Renal Care of Buffalo, Inc. *and* Communication Workers of America, Local 1168. Cases 3–CA–24947, 3–CA–25054, 3–CA–25145, and 3–CA–25223

August 31, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On October 3, 2005, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answer, and the Respondent filed a reply. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answer, and the General Counsel filed a reply.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[2]

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by removing a protected union document from the designated union bulletin board, and by threatening reprisals if the document were reposted. We further adopt the judge's recommended dismissal of allegations that the Respondent engaged in direct dealing and surface bargaining, and that the Respondent repudiated the contract as to work schedules for bargaining unit employees on the negotiating team. Finally, we adopt the judge's finding that the Respondent's allegedly unlawful conduct did not cause employees to request decertification of the Union. As explained in further detail below, we reverse the judge and find that the Respondent lawfully withdrew recognition from the Union on September 10, 2004.[3] As a result, the General Counsel's remaining allegations involving the Respondent's conduct after it withdrew recognition, and the parties' remaining exceptions to the judge's decision, are dismissed or rendered moot.

I. INTRODUCTION[4]

Renal Care of Buffalo (RCB) is a privately owned dialysis center in Buffalo, New York. During the relevant period, RCB had a service contract with Total Renal Care (TRC) for training, management, and operations. TRC, a subsidiary of DaVita Corporation (DaVita), a national dialysis service provider, operates several facilities in New York, including RCB. Cleve Hill, a separate dialysis center in Buffalo, was operated by Erie County Medical Center (ECMC). During the relevant period, TRC was in the process of acquiring Cleve Hill's operating license from ECMC. In late July 2004, in anticipation of the Cleve Hill acquisition, TRC hired two nurses, Deborah Reger and Lynne Yung, who the Respondent asserted were to train at RCB and move to Cleve Hill when the license transfer was final.

The Union had been the exclusive collective-bargaining representative for the relevant unit at RCB since 1996. The collective-bargaining agreement at issue was in effect from July 2, 2001, to July 2, 2004. The parties agreed, during negotiations for a successor contract, to extend the agreement until August 2, 2004.

The parties began negotiations for a new contract in May 2004. On August 17, several bargaining unit employees requested a meeting with DaVita officials to voice their concerns that the Union was not listening to them or representing their needs. On September 3, the employees submitted a petition to the Respondent with 15 signatures stating that the undersigned employees did not support the Union and were in favor of withdrawing recognition. On September 10, relying on the decertification petition, the Respondent withdrew recognition.

II. DISCUSSION

A. Withdrawal of Recognition

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board held that an employer must show a union's actual loss of majority support in order to lawfully withdraw recognition. In this case, the employer's withdrawal of recognition was lawful if the 15 signatures on the decertification petition, which were not disputed, represented at least 50 percent of the bargaining unit. The determining factor, therefore, is the number of unit employees at the time of withdrawal.

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We will also substitute a new notice in conformity with the Order as modified. The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] In reaching this determination, we adopt the judge's finding that Deborah Reger was not in the bargaining unit at the time the Respondent withdrew recognition, but we find, contrary to the judge, that Lynne Yung, like Reger, was also not in the bargaining unit. All dates are 2004, unless otherwise indicated.

[4] These facts are taken from the judge's decision and from undisputed record evidence.

The Respondent determined that there were 30 employees in the bargaining unit at the time and, relying on the petition's 15 signatures, withdrew recognition from the Union on September 10. The General Counsel, however, contends that there were 32 employees, and thus the 15 signatures did not represent at least 50 percent of the unit. The two employees at issue are nurses Reger and Yung.

On or about July 29, the Respondent hired Reger, a licensed practical nurse (LPN), to begin work on August 16. Reger testified that she was told during her interview that she was hired to work at Cleve Hill, but she would be trained at RCB and work there until the Cleve Hill operating license was transferred to TRC, at which time she would become a permanent employee at Cleve Hill.[5] The judge accepted the Respondent's claim that Reger was hired to work at Cleve Hill, and he thus found that Reger was not an employee at RCB for the purposes of collective bargaining and was not in the bargaining unit when the Respondent withdrew recognition. We agree.

At the end of July, about the same time Reger was hired, Yung interviewed for and was offered a full-time position with TRC as a registered nurse (RN) starting on August 3.[6] Like Reger, Yung testified that she was told that she would be trained at RCB, but she would work at Cleve Hill.[7] The judge also noted that Yung's job application stated "hired @ $22.15 as a full-time RN @ RCB to move over later."[8] Despite these facts, the judge found that Yung, unlike Reger, was an employee at RCB and thus was in the bargaining unit when the Respondent withdrew recognition.[9]

We find that the judge erred by holding that Yung was in the bargaining unit, especially after finding, on remarkably similar evidence, that Reger was not.[10] In addition to the facts stated above, the undisputed evidence shows that both Reger and Yung were on different wage scales from employees in the bargaining unit, and both were offered substantially identical benefits that were different from those provided under the collective-bargaining agreement, including bonuses and profit sharing, paid time off accrual, jury duty and bereavement leave, seniority, and layoff and recall rights.[11] Neither Reger nor Yung was required to pay union dues. Moreover, RCB employees Carrie Kropidlowski and Julie Galatioto testified that they understood that Reger and Yung were hired to work at Cleve Hill, and thus they did not ask them to sign the decertification petition. In short, the evidence shows that neither Reger nor Yung was ever considered by the Respondent, the Union, or unit members as an employee of RCB or as a member of the bar-

[5] TRC operated RCB and planned to operate Cleve Hill after the license transfer, and both facilities used the same equipment. Thus, it was reasonable that TRC might hire nurses and train them at RCB in preparation for their employment at Cleve Hill. DaVita Regional Director William Brezsnyak and RCB Operating Officer Barbara Proudman testified without contradiction that, at the time they hired Reger and Yung, they expected the operating license at Cleve Hill to be transferred to TRC within 1 to 3 months. As of the hearing dates in June and July 2005, the operating license at Cleve Hill had not yet transferred from ECMC to TRC. Thus, both Reger and Yung worked only at RCB.

[6] We do not dispute the judge's finding that both Reger and Yung were hired as permanent, full-time employees. That fact does not conflict, however, with our finding that the Respondent temporarily placed them at RCB pending the license transfer to Cleve Hill.

[7] On cross-examination, Yung was asked, "You were told that you were going to be trained at Renal Care for your work at Cleve Hill?" to which Yung responded, "Yes." The judge apparently overlooked this testimony, however, because he found that Yung "categorically denied" the Respondent's assertions that, among other things, Yung would be trained at RCB but would move to Cleve Hill when the license transferred. Contrary to our dissenting colleague, we find nothing ambiguous about counsel's question or Yung's admission that she was hired to work at Cleve Hill, and we find that Yung's admission, along with corroborating evidence cited below, is sufficient to warrant reversing the judge's finding that Yung was hired as an employee at RCB and was in the bargaining unit.

[8] Contrary to our dissenting colleague's assertion, the judge never questioned the authenticity of the phrase "to move over later" on Yung's application, but he appears to have discounted its significance. We find that it corroborates Yung's testimony that she was hired to train at RCB and "move over" to Cleve Hill later. The judge disregarded the evidence because Yung never moved to Cleve Hill during her tenure with TRC. This fact, however, reflects the vagaries of the licensing process and not the Respondent's intention, when it hired Yung, to move her to Cleve Hill. Moreover, the judge found that Reger was hired to work at Cleve Hill despite the fact that she, like Yung, remained at RCB during the relevant period. At the time the Respondent withdrew recognition, both Yung and Reger had been employed at RCB for only 1 month. We find that the evidence shows that, at the time the Respondent withdrew recognition, its intention was to place both Yung and Reger at Cleve Hill.

