The Courier-Journal, A Division of Gannett Kentucky Limited Partnership *and* Graphic Communications International Union, Local 619-M. Cases 9–CA–39172–1 and 9–CA–39172–2

September 17, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 7, 2002, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, cross-exceptions, and a supporting brief. The Respondent filed an answering brief and 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, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes to employees' healthcare insurance benefits on July 1, 2001, as untimely under Section 10(b) of the Act. We affirm that finding, without further discussion. The judge also held that the Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes to the healthcare insurance benefits of unit employees on January 1, 2002. For the reasons discussed below, we reverse that finding.

Background

The Respondent publishes and distributes the Courier-Journal, a daily newspaper based in Louisville, Kentucky. The Union represents two bargaining units of employees working for the Courier-Journal's engraving and pressroom departments. The most recent contracts covering those departments expired on August 7, 2000. At the time of the hearing, the Courier-Journal and the Union had not concluded a successor agreement for either the engraving department or the pressroom departments, nor had they reached impasse or agreed to extend the expired agreements.

The most recent collective-bargaining agreements for the engraving and the pressroom employees state:

> The Company agrees to continue in effect for the duration of this Agreement a program of health insurance plans on the same terms as are in effect for employees not represented by a labor organization. Any changes (benefits and premiums) in such plans shall be on the same basis as for non-represented employees.

In addition, the pressroom contract provides, "It is understood that the Company reserves the right to modify or terminate any (or all) benefits in this Article, at any time. In any event, the Union will be provided advance notice." Earlier contracts contained these provisions.

The Courier-Journal has made changes in the costs or benefits of employees' health insurance coverage each year since July 1, 1991. In each instance, it did so for both represented and nonrepresented employees and without first bargaining with the Union. Some changes were made during the open period or hiatus between contracts. Until the fall of 2001, the Union never objected that the unilateral changes were unlawful.

As it had done in July 1992, 1993, 1994, 1999, and 2000, on July 1, 2001, the Respondent increased employees' contributions towards healthcare insurance premiums, for both represented and nonrepresented employees. Although the Respondent gave no formal notice of the increases, the increased contributions were evident on the employees' check stubs. Among the employees receiving such stubs was Michael Heine, a union steward and union bargaining committee member for the pressroom, who had participated in all the bargaining sessions for a successor to the pressroom department agreement.

On September 24, 2001, the Respondent issued a memorandum to employees announcing that another increase in employee contributions to healthcare premiums and a number of more far-reaching changes in the healthcare insurance benefits of unit employees would go into effect on January 1, 2002.

At a bargaining session on October 3, 2001, the Respondent officially informed the Union about these latter changes. The next day, the Union's lead negotiator, David Grabhorn, stated that the Union objected to the changes and considered them unlawful. He said that the Union wanted to negotiate specific benefits and was opposed to the Respondent's making unilateral changes in unit employees' benefits whenever it made the same changes for nonrepresented employees. Grabhorn formalized his objections in a letter. The Courier-Journal's negotiator, Wendell Van Lare, responded that the Courier-Journal had the right to make the changes without bargaining as long as it kept the benefits for unit employees the same as those for nonrepresented employees.

Also on October 4, 2001, before the day's negotiation, Union Steward Heine met with Union Negotiator Grabhorn and advised him of the July 1, 2001 increase in employee premium contributions. At negotiations that day, the Courier-Journal's Van Lare informed Grabhorn that

changes had been made since the contract expired. In particular, Van Lare stated that health insurance premiums had been increased in July, "as they always had been." According to Van Lare, this surprised Grabhorn, but Heine nodded his head, apparently indicating that he was aware of the changes. Van Lare then showed Grabhorn a copy of the September 24, 2001 memorandum to employees.

Earlier, on July 18, 2000, the Union had made a formal proposal calling for the Respondent to provide health care insurance to unit employees through a union health and welfare fund, with the Respondent paying the entire premium. On November 27, 2001, the Union revised that proposal, stating that it would accept the Respondent's announced January 2002 changes if unit employees were given the option to select the union plan. Under this proposal, the Respondent would not pay the entire premium, but would make per-employee contributions to the union plan that were equal to the per-employee costs under the Respondent's plan. Van Lare said that he would keep an "open mind" about this proposal, but no further bargaining took place. On January 1, 2002, the Respondent implemented the changes announced on September 24, 2001.

Analysis

The basic principles that govern this case are well established. Healthcare insurance premiums of benefits are mandatory subjects of collective bargaining. *United Hospital Medical Center*, 317 NLRB 1279, 1281 (1995). A unilateral change in conditions of employment during negotiations violates Section 8(a)(5), since it is a circumvention of the duty to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5). Id. at 746.[1] Thus, the Board has found unilateral changes to be lawful where employers passed on portions of employee health care premium increases pursuant to established past practices of sharing premium costs with employees according to fixed percentages.[2] Where employers unilaterally passed on premium increases to employees in the absence of an established past practice, however, the Board has found the changes unlawful.[3]

Consistent with these principles, we find that the Respondent's January 2002 changes in unit employees' health care premiums of benefits did not violate Section 8(a)(5). The 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 basis as" clause of the parties' successive contracts.

Our colleague argues that the Respondent had excessive discretion with respect to the prior changes, and, thus, the changes in 2002 were not privileged. In our view, the discretion was limited, and the Respondent acted in 2002 in accord with the past practice. Further, even if the discretion is not limited, the past practice, accepted by the Union, privileged the Respondent's actions in 2002.

As to the former point, the Respondent's past practice was to treat the unit employees exactly the same as nonunit employees. That is, for the example, the Respondent did not have the freedom to grant nonunit employees a benefit and deny same to unit employees. The Union accepted this arrangement in the past. In 2002, the Respondent's action was consistent with this past practice.[4]

As to the latter point, we recognize that the Respondent had discretion as to the nonunit employees. That is the nature of nonunit employment. The significant aspect of this case is that the Union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those of nonunit employees.

Eugene Iovine, Inc., 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d. Cir. 2001), is inapposite.[5] In that case, the past practice of acquiescence was under a different union. Thus, the current union never acquiesced in unilateral changes. Similarly, *NLRB v. Katz*, supra, holds that a newly certified union is not bound to the employer's wholly discretionary merit pay increases prior to certification.

[1] 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. *Queen Mary Restaurants Corp. v. NLRB,* 560 F.2d 403, 408 (9th Cir. 1977).

[2] *Post-Tribune Co.*, 337 NLRB 1279, 1280–1281 (2002); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974).

