

Essex Valley Visiting Nurses Association and Health Professionals and Allied Employees, Local 5122.

Case 22–CA–24770

November 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On March 27, 2003, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and supporting brief and an answering brief to the Respondent's exceptions.

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 as modified below and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it unilaterally transferred four nurses from the administrative in-house positions of utilization management nurse (UM or UMs) to field nurse positions and when it thereafter terminated these nurses.¹ We agree with the judge, for the reasons set out in his opinion, that the Respondent violated Section 8(a)(5) when it unilaterally transferred the UMs into the field. Contrary to the judge, however, we find, for the reasons explained below, that the Respondent did not violate Section 8(a)(5) of the Act when it discharged the nurses. We also find that the nurses' discharge did not violate Section 8(a)(3).

I. FACTS

The essential facts are as follows. The Respondent provides home health care services from its East Orange, New Jersey facility. The nurses involved in this case were registered nurses (RNs) who were employed as UMs. They dealt with insurance companies, health maintenance organizations, Medicaid, and Medicare and were responsible for ensuring that the Respondent was paid for the services it performed. The UMs were required to be licensed RNs and to have 2 years of clinical experience.

The Respondent had been managed by East Orange General Hospital under the aegis of a holding company, Essex Valley Health Care (EVHC). In July 2000, New Community Corp. (NCC) took over control of the Re-

spondent, which had been losing money. EVHC transferred the assets of the Respondent to NCC at no cost. NCC wanted to acquire the Respondent, notwithstanding the fact that it was losing money, because the Respondent and NCC had compatible missions of providing services to the inner city of Newark.

On February 5, 2001,² the Union was certified as the bargaining representative of the Respondent's RNs and licensed practical nurses (LPNs). Contract negotiations began on May 2.

In July, Shakir Hoosain became the new chief executive officer of the Respondent. As of August 1, the Respondent lost three hospital contracts that had been generating substantial revenues. Hoosain concluded that changes were necessary to address the large amounts of money the Respondent had been losing. First, Hoosain decided to get out of the managed-care business since it had been losing money in that area. Second, the Respondent eliminated approximately 25 nonunit positions.³ Finally, the Respondent decided to transfer the UMs to field nurse positions. Field nurses are either RNs or LPNs, provide direct patient care, and are the Respondent's prime source of generating revenues. With the loss of the hospital and the managed-care contracts, there was little or no need for the work the UMs had been performing. By transferring the UMs to the field, the Respondent could service more cases and hopefully increase revenues.

On July 26, the Respondent sent a letter to the Union proposing to transfer three of the four UMs to field nurse positions. The letter stated that this proposal could be discussed at the upcoming August 1 bargaining session. The Union responded on July 27, requesting information concerning job descriptions, a plan for training and upgrading of skills for the UMs, and whether nonbargaining-unit employees would perform UM work. At the August 1 bargaining session, the Respondent expanded its transfer proposal to include the fourth UM nurse and two of five home care coordinators (HCCs).⁴ The Union expressed opposition, but asserted that if the UMs were transferred to the field, they would need a refresher course, which could be up to 6 months in length. The Respondent initially said it would provide 1 week of

² All dates hereafter are 2001 unless otherwise indicated.

³ Thirteen of the employees in these positions were transferred to other jobs throughout NCC.

⁴ HCCs perform discharge planning and obtain referrals of patients who need home health care services upon their discharge from the hospital. The HCCs who were transferred in this case, Barbara Anello and Pam Hart, are not at issue in this proceeding inasmuch as the Respondent ultimately offered their previous positions to them and they refused such offers. Accordingly, the General Counsel does not seek a remedy on their behalf.

¹ The judge found it unnecessary to reach the issue of whether the terminations also violated Sec. 8(a)(3) of the Act, as alleged in the complaint.

training, but then increased this offer to 2 weeks. The Union contended that this would be inadequate to prepare the UMs for field work.

There was various correspondence between the parties during the next week. The Respondent stated, among other things, that its proposed changes were necessary to respond to the economic situation confronting it. The Union formally requested bargaining over the changes and demanded that they not be implemented. The Respondent refused the Union's request not to implement the changes, asserting that, after the August 1 meeting, "the matter was resolved."

At an August 8 meeting with Hoosain and Director of Nursing Donna Fountain, the UMs were notified that their transfer would be effective August 30. On August 13, the Respondent began its in-house training class and started sending the UMs into the field to observe other nurses.

Once training began on August 13, the UMs filled out self-evaluation forms. The judge found that although the UMs had substantial prior experience as RNs, they all evaluated their skill levels as "poor" with regard to the majority of nursing functions, including such basic functions as hand washing and pulse taking. Thus, Savino rated her hand washing techniques, and her cardiovascular system, auscultation, and pulse taking skills as "poor." She also listed herself as "poor" in all skills relating to the pulmonary system. Likewise, Jones rated her skills in the category of "Knowledge of Nursing Process," as "poor." This category included such items as health history, physical exam, and development and revision of care plans. Jones also rated herself as "poor" in documentation skills, a primary job duty of a UM.

It is uncontested that the training the Respondent provided the UMs was the same training it provided to newly hired field nurses. In fact, there were two new hires in the same class as the UMs. This training included classroom instruction by Training Director Janine Wray-Langevine, listening to audiotapes, and being paired with experienced field nurses to go into the field and become acquainted with the types of patients and issues they might encounter during a home assessment.

Sometime after an August 15 bargaining session, Wray-Langevine investigated training options and identified two 6-week programs that cost \$1195 and \$725, respectively. Hoosain testified that he discussed these options with Nursing Director Fountain and that they decided that they could not afford to pay for these programs in addition to the nurses' salary. For this reason, the Respondent did not discuss these training programs with the Union.

There was also evidence that the UMs failed to cooperate in the training. In its August 27 letter to the Union, the Respondent noted that the nurses were showing no interest in the training sessions. In the same letter, the Respondent included the following statement: "If after the training session, the UM and HCC nurses are unable to perform field nurse positions, or refuse, they will leave us with no choice but to lay them off until they are qualified to perform field nurse work or another position within EVVNA becomes vacant which they are qualified to fill."

On August 29, the Respondent sent letters to the four affected UMs—Stella Savino, Anne Schepers, Shirley Lambert, and Patricia Jones—summarizing the facts concerning their transfers effective September 4. On that same date, Schepers refused to go out into the field with an LPN, and she received a suspension for refusing a work assignment and other alleged misconduct.⁵

After the parties exchanged further letters, in a September 12 letter, the Respondent notified the Union as follows:

[W]e have reached the decision that they cannot perform the field nurse job and due to the reorganization and their acknowledged lack of knowledge, no other position is currently available to them. Of course, in the event these individuals choose to obtain education providing them with the necessary skills to assume the field nurse job, we will consider them for available positions.

On September 13, the Respondent discharged the four UMs, asserting that, "after several weeks of training, it is obvious that you are not qualified to perform the duties and responsibilities of a field nurse." The Union challenged these discharges in a September 14 letter, asserting that the discharges were indicative of antiunion animus and that it was incorrect that the UMs were not qualified to be field nurses. On September 18, the Respondent replied that the nurses had "repeatedly confirmed their inability to perform nursing." The Respondent also stated that the nurses had "repeatedly exhibited a lack of cooperation" and had "mocked and taunted managers and showed a contemptuous disregard" for the Respondent. In a mid-September phone call concerning severance pay for the UMs, the Respondent told the Union that the employees' behavior was unacceptable during training and that their self-evaluations were poor.

In October, the Union saw an ad in the newspaper for HCC nurses, and it contacted the Respondent to see if it

⁵ There is no allegation that the Respondent violated the Act by suspending Schepers.

would recall the UMs to the HCC positions. The Respondent said that it would not take them back because of their behavior during training. In November, the Union again requested that the Respondent get back to it concerning the recall of the UMs. The Respondent repeated that the nurses admitted that they were unable to perform basic nursing tasks.

On March 14, 2002, the parties executed a collective-bargaining agreement. The parties agree that the terms of the new agreement permit unilateral transfers from that date forward.

II. ANALYSIS

As stated above, we agree with the judge that the Respondent violated Section 8(a)(5) of the Act by unilaterally transferring the UM nurses to field nurse positions on August 13. However, we find that the Respondent did not violate either Section 8(a)(5) or (3) of the Act when it discharged the UMs.

A. The 8(a)(5) Allegation Regarding the Discharges

Where an employer unilaterally changes the terms and conditions of employment in violation of Section 8(a)(5) of the Act, a discharge resulting directly from that unilateral change may also violate Section 8(a)(5). In the instant case, the unilateral change was the decision to transfer the UM nurses to field nurse positions. However, the discharge was the result of a failure to cooperate and a failure to perform adequately as a field nurse. Thus, the discharge was not the direct result of the transfer; it was the direct result of failures to cooperate and perform in the new position.⁶

The Board reached a similar result in *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004). In *Anheuser-Busch*, the Board found that the employer violated Section 8(a)(5) by unilaterally installing and using surveillance cameras. However, the Board also found that the employer was privileged to discharge 16 employees whose misconduct was observed through the unlawfully installed cameras. The Board found that because the employees were discharged for violating preexisting plant rules, there was “an insufficient nexus . . . between the Respondent’s unlawful installation and use of the cameras and the employee’s misconduct.” *Id.* at 562.

In this case, as in *Anheuser-Busch*, we find that there was an “insufficient nexus” between the Respondent’s unilateral transfer of the UMs and the Respondent’s decision to discharge them. Thus, the Respondent discharged the UMs because, according to their own admission, they

⁶ Unlike *Great Western Produce*, 299 NLRB 1004 (1990), the transfer itself was not even a factor in the decision to discharge. The decision here was wholly attributable to a failure to cooperate and poor performance.

could not perform the job of field nurse. The Respondent’s additional reason for discharging the UMs was their unacceptable behavior during the training, which training the Respondent provided to prepare them for work in the new positions and, indeed, was the precise training provided all nurses for the field nurse position.

The record is replete with evidence establishing that the UMs could not perform the field work. They themselves evaluated their skill levels as “poor” with regard to the majority of nursing functions. Jones even evaluated herself as “poor” for documentation skills, a skill she had been using for years.

Furthermore, these self-reported deficiencies were ones that the UMs were either incapable or unwilling to remedy through the training given them by the Respondent. Despite the training, the UMs could not perform the duties required of them.⁷ At the unfair labor practice hearing, Hoosain testified that the UMs stated in their self-evaluations that they were not capable of performing the work.⁸ He continued, “I didn’t want to have a liability on my hands if somebody were going to go out there and do something and someone gets hurt.” Thus, the record establishes that the Respondent discharged the UMs because of serious performance deficiencies.

Our dissenting colleague asserts that under *Great Western*, supra, a discharge need not be the result of the unilateral change in order for the Board to find it to violate Section 8(a)(5). We disagree. Under *Boland Marine*, 225 NLRB 824, 825 (1976), *enfd.* 562 F.2d 1259 (5th Cir. 1977), the discharge is unlawful if it is “solely” the result of the unilateral change.⁹

⁷ Our dissenting colleague claims that the training the nurses received was inadequate and that this was one of the subjects the parties were still discussing when the Respondent unilaterally transferred the nurses to the field. However, since the training was sufficient for new hires, it is difficult to imagine that it would not be at least adequate as a refresher course for the UMs who had previous clinical nursing experience. Further, there was evidence the Respondent had previously transferred in-house nurses into the field without any training. If those nurses could be transferred with no training at all, it is difficult to understand why the training provided here was not at least adequate.

⁸ Our dissenting colleague asserts that we have afforded these self-evaluations more weight than they deserve. Although our colleague is correct that the UMs completed these evaluations on their first day of training, the UMs stated throughout the training that they needed more training, and they continually asserted that they were unprepared to go out into the field. Furthermore, it is strange that an employee could evaluate her skills as “poor” in virtually every job requirement and be surprised that her employer finds her incapable of performing her job.

⁹ Although *Great Western* cites *Boland* with approval, it says that the discharge is unlawful if the unilateral change is a “factor” in the discharge. Although we believe that the *Boland* statement is correct, we find that, even under *Great Western*, the discharges here were lawful, inasmuch as they were caused solely by the inability of the nurses to perform.

In this case, the Respondent did not apply a unilaterally changed term or condition of employment to discharge the nurses. It applied long-standing and understood requirements that employees must possess basic skills and the appropriate attitude necessary to do their job. The unilateral transfer was not itself “a factor” in the discharge. See *Anheuser-Busch*.

The dissent also asserts that the unilateral transfer changed all the terms and conditions of employment for the nurses because they were doing a very different job as a result. We disagree. The nurses were discharged because they lacked basic skills and displayed an unprofessional attitude. As noted above, Savino rated herself poor in hand washing, and Jones rated herself poor in documentation skills, something she had been doing for years. Thus, the Respondent was not applying any new terms and conditions of employment.¹⁰

To illustrate the point further, if the unlawful change is that employees must increase their production of widgets from 8 to 10 per day, and an employee is fired for not meeting the new and unlawful requirement, the change and the discharge are unlawful. However, in the instant case, the unlawful conduct was the transfer of the employees. The principle that employees must perform competently and well was never changed. And it is that principle that caused the discharges.

Anheuser-Busch further illustrates the point. The unilateral change was the installation of the cameras. However, the rule that employees must refrain from misconduct was never changed. The employees were properly discharged for violating that rule.

The record also establishes that the discharges would not have been prevented by bargaining over the decision to transfer the UMs. Even if the Respondent had bargained over the decision to transfer the UMs, and even if the parties had agreed on enhanced training, the discharges would nonetheless have occurred, for these discharges resulted from the lack of cooperation and the consequent poor performance. Poor performance may be remedied by more training, but not if the trainee is non-cooperative.¹¹

On the basis of these facts, we find that the unilateral transfer of the UMs, like the unilateral action in *Anheuser-Busch*,¹² had no causal nexus to the discharges.

¹⁰ Our colleague posits that there was an 8(a)(5) violation with respect to an alleged refusal to bargain about training for their jobs. There was no such allegation or finding.

¹¹ Thus, contrary to the dissent, the failure to bargain over the transfer was not a factor in the discharge.

¹² The dissent contends that *Anheuser-Busch* is inapposite because the issue there was not whether the discharge violated the Act, but whether there was a connection between the discharge and the unilateral change warranting a remedy for the discharge. In our view, the

Rather, it is apparent that that the UMs were discharged because (1) they admitted that they could not perform the field work and (2) they showed a lack of interest in the training that the Respondent provided them. These factors, not the decision to transfer them, resulted in the UMs’ discharge. The Respondent committed an unfair labor practice when it unilaterally decided to transfer the employees, but that does not relieve the UMs of all responsibility for their subsequent conduct. By their own admission, the UMs simply could not perform the work of the field nurse position, and they showed disinterest, if not disdain, for the training that the Respondent provided to them. In these circumstances, there is an insufficient link between the failure to bargain and the discharges. Accordingly, we find that the Respondent did not discharge the UMs in violation of Section 8(a)(5) of the Act.¹³

B. The 8(a)(3) Allegation

The General Counsel argues that the UMs engaged in protected conduct by discussing among themselves and with the Union the deficiencies in the training they had received, by attempting to obtain information during the training from their instructor, and by addressing their demands to the Respondent through the Union at the negotiating table. The General Counsel also claims that the Respondent was hostile towards the UMs because of their protected activity and that it terminated or laid them off on that basis.

