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**Prime Healthcare Services-Garden Grove, LLC d/b/a
Garden Grove Hospital & Medical Center. and
Service Employees International Union, United
Healthcare Workers-West.** Case 21–CA–39031

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On August 4, 2010, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions, a supporting brief and a reply brief. The Acting General Counsel filed limited cross-exceptions with a supporting brief and an answering brief. The Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions, to amend the recommended remedy,⁴ and to adopt the rec-

¹ Member Becker is recused and did not participate in the consideration of this case.

² We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ 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.

⁴ We modify the judge's remedy to provide that the Respondent must not only restore unit employees' accrued sick leave benefit time that it rescinded on April 17, 2009, but must also credit unit employees with such additional time as they should accrue until the Respondent complies with our order to restore the reserve sick leave benefit itself. Extending the remedy in this fashion is fully consistent with the nature of the violation we have found. Once the Respondent exercised its right to set initial terms and conditions of employment—of which the reserve sick leave benefit had reasonably become a part (properly viewed from the employees' perspective)—the Respondent was not free to alter those terms and conditions without first providing the Union notice and an opportunity to bargain. See, e.g., *Ridgewell's, Inc.*, 334 NLRB 37, 38 (2001), *enfd.* mem. 38 Fed.Appx. 29 (D.C. Cir. 2002). Thus, the violation continues until the Respondent rescinds its unilateral action, and the reimbursement remedy applies until that occurs. Cf. *Mimbres Memorial Hospital and Nursing Home*, 356 NLRB No. 103, slip op. at 8 (2011).

Member Hayes notes that the Respondent was entitled to set initial terms and conditions of employment under *NLRB v. Burns Interna-*

*ommended Order as modified and set forth in full below.*⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Prime Healthcare Services-Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center, Garden Grove, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally discontinuing the reserve sick leave benefit and rescinding the reserve sick leave benefit time which employees accrued from July 1, 2008 to April 17, 2009, without first notifying the Union notice and giving it an opportunity to bargain.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units:

Combined Service, Maintenance, Technical,
Skilled Maintenance and Business Office Clerical
Unit:

Included: All full-time, regular part-time, and per diem Service, Maintenance, Technical, Skilled Maintenance, and Business Office employees.

tional Security Services, 406 U.S. 272 (1972), and did not intend to continue the predecessor employer's reserve sick leave benefit plan, but mistakenly did so for 9 months. In these circumstances, Member Hayes would find that the appropriate remedy to restore the status quo ante should be limited to reinstating the reserve sick leave benefits that accrued up to the April 17, 2009, date of the Respondent's discovery of its mistake. The Respondent should not be required to reinstate and continue a plan that was not part of its intended initial terms and conditions of employment.

We also modify the judge's remedy to provide that backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8, (2010).

⁵ 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). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

Professional Unit

Included: All full-time, regular part-time, and per diem Professional employees.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

(b) Reinstate the established past practice of conferring a reserve sick leave benefit on bargaining unit employees, and maintain this benefit until such time as good faith bargaining with the Union about changes results in agreement or bona fide impasse.

(c) Restore both the rescinded reserve sick leave benefit time that unit employees accrued from July 1, 2008, to April 17, 2009, and such further time as they should have accrued prior to the restoration of this benefit.

(d) Make whole unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct in discontinuing the reserve sick leave benefit and rescinding accrued reserve sick leave benefit time.

(e) 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 electronic copy of such records if stored in electronic form, necessary to analyze the amount of compensation due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Garden Grove, California facility copies of the at-

tached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 21, 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. If 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 April 17, 2009.

(g) 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. August 26, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

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.

⁶ 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."

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 change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining units:

Combined Service, Maintenance, Technical,
Skilled Maintenance and Business Office Clerical
Unit:

Included: All full-time, regular part-time, and per diem Service, Maintenance, Technical, Skilled Maintenance, and Business Office employees.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

Professional Unit

Included: All full-time, regular part-time, and per diem Professional employees.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility-based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

WE WILL reinstate the established past practice of conferring a reserve sick leave benefit on bargaining unit employees, and maintain this benefit until such time as good faith bargaining with the Union about changes results in agreement or bona fide impasse.

WE WILL restore both the rescinded reserve sick leave benefit time that unit employees accrued from July 1, 2008, to April 17, 2009, and such further time as they should have accrued prior to the restoration of this benefit.

WE WILL make whole unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct in discontinuing the reserve sick leave benefit and rescinding accrued reserve sick leave benefit time.