[3] See, e.g., *Maple Grove Health Care Center*, 330 NLRB 775, 780–781 (2000).

[4] Contrary to the judge's finding, *Mid-Continent Concrete*, 336 NLRB 258, 268 (2001), enfd. 308 F.3d 859 (8th Cir. 2002), does not compel a different result. The Board held in that case that the employer's unilateral changes in unit employees' health insurance benefits were unlawful even though the same changes were made for nonunit employees. Id. at 259. In making those changes, the employer in *Mid-Continent*—unlike the Respondent—did not act pursuant an established practice.

[5] We find it unnecessary to pass on the Board's decision in *Eugene Iovine* because it is distinguishable on the facts.

We do not pass on the legal issue of whether a contractual waiver of the right to bargain survives the expiration of the contract. Our decision is not grounded in waiver. It is grounded in past practice, and the continuance thereof.[6]

Our colleague fears that the Union's acquiescence in past unilateral action on a matter means that the Union can never regain bargaining rights as to the matter. In our view, the fear is groundless. The Union, in bargaining, can seek to take away that discretion, and can seek definite terms. Of course, the Employer can oppose and seek to retain its discretion. If impasse is reached, consistent with current Board law, the employer cannot implement its proposal, because it vests complete discretion in the Employer.[7]

In sum, the Respondent acted in a manner consistent with a lawful, established past practice concerning a mandatory subject, as entitled to do. For the reasons stated above, we find that it did not act unlawfully in so doing. We, therefore, dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting in part.

I agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes to unit employees' health insurance benefits on January 1, 2002. In holding to the contrary, my colleagues effectively remove those benefits from the bargaining table, potentially forever. Because their decision is incompatible with established principles of collective bargaining and with long-established Board law, I dissent.

I.

As set forth in the majority opinion, a series of collective-bargaining agreements between the Respondent and the Union have provided that:

> The Company agrees to continue in effect *for the duration of this Agreement* a program of health insurance plans on the same terms as are in effect for employees not represented by a labor organization. Any changes (benefits and premiums) in such plans shall be on the same basis as for non-represented employees. [Emphasis added.]

[6] Thus, we find inapposite cases which hold that the union acquiescence in prior unilateral changes "does not operate as a waiver of its right to bargain over such conduct for all time."

[7] *McClatchy Newspapers*, 321 NLRB 1986 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997).

On January 1, 2002, after the most recent contract had expired, the Respondent made significant changes in the bargaining unit employees' health insurance benefits over the Union's opposition. The changes were identical to those for nonunit employees. The Respondent did not give the Union an opportunity to bargain over the changes. The Respondent had made many such changes unilaterally over a number of years, some during periods in which the parties' contracts were in effect, others during the hiatus periods between contracts, but always without bargaining. Until 2001, the Union did not protest the changes.

II.

The majority acknowledges that health benefits are a mandatory subject for collective bargaining. As such, they cannot lawfully be changed unless the Respondent first affords the Union an opportunity to bargain over the proposed changes. My colleagues find, however, that unilateral action by the Respondent in matters of health benefits had become an established practice, and hence that the Respondent had no duty to bargain over changes in those benefits. In so holding, my colleagues have found, in substance, that the Union waived its right to bargain by agreeing to "same basis as" provisions in successive contracts and then by remaining silent in the face of the Respondent's repeated unilateral changes. I disagree: neither the contract terms, nor the Union's acquiescence in the Respondent's past unilateral changes, fulfills the conditions for a waiver of statutory bargaining rights.

To establish waiver of a statutory right to bargain over mandatory subjects, there must be a clear and unmistakable relinquishment of that right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983); *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996). Waivers can occur in any of three ways: by express contract language, by the parties' conduct (including past practice, bargaining history, and action or inaction), or by a combination of the two. *American Diamond Tool*, 306 NLRB 570 (1992); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). For a "clear and unmistakable" waiver to arise by contract, the contract language must be specific, or it must be shown that the waived right was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter. *Trojan Yacht*, 319 NLRB 741, 742 (1995). Under that standard, the union did not contractually waive its right to bargain over postcontract expiration changes in employee health benefits.

I assume, for the sake of argument, that by agreeing to the "same basis as" provisions in successive contracts,

the Union waived its right to bargain over health benefits *for the duration of the contracts*. But any such waiver necessarily expired along with the last collective-bargaining agreement, on August 7, 2000.[1] In the first place, the contract provisions in this case are the equivalent of single-issue management-rights clauses, and it is well established that a management-rights clause does not survive the expiration of the contract embodying it.[2] And there is no evidence that the parties intended otherwise. Indeed, the contracts expressly state that "The Company agrees to continue in effect *for the duration of this Agreement* a program of health insurance plans on the same terms as are in effect for employees not represented by a labor organization." (Emphasis added.) Thus, the parties plainly contemplated that any waiver of the Union's right to bargain over changes in health insurance benefits was limited to the life of the contract.[3] There is no evidence that the parties discussed or considered whether the Respondent would have the right to act unilaterally in these matters after contracts expired, or that the Union "consciously yielded its interest in the matter."

Nor does the Union's silence in the face of past unilateral changes establish a clear and unmistakable waiver of the Union's right to bargain. To the contrary, the Board and the courts have long held that a "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Corning Fiberglas*, 282 NLRB 609 (1987); *Exxon Research & Engineering Co.*, 317 NLRB at 685–686; *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969).

The Union's past acquiescence, even combined with contract language, does not clearly and unmistakably indicate that the Union had waived its interest in bargaining over future changes. The clear language of the contract, granting the Respondent the freedom to make unilateral changes in health benefits only during the life of the contract, forecloses any possible argument that the parties intended for the Respondent to operate in that fashion during the hiatus period between contracts.

In any event, it is well settled that the defense of waiver is normally not available to an employer during the course of bargaining for a new collective-bargaining agreement to replace an expired one. Rather, except in narrow circumstances not presented here, the employer has a duty to refrain from making unilateral changes in employees' terms and conditions of employment until and unless the parties have bargained to impasse on the agreement as a whole. See, e.g., *FKW, Inc.*, 321 NLRB 93, 94 (1996); *Fire Fighters*, 304 NLRB 401, 402 (1991); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). The Respondent announced and implemented the January 2002 changes in the unit employees' health plan during the course of bargaining for a new agreement. Thus, even if the facts in this case otherwise supported a finding of waiver, I would not find the waiver defense available to the Respondent under these circumstances.

