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**Castle Hill Health Care Center and SEIU 1199 New Jersey Health Care Union.** Cases 22–CA–28152 and 22–CA–28548

September 28, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND HAYES

On December 14, 2009, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief. The General Counsel also filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Castle Hill Health Care Center, Union City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) On request of the Union, restore, honor, and continue the terms and conditions of employment set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, until a new contract is con-

<sup>1</sup> The Respondent has 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.

<sup>2</sup> In her remedy, the judge found that the Respondent should restore the terms and conditions of the parties’ collective-bargaining agreement until the parties bargained to a valid impasse or the Union agreed to the Respondent’s changes, but that the Respondent was not required to cancel any unilateral changes that benefited unit employees “without a request from the Union.” See *Fresno Bee*, 339 NLRB 1214, 1216 *fn.* 6 (2003). The judge, however, did not include this relevant remedial language in her recommended Order and notice. We will modify the judge’s recommended Order and notice to correct this error.

cluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 28, 2010

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Wilma B. Liebman, Chairman

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Craig Becker, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 fail to provide to the Union, or unnecessarily delay in providing information that is relevant and necessary to the Union’s performance of its duties as the collective-bargaining representative of the employees in the following unit:

All full-time and regular part-time certified nurses aides, recreation employees, dietary and housekeeping employees employed by Castle Hill Health Care Center at its Union City, New Jersey facility.

WE WILL NOT fail to comply with the terms and conditions of employment that are set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL NOT implement terms and conditions of employment that are different from those in the collective-bargaining agreement that expired on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL NOT fail and refuse to remit contributions owed to the SEIU National Industry Pension Fund.

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

WE WILL, on request of the Union, restore, honor, and continue your terms and conditions of employment set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL make employees and former employees whole, with interest, for any and all loss of wages and other benefits incurred as a result of our unlawful alteration and discontinuance of contractual benefits.

WE WILL make contributions, including any additional amounts due, to any fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which we would have paid but for our unlawful unilateral changes.

#### CASTLE HILL HEALTH CARE CENTER

*Saulo Santiago, Esq.*, for the General Counsel.

*Alex Tovitz, Esq.* and *David F. Jasinski, Esq. (Jasinski, P.C.)*, of Newark, New Jersey, for the Respondent.

*Ellen Dichner, Esq. (Gladstein, Reif & Meginniss, LLP)*, of New York, New York, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. This case stems from charges in Cases 22-CA-28152 and 22-CA-28548, filed on December 5, 2007, and September 8, 2008, respectively, by SEIU 1199 New Jersey Health Care Union (1199NJ or the Union) against Castle Hill Health Care Center (Castle Hill, the Employer, or Respondent). On November 25, 2008, the Regional Director for Region 22 issued an order consolidating cases, consolidated second amended complaint and notice of hearing (the complaint) alleging that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint alleges, in essence, that Respondent unlawfully failed to and delayed in providing information to the Union and that it prematurely declared a bargaining impasse and unilaterally implemented terms and conditions of employment for employees represented by the Union. The Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as will be discussed in further detail below.

A hearing in this matter was held before me on April 20 through 23, 28 through 30, and May 26, 2009, in Newark, New Jersey. On May 22, 2009, based upon an amended charge filed in Case 22-CA-28152, counsel for the General Counsel moved to amend the complaint to further allege that Respondent unilaterally failed and refused to make contractually required pension fund contributions, and I granted that motion. Respondent denied the material allegations of the amendment to the complaint and argued that they do not relate back to the original charge and are timebarred by Section 10(b) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses,<sup>1</sup> and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a New Jersey corporation, with a facility located in Union City, New Jersey, is engaged in the operation of a nursing home and rehabilitation center. During the 12-month period preceding the issuance of the complaint, the Respondent derived gross revenues in excess of \$100,000 and purchased goods valued in excess of \$5000 directly from points outside the State of New Jersey. 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

As noted above, Respondent operates a long-term health care facility in Union City, New Jersey. It is owned by the Omni Company (Omni), a company that manages a number of nursing homes in New Jersey including Bristol Manor Health Care Center, Harborview Health Care Center, and Palisade Nursing Center (Bristol Manor, Harborview, and Palisade).

The Union and Respondent have been parties to a series of successive collective-bargaining agreements covering a unit of full-time and regular part-time certified nurses aides (CNAs), dietary and housekeeping (grade 1) employees, and recreation employees.<sup>2</sup> The most recent agreement between the parties was a memorandum of agreement which expired on July 24, 2007 (the 2002 MOA). The MOAs for Bristol Manor, Harborview, and Palisade expired on the same date as well, and the bargaining for these four facilities overlapped for some

<sup>1</sup> Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding as well as the demeanor of the witnesses. In addition, the inherent probability of the testimony has been utilized to assess credibility. Where there is an apparent conflict in the evidence of particular relevance to my determinations herein, I have endeavored to explain the specific basis for my conclusions. Otherwise, testimony contrary to my findings below has been discredited on some occasions because it was in conflict with the credited testimony of others or because it was inherently incredible or unworthy of belief.

<sup>2</sup> The parties stipulated to the appropriate unit at the hearing.

time. Although this proceeding relates to Castle Hill only, from time to time the parties made reference to discussions at other tables, as will be described as is relevant to the issues herein.

The parties commenced bargaining in July 2007. At this time there were approximately 120 employees in the unit; during the course of bargaining this number diminished. Pursuant to attrition, by July 2008, the number of employees had been reduced to approximately 94 full-time and regular part-time employees. The bargaining for a successor agreement took place over the course of 1 year and 13 sessions were held. Respondent was represented in negotiations by its attorney, David F. Jasinski, who was the lead negotiator, and consultant Mendy Gold.<sup>3</sup> The Union was represented in bargaining primarily by Executive Vice President Clauvice Saint Hilare, assisted by organizer Ron McCalla. There was also an employee bargaining committee which attended each scheduled session. In addition, at some point early in the negotiations the Union asked for a Federal mediator. Respondent agreed to this request, and James Kenney was appointed by the Federal Mediation and Conciliation Service to assist in the negotiations.

#### 1. The KL Labor Group Agreement and Subsequent Memoranda of Agreement

As a preliminary matter, it should be noted that at the outset of bargaining, neither party was in possession of a full contemporaneous executed copy of the collective-bargaining agreement which governed terms and conditions of employment at Castle Hill or, in fact, any of the other Omni facilities. Both parties had a succession of MOAs and side letters but they had not been compiled into a uniform document.

The KL Labor Group Agreement (the KL Agreement) was a multiemployer agreement among several nursing home facilities and 1115 Nursing Home and Hospital Employees Union (Local 1115), predecessor to 1199NJ. This agreement ran from 1992 to 1996. During the course of negotiations, the parties disagreed as to whether this formed the underlying collective-bargaining agreement applicable to Castle Hill. The Union took the position that it was, and as will be discussed below, there was un rebutted testimony that both Respondent and the Union referred to this agreement during the course of adjusting grievances with the Union.

Respondent took the position that the KL Agreement did not apply to Castle Hill. The document in question does not specifically refer to this facility and, in fact, does not reference a list of covered nursing homes. In addition, as Respondent argues, during the course of negotiations the Union was unable to identify the constituent members of the KL Labor Group nor identify who had signed the agreement on behalf of the parties.

The General Counsel and the Union have taken the position in this proceeding, as the Union did in negotiations, the the KL Agreement is the underlying collective-bargaining agreement covering Castle Hill, governs most of the noneconomic terms and provides that certain economic terms such as wages, holidays, vacations and sick and personal leave are set forth in applicable memoranda of local conditions. In support of this

<sup>3</sup> Gold did not testify herein.

argument, both the General Counsel and the Union make reference to a memorandum of local conditions which, by its terms, applied to Castle Hill and was effective from 1992 through 1996. This agreement provides, in pertinent part: "Except as modified herein, and by the terms of the Arbitration Award rendered by Hon. Leon Reich, dated August 27, 1992, the provisions of the collective bargaining agreement dated January 1, 1992, by and between the Union and KL New Jersey Labor Group shall be binding upon and constitute that agreement between the parties."<sup>4</sup>

In any event, it is clear that the parties never manifested a meeting of the minds on this issue and it continued to be a subject of discussion and disagreement in any number of negotiation sessions.

#### 2. The April 2007 request for information

In anticipation of bargaining, on April 25, 2007, Saint Hilare wrote to Castle Hill Administrator Francine Sokolowski requesting certain information, as follows:

SEIU 1199 New Jersey Health Care Union requests the following information, which it needs for upcoming negotiations for a successor agreement. Please provide the information no later than May 15, 2007. At the same time, I would suggest May 22 or 24 as bargaining date.

1. Any and all documents, including but not limited to job descriptions and performance evaluations, that describe the job duties for all bargaining unit positions;

2. For each employee working in a bargaining unit position, such documents as will show the following:

- a) Job title for each employee;
- b) Date of hire;
- c) Current hourly rate of pay;
- d) Regular hours of work;
- e) Number of overtime hours worked on a quarterly basis in 2006 and 2007;
- f) Address;
- g) Whether employee is a no-frills employee;

3. Documents, including but not limited to summary plan descriptions that show all fringe benefits such as health insurance, disability, pension, profit sharing, and 401(k) benefits available to or provided to part-time and full-time employees in the bargaining unit;

4. Any and all manuals or other documents, including documents distributed to employees, that describe any of the terms and conditions of employment for employees in the -bargaining unit;

5. Gross annual payroll for the bargaining unit for the periods January 1, 2006 through December 31, 2006 and January 1, 2007 through March 31, 2007;

6. Total cost to the Employer for each of the following benefits provided to bargaining unit employees during the periods January 1, through December 31, 2006 and

<sup>4</sup> The KL Agreement had a grievance and arbitration clause (art. 8) which established a process for interest arbitration, naming Leon Reich as the designated arbitrator.

January 1 through March 31, 2007: health, dental, vision, life insurance and pension;

7. Number of employees covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child;

8. Names of all agencies used by the Employer to provide temporary staff;

9. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007;.

10. Copies of work schedules for each nursing unit and/or department for the months October through December, 2006, and January through March 2007;

11. OSHA injury and illness records for 2005, 2006 and 2007.

12. Any and all documents setting forth policies regarding overtime work (both voluntary and mandatory), shift differentials and/or any form of premium pay for employees in the bargaining unit;

13. Any and all documents setting forth policies regarding health and safety in the workplace;

14. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Respondent, through Jasinski, initially responded to this information request on May 3, 2008. He enclosed the employee handbook and a benefits rider which described the various benefits offered to employees.<sup>5</sup> In this letter, Jasinski also denied the Union's request to negotiate the four Omni facility contracts together.

On June 4, Saint Hilare responded to Jasinski as follows:

For the record, I just want you to know that the package you sent to the Union contains for Bristol Manor: Employee list with rate, social security number, date of hire and a policy manual; for Castle Hill only a cover letter and a policy book; for Palisades: Employee list with rate, social security number, date of hire and a policy manual. In order to prepare for negotiations, the Union requests the following information:

- An updated list of all employees performing bargaining unit work by job classification in seniority order, including name, address, social security number, job title, date of hire, wage rate, shift, enrollment in health insurance (and at what level of coverage, individual, dependent, or family), part-time or full-time status, number of hours worked and paid since January 1 2007, and amount of vacation days, sick days, personal days and/or holidays earned but unused for the employees at Castle Hill. We did not receive any

of this information in the package that you sent to the Union for Castle Hill.

- The gross bargaining unit payroll from January 1 2007 through June 30 2007 for Palisades, Bristol Manor and Castle Hill.

On June 4, Jasinski forwarded a copy of Respondent's summary description plan for its health insurance. Additional information was sent on June 25 which included the gross wages for January through December 2006 and January through March 2007 and aggregate figures for the costs of health, dental and life insurance premiums for the same periods of time.

3. The Parties extend the collective-bargaining agreement

Attached to Saint Hilare's letter of July 17 was a proposed extension of the collective-bargaining agreement. The Union proposed extending the contract to August 24 and making all wage increases retroactive to July 24. By letter of July 24, Jasinski enclosed a revised extension agreement extending the contract to September 7 and proposing that all changes to the agreement become effective upon approval and ratification of the parties. It is not clear from the record which of the proposed extensions was the one put into place, but it is undisputed that the collective-bargaining agreement was extended during negotiations.

#### *B. The Bargaining, Information Requests, and Related Correspondence*

1. The first bargaining session—July 25, 2007

The parties met for the first time on July 25, or 1 day after the expiration of the 2002 MOA. The parties discussed logistical issues and ground rules. Then, Saint Hilare made a presentation in which he stated that the Union's goals were affordable health insurance, including family coverage; wage and minimum salary increases; enhanced pension benefits; increased paid time off for employees; improved health and safety language; and language that would strengthen the bargaining unit. The Employer stated its goals in bargaining as well: specifically that the Employer wanted to negotiate a contract that addressed the needs of the facility, its employees and its residents. Jasinski testified that Saint Hilare also stated that the Union was looking to obtain a contract consistent with industry standards that the Union had established with approximately 45 other nursing homes in and around New Jersey, in particular wage minimums for certain classifications of employees, and that the Union wanted the Employer to participate in the Union's benefit plan—the Greater New York Benefit Fund (GNYBF) which provided for employer-paid family coverage. Jasinski testified that he told the Union that the Employer could not accept the "industry standards" as the interests and needs of Castle Hill were unique. According to McCalla the issue of so-called "industry standards" was raised by the Employer who stated that the bargaining at Castle Hill was viewed as being for that facility exclusively and not tied to any other facility or to union standards generally. Jasinski also disparaged the GNYBF, stating that it was in financial difficulty and that the Employer had no interest in participation

<sup>5</sup> Single health insurance coverage was provided at no cost to the employees. The benefits rider listed the additional costs to employees if they wished to include family members under the Employer's plan.

in that plan. Rather, the Employer planned to continue single coverage of its employees through its own plan.<sup>6</sup>

During this bargaining session, the Union put forward a contract proposal containing both economic and noneconomic terms. The Union sought a 3-year agreement with various modifications including, among other things, a reduction in the probationary period from 60 to 30 days, an increase in paid time off for employees, the Employer's participation in the GNYBF or another plan equal to or better than the Union's plan (including dependent coverage) with the cost of premiums to be covered exclusively by the employer, the addition of parental and marriage leave, and a health and safety clause which provided for a "zero lift"<sup>7</sup> policy as well as the establishment of a health and safety committee. With regard to wages, the Union proposed a 7-percent across-the-board raise for each of the 3 years of the agreement with minimum hourly salaries in the third year of \$11 for CNAs and \$10 for grade 1 (dietary and housekeeping) employees. The proposal further provided that the employer would make contributions to the union pension fund of 3 percent of gross payroll for each nonprobationary employee covered by the agreement. There was no substantive discussion of the Union's proposal at the time.

The Union raised the issue of its prior information request and asserted that Respondent had not fully addressed all the items set forth therein. Jasinski stated that some of the information sought was irrelevant or unnecessary and that the Union had sufficient information to bargain. He then stated that the Union would receive additional information prior to the next bargaining session.

2. Interim correspondence prior to the next bargaining session

By letter of July 27, 2007, Respondent provided the Union with additional information which it had sought on April 25. In particular, Jasinski provided a list of employee names, addresses, job classifications, wage rates, dates of hire, job status, health insurance coverage, and average hours for a 2-week period during the prior 6 months. He additionally provided the Union with the cost to employees for dependent coverage. Respondent asserted that, "[t]his completes the Union's information request."

Subsequently, on July 30, 2007, Respondent requested information from the Union, as follows:

At the outset of the negotiations, the Union raised the issue of the health benefits. Based on the Union's proposal, we request a copy of the Union's current health

<sup>6</sup> At various times throughout these proceedings the parties made reference to the so-called "Tuchman Agreement." This is a collective-bargaining agreement, negotiated by the Union, governing terms and conditions of employment with approximately 20 employers, with some individual variances. McCalla testified that the Union considered the general reference to industry standards to be broadly what had been achieved in the Tuchman Agreement. Jasinski testified that after Saint Hilare made his opening presentation, he told Saint Hilare that everything he had stated was consistent with the Tuchman Agreement.

<sup>7</sup> The term "zero lift," as used in this proposal, refers generally to the use of mechanical devices to transport patients and supplies weighing over 30 pounds.

benefit plan. In addition, we request any documents reflecting the status of the current plan and/or its negotiations for a new health care provider.

We further request any and all information related to the 1199/SEIU Greater New York Benefit Fund; Service Employees International Union National Industry Pension Fund; Training and Education Fund; and New Jersey Healthcare Workers Alliance For Quality in Long Term Care.

The information which we requested included the following:

1. Any and all financial information including but not limited to internal reports and records for each of these funds for the years 2002, 2003, 2004, 2005, 2006, and 2007.

2. Any and all documents including supporting documentation filed with any government agency related to these funds for the years 2002, 2003, 2004, 2005, 2006, and 2007.

3. List of all members of the Funds for the years 2002, 2003, 2004, 2005, 2006, and 2007.

4. List of employees who have specifically benefited from the Training and Education Fund from this facility for the years 2002, 2003, 2004, 2005, 2006, and 2007.

This information is relevant to these negotiations based on your proposals and needed by us in order to formulate a counter-proposal to the Union's demands. Your attention to this matter will be greatly appreciated and facilitate the negotiations.

On August 8, prior to the next session, Saint Hilare wrote to Jasinski, requesting that the Employer submit proposals at the next session. He additionally reminded Jasinski that there were certain items of information that Respondent had not yet provided to the Union. Saint Hilare also stated that the Union would have a response to the Employer's request for information prior to the next session.

Saint Hilare's letter also made reference to a so-called "compilation" document which had been received from the Employer at the Bristol Manor table. By way of background, it should be explained that, since both parties did not have a full contract pertaining to any of the four Omni facilities, Respondent either volunteered, or was asked, but clearly agreed to prepare a document setting forth current terms and conditions of employment to assist the parties in their negotiations.<sup>8</sup> Saint Hilare noted that such a document had not been received with regard to Castle Hill and noted that the Union had many questions regarding the document it had

<sup>8</sup> As Jasinski testified, the parties mutually acknowledged the lack of a complete agreement, and the Union requested that he prepare a document which memorialized the parties' understanding of the terms and conditions for Castle Hill. Jasinski testified that he felt "uncomfortable" doing so but told the Union he would "take his best shot." Jasinski further testified that at this time he informed the Union that the document would contain the Employer's proposals going forward. According to McCalla and Saint Hilare, Jasinski offered to prepare the document and did not say anything about the incorporation of the Employer's proposals until the Union raised the issue.

received. The Union also asked Respondent to provide copies of all underlying documents it had used to prepare the "compilation."

### 3. The second bargaining session—August 14, 2007

The parties met for a second time. McCalla was not in attendance on this occasion. According to Saint Hilare, the parties discussed the compilation document which had been given to them at the Bristol Manor table. Saint Hilare testified that he argued that the compilation did not accurately replicate the existing terms and conditions, in particular that some terms were missing or had been changed. In particular, Saint Hilare pointed out that a provision providing for daily overtime had been deleted, that language protecting the Union from the unauthorized actions of employees had been deleted and that there was a new provision which allowed the Employer to assign bargaining unit work to supervisors under certain circumstances. According to Saint Hilare, Jasinski stated that if the Union did not like the compilation it should make a counteroffer.

Saint Hilare testified that he again asked Respondent to provide information responsive to the Union's April 25 request, in particular information regarding the cost of health insurance, the number of no-frills employees<sup>9</sup> and OSHA logs. Saint Hilare testified that Jasinski asked why such information was necessary and he replied it was "standard."<sup>10</sup> According to Saint Hilare, Jasinski stated that Respondent would send the information to the Union prior to the next bargaining session.

Jasinski asserted that at this meeting the Union took the position that KL Agreement formed the basis of the agreement between the parties but could not identify what it was. As Jasinski testified:

No one ever knew who the KL group was, no one could identify those signatures.<sup>11</sup> Then the Union handed me this [document] across the bargaining table, no one was participating in contract negotiations, no one had any knowledge in terms of what the KL group was, who it represented, the number of employers. We had no idea and quite honestly the union didn't have any idea either.

### 4. The third bargaining session—August 28, 2007

In accordance with the parties' agreement, a Federal mediator, James Kinney, attended this session, and all subsequent meetings between the parties. Also present were Jasinski, Gold, Saint Hilare, McCalla, and the employee bargaining committee.

Saint Hilare opened the meeting by noting that it had been over 1 month since the expiration of the agreement, and expressed dissatisfaction with the pace of bargaining.

<sup>9</sup> No-frills employees are those who forego benefits in exchange for an enhanced wage rate. Under the 2002 MOA, the employer was limited to offering such terms to 10 employees.

