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Consolidated Communications Holdings, Inc. d/b/a Consolidated Communications of Texas Company and Communication Workers of America, AFL-CIO. Case 16-CA-196201

August 3, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On March 27, 2018, Administrative Law Judge Robert A. Ringler issued the attached decision. The Charging Party filed exceptions with supporting argument, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 3, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

¹ The Charging Party has implicitly excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Accordingly, we adopt the judge's finding that the General Counsel failed to prove that the Respondent violated Sec. 8(a)(5) and (1) of the Act as alleged in the complaint. To the extent that the Charging Party argues that the judge erred by failing to make findings beyond the scope of the complaint and the General Counsel's theory of the case, we reject that argument. See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enf. 325 Fed.Appx. 577 (9th Cir. 2009).

(SEAL) NATIONAL LABOR RELATIONS BOARD

Bryan A. Dooley, Esq., for the General Counsel.
Matthew Holder, Esq. (David Van Os & Associates, P.C.), for the Charging Party.

David Lonergan and Amber M. Rogers, Esqs. (Hunton & Williams, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Houston, Texas on January 18, 2018. The complaint alleged that the employer (Consolidated or the Respondent) violated the National Labor Relations Act (the Act), when it unilaterally changed a longstanding past practice without notifying the Communications Workers of America, AFL-CIO (the Union). On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' posthearing briefs, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

At all material times, Consolidated, a corporation with offices in Conroe and Lufkin, Texas has provided internet services. Annually, it derives gross revenues exceeding \$100,000, and provides services exceeding \$5000 directly outside of Texas. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6), and (7). It also admits, and I find, that the Union is a §2(5) labor organization.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The parties have a longstanding collective-bargaining relationship. The Union represents the following bargaining unit of employees (the unit):

All non-supervisory employees [employed by Consolidated] with the exception of executive secretaries [at its Conroe and Lufkin, Texas offices].²

(GC Exh. 1; Jt. Exh. 1.) Their current contract runs from May 9, 2017 to October 16, 2019 (the 2017-2019 CBA). (Jt. Exh. 1.) Their prior agreement ran from October 16, 2013 to October 15, 2016 (the 2013-16 CBA). (Jt. Exh. 2.)

B. Issue

This litigation centers upon Consolidated's failure to decrease the unit's health insurance premiums during the 2017 open enrollment period. Although the 2017-2019 and 2013-2016 CBAs set forth the percentage that employees must pay towards premiums, these agreements are silent regarding premium amounts and calculations. (Jt. Exhs. 1-2.) The General Counsel (the GC) and Union insist that there is an established

¹ Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

² There are roughly 150 unit employees; 90 in Conroe, and 60 in Lufkin.

past practice, which requires Consolidated to raise or lower a current year's premiums solely on the basis of the past year's claims. They aver that Consolidated breached this past practice, when it kept premiums constant during the 2017 open enrollment period, when it should have actually decreased premium on the basis of the past practice. Consolidated denies the alleged past practice, avers that premiums are based upon multiple factors, and insists that its actions were legitimate. It explains that it had to maintain the status quo ante for premiums during bargaining, and then properly re-assessed premiums on the basis of its multi-factor analysis after bargaining ended. Its position is valid.

C. Undisputed Evidence

1. Collective-bargaining provisions health benefits

This chart summarizes how health benefits are described in the parties' contracts:

Contract Term	Benefit Plans Listed?	Employee Contribution Listed?	Premiums Listed?	Premium Formula?
2013–2016 CBA	Plus, standard and CDPHP plans	Yes, employees pay 5% to 40%.	No	<i>No</i>
2010–2013 CBA	Plus, standard and CDPHP plans	Yes, employees paid 5% to 22.5%.	Yes, contributions described.	<i>No</i>
2007–2010 CBA	Plans unlisted	Yes, employees paid 5% to 15%.	No	<i>No</i>
2004–2007 CBA	Plans unlisted	No	No	<i>No</i>

(Jt. Exhs. 2–5.)

2. 2017–2019 CBA negotiations

Between September 2016 and May 2017, the parties held 23 bargaining sessions.³ They reached a tentative agreement on May 4, 2017, which was ratified on May 9. Regarding health benefits, they agreed that: Consolidated would provide standard and high deductible plans; and employees would contribute 6% to 25% towards premiums. (Jt. Exhs. 1–2.) Their bargaining failed to incorporate a standardized methodology for calculating premiums in the contract.

