The Geweke Company d/b/a Larry Geweke Ford *and* Machinists District Lodge 190, Automotive Machinists Local Lodge 2182, International Association of Machinists & Aerospace Workers, AFL–CIO. Case 20–CA–31889

May 12, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 29, 2004, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed cross-exceptions, and the General Counsel filed a supporting brief and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's cross-exceptions and a reply brief to the General Counsel's answering brief.

The National Labor Relations 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, and conclusions, and to adopt the judge's recommended Order as modified and set forth in full below.

We shall modify the judge's recommended remedy and Order and substitute a new notice to more closely reflect the circumstances of this case and the violation found.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union regarding a change in health care plans and the Respondent's contribution to health care plans, and by implementing a new health care plan without bargaining with the Union.[1] The judge recommended that the Respondent bargain with the Union, upon request, regarding health care plans and related issues. The judge also recommended that the Respondent make whole unit employees for any health care expenses they may have incurred in excess of what they would have incurred had the Respondent retained the existing Blue Cross plan. The judge rejected the General Counsel's request that the Respondent be required to restore the status quo ante by returning to the 2003 health care plan with its 2003 costs and benefits. The judge stated that such a remedy was neither necessary nor possible.

We find merit to the General Counsel's exception in this regard. The standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante. See, e.g., *Keeler Die Cast,* 327 NLRB 585, 590–591 (1999); *Daily News of Los Angeles,* 315 NLRB 1236, 1241 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997); *Millard Processing Services*, 310 NLRB 421, 426 (1993).

We therefore find that the proper remedy requires that the Respondent make available the health and medical coverage benefits that were provided to unit employees before the 2003 Blue Cross health care plan was unilaterally terminated. In addition, the Respondent shall reimburse unit employees for any expenses ensuing from the unilateral change from the 2003 Blue Cross plan. The reimbursement to employees shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283

[1] Member Schaumber wishes to make the following observations. In distinguishing this case from the Board's decision in *Courier-Journal*, 342 NLRB 1093 (2004) (inadvertently referred to in the judge's decision as *The Carrier-Journal*), the judge said that "the Respondent and newly certified Union had no past relationship whatsoever and, accordingly, no past practice of permitting the Respondent to take unilateral action regarding health care or any other matter without first bargaining to impasse with the Union." The judge is correct that in *Courier-Journal*, the health insurance changes at issue were implemented pursuant to a well-established past practice to which the union had acquiesced for 10 years, both during contract terms and during contract hiatuses. However, prior acquiescence of the charging party union is not invariably a requisite element in the past practice analysis. As we pointed out in *Courier-Journal*, an employer's "unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5)." 342 NLRB 1093, 1094 (citations omitted). In Member Schaumber's view, like then Member Hurtgen's, this holds true regardless of whether the established past practice predates selection of the union. See *Eugene Iovine*, 328 NLRB 294, 295 (1999) (Member Hurtgen dissenting).

Citing *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002), the judge accurately states that "[h]ealth insurance is a mandatory subject of bargaining, and the fact that the Respondent has a past practice of providing the same health plan for all its employees on a company-wide basis does not exempt it from its bargaining obligation." The distinction should be made, however, that in *Mid-Continent Concrete*, the employer did not claim that it had an established past practice of making regular annual changes in premium amounts or other aspects of the health coverage of its employees. Instead, the employer articulated the status quo simply as the "right by the unit employees to participate in the [employer's]group insurance plan. . . ." 336 NLRB at 268. Here, the Respondent does claim a past practice of making periodic changes in health coverage for all its employees, including unit employees. However, as the judge properly found, the Respondent's changes, which were wholly discretionary, variable (involving changes in carriers, deductibles, benefit levels and premiums), and made on an ad hoc basis, did not constitute an established past practice that became part of the status quo. Nor did the Respondent here argue that it was faced with a discrete, recurring event to which it was required to respond in an expeditious fashion, privileging implementation after notice and an opportunity to bargain. See *TXU*, 343 NLRB No. 137 (2004). In fact, Respondent refused to bargain at all, even after being repeatedly requested to do so by the Union. Consequently, Respondent has established no lawful basis for its unilateral action.

NLRB 1173 (1987). However, we will allow the Respondent to litigate in compliance whether it would be impossible or unduly or unfairly burdensome to restore the 2003 Blue Cross plan.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, The Geweke Company d/b/a Larry Geweke Ford, Yuba City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing a new health care plan without bargaining with the Union.