<sup>10</sup> At the hearing, Saint Hilare testified that such information was relevant to the Union's health care and health and safety proposals. I note that he did not, however, testify that he said this directly to Jasinski at the time.

<sup>11</sup> At the hearing, McCalla was able to name the individual who had executed the agreement on behalf of the Union. The record does not establish, however, that he shared this information with the Employer.

The parties entered into a discussion of the Union's contract proposal, and the Employer offered some initial feedback. McCalla's bargaining notes reflect that there was a discussion relating to the Employer's positions on health and safety, union activity and communications, and discipline and discharge. As McCalla acknowledged, the parties had a significant dialogue about the noneconomic terms of the Union's proposal.

Jasinski also distributed the compilation document which had been prepared for Castle Hill at this session. The Union noted that there were differences between the document and the current terms and conditions of employment. These included new language affording supervisors greater leeway to do unit work and the elimination of language which facilitated organizing unorganized departments. In addition, the probationary period had been increased from 60 to 90 days, there were increased restrictions on union access to the facility, the threshold for eligibility for medical benefits and paid leave had been increased and daily overtime had been eliminated.

Jasinski informed the Union that he had provided it with what he believed to be the existing terms and conditions coupled with the Employer's bargaining proposals. According to Jasinski, he felt that proceeding in this manner would expedite the process. The Union requested that Jasinski go through the document and highlight the Employer's proposed changes from existing terms, and he agreed to do so and stated that he would provide such a highlighted version for the next bargaining session.

The Union asked whether Jasinski had used the KL Agreement in preparing the compilation. Jasinski stated that the KL group had nothing to do with the bargaining for Castle Hill. The Union asked Jasinski to check with Castle Hill representatives to see if anyone knew what the KL Agreement was, as it appeared to be the last full collective-bargaining agreement in the Union's files. As Jasinski again noted, the Union could not name any employer who was part of that group or even identify what KL stood for.

Saint Hilare asked for full compliance with the Union's outstanding information request and further asked the Employer to provide something new: the Employer's premium payments for single coverage under its plan. According to McCalla, the Union asked for this information to see if it could suggest improvements, propose alternatives or convince the Employer to go to the Union plan. In this regard, Jasinski testified that he reiterated that the Employer would not agree to go into the GNYBF.

### 5. Interim correspondence prior to the next bargaining session

On August 28, Respondent made a followup request for information from the Union:

Since the Union is proposing participation in the SEIU Pension Plan, 1199 SEIU/GNY Education Fund and 1199 SEIU/GNY Benefit Fund, we request copies of all Fund documents, including the actual Plans, as well as any and all financial records for each Plan, including the 5500's for the past 3 years. Your prompt attention to this matter will greatly facilitate these contract negotiations. Until we receive such

information, of course, we cannot intelligently respond to the Union's proposal. Thank you.

By letter dated August 30, Saint Hilare offered Respondent several bargaining dates and urged that the parties establish a schedule. He also requested an additional contract extension. On September 12, Respondent sent an additional contract extension.

#### 6. The fourth bargaining session—September 19, 2007

At this meeting, the Employer distributed the highlighted version of the compilation agreement which he had previously agreed to prepare and the parties reviewed it. The Union reiterated its request that the Employer recognize the KL Agreement as the underlying contract, and Jasinski again refused to do so.

The record establishes that in the compilation agreement distributed on this day Jasinski had failed to highlight certain variances from existing terms and conditions. In particular, the language in the pension provision was a change from what had been the existing practice; however, this was not noted by the Union at the time.<sup>12</sup> In addition, the provision deleting daily overtime had not been highlighted. According to Jasinski, when the Union pointed that out to him he acknowledged his error and told the Union that it should have been.

Jasinski testified that he told the Union that the language in the compilation agreement was not unique and had been agreed to in other SEIU 1199 contracts, in particular the one negotiated at the St. Lawrence Rehabilitation Center. According to Jasinski, that agreement contained certain provisions similar to what had been proposed by Castle Hill regarding supervisors and union visitation.

The parties also discussed their overall bargaining strategy. Jasinski stated that his preferred method, which he viewed as most efficient, was to negotiate language issues first and then deal with economics subsequently. Jasinski also told the Union that he viewed economics in their totality. The Union requested that the Employer submit an economic counterproposal.

#### 7. The 10-day notice

On October 18, 2007, the Union sent a 10-day notice to Sokolowski informing Respondent that the Union intended to conduct an informational picket at Castle Hill on October 30 from 1 to 5 p.m. Jasinski replied to this notice with a letter stating that the Employer expected the Union to engage in lawful conduct and would not tolerate any activity which impeded patient care services; that employees would be expected to report for work during their scheduled work hours and that if any employee walked off the job during their regular work hours, the Employer would take appropriate disciplinary action. Jasinski testified that this letter was sent because he had heard that there was going to be a job action, and there had been threats of a strike and he wanted to make sure employees would honor their work obligations. The record indicates that

<sup>12</sup> The Employer was proposing that it make a contribution for full-time employees only for "hours physically worked." The record establishes that this proposal was at variance from its current obligations under the 2002 MOA, which provided for contributions for both full-time and part-time employees as a percentage of payroll.

an informational picket did take place on the appointed day and time without incident.

#### 8. The October 19, 2007 request for information

On October 19, 2007, Saint Hilare wrote to Jasinski requesting information which had previously been requested on April 25, but which the Union felt had not been provided. In addition, the letter reflects certain requests that had been made directly at the bargaining table. As Saint Hilare wrote:

Dear Mr. Jasinski,

The Union has made several unsuccessful efforts to obtain from these employers information necessary to bargain contracts at Castle Hill, Palisades, Harbor View and Bristol Manor. The failure by these employers to produce requested documents has hampered our bargaining especially as we are finally beginning economic bargaining. The Union repeats its request for the following information for each of the four above referenced facilities:

1. For each employee working in a bargaining unit position such documents as will show the following:

a) Regular hours of work.

b) Number of overtime hours worked on a quarterly basis in 2006 and 2007.

c) Whether an employee is a no-frills employee.

2. Names of all agencies used by the Employer to provide temporary staff.

3. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

4. Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

5. OSHA injury and illness records for 2005, 2006, and 2007.

6. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

7. The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

8. Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

With respect to this last item, because the current Union and management negotiators did not participate in the negotiations of the prior contracts with these employers, we are both at a disadvantage in compiling a full set of contracts and MOAs for each facility. The documents that you handed us in bargaining that purportedly summarized the current terms and conditions of employment from prior agreements, were inaccurate. We therefore, reiterate our request for all contracts

and MOAs between the parties since 1990 that are within the possession and control of your clients.

The General Counsel adduced testimony from both McCalla and Saint Hilare about why such information had been requested.<sup>13</sup> In particular, the union representatives testified that the Union sought information regarding regular work hours and overtime information because employees had complained that staffing was not sufficient and because the Employer had proposed eliminating daily overtime—a proposal which would impact unit employees. The number of no-frills employees related to bargaining over the issue of dependent health care coverage. Both McCalla and Saint Hilare testified that the July 27 list of employees raised questions regarding how many no-frills slots were being utilized since the list indicated that more than 10 employees (the allotted number of no-frills slots) who were eligible for health insurance<sup>14</sup> did not receive such insurance or extra compensation for foregoing such benefits.

The second and third paragraphs requested information regarding agency usage. Saint Hilare testified that the Union had received anecdotal evidence from Castle Hill employees that agency employees had been used. Saint Hilare testified that he also spoke with certain employees, whom he did not recognize and who stated that they were from a temporary agency. The record is unclear, however, as to whether any of these conversations may have taken place prior to the October 19 letter.<sup>15</sup> McCalla testified that information regarding agency usage is relevant because agency employees are costly to the employer and the Union might want to consider whether some of the money spent on temporary staff might well be utilized to enhance the benefits of current employees; the Union was considering a staffing proposal and that the use of agency employees erodes the bargaining unit. OSHA records were requested to track whether there were safety issues at the facility which should be addressed and to defend the Union's health and safety proposals.

According to McCalla, the Medicaid cost reports were something "typically" gotten before bargaining to give the Union a "snapshot" of the facility. Such reports, which are filed with the State, are voluminous and contain information about facility such as the census, number of beds, officers, staffing, and agency usage, among other items. McCalla testified that these reports were typically reviewed by the Union's research staff and he was unable to identify where information regarding staffing or agency usage would be found.

The Union also requested per-employee premium cost for employer-funded single health insurance. Although the

<sup>13</sup> I do not rely upon this general testimony to establish what was actually stated during meetings or in other communications between the parties about the information and its possible or probable relevance. For that, I rely upon specific testimony about particular bargaining sessions, correspondence and, where appropriate, the bargaining notes taken by McCalla and Saint Hilare.

<sup>14</sup> Under the 2002 MOA, employees become eligible for single coverage after working more than 20 hours per week for a period of 6 months.

<sup>15</sup> According to Saint Hilare, the first of these discussions took place in either October or November 2007 and the second in about May 2008.

Employer had previously provided information relating to the costs of dependent coverage, it had not provided the Union with specific information about the costs of single-employee coverage. McCalla and Saint Hilare testified that this information was necessary to enable it to calculate the total cost for health insurance. In addition, the Union requested copies of those documents which the Employer had used when preparing the compilation agreement.

#### 9. The facility contracts to use agency employees

Jasinski testified that based upon threats of a job action which had emerged in connection with the informational picket, the facility contracted to provide supplemental services to ensure the continuity of patient care. Jasinski further testified that he informed the Union that the facility had done so at a subsequent negotiation session held shortly thereafter. His testimony in this regard will be discussed below.

The General Counsel presented testimony from David Greisman, the CEO of Towne Nursing Staff, Inc. (Towne Nursing). According to Greisman, in about October 2007, he received a telephone call from Gold requesting supplemental employee services. Greisman told Gold that he was not willing to provide such services unless the facility would be willing to enter into an agreement for a period of some 3 or 4 months. Towne Nursing began providing certified nurses aides, on a weekly basis, ranging from 225 to 450 hours per week during the period from October 22, 2007, through April 11, 2008. As of April 17, Towne Nursing was no longer providing services to the facility.

Saint Hilare testified regarding a copy of a work schedule given to him by an employee for Saturday, February 23, 2008. According to Saint Hilare, the agency employees assigned to work on that day are indicated by the designation "TA." There are eight such designated employees for that day.

#### 10. The fifth bargaining session—October 24, 2007

At the opening of the meeting, the Employer requested that the Union respond to its economic counterproposal. According to McCalla, the Union had not yet received such a proposal relating to Castle Hill, and he surmised that Respondent was confusing this bargaining with another table. After a caucus, Respondent presented the Union with an economic counterproposal which proposed a 5-year agreement with an overall wage increase of 17.25 percent. At the expiration of the agreement, the minimums for CNAs and grade 1 employees would be \$8.50 and \$8, respectively. Also proposed was an increase in life insurance coverage from \$12,000 to \$15,000. The Employer's pension proposal provided for monthly contributions of 2 percent for all eligible full-time employees' gross actual monthly wages, defined as hours physically worked, excluding paid leave. Employees would become eligible for participation in the pension plan after 1 year of employment. The Employer also proposed increasing the number of no-frills slots to 20.

According to McCalla's notes, there was a discussion of the Employer's wage proposal. Saint Hilare reminded the Employer that it had promised competitive wages to employees and Gold replied that the proposed wage structure was comparable to other facilities.

During this meeting, Saint Hilare brought forward the Union's modification of the noneconomic terms of its July 25 proposal which had been altered as a result of discussions the parties had held at the August 28 and September 19 bargaining sessions. Saint Hilare went through the new proposal and pointed out that in some instances the Union had adopted the Employer's stated position in its entirety and in others had altered its language to more closely approach the Employer's position. The Union had made modifications to its proposals regarding the probationary period, union activities and communications, discipline and discharge, transfers and promotions, seniority, layoff and recall, and health and safety.

According to McCalla, Jasinski then asked whether the Union agreed to everything else the Employer had put on the table. The Union replied that the fact that certain of management's proposals had not been referenced did not mean that it was accepting them.

Jasinski testified that the Union's proposal had been conditioned on the Employer's withdrawing language about supervisors doing bargaining unit work. He further testified that he requested that the Union put forward a comprehensive economic proposal and the Union said they would do so at the next session. As Respondent notes, McCalla's bargaining notes characterize this as a "good discussion."

#### 11. McCalla meets with Sokolowski and the Parties exchange correspondence

At some point prior to the planned informational picket, McCalla went to the facility and met with Administrator Sokolowski regarding an employee inquiry as to whether Columbus Day was a paid holiday. As McCalla testified, neither of them could answer that question. Sokolowski brought out her files, which appeared to be a collection of contracts and MOAs. Included among the documents was the KL Agreement. McCalla asked Sokolowski what the document was, and she replied that the way she researches such matters is to refer first to that document and then look to see whether the relevant provision has been deleted or changed by a subsequent agreement. As McCalla testified, Sokolowski further stated that she had provided a copy of the KL Agreement, along with her file, to Respondent's counsel in preparation for the negotiations. According to McCalla, they never got to the bottom of the Columbus Day issue. There was no specific reference to it in the KL Agreement, but Sokolowski offered her opinion that it had been removed as a paid holiday at some point.

During their discussion, McCalla raised the issue of the bargaining and expressed his frustration with the process. On cross-examination, McCalla admitted that he told Sokolowski that Jasinski and Gold were being unreasonable. Subsequent to this discussion, on November 6, Jasinski wrote to Saint Hilare as follows:

Throughout this negotiation, the parties expressed their differences at the bargaining table. The absence of a signed collective bargaining agreement by the Union slowed the negotiating process. The Employer, at the behest of the Union, in an effort to move the contract negotiations forward, submitted a complete contract which

set forth its understanding of the existing terms and conditions, as well as limited modifications which the Employer highlighted. The Union refused to engage in any discussion concerning the existing terms and conditions in the contract. Instead, the Union insisted the Employer submit a complete economic offer, and stated this would go a long way to resolving the contract.

We agreed with the Union's demands and submitted a comprehensive economic offer which included substantial wage increases. The Union flatly rejected this proposal and refused to make a counter-offer. Instead, the Union engaged in a demonstration at Castle Hill, inviting employees from other facilities to disrupt Castle Hill and the services to our residents.

Prior to the demonstration, Ron McCalla visited the Castle Hill and requested a meeting with the Administrator—Francine Sokolowski. During this meeting, Mr. McCalla engaged in a series of unlawful acts designed to undermine the negotiation process. Specifically, he sought to negotiate with Ms. Sokolowski, discussing specific proposals and suggesting that the Employer's representatives were an obstacle to reaching a new contract.

In more than 25 years of experience negotiating labor contracts, I have never been confronted with this type of unlawful behavior. While I have my opinion of the Union leadership, I respect the choice that the Union makes in leading the contract negotiations.

Mr. McCalla has demonstrated he simply cannot be trusted. As such, any and all discussions that the parties have will be face to face at the bargaining table. In addition, should Mr. McCalla or any other Union representative repeat this unlawful behavior, we will exercise our right to file appropriate charges with the National Labor Relations Board.

Finally, this letter shall serve as notice that since the contract expired and has not been extended, the Employer will cease deducting dues.

McCalla replied to Jasinski's letter as follows:

SEIU 1199 NJ Executive Vice President Clauvice St. Hilaire asked me to respond to your November 6, 2007 letter. The parties indeed have expressed their differences at the bargaining table though it is important to note that despite the Union's willingness to establish a comprehensive schedule of bargaining dates starting in June and the Union's availability in each week since, management has only agreed to six bargaining meetings over the last 5 months.

During bargaining you agreed to create a document that would compile all collective bargaining agreements and memorandums of understanding/agreement between the parties and bring that document to the table along with all the CBAs and memoranda that you used to compile the document. On August 14, 2007 you brought a document to our bargaining session that you purported to be the compiled current agreement between the parties. After an initial review it quickly became apparent the document

was not a faithful representation of the existing agreement but instead was a document that contained major changes to the existing conditions of employment. These changes were not highlighted nor even acknowledged by you until the Union called them to your attention. Only then did you admit that the document did indeed contain changes to the existing agreement and was essentially your non-economic contract proposal. You did not on this occasion or at any point to this day give the Union a copy of the CBAs and memoranda that you used to compile this document.

I did meet with Francine Sokolowski for the purpose of discussing whether Columbus Day is one of the contractually recognized holidays. Several workers had raised the issue with the Union. In my meeting with Ms. Sokolowski she reviewed her file of CBAs and memoranda between the parties to confirm the status of Columbus Day. Her file contained the January 1992 agreement between the Union and Management at that time organized as the "KL New Jersey Labor Group". Ms. Sokolowski stated that this document was the original and complete agreement that all the successive memoranda amended. This "KL New Jersey Labor Group" contract is the document we requested from you because we, too, understood it to be the full document underlying the subsequent MOAs yet you have denied this to be the case. Your refusal to acknowledge this document has impaired and slowed bargaining. We request that you immediately deliver that document and the other MOAs to the Union. After the Columbus Day discussion, Ms. Sokolowski and I did speak about the current state of labor management affairs. However, at no time in this dialogue did either of us discuss specific proposals submitted across the table in bargaining or any suggested changes in said proposals.

With regard to the economic proposal you finally submitted at our last bargaining session held on October 24, 2007, the Union asked some questions of clarification, gave a general first impression of the proposals and agreed to submit a counter proposal at the next session after a comprehensive review of Management's proposal. The informational picket on October 30, 2007 was peaceful, lawfully conducted and was not intended nor did it disrupt resident care.

The Union remains committed to reaching an agreement with Management at Castle Hill. Clauvice St. Hilaire has called you on numerous occasions to schedule new bargaining dates and would appreciate hearing back from you to schedule dates to resume bargaining.

#### 12. The sixth bargaining session—November 13, 2007

On November 9, Saint Hilare had written to Jasinski renewing his request for the information previously requested and urging that it be provided before the next bargaining session or by November 14 in the event no sessions were scheduled prior to that date.

At the bargaining session held on November 13, the parties discussed McCalla's meeting with Sokolowski and McCalla stated that he had seen a copy of the KL Agreement in Sokolowski's file. He reiterated that the Union felt that

acknowledging this document as the underlying agreement was important to the bargaining process. Saint Hilare stated that the Union was willing to sign off on that part of the proposed agreement which complied with terms contained in the KL Agreement. Jasinski again disputed the importance of the KL Agreement to the bargaining.

As McCalla testified, the Union put forward a verbal economic proposal which included splitting the wage increases for the second and third years rather than having the full annual wage increase become effective on the anniversary date of the contract. In addition, the Union proposed moving the minimums back to a point where they were significantly less than those set forth in the Tuchman Agreement. The Union maintained its proposal, however, that by the end of the agreement the minimum salaries would reach \$11 and \$10 for CNAs and grade I employees, respectively. The Union did not put forward any proposals regarding pension or health insurance at this time.

According to Jasinski, the Union's "theme" was industry standards. Jasinski did acknowledge that the Union's proposal had pushed back the date the minimums were to take effect.

There was a discussion of the Union's information request. McCalla's bargaining notes reflect that Saint Hilare specifically pointed to the fact that a number of employees over the no-frills limit seemed not to be receiving benefits and that he wanted to know how many employees were in that category. Saint Hilare also asked for information regarding the per-employee premium cost for single health coverage. According to McCalla, the Union was told that it had everything but that Gold will look into the issue of single health coverage. The Union asked whether that would not be something that Gold would know off the top of his head and the reply was that the Employer had made it clear that they were not going to move on the issue of health insurance. Gold stated that the Union was putting jobs in jeopardy and that the Union was not interested in a contract.

Jasinski testified that at this meeting he informed the Union that the facility had contracted to use agency employees.<sup>16</sup> He testified as follows:

The union asked us if there were agency employees that were being used and our response was yes, that we had the threat of a strike, that there was going to be a threat of a work job action, that we were taking precautions, that it was not impacting on any of the employees, that it had no effect whatsoever with regard to any of our employees, we were just looking to make sure that the services were going to be continued to be provided.

Jasinski testified that he also informed the Union that only Castle Hill was using agency workers, and that the other facilities were not. He stated that he did not recall the Union asking any questions about this issue.

<sup>16</sup> In its brief, Respondent asserts that this discussion took place at the October 24 meeting. In his testimony, however, Jasinski stated that he told the Union about the agency usage after the informational picketing (which he characterized as a "demonstration work stoppage") occurred.

With regard to the Union's information request more generally, Jasinski initially testified that he did not recall the Union raising any issues regarding outstanding information requests at this meeting, but during his cross-examination acknowledged that Respondent had informed the Union that it had provided all information that was relevant.

13. The Employer proposes a Christmas bonus and the Union agrees

On December 12 and 13, 2007, the Employer wrote to the Union proposing a one-time holiday bonus for all full-time and part-time employees of \$150 and \$75 respectively. The Union voiced no objection to this, and eventually communicated its agreement with the proposal. The bonus was implemented prior to the Christmas holiday.

