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**San Juan Bautista, Inc., d/b/a San Juan Bautista Medical Center and Hermandad De Empleados De La Salud Y Otras Agencias.** Case 24–CA–11419

February 28, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND PEARCE

On July 14, 2010, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, as well as a cross-exception with 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, and conclusions as modified below, to modify his remedy,<sup>1</sup> and to adopt his recommended Order as modified.<sup>2</sup>

The issues in this case are (1) whether the judge properly concluded that deferring the instant case to arbitration was inappropriate, and (2) whether the judge properly concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by modifying its collective-bargaining agreement with the Union by failing to pay the contractually guaranteed Christmas bonus without the Union’s consent. As explained below, we agree with both of the judge’s conclusions.

The Respondent operates a hospital in Caguas, Puerto Rico. The Union was certified as the exclusive collective-bargaining representative for several bargaining units within the hospital on December 17, 2008. Subsequently, the Respondent and the Union entered into a collective-bargaining agreement covering the units effective from June 19, 2009–June 19, 2012.

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<sup>1</sup> In his cross-exception, the General Counsel requests that any monetary award to employees be paid with compound interest. In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge’s recommended remedy by requiring that the monetary award shall be paid with interest compounded on a daily basis.

<sup>2</sup> We shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Three provisions of the parties’ collective-bargaining agreement are relevant to the instant dispute. Article 26 of the agreement provides:

Section 1- The Hospital recognizes the payment of a Christmas Bonus to each union member of the appropriate units, according to the established dispositions of Law 148, of June 30, 1969, as amended, during the first year of the Collective Bargaining Agreement.

Section 2- The Union will present the Hospital with a Christmas Bonus proposal to be negotiated for the second and third year of this Collective Bargaining Agreement.

Article 49 provides for bargaining over proposed modifications to the agreement, and article 10 establishes a grievance and arbitration procedure to resolve “all of the controversies, disputes, differences, complaints and claims which may emerge from the interpretation, application and administration” of the agreement.

Puerto Rico Law 148<sup>3</sup> requires employers to pay a Christmas bonus to employees who have worked at least 700 hours between October 1 of the previous year and September 30 of the current year. *Id.* at Sec. 501. An individual’s bonus is calculated based on his or her total wage, and constitutes compensation in addition to wages and benefits. *Id.* The bonus must be paid between December 1 and 15, unless the employer and employees agree on another payment date. *Id.* at Sec. 502. Employers may obtain an exemption from paying the bonus in any year in which the employer has not made a profit or if the total bonus amount would exceed 15 percent of the employer’s net profit. *Id.* at Sec. 501. To avail itself of the exemption, the employer must submit certified balance sheets to the Puerto Rico Secretary of Labor and Human Resources (the Secretary), who is empowered to administer the law. *Id.* at Sec. 507. By its express terms, Law 148 does not apply “where the workers or employees receive an annual bonus by collective agreement,” unless the contractual bonus would be lower than the statute created bonus, in which case the employer must pay the statutory amount. *Id.* at Sec. 506.

In November 2009, the Respondent requested a Christmas bonus exemption from the Secretary. On December 4, the Puerto Rico Department of Labor and Human Resources (the Department) informed the Respondent that it was determining whether the Respondent qualified for an exemption; its letter also stated that any exemption granted would apply only to employees not covered by the collective-bargaining agreement. On De-

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<sup>3</sup> Puerto Rico Law No. 148 of June 30, 1969, as amended, P.R. Laws Ann. tit. 29, Sec. 501 et seq. (2007).

ember 11, the Department informed the Union that it had granted the Respondent an exemption, but stated that it had specifically informed the Respondent that the exemption would “only apply to those employees that are not part of the bargaining unit” covered by the collective-bargaining agreement. Nevertheless, the Respondent refused to pay the contractual bonus to its bargaining-unit employees.<sup>4</sup>