III.

My colleagues argue, however, that the issue here is not waiver, but past practice. They find that, because the Respondent made numerous unilateral changes in unit employee health care costs and benefits, pursuant to the "same basis as" language of the parties' several contracts, its right to act in that fashion has become an established past practice, and therefore it was entitled to act consistent with that practice in January 2002, after the contract had expired. They also find that the Respondent's ability to act in this regard was limited by the requirement that any changes for unit employees be the same as for unrepresented employees.

I disagree. As my colleagues acknowledge, the Board and the courts have repeatedly held that employers may act unilaterally pursuant to an established practice only if the changes are not made in the exercise of managerial discretion. For such unilateral changes to be lawful, there must be "reasonable certainty" as to both their timing and criteria. See, e.g., *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001), and cases cited.

The Respondent's January 2002 changes were not "reasonably certain" as to either timing or criteria. First, the timing of those changes was unusual. Only one of the previous changes had occurred in January; the rest had taken place in July. Second, and more important, there was nothing certain about the criteria for the changes. The only limitation on the changes the Respondent could make in the costs and benefits of health care coverage for unit employees was that they be the same as for unrepresented employees. As the judge pointed out, that was no limitation at all: the Respondent could do exactly as it pleased with regard to the latter group's coverage, and therefore, by extension, it could do the same for unit employees. If dealing with union-represented employees exactly as it would if they were

[1] Indeed, union negotiator Grabhorn protested the Respondent's unilateral changes on exactly this basis.

[2] *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636–637 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003); *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

[3] In view of this language, the Respondent's argument that the contracts' health insurance clauses represent terms that were fully bargained, and that its unilateral, *postexpiration* changes "are the manifestation of that negotiated deal," is incorrect.

not represented is a "limitation" on the Respondent's discretion, it is one that most employers would be happy to accept.

IV.

In finding that the Respondent had no duty to bargain over changes in health benefits, my colleagues have, in effect, converted a mandatory bargaining subject into one over which the Respondent may never again have a duty to bargain. Under their view, where health benefits are concerned, the operative term or condition of employment is that the Respondent can do whatever it wants, as long as it provides the same benefits for unit employees as for unrepresented employees. That condition is, I suppose, a mandatory bargaining subject, but unless and until the Union is able to persuade the Respondent to give it up, the Union will never again have a voice in setting the substantive terms of the health benefits received by the employees it represents. This result is wholly at odds with the Act's notion of collective bargaining.

To the extent that my colleagues hold that the Respondent does not have the right to continue to act unilaterally in the health care sphere ad infinitum, naturally I agree.[4] In their view, however, the Union's mere opposition to the January 2002 changes, and even to the Respondents' continuing to act unilaterally, was insufficient to terminate the practice. I disagree. One of the chief underpinnings of the majority's "established past practice" theory is that the Union had repeatedly acquiesced in the Respondent's unilateral actions under the "same basis as" clause, even during the hiatus periods between contracts. When the Union ceased to acquiesce, and actively opposed not only the Respondent's specific changes but also its authority to act unilaterally at all, that underpinning was swept away. All that is left to support the Respondent's action is the "same basis as" clause of the expired contract. But, as explained above, such provisions do not survive the expiration of the contract—especially not this one, which by its terms limited the Respondent's authority to act unilaterally to the life of the contract. Lacking either the Union's formal or tacit approval, the Respondent was no longer entitled to act unilaterally.

V.

For all these reasons, I would find that the Respondent violated Section 8(a)(5) by making unilateral changes in unit employees' health care benefits in January 2002.

[4] Thus, they say, even if the parties bargain to impasse over a proposal by the Respondent to include the "same basis as" provision in future contracts, the Respondent will not be able to implement the proposal over the Union's opposition.

Jonathan Duffey, Esq. and *Carol L. Shore, Esq.,* for the General Counsel.
William A. Behan, Esq. and *Wendell J. Van Lare, Esq.,* of McLean, Virginia, for the Respondent.
David A. Grabhorn, Esq., of Washington, District of Columbia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Louisville, Kentucky, on September 9, 2002. The Graphic Communications International Union, Local 619-M, AFL–CIO (the Union) filed the charges on March 15, 2002, and the Director for Region 9 of the National Labor Relations Board (the Board) issued the complaint on May 30, 2002. The complaint alleges that the Courier Journal, a wholly owned subsidiary of Gannett Co., Inc. violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by increasing employee contributions to healthcare insurance premiums and instituting a new health insurance plan for bargaining unit employees without prior notice to the Union and without affording the Union an opportunity to bargain over the changes. The Respondent filed an answer in which it denied that it had committed any violation of the Act. It contends, inter alia, that those changes lawfully preserved the "dynamic status quo" since, as in the past, the same changes were made for nonrepresented employees as for bargaining unit employees.

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

FINDINGS OF FACT[1]

I. JURISDICTION

The Courier-Journal, a Division of Gannett Kentucky Limited Partnership (the Respondent)[2] is engaged in the publication and distribution of a daily newspaper at its facility in Louisville, Kentucky. During the 12-month period preceding the issuance of the complaint on May 30, 2001, the Respondent

[1] The General Counsel's unopposed motion to correct the transcript, dated October 10, 2002, is granted and received in evidence as General Counsel's Exhibit (GC Exh.) 18. These are changes to the "corrected" transcript forwarded by the court reporter, rather than to the original transcript. All citations to the transcript in this decision are to the corrected transcript, with the further corrections made pursuant to the General Counsel's motion.

[2] The complaint refers to the Respondent as "The Courier Journal, a wholly-owned subsidiary of Gannett Co., Inc.," and alleges that the Respondent is a corporation. In its answer the Respondent states that the correct name of the organization is "The Courier-Journal, a division of Gannett Kentucky Limited Partnership," and that it is a limited partnership, not a corporation. In its posttrial brief the General Counsel adopts the Respondent's characterization and refers to the Respondent as "The Courier Journal, a Division of Gannett Kentucky Limited Partnership." As a result, I refer to the Respondent in this decision as "The Courier-Journal, a Division of Gannett Kentucky Limited Partnership." In any case, the Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

derived gross revenues in excess of $500,000 and held membership in or subscribed to various interstate news services. The 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 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent publishes and distributes the Courier-Journal, a daily newspaper based in Louisville, Kentucky. The Union represents two bargaining units of employees working for the Respondent—one composed of employees in the engraving department and another composed of employees in the pressroom department[3]—and has done so since before the newspaper was acquired by Gannett in 1986. The most recent collective-bargaining agreements covering the engraving department and the pressroom department both expired on August 7, 2000.[4] Negotiations between the Respondent and the Union for new agreements started in July 2000, and continued in 2001 and 2002. As of the time of trial, the Respondent and the Union had not concluded a successor agreement for either the engraving department or the pressroom department, nor had they reached impasse or agreed to extend the expired agreements.