[9] Our dissenting colleague asserts that, by finding that Yung was not in the bargaining unit, we are overruling the judge's credibility findings. The dissent misapprehends our position. Our grounds for reversal are not the judge's credibility findings, but his failure to consider significant evidence showing that Yung was hired to work at Cleve Hill.

[10] The dissent finds that the evidence is not similar because, e.g., Reger was hired as an LPN and Yung as an RN, they did not seek the same position, and they were not interviewed at the same time or by the same hiring official. But these facts are irrelevant to the only significant issue—whether each was hired to work at Cleve Hill after the license transferred. The similar, and significant, evidence is their testimony that they were hired to work at Cleve Hill and their similar terms and conditions of employment, which, as explained below, were different from unit employees at RCB.

[11] These facts indicate that Yung and Reger did not share a community of interest with bargaining unit employees, a significant factor in determining whether employees properly belong in the unit. See, e.g., *Alley Drywall, Inc.*, 333 NLRB 1005, 1006 (2001); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) (listing community-of-interest factors, including wages and employment benefits).

gaining unit.[12] We therefore adopt the judge's finding as to Reger but reverse as to Yung and find that Reger and Yung were not in the unit when the Respondent withdrew recognition on September 10.

As a result of this finding, we necessarily find that there were 30 employees in the bargaining unit on September 10 when the Respondent withdrew recognition, and thus the 15 signatures on the decertification petition provided the Respondent with the necessary proof that the Union had actually lost majority support.[13] The withdrawal of recognition, therefore, was lawful.[14]

B. The General Counsel's Remaining Allegations

In light of our finding that the Respondent lawfully withdrew recognition from the Union on September 10, we dismiss the following allegations.

1. The judge found that the Respondent repudiated the contract by denying employee Sherry Jakubowski bereavement leave on January 11, 2005. The contract was no longer in effect on January 11, 2005, and thus the Respondent did not repudiate it. This allegation is therefore dismissed. Moreover, because we find that Jakubowski's discharge for abusing leave was lawful, the Respondent's exception to the appropriateness of the recommended remedy is moot.

2. The judge found that the Respondent unlawfully refused to furnish the Union with requested information during bargaining. On August 9, the Union requested certain information from the Respondent that it alleged was relevant to the contract negotiations.[15] The Respondent asked the Union to explain why the information was relevant, and the Union responded on August 23. The Respondent withdrew recognition 18 days later on September 10.

Following the lawful withdrawal of recognition, the Respondent no longer had a duty to provide the Union with the requested information. Thus, the only violation that could be found here involves the Respondent's failure to provide the requested information for the 18 days prior to the withdrawal of recognition.[16] Under the circumstances, we do not find that the Respondent's failure to provide the information in the 18 days between the Union's response and the withdrawal of recognition constitutes an unlawful refusal. Thus, the allegation is dismissed.

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, Renal Care of Buffalo, Inc., West Seneca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Removing printed communication protected by the Act from the designated union bulletin board and threatening employees with discipline if the printed communication is re-posted.

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

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

(a) Within 14 days after service by the Region, post at its facility in West Seneca, New York, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 em-

[12] Although the General Counsel argues that Yung and Reger were in the bargaining unit, we find it significant that the Union apparently made no effort to assure that these employees became union members, received union benefits, or paid union dues during their tenure at RCB. Moreover, we find it significant that both management and employees apparently recognized that Yung and Reger were different from unit employees at RCB.

[13] Although Members Schaumber and Kirsanow agree that the judge properly applied the *Levitz* standard here, they did not participate in *Levitz,* and they express no view as to whether that case was correctly decided. See, e.g., *Unifirst Corp.*, 346 NLRB No. 52, slip op. at 5 fn. 17 (2006); *Flying Foods*, 345 NLRB No. 10, slip op. at 3 fn. 9 (2005).

[14] In light of this finding, the Respondent's exception regarding the appropriateness of a bargaining order in this case is moot.

[15] The Union originally requested the Respondent's "990's for the three most recent years available." At the hearing, the General Counsel moved to amend the complaint to delete this item from the information-request allegation. The judge did not rule on the motion, and the General Counsel renewed it in his brief to the Board. In light of our dismissal of the information-request allegation, we find it unnecessary to pass on the General Counsel's motion.

[16] The General Counsel did not allege that the Respondent unlawfully delayed in providing the information. In any event, the relatively brief delay was not unreasonable.

[17] 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."

ployed by the Respondent at any time since July 14, 2004.

(b) 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.

The administrative law judge found, for reasons grounded in credibility findings, that the Respondent, Renal Care of Buffalo, Inc., unlawfully withdrew recognition from the Union. My colleagues reverse that finding. I dissent.

I. INTRODUCTION

The lawfulness of the Respondent's withdrawal of recognition here comes down to whether Deborah Reger and Lynne Yung were bargaining unit employees.[1] If at least one of them was, then the decertification petition was signed by less than half of the unit and did not justify the Respondent's withdrawal of recognition. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). The judge found that Yung was in the unit. Because I would affirm that credibility-based decision, I would find that the Respondent's withdrawal of recognition was unlawful.[2]

II. THE FACTS

The majority's recitation of the facts is incomplete. The judge found that Yung, a registered nurse (RN), sought a job with the Respondent at a job fair in July 2004. She and the interviewer discussed wages and benefits; Yung was particularly concerned about benefits because her husband was disabled, and there was a possibility that he would lose his own medical benefits. During the interview, DaVita Regional Director William Brezsnyak offered Yung a permanent full-time RN position *with the Respondent*, commencing on August 3. Although DaVita mentioned that Yung might at some point be transferred to the Cleve Hill facility, nothing more definite was said.

Yung began work at the Respondent's facility on August 3, on a 40-hour-per-week basis. Some time after she began work, Yung inquired of Barbara Proudman, the Respondent's administrator, about her eligibility for benefits. Proudman confirmed that Yung was eligible. Yung did not apply for medical benefits, however, as her husband was able to retain his coverage. Proudman, like Brezsnyak, told Yung that she might eventually be moved to Cleve Hill. Yung asked that she not be transferred; ultimately, she was not, but remained an employee of the Respondent, working at the Respondent's facility until she voluntarily resigned in April 2005. Neither at her interview nor at any time during her employment did any official of the Respondent or DaVita ever inform Yung that she was a temporary employee. Nor was Yung ever told, during the interview or during the course of her employment, that she was hired to work at Cleve Hill but was assigned to the Respondent's facility merely until DaVita obtained the operating license for Cleve Hill.

The judge made those findings after expressly crediting Yung's testimony and expressly discrediting the testimony of Brezsnyak, who testified that he told Yung that she was being hired for a position at Cleve Hill but would receive her training at the Respondent's facility. The judge stated: "Yung impressed me as a reliable witness who had an excellent command of the facts. Indeed, her testimony was articulate and convincing that during the hiring interview Brezsnyak offered her *a permanent full-time position at Renal Car*e with a specific hourly wage rate and benefits." (Emphasis added.)

The judge concluded that, in September, when the decertification petition was presented to management, Yung was (1) an employee of the Respondent, and (2) not a temporary employee, but a member of the bargaining unit.