PRIME HEALTHCARE SERVICES-GARDEN GROVE
LLC D/B/A GARDEN GROVE HOSPITAL AND
MEDICAL CENTER

Daniel A. Adlong, Esq., for the General Counsel.

Jonathan A. Siegel, Esq. (Jackson Lewis LLP), Newport Beach, California, for the Respondent.

Bruce A. Harland, Esq. and Jacob J. White, Esq., Alameda, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. This case was tried in Los Angeles, California on May 24 and 25, 2010. On September 28, 2009, Service Employees International Union, United Healthcare Workers-West (the Union) filed the original charge in this case against Prime Healthcare Services-Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center (Respondent or the Employer). The Union filed the first amended charge on November 2, 2009. On February 24, 2010, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by eliminating the reserve sick leave benefit of bargaining unit employees without prior notice and bargaining with the Union. The Respondent filed a timely answer in which it denied that it had violated the Act.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,¹ and having

¹ The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited docu-

considered the briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a California corporation, engaged in the operation of a hospital in Garden Grove, California. Respondent, in conducting its business operations described above, during the 12-month period ending September 30, 2009, derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the State of California. Accordingly, Respondent admits and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Since at least January 1, 2007, the Union had a collective-bargaining agreement with Tenet Healthcare Corporation covering two appropriate units of hospital employees at the Garden Grove Hospital. During the term of the 2007–2011 collective-bargaining agreement, Tenet Healthcare sold the Garden Grove Hospital to Respondent effective July 1, 2008. Respondent agreed to recognize the Union and to honor significant portions of Tenet’s bargaining agreement with the Union. However, before the transfer of ownership from Tenet to Respondent, Respondent set the initial terms and conditions of employment under which it would hire Tenet’s employees. These terms included a different health plan, 401(k) plan, long term and short term disability and life insurance plans, paid time off plan, and sick leave plan.

Tenet Healthcare provided employees with a reserve sick leave benefit. This reserve sick leave benefit provided that full-time employees accrued 1.85 hours of reserve sick pay every pay period and part-time employees accrued .92 hours of reserve sick leave per pay period. When Respondent took over the hospital it set initial terms of employment. It negotiated with the Union over changes to the health insurance plan and 401(k) plan. There was no mention of the reserve sick leave plan.

While Respondent informed the unit employees, in June 2008, of its intentions through “Employee Forums,” Respondent did not formally notify the Union of this change.² However, due to clerical errors, from July 1, 2008 to April 17, 2009 the employees continued to accrue the reserve sick leave benefits for every pay period during this time. On April 17, 2009,

mentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

² Employee forums were meetings where Prime told employees about its intended changes in various benefit plans, and informed employees of new equipment, software, and other systems which would be implemented after July 1, 2008. Prime alleges that there were at least ten of these forums. Prime contends that Union representatives attended these Employee forums and heard about Prime’s intended changes during these meetings.

Respondent notified employees of the mistake in a memo. In the memo, Respondent informed the employees that the reserve sick leave benefit would no longer accrue and that the benefit which had accrued since July 2008 would be rescinded.³ Respondent, however, did not inform the Union of this change either before or after the memo was sent. Instead, the unit employees informed the Union of this change.

A successor employer is not bound to honor the substantive terms of the collective-bargaining agreement the union negotiated with a predecessor employer. *NLRB v. Burns Sec. Serv.*, 406 U.S. 272, 282 (1971). Moreover, a successor employer has a right to set the initial terms and conditions of employment under which it will hire the employees of a predecessor without first bargaining with the employees’ bargaining representative. *Id.* at 294–295. One exception to this right is when it is perfectly clear that the successor employer will retain the predecessor’s employees under their prior working conditions. *Id.* at 294. The exception only applies, however, when the successor employer “has either actively or by tacit inference misled employees into believing they would be obtained without change in their wages, hours or conditions of employment” or when the successor employer failed to clearly announce its plan to establish new terms and conditions prior to inviting the predecessor’s employees to accept employment. *Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

In this case, neither party disputes that Respondent purchased and then assumed operation and control of the Hospital on July 1, 2008 from Tenet. Respondent also recognized the Union as the collective-bargaining representative of unit employees. Respondent alleges that between May 13, 2008 and July 1, 2008 it set the initial terms and conditions of employment before it assumed operation of the Hospital as the Respondent had a right to under *Burns*⁴ and that it held Employee Forums during which Respondent alleges it conveyed Respondent’s intended changes. It appears that Respondent made it clear to the employees that it would not hire them under the same terms and conditions of employment utilized by Tenet. Therefore, as Respondent did not mislead these employees regarding its intent to change employment terms and conditions, Respondent had the right to set the initial terms and conditions of employment under which it would hire Tenet’s employees.