The Respondent offers the same healthcare insurance benefit to its bargaining unit and nonrepresented employees. The most recent collective-bargaining agreements for the engravers and the pressroom employees state that "[f]or the duration of this agreement," the healthcare benefit will be offered to unit employees "on the same terms" as to the Courier-Journal employees who are not represented by a labor organization. (GC Exh. 2, p. 13; GC Exh. 3, p. 18.) The agreements state that "[a]ny changes (benefits and premiums) in such plans" will be made "on the same basis" as for the Courier-Journal's nonrepresented employees. Id. The agreement covering the pressroom department contains a management-rights clause in which the Respondent explicitly "reserves the right to modify or terminate any (or all)" of the healthcare insurance benefits at any time with advance notice to the Union, but no similar provision appears in the engraving department agreement. (GC Exh. 2; GC Exh. 3, p. 19.) Since November 14, 1994,[5] the successive collective-bargaining agreements covering the pressroom department have contained these provisions. The agreements for the engraving department have contained the "same terms" and "same basis" provisions since May 7, 1997, although the Respondent had earlier implemented a proposal with similar language on July 16, 1996, after it declared a bargaining impasse.

Since November 14, 1994, whenever the Respondent has made changes to the healthcare insurance premiums of bargaining unit employees, it made the same changes to the benefits of nonrepresented employees.[6] These changes have included increases in employee contributions towards healthcare insurance premiums, modifications in coverage, and the substitution of one provider for another. The Respondent usually raised employee contribution levels in July of the year, and did so in 1996, 1997, 1999, and 2000. The Respondent made these changes without first bargaining over them with the Union, and, prior to the expiration of the most recent contracts on August 7, 2000, the Union apparently had never objected that the changes were unlawfully unilateral or otherwise impermissible.

The changes that are alleged to be unlawful here went into effect on July 1, 2001, and January 1, 2002, after the contracts expired. On July 1, 2001, the Respondent increased employees' contributions towards healthcare insurance premiums. The same changes were made for employees represented by the Union as for the Respondent's nonrepresented employees. The Respondent never formally notified the Union of these changes; however, employees—including Michael Heine, a union steward and union bargaining committee member for the pressroom department[7]—did receive pay stubs that showed how much was being deducted for healthcare insurance.[8] Heine was aware that the Respondent typically increased employee contributions to the healthcare insurance premiums in July of each year. (Tr. 81.) David Grabhorn, an official with the International union who has been the local's lead bargaining representative since May 22, 2001, did not find out about the July 2001 increases until October 4, 2001, when Heine informed him that the Respondent "changed our premiums last July." (Tr. 31, 72–73.) The Respondent did not give the Union an opportunity to bargain over these changes.

On September 24, 2001, the Respondent issued a memorandum to employees announcing that more far-reaching changes to the healthcare insurance benefit of unit employees would go into effect on January 1, 2002. The Respondent: changed the amount of employee contributions to healthcare premiums;

[3] The Union is the exclusive collective-bargaining representative of employees in the following appropriate bargaining units:

> All photoengravers and other photoengraving department employees employed by [the Respondent] in its Louisville, Kentucky newspaper publishing operations, but excluding all professional employees, guards and supervisors as defined in the Act.

and,

> All pressroom employees, including journey press operators, apprentices and utility persons employed by [the Respondent] at its Louisville, Kentucky newspaper publishing operations, but excluding all professional employees, guards and supervisors as defined in the Act.

[4] The expired agreements for the engraving department and the pressroom department had been in effect since September 28, 1998, and May 29, 1998, respectively.

[5] The first of these agreements was signed on November 14, 1994, although it was given a retroactive effective date of August 2, 1993.

[6] The record shows that the Respondent also did this prior to when the "same terms" and "same basis" provision appeared on November 14, 1994. Earlier collective-bargaining agreements between the parties provide that the healthcare insurance will be provided to unit employees as described in the employee handbook or plan document. Employer's Exhibit (Emp. Exh.) 3; Emp. Exh. 6.

[7] The Union uses the term "chapel chairperson" instead of steward. Heine has attended every collective-bargaining session between the parties for a new pressroom department contract since those negotiations began on July 18, 2000. Tr. 65.

[8] The Respondent introduced a memorandum that sets forth the various contribution levels for different healthcare insurance options as of July 1, 2001, Emp. Exh. 19, but the record does not establish when, or even if, this memorandum was actually received by unit employees or union officials. See Transcript (Tr.) 69–70, 80–81.

modified the framework for determining employee contribution levels; switched from an insurance "plan year" starting on July 1 to a plan year starting on January 1; introduced separate vision and dental coverage plans; terminated the bonuses paid to employees who chose to waive the Respondent's healthcare insurance; and substituted two plans with Empire Blue Cross Blue Shield for the plans the Respondent had previously offered with Anthem Blue Preferred, United Health Care, and Aetna Communicare Choice. The Respondent made the same changes for employees represented by the Union as it did for its nonrepresented employees.

At a bargaining session on October 3, 2001, the Respondent officially informed the Union about the changes that would be made in employees' healthcare insurance benefits as of January 1, 2002. The Respondent did not solicit the Union's input regarding these changes, or give the Union an opportunity to bargain regarding them. The Union's lead negotiator, David Grabhorn, told the Respondent that the Union objected to the changes and considered them unlawful, and the Union reiterated these objections in a letter. Grabhorn advised the Respondent that the Union wanted to negotiate specific benefits and opposed the Respondent making unilateral changes in the benefits of unit members whenever changes were made for nonrepresented employees. Wendell J. Van Lare, Gannett's senior labor counsel, who was also present at the session, took the position that the Respondent had the right to make the changes without bargaining as long as the changes kept the benefits for unit employees the same as those for nonrepresented employees.

