such situations, the employer is obligated to maintain the status quo as to mandatory subjects of bargaining unless the parties have bargained to impasse. *Litton*, 501 U.S. at 198; *AlliedSignal Aerospace*, 330 NLRB 1216, 1216-22 (2000), review denied sub nom; *Honeywell Int'l v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001); *Gen. Tire & Rubber Co.*, 274 NLRB 591, 592-593 (1985), *enfd.* 795 F.2d 585 (6th Cir. 1986).

The Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962) held that Section 8(a)(5) requires employers to refrain from making a change in mandatory bargaining subjects unless the change is preceded by notice to the union and the opportunity for bargaining regarding the planned change. “Therefore, where an employer’s action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1).” *In Re Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002); *see also Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984); *A-V Corp.*, 209 NLRB 451, 452 (1974).

Here, as discussed below, CCI simply maintained the status quo upon the expiration of the contract, and non-ratification of a successor contract. The General Counsel’s witness admitted that the premium amount they paid in December 2016 was the same amount they paid in January 2017, and until ratification of the successor contract. Tr. 32. The General Counsel failed to produce any evidence to prove its allegation in the Complaint that CCI “unilaterally and contrary to its past practice failed to adjust health care premiums for employees in the Unit.” Indeed, the evidence establishes that CCI never changed health care premiums based solely on total actual claims for the previous year.

D. The Board's precedent on status quo required CCI not to change bargaining unit members' benefits on January 1, 2017.

CCI followed decades of Board precedent by maintaining the status quo, i.e., not unilaterally adjusting the premium costs on January 1, 2017, after the expiration of the collective bargaining agreement. “A collective bargaining agreement terminates on its expiration date like any other contract; however, the employer is required to maintain the status quo unless and until a new agreement is reached or the parties negotiate in good faith to impasse.” *Intermountain Rural Elec. v. NLRB*, 984 F.2d 1562, 1566 (10th Cir. 1993) (citing *Litton Financial Printing Div. v. NLRB*, 111 S. Ct. 2215, 2221 (1991)). The Board has consistently held:

[f]reezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act. Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice.

Laborers Health & Welfare Tr. Fund For N. California v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n. 6 (1988) (internal quotations and citations omitted).

The unilateral change doctrine not only applies to changes to employees' terms and conditions of employment while a collective-bargaining agreement is in effect, but also to changes to employees' terms and conditions of employment after a collective-bargaining agreement expires (with certain exceptions not applicable here). *Smi/division of Dcx-Chol Enterprises, Inc.*, 365 NLRB No. 152 (Dec. 15, 2017). Specifically, if contract negotiations between an employer and a union are pending (e.g., negotiations for a successor collective-bargaining agreement), an employer has a duty to maintain the status quo with the terms and

conditions of employment set forth in an expired collective-bargaining agreement.). *Id.*; *see also Southwest Ambulance*, 360 NLRB 835, 843 (2014).

1. CCI did not unilaterally change the terms and conditions of employment set forth in the expired collective bargaining agreement.

The threshold inquiry the Administrative Law Judge has to determine is what was the status quo. *See Life Care Ctrs. of Am.*, 340 NLRB 397, 399 (2003); *Crown Elec. Contracting*, 338 NLRB 336 (2002). In this case, status quo was the bargaining unit members paying a certain percentage (ranging from 5% to 40% depending on the plan) of the total premium. *Jt. Ex. 2*. It also required a calculation of the total premium to be completed by the Company after the parties bargained for and ratified a successor contract.

Recently in *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (Dec. 15, 2017), the Board addressed the issue of what constitutes a unilateral change. The Board held, “[o]ur view of this case is straightforward, and it consists of two parts: (1) in 1962, the Supreme Court held in *Katz*, *supra*, that an employer must give the union notice and the opportunity for bargaining before making a ‘change’ in employment matters; and (2) actions constitute a ‘change’ only if they materially differ from what has occurred in the past.” *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (Dec. 15, 2017). “Nor is there any doubt that the Board and the Courts have uniformly interpreted *Katz* to require advance notice and the opportunity for bargaining only when the employer’s actions constitute a ‘change.’” *Raytheon*, 365 NLRB No. 161 at 6, n. 24. Furthermore, the *Raytheon* Board stated, “[a]s the Board held in *Daily News*, ‘the vice . . . is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.’” *Id.* (citing *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994)) (emphasis in original). Furthermore, the

concurrence in *Raytheon* addressed facts similar to those before this Administrative Law Judge.