³ The memo read in pertinent part:

A mistake was made while setting up the employees of Garden Grove Hospital following the sale of the hospital to Prime Healthcare Services. The error was allowing the reserve sick accrual to continue after July 1, 2008.

Garden Grove Hospital will honor the reserve policy with respect to any accrued balance as of June 30, 2008. However, after July 1, 2008 the accrual of 1.85 hours per pay period for full-time employees and .92 hours for part-time employees was supposed to end. The payroll department has corrected this error for all Garden Grove employees.

As a result, you may see a change in the Reserve Sick balance on your paystubs. The balance will reflect any accrued sick as of June 30, 2008 less hours taken since July 1, 2008 only. Any hours accrued since July 1 has been removed.

⁴ *Burns Sec. Serv.*, 406 U.S. 272.

III. CONCLUSIONS

A. Respondent's Duty to Bargain with Incumbent Union

Where the bargaining unit remains unchanged and the successor employer hires a majority of the predecessor's employees which are represented by a certain bargaining agent, the new employer has a duty to bargain with the incumbent union. *Burns Sec. Serv.*, 406 U.S. at 281. When the "substantial and representative complement" rule is satisfied, the bargaining obligation attaches and the successor employer must bargain with the union that represents those employees. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 47 (1987).⁵

Here, Respondent continued to employ the employees of Tenet without a break in service. Therefore, while the Respondent had the right to set the initial terms and conditions of employment, once it retained a majority of Tenet's unit employees Respondent had a duty to bargain with the Union.

B. The Nature of the Reserve Sick Leave Benefit as a Subject of Bargaining

Sections 8(a)(5) and 8(b)(3) of the Act compel collective bargaining for mandatory subjects of bargaining. 29 U.S.C. §158. Mandatory subjects of bargaining concerning "rates of pay, wages, hours of employment, or other conditions of employment." *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958). An employer is barred from taking unilateral action in regard to mandatory subjects of bargaining.⁶ *NLRB v. Katz*, 369 U.S. 736 (1962). An employer that unilaterally changes a condition classified as a mandatory subject of bargaining, altered without negotiation and accomplished by evading the union, may support an inference of a lack of good faith. Id. Moreover, the duty to bargain does not extinguish when a collective-bargaining agreement is in effect. *See Conley v. Gibson*, 355 U.S. 41, 46 (1957). The U.S. Supreme Court has held that the "[c]ollective bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights

1. Sick leave as a mandatory subject of bargaining

The U.S. Supreme Court has recognized sick leave to be a term and condition of employment and, therefore, a mandatory subject of bargaining. *Katz*, 369 U.S. at 744. In *Katz*, the sick leave plan at issue consisted of employees having a certain number of paid sick leave days annually plus the accumulation of unused sick days which could be carried over into the next year. Id. The employer in *Katz* reduced the number of paid annual sick days from 10 days to 5 days, but doubled the

amount of accumulated sick leave days that could be carried over from 5 days to 10 days. Id. The Court found that the entire sick leave plan was a mandatory subject of bargaining and that the employer made a unilateral change violating Section 8(a)(5) when it failed to bargain over this change. Id.

In this case, the employees' sick leave benefit, which included a reserved sick leave benefit, is similar to the sick leave plan in *Katz*. Id. Respondent's present employees who were employees under Tenet were given a certain amount of sick leave days plus the reserve sick leave benefit which allowed full time employees to accrue a certain amount of reserve sick leave hours per pay period. If Respondent's reserve sick leave benefit can be classified as not being a separate or an extra benefit, but as a part of a sick leave plan like the one in *Katz*, then the reserve sick leave benefit in this case is a mandatory subject of bargaining. Therefore, Respondent's change of the reserve sick leave benefit without bargaining with the Union is a unilateral change and a violation of Section 8(a)(5).

