

**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.**

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**CONSOLIDATED COMMUNICATIONS, INC.'S ANSWERING BRIEF IN RESPONSE  
TO CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW  
JUDGE'S DECISION AND BRIEF IN SUPPORT**

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Respondent Consolidated Communications, Inc. (Consolidated or CCI) files this Answering Brief to Charging Party Communications Workers of America, AFL-CIO's Exceptions to the Decision of the Administrative Law Judge and Brief in Support pursuant to Section 102.46(b) of the National Labor Relations Board's Rules and Regulations.<sup>1</sup>

**I.**  
**STATEMENT OF FACTS**

**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. Dec. at 2, ln. 5; *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.

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<sup>1</sup> The General Counsel did not file exceptions to the ALJ's Decision.

**C. NEGOTIATIONS BETWEEN THE UNION AND CCI REGARDING HEALTH INSURANCE**

The parties began negotiations<sup>2</sup> 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.

The parties agree that Article 22 (Health Insurance) was negotiated 22 of the 23 times the Union and CCI met to negotiate the successor contract. Jt. Ex. 6; R. Exs. 1 and 2. The parties further 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. 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

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<sup>2</sup> 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.

were still actively engaged in negotiations about health insurance.<sup>3</sup> See R. Exs. 1 and 2; GC Ex. 9. Novark testified that the Union did not agree with the Company about the number of plans until “the very end.” Tr. 41-42.

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.

**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.

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<sup>3</sup> 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.

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. THE ALJ'S DECISION**

Before the ALJ was the General Counsel's allegations that 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). The General Counsel further alleged that Consolidated, "which is self-insured, has established a past practice of adjusting employees' health insurance premiums each January based on the total actual claims for the previous year." GC Ex. 1(c).

The ALJ concluded Consolidated was required to maintain the status quo ante for healthcare premiums during bargaining, and could not adjust premiums until the successor bargaining agreement was ratified. Dec. at 2, Ins. 26-28. Furthermore, the ALJ decided that the General Counsel failed to meet its burden and establish that a past practice existed, in which Consolidated adjusted premiums on January 1, in the absence of a ratified CBA. Dec. at 3, In. 23 – 5, In. 35. The ALJ also concluded that the General Counsel failed to establish that healthcare premiums were determined solely on the basis of the prior year's claims. Dec. at 5, Ins. 28-31. Indeed, the ALJ concluded that "the GC's position is compromised ***by the complete lack of any supporting documentary evidence.***" Dec. at 5, Ins. 18-21. (emphasis in original). Rather, the ALJ concluded "that the record established that several factors, as opposed to an isolated factor, determine the cost of the next year's health insurance premiums, and that there is no past practice to the contrary." Dec. at 5, Ins. 28-31.

**II.**  
**ARGUMENTS AND AUTHORITIES**

**A. THE ALJ CORRECTLY DECIDED THAT THE ISSUE OF THE CASE WAS ABOUT HOW THE TOTAL PREMIUM WAS CALCULATED, AS THIS WAS THE GENERAL COUNSEL'S ALLEGATION IN ITS COMPLAINT.**

The Charging Party's attempt to change the issue of the case fails. For unknown reasons, the Charging Party now claims the case was about the amount of the premiums bargaining unit members paid, rather than the premium amount being based solely on the total actual claims for the previous year. The ALJ correctly held that "[t]his litigation centers upon Consolidated's failure to decrease the unit's health insurance premiums during the 2017 open enrollment period." Dec. at 2, Ins. 17-18. The ALJ further correctly noted that the relevant CBAs "set forth the percentage that employees must pay towards premiums, [but] these agreements are silent regarding premium amounts and calculations. (Jt. Exhs. 1-2)." Dec. at 2, Ins. 19-20.