Prior to any of the changes described above, the Union made a formal healthcare insurance proposal, dated July 18, 2000, to the Respondent, which called for the Respondent to provide healthcare insurance to unit employees through a union health and welfare fund with the Respondent paying the entire premium for employees. On November 27, 2001, the Union revised this proposal to provide that the Union would accept the changes the Respondent was planning to make on January 1, 2002, as long as unit employees were also given the option of choosing the union insurance plan. (GC Exh. 9.) Under this compromise proposal the Respondent would not be responsible for paying the entire premium for employees who chose the union plan, but rather would be required to make per-employee contributions to the union fund that were equal to the per-employee costs under the Respondent's plans. Id. The Union did not identify a specific union insurance plan, but provided examples of such plans to the Respondent. (Tr. 53.) Van Lare indicated that he would keep an "open mind," and stated that he was "not clear on how the [amount of the employer's contributions to the union plan] was arrived at or whether that was an amount . . . [the Respondent would] be comfortable with." The Respondent did not request further details about the proposal and the Union did not provide them. The Union made a number of information requests to the Respondent designed to help it determine what the per-employee costs of the Respondent's plans were. The purpose of this was to allow the Union to determine what the Respondent's equivalent per-employee contributions to the union insurance plan would be under the Union's revised proposal.

B. The Complaint Allegations

The complaint alleges that the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representatives of engraving and pressroom department employees in violation of Section 8(a)(1) and (5) by unilaterally increasing employee contributions to healthcare insurance on about July 1, 2001, and unilaterally instituting a new health insurance plan for employees on about January 1, 2001, without prior notice to the Union and without affording the Union an opportunity to bargain.

III. ANALYSIS AND DISCUSSION

A. Alleged Unilateral Changes to Healthcare Insurance

Healthcare insurance benefits are a mandatory subject of collective bargaining that an employer may not alter without bargaining to mutual agreement or to a good-faith impasse. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); *United Hospital Medical Center*, 317 NLRB 1279, 1281 (1995). The obligation to bargain over changes to employee healthcare insurance continues during negotiations following the expiration of a collective-bargaining agreement. See, e.g., *Beverly Health & Rehabilitation Services,* 335 NLRB 635 (2001); *United Hospital Medical Center*, supra; see also *Made 4 Film, Inc.*, 337 NLRB 1152 (2002) ("Generally, an employer has a statutory obligation to continue to follow the terms and conditions . . . in an expired contract until a new agreement is concluded or good-faith bargaining leads to impasse."). On July 1, 2001, and January 1, 2002, the Respondent made significant changes in the healthcare insurance offered to unit employees. It altered employee contribution levels, the framework for calculating employee contributions, some of the coverages, and the timing of the "plan year" applicable to deductibles. In addition, it discontinued a bonus program for employees who declined insurance, and substituted two new healthcare insurance plans with Empire Blue Cross Blue Shield for the plans it previously offered to employees with three other providers. Such alterations in benefits are changes subject to bargaining even if they preserve the uniformity of benefits between unit and nonunit employees. *Mid-Continent Concrete*, 336 NLRB at 259, 268.

The July 1 changes in contribution levels were made without giving the Union formal notice or an opportunity to bargain. With respect to the January 1 changes, the Respondent provided the Union with notice on October 3, 2001, but not with an opportunity to bargain. When Grabhorn requested bargaining regarding the changes, Van Lare told him that the Respondent had no obligation to bargain. Indeed, Van Lare indicated that the Respondent had already taken steps that would render it impossible to preserve the existing healthcare insurance benefits for bargaining unit employees as of January 1, 2002. (Tr. 169–170.) The Respondent made the changes without requesting the Union's input or undertaking negotiations with the Union about the changes. Although Van Lare indicated that he had an "open mind" regarding the Union's proposal for offering insurance through a union health and welfare fund, the Respondent never engaged the Union's bargaining committee regarding that proposal, or the Union's subsequent compromise pro-

posal. Based on this record, I conclude that on October 3 the Respondent presented the Union with notice of a fait accompli regarding the changes it had already decided to make on January 1, 2002, and did not afford the Union a meaningful opportunity to bargain. See *Midwest Power Systems*, 323 NLRB 404, 407 (1997), enf. denied on other grounds 159 F.3d 636 (D.C. Cir. 1998) (employer does not satisfy its duty to bargain when it meets to discuss announced changes, yet manifests its belief that it is not obligated to bargain over the change); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1324 (7th Cir. 1983) (where notice of a change is given under circumstances that make it clear that the employer had no intention of bargaining, the employer has merely informed the Union of a "fait accompli" and has not satisfied its obligation to bargain); see also *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993) (employer failed to satisfy obligation to bargain even though it indicated that it was willing to discuss the decision it had made, but refused to delay implementation of its decision). I conclude that the Respondent made unilateral changes to a mandatory subject of bargaining.

The Respondent may avoid a finding of violation if can show that the Union waived bargaining regarding the subjects of the unilateral changes. A waiver of bargaining rights by a union is not to be lightly inferred, but rather must be demonstrated by the union's clear and explicit expression. *Beverly Health & Rehabilitation Services*, 335 NLRB at 636; *Rockford Manor Care Facility*, 279 NLRB 1170, 1172 (1986). The most recent pressroom department contract contained a provision stating that the Respondent had "the right to modify or terminate any (or all)" of the healthcare insurance benefits "at any time." I believe that prior to the expiration of the contract this management rights provision did constitute a waiver of bargaining over the terms of the unified healthcare insurance benefit. However, the Board has held that such a waiver expires when the contract expires and does not create a "status quo" during its effective period that permits unilateral changes following its expiration. *Beverly Health & Rehabilitation Services*, 335 NLRB at 637. Since the unilateral changes at issue here were made after the expiration of the contract containing the waiver, the Respondent's failure to bargain is not sanctioned by the management rights provision.

The expired agreements for both the pressroom department and the engraving department also contained provisions stating that healthcare insurance would be provided to bargaining unit employees on the "same terms" as to nonrepresented employees, and that any changes would be on the "same basis" as for nonrepresented employees. This contract language did not constitute a waiver of bargaining. In *Rockford Manor Care Facility*, 279 NLRB 1170, 1173 (1986), the Board held that a contract provision stating that health and life insurance would be offered to represented employees on the "same basis" as to nonunit employees only "impli[ed] assent to the principle of a single unified, company wide program," and did not "convey an intent on the part of the Union to waive its right to participate in deliberations about which option was more appropriate for all." As in *Rockford Manor*, supra, the "same terms" "same basis" language in the expired collective-bargaining agreements in this case does not convey an intent on the part of the Union to waive its right to participate in deliberations about the unified healthcare insurance benefit for unit and nonrepresented employees. Even if one assumes that the "same terms"/"same basis" provision was a waiver, such a waiver would not have survived the expiration of the contract. "It is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary." *Ironton Publications, Inc.*, 321 NLRB 1048 (1996). Here not only does the evidence fail to establish that the parties intended that any waiver represented by the "same terms"/"same basis" language would outlive the contract, but the provisions themselves explicitly state that the language would only "continue in effect *for the duration of this Agreement*." (See GC Exhs. 2 and 3 (emphasis added).) Thus, even assuming that the "same terms"/"same basis" language gave the Respondent the right to make changes to the healthcare insurance benefit without bargaining over them with the Union, that right expired with the contracts on August 7, 2000, and cannot justify the Respondent's unilateral changes on July 1, 2001, and January 1, 2002.