(b) Refusing to bargain with the Union regarding health care plans or the Respondent's contributions to health care plans.

(c) 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 actions necessary to effectuate the policies of the Act.

(a) Bargain with the Union, upon request, regarding health care plans and related issues.

(b) On request of the Union, rescind the changes to the health insurance benefits and premiums.

(c) On request of the Union, rescind the change in the carrier providing health insurance and restore the insurance furnished under the 2003 Blue Cross plan before the change.

(d) Make employees whole for all increased costs to them for health insurance benefits in excess of their costs under the 2003 Blue Cross plan, including the cost of the health insurance premiums and the expenses incurred as a result of the change in insurance plans, with interest.

(e) 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, time cards, 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 or costs due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since December 19, 2003.

(g) Within 21 days after service by the Regional Office, file with the Regional Director for Region 20 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.

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 have 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 refuse to bargain regarding health care plans or our contribution to health care plans with Machinists District Lodge 190, Automotive Machinists Local 2182, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union) as the collective-bargaining representative of employees in the following unit:

[2] In addition we shall modify the judge's recommended Order in accordance with *Ferguson Electric Co.,* 335 NLRB 142 (2001), and *Excel Container,* 325 NLRB 17 (1997).

[3] If this Order is enforced by a judgment of the United States court of appeals, the wording 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."

All full-time and regular part-time automotive technicians, lubrication technicians, shipping and receiving employees, parts driver, body shop parts man, front countermen and back countermen employed by us, excluding all other employees, business office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT implement a new health care plan without bargaining with the Union.

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

WE WILL negotiate in good faith with the Union, upon request, regarding health care plans and related issues of our unit employees.

WE WILL, on request of the Union, rescind the changes that we made unilaterally to health care benefits and premiums.

WE WILL, on request of the Union, rescind the change in the carrier providing health insurance and restore the insurance furnished under the 2003 Blue Cross plan before the change.

WE WILL make employees whole for all increased costs to them for health insurance benefits in excess of their costs under the 2003 Blue Cross plan, including the cost of the health insurance premiums and the expenses incurred as a result of the change in the insurance plans, with interest.

THE GEWEKE COMPANY D/B/A LARRY GEWEKE FORD

Shelly Brenner, Esq., for the General Counsel.
Donald E. Cope, Esq. (Fine, Boggs, Cope & Perkins, LLP), of Sacramento, California, for the Respondent.
Antonio Ruiz, Esq. (Weinbe, Roger & Rosenfeld), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Yuba City, California, on October 27, 2004. The charge was filed on May 14, 2004, by Machinists District Lodge 190, Automotive Machinists Local 2182, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union). On July 29, 2004, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by The Geweke Company d/b/a Larry Geweke Ford[1] (Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent, in its answers to the complaint, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation engaged in the retail and nonretail sale of automobiles and related products with its office and place of business located in Yuba City, California. In the course and conduct of its business operations, the Respondent annually receives gross revenues in excess of $500,000, and annually purchases and receives at its California facility goods valued in excess of $5000 which originated outside the State of California. It is admitted, and I find, that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether the Respondent implemented a new health plan for its employees without affording the Union an opportunity to bargain about the implementation of the new health plan or the Respondent's monthly contribution to the employees' premiums, in violation of Section 8(a)(5) and (1) of the Act.

B. Facts

The Respondent operates a Ford dealership in Yuba City, California. On August 11, 2003, the Union was certified as the collective-bargaining representative of the Respondent's automotive technicians, shipping and receiving employees, parts driver, body shop parts man, front countermen, and back countermen. This collective-bargaining unit numbers some 24 employees.

The Respondent's owner also owns and operates various other enterprises located in California. The employee complement of all such businesses totals approximately 500 employees. For many years all of these employees have been provided the opportunity to participate in the same group health plan covering all of the Respondent's business enterprises. The Respondent contributes part of the monthly premium for each participating employee, and the remainder of the premium, and policy deductibles and copayments, is the employee's responsibility.[2]

[1] The name of the Respondent was amended at the hearing.

[2] The Respondent has not established that it had a past practice of paying a fixed percentage of its employees' monthly health care premiums; rather, it appears that the Respondent determines the amount of its contribution on an ad hoc basis at each annual renewal of the contract and/or change of insurance carriers. Thus, there is no established status

The group health insurance contract is a 1-year contract and expires on December 31 of each year. Premiums for each succeeding year are generally higher. Prior to December 31 of each year the employees are given the option of renewing their current coverage for the succeeding year or changing their coverage by selecting various options under the plan. According to the unrebutted testimony of Respondent's comptroller, Dianne Estes, the Respondent has changed group insurance carriers five or more times during the past 9 years in order to provide comparable coverage at the least possible cost both for itself and its employees.