14. The seventh bargaining session—January 17, 2008

The parties met for their next session on January 17, 2008. According to McCalla's bargaining notes, Jasinski asked for a clarification of the Union's proposal regarding wages, minimums and vacation time.

At this session, the Employer provided the Union with a verbal economic counterproposal which included a 5-year agreement, with a total wage increase of 18 percent over the course of the agreement, at the end of which the minimum salaries for CNAs and grade 1 employees would be \$9.50 and \$8.75, respectively, and which provided for an increase in the number of allowable no-frills slots to 20. Jasinski stated that the Employer wanted to conclude the contract and was frustrated because it had provided the Union with a language proposal months ago which incorporated language found in the KL Agreement with some minor changes, there had been no response. Saint Hilare countered by pointing out that management had previously stated that the St. Lawrence contract had been the basis for its proposals. Saint Hilare further disagreed with Jasinski's assertion that the Union had not responded to the Employer's noneconomic proposals, noting that the Union's had placed its own noneconomic proposals on the table and was awaiting the Employer's response.

According to McCalla, the Union again asked the Employer to provide the cost of single employee coverage. In addition, the Union wanted to go through the employee roster and identify the no-frills employees. Gold and Jasinski replied that the Union had received all the information it needed and accused the Union of not being interested in bargaining. McCalla requested that the Employer provide the Union with copies of the KL Agreement and related MOA's. On cross-examination, McCalla acknowledged that at the time this request was made, the Union already was in possession of a copy of the KL Agreement and, in fact, had previously supplied it to the Employer. McCalla testified that the request was made because the Union felt that a good-faith review would compel the Employer to acknowledge that the KL Agreement was the underlying contract.

15. On January 29, 2008, Respondent replies to the Union's October 19, 2007 information request

By letter dated January 29, 2008, Jasinski issued the following response to the Union's October 19, 2007 demand

for information. Copies of various memoranda of agreement, including the KL Agreement, were enclosed as well.

As Jasinski wrote:

We are frustrated with the Union's current efforts to avoid meaningful contract negotiations. At the request of the Union, and in an effort to move the negotiations forward, we submitted a complete contract which set forth its understanding of the existing terms and conditions, as well as some limited modifications which we highlighted. Instead of showing your appreciation, the Union decided to file unfair labor practice charges alleging that I somehow misrepresented the terms of the prior contract. As you know, these allegations are patently false.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. Nonetheless, the Union did what it always does—ask for additional information that is largely duplicative and/or irrelevant to the bargaining process. Your recent request for information further represents the Union's delay and bad faith tactics.

Nonetheless, in a further effort to move the negotiations forward, we respond to your additional request for information, dated October 19, 2007, as follows.

**Request No. 1**

For each employee working in a bargaining unit position such documents as will show the following:

- a) Regular hours of work;
- b) Number of overtime hours worked on a quarterly basis in 2006 and 2007; and
- c) Whether an employee is a no-frills employee.

**Response to No. 1:**

This information was already provided to the Union.

**Request No. 2**

Names of all agencies used by the Employer to provide temporary staff.

**Response to No.2**

The facility does not utilize any agencies to provide temporary staff.

**Request No. 3**

Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

**Response to No. 3**

The facility does not possess any such invoices.

**Request No. 4**

Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

**Response to No. 4**

This information will be forwarded to the Union under a separate cover.

**Request No. 5**

OSHA injury and illness records for 2005, 2006, and 2007.

**Response to No. 5**

The facility does not possess such information. Furthermore, we fail to see how this information is relevant to the current negotiations.<sup>17</sup>

**Request No. 6**

Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

**Response to No. 6**

This information is readily available to the Union through the State. Indeed, as the Union has demonstrated in the past, you are already in possession of this information

**Request No. 7**

The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

**Response to No. 7**

This information was already provided to the Union.

**Request No. 8**

Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

**Response to No. 8**

We find it particularly troublesome that you seek copies of prior contracts and MOAs negotiated by your Union. Nonetheless, we enclose the prior contracts and all memoranda of agreements in our possession and the documents provided by the Union during the negotiations, including the KL New Jersey labor Group Contract.

.....  
Jasinski continued:

We look forward to continuing our contract negotiations and fully anticipate that the Union will resume these negotiations in good faith. All we ever wanted was to negotiate a fair contract that balances the needs of the facility, our employees, and our residents. As you have demonstrated, you have been

able to negotiate and make proposals. Avoid the game-playing that has scarred other negotiations. We are not interested in game-playing and only look for a contract that addresses the needs of our employees.

**16. The eighth bargaining session—February 12, 2008**

At the outset of this meeting, the Union put forward a new economic proposal. McCalla characterized this as a “structural move” in that the Union now would agree to having a contract that would not reach back to the expiration date of the 2002 MOA, but would be a 3-year agreement moving forward. The Union additionally proposed a signing bonus of \$400. The date for the top minimum hiring rate was pushed into 2011 and the Union’s demand for pension contributions was reduced to 2.5 percent of gross payroll. The Union additionally reduced its proposal regarding sick days and holidays to 10 in each category and further proposed a \$3 per week uniform allowance.

The Employer then made an economic counterproposal. It reiterated that its position on health insurance was final, proposed a 2-percent contribution to the pension fund, and that it would maintain the status quo with regard to vacation and holidays. In addition, the Employer proposed a two-tier system for medical leave for current and newly-hired employees.

In addition, Jasinski brought forward a new wage proposal that included a signing bonus of \$100 and a formula for wages which amounted to a 17-percent increase over the life of the agreement. After a caucus, the Union came back to the table and stated that it believed that management’s wage proposal was less favorable than the one which had been put forward in January. Jasinski disagreed, and told the Union that it could choose between the new wage proposal or the one which had been previously put forward and consider that to be management’s current position. After a caucus, the Union came back to the table and stated that they would choose the Employer’s prior proposal as reflecting its current bargaining stance. Even though it did not have a signing bonus, the wage structure was more favorable to employees.

At this meeting Jasinski also announced that the Employer had reached its final offer on a number of economic provisions, leaving only the wages and minimums at issue. He further stated that the Employer was close to its final offer on wages and had reached its final offer as to the noneconomic language in the proposed agreement. Both McCalla and Saint Hilare expressed surprise at this position insofar as there had been no discussion of their October 24 proposal regarding noneconomic terms and conditions.

**17. Saint Hilare responds to Respondent’s January 29, 2008 letter**

On February 14, 2008, 2 days after the Parties had met for the eighth time, Saint Hilare responded to the letter sent by Jasinski on January 29 and the information provided therein, as follows:

I am responding to the letters you faxed to the Union on January 29, 2008 referencing a request for information relevant to negotiating collective bargaining agreements at the above referenced facilities that I sent you on October

<sup>17</sup> Jasinski testified that he had been in error in asserting that the facility did not maintain OSHA records.

19, 2008. While you sent four separate letters for each of the facilities in question, your statements were identical in each letter so I will take the liberty to respond to all of the assertions you raised in one document.

The Union shares your frustration at the lack of progress at these negotiations though we take issue with many of the assertions in your letters. To start, the "complete contract" you submitted at each negotiation was not a faithful representation of the existing terms between the parties and you did not indicate or state that it included "highlighted modifications" when you provided the document. The changes you inserted were subsequently highlighted only after we brought them to your attention at bargaining. Further, you did not provide "all the documents responsive to . . . information requests". We have raised the issue of lack of compliance with our information requests both in writing and at multiple bargaining sessions for the above referenced facilities. I will respond to your letter in the format you used. Each response represents our understanding for each of the above referenced facilities.

#### **Request 1**

1. We have not received information on overtime hours.

2. We have not received a list of no-frills employees. Contrary to your claims, we cannot determine from information provided which employees are no-frills.

#### **Request 2 and 3**

Information from our members disputes the assertion that no agency CNAs are being used in the above referenced facilities.

#### **Request 4**

As I advised you on February 7, 2007 we have yet to receive the copies of work schedules for the above referenced facilities promised in your January 29, 2008 letter.

#### **Request 5**

We find it hard to believe that the facilities do not keep OSHA logs. It is my understanding that nursing homes need to keep these records. The Union has made proposals for improved health and safety standards that would be informed by this information which reflects employee injuries and illnesses.

#### **Request 6**

We understand but do not agree with your position that you need not provide Medicaid costs reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available.

#### **Request 7**

You provided only the cumulative cost for single health insurance coverage for everyone in the above referenced facilities, not the monthly per employee

premium cost to each of the four employers. That vital piece of information cannot be accurately computed from the information we received. We cannot simply divide the cumulative total by the number of employees to determine the cost because the number of employees fluctuates from month to month. We do not understand why you refuse to simply provide this readily accessible monthly premium information.

#### **Request 8**

We finally received the MOAs and contracts as you promised in your January 29, 2008 letter. We are pleased to receive this information so that we can confirm past practices and benefits and bargain intelligently over the issues. We note that at least one of the KL Labor Group contracts you sent us is not a document we had and gave to you during bargaining. We presume that it is a document that the employer had in its possession and recognized as part of the bargaining history between the parties. If that is incorrect, please let me know.

The Union also looks forward to returning to negotiations and concluding collective bargaining agreements that address the legitimate needs of our members as well as the needs of the residents and operators of the facilities.

18. Respondent replies to Saint Hilare's  
February 14, 2008 letter

On February 20, 2008, Jasinski responded to the assertions contained in Saint Hilare's letter, as set forth below:

We have reviewed your letter dated February 14, 2008 combining all facilities and continue to be perplexed by your actions. Instead of focusing your attention on negotiating a contract in the best interests of your members, you persist with your requests for information entirely irrelevant to the bargaining process.

As we advised you, we will provide copies of the work schedules under separate cover. Otherwise, we have fully complied with the Act by providing the Union with all the information necessary to negotiate. We continue to assert that this information is unnecessary, irrelevant and already in the Union's possession. Your request for irrelevant information further represents the Union's delay tactics and abuse of the process. One needs to look no further than the Union's ability to put forth full comprehensive economic offers with the information we have already provided to you.

Additionally, we have repeatedly told you at the bargaining table that the KL Labor Group contracts have no relevance to these negotiations. Contrary to your self-serving statements, we do not recognize that these documents are part of the bargaining history of the parties.

It is time for you to stop playing games and focus on negotiating a contract in good faith. If it is your position that the Union will not return to the bargaining table without this information, please let us know. If that is the case, we respectfully request that you have the decency to inform your members of the reasons that the parties are

not meeting. We do not want any misunderstanding or miscommunications on this point. Otherwise, we intend on going forward with the scheduled sessions in a good faith effort to reach an amicable resolution that balances the needs of this facility with that of the employees.

Finally, by combining all the facilities in your letter, you continue to disregard our position that each facility is separate and stand alone. In the future, please address each facility separately, since each facility has its own collective bargaining agreement.

19. The ninth bargaining session—February 27, 2008

As McCalla testified, the Union decided to make some structural changes and compromises to “jumpstart” the bargaining with regard to wages and health insurance. In particular, the Union agreed to add a fourth year to the agreement. In addition, the Union agreed to run the contract prospectively and, as McCalla stated, that would bring the coverage of the agreement closer to management’s proposal for a 5-year term. Further, the top salary minimum rates were pushed back to take effect September 2011. The Union additionally proposed a 2-percent seniority recognition bonus.<sup>18</sup> The Union modified its proposal regarding employer-financed dependent care coverage and suggested a schedule that would not require the Employer to make full payment for dependent coverage until an employee had completed 10 years of service.<sup>19</sup>

Jasinski told the Union that the proposed wage structure, coupled with the seniority bonus, was regressive and demonstrated the Union’s bad faith. Jasinski stated that the Union’s advancement of this proposal, at such a late date in negotiations, showed that they were not trying to get a contract and were just attempting to drag things out.

20. The 10th bargaining session—March 11, 2008

Prior to this meeting, on February 29, 2008, the Union issued another 10-day notice regarding informational picketing at Castle Hill.

At the 10th meeting, which McCalla did not attend, the Employer put forth a revised economic proposal which sought to modify paid time off by establishing a two-tier system for current and newly-hired employees. Respondent also offered an increase in the signing bonus.

Saint Hilare told Respondent that, without the information regarding health premium costs, it was difficult to bargain over or defend its health care proposal. Jasinski replied that the Union had been able to make its proposals without the information.

Saint Hilare testified that at this meeting he told Jasinski that there Castle Hill was utilizing the services of agency employees

<sup>18</sup> Saint Hilare’s bargaining notes from March 11 indicate that the Union’s seniority recognition proposal would apply to employees with more than 5 years of employment.

<sup>19</sup> For the first 5 years of employment, the employee would pay for dependent care. After this point, the Employer would assume 50 percent of the cost and the share of the Employer’s burden would increase by 10 percent each year until the employee had completed 10 years of employment.

and that Jasinski denied that claim.<sup>20</sup> Saint Hilare also stated that the Union had asked the Employer about the number of no-frills employees and why certain employees did not have health insurance and Gold replied that the Employer would get back to the Union on that issue.

Saint Hilare also told the Employer that members were complaining about having received medical bills. Gold collected copies of such bills from the bargaining committee members and said he would look into the issue. The Union complained that new employees were not being informed that they were eligible for health insurance, and Gold stated that there was a staff member whose responsibility it was to speak with new employees about their benefits.

A bargaining session scheduled for March 18 was thereafter canceled by the Union. On that day, Saint Hilare met with local politicians to enlist their support in getting a contract with Respondent.

21. On April 1, 2008, Respondent provides additional information to the Union

By letter dated April 1, Jasinski wrote to Saint Hilare and provided additional information to the Union as follows:

We provide you with the following information:

1. Amount of overtime for the previous year varied each week based on a number of factors including call-outs and unavailability of staff. Nevertheless, it is fair to estimate that overtime hours typically ranges from 100-300 hours per week over the previous year.

- 2. Number of no-frills employees: 0
- 3. Agency Usage: None as of April 1, 2008
- 4. OSHA: See attached<sup>21</sup>
- 5. Monthly insurance premiums:
  - 289 Single
  - 526 E+1
  - 647 Family

As we have previously stated across the table, nothing has prevented the Union from engaging in negotiations. To the contrary, the Union has made proposals and counterproposals including a comprehensive contract proposal. Upon receipt and review, if you have any additional questions or comments, we respectfully request that you respond in writing.

22. The Union’s response to Respondent’s April 1 letter and submission

On April 9, Saint Hilare responded as follows:

I am responding to your April 1, 2008 letters regarding the Union’s outstanding request for bargaining information. While you sent four separate letters for each of the facilities in question, your statements were almost identical for each facility. Unless otherwise indicated, my comments below relate to all four facilities.

<sup>20</sup> Saint Hilare’s bargaining notes list as an issue to be raised, “agency workers @ Castle Hill.” There is also a subsequent reference to “agency.”

<sup>21</sup> Enclosed was the OSHA log for 2007.

Request 1: Your response to the Union's request for overtime information is inadequate. You state, "it is fair to estimate" for all four facilities that overtime hours "typically range from 100-300 hours per week over the previous year." The Union requested the number of overtime hours worked on a quarterly basis in 2006 and 2007 for each bargaining unit employee. Your generalized estimate is not sufficient.

You provided contradictory information on the number of no-frills employees.

Requests 2 and 3: You continue to deny that the facilities use agency workers.

Request 4: No schedules were provided.

Request 5: After all these months, you finally produced OSHA logs for 2007 on April 1, 2008. You did not produce logs for 2005 and 2006.

Request 6: No documents provided.

Request 7: Thank you for finally providing the monthly insurance premiums in your April 1, 2008 letter.

The piecemeal fashion in which the information has been provided and the failure to provide all the information requested, even these many months later, has made these negotiations particularly difficult. Now that we have information regarding health insurance and health and safety, we will provide you with revised proposals at our next bargaining sessions at all four facilities. Once we receive the remaining information, we will present further proposals.

#### 23. The 11th bargaining session—April 9, 2008

The Employer had maintained that the facility did not have any no-frills employees. Jasinski testified that the Union kept raising the issue because the Employer had proposed increasing the number of allowable slots and had been informed that this was to afford the Employer increased flexibility. As Jasinski testified, Respondent also took the position that, inasmuch as no-frills employees were union members, the Union could get that information from them.

At this bargaining session, the union representatives had brought with them a copy of the employee list which had been provided by Respondent. The Union had placed question marks next to the names of all employees who were designated as not having health insurance. According to Saint Hilare, the list showed a number of employees who appeared to be without coverage who worked enough hours and had sufficient seniority to qualify under the 2002 MOA. The Union wanted to speak about individual employees, but the Employer refused to do so. Initially, Gold stated that he would get back to the Union with a response, but then the Employer advanced several possible explanations as to why workers who were not no-frills employees would nevertheless not have coverage: the employee may not have sufficient hours to participate, the employee may not have reached the 6-month waiting period in order to participate; or the employee simply never signed up for coverage.<sup>22</sup> On cross-examination, Respondent adduced

<sup>22</sup> This assertion prompted a discussion about whether the Employer had an affirmative obligation to ensure that employees who qualified for coverage were knowledgeable about their rights.

testimony from Saint Hilare that the Union had not sought to file grievances with regard to any employee who was listed as not receiving health insurance who the Union felt would qualify for that benefit.

The Union reiterated its prior requests for employee schedules and was told that they were bulky and not retained.<sup>23</sup>

#### 24. Respondent's April 22, 2008 response to the Union's April 9 letter

On April 22, 2008, Jasinski replied to Saint Hilare's April 9 letter as follows:

We are in receipt of your letter dated April 9<sup>th</sup>. At the inception of these negotiations, the Employer provided the Union with a complete response to the Union's request for information. Nonetheless, on April 1, 2008, we provided a supplemental response in response to information requested by you. Instead of expressing appreciation, you claim that the failure to provide the Union with additional information—which is largely irrelevant, not in our possession, and/or easily ascertainable—has made these negotiations difficult.

Let's be clear. The parties have been negotiating for months. As we previously stated across the bargaining table and in prior correspondence, the Union has been fully capable of putting forth full economic proposals and counterproposals. Indeed, you have made proposals covering every economic item. The additional information being sought is neither relevant nor necessary to continue bargaining. Rather, it reflects the Union's delay and stall tactics and its warped purpose of avoiding a contract that addresses this facility.

As always, we are fully prepared to continue negotiating in good faith. Nonetheless, if the Union is unwilling to continue bargaining without the rest of the requested information, please let us know. Otherwise, the Union should be prepared to negotiate a contract that balances the needs of this facility and its employees.

Thank you.

#### 25. The 12th bargaining session—May 14, 2008

On May 8, Saint Hilare wrote to Jasinski confirming that he had received a letter setting a negotiating date of May 14. Jasinski replied the same day noting that since the Union had requested the involvement of the FMCS, any and all communications regarding the negotiations be communicated through the mediator, including proposed dates for meetings.

At this meeting, as Jasinski testified, certain economic proposals were exchanged and from the Employer's perspective, "we were pretty close to our final offer at that time." Saint Hilare's bargaining notes for May 14 show that the Employer presented a proposal for a 5-year agreement, a \$175 signing bonus upon ratification, a 17.5-percent wage increase over the life of the agreement, and final minimum salaries of \$9.50 and \$8.75. No-frills employees would receive a wage enhancement of \$1.50 per hour, and 20 such positions would be

<sup>23</sup> Previously, in letters dated January 29 and February 20, the Union had been advised that schedules would be provided.

allotted. The majority of other benefits would be as had been previously proposed. The Union modified its February 27 offer by reducing the proposed signing bonus to \$325 and lowering proposed wage increases by \$.25 in 2 years of the contract.

The Union requested that the Employer supply it with an updated employee roster. Jasinski agreed, and according to Saint Hilare, also committed to providing the Union with answers to its questions regarding no-frills employees. On May 14, Respondent supplied Saint Hilare with a list of employees as of May 13, 2008, setting forth each employee's name, title, rate of pay, date of hire, address, hourly status, and health insurance status. As Saint Hilare testified, however, the document did not contain any health insurance information whatsoever with regard to a number of employees and lists one employee as being a no-frills employee; thus it did not clear up the no-frills issue.

During the meeting, Saint Hilare told the employer representatives that he would be unavailable for bargaining during the month of June due to a union convention and a planned vacation. According to Saint Hilare, he made a point of repeating this at the meeting and Jasinski joked with him about it. Jasinski testified that he did not recall how he became aware that Saint Hilare would be unavailable, and that any such unavailability should not have precluded the parties from negotiating inasmuch as McCalla would have been available in any event. Jasinski further asserts that he communicated this to Saint Hilare.