We find that the General Counsel has not met his initial burden under *Wright Line*¹⁴ of establishing that the Respondent’s decision to discharge the UMs was unlawfully motivated. While the record shows that the UMs engaged in union activity and that the Respondent had knowledge of this activity, there is insufficient evidence to establish that the Respondent was hostile to the UMs because they had joined with the Union in requesting training. Indeed, the Respondent attempted to accommodate the Union’s training demands. As noted above, Hoosain testified that the nurses had requested a longer training program and that Training Director Wray-Langevine had identified two 6-week programs that cost \$1195 and \$725, respectively. However, the reason for

issue in *Anheuser-Busch* was whether the discharge was caused by the unilateral change. If a discharge is not caused by the unilateral change, it does not warrant the finding of a violation or a remedy.

¹³ Our dissenting colleague asserts that we have erred in relying on an argument not advanced by the Respondent. We disagree. It is clear that the Respondent argued that the discharge of the UMs resulted from their refusal to cooperate with the training and their admission that they were unqualified to perform the field nurse work, and not from the Respondent’s unilateral action.

¹⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

the rejection of these programs was not protected activity. Rather, Hoosain testified that the Respondent could not afford to pay for these programs in addition to the nurses' salary. As discussed above, it is undisputed that the Respondent was losing money and was working to reverse such losses. It is also undisputed that the Respondent increased its original training proposal from 1 to 2 weeks after the Union requested a longer refresher course. Accordingly, we find that the General Counsel failed to establish that the Respondent's discharge of the UMs was motivated by their demand for training. In any event, assuming arguendo that the General Counsel did establish prima facie that the discharges were in part motivated by protected activity, we have found, as discussed above, that the UMs would have been discharged in any event because they could not perform the work and because they showed a lack of interest in the training provided to them. Thus, the Respondent satisfied its *Wright Line* burden of proving that it would have discharged the UMs even if they had not been engaged in protected activity.

AMENDED REMEDY

As stated above, we are adopting the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring the UM nurses to field nurse positions. The standard remedy for this unfair labor practice would be to order the Respondent to bargain about the matter and, pending bargaining, to rescind the unlawful transfers and to make the UMs whole for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful conduct. However, as the judge recognized, the standard remedy is not appropriate in the particular circumstances of this case. The parties have now bargained about the matter. On March 14, 2002, the parties entered into a collective-bargaining agreement, which contained a management-rights clause privileging the Respondent to take the unilateral action at issue here. Further, in light of this contract provision, it is clear that the UM nurses, would in any event have been lawfully transferred to field nurse positions as of March 14, 2002. We therefore find that their right to return to their former positions ended at that time.

However, the nurses are entitled to backpay, at the UM rate from the date of their transfer (August 13) until March 14, 2002.¹⁵ Therefore, we shall order the Respondent to make whole the UM nurses for any losses attributable to its unilateral transfer, as set forth in *Ogle Protection Services*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283

¹⁵ The lawful discharge of September 13, 2001, did not toll backpay as that discharge was from the field nurse position.

NLRB 1173 (1987), for the period of August 13, 2001, to March 14, 2002.

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, Essex Valley Visiting Nurses Association, East Orange, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without affording Health Professionals and Allied Employees, Local 5122 the opportunity to bargain, transferring employees, eliminating job classifications, or making any other changes in terms or conditions of employment of its employees in the following bargaining unit:

All full-time and regular part-time (including regular per diem) Registered Nurses and Licensed Practical Nurses employed at its East Orange, New Jersey facility, but excluding all office clerical employees, managerial employees, confidential employees, guards, and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Stella Savino, Anne Schepers, Shirley Lambert, and Patricia Jones whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct until March 14, 2002, as set forth in the amended remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in East Orange, New Jersey, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Re-

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gion 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 13, 2001.

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

MEMBER WALSH, dissenting in part.

I agree with the judge and my colleagues that the Respondent violated Section 8(a)(5) of the Act when it unilaterally transferred in-house administrative nurses to field positions without bargaining with the Union. However, my agreement with my colleagues ends there. As explained below, I agree with the judge that "since it is clear that [the nurses'] terminations resulted from this unilateral transfer, the terminations are also violative of Section 8(a)(1) and (5) of the Act."¹

I. FACTUAL BACKGROUND

The basic facts of this case are not in dispute. The Respondent, a provider of home health care services, was transferred at no cost to New Community Corporation (NCC) in July 2000, because the Respondent was suffering substantial losses that its prior owner no longer wished to incur. NCC and the Respondent had consistent missions of providing services in the city of Newark, and thus NCC wanted to acquire the Respondent notwithstanding its financial situation.

The Respondent employs or employed registered nurses (RNs) and licensed practical nurses (LPNs) in the classifications of field nurse, utilization management nurse (UMs) and home care coordinator (HCCs). The field nurses provide direct patient care and are the Respondent's main source of generating revenue. The UMs and HCCs perform administrative functions. The UMs make sure that the Respondent is paid for the services it renders. They deal with insurance companies, health

maintenance organizations, Medicaid, and Medicare. The HCCs perform discharge planning and obtain referrals of discharged hospital patients who need health care in their homes. The nurses involved in this case were RNs who were employed as UMs.

The Union was certified on February 5, 2001² as the bargaining representative of the Respondent's RNs and LPNs. The Respondent and the Union began negotiations for an initial contract in early May.

In July, Shakir Hoosain replaced the Respondent's previous chief executive officer. As of August 1, the Respondent lost three hospital contracts that had been generating substantial revenues. Hoosain concluded that changes needed to be made to address the large amounts of money the Respondent had been losing. Effective August 1, 24–27 nonunit positions were eliminated.³ The Respondent also decided to stop participating in managed-care contracts. It had been losing money on these contracts, which provided a significant portion of the work for the UMs. In addition, the Respondent decided to transfer the UMs to field nurse positions so it could service more cases and hopefully increase revenues.

On July 26, the Respondent wrote to the Union, proposing to transfer three of the four current UMs to field nurse positions. The Union responded to the Respondent's proposal on July 27 by requesting information about a "[p]lan for training, orientation, and upgrading of skills for UM nurses."

At an August 1 bargaining session, the Respondent expanded its transfer proposal to include the fourth UM and two HCCs.⁴ The Union expressed opposition, but made several suggestions to forestall or avoid the decision to transfer the nurses. Training was discussed extensively. The Union said that the transferred nurses would need a refresher course. It mentioned that such a course could be as long as 6 months. Initially, the Respondent said it would provide 1 week of training. It then caucused and indicated that it would furnish 2 weeks of training. The Union proposed several alternatives to the transfer, including having clinical managers and per diem nurses perform the needed field work.

Correspondence between the parties followed. In an August 2 letter, the Respondent stated, among other things, that the proposed changes were necessary to respond to the economic situation confronting it. In an

² All dates hereafter are 2001 unless otherwise indicated.

³ Approximately half of these employees were transferred to other jobs throughout NCC's organization.

⁴ The HCCs who were transferred are not at issue in this case. The Respondent ultimately offered them reinstatement to their prior positions, and they refused these offers.

¹ I also agree with the judge that it is unnecessary to reach the issue of whether the Respondent violated Sec. 8(a)(3) of the Act by terminating the nurses.

August 3 letter, the Union formally requested bargaining over the changes and demanded that they not be implemented. On August 8, the Respondent refused the Union's request not to implement the changes, asserting that, after the August 1 meeting, "the matter was resolved."

At an August 8 meeting, Hoosain and Director of Nursing Donna Fountain told the affected UMs, Stella Savino, Anne Schepers, Shirley Lambert, and Patricia Jones, that their transfers would be effective August 30.⁵ In an August 13 letter, the Union again objected to the unilateral implementation of the reorganization. In addition, on August 13, the Respondent began its 2-week in-house training program, conducted by Training Director Janine Wray-Langevine. It also started sending the UMs into the field to observe other field nurses performing their duties. On their first day of training, the UMs were given self-evaluation forms to complete.

On August 15, the parties met for another bargaining session. The Union asserted that the Respondent was acting in bad faith by implementing the transfers without bargaining. The Respondent asserted that it had bargained and had discussed the effects of its decision. At a meeting the following day, the Union expressed to the Respondent some of the concerns it had received from the UMs who had started training. The UMs complained about having to watch videos about the history of the Respondent. Some of them had to miss certain classes because they needed to complete their UM work or because their part-time schedules conflicted with the class schedule.

Sometime after the August 15 bargaining session, Wray-Langevine investigated training options and identified two 6-week programs that cost \$1195 and \$725, respectively. Hoosain testified that he discussed these options with Nursing Director Fountain and that they decided that they could not afford to pay for these programs in addition to the nurses' salary. Thus, the Respondent never discussed these courses with the Union.

On August 24, the Union sent another letter objecting to the transfer, requesting additional bargaining, and

again expressing concerns over the training that had been provided. The Union insisted once again that the transferred employees required a real refresher course. The Respondent responded on August 27, asserting that the issues had been discussed numerous times and that the employees were showing no interest in the training. That letter also contained the following statement: "If after the training session, the UM and HCC nurses are unable to perform field nurse positions, or refuse, they will leave us with no choice but to lay them off until they are qualified to perform field nurse work or another position within EVVNA becomes vacant which they are qualified to fill." On August 29, the Respondent sent letters to each of the four UMs, summarizing the facts concerning their transfers effective September 4. On September 4, the UMs were notified by Hoosain and Fountain that the transfers were in effect.

On September 6, the parties met again. The Union inquired about the on-going training. The Respondent responded that, based on its review of the evaluations completed by the UMs, it would assess its position. In a September 12 letter, the Respondent notified the Union as follows:

[W]e have reached the decision that they cannot perform the field nurse job and due to the reorganization and their acknowledged lack of knowledge, no other position is currently available to them. Of course, in the event these individuals choose to obtain education providing them with the necessary skills to assume the field nurse job, we will consider them for available positions.

The next day, September 13, the Respondent sent identical discharge letters to Savino, Schepers, Lambert, and Jones, asserting that they were not qualified to perform the duties of a field nurse.

In a September 14 letter, the Union protested these discharges. It claimed that the discharges were indicative of antiunion animus. It also pointed out that it had previously told the Respondent that the UMs would need additional training and that the Respondent had failed to provide that training. The Respondent responded on September 18, indicating that the UMs themselves had confirmed their inability to perform nursing functions. In a mid-September phone call concerning the termination of the UMs and the Respondent's failure to give them severance pay, the Respondent again stated that the UMs' behavior during training was unacceptable and that their self-evaluations were poor.

The Union saw an ad in the paper in late October for HCCs and called the Respondent to ask if it would be recalling any of the UMs to the HCC positions. The Re-

⁵ Savino testified that she was hired by the Respondent in 1990 or 1991 as a medical review nurse, which later turned into the UM position. She also testified that she had not performed direct patient care in about 20 years. Schepers testified that she was hired by the Respondent in 1995 as a per diem staff nurse and that she transferred to a UM position in approximately 1995. Lambert testified that she was hired in 1991 as a medical review nurse 3 days a week and as a field nurse 2 days a week. After approximately a year, she became a full-time medical review nurse, which later became the UM position. She testified that medical review nurses performed no patient care. Jones testified that she was hired in 1991 as a community health nurse and field nurse, and that she transferred to a medical review position in 1992.

spondent refused to do so because of the UMs' behavior during training. On November 1, the Union requested that the Respondent get back to it concerning the recall of the UMs. The Respondent replied on November 7, repeating that the nurses admitted that they were unable to perform basic nursing tasks.

II. ANALYSIS

A. Application of the *Great Western Standard*

In *Great Western Produce*, 299 NLRB 1004, 1005 (1990), the Board set out the following test for analyzing discharges and other discipline alleged to violate Section 8(a)(5): "If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5)." (Emphasis added.) The Board reasoned as follows:

An employer that refuses to bargain by unilaterally changing its employees' terms and conditions of employment damages the union's status as bargaining representative of the unit employees. That status is further damaged with each application of the unlawfully changed term or condition of employment. No otherwise valid reason asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition.

Id. at 1005.

The Respondent's action was certainly a factor, if not the only factor in the UMs' discharge. First, there can be no doubt that there is a causal relationship between the unilateral change and the discharges. Thus, had the unilaterally implemented transfers not occurred, the UMs would have remained in their in-house positions and would not have been discharged. Therefore, the Respondent's unilateral conduct was unquestionably a factor in the discharges.

Second, even the Respondent acknowledged that the UMs needed training before they could perform adequately as field nurses. Yet, the Respondent failed to bargain over the training issue before it discharged the UMs as unqualified to serve as field nurses.

The record makes it clear that the Union repeatedly requested a refresher course and repeatedly asserted that the training the UMs were receiving was inadequate, but the Respondent summarily dismissed the Union's concerns. Thus, as the judge found, at the end of the parties' August 1 meeting, bargaining had not been completed on the training issue. The Union was still pressing for a refresher course for the UMs, while the Respondent had offered 2 weeks of in-house training. At that point, the Respondent had not even investigated the possibility of a refresher course of less than a 6-month duration, as the

Union had mentioned. When the UMs subsequently complained about the in-house training and again requested a refresher course, the Respondent then investigated and identified two 6-week courses. However, it decided it could not pay for even these shorter courses, so it never brought them to the Union's attention. The Respondent's approach toward its bargaining obligation is well summarized in its letter of August 8 in which it declared to the Union that, after the August 1 meeting, "the matter was resolved." Thus, it is apparent that the Respondent did not bargain over the training, but instead unilaterally implemented the 2-week in-house training. This unilateral decision made futile any further efforts to bargain over the training issue.

Of course, we do not know for certain that had the Respondent fulfilled its bargaining obligation, the UMs would have received sufficient training to perform ably as field nurses. But to the extent that there is a lack of certainty on this point, such uncertainty should be resolved against the Respondent as the wrongdoer. As the Supreme Court stated in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 256 (1946), "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." Resolving the doubt against the Respondent, the party who violated the Act, it logically follows that there is a causal relationship between the Respondent's failure to bargain over the training issue and the UMs' inability to perform the field nurse job.

B. Response to the Majority

The majority's conclusion that the Respondent did not violate Section 8(a)(5) of the Act when it discharged the UM nurses is unsupportable. First, the majority uses an incorrect standard to analyze the Section 8(a)(5) discharge allegation. Second, even under that standard, the majority reaches the wrong result. Third, the majority fails to acknowledge that the Respondent's refusal to bargain about the training was an integral part of the Respondent's unlawful unilateral action. Finally, the majority affords more weight to the nurses' self-evaluations than they deserve.

1. Reliance on incorrect standard

As discussed above, *Great Western* provides the proper test for analyzing discharges under Section 8(a)(5). Yet, the majority states: "Where an employer unilaterally changes the terms and conditions of employment in violation of Section 8(a)(5) of the Act, a discharge resulting directly from that unilateral change may also violate Section 8(a)(5)." *Great Western* requires that the unilateral action be a factor in—not the direct cause—of the discharge, and the word "may" no-

where appears in the *Great Western* test; if the unilateral action is a factor in the discharge, the discharge violates Section 8(a)(5).⁶

My colleagues rely primarily on *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004), to support their “direct causal nexus” theory.⁷ In *Anheuser-Busch*, I joined Chairman Battista in finding that the respondent violated Section 8(a)(5) by unilaterally installing and using surveillance cameras without giving the union notice and an opportunity to bargain. Sixteen employees were later disciplined for misconduct the respondent observed through use of the cameras. Over my dissent, Chairman Battista and Member Schaumber denied make-whole relief to these employees, finding “an insufficient nexus . . . between the Respondent’s unlawful installation and use of the cameras and the employees’ misconduct to warrant a make-whole remedy.” *Id.* at 562.