The Respondent argues that application of the strict requirements regarding waiver is not appropriate since the changes it made to employees' healthcare benefits did not alter the "dynamic status quo" that existed before the expiration of the contract under the bargained-for "same terms"/"same basis" provision. The Respondent contends that the healthcare insurance changes at issue here lawfully preserved the dynamic status quo by maintaining uniformity between the benefits provided to bargaining unit employees and the benefits provided to nonrepresented employees. This argument fails under Board precedent. Although the Board has sometimes held that an employer can, or even must, preserve the dynamic status quo by making certain changes after a contract's expiration, the Board has only viewed changes in that way when they were based on fixed criteria that eliminated or limited the employer's discretion. See, e.g., *Post-Tribune Co.*, 337 NLRB 1279 (2002) (employer did not change the status quo during bargaining when it continued to allocate a specific percentage of the cost of an employee's insurance coverage to the employee, even though the actual dollar amount of employees' contributions increased when the insurance carrier raised the total premium),[9] and *Ventura County Star-Free Press*, 279 NLRB 412, 419 (1986) (pay step increases consistently granted to employees when they reach new experience levels are part of a dynamic status quo).[10]

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[9] The record in the instant case does not show, and the Respondent does not contend, that the premium changes on July 1 and January 1 were based on an established practice of allocating a specific percentage of the total premium to employees.

[10] The Respondent also seeks support for its "dynamic status quo" argument by reference to the decision in *Matheson Fast Freight*, 297 NLRB 63 (1989), a case in which an employer successfully argued to the administrative law judge that the company did not have to bargain over changes in starting time because such changes were routine responses to business fluctuations and consistent with the status quo. That ruling is without precedential weight since no exception was filed to the relevant portion of the judge's decision and so the Board adopted the finding regarding it only on a "pro forma" basis. See *Whirlpool Corp.*, 337 NLRB 726, 727 fn. 4 (2002) ("It is well settled that the

The Board has repeatedly declined to find that a dynamic status quo authorized unilateral changes in situations, such as this one, where the past practice identified by the employer did not have reasonably fixed and certain criteria that limited the employer's discretion. See *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001) (consistency with past practice does not justify unilateral changes where such practice fails to create "reasonable certainty" as to the "timing and criteria" for the changes). In *Mid-Continent Concrete*, supra, for example, the Board held that an employer's past practice of maintaining uniformity between the benefits of unit and nonunit employees did not create a sufficiently definite status quo to render unilateral changes permissible. In that case, are here, the employer provided the same healthcare insurance to unit and nonunit employees and argued that when it changed insurance plans and benefits for both groups it had no obligation to bargain since the changes maintained "the status quo benefit of a right by the unit employees to participate in the group insurance plan." 336 NLRB 258, 268 (2001). The administrative law judge, in a decision affirmed by the Board, rejected the employer's argument and ruled that the employer had violated Section 8(a)(1) and (5) by making the changes without bargaining. The Board affirmed, stating that "[c]ontrary to the [employer's] assertions, it is immaterial that its changes to the plan, a mandatory subject of bargaining, . . . involved both unit and nonunit employees." Id. at 2.

In *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1994), the employer argued that it did not have to bargain when it increased employees' contributions to healthcare premiums since the increases were consistent with the company's established practice of passing on raises in premiums to employees. The Board found that the employer had violated Section 8(a)(1) and (5) by making the changes without bargaining since the increases to employee contributions were not shown to be based on a "fixed percentage" of the total premium and the employer retained "total discretion" over what employees were required to contribute. Similarly, in *Maple Grove Health Care Center*, 330 NLRB 775, 780 (2000), the employer argued that it had no obligation to bargain over a change in employees' insurance premiums because it had maintained the status quo by passing on a portion of the externally imposed insurance premium increase to employees. The Board rejected that argument, noting that the status quo claimed by the employer was not sufficiently certain to justify the failure to bargain since the employer had not shown an established practice of requiring employees to pay a fixed percentage of the healthcare insurance premium.

As in *Mid-Continent*, supra, *Dynatron/Bondo Corp.*, supra, and *Maple Grove Health Care Center*, supra, the dynamic status quo described by the Respondent here does not create reasonable certainty as to the timing and criteria for future changes and would not meaningfully limit the Respondent's discretion to make future changes to the healthcare insurance of bargaining unit members. Unlike the situation in cases such as *Post-Tribune*, supra, the Respondent here would not be limited to responding in fixed way to decisions made by an insurance carrier or other circumstances beyond the control of the Respondent's management. The only constraint on the Respondent's discretion to make whatever changes it wanted, whenever it wanted, would be, as it was in *Mid-Continent*, that changes made for the bargaining unit members would have to also be made for nonrepresented employees. Since the Respondent has no obligation to bargain over changes to the benefits of nonrepresented employees, the fact that the unit members' benefits had to be the same as those of nonrepresented employees would not meaningfully limit the Respondent's discretion. To permit the Respondent such broad discretion to unilaterally change the working conditions of represented employees would be "in direct contravention of the mandates of Section 8(a)(5)." *Mid-Continent Concrete*, 336 NLRB at 268.

In its brief, the Respondent chronicles the prior unilateral changes that the company has made to the healthcare insurance benefits of unit employees without objection by the Union. This history cannot overcome the Board's holding in *Mid-Continent Concrete* that such changes in the healthcare insurance of unit members require bargaining *even if* the changes are consistent with the "status quo" practice of maintaining uniformity between the benefits of unit and non-unit employees.[11] Moreover,

Board's adoption of a portion of a judge's decision to which no exceptions are filed does not serve as precedent for any other case.").