2. Past practices create mandatory subject of bargaining

The Board has also defined other miscellaneous employee benefits as wages and, therefore, mandatory subjects of bargaining. *See, e.g., Seafarers Local 777 (Yellow Cab Co.) v. NLRB*, 603 F.2d 862, enfg. in part, 229 NLRB 1329 (1977) (drivers being allowed to take their taxi cabs home at night); *AT&T Corp.*, 325 NLRB 150 (1997) (paycheck-cashing services); *Florida Steel Corp.*, 230 NLRB 1054 (1977) (reimbursement rates for lodging and meal expenses and use of credit cards by employees); *Master Slack Corp.*, 230 NLRB 1054 (1977), enfd., 618 F.2d 6 (6th Cir. 1980) (allowing employees to purchase goods on layaway); *Gratiot Comty. Hosp.*, 312 NLRB 1075 (1993), enfd. in relevant part, 51 F.3d 1255 (6th Cir. 1995) (longstanding practice of employer issuing and laundering uniforms). Whether these miscellaneous benefits become mandatory subjects of bargaining is impacted by the duration of the past practice of providing the benefit. *Gratiot Comty. Hosp.*, 312 NLRB 1075 (1993).

An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if these practices are not required by a collective-bargaining agreement. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). As such, these past practices cannot be changed without offering the unit employees' collective-bargaining representative notice and an opportunity to bargain. Id. *See also Granite City Steele Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distrib. of Delaware*, 334 NLRB 409, 411 (2001).

The Board has generally held that employer practices which occur over a long period of time supply the longevity needed to establish a past practice. In *Granite City Steel Co.*, 167 NLRB at 315, the Board found a past practice when the employer allowed six succeeding union business representatives access to the blast furnace plant for 15 years for the purpose of resolving grievances. In *Sunoco, Inc.*, the Board found a past practice when for 3 years the employer offered unit employees at certain facilities the chance to deliver jet fuel. *Sunoco, Inc.*, 349 NLRB

⁵ The Board's "substantial and representative complement" rule determines the date when a successor's obligation to bargain with the predecessor's employees' union arises. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 28 (1987). The obligation is fixed when the successor employer hires a majority of predecessor's unit employees. Id.

⁶ Unilateral changes made by an employer to mandatory subjects of bargaining are considered per se refusals to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962).

at 244.

Moreover, a past practice must occur regularly and with such frequency that employees could reasonably expect the “practice to continue or reoccur on a regular and consistent basis.” Id. The Board in *DMI Distrib. of Delaware*, 334 NLRB at 411, did not find a past practice when the policy of the employer giving bonuses was in effect for 11 years, but bonuses were only actually given to employees “a couple of times.” See *B & D Plastics, Inc.*, 302 NLRB 245 fn. 2 (1991) (Board found it a random event rather than a past practice when, only three times in the past 5 years, an employer held cookouts for employees and gave the employees paid time off to attend these cookouts.) See also *Exxon Shipping Co.*, 291 NLRB 489 (1988) (Board found that when the union participated twice in government investigations regarding the possible death of one of its members, 3 years apart, too remote in time and too intermittent in their occurrence to be a past practice especially when there was no union participation in three similar investigations).

General Counsel relies on *JPH Mgmt., Inc.*, 337 NLRB 72 (2001) to assert that the 9 months of mistaken accrual of the reserve sick benefit in this case is long enough to establish a past practice and therefore a term and condition of employment which Respondent needed to bargain over in order to change or rescind. In *JPH Mgmt., Inc.*, the employer mistakenly gave its employees a wage increase for 5 weeks and subsequently rescinded the increase after discussing the mistake with the union. General Counsel argues that the Board in *JPH Mgmt., Inc.* found that a term and condition of employment was established by this 5 week mistake because the Board classified it as past practice. General Counsel’s reliance on *JPH Mgmt., Inc.*, however, is misguided. While both this case and *JPH Mgmt., Inc.* are similar as both involve a mistake an employer made which resulted in employee gain, the Board in *JPH Mgmt., Inc.* did not find that this wage increase established a term and condition of employment because it was a past practice, but rather because wages are always considered mandatory subjects of bargaining. *JPH Mgmt., Inc.*, 337 NLRB at 73. Neither the term “past practice” nor the conclusion that 5 weeks was a long enough time to establish a past practice were a part of the Board’s or the ALJ’s analysis in *JPH Mgmt., Inc.* Id. Therefore, General Counsel’s reliance on *JPH Mgmt., Inc.*’s 5-week mistake to establish that Respondent’s 9-month sick leave accrual error was enough time to establish a past practice is erroneous.