26. Respondent's May 15, 2008 letter to the Union and the Union's response

On May 15, Jasinski wrote to Saint Hilare, as follows:

On May 14, 2008, the parties held another negotiation session. At that time, the Employer made a complete proposal for a new collective bargaining agreement to the Union. The Union responded with a minor change in its wage proposal and no further changes in any other provision including economic and non-economic items.

Prior to the conclusion of this meeting, after nine (9) months of negotiations, you requested (for the first time) an updated list of employees. You indicated that once you receive that list you will be prepared to schedule another negotiation session. Yesterday, we forwarded to you in your office the updated list of Union employees. Therefore, we see no reason for continued delay and request a bargaining session for this facility. We propose May 30, June 2 or 3, 2008 to continue negotiations, as this will provide you with more than sufficient time to confirm the information and formulate a complete response. At that session, we expect a full proposal from the Union that includes economic and non-economic items.

On May 20, Saint Hilare replied as follows:

This is to advise you that a set of bargaining date[s] is sent to you for your confirmation regarding Castle Hill, Harbor View and Palisades. The Union is available on June 6, 2008 for

Castle Hill at 10AM, June 9, 2008 for Palisades at 10AM and June 10, 2008 for Harbor View at 10AM.<sup>24</sup>

27. Respondent's May 28, 2008 response to the Union's April 9 information request

On May 28, Jasinski wrote to the Union, enclosing certain information that previously had been requested from Respondent:

We enclose the following additional documents responsive to the Union's request for information:

1. Total overtime hours by quarter for 2006 and 2007;
2. OSHA Reports for 2005 and 2006;
3. New Jersey State Reimbursement Reports for 2005 and 2006; and
4. the following department schedules:
  - a. Dietary Department (12/30/07-5/16/08)
  - b. Housekeeping Department (12/23/07-4/26/08)
  - c. Nursing Department (1/6/08-4/26/08)

These are all of the responsive documents in our possession. Additionally, as we previously stated, there were no agency personnel used by this facility in the requested time period.

We continue to await dates for continued negotiations at this facility.

McCalla testified that the overtime information provided by Respondent in this letter was not responsive to its requests for individualized information and, therefore, did not enable the Union to fully investigate the potential impact the proposed elimination of daily overtime would have on individual employees.

28. On June 10, 2008, the Union responds to Respondent's May 28 submission

On June 10, Saint Hilare sent Jasinski the following reply to his May 28 letter and the information provided therein:

We received the information accompanying your May 28, 2008 letter. As you know, we have been seeking this information since April 25, 2007. Your piecemeal production has greatly impaired our ability to bargain. Further, the information you provided still is not complete.

I must also point out that since early April, 2008 at Castle Hill bargaining, I requested updated information for all four facilities. With respect to the documents produced with your May 28, 2008 letter, the production remains incomplete.

1. Overtime hours: You did not provide overtime hours for each employee as requested for any of the four facilities. Rather, you provided a total quarterly amount for all employees, presumably across all bargaining unit job titles for 2006 and 2007. Given the employer's proposal on the elimination of daily overtime, the receipt of this information is necessary.

At the April, 2008 session at Castle Hill, we questioned you about your response to our request for

<sup>24</sup> Saint Hilare was available this week as it fell between the convention and his vacation.

overtime information. We told you the information was necessary given your daily overtime proposal. You replied that the rough estimate you provided was all that you had to give us. We need the overtime information for June 1, 2007 through May 31, 2008, as well as for the period stated in the April 25, 2007 request. We also need it in the form described in our April 25, 2007 letter, i.e., on a quarterly basis for each employee.

2. OSHA reports: none were provided for 2005 at Harborview.

3. Cost Reports: It does not appear that you provided the complete and final reports as the copies provided did not contain Schedule H, the provider's certification. In addition, other pages were missing from the 2006 and 2005 reports for Castle Hill. In my February 14, 2008 letter I also asked you to provide the 2007 reports as soon as they are prepared by your clients; to date, no 2007 reports have been provided.

4. Schedules: The schedules you provided do not show all individuals who were actually working on the floors. There are daily schedules in nursing which show on a single page all individuals who actually work on all shifts on all units. Please provide the daily schedules for February 1, 2008 through the present. In addition, the LPN schedules for Harborview were provided only for one month and not even all shifts for that month. Finally, only about four months of schedules were provided for each of the four facilities.

5. Agency information: You stated in your May 28, 2008 letter that "there were no agency personnel used by this facility in the requested time period." What do you mean by requested time period? In your previous correspondence and at bargaining, you claimed that none of the facilities used agency workers. Are you now saying that agency workers have been or are being used since March 2007? If so, please provide the information regarding agency usage, as requested paragraphs 8 and 9 in my April 25, 2007 information letter for all four facilities during the period from March 2007 to the present time.

6. No-frills: You have not clarified the contradictory information provided to us on April 1, 2008.

Thank you for your anticipated cooperation.

29. Respondent's June 17, 2008 reply to the Union's June 10 letter

On June 17, Jasinski wrote to Saint Hilare in response to the assertions made in his June 10 correspondence:

We are in receipt of your letter dated June 10, 2008. Your response to the information we provided with our May 28th letter is just as puzzling as your repeated steps to try to avoid reaching a contract. In our letter, we informed you that we have provided you with all of the information in our possession. Yet, you insist that our production somehow "remains incomplete." It is no different than the responses you make at the negotiating table.

Now, more than ever, it is apparent that the Union has absolutely no interest in using any of this information for

legitimate purposes at the bargaining table. Rather, the Union's strategy is transparent—to use these information requests to avoid meaningful bargaining and to try to avoid reaching impasse. Instead of continuing your bad faith conduct by putting forth irrelevant and harassing information requests, I suggest that you refocus your energies to engage in meaningful bargaining so that the parties can reach a contract for the benefit of our employees.

We respond to your specific allegations as follows:

1. The approximate average overtime worked per employee are as follows:

1<sup>st</sup> Quarter 2006 - 53 hrs  
2<sup>nd</sup> Quarter 2006 - 38 hrs  
3<sup>rd</sup> Quarter 2006 - 73 hrs  
4<sup>th</sup> Quarter 2006 - 50 hrs

1<sup>st</sup> Quarter 2007 - 63 hrs  
2<sup>nd</sup> Quarter 2007 - 47 hrs  
3<sup>rd</sup> Quarter 2007 - 65 hrs  
4<sup>th</sup> Quarter 2007 - 55 hrs

Moreover, contrary to your assertion, we never proposed to eliminate overtime. To the contrary, all bargaining unit employees will continue to be paid overtime compensation on a weekly basis. We stated this at the bargaining table. You continue to try to manipulate and distort the facts.

2. As you concede, we provided you with all the requested OSHA reports.

3. We provided you with the 2005 and 2006 cost reports in their entirety. We provided you with these cost reports even though they are typically not considered to be relevant in negotiations, and you have not demonstrated any need for these documents, as you must under Board law. *Troy Hills Nursing Home*, 326 NLRB 1465, n.2 (1998). You claim that "Schedule H" and other unidentified pages were missing from these reports. Accordingly, please provide us with the *specific* reasons why you consider such information relevant to the bargaining.

4. We provided you with all the schedules in our possession. We cannot provide them in a form which does not exist.

5. This facility did not utilize agency personnel from March 2007 through the present.

6. Currently, Castle Hill does not have any employees in the no-frills category. We fail to understand what "clarification" is needed.

We recognize that you are currently away on vacation. In fact, we know that you have been unavailable since the end of May. We suggest that you propose dates in July and August that will not conflict with your schedule.

Thank you.

30. Respondent declares impasse and issues  
its final offer

On July 7, Jasinski sent the Union a letter together with what was characterized as its final offer, as follows:

We are fast approaching the one-year anniversary of the expiration of the referenced collective bargaining agreement. Since the expiration of the contract, the Employer met with the Union and its committee in numerous bargaining sessions. In these sessions, the Employer responded to the Union's proposals and offered a complete contract containing terms and conditions as well as addressing all economic issues. The exchanged proposals and counter-proposals were made on our part in a good faith attempt to reach an amicable resolution for a new collective bargaining agreement.

These numerous sessions with counter-proposals demonstrate there is a difference of opinion between the parties on a number of things, including, but not limited to, wages, health benefits and paid time off. It has been over one month since we last met with the Union. The Mediator, as well as this office has tried to contact you—all attempts have been unsuccessful. It is apparent to us that the Union has shown no interest in meeting to resolve this collective bargaining agreement and refuses to move from its fixed positions.

Because of the Union's inactions and unwillingness to modify its proposals, we are at an impasse. Enclosed, please find the Employer's final offer, which we will implement July 11, 2008. The implementation of this final offer is based on a number of factors including, but not limited to, the Union's fixed positions in the contract negotiations.

This final offer does not preclude meeting with the Union—we will. We believe that too much time has transpired and we do not see any interest by the Union to resolve this matter. Should you have any questions or want to discuss this matter further, please call the undersigned.

....

FINAL OFFER  
CASTLEHILL HEALTH CARE CENTER  
And  
SEIU 1199 NEW JERSEY

TERM: Five (5) years, to be effective upon ratification by members.

ELIGIBILITY: Employees who are regularly scheduled and work thirty (30) hours or more per week shall receive full benefits. The working time shall be defined as per the Employer's Workweek proposal.

Employees who are regularly scheduled and work twenty (20) hours and less than thirty (30) hours shall receive benefits on a prorata basis. The working time shall be

defined as per the Employer's Workweek proposal.

WAGES

BONUS: \$175.00 - Full time employees  
\$90.00 - Part time employees

NO-FRILLS: \$2.50 per hour above the minimum in the job classification for all employees who waive all contract economic benefits.

\$1.50 per hour above the minimum in the job classification for all employees who waive all economic benefits with the exception of paid holidays, sick days, personal, if any, and vacation days.

*Twenty-five (25) no-frills positions.*

Upon ratification or implementation by the Employer: three percent (3%) increase.

Twelve (12) months after ratification: two and one-half percent (2 ½ %) increase

Eighteen (18) months after ratification: two percent (2%) increase.

Twenty-four (24) months after ratification: three percent (3%) increase.

Thirty-six (36) months after ratification: two percent (2%) increase.

Forty-two (42) months after ratification: two percent (2%) increase.

Forty-eight (48) months after ratification: three percent (3%) increase.

Increases shall not be added to minimums.

**New Minimum hiring rates as follows:**

**CNAs Grade 1**

**Upon ratification**

**\$8.75      \$8.00**

**Twenty-four (24) months after ratification**

**\$9.25      \$8.50**

**Forty-eight (48) months after ratification**

**\$10.00      \$9.00**

Employees shall receive the increase to the new minimum or the general increase, whichever is greater.

**EMPLOYEES EMPLOYED PRIOR TO RATIFICATION SHALL RECEIVE THE FOLLOWING BENEFITS:**

HOLIDAYS: -Eight (8) designated holidays  
- Employee's birthday  
- Two (2) personal days accrued annually

SICK DAYS: Eight (8) sick days accrued annually

VACATION: CNAs and Grade I

Ten (10) paid days - Upon completion of one (1) year of continuous employment.  
 Beginning of sixth (6th) year of continuous employment, eligible employees begin to accrue fifteen (15) paid days.  
 Beginning of the sixteenth (16th) year of continuous employment, eligible employees begin to accrue sixteen (16) paid days.  
 Beginning of the twenty first (21st) year of continuous employment, eligible employees begin to accrue seventeen (17) paid days.

**HEALTH INSURANCE:**

As provided by the Employer.

**PENSION:** Two percent (2%) of all eligible full-time covered employees' wages for hours physically worked, as defined in the Employer's Pension Article.

**LIFE INSURANCE:**

Increase to a total of \$15,000.00.

**1199 TRAINING AND UPGRADING FUND:**

One half percent (1/2%) of hours physically worked for eligible employees for hours physically worked. Eligibility and hours physically worked are defined as per the Pension Provision in the Employer's proposal.

**UNIFORM:** Increase to \$3.00 per week for all full-time employees. This amount shall be pro-rated for eligible part-time employees.

**EMPLOYEES HIRED AFTER RATIFICATION:**

**HOLIDAYS:** Eight (8) designated holidays  
 Employee's birthday

**SICK DAYS:** Earn one (1) day for every two (2) months of continuous employment.

**VACATION:** CNAs and Grade 1:

Upon completion of the first (1st) year of continuous employment five (5) paid days.  
 Beginning of the third (3rd) year of continuous employment, eligible employees begin to accrue ten (10) paid days.  
 Beginning of the eleventh (11th) year of continuous employment, eligible employees begin to accrue fifteen (15) paid days.  
 Beginning of the sixteenth (16th) year of continuous employment, eligible employees begin to accrue sixteen (16) paid days. Beginning of the twenty-first (21st) of continuous employment, eligible employees begin to accrue seventeen (17) paid days.

**HEALTH BENEFITS:** Same as all other employees.

**PENSION:** Same as all other employees.

**LIFE INSURANCE:** Same as all other employees.

**UNIFORMS:** Same as all other employees.

**TRAINING AND**

**UPGRADING:** Same as all other employees.

**31. The Parties confirm subsequent negotiations**

On July 7, 2008, apparently prior to receiving or reviewing the final offer, Saint Hilare wrote to Jasinski that he had just returned from vacation and had reviewed Jasinski's June 17 and 23 letters, written while he had been away. He expressed surprise at Jasinski's statements concerning his failure to contact the Employer to propose bargaining dates. He further stated that he had contacted the mediator, and proposed a series of bargaining dates for the four Omni facilities. He additionally outlined the information which the Union maintained had still not been furnished.

On July 10, Jasinski replied that the Respondent would meet with Saint Hilare regarding Castle Hill on July 17, 2008. With regard to the information sought, Jasinski asserted that the Employer had given the Union all the information in its possession and further stated that "the no-frills employees do not apply to this facility." In this letter, Jasinski characterized the upcoming meeting as "negotiations."

**32. The Union responds to Respondent's declaration of impasse and the final offer**

On July 11, Saint Hilare sent the following letter to Jasinski:

I received your letter dated July 7, 2008 regarding the final offer for Castle Hill. I sent you a letter on July 7, 2008 where I proposed bargaining dates on which both the mediator and I are available.

I dispute in the strongest terms that the parties are at impasse. You continue to fail to provide all the information requested. Our last bargaining session we asked a number of questions about the Employer's health plan such as why employees who appeared to be eligible for health insurance under your proposal were not covered and why deductions were made from paychecks for "free" dental benefits. You have not responded to those questions.

Your claim that you are imposing your "final offer" because the Union has been unwilling to modify its proposals and its "inactions" is preposterous. The Union has repeatedly modified its proposals and as recently as at our last session. The proposal I received today from you was never previously presented. For example, you never had a proposal for 25 no frills employees. The Union has not had the opportunity to discuss this or the other parts of your offer with the committee and the Union has a number of questions about it.

Further, the impact of short staffing at Castle Hill and the increased usage of the agency employees have become especially acute and I just learned that during my vacation employees conducted a spontaneous protest over the impossible working conditions and difficulty in providing

patient care that have resulted from understaffing. The Union bargaining committee has finally had the chance to review schedules that you belatedly produced on May 28, 2008 (almost a year after they were requested and which remain incomplete). This information has influenced proposals that the Union intends to discuss at our next session.

Given that the parties are not at impasse, the Employer's unilateral imposition of your "final offer" violates its duty to bargain in good faith. Instead of threatening to impose, I suggest you accept the bargaining date I offered in my letter of July 7, 2008 and approach the bargaining table with some flexibility so we can finally settle this contract.

Thank you for your anticipated cooperation.

### 33. The 13th bargaining session—July 17, 2008

The parties met again on July 17. At the outset, Saint Hilare asked whether the Employer had implemented its final offer. Jasinski replied that it had, as of July 13. The Union informed the Employer that, despite certain references to ratification in the final offer, it would not be submitted for ratification by employees. The Union then posed a series of questions regarding certain terms of the final offer relating to part-time employee eligibility for benefits and the signing bonus; whether the proposed no-frills rate would be above an employee's current rate or the minimum rate of pay; why the Employer had raised the allowable number of no-frills employees from 20 to 25 slots and whether employees working fewer than 20 hours per week would receive any benefits. The Employer provided the answers to such inquiries. The Union was informed that the otherwise unexplained reference to the "workweek proposal" referred to what had been set forth in the compilation document.

The union representatives argued that the parties were not at impasse and told the employer representatives that they had advanced proposals in every meeting, and were prepared to do so going forward. Saint Hilare noted that the Employer had never responded to the Union's October 24, 2007 non-economic proposal.<sup>25</sup> Jasinski replied that the Union did not want a contract; that the only thing they cared about was information and that the Union was unwilling to move beyond industry standards. The Union responded that even its initial proposal did not seek such industry standards and that the most recent economic proposal lagged in years behind the Tuchman Agreement.<sup>26</sup>

<sup>25</sup> Jasinski testified that there was no subsequent discussion of the Union's October 24 proposal because the Union had insisted that the parties negotiate economics and the parties did not have further discussions about the language issues.

<sup>26</sup> As McCalla explained, the Union's most recent economic proposal comes to minimums of \$10 for grade 1 and \$11 for CNAs in 2011. In the Tuchman Agreement, those rates were reached in 2008. In addition, the proposed scale for the initiation of dependent health coverage differs from the Tuchman Agreement insofar as that contract provides for full dependent coverage, with premiums fully paid by the Employer. The Tuchman Agreement additionally affords employees greater paid sick leave, vacation, and holidays.

There was a clarification of when part-time employees working between 20 and 30 hours per week would see their benefits reduced. The Employer clarified that its proposal to raise this threshold applied prospectively only, and did not affect current employees. The parties then discussed the difficulties with staffing. Saint Hilare noted that the facility's employee census had dropped from 121 to 94 employees and asked why that was the case. Jasinski attributed this to typical turnover and denied there was a staffing issue. Saint Hilare handed the employer a copy of the employee roster which had been provided on May 14 which indicated with specificity those employees who appeared to qualify to receive health insurance and who were not so designated. Jasinski took the list and told Saint Hilare that the Employer would research the issue and get back to the Union.

The Union again asked about the facility's use of agency employees. According to Saint Hilare, it was at this time that Jasinski acknowledged that the facility had, in fact, used agency employees and Saint Hilare asked for specific information about such usage. McCalla testified, and his bargaining notes show, that Jasinski told the Union to put their request in writing. The Union also relayed complaints from the members about the Employer's use of students. They stated that unit employees were complaining that they had to take extra time to train these workers, as they did with agency employees.

At this point in time, the Union caucused to review the information they had obtained and consult with the bargaining committee. Upon their return they were informed that, due to a family emergency, Jasinski would have to leave. As he was leaving, Saint Hilare told Jasinski that he had a proposal to give the Employer and Jasinski told Saint Hilare to fax it to him. Saint Hilare testified that he did not do so inasmuch as the Union's practice is not to conduct bargaining in the absence of employee participation.

Jasinski offered little testimony about what occurred at this meeting, other than to state that the Union did not put forth any proposals and to note that the Union brought up subjects, such as the students, that had not previously been discussed in bargaining.

### 34. Subsequent information requests and correspondence

On July 23, 2008, Saint Hilare wrote to Jasinski asking for information regarding agency usage and requesting further bargaining. His letter is as follows:

I am writing to follow-up our discussion on July 17, 2008 during the Castle Hill bargaining regarding information on agency workers as well as the number of employees who do not have health insurance coverage. As explained, the Union will need to formulate proposals. This letter also is a follow-up to the July 7, 2008 regarding the Union's outstanding information requests for Bristol Manor, Castle Hill and Harborview bargaining

At the Castle Hill bargaining on July 17, 2007, employer conceded after having repeatedly denied using agency workers, that agency workers have, in fact, been in used at Castle Hill to provide temporary staff. Based on that, the Union requests:

1. Names of all agencies used by the employer to provide temporary staff;

2. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the employer during the periods January 1, 2008 through July 22, 2008.

3. At bargaining, Castle Hill also agreed to provide a seniority list of the employees with explanation on why some employees who are working the required number of hours do not have health insurance coverage. You recall that at that session, the Union provided a list of names with question mark beside names for employees who do not have health insurance coverage.

Please provide the information listed above as well as the outstanding information described in my July 7 letter. Please also let me know which dates you are available to bargain for Castle Hill, Harborview and Bristol Manor.

According to the testimony of the union witnesses, there was no response to this letter.