#### I. DEFERRAL TO ARBITRATION

The judge found, and we agree, that deferring the instant controversy to arbitration would be inappropriate. The Board considers six factors in deciding whether to defer a dispute to arbitration: (1) whether the dispute “arose within the confines of a long and productive collective-bargaining relationship;” (2) whether there is a “claim of employer animosity to the employees’ exercise of protected rights;” (3) whether the agreement provides for arbitration “in a very broad range of disputes;” (4) whether the arbitration clause “clearly encompasses the dispute at issue;” (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is “eminently well suited to resolution by arbitration.” *United Technologies Corp.*, 268 NLRB 557, 558 (1984); see *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971). Neither the first nor the last factor is present here.<sup>5</sup> Accordingly, we reject deferral.

##### A. Long and Productive Bargaining Relationship

The present dispute does not arise within the confines of a long and productive bargaining relationship. At the time the Respondent refused to pay the bonus, the Union had been the employees’ exclusive bargaining representative for 1 year and the collective-bargaining agreement had been in place for only 6 months. Considering the fact that four other charges were settled before or during the hearing in this matter, it is clear that this was, at a minimum, a contentious year, characterized by disagreements and legal wrangling extending well beyond the Christmas bonus dispute.<sup>6</sup> Whatever the nature and

merits of these disagreements, their existence indicates the relationship between the Union and the Respondent had not matured. We are unaware of any decision finding that a relationship as new and contentious as the one at issue here can be considered “long and productive” for the purposes of a *Collyer Wire* analysis, and we note that the Board has previously found that a similarly short and fraught relationship does not satisfy the standard. See *Beverly Enterprises*, 310 NLRB 222, 257–258 (1993), *enfd.* in relevant part sub nom. *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994) (relationship was less than 2 years old and the employer committed four violations during that time).

##### B. Suitability of the Dispute to Resolution by Arbitration

The dispute here is not well suited to resolution by arbitration. A dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute. See *Collyer*, *supra* at 842. Deferral is not appropriate when “no construction of the contract is relevant for evaluating the reasons advanced by Respondent for failing to comply with that contract provision.” *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979), *enfd.* mem. 636 F.2d 1210 (3d Cir. 1980), *cert. denied* 452 U.S. 916 (1981). Moreover, deferral is also not appropriate if the contract provision at issue is unambiguous. See, e.g., *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001).

In evaluating this factor, it is crucial to correctly characterize the present dispute. Although the Respondent describes the dispute as one over the meaning of article 26, the actual dispute is over whether the statutory exemption granted to the Respondent by the Department applies to the employees covered by the collective-bargaining agreement. In fact, the Respondent is defending this case not simply on the basis of the contract, but also—and, primarily—on the basis of the statutory exemption.<sup>7</sup> Recognizing that the dispute is over the scope of the exemption, the question then becomes whether resolution of the dispute primarily requires interpretation of the collective-bargaining agreement.

We conclude that determining the scope of the statutory exemption does not, in this case, primarily require

<sup>4</sup> The Respondent initially tried to negotiate a different bonus payment schedule with the Union, but the Union rejected Respondent’s proposals. The Union appears to have taken some initial steps to invoke the agreement’s grievance and arbitration procedures, but it filed the instant unfair labor practice charge when the Respondent resolved that it would not pay the bonus.

<sup>5</sup> There is no dispute that factors (3), (4), and (5) favor deferral. Regarding factor (2), we note that this dispute takes place within the context of various other unfair labor practice allegations that were resolved by a non-Board settlement. No additional evidence of employer animosity has been offered, however.