III. ANALYSIS

The judge found that Yung was hired as a full-time RN at the Respondent's facility, and that she worked there and nowhere else, performing unit work, until her voluntary departure some 8 to 9 months later. On those facts, it seems to me indisputable that Yung was an employee

[1] The unit consists of::

All full-time, regular part-time and per diem scheduled employees employed by the Employer at its facility located at 550 Orchard Park Road, West Seneca, New York, including registered nurses (RNs), social workers, dieticians, licensed practical nurses (LPNs), patient care technicians, maintenance/re-use technicians, machine technicians and the chief technician, but excluding clinical care coordinators/directors, office clerical employees, medical records consultant, chief executive officer, business manager, all other employees of the Employer, guards and supervisors as defined in the Act.

[2] Because I would find that Yung was in the unit, I find it unnecessary to pass on the judge's finding that Reger was not in the unit at the time in question. Further, in view of my finding that the Respondent's withdrawal of recognition was unlawful, I disagree with the majority's findings that the Respondent's conduct subsequent to the withdrawal of recognition—namely, its repudiation of the contract regarding bereavement leave; its discharge of employee Sherry Jakubowski for allegedly misusing bereavement leave; and its failure to furnish the Union with requested information—was lawful. I would adopt the judge's findings that each of those actions was unlawful. I would therefore find that employee Jakubowski is entitled to reinstatement and backpay as a remedy to her unlawful discharge, and I would grant the General Counsel's motion to delete the Union's request for "990's" from the information-request allegation in the complaint.

of the Respondent and a member of the unit.[3] As basic as any other Board principle is that an administrative law judge's credibility findings are entitled to great deference, and the Board should not overrule such findings unless the clear preponderance of all the relevant evidence demonstrates that they are incorrect. *Standard Drywall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). In light of that standard, my colleagues have failed to point to any convincing evidence that justifies their disregard of the judge's credibility-based finding that Yung was in the unit during the relevant period. Indeed, the majority's response to the judge's credibility findings is largely to ignore them. The majority's freewheeling approach to the facts is incompatible with our fundamental rules of procedure.

The principal rationale my colleagues offer for reversing the judge is that it was inconsistent of the judge not to treat Yung and Reger in the same manner "on remarkably similar evidence." The short answer to that assertion is that the evidence is not "remarkably similar." Yung was an RN, Reger an LPN. They did not seek, nor were they offered, the same position, and they did not interview at the same time or with the same hiring official. In fact, there was no credited evidence showing that the Respondent hired the two employees with the same purpose in mind. Accordingly, there was nothing remarkable about the judge's crediting both Yung, who testified that she was hired to work for the Respondent, *and* Reger, who testified that *she* was hired for Cleve Hill. The majority's attempt to impose consistency is at odds with the record.

My colleagues also state that Yung "testified that she was told that she would be trained at [the Respondent], but she would work at Cleve Hill." My colleagues refer to a portion of Yung's cross-examination testimony in which she answered "yes" to a question about whether she was being trained at the Respondent for her future work at Cleve Hill. Yung's answer to that ambiguous question, however, does not require the reversal of the judge's finding that Yung was hired as an employee of the Respondent, especially in light of Yung's other, credited testimony.

In addition, my colleagues rely upon the testimony of two antiunion employees, Carrie Kropidlowski and Julie Galatioto, that it was their understanding that Yung was hired to work at Cleve Hill, and for that reason they did not seek her signature on the decertification petition. But what Yung's coworkers—who were not present when Yung was hired and had no involvement in the hiring process—perceived her employment status to be is irrelevant.

My colleagues further point to a notation made by Brezsnyak on Yung's employment application that states that Yung was hired as a full-time RN at the Respondent "to move over later." But the judge did not find that this notation was made at the time of the interview, or indeed at any time during Yung's tenure with the Respondent. Moreover, as the notation fails to indicate where or when Yung was to be "moved," it is ambiguous at best, and it does not compel a finding that Yung was hired as an employee of Cleve Hill.[4]

Finally, my colleagues point out that Yung was not paid the same amount as other unit employees, and that she was offered employee benefits that were different from those provided under the collective-bargaining agreement. My colleagues also assert that Yung was not "required" to pay union dues and that she was not "treated" as a unit employee. In the absence of any other credible evidence, however, those factors fail to prove that Yung was hired as an employee of Cleve Hill rather than the Respondent. Even assuming that the Respondent—which apparently wanted to ensure that Yung was not considered a unit employee—did not treat Yung as it treated other unit members, this does not change the fact that Yung performed full-time unit work and *should have been* included in the unit. In these circumstances, the differences in Yung's pay, benefits, and "treatment" fail to refute the judge's finding that Yung was in the unit.

In sum, for the reasons stated above, I believe that the evidence my colleagues rely upon to support their finding that Yung was not in the unit when the Respondent withdrew recognition is insufficient to reverse the judge's credibility-based findings. I would therefore adopt the judge's finding that Yung was in the unit, and that the Respondent failed to show that the Union had actually lost majority support under *Levitz,* supra, when it withdrew recognition. Accordingly, I would adopt the

[3] Even assuming that Yung was hired with an understanding that she would transfer to Cleve Hill when DaVita obtained the appropriate license, I would conclude that Yung was a unit employee. Yung was performing full-time unit work. The Respondent's expectation that she would be transferred to Cleve Hill, *which neither the Respondent nor DaVita then owned or administered*, is not sufficient to deny her employee status or remove her from the unit.

[4] My colleagues assert that the judge "discounted the significance" of the notation. That assertion is without merit. There is no question that the judge found the notation to be "significant"; he simply did not find that it supported my colleagues' desired conclusion. In this regard, the judge interpreted the notation—which states that Yung was hired as "a full-time RN at Renal Care" and does not mention Cleve Hill—to mean that Yung was hired as *an employee of the Respondent*. Considering the plain language of the notation, and the lack of any other credible evidence to show that Yung was hired as an employee of Cleve Hill, the judge's interpretation is more logical and reasonable than that of my colleagues.

judge's finding that the Respondent's withdrawal of recognition was unlawful, and, for the reasons stated by the judge, I would issue a bargaining order to remedy that violation.

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 remove printed communication protected by the Act from the designated union bulletin board and threaten employees with discipline if the printed communication is re-posted.

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

RENAL CARE OF BUFFALO, INC.

Ron Scott, Esq. and *Aaron Sukert, Esq.,* for the General Counsel.

Charles S. Birenbaum, Esq., Jeffrey S. Bosley, Esq., and *Deborah S. K. Jagoda, Esq.,* of San Francisco, California, and New York, New York, for the Respondent-Employer.

Patricia DeVinney, of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on June 27 through July 1, and July 18 and 19, 2005, in Buffalo, New York, pursuant to a consolidated complaint and notice of hearing in the subject cases (the complaint) issued on April 28, 2005, by the Regional Director for Region 3 of the National Labor Relations Board (the Board). The underlying charges and amended charges were filed on various dates in 2004[1] and 2005 by Communications Workers of America, Local 1168 (the Charging Party or the Union) alleging that Renal Care of Buffalo, Inc. (the Respondent, Renal Care or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent engaged in a number of independent violations of Section 8(a)(1) of the Act including removing printed communications from the union bulletin board and threatening discipline if they were re-posted. Additionally, the complaint alleges violations of Section 8(a)(1) and (5) of the Act including engaging in surface bargaining, bypassing the Union and engaging in direct dealing with employees concerning conditions of employment, the refusal to provide necessary and relevant information, unilaterally changing conditions of employment and unlawfully withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the operation of an outpatient dialysis center in West Seneca, New York, where it annually in conducting its business operations derives gross revenue in excess of $250,000 and purchases and receives products, goods, and materials valued in excess of $5000 directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since about 1996, the Union has been the designated exclusive collective-bargaining representative of the unit and at all material times, from 1996 until on or about September 10, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from July 2, 2001, to August 2 (GC Exh. 16).

