

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

CONSOLIDATED  
COMMUNICATIONS, INC.,

Respondent,

and

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO,

Charging Party.

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CASE 16-CA-196201

**CHARGING PARTY'S REPLY TO CONSOLIDATED COMMUNICATIONS, INC.'S  
ANSWERING BRIEF IN REPSONE TO CHARGING PARTY'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

<b>CONSOLIDATED COMMUNICATIONS,</b>	§	
<b>INC.,</b>	§	
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<b>Respondent,</b>	§	
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	§	
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ANSWERING BRIEF IN REPSONE TO CHARGING PARTY’S EXCEPTIONS TO THE  
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COMES NOW Charging Party Communications Workers of America, AFL-CIO (“Charging Party” or “the Union”) and, pursuant to Section 102.46 of the Rules and Regulations (“R&R”) of the National Labor Relations Board (“NLRB” or “the Board”), 29 C.F.R. § 102.46(e), files this reply to the May 8, 2014 answering brief of Respondent Consolidated Communications, LLC (“Respondent” or “Consolidated”), and would respectfully show the Board the following in support of Charging Party’s exceptions to the decision of the Administrative Law Judge (“ALJ”):

**I. The Cost for the 2017 healthcare premiums was established before December 2016**

Respondent contends in its answering brief that the premiums for 2017 were not established prior to the ratification of the successor labor agreement. (Respondent Answering Brief (“Answer”), p. 6). This argument is stagecraft by Respondent to distract from the uncontroverted evidence that Respondent knew as of September 26, 2016, the date of Respondent Exhibit 3, that premium costs under any scenario were decreasing. If the Plus Plan remained available to

bargaining unit employees, as it did for purposes of the December 2016 enrollment for premium payments beginning in January 2017, the premiums per plan would be as follows. The 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. (Respondent Exhibit (“R”) 3, p. 5; see also Transcript (“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.). All of the total premiums, including the Plus Plan, were lower than the 2016 rates (Compare with GC 5 and GC 8, p. 4).

Respondent argues in its answering brief that these rates were not certain until the labor agreement was ratified. This point obscures the fact that the price across the board for the insurance plans would have fallen regardless of the configuration of the plan. There is no scenario outlined in Respondent Exhibit 3 where premiums would not decrease. Therefore, in January of 2017, when Respondent applied the labor agreement contribution rates to the 2016 premiums, (See General Counsel Exhibit (“GC”) 5; GC 8, p. 4), Respondent overcharged bargaining unit employees.

Respondent’s argument against the certainty of the September 2016 analysis is undermined by the fact that it accurately predicted the premiums ultimately implemented following the conclusion of bargaining in May 2017 during the open enrollment for July 2017. The September

2016 analysis determined, assuming the elimination of the Plus Plan, that 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. (R 3, pp. 8-9). 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 July 1, 2017 after a successor agreement had been reached. (Charging Party (“CP”) 1, p. 3 (Bates 003188)). The September 2016 analysis therefore correctly projected premium costs with the elimination of the Plus Plan. This corroborates the conclusion that the September 2016 analysis also correctly predicted the premiums had the Plus Plan remained, a conclusion buttressed by the fact that Respondent Exhibit 3 describes its Plus Plan projection as a “Status quo plan design—so assume no changes except medical inflation—this acts as our baseline costs.” (R 3, p. 2).

Respondent essentially argues that the similarities between the September 2016 analysis and the July 2017 rates are a coincidence. That conclusion is not tenable given the fact that the 2016 analysis was ultimately implemented in July 2017 with open enrollment following bargaining. This evidence conclusively shows that Respondent’s premiums were lower as of January 1, 2017 than they had been in 2016 and therefore Respondent overcharged bargaining unit employees when in January 2017 it charged employees the same premiums they had been charged in 2016. The ALJ’s contrary finding should be reversed.

**II. The ALJ's reliance on *E.I. Du Pont de Nemours* led to the application of the incorrect analytical framework in this case**

Respondent contends that the ALJ's reliance on *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) did not have a substantive outcome on the outcome of this case. (Answer, pp. 9-12). This argument cannot be sustained because the ALJ's analysis of the unilateral change in this case overlooked the continuity emphasized by the Board in *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017). By relying on *Du Pont*, which focuses on what an employer cannot do, the ALJ's decision misses the point of *Raytheon*, which underscores what an employer can do, namely act in a manner consistent with its past practices.