Regardless of the distinguishability of *JPH Mgmt., Inc.*, the mistaken accrual of the reserve sick leave benefit happened with such regularity and frequency that Respondent’s employees could have reasonably expected the “practice to continue or reoccur on a regular and consistent basis” as Respondent mistakenly allowed this reserve sick leave benefit to continue accruing every pay period for 9 months. *Sunoco*, 349 NLRB at 244. However, as the above cited cases show, the Board has found a past practice when the practice has been in place and repeatedly used for a period of years. Prime’s mistaken practice occurred for only 9 months. On the other hand, the Board has never specifically stated that to find past practice it is required to have been affect for a number of years. Therefore, while the accrual in this case only continued for 9 months,

based on the regular and consistent accrual of this benefit, without interruption, this benefit could reasonably be classified as a past practice.

C. Conclusion

While Respondent was free to set the initial terms and conditions of employment under which to hire Tenet’s former employees, when Respondent retained a majority of the Tenet employees which were represented by the Union, the duty to bargain with the Union attached. This duty does not expire even during the term of Respondent’s existing collective-bargaining agreement with the Union. The reserve sick leave benefit in this case could reasonably be classified as a mandatory subject of bargaining as either sick leave or a past practice. Thus, Prime had the duty to bargain with the Union when it rescinded the mistakenly accrued sick leave benefit from the employees.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(5) and (1) of the Act when it rescinded the reserve sick leave benefit in April 2009.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of 8(a)(1) and (5), 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.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁷

ORDER

The Respondent, Prime Healthcare Services-Garden Grove, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from unilaterally discontinuing the reserve sick leave benefit and rescinding the reserve sick leave benefit time which employees accrued from July 1, 2008 to April 17, 2009 without affording the Union notice and an opportunity to bargain.
2. Take the following affirmative actions necessary to effectuate the policies of the Act.
 - (a) Reinstate its established past practice of conferring a reserve sick leave benefit to employees.
 - (b) Restore the rescinded reserve sick leave benefit time that employees accrued from July 1, 2008 to April 17, 2009.
 - (c) Bargain with the Union, on request, regarding its decisions, and the effects of those decisions, in ceasing to provide a reserve sick leave benefit to employees and rescinding reserve

⁷ All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

sick leave benefit time which employees accrued from July 1, 2008 to April 17, 2009, in the following appropriate units:

Combined Service, Maintenance, Technical, Skilled Maintenance and Business Office Clerical Unit:

Included: All full-time, regular part-time, and per diem Service, Maintenance, Technical, Skilled Maintenance, and Business Office employees.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

Professional Unit

Included: All full-time, regular part-time, and per diem Professional employees.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

(d) Make whole those Service Unit and Professional Unit employees who were directly and indirectly affected, for any loss of earnings and other benefits they may have suffered as a result of its unlawful conduct in ceasing to provide a reserve sick leave benefit and rescinding reserve sick leave benefit time which unit employees accrued from July 1, 2008 to April 17, 2009.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copy of such records if stored in electronic form, necessary to analyze the amount of compensation due under the terms of this order.

(f) Post at its place of business in Garden Grove, California, copies of the attached notice marked "Appendix."⁸ Copies of the notice provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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

⁸ 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."

covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. August 4, 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 unilaterally discontinue the reserve sick leave benefit or rescind the reserve sick leave benefit time which, employees accrued from July 1, 2008 to April 17, 2009 without affording the Union notice and an opportunity to bargain.

WE WILL reinstate the established past practice of conferring a reserve sick leave benefit to employees.

WE WILL restore the rescinded reserve sick leave benefit time that employees accrued from July 1, 2008 to April 17, 2009.

WE WILL bargain with the Union, on request, regarding our decisions, and the effects of those decisions, in ceasing to provide a reserve sick leave benefit to employees and rescinding reserve sick leave benefit time which employees accrued from July 1, 2008 to April 17, 2009, in the following appropriate units:

Combined Service, Maintenance, Technical, Skilled Maintenance and Business Office Clerical Unit Service Unit:

Included: All full-time, regular part-time, and per diem Service, Maintenance, Technical, Skilled Maintenance, and Business Office employees.

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

Professional Unit

Included: All full-time, regular part-time, and per diem Professional employees.

Excluded: All other employees, managers, supervisors,

confidential employees, guards, physicians, residents, central business office employees (whether Facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Respondent and already represented employees.

WE WILL make whole those Service Unit and Professional Unit employees who were directly and indirectly affected, for

any loss of earnings and other benefits they may have suffered as a result of its unlawful conduct in ceasing to provide a reserve sick leave benefit and rescinding reserve sick leave benefit time which unit employees accrued from July 1, 2008 to April 17, 2009.

PRIME HEALTHCARE SERVICES-GARDEN GROVE LLC
D/B/A GARDEN GROVE HOSPITAL AND MEDICAL
CENTER