At various times from May until August 2004, Respondent and the Union met for the purpose of negotiating a successor collective-bargaining agreement.

Renal Care is owned by Dr. Eugene Cunningham. It has a contract with Total Renal Care which is a subsidiary of DaVita Corporation for management services. DaVita owns and manages over 500 Dialysis Centers throughout the United States with the Respondent being the only Center whose employees are represented by a labor organization.

Cleve Hill is a Dialysis Center located in Buffalo, New York, and is owned by the Erie County Medical Center but has a management services contract with Total Renal Care. Cleve Hill employees are represented by a labor organization other

[1] All dates are in 2004, unless otherwise indicated.

then the Union. Renal Care does not presently own or operate Cleve Hill, however, it is anticipated that Cleve Hill will eventually become part of the DaVitta umbrella of companies.

B. The 8(a)(1) Allegations

The General Counsel alleges in paragraphs 6(a) and (b) of the complaint that on or about July 14, the Respondent removed printed communications protected by the Act from designated union bulletin boards and threatened employees with discipline if they re-posted the materials.

1. The facts

Union Steward Sherry Jakubowski informed Union Vice President Sharon Schultz that a number of bargaining unit employees had complained to her that unknown visitors were interrupting there work duties and requesting to talk to them. Jakubowski learned that the majority of these visitors were managers associated with DaVita Corporation whose subsidiary Total Renal Care had a management services contract with Renal Care. In late June 2004, Schultz in conjunction with the Union's attorney prepared a list of questions titled "What to know about the DaVita visitors." This one-page document listed eight bullets that included requesting the visitors to identify themselves, inquiring whether the employees were required to answer questions and the consequences if they did not and whether the employees could have a witness or obtain a copy of any prepared written questions (GC Exh. 9). Schultz provided the document to Jakubowski who posted it on the designated union bulletin board on or about July 1.[2] Several days later, Jakubowski noticed that the document was removed from the union bulletin board. Accordingly, Jakubowski re-posted the document. On or about July 14, Jakubowski observed a printed sign above the union bulletin board that stated: Posting of the document, "What to know about the DaVita visitors," violates the union contract and is prohibited by management. Re-posting the document is just cause for disciplinary action (GC Exh. 10). The bottom of the sign had the name of the Respondent's administrator, Barbara Proudman.

Since the sign threatened employees with discipline, Jakubowski did not repost the DaVita visitors questions.

Respondent raised the issue of the DaVita visitor's questions during bargaining between the parties in one of the sessions held in July 2004. They claimed the posting of the DaVita questions posed a threat to patient safety and interfered with there ability to conduct efficient operations. (GC Exh. 32.) The Employer proposed that the parties solve any problems associated with this issue and come to an agreement through the negotiation process. The Union declined to enter into such an agreement.

2. Discussion

The Board has long held that employees are privileged to engage in protected conduct as long as it is not egregious so as to lose its protection under the Act. *Felix Industries,* 331 NLRB 144, 146 (2000). Here, the employees were concerned that unknown visitors were interfering with there job duties, interrupting there work routine, and asking questions about matters that some of the employees were uncomfortable in responding to. I find that the questions contained on the DaVita visitor's document are protected and do not interfere with the operations of the Respondent or undermine patient rights. *Tradewaste Incineration,* 336 NLRB 902, 905 (2001). If DaVita visitor's wanted to ask questions of employees while they were working, then employees should be entitled to respond in kind. Such questions would enable an employee to determine whether the issue was critical or could be deferred to another time. It would also permit an employee to determine if the questions were voluntary or mandatory. I note that the Respondent claimed that the posting of the DaVita document violated the parties' collective-bargaining agreement but no grievance was ever filed and no discussions occurred with the Union before the document was unilaterally removed from the union bulletin board or employees were threatened with discipline if the material was re-posted.

Under these circumstances, I find that the Respondent engaged in conduct violative of Section 8(a)(1) of the Act when it removed the DaVita visitor's document from the union bulletin board and threatened employees with discipline if the material was re-posted.

C. The 8(a)(1) and (5) Allegations

1. Surface bargaining

The General Counsel alleges in paragraph 8 of the complaint that the Respondent has engaged in surface bargaining and therefore has failed and refused to bargain in good faith with the Union. During the period between May and September 10, the General Counsel asserts that the Respondent engaged in conduct including:

1. Insisting on a management rights clause that would grant it the right to make mid-term contract modifications to the parties' collective-bargaining agreement, and exclude such modifications from arbitration.
2. Insisting on a no strike/no lockout proposal that would prohibit employees from engaging in protected activity including handbilling.
3. Insisting on contract proposals, that as a whole, would leave the employees in the Unit with fewer rights and protections than they would have if they did not have a collective-bargaining agreement.

It should be noted that the Respondent filed an unfair labor practice charge (Case 3–CB–8333) against the Union alleging that it refused to bargain in good faith over the period of the parties negotiations between May and August 2004. By letter dated February 28, 2005, the Regional Director for Region 3 dismissed the charge and on May 5, 2005, the Respondent's appeal of the Regional Director's dismissal was denied by the General Counsel.

a. The facts

The parties commenced negotiations on May 27, and the Union was informed during this meeting that the Respondent re-

[2] Art. 45 of the parties' collective-bargaining agreement provided for a bulletin board reserved for the Union's use. There are no contractual restrictions on material that could be posted (GC Exh. 16).

tained Total Renal Care to represent it in collective bargaining. The Respondent made a presentation to educate the Union about the mission and values that Total Renal Care has adopted and informed the Union that it will base its bargaining proposals on these criteria. The Union proposed that the parties deal with noneconomic items first before preceding to economic issues. No bargaining proposals were exchanged by either party at this meeting.

The next meeting was held on June 8. The issue of ground rules for negotiations was raised by the Respondent and the Union demanded that any ground rules be in writing. During the period between June 8 and the next scheduled negotiation session on June 24, the parties exchanged written proposals on ground rules. Both parties agreed that an inordinate amount of time was spent on finalizing the ground rules that were finally completed on June 24 (R. Exh. 6).

On June 23, the Respondent proffered its initial contract proposal to the Union. This proposal included a comprehensive management-rights clause and a no-strike/no-lockout clause both of which were somewhat more restrictive then what was included in the parties' existing collective-bargaining agreement. On June 29, the Respondent conducted a briefing on incentive pay and profit sharing. On June 30, the Employer presented its second revised proposal to the Union and removed the incentive pay and profit-sharing proposal from inclusion in the management-rights clause. At the conclusion of the June 30 meeting, the parties had reached agreement on ground rules, a confidentiality clause and extending the existing agreement to August 2.

At the July 14 negotiation session, the Union informed the Respondent that it was not interested in engaging in further negotiations on profit sharing. The Union, however, introduced a nondiscrimination proposal in which the parties engaged in an extensive dialogue. Additionally, the Union introduced a number of new proposals to restructure the contract in response to the Employer's earlier proposals to do the same.[3]

On July 15, the Respondent made its third revised proposal to the Union. This proposal eliminated profit sharing but retained incentive pay. The Union reconsidered its removal of the profit-sharing proposal and now proposed to include that subject along with incentive pay for negotiation between the parties. Accordingly, on July 15, the Respondent agreed to reintroduce the profit-sharing proposal for discussion between the parties. Additionally, the parties continued discussions on the Union's nondiscrimination proposal which the Union initially withdrew during this session but after further consideration came back to the table and reinstated the proposal.