<sup>6</sup> The Union originally filed charges against the Respondent, and the General Counsel issued a complaint, alleging discriminatory discharge of two employees, failure to give notice of and bargain over unilateral changes to terms and conditions of employment (through layoffs,

elimination of positions, subcontracting of unit work, health insurance cancellation, and changes in the Respondent’s Rules of Conduct), unreasonable delay in furnishing information, and threatening employees with discharge for participating in a strike. The dates of the alleged conduct ranged from January to December 2009. The Respondent, for its part, sought and obtained a temporary restraining order from the U.S. District Court for the District of Puerto Rico to prevent a threatened December 2009 strike over the Christmas bonus dispute and an unrelated disagreement over shift assignments for nurses.

<sup>7</sup> See R. Br. in support of exceptions at 9–12.

such interpretation. The Respondent argues that the contract incorporates the requirements of Law 148. Absent the issuance of an exemption, there would be no question that the Respondent was required to pay a Christmas bonus in accordance with the law's terms. Thus, the only even colorable argument in this case is that the exemption applied to the unit employees. This is not a question of contractual interpretation.

Moreover, the provisions requiring interpretation in this case are not ambiguous. As stated above, but for the issuance of the exemption, the Respondent concedes that the contract required it to pay a bonus in accordance with the requirements of Law 148. The exemption clearly did not alter that contractual requirement. The Department explicitly stated that the exemption granted to the Respondent does not apply to employees covered by the collective-bargaining agreement. Thus, there simply is no reasonable construction of the exemption that leads to the conclusion that it relieved Respondent of its contractual commitment to pay bonuses in accordance with the law.<sup>8</sup>

Finally, even if a construction of article 26 of the collective-bargaining agreement were necessary to resolve this dispute, we conclude that this provision, too, is unambiguous in the relevant respect. As stated above, all parties agree that, absent the exemption, article 26 required the Respondent to pay a bonus in accordance with the terms of Law 148. The key phrase here is "according to the established dispositions of Law 148." Respondent argues that because article 26 of the parties' agreement "incorporated" Law 148 it also incorporated the exemption, thereby making the exemption applicable to unit members. The problem with that argument, of course, is that the exemption expressly did not apply to represented employees. Thus, the appropriate government agency clearly expressed its intention that the exemption would not affect the rights of represented employees. The exemption accordingly did not in any way alter the "established dispositions of Law 148" as they are incorporated by reference into the agreement. We therefore conclude that the relevant provision of the contract is unambiguous.<sup>9</sup> For each of these reasons, the dispute is ill-suited to arbitration.

<sup>8</sup> We further observe that if this dispute were deferred to arbitration, the arbitrator, to reach a contrary result, would not be explicating the contract but reexamining the Department's determination of the scope of the exemption.

<sup>9</sup> Had the Department simply granted the Respondent a blanket exemption, whether such an exemption applied to unit members might well have posed a question of contract interpretation.

## II. UNLAWFUL CONTRACT MODIFICATION

We agree with the judge that the Respondent's failure to pay the bonus was an unlawful contract modification that violated Section 8(a)(5) and (1).<sup>10</sup> We affirm the judge's threshold finding that the Christmas bonus was a term and condition of employment within the meaning of Section 8(d) and thus a mandatory subject of bargaining.<sup>11</sup> Absent the union's consent, a mid-term contract modification of a term governing a mandatory subject of bargaining violates Section 8(a)(5). See *Bonnell/Tredegear Industries*, 313 NLRB 789, 790 (1994), *enfd.* 46 F.3d 339 (4th Cir. 1995). An employer, however, can justify that conduct by articulating a "sound arguable basis" for believing that the contract allowed such a modification. See *Hospital San Carlos Borromeo*, 355 NLRB No. 26, slip op. at 1 (2010).

The Respondent's sole basis for its refusal to pay the bonus is that the exemption granted it by the Department permitted nonpayment. As discussed above, the exemption, on its face, does not apply to employees covered by a collective-bargaining agreement. Accordingly, the Respondent has failed to meet the "sound arguable basis" standard. See *id.*, slip op. at 1. We therefore agree with the judge that the refusal to pay the Christmas bonus was an unlawful contract modification in violation of Section 8(a)(5) and (1).