Despite Charging Party's attempts to change the issue after the ULP Hearing, after the submission of post-hearing briefs, and after the ALJ's Decision, the charge and the Complaint evidence that the ALJ correctly stated and decided the issue asserted against Consolidated by the General Counsel. Indeed, 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). Then on August 31, 2017, the Acting Regional Director issued a Complaint against Consolidated that stated, "[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). The Complaint also alleged that Consolidated "which is self-insured, has established a past practice of adjusting

employees' health insurance premiums each January, based on the total actual claims for the previous year." GC Ex. 1(c).

Moreover, the Charging Party's contention in its Exceptions Brief that Consolidated knew the premium as of September 2016 is belied by the undisputed evidence. Exceptions Brief at 10. The Charging Party continues to ignore the fact that Consolidated could not adjust the premium cost up or down because the parties had not ratified a successor CBA by January 1, 2017, and were still negotiating the costs. Rather, the evidence established that CCI previously 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.

The fact that a proposal the parties exchanged in 2016 was finally accepted on the day of ratification on May 4, 2017, does not establish that Consolidated knew what the premium amount was going to be. The ALJ properly noted that the parties held 23 bargaining sessions between September 2016 and May 2017, and what the premium amount was going to be was discussed until the last bargaining session. While the parties agreed and ratified certain premium amounts, it is undisputed that as of January 1, 2017, the parties had not agreed upon new premium amounts, and the previous CBA had expired. The parties had not agreed upon plan design, number of plans, and allotment of premium shares until May 4, 2017. Accordingly, the ALJ properly held that the General Counsel failed to establish that CCI could have adjusted the health care premiums as of January 1, 2017.

**B. THE ALJ CORRECTLY DECIDED THAT THE GENERAL COUNSEL FAILED TO ESTABLISH A PAST PRACTICE OF CONSOLIDATED ADJUSTING HEALTHCARE PREMIUMS ON JANUARY 1 IN THE ABSENCE OF A RATIFIED CBA.**

**1. The ALJ correctly held that there was no past practice between the Union and CCI regarding adjusting health care premium shares during a contract hiatus.**

The ALJ correctly determined that the General Counsel failed to satisfy its burden of establishing a past practice. Indeed, the General Counsel carefully walked through the evidence submitted by each party regarding an alleged past practice. Dec. at 3, ln. 23 – 5, ln. 31. The ALJ correctly concluded that the General Counsel’s witnesses—Darrel Novark, Mark Franken, and Eddie Edds—claimed, but failed to prove, that “Consolidated maintained a past practice, where it derived annual health insurance premiums solely on the basis of the prior year’s claims.” Dec. at 5, lns. 3-5. Novark claimed that such a practice had been in place for at least 9 years. Dec. at 3, ln. 30. The ALJ properly weighed the evidence, and held that “the GC’s position is compromised

***by the complete lack of any supporting documentary evidence.***” Dec. at 5, Ins. 20-21 (emphasis in original). Thus, the ALJ properly credited Consolidated’s witnesses that multiple factors were used to calculate the premium, and “that there is no past practice to the contrary.” Dec. at 5, Ins. 30-31.

The Charging Party’s Brief does not dispute that it was the General Counsel’s burden to establish past practice. “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 Transp.*, 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).

Moreover, the Charging Party also does not dispute that 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 Charging Party’s Brief ignores the critical detail regarding this being a unique situation, as the parties had always ratified a successor contract by January 1; and thus, Consolidated always knew what the premium amount was. 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 CCI adjusting premiums in the absence of a ratified or existing collective bargaining agreement, there is no past practice.

Accordingly, the ALJ correctly decided that the General Counsel failed to establish a past practice existed.

**2. The ALJ did not rely on overruled authority to support his decision that the General Counsel failed to establish a past practice.**

The Charging Party’s contention that the ALJ’s citation to *Du Pont* resulted “in his decision failing to give proper weight to the past practice of the parties” is without merit. Exceptions Brief at 3. First, despite the Charging Party’s contention to the contrary, a plain reading of the ALJ’s decision reveals that the ALJ’s finding that the Company did not violate the Act does not rely—either directly or indirectly—on the recently overruled *E.I. Du Pont de Nemors* decision. Dec. at 6, Ins. 25-38. Rather, the ALJ’s holding that the Company did not violate the Act is solely based on his finding that the General Counsel did not establish that the Company “has established a past practice of adjusting employees’ health insurance premiums each January based on the total actual claims for the previous year” as alleged by the General Counsel’s Complaint. Dec. at 5, Ins. 36-37 (citing Complaint and Notice of Hearing, p. 3).