The Union presented the Respondent with a partial response to its third proposal on July 22, but did not provide a full response until July 27. On that same date, the Respondent presented its fourth and fifth contract proposals to the Union. While the Respondent was prepared to commence negotiations in the morning (per the ground rules), the Union requested additional time to caucus and negotiations did not begin until late in the afternoon. While the Union responded to a number of the Respondent's proposals, it indicated that it was still reviewing the totality of the fourth proposal and was not prepared to respond in full. Finally, on July 30, the Union presented a revised proposal to the Respondent.

The parties continued negotiations during the month of August 2004, and met on August 5, 6,[4] 24, and 25.[5] Likewise, they tentatively scheduled two negotiating sessions in September to take place after the September 10.[6]

During the August 5 negotiating session, the parties discussed the management-rights clause proposal that had remained unchanged since the Respondent's June 30 revisions. The Union's spokesperson, Debora Hayes, stated that we do not necessarily oppose a management-rights clause but we can't blindly agree to it. While some proposals were tentatively agreed to during the August 6 negotiation session, in subsequent sessions held in August 2004, changes were proposed by the Respondent.

b. Discussion

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith, with respect to wages, hours, and other terms and conditions of employment. . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." "Both the employer and the union have a duty to negotiate with a sincere purpose to find a basis of agreement," *Atlantic Hilton & Tower,* 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960), but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position"). The employer is, nonetheless, obliged to make some reasonable effort to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all.

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003). From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO,* 334 NLRB at 487.

The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed upon provisions and arbitrary scheduling of meetings.

[3] The Union proposals concerned recognition, per diem job classification, extended illness, resignation, Family Medical Leave Act, military leave, outsourcing, the preceptor program, management rights, and several other proposals.

[4] The Respondent presented its sixth contract proposal to the Union.

[5] The Respondent presented its seventh contract proposal to the Union.

[6] The Respondent presented its eighth contract proposal to the Union on September 3.

In totality, the parties engaged in 15 bargaining sessions between May and August 2004. While two additional sessions were scheduled in September 2004, they were never held as the Respondent withdrew the Union's recognition on September 10.

I have reviewed the voluminous bargaining proposals compiled for both the Respondent and the Union (Jt. Exh. 1). Likewise, I have reviewed the Respondent's official bargaining notes for each of the 15 negotiation sessions held between the parties (R. Exh.13). I also note the Union's admission that a number of the Respondent's requests for information had not been responded to as of August 25.

The Respondent concedes that it proposed a restrictive management-rights clause and adhered to this unchanged proposal throughout the negotiation process. However, the Union admitted that the Respondent never conditioned agreement on its management-rights clause before it would agree to anything else in the parties' collective-bargaining agreement. Likewise, the Union acknowledged that while the Respondent's proposed a no-strike/no-lockout proposal that prohibited certain conduct including handbilling, the Employer informed the Union that the proposal only restricted handbilling that interfered with its business operations.

Under these circumstances, and particularly noting that both the Respondent and the Union moved very slowly during the course of bargaining, I find no evidence that either party refused to bargain in good faith, with any intent of frustrating the reaching of a collective-bargaining agreement. In this regard, the Employer and the Union participated in 15 negotiation sessions on agreed upon dates, exchanged proposals, and moved on some issues including reaching agreement on ground rules, a confidentiality clause, extending the agreement and tentatively agreeing on hours of work and work schedule proposal.

Accordingly, the Employer's conduct did not violate Section 8(a)(1) and (5) of the Act and I recommend that paragraph 8 of the complaint be dismissed.

2. Bypassing the Union

The General Counsel alleges in paragraph 9 of the complaint that on or about June 2, 3, and 4, Respondent by Jack Stewart, bypassed the Union and dealt directly with employees in the unit by discussing with them their opinions about merit pay, pay for performance, and flexible work hours.

a. The facts

Stewart, an admitted agent of Respondent, is employed as a people services manager for DaVita. In early June 2004, at the direction of his immediate boss, Stewart visited Renal Care for the purpose of assessing employee morale and evaluating the relationship between employees and first- and second-line managers.

Stewart was provided with a list of employees and prepared in advance a number of questions that he intended to ask employees in individual meetings. An example of these questions include the name, position, and length of employment for each employee, the employee's rating on a scale of 1–10 on how satisfied they were at work and a request to provide positive and negative factors concerning there jobs. Additional questions included a rating of the effectiveness of management on a scale of 1–10 and what changes the employees would make for improvement at Renal Care.

Stewart met with approximately 12 employees either individually or in a group setting for periods lasting between 10 and 20 minutes (GC Exh. 72). Each employee was informed in advance of the meeting that it was voluntary. During some of these meetings Stewart engaged employees in discussions about pay for performance, merit pay, and other benefit matters. Stewart took notes that comport with the recollections of the employees in attendance at the meetings (GC Exh. 71).

b. Analysis

Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice by refusing to bargain collectively with the exclusive representative of its employees. The duty to bargain is defined in Section 8(d). The obligation to bargain in good faith requires, "at a minimum recognition that the statutory representative is the one with whom the employer must deal in conducting negotiations, and that it can no longer bargain directly or indirectly with employees." *General Electric Co.,* 150 NLRB 192, 194 (1964), enfd. 418 F.2d 736 (2d Cir. 1069), cert. denied 397 U.S. 965 (1970). Indeed, it is not enough that the employer communicates with its employees about wages, hours, or working conditions; such communication must be made with the intent to, or for the purpose of, circumventing bargaining with the union. *Emhart Industries,* 297 NLRB 215, 225 (1987).

The Board in *Permanente Medical Group, Inc.,* 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.,* 316 NLRB 979 (1995), held that in order to prove unlawful direct dealing in violation of Section 8(a)(5) of the Act the following criteria must be established:

> (1) the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made without notice to, or to the exclusion of the union.

In *Emhart*, supra, the Board found that an employer did not engage in direct dealing even though it conducted several mandatory employee meetings, without notice to the union, on procedures for productivity and quality control, topics that were also the subjects of ongoing negotiations with the union. Since the employer was not promising any benefits in these meetings to the exclusion of the union, the Board held that its intent was not to undermine the union and thus there was no unlawful direct dealing.

The evidence establishes that Stewart directly communicated with union represented employees and such communication was made without notice to the designated union representative. In this regard, Proudman admitted that her normal contact for changes in conditions of employment was Vice President Schultz rather then Union Steward Jakubowski, who participated in a meeting with Stewart.

Stewart's meetings with the employees were entirely voluntary. There is no evidence that Stewart commented about the

Union or discussed its merits with those employees that attended the meetings. There was no evidence presented that Stewart singled out bargaining unit employees to attend the meetings. Rather, the record discloses that Stewart met also with non bargaining unit employees based on their availability and asked the same questions of these employees.

There is no evidence that Stewart's conversations were to effect any changes to employee's terms and conditions of employment without bargaining with the Union. Stewart apprised the employees that he had nothing to do with the collective-bargaining negotiations including not being a member of the bargaining team and had no input into framing collective-bargaining proposals. While Stewart did inquire of employees whether they preferred pay for performance or tenure based pay, he never attempted to negotiate with the employees. Rather, the parties addressed the subject of incentive pay during the course of there collective-bargaining negotiations.

Additionally, the General Counsel did not establish evidence that Stewart made any promises to the employees. Moreover, Stewart did not have the authority to make any changes to terms and conditions of employment and he did not assign work to or evaluate Renal Care employees.

