

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**CONSOLIDATED
COMMUNICATIONS, INC.,**

Respondent,

and

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

Charging Party.

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CASE

16-CA-196201

CHARGING PARTY'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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CHARGING PARTY’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

COMES NOW Charging Party Communications Workers of America, AFL-CIO (“Charging Party”) and, pursuant to Section 102.42 of the Rules and Regulations (“R&R”) of the National Labor Relations Board (“NLRB” or “the Board”), files this brief with the Administrative Law Judge (“ALJ”) and would respectfully show the following:

I. Summary of the Facts

Consolidated Communications, Inc. (“Respondent”) and Charging Party are parties to a longstanding collective bargaining relationship. In 2016, the parties entered into negotiations for a successor agreement and were unable to reach an agreement before the 2013-2016 agreement (Joint Exhibit (“J”) 2) expired. The labor agreement provided employees with a choice of three insurance plans, the Plus Plan, Standard Plan, and the CDHP or high deductible plan. That agreement required employees pay a specified percent of the total health insurance premium as follows:

Plus Plan

2014	30% of total premium
2015	35% of total premium
2016	40% of total premium

Standard Plan

2014	20% of total premium
2015	20% of total premium
2016	20% of total premium

CDHP Plan

2014	5% of total premium
2015	5% of total premium
2016	5% of total premium

(JX 2, p. 53). The total premium is the total amount that the employer pays for the employee at that point in time. (Transcript (“Tr.”) 27). When the agreement expired on October 16, 2016 (JX 2, p. 67), the collective bargaining agreement (“CBA”) required the employer to charge employees 40% of the premium for the Plus Plan, 20% of the premium for Standard Plan, and 5% of the total premium high deductible plan.

Prior labor agreement have always required employees pay a percentage of the premium and the parties have never bargained over the cost of the premium. Darrell Novark, a former CWA local president and bargaining committee member, testified that the practice of employees contributing to the cost of the health insurance premium by paying a percent of the premium had been in place approximately ten years. (Tr. 29-30). The 2004 CBA did not require active employees to contribute any dollar amount to the cost of the premium. (JX 5, p. 53). The 2007 CBA was the first to require active employees to pay a percent of the premium as follows:

2008	5% of total premium
2009	10% of total premium

2010 15% of total premium

(JX 4, p. 52). The 2010 CBA required employees to pay the following percent of the premium:

Plus Plan

2011 17.5% of total premium

2012 20% of total premium

2013 22.5% of total premium

Standard Plan

2011 15% of total premium

2012 15% of total premium

2013 20% of total premium

CDHP Plan

2011 5% of total premium

2012 5% of total premium

2013 5% of total premium

(JX 3, p. 53). As such, the parties since active employees began contributing to the cost of health insurance with the 2007 CBA never bargained a specific dollar amount employees would pay; the parties always agreed on a percent of the total premium that the employees would pay.

In late October or early November of 2016, after the expiration of the 2013 CBA but while the parties were still negotiating for a successor agreement, Respondent's former Director of Labor Relations, informed Novark and other members of the bargaining committee that the premiums would be going down. (Tr. 30-31). This decrease was not conditional on any other proposal. (Tr. 34). Respondent held an open enrollment in December 2016 for the year 2017, but Novark did not notice a decrease in the amount he contributed to his healthcare costs; the dollar amount he paid remained the same. (Tr. 32).

The employer sought in the 2016-17 negotiations to eliminate the Plus Plan. During the bargaining, Respondent provided Charging Party with information showing that the Plus Plan total monthly premium in 2016 for an employee only was \$695.99, for an employee with spouse was \$1,440.69, for an employee with children was \$1,350.21, and for an employee with family was \$2,122.76. (General Counsel Exhibit (“GC”) 5). The Standard Plan total monthly premium in 2016 for an employee only was \$659.92, for an employee with spouse was \$1,366.04, for an employee with children was \$1,280.25, and for an employee with family was \$2,012.76. (Id.). The high deductible plan total monthly premium in 2016 for an employee only was \$575.77, for an employee with spouse was \$1,191.84, for an employee with children was \$1,116.99, and for an employee with family was \$1,756.10. (Id.). This information is consistent with the materials provided to bargaining unit employees during the December 2016 enrollment for the year 2017. (GC 8, p. 4 (Bates 000702)) and shows that as of December 2016 for the year 2017 enrollment, Respondent was using the premium costs from 2016 and not just the percent contribution stated in the CBA.