The Union and Respondent commenced bargaining negotiations on September 11, 2003, and have met once or twice a month since that date. The Respondent's principal negotiator is Donald Cope, an attorney, and the Union's principal negotiator is Mark Martin, a business representative.

On October 1, 2003, the Union submitted its first bargaining package proposal. Regarding health insurance, the Union proposed that the Respondent continue in effect its then current health plan, and that the Respondent fund the entire cost of the monthly insurance premiums for the participating employees. Apparently, that continues to be the Union's health insurance bargaining position. In November 2003, the Respondent submitted its bargaining proposals and, with regard to health care, proposed that the Respondent continue to provide its unit employees with the opportunity for health coverage under the same terms and conditions as its nonunion employees.

At the bargaining session on December 12, 2003, Cope announced that on December 31, 2003, the current health plan would expire, and that there would be changes effective January 1, 2004. Martin asked what the changes would be, and requested that the Respondent bargain over any proposed changes prior to implementation of any changes. Cope also stated that the Respondent was looking into changing from its Blue Cross plan to a Great West insurance plan as the proposed 18 per cent premium increase in its current Blue Cross plan was "outrageous." During and subsequent to that meeting, the Union requested and was provided with information regarding both plans.

On December 19, 2003, the Respondent distributed to its employees a two-page document. The first page is a notification to all employees, both union and nonunion, requiring them to attend one of four scheduled health insurance benefits meetings that day. The second page of the document is entitled "Geweke Companies Rate/Plan Comparison, Plan Year 2003 vs Plan Year 2004." It compares the monthly premium rates under the Blue Cross plan with the monthly premium rates under the Great West plan, and states, inter alia, that:

> The *current* medical plans will not be offered as of 1/1/2004. We have enrolled all medical plans under 1 insurance carrier, Great West. Great West offers a variety of plans to accommodate the individual needs of each associate and their families, at a much lower cost to the associate. We are anticipating this to be beneficial to all associates in the entire Geweke Auto & RV Group. We are staying with Guardian Dental, and there are not changes in the benefits offered and no increase in the cost. There is no change to the Vision Plan, nor is there a rate increase. [Original emphasis.]

At a bargaining meeting on that day, December 19, 2003, Union Business Representative Martin objected to the Respondent's implementation of the new health insurance plan without affording the Union the opportunity to bargain over both the decision and effects of the change on the unit employees. Martin advised the Respondent that during negotiations the Respondent had an obligation to maintain the status quo with regard to employee benefits; namely, to maintain the same health care plan at the same current rates for the unit employees until health care had been negotiated. Cope replied, according to Martin, that "as long as the unit employees are being offered the same thing as the nonunit employees, that there's no change in status quo." Cope said, according to Martin, that the Respondent did not have to bargain over health care changes "because it's not a violation of status quo, and [Martin] can take it to the Board." Cope also advised that as of January 1, 2004, the Respondent would be increasing its contribution to the monthly premium for each enrolled employee from $175 to $200 per month.

By letter dated December 22, 2003, Martin reiterated his objections to the Respondent's implementation of the new plan, and by letter dated, December 23, 2003, Cope replied, inter alia, as follows:

> As I stated to you at our bargaining session on December 19th, the status quo is that the unit members are provided with the same health insurance coverage at the same cost as all other Larry Geweke Ford employees. As I explained to you Geweke's health coverage expires on December 31. Geweke was forced to explore other coverage options. Geweke has found alternative coverage at a comparable cost. Geweke actually increased its contribution to keep the employees' contribution almost the same.
>
> As I explained to you, this was not a voluntary or discretionary act on the part of Geweke. It was forced to find other coverage to maintain the status quo, not to change it.
>
> Geweke has provided you with information concerning the new coverage and we are more than willing to negotiate any affects that the new coverage might have on the unit employees. However, Geweke has maintained the status quo of providing coverage to the unit employees.

Michael Hansen has been a licensed insurance agent in the State of California since 1989, and has worked with the Respondent as its benefits insurance broker since 1994. Hansen testified that although there are always differences in comparison between health insurance plans, the Blue Cross and the Great West plan are similar and are "considered comparable benefit plans."