For all of the above reasons, I find that the General Counsel did not establish that Stewart's voluntary discussions with bargaining unit employees was for the purpose of establishing or changing wages, hours, and terms and conditions of employment. Under these circumstances, and particularly noting that Stewart did not undercut the Union's role in bargaining, I find that the Respondent did not bypass the Union and deal directly with bargaining unit employees. Therefore, consistent with outstanding Board precedent, I recommend that paragraph 9 of the complaint be dismissed.

3. Unilateral changes

The General Counsel alleges in paragraph 10 of the complaint that the Respondent without notice or bargaining with the Union, on or about August 1, unilaterally changed a term of employment by which it counted days spent by employees in collective bargaining as workdays for the purpose of scheduling their work and on or about January 10, 2005, repudiated an article in their collective-bargaining agreement regarding bereavement leave for the death of nonimmediate family members.[7]

The Supreme Court has held that an employer must first notify and bargain with the union before it effects changes in mandatory subjects of bargaining. *NLRB v. Katz,* 369 U.S. 736 (1962).

a. The term of employment

Jakubowski and Lori Digaetano, both of whom are members of the Union's negotiating team, testified that a practice existed for employee union negotiators to have days spent in collective bargaining counted as workdays for the scheduling of work. For example, if these employees were scheduled to work a regular 5-day schedule and 2 days were spent in negotiations, they would only have to work 3 additional days to complete there regular scheduled workweek. According to Jakubowski, Respondent changed this practice on or about August 1, by not providing her a day off after she completed her 5-day work schedule that included 2 days spent in negotiations. Thus, with the 2 negotiation days included, Jakubowski was scheduled and did work 6 days that week.

The Respondent denies that any unilateral change occurred and relies on the parties June 24 bargaining ground rules to support there position (R. Exh. 6). In this regard, item 2 of the ground rules provides that "employees specifically identified above will be released from any scheduled work on days of negotiations but are expected to work if scheduled on any day preceding or following the negotiations."

Under these circumstances, and in agreement with the Respondent, I find that the Union agreed to a procedure on the scheduling of work for employees who participated in negotiations. Therefore, since Jakubowski was scheduled to work a total of 6 days (2 negotiation days and 4 workdays) the ground rules agreement prevails (R. Exh. 6).[8] Likewise, I note that Jakubowski worked a similar 6-day schedule at the end of June 2004, a period of time after the execution of the parties' ground rules agreement on June 24 (R. Exh. 18).

Accordingly, the General Counsel's allegation of a unilateral change by which it counted days spent by employees in negotiations as workdays for the scheduling of work is rejected and I recommend that paragraph 10 of the complaint be dismissed.

b. Bereavement leave

Jakubowski testified that a nonimmediate family member died on January 7, 2005. On arriving at work the following day, she reported the death to the charge nurse and requested 1 day of bereavement leave for January 11, 2005, the day of the funeral. After checking the work schedule, the charge nurse initially informed Jakubowski that there appeared to be adequate coverage but any leave must be approved by Renal Care Administrator Proudman. Upon further checking the schedule on January 10, 2005, Proudman apprised Jakubowski that circumstances had changed and coverage was necessary for the evening of January 10, 2005 (Monday). Accordingly, Proudman requested Jakubowski to remain at work and cover the evening shift. Proudman offered Jakubowski the option of working the second shift on January 10, 2005, in return for the day off on January 11, 2005. Jakubowski, who was scheduled to attend the deceased's wake on Monday evening, rejected the offer and also did not report to work on January 11, 2005 (Tuesday), the day of the funeral.

Upon returning to work on January 12, 2005, and completing her regularly scheduled shift, Jakubowski reported to Proudman's office, as directed. In the presence of a witness, Proudman informed Jakubowski that because she did not work on January 11, 2005 (no call-no show without requesting PTO)

[7] Art. 29, sec. 3 states: For nonimmediate family, an employee will be allowed one (1) day off for any actual workdays missed from the day of death through the day of burial. Pay for such leave will be deducted from any accrued but unpaid PTO. The term PTO stands for paid time off.

[8] On cross examination, Jackubowski admitted that she was aware of being scheduled for 6 days of work including 2 days for negotiations but informed Proudman that she did not want to cancel negotiations.

and disregarded patient care, she was being terminated effective immediately.

The General Counsel seeks a make-whole remedy arguing that the repudiation of article 29, section 3, of the parties' collective-bargaining agreement was undertaken without notice to or affording the Union an opportunity to negotiate. Therefore, Jakubowski's discharge was a direct result of the repudiation and is violative of Section 8(a)(1) and (5) of the Act.

The Respondent proffers several defenses to this allegation. First, it argues that on January 10, 2005, the parties' collective-bargaining agreement was no longer in effect. Moreover, since it lawfully withdrew recognition from the Union on September 10, it was under no obligation to notify and bargain with the Union concerning the provisions of article 29, section 3 of the parties' collective-bargaining agreement. Second, it asserts that in order to take bereavement leave under article 29, section 3, an employee must request and be granted PTO. Since Jakubowski did not comply with this requirement and did not call in on January 11, 2005, she was lawfully terminated.

Based on my below finding that the Respondent did not conclusively establish that a majority of the employees in the bargaining unit no longer wanted the Union as its representative, the repudiation of article 29, section 3 without notice to or negotiations with the Union was unlawful.

Accordingly, since the terms and conditions of the expired agreement remain in full force and effect until an agreement is reached or the parties bargain to impasse, the Respondent has an obligation to negotiate with the Union. Its failure to do so is a violation of Section 8(a)(1) and (5) of the Act.

Second, the Respondent opines that even if the collective-bargaining agreement remained in full force and effect, it was nevertheless privileged to deny bereavement leave to Jakubowski. It argues that article 20, section 5(a) of the parties' collective-bargaining agreement supports this proposition.[9] Stated otherwise, the Respondent contends that the request for bereavement leave was for a nonvacation request and could be denied based on staffing needs.

The fallacy of this argument is exposed by a literal reading of the first portion of article 29, section 3. Indeed, it provides that an employee *will* be allowed one (1) day off for any actual workdays missed from the day of death through the day of burial for a nonimmediate family member (emphasis added). This is fully consistent with the language of article 29, section 1 that provides an automatic entitlement for time off to attend to the death of an immediate family member. The reference to PTO in article 29, section 3 solely involves how the employee will be paid. It has no relation to the scheduling of work and the staffing needs of the facility as found in article 20, section 5(a). Likewise, there is no reference in article 29, section 3 to any requirement to request or have approved a PTO day before bereavement leave is granted.[10] Moreover, the scheduling of work or staffing needs is not addressed in article 29.

Based on the forgoing, I find that the Respondent unilaterally repudiated article 29, section 3 of the parties' collective-bargaining agreement without notice to or bargaining with the Union, and therefore violated Section 8(a)(1) and (5) of the Act.[11]

Under these circumstances, a make-whole remedy for Jakubowski is appropriate. See *Tocco, Inc.,* 323 NLRB 480 (1997).

4. The refusal to provide information

The General Counsel alleges in paragraph 11 of the complaint that the Respondent refused to provide necessary and relevant information to the Union that was requested by letters dated August 9 and 23. The information requested concerned policies and procedures for Respondent that are not covered by the parties' collective-bargaining agreement and policies and procedures for DaVita and Total Renal Care.

The Board in *Sheraton Hartford Hotel,* 289 NLRB 463, 463–464 (1988), set forth the law to be applied in situations like the instant matter.

> Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. When the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. When the information does not concern matters pertaining to the bargaining unit, the union must show that the information is relevant. When the requested information does not pertain to matters related to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.