In the concurrence, the Board noted:

Following the expiration of the parties' CBA on April 29, 2012, the Respondent was required to maintain the terms and conditions of employment of the expired CBA until the parties negotiated a new agreement or bargained in good faith to impasse. **In my view, pursuant to this duty to maintain the status quo, the Respondent was required to continue to provide unit employees with coverage under the Raytheon Plan, in its entirety.** The Respondent was not free to provide the unit employees with only certain aspects of the Raytheon Plan, nor was the Respondent free to provide unit employees with different benefits than that provided to non-unit employees under the Raytheon Plan on an annual basis. In fact, it seems clear that, had the Respondent kept in place for unit employees the specific benefits in place at contract expiration, but then revised the Raytheon Plan benefits for all other employees, such action would constitute a violation of the Act. For these reasons, in my view, it is not reasonable to consider the Respondent's responsibility to maintain the status quo as a responsibility to maintain certain, specific benefits that were in place at the time of the contract expiration. **Rather, the Respondent's status quo duty was to continue providing the unit employees with the coverage provided to all employees under the Raytheon Plan, including annual changes made pursuant to the terms of the Raytheon Plan itself.**

Raytheon, 365 NLRB No. 161 (Dec. 15, 2017) (emphasis added) (internal citations omitted).

As discussed above, multiple factors are used to calculate the total premium. Indeed, as Schott and Oliphant testified, despite the Union's contention, prior claim experience has **never** been the sole factor used to calculate the total premium. Moreover, Schott and Oliphant also testified that they have worked on calculating CCI's health care premiums, including for Lufkin-Conroe, since 2006 and 2003, respectively, and a total premium cannot be calculated until a collective bargaining agreement is ratified and they know the agreed upon terms. Tr. 186-87, 207-08. Thus, because certain factors could not be determined until after a successor contract was ratified, the status quo required CCI to keep the total premium the same. Any alteration to the total premium would have required CCI to unilaterally (and arbitrarily) change the premium amount.

As of January 1, 2017, the record evidence establishes that the parties had not agreed, even tentatively, to any terms regarding health care. Furthermore, the evidence is clear that the parties were actively negotiating Article 22 (health insurance), including plan design, the number of plans, and the allotment of premium shares until the day a tentative agreement was reached on May 4, 2017. R. Exs. 1 and 2. The evidence demonstrates that the Union continued to make proposals about health insurance, including plan design, the number of plans, and the allotment of premium shares until May 4, 2017. R. Ex. 1. This further proves that CCI could not have adjusted health care premiums on January 1, 2017.

The General Counsel failed to establish that CCI actually changed anything regarding health care premiums. As the board has held, it is the change that is prohibited. But here, no change occurred. Rather, as the Board has held where an employer, like CCI does not change existing conditions after the expiration of a collective bargaining agreement, it does not violate Section 8(a)(5) and (1). *See In Re Post-Tribune Co.*, 337 NLRB at 1280. The General Counsel's witnesses, including Novark, admit that nothing changed regarding their health care premiums until a successor contract was ratified on May 9, 2017. Accordingly, the General Counsel failed to satisfy its burden.

- E. **There was no past practice between the Union and CCI regarding adjusting health care premium shares during a contract hiatus. And, CCI did not unilaterally change its alleged past practice of adjusting employees' health insurance premiums each January based on the total actual claims for the previous year.**

The General Counsel had the burden to establish past practice, and failed to do so. "The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis."

Palm Beach Metro Transportation, 357 NLRB 180, 183 (2011) (internal citations omitted); *see also Eugene Iovine, Inc.*, 353 NLRB 400 (2008). Indeed, a “past practice is defined as an activity that has been satisfactorily established by practice or custom; an established practice; an established condition of employment; a longstanding practice.” *In Re Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003).

1. There was no past practice of adjusting premiums during a contract hiatus.

The General Counsel did not establish that there was a past practice of CCI adjusting—either by increasing or decreasing—the premium cost share on January 1, when the parties did not have a ratified collective bargaining agreement in place. The Board has held that where the parties do not ratify a successor collective bargaining agreement for the first time in the parties history, as occurred here, no past practice exists. In *Intermountain Rural Elec. Ass’n*, 305 NLRB 783, 784 (1991), the Board held “[t]his was the first time in their bargaining history that the parties failed to agree to a successor contract before the previous contract expired. Thus no past practice exists concerning payment of insurance premiums during a contract hiatus.” Similarly, because the Union and CCI did not have a past practice of the CCI adjusting premiums in the absence of a ratified or existing collective bargaining agreement, there is no past practice.