### Amended Remedy

In addition to the relief recommended by the administrative law judge, any interest due to the unit employees shall be compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, San Juan Bautista Medical Center, Caguas, Puerto Rico, its offi-

<sup>10</sup> The complaint alleged a unilateral change without notice and opportunity to bargain, rather than a contract modification without the Union's consent. At the hearing, however, the General Counsel summarized his position in a manner consistent with a contract-modification theory, stating: "The collective-bargaining agreement provided for the payment of a Christmas bonus, and the Employer failed to pay the Christmas bonus without the Union's consent." In any event, the Respondent does not contend that the contract-modification theory was not fully and fairly litigated nor does it otherwise contend that the alleged breach of contract does not rise to the level of a violation of Sec. 8(a)(5). Cf. *NCR Corp.*, 271 NLRB 1212, 1213 fn. 6 (1984) (observing that "a mere breach of contract is not in itself an unfair labor practice"); *United Telephone Co. of the West*, 112 NLRB 779 (1955) (holding that alleged isolated breach of contract does not necessarily violate Sec. 8(a)(5)).

<sup>11</sup> The Respondent did not except to this finding.

cers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(a) Continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the units described above and pay each unit employee their 2009 Christmas bonus, with interest at the rate prescribed in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).”

2. Substitute the following for paragraph 2(c).

“(c) Within 14 days after service by the Region, post at its Caguas, Puerto Rico facility, copies of the attached notice marked “Appendix.”<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 December 15, 2009.”

Dated, Washington, D.C. February 28, 2011

_____ Wilma B. Liebman,	Chairman
_____ Craig Becker,	Member
_____ Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>12</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.”

*Ayehsa K. Villegas Estrada, Esq.*, for the Government.<sup>1</sup>  
*Eliseo Roques Arroyo, Esq.*, *Luis R. Perez Giusti, Esq.*, and  
*Mariel Ayala Morales, Esq.*, for the Hospital.<sup>2</sup>

## DECISION

### STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an alleged failure by San Juan Bautista, Inc., d/b/a San Juan Bautista Medical Center (the Hospital) to pay employees in certain bargaining units their 2009 Christmas bonus. I heard this case in San Juan, Puerto Rico, on May 18, 2010. The case originates from a charge filed by Hermandad de Empleados de la Salud y Otras Agencias (the Union) on December 16, 2009, and amended on March 10, 2010, against the Hospital. The prosecution of the case was formalized on March 31, 2010, when the Regional Director for Region 24 of the National Labor Relations Board (the Board), acting in the name of the Board’s General Counsel, issued an Order Further Consolidating Cases, Consolidated Amended Complaint, and notice of hearing (complaint) against the Hospital.

The consolidated amended complaint related to five cases. Prior to trial, the Hospital and Union reached a settlement of Cases 24–CA–11096 and 24–CA–11119 which settlement was approved by the Regional Director for Region 24. At the trial, the Hospital and Union reached a settlement of Cases 24–CA–11243 and 24–CA–11416, which I approved on the record at the beginning of the trial, and I remanded those cases to the Regional Director for compliance. The Regional Director, on May 28, 2010, issued an Order reflecting the foregoing, severing those cases, and withdrawing the complaint as to those cases. I have amended the caption herein to delete the case numbers of those cases. The remaining case, 24–CA–11419, was litigated.

The complaint alleges the Hospital, on or about December 15, 2009, failed and/or refused to pay unit employees’ their 2009 Christmas bonus without prior notice to the Union and without affording the Union an opportunity to bargain with the Hospital with respect to this conduct and the effects of this conduct and/or without first bargaining with the Union to a good-faith impasse. It is alleged the Christmas bonus is a mandatory subject for the purpose of collective bargaining and that the Hospital has by its actions failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act).