[11] In any case, the history cited by the Respondent does not demonstrate that the Union and the Respondent both viewed the "same terms"/"same basis" language in the contracts as allowing the Respondent to make unilateral changes to healthcare insurance of unit employees. For as long as the pressroom department contract has contained the "same terms" and "same basis" language—i.e., since November 14, 1994,—it has also contained a management rights clause giving the Respondent "the right to modify or terminate any (or all)" of the healthcare insurance benefits at any time. That provision gave the Respondent the right to make unilateral changes to the healthcare insurance of pressroom department employees for the duration of the agreement, without reliance on the "same terms"/ "same basis" provisions. With respect to the engraving department employees, the first negotiated contract that included the "same terms"/"same basis" provision did not take effect until May 7, 1997, after most of the unilateral changes chronicled by the Respondent occurred. For these reasons, the history cited by the Respondent does not demonstrate that the Union agreed with the Respondent's position regarding the meaning of the "same terms"/"same basis" language. See also *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996) ("[U]nion 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."), *Midwest Power Co.*, 323 NLRB at 407 (union's silent acquiescence to changes regarding retiree benefits in the past had no bearing on the legality of new changes to retiree benefits).

The Respondent argues that Grabhorn admitted during cross-examination that the language in the prior agreements allowed the Respondent to make unilateral changes to the healthcare insurance of unit employees without bargaining prior to the expiration of those agreements. R. Br. at 24. It is not clear from Grabhorn's testimony whether his opinion was based on the "same terms"/"same basis" language as opposed to the separate management-rights clause. At any rate, the record does not show that Grabhorn was directly involved in negotiating or policing the Courier-Journal contracts at the times of the prior unilateral changes chronicled by the Respondent, or that Grabhorn

in a recent decision, *Beverly Health & Rehabilitation Services*, supra, the Board held that when a contractual waiver of bargaining expires, preexpiration unilateral changes pursuant to such a waiver do not create a status quo that survives the contract or permits postexpiration unilateral changes. 335 NLRB 636–637. That holding controls here. When the pressroom and engraving department contracts expired, any waivers of bargaining that may have been contained in those contracts expired as well. Therefore, as in *Beverly Health & Rehabilitation Services*, the Respondent can no longer rely on the "status quo" that existed under such waivers and the "overriding statutory obligation to bargain controls." Id. at 637.

The Respondent argues that the standards applicable to expiration of waivers are not relevant here because the "same terms"/"same basis" provision represented not a waiver, but a specific bargain between the parties permitting the Respondent to make unilateral changes regarding healthcare insurance benefits. The Board, however, has held that the standards used to analyze possible waivers, not those used to analyze specific agreements, apply to language like that found in the "same terms"/"same basis" provisions in this case. In *Trojan Yacht*, 319 NLRB 741 (1995), the Board considered whether an employer's unilateral changes to unit employees' pension and savings benefits were authorized by a contract stating that those benefits would be provided in the same manner and to the same extent for unit and nonunit members. The administrative law judge held that the changes were lawful after explicitly choosing to analyze the issue under standards of "contract interpretation" applicable to "agreed to language," rather than under the special standards applicable to waivers. Id. at 747. The Board reversed the judge's decision, and held that the standards for waivers *did* apply in such a situation, and that the "same manner" and "same extent" contract language was insufficient to show a waiver. Id. at 742. Similarly, the waiver standards, rather than the standards applicable to specific bargains in contracts, are applicable to the Respondent's argument that the "same terms"/"same basis" provisions relieve the company of its obligation to bargain about changes to the healthcare benefits of unit employees. Under the applicable standards any waiver in the pressroom department and engraving department contracts expired when those contracts expired.

The Respondent argues that, even if it had an obligation to bargain regarding the January 1, 2002 changes, this obligation was limited under an exception to the general bargaining obligation. The Respondent cites *Stone Container Corp.*, 313 NLRB 336 (1993), in which the Board has held that an overall bargaining impasse is not a condition precedent to a change in a term or condition of employment where the change concerns a discrete event, such as an annual pay raise, which is scheduled to occur during the bargaining process. According to the Respondent, the exception applies here since the January 1, 2002 changes were tied to a "discrete and critical event"—specifically, to the unavailability effective January 1 of the three insurance plans in which the unit employees were then participating. This argument might have some appeal if the unavailability of the healthcare insurance plans, and the timing of such unavailability, were shown to be out of the Respondent's control. However, neither was. Rather, the record indicates that the reason the unified plans in which the unit employees had been participating would no longer be available as of January 1 was that the Respondent's management had decided to cancel those plans as of that date. (Tr. 169–70.) Thus, the Respondent unilaterally created and scheduled the "discrete and critical event" that it uses to justify the unilateral changes that flowed from that event. The Respondent's cites no authority indicating that this type of circular reasoning warrants easing a party's bargaining obligations.

Even assuming that the Respondent did not have to bargain to an overall impasse regarding the January 1 changes, I would still conclude that its conduct violated the Act. The Respondent did not merely fail to bargain to overall impasse, it refused to bargain *at all* about the specific changes it planned for January 1. Van Lare's reaction to the Union's demand for bargaining regarding the healthcare insurance changes was to state that the Respondent had no obligation to negotiate over the changes and to assert that the Company had already made decisions that rendered changes essentially unavoidable. The Respondent did not engage the Union in any discussions regarding the proposed changes or alternatives and did not respond in a meaningful way to either the Union's initial healthcare insurance proposal, or to the compromise proposal the Union made at the end of November 2001. In its brief, the Respondent even complains about the information requests made by the Union so that it could flesh-out the proposal for a union plan.[12] Given the record here, I find that the Respondent fell far short of even the reduced bargaining standard it asserts was applicable.

For the reasons discussed above, I conclude that the Respondent made unilateral changes to unit employees' healthcare insurance benefit in violation of Section 8(a)(1) and (5) of the Act.

had any special knowledge regarding the reasons that other union officials did not oppose those changes. Therefore, any opinion Grabhorn has about the reasons the Union did not object to those prior unilateral changes is not instructive.