The Respondent has made it clear that it has been willing to negotiate with the Union regarding the effects of the Great

quo in this regard. See *Post-Tribune Co*., 337 NLRB 1279, 1280 (2002); *Maple Grove Health Center*, 330 NLRB 775, 780–781 (2000).

West plan upon the unit employees. It has asked the Union to bring to the Respondent's attention any specific instances of additional expenses actually incurred by employees or their family members under the Great West plan that would not have been incurred under the Blue Cross plan. To date, the Union has not brought any such instances to the Respondent's attention. Martin testified that because of lack of cooperation from the bargaining unit, and the failure of any employees to come forward, the Union had no information regarding how the unit employees were personally impacted.

While the General Counsel has pointed out differences in the two plans, and while certain premiums, copays, or deductibles may be higher or lower depending on the employees' selection of benefits, there is no credible record evidence that the change in plans from Blue Cross to Great West has caused any employee to pay more for health insurance on an annual overall or net basis. Nor is there any evidence that any employee has been precluded from utilizing the same physicians and hospitals that were available under the Blue Cross plan.

C. Analysis and Conclusions

It is clear that the Respondent, without inviting or permitting any input from the collective-bargaining representative of its unit employees, simply refused to negotiate with the Union regarding the implementation of a new health insurance plan, a mandatory subject of bargaining. Thus the Respondent unilaterally selected and implemented a new insurance plan for its unit employees, and unilaterally increased its monthly contribution per employee.

The record evidence shows that health insurance for the Respondent's employees is an employee benefit that is revisited annually on a companywide basis. The Respondent takes the position that because it treats all of its union and nonunion employees the same, it is never required to bargain with the Union over health insurance benefits. In support of this position the Respondent primarily relies on *Carrier-Journal*, 342 NLRB 1093 (2004). In *Carrier-Journal,* slip op. at 2, the Board states as follows:

> The [health care] changes were implemented pursuant to a well-established past practice. For some 10 years, the Respondent had regularly made unilateral changes in the costs and benefits of the employees' health care program, both under the parties' successive contracts and during hiatus periods between contracts. In each instance, the Union did not oppose the Respondent's changes. Like the previous changes, the Respondent's January 2002 changes for unit employees were identical to those for unrepresented employees, consistent with the "same benefits as" clause of the parties' successive contracts.

Thus, unlike the situation in the instant case, the contract between the union and employer in *Carrier-Journal* contained contract terms providing that the employer could unilaterally change health insurance benefits for unit employees so long as such changes were identical to those for the employer's unrepresented employees; and this particular contract provision had been implemented by the employer, without objection from the union, for some 10 years. In the instant case, however, the Respondent and newly certified Union had no past relationship whatsoever and, accordingly, no past practice of permitting the Respondent to take unilateral action regarding health care or any other matter without first bargaining to impasse with the Union.

Health insurance is a mandatory subject of bargaining, and the fact that the Respondent has a past practice of providing the same health plan for all its employees on a companywide basis does not exempt it from its bargaining obligation. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).

Had the Respondent agreed to bargain with the Union over the matter of health care, it is quite possible that the parties could have reached some mutual accommodation. Clearly there were critical time constraints due to the unavoidable increase in Blue Cross premiums that were to become effective on January 1, 2004. Had the parties reached an impasse after expedited and good-faith negotiations, the Respondent would have been privileged to make timely unilateral changes over the Union's objection. However the new Great West plan, including the Respondent's increased monthly contributions, was presented as a fait accompli. Thus, with regard to health care issues, the Union was simply ignored and disregarded as the employees' collective-bargaining representative. Moreover, it appears that the Respondent continues to adhere to this untenable position, and will continue to refuse to bargain with the Union over health care in the future. Accordingly, I find that the Respondent has violated and is continuing to violate Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated and is violating Section 8(a)(1) and (5) of the Act as alleged in the complaint.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act by unilaterally changing and implementing a new health care plan for its unit employees without bargaining with the Union regarding such changes and related matters, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I further recommend that the unit employees be made whole for any

health care expenses they incurred in excess of what they would have incurred had the Respondent retained the Blue Cross plan with its 18-percent January 1, 2004 increase in premiums. The reimbursement to employees shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

[Recommended Order omitted from publication.]

[3] The General Counsel suggests that to remedy the violation the Union should be given the option of requiring the Respondent to restore the status quo by returning to the 2003 Blue Shield health care plan with its 2003 costs and benefits. This suggested remedy appears to be neither necessary nor possible, and the remedy provided herein seems appropriate under the circumstances.