By letter dated August 9, the Union requested the information described above in an effort to aid it in negotiation meetings scheduled later in the month and during September 2004. The Union apprised the Respondent that the information was relevant in light of their suggestion that the Union adopt much of DaVita's and Total Renal Care's culture, methods, and style

[9] Art. 20, sec. 5(a) states: Although PTO may be utilized as an employee wishes, it is the responsibility of each employee to submit a written request for PTO to his or her immediate supervisor. All requests for PTO will be considered in light of the staffing needs of the facility.

[10] Schultz credibly testified that in the 2001 negotiations that led to the parties' collective-bargaining agreement regarding art. 29, the Respondent agreed to grant employees 1 day off for the death of a nonimmediate family member but unlike the death of an immediate family member that provided 3 days off with pay, if an employee used a nonimmediate day off, they would be paid from their bank of PTO time. Likewise, Schultz confirms that the Respondent could not deny a day off for the death of a nonimmediate family member (Tr. 492–496).

[11] I reject the Respondent's argument that there refusal to grant bereavement leave to Jakubowski was consistent with its previous denial of a day off for her in an earlier filed grievance under the same contractual article (R. Exh. 7). In this regard, that denial involved bereavement leave taken on a Saturday in contrast to the subject complaint allegation for bereavement leave that was requested for a Tuesday. The parties' collective-bargaining agreement at art. 15, sec. 7, provides that when an employee fails to report on any Saturday, he or she must work a makeup Saturday on another weekend in which they would not otherwise be scheduled.

of operation including but not limited to its profit-sharing plan and the language of its preamble proposal (GC Exh. 50).

By letter dated August 17, the Respondent replied to the Union and objected to the overbroad, vague, and unreasonable nature of the information request this late in the bargaining process (GC Exh. 51). The Respondent further stated in its letter that the Union should clarify the specific information that it was seeking and explain the reasons it is relevant. The Respondent promised to give further consideration to the information request once it was clarified.

By letter dated August 23, the Union replied to the Respondent and further supported the reasons that it requested and sought the information (GC Exh. 52).

The record is clear that the Respondent did not provide the requested information to the Union.

I find, based on outstanding Board case law, that in light of the Respondent's proposal to the Union during negotiations that the culture, methods and style of operation of DaVita and Total Renal Care be adopted by the Union, the information requested was necessary and relevant for the Union to formulate collective-bargaining proposals.

Since the Respondent refused to provide the information to the Union, I find that it violated Section 8(a)(1) and (5) of the Act.

5. Withdrawal of recognition

The General Counsel alleges in paragraphs 12 and 13 of the complaint that the Respondent unlawfully withdrew the recognition of the Union as the exclusive collective-bargaining representative on or about September 10.

The parties entered into a stipulation of facts which addresses a number of issues related to this matter (Jt. Exh. 2).

In pertinent part, the parties agree that on or about September 3, the Respondent received a petition from 15 bargaining unit employees that they no longer wanted the Union as there exclusive collective-bargaining representative and urged Renal Care to immediately withdraw recognition from the Union as it no longer enjoys the support of a majority of employees in the unit.

On or about September 10, Respondent determined that the bargaining unit consisted of 30 employees.

On September 10, Respondent withdrew recognition from the Union.

The General Counsel challenges the Respondent's determination that the bargaining unit consists of 30 employees. Rather, the General Counsel asserts that the bargaining unit should be comprised of 32 employees, and therefore, the Respondent has failed to establish that a majority of employees in the unit no longer want the Union to represent them for collective-bargaining purposes. Thus, the General Counsel argues that the September 10 withdrawal of recognition from the Union was unlawful.

In order to substantiate that position, the General Counsel presented the testimony of two individuals, Deborah Reger and Lynne Yung, who they contend were full-time employees in the unit during the critical period.

The Respondent admits that these two employees were hired but opines that they were temporary employees within the meaning of article 14 of the parties' collective-bargaining agreement.[12] Thus, it argues that since they were not in the bargaining unit they were not "employees" covered by the agreement. In addition, the Respondent asserts that Reger and Yung were not hired as employees of Respondent. Rather, they contend that both employees were hired for full-time positions at Cleve Hill. Therefore, Reger and Yung could not be considered as employees of Respondent and were lawfully excluded from the bargaining unit.

Reger credibly testified that she interviewed with Proudman on July 29, and was hired as a licensed practical nurse to start work on August 16. During the interview, Reger apprised Proudman that she was seeking a full-time position with benefits as she presently enjoyed those emoluments. According to Reger, there was no discussion during the interview about accepting a temporary position. If there had been such an offer for a temporary employee position, Reger would have declined it. Reger acknowledges signing the Respondent's associate activation form on July 29, but credibly testified that the portion on the form filled out by the Respondent designating her as a temporary employee was not discussed or shown to her (GC Exh. 5).

Record evidence confirms that the Respondent provided and Reger completed enrollment application forms for medical, dental, and vision benefits in August and September 2004 (GC Exhs. 58 and 59).

Reger admitted on cross-examination that during the hiring interview, Proudman apprised her that she would be hired for Cleve Hill and would be working 5 days per week for 7.5 hours per day. Reger also testified that Proudman informed her that she would be temporarily assigned to Renal Care for her orientation and training period but was specifically hired to work at Cleve Hill.[13] Indeed, Reger admitted that she expected to be a permanent employee of Cleve Hill.

In February 2005, Reger bid on a posted position that was advertised by the Respondent. She was selected for the position and is now a full-time employee of Renal Care.

Based on the above discussion, and in agreement with the Respondent, I conclude that Reger was not an employee of Respondent in September 2004. Rather, I find that Reger was hired to be a full-time employee of Cleve Hill. Therefore, while I reject the Respondent's argument that Reger should have been excluded from the bargaining unit because she was a temporary employee,[14] I find that Reger was properly excluded

[12] Art. 14 states in pertinent part: Sec. 1. A temporary employee is an employee hired for a specific period of time not to exceed six (6) months and is so informed at the time of hire. Sec. 3. Temporary employees are not entitled to any of the benefits outlined in this contract and are not "employees" covered by the contract.

[13] Proudman testified that Reger was hired for Cleve Hill because New York State gave an indication that the operating license for Cleve Hill would be transferred in approximately 2 months. I note that as of the date of the hearing the operating license for Cleve Hill has not been transferred.

[14] To further support this finding, I note that in addition to receiving full-time benefits, the Respondent never informed Reger that she was a temporary employee at the time of hire and her employment was for a period in excess of six months. See art. 14, secs. 1 and 3.

from the collective-bargaining unit in September 2004, due to her being hired as a full-time employee for Cleve Hill.

Yung, the other employee in dispute, credibly testified that she sought a registered nurse position at a job fair for Renal Care in July 2004. According to Yung, DaVita Regional Director William Brezsnyak offered her a permanent full-time nurse's position at Renal Care with a starting date of August 3. Yung testified that the interview topics included a discussion of her hourly wage and benefits. Yung was seeking a permanent full-time position with benefits as her husband was disabled and there was a possibility that he could lose his medical benefits. On August 3, Yung commenced her training orientation at Renal Care. During her training period, Yung had a discussion with Proudman about medical benefits and was informed that she was eligible for them. Ultimately, Yung did not apply for medical benefits with the Respondent as her husband was able to retain his medical coverage. Yung remained an employee at Renal Care for her entire tenure between August 2004 and April 2005, when she voluntarily resigned her employment.

Yung testified that neither Proudman nor Brezsnyak ever informed her that she was a temporary employee either during her hiring interview or while she was employed at Renal Care. Likewise, as with Reger, Yung never saw the portion of the associate activation form completed by Brezsnyak that classified her as a temporary employee.