I adhere to my *Anheuser-Busch* dissent, but even assuming make-whole relief was properly denied in that case, it is factually distinguishable. In *Anheuser-Busch*, the majority emphasized that the employer changed no rules or codes of conduct—the employees were disciplined for violating preexisting rules or standards of conduct. Here, the Respondent unilaterally transferred the UM nurses to field nurse positions, thereby changing all of their duties and the conduct it expected of them. It then discharged them when they could not perform the new job duties that the Respondent unlawfully imposed. Thus, this case and *Anheuser-Busch* are factually poles

apart. Therefore, *Anheuser-Busch* does not support the majority’s decision here.⁸

2. An 8(a)(5) violation is established under the majority’s test

Even applying the majority’s erroneous test to the present situation, it is perfectly clear that the discharge of the UM nurses resulted directly from the Respondent’s unilateral action in transferring them into the field. The nurses were discharged for being unable to perform duties that were the very subject of the 8(a)(5) violation my colleagues and I all agree the Respondent committed. As noted above, the UM nurses performed purely administrative work—they had no direct patient care responsibilities. Upon their transfer to the field, they were responsible for hands-on patient care, despite the fact that they had not performed patient care for some 10 to 20 years and despite many changes in the nursing occupation. The Respondent unilaterally put them in a position where they were required, without adequate training, to perform duties they did not feel comfortable performing. It then discharged them when they admitted they could not perform the unlawfully imposed duties.⁹ Without a doubt, their transfer had a “direct causal nexus” to their discharge.

3. The refusal to bargain over training was an integral part of the Respondent’s unlawful unilateral action

The majority also asserts that the UMs could not perform the duties required of them despite the training they were provided. In this regard, the majority claims that the training provided to the UMs was at least adequate because it was the same training provided to new hires. However, it is not the Board’s place to assess the adequacy of the training. The extent, the adequacy, and the duration of the training were issues to be bargained as part of the Respondent’s decision to transfer the UMs to field nurse positions. As noted above, this bargaining never took place. This failure to bargain over training was one of the reasons why the judge found, and my colleagues agree, that the Respondent violated Section

⁶ The majority claims that I have misinterpreted *Great Western*. According to the majority, *Great Western* requires that a discharge be the “result” of the unilateral change for the discharge to violate Sec. 8(a)(5). Actually, it is the majority that has misinterpreted *Great Western*. The majority seizes on a phrase in *Great Western*, removes it from its context, and ignores the two sentences that follow:

We shall continue to apply the following test for analyzing discharges and other discipline alleged to violate Section 8(a)(5): If the Respondent’s unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5). [*Great Western*, 299 NLRB at 1005 (emphasis added) (footnote omitted).]

Obviously, a discharge that is the “result” of the unilateral change violates Sec. 8(a)(5). *Great Western* sets a lower standard for establishing a violation: the unilateral action need only be a factor in the discharge. That lower standard is the one the majority should be applying here, and its adamant refusal to do so is erroneous as a matter of law.

Boland Marine, 225 NLRB 824 (1976), *enfd.* 562 F.2d 1259 (5th Cir. 1977), relied on by the majority, predates *Great Western*. Subsequent cases have applied the *Great Western* test. See *Consec Security*, 328 NLRB 1201 (1999); *Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001).

⁷ The “direct causal nexus” issue was not raised by the Respondent in its exceptions, and, as such, is not properly before the Board. See, e.g., *Ave Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (argument not made by excepting party itself is not procedurally before the Board).

⁸ *Anheuser-Busch* is also inapposite for another reason. In *Anheuser-Busch*, there was no complaint allegation that the discipline of the 16 employees violated Sec. 8(a)(5). The majority and the dissenting opinions disagreed on the remedial issue of whether there was a sufficient causal nexus between the unlawful unilateral conduct and the discipline to warrant a make-whole remedy. By contrast, in the instant case, the issue is not one of remedy, but whether there was a violation of the Act in the first place: Did the Respondent violate Sec. 8(a)(5) by discharging the UMs?

⁹ Given these undisputed facts, there is no merit in the majority’s assertion that “the Respondent was not applying any new terms and conditions of employment” when it discharged the nurses.

8(a)(5) when it unilaterally transferred the UMs to field nurse positions.¹⁰

In sum, it is undisputed that the Respondent violated Section 8(a)(5) when it unilaterally transferred the UMs to field nurse positions without bargaining with the Union over several relevant issues, including the training they needed to successfully perform the new job duties the Respondent imposed upon them. Nevertheless, the majority illogically concludes that there is no causal nexus between the unfair labor practice the Respondent committed and the discharge of the UMs.

4. The nurses' self-evaluations are entitled to little weight

My colleagues also stress that the UMs indicated in their self-evaluations that they were unable to perform the field nurse job. The majority affords these evaluations more weight than they deserve. First, the self-evaluations were completed on the first day the nurses attended training. At that time, there could be no legitimate way that the Respondent and/or the nurses could predict what the nurses' skill levels would be at the end of the training. Second, the nurses were not given any significant instruction as to how or why the self-evaluations were to be completed. They were not told that the evaluations might be used to determine their continued employment, and they were not given an opportunity to discuss the evaluations with management before being terminated. Since the evaluations were completed at the beginning of the training, it would have been reasonable for the nurses to assume that they would be used as diagnostic tools to help the Respondent determine which skills should be taught or focused on during the training. Third, although the Respondent advised the Union on September 6 that, based on its review of the self-evaluations, it would have to assess its position regarding the ongoing training, it never notified the Union about any such assessment. Instead, less than 1 week later, it notified the Union that the UMs would be discharged "due to their acknowledged lack of knowledge."

5. Conclusion

For all the reasons set forth above, the Respondent's unlawful unilateral action in transferring the UMs into the field—including its refusal to bargain over the necessary training—was a factor in their discharge. As such,

¹⁰ The majority is correct that there was no allegation or finding that the refusal to bargain about training, standing alone, violated Sec. 8(a)(5), and I do not "posit" otherwise. I simply stress that the refusal to bargain over training was an integral and essential component of the 8(a)(5) violation that was alleged and found, i.e., unilaterally transferring the UMs to field nurse positions without affording the Union an opportunity to bargain.

the discharges also violated Section 8(a)(5) of the Act. *Great Western*, supra.

REMEDY

Since the UMs were discharged in violation of the Act, they are entitled to a remedy for this violation. The majority awards backpay to the UM nurses from their August 13, 2001 transfer until March 14, 2002, the date on which the UM nurses would have been lawfully transferred to field nurse positions. This provision of the majority's decision correctly remedies the Respondent's unlawful conduct in transferring the UM nurses to field nurse positions. However, similar to the make-whole relief I found necessary in *Anheuser-Busch*, the Respondent's unlawful conduct in discharging the UM nurses must also be remedied. Therefore, the UMs should be offered reinstatement to the field nurse position and made whole for any loss of earnings resulting from their unlawful discharge.¹¹ Backpay should begin again on March 14, 2002, and continue until the employees receive a proper offer of reinstatement to the field nurse position.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you as set forth above.

¹¹ In *Great Western*, the Board also stated that, as a remedial matter, "a respondent may avoid having to reinstate and pay backpay to an employee discharged pursuant to an unlawfully instituted rule or policy if the employer demonstrates that it would have discharged the employee even absent that rule or policy." 299 NLRB at 1066. In the present case, however, had the unilaterally implemented transfers not occurred, the UMs would have remained in their in-house positions and would not have been discharged. Therefore, the Respondent cannot show it would have discharged the employees even absent its unlawful unilateral change.

WE WILL, within 14 days of the Board's Order, offer Stella Savino, Anne Schepers, Patricia Jones, and Shirley Lambert full reinstatement to their former position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Stella Savino, Anne Schepers, Patricia Jones, and Shirley Lambert for any loss of pay they may have suffered as a result of their unlawful transfer to the position of field nurse until March 14, 2002, the date on which the parties executed a collective-bargaining agreement.

ESSEX VALLEY VISITING NURSES ASSOCIATION

Benjamin W. Green, Esq., for the General Counsel.
David Jasinski, Esq. and *Karen M. Williams, Esq.* (*Jasinski & Paranac, P.C.*), of Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Health Professional and Allied Employees, Local 5122 (the Union), the Regional Director for Region 22, issued a complaint and notice of hearing on January 31, 2002, alleging that Essex Valley Visiting Nurses Association (Respondent), violated Section 8(a)(1) and (5) of the Act, by in substance unilaterally implementing the transfer of certain employees to field nurse positions without affording the Union an opportunity to bargain with respect to this conduct and the effects of such conduct, and by terminating the employment of four employees on the grounds that they were unqualified to perform the functions of the field nurse position.

On May 31, 2002, the Acting Director issued a first amended complaint against Respondent, adding the allegations that the termination of the four employees was also violative of Section 8(a)(1) and (3) of the Act by discriminating against these employees and discouraging membership in the Union.

The trial with respect to the allegations in the above complaints was held before me in Newark, New Jersey, on June 12, 13, and July 10 and 11, 2002. On the first day of trial, General Counsel further amended the complaint to read that the four employees were terminated because they formed, joined, and assisted the Union and engaged in concerted activities.

Briefs have been filed, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is engaged in the provision of home health care services from its East Orange, New Jersey facility. Annually, Respondent derives gross revenues in excess of \$250,000 and purchases goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey. It is admitted and I so find that Respondent has been 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. RESPONDENT'S OPERATIONS

Respondent was previously associated with and managed by East Orange General Hospital, under the aegis of Essex Valley Health Care Inc. (EVHC), which is a holding company, that had a real estate operation, as well as the hospital. EVHC also operated Care at Home, a company that supplied home health aides, as opposed to Respondent, who supplied skilled visiting nurses to clients.

Prior to July 2000, EVHC asked New Community Corporation (NCC), a large community development corporation to take over control of Respondent and Care at Home. Respondent was losing money at the time, and EVHC was "dumping a lot of money into it." Therefore EVHC was happy to get Respondent off their hands. Thus EVHC transferred the assets of Respondent and Care at Home to NCC at no cost.

NCC essentially is top management for a number of profit and nonprofit corporations, including New Community Health Care Inc. (NCHC), which is a nursing home and is responsible for managing NCC's health care operations. Respondent was placed under the control of NCHC, which also operates Care at Home, several medical day care centers and a Family Service Bureau.

NCC desired to acquire Respondent, although it was losing money, because Respondent was providing services to the inner city of Newark, as did NCC, and therefore their missions were compatible.

Mary Hanna was the CEO of Respondent, at the time of the transfer. On November 1, 2000, she sent a memo to Monsignor Linder, the CEO of NCC, proposing various steps to address a shortage of nurses. Thus included bonuses, salary increases, and recruitment efforts, but did not propose any transfers of nurses from administrative positions.¹

In July 2001, Mary Hanna was replaced as CEO by Shakir Hoosain. That decision was made by the board of directors of NCHC, and Hoosain was notified of the decision by Linder. Hoosain is also the CEO of NCHC. Vincent Gold is the director of finance for both Respondent and NCHC.

Linder is both the CEO of NCC and a board member of NCHC; and receives regular reports of Respondent's operations. NCC centrally coordinates recruitment for the various health agencies (NCHC), including Respondent.

NCC provides regular loans and services to Respondent, such as accounting, human resources, transportation, and security. Since Respondent has been suffering large losses, NCC has been paying the salaries of Respondent's employees, including that of Hoosain. Although there are loans on the books of these companies, to cover the costs of these loans and services, they have not been paid back, and no effort has been made to collect these loans to date. Thus there is a continuing

¹ The record reflects that Respondent attempted to implement some, but not all of Hanna's recommendations. Thus, it did offer nurses a sign on or recruitment bonus, and attempted to recruit foreign nurses, but it does not appear that it raised salaries of the existing RN staff, nor hired a full-time nurse recruiter, as recommended by Hanna.

transfer of cash from NCC to Respondent that generates an intercom any liability, to pay for Respondent's losses.

Respondent employed registered nurses (RN), and licensed practical nurses (LPN) in classifications including field nurses, utilization management nurse (UM), and home care coordinator (HCC). Field nurses who are either RN's or LPN's provide direct patient care, and are Respondent's prime source for generating revenue. They visit patients in their homes to provide health care services, such as assessment of condition, checking medication, checking vital signs, giving injections and other medical services, and giving progress reports to the doctor and the Clinical Manager.²

UM's are primarily responsible for insuring that Respondent receives payment for the services that it performs, which is essentially administrative work dealing with insurance companies, HMO's Medicaid and Medicare. However, UM's are required to be licensed RN's with 2 years of clinical experience, since they also monitor and oversee the work of field nurses, and evaluate the care provided by the field nurses, and they need to know the appropriate diagnosis necessary for reimbursement.

HCC's are responsible for obtaining referrals of hospital patients being discharged for health care in their homes and performing discharge planning.

On February 5, 2001, the Union was certified as the collective bargaining representative of Respondent's RN's and LPN's. The parties did not start negotiations until May 2. Bernard Gerard, vice president of the Union was the Union's chief negotiator. He was accompanied by several employee committee members. David Jasinski, Respondent's attorney was its chief spokesmen and negotiator. He was accompanied by Mary Hanna for the first few meetings, and then by Hoosain and Gold after Hoosain became Respondent's CEO in place of Hanna.

III. RESPONDENT'S DECISION TO TRANSFER EMPLOYEES

As noted above Respondent was losing substantial amounts of money, when it came under the control of NCC. The amount of its losses continued to increase, and when Hoosain took over as CEO, he concluded that changes were necessary to address this deficit. In this regard, the number of nursing admissions, which is directly related to Respondent's income, decreased from 284 in August 2000 to 17 in August 2001. Additionally, Respondent lost contracts with three hospitals as of August 1, 2001.³

Hoosain after reviewing financial records with Gold, concluded that Respondent was losing money on its managed care contracts, and concluded that it would no longer perform managed case work any longer.⁴

As related above, even when Hanna was CEO, Respondent was suffering from an inability to recruit nurses, and she presented a plan to Linder to help rectify that problem. The lack of nurses was primarily responsible for the fact that Respondent

had to defer 540 referrals from July 2000 to July 2001, since it did not have enough nurses in the field to conduct patient visits.

Based on all of these problems, Hoosain concluded that drastic measures were required to increase revenues and decrease costs. Respondent decided to eliminate 24-27 mid- and upper-level positions, including top, mid and lower management, as well as clericals, secretaries, and other nonunit positions. This action was effectuated, effective August 1, 2001.⁵

As noted above, Respondent also decided to no longer participate in managed care contracts at approximately this time period.

Finally, Respondent concluded that as a result of these financial problems and its desire to increase the number of nurses in the field, that it would transfer UM nurses to field nurse positions. This would hopefully increase revenues, because more nurses in the field would allow Respondent to service more cases, and since managed care work would be eliminated, and it had lost 3 hospital contracts, there would be little or no need for the functions performed by UM's or HCC nurses.

Respondent notified the Union by letter dated July 26, 2001, from Jaskinski to Gerard, of its intention to transfer UM nurses to the field. The letter reads as follows:

Re: Essex Valley VNA

Dear Bernie:

In light of a series of changes which have had a direct impact on Essex Valley Visiting Nurse Association (EVVNA), including but not limited to, shortage of qualified nursing professionals, EVVNA has reviewed its immediate and future staffing needs.

For a variety of reasons, EVVNA proposes to transfer the current UM (Utilization Management) Nurses to field nurse positions. Management has determined, due to the changes in operation, these individuals can best serve the organization and meet the patient-care needs of our clients by providing direct patient care. Upon assessment of our needs, it is our proposal that we will need one UM Nurse who will continue full-time in that position and perform the necessary duties and responsibilities. Significantly, UM Nurses assigned to field nurse positions will not lose any pay or benefits.

We have reviewed all options and this proposal appears to be the only visible choice consistent with our commitment to provide quality healthcare services. Of course, as the Union representing the employees, we solicit your response to our proposal and any suggestions which you can offer to address this immediate issue. Since we have already scheduled a meeting for August 1st, we suggest we utilize the necessary time on that date to discuss our proposal, your specific response and position and any related matters.