Respondent provided Charging Party with information during the bargaining that the 2017 premiums would be lower. The Standard Plan total monthly premium for 2017 for an employee only was \$553.40, for an employee with spouse was \$1,145.54, for an employee with children was \$1,073.60, and for an employee with family was \$1,687.88. (GC 6). For the high deductible plan, the total monthly premium for 2017 for an employee only was \$499.32, for an employee with spouse was \$1,033.59, for an employee with children was \$968.67, and for an employee with family was \$1,522.92. (Id.). These amounts are identical to the information provided to bargaining

unit employees in the summer of 2017 when they went through a second open enrollment for 2017 after a successor agreement had been reached. (Charging Party (“CP”) 1, p. 3 (Bates 003188)).

Brooke Oliphant, an Account Executive with Arthur J. Gallagher & Co., Respondent’s insurance broker, was asked to calculate insurance costs for 2017. Two of the tables she created showed premium totals identical to those provided to the Union in General Counsel Exhibit 6 and to bargaining unit employees in Charging Party Exhibit 1. (Respondent (“R”) 3, pp. 8-9). One calculation Ms. Oliphant made showed the Standard Plan total monthly premium for 2017 for an employee only was \$596.67, for an employee with spouse was \$1,235.11, for an employee with children was \$1,157.54, and for an employee with family was \$1,819.85. (Id., p. 6). For the high deductible plan, the total monthly premium for 2017 for an employee only was \$520.95, for an employee with spouse was \$1,078.37, for an employee with children was \$1,010.65, and for an employee with family was \$1,588.90. (Id.). These premium costs are all lower than the corresponding 2016 rates. (GC 5; GC 8, p. 4).

Ms. Oliphant also made another calculation showing a premium cost for 2017 again lower than the corresponding costs for 2016, but this time including the Plus Plan. That calculation showed Plus Plan total monthly premium in 2017 for an employee only as \$629.12, for an employee with spouse was \$1,302.28, for an employee with children was \$1,220.50, and for an employee with family was \$1,918.82. (R 3, p. 5; see also Tr. 198). The Standard Plan total monthly premium in 2017 for an employee only was \$596.67, for an employee with spouse was \$1,235.11, for an employee with children was \$1,157.54, and for an employee with family was \$1,819.85. (Id.). The high deductible plan total monthly premium in 2017 for an employee only was \$520.95, for an employee with spouse was \$1,078.37, for an employee with children was

\$1,010.65, and for an employee with family was \$1,588.90. (Id.). Once again, all of the total premiums, including the Plus Plan, were lower than the 2016 rates (Compare with GC 5 and GC 8, p. 4), but still Respondent, as reflected in General Counsel Exhibit 8, used the higher premium rates of 2016 rather than the newer, and lower, 2017 rates.

II. Arguments and Authorities

a. The Total Premium Costs for 2017 were lower than 2016

The evidence recounted above establishes that the evidence in this case shows that the premium costs for 2017 were lower than the costs for 2016 under any variation formulated by Ms. Oliphant. Ms. Oliphant's projection including the Plus Plan showed lower monthly premium costs for 2017 than in 2016. (See *supra*, pp. 5-6). Her projections including only the Standard Plan and high deductible plan also showed premium costs lower in 2017 than the corresponding 2016 costs. (See *supra*, p. 5). The information provided to Charging Party by Respondent also shows premiums decreasing from 2016 to 2017. (Compare GC 5 to GC 6). Despite the indisputable fact that premium costs decreased in 2017, Respondent continued to use the 2016 premium costs for determining bargaining unit employee percent contributions for its open enrollment in December 2016 (GC 8, p. 4), but used the correct 2017 premium costs the July 2017 after the successor contract ratified. (CP 1, p. 3).

Respondent's computation for the employee contribution for January through June of 2017, as argued below, constitutes an unlawful unilateral change because the employee percent contribution, not the dollar amount, carried forward from the 2013 CBA until the successor agreement was ratified. Respondent's failure to abide by the contractually established practice, as

well as past practice, of determining the employee contribution based on a percent of the total premium violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).

b. Respondent committed a unilateral change

Respondent's conduct in this case runs afoul of the prohibition against unlawful unilateral changes established by the United States Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962) and *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991). Under *Katz*, "an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743. "The *Katz* doctrine has been extended to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton*, 501 U.S. at 198 (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)); see also *Air Convey Indus.*, 292 NLRB 25, 25-26 (1988) (holding "It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.").

Most mandatory subjects of bargaining fall within the *Katz* prohibition against unilateral changes. *Litton* at 199. Health insurance benefits and the amount of premiums for such benefits are a mandatory subject of bargaining. *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949). There is no exception for health insurance benefits and premiums from the rule of *Katz*. *Litton* at 199-200. Respondent was therefore obligated to follow the contract and require employees to pay the percentage of their premium as required by the 2013 CBA (JX 2, p. 53).