#### 35. Subsequent telephone discussions

Saint Hilare testified that after the parties' final meeting on July 17, he called Jasinski's office on several occasions and spoke with him. As Saint Hilare testified, in one of these discussions Jasinski asked what the Union was trying to achieve. Saint Hilare replied that the Union wanted the same things he had stated at the initiation of bargaining, and that they were not talking about the moon or \$20 per hour. Jasinski suggested that the Union forego employer contributions to the pension and alliance funds. Saint Hilare replied that he could not bargain with Jasinski on the phone, requested that he come to the table and stated that the Union had a proposal to make. Jasinski told Saint Hilare to send it to him. Saint Hilare told Jasinski that he would not do that and that he would not bargain with Jasinski in the absence of the members. Saint Hilare testified that at the time of the July 17 meeting, the Union had a written proposal to present, but had not yet shown it to the members. He had planned to discuss this proposal at a caucus and then bring it to the Employer, but the meeting ended before he could do so. When asked whether anything prevented the Union from caucusing with the bargaining committee and discussing that proposal with Respondent after Gold and Jasinski left the meeting, Saint Hilare replied: "As I mentioned to you, we haven't done that and bargaining face-to-face as we always do. So why should we do it now, especially when management put the final offer on the table, we have so many details, so many questions, why should I do that by phone, why should I do that?" Saint Hilare then testified that he asked Jasinski for an "off the record" meeting and Jasinski initially assented but when he found out who would be present, declined to meet. In other respects, as Saint Hilare testified, Jasinski never expressly refused to meet, he simply did not respond to the Union's requests for additional bargaining dates.

#### *C. Stipulations and other evidence as to changes in terms and conditions of employment*

At the hearing, the parties entered into certain stipulations regarding the implementation of Respondent's final offer. In particular, the parties stipulated that the Employer stopped paying daily overtime; that there was a partial implementation of a uniform allowance as to certain employees and a no-frills system consistent with the final offer was implemented. In addition, Jasinski testified that the Employer has given its employees the wage increases set forth in the final offer and that Respondent advised the Union that the terms relating to health insurance eligibility would be implemented prospectively, and that no part-time employee currently receiving such benefits would lose them.

#### *D. The Alleged Failure to Remit Pension Contributions*

##### 1. The amendment to the complaint

The charge in Case 22-CA-28152, as originally filed on December 3, 2007, alleges, in relevant part, that: "[s]ince in or about July, 2007, the above named Employer . . . delayed, failed and refused to furnish information to the Union necessary to collective bargaining negotiations."<sup>27</sup>

On April 9, 2009, the Union amended that charge to add the following allegation: "Since in or about July 2007, the above-named Employer unilaterally failed to make pension fund contributions without notifying or bargaining with the Union." The regional office mailed the amended charge to the Respondent and its counsel of record on April 10, the following day. Following an investigation which was conducted during the course of the proceedings in this matter, on May 22, 2009, counsel for the General Counsel moved to amend the complaint to allege that since on or about February 1, 2007, the Respondent unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union.

At the hearing Respondent objected to the proposed amendment, arguing that it was barred by the 10(b) statute of limitations and that it was predicated on a different theory from the original charge. In its brief, Respondent raises certain additional defenses to the proposed amendment. In particular, Respondent argues that only the SEIU National Industry Pension Fund (the Fund) has standing to raise such a claim and that the Fund is neither a party to the charge nor to the collective-bargaining agreement. In this regard, the Respondent argues that the Union has no right to raise this claim on behalf of the Fund. Respondent additionally denies the material allegations of the amendment.

At the hearing, I granted the General Counsel's motion to amend the complaint. The evidence adduced with respect to this allegation consisted primarily of the testimony of Betsy Blount, who has been employed by the Fund since 2000 in various positions, together with certain documentary evidence

<sup>27</sup> There is another allegation, contained in the charge as filed in December 2007, that the Employer falsely presented to the Union a document purporting to represent existing terms and conditions of employment, which is not a subject of the instant complaint.

which was maintained in the Fund's files, as will be discussed below.

## 2. Background

By letter dated November 22, 2002, the Union's then-attorney, Richard M. Greenspan, forwarded to the Fund a copy of the pension appendix executed by the parties in conjunction with the 2002 MOA. Beginning in about August 2002, contributions were remitted. However, payments for employees of Respondent were made by three entities. Castle Hill made contributions for the dietary employees of the facility. Contributions for the certified nurses aides were drawn on the checks of an entity called Healthcare Staffing & Consultants, LLC (Healthcare). Contributions on behalf of the recreation employees were drawn on the checks of Sunshine Recreation, LLC (Sunshine).

Some 4 years later, on November 5, 2006, SEIU International Representative Larry Alcott sent an e-mail to Fund Collections Manager Jack Salm about remittances for the Castle Hill employees:

Jack,

I want to follow up on the list of pension issues in NJ that we discussed on the phone last week:

Omni Mgmt group (Castle Hill, Bristol Manor, Palisades and Harborview)—The Employer is a party to 4 separate CBA's with the Union. The Employer has made contributions for the past 4 years pursuant to those CBA's; however the Pension Fund failed to deposit those checks. The Employer provided a letter to the Pension Fund over 1 year ago stating that the nursing homes were the parties to the agreement and the Employer. The Pension contributions were made by their contracted payroll operations. We requested that the Pension Fund deposit all checks and give members appropriate service and vesting credit.

We have not received any reports or copied correspondence (whether to the Employers or legal documents) to date. Please reply.

On November 8, 2006, Salm replied to Alcott's e-mail with the following inquiries:

In item three of your e-mail, you mention Omni Management Group. The checks we have are from Healthcare Staffing & Consultants LLC and Sunshine Recreation, LLC. A couple of questions-

1. Who are the CBA's with—Omni Management Group or the individual properties?
2. Please forward copies of the four (4) CBA's that you mentioned in your e-mail
3. Is Healthcare staffing now out of the picture?

As for item 2 of your e-mail, we are in the process of putting together all of the information for our Collection Counsel. We will keep you apprised of all developments.

Later that day, Alcott replied:

We will send you the 4 most recent MOUs with Bristol Manor, Harborview, Palisades and Castle Hill. Healthcare Staffing is not relevant.

There is no record evidence of any further communications between Alcott and Salm regarding these matters.

## 3. The alleged failure to remit contributions

In May 2007, Blount was promoted to the position of Fund collection manager.<sup>28</sup> Prior to that time she served as an assistant manager in the Fund's processing department. As Blount testified, after an employer and a local union execute a collective-bargaining agreement, the contract is submitted to the Fund for final approval to ascertain that it conforms to Fund requirements and is then submitted to Fund counsel for final approval. Once such approval is granted, the collection department establishes a computer file with an employer number and site number. If the contract is not approved, it is returned to the parties with a letter indicating the language necessary for compliance with Fund requirements.

Blount testified that after she became collection manager, she was assigned to investigate a group of checks that the Fund did not have contracts for and determine who they belonged to. These were checks drawn on the accounts of Healthcare and Sunshine. As Blount testified, because Healthcare and Sunshine were not parties to collective-bargaining agreements, files had not been created for them in the Fund computer database and they were not recognized as employer participants.

Thereafter, the Fund trustees determined that, inasmuch as Healthcare and Sunshine were not parties to collective-bargaining agreements authorizing the Fund to accept their contributions, the remittances should be returned. Accordingly, on October 10, 2008, Blount wrote separately to Healthcare and Sunshine as follows:

Please find enclosed checks issued by [Healthcare] [Sunshine] for the period of August 2003 through January 2007.

Unfortunately, the SEIU National Industry Pension Fund (NIPF) has been unable to process these payments because we have not received a signed copy of the Collective Bargaining Agreement (CBA) between [Healthcare] [Sunshine], and SEIU Local 1199 NJ which requires contributions to the fund. The NIPF has made numerous attempts to Local 1199NJ to obtain a signed copy of the CBA, which have been unsuccessful.

In accordance with a recent Board of Trustee decision, to return contributions to employers without an acceptable CBA on file with the Fund within 6 months or more after the receipt of the first contribution payment, we are returning and refunding all checks that have been received from [Healthcare] [Sunshine]. In addition, most of the checks are older than 6 months and would have to be reissued upon receipt of the acceptable CBA.

Please be advised that we will not accept any future payments from [Healthcare] [Sunshine] until we receive an acceptable signed copy of the CBA. Lastly, please keep in mind that once an acceptable CBA is received late fees and interest will be assessed on contribution payments older than 30 days.

<sup>28</sup> She currently serves as the Fund's benefits processing manager.

A copy of this letter was sent to the SEIU Local 1199NJ President Milly Silva.

As Blount testified, after this letter was sent, Silva and Union Attorney Ellen Dichner contacted her to discuss why the Fund had decided to return the contributions from Healthcare and Sunshine. A conference call was scheduled on two prior occasions, but did not occur until February 9, 2009.

On February 9, a telephonic conference call was held among Blount, Silva, Dichner, and other Fund personnel. Blount explained that the Fund did not have signed contracts with Healthcare and Sunshine and that therefore, the pension contributions were returned to these vendors. Silva and Dichner maintained that the local union had sent a copy of the most recent contract (the 2002 MOA) for Castle Hill and urged the Fund to search their files for the document.

Blount testified that at that point she undertook an investigation and learned that Healthcare and Sunshine had been contributing for CNAs and recreation employees, respectively, at Castle Hill. She additionally learned that both Healthcare and Sunshine had ceased making contributions to the Fund as of January 2007.<sup>29</sup>

The last check sent by Healthcare, dated May 9, 2007, is for contributions applicable to January of that year. Similarly, the last check sent by Sunshine, dated May 8, 2007, is for January 2007 contributions to the Fund. Both checks are attached to rosters of covered employees which reference the Employer by name. For example, the relevant attachment to the Sunshine check bears a caption which reads: "JAN 2007 UNION REPORT CASTLEHILL SUN."<sup>30</sup> Similarly, attached to the Healthcare check was an employee roster entitled: "JAN 2006 UNION REPORT CASTLEHILL HSC."<sup>31</sup> Blount offered no explanation as to why these reports would not have, or did not, assist the Fund in ascertaining which employees the contributions were being made on behalf of. Indeed, when questioned by counsel for the General Counsel, she offered the following seemingly contradictory and, frankly, confusing testimony:

Q. [BY COUNSEL FOR THE GENERAL COUNSEL]: And after you sent out [the October 10, 2008 letter]—Let me ask it this way. When did you find out what employees Health Care Staffing was contributing for:

A. Once we received their reports.

Q. And when was that?

A. 2007. The end of 2007.

Blount later testified as follows:

Q. And prior to February 2009, did you know the employees that Sunshine Recreation was contributing for?

A. Only based on the report that we had back from January 2007.

<sup>29</sup> Blount offered no explanation of why she did not become aware of this in October 2008, when she returned the remittances to Healthcare and Sunshine.

<sup>30</sup> The date in question originally read 2006, but was crossed out and 2007 written in.

<sup>31</sup> The designation of 2006 appears to have been an error.

Q. Did you know whether Sunshine was contributing for any—Prior to February, did you know whether or not they were contributing for any employees of Castle Hill?

A. No.

At some point after the February 2009 conference call, the Fund advised the Union that the Employer had ceased making contributions after January 2007. The Union was further told that the Fund had reversed its decision to refund contributions to Healthcare and Sunshine and that both vendors would be set up in the Fund's system pursuant to the 2002 MOA.

On April 9, Fund Collection Manager Miriam Gibbs wrote to Healthcare and Sunshine advising them as follows:

A letter was sent to you dated October 10, 2008, notifying you that the SEIU National Industry Pension Fund was unable to process your payments due to non receipt of a signed collective bargaining agreement. . . .

We have subsequently received signed collective bargaining agreements, enabling the Fund to properly setup your account. The initial date of contribution is September 1, 2002. Contributions are presently due for September 1, 2002 through March 31, 2009. Additionally, remittance reports are due for the following periods: September 2002 through July 2003 and January 2007 through March 2009.

Although the National Industry Pension Fund will accept the collective bargaining agreement for the term of July 25, 2002 through July 24, 2007, any new agreements requiring contributions to the National Industry Pension Fund must adhere to the terms of the enclosed Bargaining Basics Manual. For example:

1. Pension contributions are required on all bargaining unit employees from date of hire or no later than 90 days of employment and all other employees (such as temporary, casual, on-call, extra, seasonal and no frill) are covered after 1,000 hours of employment.

2. The CBA must specify the pension contribution rate as a flat dollar amount or a percentage of pay. The minimum contribution rate is \$0.15 per hour for all new contracts and renewals with effective dates after July 1, 2004.

3. The CBA must clearly state that the pension contributions are to be remitted to SEIU National Industry Pension Fund.

4. All employers must agree to be bound by the NIPF Trust Agreement.

There was no response to these letters.

### III. ANALYSIS AND CONCLUSIONS

#### *A. The Alleged Failure to Provide Information*

The complaint alleges and the General Counsel contends that the following information sought by the Union is presumptively relevant or, alternatively, that its relevance has been demonstrated: documents showing overtime hours worked by bargain-

ing unit employees on a quarterly basis in 2006 and 2007,<sup>32</sup> the names of no-frills employees, the names of agencies used by Respondent for temporary staff and copies of invoices showing names, number of hours worked, rates billed and job titles for each agency employee, copies of work schedules, OSHA injury and illness reports for 2005, 2006, and 2007, copies of Medicaid cost reports for 2005 and 2006 and per employee monthly premium cost for employer-funded single health insurance. The General Counsel further contends that, since October 19, 2007, the Employer has either failed and refused or unlawfully delayed in providing such information to the Union. As discussed in further detail below, Respondent contends that it sufficiently complied with the Union's information requests to allow it to meaningfully bargain and that the Union's repeated requests were interposed in bad faith, for the purpose of delay and to forestall a valid bargaining impasse.

#### 1. Applicable legal principles

It is well settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to assess proposals and claims made by the employer relevant to contract negotiations. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

Information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the requesting party to establish specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). In such an instance, the employer bears the burden of showing a lack of relevance. *AK Steel Co.*, 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance of information pertaining to employees within the bargaining unit and has no further obligation to explain its significance, unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004), quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001): "When a union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy."

Requests for matters outside the bargaining unit require a demonstration of relevance. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976). The Board uses a broad, discovery-type standard in determining the rele-

vance of requested information. Thus, the burden is not an exceptionally heavy one, requiring only that the desired information would be of use to the party in carrying out its statutory duties and responsibilities. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *Shoppers Food Warehouse*, *supra*; *Richmond Health Care*, 332 NLRB 1034, 1035 (2000) (potential or probable relevance is sufficient to give rise to an employer's obligation to provide information). A party has satisfied such a burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. However, the Board has also held that, as to nonunit information for which relevance must be demonstrated, the General Counsel must present evidence either that the union demonstrated the relevance of the nonunit information or that the relevance of the information should have been apparent to the respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). The Union's explanation of relevance "must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." 350 NLRB at 1258 fn. 5 (citations omitted).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "An employer must respond to the information request in a timely manner" and "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all." *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2000); see also *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005) (and cases cited therein).

With regard to the Union's information requests generally, Respondent argues that the Union propounded such requests on Castle Hill for reasons other than to move the bargaining process forward. In particular, Respondent argues that the Union's information requests were made to avoid meaningful bargaining and in a futile attempt to avoid reaching impasse. In support of this argument, Respondent contends that the Union repeatedly demanded information which had already been received, which was readily attainable or wholly unnecessary to the bargaining process. Respondent notes that the Union was able to, and did, make its initial "comprehensive" proposal relying on the information already within its possession, and did not require any further information prior to putting forth subsequent proposals. Respondent additionally argues that it sufficiently complied with the Union's repeated information requests, that it provided information to the Union on no fewer than eight occasions and, further, that any limited delay in providing information is not unlawful.

In support of its contentions, Respondent relies upon *ACF Industries*, 347 NLRB 1040 (2006). There, the Board found that the union's information request was purely tactical and submitted solely for delay and to avoid impasse where the union requested the information after months of extensive bargaining, after the contract's expiration, after the union's rejection of the employer's final offer, and after the respondent de-

<sup>32</sup> The complaint additionally alleges a failure or delay in providing documents showing "regular hours of work." Neither the General Counsel nor the Union make reference to any such allegation other than the alleged failure to provide employee work schedules, which is discussed below.

clared it had nothing left to offer.<sup>33</sup> By contrast, here, the initial information request was made prior to the expiration of the 2002 MOA and before bargaining commenced. Moreover, here the Union reiterated its requests throughout bargaining, well prior to Respondent's declaration of impasse and final offer. Similarly, in *Sierra Bullets*, 340 NLRB 242, 244 (2003), also cited by the Employer, the Board concluded that the pendency of an information request relating to an overtime proposal did not preclude a finding of impasse where the information request was not made until the 17th bargaining session, the proposal had not been made until the 16th session, the parties had been previously concentrating primarily on other core issues in bargaining and there was no convincing argument that the information would have broken a deadlock over these other core issues. Again, the circumstances in *Sierra Bullets* are not similar to those involved here, where, as both Saint Hilare and McCalla testified, the Union sought information throughout the bargaining process which was directly tied to proposals or anticipated counterproposals regarding such matters as the proposed elimination of daily overtime, a proposed increase in the allowable number of no-frills employees, staffing levels, medical insurance, and the health and safety of employees in the workplace.

Respondent argues that the circumstances of the instant case are "strikingly similar" to those presented in *United Engines Inc.*, 222 NLRB 50, 55-56 (1976). There, the respondent was charged with a delay in transmitting certain relevant data which the union sought in connection with bargaining negotiations until it was informed that the union had filed unfair labor practices with the Board. The administrative law judge found that the respondent had not violated the Act. In that case, the respondent never raised any objection to disclosure of the information sought by the union, characterized as "copious" and provided the bulk of it within 1 month of the Union's request. The only outstanding item was the information related to the employer's retirement plan, which the respondent said would be covered in a booklet and provided as soon as it was received. The booklet was then provided. Thereafter, as the judge found, the respondent "invited further requests" by the Union for additional information. Once such requests were made, the information was promptly furnished.<sup>34</sup>

<sup>33</sup> The Board additionally found that the parties had reached a good-faith impasse, and the union showed no interest postimplementation bargaining.

<sup>34</sup> In support of its contention that any delay in providing the Union with information was not unlawful, Respondent also relies upon *Good Life Beverage Co.*, supra and *Union Carbide Corp.*, 275 NLRB 197 (1985). In *Good Life Beverage Co.*, the Board found that a 5-1/2-month delay in providing information was not unlawful where the information sought raised confidentiality concerns and the employer sought to discuss the matter to reach an accommodation with the requesting union for mutually agreeable protective conditions. Here, Respondent has pointed to no such circumstances. In *Union Carbide*, which dealt with a delay of over ten months, there was no showing that the requested information, which was voluminous, could have been produced any sooner, that there was any urgency in fulfilling the request and that it involved a matter currently or forthcoming in any negotiations between the parties.

In the instant case, while it appears that the Union did request a great deal of information from the Employer initially, and subsequently, there is no specific evidence that any alleged delay in providing information was due to the volume of that request, or Respondent's need for time to assemble it or receive documentation relative to such demands. Moreover, the record fails to establish that Respondent raised such objections to the Union. Nor has Respondent propounded such an argument here. Rather, as set forth above, Respondent consistently took the position either that it had fully complied with the Union's request or that the information sought was unnecessary for the Union to bargain.

As the above-cited cases demonstrate, Respondent is not empowered to make a unilateral determination that presumptively or otherwise relevant information sought by the Union is unnecessary or irrelevant to bargaining or the performance of the Union's statutory duties. To the contrary, Respondent's arguments in this regard are unavailing. Had the information sought by the union been provided in a timely fashion, it is reasonable that it could have been used to determine strategy and tactics in the negotiations: "Priority of issues, consideration of bargaining strategy as to trade-offs of economic and non-economic issues, even the nature and extent of the bargaining posture on the various issues might well have been impacted upon by such information and the need therefore would be current and present throughout the negotiations." *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1014 (1996). Moreover, as the courts have noted, the fact that a contract has been negotiated without the requested data does not render the information not relevant. See *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 266 (2d Cir. 1963); cert denied 375 U.S. 834. In *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1941), the court stated:

Nor is our determination that the information was relevant affected by the subsequent execution of a contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.<sup>35</sup>

With the foregoing standards in mind, I will now evaluate the various information requests made by the Union and the Respondent's responses thereto.

## 2. Overtime hours worked by each employee on a quarterly basis

From the outset, even prior to the initiation of bargaining, the Union sought information showing the overtime hours for each employee on a quarterly basis for the years 2006 and 2007. Information regarding employee overtime has been found to be presumptively relevant. *U.S. Information Services*, 341 NLRB

<sup>35</sup> Moreover, as the forgoing Board precedent makes clear, the Union is entitled to information not only to assist it in contract negotiations, but in connection with a full range of statutory duties. Thus, even if I were to find that the Union could bargain without the information it sought, that would not be dispositive of Respondent's obligation to furnish it in a timely manner, particularly insofar as the information relates to bargaining unit employees.