As correctly outlined by the ALJ, to establish the 8(a)(5) allegation in the Complaint, the General Counsel first had the burden to establish that a past practice existed regarding “adjusting employees’ health insurance premiums each January based on the total actual claims for the previous year.” Dec. at 5, Ins. 35-38. If the General Counsel established a past practice, the General Counsel was then required to prove that Consolidated acted inconsistently with the past practice in violation of the Act. Dec. at 5, ln. 38 – 6, ln. 1. It follows that if the General Counsel cannot meet its initial burden of establishing past practice, any analysis of whether the Company

violated the act by unilaterally changing a non-existent past practice is unnecessary. *See, e.g., Burndy, LLC*, 364 NLRB No. 77, n. 62 (Aug. 17, 2016) (finding “no past practice has been established and therefore no unilateral change took place.”).

A reading of the ALJ’s decision reveals that the General Counsel’s case failed at the first step of the foregoing analysis because the ALJ found that the General Counsel failed to establish a past practice. *See* Dec. at 4, Ins. 28-31 (“I find . . . that the record established that several factors, as opposed to an isolated factor, determine the cost of next year’s health insurance premiums, and that there is no past practice to the contrary.”); *see also* Dec. at 6, ln. 27 (“[The General Counsel’s] witnesses, as noted, conclusively failed to establish the past practice.”). The ALJ’s decision does not rely on or cite to *E.I. Du Pont de Nemours* for this dispositive finding that the General Counsel failed to establish a past practice “of adjusting employees’ health insurance premiums each January based on the total actual claims for the previous year,” as alleged in the Complaint.

Rather, the ALJ only cites to *E.I. Du Pont de Nemours* in a hypothetical discussion of the disposition of the case if the General Counsel had met its burden and established a past practice, thereby requiring the ALJ to conduct the second step of the analysis outlined above. Dec. at 6, Ins. 30-35. This is evident by the clear language of the decision, where the ALJ states that

[i]t is also noteworthy that, *even if the GC’s version of a past practice had been adduced*, Consolidated’s decision to maintain the status quo ante regarding a discretionary matter such as health insurance premiums, while contract negotiations were pending, was nevertheless lawful under extant Board law. *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 10 (2016) (discretionary unilateral changes in health insurance benefits made during bargaining pursuant to a past practice developed under an expired contract are unlawful).

Dec. at 6, Ins. 30-35.

Accordingly, despite the Union's contention to the contrary, the ALJ's decision that the Company did not violate the Act did not rely on the recently-overturned *E.I. Du Pont* decision.<sup>4</sup>

Moreover, even if the ALJ's decision did rely on *E.I. Du Pont* (which it does not), this reliance would be harmless as the bargaining obligations for employers is more onerous under *E.I. Du Pont* than in *Raytheon*. In the decision, the ALJ hypothetically contends that even if a past practice was established by the General Counsel, the Company nevertheless did not violate the Act and met its bargaining obligations, and cites to *DuPont* for this proposition. Dec. at 6, lns. 30-35. However, in arguing that the ALJ's "reliance" on *E.I. Du Pont* resulted in the ALJ's finding that Consolidated did not violate the Act, the Union ignores that an employer's obligations under *E.I. Du Pont* is more restrictive and burdensome than in *Raytheon*. In *E.I. Du Pont*, the Board held that actions consistent with an established past practice constitute a change, and therefore require the employer to provide the union with notice and an opportunity to bargain prior to implementation, if the past practice was created under a management-rights clause in a CBA that has expired, or if the disputed actions involved employer discretion. *Raytheon*, 365 NLRB No. 161, slip op. at 1 (2017) (citing *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016)). *Raytheon*, however, overruled this restrictive bargaining obligation, and instead found that the an employer does not violate the NLRA by implementing a unilateral change if the "change" is similar in kind and degree with an established past practice consisting of comparable unilateral changes. *Id.* at 13. This less restrictive bargaining obligation in *Raytheon* is highlighted by the Board's decision, wherein it discusses the retroactive application of the decision, stating