The Hospital, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint, and raised certain affirmative defenses.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. The parties stipulated to the facts and called no witnesses. I have studied the whole record, the post-trial briefs, and the authorities cited therein. Based on the

<sup>1</sup> I shall refer to counsel for General Counsel as counsel for the Government and General Counsel as the Government.

<sup>2</sup> I shall refer to counsel for the Respondent as counsel for the Hospital and shall refer to the Respondent as the Hospital.

analysis below, I conclude and find the Hospital violated the Act substantially as alleged in the complaint.

#### FINDINGS OF FACT

##### I. JURISDICTION, LABOR ORGANIZATION STATUS, AND OFFICIAL POSITIONS

The Hospital is a Commonwealth of Puerto Rico corporation with an office and place of business in Caguas, Puerto Rico, where it is, and has been, engaged in the operation of an acute health care facility. During the past 12 months ending March 31, 2010, a representative period, the Hospital purchased and received directly from points and places located outside the Commonwealth of Puerto Rico goods and materials valued in excess of \$50,000. During the same period of time it also had gross revenues in excess of \$250,000. The parties admit, and I find, the Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

Hospital Human Resources Director Calvin Tua Algarin and Hospital Director Julio Andino Rodriguez are supervisors and agents of the Hospital within the meaning of Section 2(11) and (13) of the Act and Hospital School of Medicine President Yocasta Brugal is an agent of the Hospital within the meaning of Section 2(13) of the Act. Sixto Alvelo is the Union's Executive Director and Maria Diaz Bigio is its President. Miguel Romero is Secretary of the Commonwealth of Puerto Rico Department of Labor and Human Resources; and, Carlos Maldonado Lopez is Deputy Director for the Work Norms Bureau of the Commonwealth of Puerto Rico Department of Labor.

##### II. THE FACTS

###### A. Background

Before getting to the Christmas bonus at issue herein, it is helpful to review certain background information that places the bonus issue in context.<sup>3</sup> It is admitted that the units (Units), described below, constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. It is admitted the Union was certified as the exclusive collective-bargaining representative of the Units on December

17, 2008. It is also admitted that at all times since December 17, 2008, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Units.

###### B. The Collective-Bargaining Units

INCLUDED: All licensed registered nurses and technologists employed by the Employer at its hospital located at Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors and guards as defined in the Act.

INCLUDED: All business office clerical employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

INCLUDED: All licensed practical nurses and technician employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

INCLUDED: All maintenance and non-skilled employees employed by the Employer at its facility located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

###### C. The 2009 Christmas Bonus

It is stipulated that the Hospital and Union are parties to a collective-bargaining agreement effective from June 19, 2009, through June 19, 2012, covering terms and conditions of employment for employees in the Units. Pertinent to this case the parties' collective-bargaining agreement at Article 26, "Christmas Bonus" states:

Section 1- The Hospital recognizes the payment of a Christmas Bonus to each union member of the appropriate units, according to the established dispositions of Law 148, of June 30, 1969, as amended, during the first year of the Collective Bargaining Agreement.

Section 2- The Union will present the Hospital with a Christmas Bonus proposal to be negotiated for the second and third year of this Collective Bargaining Agreement.

On October 30, 2009, Union Executive Director Sixto Alvelo notified the Hospital in writing of certain actions the Union would be taking including a 24-hour strike commencing at 6 a.m. on December 16, 2009. It was explained that the justification for the various actions was the Hospital's unfair labor practices and bad-faith negotiations.