988 (2004) (citing *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434, 436 (1988) (total hours and overtime hours worked “by each unit employee” is presumptively relevant). In its July 27, 2007 and January 28, 2008 letters, Respondent claimed it provided such information. The record establishes, however, that no overtime information was provided to the Union until April 1, 2008, where it was stated that “[i]t is fair to estimate that overtime hours typically [range] from 100–300 hours per week over the previous year.” The Union then advised Respondent that that was not the information which had been requested. Thereafter, on May 28, 2008, Respondent provided total overtime hours for each quarter of 2006 and 2007 but did not provide the information for each employee. On June 10, the Union reiterated its request for “overtime hours for each employee.” On June 17, 2008, Respondent responded with the “the approximate average overtime worked” by employees for each quarter of 2006 and 2007.

Aside from its presumptive relevance, it is clear from the record that such information took on additional significance in light of the Employer’s proposal to eliminate daily overtime. Thus, the Union has shown that this information was relevant and necessary to enable it to determine the impact the Employer’s workweek proposal would have on the bargaining unit, both in relation to individual employees and to the unit as a whole.

I note that Respondent has advanced no argument that providing this information would have been unduly burdensome or that it did not exist. Rather, it is apparent that Respondent did maintain such information inasmuch as it was able, in May 2008, to provide overtime hours for each quarter of 2006 and 2007 for the bargaining unit as a whole, and compute average overtime hours thereafter. In short, Respondent has advanced no convincing rationale for its continuing refusal to provide such information. Accordingly, I find that by failing and refusing to provide the Union with overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and 2007, as alleged in the complaint, Respondent has violated Section 8(a)(1) and (5) of the Act.<sup>36</sup>

### 3. The identification of no-frills employees

In its letters of April 25 and October 19, 2007, the Union requested that the Employer identify all no-frills employees.<sup>37</sup> On January 29, 2008, Jasinski wrote that the information had already been provided. On April 1, 2008, Respondent told the Union that there were no such employees in that category. Thereafter, on May 14, 2008, the Employer provided an updated employee list to the Union. That list named one employee as a no-frills employee. The employee roster additionally showed that this employee had been hired on October 9, 2006, so a question may fairly be raised as to whether Jasinski’s response on April 1 was mistaken or false. I note that Respondent has failed to explain why it had previously told the Union that there were no no-frills employees when one was apparently on

its payroll. Thereafter, in its letter of June 17, 2008, Respondent continued to maintain that there were no employees in the no-frills category. Thus, the information provided to the Union on this issue was contradictory, at best.

The issue of whether bargaining unit employees have agreed to forfeit contractual benefits in exchange for an increased wage rate, and who has agreed to do so, is presumptively relevant. Moreover, the record demonstrates that the issue of whether there were no-frills employees was related to various matters under consideration during negotiations. As noted above, the Employer had proposed increasing the limit on such employees from 10 to 20. As both Saint Hilare and McCalla testified, the Union had questions about why this proposal had been made if, in fact, no employees were currently in the no-frills category. Moreover, the employee rosters given to the Union during bargaining indicated that a number of employees, significantly in excess of 10, did not have health insurance. At the April 19 bargaining session the Union sought to review the most recent employee roster. At that time, according to Saint Hilare, a number of employees without insurance appeared to have the necessary hours and tenure to qualify. In response, the Employer offered generalized, speculative responses as to why employees might not have health insurance.

Thus, the record establishes that the Employer responded to the Union’s October 19, 2007 information request on April 1, 2008. As an initial matter, there is at best an apparent and unexplained delay of over 5 months in responding to the Union’s request for information regarding this matter.

Even assuming, however, that Respondent had told the Union at an earlier point in time that the facility did not have any no-frills employees,<sup>38</sup> the record demonstrates that such information was incorrect. Accordingly, I find that Respondent delayed and then failed to provide accurate information regarding the no-frills status of its employees in violation of the Act.

### 4. The use of agency employees

The Union’s April 25 and October 19, 2007 letter sought the names of all agencies used by the Employer to provide temporary staff and invoices showing the names, number of hours worked, rate(s) billed and job title for each employee provided to the Employer during the period from January 1, 2006, through March 31, 2007. The Union reiterated its request for information regarding the use of agency employees on several occasions thereafter.<sup>39</sup> The Union had anecdotal evidence, coming from employees, that agency workers were being used during the period of time the parties were bargaining. Saint Hilare made reference to this anecdotal information in his February 14, 2008 letter to Jasinski. Such hearsay evidence is sufficient to support an information request. *Magnet Coal, Inc.*, 307 NLRB 444 fn. 3 (1992), enfd. mem. 8 F.3d 71 (D.C. Cir. 1993). The record further establishes that at a bargaining session on March 13, 2008, Saint Hilare informed Respondent that the

<sup>36</sup> Saint Hilare’s June 10, 2008 letter updates this request for the period from June 1, 2007, to May 31, 2008. There is no evidence that the overtime information for this time period has been provided.

<sup>37</sup> This request had also been set forth in the Union’s April 25, 2007 information request.

<sup>38</sup> Jasinski offered generalized testimony that he repeatedly told the Union that there were no no-frills employees and the Union did not believe him. Respondent has pointed to no specific evidence as to any such representation, however, prior to the April 1, 2008 letter.

<sup>39</sup> February 14, April 9, June 10, and July 7 and 11, 2008.

Union was aware that the Employer was using agency employees.

According to McCalla and Saint Hilare, the Employer had repeatedly denied using agency workers. Moreover, in correspondence dated January 29, 2008, Jasinski stated, "The facility does not utilize any agencies to provide temporary staff." This assertion was disputed by Saint Hilare in his February 14 letter where he maintained that the Union had information from its members that agency employees were being used. Then, on April 1, 2008, Jasinski wrote: "Agency Usage: None as of April 1, 2008." On June 17, 2008, Jasinski advised the Union, "This facility did not utilize agency personnel from March 2007 through the present." According to the Union, it was only when the parties met on July 17, 2008, after the final offer was implemented, that Respondent acknowledged that the facility had used agency workers.<sup>40</sup> On July 23, Saint Hilare then made a further written request for specific information which, to date, has not been replied to.

The information requested is clearly relevant to the Union's concerns, as bargaining representative, of the nature and extent of the use of workers outside the unit who are being used to supplant the unit work force. *Lenox Hill Hospital*, 327 NLRB 1065, 1098-1069 (1999). Information concerning the identity of such workers, their classifications, wages and the length of time employed at the facility are relevant to determine what Respondent was willing to pay for temporary employees to perform the same work as that performed by unit employees. Similarly information regarding the names of the agencies used by Respondent is relevant as it provides an independent basis for the Union to conduct an investigation regarding the extent to which unit work is being supplanted.<sup>41</sup> Moreover, the relevancy of such information would have been apparent to the Respondent, and I note that Respondent has never contended otherwise.

Respondent has argued that it provided the Union with the necessary information regarding agency usage and that it complied with the Union's written request which sought such information for a limited period of time, i.e., January 1, 2006, through March 31, 2007. Respondent additionally argues that any further requests were made in bad faith and that the Union's failure to file a grievance regarding agency usage demonstrates that this issue was of no relevance to contract negotiations.

While it is the case that the Union's initial request for invoices showing the name, work hours, compensation rate, and job title of each agency employee was for a particular period of

<sup>40</sup> I do not credit Jasinski's testimony that he told the Union in about November 2007 that due to a threat of a work stoppage the facility had contracted agency employees. The weight of the evidence, including the written communications between the parties, does not support this testimony, but rather refutes it. Moreover, I do not believe that the Union would have simply accepted Jasinski's representations at face value without documenting them and immediately demanding further information of the sort outlined in its October 19, 2007 letter.

<sup>41</sup> As McCalla and Saint Hilare testified, the use of agency employees is additionally related to the whether the facility is properly staffed. Their testimony that the Union brought employees' complaints about staffing to the Employer's attention is un rebutted.

time, the record shows that the Union subsequently sought updated and contemporaneous information, including the names of agencies used to provide temporary employees.<sup>42</sup> Moreover, Jasinski's various responses to the Union demonstrate that he understood that to be the case.<sup>43</sup> Moreover, the record contains testimony regarding these continuing demands for information as well as the responses offered by Respondent. Thus, I find that the issue of the Respondent's continuing failure to provide such information was fully litigated at the hearing. See *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

Further, Respondent's arguments pertaining to the Union's failure to file grievances regarding agency usage are unavailing. At all relevant times there was no collective-bargaining agreement in effect and, moreover, there is no evidence that the use of agency personnel is contractually proscribed.

Apart from the hearsay evidence offered by McCalla and Saint Hilare regarding Respondent's use of agency employees, the General Counsel adduced independent, probative evidence to show that the facility employed agency personnel from October 2007 to April 2008, a period of some 6 months during which the parties were bargaining and this issue was repeatedly raised by the Union. During this period all of the representations made by Respondent were contrary to the actual practice occurring at the facility. Accordingly, I find that Respondent's continuing failure to provide accurate information regarding the use of agency employees as requested by the Union on October 19, 2007, and at various times thereafter, constitutes an unlawful failure to provide information in violation of Section 8(a)(1) and (5) of the Act.

##### 5. Work schedules

The complaint alleges that the Employer failed and refused or, alternatively, delayed in providing employee work schedules to the Union. In his April 25 and October 19, 2007 letters, and at various other times throughout bargaining, Saint Hilare requested such information for the periods of October through December 2006 and January through March 2007. In letters dated January 29 and February 20, 2008, Respondent did not dispute that such schedules were maintained and stated that they would be provided under separate cover. Both McCalla and Saint Hilare's bargaining notes show that the Union also raised the issue at the bargaining session on April 9, 2008, and stated that the request was related to the issue of overtime. Subsequently, on May 28, 2008, Respondent provided the work schedules for the dietary, housekeeping, and nursing departments for the period beginning in late-December 2007 and continuing through April 2008.<sup>44</sup> Saint Hilare responded that

<sup>42</sup> See, for example, Saint Hilare's letters of June 10 and July 23, 2008. In addition, the record establishes that Saint Hilare raised the issue of the current use of agency employees at the bargaining table.

<sup>43</sup> As noted above, on January 29, 2008, Jasinski wrote that the facility "does not" utilize agencies to provide temporary staff; On April 1, Jasinski wrote "None as of April 1, 2008," and on June 17, Jasinski advised the Union that the facility did not utilize agency personnel "from March 2007 through the present."

<sup>44</sup> Schedules for the dietary employees were provided through mid-May 2008.

the submission was not fully responsive to the Union's request and did not show all individuals actually working on the floors. Saint Hilare also made an additional request for the daily schedules for February 1, 2008, through the present. On June 17, 2008, Jasinski wrote that the Employer had provided the Union with all the schedules in its possession and that it could not provide the information in a form which does not exist.<sup>45</sup>

Such information, as it relates to bargaining unit employees, is presumptively relevant. *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008). Moreover, it is relevant to the Union's investigation of employee complaints regarding staffing and agency usage and would be of use to the Union in effectively generating and bargaining over proposals such matters. Respondent has failed to explain the delay in providing these schedules to the Union, or to offer any valid explanation of why it could not fully comply with the Union's initial request for their production. Accordingly, I find that Respondent has unlawfully delayed and refused to provide the Union with work schedules of bargaining unit employees, as alleged in the complaint.

#### 6. OSHA injury and illness records

The Employer maintains OSHA records which document on the job injuries and illnesses. On October 19, 2007, the Union requested copies of such records for 2005, 2006, and 2007. In his January 29, 2008 letter, Jasinski stated that the facility did not maintain such records. At the hearing, Jasinski acknowledged that this statement had been made in error. The Union's request for OSHA logs was renewed in Saint Hilare's letter of February 14, 2008. Thereafter, on April 1, Respondent provided the log for 2007. On April 9, 2008, Saint Hilare reiterated the Union's request for years 2005 and 2006. Those records were provided on May 28.

As the Board has found, workplace safety is a mandatory subject of bargaining. See *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000). Accordingly, the Board has found that OSHA logs and other health and safety information is presumptively relevant. *Honda of Hayward*, 314 NLRB 443, 451 (1994). Moreover, Saint Hilare and McCalla testified that such records would be of assistance to the Union in formulating its health and safety proposal. Respondent has failed to rebut the presumption that this information is relevant or to offer any valid explanation of why it failed to provide such information to the Union for more than six months. Accordingly, I find that Respondent unlawfully delayed the production of OSHA logs for 2005, 2006, and 2007, as alleged in the complaint.

#### 7. Medicaid cost reports

On October 19, 2007, the Union requested copies of Medicaid cost reports for 2005 and 2006. These reports are voluminous, and there is evidence that the Union's research department makes use of them to obtain general information about the size, finances, and operations of the nursing home. McCalla testified that the reports contain information about staffing and

<sup>45</sup> Both the General Counsel and the Union contend that Jasinski's assertion that the facility did not maintain schedules in the form sought by the Union is false, but I find that this issue is not sufficiently addressed by the record for me draw such a conclusion.

agency usage; however, he appeared unfamiliar with the reports and could not pinpoint where such information was located.

On January 29, 2008, Respondent replied that the information was readily available from the State, and that the Union had demonstrated that they are already in possession of such information. On February 14, Saint Hilare wrote: "We understand but do not agree with your position that you need not provide Medicaid cost reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available." On April 9, Saint Hilare noted in a letter to Jasinski that the reports had not yet been received. The documents sought by the Union were provided by Respondent on May 28, 2008.

Respondent argues generally that the Union did not need this information to meaningfully bargain. In its brief, Respondent argues that the Union never demonstrated the relevance of this information during bargaining.

Respondent's apparent position, as stated to the Union, that it was under no obligation to provide the requested data because it could have been gotten from public records is not supported by extant Board law. To the contrary, the duty of an employer to provide relevant information in its possession is not excused by the fact that it may be obtained elsewhere. *Kroger Co.*, 226 NLRB 512, 513-514 (1976); *People Care, Inc.*, 327 NLRB 814, 824 (1999); *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994).

Nevertheless, Respondent did raise the issue of the relevance of this information during bargaining, albeit belatedly. Inasmuch as the Medicaid cost reports contain, primarily, nonunit information, I find that there some question about whether the Union, at any point during negotiations, sufficiently articulated "with some precision" the basis for its request or demonstrated why such documents would be relevant to bargaining or to any of the Union's other statutory duties and responsibilities. *Disneyland Park*, supra at 1258. I note that neither McCalla nor Saint Hilare testified that they stated why the Union was seeking this information from the Employer, and there is no such explanation in any of the correspondence in the record.<sup>46</sup>

In *Troy Hills Nursing Home*, 326 NLRB 1465 fn. 2 (1998), the Board denied the General Counsel's Motion for Summary Judgment as to the respondent's failure to provide Medicare and Medicaid cost reports, finding that they appeared to seek financial information and the union had not demonstrated the relevance of such information to the employer. Here too, I find that the General Counsel has failed to meet its burden to show that the Union established the relevance of the information or that such relevance would have been apparent to Respondent. *Disneyland Park*, supra.<sup>47</sup>

<sup>46</sup> Neither Saint Hilare's February 14 or April 9, 2008 communications to Jasinski on this issue state why the Union is seeking this information and are not sufficient to demonstrate its relevance.

<sup>47</sup> Both the General Counsel and the Union argue that the relevance of the reports lies in the staffing and agency information they contain. I note, however, that neither McCalla nor Saint Hilare could demonstrate how and where such information could be gleaned from the reports; nor does that rationale explain or justify why the reports were sought in their entirety. In any event, to the extent the Medicaid cost reports contain relevant information regarding agency use, my finding that the

Accordingly, I do not find that Respondent violated the Act in delaying their production.

#### 8. Health insurance premium information

On July 27, 2007, the Employer provided the Union with the total cost for health insurance premiums for 2006 and the first quarter of 2007. The Union was also provided with the cost to employees for dependent coverage. What the Union did not know was the cost to the Employer for its employees' single coverage and, therefore, Saint Hilare requested such information at the August 28, 2007 bargaining session, and reiterated this request in his letter of October 19.

On January 29, 2008, Respondent wrote that such information had already been provided. By letter dated February 14, Saint Hilare explained that the information had not been provided and could not be computed, as Jasinski had suggested, by dividing the cumulative cost furnished by the number of employees as there were too many variables. On April 1, 2008, Respondent provided the monthly insurance premium cost sought by the Union.

Respondent has argued that the Union did not need the monthly premium costs because it could have made that determination based upon the information that had been previously provided in July 2007. Jasinski's testimony on this matter, however, failed to demonstrate how this could be done with any measure of precision.<sup>48</sup> More to the point, however, is the fact that whether or not the Union could have attempted to calculate the costs in the abstract, under the Board's standards, it was entitled to receive such information which would have been of use to it in arriving at a more exact figure. See *Albertsons, Inc.*, 310 NLRB 1176, 1187 (1993) (employer's claim that union could determine amounts of contributions to trust fund from plan documents did not excuse the employer's failure to provide its own information on the actual contributions made where this information would allow the union to verify the information found in the plan).

The Board has held that premiums paid under health insurance plans are wages, and as such, information regarding premiums is presumptively relevant. *Nestle Co.*, 238 NLRB 92, 94 (1978). Further, it is apparent that the cost of employee fringe benefits is of particular relevance during collective-bargaining negotiations.

Further, in this case, such information related to an issue central to the parties during bargaining, i.e., whether the Employer would (or would not) agree to some measure of dependent coverage for its employees. Clearly, understanding the costs to the Employer of providing health insurance coverage for its employees might well be of some relevance to the Union in formulating a proposal to bridge the gap between the parties'

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Employer generally has failed to provide such information subsumes such arguments.

<sup>48</sup> Jasinski testified that it would be possible to divide the total cost of insurance by the number of employees. This formula, however, fails to account for those employees who did not appear to have any health insurance. Thus, any such calculations could not reliably give the Union the information it sought.

positions. *Baldwin Shop 'N Save*, 314 NLRB 114, 124 (1994).<sup>49</sup> Accordingly, I find the delay in providing such information to be unlawful.

For the reasons set forth above, I find that Respondent has failed and refused or unlawfully delayed in providing information, as alleged in the complaint, as follows: documents showing the number of overtime hours worked by bargaining unit employees on a quarterly basis in 2006 and 2007; the identification of no-frills employees; the names of agencies used by the Employer for temporary staff and copies of invoices showing names, number of hours worked, rate(s) billed, and job title for each agency employee; copies of work schedules; OSHA injury and illness reports for 2005, 2006, and 2007; and the per employee monthly premium cost for employer-funded single health insurance. In this manner, Respondent has violated Section 8(a)(1) and (5) of the Act.<sup>50</sup>

#### B. Respondent's Claim of Impasse

##### 1. Applicable legal standards

The Board considers negotiations to be in progress, and thus, will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Cotter & Co.*, 331 NLRB 787, 787 (2000), quoting *Television Artist AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it. *Naperville Ready Mix, Inc.*, 329 NLRB 174, 183 (1999), *enfd.* 242 F.3d 744 (7th Cir 2001); *Serramonte Oldsmobile*, 318 NLRB 80, 97(1995), *enfd.* in relevant part 86 F.3d 227 (D.C. Cir. 1996). The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.* sub nom *Television Artist AFTRA v. NLRB*, *supra*. The Board also considers the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. *Cotter & Co.*, *supra* at 789; *Wycoff Steel*, 303 NLRB 517, 523 (1991). The Board further takes into account whether the parties con-

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<sup>49</sup> In *Baldwin Shop 'N Save*, *supra* at 124 fn. 8, it was noted that in *Sylvania Electric Products v. NLRB*, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852, the court held "that the Board could properly find that a union was entitled to information concerning the cost of welfare benefits, where the union sought 'better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay.'"

<sup>50</sup> In his post-hearing brief, Counsel for the General Counsel asserts, for the first time, that Respondent unlawfully delayed in furnishing the Union with copies of the KL Agreement and other memoranda of agreement which had been entered into by the parties. This was neither alleged in the complaint nor identified as an additional independent violation during the hearing. Nor has the General Counsel proffered a sufficient legal argument as to why I should find this to be a *de facto* violation of the Act. Accordingly, I find that this matter was not litigated and decline to address it further.

tinued to meet and negotiate. See, e.g., *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). In short, the Board requires that both parties believe that they are “at the end of their rope.” *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. den. 534 U.S. 818 (2001) (and cases cited therein).

The Board has recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception. *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). Where movement between the parties indeed occurs, the Board does not confine its examination of bargaining history solely to the item claimed to be at impasse. See *Sacramento Union*, 291 NLRB 552 (1988), enfd. 888 F.2d 1394 (9th Cir. 1981). Rather, the very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on stalled ones: “Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas.” *Patrick & Co.*, 248 NLRB 390 (1980), enfd. 644 F.2d 889 (9th Cir. 1981); *Sacramento Union*, 291 NLRB at 556 (citation and footnote omitted). Further, although a good-faith impasse temporarily suspends the duty to bargain, the parties are not permanently relieved of bargaining obligation: “As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which, in almost all cases is eventually broken, either through a change of mind or the application of economic force.” *Charles D. Bonnano Linen Service v. NLRB*, 454 U.S. 404, 412 (1982) (internal quotation omitted).