The Union, by Gerard responded immediately, by letter of July 27, 2001, in which the Union requested information with

² Clinical managers are Respondent's supervisors.

³ This substantially reduced the work available for HCC's.

⁴ Managed care contracts provided a significant portion of the work of UM's.

⁵ The record reflects that Respondent arranged for the transfer of 13 of the employees affected by the elimination of their positions, to other jobs throughout NCC's organization.

regard to Respondent's proposed transfer of bargaining unit employees. This letter is set forth below:

Re: Essex Valley VNA

Dear David,

I am in receipt of your letter of July 26, 2001 outlining proposed changes to the Utilization Management department. These proposals are of serious concern to our union members at EVVNA and raise many questions.

Please, bring the information requested, and be prepared to answer the following questions at the meeting on August 1st so that we can have an informed discussion at that time.

- Job description for Utilization Management, Clinical Manager, and Field Nurse.
- Plan for training, orientation, and upgrading of skills for UM nurses.
- What other actions have been taken to bring in other field nurses, i.e., agency recruitment, use of per diem pool?
- What are the reasons or changes at EVVNA that will allow one person to effectively do the job of two full-time and two part-time personnel?
- Will non-bargaining unit employees be performing UM work?
- What is the plan for transition back to UM for these displaced nurses as additional field nurses are hired?

Sincerely,
Bernard W. Gerard, Jr.
First Vice-President

The parties met on August 1, as scheduled. The meeting began with Jasinski announcing that Respondent was expanding its initial proposal to transfer employees to include an additional UM nurse and two HCC nurses. Thus while in its July 26, 2001 letter, Respondent stated that it intended to transfer three UM nurses, it changed to four on August 1, 2001, which in fact represented the entire complement of UM nurses.⁶ While the initial proposal made no mention of HCC's, on August 1, 2001, Jasinski stated that two of the five HCC's would be transferred to the field,⁷ one present HCC would remain performing HCC work, and two other HCC's would do 50 percent HCC work and 50 percent other work.

Gerard was taken back by this increase in the number of employees affected and the inclusion of HCC's in the action, and indicated that he had only been prepared to discuss the UM's, based on Jasinski's letter. Nonetheless, the HCC's were discussed during the meeting, although most of the discussion dealt with the UM's.

With respect to the HCC's, Jasinski informed the Union that Respondent had lost several specific contracts with hospitals,

which substantially reduced the need for HCC's. He added that statistics demonstrated that Respondent was obtaining more referrals from hospitals where it did not have HCC's stationed.

Jasinski explained further that Respondent's revenues were dropping dramatically, which required something to be done, or else "we will not have an agency to negotiate a contract over." Jasinski added that Respondent had a severe shortage of field nurses, which in part caused it to defer or divert a large number of referrals, due to an inability to provide the necessary services.

Gerard on behalf of the Union expressed opposition to Respondent's proposal throughout the session, although it had a number of questions and made some alternative suggestions to forestall or avoid the decision to transfer employees to field nurse positions.

Respondent did not produce any of the information requested in writing at the August 1, 2001 meeting,⁸ but a number of the matters raised in the letter were discussed orally during the meeting.

The Union raised the issue of compensation. Jasinski responded that although some UM nurses received a higher salary than field nurses, they would not lose any compensation by virtue of the transfer, and would retain their old salary. Jasinski also informed the Union that HCC nurses, who received lower salaries than field nurses, would receive raises to go out into the field. The Union had no objection to either of these decisions.

The Union also asked, after a request from one of the HCC nurses, whether the transferred nurses could change from full time to part time. Jasinski replied that Respondent would accommodate any employee who wanted to change to part time or even per diem, if they so choose.

Gerard asked what efforts Respondent made to recruit additional nurses, and why it did not increase its use of per diem nurses. Jasinski replied that Respondent had consistently advertised and done everything it could to find RN's.⁹ With respect to per diems, as noted Gerard proposed that Respondent increase its use of per diem nurses, rather than transfer employees. However, Jasinski responded that although there was a large list of per diem's, very few of them made themselves available to work. Jasinski in fact pointed to Elmer Daniels, who was a member of the Union's negotiating committee, but who rarely made herself available for work, and did not call in or state that she was available.¹⁰ Hoosain in fact, stated to Gerard that the Union should provide Respondent with a list of per diem nurses who are ready to work. Gerard replied that Respondent had a list, and that the Union did not have access to the list. Moreover, Hoosain also mentioned that Respondent did not want to have a temporary work force, and it was looking for a regular work force and field nurses that it can rely upon on a regular basis. Therefore, since per diem nurses' schedule was at their whim, Respondent could not schedule

⁸ For example, it did not produce the job descriptions of UM's, field nurse or clinical managers, as requested.

⁹ Respondent did not however produce any documentation of its advertising efforts, until the August 15, 2001 meeting.

¹⁰ According to Jasinski the last time that Daniels had worked for Respondent was sometime in January 2002, some 6 to 7 months before the August 1, 2001 meeting.

⁶ The four UM nurses were Stella Savino, Anne Schepers, Shirley Lambert, and Pat Jones. Two of these nurses worked full time, and two part time.

⁷ The two HCC's who were to be transferred were Barbara Anello and Pam Hart.

nurses properly without being able to know their availability in advance.

Gerard asked who would be performing the work previously performed by the four UM's. Jasinski replied that the intake nurse (a bargaining unit position), would be able to perform the work, in part since Respondent would no longer be performing managed care work, which was responsible for a large portion of UM work. Jasinski stated that only bargaining unit members would be performing the work previously done by UM's. Gerard suggested that Respondent utilize clinical managers to go out into the field. Jasinski replied that clinical managers are not in the bargaining unit, and what they do is not the Union's concern.

In that regard, Jasinski testified at trial that when the Union made this proposal he rejected it in part because he was surprised that the Union would make such a proposal, since it was inconsistent with the Union's previous objections to Respondent's proposal to subcontract. However, he admits that he did not mention this at the negotiations. Further, according to Jasinski, after the offer was made by the Union, he discussed the proposal with his client during a caucus, and his client told him that the clinical managers had too much work to perform, so he (presumably Hoosain) did to want to send them to the field.¹¹

The Union raised the issue of whether the transferees would need a car to go to the field, since some of the employees did not own cars. After a caucus, Respondent informed the Union that the employees would not need a car. Gerard asked how employees would be able to cover their workload without a car, Jasinski replied that Respondent was "working on it."

The subject that produced the most extensive discussion at the meeting of August 1, 2001, was the issue of training. The Union took the position that the transferred nurses would need a refresher course, before going out into the field. Gerard noted that the nurses had not been in the field for a long period of time, and that they need a refresher course to upgrade their skills. Gerard mentioned that such a course could be up to 6 months in length, but did not insist on or propose a course of that length. Jasinski responded that Respondent intended to provide 1 week of in-house training, which would include nurses going out and observing current field nurses in their work. Jasinski stated that these nurses are all certified RN's, they have experience in the field, and in their current jobs, they review and check on the work of field nurses. Therefore, Respondent believed that 1 week of training was more than adequate. Further, Jasinski mentioned that in the year 2000, Respondent had transferred UM nurse Kathy Mahabir and HCC nurse Beverly Shalela to the field, and they did so without any training whatsoever. Gerard on behalf of the Union, continued to insist that a refresher course was necessary, and pointed out that training in paperwork alone, can take about a month.

Respondent then caucused, and indicated that it had considered the Union's concerns, and would furnish 2 weeks of train-

ing. Gerard replied that 2 weeks of training is not sufficient, and that the nurses needed a true skills upgrading refresher course. Jasinski replied that Respondent felt that 2 weeks would be sufficient.

Jasinski informed Gerard that Respondent had "exhausted all options," in trying to recruit additional nurses, and that it intended to transfer the employees in 30 days, but would start the 2 weeks training on or about August 13, 2001. He asked Gerard if the Union had any further questions. Gerard responded that he had no further questions at that time, but the Union would be seeking additional information from Respondent, and that the Union needed more time to continue bargaining. He added that the Union intended to discuss these matters at the next session. Jasinski made no response to this statement and the meeting concluded.

Jasinski testified that after this meeting concluded, he felt that bargaining had been fully exhausted as to the decision to transfer the employees, and that the parties were either at impasse and or the Union had implicitly agreed with the decision to transfer the employees. Although Jasinski conceded that some issues particularly training and transportation were still unresolved, he asserts that Respondent viewed these issues as logistic or effects issues, which were not the same as the decision to transfer employees, about which Respondent believed bargaining had been completed.¹² Therefore the decision was made that Respondent would implement the plan to transfer employees to the field, effective 30 days later, with training to start on or about August 13, 2001.

Accordingly on August 2, 2001, Jasinski wrote to Gerard, summarizing what he believed to be the discussion at the August 1, 2001 meeting.

The letter states that the changes proposed by Respondent are necessary to respond to the changes confronting Respondent, and asked Gerard if the Union "had any other suggestions or comments regarding our proposal, we request your comments on or before Monday, August 6, 2001." The letter adds that requested information, including referrals and diversions will be sent under separate cover.

By letter dated August 3, 2001, Jasinski forwarded to Gerard a copy of the UM nurse job description, and mentioned that as of that date, Respondent announced a "further restructuring in the organization," which resulted in the elimination of non-Union position and transfer of other employees.

Interestingly, in neither of these letters, did Jasinski announce that Respondent believed that the parties were at impasse at the end of the August 1, 2001 meeting, or that agreement was reached on the decision to transfer unit employees to the field or that Respondent had made a final decision to implement the transfer as of August 2 or 3, 2000.

Gerard responded by letter of August 3, 2001, formally requesting bargaining over the changes, demanding that they not be implemented and requesting additional information, as follows:

¹¹ It is also significant that the job description for clinical managers, which was never turned over to the Union, although requested, states that clinical managers are expected to provide relief coverage for his or her team.

¹² Hoosain in fact testified that at the end of the August 1, 2001 meeting, he believed that Respondent's offers were exhausted and "we had agreed on something."

Dear David,

We demand to bargain over the changes you proposed at Wednesday's negotiating session. In order for us to prepare for those negotiations the following information is necessary for us to prepare our position and proposals. We further demand that you not implement any of the proposed changes until the conclusion of such negotiations.

As per my letter of July 27, 2001 we hereby renew our request for the following: (Please note the request is updated in response to your additional proposals)

- Job description for Utilization Management, Clinical Manager, Home Care Coordinator, and Field Nurse. (I have received the UM and RN description today)
- Plan for training, orientation, and upgrading of skills for UM nurses and HCC personnel. Please provide the curriculum detail on a day-by-day basis including preceptor over site in the field.
- What other actions have been taken to bring in other field nurses, i.e. agency recruitment, use of per diem pool? Please provide the names of agencies, person spoken to, date and response. Provide the names of the per diems called, the date and their response.
- Will non-bargaining unit employees be performing UM and HCC work?
- What is the plan for transition back to UM and HCC for these displaced nurses as additional field nurses are hired?

In addition to the above information request and in response to our discussion Wednesday night and your letter received by facsimile yesterday afternoon please provide us the following information.

- A complete outline of the restructuring being proposed including the proposed new job description for the Administrations nurse assigned to UM and the HCC nurse assigned to in-take.
- Provide details of how the work currently being done by the UM department will be completed by the Admissions nurse in addition to her current responsibilities.
- Provide details of the training for the Admissions and HCC nurses to assume their proposed new responsibilities.
- Provide documentation of deferrals that were directly related to the unavailability of a Field RN.
- As per your letter of August 2, 2001 you stated these changes are necessary "do to changes in the nursing service environment." Please provide full details regarding these changes.
- As per your letter of August 2, 2001, "there will be no requirement for the UM nurses to have a car." Please provide details as to your plans for how these nurses will be provided transportation in the field to see their patients.

As stated in your letter of August 2, 2001, we look forward to receiving the information on referrals and diversions.

This request is made without prejudice to the Union's right to file subsequent requests. Please provide the information by August 8, 2001. If any part of this letter is denied or if any material is unavailable, please provide the remaining items by the above date, which the Union will accept without prejudice to its position that is entitled to all documents and information called for in the request.

Upon timely receipt of this information we will be prepared to discuss these issues at our next negotiating session previously scheduled for August 15, 2001. If you would like to meet over these matters on an earlier date we would be willing to do so provided the above is received in sufficient time for us to properly prepare.

Sincerely,

Bernard W. Gerard, Jr.
First Vice-President

Jasinski responded by letter of August 8, 2001, essentially refusing Gerard's request not to implement the change, asserting that the Union had full opportunity to discuss the issue of the decision to transfer employees. Indeed he asserted that he believed that after the August 1 meeting, "the matter was resolved." He further contended that Respondent has no further information to submit and that the Union requests which deal with the "operation" as opposed to the decision itself, i.e.,— assignments of those who do not drive, will be responded to and discussed.

On the same day that Jasinski sent this letter (August 8, 2001), the employees were notified of the transfer at a meeting with Hoosain and Donna Fountain, Respondent's director of nursing. Fountain explained that the employees were going to be transferred to the position of field nurse, effective August 30, 2001, and informed them of what team each of them would be assigned.¹³ Shirley Lambert asked if the employees had any options. Fountain replied "what do you mean by options?" and then stated that there are no options or alternatives, this will be the new assignments for the employees.

By letter dated August 13, 2001, the Union again objected to Respondent's reorganization, accused it of committing an unfair labor practice and requested additional information as follows:

August 13, 2001

VIA FACSIMILE & LETTER

Dear David,

I received your letter, dated August 8, 2001, concerning the reorganization that has been implemented at Essex Valley Visiting Nurses Association (EVVNA). We continue to maintain that the unilateral implementation of the reorganization violates the National Labor Relations Act and is "bad faith" bargaining. In our view, EVVNA has

¹³ Respondent utilized a system of teams, designated by color, such as the "blue team," "green team," and "red team."

an obligation to bargain this issue with us prior to any implementation.

In order to effectively represent the members of our bargaining unit with respect to this issue, we request the following additional information:

1. The total number of home visits made by bargaining unit staff on a monthly basis since January 2001, broken down by category of visit (admission, revisit, etc.)
2. A list of the tasks performed by Utilization Management (UM) staff and who will be performing each of these tasks when UM staff is sent into the field.
3. Has the workload for UM staff increased or decreased since January 2001? Please provide a breakdown on a monthly basis.
4. A copy of all employment ads for RNs and LPNs placed in newspapers and journals since January 2001. Please provide, for each ad, the name of the publication and the date published. Indicate the number of applications resulting from each ad.
5. List any other activities used to recruit RNs and LPNs.
6. List the number of referrals from each hospital where HCC's are currently located on a monthly basis since January 2001.
7. A list of tasks performed by HCC's and who will be performing each task when they are sent into the field.
8. When did EVVNA management begin to discuss moving UM staff and HCC's into the field? Please provide all notes from any discussion of this topic.
9. What is EVVNA's analysis of why they cannot recruit and retain RNs and LPHs?
10. What actions have been taken to alleviate this problem besides the current reorganization? Does EVVNA believe that the elimination of the pension and reduction of health benefits has been a factor in creating the problem?

We look forward to a prompt reply to this information request.

Sincerely,
Bernard W. Gerard, Jr.
First Vice-President

Respondent did not reply to this letter, and did not submit any information to the Union, as requested, prior to the August 15, 2001 negotiation session.

On August 13, 2001, Respondent began implementation of its transfer decision, by starting its 2 week in-house training, conducted by Janine Wray-Langevine, as well as sending employees to make clinical visits to observe various field nurses performing their work.