On November 10, 2009, Union Executive Director Sixto Alvelo and Union President Diaz Bigio hand delivered a letter to Puerto Rico Secretary of Labor Miguel Romero. In their letter they explain they have information the Hospital has solicited to be exempted from paying the 2009 Christmas bonus to its employees. The Union states in the letter that it represents the Hospital employees and they have a collective-bargaining agreement with the Hospital covering the employees. The Union asks that the Hospital's exemption request be denied and

<sup>3</sup> The Hospital filed a Motion for Partial Summary Judgment with the Board asking the Board to defer the complaint allegations concerning the 2009 Christmas bonus issues to arbitration. The Board in an Order dated May 17, 2010, declined to do so. The Board concluded the Hospital failed to establish there were no material issues of fact and that it was entitled to partial summary judgment as a matter of law. The Board explained it was further declining to defer because of numerous other complaint allegations including several alleged unilateral changes by the Hospital. The Board's denial was without prejudice to the Hospital renewing its deferral argument before the judge in the event the remaining complaint allegations were resolved prior to trial. Member Schaumber, however, dissented from the majority and would defer the 2009 Christmas bonus dispute to arbitration pursuant to the principles set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). Member Schaumber views the dispute as arising from differing interpretations of art. 26 of the parties' collective-bargaining agreement and as such covered by the arbitration.

suggests that any controversy regarding the 2009 Christmas bonus be resolved by the parties.

On December 4, 2009, Commonwealth Deputy Director for the Work Norms Bureau of the Puerto Rico Department of Labor Maldonado Lopez wrote the Hospital regarding their request for an exemption from paying the 2009 Christmas bonus. He advised the Hospital that an audit of their finances would be made to determine if the requested exoneration of payment could be granted. He also noted that Puerto Rico's Christmas Bonus Law would "not apply in cases where the employees receive a Christmas bonus by means of a Collective Bargaining Agreement," and that any exemption would "apply to those employees not covered by the Collective Bargaining Agreement."

On December 11, 2009, Deputy Director Maldonado Lopez wrote Union Executive Director Sixto Alvelo acknowledging the Union's representative status of certain Hospital employees and indicated that the exoneration granted to the Hospital regarding the 2009 Christmas bonus would only apply to those employees that are not part of the Units. He also stated the Hospital had been so notified.

Hospital Director Andino Rodriguez attached a memorandum to the pay stubs of all unit employees on December 15, 2009, in which he noted the Union had called a strike for December 16, 2009. He urged the employees not to participate in the "illegal" strike which he said the Union called "due to Hospital Management's determination not to grant the [2009] Christmas Bonus." He suggested that if the employees felt the Hospital was not complying with its contractual requirements to file grievances as outlined in the parties' collective-bargaining agreement. Director Andino Rodriguez noted the Hospital had proposed to pay the bonus over time starting in December 2009 and concluding in July 2010, but, indicated the Union rejected that offer.

In order to avoid a work stoppage the parties met on several occasions, bargained and exchanged proposals for payment of the employees' Christmas bonus but never reached an agreement.

On December 21, 2009, Union Executive Director Sixto Alvelo wrote Hospital HR Director Tua Algarin requesting he summon the Grievance Arbitration Committee to resolve the Hospital's failure to pay the 2009 Christmas bonus and noted the Hospital's denial of the bonus "constitutes a violation of Article 26, of the Collective Bargaining Agreement." In a follow up letter of January 5, 2010, Sixto Alvelo asked Tua Algarin to confirm in writing, in accordance with "Section 7-Third Step of Article 10, Grievances and Arbitration Procedures" of the parties collective-bargaining agreement, that the Hospital was not going to pay the Christmas bonus.

The parties stipulated the Hospital never at any time paid the 2009 Christmas bonus.

It is helpful at this point, to examine the Christmas Bonus Law which requires any employer who employs one or more worker or employee to pay the worker or employee a Christmas bonus. The Christmas Bonus Law sets forth the hours (700) an employee must work in a natural year (October 1 to September 30) to be eligible for a bonus and provides computations utilizing employees' wages or salary, up to a fixed maximum, to

determine the amount of the bonus. The time frame (December 1 to 15) for paying the bonus is set forth, as well as, penalties for late or nonpayment of the Christmas bonus.