In addition, “[a]n impasse does not destroy the collective-bargaining relationship. Instead, a genuine impasse merely suspends the duty to bargain over the subject matter of the impasse until changes in circumstances indicate that an agreement may be possible. Anything that creates a new possibility of fruitful discussion breaks an impasse and revives an employer’s obligation to bargain over the subject of the impasse.” *Pavilions at Forrestal*, 353 NLRB 540 (2008) (quoting *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1966)).

## 2. The relevant factors

### a. The Parties’ bargaining history

While the Union or its predecessor Local 1115 have represented employees at Castle Hill for a number of years and have executed several MOAs, this was the first negotiation that was conducted by these particular principals and the record reflects that there were initial obstacles including the lack of a fully integrated recent collective-bargaining agreement for the parties to work from.

In support of its contention that impasse had been reached, Respondent notes that the negotiations spanned a period of over 1 year and there were 13 face-to-face meetings and many letters exchanged during this period of time. As Respondent argues, the Board has found impasse has occurred when fewer sessions have been held. *Richmond Electrical Services*, 348 NLRB 1001 (2006); *Lou Stechers Super Markets*, 275 NLRB 475 (1985). *J. D. Lunsford Plumbing*, 254 NLRB 1360 (1981). Respondent

thus argues that it properly declared impasse under such circumstances.

In support of its contention that no impasse occurred, the General Counsel and the Union point to various events which occurred at and after the May 14, 2008 bargaining session which, it is contended, demonstrate that the parties had intended that bargaining would continue. At that meeting, which was the last session held by the parties prior to the Employer’s declaration of impasse and promulgation of its final offer, the parties exchanged economic proposals. At this time Saint Hilare made clear that he would be unavailable during the month of June due to an upcoming union convention and a personal vacation. Subsequent to the May 14 session, Jasinski sent Saint Hilare an updated list of bargaining unit employees, which included information regarding health insurance status and no-frills employees. On May 28, the Employer sent additional information, including OSHA reports, employee schedules, Medicaid cost reports and certain overtime information. On June 10, Saint Hilare continued to ask for more information including overtime, daily schedules, and agency information. Respondent sent additional information on June 17.

Subsequently, on June 17 Jasinski appeared to anticipate further negotiating sessions. In particular, he wrote: “We recognize that you are currently away on vacation . . . . We suggest you propose dates in July and August. . . .”

Jasinski thereafter wrote to Saint Hilare on June 23, complaining that the Union had not contacted Respondent or the mediator for several weeks. He nevertheless asked for further bargaining dates. On July 7, Jasinski sent the Union Respondent’s final offer with an implementation date of July 11. He stated: “Because of the Union’s inaction and unwillingness to modify its proposals, we are at impasse.” The General Counsel and Union argue that such assertions are false and disingenuous because Jasinski was well aware of Saint Hilare’s unavailability during June and was seizing on the opportunity to prematurely declare impasse.

On July 7, Saint Hilare had written to Jasinski, stating that he had just returned from vacation and had reviewed Jasinski’s letters of June 17 and July 23. He proposed bargaining dates. Jasinski responded on July 10 confirming, as he put it, “negotiations.” After reviewing the final offer Saint Hilare wrote to Respondent, disputing the claim of impasse. He challenged Jasinski’s claim of union inaction, pointing out that the Union had consistently modified its proposals, up to and including the May 14 session. He noted that the final offer contained proposals which had not previously been brought to the Union during negotiations and advised Respondent that the Union had further proposals to present.

From the record it is apparent that there were difficulties in the bargaining, numerous negotiation sessions, and a general lack of agreement on various issues. Nevertheless, I find that the parties’ bargaining history does not establish that the parties were at impasse at the time the final offer was implemented.

I note that the parties had not discussed language issues for several months. The Employer’s only noneconomic proposal was presented on September 19 and the Union’s counterproposal on October 24, 2007. This proposal reflected concessions from the Union’s initial offer. The history of negotiations, as

described by the parties, shows that the Employer never responded to this proposal. Respondent argues that this was because the Union insisted on negotiating economics first. However, there is no evidence that the Union explicitly refused to discuss noneconomic issues with the employer at any time during negotiations.

Moreover, I note that the parties exchanged wage proposals at the May 14 meeting which represented concessions from those put forward previously and, further, that the letters initially exchanged after this bargaining session demonstrate that continued negotiations were anticipated by both parties subsequent to this meeting.

Respondent argues that the lack of substantive discussion at the July 17 meeting shows that the parties were at impasse. As noted above, however, this meeting took place after the implementation of the final offer and the Union justifiably had many questions about how the implementation would affect unit employees. There were also inquires about certain new proposals which had been included in the final offer and the information which had been provided to the Union in the interim period between meetings. The Employer also finally conceded the use of agency employees, but did not offer a response to the Union's request for specific information about such use. The Employer ended the meeting after the Union returned from a caucus. When told that the Union had further proposals to submit, the Employer insisted that the Union bargain through correspondence rather than through a face-to-face meeting.<sup>51</sup>

The foregoing evidence, in my view, fails to meet Respondent's burden to show that both parties were at the end of their negotiating rope at the time the final offer was implemented.

#### *b. Good faith of the Parties in negotiations*

Although there is no complaint allegation of overall bad-faith bargaining, the General Counsel and the Union allege that Respondent demonstrated bad faith in various ways. Conversely, Respondent argues that the Union demonstrated bad faith and an unwillingness to negotiate for an agreement which did not meet standards which had been achieved in other contracts.

Respondent accuses the Union of adopting a "take it or leave it" strategy, maintaining fixed positions and engaging in regressive bargaining throughout negotiations. Respondent accuses the Union of an effort to stall negotiations by insisting on reaching an agreement with the same terms as the Tuchman Agreement and/or the KL Agreement or no contract at all. In support of this contention, Respondent relies upon *Richmond Electrical Services*, supra; *J. D. Lunsford Plumbing*, supra; and *Matanuska Electric Assn.*, 337 NLRB 680 (2002). In addition, as noted above, Respondent has contended that the Union's information requests were purely tactical and made for the purpose of delay and to foreclose a finding of impasse. *ACF Industries*, 347 NLRB at 1043.

Based upon the credited evidence herein, I cannot conclude that the Union bargained in bad faith. I do not agree that the Union adopted a "take it or leave it strategy" or maintained a fixed insistence on obtaining either industry standards or terms consistent with the Tuchman Agreement.

Initially, I note that it has been recognized that a union has the legitimate right to seek for its members the same or similar terms and conditions of employment that have been negotiated with other employers. *Teamsters Local 282 (E. G. Clemente Contracting)*, 335 NLRB 1253, 1255 (2001); *Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965). In determining bad faith, the Board considers the totality of a party's conduct. *St. George Warehouse*, 341 NLRB 904, 908 (2004).

Moreover, I note that while Saint Hilare made clear the Union's goals, there is no evidence that the union negotiators stated that any issue was nonnegotiable. Further, the record establishes that the Union made various concessions on noneconomic and economic issues, including health insurance and offered compromises relating to the term and effective date of the proposed agreement. Its wage proposals, which were modified on several occasions, were consistently less favorable to employees in terms of wage rates and minimums than what had previously been negotiated in the Tuchman Agreement, and almost always more favorable to the Employer. Moreover, at the bargaining session on February 27, 2008, it presented the Employer with a significant modification of its proposal for family health coverage whereby the Employer would not pay any premiums for the first 5 years and then be subject to a sliding scale and would be liable for the full premium only after an employee had reached 10 years of employment.

Respondent alleges that the introduction of a 2-percent seniority bonus on February 27, 2008, was a regressive proposal. However, this proposal was suggested, as Saint Hilare testified, on the day the Union introduced a counterproposal which reduced the cost to the Employer of dependent care coverage by having employees pay a portion of the premium. In addition, other economic demands were reduced, in particular pushing back the maximum contract minimum rates to become effective in September 2011. Thus, the Union presented the Employer with an economic proposal more favorable to employees in some respects and less favorable in others from what had been previously proposed. I further note that Respondent presented no evidence that would substantiate its claim that this proposal was actually regressive in nature; nor does it appear from the record that Respondent computed the actual costs of the proposal at the meeting in question or thereafter.

*Matanuska Electric Assn.*, supra, cited by Respondent, is inapposite here. In that case, the Board found that the union had engaged in stall tactics including taking the position that "all words are ambiguous" and insisting that the employer was obliged to explain its motivation. In addition, the employer stated that it was willing to continue bargaining if the union submitted a proposal showing movement, but the union failed to do so. 337 NLRB at 683-684. Those facts are clearly distin-

<sup>51</sup> Sec. 8(d) of the Act defines the duty to bargain collectively as the mutual obligation of the parties to "meet . . . and confer in good faith. . . ." Moreover, even if the parties had reached a lawful impasse here, it is well settled that the obligation to meet and bargain continues. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1017 (2006); *Paul Mueller Co.*, 332 NLRB 312, 317 (2000).

guishable from those presented by the circumstances of this case.<sup>52</sup>

Based upon the foregoing, I find that the evidence fails to support Respondent's assertion of bad faith on the part of the Union.

In support of their contention that Respondent negotiated in bad faith, the General Counsel and the Union point to Respondent's refusal to acknowledge the existence and relevance of the KL Agreement. Respondent, conversely, argues that the Union's insistence on this evinces its bad faith. Respondent argues that the Union could never properly identify who had entered into or been bound by such agreement and that its reliance on this as the underlying contract was part of a strategy to frustrate bargaining.

As an initial matter, I note that McCalla's testimony that Administrator Sokolowski stated that she referred to the KL Agreement when addressing grievances was un rebutted. In addition, Saint Hilare testified that he too referred to the document in the same fashion.<sup>53</sup> While Respondent's refusal to acknowledge the relevance of this agreement may be puzzling under such circumstances, the fact remains that the General Counsel's witnesses failed to offer specific evidence as to how such a refusal to acknowledge a contract which expired over a decade ago presented tangible or significant roadblocks to bargaining. It is true that this was a source of disagreement which apparently contributed to the dissension between the parties. Other than this, however, there is no evidence that the parties were in disagreement regarding the existing terms and conditions of employment in effect prior to the expiration of the 2002 MOA. Had there been some uncertainty on these issues, the issue of the applicability of the KL Agreement might well have taken on enhanced significance. In the absence of any such evidence, I am not convinced that Respondent's apparent failure to acknowledge the relevance of the KL Agreement constituted a major impediment, imposed by Respondent, on the negotiations.<sup>54</sup>

The General Counsel and the Union accuse Respondent of other misrepresentations during the course of bargaining. They cite the Respondent's failure to highlight its pension proposal, among others, in the compilation agreement presented to the Union on August 28, 2007.<sup>55</sup> I find this particular example unavailing. The record fails to show why this particular proposal was not highlighted and I decline to speculate as to why it was not. However, I also find it hard to believe that Respondent thought it could somehow dupe the Union into accepting these

<sup>52</sup> *Richmond Electrical Services*, supra, and *J. D. Lunsford Plumbing*, supra, also cited by Respondent, are discussed below.

<sup>53</sup> Further, the 1992-1996 Castle Hill memorandum of local conditions makes specific reference to the applicability of the KL Agreement.

<sup>54</sup> In fact, as the Union notes in its brief, a comparison of the compilation document prepared by Jasinski early in negotiations with the noneconomic provisions of the KL Agreement shows that a number of provisions are identical and others substantially similar. I further note that Jasinski eventually acknowledged this during negotiations.

<sup>55</sup> Jasinski had also failed to highlight its overtime proposal, but acknowledged this omission after it was brought to his attention at the meeting where the document was reviewed.

new terms, as the General Counsel appears to suggest. Certainly, Respondent had every reason to believe that the Union's experienced negotiators would review the compilation document in preparation for further negotiations. I further note that Respondent's proposed pension language was set forth in its entirety in the economic proposal given to the Union on October 24, 2007.

The General Counsel and the Union further allege that Respondent continually misrepresented whether the facility used agency employees. The record supports this contention. As noted above, I do not credit Jasinski's testimony that he informed the Union that the facility had employed agency employees in October or November, after the issuance of the 10-day notice, as it is against the weight of all the other evidence in the record. Rather, I find that during the period when Respondent was actively contracting with at least one agency for nonunit employees, it repeatedly advised the Union that none were being used. It was only after the issuance of the final offer, at the last meeting of the parties, that Respondent acknowledged that agency employees had been utilized.

*c. Contemporaneous understanding of the Parties as to the state of negotiations*

It is the case that on May 14, 2008, Respondent advised the Union that it was close to its final offer. It is also the case, however, that economic proposals were exchanged by the parties, and the Employer did not declare impasse on that occasion. See *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *Essex Valley Visiting Nurses Assn.*, supra at 841.

With regard to Respondent's comments at the May 14 meeting and the subsequent issuance of the final offer, the Board has held that the assertion of a "final" position does not, by itself, require a finding of impasse. *Grinnell Fire Protection Systems*, 328 NLRB at 585 (citing inter alia, *PRC Recording Co.*, 280 NLRB at 640). See also *Cotter & Co.*, 331 NLRB at 791, where Member Brame quoted Judge Posner for the proposition that one party's proffering of a so-called final offer is not conclusive on the question of impasse because "[a]fter final offers come more offers."<sup>56</sup>

Here, the overall course and conduct of the parties does not evince a mutual understanding that further bargaining would not take place or be fruitful. As noted above, on June 17, 2008, Jasinski wrote to Saint Hilare: "We recognize that you are currently away on vacation . . . . We suggest you propose dates in July and August. . . ." He thereafter asked for further bargaining dates on June 23. He also continued to send information to the Union. When Saint Hilare responded and proposed bargaining dates, Jasinski responded on July 10 confirming "negotiations." After receiving the final offer, Saint Hilare wrote to Jasinski and disputed his claims of union inaction and impasse.

Based upon the foregoing, I conclude that the evidence is insufficient to meet Respondent's burden of proof that, at the time of the promulgation or implementation of the final offer the parties were of a contemporaneous mutual understanding that further bargaining would be futile. I further find that the

<sup>56</sup> *Chicago Typographical Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

objective evidence does not support Respondent's unilateral reliance on such an assumption.

*d. Importance of the issues central to the bargaining*

As Respondent notes, there were key issues that remained in dispute up to and through the final bargaining session. These include health insurance, wages, minimums, and the use of no-frills employees. Respondent argues that these disputes resulted in an impasse. Respondent further argues that the Union's insistence on settling the contract based upon the terms of the Tuchman Master Agreement and/or the KL Agreement further established that impasse had been reached. *Richmond Electrical Services*, supra; *J. D. Lunsford Plumbing*, supra. In this regard, Respondent argues that the parties need not reach impasse on all issues before an employer may lawfully implement its bargaining proposal. *Calmat Co.*, 331 NLRB 1084, 1097 (2000).

It is apparently conceded by the General Counsel and the Union that issues separating the parties included wages, health insurance, the proposed elimination of daily overtime, and Respondent's proposal to double the number of no-frills workers. The General Counsel and the Union contend, for various reasons attributable to Respondent's conduct at the table, that the parties were unable to move beyond preliminary discussions of these and other issues. These include the Employer's refusal to accept the KL Agreement as the underlying document, alleged misrepresentations regarding the compilation agreement and the Employer's refusal to provide information regarding key issues such as no-frills employees, agency and employee overtime, among others.

In disagreement with Respondent, and notwithstanding the fact that the parties had not reached agreement on several critical issues, I cannot conclude that the evidence establishes that the parties were at impasse at the time of the implementation of the final offer. The evidence fails to demonstrate the sort of deadlock which is characteristic of such a finding. The Union never told the Employer that it would be unwilling to make further concessions and, in fact, had made concessions throughout bargaining. Whether the parties could have eventually resolved their differences is unknown; however, the evidence is clear that the Union offered to continue bargaining and, prior to July 7, the Employer had committed to doing so as well.

*Richmond Electrical Services*, supra, and *J. D. Lunsford Plumbing*, supra, cited by Respondent, may be distinguished in that the unions in those cases refused to accept any terms different from the standard, area contracts. In *Richmond*, the union conceded that the most-favored-nations clause precluded it from agreeing with the employer on wages lower than those in the industrywide agreement, and the Union never proposed lower wages. In addition, the impasse over wages there led to "a complete breakdown in negotiations." 348 NLRB at 1003. Here, by contrast, the Union submitted economic proposals consistently less favorable to employees than the ones negotiated with other employers and made concessions to align its proposals more with positions taken by the Employer throughout bargaining.

Similarly, *Calmat Co.*, supra, is distinguishable insofar as it holds that impasse on a single critical issue may place such a hold on negotiations to render further bargaining meaningless. There, however, the union specifically told the employer that it would not make any further proposals unless and until the respondent "got off its . . . damn pension proposal." When the respondent's negotiator said that was not possible the union's negotiator acknowledged that the parties were "hung up on that" and the employer's representative concurred. 331 NLRB at 1099. Further, at one point prior to the communication of the respondent's final offer, the union told the employer that unless it took its pension proposal off the table there would be no movement on any other issue. In a letter communicating the final offer, the employer noted that the parties were at "irreconcilable odds." Such circumstances do not obtain here, where there is insufficient evidence to meet Respondent's burden to show that the parties had reached the sort of stalemate resulting in intractable positions on any issue or group of issues which would render further bargaining futile.

By contrast, in *NewcorBay City Division*, 345 NLRB at 1239, the Board found that the respondent's assertion of impasse was not lawful where the union's agent asked to continue bargaining and assured the employer that it was prepared to negotiate. It was expected that the union would make concessions based upon information provided by the employer. The Board found that no impasse had occurred even though the union "had not offered specific additional concessions, but only declared its intention to be flexible and continue bargaining." The Board noted that although a "wide gap" existed between the parties' positions, no impasse occurred where there was a possibility of further movement on important issues. Similarly, here, the evidence here shows that despite a "wide gap" on health insurance and other issues, the union officials were not at the end of their rope, but were willing to negotiate further.

*e. The effect of the refusal to provide information on the issue of impasse*

A failure to provide information relevant to core issues separating the parties frustrates the bargaining process and precludes a finding of impasse. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). Similarly, information that is not produced in a timely manner may also prevent parties from reaching a lawful impasse. *Orthodox Jewish Home for the Aged*, 314 NLRB at 1008. As the Board has found: "A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Decker Coal Co.*, 301 NLRB 729, 740 (1991).

Here, the Employer's refusal to or delay in providing information related to mandatory subjects of bargaining such as overtime, health insurance, employee schedules, the health and safety of employees and the use of agency employees to support bargaining unit employees went to core issues which were the subject of much discussion and debate over the months of negotiations, as has been discussed above.

As has been noted above, Respondent asserts that the Union did not need such information to make its proposals; thus, the information sought was neither necessary nor relevant. In sup-

port of this contention, Respondent cites *Sierra Bullets LLC*, 340 NLRB 242, 244 (2003). In that case, however, the Board considered the “precise issue” of “whether the mere existence of any information request, regardless of its relevance to the core uses that separate the parties at the bargaining table” precludes a finding of impasse. The Board found that because the requested information in that case was irrelevant there was “no convincing argument that [providing the information] would have changed the fact that the parties were deadlocked.” The animating principle in that case, however, was whether the information sought was relevant; there was no suggestion that anything further was required. Thus, Respondent is incorrect in its apparent supposition that it must be shown that the information would have changed the course of bargaining. As has been observed by one court: “the Board has never required the establishment of ‘but for’ causation in absolute terms.” *E. I. du Pont de Nemours v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007). See also *Caldwell Mfg.*, 346 NLRB at 1170 (“To the extent that there is uncertainty about what, if any, new proposals the Union would have made if it had been given the opportunity to review information . . . that uncertainty must be resolved against the Respondent, whose unlawful action created the uncertainty.”).