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<sup>4</sup> The Board has found that a judge's citation to overruled authority may be merely disregarded. *See e.g., Rock-Tenn Co.*, 319 NLRB 1139, 1139, n. 2 (1995) ("In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act, we do not rely on his citation of *Otis Elevator Co.*, 269 NLRB 891 (1984), because that decision was overruled in *Dubuque Packing Co.*, 303 NLRB 386, 390 fn. 8 (1991).).

“[w]e perceive no ill effects that would be occasioned by applying the standard we announce herein to this case and to all pending cases. *No party that has acted in reliance on DuPont will be found to have violated the Act as a result of applying the standard we announce today* retroactively. In reliance on *DuPont*, parties may have engaged in bargaining that our decision today renders unnecessary, but such bargaining is merely rendered supererogatory by our decision, not unlawful.” *Id.* at 17 (emphasis added). Accordingly, any finding that the Company did not violate the Act pursuant to the standard set forth *E.I. Du Pont* necessarily means that a violation would not have occurred under the *Raytheon* standard.

Accordingly, there is no merit to the Charging Party’s contention that the ALJ relied on *Du Pont* in determining that the Company did not violate the Act, and even if he did, such reliance was harmless and did not impact the ALJ’s findings.

**C. THE ALJ CORRECTLY DECIDED THAT CONSOLIDATED DID NOT UNILATERALLY CHANGE THE BARGAINING UNIT MEMBERS’ HEALTHCARE PREMIUMS.**

**1. The ALJ correctly decided that Consolidated could not calculate the 2017 healthcare premiums until a successor contract was ratified.**

The Charging Party incorrectly argued that Consolidated knew the total premium costs for 2017 were going to be lower than 2016. Exceptions Brief at 14. The ALJ correctly held that the General Counsel failed to produce any evidence that Consolidated could have calculated the premium on January 1, 2017. 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.

Despite the Charging Party's argument, Consolidated did not continue to charge bargaining unit members a fixed dollar amount. Rather, because there was no ratified CBA, Consolidated maintained the status quo ante, and continued to charge the same amount based on percent of the premium stated in the expire CBA. Indeed, the ALJ correctly held that Consolidated had to maintain the status quo. Dec. at 6, n. 13.

**2. 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 had to determine was what was the status quo. *See Life Care Ctrs. of Am.*, 340 NLRB 397, 399 (2003); *Crown Elec. Contracting*, 338 NLRB 336 (2002). As the ALJ correctly held, 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. Dec. at 2; 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, as the ALJ properly held. Dec. at 5-6.

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 (10<sup>th</sup> 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).

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 that were decided by the ALJ. 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).

The ALJ correctly held that multiple factors are used to calculate the total premium. Dec. at 5, Ins. 28-31. 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. The ALJ agreed. Dec. at 3, ln. 23 – 5, ln. 31. Indeed, as the ALJ properly held, prior claim experience has **never** been the sole factor used to calculate the total premium. Dec. at 5, Ins. 28-31. Thus, the ALJ correctly held that 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. Dec. at 5, Ins. 3-31. 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 ALJ correctly decided that the General Counsel failed to establish that CCI actually changed anything regarding health care premiums. Dec. at 5, Ins. 30-38. 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 ALJ correctly held that the General Counsel failed to satisfy its burden.

### **III.** **CONCLUSION**

For the reasons stated in the Administrative Law Judge's Decision and herein, the Board should deny Charging Party's exceptions and dismiss the Complaint in its entirety.

Respectfully submitted this 8<sup>th</sup> day of May, 2018.

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Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I certify that on this 8<sup>th</sup> day of May, 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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