The Puerto Rico Secretary of Labor and Human Resources is designated to administer the Christmas Bonus Law and is empowered to examine an employer's books, accounts, files, and related documents to determine an employer's responsibilities toward their employees regarding Christmas bonuses. An employer may be exempt from paying, in whole or in part, the statutory Christmas bonus by petitioning the Secretary for such relief. An employer may be exempt, in whole or in part, by demonstrating to the Secretary the employer has not obtained profits from its business or the profits are not sufficient to cover the total amount of the bonuses without exceeding a 15-percent limit on net annual profits that must be utilized for the statutory Christmas bonuses. In order to seek any type of exemption an employer must submit by November 30 a general balance sheet and a profit-and-loss statement to the Secretary for the 12-month period from October 1 of the previous year to September 30 of the current year. The balance sheet and profit-and-loss statements must be certified by a certified public accountant. If an employer does not submit the above described general balance sheet and profit-and-loss statements within the time and in the manner specified, the employer is required to pay the statutory Christmas bonuses.

The Christmas Bonus Law states: "The provisions of this chapter shall not apply in cases where the workers or employees receive an annual bonus by collective agreement; except in the event where the amount of the bonus to which entitled by such agreement may result lower than the one provided by this chapter in which case they shall receive the necessary amounts to complete the bonus provided herein."

### III. ANALYSIS, DISCUSSION, AND CONCLUSIONS

The complaint alleges that the Hospital violated the Act by failing to pay the Christmas bonus without prior notice to the Union and without affording the Union an opportunity to bargain.

The General Counsel argues that the failure to pay the Christmas bonus constituted a unilateral change in the contract to which the Union did not agree and that deferral to the contractual grievance arbitration procedure is inappropriate.

The Hospital, at the hearing and in its brief, argues that deferral to arbitration is appropriate because its failure to pay the Christmas bonus relates to "interpretations or application of the agreement." I disagree. Deferral to arbitration is appropriate when the issue relates to the meaning of contractual provisions. As explained in *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 408 (9th Cir. 1978), it would "undercut the duty to bargain if the employer were allowed to act with reference to a mandatory bargaining subject and then simply defend its actions in a later arbitration hearing." The contractual language regarding the obligation of the Hospital during the first year of the contract to pay the Christmas bonus consistent with the Puerto Rico statute is clear and unambiguous:

The Hospital recognizes the payment of a Christmas Bonus to each union member of the appropriate units, according to the established dispositions of Law 148, of June 30, 1969, as

amended, during the first year of the Collective Bargaining Agreement.

When the meaning of a contract provision is free from ambiguity, arbitration is unnecessary and deferral is inappropriate. *Caritas Good Samaritan Medical Center*, 340 NLRB 61, 63 (2003).

The Hospital, in its brief, argues that it was not obligated to pay the bonus because it sought and was granted an exemption. In that regard, the Hospital contends that the contractual language “incorporated the economic waiver provision.” The brief neglects to acknowledge that the exemption was not granted with regard to employees in the bargaining units whose terms and conditions of employment, including specifically payment of the Christmas bonus, were addressed in the collective bargaining agreement. The December 4, 2009 letter to the Hospital from Maldonado Lopez points out that Puerto Rico’s Christmas Bonus Law does “not apply in cases where the employees receive a Christmas bonus by means of a Collective Bargaining Agreement” and that any exemption granted would apply only “to those employees not covered by the Collective Bargaining Agreement.” Thus, the exemption did not apply to employees who were covered by the collective-bargaining agreement. As correctly argued in the brief of the General Counsel, upon the receipt of the December 4 letter the Hospital had two choices: “(1) obtain the consent of the Union to pay a different amount for the Christmas bonus; or (2) pay the Christmas bonus.”

The Christmas bonus, monetary compensation comparable to wages, was a term and condition of employment of the employees in the Units and was a mandatory subject of bargaining. “[I]t is well settled that an employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act, by modifying a term of a collective bargaining agreement without the consent of the other party while the contract is in effect [footnote omitted].” *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994). An employer is prohibited from modifying the terms and conditions of employment established by a collective-bargaining agreement without first obtaining the consent of the union.