3. Open enrollment for health benefits

Between December 2016 and January 2017, Consolidated held open enrollment. Given that negotiations for the 2017–2019 CBA were ongoing, Consolidated maintained the status quo ante menu of plans, contributions and premiums. It never notified the Union of its decision to maintain the status quo

³ Stephanie Collier, Eddie Edds, Darrel Novark, and Mark Franken were on the Union's bargaining team; Rheta Bobo, Mike Cannon, Kerry Wiggins, and Kayla Martin were on Consolidated's team. (Jt. Exh. 6.)

ante. The Union contends that this decision breached the parties' established practice, and that Consolidated was obligated to decrease premiums at that time.

D. Disputed Evidence on the Past Practice

1. GC and union witnesses

Novark, who was Union president from 2008 to 2017,⁴ described his understanding of the past practice as follows:⁵

If we were doing good [and] ... we were below what our numbers were last year, ... we would get a reduced rate. If we were doing bad, ... we would get an increase ... at the end of the year.

(Tr. 29.) He averred that this has been the steady practice for 9 years. To this end, he recollected that, in November 2016, "Rheta [Bobo]... said it looks like ... we hadn't ... used as much money that year and our premiums would be going down." (Tr. 31.) He said that, in January 2017, Bobo recanted this statement, and said that she had misspoken. (Tr. 35.)

Union Administrative Director Franken stated that, after a negotiating session, the Union's team had this exchange with Bobo regarding premiums:

They ... ask[ed] Rheta ... if she knew ... how much it was going to be reduced, [and] ... her response was she wasn't sure how much it was going to be reduced.

(Tr. 57.) He described his understanding of the past practice in the following way:⁶

[B]ased on ... the plan experience for the various plans, and then whatever percentage that the employees are required to pay contractually is applied to whatever that premium is for the upcoming plan year. ...

(Tr. 60.) Edds generally corroborated Novark and Franken. (Tr. 102.)

2. Consolidated's witnesses

Former Labor Relations Director Bobo vigorously denied saying that premiums would decrease,⁷ and explained that premiums were based upon several factors. Network Operations Manager Cannon, another bargaining team member, denied witnessing anyone state that premiums would decline.

Vice President Vivian Schott described how premiums are set:⁸

[P]remium cost [has] ... many factors.... [C]laims is ... one of them.... [I]t's [also] trend and inflation.... It's [also] ... the prescription plan, ... as more ... use specialty drugs.... It's [also] the cost for Blue Cross/Blue Shield to handle the claims. It's [also] the cost of a stop loss.... [which] changes the cost The copays drive changes. The deductibles, the

⁴ He is now a plant engineer and outside of the unit.

⁵ He did not provide a detailed explanation of the basis for his position, or offer supporting documentation.

⁶ He did not provide a detailed explanation of the basis for his position, or offer supporting documentation.

⁷ She was employed by Consolidated for the prior 16 years; she left the company on December 29, 2017.

⁸ She has been employed by Consolidated for 12 years.

out of-pocket, the in-network/out-of-network costs drive claim costs. How many people go into the plan, [and] what our assumptions [about] ... who's going to move ... [after] we eliminated the plus plan.... And then what type of people do you have? Do you have family coverage ... [or] single folks in there? Those [variables] all play a factor into the cost.

(Tr. 205–206.) She denied that claims have ever singlehandedly controlled premiums. (Tr. 208.)

Brook Oliphant, an account executive for insurance broker A.J. Gallagher, testified that she handles Consolidated's account. She reiterated that multiple factors determine premiums, including fixed costs, administrative fees, claims experience, stop loss coverage costs, plan types, benefit design, health care inflation, and enrollment assumptions. She insisted that a premium would never be calculated solely on the basis of claims.

3. Credibility resolution

Two key credibility issues require resolution. The first involves Bobo's alleged comment that premiums would go down in 2017. The second involves the past practice itself.

Regarding Bobo's alleged comment, Novark, Franken, and Edds each testified that she made the statement at issue, while she denied. I credit Novark, Franken and Edds; they were credible, had strong demeanors, and were consistent. Bobo was a less than credible witness, who appeared to be more concerned with not conceding a point than providing a candid account. I find, as a result, that Bobo initially made a statement, in or about November 2016, that 2017 premiums would decrease, and later recanted this errant statement.