In any event, *Sierra Bullets*, supra, is inapposite to the circumstances here. In that case the sole theory of the violation which had been litigated was that impasse was precluded by the existence of an outstanding information request. Here, as described above, I have found that under the “totality of the record evidence” there are numerous factors which lead to the conclusion that a valid impasse had not been reached. *Grinnell Fire Protection*, 328 NLRB at 585. This includes, but is not limited to, the fact that there had been a refusal to provide relevant information prior to Respondent’s declaration of impasse.<sup>57</sup>

#### f. Other considerations

Moreover, the evidence establishes that Respondent’s July 7 final offer differed in certain respects to its previous offers across the table. Under the no-frills proposal for the first time, Respondent proposed a two-tier no-frills system, and increased the number of allotted slots to 25 whereas it had previously proposed 20. In addition, the no-frills rate would be paid above the minimum for each job classification, as opposed to an amount of \$1.50 per hour over the employee’s base rate, as had been proposed on October 24.<sup>58</sup> In this regard, the Board has

<sup>57</sup> As set forth above, I have found that no valid impasse has occurred. Even assuming, however, that a valid impasse had taken place, an employer nevertheless has an obligation to furnish information in order to enable a union to perform its statutory duties. *NLRB v. Acme Industrial*, supra at 435–437. The Board has held that an impasse is viewed as “only a temporary deadlock or hiatus” in bargaining, and that even during such a hiatus, an employer has a duty to supply relevant information. *Watkins Contracting, Inc.*, 335 NLRB 222, 225 (2001).

<sup>58</sup> For the reasons discussed above, I do not find that the final offer contained previously undisclosed language with regard to the Employer’s obligation to make pension or training fund contributions. I also note, however, that McCalla testified that the proposed language, which limited coverage and contributions to full-time employees “for hours physically worked,” would not satisfy the requirements of Fund trustees.

held that introducing significant new proposals at a late stage of negotiations will undermine a contention that the parties have reached impasse. See, e.g., *Hotel Roanoke*, 293 NLRB 182, 183 (1989). Here, in agreement with the General Counsel and the Union, I find that Respondent’s late introduction of new proposals, which were related to issues which had been the subject of significant discussion at prior bargaining sessions, and which had never been put forward prior to the announcement of the final offer, suggests that a valid impasse had not been reached.

In further support of its contention that impasse had been reached, Respondent relies upon the fact that the Union did not schedule any sessions after July 17, 2008, and argues that this demonstrates the Union’s unwillingness to reach an agreement. The evidence, however, shows that in correspondence exchanged after the declaration of impasse and implementation of the final offer the Union continued to demonstrate its willingness to meet and took the position that further discussion could prove fruitful. Respondent, while not refusing to meet, failed to agree to any further meetings after July 17. Under such circumstances, I do not find the fact that no further meetings had been scheduled to be determinative. To the contrary, I find that the Union’s stated willingness to meet further suggests “a new possibility of fruitful discussion.” *PRC Recording Co.*, supra at 636.

Accordingly, based upon the foregoing, I find that the parties had not reached a valid impasse at the time of the implementation of Respondent’s final offer.

#### C. The Alleged Unilateral Changes in Terms and Conditions of Employment

The complaint alleges that in July 2008, Respondent implemented its final offer and unilaterally changed terms and conditions of employment for the Castle Hill unit employees without the agreement of the Union and in the absence of a valid bargaining impasse. Respondent’s answer denied these allegations of the complaint and asserts that it legally implemented their last best offer and that Respondent did not change any term and condition of employment for unit employees prior to reaching a valid impasse with the Union.

The general outline of the relevant law is well settled. During negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While such negotiations are ongoing, “an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Moreover, no impasse is possible where an employer presents the union with a “fait accompli” as to a matter over which bargaining to impasse is required. *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999) (citations omitted), enfd. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000).

As discussed above, I have found that the parties had not reached impasse in bargaining. Moreover, the record estab-

lishes that Respondent has made unilateral changes in terms and conditions of employment. In particular, on or about July 13, 2008, Respondent implemented its final offer which increased employees' wages, established a two-tier no-frills system which also changed the rate of compensation for no-frills employees and increased the number of no-frills slots to 25, eliminated daily overtime pay, reduced health insurance benefits for employees working between 20 and 30 hours per week and partially implemented a uniform allowance for full-time employees only. None of these changes had been agreed to in bargaining and, as discussed above, certain changes even differed from proposals Respondent had advanced during bargaining prior to the declaration of impasse.

All of the foregoing changes implicate wages, hours, and other terms and conditions of employment and are, therefore, mandatory subjects of bargaining. See, e.g., *Verizon New York, Inc.*, 339 NLRB 30, 31 (2003) (wages); *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 159 (1971) (pension and insurance benefits for active employees); *Mid Continent Concrete*, 336 NLRB 258, 259 (2001) (health insurance benefits); *Keeler Die Cast*, 327 NLRB 585, 588–589 (1999) (wages, overtime, insurance coverage, and vacation policies).

Accordingly, by making such changes in the absence of a valid impasse in bargaining and without the consent of the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

#### *D. The Alleged Unilateral Discontinuance of Pension Fund Contributions*

##### 1. Contentions of the Parties

The complaint, as amended at the hearing, alleges that since on or about February 1, 2007, the Employer unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union. This allegation is based upon an amended charge, filed on April 9, 2009, which amended an earlier charge filed in December 2007. At the hearing, Respondent answered the amended complaint, denying the material allegations and asserting certain affirmative defenses. In particular, Respondent argued that the allegations of the amended complaint were not supported by the evidence, were time barred by Section 10(b) of the Act and did not relate back to the original charge as the amendment was predicated upon a different legal theory from that set forth in the initial charge. In its posthearing brief, Respondent further argues that the Union is without standing to raise the claim.

The General Counsel argues that the amendment is not time barred because the allegations of the amended charge are "closely related" to the allegations of the earlier charge in Case 22–CA–28152 as they relate to mandatory subjects that were the subject of ongoing contract negotiations. The General Counsel further contends that the 10(b) period did not start to run until February 9, 2009, when the Fund conducted an investigation into whether Healthcare and Sunshine had contracts with the Union. The General Counsel maintains that the Union did not have either actual or constructive notice of the delinquencies prior to that time and that the Respondent has not met its burden of showing otherwise.

The Union argues that the Employer's method of remitting contributions, through three different entities, created confusion which made it difficult for the Fund to identify those payments as Castle Hill contributions. Because the Fund was unaware that the Healthcare and Sunshine checks were for Castle Hill employees, and because Castle Hill was contributing regularly for other employees, the Fund believed there was no collective-bargaining agreement authorizing the acceptance of such contributions. The Union argues that it was not until February 2009, when a conference call was precipitated by the Fund's refund letters that the Fund was in a position to recognize that the cessation of the Healthcare and Sunshine payments in February 2007 resulted in a delinquency in contributions by Castle Hill.

As noted above, Respondent argues that only the Fund, and not the Union, has standing to raise the allegations of the amended charge. In support of this contention, Respondent maintains that the Fund and the Union are separate and distinct entities and, moreover, that the Union does not represent the Fund. Respondent further argues that the evidence shows that since 2002 Castle Hill has always made the required contribution to the Fund and it was the Fund that refused to process the checks it received from August 2003 through January 2007. The Fund then returned the checks and refunded amounts already paid and told the Employer that they would not accept further contributions without a signed collective-bargaining agreement. Subsequently, by letter dated April 1, 2009, the Fund reversed course and found that the Employer would be required to make contributions because it claimed it had subsequently received a signed collective-bargaining agreement. As Respondent argues: "As such, the Union's allegations that the Employer *deliberately* failed to make the necessary contributions to the Fund are utterly absurd. . . ." (Emphasis in original.)

##### 2. Analysis

###### *a. The Union has standing to file the charge*

With regards to Respondent's argument regarding the Union's asserted lack of standing, as an initial matter, I note that the Board administers public policy and its processes may be invoked by any person who believes such policies have been violated. This is reflected in Rule 102.9 of the Board's Rules and Regulations and Statements of Procedure which provides, *inter alia*, as follows:

Who may file . . . a charge that any person has engaged in and/or is engaging in any unfair labor practice affecting commerce may be filed by any person . . . .

Moreover, in *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17–18 (1943), the Supreme Court addressed the issue as follows:

The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the legislative hearings senator Wagner, sponsor of the bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it often was not prudent for the workman himself to make a complaint against his employer,

and that strangers to the labor contract were therefore permitted to make the charge. The charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

The Board has since adopted this ruling in *Bagley Products*, 208 NLRB 20, 21 (1973), and has also specifically affirmed that any person can file an unfair labor practice charge. See *Utility Workers Local 111 (Ohio Power Co.)*, 203 NLRB 230 (1973).

*b. The 10(b) Issue*

Section 10(b) of the Act provides, in relevant part, that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.”

I do not agree with the General Counsel’s contention that the amendment is timely because it is “closely related” to the original timely-filed charge. The applicable principles are set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988):

First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

In this case, in agreement with Respondent, I find that the allegations of the amendment do not involve the same legal theory as that set forth in the original charge. While both allegations concern violations of Section 8(a)(5), they are otherwise dissimilar. The initial charge alleges a failure to provide information, the amendment alleges a unilateral change in terms and conditions of employment. Further, the factual predicates for the two allegations are not comparable and do not involve similar conduct during the same period. Nor is there a “causal nexus” between the allegations. See *SKC Electric, Inc.*, 350 NLRB 857, 859 (2007). Moreover, it is apparent that the Respondent would not be raising similar defenses to these allegations. I conclude therefore, that the amendment to the charge in Case 22–CA–28152 is not timely under the principles enunciated in *Redd-I* and its progeny. See *Regency Grande Nursing & Rehabilitation Center*, 347 NLRB 1143, 1143–1144 (2006).

Nevertheless, for the following reasons, I find that the amendment to the charge is timely filed. The 10(b) limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. See *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005); see also *Allied Production Workers Local 12*, 337 NLRB 16, 18 (2001) (finding that the 6-month period provided by Section 10(b) begins to run only when a party has “clear and unequivocal notice” of the unfair labor practice). “A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence.” *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366, 368 (2005) (citing *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001)) (applying Section 10(b) where a charging party was found to have been “on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred.”); see also *St. Barnabas Medical Center*, 343 N.L.R.B. 1125, 1127 (2004) (finding that knowledge is imputed when a party first has “knowledge of the facts necessary to support a ripe unfair labor practice.”). If a party “ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[,]” and “whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led.” See *Miramar Hotel Corp.*, 336 NLRB 1203, 1252 (2001) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); see also *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191 (1992) (holding that the “Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent’s contractual non-compliance.”); *Mathews-Carlson Body Works*, 325 NLRB 661, 662 (1998) (finding that had the union exercised reasonable diligence, the union would have become aware that Respondent had not made fringe benefit payments on behalf of a majority of the employees); but see *R.R.R. Restaurant*, 314 NLRB 1267, 1268 (1994) (finding the union had no knowledge of the repudiation of benefits where the employer consistently made late payments). The burden of showing such clear and unequivocal notice is on the party raising Section 10(b) as an affirmative defense. See *Dedicated Services*, 352 NLRB 753, 759 (2008).

The Board has, in various circumstances, held that knowledge must be imputed directly to a union, and not to third parties, in order for the union to have constructive knowledge of an unfair labor practice. See *Dedicated Services*, supra (and cases cited therein). Moreover, in situations involving unions and benefit trust funds, it is well settled that the law recognizes that labor organizations, and employers for that matter, are not presumed to be affiliated with multiemployer benefit funds, or to be anything but separate and distinct entities. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Operating Engineers Local 12 (Griffith Co.)*, 243 NLRB 1121, 1125 (1979), aff’d. 660 F.2d 406, 411 (9th Cir. 1981). The activities of such a fund will be binding on a labor organization only upon a specific showing of agency responsibility. *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984). Here, Respondent has adduced no such evidence and, to the contrary, has argued that these entities are unrelated. Overall, then, the Union, and not the Fund,

must have had knowledge of the wrongdoing in order for the 10(b) period to begin.

That being said, I do not agree with the General Counsel and the Union that the Union was not in a position to know about the delinquencies in pension contributions prior to the February 2009 conference call. I find that the record here shows that the Union had sufficient facts at an earlier occasion to warrant the exercise of due diligence in this matter.

In particular, I find that this occurred in October 2008, when Blount wrote to Healthcare and Sunshine returning checks for a period from August 2003 through January 2007 and sent a copy of this letter to Union President Silva. In my view, the apparent failure of the employer to remit contributions after January 2007 was sufficient notice to trigger the Union's obligation to inquire as to why there were no contributions received after that date.<sup>59</sup> While it can be argued that there was no "clear and unequivocal" evidence of wrongdoing at this point, the Union was put on notice of facts that reasonably would have engendered suspicion that an unfair labor practice had occurred and a simple inquiry would have revealed that the employer had ceased making payments, as was the case after the Union and the Fund held their conference call. *Ohio & Vicinity Regional Council of Carpenters*, supra; *St. Barnabas Medical Center*, supra; *Mathews-Carlsen Body Works*, supra. I note that Respondent has failed to adduce evidence of any reporting requirement or any other basis for me to conclude that actual or constructive knowledge had or should have occurred on a prior occasion, and makes no such argument here. Accordingly, I find that it was not until October 10, 2008, that the Union had sufficient facts at its disposal to ascertain that the Employer had failed to make contributions for the majority of the bargaining unit.<sup>60</sup>

Inasmuch as, by that time, the 2002 MOA had expired, a timely charge had to be filed and served not more than 6 months after the Union received actual or constructive notice of the unfair labor practice. See *Chemung Contracting Corp.*, 291 NLRB 773 (1988); see also *Park Inn Home for Adults*, 293 NLRB 1082, 1083 (1989). Thus, here the Union was required to file and serve its charge no later than 6 months after October 10, 2008, the date on which it should have known of the Employer's alleged wrongdoing. See generally *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). (The 10(b) period does not begin to run until the aggrieved party has received actual or

constructive notice of the conduct that constitutes the alleged unfair labor practice.)

The Union filed its charge on April 9, 2009. The record demonstrates that it was sent to the Respondent and its counsel of record by the regional office on April 10, the following day. In accordance with Section 102.113 of the Board's Rules and Regulations, the date of service is the day on which the charge is deposited in the mail. See *Sioux Quality Packers*, 228 NLRB 1034, 1037 (1977); *Heartshare Human Services*, 339 NLRB 842, 847 (2003). Thus, the amendment to the charge was filed and served within the 6-month period after the Union received constructive notice of the unfair labor practice, albeit just barely.<sup>61</sup> Accordingly, I find that the Union's charge was filed and served in accordance with the provisions of Section 10(b) of the Act.<sup>62</sup>

As noted above, the amended charge alleges a failure to remit pension contributions dating from July 2007. The amended complaint, however, alleges that the failure to remit such contributions dates back to February 2007. Here, based upon the principles of *Redd-I*, supra, I find that the variance between the charge and the allegations of the complaint are not time barred. The charge and the complaint involve the same theory of violation of the Act, sequence of events and defenses interposed by Respondent. In addition, the timing of the violation was a matter fully litigated at the hearing. See *Concourse Nursing Home*, supra at 694 fn. 13.

#### *c. The unilateral cessation of Pension Fund contributions*

Having found that the charge is timely filed and served and the allegations of the complaint are not barred by the applicable statute of limitations, I will now proceed to evaluate the evidence adduced in this matter. As noted above, Blount testified that the final checks from Healthcare and Sunshine were received in July 2007, and were remittances for the month of January 2007. This evidence, and Blount's testimony that no contributions were received thereafter, was unrebutted. There is no evidence that the Union was afforded notice or an opportunity to bargain over this issue at any relevant time.

Respondent argues that, since the Fund returned checks to Healthcare and Sunshine, there is no evidence that the Employer deliberately failed to make contributions. Inasmuch as the Employer ceased remitting contributions more than 1 year prior to the return of any checks, the logic of this argument

<sup>59</sup> I additionally note that Blount specifically noted that most of the checks were more than 6 months old, yet another indication that timely payments were not being made. In addition, for the foregoing reasons, I do not credit Blount's testimony that the Fund was unaware that the Healthcare and Sunshine had ceased making contributions to the Fund until February 2009.

<sup>60</sup> I note that some 2 years earlier, in November 2006, Union Representative Larry Alcott exchanged e-mails with Fund Collections Manager Jack Salm regarding the relationship between Castle Hill and Healthcare and Sunshine. From these communications it is apparent that the Union was aware that the Fund had failed to deposit the remittances sent by Healthcare and Sunshine; however, employer contributions were still being made at that time. Therefore, there is an insufficient basis to impute to the Union constructive knowledge of any future failure to remit contributions to the Fund.

<sup>61</sup> See *MacDonald's Industrial Products*, 281 NLRB 577 (1986) (limitations period begins to run on the date after the alleged unfair labor practice occurs and does not include the day of the alleged unfair labor practice).

<sup>62</sup> Sec. 102.14 of the Board's Rules and Regulations provides that the charging party shall be responsible for the timely and proper service of the charge. However, the Board and the courts historically have held that service by the Board's regional office is sufficient, as long as it is timely. See *T.L.B. Plastics Corp.*, 266 NLRB 331 fn. 1 (1983), and cases cited therein.

escapes me. Nevertheless, in any event, applicable law makes clear that an employer's motive is not an element essential to a finding that a unilateral change is violative of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Gulf Coast Automotive Warehouse*, 256 NLRB 486, 488-489 (1981); *Merrill & Ring, Inc.*, 262 NLRB 362 (1982). Here, Respondent had a continuing obligation to make Fund contributions, notwithstanding any apparent failure on the part of the Fund to act with some measure of diligence in this matter.

Accordingly, I find that Respondent has unlawfully ceased remitting pension contributions for bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint, as amended.

#### 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. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in or failing and refusing to provide certain information requested by the Union in its letter of October 19, 2007, and at various points thereafter, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time certified nurses' aides, dietary and housekeeping and recreation employees employed by Respondent at its Union City, New Jersey facility.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by implementing its final offer and unilaterally changing terms and conditions of employees in the above-described unit without having reached agreement with the Union and in the absence of a valid bargaining impasse.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally ceasing to remit contributions to the SEIU National Industry Pension Fund.

#### 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. In particular, I shall recommend that the Respondent supply the requested information, other than that which has already been provided to the Union. I further recommend that the Respondent be ordered to place into effect all terms and conditions of employment provided for by the collective-bargaining agreement which expired on July 24, 2007, and to maintain those terms in effect until the parties have bargained to a valid impasse, or the Union has agreed to the changes. Provided, however, that nothing in this recommended Order is to be construed as requiring that Respondent cancel any unilateral changes that benefited the unit employees without a request from the Union. I also recommend that the

Respondent be ordered to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final offer on or about July 11, 2007, or its unilateral discontinuance of contributions to the SEIU National Industry Pension Fund in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest to be computed as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons*, *supra*. I further recommend that the Respondent be ordered to make all contributions to any fund established by the collective-bargaining agreement with the Union which was in existence on July 24, 2007, and which contributions the Respondent would have made but for the unlawful unilateral changes, including all required contributions to the SEIU National Industry Pension Fund, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979).<sup>63</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>64</sup>

#### ORDER

The Respondent, Castle Hill Health Care Center, Union City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide to the Union, or unnecessarily delaying in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's employees in the following unit:

All full-time and regular part-time certified nurses aides, dietary and housekeeping employees and recreation employed by Respondent at its Union City, New Jersey facility.

(b) Failing to comply with the terms and conditions of employment that are set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

<sup>63</sup> I leave for the compliance portion of these proceedings the appropriate computation of interest and additional sums due with respect to those Fund remittances which had been timely made by the Employer but not processed by the Fund.

<sup>64</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Implementing terms and conditions of employment that are different from those in the collective-bargaining agreement which expired on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

(d) Failing and refusing to remit contributions owed to the SEIU National Industry Pension Fund.

(e) 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) Restore, honor and continue the terms and conditions of employment set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

(b) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful alteration or discontinuance of contractual benefits, with interest, as provided for in the remedy section of this decision.

(c) Make contributions, including any additional amounts due, to any fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which Respondent would have paid but for its unlawful unilateral changes, as provided for in the remedy section of this decision.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Union City, New Jersey, copies of the attached notice marked "Appendix."<sup>65</sup> Copies of the notice, on forms provided by the Regional Director for Region 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 October 19, 2007.

<sup>65</sup> 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."

(f) 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.

Dated, Washington, D.C., December 14, 2009.

#### 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 fail to provide to the Union, or unnecessarily delay in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the employees in the following unit:

All full-time and regular part-time certified nurses aides, recreation employees, dietary and housekeeping employees employed by us at our Union City, New Jersey facility.

WE WILL NOT fail to comply with the terms and conditions of employment that are set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL NOT implement terms and conditions of employment that are different from those in the collective-bargaining agreement which expired on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

WE WILL NOT fail and refuse to remit contributions owed to the SEIU National Industry Pension Fund.

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

WE WILL restore, honor and continue the terms and conditions of employment set forth in the collective-bargaining agreement with the Union that expired on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL make employees and former employees whole for any and all loss of wages and other benefits incurred as a result of our unlawful alteration or discontinuance of contractual benefits, with interest.

WE WILL make contributions, including any additional amounts due, to any fund established by the collective-bargaining agreement that was in existence on July 24, 2007,

and which we would have paid but for our unlawful unilateral changes.

CASTLE HILL HEALTH CARE CENTER