Brezsnyak testified that during the hiring interview he apprised Yung that she was being hired for a temporary position at Cleve Hill but would be assigned to Renal Care while completing her initial training before being transferred to Cleve Hill in approximately 1 to 3 months once the operating license was finalized. Yung categorically denied these assertions.

I reject Brezsnyak's testimony to this effect for the following reasons. First, Yung impressed me as a reliable witness who had an excellent command of the facts. Indeed, her testimony was articulate and convincing that during the hiring interview Brezsnyak offered her a permanent full-time position at Renal Care with a specific hourly wage rate and benefits. I also note that documentation contained in Yung's personnel file, with Brezsnyak's handwriting contained thereon, undermine and contradict his testimony (GC Exh. 69). In this regard, the document states that Yung was hired @ $22.15 as a full-time RN @ RCB to move over later.[15] Indeed, the evidence confirms that Yung remained a full-time employee at Renal Care for her entire tenure of employment and was never moved over or employed at another facility. Likewise, I note that there is no written documentation in Yung's personnel file confirming that she was hired for a registered nurse's position at Cleve Hill.[16]

I also find that Yung was not a temporary employee for the following reasons. First, I fully credit Yung's persuasive testimony that neither Proudman nor Brezsnyak ever informed her she was a temporary employee as required to do so under the parties' collective-bargaining agreement. Second, Yung was employed for a period in excess of 6 months, and therefore could not be a temporary employee. Third, Proudman informed Yung that she was eligible for medical benefits an emolument not afforded temporary employees under the parties' collective-bargaining agreement.

Accordingly, and particularly noting the above discussion, I find that Yung was a full-time employee of Respondent during September 2004, and should have been included in the bargaining unit.

Therefore, contrary to the Respondent's determination that the bargaining unit was comprised of 30 employees, I find that it should have consisted of 31 employees effective in September 2004. Under these circumstances, I find the Respondent did not obtain a majority of employees in the unit that indicated that they no longer wanted the Union to represent them when it withdrew the Union's recognition on September 10.

Thus, the Respondent unlawfully withdrew recognition from the Union and violated Section 8(a)(1) and (5) of the Act.

The General Counsel further argues that the decertification petition the Respondent received from its employees on or about September 3, was tainted by unfair labor practices that were committed by the Respondent. Therefore, the General Counsel asserts that the withdrawal of the Union's recognition on September 10, was also unlawful on this basis.

An employer who wishes to withdraw recognition from a certified union after the expiration of a collective-bargaining agreement may rebut the presumption of majority status by showing that on the date recognition was withdrawn the union did not enjoy majority support. *Levitz Furniture Co.,* 333 NLRB 717 (2001).

The law is also well settled that an employer may not avoid its duty to bargain by relying on any loss of majority status attributable to its own unfair labor practices. *Pittsburgh & New England Trucking Co.,* 249 NLRB 833, 836 (1980). However, the unfair labor practices must be of a character to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Stated otherwise, in the subject case, the unfair labor practices must have caused employee disaffection or at least had a meaningful impact in bringing about that disaffection. Factors that often are considered include any possible tendency to cause employee disaffection from the union and the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.,* 271 NLRB 78, 84 (1984).

For the following reasons, and in agreement with the Respondent, I find that the Respondent's unfair labor practices prior to the withdrawal of the Union's recognition on September 10 did not cause employee disaffection, erode morale, or undermine support in the Union.[17]

[15] Yung is a (RN) registered nurse. RCB stands for Renal Care of Buffalo.

[16] It is further noted that Yung's associate activation form, executed by Brezsnyak, shows that she was hired on August 3 at Renal Care (GC Exh. 6).

[17] Respondent proffered the testimony of two bargaining unit employees to support there contention that the employees signatures on the decertification petition was freely made independent of any alleged unfair labor practices (Jt. Exh. 2). Carrie Kropidlowski testified that at an August 1 meeting she apprised union representatives that she no longer wanted the Union to represent her due in part to there lack of progress in negotiations with the Respondent, the Union's intent to engage in informational picketing and the Union's desire that employees wear union insignia and T-shirts. Kropidlowski asserted that Stew-

Significantly, the General Counsel stated at the hearing that it is the surface bargaining allegations/violations that caused a disaffection of the employees and tainted the withdrawal petition. Based on my above finding that the Respondent did not violate the Act by engaging in surface bargaining, this rationale cannot support the General Counsel's position that the withdrawal of recognition was tainted. Moreover, the General Counsel did not submit any employee testimony or other evidence to establish that the unfair labor practices found above had any causal relationship to the reasons that the Respondent withdrew recognition from the Union on September 10. *Flying Foods,* 345 NLRB No. 10 (2005). For example, the employees who signed the withdrawal petition had no involvement in the drafting of the request for information nor did they know the type of information that was requested concerning specific bargaining proposals that had been discussed during negotiations. Indeed, the two employees who testified about the withdrawal petition both stated that they were not aware of any issues or discussions surrounding requests for information and their reason for signing the petition was unrelated to any unfair labor practices that the Respondent might have committed. Rather, it is apparent from their testimony that it was the Union's conduct that caused employee disaffection and prompted the employees' signatures on the withdrawal petition.

Therefore, I find that the Respondent's unfair labor practices did not taint the employee petition and the resulting withdrawal of the Union's recognition. Under these circumstances, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act in accordance with the General Counsel's alternative theory.

Finally, however, I find that an affirmative bargaining order is appropriate in this case. Such an order will vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the Respondent's withdrawal of recognition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges.

art's meeting with employees in June 2004, the removal of printed communication from the designated union bulletin board and the refusal of Respondent to provide necessary and relevant information to the Union in no way impacted her decision not to want the Union as the exclusive representative of the employees. Julie Galatioto also signed the decertification petition and expressed similar reasons for doing so. Galatioto, however, did not blame either the Union or Respondent for the lack of progress during the parties' negotiations. The General Counsel did not present any employee testimony to confirm that the unfair labor practices engaged in by the Respondent prior to the withdrawal of recognition on September 10 was the reason the Union lost employee support.

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. Respondent violated Section 8(a)(1) of the Act by removing printed communications protected by the Act from the designated union bulletin board and threatening employees with discipline if they re-posted the printed communication.

4. Respondent violated Section 8(a)(1) and (5) of the Act when it repudiated article 29, section 3, of the parties' collective-bargaining agreement regarding bereavement leave for the death of nonimmediate family members without notice to or bargaining with the Union.

5. Respondent violated Section 8(a)(1) and (5) of the Act when on September 10, 2004, it unlawfully withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.

6. Respondent violated Section 8(a)(1) and (5) of the Act when it refused to furnish the Union with necessary and relevant information that it requested on August 9 and 23, 2004.

7. Respondent did not violate Section 8(a)(1) and (5) of the Act when it bypassed the Union and dealt directly with employees in the unit by discussing with employees their opinions about merit pay, pay for performance, and flexible work hours.

8. Respondent did not violate Section 8(a)(1) and (5) of the Act by engaging in surface bargaining for a successor collective-bargaining agreement between May and August 2004.

9. Respondent did not violate Section 8(a)(1) and (5) of the Act by unilaterally changing a term of employment by which it counted days spent by employees in collective bargaining as work days for the purposes of scheduling their work.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The remedy should include a cease and desist order, the posting of an appropriate notice and the reinstatement of Sherry Jakubowski who was unlawfully terminated when the Respondent repudiated article 29, section 3 of the parties' collective-bargaining agreement. Appropriate lost wages and benefits must accompany the reinstatement, computed on a quarterly basis from date of discharge to date of

proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W.Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]