*Raytheon* permits unilateral changes consistent with past practice. *Raytheon*, 365 NLRB No. 161, slip op. at 18. Respondent in its answering brief, while not conceding the existence of a past practice, notes that one could not be established under the facts of this case because the 2016-17 bargaining between the parties was the first time that there had been no new contract by expiration and therefore there was no past practice that applied to this situation. (Answer, pp. 8-9, citing *Intermountain Rural Elec. Ass'n*, 305 NLRB 783, 784 (1991)). *Raytheon*, however, holds that employers may follow their past practices. *Raytheon*, slip at 16, 18. *Intermountain Rural*, like *Du Pont*, overemphasizes the restrictions on employers under Section 8(a)(5) while failing to address the fact that 8(a)(5) permits established past practices to serve as gap-filling measures in the absence of a labor agreement.

In this case, the evidence showed a past practice of Respondent always charging employees a percent of the annual premium. (Tr. 29-30). When it came time for enrollment for health insurance for 2017 and there was no contract in place, Respondent, in accordance with *Raytheon*, should have applied the established percentages from the expiring labor agreement to the new

premiums as per its past practice. The fact that this was the first enrollment without a labor agreement is immaterial to the analysis of this case under *Raytheon* because *Raytheon's* focus, unlike *Du Pont* and *Intermountain Rural*, is on the existence of legitimate and lawful past practices that define terms and conditions of work for bargaining unit employees in the absence of a valid labor agreement. By focusing of *Du Pont* as its touchstone for the 8(a)(5) analysis, the ALJ's decision fails to credit the evidence of a past practice and that Section 8(a)(5) mandated the continuation of that practice in the absence of a labor agreement. The ALJ's determination that there was no past practice in this case should therefore be reversed.

**III. In the alternative, the NLRB should find a violation of Section 8(a)(5) based on the alternate theory advanced by Charging Party**

Charging Party excepted from the ALJ's failure to find a violation of Section 8(a)(5) based on CWA's theory that the terms and conditions of work continued upon expiration of the 2016 labor agreement and, specifically, the percentages of the bargaining unit employees' contribution to the premium remained in effect and should have been applied to the new premiums because the agreement specified the percent employees were to contribute to the premium, but not the amount of the premium. Respondent asserts in its answering brief that the ALJ correctly framed the issue in the case based on language of the charge and the complaint. (Answer, pp. 5-7). Respondent's argument does not recognize that the NLRB permits going beyond the language of the complaint so as to "find and remedy a violation even in absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enf'd* 920 F.2d 130 (2d Cir. 1990).

When a labor agreement expires, its terms covering mandatory subjects of bargaining remain in effect until new terms or impasse are reached. *Litton Fin. Printing Div. v. NLRB*, 501

U.S. 190, 198 (1991). The 2013-16 labor agreement (Joint Exhibit (“J”) 1) contained percentages to be applied to the healthcare premiums, but not the premiums themselves. (J 1, p. 53). As discussed above, the premiums for 2017 were established as of September 2016 when Respondent Exhibit 3 was created. Those were the premiums Respondent had to work with during the open enrollment for January 2017 and, per the terms of the expired labor agreement, the percentages contained in the 2013-16 agreement should have been applied to the premiums applicable for 2017. Respondent’s failure to do so constitute a unilateral change in the amount employees had to contribute to the healthcare premium in violation of Section 8(a)(5). The NLRB should reverse the ALJ’s contrary decision and find a violation of Section 8(a)(5).

**IV. Conclusion**

For all the foregoing reasons, Charging Party Communications Workers of America, AFL-CIO prays that its exceptions be granted and the decision of the Administrative Law Judge be vacated, and that the NLRB render a decision that Respondent Consolidated Communications, Inc. violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) for the reasons argued in Charging Party’s exceptions and this reply.

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 May 22, 2018 as follows:

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