Regarding the past practice itself, Novark, Franken and Edds testified that Consolidated maintained a past practice, where it derived annual health insurance premiums solely on the basis of the prior year's claims. Novark indicated that this practice had been in effect for at least 9 years. Bobo, Schott, and Oliphant, however, denied any such past practice, and stated that multiple factors, as opposed to a single factor, controlled premiums. Regarding whether premiums are *solely* determined by the prior year's claims, I credit Consolidated's witnesses for several reasons. First, it is implausible that a self-insured employer would simplistically use just their prior year's claims to calculate something as complex as their next year's premiums. By way of an extremely oversimplified example, if prior year claims decreased by 5 percent and healthcare inflation rose by 20 percent, it is implausible that a rational employer would blindly decrease premiums by 5 percent, while ignoring the 20 percent inflation increase.⁹ Second, Novark's claim that the alleged practice has been effective for 9 years is contradicted by the 2010–2013 CBA, which sets fixed employee contribution amounts, and clearly ignores the reported past practice.¹⁰ Third, it is highly likely that the GC's witnesses are confusing a

⁹ A reasonable employer would logically seek to calculate premiums in the fullest, most informed, and least risky manner that it possibly could, which would translate into factoring in every relevant variable that it could identify (i.e., trends, inflation, medical costs, specialty drugs, population characteristics, plan benefits, plan design, etc.).

¹⁰ This inconsistency on a key matter from a central witness undercuts the overall credibility of the GC's case.

correlated factor (i.e., past year's claims are loosely correlated with the next year's premiums) with a singly conclusive factor (i.e., past year's claims always and solely determine next year's premiums).¹¹ This confusion likely caused the GC's witnesses to erroneously assume the existence of a past practice, where no such practice existed. Finally, the GC's position is compromised *by the complete lack of any supporting documentary evidence*. If the GC's past practice allegations were accurate, it could have easily corroborated the practice with documentation of the past claims, and then demonstrated with pinpoint mathematical accuracy that the succeeding year's premiums rose and fell solely on the basis of the past year's losses and gains.¹² Such evidence, if it actually existed, was highly accessible, inasmuch as the GC could have subpoenaed it, or the Union could have made a connected information request. This glaring evidentiary lapse on a matter (as will be discussed below), where the GC held the burden of proof eviscerates its position. In sum, the credibility battle regarding the past practice was abundantly won by Consolidated. I find, accordingly, 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.

III. ANALYSIS

The GC failed to establish that Consolidated violated §8(a)(5). The complaint alleged, as noted, that Consolidated has "established a past practice of adjusting employees' health insurance premiums each January based on the total actual claims for the previous year," and, "[a]bout January 1, 2017, Respondent unilaterally and contrary to its past practice failed to adjust health care premiums for employees in the unit." (GC Exh. 1.)

A. Legal Precedent

The Board has held that, "[u]nder the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act bars employers from taking unilateral action on mandatory bargaining topics such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 5 (2011). It is well-established that health benefits are mandatory bargaining topics. See, e.g., *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002). An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even where such practices are not expressly set forth within a collective-bargaining agreement. *Garden Grove Hospital*, *supra*.

¹¹ Bobo was likely confused in this manner, when she errantly stated that the decrease in last year's claims would cause premium rates to decrease. Moreover, this confusion is plausible given the complexity of the subject.

¹² Such evidence would not have just been persuasive; it would have been virtually indisputable.

The party asserting the existence of a past practice bears the burden of proof on the issue; specifically, the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183–184 (2011), enf. 459 Fed. Appx. 874 (11th Cir. 2012).

B. Discussion

Given that the GC (i.e., the party asserting the past practice herein) held the burden of proof on this matter under *Palm Beach Metro*, its connected unilateral change claim must fail. Its witnesses, as noted, conclusively failed to establish the past practice. The record actually established, in contrast to the GC’s allegations, that Consolidated uses a multi-factor actuarial analysis to identify premium costs, as opposed to the mechanical, single factor analysis alleged herein. It is also noteworthy that, even if the GC’s version of a past practice had been aduced, 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).¹³ In sum, Consolidated did not

¹³ Hence, if Consolidated would have implemented the past practice in the manner alleged by the GC during bargaining, it would have still

violate the Act, when it maintained the status quo ante and retained its premiums in early 2017 while bargaining continued, and thereafter adjusted such premiums once bargaining ended in accordance with its past practice.

CONCLUSIONS OF LAW

1. Consolidated is an employer engaged in commerce, within the meaning of §2(2), (6), and (7) of the Act.
2. The Union is a labor organization, within the meaning of §2(5) of the Act.
3. Consolidated did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁴

ORDER

The complaint is dismissed in its entirety.
Dated Washington, D.C. March 27, 2018

violated *E.I. Du Pont De Nemours*. This catch-22 situation is untenable.

¹⁴ If no exceptions are filed as provided by §102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.