The parties met again on August 15, 2001. Gerard began the meeting by asserting that Respondent had no legal right to implement the change, and that Respondent's implementation without bargaining was "bad faith bargaining." Jasinski responded that Respondent had bargained with the Union, it had discussed the effects, and that because of the changing nursing environment, it had to respond to it. He added that Respon-

dent had lost contracts, and there is no need for UM's because of the reorganization. Jasinski concluded that Respondent felt that it needed to do it, so "we decided to do it."

In response, Gerard presented in writing a temporary recruitment and retention package, which the Union believed could eliminate the need for the transfer. The proposal is as follows:

HPAE
Temporary Recruitment and Retention Package
August 15, 2001

The following changes in employees' wages and benefits will be implemented in order to improve the recruitment and retention of staff. The parties agree that these changes are temporary, interim measures and that the collective bargaining agreement that is negotiated by the parties may or may not contain the items listed below.

1. Wages—Increase the hiring rate by \$2/hour and employees' current wages rates by \$2/hour.
2. Pension—Establish a 401K-pension plan with an employer contribution of 4% of salary. Employee Contributions are voluntary.
3. Health Insurance—Eliminate employee co-payments.
4. Retention Bonus—\$1000 to current employees effective September 1, 2001.
5. Sign-in Bonus—\$2000 for new full-time and part-time employees.
6. Referral Bonus—\$2000 for current employees for referring new employee to EVVNA. \$1000 when new employee is hired and \$1000 when new employee passes probation.
7. Per Diem Visit—New Per Diem Employees to receive a \$1,000 sign-on bonus for doing 2 weekends per month. Visits will be paid at \$100.00 per admission and \$45.00 per re-visit. (If current Per Diem employees increase their visits to 2 weekends per month they will be paid at the aforementioned rates).

Respondent indicated that it would respond to the Union's proposal at the next bargaining session.

Gerard then requested that Respondent respond to the Union's previous information requests, and in fact he made a list combining the Union's prior requests, and orally went through his list with Respondent at that meeting. Jasinski answered some questions, but not others, produced some information, and as to some requests, indicated that the information would be provided subsequently.

For example, Jasinski informed the Union that it had been considering the transfer since December 2000. He also provided to Gerard copies of advertisements that Respondent had placed in order to recruit additional nurses, a copy of a recruitment bonus offered by Respondent, told the Union about efforts made to recruit nurses from Nigeria and Ireland, and that it intended to open a school for nurses. However, Respondent did not provide the Union with a list of agencies used to recruit nurses, or names and dates of per diems called by Respondent, in order to solicit them to increase their workload.

Jasinski told the Union that the workload of UM's has substantially decreased since January 2001, but it did not have a breakdown on a monthly basis, as requested. Jasinski indicated that Respondent did not have that information, but would do its best to provide these figures.

With regard to transportation, Jasinski repeated that nurses would not need a car, and stated that they should use public transportation. The Union asked how employees would be able to complete their workload by public transportation, and whether there would be an adjustment of workload on that basis. Jasinski replied that he didn't have any idea about that, but the issue would be discussed.

The clinical manager's job description was still not produced, although other job descriptions requested by the Union had been provided previously.

Jasinski explained concerning training, that Nurse Educator Langevine would be teaching training over a 2-week period, and that employees would go into the field and observe other nurses. However, the Union was not provided any details of the training curriculum, as it had previously requested.

The parties met again on August 16, 2001. At this session, Jasinski announced that Respondent would respond to the Union's temporary recruitment package at the next meeting. By this time, Respondent had began the in-house training of the UM's and HCC's, in preparation for the transfer. Several employees, such as Anello, Jones, Schepers, and Savino had called Gerard to register complaints about the training, such as that the employees watched videos about the history of Respondent, that some employees were still required to do UM work, and weren't able to attend all the classes, and that part time employees, because of their schedule were also missing some classes. Gerard expressed these concerns at the session, but the record does not reflect Respondent's response.

At the August 16, 2001 meeting, the parties signed off on a management rights clause, which had been proposed by Respondent back in May 2001, and which had been the subject of bargaining at several other meetings. The agreed-upon clause gave Respondent the "sole and exclusive right to manage its operations, to determine the workforce; . . . lay off . . . to assign duties and assignments to bargaining unit employees; to organize, discontinue enlarge or reduce a department, function or division; to assign or transfer Employees to other departments or shifts as operations may require." Notably although there was discussion over this clause, the Union did not contest any of the above language, although it did succeed in eliminating the right to subcontract from the Respondent's original proposal.

However, the parties had not agreed to implement provisions on an individual basis. In fact, the record reveals that on September 6, 2001, although the parties had already agreed on a grievance procedure and arbitration clause, Jasinski refused to utilize the grievance procedure to discuss the suspension of employee Anne Schepers, informing Gerard that since the full contract was not in place, "we can use the current grievance procedure from the manual."

On August 24, 2001, Gerard sent a letter to Jasinski, complaining about the training, objecting to the transfer, and again

demanding bargaining over the issue. The letter reads as follows:

August 24, 2001

Dear David,

HPAE strongly objects to the unilateral changes being made in the working conditions of the UM and HCC Nurses. These changes were being made because of a "need for more RNs in the field." During the past two weeks RNs and LPNs have been sent home because of a lack of work and referrals. This demonstrates the lack of need for this re-organization. Additionally, non-bargaining unit individuals are being trained to do the work of bargaining unit members.

The two-week training to familiarize the nurses with fieldwork has not been administered well. Members were responsible to do other duties, and therefore were not part of a full two-week training program. Part-time employees have only received some training as a result of their schedule. These nurses need a refresher course in care in the field to be competent in their practice. Without this the nurse is in violation of their Scope of Practice, N.J.A.C. 13:36.2(a) and the EVVNA in violation of Department of Health and Senior Services, Licensing Standards for Home Health Agencies, N.J.A.C. 8:42-7.3(b) and (d).

We renew or demand to bargain over this unilateral change. It is evident that no emergent circumstances existed which necessitated implementing this change prior to the opportunity to fully bargain over all aspects of this issue.

Sincerely,
Bernard W. Gerard, Jr.
First Vice-President

Jasinski responded by letter of August 27, 2001, essentially asserting that the issue had been discussed numerous times with the Union, and claiming that the employees were not cooperating in the training. The letter states as follows:

August 27, 2001

Dear Bernie:

We are in receipt of your letter of August 24, 2001. It is obvious that you have been misinformed on several points which we have previously discussed. Nevertheless, a brief response is warranted.

First neither RNs nor LPNs were sent home because of work or referrals. As you know, referrals are substantially down for 2001, however, once field RNs are sent into the field, this should generate additional work for RNs and LPNs.

Second, contrary to your letter, non-bargaining unit individuals are not in training doing the work of bargaining unit members. As we have repeatedly advised you, changes and improvements in operations have resulted in the admissions nurse and field nurses doing paperwork and necessary followup previously performed by UM nurses. This work has and will continue to be done by

bargaining unit personnel. It is apparent that the UM and HCC nurses refuse to accept the reality that the change in organization demonstrates a lack of, need for their specific positions. Finally, we have discussed our proposal and decision numerous times with the Union. Unfortunately, we cannot prevent hospitals from canceling their discharge planning contracts or magically increase the nursing staff or remain stagnant and not address the needs of our patients. Change is inevitable.

EVVNA made every attempt to accommodate UM and HCC nurses. Unfortunately, there simply doesn't seem to be any accommodation that would be acceptable to the UM and HCC nurses, short of no change. That option is not available. Since the announcement of the reorganization, the UM nurses have exhibited a complete lack of concern for the Agency, the nursing department and, most importantly, its patients. They have repeatedly exhibited intractable behavior and show no interest in the training sessions.

Finally, your letter only confirms that the UM and HCC nurses duties and responsibilities are consolidated within the organization without compromising our services. If after the training session, the UM and HCC nurses are unable to perform field nurse positions, or refuse, they will leave us with no choice but to lay them off until they are qualified to perform field nurse work or another position within EVVNA becomes vacant which they are qualified to fill. Prior to our September 5th bargaining session, if you have any questions, please advise.

Very truly yours,
JASINSKI AND PARAJNAC, P. C.
DAVID F. JASINSKI

On August 29, 2001, Respondent sent letters to the four UM employees, essentially summarizing the facts concerning their transfer, effective September 4, 2001, their assignment to a new team, and that their salary will remain the same. The letter states as follows:

August 29, 2001

Ms. Stella Savino
114 Cooper Avenue

Dear Ms. Savino:

Due to the critical shortage of field registered nurses, Essex Valley Visiting Nurse Association patient volume and visit volume has decreased dramatically this year. This decrease made it necessary to assess EVVNA. After careful analysis, it was determined that Essex Valley Visiting Nurse Association would have to restructure and decentralize several departments. On August 1st, HPAAE was notified of the agency's decision to consolidate the Utilization Management Department and transfer two Home Care Coordination into the field. In addition, two HCC's will continue (.5) as HCC's part-time to the Referrals / Admissions Department. On August 3rd several Essex Valley Visiting Nurse Association employees were laid off.

As a result, you were reassigned to the Blue Team as a field nurse effective September 4, 2001. As discussed on August 8, 2002, your salary and benefits will remain the same. Ms. Agnes Smith will be your immediate supervisor. In addition, like every other field nurse, you will be required to work one weekend every four weeks and the required holidays.

During this transition, you have begun your two-week orientation to your field nurse position. I would like to add that if in the future, the Utilization Management Department becomes essential to Essex Valley Visiting Nurse Association operation and you are still employed at Essex Valley Visiting Nurse Association, you would be notified to see if you would like to return to your former position.

Sincerely,
Donna Fountain
Vice President of Nursing and Executive Director

On September 6, 2001, the parties met once again. Jasinski rejected the Union's previously submitted Temporary Recruitment Package. Jasinski stated that Respondent has advertised in the paper and was offering a sign on bonus and retention bonus. With respect to the other aspects of the package, such as increases in salary and pension and health coverage, Jasinski stated that these matters would be addressed as part of the economic proposals in the contract, but would not be discussed as an independent temporary package in order to recruit additional nurses, as urged by the Union.

Gerard asked Jasinski about the on-going training, and what Respondent intended to do with the HCC's and UM's. Jasinski responded that based on its review of the self-evaluations made by the nurses, Respondent would assess its position.

Respondent never notified the Union about reassessment of its position with regard to training. Instead, as detailed more fully below, it discharged the four UM's on September 13, 2001.

The two HCC's affected, Hart and Anello, both went out into the field as field nurses for a short period of time in early September 2001. Both resigned shortly thereafter. Both were offered the opportunity to return to their positions as HCC in late September 2001, but both employees refused to accept. Hart refused to return to an HCC position, because Respondent would not agree to pay her the same salary as it did during her brief tenure as a field nurse.¹⁴

During bargaining Respondent repeatedly informed the Union that after the transfers all work previously performed by unit employees would be performed by other unit employees such as the admission nurse or the field nurses. However, the evidence establishes, that some work, particularly the reviewing and signing off on various forms prepared by field nurses, previously done by UM's, was subsequent to the transfer, done by clinical managers. While some evidence suggests, that in the past, the clinical managers would also review and or sign off on these forms, it was always after the UM's reviewed them first.

¹⁴ As related above, the field nurses were paid more than HCC's and when the HCC's were transferred to the field, they received raises.

IV. THE TERMINATION OF THE UM'S

As related above, Respondent's employees, including the four UM's Jones, Schepers, Savino, and Lambert were notified August 3, 2001 of Respondent's intention to transfer them to field nurse positions. The employees began discussing among themselves, that in view of their long absence from the field they were reluctant to return to that position, without a refresher course. They met with Gerard and advised him of their concerns, and he agreed that such a course would be advisable. They also notified Gerard of the inadequacies that they perceived in the orientation that they were receiving. As also related above, Gerard relaxed these concerns to management and attempted to obtain Respondent's agreement to provide a refresher course to employees, albeit unsuccessfully.

The in-house training was conducted by Langevine, starting on August 13, 2001. The trainees also included HCC's and some new employees; in addition to the 4 UM's. At the start of the training, the participants were given self evaluation forms to fill out. Although all of the UM's had substantial prior experience as RN's, they all evaluated their skill levels as "poor" with regard to the majority of nursing functions, including some "basic" functions, such as hand washing and the taking of a pulse. Jones even rated documentation skills, which were directly related to her position as a UM as "poor." The employees were not satisfied with the course given by Langevine, and on several occasions, she refused to answer their questions, telling them, "I'm not here to teach nursing." One of the questions asked that prompted this response was about handwashing and Langevine got angry. The nurse replied that Respondent had been cited by the state for poor hand washing technique in the past, so the question was important.

The UM's subsequently complained to Langevine about the training that they were receiving, and indicated that they needed a refresher course. Langevine replied that she would look into it, and speak to Fountain about the matter.

About a week after the training began, Schepers complained to Fountain about the training, and stated that the employees needed a refresher course. Fountain seemed perplexed that there would be any difficulty in going out into the field, and told Schepers to see how the orientation goes.

During August 2001, Langevine investigated refresher courses, and submitted a memo to Fountain, detailing two refresher courses that she had found which lasted from 6 to 8 weeks. Hoosain testified that he and Fountain discussed this memo and concluded that there was no 6-month program, that the Union had proposed. As for the two shorter programs that Langevine had found, Hoosain asserts that he and Fountain decided that Respondent could not afford to send four nurses to these programs, plus their salaries. Therefore, Respondent did not mention to the Union that it had found two courses, shorter than 6 months, because it was not prepared to pay for them.

During the course of the training some of the UM's missed part of the sessions, because they were part time, and some, such as Jones, missed part of sessions, because she had important work to perform. Moreover, Jones and Lambert were on vacation for the last week of the training.

On September 4, 2001, Savino, Schepers, Hart and a fourth nurse were called to a meeting with Hoosain and Fountain.

Hoosain informed the employees that the plan was in effect, and the employees would be going out into the field. Both Schepers and Savino objected, and informed Respondent that their training had not been adequate, that they were not ready to go out into the field without a refresher course. Savino reminded Hoosain that she had not done patient care in over 20 years. Hoosain responded by asking if the employees knew how to take a pulse or blood pressure or temperature? Schepers replied that they knew how to do these things, but that's not what the practice of nursing is. Schepers added that she did not ask for this position, and would not apply for the position without taking a nurse refresher course. The discussion became heated, and Hoosain told the employees that they could take a book into the patients apartment, if they needed to know something. The employees said that they needed CPR, and Hoosain answered that they would get CPR. Savino and Schepers continued to insist that they were not prepared to go out into the field, without a refresher course. Hoosain stormed out of the meeting obviously quite angered. After Hoosain left the meeting, Savino and Schepers repeated their position to Fountain, that the employees needed hands on training and a refresher course. Fountain did not respond and left the meeting. Savino then went to see Hoosain to try to resolve the matter. She went into Hoosain's office, and Hoosain told her that he had not invited her into his office. Fountain came into the office and told Savino that she would talk to them, and instructed Savino and Schepers to wait for her downstairs.

Savino and Schepers waited for Fountain, and again asked her about the refresher course. Fountain replied that Respondent had not made any decisions on that request. Savino had been assigned to go out into the field with another RN and she asked Fountain if she should go. Fountain said yes. Schepers, who had been assigned to go out with an LPN protested to Fountain that she would not go out with an LPN, because the scope of practice for an LPN differs from that of an RN. Fountain informed Schepers that she would talk to her further after she completed some work. Savino went out to her assignment with an RN.

Schepers waited for an hour, but Fountain did not talk to her. Schepers noticed that an RN was about to go into the field, and Schepers asked if she could accompany her. The RN agreed, but when Schepers called Fountain and asked if she could go out with the nurse who was about to leave Fountain told her no. Schepers could not go with that nurse, and that she would talk to her shortly.