Here, the General Counsel failed to meet its burden because it did not establish that an activity was satisfactorily established by practice or custom to the point where it became a condition of employment because of its longstanding practice. While the Union claims that there is a past practice of CCI adjusting premiums on January 1 for bargaining unit members in Lufkin-Conroe, it failed to establish regularity or frequency. Critically, the General Counsel attempts to ignore the undisputed fact that the parties **always** had ratified a successor collective bargaining agreement by January 1, and thus, the Company knew the agreed upon premium

amount to charge bargaining unit members. The Company was not unilaterally making changes to bargaining unit members' premiums or the total premium costs in those instances; rather, the Company was simply implementing the bargained for contract terms. The General Counsel did not enter any evidence regarding any instances that are similar to what occurred here—no successor collective bargaining agreement being ratified, and the parties operating with an expired collective bargaining agreement as of January 1. Accordingly, it failed to establish a past practice. *See Caterpillar Inc.*, 355 NLRB 521 (2010) (holding that respondent failed to establish past practice because it failed to establish the specific circumstances surrounding the alleged change, and it presented no dates on which prior changes allegedly occurred, or the number or the frequency of the changes).

It is undisputed that for the first time in their bargaining history, CCI and the Union in Lufkin-Conroe did not ratify a successor collective bargaining agreement by January 1, 2017. Thus, there is no past practice. Rather, this is an entirely unique situation for the parties. The testimony demonstrated that calculating the total insurance premium required multiple factors be resolved, and that the only resolution was a ratified contract. The General Counsel and the Union did not put on any evidence that the Company ever unilaterally changed the total premium costs in absence of a ratified collective bargaining agreement.

Even if there was a past practice, which CCI denies because this was a unique situation between the Union and CCI at Lufkin-Conroe, CCI followed its past practice at its other locations. Schott testified that the Company had three prior instances of open enrollment occurring during a time when a successor collective bargaining agreement had not been ratified in time. Schott's uncontradicted testimony is that, "[w]e have two bargaining units in Pennsylvania and one in Illinois that went past the open enrollment time, and we did not have a

contract, so we – our practice has been to leave everything as is, because, you know, we didn't have a contract in place, an agreement in place.” Tr. 210. In those instances, CCI and the union eventually ratified successor collective bargaining agreements. Tr. 210. Afterward, CCI “has an open enrollment and went forward there with the new contract in place, whatever plan design was negotiated at that point in time.” Tr. 210-11. Accordingly, to the extent there was a past practice in instances when no successor collective bargaining agreement had been ratified, CCI followed that past practice.

F. CCI did not state or promise the Union that premiums would be lower in 2017. No tentative agreement, or other memorialized agreement, between Union and CCI stated such.

The Union incorrectly contends that that total premium is calculated by “[i]f the company’s actuarial team, if they would run the number and they say, all right, it’s projected that it’s going to go up and it goes down – if it goes up, so we’d get – as the first contract – as the contract comes into play, then we would get an increase in our premiums, and if – at the end of the year, if they were actually down for that year, then they would go down the next year.” Tr. 29-30.

Schott testified that she attended one bargaining session in person in late-September 2016. Tr. 203. According to Schott, present for the Company were Kayla Martin, Kerry Wiggins, Mike Cannon, and Rhetta Bobo; and present for the Union were Stephanie Collier, Eddie Edds, and Darrell Novark. Tr. 46; 203. (Novark testified that he recalled Schott making a presentation to the group). Schott further testified:

There[] [was] a lot of questions from the union side, just trying to get an understanding, the difference between the nonunion plan and their current union plan. So we discussed plan design, the difference in the deductibles. We discussed what it would mean if we eliminated the plus plan.

We discussed like Doctor on Demand and Simply Well and some extra things that are part of the union plan. We went through all of that. There were quite

a few questions about if we added the Simply Well plan, would that change the cost of the premium. If we changed the deductible and the copay in a Simply Well, would that change the costs to the premium.

Tr. 203. Furthermore, Schott testified that she also discussed the implications of eliminating the plus plan with the Union. Tr. 204. Specifically, Schott said that she discussed with the Union, “the history of why did we eliminate that for the nonunion plan, what the purpose of it was. And so we explained that the behavior is different. When you have lower copays, you’re going to – you have a tendency to utilize it, the plan, more, so the cost goes up, and many times, our people that are most ill with the most claims go into that plan.” Tr. 204. Schott also discussed premium share with the Union during her visit. Tr. 205. Premium share is the “cost of the total premium that the union would pay or an employee would pay, participant would pay.” Tr. 205.

