United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 30, 2007

TO : Ronald K. Hooks, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Patterson Warehouses, Inc. 530-6001-5017-5000
Case 26-CA-22671 530-8049
530-8054-1000

This case was submitted for advice as to whether, in view of the Board's recent decision in Courier Journal,[1] the Employer's unilateral changes to employees' health insurance benefits were made pursuant to an established past practice and, thus, did not violate Section 8(a)(5).

We conclude that the charge should be dismissed, absent withdrawal. As in Courier Journal, the Employer's unilateral changes did not violate Section 8(a)(5) because they were made pursuant to an established past practice of making annual changes to employees' health insurance benefits, and the Union had previously acquiesced to such changes.

FACTS

Patterson Warehouses, Inc. (Employer), provides warehousing, distribution, and transportation services. Teamsters, Local Union No. 984 (Union), has been recognized as the exclusive representative of the Employer's warehouse employees since 1960. In 1987, the Employer began providing health insurance coverage to all of its employees. Each year since then, the Employer has negotiated with insurance providers for new health insurance coverage, which has resulted in changes to health insurance benefits, such as to employees' co-pays and deductibles.[2] Before the subject changes, the insurance

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[1] 342 NLRB 1093 (2004). The Board reaffirmed this position in Courier Journal, 342 NLRB 1148 (2004).

[2] The Employer claims that the same types of benefits changes, i.e., co-pays and deductibles, have been made annually since it began providing employees with health insurance in 1987. The Union has not rebutted this assertion and the evidence shows that at least since 2001, the Employer's annual changes to employees' health

year traditionally ran from December 1 to November 30. Negotiations for new plan coverage began in September and concluded in November. After negotiations, the Employer signed a contract with the insurance provider and then provided the Union and employees with notice of the new insurance plan prior to its effective date.

Since 1987, the Union has never requested bargaining or filed a grievance concerning any of the Employer's changes to the employees' health insurance benefits. However, there was one occasion in November 2000 when the Union objected to the Employer's changes. The Union's objection is evidenced in an Employer's letter to the Union dated November 20, 2000. In its letter, the Employer stated that the insurance coverage did not violate any language in the parties' contract and explained that attempts to delay the plan could impact all personnel. The Union did not file a grievance or otherwise further pursue its objection, and the new insurance plan went into effect, as scheduled, on December 1, 2000.

The parties' most recent contract was effective from December 1, 2001 to November 15, 2005. With regard to healthcare, the parties have historically negotiated only over employee premium contributions and dependent coverage, but not health insurance benefits. Accordingly, all of the parties' contracts, including the most recent one, provided specific employee premium contribution and dependent coverage amounts for each contract year. The only other provision in the parties' most recent contract that addressed healthcare insurance involved changes to insurance carriers or insurance coverage. The provision read:

> The Company reserves the right to change insurance carriers at the end of any insurance contract year....In the event of such a change, the Company shall give prior written notice to the Union and adequate information to allow the Union to compare benefits.

None of the parties' previous contracts, or the most recent contract, included a clause requiring the Employer to provide health insurance benefits to unit employees on the same basis as non-unit employees. However, since 1987, any changes that have been made to insurance benefits have been applied identically to unit and non-unit employees.

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insurance benefits were limited to employees' co-pays and deductibles.

On November 3, 2005, the parties began negotiations for a successor contract. However, before the parties finalized a contract or executed an extension, the parties' most recent contract, by its own terms, expired on November 15, 2005. Since then, the parties have continued to negotiate for a successor contract but are not currently covered by a contract. This is the first contract hiatus period the parties have experienced since 1987.

In October 2006,[3] during this contract hiatus period and a month later than usual, the Employer began its yearly negotiations for insurance coverage. In December, the Employer signed a contract that included changes to the employees' health insurance benefits, specifically to co-pays and deductibles. The insurance provider remained the same, and the new insurance coverage did not include any changes to the employees' premium contributions or dependent coverage. On December 29, the Employer provided notice of the new health insurance coverage to the employees but not the Union, as it had in prior years. On January 1, 2007, the new insurance plan took effect.

On January 18, 2007, the Union learned for the first time of the changes to the health insurance coverage during a bargaining session with the Employer. On February 12, 2007, the Union filed the instant charge alleging that the Employer's unilateral action violated Section 8(a)(5).

The Employer contends that, when it negotiated and implemented the changes to the employees' health insurance coverage, it was acting in accordance with past practice established and followed since 1987. The Union argues the Employer did not act in accordance with past practice because it did not provide the Union with notice of the changes as it had done in previous years. Without such notice, the Union argues, it was effectively precluded from bargaining over the changes. The Union further argues that all other previous changes are distinguishable because they occurred during the term of the contracts whereas these changes were implemented during a contract hiatus period.

ACTION

We conclude that the charge should be dismissed, absent withdrawal. As in Courier-Journal, the Employer's unilateral changes did not violate Section 8(a)(5) because they were made pursuant to an established past practice of making annual changes in health insurance benefits for unit

[3] All dates hereafter are 2006, unless otherwise noted.

employees and further, the Union had previously acquiesced to such changes.