At about 1:15 p.m., Schepers was summoned into Hoosain's office. Fountain was also present. Hoosain handed Schepers a letter of suspension for refusing a work assignment, insubordination, verbal abuse, and creating a hostile environment. Schepers read the letter, and complained that there was no verbal abuse or disruptive behavior, and stated that she had not even raised her voice. Hoosain replied that she would have to take it up with the Union. Hoosain asked Schepers why she would not go out with an LPN. Schepers responded that since she was training to be a case manager which only RN's can do, why couldn't she go out with an RN. Hoosain answered that there were no RN's there at the time. Schepers answered that

yes they were, and that she had called Fountain and informed her that an RN was leaving.

Hoosain then asked why Schepers was unwilling to go into the field by herself. She responded that the employees had not finished their training, and she didn't feel qualified and still had questions. Hoosain asked what question did she have? She mentioned that she was confused about how to interpret PT and INR values. Hoosain gave a response. Hoosain asked if she could take a temperature and blood pressure? She replied that there was more to nursing than temperature and blood pressure. After some further discussion, and Hoosain attempting to tell Schepers what she could do, Schepers said to him, "why can't you go out in the field and do this if you know all the answers to these clinical questions." Hoosain answered that he did not have a license. Schepers continued, "so the only difference between you and myself is that you don't have a license and I do." Hoosain said yes. At that point, Schepers asked if she could leave and then left the office.

Subsequent to September 4, 2001, Savino made several requests of Fountain as to whether Respondent would pay for a refresher course. Fountain replied that Respondent had not made any decisions as yet, and did not inform her of the shorter courses that Langevine had brought to her attention.

On September 5, 2001, Schepers returned to work and sent a letter responding to her discipline. The letter reads as follows:

September 5, 2001

Dear Mr. Hoosain:

In response to the letter of suspension I received on September 4, 2001, I respectfully disagree with Ms. Fountain's account of our conversation and description of my behavior. My recollection of the events and conversation are as follows:

One of the staff LPN's approached me and told me she was ready to go out in the field and that I was to go with her. I told her I needed to speak with Jeanine Wray-Langevine regarding this assignment. I then found Jeanine and informed her that I was not going into the field with an LPN. I based this decision on my orientation and educational needs as a field staff RN. Jeanine advised me to tell Donna Fountain regarding my decision.

Soon after a fellow co-worker (Stella Savino) and I located Donna Fountain in the main nursing area speaking with a field staff and clinical manager. We waited quietly until she addressed us. I then told her I was assigned to go out with one of the LPN's and that I wouldn't go out with an LPN. She questioned why and I informed her that the scope of practice of an LPN differs from that of an RN. She informed me that an LPN can perform many of the duties that an RN can. I refused because I am orienting as an RN, therefore I should be sent into the field with an RN. I was neither verbally abusive, loud, or disruptive in any way to Ms. Fountain. On the contrary, I waited quietly until she addressed me and simply informed her of my reasons for not going into the field with the LPN. Ms. Fountain then told me she would discuss this situation when she finished up with the clinical manager and field nurse.

At that time, my co-worker and I walked back to our desks. Ms. Fountain did not ask us to "step aside to a quiet area" where she could discuss the matter further. Additionally, I did not walk away and "mutter discontent," with my assignment. I then waited for Ms. Fountain to discuss this matter further; however, she did not approach me. After waiting for thirty minutes to an hour I paged her and asked her if I could go into the field with an RN who was about to leave for the field. She told me no, and that she would speak with me shortly. I was then paged by you and was advised to come to your office at 1:15 p.m.

I am requesting specific clarification as to what I did or said that constitutes verbal abuse, disorderly conduct and disruptive behavior. I am certain that I did not engage in any of the behavior that Ms. Fountain describes.

Myself, and the other members of the Utilization Management staff are only asking for a proper education and training program to prepare us for this new position, since we have not done direct patient care from seven to eighteen years. If there is a hostile environment, it has not been created by me or any of my co-workers who are attempting to gain the knowledge needed to become RN case managers. Furthermore, I will not compromise quality patient care, nor my nursing license with an inadequate orientation that does not even comply with the Essex Valley Van's own policy and procedure manual regarding orientation and assessment of clinical competency of RN's. My co-workers and I have made known to Jeanine Wray-Langevine[,] Donna Fountain and you, that we need a refresher course in order to practice nursing in a safe and effective manner, since we have not practiced direct patient care for several years.

I would appreciate a response as soon as possible regarding the allegation of verbal abuse, loud disorderly conduct and creating a hostile environment.

Sincerely,
Anne Schepers

Savino also sent a letter to Hoosain, dated September 10, 2001, in support of Schepers, in which she also repeated her position that the employees needed a refresher course.

By letter dated September 12, 2001, Jasinski notified the Union of Respondent's decision to terminate the four UM's. This letter reads.

September 12, 2001

Re: Essex Valley VNA
UM Nurses and Home Care Coordinator

Dear Bernie:

After a number of weeks of attempting to train the UM and Home Care Coordinators, EVVNA is faced with the realization that these individuals are not qualified to serve as field nurses. From the inception, UM's & HCC's evidenced an inability to perform the jobs. In particular, their response to the self-evaluation forms is direct evidence that the individuals were unable to perform the most basic nursing tasks, i.e., every RN candidly admitted that they were unable to provide the most basic tasks of abilities

rendering proper hand washing techniques to assessments of everything. Quite candidly, the admitted lack of knowledge and skill was frightening, nevertheless, we initiated remedial training including inviting outside professionals to participate in in-service training program.

Consistent with our efforts to assist these individuals, we engaged in training with the hope that as licensed RNs they would demonstrate the necessary skills to perform the field nurse job. Unfortunately, no efforts were made. To the contrary, the individuals displayed a contempt for the outside professionals and EVVNA management personnel, i.e., refused to cooperate by accompanying the field nurses.

Therefore, we have reached the decision that they cannot perform the field nurse job and due to the reorganization and their acknowledged lack of knowledge, no other position is currently available to them. Of course, in the event these individuals choose to obtain education providing them with the necessary skills to assume the field nurse job, we will consider them for available positions.

We are prepared to sit down and discuss with you and your committee the effects of this decision. After more than one month, it is obvious to us that you were right after all; that these individuals were not qualified to be field nurses.

The next day, September 13, 2001, Respondent sent identical certified letters to Jones, Lambert, Savino, and Schepers. These letters are as follows:

It is with regret that EVVNA must inform you that after several weeks of training, it is obvious that you are not qualified to perform the duties and responsibilities of a field nurse.

Based on your nursing background and experience level, we expected that you would be able to assume this position. However, from the inception you readily admitted in your self-evaluation that you were unable to perform even the most basic of nursing functions. It became obvious that the remedial training would be insufficient to provide you with the necessary skills to perform the field nurse position. This is contrary to the requirements for holding an RN license in the State of New Jersey. We ultimately were forced to agree with Mr. Bernie Gerard that to send you out into the field would be unfair to you and potentially compromise the healthcare of our patients, which we were unwilling to do.

Given this, your employment is terminated effective this date. As of today, you will cease to accrue any benefit time. We will calculate your vacation payout and provide you with a final check of any and all accrued vacation benefits as of this date. Consistent with our policy, you will be covered under the current medical benefit plan until September 30th. If you wish to continue medical and/or dental coverage, at your own expense, after September 30th, you may enroll in COBRA. Detailed information on the COBRA plan will be mailed to you.

If at any time, you can demonstrate that you have attained the necessary training and skill level to practice

nursing, we will welcome you back to available full-time or part-time positions. I want to extend a sincere appreciation to you for your service, and wish you the best in your future endeavors.

Sincerely,
Donna Fountain
Vice President Nursing/Executive Director

Gerard responded to Jasinski, by letter of September 14, 2001, as follows:

September 14, 2001

Dear David,

I have received your letter indicating that the UM and HCC nurses have been laid off. I mentioned at the opening of our last meeting that this lay-off would cause considerable difficulties because you have done this without regard to seniority in the organization. There are other members still employed who hold lesser seniority than the members released.

Additionally, the way in which you laid off these members is indicative of anti-union animus. The non-bargaining employees who were laid off in mid August were offered severance packages. I would expect that our members be treated in the same way. What steps will you be taking to correct this inequity?

Lastly, you are incorrect in your statement that I intimated that these "individuals were not qualified to be field nurses." I stated that these nurses were not qualified at the present time, that they would need additional training and that EVVNA has failed to provide that training.

Please send me a current bargaining unit list. I am expecting a call from you to set dates for our next meeting to discuss these matters and to continue our negotiations. Please reply promptly.

Sincerely,
Bernard W. Gerard, Jr.
First Vice-President

Jasinski responded by letter of September 18, 2001. This letter is set forth below.

September 18, 2001

Re Re: Essex Valley VNA
UM Nurses and Home Care Coordinators

Dear Bernie:

We are in receipt of your letter dated September 14, 2001 concerning the UM and HCC nurses. We respectfully disagree with a number of your statements.

First throughout this matter, the UM and HCC nurses repeatedly confirmed their inability to perform nursing functions. As we advised you, the answers to the self-evaluation forms were a shocking discovery of their lack of abilities. They candidly admitted an inability to perform the most rudimentary of nursing functions. Secondly, they repeatedly exhibited a lack of cooperation. Throughout this matter, they mocked and taunted managers and showed a contemptuous disregard for EVVNA. It

was apparent that they wanted EVVNA to fail and repeatedly made the outrageous statement that the EVVNA should close down. The admissions of lack of skills coupled with their attitude confirm that there are no other positions available for them at this time.

Contrary to your allegations, seniority is not considered in determining retention of employees outside of positions. As you will recall, we retained the most senior HCCs. Ability to perform the job is of paramount importance to us, since the UM and HCC nurses, by their own admissions, are unable to perform basic nursing functions, we are left with no choice but to terminate them. Your allegations that the decisions were based on union animus is transparent and refuses to recognize the change in the operations and the difficulties we have been experiencing for more than one (1) year.

We stand ready, willing and able to meet with you to discuss the effects of their terminations. I propose Monday, September 24th to negotiate over the effects of these terminations and continue negotiations for an initial collective bargaining agreement. Please call to confirm this date or propose alternate dates.

Very truly yours,
JASINSKI AND PARANAC, P.C.

Jasinski explained at trial his reference to the "attitude" of the employees. He asserted that the UM's "were unwilling, they were insubordinate, their comments to Shakir Hoosain about why don't you go out there. That demonstrated to us a lack of interest on their part."

In mid-September, Gerard had a phone conversation with Jasinski concerning the termination of the employees, and the failure to give them severance as it did to other employees who were laid off. Jasinski replied that the employees behavior was unacceptable during training, their self-evaluations were remarkably poor, and because of their behavior, Respondent was not interested in giving any severance. Gerard responded that the employees truthfully answered the self-evaluations, that the employees weren't adequately prepared to go into the field without a refresher course.

On October 22, Gerard saw an advertisement the paper for HCC nurses. He called Jasinski shortly thereafter, and asked if Respondent would be recalling any of the UM's to the HCC positions, since there were qualified to do that job. Jasinski replied that he was unaware of any advertisements, but that Respondent would not be recalling them because of their behavior during training. Gerard stated that this is for an HCC position and they are qualified to do this work. Jasinski indicated that Respondent was not interested in taking them back at this time.

On November 1, 2001, Gerard wrote to Jasinski. Most of the letter dealt with Gerard's complaints about negotiation scheduling. However the letter also made reference to the recall of UM nurses, and requested that Jasinski get back to him concerning the recall of UM nurses, in light of the ad in the paper for HC nurses, a position for which they are qualified. Gerard also stated that Respondent had posted internally for an admitting nurse, for which the UM nurses are also qualified.

Jasinski replied by letter of November 7, 2001. He responded to Gerard's complaints about negotiation scheduling. He responded to Gerard's inquiry about UM nurses, by repeating the problems that Respondent had with them prior to the layoff. He also stated there is no vacant admitting nurse position, but made no reference to the vacant HCC position. The relevant positions of the letter is set forth below.

Finally, your characterization on the UM nurses is again misplaced and intentionally misleading and requires repeating. EVVNA thoroughly discussed with you the UM nurses and the RIF. At your request, we accommodated the UM nurses by giving them additional in-service training to allow them to perform field nurse assignments. By their own admissions, they admitted they were unable to perform basic nursing tasks. If there is any doubt, I refer you to the UM nurses own skills competency assessment. Have the UM nurses signed up for needed skill training to perform the remedial nursing tasks to allow them to fill vacant positions with EVVNA? If they have, please advise. Interestingly, contrary to your statement there is no vacant Admitting Nurse position.

Sincerely,
JASINSKI AND PARANAC, P.C.
DAVID F. JASINSKI

On March 14, 2002, the parties executed a collective bargaining agreement, which contained the management rights clause that the parties had signed off on at the August 16, 2001 meeting.¹⁵

Gerard conceded during the instant trial, that the signing of the contract with the management rights clause, resolved Respondent's right to transfer employees in the future, and that if it had been in effect at the time of the transfer, Respondent could have effectuated the transfer under that clause. However, it would still in Gerard's view, be obligated to bargain about effects of the reorganization.

On April 25, 2002, Jasinski wrote a letter to Gerard, which reads as follows:

April 25, 2002

Re: Essex Valley VNA

Dear Bernie:

The parties reached an agreement covering terms and conditions of employment for RNs employed at EVVNA. In accordance with the terms of the agreement, the parties agreed to Article xxx, Management Rights Clause which provided, inter alia, the right;

¹⁵ Back in September 2001, Jasinski and Gerard discussed the management-rights clause in a phone conversation. When Gerard accused Respondent of violating the Act by transferring the employees, Jasinski replied that the parties had discussed the issue, and had agreed on a management-rights clause on August 16, 2001, which gave Respondent the right to eliminate departments. Thus it had not violated the NLRA. Gerard replied that the clause was not in place yet, since the contract was not completed. Further Gerard asserted that Respondent had a duty to bargain about the transfer and over any changes implemented.

To organize, discontinue, enlarge or reduce a department function or division to assign to transfer employees to other departments or shifts as operations may require to introduce new or improved methods or facilities, regardless of whether or not the same causes a reduction in the working force.

....

As you are aware, EVVNA, due to market conditions, engaged in a restructuring of its operations, which resulted in consolidation and the reduction of a number of bargaining unit and nonbargaining unit personnel. A decision was reached that the UM function was unnecessary and HCC position would be consolidated. These actions resulting in a layoff of a number of UM Nurses and Home Care Coordinators.

In addition to the Management Rights Clause, the parties negotiated 7.4 layoffs/Reduction of hours which provided for layoff of employees. Consistent with this language, the parties agreed if no position was available, the laid off employee would be offered another position within the bargaining unit. In this case, the impacted UM and Home Care Coordinator positions would be offered field nurse positions.

As I advised you, EVVNA had gone through a substantial and dramatic change. The HCC work previously done is either redundant, unnecessary or absorbed by current bargaining unit employees. For instance, appeals which provided for a majority of the HCC work is no longer required, due to a change in operation. Similarly, Medicaid audits are no longer done on a regular basis. Rather, they are performed once a month. In the case of the 488's, the RN's are currently performing that particular task.

Please advise in writing whether the laid off personnel are interested in the available work at EVVNA, i.e. field nurse positions.

Very truly yours,
JASINSKI AND PARANAC, P.C.
DAVID F. JASINSKI

DEJ:jjj
cc: Mr. Shakir Hoosain

The Union made no response to this letter. The record does not disclose whether or not Gerard communicated to the UM's Jasinski's request that the UM's notify Respondent if they were interested in available field nurse positions.