[12] The facts belie the Respondent's contention that the Union was engaging in delaying tactics in the face of the January 1, 2002 deadline. On October 3, 2001, the Respondent first notified the Union of the changes it had decided to make on January 1, 2002, to employees' healthcare insurance. The Union immediately requested bargaining regarding those changes. The Union already had a proposal on the table regarding healthcare insurance, and formulated a second, compromise, proposal on the subject during negotiations at the end of November. It gave the Respondent examples of the type of union health and welfare plan it was proposing to use. The Union made numerous information requests seeking information that would permit it to clarify for the Respondent the costs associated with the Union's proposal. The Union made these negotiation efforts even in the face of the Respondent's statements that it had no obligation to bargain and that the changes were essentially inevitable. The evidence of Union delay that the Respondent alludes to is negligible. In one instance Grabhorn could not schedule a followup bargaining session because he did not have his calendar with him. The Respondent complains, as well, about the Union's information requests. I conclude that the Respondent has not shown that the Union intentionally created any significant delay at all, much less that the Union engaged in such profound delaying tactics as to relieve the Respondent of its ordinary responsibility to bargain.

B. The 10(b) Limitations Period

The Respondent raises an affirmative defense that the complaint allegation regarding the July 1, 2001 increase in employees' contributions is time barred.[13] Section 10(b) of the Act states that "no complaint shall issue based on upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). "The concept of constructive knowledge incorporates the notion of 'due diligence, i.e., a party is on notice not only of facts actually known to it but also facts that with 'reasonable diligence' it would necessarily have discovered." *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995). The party asserting the 10(b) defense has the burden of showing actual or constructive notice. *Nursing Center at Vineland*, supra; *Carrier Corp.*, 319 NLRB 184, 190 (1995); *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995).

The charges in this case were filed on March 15, 2002. Therefore, the charge would not be timely with respect to the July 1, 2001 changes unless the Union did not have actual or constructive knowledge notice of those changes until after September 15, 2001,—i.e., after the start of the 6-month period leading up to the filing of the charge on March 15. Although the Respondent did not give notice of the changes to union officials in their official capacities, the changes were reflected on the pay stubs of union employees by an increase in the amounts withheld for healthcare insurance. Heine, a union steward and member of the pressroom department bargaining committee since at least July 2000, received such a pay stub. Heine informed Grabhorn about the increase in premiums on October 4, 2001.

I conclude that Heine had actual or constructive notice of the July 1 increase in employee contributions prior to September 15, 2001. Heine testified that while he could not recall whether he received notice regarding the increases prior to July 1, he remembers that the increase "was talked about in the . . . breakroom." Heine was aware that the Respondent typically raised the employee contributions in July. It is obvious that Heine knew about the changes on October 4, since that is when he told Grabhorn about them, and he did not claim that it was only some event between September 15 and October 4 that enlightened him about the change. Given that Heine received a pay stub showing the increased healthcare deduction in July 2001, given his knowledge that the Respondent typically imposed increases in July each year, given that he was a union steward and bargaining committee member, and given his failure to deny that he learned about the July 1 increases prior to September 15, I feel comfortable inferring that Heine was aware of the increases within a few days or weeks after they went into effect on July 1, 2001. Certainly he was aware of the changes well before September 15, or would have been with the exercise of reasonable diligence.

The General Counsel argues that Heine's knowledge should not be imputed to the Union because there is nothing in the parties' collective-bargaining agreement giving Heine the authority to receive notification of proposed changes on behalf of the Union and no evidence that the Union held out Heine as possessing such authority. Under Board precedent, "whether unit employees' knowledge is imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences depends on the factual context." *Nursing Center at Vineland*, 318 NLRB at 339. It is appropriate given the factual context here to impute Heine's knowledge to the Union. Heine was not merely an employee. He was a steward and had been a member of the pressroom department bargaining committee for a year at the time of the July 1, 2001, changes. He attended all of the pressroom department bargaining sessions for a new contract. In *Baytown Sun*, 255 NLRB 154, 160 (1981), a union steward's knowledge was imputed to the union for purposes of determining whether the charge was timely where the steward was closely tied to the union, was a member of the union's negotiating committee, and had attended all of the negotiating sessions between the employer and the union.[14] Given the factual context in this case, I conclude that, as with the steward in *Baytown Sun*, supra, Heine's pre-September 15 knowledge of the July 1 increases should be imputed to the Union.

For the reasons discussed above, I conclude that the complaint allegation that the July 1, 2001 unilateral changes in employee contributions to healthcare insurance violated Section 8(a)(1) and (5), is time barred pursuant to Section 10(b), and must be dismissed.

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 engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by making unilateral changes to the healthcare insurance benefits of unit employees on January 1, 2002.

[13] There is no dispute that the charges were timely with respect to the more extensive unilateral changes made on January 1, 2002.

[14] I have considered the decision in *Catalina Pacific Concrete Co.*, 330 NLRB 144 (1999), which the General Counsel cites in its brief. In that case the Board concluded that notice to a "nominal" steward who had crossed the union picket line and was working during a strike, and who the employer itself claimed was a statutory supervisor, was not adequate to initiate the limitations period. Id. at 144, 149. The Board explained that despite such individual's "nominal status as a steward, the [employer] could hardly have reasonably believed that notice of unilateral changes to someone it was claiming as one of its supervisor[s] was an acceptable method of communicating with the Union about those changes." Id. at 144. In the instant case, Heine was not only a steward, but a member of the negotiating committee who had participated in all the bargaining sessions for a successor to the pressroom department agreement that expired on August 7, 2000. His status as a union official was not "nominal," but, as in *Baytown Sun*, supra, very real.

4. The Respondent has violated Section 8(a)(1) and (5) of the Act by making unilateral changes to the healthcare insurance benefits of unit employees on January 1, 2002.

5. The complaint allegation that the Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes to employees' healthcare insurance benefits on July 1, 2001, is untimely under Section 10(b) of the Act and must be dismissed.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I also conclude that the Respondent must be required to rescind the unilateral changes it made on January 1, 2002, to bargaining unit employees' healthcare insurance program and restore, and make available to unit employees, the same health care benefits that were available to such employees immediately prior the January 1, 2002 changes, under the same terms that the benefits were then available. The program allowing employees to obtain a monetary bonus by opting out of the healthcare plans, which was discontinued on January 1, 2002, also must be restored. In addition, the Respondent must make the unit employees whole by reimbursing them for any expenses resulting from the Respondent's unlawful conduct, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Such expenses include, but are not necessarily limited to: any portions of premiums that unit employees have paid since January 1, 2002, that were in excess of the premiums they would have paid if their pre-January 1, 2002 contribution levels had not been unlawfully changed; any amounts that unit employees were denied because the opt-out bonus was unlawfully discontinued; and, any unreimbursed healthcare costs that unit employees incurred since January 1, 2002, that would not have been incurred, or that would have been reimbursed, if not for the unlawful changes to the healthcare insurance benefit.

[Recommended Order omitted from publication.]