An employer violates Section 8(a)(5) when it makes a unilateral change to unit employees' terms and conditions of employment concerning a mandatory subject without first giving the union notice and an opportunity to bargain over the change.[4] Health insurance benefits are a mandatory subject of bargaining.[5] Accordingly, an employer may not unilaterally implement changes to unit employees' health insurance benefits without bargaining to agreement or impasse with the union,[6] or without the union's "clear and unmistakable" waiver of its bargaining rights over the subject matter.[7] However, as the Board held in Courier Journal, an employer's unilateral changes made pursuant to a longstanding practice are a continuation of the status quo, and, thus, the employer is not required to bargain with the union, and its unilateral implementation of such changes does not violate Section 8(a)(5).[8] Regularly occurring changes to employees' health insurance program over a period of ten years, and the union's acquiescence to such changes, created an established term and condition of employment, and such unilateral changes were a continuance of the status quo.[9]

In Courier-Journal, the parties were in negotiations for a successor contract but had not finalized an agreement or reached impasse when the employer implemented changes to the employees' health insurance premiums and benefits. For ten years, the employer had unilaterally made changes each year to both unit and non-unit employees' health insurance

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[4] See Mid-Continent Concrete, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002).

[5] See United Hospital Medical Center, 317 NLRB 1279, 1282 (1995).

[6] Mid-Continent Concrete, 336 NLRB at 259.

[7] Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

[8] 342 NLRB at 1094.

[9] See id. at 1095, fn. 1, citing Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403, 408 (9th Cir. 1977) ("the longstanding-practice exception is based on the recognition that certain unilateral changes in terms and conditions of employment do not interfere with the collective-bargaining process because they represent the status quo"), and cases cited therein.

coverage.[10] The parties' expired contract contained a "same basis" clause which required that health insurance plans were to be provided to unit employees on an identical basis as for non-unit employees.[11] But over the ten years, the changes occurred both while the contract was in effect and during hiatuses between successive contracts.[12] During this period, the union had never objected to the employer's changes.[13]

The Board in Courier Journal recognized that health insurance coverage and benefits are mandatory subjects of bargaining, and that a unilateral change in conditions of employment during negotiations violates Section 8(a)(5).[14] However, the Board concluded that the circumstances demonstrated an established past practice that did not require further bargaining each time it was exercised.[15] In particular, the Board noted the employer's regular, unilateral changes to the employees' health insurance costs and benefits over a ten-year period, which had been made on an identical basis for unit and non-unit employees, and occurred during both terms of and hiatuses between the parties' contracts.[16] The Board also relied on the fact that over the ten-year period, the union had not once objected that the unilateral changes were unlawful.[17]

Although the "same basis" clause in the parties' contract defined the employer's discretion with respect to making unilateral changes to employees' health insurance coverage,[18] the parties' most recent contract had expired before the employer's subject changes were made. The Board

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[10] Id. at 1094.

[11] Id. at 1093.

[12] Id. at 1094.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at 1093.

[18] Id.

grounded its decision not in contractual waiver but in past practice, and the continuance thereof.[19]

We conclude that, as in Courier Journal, the Employer's unilateral changes did not violate Section 8(a)(5) because they were made pursuant to a past practice, with the Union's acquiescence, of making changes in health insurance benefits for unit employees. This longstanding practice created an established term and condition of employment. Thus, every Fall since 1987, when the Employer began providing insurance coverage to its employees, it initiated negotiations with a plan provider for new plan coverage (including changes to employees' benefits), signed a contract with the insurance provider shortly thereafter, and provided notice to the Union and employees of the new insurance coverage before the new plan's effective date. The Employer's latest changes did not depart from this twenty-year practice. Like the previous changes, the latest changes involved the employees' health insurance benefits, occurred during the same time of year, and applied identically to both unit and non-unit employees. Further, as in Courier Journal, the Union, here, had not once requested bargaining or filed a grievance over any of the Employer's changes to the employees' insurance benefits over this twenty-year period.[20]

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[19] Id. at 1095. Accordingly, the Board declined to address the issue of whether a contractual waiver, i.e., the "same basis" clause, survived the contract's expiration.

[20] We recognize the Board's longstanding principle that, "union acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past." Provena St. Joseph Medical Center, 350 NLRB No. 64, slip op. at 8, fn. 35 (2007), citing Amoco Chemical Co., 328 NLRB 1220, 1225 fn. 6 (1999), enf. denied, 217 F.3d 869 (D.C. Cir. 2000). However, cases that applied this principle and found no union waiver differ from the instant case in two significant respects. First, those cases involved unilateral changes that occurred sporadically, whereas, in the instant case, the unilateral changes at issue occurred at the same time annually for over twenty years. Further, the unilateral changes in those cases differed significantly from previous changes in their scope and nature, in some instances resulting in a reduction in or elimination of a term or condition of employment. Here, the changes, as in previous years, were limited to changes in the same employees' health insurance benefits that had

Our conclusion is not altered by the fact that the parties' expired contract here did not include a "same basis" or other clause that authorized employer action. As in Courier Journal, we do not rely on a contractual clause to privilege the employer's changes, but on the evidence that the changes were a continuance of the employer's longstanding practice, with the Union's acquiescence of regularly making changes to the employees' health insurance benefits.[21] Here, because none of the Employer's past or present changes to the employees' health insurance benefits had been made pursuant to any contractual waiver, the differences between the contract here and that in Courier Journal are not relevant.