Instead, Respondent used the 2016 premiums and the 2013 CBA's percentage for the December 2016 enrollment. (GC 8, p. 4). No figure for the 2017 premiums, as discussed above, was equal to the 2016 premiums; all of those figure were lower. (*Supra*, pp. 5-6). As such, Respondent unilaterally changed the wages and/or terms of conditions of employment by not multiplying the established percentage by the new premium rates as reflected in Respondent Exhibit 3, Charging Party Exhibit 1, and General Counsel Exhibit 6.

This case presents the converse of *House of the Good Samaritan*, 268 NLRB 236 (1983). In *Samaritan*, an employer's policy manual stated it would pay maximum amount for its premiums and historically this amount exceeded the cost of the total premium. *Samaritan*, 268 NLRB at 236-37. After the employer was organized and bargaining begun, the cost of the premiums rose beyond the amount provided for in the manual and the employer passed the excess premium amount on to its bargaining unit employees but covered the costs as to its organized employees. *Samaritan* at 237. The Board held

What Respondent was required by law to do was to maintain the status quo. I find the status quo, with respect to health insurance premiums, to be reflected by the terms of Respondent's policy manual regarding health insurance as of May 7, 1981. There is insufficient evidence in this record to reflect that Respondent had always covered increases in premiums for its unrepresented employees and made this practice consistent and inflexible. Absent such proof, I believe Respondent was bound to adhere to the policy that was in effect as of May 7, 1981.

Accordingly, I find that Respondent has not violated the Act by passing along the cost of the increased health insurance coverage to technical bargaining unit employees while choosing to pay the increase in premiums for its unrepresented employees. *Id.*

As in this case, the parties in *Samaritan* did not agree to the premium, but an amount that the employer would cover. In *Samaritan*, that amount was reflected in a dollar figure, in this case it is reflected in a percentage allocation between the Respondent and bargaining unit employees.

Respondent in this case, however, has done the opposite of the employer in *Samaritan*. Whereas the employer in *Samaritan* adhered to the terms in its manual and paid up to the amount it pledged, Respondent in this case did not multiply the new lower premiums by the percentages established in the CBA. No evidence in the record of this case shows that the 2017 premiums were equal to the 2016 premiums. Respondent's use of the old premiums therefore contravenes the rule established in *Samaritan* that an employer should adhere to its established policy. Respondent therefore violated Section 8(a)(5) of the Act when it used the old premium amounts from 2016 as the basis of computing the employee contributions from January through June of 2017.

c. Expiration of the 2013 CBA did not terminate the insurance premium benefit

Unless explicitly stated, expiration of a contract does not terminate a contractual benefit. *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 132 (D.C. Cir. 2001). Nothing in Article 22, Health Insurance, states that the benefit expires on a date certain. The CBA states "beginning January 1, 2014," participation in the premium costs sharing will commence. (JX 2, p. 53). The structure of the contract is thus that as of 2016, the employee percentage was 40% for the Plus Plan, 20% for the Standard Plan, and 5% for the high deductible plan. (Id.). No part of the CBA terminates those contribution percentages; successor percentages must be negotiated. As of the December 2016 early enrollment for 2017, no such successor rates had been agreed to by the parties and as such the existing percentages should have been applied to the new premiums. The expiration of the 2013 CBA therefore does not terminate the premium benefits at issue in this case.

d. Charging Party did not waive its protection against unilateral changes

A union can waive its protection against unilateral changes. *Honeywell*, 253 F.3d at 133 (citing *Cauthorne Trucking*, 256 NLRB No. 115 (1981)). Such waivers must be clear and

unmistakable. *Metro. Edison v. NLRB*, 460 U.S. 693, 703 (1983); *Honeywell* at 133. The expiration of a contract might terminate contractual rights, but it does not waive statutory rights because a duration clause alone “in no way evinces a clear and unmistakable waiver by the Union.” *Id.* at 134. In this case, there is no clear and unmistakable evidence that Charging Party waived its right to the statutory protection against unilateral changes under *Katz* and *Litton*. Waiver is therefore not an available defense to Respondent in this case.

III. Conclusion

For all the foregoing reasons, Charging Party prays that Respondent be found to have violated Section 8(a)(5) of the National Labor Relations Act by implementing a unilateral change as to the computation of the percentage of the health insurance premium bargaining unit employees are required to pay.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This section is to certify service of the above and foregoing instrument has been forwarded electronically to the parties below on February 21, 2018 as follows:

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