Hoosain testified that he discussed the decision to terminate the UM's in early September 2001, with Fountain. According to Hoosain, Fountain informed him that there was a lot of resistance from the nurses to go out into the field, that they had not completed their training and had refused to go out into the field. He claims that Fountain informed him that two nurses, Savino and Schepers had refused to go out and observe certain

nurses.¹⁶ According to Hoosain, he and Fountain concluded that the nurses own evaluations expressed that the UM's were not capable of performing field nurse work, Respondent did not want to have a liability on its hands, if somebody went out there and someone gets hurt. Therefore, since there was no more work for them as a UM, Hoosain contends that Respondent decided to lay the employees off, with the stipulation that if they obtained sufficient training in the future, they could return to work as a field nurse.

Hoosain also testified that he spoke to Frenchy Pierce, the Director of Nursing for NCC's Nursing Home about the possibility of the Nursing Home helping to train the UM nurses. However, after Pierce read the self-evaluation forms prepared by the four UM's, she declined to take on the task of training these individuals, because their skills were so deficient. Pierce sent a memo to Hoosain, dated September 7, 2001, confirming this decision of hers, not to provide training for these UM's.

Hoosain also testified that he was informed by Langevine who conducted the in-house training, that the employees' behavior during training was "one of total negativity towards what was going on," and in part that was because they were asking for different training. Further, Hoosain admitted that in the letter explaining the discharge that it sent to the Union on September 12, 2001, when it referred to the employees behavior during training, Respondent included their attitude towards learning, and that the employees wanted additional training from an outside source.

V. ANALYSIS

A. *The Alleged Unilateral Transfer of Nurses to the Field*

The amended complaint alleges and General Counsel contends that Respondent violated Section 8(a)(1) and (5) of the Act, when it, on August 13, 2001, unilaterally implemented a transfer of UM and HCC nurses to field nurse positions,¹⁷ without bargaining with the Union.

Generally, where as here, the parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasant-view Nursing Home*, 335 NLRB 961, 962 (2001). *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line*, the Board recognized two exceptions to that general rule; when a union engages in bargaining delay and "when economic exigencies compel prompt action." *Id.* at 374.

The Board further refined *Bottom Line* in *RBE Electronics of S.D.*, 320 NLRB 80 (1995), and concluded that there may be economic exigencies that, although not sufficiently compelling to excuse bargaining altogether, will enable the employer to satisfy its bargaining obligation by providing the Union with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to

¹⁶ In that connection, while Schepers admitted that she did refuse on one occasion to go out with an RN, Savino asserts that she in fact went out 10-12 times with nurses during the training period.

¹⁷ This action also effectively eliminated the position of UM nurse.

impasse over the particular matter. *Id.* at 82; *Pleasantville*, *supra*.

With respect to the type of “economic exigency” about which an employer is excused from bargaining, the Board has limited these matters to “extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action.” *RBE*, *supra* at 81; *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995); *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987). In that regard, “absent a dire financial emergency . . . economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage or supply shortages do not justify unilateral action.” *RBE*, *supra*, footnote omitted.

Respondent argues that the evidence meets this standard, relying on the facts that it lost a substantial amount of referrals over the last year, lost three major accounts and discontinued managed care operations. I do not agree. I find that the Respondent’s claimed exigency is not the type of “extraordinary events that justifies unilateral action without bargaining.” *Pleasantville Nursing Home*, *supra* at 962.

The nursing shortage which Respondent asserted motivated its decision, wasn’t an “unforeseen occurrence,” since it had been a problem as far back as November 1, 2000, when the prior CFO, Hanna made suggestions to alleviate that situation, which were only partially implemented at that time. Moreover, while Respondent presented evidence of severe economic distress, the evidence establishes that Respondent has been losing money for years, and in fact when NCC took over the operations of Respondent in July 2000, the prior parent was so happy to get Respondent off its hands, that it transferred Respondent’s assets to NCC at no cost. Thus Respondent’s economic problems were nothing new. More importantly, NCC has been funding Respondent’s operations meeting Respondent’s payroll, and making good on its losses. Although these transactions appear as loans to Respondent, thereby establishing Respondent’s alleged losses, there is no evidence that NCC has attempted to call in these loans or to stop funding Respondent’s operations. Accordingly, “no dire economic emergency” was been established.¹⁸

Turning to the less compelling type of economic exigency, which requires notice and bargaining to impasse, this exception is limited only to those exigencies in which time is of the essence and which demand prompt action. In that regard Respondent must prove that its changes were “compelled,” and that the exigency was caused by external events, was beyond its control or not reasonably foreseeable. *Pleasantville*, *supra*, *RBE Electronics*, *supra*.

¹⁸ General Counsel, at the close of the trial, moved to amend the complaint to allege NCC and NCHC as single employers with Respondent. I denied the motion as being untimely, and noted that General Counsel could make such allegations at compliance. I therefore make no finding as to single employer status. However, whether or not NCC is a single employer with Respondent, the evidence is clear, as related above that NCC is funding Respondent’s operations, which negates any assertion of a “dire financial emergency . . . requiring immediate action.”

Respondent asserts that it has met this standard by the same evidence disclosed above, of its severe economic distress at the time of the transfer.

Once more, I conclude that Respondent has fallen far short of meeting its burden of proof as to this issue. As I have related above, the nursing shortage, as well as Respondent’s economic distress were not new events, and were reasonably foreseeable. Respondent’s decision was not caused by external events beyond its control, but was simply a change in managerial philosophy. Thus when Hoosain took over as CEO from Hanna, he decided that rather than fully implement Hanna’s proposal to reduce the nursing shortage, that he would instead transfer UM’s and HCC’s to field positions. With respect to the decision to eliminate managed care work, this decision was made by Respondent itself, so it can not be considered events beyond Respondent’s control.

While Respondent has shown that it needed to attract additional nurses, it has failed to show that “time was of the essence” with respect to the issue or that “prompt action” was “compelled” independent of the overall process. *Pleasantville*, *supra*, *RBE Electronics*, *supra*. Further, as also detailed above, NCC has continued to fund Respondent and cover its losses, and there is no indication that NCC intends to cease that practice or to call in its loans. In these circumstances, I find that “the evidence does not demonstrate the sort of emergency that *RBE Electronics* Contemplates.” *Pleasantville Nursing Home*, *supra* at 963.

Moreover, even if Respondent was faced with exigent circumstances susceptible to piecemeal bargaining Respondent must still establish that the Union was afforded timely notice and an opportunity to bargain over the transfer decision, that an impasse was reached.

A genuine impasse in negotiations exists when the parties are warranted in assuming that further bargaining would be futile. *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993), or when there is “no realistic possibility that continuation of discussion at that time would have been fruitful.” *NLRB v. WPIX*, 906 F.2d 898, 901 (2d Cir. 1990). “Both parties must believe that they are at the end of their rope.” *Larsdale*, *supra*, citing *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). The existence of an impasse is not lightly inferred, and the burden of proving it rests on the party asserting it. *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), *enfd.* 86 F.3d 227 (D.C. Cir. 1996).

Respondent in my judgment has fallen far short of meeting its burden of proving the existence of an impasse. In that regard, Respondent asserts that by the close of the August 1, 2001 meeting, a bargaining impasse had been reached as to Respondent’s proposal to transfer employees to the field. Respondent contends that the issue was fully explored at that meeting, and the parties were “deadlocked” at the end of the meeting. Although the parties only met once with respect to the issue, Respondent contends that one meeting can be sufficient to establish an impasse. *Dixon Distribution Co.*, 211 NLRB 241, 244 (1974).

Once again, I cannot agree with Respondent’s assertion. I note initially that although the issue of the transfer was dis-

cussed at the August 1, 2001 meeting, the extent of the transfer was substantially enlarged from the Respondent's initial notification to the Union of the decision on July 26, 2001.¹⁹ The Union was taken aback by this change, and indicated that it had only been prepared to discuss the UM's, as reflected in Jasinski's letter.

Further, by the close of the meeting, there is no question that several issues were still outstanding, such as training and transportation, and that bargaining had not been completed on these issues. The Union was still pressing for a refresher course for employees, and Respondent had offered 2 weeks of in-house training. Significantly, at that point, Respondent had not even investigated the possibility of a refresher course of less than 6 months duration, as the Union had mentioned. Interestingly, subsequent to the meeting, after employees complained about the in-house training, and requested a refresher course Respondent did investigate the issue, and found two courses of much shorter length. It decided not to offer to pay for even these shorter courses, so it never even brought them to the attention of the Union. However, since Respondent did not even have this information on August 1, 2001, and hadn't even inquired about it, when the issue was first raised by the Union, it can hardly be said that bargaining over the issue of training had been completed or was "deadlocked."

Respondent argues in its brief that the "parties were at loggerheads on the transfers, and the issue was not raised by the Union again to this very day." This assertion is incorrect. The Union consistently attempted to raise the issue subsequent to August 1, 2001, including in its August 24, 2001 letter to Jasinski. Moreover, Respondent a few days after the August 1, 2001 meeting, announced its decision to implement the transfers, and to start 2 weeks of in-house training, thereby making any further efforts to bargain over a refresher course, futile.

Most significantly, neither party stated that the parties had reached impasse at the close of the meeting, and there can be no finding that by the close of the meeting, there was "a contemporaneous understanding of the parties" that an impasse had been reached. *CJC Holdings, Inc.*, 320 NLRB 1041, 1045 (1996). While Jasinski did use the phrase that Respondent had "exhausted all options," at the meeting, he was referring to Respondent's efforts to recruit nurses, not to the state of negotiations. Significantly, even after the Union complained about Respondent's unilateral implementation, neither Jasinski nor Respondent asserted that the parties were at impasse on August 1, 2001, but instead merely claimed that the issue was discussed with the Union, and that Respondent believed that the matter was "resolved." Respondent claimed that the outstanding issues, such as transportation and training were merely operational or effects issues, and would be addressed at subsequent sessions. However, in my view, these matters, particularly training are not merely effects or operational issues, but are relevant to the decision itself. Indeed, the Union consistently opposed the transfer to the field, and one of the reasons that it did so, was the objection of the employees to being transferred without a refresher course. Thus it is clear that the Un-

ion would not agree to the transfer, without resolution of this issue, and it wanted further bargaining on this and other issues before implementation. Gerard made that clear at the close of the August 1, 2001 meeting, by stating the Union would be seeking more information, and it needed more time to continue bargaining. Any doubt about the Union's intention was made clear in Gerard's August 3, 2001 letter, in response to Jasinski's August 2, 2001 letter,²⁰ where he specifically demanded bargaining over the changes, and requested that they not be implemented.

Accordingly, since it is crystal clear that the Union did not believe on August 1, 2001, that bargaining proposals could no longer be fruitful,²¹ *Huck Mfg.*, supra at 1186; *PRC Recording*, supra at 670; and *Larsdale*, supra, there was no contemporaneous understanding by both parties that they had reached impasse. *Wycoff*, supra at 523. *CJC Hollings*, supra; *Naperville Ready Mix*, supra at 183.²²

Lastly, but certainly not least, Respondent had not fully complied with its obligation to supply relevant information to the Union on or before August 1, 2001, or thereafter. Thus the Union requested in writing several items of relevant information by letter of July 27, 2001. Respondent supplied none of the information in writing prior to or at the meeting, which requests included job descriptions of UM's, field nurses and clinical nurses. While Respondent did respond orally to some of the requests, the failure to produce these job descriptions preclude any finding of an impasse. These job descriptions were potentially relevant to further bargaining, since they involve the positions affected. Moreover, the Union had proposed that clinical managers be used temporarily to perform field nurse work, rather than transfer UM or HCC employees to these positions. Thus, the clinical manager job description was clearly important to bargaining on this issue, particular where the job description (which incidentally Respondent never produced to the Union), reflected that clinical managers "are expected to provide relief coverage for his or her team." Whatever is meant by that, it certainly could have provided ammunition for the Union to argue that Respondent should use clinical managers, rather than UM's or HCC's to go into the field.

In this regard, Respondent characterizes the Union's proposal as a "puzzlingly deleterious suggestion with respect to the Union's seeming interest in self preservation," which demonstrates that an impasse existed. I disagree. To the contrary, the

²⁰ Significantly, even in that letter of Jasinski, Respondent did not claim that impasse had been reached on August 1, 2001. The letter merely summarized the meeting, concluded that the proposal changes were necessary, and asked the Union for its comments.

²¹ In that regard it is significant that at the next meeting, August 15, 2001, the Union proposed a temporary recruitment and retention package, in an attempt to forestall the transfer. Respondent eventually responded by rejecting the idea, and postponed bargaining on the economic issues raised for future sessions.

²² Indeed, I find the self-serving testimony of Jasinski, that he believed that the parties reached impasse on August 1, 2001, to be unconvincing. The record discloses, as detailed above, that Respondent never made such an assertion, and instead asserted to the Union that the parties had agreed on the decision, but merely were bargaining over the effects.

¹⁹ Thus the number of transferees was expanded from three to six, and an additional classification (HCC nurse) was included.

Union's proposal, which is admittedly contrary to the Union's normal and previous position of protecting unit work, demonstrates the depths of the Union's objections to the transfer proposal, and its willingness to consider alternatives, and that further bargaining could be fruitful. Indeed, it shows that the Union might have been persuaded to make other concessions, in order to forestall the transfer.

In any event, it is well settled that in these circumstances, the failure of Respondent to produce relevant information to the Union, precludes a finding that an impasse existed at the close of the August 1, 2001 meeting. *Larsdale*, supra at 1319; *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985); and *Serramonte Oldsmobile*, supra at 98.

I also conclude that Respondent's reliance on *Dixon Distributing*, supra, to support its assertion that an impasse existed on August 1, 2001, is misplaced. In *Dixon*, the employer, during the period when a question concerning representation still existed because of unresolved objections, made changes in delivery routes of unit employees. The parties had one short bargaining session over the issue, during which the administrative law judge concluded the subject was discussed, and the union's objections were considered. The judge concluded in effect, that an impasse had been reached, and noted that he believed that it was significant that the change occurred during the period when a question concerning representation was still pending. The judge observed in that regard that "management does need to run its business, and changes in operations toward that end often cannot wait the ultimate full fledged contract bargaining with a certified union." *Id.* at 244. The judge therefore concluded that the parties had bargained about the subject, and that respondent had not violated the Act.

The Board affirmed the judge's dismissal of this allegation, but only by a 2-1 vote, with Member Jenkins dissenting. More importantly, of the majority of Members Penello and Kennedy, Member Kennedy stated that he finds no violation in accordance with his dissent in the representation case on which the union's certification was predicated. Thus, only one member of the Board, Member Penello, finds no violation because he agreed with the administrative law judge that the employer "satisfied its duty to bargain with the . . . Union." *Id.* at 241. Thus, only one Board Member agreed with the judge's implicit assumption, that a good-faith impasse existed after the one meeting of the parties. Moreover, here unlike in *Dixon*, as detailed above, there was still an outstanding relevant information request that had not been complied with prior to or by Respondent on August 1, 2002, which based on Board precedent precludes a finding of an impasse.

Accordingly, for the above reasons, *Dixon*, supra, cannot be considered sufficient authority, to find that an impasse existed on August 1, 2001.

Respondent also argues that the Union waived its rights to bargain over the issue of the transfer. *US Lingerie*, 170 NLRB 750 (1968). In that connection, Respondent contends that the Union has failed to request bargaining over the transfer, even after August 1, 2001, and argues that its only bargaining requests, dealt with effects issues, such as training and transportation. As I have already observed above, I conclude that Respondent has mischaracterized the significance of the issue of

training. It was not merely an issue of effects in these circumstances, since the record is clear that the Union and the employees, at all times, both before and after August 1, 2001, opposed the Respondent's proposal to send the UM and HCC nurses out into the field, without a refresher course. This is therefore an issue relevant to the decision itself, since it is clear that absent a refresher course, the Union was urging that the employees remain in their prior positions of UM and HCC nurse.