We recognize that the facts that the subject changes were made during the parties' contract hiatus period, and the lack of notice to the Union of the changes are both different circumstances from previous years. However, we conclude that neither of these circumstances, independently or together, mark a material departure from the established past practice.

It is not significant that the subject changes occurred during a contract hiatus period, while all the previous changes had occurred during the effective terms of the contracts. Such a difference would be significant only if the contract contained a provision authorizing the Employer to make changes unilaterally. In that case, if no changes had been made outside the term of the contract, it would be difficult to discern whether the authorization to do so stemmed only from a contractual waiver, limited to the term of the contract.[22] Here, however, no contract

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been modified in prior years. See e.g., Amoco Chemical Co., 328 NLRB at 1222 fn. 6 (midterm changes to employees' medical plan were far more substantial in scope and impact on unit employees than prior changes); Owens-Corning Fiberglas, 282 NLRB 609, 609 (1987) (unilateral modifications to employee discount program was not historically the same as previous change); and Exxon Research & Engineering Co., 317 NLRB 675, 686 (1995), enf. denied 89 F.3d 228 (5th Cir. 1996)(no direct or analogous precedent to privilege unilateral changes to employees' thrift savings plan that involved "takeaways").

[21] Id. at 1094.

[22] In Courier Journal, the contract contained such a waiver. The evidence that the changes at issue there had occurred both in hiatus periods as well as during the contract term was thus significant to determining that a past practice

clause authorizes unilateral action by the Employer; whether changes occurred during or outside the term of the contract, they can be privileged only by an established past practice. Where the nature of the changes in benefits were consistent with past changes, were made identically for unit and non-unit employees, and were made at the same time of the year, the fact that the changes in 2006 occurred during a hiatus is not a material departure from the prior changes.

Nor does the Employer's failure to provide the Union with notice of the subject changes mark a material departure from its practice because the Union had never taken any action to contest the changes when it received such notices in the past. From 1987 to the time of the subject changes, the Employer provided simultaneous notice to the employees and Union of new plan coverage prior to the plan's effective date. With the subject changes, the Employer gave the employees notice but not the Union. However, since 1987, when the Union received notice of such changes, it never once requested bargaining or filed a grievance contesting the Employer's changes. The evidence demonstrates only one occasion, in November 2000, when the Union objected to the Employer's changes. The Union did not, however, pursue any further action after the Employer stated it was privileged to make the changes and intended to make them. In light of the minimal impact the Employer's notices to the Union had in prior years, we do not consider it a material aspect of the Employer's past practice and therefore, its failure to give notice of these most recent changes is not a material departure from past practice. Further, even if the Employer had given the Union notice of the subject changes, such notice would not have triggered a bargaining obligation. As in Courier Journal, the Employer was not required to bargain with the union over changes made pursuant to a longstanding practice because such changes are essentially a continuation of the status quo.[23]

Finally, we conclude that this case should not be held in abeyance pending the Board's decisions in E.I. DuPont de Nemours, Louisville Works (DuPont),[24] because resolution of

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had been established, rather than a more limited grant of authority restricted to the term of the contract.

[23] Id. at 1094.

[24] JD(KY)-92-05, 2005 WL 3477992, slip op at 5 (2005) (finding no Section 8(a)(5) violation); JD(DEL)-93-05, 2005 WL 3555503 (2005) (finding Section 8(a)(5) violation). The DuPont cases are currently before the Board on exceptions.

the Dupont cases would not provide useful instruction in resolving the instant case. The DuPont cases involve the similar issue of whether, in light of Courier Journal, the employer violated Section 8(a)(5) when it unilaterally made changes to employees' health insurance coverage during a hiatus period. The question there, however, is whether contractual waivers, which allowed the employers to "change or discontinue [the insurance] plan in its discretion," survived the expiration of the contracts and continued to privilege the Employer's actions during hiatus perids.[25] Here, the only contractual waiver in the parties' most recently expired contract involved changes in health care providers, and the subject changes did not involve a change in health care providers. As such, the Board's resolution of whether a contractual waiver survives the expiration of the contract in the DuPont cases will not affect the analysis of the instant case.

For the foregoing reasons, we conclude that the Employer's unilateral changes did not violate Section 8(a)(5) because they were made pursuant to an established past practice and, absent withdrawal, the charge should be dismissed.

B.J.K.

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[25] JD(KY)-92-05, slip op. at 4; JD(DEL)-93-05, slip op. at 6. This is the issue the Board declined to address in Courier Journal.