

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

**VHS OF MICHIGAN, INC. d/b/a
DETROIT MEDICAL CENTER (DMC)**

and

Case No. 07-CA-205394

**LOCAL 283, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS (IBT)**

Robert A. Drzyzga, Esq., for the General Counsel.
Shaun P. Ayer, (The Allen Law Group, PC, Detroit, Michigan)
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Detroit, Michigan on June 4, 2019. Teamsters Local 283 filed the charge in this matter on August 29, 2017. The General Counsel issued a complaint on March 29, 2018.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in changing the circumstances under which employees in the bargaining unit covering laboratory assistants and customer service representatives would be paid overtime.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Detroit Medical Center (DMC), a corporation, operates hospitals at its facilities in Detroit, Michigan where it derived gross revenues in excess of \$250,000 in 2018. During 2018, DMC purchased and received goods and materials valued in excess of \$5,000

directly from points outside of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Teamsters Local 283, is a labor organization within the meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

For at least 16 years, members of the DMC bargaining unit covering senior laboratory assistants, laboratory assistants and customer service representatives have been paid overtime (time and a half) for any shift that exceeded 8 hours, regardless of the number of hours worked in a week. These employees are members of 1 of 3 bargaining units represented by Teamsters Local 283.

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At a meeting with union stewards on June 23, 2017, Jonita Edwards, the human resources director for DMC, announced that effective July 9, 2017 Respondent would be making a change in its pay practices. After July 9, employees would only be paid overtime if they worked more than 40 hours a week. These changes are set forth in detail in G.C. Exh. 10. Respondent made it clear that it believed it did not have to give the Union advance notice of this change or give the Union an opportunity to bargain over it. Melissa Berger, one of the union stewards, asked Edwards how DMC could make such change without the presence union business representative Steve Hicks, the union's lead negotiator in collective bargaining.¹ Edwards replied that the DMC could make such a change unilaterally to conform to the policies of Tenet Healthcare, its parent company.²

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At the time of the change DMC and the Union were in negotiations for a successor agreement to their January 1, 2012-December 31, 2014 collective bargaining agreement. This agreement has been extended every 45 days since its expiration and is currently still in force. While the parties disagree as to whether the extension has been continuous, they agree that the contract was in force at the time the overtime calculation changed in June-July 2017.

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Respondent contends that it was entitled to unilaterally make this change pursuant to Article 7, Section 1(A) of the collective bargaining agreement. That provision states:

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Recognizing that the provisions of health care services may require regular work on seven days per week, the regular work schedule for a full -time employee shall consist of eighty (80) hours per 2 -week period and eight (8) hours per workday. The Employer reserves the right to change the regular work schedule to forty (40) hours, per week. This schedule may be Monday through Friday or various alternate seven-day operations schedules with four (4) days off, within the two-week period, for full time employees.³

¹ Hicks testified that he did not find out about the change until July 13, 2017, at a bargaining session.

² Tenet purchased DMC from Vanguard Health sometime prior to 2014.

³ This provision is consistent with Section 7(j) of the Fair Labor Standards Act, which has special provisions for the health care industry.

This language has been in each of the collective bargaining agreements between the parties since January 1, 2006, G.C. Exhs. 2, 3 and 4. Article 7, Section 4 of the collective bargaining agreement covers overtime, but does not and has not since January 1, 2006, specifically addressed the conditions upon which overtime will be paid. Nothing in the contract states how many hours in a day, week or pay period an employee must work to be entitled to overtime pay. As stated previously, since 2006 until July 9, 2017, unit employees were paid overtime if they worked more than 8 hours in any shift, regardless of the number of hours worked in a week or bi-weekly period. Nevertheless, Respondent contends that Section 1(A) allows it to cease paying overtime to unit employees who work over 8 hours in a single shift despite the fact that it had been consistently doing so for 11 years.