I find the Hospital violated Section 8(a)(5) and (1) of the Act when it modified the Christmas bonus provisions of the parties’ collective-bargaining agreement by failing to pay the Christmas bonus provided therein without the consent of the Union.

#### REMEDY

Having found that the Hospital has engaged in certain unfair labor practices, I find it necessary to order the Hospital to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act as set forth in the recommended Order below.

The Hospital, having unlawfully failed to pay employees in the Units the Christmas bonus, it must make them whole by paying the bonus plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel requests that compound interest be awarded upon any backpay due. Consistent with the decision of the Board in *Carpenters Local 687 (Convention & Show Ser-*

*vices*), 352 NLRB 1016, fn. 2 (2008), not to deviate from its current practice of awarding simple interest, I deny that request.

The Respondent will also be ordered to post an appropriate notice in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The Hospital, San Juan Bautista, Inc. d/b/a San Juan Bautista Medical Center, Caguas, Puerto Rico, its officers, agents, and successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing to bargain in good faith with Hermandad de Empleados de la Salud y Otras Agencias as the exclusive collective-bargaining representative in the following units:

INCLUDED: All licensed registered nurses and technologists employed by the Employer at its hospital located at Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors and guards as defined in the Act.

INCLUDED: All business office clerical employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

INCLUDED: All licensed practical nurses and technician employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

INCLUDED: All maintenance and non-skilled employees employed by the Employer at its facility located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

(b) Failing to continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the units described above, and failing and refusing to pay those unit employees their 2009 Christmas bonus as set forth in the collective-bargaining agreement covering the unit employees.

(c) 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.

(a) Continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the units described above and pay

<sup>4</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.

each unit employee their 2009 Christmas bonus, with interest as prescribed in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 24 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security 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, with interest, of the 2009 Christmas bonus due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Caguas, Puerto Rico, copies of the attached notice marked "Appendix" in both English and Spanish.<sup>13</sup> Copies of the notice on forms provided by the Regional Director for Region 24, after being signed by the Hospital's authorized representative, shall be posted by the Hospital 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 Hospital 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 Hospital has gone out of business or closed the facility involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the notice in both English and Spanish to all current employees and former employees employed by the Hospital at any time since December 15, 2009.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 24 of the Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Hospital has taken to comply.

Dated, Washington, D.C., July 14, 2010.

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 bargain in good faith with Hermandad de Empleados de la Salud y Otras Agencias as the exclusive collective-bargaining representative of the employees in the following appropriate units:

**INCLUDED:** All licensed registered nurses and technologists employed by the Employer at its hospital located at Caguas, Puerto Rico.

**EXCLUDED:** All other employees, including supervisors and guards as defined in the Act.

**INCLUDED:** All business office clerical employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

**EXCLUDED:** All other employees, including supervisors, guards and professionals as defined in the Act.

**INCLUDED:** All licensed practical nurses and technician employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

**EXCLUDED:** All other employees, including supervisors, guards and professionals as defined in the Act.

**INCLUDED:** All maintenance and non-skilled employees employed by the Employer at its facility located in Caguas, Puerto Rico.

**EXCLUDED:** All other employees, including supervisors, guards and professionals as defined in the Act.

WE WILL NOT fail and refuse to continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering employees in the units described above.

WE WILL NOT fail and refuse to pay the unit employees their 2009 Christmas bonus as set forth in the collective-bargaining agreement.

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

WE WILL continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering our employees in the units described above.

WE WILL pay each unit employee their 2009 Christmas bonus as set forth in the collective-bargaining agreement with interest.

SAN JUAN BAUTISTA, INC. D/B/A SAN JUAN BAUTISTA  
MEDICAL CENTER

<sup>13</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."