Bobo, CCI’s lead negotiator (Tr. 132), emphatically testified that she never told the Union that premiums were going to go down. Tr. 168-69. Indeed she said,

I’m sure I didn’t because I didn’t know that Because like we talked about earlier, there’s several variables that take into consideration, and we would have to know all of those variables and have those factors when we make that decision. And then when we do, we were going to let the health benefits department and our vendor to get the final answer. And at that point we didn’t have that information. We were still going back and forth, still going back and forth on whether they wanted to get on the company plan or not and what percentages, and so those were constantly changing. So I didn’t know.

Tr. 169.

Mike Cannon, who was a member of CCI’s bargaining committee, also testified that the Company did not tell the Union that premiums would go down in the next contract year. Tr. 177-78. Indeed, he specifically stated that Bobo did not say that based on cost experience premiums were going down. Tr. 178.

Novark, unconvincingly testified that Bobo told the Union that premiums were going to go down. Novark admits that the Union did not ask Bobo how much the premium allegedly was

going to decrease. Tr. 39. Importantly, Novark testified that even if Bobo said that premiums were going to decrease, **at the exact same meeting** she stated “if that’s what you thought or if that what you heard” she had misspoken. Tr. 40. Indeed, Novark testified, “Yes. She said she may have misspoke.” Tr. 40. Mark Franken, the Union’s Administrative Director, began attending negotiations on November 2, 2016. Tr. 55. He did not attend all of the bargaining sessions. Tr. 55. Franken testified that he heard the members of his bargaining committee ask Bobo if the total premium would decrease for 2017, which contradicts Novark’s testimony. Tr. 39, 67. Franken testified, “my recollection is Rhetta, her response was she wasn’t sure how much it was going to be reduced.” Furthermore, Franken testified that after the Union learned that the premiums were not adjusted on January 1, 2017 that it was not brought up in bargaining afterward. Tr. 67.

Furthermore, the parties did not have a tentative agreement, or any other memorialized document that stated premiums were going to go down. Rather, as evidenced by the Union’s and CCI’s proposals, health care, including the percentage of total premium that would be paid by bargaining unit members, number of plans, and other benefits such as benefits related to retirees and the Simply Well plan were continuously negotiated until the day a tentative agreement was signed on May 4, 2017. R. Exs. 1 and 2.

G. The General Counsel failed to establish that CCI failed or refused to bargain with the Union over Article 22.

The General Counsel failed to present any evidence that CCI failed or refused to bargain over the alleged unilateral change. As an initial matter, the General Counsel had to establish that a unilateral change occurred. *In Re Post-Tribune*, 337 NLRB at 1280. As detailed above, the General Counsel failed to carry its burden, as it did not produce any evidence that a change actually occurred. Because no change occurred, CCI did not have to give notice and opportunity

to bargain about maintaining the status quo. *See Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991) (“When changing in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice,” it is lawful to continue apply the same rules without bargaining because the changes are not sufficiently “material, substantial, and significant,” to require notice and the opportunity to bargain); *see also Trading Port, Inc.*, 224 NLRB 980, 983-984 (1976) (employer implemented no change that required bargaining when the employer applies its preexisting productivity standards, including penalties for failing to satisfy those standards, but “devised a more efficient means of detecting individual levels of productivity, of policing individual efficiency, and advanced a more stringent view towards below average producers than in preceding 18 months or so.”). Additionally, directly contradicting the General Counsel’s argument is Novark’s admission that the issue of total premium came up during negotiations in “the first part of November, end of October, in that time frame” between the parties, and “[t]here was a lot of discussion over insurance.” Tr. 30, 41. Further contradicting the absurd claim that the Union was not given an opportunity to bargain over Article 22 is the fact that the parties agree that Article 22 was negotiated between the parties at least 22 times of the 23 times the parties met to bargain the successor collective bargaining agreement. Jt. Ex. 6. It is practically impossible for the parties to have bargained health insurance anymore. Thus, the General Counsel failed to establish that the Union was denied notice and an opportunity to bargain.

Accordingly, the General Counsel failed to meet its burden.

IV. CONCLUSION

Because the General Counsel failed to establish its burden that CCI violated Section 8(a)(5), the Complaint should be dismissed in its entirety.

Respectfully submitted this 21st day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of February, 2018, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nlrb.gov> and a copy of same to be served via e-mail on the following parties of record:

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