Notably, as detailed above, on August 15, 2001, the Union proposed a temporary retention package, in order to forestall or even eliminate the need for the transfer, and made numerous requests in writing to continue bargaining about the transfer issue, all of which Respondent summarily rejected, on the grounds that the Union had ample opportunity to and did bargain on August 1, 2001, about the issues involved. Therefore, I reject Respondent's argument that the Union waived its right to bargain over the transfer issue.

Respondent makes a somewhat related argument that by signing off on the management-rights clause at the August 16, 2001 meeting, the Union waived its rights to bargain. Initially I note that this event took place well after the August 1 alleged impasse, after Respondent made its decision to implement a few days later, and after the implementation began on August 13, 2001. Thus it could not be construed as a waiver for those reasons alone. More importantly, the parties had made no agreement that signed off on clauses were to be effective immediately, and it is clear that until a full contract is agreed upon, all prior tentative agreements can be withdrawn, and are not in effect. Therefore, I find that the tentative agreement by the Union to a management-rights clause, cannot be construed as a waiver of the Union's rights, and does not exonerate Respondent from its obligation to bargain with the Union prior to the change.²³

Respondent also argues that its decision to transfer employees was consistent with past practice, since Respondent had previously prior to the certification transferred employees into the field from UM or HCC positions. In that regard Respondent relies on evidence that two employees Shalela and Mahabir had been transferred to field nurse positions in 2000. It also asserts that Elmer Daniels was transferred to the field. However, Respondent mischaracterizes the record testimony on this issue. The record reveals that Daniels was a UM nurse, who also performed per diem visits to the field, while she continued to do UM work. Subsequently, Daniels left her UM position to go to nursing school, but continued to do some per diem visits as a field nurse.

With respect to Shalela and Mahabir, although they were transferred to the field in 2000, this evidence is insufficient to establish Respondent's implicit position, that the transfer here does not represent a "change" in terms on conditions of employment. However, it is well settled that an employer's past

²³ As detailed above the Union and Respondent reached a collective-bargaining agreement in March 2002, incorporating the same management-rights clause. While as I discuss below, this fact is relevant to issues of remedy, it has no effect on whether Respondent violated the Act in August 2001.

practice in effectuating discretionary employment decisions, are no defense to employer's unilateral changes once the Union is certified. *Mackie Automotive Systems*, 336 NLRB 347 (2001); *Porta King Building Systems*, 310 NLRB 541, 542 (1993), enfd. 14 F.3d 1258 (8th Cir. 1991); *Adair Standish*, 292 NLRB 840 fn.1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990); and *Amsterdam Printing & Litho Co.*, 223 NLRB 370, 372 (1976). See also *Monroe Mfg., Inc.*, 323 NLRB 24, 63-64 (1997). Moreover, only operational changes "so commonplace as to be a basic part of the job itself," are not "characterized as unilateral changes." *Mackie Automotive*, supra at 349.

Here, Respondent's prior transfers of two employees into the field were isolated acts, and not the type of nondiscretionary action that must remain in place as part of the status quo following certification of the Union. *Our Lady of Lourdes*, 306 NLRB 337 (1992).

Accordingly, in sum I conclude that Respondent had unilaterally transferred employees to the field, without having reached an overall impasse with the Union, had not established exigent circumstances, and had not reached an impasse over the issue of the decision to transfer the employees. (Also thereby effectively eliminating the job classification of UM nurse.) In these circumstances, Respondent has violated Section 8(a)(1) and (5) of the Act. I so find.

B. *The Termination of Schepers, Savino, Jones, and Lampert*

The evidence is undisputed that Respondent terminated the employment of the four UM nurses on September 13, 2001, assertedly because Respondent decided that the employees "cannot perform the Field Nurse job." Since I have found above that the Respondent's action in unilaterally transferring the employees was violative of the Act, and it is clear that their terminations resulted from this unilateral transfer, the terminations are also violative of Section 8(a)(1) and (5) of the Act. *Raven Government Services*, 336 NLRB 991 (2001); *Five Cap*, 331 NLRB 1165, 1221 (2001); *Eddie Potash Inc.*, 331 NLRB 552 (2000); *Gaska Tape Inc.*, 241 NLRB 686 (1979); *Boland Marine & Mfg. Co.*, 225 NLRB 824, 825 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977); and *Food Fair Stores*, 163 NLRB 365, 367-368 (1967). I so conclude.

General Counsel also alleges in its brief that Respondent violated Section 8(a)(1) and (5) of the Act, by refusing to bargain with the Union about the decision to discharge or lay off the employees. *Contech Division*, 333 NLRB 875 (2001); *N.K. Parker Transport Inc.*, 332 NLRB 547 (2001); and *Kajima Engineering*, 331 NLRB 1604, 1618-1620 (2000).

However, there was no complaint allegation alleging this theory of a violation, and there was no assertion during the trial that General Counsel was making such an assertion. Therefore Respondent was not put on notice that it was being charged with this violation of the Act, and the issue was not fully litigated. In these circumstances, it is inappropriate to make a finding based on this alleged violation, and I shall not do so. *McKenzie Engineering Co.*, 326 NLRB 473 (1998).

The complaint does allege and General Counsel asserts, that Respondent's termination of the four employees was also violative of Section 8(a)(1) and (3) of the Act, because it was motivated by the employees engaging in protected concerted activ-

ity, along with the Union, of attempting to obtain adequate training to go into the field.

Respondent raises numerous defenses to this allegation, including the assertion that the employees engaged in unprotected activity of engaging in a partial strike. *L & BF, Inc.*, 333 NLRB 268 (2001); *Bird Engineering*, 270 NLRB 1415 (1984).

However, inasmuch as I have found that the terminations of the employees violated Section 8(a)(1) and (5) as detailed above, the remedy for these violations would not be substantially different, than the remedy for Section 8(a)(1) and (5) violations with respect to the terminations. In these circumstances, I find it unnecessary to decide whether the terminations, also violated Section 8(a)(3) of the Act, as alleged. I therefore make no findings or conclusions as to these issues.

CONCLUSIONS OF LAW

1. 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. By unilaterally implementing its decision to transfer employees, and to eliminate the classification of utilization management nurse, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

The standard remedy to correct an employer's unilateral change is to return to the status quo before the institution of the changes in question and make employees whole for any losses suffered by them as a result of the change *NLRB v. Katz*, 369 U.S. 736 (1962); *Visiting Nurse Services of Western Mass.*, 325 NLRB 1125, 1132 (1998); and *Eddie Potash*, supra. General Counsel seeks such a remedy herein.

However, on March 14, 2002, the parties entered into a collective-bargaining agreement, which contained a broad management-rights clause, which even the Union conceded, would have privileged Respondent's action in transferring employees and eliminating a job classification, had it been in effect in August 2001. In such circumstances, the standard remedy is no longer appropriate, since the matter has been bargained and agreed on by the parties. *Intrepid Museum Inc.*, 335 NLRB 1, 18 (2002); *Five Cap*, supra at 1223; *Storer Communications*, 297 NLRB 296, 297 (1989); *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985), supp. dec. 276 NLRB 27 (1985); *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1026 (D.C. Cir. 1982); *LaPorte Transit Co. v. NLRB*, 888 F.2d 1182, 1186 (7th Cir. 1989). C.F. *Eddie Potash*, supra, where the Board issued the standard remedy, notwithstanding the subsequent execution of a collective-bargaining agreement, since that agreement expressly reserved to all parties the right to pursue legal claims concerning the legality of the change in shifts, the unilateral change in that case. In contrast, here the Union with full

knowledge that the issue of the legality of the transfer was not resolved, chose to enter into a contract containing a management-rights clause, which it admits would allow the transfer and reclassification.²⁴

Accordingly, I shall not order Respondent to rescind the unilateral changes or to restore the UM position, as requested by General Counsel. In this regard, General Counsel argues that since Respondent has not offered to reinstate the UM's to UM positions or substantially equivalent positions, it should be ordered to do so, and that Respondent may well not decide to retransfer them to the field, since the experiment of transferring nurses to the field failed miserably, and Respondent may wish to mitigate potential liability. I will discuss Respondent's reinstatement liability below, but the issue of restoring the UM classification and ordering the transfers rescinded, is I believe disposed of by the collective-bargaining agreement entered into by the parties. While it may be true that Respondent might wish to mitigate its liability, nothing in my order precludes Respondent from restoring the UM positions and reinstating the four employees to these jobs. While this may be a wise action for Respondent to take, in order to minimize a potentially significant backpay liability, it is not required to do so, based on the precedent that I have cited above.

The issues of reinstatement and backpay are also impacted by the execution of the collective-bargaining agreement. The ordinary backpay and reinstatement remedies are clearly applicable from the date of the termination to at least until March 14, 2002. In that regard, Respondent argues that the employees are not entitled to any backpay, because they refused the transfer to the field which was offered to them prior to the discharge, and their failure to accept this position constituted a willful failure to mitigate damages, by refusing to accept a substantially equivalent position of employment. I disagree.

Initially, I note that the record reveals that only two of the employees, indicated their refusal to accept the transfer, (Scheppers and Savino), and it was not an outright refusal to agree, but only a refusal to agree, without what they considered proper training. Moreover, the decision to transfer the employees was, as I have noted above, unlawful, because Respondent had not bargained fully with the Union, and the discharge of the employees, as a direct result of this unlawful act, is also violative of the Act. Therefore, it cannot be argued that the employees were obligated to mitigate their damages, before they were discharged. Respondent also argues that it offered reinstatement in the discharge letters itself, as well as in Jasinski's April 25, 2002 letter to Gerard. Once more I cannot agree. In order to satisfy an employer's remedial obligation, the offer of employment must be specific, unequivocal and unconditional. *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), *Thalbo Corp.*, 323 NLRB 630, 637 (1997). Here, without deciding whether or

not a field nurse position can be construed as a "substantially equivalent position," these "offers" are clearly insufficient to toll Respondent's backpay liability. The discharge letters while stating that the employees are terminated, because they cannot perform the field nurse job, states that if in the future they can demonstrate the necessary training and skill to do the job, Respondent will welcome them back to available positions. This can hardly be described as a specific, unequivocal or unconditional offer of a job. Similarly, Jasinski's letter to Gerard inquiring whether the laid-off nurses were interested in available work as field nurses, does not meet that standard, since it is not an unconditional offer of a job, says nothing about training, and does not indicate whether Respondent now believes, contrary to its prior position, that the laid off nurses were capable of performing field nurse work. Further, this alleged "offer" was not made directly to the discriminatees, and is invalid for that reason as well.

Most importantly of all, Respondent was obligated to reinstate the discriminatees to their former positions, if it exists. Since I have found that Respondent unlawfully transferred the employees to field positions, it follows that their UM positions still existed at least until March 14, 2002.²⁵ Thus, since the UM positions still existed prior to March 14, 2002, Respondent is obligated to reinstate the discriminatees to those jobs. The question of substantially equivalent employment only becomes relevant, if the original job no longer exists. Employer's do not have the option of choosing to reinstate to a substantially equivalent job where the discriminatee's job is still extant. *Murbo Parking*, 276 NLRB 52, 56 (1985); *Burnup & Sims*, 256 NLRB 965, 978 (1981). *De Lorean Cadillac*, 231 NLRB 329, 333 (1977), modified 614 F.2d 554 (6th Cir. 1980); and *Val-mac Industries*, 229 NLRB 310 fn. 5 (1977).

Accordingly, I conclude that Respondent's backpay and reinstatement obligations continue at least until March 14, 2002, and Respondent's obligations were not tolled by any alleged offers of reinstatement.

Subsequent to March 14, 2002, the issues become murky, in view of the aforementioned collective-bargaining agreement. Thus, as of that date, it cannot be concluded that the UM positions were still in existence. However, I believe it is appropriate to issue the standard reinstatement order, since it is possible that subsequent to the close of the hearing, Respondent may have reinstated the position. If not, then the issue is raised as to whether Respondent was obligated to offer the discriminatees substantially equivalent employment. This issue must be resolved at the compliance stage of this proceeding.

I would note however, that the record already establishes, that subsequent to the terminations, Respondent advertised for HCC positions, and offered HCC positions to Hart and Anello.²⁶ The Union in fact urged Respondent to offer HCC jobs to the discriminatees, asserting that they were qualified for these positions. Thus, the compliance stage will determine

²⁴ It could be argued that the Union had filed the instant charge with the Board, which at the time of the agreement was still being processed. Therefore, it may have believed that the Board would be able to fully remedy the past violations, and the contract agreement would only apply to future conduct. However, I believe the above precedent is dispositive, and that the Union could and should have protected itself as in *Eddie Potash*, by reserving the right to pursue legal claims with respect to the transfers in the agreement reached on March 14, 2002.

²⁵ In that regard, there is no question that at least some functions, previously performed by UM's, were still being done by other unit employees and by clinical managers.

²⁶ The record is not clear whether one or two HCC jobs were available.

whether Respondent should have offered the discriminatees HCC jobs or any other allegedly substantially equivalent position that may have become available.

In this connection, I also note the evidence that when Respondent laid off 13 nonbargaining employees, these employees were transferred to jobs within NCC. As I have related above, I denied General Counsel's motion to amend the complaint to allege NCC and NCHC as single employers with Respondent, with leave to make such a contention in compliance. Thus if General Counsel decides to allege such status in a compliance proceeding, and succeeds in establishing such a relationship, then the issue is raised, as to whether Respondent is obligated to offer some or all of the discriminatees, substantially equivalent positions, at other NCC or NCHC positions. *Casey Electric, Inc.*, 313 NLRB 774 (1994); *Flour Daniel Inc.*, 304 NLRB 980, 981 (1987); *Dean General Contractors*, 285 NLRB 573, 573-575 (1987) (Board orders that issue of whether discriminatees would have been transferred or reassigned to other projects, to be litigated at compliance stage.)

Respondent's backpay liability,²⁷ subsequent to March 14, 2002, will also be determined in compliance, based on the above issue of whether substantially equivalent positions were available for the discriminatees. *Dean General*, supra.

That leaves a final issue, of whether Respondent is obligated to offer reinstatement to the discriminatees to the position of field nurse, subsequent to March 14, 2002, as a substantially equivalent position of employment. I shall leave this trouble-

some issue to compliance as well. Issues to be decided include whether a field nurse is a substantially equivalent position, whether the discriminatees were qualified to perform that work, and whether Respondent should be obligated to offer them field nurse jobs, when the employees themselves indicated that they did not wish to perform that job, without a refresher course, and two of the four employees (Scheppers and Savino) actually refused to go out into the field, without such a course.

On the other hand, it could be argued that since the employees were discharged unlawfully, they should be offered the opportunity to accept or reject field nurse position, by receipt of an unconditional offer of reinstatement to that position. I make no finding on these issues, but leave the resolution of such questions to the compliance stage of this proceeding.

Indeed, although not required in this decision, Respondent may wish to avoid the resolution of these difficult issues, and seek to mitigate its liability by, as General Counsel suggests, offering the discriminatees their UM positions, and then retransfer them to the field, after bargaining with the Union about what kind of training would be provided. Or it could simply offer them reinstatement to field nurse positions, along with an agreement to pay for a refresher course. I shall leave to Respondent the decision of whether to opt for any of these or perhaps other suggestions to help resolve these troublesome issues.

In any event, as described above, I shall recommend the traditional backpay and reinstatement remedies to the discriminatees, with the modification that subsequent to March 14, 2002, compliance shall determine, consistent with my opinion, the extent of that obligation to date.

[Recommended Order omitted from publication.]

²⁷ Backpay with respect to both post- and pre-March 14, 2002, shall be computed with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1123 (1987).