ANALYSIS

An employer violates Section 8(a)(5) and (1) of the Act if it makes a material unilateral change in the terms and conditions of employment during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining, *NLRB v. Katz*, 369 U.S. 736, 743 (1962). A change in a long-standing method of calculation of when employees are eligible for overtime pay is a mandatory subject of bargaining, *Chef's Pantry*, 274 NLRB 775 fn. 6 (1985). An employer that makes a change in this method unilaterally, violates Section 8(a)(5) and (1) of the Act, *Intermountain Rural Electric Association*, 305 NLRB 783, 787-88 (1991).

I conclude that the Board's decision in *Intermountain Rural Electric Association* is dispositive of this case. Intermountain had an established practice of computing eligibility for overtime pay for all hours for which an employee was compensated, including vacation and sick leave. In 1980, Intermountain succeeded in changing the contract language to require employees to make up paid time off before being paid at the premium overtime rate. According to the contract, employees became eligible for overtime pay only if they worked more than 8 hours a day or 40 hours per week. Despite this change in the contract, Intermountain continued to pay the overtime rate for all hours for which employees were compensated. In 1989 Intermountain unilaterally ceased this practice and refused to pay overtime rates unless an employee actually worked 40 hours a week or a full 8-hour day. The Board found this to be an illegal unilateral change.⁴

An employer's practices, even if not required by a collective bargaining agreement, which are regular and long-standing, rather than a random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change, *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 NLRB 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245n. 2 (1991); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001); *The Sacramento Union*, 258 NLRB 1074,

⁴ The Board reversed the judge's conclusion in *Intermountain* that the Union had waived its bargaining rights over this change. In the instant case, Respondent argues that the language of the collective bargaining agreement (or its interpretation of the contract language) constitutes a waiver of the Union's bargaining rights. This argument is foreclosed by the *Intermountain* decision. An established past practice supersedes contract language that is inconsistent with it.

1075-1076 (1981). During negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for an agreement as a whole, *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. 15 F. 3d 1087 (9th Cir. 1991). Respondent does not contend that an overall impasse was reached on or prior to July 9, 2017. Respondent's long-standing and consistent practice of paying unit employees the overtime rate when they worked more than 8 hours in a shift is such a term and condition of employment that cannot be changed unilaterally.

CONCLUSION OF LAW

Respondent, VHS of Michigan violated Section 8(a)(5) and (1) of the Act by unilaterally changing its policies as to when unit employees were eligible for overtime pay.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, VHS of Michigan, Inc., d/b/a Detroit Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Unilaterally changing its policies as to the eligibility of employees for overtime pay.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Upon request of the Union, restore its established past practice with regard to eligibility for overtime pay, e.g., paying time and a half for any hours worked in excess of 8 in one shift.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5 (b) Before implementing any changes in the wages, hours and other terms and conditions of employment of unit employees, notify and upon request, bargain collectively and in good faith with the Union, Teamsters Local 283 as the exclusive bargaining representative of its senior laboratory assistants, laboratory assistants and customer service representatives. During collective bargaining negotiations refrain from making implementation of any unilateral changes unless and until an overall impasse has been reached on bargaining for an agreement as a whole.
- 10 (c) Make whole unit employees for any loss of pay or other benefits they may have suffered as a result of the unlawful conduct in the manner set forth in *Ogle Protection Services*, 183 NLRB 662, 683 (1970) enfd. 444 F. 2d 502 (6th Cir. 1971) with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).
- 15 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 20 (e) Within 14 days after service by the Region, post at its Detroit, Michigan facilities copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.
- 25 Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2017.
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⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. July 23, 2019



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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally changing our policies as to the eligibility of employees for overtime pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL upon request from the Union, restore our established past practice with regard to eligibility for overtime pay, e.g., paying time and a half for any hours worked in excess of 8 in one shift.

WE WILL make unit employees whole for any loss of pay or other benefits they may have suffered as a result of our illegal unilateral change as to the eligibility of unit employees for overtime pay, with interest compounded daily.

WE WILL bargain in good faith with Local 283 of the International Brotherhood of Teamsters as the exclusive collective bargaining representative of our senior laboratory assistants, laboratory assistants and customer service representatives.

**VHS OF MICHIGAN, INC. d/b/a
DETROIT MEDICAL CENTER (DMC)**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-205394 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.